

The TPPA and environmental protection in New Zealand

Our government is negotiating an international agreement that could have a huge effect on the lives of ordinary kiwis. It's called the Trans-Pacific Partnership Agreement (TPPA), and it involves eleven Asian and Pacific-rim countries, including the United States. If it goes ahead, we risk damage to our innovative economy, our pristine environment, our health, and the ability to shape our own future.

Because the negotiations are being conducted in secret, what we know about the TPPA comes from leaked documents and detective work. This is not acceptable. We live in a democracy, which means we have the right to know what is done in our name and to have a say.

One of the many causes for concern around the TPPA is its potential effect on the New Zealand environment.

Investor-State Dispute Settlement

One of the most significant causes for concern around the TPPA is that it would give foreign investors the right to sue the New Zealand government in private offshore tribunals for introducing laws or policies which they claim would significantly hurt their investments. This is called Investor-State Dispute Settlement (ISDS) and – if overseas examples are anything to go by – it would disproportionately affect moves to strengthen environmental protection.

The United States has many existing trade and investment agreements that guarantee similar rights to foreign investors. Over US\$700 million have been paid out by governments to overseas investors in ISDS disputes brought under these agreements, and **70 percent of those cases**¹ have been challenges to natural resource and environmental policies. The process is conducted in private and can take years to resolve. **The OECD says**² the legal costs of these disputes alone average at US\$8 million but can easily exceed US\$30 million.

The problems with ISDS are not only that governments risk paying out huge sums to foreign investors for taking steps designed to protect the environment, but that governments will be less willing to adopt new environmental protection policies because of the threat of a law suit. This is called “regulatory chill”, and could make it more difficult to strengthen New Zealand’s environmental regulations beyond their present levels. Foreign investors can threaten a dispute even if their legal arguments are very weak, just to have this chilling effect on government decisions.

The TPPA is often described by its backers as a trade agreement for the 21st century; in fact, it would discourage the New Zealand government from



“A TPPA could give transnational companies the right to sue future governments if they legislated to reduce greenhouse gas emissions or restrict the use of Genetic Engineering technology. It would give away the freedom of our children and grandchildren to determine their own future. Please help us stop it.”

– Jeanette Fitzsimmons, former Green Party Co-leader

Links:

1. <http://www.citizen.org/documents/Leaked-TPP-Investment-Analysis.pdf>
2. <http://www.oecd.org/daf/internationalinvestment/internationalinvestmentagreements/50291642.pdf>



Investor-State Dispute Settlement under the TPPA – continued

taking steps to face the environmental challenges the 21st century holds.

Some examples of environmental protection measures which could be affected by ISDS if New Zealand signs up to the TPPA are:

- Our **Emissions Trading Scheme** (ETS), which is designed to reduce New Zealand's contribution to global climate change, and to meet our obligations under the Kyoto protocol. The government has **proposed legislation**³ that will extend the transition period for full implementation of the ETS **indefinitely**.⁴ If New Zealand were to sign-up to the TPPA with the ETS in such a weakened form, any future changes to the scheme to seriously address climate change would risk ISDS litigation from overseas companies invested in New Zealand farming or industrial operations.
- **Water quality regulation**. Water quality in New Zealand's rivers is decreasing, in large part **because of an intensification of dairy farming**.⁵ Increased regulation of dairy run-off will be required in future years if New Zealand is to have waterways safe for swimming, and to retain our clean green image. A recent **landmark decision**⁶ of the Environment Court shows this process is already underway. Under the TPPA, any tightening of water quality regulation will open the door to ISDS law suits from investors linked to the other ten countries.
- **Agricultural water use**. Commercial, industrial, and domestic water-users in New Zealand increasingly have to pay for water they use, but farmers are able to use water sources flowing through their land for free. This arrangement has significant implications for downstream water users, and has been criticised by the OECD. If New Zealand were to adopt the **OECD recommendation**⁷ of pricing agricultural water usage, that decision could be challenged by investors from the TPPA countries.
- **Dirty energy regulation**. If New Zealand were to introduce measures in addition to the ETS to shift us away from fossil fuels, such as altering electricity regulation, it could face significant challenges under ISDS. These risks are highlighted by an ISDS case for Euro 1.4 billion brought by Swiss power company Vattenfall against Germany. In that case, a coal electricity plant owned by Vattenfall was made to comply with environmental regulations around climate change and water quality. The parties settled out of court on unknown terms.
- **Regulation of deep-sea drilling** in New Zealand's Exclusive Economic Zone (EEZ). The government has recently introduced a **new management system for New Zealand's EEZ**⁸ which, in the words of the Sustainability Council of New Zealand, has "**the spine of a jellyfish**"⁹, and **according to Greenpeace**,¹⁰ is "declaring an open season for deep water drilling along our coastlines". If the TPPA is in place, changing this law (as Labour is **suggesting it will**)¹¹ would risk major claims from the overseas corporations lining up to drill in our waters. New laws limiting fracking could face similar challenges. ▶▶▶



