

EQUAL JUSTICE PROJECT

The Equal Justice Project (EJP) is a pro-bono student-run charity run by students from the University of Auckland’s Faculty of Law.

Members of the EJP Communications Team (Akhil Parashar, Ben Bowley-Drinnan, Olivia Fisher, Patricia Lu, James Adams, Valeeria Slaiman, Emily Davidson, Haya Khan) have considered the proposed Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

Edited by the Communications Team Co-Managers and the Head Editor (Hannah Yang).

TABLE OF CONTENTS

1. Trade in Goods.....	1
2. Government Procurement & State owned enterprises.....	3
3. Intellectual Property, Business Services and Commerce	5
4. Trade Remedies, Investor and State Dispute Settlements (Emily)	6
5. Public Health Concerns	9
6. Environmental Outcomes	11
7. Process Concerns and Suspensions.....	13
8. Labour and Indigenous Issues.....	16

1. TRADE IN GOODS

- 1.1 The Comprehensive and Progressive Agreement for Trans-Pacific Partnership is one of the biggest multinational trade deals ever established, and New Zealand's involvement in it is symbolic of our position at the forefront of the global stage.
- 1.2 The CPTTP is a very good document with great benefits to New Zealand's economy. It is not perfect, but negotiated outcomes almost never are. The involvement of the United States of America would have been hugely beneficial for all parties involved. However, looking at recent news, the USA may yet join the CPTPP.¹
- 1.3 **Advantages**
 - 1.3.1 The prima facie advantages we can expect are New Zealand consumers have greater access to overseas markets and products. Tariffs will be eliminated on all New Zealand’s exports to CPTPP economies, with the exception of beef into Japan; and a number of dairy products into Japan, Canada, and Mexico, where access will still be improved through partial tariff reductions and duty-

¹ Erica Werner, Damian Paletta and Seung Min Kim "Trump weight rejoining Trans-Pacific Partnership amid trade dispute with China" (12 April 2018) The Washington Post <https://www.washingtonpost.com/business/economy/trump-weighs-rejoining-trans-pacific-partnership/2018/04/12/37d59500-3e71-11e8-8d53-eba0ed2371cc_story.html?utm_term=.23ea5486fc62>

free quotas. This has the potential to deliver an estimated \$222 million of tariff savings annually, with \$92 million of those savings starting as soon as the CPTPP enters into force. By way of comparison, the annual tariff savings from New Zealand's free trade agreement with China were initially estimated at \$115 million a year, although since then trade growth has seen New Zealand's annual exports to China quadruple.

- 1.3.2 A reduction in tariffs should ideally reduce the cost of goods being introduced, but it is likely that many producers would want to increase profit margins. Regardless, the goods imported would be cheaper than many locally produced goods. Those who fall under a lower socio-economic income bracket would benefit as average overall spending may reduce. The increased competition from overseas products is likely to help our innovative industries to flourish and attract much needed investment from overseas. Our niche products that are currently too expensive for the domestic population will attract overseas consumers. Increase in revenue will help in achieving economies of scale, ideally resulting in cheaper goods in both the domestic and overseas markets.²

1.4 **Disadvantages**

- 1.4.1 The disadvantages to be considered are the possible failure of non-innovative New Zealand businesses. New Zealand needs to negotiate better to maintain some sort of solid grounding (but not exclusivity) in certain markets so the increased revenue stream for certain businesses is used towards better investments and innovations.
- 1.4.2 Additionally, an unintended consequence is that the agreement will not do New Zealand's appalling savings rates any good.³ The general culture of spending will resume, and there is potential for our overall spending to outgrow our revenue (only in the CPTPP context).
- 1.4.3 New Zealand's geographically isolated location means we have little leverage when it comes to negotiating. There is not much we outdo other countries in, and the sales of our niche products depends heavily on how they are marketed and the "goodwill" associated with them. While New Zealand is known for exporting red meat, we need to engage in research and development to consider the possibility of lab grown/plant-based meats, which could compete with our exports in future, unless we decide to establish our own industry. New Zealand's relatively fertile soil means we can have an advantage over other countries. Growing plants would also offset the downsides (environmental, arguably ethical) of animal agriculture, along with the financial gain since per hectare, our return for horticulture is \$33,058, whereas it is only \$11,045 for dairy.⁴ A cultural paradigm shift is necessary in order to understand the benefits of plant-based and lab grown meats over current practices. This may also result in animal-grown meat becoming more valued and exclusive, pushing the prices up, as a side effect beneficial for our exporters.

² "Comprehensive and Progressive Agreement for Trans-Pacific Partnership" (March 2018) The Ministry of Foreign Affairs and Trade <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/cptpp-overview/>.

³ Susan Edmonds "For third year in a row, New Zealanders spending more than they earn" (24 November 2017) Stuff <<https://www.stuff.co.nz/business/99234573/stats-nz-data-shows-new-zealanders-spending-more-than-they-earn>>.

⁴ "QuickStats about dairying – New Zealand" (December 2014) DairyNZ <<https://www.dairynz.co.nz/media/1357994/quickstats-new-zealand.pdf>> and A G Aitken and E W Hewe "Fresh Facts New Zealand Horticulture 2014" (2014) The New Zealand Institute for Plant & Food Research Ltd <<http://www.freshfacts.co.nz/files/fresh-facts-2014.pdf>>.

