Submission of the New Zealand Council of Trade Unions Te Kauae Kaimahi

to the

Foreign Affairs, Defence and Trade Select Committee

on

the Free Trade Agreement between New Zealand and the Republic of Korea

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1. Introduction

1.1. This submission is made on behalf of the 36 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 325,000 members, the CTU is one of the largest democratic organisations in New Zealand.

1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.

1.3. This submission looks at a number of aspects of the Free Trade Agreement between New Zealand and the Republic of Korea (NZSKFTA), but focuses on the Investment chapter and particularly on the Investor-State Dispute Settlement provisions. These are hugely controversial internationally because of the privileges they give to overseas investors and the damaging effects they have had. ISDS is of particular moment because it will be part of the Transpacific Partnership Agreement (TPPA) if it is completed. We oppose ISDS being part of this or any other agreement that New Zealand is party to. This submission explains why.

1.4. As a general point, we note that this agreement must be interpreted in the light of the possible coming into force of the TPPA. If South Korea is not a party to the TPPA (as it is unlikely to be initially) it will have access to many of its provisions through the Most Favoured Nation rights provided in the NZSKFTA. If South Korea joins the TPPA (as it has applied to do) then this agreement will become largely redundant, including any safeguards that are not in the TPPA.

2. General CTU approach to international commerce agreements

2.1. The CTU policy approach on trade matters is to identify possible risks to the New Zealand economy, local businesses and other interests, whilst recognising the perceived advantages that some sectors may accrue from

enhanced access to markets. However international commerce agreements such as the NZSKFTA go well beyond trade. Indeed, as tariff barriers disappear they have become much more about vital and sensitive “behind the border” issues that impact heavily on the ability of governments to govern in the interests of their citizens.

2.2. The rules in these agreements are heavily biased towards increasing commerce in the form of trade, investment, returns on intellectual property, and so on. The impacts on working conditions, the fair distribution of the income from the economy, the distribution of power in society, social equity and progress, health, the environment and many other aspects of human welfare are secondary and the impacts largely invisible. While lipservice is paid to some of these impacts (as it is in the present agreement and MFAT’s National Interest Analysis as discussed below), it is far from sufficient to mitigate those impacts, let alone to put increasing welfare first.

2.3. This can be described as neoliberal approach to international relationships which privileges the working of the market over social outcomes that are the ultimate goal of commerce and the economy. It gives insufficient recognition to the importance of government, regulation and balance in society in achieving fair outcomes. These lessons were relearned in the Global Financial Crisis, but international commerce agreements in the present model remain firmly rooted in the thinking of the 1980s and 1990s.They can promote unrestricted access by multinational corporations to land, resources, workers, culture, plant life, indigenous intellectual property rights and so on without protections for the people of that country. Our concerns are both for direct impacts and for unintended consequences.

2.4. The gains from goods trade are well understood, even though all-too-common market imperfections mean they are not always realised and economic development implications are frequently ignored. However, the economics of investment are not nearly as straightforward. Even well-known free-trade advocate and former advisor to the Director General of the World Trade Organization, economist Jagdish Bhagwati has drawn the distinction

between “between trade in widgets and dollars” (Bhagwati, 1998). In opposing liberalisation of international financial investment flows he wrote:

> the mainstream view that dominates policy circles, indeed the prevalent myth, is that despite the striking evidence of the inherently crisis-prone nature of freer capital movements, a world of full capital mobility continues to be inevitable and immensely desirable. Instead of maintaining careful restrictions, we are told, the only sensible course is to continue working toward unfettered capital flows…This is a seductive idea: freeing up trade is good, why not also let capital move freely across borders? But the claims of enormous benefits from free capital mobility are not persuasive. Substantial gains have been asserted, not demonstrated, and most of the payoff can be obtained by direct equity investment … The myth to the contrary has been created by what one might christen the Wall Street-Treasury complex, following in the footsteps of President Eisenhower, who had warned of the military-industrial complex.