The TPPA is billed as an agreement for the 21st century. But it will do nothing to address the challenges of financial instability, climate change, energy scarcity, job insecurity, structural poverty and inequality. Instead, it will lock future governments into a failed regime where markets rule for the next 100 years.

– Professor Jane Kelsey, Faculty of Law, University of Auckland.

Links:

3. <http://www.legislation.govt.nz/bill/government/2012/0052/latest/versions.aspx>
4. http://www.sustainabilitynz.org/docs/ETS_Changes_to_Cost_At_Least_1.3_Billion.pdf
5. <http://www.niwa.co.nz/publications/wa/water-atmosphere-1-july-2010/how-clean-are-our-rivers>
6. <http://www.stuff.co.nz/dominion-post/news/7621145/Ruling-puts-rivers-ahead-of-farmers>
7. <http://www.oecd.org/newsroom/waterpricesforagriculture.htm>
8. http://www.parliament.nz/en-NZ/PB/Legislation/Bills/2/4/7/00DBHOH_BILL11023_1-Exclusive-Economic-Zone-and-Continental-Shelf.htm
9. http://www.sustainabilitynz.org/news_item.asp?SID=241
10. <http://www.scoop.co.nz/stories/PO1208/S00453/eez-law-favours-big-polluters-over-nz-public.htm>
11. <http://www.labour.org.nz/news/economic-zone-bill-must-go-back-to-committee>

Investor-State Dispute Settlement under the TPPA – continued

- **Hazardous substances regulations:** If New Zealand brought in new rules to restrict the use of hazardous substances, overseas investors from TPPA countries could seek compensation under ISDS. This happened in Canada when the giant US chemical company DowAgroSciences **sued Quebec**¹² for banning the use of a pesticide, using an agreement called NAFTA that introduced ISDS into free trade treaties. Although the Quebec government was ultimately successful, by bringing the case DowAgroSciences was able to continue to sell its product in Canada for three years while the case was resolved.

The examples above are not an exclusive list of environmental risks under the TPPA – any regulation which significantly reduced the value of overseas investments in New Zealand would be at risk of triggering ISDS claims, no matter how toxic their activity. The defenders of ISDS claim that exceptions protect environmental regulation, but those clauses are limited and unpredictable and the number of cases show they don't deter investors from bringing disputes.

Other threats to the environment under the TPPA

ISDS is not the only threat to the environment under the TPPA – it also risks abandonment of the **compulsory labelling of genetically modified food**¹³ and **undermining existing international environmental agreements**.¹⁴

“Does the TPPA sound like something New Zealand should be a part of?”



Links:

12. <http://www.sierraclub.ca/en/trade-and-environment/nafta-dispute-settlement-over-quebec-pesticide-ban-has-both-sides-claiming-vic>
13. http://www.itsourfuture.org.nz/th_gallery/geneticmodification/
14. <http://www.itsourfuture.org.nz/tppas-effects-on/>
15. www.itsourfuture.org.nz/take-action/
16. www.avaaz.org/en/stop_the_corporate_death_star/
17. www.itsourfuture.org.nz/news/