Pax Christi Aotearoa-New Zealand

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Hon Murray McCully MP
Minister of Foreign Affairs and Trade
Parliament Buildings
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Wellington

Dear Minister

Submission on the New Zealand Government Policy relating to the Trans-Pacific Partnership Agreement

Pax Christi Aotearoa-New Zealand is an independent section of Pax Christi International, the Catholic peace movement set up 70 years ago in France. Since its inception, Pax Christi has spread to more than 50 countries and now has members and associates across all faiths. In furthering the international mission, seeking "peace for all everywhere", we have focused on a range of issues relating to: Te Tiriti o Waitangi, the development of peaceful relationships among nations in the Asia-Pacific region, protection of human rights, and disarmament and demilitarisation. In order to maintain peace and peaceful relationships between the government and its people, Pax Christi recognises that the New Zealand government must achieve a higher degree of transparency and protection for Māori and New Zealanders in relation to the Trans-Pacific Partnership Agreement (TPPA) and must maintain a position in which it is able to protect the environment. Pax Christi believes that the TPPA does not provide adequate protection for these vital interests.

We believe that the New Zealand government should not ratify the TPPA for the following reasons:

A Māori Interests and Rights

A.1 Tino Rangatiratanga & Sovereignty

"With each instrument that it signs up to, the Crown has less freedom in how it can provide for and protect Māori, their tino rangatiratanga, and their interests in such diverse areas such as culture, economic development and the environment." (Wai 262, *Waitangi Tribunal Report Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, 2011)

- The TPPA does not acknowledge tino rangatiratanga but instead assumes that Māori interests exist subserviently to the New Zealand government. Nor does it acknowledge Māori as Treaty Partners.

- The restrictive manner in which the TPPA seeks to facilitate trade places a fetter on New Zealand government's sovereignty in an undemocratic way, therefore limiting the extent to which Māori interests can be provided for. "Most [rules and obligations within the TPPA] target the 'behind the border' decisions of governments by restricting the kinds of policies, laws and actions they can adopt, setting the criteria and objectives that must be privileged, and giving foreign states and commercial interests the right to participate in many of those decisions". Such a system undercuts the legislative process in a manner that undermines the transparency and accountability that is so vital to New Zealand's democratic system and Treaty partnership. ISDS in particular poses a significant threat to the power of Parliament to regulate in the interests of Māori.

- The agreed rules and obligations within the TPPA are a reflection of the power imbalance between member countries' and seek to perpetuate and protect the interests of the USA and large businesses at the risk of weaker countries' interests.

- "As the Waitangi Tribunal foreshadows, the TPPA fetters the sovereignty of New Zealand governments and has the potential to chill their future decisions, including on policies relating to Maori under Te Tiriti o Waitangi, the He Wakaputanga o te Rangatiratanga (Declaration of Independence), the UN Declaration on the Rights of Indigenous Peoples, and as a matter of public policy or social justice." (Carwyn Jones, Claire Charters, Andrew Erueti and Jane Kelsey, *Māori Rights, Te Tiriti o Waitangi and the Trans-Pacific Partnership Agreement*, Trans-Pacific Partnership Agreement – New Zealand Expert Paper Series, December 2015)

- "There has been no credible attempt to engage with Māori as the Crown's Treaty Partner in the TPPA" (Carwyn Jones, Claire Charters, Andrew Erueti and Jane Kelsey, *Māori Rights, Te Tiriti o Waitangi and the Trans-Pacific Partnership Agreement*, Trans-Pacific Partnership Agreement – New Zealand Expert Paper Series, December 2015).

- "The more significant the issue for Māori, the more weight should be accorded to their views" (Wai 262). Given the great impact on Māori tino rangatiratanga that the TPPA will potentially impose, consultative measures should have been in place prior to the start of negotiations.

A.2 Treaty of Waitangi Safeguard

"1. Provided that such measures are not used as means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, trade in services and investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Māori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi.

