



FROM THE PERMANENT REPRESENTATIVE

AUSTRALIAN PERMANENT MISSION
GENEVA

2 August 2016

Ms Natasha Foucard
Officer in Charge
Special Procedures Branch
Office of the United Nations High Commissioner for Human Rights

Dear Ms Bennoune, Mr De Zayas, Mr Kaye, Mr Pūras, Ms Tauli-Corpuz, Ms Dandan, and Mr Cannataci,

Thank you for your letter dated 20 April 2016, which attached a joint communication from various United Nations Special Rapporteurs and Independent Experts concerning “alleged adverse human rights impact stemming from certain provisions within the Trans-Pacific Partnership”.

I am writing to associate Australia with the letter written by New Zealand Acting Permanent Representative Carl Reaich on behalf of 10 TPP signatories. I attach a copy of that letter for your reference.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian McConville'.

Ian McConville
Chargé d’Affaires *a.i.*



NEW ZEALAND
Permanent Mission
TE AKA AORERE

Ms Natacha Foucard
Officer-in-Charge
Special Procedures Branch
Office of the United Nations High Commissioner for Human Rights

Dear Ms Bennoune, Mr De Zayas, Mr Kaye, Mr Pūras, Ms Tauli-Corpuz, Ms Dandan, and Mr Cannataci,

Thank you for your letter dated 20 April 2016 concerning the "alleged adverse human rights impact stemming from certain provisions within the Trans-Pacific Partnership" (TPP or Agreement).

This reply is on behalf of all TPP signatories except Australia and Canada¹:

The signatories to TPP are strongly of the view that TPP represents a significant achievement to the benefit of each member country and its people, as well as the region. TPP seeks to advance regional integration in a number of areas. The Agreement represents a carefully-negotiated outcome, reflecting the needs and circumstances of each signatory. We reject the assertion that certain provisions in TPP could adversely affect the enjoyment of human rights. As TPP leaders stated when they met on 18 November 2015 to mark the conclusion of TPP negotiations:

"TPP will strengthen and broaden the mutually-beneficial linkages between our economies; enhance our regional and global competitiveness; support the creation of jobs and new opportunities for young people; promote economic growth and development in our countries; support innovation and help to alleviate poverty; and ensure the greatest benefits for our people."²

Any analysis of TPP should take into account the significant benefits the TPP Agreement is projected to have on living standards in TPP countries. This potential is not only recognised by TPP signatories, but also by other organisations such as the World Bank. These benefits were noted by TPP Ministers when they announced the conclusion of negotiations on 5 October 2015.³ Your letter does not refer to any of these benefits.

In addition to liberalising trade and investment between TPP countries, the Agreement addresses the challenges our stakeholders face in the 21st century, while also taking into account the diversity of our levels of development. TPP remains, however, a trade and investment agreement. It was not intended to expressly address all matters of international

¹ Australia is currently in caretaker mode ahead of its Federal election on 2 July 2016 and will respond separately after that election. Canada will also respond separately.

² The TPP Leaders statement is available at <https://www.mfat.govt.nz/assets/securedfiles/Trans-Pacific-Partnership/Trans-Pacific-Partnership-Leaders-Statement-18Nov2015.pdf>

³ TPP Ministers statement is available at <https://www.mfat.govt.nz/assets/securedfiles/Trans-Pacific-Partnership/TPP-Ministers-statement.pdf>

significance. It was carefully negotiated to coexist with other international agreements, and to allow governments to continue to advance work in other areas to address matters of international significance. In this regard, we specifically draw your attention to Article 1.2 of TPP that expressly recognises the Parties' intention for TPP to coexist with their existing international agreements.

The letter poses questions related to the process of the TPP negotiations, as well as several specific provisions in the Agreement. We would note that the answer to most of these questions requires an assessment of what each of the specific legal obligations in the Agreement means for each TPP country. Other comments appear not to relate to the actual text of the Agreement. We do not attempt to replicate here the large amount of information TPP countries have made available during and upon conclusion of negotiations or to reiterate the entire plain text of the Agreement. The point remains, however, that our 12 countries would not have signed an agreement that was not strongly in each of our national interests, or that infringed on access to medicines, the enjoyment of human rights within our respective countries, or the rights of indigenous peoples. Nevertheless, we have sought to address below the area of concern raised in the letter.

Negotiation process

Stakeholder engagement on a trade and investment agreement is not generally undertaken on a regional or global level with international civil society groups, but rather is undertaken by each State participant in the negotiation. Each TPP country undertook consultation in line with well-established practices that vary from country to country. There is a range of different approaches among TPP countries, reflecting different constitutional and legal frameworks, established policies and practices, negotiating priorities and groups of stakeholders, among other considerations. However, we would note that the high level of public interest in TPP led TPP partners to host structured stakeholder engagements during the negotiations, in which all TPP negotiating partners participated.

While TPP countries agreed to keep the draft text and related documents confidential during the negotiation process, as is the practice in trade and many other multilateral negotiations, they were open about the issues under negotiation and the substance of the issues under discussion. In particular, a comprehensive outline of the areas of negotiation was released on 12 November 2011 by TPP leaders following their meeting in Hawaii.⁴ Further detail on public engagement by a number of TPP countries was also set out in letters to the Office of the United High Commissioner in 2011, not repeated here.

Access to medicines and intellectual property provisions

No participant in the TPP negotiations would have considered becoming party to a negotiated outcome that negatively impacted its ability to promote the highest attainable standard of physical and mental health or unduly constrained access to affordable medicines.

We specifically draw your attention to a reaffirmation of the commitment from all parties to the Declaration on TRIPS and Public Health and the flexibilities already established in multilateral fora, included in Section A of the IP Chapter. The obligations in this Chapter neither prevent nor shall prevent a Party from taking measures to protect public health and states that the Chapter can and should be interpreted and implemented in a way that supports the right of each Party to protect public health and, in particular, to promote access to medicines for all.

