

# Trans-Pacific Partnership Negotiations – Intellectual Property Stakeholder Update

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## Introduction

After six rounds the intellectual property (IP) negotiations have now progressed to the stage where there are several text proposals on the table. These include both proposals for complete or substantially complete chapters, and proposals for components of a chapter.

This update outlines New Zealand's objectives for the intellectual property (IP) chapter, reports briefly on the six rounds of negotiation that have already taken place, and discusses some of the key IP issues.

From the discussions to date it is clear that all nine countries regard the IP chapter as important. There are, however, quite diverse perspectives around the table on key issues.

New Zealand's IP regime reflects our position as a "net importer" of IP. Our IP regime is consistent with international rules, while at the same time taking account of the needs and concerns of New Zealand owners and users of IP.

## New Zealand's negotiating position

New Zealand's negotiating position in the TPP and our previous FTAs has included several key points:

- IP rights are a way of encouraging innovation and the provision of creative goods to society, while increasing social and economic welfare. IP chapters should be assessed with these goals in mind;
- There is a point where IP rights become too strong, and rather than incentivise innovation and creativity, they discourage it. For example, extending patent terms to 50 years would discourage innovation, not encourage it. IP chapters should not discourage innovation and creativity;
- The WTO Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS) is the international standard for IP rights;
- Implementation of the TRIPS agreement can be improved in many areas for the benefit of IP owners and users. The TPP should focus on achieving better implementation of TRIPS standards;
- TRIPS contains important flexibilities that countries can use to design their IP regimes in a way that increase innovation and creativity. The IP chapter should not override these flexibilities;
- Enforcement of IP in the digital environment creates significant challenges. The TPP parties should consider how the effectiveness of existing enforcement measures can be enhanced. The benefits of any new enforcement measures should not outweigh the costs, and alternative approaches should be considered.
- There are real gains to be made in increasing the operational efficiency of existing IP administration regimes. The TPP chapter should focus on measures that do this;

- Developing and building capacity in the IP regimes of less developed TPP partners will also have benefits for the IP industries of more developed countries. The TPP should include cooperation mechanisms that allow us to do this; and;
- Robust regulatory practice is especially important and IP standards and rules should be assessed with adequate regulatory impact analysis.

## Snapshot of rounds three to six

Since we last consulted four rounds of negotiations have taken place (in Brunei, Auckland, Santiago, and Singapore). The Brunei and Auckland rounds involved the submission of a series of papers on issues that parties considered should be discussed by negotiators. These discussions were intended to identify key areas of convergence and divergence between parties' goals for the IP chapter, and also to try and identify what would constitute appropriate IP standards in a modern "21<sup>st</sup> Century" trade agreement.

New Zealand's view is that trade agreements that are too prescriptive and limit domestic flexibility can be damaging to IP regimes, as technology is developing at a very fast pace, and IP regimes need to be regularly updated to reflect this. Flexibility is also important to allow developing countries to develop their IP regimes and grow their industries.

New Zealand has also focused on the appropriate role for IP in the Asia-Pacific region. As the goal for the TPP is that it can be extended out to become an Asia-Pacific wide free trade agreement (for example it could include the likes of Japan, and other APEC members), it is important to discuss the role of IP in the wider region. This includes consideration of how IP can maximise innovation and public welfare in the region, and how existing IP systems can be managed more effectively (for example, there may be benefits for businesses in sharing work across IP offices, or improving the efficiency of IP registration systems in the Asia-Pacific).

In the last two rounds, negotiations have proceeded to the submission of possible texts for the IP chapter. Parties are still discussing the range of text proposals that have been made, gaining an understanding of the impacts of those proposals, and looking for areas where there might be agreement. There are many areas where there are differences between the parties, and it is likely that further text may still be tabled.

## Key Issues

### General

IP chapters can include a list of treaties that parties are required to join. Such obligations are a feature of existing FTAs between Australia, Chile, Peru, Singapore and the US. New Zealand belongs to some of the treaties included in these lists and is in the process of joining others. Currently, however we do not belong to and are not seeking to join such treaties as:

- the *WIPO Copyright Treaty* (WCT);
- the *WIPO performances and Phonograms Treaty* (WPPT);
- the *International Convention for the Protection of New Varieties of Plants* (UPOV 91);
- the *Patent Law Treaty*.

## Copyright

### *Copyright term*

The extension of copyright term is often addressed in the IP chapter of FTAs. A number of FTAs that contain “TRIPS+” standards require extension of copyright term to at least 70 years from the death of the author (or 70 years from the date of first publication). The copyright term in New Zealand is currently 50 years, as this is the international standard required under TRIPS.

### *Technological protection measures*

The protection of technological protection measures (TPMs) that protect copyright works is also an issue that is often dealt with in the IP chapters of FTAs. TPMs include mechanisms such as digital locks or regional coding. New Zealand currently protects against the making or dealing in devices or services that circumvent a TPM. However, we do not protect TPMs that control access to works for purposes that do not infringe copyright (such as regional coding on DVDs). We also expressly enable the circumvention of TPMs to allow users of copyright works to exercise a copyright exception or permitted act.

