



22.07.2016

Submission to the Parliament on the Trans-Pacific Partnership Amendment Bill.

## **Introduction**

1. This submission has been prepared by the Wellington Community Justice Project.
2. The Wellington Community Justice Project (WCJP) ([www.wellingtoncjp.org](http://www.wellingtoncjp.org)) is a student-led organisation at Victoria University of Wellington. The project, formed in 2010, has twin aims: to improve access to justice and legal services in the community; and to provide law students with an opportunity to gain practical experience. It pursues these goals by establishing community-based volunteer projects and working with other organisations that have similar goals.
3. The research for this submission was carried out by students Josiah Koh (LLB), and Tan Chong Hui Joshua (LLB), and Hannah Kitty Mackenzie (LLB/ BA) as part of volunteer work for the project.

## *I Introduction*

1. The Wellington Community Justice Project (WCJP) has concerns in the economic benefit, the extension of copyright protection, and the investor-state dispute settlement (ISDS) process in the Trans-Pacific Partnership Agreement (TPPA) Amendment Bill. The WCJP's concerns are:

- a) the uncertainty of the economic benefits of entering into the TPPA;
- b) the extension of copyright protection could result in adverse consumer effects; and
- c) that the ISDS process may be different in the TPP due to its scale.

2. A different author has prepared each subsequent section.

## *II Is the TPPA important for export growth and economic benefit?*

3. The TPPA removes trade barriers for exporters of New Zealand (NZ) goods and services to the Asia-Pacific region. The Ministry of Foreign Affairs and Trade (MFAT) has estimated a \$259 million reduction in tariffs by 2030.<sup>1</sup> This is expected to translate into tariff savings for NZ exporters.

4. The WCJP agrees that there are tariffs reductions to be had. However, the estimated figure may be exaggerated. WCJP also believes that the TPPA imposes costs which render its net economic benefit less impressive than as indicated.

### *A Tariff reductions – overly optimistic?*

5. New Zealand exporters are unlikely to enjoy the full benefit of the tariff reductions. Instead, the party holding the most market power in the supply chain will likely enjoy that benefit.<sup>2</sup> New Zealand mainly exports commodities which hold modest value in comparison

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<sup>1</sup> Ministry of Foreign Affairs and Trade *Economic Modelling on Estimated Effect of TPP on New Zealand Economy* <<https://www.mfat.govt.nz>>.

<sup>2</sup> Tim Hazledine “No More than a Case of Beer? TPP Trade Liberalisation Benefits for New Zealand” (2 December 2015) TPP Legal <[www.tpplegal.wordpress.com](http://www.tpplegal.wordpress.com)>.

to our importers who use those commodities to make a higher value end product to sell to customers. Those importers are in a stronger position to capitalise on the tariff reductions to increase their profit margins. Whether tariff reductions translate into lower consumer prices (which would then increase demand for the end product and consequently our exports) will largely be determined by them. Hence, the \$259 million estimation is overly optimistic and the benefit is likely to be considerably less.

*B Costs that have yet to be considered*

6. More importantly, the Government's analysis of the TPPA does not contain a comprehensive breakdown of the likely costs of the TPPA. Estimated costs include a loss of tariff revenue (\$20 million per annum), costs incurred from increases in the copyright term (\$55 million per annum), and additional costs for PHARMAC (\$2 million per annum and a one-off cost of \$4.5 million).<sup>3</sup> Coates' analysis does not touch on the likely higher administrative and compliance costs, the negative impact longer copyright terms have on innovation, and the potential increase in legal costs incurred under the ISDS mechanism.<sup>4</sup> Without being fully informed of the costs, the net economic benefits under the TPPA are uncertain.

*C Increase in exports must be viewed in context*

7. Using the dairy industry as an example, NZ's exports will increase under the TPPA. However, the exports of other countries may increase even more. Consequently, this may enable other countries to gain a competitive advantage over our exports.

8. The Government estimates dairy tariff savings of \$102 million after all tariff reductions have been implemented. This figure materialises only 30 years after the TPPA comes into force. This is a long period of time to wait for markets to open, and even then only a small

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<sup>3</sup> Barry Coates and others "The Economics of the TPPA" (January 2016) It's Our Future <[www.itsourfuture.org.nz](http://www.itsourfuture.org.nz)>.

<sup>4</sup> *Ibid.*

proportion of markets will be opened up to NZ exports. Dairy exports to Japan, the United States, Canada and Mexico will still be subject to significant tariffs and quotas.

8. For example, the United States tariff on whole milk powder will take 30 years to phase out. Also, Canada will only permit an additional 3.25% of imports over five years. Japan has only agreed to limited tariff-rate quotas for skim milk powder and butter, which are key exports for NZ. By contrast, Japan has agreed to remove tariffs on whey and cheeses, which are key exports for the United States market.