2.5. We believe that New Zealand’s international trade and investment policies should be driven by, and be consistent with, its economic and social development policies. For the CTU, any analysis of the relative merits of a commerce agreement such as the NZSKFTA must be based on empirically sound research, properly conducted net benefit analysis including social, environmental and cultural considerations, and include analysis of:

- the impact on social equity;
- the effects on the quality and level of employment New Zealand;
- adherence to core labour standards in the partner country;
- the contribution any proposed agreement will make to sustainable social and economic development in NZ;
- the impact on public and social services;
- the extent to which the agreement is based on principles which will advance equitable trading relations between countries;

- the genuine application of the Treaty of Waitangi relationship; and
- in general, the maintenance of policy space to respond to unforeseen situations, market and regulatory failure and the right of democratically elected governments to implement their mandate.

3. Investment (Chapter 10) – General

3.1. Investment is important for any economy. Good quality investment which raises productivity, creates well paid jobs, introduces and uses new knowledge, technology and skills – in short adds to social welfare and equity – may be welcomed. Unfortunately there are many problems in an international context which agreements like this must recognise.

3.2. Investment is in two forms: Foreign Direct Investment, where control of a firm is intended, and other forms which are essentially financial, either minority (portfolio) shareholdings in companies or financial instruments such as bonds and derivatives.

Financial investment

3.3. ***Summary:*** *Massive international flows of financial forms of investment can create and exacerbate dangerous instability in the country's financial system and economy. Policies to control these flows have increasingly been recognised as necessary, especially following the experiences of the Global Financial Crisis, but their use is imperilled by Article 10.10 (Transfers) in this agreement which prevents such controls and is insufficiently protected by the temporary exception in Article 20.3 (Measures to Safeguard the Balance of Payments). In particular, this endangers government finances.*

3.4. While Financial Services is excluded from this agreement (which we welcome and comment on further below), financial forms of investment are not. The definition of "investment" includes for example: (Article 10.2) "(b) shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom; (c) bonds, including government issued bonds, debentures, and loans and other forms of debt, and rights derived therefrom; (d) futures, options and other derivatives". Financial investors such as banks,

insurance companies, hedge funds, investment banks, currency traders and investment funds can claim rights under this agreement.

3.5. Financial forms of investment bring the potential problems of large flows of capital determining the exchange rate, harming export and import-competing industries, and in times of financial turmoil exacerbating rather than helping resolve a crisis. This was amply demonstrated during the Global Financial Crisis requiring in some cases massive government intervention leading to enormous increases in public debt. In New Zealand's case, it required Reserve Bank support for commercial bank liquidity which was imperilled by their previous heavy overseas short-term borrowing, and the government felt compelled to provide retail and wholesale deposit guarantees. Both put our public finances at risk. A number of countries including South Korea who were not then encumbered by treaty commitments preventing controls on capital flows used them as an important measure in protecting their economies.

3.6. As a result of this experience and of earlier experience such as Malaysia's effective use of capital controls in response to the Asian financial crisis in the late 1990s, the International Monetary Fund (IMF) has dramatically changed its position on the use of capital flow management. Having previously strongly opposed such policies, it now advocates retaining their use as part of a "toolkit" of policies to deal with the problems of international capital flows (e.g. Blanchard, Dell'Ariccia, & Mauro, 2013). However the acceptance is now increasingly widespread, with many experts (e.g. Stiglitz & Ocampo, 2008; Gallagher, 2010; UNCTAD, 2014) advocating considerably broader use than does the IMF. For Iceland, capital controls were crucial in preventing an enormously damaging economic crisis brought about by irresponsible banking practices. Many economists favour international financial transaction taxes, which are being brought into use by the European Union and have been used by Brazil for many years. Capital flow management has an important place in preventing crises as well as reacting to one, and in exchange rate management. At the very least it would be extremely unwise to commit to forgo their use forever.

3.7. This is imperilled by Article 10.10 (Transfers) in this agreement which prevents such controls on international transactions of capital or profits, dividends, interest etc. While the general exception for Balance of Payments emergencies (Article 20.3: Measures to Safeguard the Balance of Payments) provides some temporary relief, it is only temporary and currently seems unlikely to survive the TPPA. See our further discussion below.

