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11 March 2016

Submission to Parliamentary Select Committee: International treaty examination of the Trans-Pacific Partnership Agreement (TPPA)

A: Summary

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

Our main concern is:

Climate change is a major issue of human health and survival. It requires urgent action globally and in New Zealand (NZ) to rapidly reduce greenhouse gas emissions – particularly the emissions from fossil fuels. The TPPA will hinder the ability of NZ (and the other signatory nations) to pass policy and regulation to achieve this.

B: Who we are

OraTaiao: The NZ Climate and Health Council is an incorporated society of over 420 health professional members who understand that climate change is a threat to human health and survival, 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 NZ and internationally.

C: Submission basis

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}

¹ Costello A, Abbas M, Allen A, 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, et al. The 2015 Lancet Commission on Health and Climate Change. Health and climate change: policy responses to protect public health. Lancet. 2015. <http://www.thelancet.com/commissions/climate-change-2015>

Climate change threatens to impact health through a number of 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.

As The Lancet medical journal describes, humanity is on the cusp of choosing to use climate action as our greatest health opportunity or committing to "unacceptably high and potentially catastrophic risk to human health".³

If we choose the path of rapid and healthy climate action in NZ (e.g. climate-friendly transport, housing, energy and food policies) we can address some of the biggest causes cutting adult lives short and making our children sick. These include heart disease, obesity, cancer, asthma, and road traffic injury.⁴

The recent United Nations Framework Convention on Climate Change (UNFCCC) agreement in Paris (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.

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 1.5°C warming will require a rapid transition away from fossil fuels to move to net zero emissions of CO₂ by around 2050.⁵

This means that most of the fossil fuel reserves already claimed by fossil fuel companies must remain unburnt.⁶ Major changes also will need to take place within other sectors (e.g. agriculture, forestry, land-use) to bring down CO₂ and other long-lived GHGs.⁷

To bring about such an unprecedented transition within the time frame available is an enormous challenge that will require governments to have maximum flexibility and scope for policy innovation.

Despite the scale and urgency of this global challenge, the need to limit warming to "well below 2°C" is not acknowledged in the TPPA 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

³ Ibid

⁴ 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. NZ Med J. 2014;127:16-31.

⁵ Joeri R, Luderer G, Pietzcker R et al. Energy system transformation for limiting end of century warming to below 1.5oC. Nature Climate Change. 2015; 519-27.

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 IPCC: Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change. http://www.ipcc.ch/pdf/assessment-report/ar5/wg3/ipcc_wg3_ar5_summary-for-policymakers.pdf

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

An earlier draft 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

There are numerous specific concerns about how the TPPA would make the required transition away from fossil fuels more difficult. The section below outlines these concerns:

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

The TPPA would give the fossil fuel industry additional opportunities and powerful new levers to resist reforms that threaten to lessen the value of its reserves.

1) The ISDS mechanism

- a. 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
 - iii. Of allegations that a contract between the investor and the government has been breached by the government
- b. Under existing trade agreements, the fossil fuel and extractive industries have launched a disproportionately high number of ISDS claims.¹⁰ These include:
 - 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 on the basis of a breach of “fair and equitable treatment”. As a result of this threat, the German government settled on an agreement that required Hamburg to abandon its environmental standards.¹¹
 - 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 on the basis of alleged breaches of the “minimum standard of treatment” as well as allegations of “indirect expropriation”.¹² 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.¹³
 - iii. A 15 billion US\$ claim initiated over the last few months by TransCanada in response to President Obama’s blocking of the Keystone XL pipeline carrying crude oil from the Alberta

⁹ Ibid

¹⁰ UNCTAD, “World investment report 2015: Reforming international investment governance”, chapter III, p.115. Available at: http://unctad.org/en/publicationchapters/wir2015ch3_en.pdf

¹¹ See Sierra Club. “A dirty deal: How the Trans-Pacific Partnership threatens our climate.” December 2015. Available at: <http://bit.ly/1OxfXs1>

¹² Ibid

¹³ 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>

- tar sands to refineries in Texas.¹⁴ This is 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)”¹⁵
- iv. In February 2016, the 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.¹⁶
- 2) The TPPA would mandate rules that would facilitate unchecked exports of liquefied natural gas (LNG) from the US by requiring the US Department of Energy to automatically approve *all* exports of LNG to *all* TPPA countries including Japan (the world's biggest LNG importer).¹⁷
 - 3) The Technical Barriers to Trade Chapter would also make the transition to zero CO2 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).
 - 4) The TPPA 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.¹⁸

Protecting Government ability to act on climate change

Based on concerns about the use of ISDS to obstruct action on climate change, the EU Parliament have recommended¹⁹ that a carve-out be applied to ISDS for actions on climate change (The Van Harten Proposal) in the Transatlantic Trade and Investment Partnership or TTIP, the European equivalent of the TPPA.²⁰

This is a powerful statement by one of the world's largest economic blocs that climate action must not be derailed by the vested interests of fossil fuel companies.

New Zealand needs to insist on a similar climate 'carve out' from trade agreements that we are involved in, including the TPPA. However, the requirement for such an exemption indicates that the TPPA is deeply flawed; if the agreement included protection of government sovereignty to make laws, no such 'carve outs' would be needed.

¹⁴ See <http://keystone-xl.com/wp-content/uploads/2016/01/TransCanada-Notice-of-intent-January-6-2016.pdf>

¹⁵ See Expert Paper #4. The environment under TPPA governance. Available at <https://tpplegal.files.wordpress.com>

¹⁶ See <http://www.huffingtonpost.com/ben-beachy/the-wto-just-ruled-against-b-9307884.html>

¹⁷ See Sierra Club. “A dirty deal: How the Trans-Pacific Partnership threatens our climate.” December 2015. Available at: <http://bit.ly/1OxfXs1>

¹⁸ 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

¹⁹ 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>

²⁰ 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

D: Conclusion

Climate change is a major issue of human health and survival. 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, but the TPPA will hinder the ability of NZ (and the other nations) to pass policy and regulation to achieve this.

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

- TPP could trump climate accord. NZ Herald, 31 December 2015. http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11567925
- TPP must not block the path to healthy climate action. NZ Herald, November 27 2015. http://www.nzherald.co.nz/opinion/news/article.cfm?c_id=466&objectid=11552338
- TPPA should not be adopted without a full, independent health assessment. New Zealand Medical Journal. 19th February 2016. <https://www.nzma.org.nz/journal/read-the-journal/all-issues/2010-2019/2016/vol-129-no-1430-19-february-2016/6809>

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