

1. Introduction

- 1.1 'It's Our Future NZ' is a network of academics, public interest groups, activists and concerned citizens organising an information, education and grassroots campaign with regard to the Trans-Pacific Partnership Agreement (TPPA).
- 1.2 The TPPA is a trade, investment and economic integration agreement currently being negotiated between twelve countries – Australia, Brunei-Darussalam, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam. Japan will join the negotiation as a full partner on 23 July 2013. The parties aim to conclude the TPPA in late 2013.
- 1.3 Following the collapse of the Doha Round of World Trade Organisation (WTO), the proposed TPPA has become a strategic vehicle for major powers to advance their proposals for WTO-plus obligations and seek new rules and arrangements.
- 1.4 State parties to the negotiations have existing, but varying, human rights obligations, including International treaties like the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Labour Organisation (ILO) core labour rights, Convention on the Rights of the Child (CRC), the Declaration on the Rights of Indigenous Peoples (DRIP) and the Cartagena Protocol on Biodiversity.
- 1.5 In New Zealand, human rights are primarily governed in domestic law by the Bill of Rights Act 1990 (which enacts the International Covenant on Civil and Political Rights) and the Human Rights Act 1993, and the Crown's obligations under the Treaty of Waitangi 1840.
- 1.6 State parties to the TPPA are bound to take measures that respect, protect and fulfil their human rights obligations, avoid measures that would constrain their ability to meet those commitments, and not undermine the ability of other countries to comply with their own obligations.¹
- 1.7 The UN High Commissioner for Human Rights observed in 2002 that any deliberately retrogressive measure in the liberalisation process that reduces the state's ability to protect human rights is itself a human right violation and states should not be subject to sanctions for taking actions to protect human rights. The actual or potential conflict between the implementation of the WTO intellectual property rights agreement and the realisation of economic, social and cultural rights, in particular the rights of self-determination, food, housing, work, health and education. The Commissioner also stressed the need for adequate protection of traditional knowledge and cultural values of indigenous peoples against bio-piracy and of their control of genetic and natural resources.²
- 1.8 Because TPPA negotiations are conducted under a veil of secrecy it is impossible to make fully informed assessments of their human rights implications. Knowledge about the text of the proposed TPPA has been gleaned from leaked chapters and annexes covering investment, transparency, regulatory coherence and intellectual property, the development of legal norms in similar agreements by negotiating countries, public statements and the stated demands of corporations and industry bodies.
- 1.9 This information reveals threats to access to medicines, public health, indigenous knowledge and other indigenous rights, access to social services, protection for labour and environment, conservation and

¹ Vienna Convention on the Law of Treaties 1969, Articles 26 and 30.4(b)

² ECOSOC, 'Economic, Social and Cultural Rights. Liberalization of Trade in Services and Human Rights. Report of the High Commissioner. Executive Summary', E/CN.4/Sub.2/2002/9, 25 June 2002, pp 4, 26 and 28

climate change measures, and rights to development. Proposed investor-state dispute settlement would intensify these threats through legal recourse by foreign investors to opaque international arbitral tribunals that are facing a crisis of credibility.

2. Right to Participate in Public Affairs

- 2.1 The negotiation of binding international agreements under conditions of strict confidentiality makes it impossible for members of Parliament and citizens to participate in an effective and meaningful way in decisions that have enforceable long-term consequences. It also prevents independent and detailed assessment of its implications for human rights obligations and democratic debate on the merits of an agreement before the negotiations are concluded.
- 2.2 International human rights bodies have stressed the importance of transparency and debate over proposed agreements.³
- 2.3 There have been numerous requests to the TPPA parties to the negotiations for greater transparency and release of draft texts.⁴ This request is consistent with the precedents set in the WTO, the Free Trade Area of the Americas (FTAA), the Multilateral Agreement on Investment (MAI), the Anti-Counterfeiting Trade Agreement (ACTA). In several cases, the ensuing debate resulted in significant changes or failure of the agreements, reflecting the importance of public input.
- 2.4 However, the New Zealand government, as the official repository of the TPPA documents, has confirmed that all parties agreed not to make the text public until an agreement is concluded. The other negotiating documents will not be released until four years after either agreement comes into force or the negotiations have closed.⁵
- 2.5 Despite that statement, some countries have disclosed text discriminately to corporate interests. Members of the US Congress have complained about the severe restrictions imposed on access to the text.⁶ Green parties in three parties, including NZ, have objected to their denial of access to draft texts.⁷
- 2.6 A number of international human rights agencies have stressed the importance of human rights impact assessments of proposed free trade and investment treaties. In 2011 the UN Special Rapporteur on the right to food stressed that the right to participate in public affairs means no free trade and investment agreement should be concluded in the absence of a public debate conducted by freely elected parliamentary assemblies.⁸
- 2.7 The UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises also published a report in 2011 on *Guiding Principles on Business and Human Rights*. The ninth principle says “States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.”⁹