2. The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 28 (Dispute Settlement) shall otherwise apply to this Article. A panel established under Article 28.7 (Establishment of a Panel) may be requested to determine only whether any measure referred to in paragraph 1 is inconsistent with a Party's rights under this Agreement" (article 29.6)

- The exception has "serious limitations" in that it "fails to protect tino rangatiratanga and leaves the rights and interests of Māori vulnerable to objections from foreign states and corporations who have no obligations under Te Tiriti or UNDRIP" (Carwyn Jones, Claire Charters, Andrew Erueti and Jane Kelsey, *Māori Rights, Te Tiriti o Waitangi and the Trans-Pacific Partnership Agreement*, Trans-Pacific Partnership Agreement – New Zealand Expert Paper Series, December 2015).

- This is because "Not only does the government have to accept that it has an obligation to Māori under Te Tiriti or otherwise, such as the UNDRIP, it must also be prepared to act on it. To date the New Zealand government has failed to address problematic aspects of national law that Māori have identified, including prior and informed consent.

- Any belated action by the government that relied on the exception could also be challenged as "arbitrary discrimination", given the government's previous decisions that such action was not warranted." History shows that the government has refused on multiple occasions (for instance, the foreshore and seabed) to acknowledge the existence of an obligation toward Māori with regard to commercially profitable resources. The threat of an expensive ISDS claim for "arbitrary discrimination" chills any potential for the issue of prior and informed consent to be addressed.

- It should also be noted that Māori interests cannot always be so easily distinguished from interests held by the general public, which are not well protected as suggested from existing ISDS cases. The Agreement goes further to discourage any such protective action through the chilling effect the ISDS enforcement system will have on the legislative process. Therefore, not only does the exception fail to protect all Māori interests, but is unlikely to result in any real protection.

A.3 Intellectual Property

- The existing IP system is inadequate to protect mātauranga Māori and taonga. It does not recognise the traditional knowledge creators or kaitiaki obligations, and is based on a perception of knowledge in terms of commercial or public value rather than as taonga.

- For instance, the limited timespan of rights focuses on balancing commercial exploitation and public use of intellectual property without considering or recognising kaitiaki, which extends indefinitely.

- The *Ka Mate* haka is a perfect example of the failure of the existing IP system to give effect to kaitiaki. Not only was this existent prior to copyright in New Zealand, but was rejected for application as it was considered as being in the public domain (Carwyn Jones, Claire Charters, Andrew Erueti and Jane Kelsey, *Māori Rights, Te Tiriti o Waitangi and the Trans-Pacific Partnership Agreement*, Trans-Pacific Partnership Agreement – New Zealand Expert Paper Series, December 2015).

- The Waitangi Tribunal noted that "IP law is not focused on the kaitiaki obligation to safeguard and protect the integrity of mātauranga Māori and taonga works. In addition, the law does not prevent derogatory or offensive use of mātauranga Māori and taonga works. Rather the focus of IP law is on facilitating commercial exploitation" (Wai 262).

- Jones, Charters, Erueti and Kelsey argue that "The Intellectual Property Chapter significantly strengthens the position of holders recognised intellectual property rights such as copyrights, trademarks and patents. However these forms of property rights often provide little or no recognition of traditional knowledge holders, who then see their own rights and responsibilities undermined."

- While there is no mention as to how it might interplay with the 1993 Maatatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples as attended by delegate groups from member countries, the proposed IP system does nothing to recognise the guardianship of indigenous people over intellectual property or improve the existing system. It enforces a commercially-focused mentality that leaves the precious intellectual property of indigenous peoples vulnerable to exploitation, suggesting that it directly goes against New Zealand's obligations toward Māori under existing obligations.

- Article 13(1) UNDRIP establishes the right of indigenous peoples to 'maintain, control, protect and develop their… sciences, technologies, and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of the fauna and flora' and 'have the right to maintain, control, protect and develop their intellectual property' over such things.

- The TPPA affords Māori no protection whatsoever except that which is granted by the Crown under Treaty obligations. Not only would this require the Crown to firstly acknowledge the existence of an obligation which it has been reluctant to do in the past, but any change of heart could be challenged as "arbitrary" under ISDS.