2 GOVERNMENT PROCUREMENT & STATE-OWNED ENTERPRISES

2.1 Opening Remarks

- 2.1.1 The goals that governments aim for, the tools they ought to use, and the size that they ought to be: these questions have long been debated. To this day, some people contend that governments should take a residual role, guaranteeing merely those services that the market cannot provide and legislating only when necessary to prevent or fix market failures. Others take a broader view of the proper role of government, and therefore advocate for the government to use the resources at its disposal to directly improve wellbeing by providing a broad range of services and to regulate more extensively.
- 2.1.2 Many Free Trade Agreements (FTAs) have sought to constrain the options that signatory governments have to pursue policy objectives. This is a principled but arguably undemocratic argument: proponents of such agreements essentially contend that some values that FTA's enshrine (such as the right to personal property) are more important than the other values that a government might choose to prioritise, and that the negotiators are in a better position to make this value judgement than the parties' present and future leaders. Such is the reality of contemporary FTAs.
- 2.1.3 The CPTPP departs from this reality in a number of ways. Government action is constrained less by this deal than many members of the public fear, and substantially less than in the original TPPA. In terms of government procurement and state-owned enterprises (SOEs), the restrictions appear to be entirely reasonable. However, there remains a moral question: should the priorities of New Zealanders in the future be constrained by what New Zealanders in power today believe is reasonable?

2.2 Procurement

- 2.2.1 Notwithstanding disagreement about what size governments ought to be, it is clear that governments presently are significant actors in national and international markets. A large proportion of government spending pays the wages of people employed by the government, but the remainder (the OECD estimates 14-20% of developed nations' GDP) goes to individuals, businesses and other entities that provide goods or services. This is what is meant by 'government procurement.
- 2.2.2 How procurement is carried out has a significant impact on local economies and on foreign actors. Some would argue that government must purchase goods and services from the entity that can do so for the least cost to the taxpayer, and that any deviation from this would be irrational and inefficient. Others would speak of the 'co-benefits' that can be obtained by considering other objectives when making procurement decisions.
- 2.2.3 The procurement rules in the CP-TPP include obligations on decision-makers to ensure fair process and transparency, and especially to not discriminate between local and foreign providers on the basis of ownership. New Zealand's negotiators had to balance the potential costs & benefits of New Zealand government entities following non-compliant procurement processes with the costs & benefits to New Zealanders who provide goods and services to overseas governments.
- 2.2.4 Agencies would generally retain the option of offering a series of smaller contracts (rather than one larger one) in order to not have to comply with the rules or to benefit local providers. This is possible because the CP-TPP rules on procurement do not apply to equally to all government entities, as the following table shows.

	<i>Threshold above which procurement contracts are subject to procurement rules in CP-TPP: Goods and Services</i>	<i>Threshold above which procurement contracts are subject to procurement rules in CP-TPP: Construction</i>
Central Government Agencies	\$260,000	\$10,000,000
Crown Agencies	\$800,000	\$10,000,000
State Owned Enterprises, Local Government	Not covered by the procurement chapter	Not covered by the procurement chapter

2.2.5 Article 15.2 also notes a number of goods and services that might constitute procurement in a broad sense of the word but are not covered by this chapter, and there is a clear statement at Article 15.3 that procuring agencies are not constrained from adopting or maintaining measures contrary to these rules if those measures are *necessary* for protecting such values and human or environmental health. It is not clear how the criterion of necessity should be assessed.

2.2.6 In sum: even if the benefits of these procurement rules to New Zealanders overseas are largely unknown, these benefits are highly likely to outweigh the very small costs to New Zealand. Our government is unlikely to see any value in discriminating against foreign-owned providers on the grounds prohibited, and the exceptions likely cover any procuring processes that future New Zealanders believe should not comply with this chapter.

2.3 State Owned Enterprises

2.3.1 The rules around state enterprises and state-owned enterprises are somewhat more restricting. Again, there are a number of exceptions (for instance, sovereign wealth funds are not covered by the rules) and qualifications. This is followed by rules that prohibit states providing non-commercial support to their own enterprises in areas such as competition law.

2.3.2 For the same reasons as with the procurement chapter, it is unlikely that New Zealanders would choose to breach these rules, provided that state-owned enterprises and similar entities in New Zealand continue to operate in broadly the ways that they presently do. However, the same cannot be said for other countries, and if they agree to the CP-TPP, there are opportunities for New Zealanders in foreign markets presently monopolised by state-owned enterprises. It would therefore be reasonable to assume that New Zealand will benefit on net from the rules contained in this chapter.

3. INTELLECTUAL PROPERTY, BUSINESS SERVICES AND COMMERCE

3.1 Grace Periods Patent Filing⁵

- 3.1.1 Grace periods allow for more fearless creativity and exposure of the results to the public by inventors and academics. Allowing a maximum of 12 months before they are ineligible to patent their invention is not a major change from what the TPPA originally suggested. However, it may have a huge impact for those that seek to patent their creations in New Zealand, who have historically been allowed grace periods in a limited number of circumstances.
- 3.1.2 Advantages would be significant for inventors and academics, allowing them to share greater quantities of their work in the market without fear of it being 'stolen'. Current law requires no visibility to the public for pure 'novelty' of an item to have a patent approved.
- 3.1.3 There are no apparent disadvantages of this law being implanted. However, disadvantages of the current system with no grace periods are apparent. Authors/inventors/artists must invest money to patent a creation that may not generate any money back.
- 3.1.4 Grace periods will allow the inventor/author/artist to get an idea of the product's market value before applying for a patent. This should allow the New Zealand economy to have more inventions enter the market. Under current patent laws, the requirement to invest in a patent first acts as a deterrent for inventors, particularly those who are small business owners.

3.2 Musician and Performer's Rights

- 3.2.1 The CPTPP allows for performers to have rights over their own musical content, allowing them to be co-owners. Currently in New Zealand only the producer has rights to the copying and distribution of a sound recording. This would give performers greater rights in regards to the copying and communication of their material to the public. This doesn't disadvantage the present democratic system or economy in any major way.
- 3.2.2 Allowing performers to own their work sets a fear of higher charges for music. However, this is unlikely to result in a significant difference from current prices. Small price increases alone is not a compelling reason to exit CPTPP negotiations.
- 3.2.3 If performers do charge more for their music, there is still a benefit for the New Zealand economy as a considerably small music industry will increase their revenue. The ability to have a higher level of decision-making in the marketing and sales of their content may incentivise more New Zealand citizens to produce original audio content.
- 3.2.4 **Recommendations:**
 - 3.2.4.1 *Proposing a limit on the amount that performers can raise prices of their content by.*

3.3 E-commerce

- 3.3.1 Signing the CPTPP agreement would enforce the removal of tax on e-commerce between the parties to the free trade agreement. As the USA is not part of this agreement, theoretically it does not prove a huge set back to the economy.