10. Overall, a 2.2% tariff reduction over a 22-year period means that increases in NZ exports will be modest.<sup>5</sup> This increase will likely be overshadowed by the substantial government subsidies to farmers in the United States, Japan and Canada, and fluctuations in commodity prices and exchange rates.<sup>6</sup> In comparison to NZ, tariff reductions on United States exports under the TPPA are substantial and more overseas markets like Japan are opened up to them. This may give the United States a competitive advantage (cheaper products available at greater production scales, and geographically closer to major markets) over NZ.

11. New Zealand's competitive advantage in the agricultural industry lies in her ability to differentiate her products. For instance, through higher standards of animal welfare, better consumer health and food safety measures undertaken. Labelling standards are integral to this process. However, art 7.8 (Sanitary and Phytosanitary Measures) on equivalence between the importing and exporting country may allow the importing country to align NZ's labelling standards with theirs.<sup>7</sup> This impedes NZ's ability to differentiate its products, which is important given the competition from the United States dairy industry.

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<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

*D Conclusions of the economic effects*

12. The WCJP believes that the TPPA is not as beneficial a deal as the Government is painting it out to be. The TPPA is a long-term trade agreement that will affect future generations of New Zealanders. Parliament and the general public should be fully informed before this Bill is passed.

13. The WCJP understands the concern that failure to participate in the TPPA would see NZ trailing economically. However, public concerns over the TPPA in the other participating countries suggests that caution should be exercised. More information is needed on the likely cost of implementing the TPPA before we can confidently say that it is an agreement worth entering into.

14. Export increases in some industries like the agricultural industry (where NZ is strongest in) will be modest and largely dwarfed by external factors like government subsidies in other countries. More importantly, the effects of the TPPA will be asymmetric. While NZ exports may increase, the exports of other countries like the United States will increase much more.

*D Consideration for small and medium sized businesses*

15. Some Members of Parliament have opined that TPPA would endanger job prospects for New Zealanders, with affected industries including dairy and medical industries. The government should be mindful that there will be people (especially the small and medium enterprises) lose out from this seemingly lucrative trade deal. The government might need to look for alternatives to assist these SMEs to transition into a business structure suitable in light of the adoption of the TPPA Amendment Bill.

## *E Conclusions on the economic benefits*

16. Should the TPPA Amendment Bill be passed, it is important for NZ to move up the supply chain, broaden its economic base and not rely primarily on exporting commodities.<sup>8</sup> Given the protection on other countries' dairy markets, it would be wise for NZ to develop other industries. Small and medium-sized enterprises (SMEs) cannot do this restructuring alone. The responsibility lies with the government to provide incentives for businesses to venture into new industries.

## *III The Extension of Copyright Protection*

17. This part of the submission will briefly comment about the undesirable effect of the extension of copyright protection period from 50 years to 70 years. The TPPA requires this change to bring New Zealand's copyright law in line with the international standard. For example, the United States and Australia (also most of the OECD countries) have copyright protection for 70 years after the life of the author.

### *A Potential adverse effects*

18. WCJP understood that it is difficult for the government to strike a balance between freedom of information and the rights of the owner to use their own product. Nonetheless, the WCJP considers that the government should consider and take into account the potential costs that the consumers had to bear. As identified above, the copyright protection extension it will cost consumer at least \$55 million per year.<sup>9</sup> This cost will increase marginally over a 20 year period.

19. While the WCJP acknowledged that most of this cost will not be trickled down to consumers in terms of more expensive digital products, it might become disincentives for the public members to access to great, copyright protected, artistic works. As the protection

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<sup>8</sup> Scoop Media "BusinessNZ says TPP a good deal for New Zealand" (6 October 2015) Scoop <[www.scoop.co.nz](http://www.scoop.co.nz)>.

<sup>9</sup> B Coates, above n 3.

extends for another 20 years, this means that these digital copies will still enjoy the protection from the copyright laws. Consumer who wished to access these materials may have to pay a higher price in order to get these digital copies.

20. For example, some members of institutions or university students might want to get hold of their own Michael Jackson album. Under the TPPA Amendment Bill, they would need to pay for a higher price to buy them. In other words, the consumers might not be able to buy these artworks to aid their own creation of the artistic work. Hence, it can hamper aspiring artists from creating their own works and get those works protected by copyright.

21. A lack of accessible resources to aid artwork creation by New Zealanders may hamper our ability to create outstanding artwork. Therefore, the government should provide grants to incentivise the local artwork creation and grant these works copyright protections. This is to ameliorate the potential adverse effect, however modest, coming from the extension of the copyright period.