A.4 Biodiversity and Genetic and Biological Resources

- "The commercialisation of mātauranga is associated with genetic and biological resources. This has the potential to conflict with kaitiaki, and is harmful to the relationship between kaitiaki and the Taonga species where bioprospecting is inconsistent with tikanga Māori." (Wai 262)

- TPPA Article 20.13 focuses on use of biological diversity rather than biodiversity itself. The focus is on use and exploitation of genetic resources. While it acknowledges 'the importance of respecting, preserving and maintaining knowledge and practices of indigenous and local communities embodying traditional lifestyles that contribute to the conservation and sustainable use of biological diversity', there is no mechanism by which to protect such measures. This leaves mātauranga unprotected and kaitiaki unrecognised.

A.5 Environment & Māori

- Article 29.8 sets out a general exception for Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources:
    - "Subject to each Party's international obligations, each Party may establish appropriate measures to respect, preserve and promote traditional knowledge and traditional cultural expressions"

- Each party may take measures to respect, preserve, and promote traditional knowledge and cultural expressions if international obligations including the TPPA permit. However, given that this general exception is subject to international obligations (including the TPPA), the exception is without any true substance or protective power.

- "Perhaps the key concerns that arise from the TPPA provisions in relation to these subjects are less about substantive issues and more about the process that in turn informs the decision about substantive law and policy. Given the weakness of the Treaty of Waitangi exception Chapter 29, it is likely that the New Zealand government will become more conservative and entrenched on these issues and it will become increasingly difficult to get any movement towards more Treaty-consistent law and policy in this area" (Carwyn Jones, Claire Charters, Andrew Erueti and Jane Kelsey, *Māori Rights, Te Tiriti o Waitangi and the Trans-Pacific Partnership Agreement*, Trans-Pacific Partnership Agreement – New Zealand Expert Paper Series, December 2015).

A.6 Investor-State Dispute Settlement

- Before any steps toward accepting the ISDS system as a viable method of adjudication, the New Zealand government should take note that such a system does not recognise the public nature of interests, has significant issues with the quality of decisions made, has a lack of rigorous regulation regarding arbitrators, has no appeal process, and undermines existing and proven local remedies (Amokura Kowharu, *TPPA: Chapter 9 On Investment*, Trans-Pacific Partnership Agreement – New Zealand Expert Paper Series, December 2015).

- The New Zealand government should not agree to override domestic and proven judicial processes with private overseas tribunals without appeal processes. Existing cases suggest that outcomes tend to be in favour of commercial parties despite democratically elected government bodies choosing to act in the interests of indigenous people and the environment. It is both a threat to Māori kaitiaki, tino rangatiratanga and toward the interests of the public.

- One example comes from Ecuador, where ISDS was used in the US-Ecuador Bilateral Investment Treaty by Chevron to challenge a domestic judgement won by an indigenous group seeking remedy of noxious damage in the Amazon basin.

- Currently, Peru is being used by a Canadian mining company Bear Creek for $1.2 billion claiming expropriation after protests by indigenous people and a supportive regulatory response by the Peruvian government.

- "The essence of the chilling process is the threat, not necessarily the actuality, of repercussions. The TPPA's last-minute exclusion of big tobacco from the dispute process has only grazed the tip of a very large iceberg" (Barry Coates, Rod Oram, Geoff Bertram and Tim Hazledine, *The Economics of the TPPA*, Trans-Pacific Partnership Agreement – New Zealand Expert Paper Series, January 2016). Therefore while the ISDS system does provide an enforcement mechanism for the TPPA's main features, the monetary and reputational costs of a potential claim will cause any regulatory change more in line with Te Tiriti to be at most slow moving if at all.

- It should serve as a warning that the EU halted negotiations on an FTA with the USA on the grounds that ISDS was a "very toxic issue" and instead proposed an international judicial system for settling disputes. Given that New Zealand is about to begin negotiations for an FTA with the EU, it would make sense for the same judicial proposal to apply to the TPPA.