⁵ David Parker *National Interest Analysis* (Ministry of Foreign Affairs and Trade, 21 February 2018). *All information sourced from the Ministry of Foreign Affairs' National Interest Analysis of the CPTPP*

- 3.3.2 Allowing tax-free online shopping for New Zealander residents and for overseas purchasers to buy from New Zealand brands. This has the potential of increasing the revenue for the New Zealand economy through overseas purchasers.
- 3.3.3 If it is made apparent that New Zealand does not charge customs tax with parties to the agreement, it would become reason for attracting customers that may end up paying less when purchasing from us. Of particular importance are the four countries with which New Zealand does not have a Free Trade Agreement: Japan, Canada, Peru and Mexico. Export destinations would open up to small and large New Zealand businesses, enabling them to trade with fewer restrictions.
- 3.3.4 The evident disadvantage would be the revenue lost through customs tax, this however may prove to not be as detrimental as originally thought. The United States, which is a major supplier of online purchases for New Zealand, will still have tax imposed. Customs tax will continue to apply to goods sourced in non-signatory countries.
- 3.3.4.1 **Recommendations:**
- 3.3.4.1.1 *Propose a lower tax rate on e-commerce in the event United States re-joins the treaty.*

3.4 **Domestic Intellectual Property and Commerce policies**

- 3.4.1 The problematic provisions of TPP have been suspended upon United States leaving the treaty. This significantly decreases the weight and number of drastic changes to domestic law that the public had expressed opposition to.
- 3.4.2 However, these provisions have been suspended, not removed. If the United States re-enters the treaty and suggests their reinstatement after New Zealand has already entered the CPTPP, public dissent may be fierce. The Intellectual Property and Commerce provisions of the original TPPA were highly unpopular amongst citizens. The potential for these provisions to be re-instated may be too concerning for some.
- 3.4.3 Presently, the change to IP and Commerce policies is not detrimental to democracy or the economy, they are simply positive 'tweaks' that do not harm the wider public but benefit those that are directly involved.
- 3.4.4 **Recommendations:**
- 3.4.4.1 *Make the 'worst case scenario' of those provisions being reinstated more evident to the public, and discuss potential democratic solutions to deal with this possibility.*

4. TRADE REMEDIES, INVESTOR AND STATE DISPUTE SETTLEMENTS

4.1 **Are there adequate safeguards protecting the Government's right to regulate domestically in a democratic manner?**

- 4.1.1 Investor-State Dispute Settlement (ISDS) enables foreign investors to claim that new laws introduced by the New Zealand Government have breached their special rights by undermining the value of their investment. An investor from any CPTPP country will be able to sue the New Zealand government for damages that can amount to millions. 'Investment' is defined extremely widely to include almost anything a foreign company has spent money on in New Zealand- including shares, businesses, contracts, land and intellectual property rights.⁶

⁶ Comprehensive and Progressive Agreement for Trans-Pacific Partnership (8 March 2018, not yet in force), art 9.1.

- 4.1.2 This raises a serious issue as to whether the ISDS provisions impinge on New Zealand's democracy. Our government is elected to implement policies and pass laws in the interests of the country. The threat of litigation from well-resourced multinational corporations should not be a factor in such decisions. It will impede the ability of the government to focus on acting in the best interests of New Zealand and its people.
- 4.1.3 Furthermore, the cost of defending against such a claim can amount to millions of taxpayer dollars. The average cost of defending an ISDS case is US\$8 million, but can easily exceed US\$30 million (Australia spent A\$50 million defending itself against Phillip Morris).⁷ The financial consequences would be far greater in the event that the government lost. The mere threat of protracted and expensive disputes may prevent the government from acting in the best interests of the nation. If ISDS provisions are included, our Government may be forced to pay taxpayer dollars directly to private foreign corporations, and essentially take financial responsibility for their business risk. New Zealand's comparative size and wealth means we cannot afford the risks of ISDS.
- 4.1.4 Trade Minister David Parker has attempted to assuage these fears by insisting that there is very little risk of being sued.⁸ The New Zealand Government has never been sued under any of our other agreements.⁹ New Zealand has side letters with Australia, Brunei, Malaysia, Peru and Vietnam, which exclude ISDS to various degrees.¹⁰ Canada and Chile have joined NZ in a declaration that they will use ISDS responsibly.¹¹ These are positive but inadequate measures. The magnitude of the risk is such that relying on mere goodwill and vague assurances is insufficient.
- 4.1.5 Democratic governments should be responsible to their people. ISDS will make our domestic government financially responsible to overseas corporates' private business agendas. This is anathema to the protection of cultural rights, consumer rights, egalitarianism and environmental welfare. Wealthy businesses are already empowered socially and politically in many ways. If ISDS provisions are included, interest groups for any non-trade matter (such as human rights or the environment) will be comparatively weakened. The government is responsible for creating a stable environment for businesses to operate in. But it should not be any more accountable to those businesses than to the rest of its people. Companies act in self-interest. Governments must not. If the government has a democratic reason to act, it should be able to do so without incurring financial penalties. ISDS privilege the financial rights of wealthy multinational corporations above the democratic rights of New Zealand's citizens, and amount to selling our sovereignty.

4.2 Does ISDS provide NZ businesses with significant advantages, or are these outweighed by the advantages given to competing overseas companies?