Some FTAs require protection against the act of circumvention outright – even when circumvention does not breach copyright. This may conflict with the ability of persons to use a digital copyright work to perform a permitted act.

### *Internet service providers*

IP chapters in FTAs sometimes deal with the issue of Internet Service Provider (ISP) liability. For example, some IP chapters provide prescriptive rules about when ISPs qualify for safe harbours from copyright liability, including the requirement that an ISP have a policy that provides for the termination of the Internet accounts of repeat infringers. New Zealand has recently developed its own approach to infringing file sharing, which includes a notice process, with recourse to the Copyright Tribunal.

### *Copyright exceptions*

IP chapters in FTAs do not usually prescribe what copyright exceptions may or may not be provided in domestic laws. However, when considering the potential impact of various proposals for the TPP IP chapter it is important to recall that the level of IP protection afforded is the combination of exclusive rights and exceptions (or permitted acts). The balance between the two will differ across the copyright laws of different countries.

For example, the TPM and copyright term provisions in US copyright law are balanced against the fair use doctrine applied by the US courts. Many TPP parties do not have US style fair use as a feature of their legal systems, which means that some proposals that are consistent with US law may have a disproportionate impact without an appropriate exception or limitation to act as a counterbalance.

## Data Protection

IP chapters of FTAs sometimes deal with data protection. For example, existing FTAs between Australia, Chile, Peru, Singapore and the US require a ten year period of data exclusivity for agricultural chemicals and a five year period of data exclusivity for pharmaceuticals. New Zealand protects such data for five years.

## **Patents**

The term of protection for patents is not usually dealt with in IP chapters in FTAs. However some FTAs require patent term extension for “unreasonable” delays in granting of patents for pharmaceuticals or “unreasonable” delays in marketing approval for pharmaceuticals. This is a topical policy issue in a number of TPP countries.

If New Zealand were to extend the patent term for pharmaceuticals it would have implications for generic pharmaceutical manufacturers and the cost of patented pharmaceutical products.

The IP chapters of some FTAs deal with the subject matter that must or may be patentable. Some reflect the TRIPS standards on what may be excluded from patentability, while others limit the flexibility contained in TRIPS.

For example, TRIPS enables parties to exclude methods of medical treatment of humans from patentability. Such methods are currently not patentable in New Zealand. If they were, the costs of such methods, and pharmaceuticals associated with those methods could rise. There could again be implications for New Zealand manufacturers of generic pharmaceuticals.

Some FTAs also include a requirement to provide a “grace period” where public disclosures of an invention by an inventor in the 12 month period before a patent application is filed will not prevent a patent being granted on the invention.

## **Trade Marks**

Trade Marks are likely to be a less contentious area in the IP chapter. We do not expect that other TPP parties will be seeking trade marks provisions that differ significantly from New Zealand’s trade marks regime. New Zealand could be asked to accede to the Madrid Protocol, but this process is already underway and a Bill is currently before Parliament that will facilitate New Zealand’s implementation of the Madrid Protocol.

## **Geographical indications**

New Zealand is in favour of the inclusion of text on geographical indications (GIs), including the provision of challenge processes for the protection of GIs, and safeguards against the granting of protection of generic terms or pre-existing trade marks as GIs. This would be in New Zealand’s interests as our producers commonly use accepted generic terms (such as Feta to describe a particular type of cheese) to describe their produce that are not widely understood to represent the geographical origin of that good. It is also important that our exporters have the opportunity to market such goods overseas without improper barriers that prevent them from doing so.

## **Traditional Knowledge**

Ensuring that the TPP IP chapter makes provision for traditional knowledge is important for New Zealand. As per our current FTAs, we seek language allowing us to undertake domestic measures that are consistent with our obligations under the Treaty of Waitangi.

## **Enforcement**

The IP Chapters of some FTAs require countries to put in place more extensive enforcement regimes in the area of IP rights. New Zealand recently concluded negotiations for the Anti-Counterfeiting Trade Agreement, a multilateral treaty dealing with the enforcement of IP rights and in particular copyright and registered trade marks.

New Zealand’s view is that TPP should facilitate cooperation in the area of IP enforcement. At the same time, we believe that the ACTA agreement should form the high water mark for IP

enforcement standards, although we also recognise that given the number of developing countries in the Asia-Pacific region, ACTA standards may not be appropriate in all cases.

New Zealand's existing FTAs provide flexibility to implement IP enforcement solutions that fit well with our legal system, and that are effective in the face of changing technologies. The enforcement provisions in existing FTAs between, for example, the US, Australia, Chile and Singapore are significantly more prescriptive and would provide less flexibility for New Zealand.

### **Input from stakeholders**

We welcome your views on any issues regarding the IP chapter of the TPP. We are especially interested in hearing how you think New Zealand could use the TPP negotiations to enhance innovation in New Zealand, develop our digital marketplace for intellectual property goods and develop our technology sector.