³ eg. UN Sub-Commission on the Promotion and Protection of Human Rights. “Globalization and its impact on the full enjoyment of all human rights” (Resolution 2001/5), 25th meeting, 15 August 2001; ECOSOC, ‘Economic, Social and Cultural Rights. Liberalization of Trade in Services and Human Rights. Report of the High Commissioner. Executive Summary’, E/CN.4/Sub.2/2002/9, p.5;

⁴ <http://www.citizen.org/Page.aspx?pid=4768>

⁵ <http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/1-TPP-Talk/0-TPP-talk-29-Nov-2011.php>

⁶ http://www.huffingtonpost.com/2013/06/13/elizabeth-warren-free-trade-letter_n_3431118.html

⁷ <http://www.greenparty.ca/statement/2012-08-21/joint-statement-trans-pacific-partnership-agreement>

⁸ Olivier De Schutter, Report of the UN Special Rapporteur on the right to food to the UN Human Rights Council. Addendum *Guiding principles on human rights impact assessments of trade and investment agreements*, A/HRC/19/59/Add.5, 19 December 2011

⁹ John Gergard Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect Respect and Remedy” Framework*, UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations, March 2011

- 2.8 Commentary to that principle notes these agreements can create economic opportunities, but they also affect the domestic policy space and States 'should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements...'. In the absence of public debate, there is no evidence that adequate policy space has been retained to protect human rights.
- 2.9 The secrecy surrounding the TPPA is of particular concern in New Zealand where constitutional arrangements make the negotiation, signing and ratification of international treaties an executive act. The Cabinet Manual states in para 7.112 that 'In New Zealand, the power to take treaty action rests with the Executive.' New Zealand citizens and the New Zealand Parliament will not gain access to the text until it has been signed, which signals an intention by the state to be bound by the content. Parliamentary participation is ex post, largely cosmetic and ineffectual.
- 2.10 It's Our Future NZ condemns the corrosive effect of this secrecy on our democracy and its potential to make the 'right to take part in the government of his country, directly or through freely chosen representatives' under Article 21 of the Universal Declaration of Human Rights practically unrealisable.

3. Right to Health

- 3.1 The leaked TPPA draft chapters on intellectual property contain provisions that extend intellectual property provisions on patented goods such as pharmaceuticals. When this passes into law it will hinder the effectiveness of NZ's state-run Pharmac bulk-buying medicines system, which operates a subsidy scheme based on reference pricing that includes parallel imported and generic drugs. In addition, the leaked chapter on transparency and procedural fairness in health-care technologies is designed to increase the ability of PhRMA to influence and undermine the Pharmac process.¹⁰
- 3.2 This is in contravention of Article 25 of UDHR, which firmly establishes the right to health, and Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which guarantees the right of everyone to the enjoyment of the highest attainable standard of health. New Zealand has not ratified the Optional Protocol that makes claims actionable.
- 3.3 On 19 July 2011 the UN Special Rapporteur on the Right to Health sent communications to the governments of each of the (then nine) negotiating countries with regard to complaints that the leaked provisions would 'strengthen monopolies for life-saving medicines and create barriers for access to medicines', as well as other members surround the right to health. Only Australia, Chile and New Zealand responded. The New Zealand government said that 'no New Zealand government would consider becoming party to a negotiated outcome that called into question either the right to health or access to essential medicines.'¹¹
- 3.4 During a visit to Hanoi in December 2011, the UN Special Rapporteur on the right to health issued a press statement about Vietnam's the right to health and access to medicines, which warned that: 'During the TPPA negotiations, there is a risk that TRIPS-plus provisions will be agreed to that will prevent the Government from using TRIPS flexibilities. This may well delay the introduction of generic medicines, including locally produced, thereby result in further increases in the prices of medicines, as evidence the experience of other countries.'¹²
- 3.5 The 2012 report of the UNDP Global Commission on HIV and the Law *Risks, Rights and Health* made special reference to the risks that TRIPS-plus standards in free trade agreements (FTAs) and economic partnership agreements EPAs pose for access to medicines. It specifically referred to 'the United States-promoted Transpacific Partnership Agreement (TPPA)' as a case in point. 'Among other terms friendly to