- 4.2.1 The CPTPP offers investors increased certainty, stability and transparency, and new opportunities in Canada, Japan, Mexico and Peru. There will also be enhanced market access commitments in Brunei, Chile, Malaysia, Singapore and Vietnam. New Zealand companies will have protection from unjust or arbitrary governmental actions, such as expropriation of assets without compensation.¹²

⁷ "Investor-State Dispute Settlement (ISDS)" (27 June 2015) It's Our Future <<https://itsourfuture.org.nz>>.

⁸ Dan Satherley "CPTPP Side Letters Won't Stop Companies Suing NZ" *Newshub* (online ed, 10 March 2018).

⁹ "CPTPP: The Five Countries that Won't Sue NZ According to the Government" *Newshub* (online ed, 9 March 2018).

¹⁰ Above n 9.

¹¹ Above n 9.

¹² "Investment and ISDS" New Zealand Foreign Affairs and Trade <www.mfat.govt.nz/en/trade/free-trade-agreements/>.

- 4.2.2 However, local companies cannot bring an ISDS claim against the New Zealand Government.¹³ New Zealand investors only have the right to take ISDS cases against other CPTPP countries. This discriminates between the level of trade protection afforded to local business and overseas corporates. If a local company disagrees with governmental policy, they can take the matter to the New Zealand courts. However, a foreign investor would have the option of using the New Zealand court system or using ISDS to take the case to an international tribunal claiming a breach of their special rights under the agreement. They could even do both. For example, Philip Morris lost in Australia's highest court, but continued to sue Australia using ISDS under an investment agreement with Hong Kong.¹⁴ ISDS therefore encourages governments to legislate in a manner that discriminates between local and foreign businesses. Furthermore, the international tribunal is usurping the authority of the domestic courts, by effectively creating a further right of appeal which breaches fundamental principles of justice. The authority and certainty of the domestic court system is a crucial component of a functioning democracy.
- 4.2.3 Only large and wealthy multinational corporations are likely to benefit from ISDS. The resources required to bring such a claim excludes less affluent businesses from participating. Therefore, ISDS serve only to further empower the already powerful, and do nothing to correct social or economic imbalances.
- 4.2.4 It is notable that the New Zealand government did not want ISDS included.¹⁵ They are a concession to other nations that considered them a commercial priority. New Zealand is not in a strong position to object to their inclusion, but will be in an even weaker position to defend against litigious corporates once the CPTPP is ratified.

4.3 Does the dispute resolution methodology meet the basic requirements of justice?

- 4.3.1 ISDS tribunals frequently put the financial interests of foreign investors ahead of the right of governments to govern their own affairs. Decisions are based on the wording of treaties rather than domestic laws.¹⁶ Therefore, the tribunals are not bound to balance their judgment with considerations of the general public good, in the way that a domestic court would.
- 4.3.2 Furthermore, the ISDS tribunals lack the basic necessities of fair due process. Orders can undermine the separation of powers by requiring the executive to override rulings of the judiciary. There is no power to appeal from the international tribunal's decision.¹⁷ If damages are awarded, that number is final. ISDS hearings are often private and secretive, which is inconsistent with principles of justice such as transparency and consistency.¹⁸ These principles are highly valued by our domestic legal system.

¹³ "Common Questions" New Zealand Foreign Affairs and Trade <www.mfat.govt.nz/en/trade/free-trade-agreements/>.

¹⁴ "Investor-State Dispute Settlement (ISDS)", above n 7.

¹⁵ "Common Questions", above n 13.

¹⁶ Michael Robinson "Is Democracy Threatened if Companies Can Sue Countries?" *BBC News* (online ed, 31 March 2015).

¹⁷ Above n 16.

¹⁸ "Investor-State Dispute Settlement (ISDS)", above n 7.

5. PUBLIC HEALTH CONCERNS

- 5.1 The New Zealand government's commitment to the CPTPP, an economic treaty, without an expert independent assessment of the agreement's public and environmental health implications would be a failure of the government's role and stated objective to "regulate and decide what is best for New Zealanders."¹⁹ For the purpose of international law, a treaty is an agreement between one or more states where the parties exercise their intention to create binding rules and obligations. New Zealand officials involved in the treaty-making process have an obligation to ensure that New Zealand's wider social interests, including public and environmental health interests which advance human rights, are taken into account and are the subject of adequate consultation before concluding the treaty-making process by negotiating, drafting or committing New Zealand to the terms of the CPTPP.
- 5.2 The Association of Salaries Medical Specialists (ASMS) has described the failure of the New Zealand government to produce an independent assessment as grossly negligent.²⁰ Trade Agreement Theory indicates the purpose of negotiation as to enter into an agreement between states to participate in an activity that will result in mutual benefits. Consequently, it is counter intuitive for New Zealand officials to negotiate and commit to the terms of the CPTPP without an independent and accessible expert assessment of the public health risks to ensure the economic benefits are sustainable and legitimate. The New Zealand Climate and Health Council [NZCHC] supports this position when they emphasize: "the CPTPP must have a thorough and independent assessment by credible, independent public health and legal experts before our Government commits us to this agreement" and "New Zealanders deserve to know how the CPTPP would affect our ability to protect health and address climate change in the coming decades."²¹
- 5.3 The New Zealand Medical Association (NZMA) confirms the CPTPP would have an undeniable influence on the future public health of the New Zealand.²² The NZMA describes the CPTPP's potential to conflict with policies that advance health and human rights, obstruct the government's ability to regulate or ban direct-to-consumer products (i.e. medicine and food insecurity) and associate the agreement with considerable risks to health equity and social justice.²³ Furthermore, the NZMA identifies the overall adverse health impacts from the CPTPP will be disproportionately borne by the vulnerable and already suffering from disadvantage in New Zealand: low-income, children, elderly, Maori and Pacific populations.²⁴ The NZMA examines the New Zealand government's failure to produce an independent analysis that investigates 'who benefits and who suffers' in regard to the CPTPP as prioritizing the interests of transnational corporations and foreign investors ahead of concerns about human and environmental health.²⁵

¹⁹ "Comprehensive and Progressive Agreement for Trans-Pacific Partnership" (15 April 2018) Ministry of Foreign Affairs and Trade <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/cptpp-overview/>.