3.8. Further, the present agreement (as noted in 3.4) explicitly includes government issued bonds as investments. In times of financial crisis either on a national or local government level, debt restructuring is necessary in order to allow a government to recover from a position in which debt has reached unmanageable levels. As with private bankruptcies and similar situations, the process often requires a "haircut" on holders of government debt – that is, agreement is reached with creditors that they will be repaid only a portion of what is owed, usually over a longer term than originally contracted. This allows orderly repayment of debt at a level that will not cause the extremes of poverty, unemployment, social and economic dislocation and often consequent social upheaval that total debt default can lead to.

3.9. Such orderly arrangements are being undermined by "vulture funds" purchasing at rock-bottom prices the debt instruments of governments in such circumstances after haircuts have been agreed with the great majority of creditors. They then use the disputes processes in agreements such as this to demand full payment rather than the reduced payment accepted by other creditors. Not only is this punitive for the people of the country concerned, but it threatens the viability of future debt restructuring processes because creditors are unlikely to agree to forego a portion of their repayments if they believe others may be paid in full. The present agreement does not prevent this occurring but to the contrary explicitly includes government issued bonds as investments.

3.10. Global financial risks have not gone away and indeed in some ways are higher than before the Global Financial Crisis. We need to preserve our ability to take a variety of policy measures to prevent and deal with crises

rather than find ourselves locked into a deregulatory regime which has proved flawed in recent years.

Foreign Direct Investment

3.11. ***Summary:*** *The evidence in New Zealand is that often-asserted advantages of foreign direct investment frequently do not hold. While bringing substantial financial gains to the owners, overseas owned firms do little to improve New Zealand's productivity, technology, knowledge spillovers, linkages and capability, but are likely to lead to an increase in our international liabilities. It is costly: the rate of return on foreign equity capital in New Zealand is almost three times as high as that on foreign debt. There are also widely held sensitivities around the overseas ownership of New Zealand's land and fishing quota. It is therefore imperative that we are selective of foreign direct investment and retain the right to be selective, but Article 10.5 (National Treatment) and Article 10.11 (Performance Requirements) severely hamper our ability to do so. The exception for overseas investment approval gives only limited room to move and has multiple problems.*

3.12. Foreign direct investment, where control of a firm is intended, can be desirable if it brings new capital, expertise unavailable in New Zealand, technology, knowledge spillovers to other firms and workers, and linkages into the local economy that multiply its developmental effects. While the international literature refers to these as benefits of foreign direct investment, the question as to whether they are actually present in New Zealand should be evaluated as an empirical matter. In fact they often seem to be weak in New Zealand.

3.13. For example Fabling and Sanderson (2011) find that "foreign firms tend to target high-performing New Zealand companies" but that "positive effects do not extend to productivity growth" unless the acquired company was originally capital-shallow. "Overall, the New Zealand research echoes the theoretical ambiguity … – while foreign acquisitions generate potential for positive effects on domestic firms, these positive outcomes are not guaranteed and depend heavily on the motivation of the new foreign parent." They show a fall

in capital/labour ratios after acquisition of high capital-intensity firms (Table 6, p.18) which is consistent with asset-stripping and leveraged buyouts which have been common in the last two decades.

3.14. More recently, Maré, Sanderson and Le (2014) found that in contrast to international experience, the wage premium for working in a foreign-owned firm is only 2.7% to 3.5% after taking account factors such as firm size, location, industry, and the tendency of such firms to hire more highly skilled workers. They comment: “These findings give little support to the argument that foreign firms provide substantial indirect or spillover benefits to domestic firms through human capital accumulation and labour mobility.”

3.15. An Inland Revenue Department (IRD) analysis of Management’s top-200 non-bank firms (Benge, 2010) shows much higher returns on equity (26% compared to 12%) and assets (16% compared to 10%) to foreign firms, but that was not matched by the firms’ export performance. This led IRD to suggest that these firms were concentrated in areas of the economy with location-specific rents – that is, areas not exposed to international competition and with dominant market positions.

3.16. The evidence is therefore that while bringing substantial financial gains to their owners, overseas owned firms do little to improve New Zealand’s productivity, technology, knowledge spillovers, linkages and capability, but are likely to lead to an increase in our international liabilities.