### *III Investor-State Dispute Settlement Concerns*

22. The WCJP acknowledges that ISDS provisions in trade agreements, to which New Zealand is already party to, is not a new concept. However, the WCJP is concerned about the scale of the TPPA and the recent case examples of ISDS being invoked by corporations to sue governments in Australia in *Philip Morris Asia Limited v. The Commonwealth of Australia* and in Germany in *Vattenfall AB and others v. Federal Republic of Germany*.<sup>10</sup>

23. The WCJP recommends that the Government reconsider the significance that the consequences of such ISDS provisions will have on the restriction of domestic legislating powers, and in turn, ordinary New Zealanders.

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<sup>10</sup> *Philip Morris Asia Limited v The Commonwealth of Australia* UNCITRAL PCA Case No. 2012-12; *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12).

24. It should be noted that this author is not against the TPPA as a whole. There is a need for a 21<sup>st</sup> century trade agreement to facilitate the overall objective of comprehensive market access. However, unneeded liability, to which the New Zealand government is opening itself up to, will have consequences on ordinary New Zealanders.

*A Restrictions on domestic legislation*

25. Under the ISDS provisions, if the legal framework which governs the investment changes in a way that was not foreseen or anticipated by the investor at the time of making the investment, then the investor should be compensated for the cost of complying with those changes. Consequently this will restrict the New Zealand government's ability to legislate in our public interest, as there is the constant threat of legislating inconsistently with corporation's objectives in New Zealand.

26. The New Zealand Government has claimed that ISDS provisions are not dangerous and to stop catastrophising about the possible consequences as they have been included in so many previous agreements.<sup>11</sup> Nobody is catastrophising. It is clear that precedents show the exposure of governments under ISDS provisions to the corporations' willingness to sue.

27. The public interest of our country will be in jeopardy, as legislating on public health issues, environmental issues, *inter alia*, will always have to be consistent with corporation's investment interests. For instance, in *Philip Morris*, the Australian government implemented legislation to impose plain packaging on cigarettes in the public interest of deterring smoking. Philip Morris Asia Limited (a tobacco company) commenced proceedings against Australia in an international arbitration tribunal under the ISDS provisions in the Australia-Hong Kong BIT.<sup>12</sup>

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<sup>11</sup> Chris Bramwell "Will the TPP undermine NZ's sovereignty?" (3 February 2016) Radio New Zealand <<http://www.radionz.co.nz>>

<sup>12</sup> Peter Martin "Australia faces \$50m legal battle in cigarette plain packaging fight with Philip Morris" (28 July 2015) The Sydney Morning Herald <<http://www.tobaccotactics.org>>.

28. Philip Morris claimed that the proposed legislation was inconsistent with their investments in the tobacco industry in Australia. Australia succeeded in the case on a procedural issue, after spending \$50 million taxpayer dollars.<sup>13</sup> It is frightening that by legislating in the public interest to protect us, governments are making themselves liable to corporations and, in addition, using taxpayer money to defend these cases.

29. In *Vattenfall v. Germany*, the German government amended their Atomic Energy Act to quicken the phasing out of nuclear energy in Germany.<sup>14</sup> As part of these amendments, nuclear power plants owned by Vattenfall were to be shutdown immediately. Under the Energy Charter Treaty, Vattenfall claimed against the German government for €700 million initially.<sup>15</sup> On the 11<sup>th</sup> of March 2011 a settlement was awarded against Germany.<sup>16</sup> There is very little information as to how much this settlement was, which demonstrates the lack of transparency in the ISDS process.

30. The moral of both of these cases is the frightening reality of the governments limitation to legislate on public issues such as public health and environmental issues, because of the possibility of being sued by a major corporation is so high.

31. The influence of money (and major corporations) over politics and the interest of the public is frightening. The government's main democratic responsibility is to legislate for the protection and interests of the people. The ISDS provisions within the TPPA grossly undermine this commitment.

## *B Previous trade agreements*

32. New Zealand has included ISDS provisions in trade and investment deals with 13 economies over the last 27 years and has never been sued. The TPPA is the largest trade

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<sup>13</sup> At (2).

<sup>14</sup> "Vattenfall v. Germany (II) and the Familiar Irony of ISDS: Investors before Public Interest?" Corporate Disputes <<http://www.corporatedisputesmagazine.com>>.

<sup>15</sup> At (7).

<sup>16</sup> Catherine Beard "TPP risks overstated" (17 September 2015) Business NZ <<http://www.businessnz.org.nz>>.

agreement to be signed, the parties of which encompass 40 per cent of the world's GDP. Thus, it is logical that the risk of liability will be significantly higher – particularly with the United States being a signing member.

*C Conclusions on the ISDS provisions*

33. The WCJP recommends the Government seriously reconsider pushing through the replacement of the traditional ISDS system with a modernised international court system as favoured by European countries, which will not prioritise multi-national corporations interests, over those of ordinary New Zealanders.