²⁰ Association of Salaried Medical Specialists "NZ Government commitment to CPTPP without independent assessment of health and climate change impacts would be grossly negligent" (media release, 26 January 2018).

²¹ New Zealand Climate Change Health Council "Health and Climate Change Impact must be assessed" (press release, 26 January 2018).

²² Oliver Hailes, Rhys Jones, David Menckes, Joshua Freeman and Erik Monasterio "Climate change, human health and the CPTPP" (2018) 131 NZMJ 1471 7 at 12.

²³ At 12.

²⁴ Above n 20, at 7.

²⁵ "Health and Climate Change Impact must be assessed", above n 21, at 7.

- 5.4 The New Zealand government has publicized a desire for trade policy (including, specifically, the CPTPP) to support environmental issues and protect New Zealanders' health.²⁶ Despite this, the NZMA has questioned the integrity of these objectives when they contend that the CPTPP "pays lip service to broader social and environmental concerns."²⁷ This claim is strengthened by a complete absence of the term "climate change" from the CPTPP, which comprises of 6,000 pages and dedicates an entire chapter to the environment.²⁸ The absence of the term "climate change" in the agreement is problematic because scientific literature and consensus identifies climate change as the most serious threat to the global public in the present century.²⁹ The direct impacts of climate change on health include death, illness and injury due to heat waves and extreme weather.³⁰ Meanwhile, powerful indirect impacts on health are mediated by a complex interaction of social, environmental and economic factors which include air pollution, shifting patterns of infectious disease, fresh water contamination, economic collapse, forced migration, conflict over scarce resources and the increasing concern of food insecurity and biosecurity hazards.³¹ The Royal Society of New Zealand reports that climate change is already having a direct effect on public health in New Zealand and that these effects will continue and increase in severity in the coming decades if left unchecked.³²
- 5.5 Free trade agreements (FTAs) could threaten public health by hampering the government's ability to regulate or ban direct-to-consumer products, such as food and medicine.³³ A study by the University of Oxford on the North America Free Trade Agreement (NAFTA) provides evidence that a seemingly modest change to product tariffs in FTAs can result in a substantial and population-wide exposure to risk.³⁴ The study on the effects of the NAFTA confirmed that lowering product tariffs on food containing High Fructose Corn Syrup (HFCS) foods and syrups were associated with 41.6% increase in its usage in foods consumed per day.³⁵ HFCS is an especially harmful type of sugar, which has been linked to dyslipidemia, cardiovascular disease and metabolic syndrome.³⁶ This rise in HFCS consumption corresponded with a large rises in obesity rates from 5.6% to 14.6% and rises in prevalence of diabetes from 3.3% to 5.6%.³⁷

²⁶ Paul McBeth "Government calls for public to get involved in trade plan" *The New Zealand Herald* (online ed, New Zealand) 13 April 2018 at 1.

²⁷ Above n 21, at 7.

²⁸ David Menks and Rhys Jones "Trade agreement may affect people's health" *Newsroom* (online ed, 3 April 2018) at 1.

²⁹ "Climate change, human health and the CPTPP", above n 4, at 7.

³⁰ At 7.

³¹ At 7.

³² "Health and Climate Change Impact must be assessed", above n 21.

³³ "Climate change, human health and the CPTPP", above n 21, at 7.

³⁴ Barlow, Pepita, Martin McKee, Sanjay Basu and David Stuckler. "Impact of the North American Free Trade Agreement on high-fructose corn syrup supply in Canada: a natural experiment using synthetic control methods" (2017) 189 26 *CMAJ* [881 at 887].

³⁵ At 2.

³⁶ At 3.

³⁷ At 9.

6. ENVIRONMENTAL OUTCOMES

- 6.1 While the proposed Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is revolutionary in bringing legally enforceable environmental policy concerns into a free trade agreement, more concrete environmental securities should be provided in the Environment chapter to address continued concerns and criticisms before it is implemented.
- 6.2 Environmental provisions in trade agreements are relatively recent³⁸ and were often limited to building capacity and capability rather than enhancing policy.³⁹ The CPTPP sets itself apart in its acknowledgement and commitment to improving and upholding environmental standards amongst the multiple member states. The labour and environmental outcomes in the CPTPP are the "most comprehensive New Zealand will have achieved in a free trade agreement, with labour and environment standards made legally enforceable for the first time".⁴⁰
- 6.3 General commitments for all member states are in place, aimed at enforcing environmental laws and ensuring that trade policies will not detract from them in a way that would weaken their protections.⁴¹ In other words, it keeps consistent with existing commitments. The existence of the more specific obligations regarding the protection of endangered species, and regulation of fish subsidies, among others, show comprehensive efforts to address specific trade-related environmental concerns.
- 6.4 The Environment chapter itself does not negatively affect New Zealand interests outright. The National Interest Analysis (NIA) from March 2018 states that the CTPP will not inhibit the New Zealand government's ability to regulate environmental protection.⁴² It acknowledges that trade liberalisation could lead to biosecurity risks, increased pollution levels and other impacts. But the NIA assures that there are a variety of ways these risks could be mitigated, such as having local regulation policies and improvements in technology that would ultimately lead to more efficient resource use.⁴³ They do not expect the CPTPP to create negative environmental effects that cannot be managed with what is already available.⁴⁴
- 6.5 It is clear that the aim is to establish a free trade agreement that works with the environment rather than at the cost of it. This is a positive direction to take and will no doubt be influential in future free trade agreements. It is especially important, given the impact of environmental protection and the historical trend of trade agreements functioning in opposition to, rather than alongside, environmental regulations.⁴⁵
- 6.6 However, environmental concerns stemming from the original Trans-Pacific Partnership Agreement (TPP) are not changed nor addressed by the CPTPP. It is understandable that trade agreements would primarily focus on trade but given the commitment to sustainability and protection the CPTPP affords to the environment, and the pervasive impact of the environment across all sectors and societies, more concrete

³⁸ Errol Meidinger "Mega-Regional Trade Agreements and Global Environmental Governance: The Case of the Trans-Pacific Partnership Agreement" (Legal Studies Research Paper, University at Buffalo School of Law, 2016) at 4.