⁴ See <https://ustr.gov/tpp/outlines-of-TPP>.

Rights of indigenous peoples and intellectual property provisions

The letter questions the relationship between TPP and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

No obligation in TPP weakens any country's ability to address issues relating to indigenous rights.

TPP includes a number of important elements related to the information cited in your letter concerning the relationship of intellectual property systems with Indigenous peoples:

- Article 29.8 of TPP states that Parties, subject to their international obligations, may take measures to respect, preserve and promote traditional knowledge and traditional cultural expressions.
- Under Article 18.16, TPP Parties recognise the relevance of intellectual property systems and traditional knowledge associated with genetic resources to each other, when that traditional knowledge is related to those intellectual property systems, and commit to endeavour to cooperate through their respective agencies responsible for intellectual property, or other relevant institutions, to enhance the understanding of issues connected with traditional knowledge associated with genetic resources, and genetic resources. The Parties also agree to endeavour to pursue quality patent examination, which may include that in determining prior art, relevant publicly available documented information related to traditional knowledge associated with genetic resources may be taken into account, an opportunity for third parties to cite, in writing, to the competent examining authority prior art disclosures that may have a bearing on patentability, including prior art disclosures related to traditional knowledge associated with genetic resources, if applicable and appropriate, the use of databases or digital libraries containing traditional knowledge associated with genetic resources and cooperating in the training of patent examiners on how to deal with applications related to traditional knowledge associated with genetic resources. This article provides a framework within which TPP Parties can cooperate to improve understanding of issues related to traditional knowledge and genetic resources.
- The provisions relating to traditional knowledge and the intellectual property system (in particular the patent system) represent an important step forward.

Internet service providers

The letter refers to a speculative assertion that certain provisions in TPP "may incentivise internet service providers to remove content based on unproven allegations of infringement and therefore have a chilling effect on the right to freedom of expression online."

The TPP countries recognise the importance of including obligations related to Internet Service Providers (ISPs) in the Agreement in order to facilitate the continued development of legitimate online services. In arriving at the ISP outcome in TPP, the TPP signatories gave significant consideration to the importance in any system of due process in any system to deal with online infringement. A number of specific safeguards were carefully built into the provisions to take account of concerns raised by some stakeholders around this issue. For example:

- ✦ The provisions ensure that Parties do not condition safety from liability on an ISP monitoring its service or affirmatively seeking facts indicating infringement (Article 18.82.6).
- ✦ Where ISPs receive allegations of infringement via notices, those notices must include information to safeguard against vexatious or false claims, such as information sufficient to identify the infringing material and reliable information as to the authority of the person sending the notice (Footnote 157 to Article 18.82.3.(a)).
- The provisions require Parties to have monetary remedies against knowing material misrepresentations made in notices of alleged infringement (Article 18.82.5).
- The Parties recognise the importance of providing enforcement procedures against copyright infringement in the online environment in a manner consistent with Article 41 of the TRIPS agreement, which, among other provisions, requires Parties to provide safeguards against the abuse of enforcement procedures (Article 18.82.1).

In addition, under Article 18.4, all TPP signatories recognise the need to promote innovation and creativity; facilitate the diffusion of information, knowledge, technology, culture and the arts; and foster competition and open and efficient markets, and Article 18.66 provides that Parties will endeavour to achieve an appropriate balance in their copyright and related rights systems. These provisions are important for the digital economy and when interpreting the ISP provisions.

International Convention for the Protection of New Varieties of Plants

The letter also poses questions regarding the International Convention for the Protection of New Varieties of Plants (UPOV). There are 74 members of UPOV, the majority of which are members of the latest 1991 Act of the UPOV convention. We would note that most of the assertions regarding UPOV have been comprehensively addressed elsewhere, and that UPOV 91 does not require a member to prevent farmers from saving seed of protected varieties to grow the next year's crop.

Dispute settlement

TPP signatories do not consider that the dispute settlement provisions within TPP would have any implications for countries meeting their obligations under international human rights law. As your letter notes, TPP includes two dispute settlement mechanisms. Dispute Settlement under TPP Chapter 28 establishes a dispute settlement mechanism including consultation to resolve disputes between Parties that result from interpretation and application of the Agreement. It applies unless stated otherwise in the Agreement. Investor-State Dispute Settlement under TPP Chapter 9 applies only to the investment-related provisions of the Agreement.

Dispute settlement mechanisms are common to many trade and investment agreements, including the Agreement Establishing the World Trade Organization (WTO).

There has never been a decision by any arbitral tribunal in relation to a trade agreement, including the WTO, that has detrimentally affected human rights or in which the tribunal has identified a contradiction between human rights and those related to trade or investment.

Through TPP, Parties are seeking to establish a predictable legal and commercial framework for trade and investment through mutually-advantageous rules. The TPP Parties are also committed to promoting transparency, good governance and the rule of law, including through establishing dispute settlement mechanisms.

The inclusion of dispute settlement mechanisms does not, as the letter alleges, fail to ensure the protection and promotion of other public interest concerns. In the TPP Preamble, signatories recognise their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals. In addition, the dispute settlement mechanism in TPP incorporates appropriate protections and safeguards. The signatories ensured that TPP does not hamper any Party's ability to adopt measures to protect and promote the public interest.

We hope our response has clarified our views on the matters raised in your letter dated April 20 2016.

Yours sincerely

A handwritten signature in black ink, appearing to read 'C. A. Reaich', with a long horizontal flourish extending to the right.

Carl Reaich
Acting Permanent Representative to the United Nations