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18 April 2018

Submission to Parliamentary Select Committee: International treaty examination of the “Comprehensive and Progressive Agreement for Trans-Pacific Partnership” (CPTPP)

A: Summary

This submission introduces OraTaiao: The NZ Climate and Health Council, describes the basis for our submission, and provides links to opinion-editorials and peer-reviewed medical journal papers that elaborate on our concerns.

In summary:

- Climate change is a major threat to human health and ultimately to human survival. It worsens health inequities. It requires urgent action globally and in New Zealand (NZ) to rapidly reduce greenhouse gas emissions – particularly from fossil fuels.
- The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) will create a more challenging legal environment for NZ (and other signatory nations) to pass the policy and regulatory changes necessary to achieve this.
- The CPTPP will not only constrain our ability to meet our United Nations Framework Convention on Climate Change (UNFCCC) commitments, but will also result in New Zealand forgoing health gains, by avoiding climate action that would otherwise have significant health/equity co-benefits.
- The CPTPP must undergo an independent assessment of its potential impact on the ability of signatory governments to sufficiently reduce their emissions to meet the international UNFCCC commitment to keep global temperature rise “well below 2°C” and “pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels”.
- Such independent assessment should incorporate a ‘climate health and equity assessment’ of the deal – i.e. assessing not just the CPTPP’s potential impact on the ability of signatory governments to sufficiently reduce their emissions, but also the corresponding health and health equity impacts, both in New Zealand and for our Pacific Island neighbours.
- This assessment must be carried out by a team of independent experts, and should be completed and publicly released prior to ratification and with reasonable time for expert scrutiny and public debate.

B: Who we are

OraTaiao: The New Zealand Climate and Health Council is an incorporated society of over 600 health professional members and supporters who understand that climate change is a threat to human health and are concerned by this, but also understand that well-designed climate action can bring immediate benefits to health and the fair distribution of good health.

Within its membership, OraTaiao has some of the world's leading climate-health experts, and is consolidating linkages with health bodies and other climate-health organisations in New Zealand and internationally.

C: Basis of this Submission

1. Climate change has been described as the “biggest global health threat of the 21st century” by one of the world's leading medical journals, The Lancet.^{1,2}
2. Climate change threatens to impact health through many pathways, including: heat waves and extreme weather events; food and water insecurity; geographical spread of infectious disease vectors; mass displacement and economic disruption, and; increased risk of human conflict. It also worsens inequities in health, both directly and as a result of the differential impacts of mitigation and adaptation efforts.³
3. The UNFCCC COP21 agreement in Paris 2015 (the Paris Agreement) to limit warming to well below 2°C, and aspiration to keep warming below 1.5°C, is an acknowledgment that society has some major changes ahead, particularly for the generation and use of energy.
4. The burning of fossil fuels to produce energy is the major source of the most important greenhouse gas (GHG) driving climate change, carbon dioxide (CO₂). Staying below 2°C warming will require a rapid transition away from fossil fuels as part of the move to near zero emissions of CO₂ and other long-lived greenhouse gases during the second half of this century.⁴ Staying below 1.5°C means global net zero emissions well before 2040⁵. Applying the Paris principle of wealthier nations moving faster, means NZ may need to be net zero during the 2030s – a decade or so from now.

¹ Costello A, Abbas M, Allen A, Ball S, Bell S, et al. Managing the health effects of climate change: Lancet and University College London Institute for Global Health Commission. Lancet.2009;373:1693-1733.

² Watts N, Adger WN, Agnolucci P, Blackstock J, Byass P, et al; Montgomery H, Costello A; for The 2015 Lancet Commission on Health and Climate Change. Health and climate change: policy responses to protect public health. Lancet. 2015.

³ Jones R, Bennett H, Keating G, Blaiklock A. Climate change and the right to health for Māori in Aotearoa/New Zealand. Health Hum Rights. 2014;16(1):54-68. <https://cdn2.sph.harvard.edu/wp-content/uploads/sites/125/2014/06/Jones2.pdf>

⁴ IPCC, 2014: Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland

⁵ Walsh B, Ciais P, Janssens IA, Peñuelas J, et al. Pathways for balancing CO₂ emissions and sinks. Nat Commun. 2017;8:14856.