3.17. The cost of foreign equity capital is high compared to debt. Balance of Payments data shows the average return on New Zealand’s international equity liabilities between 2002 and 2011 was 11.8%, almost three times the average return on debt of 4.1%. In all, the outflow of income on foreign investment in New Zealand exceeds New Zealand’s current account deficit, leading to high and growing international liabilities. In addition there are issues of tax avoidance, including thin capitalisation and transfer pricing, which reduce the return to New Zealand.

3.18. There are also widespread sensitivities around the overseas ownership of New Zealand’s land and fishing quota, which should be respected for both

economic reasons (including external control of supply chains) and cultural reasons.

3.19. There is therefore good reason to be selective of foreign direct investment.

3.20. This is prevented in the NZSKFTA by Article 10.5 (National Treatment) and Article 10.11 (Performance Requirements).

3.21. Article 10.5 (National Treatment) prevents differential conditions being put on overseas firms, ruling out conditions being placed on their activities in New Zealand other than those placed on all firms.

3.22. Article 10.11 (Performance Requirements) explicitly rules out a list of potential conditions such as requirements to export, use local content, or introduce new technology or processes. This ban applies in connection to the "establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment". Similar requirements are already present in other agreements such as the Trade-Related Investment Measures (TRIMS) agreement in the WTO but the NZSKFTA has extended the list of banned requirements. For example, TRIMS applies only to trade in goods whereas Art 10.11 applies to goods and services, which are not necessarily traded ones. Art 10.11 outright prevents any requirement to export a given level or percentage of goods or services, whereas the TRIMS ban is only on requiring a relationship between exports and the firm's imports. ("trade balancing"), which also exists in the NZSKFTA. Art 10.11 bans requirements for transfer of a particular technology, production process or other proprietary knowledge to a firm in New Zealand, so promises of introduction of technology cannot be enforced. Even on receipt of an advantage such as a subsidy, overseas firms cannot be required to use a given level of domestic content or give preference to locally produced goods (unless it is the subject of government procurement).

3.23. An exception has been filed to the requirements of Articles 10.15 and 10.11 (and also Art 10.12 which limits conditions placed on Senior Management and Boards of Directors) in Annex II. This allows the government to have approval requirements for takeovers or new investment by overseas

investors in similar terms to the current Overseas Investment Act and Fisheries Act. It can maintain existing requirements or adopt new ones. However the exception is limited to current categories of investment: acquisition of 25% or more shares or voting power; commencement or acquisition of businesses worth over $50 million, acquisition or control of sensitive land defined in the current legislation, and acquisition of 25% or more of a company owning fishing quota or direct acquisition of quota. The $50 million threshold above which approval is required is lower than the current general $100 million limit (which has been raised repeatedly and is much higher for Australia).

3.24. The exception, while an improvement over other agreements, is less useful than it may appear. It applies only at time of acquisition or establishment of a business, not to the ongoing operation. It is within the current limited framework so doesn't include for example the ability to define new classes of overseas investment such as strategic investment. Classes of land appear to be limited to be those defined in the current legislation so for example purchase of urban residential property is excluded from control. Finally, New Zealand's position in the TPPA negotiations is not known, though the leaked TPPA Investment Chapter shows it trying to exempt the current Overseas Investment Act from ISDS and State to State dispute settlement. If its exceptions are in the end weaker than the NZSKFTA, as is likely under US pressure (the US regularly identifies the Overseas Investment regime as a barrier in its National Trade Estimate Reports on New Zealand[1]) then the weakened conditions would be available to South Korean investors under Most Favoured Nation.

3.25. Further, the exception does not prevent investors taking advantage of the Expropriation and Fair and Equitable Treatment provisions.

3.26. Conditions may be placed on investors in approval processes under the Overseas Investment Act. Some such as the good character of those in control of an investment, and complying with representations made in the application are standard (even if weak). There is also power under the Act to

[1] E.g. https://ustr.gov/sites/default/files/2015%20NTE%20Combined.pdf

revoke approvals in case of fraud, and to force the sale of property in the case of contravention of the Act. The enforcement of these conditions or other actions after the investment has been approved are subject to ISDS. An investor who acquires an investment without approval when approval should have been sought presumably also gains coverage of ISDS, firstly because the Investment chapter does not exclude investments that were made unlawfully, and secondly because the Overseas Investment Act 2005 in s.29(1) states that an investment without consent is not an illegal contract and is not void only because of the lack of consent.

