

Climate change, human health and the CPTPP

Oliver Hailes, Rhys Jones, David Menkes, Joshua Freeman, Erik Monasterio

Unless you are a politician, activist or business leader, there is a high chance your eyes will glaze over with talk of the Trans-Pacific Partnership Agreement (TPPA). The economic treaty is a technical legal document of around 6,000 pages, and its recent rebranding as the Comprehensive and Progressive Agreement for TransPacific Partnership (CPTPP) serves only to frustrate and confuse laypeople trying to understand its implications. But the influence of the CPTPP on the future health of the New Zealand population is undeniable and, despite the treaty's complexity, it demands the full attention of the nation's health professionals.

It is now well established, for instance, that the original TPPA would have driven up the price of pharmaceuticals by expanding intellectual property protections and weakening Pharmac's purchasing model.¹ It might have also stymied the government's ability to regulate or ban direct-to-consumer advertising (DTCA) of prescription medicines, an effective marketing tool that drives demand for expensive and potentially harmful drugs.² Overall, the treaty was noted for its potential to conflict with policies that advance health and human rights,³ and was associated with considerable risks to health equity and social justice.⁴

In this viewpoint article, however, we focus on the CPTPP in the context of the global climate crisis and its potential downstream impacts on health. While the treaty pays lip service to broader social and environmental concerns, we will highlight how the CPTPP is geared fundamentally towards the interests of transnational corporations and foreign investors at the expense of concerns about human and environmental health.

Climate change and human health

There is a considerable body of scientific literature and consensus on the harmful

impacts of climate change on health. So much so that climate change has been identified as the most serious threat to global public health this century.⁵ Direct impacts include death, illness and injury due to heat waves and extreme weather events. Powerful indirect impacts on health are mediated by a complex interaction of social, environmental and economic factors. These include shifting patterns of infectious disease, air pollution, freshwater contamination, impacts on the built environment from sea level rise, forced migration, economic collapse, conflict over scarce resources and increasing food insecurity.⁶ The mental health impacts of climate change are likely to be significant and represent a poorly recognised burden on the health system. They include direct and indirect effects, with disproportionate impacts on populations already facing high rates of mental illness and substance use disorders, notably indigenous and socioeconomically disadvantaged communities.⁷

A recent report from the Royal Society demonstrates that climate change is already affecting the health of New Zealanders, and that these impacts will intensify if climate change is allowed to continue unchecked.⁸ The overall adverse health impacts will be disproportionately borne by vulnerable groups and those already suffering from disadvantage in Aotearoa: children, elderly, low-income, Māori and Pacific populations.^{9,10}

Yet there are significant co-benefits for New Zealanders' health that could be achieved through reduction of emissions in sectors such as transport, housing, energy and agriculture.⁹ Indeed, tackling and mitigating climate change has been recognised as perhaps the greatest global health opportunity of the 21st century.¹¹ This opportunity can only be realised through the initiative of a government that is willing and able to make bold changes in social and economic policy.

Background to the CPTPP

The 11 negotiating parties to the CPTPP represent the remainder of the 12 states (now minus the US) that formally signed the TPPA in Auckland on 4 February 2016: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. In its original form, the TPPA was poised to set the rules for the free flow of goods, services, information and investment around the Pacific Rim, fusing a dozen domestic markets to form a regional bloc embracing some 40% of global GDP and one-third of international trade.¹² However, by dint of Article 30.5.2, the TPPA could not come into force without ratification by the US.¹³

On 8 November 2016, the very same day that the TPPA's proponents were thwarted by Donald Trump's election on an anti-TPPA platform, the World Meteorological Organization (WMO) reported to the United Nations Climate Change Conference in Morocco that the past five years were the hottest on record.¹⁴ This process continues to be accelerated by a global economic model creating ever greater carbon emissions, and there is an emerging consensus that current geological changes signal a new epoch, the Anthropocene, in which human activity is the dominant influence on climate and the environment.¹⁵ The Paris Agreement, signed on 22 April 2016, attempts to address the threats of climate change through national efforts to reduce carbon-intensive industry. Yet these unenforceable commitments are directly at odds with the binding rules of economic treaties like the CPTPP, which effectively underwrite unsustainable patterns of production, transport and consumption based on fossil fuels as the primary energy source.¹⁶

After some Canadian hesitation during negotiations at the Asia-Pacific Economic Cooperation (APEC) summit in late 2017, a deal was struck by the 11 countries on 23 January 2018 following two days of talks in Tokyo, with plans to sign the revised terms on 8 March in Chile. Only 22 out of the more than 1,000 provisions to the original text have been suspended, not removed, and they can be revived by consensus.¹⁷ Thus, the substance of the CPTPP is identical to that which was signed in early 2016. At

this critical juncture, it is vital to examine how the treaty might threaten essential government action on climate change.