- ISDS impedes health, environmental safety, financial regulations to protect US economy and its citizens. Companies can sue for reductions in future expected profits from regulatory changes. For example, Philip Morris (a cigarette company) brought a claim against Uruguay for requiring warning labels on cigarette packets, which was effective in reducing cigarette consumption. As illustrated, the system places greater power in the hands of larger multinational businesses.

B Environment as contained in Chapter 20

B.1 Wording

- Chapter 20 purports to promote environmental sustainability without committing to solving the main environmental problems that the world faces. New Zealand simply cannot afford to place its natural resources in the hands of foreign investors who have substantial access but little to no culpability or responsibility toward maintaining it.

- The health of New Zealand's economy is dependent on maintaining a "100% Pure" image, with tourism second only to the dairy industry as the foremost contributor to GDP. We believe that ratification of the TPPA will only serve to harm New Zealand's environment in the long term (Christine Cheyne, *TPP light on environment safeguards*, Friday 12 February 2016).

- The Sierra Club describes Chapter 20 as being "plagued with loopholes and non-binding language, this provision falls far short of requiring countries to adopt, maintain and implement policies to identify contraband and penalize actors that fail to identify contraband in a manner that would serve as a strong disincentive to engage in illegal trade." (Ilana Soloman and Ben Beachy, Sierra Club 2 December 2015 A Dirty Deal: How the Trans-Pacific Partnership Threatens our Climate)

- The language used is distinctly non-committal, using phrases such as "endeavour to" and "as appropriate", giving too much discretion in dealing with suspected violations of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) to be of any significant effect.

- It is poorly aligned with the 2015 Paris Agreement at least in part due to the incentives the ISDS system places on companies to sue governments for restricting access to unsustainable practices without any binding rules to balance it (Christine Cheyne, *TPP light on environment safeguards*, Friday 12 February 2016).

- Examples from Peru regarding an environmental violation of the US Peru FTA suggests that where there is no publicity or political pressure to take action, governments of offending countries will be slow to take action and reluctant to spend diplomatic capital to reinforce environmental policies or protect another country's environment (Josè de Echave, *Peru's story haunts the TPPA*, The Hill, 9 June 2015).

- This is exacerbated by the asymmetry of rights and means accorded to organisations that would protect private wealth rather than protect public goods. As aptly described by Stiglitz, "if there ever was a one-sided dispute-resolution mechanism that violates basic principles, this is it" (Joseph Stiglitz, *The secret corporate takeover of trade agreements*, The Guardian, 13 May 2015).

B.2 ISDS and the Environment

- The TPP investment chapter would give foreign investors, including some of the world's largest fossil fuel corporations, expansive new rights to challenge climate protections in unaccountable trade tribunals. This includes the power for investors to demand compensation for climate policies that do not conform to their "expectations" or that they claim reduce the value of their investment. This would roughly double the number of firms that would have foreign investor privileges to more than 9,000 firms (Ilana Soloman and Ben Beachy, *A Dirty*

Deal: How the Trans-Pacific Partnership Threatens our Climate, Sierra Club, 2 December 2015).

- Given that over 85% of money paid out under ISDS to date has been in claims over resources and the environment (www.citizen.org.nz/documents/fact-sheet-TPPA-and-environment.pdf), the ISDS poses a significant threat to the New Zealand government's ability to act in the interests of the environment.

- Bilcon, a US company was denied a permit for quarrying and marine terminal in Nova Scotia after the local environment panel accepted concerns from the local community and prioritised the environment. In that case, the ISDS system acted as an appeal body to the Canadian statutory process, and substituted its own priorities for that of the domestic process. The ISDS should be considered with suspicion given that it effectively overthrows domestic interests decided in the public interest, leaving no protection against claims due to actions protecting the environment or tackling climate change. Bilcon, alongside cases where governments have been sued for placing restrictions on coal burning and hydraulic fracturing suggest that the TPP "may end up undermining government efforts to protect the environment" (Christine Cheyne, *TPP light on environment safeguards*, Friday 12 February 2016).