¹⁰ <http://www.citizenstrade.org/ctc/blog/2011/10/22/leaked-trans-pacific-fta-texts-reveal-u-s-undermining-access-to-medicine/>, <http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf>

¹¹ <http://keionline.org/node/1554>

¹² <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11683&LangID=E>

the United States pharmaceutical industry, the proposed patenting standards would allow patenting of new forms, new uses and new formulation of existing medicines; extend patent terms; and restrict the use of price control mechanisms.¹³

3.6 It recommended in para 6.3.1 that 'All countries must immediately adopte and observe a global moratorium on the inclusion of any intellectual property provisions in any international treaty that would limit the ability of countries to retain policy options to reduce the cost of HIV-related treatment.'

3.7 While the New Zealand government has said that it will not make concessions that affect the 'fundamentals' of Pharmac it is unclear that that means, and the secrecy of the TPPA makes that impossible to monitor in advance.

4. Further Human Rights Issues

4.1 The leaked text of the TPPA investment chapter confirmed that only Australia has rejected the inclusion of 'Investor-state dispute settlement' ("ISDS") in the TPPA. The UNCTAD and the OECD have both observed in 2012 that international disputes tribunals operating International Court for Settlements in Disputes (ICSID) and under the United Nations (UNCITRAL) rules are facing a crisis of legitimacy.¹⁴

4.2 Similar provisions in FTAs and investment treaties have demonstrated severe breaches of provisions of the UN Declaration on the Rights of Indigenous Peoples (DRIP), and abuses with regard to the right to enjoy a healthy environment, a developing norm. Four examples of the use of ISDS illustrate the violations of various fundamental human rights and the implications for New Zealand of similar cases and awards affecting indigenous rights, environment, and public health and safety:

- (i) Chevron has sued Ecuador to overturn a decision of the domestic courts after 18 years of legal action, to award \$18 billion in damages to clean up its toxic contamination of the Amazon basin that is home to many indigenous communities. The ICSID tribunal has ordered Ecuador's President to suspend enforcement of the judgment, even though such action would breach the Constitution.¹⁵
- (ii) US-based Occidental Petroleum used such powers to challenge Ecuador's cancellation of a mining concession. Even though it was accepted that Occidental breached the contract it received the largest ever award of US\$1.8 billion plus US\$589 million in backdated compound interest. The tribunal considered Ecuador's response had been disproportionate.¹⁶
- (iii) Philip Morris Asia has challenged Australia's law on plain packaging of tobacco before an UNCITRAL tribunal that is sitting largely in secret in Singapore. New Zealand proposes to introduce a similar law, consistent with its obligations under the UN Framework Convention on Tobacco Control. Tobacco companies have threatened similar action against New Zealand if it proceeds, but the prospects for such a case are weaker than under the proposed TPPA.¹⁷
- (iv) In November 2012 US pharmaceutical firm Eli Lilly and Company filed proceedings under similar investor-state mechanisms of the North American Free Trade Agreement against Canada. The drug company is claiming C\$100 million in damages because Canada's courts reject its application to extend its monopoly patent protections.¹⁸

¹³ <http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/hiv-and-the-law--risks--rights---health/> at p.83

¹⁴ OECD, *Investor-State Dispute Settlement. Public Consultation: 16 May-23 July 2012*, OECD, Paris; UNCTAD, *World Investment Report. Towards a new generation of investment policies*, UNCTAD, New York, 2012.