<https://www.nature.com/articles/ncomms14856>. See also <https://insideclimatenews.org/news/13042017/paris-climate-agreement-greenhouse-gas-emissions-global-warming>

5. This means that roughly 80% of fossil fuel reserves already claimed by fossil fuel companies must remain unburnt.⁶ Other major changes will need to take place within other sectors (e.g. agricultural/land-use systems) to bring down the other long-lived GHGs.⁷
6. To bring about such an unprecedented transition within the time frame required is an enormous challenge that will require governments to have maximum flexibility and scope for policy innovation. Moreover, unless effective carbon capture and storage technologies are rapidly developed and deployed at an enormous scale, existing fossil fuel reserves simply cannot be burnt if warming is to be limited to “well below 2°C”, let alone limiting to 1.5°C which our Pacific neighbours and other low-lying nations have campaigned for. The provisions in the CPTPP must therefore be scrutinised and analysed in light of this stark reality.
7. Importantly, the CPTPP does not acknowledge the scale of these imminent challenges for signatory governments, nor does it acknowledge the United Nations Framework Convention on Climate Change (UNFCCC). Furthermore, the need to limit warming to “well below 2°C”, and ideally below 1.5°C, is also not acknowledged in the CPTPP text, and the term “climate change” does not appear anywhere within the text (including the Environment Chapter). Instead there is a weak statement that “The parties acknowledge that transition to a low emissions economy requires collective action”⁸, which is already several years out of date, with the global commitment to “net zero emissions” economies by mid-century.
 - a. Note that an earlier draft of the CPTPP, which contained a paragraph recognising the need for coherence between trade and climate policy, did not make the final text, neither did a section acknowledging commitments under the UNFCCC.⁹
8. Thus, the CPTPP is oddly out of touch and silent about what is arguably the greatest global health challenge of the 21st century: climate change. It is deeply concerning that the agreement fails to account for the realities conveyed in the fifth Intergovernmental Panel on Climate Change (IPCC) scientific report and the Paris Agreement.
9. Furthermore, the CPTPP will not only constrain our ability to meet our UNFCCC commitments, but will also result in New Zealand forgoing significant health gains and widening health inequity. This will occur as a result of inhibition of climate action that would otherwise have significant health and health equity¹⁰ co-benefits.¹¹
10. Climate change worsens inequities in health, both within New Zealand but also, importantly, across countries.¹² By making it harder for New Zealand to address climate change, the

⁶ See Carbon Tracker Initiative: “Unburnable carbon 2013: Wasted capital and stranded assets” <http://www.carbontracker.org/report/unburnable-carbon-wasted-capital-and-stranded-assets/>

⁷ See IPCC. Climate Change 2014: Synthesis Report.

⁸ See Expert Paper #4. The environment under TPPA governance, Simon Terry available at <https://tpplegal.files.wordpress.com>

⁹ Ibid

¹⁰ New Zealand College of Public Health Medicine/New Zealand Medical Association. NZCPHM Policy Statement on Health Equity (adopting the New Zealand Medical Association Position Statement on Health Equity 2011). Wellington: NZCPHM, 2016. https://www.nzcpmh.org.nz/media/58923/2016_11_17_nzcpmh_health_equity_policy_statement.pdf

¹¹ Bennett H, Jones R, Keating G, Woodward A, Hales S, Metcalfe S. Health and equity impacts of climate change in Aotearoa-New Zealand, and health gains from climate action. N Z Med J. 2014 Nov 28;127(1406):16-31. . <http://www.nzma.org.nz/journal/read-the-journal/all-issues/2010-2019/2014/vol-127-no-1406/6366>

¹² Metcalfe S, for the New Zealand College of Public Health Medicine and OraTaiao: The New Zealand Climate and Health Council. Fast, fair climate action crucial for health and equity. Editorial. N Z Med J 2015;128(1425):14-23. <https://www.nzma.org.nz/journal/read-the-journal/all-issues/2010-2019/2015/vol-128-no-1425-20-november-2015/6741>

CPTPP will limit the government's ability to not only fulfil its intentions to address health and other inequities, but also its climate commitments to the Pacific Islands in the frontline of climate change. This would amount to an abrogation of New Zealand's responsibility to demonstrate climate leadership and a betrayal of our Pacific neighbours.

There are numerous specific concerns about how the CPTPP would make the required transition away from fossil fuels more difficult. These are described below.