Climate change and the CPTPP

Only six of the 30 chapters to the TPPA, now the CPTPP, deal with trade in goods such as meat, milk and motorcars. The rest of the 6,000 pages cover a vast range of matters such as Electronic Commerce, Government Procurement, Labour and Environment. Yet nowhere in the final text is the term "climate change" mentioned.¹⁸

Article 20.15 appears to address the climate crisis obliquely by acknowledging that "transition to a low emissions economy requires collective action" and that the parties "shall cooperate to address matters of joint or common interest" such as "development of cost-effective, low emissions technologies and alternative, clean and renewable energy sources". Other environmental issues recognised in Chapter 20 include ship pollution of the marine environment, depletion of the ozone layer, overfishing and conservation of flora, fauna and natural resources. But it is important to realise from a legal standpoint that these soft acknowledgements and the vagaries of the environmental "Cooperation Frameworks" (Article 20.12) contrast starkly to the enforceable rules designed to protect the profitability of foreign investments.

The drafters of the CPTPP seem well aware of the important relationship between law, economic growth and the environment: it is widely understood that while the state has a role in regulating private sector access to natural resources at the national level, international law has historically played an important role in securing a globalised, neoliberal approach to resource ownership and exploitation.^{19,20} Beyond the impact on particular sectors, the CPTPP would place enforceable limits on the New Zealand government's regulatory powers, analogous to supreme constitutions in countries where the courts can override democratic legislation.²¹ Chapter 9 on Investment contains strong and expansive rights for foreign investors—including protection from expropriation without compensation (Article 9.8) and an open-ended guarantee of a "minimum standard of treatment" (Article 9.6)—that are enforced through the investor-state

dispute settlement (ISDS) mechanism. ISDS provisions are included in economic treaties to help resolve disputes between foreign investors and countries in which they have invested, but the process is undergoing a crisis in legitimacy due to concerns about structural biases in favour of investors.²²

Investor protections under the CPTPP effectively introduce a backdoor mechanism to constrain New Zealand's law-making process by enabling investors to sue governments if they adopt regulations that, for example, erode the expected value of their assets through environmental regulations such as the phasing out of fossil fuel extraction. These protections are not available to New Zealand citizens and businesses, yet they extend to "every asset that [a foreign] investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk" (Article 9.1). This expansive definition goes well beyond real estate and physical assets to cover almost everything that can be wrapped in the cloak of property rights, including this non-exhaustive list of examples: regulatory permits; intellectual property rights; financial instruments such as stocks and derivatives; "turnkey, construction, management, production, concession, revenue-sharing and other similar contracts"; and "licences, authorisations, permits and similar rights conferred pursuant to the [country's] law".

Admittedly, the CPTPP contains a boilerplate safeguard: "non-discriminatory regulatory actions by a [government] that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances" (Annex 9B.3(b)). But notice all the investor-friendly qualifications buried within this exception: "non-discriminatory"; "legitimate"; "except in rare circumstances". Investment lawyers are trained (and paid handsomely) to exploit such loopholes, which many ISDS cases internationally have invoked to challenge public health and environmental legislation.²³ For instance, a Canadian

energy company brought a claim of US\$15 billion against the US under the North American Free Trade Agreement (NAFTA) after the Obama administration cancelled construction of the Keystone XL pipeline, intended to link Canada's tar sands and the Gulf of Mexico, on environmental grounds including concerns about climate change.³

The 22 adjustments in the rebranded agreement have admittedly introduced modest improvements in some specific, technical areas. For example, doctors should be pleased to see that the suspension of Articles 18.50 and 18.51 temporarily removes the requirements for countries to strengthen their data- and market-protection settings for biologics, thereby allaying fears that public access to cutting-edge medicines will be limited through cost-prohibitive monopolies. However, these interim adjustments do nothing to address the core problems with the CPTPP and its less obvious but more serious long-term impacts on health caused by climate disruption. Despite official assurances that ISDS concerns have been remedied, the suspensions in the Investment Chapter only prevent investors from using that mechanism if the dispute concerns a private contractual relationship with the New Zealand government, distinct from a claim against public regulatory measures, or if the investor is based in Australia.¹⁷ Moreover, these suspensions will almost certainly be abandoned if the US seeks to join at a later date, as the Trump administration has indicated recently, which is by far the most frequent home state of claimants under ISDS provisions: as at the end of 2014, about 130 claims had been initiated by US investors, nearly twice as many as the second most litigious state.²⁴ Notably, over 85% of damages paid by governments under economic treaties with the US have resulted from investor claims over resources and the environment.²⁵