³⁹ Ministry of Foreign Affairs and Trade "Comprehensive and Progressive Agreement for Trans-Pacific Partnership National Interest Analysis March 2018" at [4.21.1].

⁴⁰ Ministry of Foreign Affairs and Trade "Comprehensive and Progressive Agreement for Trans-Pacific Partnership Overview" <Ministry of Foreign Affairs and Trade <www.mfat.govt.nz> at 5.

⁴¹ Comprehensive and Progressive Agreement for Trans-Pacific Partnership at [5.20].

⁴² At [7.5.1].

⁴³ At [7.5.2].

⁴⁴ At [7.5.4].

⁴⁵ Meidinger, above n 38, at 4.

Submission on the CPTPP by the Equal Justice Project

environmental securities are expected. More so because of the likely impact of the CPTPP in future trade agreements and in the number of involved nations.

6.7 The New Zealand Medical Association (NZMA) has criticised the CPTPP for offering “soft acknowledgements” only, which contrasts greatly with the strong enforceable rules that protect foreign investment profits.⁴⁶ Though there are specific provisions, such as those related to fisheries and wildlife, the environmental protections alone are very general. There is nothing concrete on requirements, binding action or what will actually be done in response to negative effects.

6.8 The investor-state dispute settlement (ISDS) scheme continues to be a contentious and major concern. This is because it gives room for foreign investors and corporations to sue the government over national law changes that may affect their operations or profitability.⁴⁷ It has the potential to undermine the environmental commitments the CPTPP itself upholds its members to.⁴⁸ There is a lack of information disclosed on the number of countries who have agreed to exclude ISDS claims against New Zealand.⁴⁹ Clauses of this nature have already been successful in beating environmental laws in the past – for example, Indonesia backed down on banning open-pit mining in protected forests because of lawsuit threats from mining companies.⁵⁰ It gives strong investor entitlements which could come at the cost of the public interest and environmental regulation. A particular impact it could have is limiting how the government can pursue more aggressive action to tackle climate change. One example is the Labour government’s plan of a Zero Carbon Bill, with a goal of net-zero carbon emissions by 2050.⁵¹

6.9 Research into the environmental effects of free trade agreements has indicated that agreements between both developing and developed countries have led to an increase of world greenhouse gas emissions.⁵² Additionally, the NIA’s assurance that the technological advancements due to the trade liberalisation would eventually lead to more efficient resource use is not guaranteed nor is it backed up with concrete examples of how this could take place. This argument harks back to the idea of the environmental Kuznets curve⁵³, which suggests that economic development may initially cause environmental degradation, but once a certain level of economic growth is achieved, then this damage would be reduced.⁵⁴ But this is no guarantee and the idea has been highly critiqued. Studies have shown that there is little evidence to support this pattern in reality.⁵⁵

6.10 It is not difficult to expect more enforceable and specific environmental protections, given the impact this trade agreement will have on the environment and especially compared to the stronger language found in other sections of the CPTPP.

⁴⁶ Olivia Hailes and others “Climate change, human health and the CPTPP” (2018) 131 NZMA 7 at 8.

⁴⁷ Hailes, above n 46, at 8.

⁴⁸ Meidinger, above n 38, at 17.

⁴⁹ Fuseworks Media “Labour squanders opportunity for real change – Kelsey” (21 February 2018) Voxy <www.voxy.co.nz>.

⁵⁰ Branko Marcetic “Does the revamped TPP get a clean bill of health on the environment?” (7 March 2018) The Spinoff <thespinoff.co.nz>.

⁵¹ Hailes, above n 46, at 10.

⁵² Mehdi Nemati and others “Are Free Trade Agreements Good for the Environment? A Panel Data Analysis” (paper presented for the 2016 Agricultural & Applied Economics Association and Western Agricultural Economics Association Annual Meeting, Boston, Massachusetts, 31 July – 2 August 2016) at 18.

⁵³ Meidinger, above n 38, at 4.

⁵⁴ Tejvan Pettinger “Environmental Kuznets curve” (11 September 2017) Economics Help <www.economicshelp.org>.

⁵⁵ David I. Stern, “The Environmental Kuznets Curve” (2004) 32 WD 1419 at 1435.

6.11 **Recommendations**

- 6.11.1 Provide more disclosure and assessment of potential environmental impacts of the trade agreement and concrete strategies that would mitigate these. These are to be released to the public before implementation should occur.
- 6.11.2 Stronger and more concrete enforcement provisions to give assurance that environmental protection will go alongside trade liberalisation, rather than as a potential after-effect.