Ways in which the CPTPP would obstruct the transition away from fossil fuels

The CPTPP would give the fossil fuel industry additional opportunities and powerful new levers to resist reforms that threaten to lessen the value of its reserves, as follows:

- 1) The investor state dispute settlement (ISDS) mechanism
 - a. ISDS would allow the fossil fuel industry to initiate claims on the basis:
 - i. That their right to "minimum standard of treatment" had been breached;
 - ii. That changes in domestic legislation or regulations amounted to "indirect expropriation" of their investment.
 - b. Under existing trade agreements, the fossil fuel and extractive industries have launched a disproportionately high number of ISDS claims.¹³ Key examples are:
 - i. A claim for 1.5 billion euro by Swedish company Vattenfall against the Hamburg government in response to environmental requirements to protect the Elbe River (Vattenfall was building a new coal-fired power plant adjacent to the river). The claim was based on a breach of "fair and equitable treatment". Because of this threat, the German government settled on an agreement that required Hamburg to abandon its environmental standards.¹⁴
 - ii. A claim from US company Lone Pine Resources in response to a moratorium on fracking in Quebec. The moratorium was in response to a Quebec Government review that concluded fracking would have major local impacts on the environment and local communities. The claim for 120 million dollars plus legal expenses is ongoing and has been made based on alleged breaches of the "minimum standard of treatment" as well as allegations of "indirect expropriation".¹⁵ In NZ, this is particularly relevant given the report of the Parliamentary Commissioner for the Environment which concluded that even now fracking in New Zealand is inadequately regulated by international standards.¹⁶
 - iii. A 15 billion US\$ claim initiated by TransCanada in response to President Obama's blocking of the Keystone XL pipeline carrying crude oil from the Alberta tar sands to

¹³ UNCTAD, "World investment report 2015: Reforming international investment governance", chapter III, p.115. Available at: http://unctad.org/en/publicationchapters/wir2015ch3_en.pdf

¹⁴ See Sierra Club. "A dirty deal: How the Trans-Pacific Partnership threatens our climate." December 2015. Available at: <http://bit.ly/1OxfXs1>

¹⁵ Ibid

¹⁶ Wright J. Drilling for oil and gas in NZ: environmental oversight and regulation. Wellington: Office of the Parliamentary Commissioner for the Environment, 2014. Available at: <http://www.pce.parliament.nz/assets/Uploads/PCE-OilGas-web.pdf>

refineries in Texas.¹⁷ This was despite Obama citing climate change concerns as the main reason for his decision: “approving this project would have undercut (US) global leadership (on climate change)”.¹⁸

- iv. In February 2016, the World Trade Organization (WTO) released its ruling against India's National Solar Mission, declaring that India's efforts to boost local production of solar cells was in violation of WTO rules. Though India argued that the program helped it to meet its commitments under the United Nations Framework Convention on Climate Change (UNFCCC), that argument was rejected by the WTO. Rather, the ruling clearly affirmed that domestic policies seen as violating WTO rules cannot be justified on the basis that they fulfil UNFCCC or other international climate commitments.¹⁹
- c. Based on concerns about the use of ISDS to obstruct action on climate change, the European Union (EU) Parliament has recommended²⁰ that a carve-out be applied to ISDS for actions on climate change (The Van Harten Proposal) in the Transatlantic Trade and Investment Partnership (TTIP), the European equivalent of the CPTPP.²¹
- 2) The Technical Barriers to Trade Chapter would also make the transition to net zero emissions more difficult, for example by mandating that policies meet a “necessity test” imposed by the requirement that regulations must not be “more trade-restrictive than necessary to fulfil a legitimate objective” (Technical Barriers to Trade Chapter art 8.4 (1)a).
- 3) The CPTPP would replicate WTO rules which were used in 2013 to rule against Ontario's successful local clean energy programme which created local jobs while reducing emissions.²² To ensure a fair transition to net zero emissions, the New Zealand government may want to introduce policies that promote local job creation.
- 4) The CPTPP would tend to shift manufacturing to countries that use manufacturing processes that are more carbon emission intensive, such as Vietnam and Malaysia.²³
- 5) Other ways in which the CPTPP could exacerbate our global emissions trajectory include increasing shipping, expanding wasteful production and consumption; escalating tropical deforestation due to cash crop expansion; and increasing coal exports (due to elimination of the few remaining existing coal tariffs).²⁴

¹⁷ See <http://keystone-xl.com/wp-content/uploads/2016/01/TransCanada-Notice-of-intent-January-6-2016.pdf>

¹⁸ See Expert Paper #4. The environment under TPPA governance. Available at <https://tpplegal.files.wordpress.com>

¹⁹ See http://www.huffingtonpost.com/ben-beachy/the-wto-just-ruled-against-b_9307884.html

²⁰ See “EU Parliament adopts robust mechanism needed for Paris climate talks. Are European national leaders ready to act?” Available at: <http://canadians.org/media/eu-parliament-adopts-robust-mechanism-needed-paris-climate-talks-are-european-national-leaders>

²¹ See Gus Van Harten. September 20 2015. “An ISDS carve-out to support action on climate change” Osgoode Legal Studies Research Paper No 38/2015. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id