So, if we peel back the window dressing, the fundamental objective of treaties like the CPTPP remains to protect the business interests of investors (primarily transnational corporations) by limiting the legislative power of future governments, even if they gain a democratic mandate for change.^{26,27} The effect of the Investment Chapter, in particular, is not

so much to reform current policy but to prevent future progressive or precautionary reforms through obligations that make it more difficult for governments to regulate in response to public health and environmental risks.²⁸ At the very least, New Zealand's negotiators should have demanded an ISDS "carve-out" to support action on climate change, similar to the clause that excludes tobacco control measures from ISDS action (Article 29.5).²⁹ Instead, if ratified, the CPTPP would shore up the existing model of underregulated economic growth and impede the adoption of a more balanced, interventionist and sustainable approach to development, despite overwhelming evidence that urgent and decisive reforms are needed to address the climate threat to human health.

Concluding remarks

Since 1984, successive governments in New Zealand and other countries in the Organisation of Economic Cooperation and Development (OECD) have actively pursued a broadly neoliberal policy agenda characterised by transforming public property and social services into tradable assets and creating a regulatory landscape that prioritises interests of foreign investors.³⁰ As we have noted, international economic treaties such as the CPTPP have been a key mechanism through which this agenda has been consolidated and expanded. However, in

light of climatic impacts alone, it is now clear that this model of economic development is unsustainable, dangerous to population health and in urgent need of fundamental reform.

The Labour-led Government has launched into its first term with bold plans to align New Zealand's economy with priorities dictated by the urgency of the climate crisis. This will include introducing a Zero Carbon Bill to set statutory targets for transitioning to net-zero carbon emissions by 2050; health professionals will have the opportunity to contribute to the nationwide consultation beginning in May. Ironically, the Government's ambition in this regard would be seriously undercut by signing a treaty that underwrites the economic status quo and creates strong legal headwinds for essential regulatory action. A systematic and independent assessment of the CPTPP's anticipated impacts on climate disruption, and on mitigation strategies, should therefore be undertaken and released for public discussion before the treaty is ratified. The assessment should also include an analysis of the projected impacts on population health and equity. Such an assessment is particularly critical as climate change poses such clear risks to the health of New Zealanders, and the constraints on climate action conferred by the CPTPP (as presently formulated) would prevent important steps to protect our health and create a fairer society.

Competing interests:

Nil.

Author information:

Oliver Hailes, Solicitor and Legal Scholar, Wellington; Rhys Jones, Senior Lecturer, Te Kupenga Hauora Māori, University of Auckland, Auckland;
David Menkes, Academic Psychiatrist, Waikato Clinical Campus, University of Auckland, Auckland; Joshua Freeman, Consultant Clinical Microbiologist, Canterbury District Health Board; Erik Monasterio, Clinical Director Canterbury Regional Forensic Service and Senior Clinical Lecturer, Christchurch School of Medicine, University of Otago, Christchurch.

Corresponding author:

Dr Erik Monasterio, University of Otago, PO Box 4345, Christchurch 4345.
erik.monasterio@cdhb.health.nz

URL:

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

REFERENCES:

1. Gleeson D, Lopert R, Reid P. How the Trans Pacific Partnership Agreement could undermine PHARMAC and threaten access to affordable medicines and health equity in New Zealand. *Health Policy*. 2013; 112(3):227–33.
2. Gleeson D, Menkes DB. Trade Agreements and Direct-to-Consumer Advertising of Pharmaceuticals. *IJHPM*. 2018; 7(2):98–100.
3. Keating G, Freeman J, Macmillan A, Neuwelt P, Monasterio E. TPPA should not be adopted without a full, independent health assessment. *NZ Med J*. 2016; 129(1430):7–13.
4. Keating G, Jones R, Monasterio E, Freeman J. The Potential Impact of the Trans-Pacific Partnership Agreement on Health Equity, with Illustration from New Zealand. *Applied Health Economics and Health Policy*. 2016; 14(4):397–400.
5. Costello A, Abbas M, Allen A, Ball S, Bell S, Bellamy R, et al. Managing the health effects of climate change. *Lancet*. 2009; 373(9676):1693–733.
6. Woodward A, Smith KR, Campbell-Lendrum D, Chadee DD, Honda Y, Liu Q, et al. Climate change and health: on the latest IPCC report. *Lancet*. 2014; 383(9924):1185–89.
7. Every-Palmer S, McBride S, Berry H, Menkes DB. Climate change and psychiatry. *Aust NZ J Psychiatry*. 2016; 50(1):16–8.
8. Royal Society/Te Apārangi. Human Health Impacts of Climate Change for New Zealand: Evidence Summary. October 2017.
9. 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(1406):16–31.
10. Jones RG, Bennett H, Keating G, Blaiklock A. Climate change and the right to health for Māori in Aotearoa/New Zealand. *Health and Human Rights Journal*. 2014; 16(1):54–68.
11. Watts N, Adger WN, Agnolucci P, Blackstock J, Byass P, Cai W, et al. Health and climate change: policy responses to protect public health. *Lancet*. 2015; 386(10006):1861–914.
12. Meltzer JP. The Trans-Pacific Partnership Agreement, the environment and climate change. In: Voon T, editor. *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement*. Northampton: Edward Elgar Publishing; 2013:208.
13. Geddis A. Why the TPP11 will have to go back before Parliament [Internet]. *Pundit*. 22 May 2017 [cited 25 January 2018]. Available from: <http://www.pundit.co.nz/content/why-the-tpp11-will-have-to-go-back-before-parliament>
14. Polychroniou CJ. Trump in the White House: An Interview with Noam Chomsky [Internet]. *Truth-out*. 14 November 2016 [cited 25 January 2018]. Available from: <http://www.truth-out.org/opinion/item/38360-trump-in-the-white-house-an-interview-with-noam-chomsky>
15. Boneuil C, Fressoz J-B. *The Shock of the Anthropocene: The Earth, History and Us*. New York: Verso Books; 2017.
16. Hailes O. *The Politics of Property in Constitutional Reform: A Critical Response to Sir Geoffrey and Dr Butler*. *NZJPIL*. 2017; 15(2):260.
17. TPP and CPTPP - the differences [Internet]. *New Zealand Foreign Affairs & Trade*. 2018 [cited 28 January 2018]. Available at: <http://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/cptpp-2/tpp-and-cptpp-the-differences-explained>
18. Rimmer M. Greenwashing the Trans-Pacific Partnership: Fossil Fuels, the Environment, and Climate Change. *Santa Clara J. Int'l L*. 2016; 14:520–28.
19. Parenti C. *Environment-Making in the Capitalocene: Political Ecology of the State*. In: Moore JW, editor. *Anthropocene or Capitalocene?: Nature, History, and the Crisis of Capitalism*. Oakland: PM Press; 2016:166–84.
20. Miles K. *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital*. Cambridge: Cambridge University Press; 2013.
21. Hailes O, Geddis A. The Trans-Pacific Partnership in New Zealand's Constitution. *NZULR*. 2016; 27(2):226–62.
22. Kahale G. *Is Investor-State Arbitration Broken? TDM*. 2012;7.
23. Hailes O, Geddis A. The Trans-Pacific Partnership in New Zealand's Constitution. *NZULR*. 2016; 27(2):254–57.

24. United Nations Conference on Trade and Development (UNCTAD). Recent trends in IIAs and ISDS. February 2016; IIA Issues Note, No. 1:6.
25. Terry S. Expert paper #4: the environment under TPPA governance. Trans-Pacific Partnership Agreement New Zealand Expert Paper Series. January 2016:11.
26. Gill S, Cutler AC, editors. New Constitutionalism and World Order. Cambridge: Cambridge University Press; 2014.
27. Schneiderman D. Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise. Cambridge: Cambridge University Press; 2008.
28. Hailes O, Geddis A. The Trans-Pacific Partnership in New Zealand's Constitution. NZULR. 2016; 27(2):243–62.
29. Van Harten G. An ISDS Carve-Out to Support Action on Climate Change. Osgoode Legal Studies Research Paper Series. 2015:113.
30. Kelsey J. The FIRE Economy: New Zealand's Reckoning. Wellington: Bridget Williams Books; 2015.