7. PROCESS CONCERNS AND SUSPENSIONS

7.1 **Suspensions**

- 7.1.1 The major point of difference between the CPTPP and the original TPP is the suspension of certain terms. The CPTPP text states that 22 terms have been suspended from the original TPP document.⁵⁶ It has also been stated that reintegration of the suspended provisions would require all parties to agree.⁵⁷ On this basis the Government has claimed that the CPTPP is superior to the TPP.
- 7.1.2 There are questions over whether other parties to the agreement would agree to lift the suspensions if other countries desired to enter. Indeed, Japan has stated that they pushed for suspensions, rather than outright deleting the clauses in question, in order to “lure” the United States of America back to the deal in the future.⁵⁸
- 7.1.3 On this basis, there are significant questions about whether parties to the agreement would reactivate the suspended clauses if the United States demanded so in order to join the CPTPP. This issue has been noted by James Shaw.⁵⁹
- 7.1.4 Whilst the suspension of these problem clauses is a significant asset politically in order to differentiate the CPTPP from the TPP, there is still concern regarding the choice to suspend, rather than outright delete the clauses on the basis that this could simply lead to a reinstatement in the case of re-entry by the United States.
- 7.1.5 **Recommendations:**
 - 7.1.5.1 Provide more information regarding the process of reactivation of suspended clauses.
 - 7.1.5.2 Confirm the requirements that would have to be met for New Zealand to support reactivation.
 - 7.1.5.3 Explain what reactivation of suspensions would entail.

7.2 **Secrecy**

- 7.2.1 It has been noted that the previous government made great efforts to ensure that the full text of the predecessor TPP agreement was kept secret, on the basis that disclosure would affect New Zealand’s negotiating position.⁶⁰

⁵⁶ Comprehensive and Progressive Agreement for Trans-Pacific Partnership Preamble (8 March 2018, not yet in force) at 2.

⁵⁷ “CPTPP vs TPP” Ministry of Foreign Affairs and Trade www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/tpp-and-cptpp-the-differences-explained/#what.

⁵⁸ Cory Baird “TPP remains largely unchanged in attempt to lure back U.S., Japanese official says” *The Japan Times* (online ed, Japan, 21 February 2018).

⁵⁹ “Greens remain opposed to TPP” (21 February 2018) Radio New Zealand <https://www.radionz.co.nz/news/political/350955/greens-remain-opposed-to-tpp>.

⁶⁰ *Kelsey v Minister of Trade* [2015] NZHC 2497, [2016] 2 NZLR 218 at 230.

Submission on the CPTPP by the Equal Justice Project

- 7.2.2 Indeed, whilst the current Government has released the full text and side letters, Jane Kelsey has still criticised the secrecy of the negotiations on the basis that they have resulted in a “trust us” mindset.⁶¹
- 7.2.3 Moreover, the Green Party’s trade spokeswoman, Golriz Ghahraman, has criticised the secrecy of the negotiations as “undermining our democracy”.⁶² Indeed, some information remains withheld,⁶³ in line with the principles espoused in the Official Information Act (OIA).⁶⁴
- 7.2.4 The Government’s commitment to transparency is admirable. However, the continued non-disclosure of elements of the negotiating positions coupled with the overall secrecy surrounding the procedure has done little to remove the issues of secrecy that affected the previous TPP. It could be possible to attempt to at least give an indication concerning the subject matter of redacted information, or to at least give better reasoning for the redactions than simple use of the OIA blocks.
- 7.2.5 **Recommendations:**
- 7.2.5.1 Provide a more comprehensive reason for non-disclosure on the basis of Official Information Act requests.
- 7.2.5.2 Indicate the subject matter for the redacted information, ideally specific areas, but if not, more general areas.

7.3 Accessibility

- 7.3.1 The Government has released the full text of the CPTPP, along with side letters and annexes concerning certain sections. Whilst this is a positive step when compared to the previous TPP, there are still concerns about accessibility of the text.
- 7.3.2 The full text of the CPTPP runs to over 580 pages, not including annexes and side letters.⁶⁵ Combined with the National Interest Analysis which runs to 251 pages,⁶⁶ this raises significant concerns that the agreement will be too long and verbose for ordinary New Zealanders to understand, which could result in misinformation spreading regarding the Agreement.
- 7.3.3 In addition, the previously mentioned issue of redactions on the basis of the OIA significantly decreases accessibility, as the full picture of the agreement cannot be seen in its full context. There are also issues about ‘blanket bans’, something that was noted in the previous TPP.⁶⁷
- 7.3.4 This is compounded by the additional law changes that will need to be made as a result of the ratification of the CPTPP. The impact of these changes is quite uncertain, and may result in significant questions.
- 7.3.5 Whilst the government should be commended for their work around ensuring the CPTPP can be understood by the New Zealand population, via the use of “outreach meetings” and other such

⁶¹ “CPTPP is ‘same old deal’, with just added tinsel – TPP critic” (25 January 2018) RadioLIVE < <http://www.radiolive.co.nz/home/audio/2018/01/jane-kelsey-on-the-revised-tpp-agreement-.html>>.

⁶² (28 February 2018) 727 NZPD 2283.

⁶³ Hamish Rutherford “TPPA Official Information Act request ‘may involve 30,000 pages’” Stuff (28 September 2015) < <https://www.stuff.co.nz/business/72454716/tppa-official-information-act-request-may-involve-30000-pages>>.

⁶⁴ Official Information Act 1982, ss 6-9.

⁶⁵ Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, not yet in force).

⁶⁶ “National Interest Analysis” Ministry of Foreign Affairs and Trade < <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/cptpp-national-interest-analysis//>>.

⁶⁷ *Kelsey v Minister of Trade* [2015] NZHC 2497, [2016] 2 NZLR 218.

initiatives,⁶⁸ the publicity of those meetings has been lacking, judging from the lack of knowledge amongst the general public about the existence of those meetings.

7.3.6 Taking steps to make the text more accessible would likely have a positive effect on engagement with the CPTPP, and would also go some way towards amending the issues surrounding secrecy and the place of the suspended provisions.