- The cost of participating in a case may alone be sufficient to chill and disempower governments against commercial interests seeking to take advantage of resources to the detriment of the environment at an estimated $8 million USD per case (Simon Terry, *The Environment under TPPA Governance*, Trans-Pacific Partnership Agreement – New Zealand Expert Paper Series, January 2016). This may prevent New Zealand from imposing more restrictive legislation to protect the environment and uphold New Zealand's clean green image. For instance, stricter rules on logging, raising charges on greenhouse gas emissions and prohibition on pesticide may come under scrutiny by the ISDS. It would therefore favour lower environmental standards when in reality these must be raised.

- It would be "a silent killer of progressive reforms, with proposals dying before they have seen the light of day. The cost would be measured not just in the effects of ongoing unsustainable practises, but in the dispiriting of communities and a nation no longer willing to assert guardianship over key areas of its ecological life support system" (Simon Terry, *The Environment under TPPA Governance*, Trans-Pacific Partnership Agreement – New Zealand Expert Paper Series, January 2016).

- The WTO recently found that a domestic content clause requiring 10% of solar cells to be produced nationally in India was discriminatory. India had argued that the regulation was part of their commitment to international sustainable development initiatives and agreements. "A dangerous and self-serving position used to justify attacking common sense renewable energy policy in a developing country which has other competing priorities including serving its people" (Dipti Bhatnagar and Sam Cossar-Gilbert, *World Trade Organisation smashes India's solar panels industry*, 28 February 2016). This only serves to prove the point that trade agreements are becoming a significant hindrance against any viable action on climate change and is likely to liberalize trade in polluting fossil fuels and restrict government options even further. "In the face of a growing climate emergency, we need a trade system that helps rather than hinders the development of sustainable societies, by supporting local economies, sustainable jobs, a clean environment and more responsible energy" (Dipti Bhatnagar and Sam Cossar-Gilbert, *World Trade Organisation smashes India's solar panels industry*, 28 February 2016) which the TPPA fails to do.

C Gain for New Zealanders

- The TPPA, while flaunted as a free trade agreement falls substantially short of facilitating free trade. It would be better described as a "managed trade" pact as argued by Martin Sandbu, an analyst at the Financial Times of London (Martin Sandbu, *Free Lunch: Habemus TPP*, FT, bit.ly/FTonTPPA), and Joseph Stiglitz (*The secret corporate takeover of trade agreements*, The Guardian, Wednesday 13 May 2015).

- It was argued that the purported gain from the TPPA was at best minimal: "It is striking how little the TPPA will deliver. Without the TPPA our GDP will grow by 47% by 2030 at current growth rates. The TPPA would add only 0.9% (Barry Coates, Rod Oram, Geoff Bertram and Tim Hazledine, *The Economics of the TPPA*, Trans-Pacific Partnership Agreement – New Zealand Expert Paper Series, January 2016). This is in part because although it removes numerous barriers to trade relating to exports, the benefits would be minimal since New Zealand already maintains free trade agreements with most of the big member countries.

- In addition, while the TPPA will remove tariffs, it will on the other hand perpetuate agricultural subsidies which for New Zealand are a far greater distorter of trade for our primary sector (Rod Oram, *TPPA honesty pays*, Sunday Star Times, 7 February 2016). In doing so, it undermines negotiations in the World Trade Organisation, the "only viable forum for removing these trade distorting subsidies" (Barry Coates, Rod Oram, Geoff Bertram and Tim Hazledine, *The Economics of the TPPA*, Trans-Pacific Partnership Agreement – New Zealand Expert Paper Series, January 2016).

- This is likely to reinforce New Zealand's position as a commodity producer and "hinder progress up the value chain where greater prosperity lies" (Rod Oram, *TPPA honesty pays*, Sunday Star Times, 7 February 2016).

The minimal net benefit of joining the TPPA - even in commercial value should give great reason for the New Zealand government to reconsider its ratification. The uncertainty and lack of repute associated with the ISDS process places too great a risk on Māori and the environment without adequate or likely protection from the New Zealand government. New Zealand must first seek to improve legal instruments to protect and empower those who would be most vulnerable under such an Agreement at the very least.