¹⁵ www.citizen.org/documents/oxy-v-ecuador-memo.pdf

¹⁶ Luke Eric Peterson, 'Ecuador must pay \$1.76 billion US to Occidental for expropriation of oil investment; largest award ever in bilateral investment treaty case at ICSID', *Investment Arbitration Reporter*, 9 October 2012

¹⁷ Jane Kelsey, *Hidden Agendas: What We Need To Know About The TPPA*, Bridget Williams Books, Wellington, 2013

¹⁸ [www.citizen.org/documents/Eli%20Lilly%20Briefing%20\(3-10-13\).pdf](http://www.citizen.org/documents/Eli%20Lilly%20Briefing%20(3-10-13).pdf)

- 4.3 The provisions of the financial services and investment chapters are expected to reinforce the model of risk-tolerant financial deregulation that was responsible for the most recent global financial crisis with its far-reaching human rights implications.¹⁹
- 4.4 The leaked investment chapter would intensify these risks by prohibiting the use of capital controls under any circumstances, including for balance of payments or social emergencies. Existing US FTAs have similar provisions. The US approach was strongly criticised in a letter from US economists including Dr Dani Rodrik, Professor Ricardo Hausmann, Dr. Joseph Stiglitz and others in a letter of 31 January 2011.²⁰
- 4.5 It is now well understood that capital controls can prevent speculation in futures markets of primary food commodities. This speculation can push up the price of food independent of supply and demand fundamentals, making food increasingly unaffordable, undermining the progressive realisation of the right to food, contained in the right to an adequate standard of living enshrined in Article 25 of UDHR. This right is further expressed in Article 11 of ICESCR.
- 4.6 New Zealand is a highly deregulated country which has many other problems in areas involving mining and conservation, health and safety in mines and forestry, privatisation of social services, including sewage and water, education and housing. The TPPA has the potential to prevent New Zealand from complying with its international human rights obligations in these areas, and if the TPPA is concluded and comes into force.

5. Human Rights Impact Assessment

- 5.1 On 5 May 2011 Professor Jane Kelsey, with the assistance of the Human Rights Group of the Equal Justice Project at the School of Law at the University of Auckland requested the NZ Human Rights Commission to conduct a scoping study on TPPA's potential human rights impact, highlighting the right to health, livelihood, impact on indigenous peoples and democratic decision-making.
- 5.2 The supporting document made reference to a seminar of experts that had convened in Geneva in mid-2010 that concluded that: 'The global trade and investment regime has a profound impact on human rights. An alternative regime is needed to ensure that trade and investment support the realization of human rights.'²¹ It also referred to national initiatives to conduct such studies.
- 5.3 Subsequently, the 2011 report of the UN Special Rapporteur on the right to food to the 19th session of the Human Rights Council set out *Guiding principles on human rights impact assessments of trade and investment agreements*. The first principle said 'All states should prepare human rights impact assessments prior to the conclusion of trade and investment agreements.'²²
- 5.4 The NZ Human Rights Commission responded to Professor Kelsey's request by stating it did not have the resources to undertake a scoping study of the TPPA. 'However it does have an ongoing interest in whether, how and to what extent human rights are taken into account by New Zealand in negotiations for free trade agreements... Therefore the Commission has agreed to maintain a watching brief over TPPA...' .²³ However, there is no evidence of any active oversight or examination.
- 5.5 It's Our Future NZ is concerned that the NZ Human Rights Commission has failed to take necessary steps to ensure that the TPPA would not impede New Zealand's compliance with its human rights obligations under the TPPA and its obligations as a State party to the Vienna Convention on Treaties.²⁴

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¹⁹ United Nations, *Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System*, Preliminary report, UN, New York, June 2009, p.87

²⁰ <http://ase.tufts.edu/gdae/Pubs/rp/TPPAEconomistsLetter.pdf>

²¹ Jane Kelsey, 'The case for a human rights impact assessment of the proposed Trans-Pacific Partnership Free Trade and Investment Agreement', 5 May 2011

²² Above, note 8

²³ NZ Human Rights Commission to Professor Jane Kelsey, 10 August 2011

²⁴ For further information please contact [Edward Miller](#) or [Jane Kelsey](#)