²² Ontario's feed in tariff programme which incentivised local production of solar panels and wind turbines, was ruled against by the WTO in 2013. Article 2.31 of the TPPA incorporates the WTO provision on which this ruling was based (Article III of GATT). For WTO ruling see: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds412_e.htm

²³ See Sierra Club. “A dirty deal: How the Trans-Pacific Partnership threatens our climate.” December 2015. Available at: <http://bit.ly/1OxfXs1>

²⁴ Ibid

²¹ Hailes et al. Climate change, human health and the CPTPP. NZ Med J; 131: March 2018. Available at:

<https://www.nzma.org.nz/journal/read-the-journal/all-issues/2010-2019/2018/vol-131-no-1471-9-march-2018/7510>

²² OECD Investor-State Dispute Settlement Public Consultation:2012. P43-4. Available at

<http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf>

²³ United Nations Conference on Trade and Development (UNCTAD) World Investment Report 2012 pages xxi and 88. Available at: http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf

There are problems too with the legal safeguards within the CPTPP, which increase the risks, described below.

Alleged legal safeguards

1. Despite claims made in the National Interest Analysis (NIA) that the CPTPP fully preserves the freedom of government to act in the interests of the environment and public health, unfortunately, the legal reality is far less black and white. There is no question that environmental policy changes required for transitioning to a net zero carbon economy would become more legally contestable under CPTPP. Alleged legal safeguards described in the NIA as being fully protective at best create a contestable legal grey area with loopholes that law firms and fossil fuel companies under threat will be actively looking to leverage and test to the limits.²¹
2. Alleged legal safeguards on the “investor to state dispute settlement” (ISDS) process (e.g. qualifications on definitions of expropriation and minimal standard of treatment) are also undermined by the lack of reform of the ISDS court system itself. Structural biases and conflicts of interest remain, because those standing in judgment will still alternate between that role and acting as litigators for investors. The credibility of any touted legal safeguards is therefore undermined by this continuing arrangement. Concerns about such conflicts of interest and other procedural concerns have been raised by UNCTAD²² and the OECD²³.
3. ISDS is inherently asymmetric. In other words, it legally empowers commercial interests such as fossil fuel companies and other intrinsically high emissions industries at the expense of civil society. This is because ISDS cases can only be initiated by investors. The priorities and concerns of health and environmental groups can at best be defended by their government. Although fossil fuel companies would also be free to use our domestic legal process, there is no equivalent legal process to ISDS for civil society groups to initiate claims against investors in response to harms caused to population or environmental health.
4. Other entitlements in the agreement, for example, entitlements in the "Technical Barriers to Trade" chapter, the "Transparency" chapter, and the "Regulatory Coherence" chapter would entitle the fossil fuel industry and other high emissions industries to have more extensive access to government information and input into government processes. These new privileges could then be used by these groups to lobby more effectively to protect their commercial interests and could also potentially be used to compile the basis for a legal claim via ISDS or another legal mechanism. All of this would have the net effect of creating a legal environment that is more favourable to the interests of the fossil fuel and other intrinsically high emissions industries.

D: Conclusion

Climate change is a major issue of human health and survival – and an unprecedented opportunity to improve human health. It requires urgent action globally and in New Zealand to rapidly reduce GHG emissions – particularly the emissions from fossil fuels. This has been acknowledged by all

governments in the landmark 2015 Paris Agreement. The CPTPP will create a more challenging legal environment for NZ (and the other signatory nations) to pass policy and regulation to achieve these necessary emissions reductions.

The CPTPP must therefore undergo an independent assessment of its potential impact on the ability of signatory governments to sufficiently reduce their emissions to meet the international UNFCCC commitment to keep global temperature rise “well below 2°C” and “pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels”. Such independent assessment should include both climate health and health equity impacts, both within New Zealand but also considering our Pacific neighbours. This assessment must be carried out by a team of independent experts and should be completed and publicly released prior to ratification with reasonable time for due expert scrutiny and public debate.

Links to two NZ Herald opinion-editorials, and two medical journal papers, that elaborate on our concerns:

- http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11567925
- http://www.nzherald.co.nz/opinion/news/article.cfm?c_id=466&objectid=11552338
- <https://www.nzma.org.nz/journal/read-the-journal/all-issues/2010-2019/2016/vol-129-no-1430-19-february-2016/6809>
- <https://www.nzma.org.nz/journal/read-the-journal/all-issues/2010-2019/2018/vol-131-no-1471-9-march-2018/7510>

OraTaiao: The NZ Climate and Health Council would like to speak to this submission in person to the Select Committee. Please contact via email: info@orataiao.org.nz

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