7.3.7 Recommendations:

7.3.7.1 Ensure that outreach meetings are continued throughout the ratification process

7.3.7.2 Provide education around the meaning of verbose or overly long provisions

7.4 Withdrawal

7.4.1 The mechanism for withdrawal from the CPTPP is simple, as provided for in the text.⁶⁹

7.4.2 However, there are significant concerns regarding the loss of economic benefits. The National Interest Analysis provides that the economies involved in the CPTPP account for 13.5% of world GDP, and new markets such as Japan, Canada, Mexico and Peru will be worth 4.2 billion in goods and 1.3 billion in services.⁷⁰ This is compounded by a rise in GDP of at least 1.2 billion.⁷¹

7.4.3 However, if New Zealand decided to withdraw from the CPTPP, it is likely that we would lose all these potential benefits. Moreover, it has been noted that non-compliance with the CPTPP would result in significant disadvantages for New Zealand exporters and the loss of opportunities to shape future trade in the Asia-Pacific region.⁷²

7.4.4 Given New Zealand's status as an export-based economy, it seems unlikely that a future government would leave the CPTPP and hence expose New Zealand exporters to increased tariff rates, which the National Interest Analysis has estimated will cost an estimated \$222.4 million once the CPTPP is fully implemented.⁷³

7.4.5 There are also political costs to consider regarding the withdrawal, as it is unlikely any political party would risk voter ire by withdrawing from the CPTPP on the basis of the harms it might cause economically. On this basis, whilst the mechanism is theoretically simple, there are significant issues around the political and economic costs.

⁶⁸ (28 February 2018) 727 NZPD 2270.

⁶⁹ Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, not yet in force) at art 30.6.

⁷⁰ "National Interest Analysis" above n 11, at 4.

⁷¹ At 5.

⁷² At 19.

⁷³ At 22.

8. LABOUR AND INDIGENOUS ISSUES

8.1 Labour Rights

- 8.1.1 Article 19.5 requires that each party to the agreement must abide by the following labour laws: freedom of association and recognition of the right to collective bargaining; elimination of compulsory labour; abolition of child labour; and the elimination of discrimination. However, the article meets controversy when discussing what “acceptable conditions of work as determined by that Party” entails.⁷⁴ It allows flexibility for the parties to identify limitations of acceptable conditions. There is also no accountability method to ensure that countries party to the agreement do implement the labour laws and do so effectively. For example, China had ratified the ICESCR only to be consistent with provisions of laws already implemented, therefore blocking provisions that allowed Chinese workers to create trade unions. Australia, also party to the declaration, could not force China to enforce the declaration.⁷⁵ The vague exception leaves room for error.
- 8.1.2 Labour Disputes: Article 19.15 establishes specific consultation procedures to be used before dispute settlement provisions are engaged. The provision allows individual workers, unions and other actors to raise cases concerning labour. However, these procedures are time consuming and expensive, as individuals will be required to demonstrate an impact on trade and investment between the parties.⁷⁶

8.2 Indigenous Issues:

- 8.2.1 Free Trade Agreements (FTA) tend to intrude in the culture and environment of indigenous communities. When producing the TPPA, the parties had neglected input from indigenous peoples affected by the agreement. This was in contravention to the United Nations Declarations for the Rights of Indigenous Peoples (UNDRIP), in which countries party to the Declaration are required to receive “free, prior and informed consent” to sign an agreement.⁷⁷ There was an exception for the Treaty of Waitangi stating that “nothing in the TPPA will prevent the Crown from meeting its Treaty obligations.” However, the allusion is very surface level. The CPTPP allows foreign investors from party countries to challenge laws and decisions of the NZ government through investor-state dispute settlement (ISDS). The ISDS threatens the validity of the Treaty of Waitangi exception in the CPTPP, as new laws aimed at fulfilling New Zealand's Treaty obligations may be challenged. For example, foreign investors may bring an ISDS claim against laws that aim to strengthen Māori water rights.⁷⁸ They may also bring claims in relation to foreign investment law allowing Māori ownership of forests on the ground that the law challenges their ownership of assets.⁷⁹ The Treaty of Waitangi exception in the CPTPP is therefore not enough protection for the rights of indigenous people.

⁷⁴ Laura Macdonald and Angella MacEwen *Does the TPP work for workers? Analyzing the labour chapter of the TPP* (Canadian Centre for Policy Alternatives, report, July 2016).

⁷⁵ Jadranka Petrovic “Intersecting Trade, Politics and Human Rights: The Negotiation Phase of the Australia-China Free Trade Agreement” (2017) 51 *Journal of World Trade* 67.

⁷⁶ Macdonald and MacEwen, above n 74.

⁷⁷ Victoria Tauli-Corpuz “UN says the TPP threatens Indigenous rights” (27 February 2016) *The Council of Canadians* <<https://canadians.org/blog/>>.

⁷⁸ Jane Kelsey “Te Tiriti O Waitangi, Tino Rangatiratanga And The TPPA” (2 February 2016) *It's Our Future* <<https://itsourfuture.org.nz/>>.

⁷⁹ Kelsey, above n 78.

Submission on the CPTPP by the Equal Justice Project

8.2.2 Intellectual Property and Indigenous Rights: The TPPA had the potential to affect Intellectual Property (IP) and environmental law guaranteed through the Treaty and UNDRIP. UNDRIP provides that indigenous peoples have a “right to maintain, control, protect and develop their intellectual property.” The TPPA would have made it hard for Māori to protect rights and obligations to their environment. However, the CPTPP includes provisions that protect and improve the treatment of traditional knowledge in IP systems. This requires countries party to the CPTPP agreement to ensure that quality patent examination practices are processed with patents in relation to traditional knowledge.⁸⁰ The CPTPP also introduces the commitment of New Zealand to create a law that protects indigenous plants by giving effect to the International Convention for the Protection of New Varieties of Plants (UPOV 91).⁸¹

⁸⁰ "Māori Interests" (11 April 2018) New Zealand Foreign Affairs and Trade <www.mfat.govt.nz/en/trade/free-trade-agreements/> at 4.

⁸¹ At 5.