Inadequate National Interest Analysis

3.27. ***Summary**: the National Interest Analysis fails almost completely to analyse the national impact of greater protection of investors. There is no justification given for the State to take action that compromises the future welfare of New Zealanders in order to reduce the risk of New Zealand based investors activities in another country. It does not analyse the risks of the rights given to inward investors. It fails to analyse the distributional effects of the investment when international evidence is that outward investment and some inward investment is a factor in increasing income inequality. The benefits are far from equally shared.*

3.28. The National Interest Analysis justifies liberalisation of investment and greater protection of investors in terms of the interests of New Zealand based investors wanting to invest in South Korea. There is no attempt to quantify the national benefits of this: it is apparently assumed that what is good for the investors is good for New Zealand. Some outward investment may be desirable such as if it allows exports of goods or services that would not otherwise occur, or (in the case of Kiwifruit) allows Zespri to supply the market year round. However some may be purely for financial reasons, and some may be to send production offshore at the expense of New Zealand jobs. The benefits then go disproportionately to the investors themselves (who may not even be New Zealand residents in the case of a subsidiary of an overseas owned New Zealand based firm) with little benefit to New Zealand workers, or indeed loss of good jobs.

3.29. A case has not been made as to why the State has a role in reducing the risks of any of these investors. RIsk is an innate part of any investment.

3.30. There is international evidence that the benefits of outward investment are very unequally distributed. An important international OECD study, “Divided We Stand: Why inequality keeps rising” (Organisation for Economic Co-operation and Development, 2011) finds that outward foreign direct investment increases income inequality, while IMF researchers (Jaumotte, Lall, & Papageorgiou, 2013) find that in both developed and developing countries, financial globalization including foreign direct investment is associated with increases in income inequality. In both groups of countries, inward FDI is associated with rising inequality, while in developed countries outward FDI also has an additional negative impact.

3.31. Given that the protection given to outward investment is at the expense of many options for future New Zealand governments to pursue policies in the interests of New Zealanders, it is in effect a subsidy of unknown size to what can be presumed to be a relatively small number of outward investors. It is at the expense of many New Zealanders who cannot afford it, and at the expense of New Zealand’s future economic development. No justification has been given for this other than the benefit to the investors.

Definitions of investor and investment too broad

3.32. We are concerned at the very broad definition of investment (Article 10.2) which extends to contracts and rights under contracts (such as private-public partnerships or PPPs, construction contracts, and information technology providers such as Novopay), intellectual property rights (such as trade marks on cigarette packs giving them protection under investment dispute procedures as well as disputes under Chapter 11 on Intellectual Property), and licenses, permits and concessions (so that licenses, permits etc issued by local government as well as central government could in their own right be the subject of investment suits if the issuer needed to change their conditions or revoke them). A wide range of local and central government activities and

decisions can therefore be challenged under the cover of being an "investment".

3.33. Further, an investor includes persons "attempting to make" an investment (Article 10.2), so that for example investors applying for approval to invest under the Overseas Investment Act would have standing to challenge the decisions of Ministers, the Overseas Investment Office, and other local or central government authorities issuing permits etc required for the "attempted" investment, if they are unhappy with the outcome. This is confirmed in the key articles 10.5 (National Treatment) and 10.6 (Most-Favoured-Nation Treatment) which apply to "establishment" of investments as well as established ones. A dispute would have to be via the general State to State Disputes Procedures of this agreement because only existing investments are subject to ISDS.

3.34. This contrasts with the New Zealand-China FTA (NZCFTA) which excludes "admission" of investors or investments from its coverage of National Treatment (the right to no less favourable treatment than New Zealand investors) although it did not make the same exclusion to MFN, which means subsequent treaties effectively overrode that. This reduced the likelihood that for example the shareholders in the first investor proposing to buy the Crafar farms (Natural Dairy (NZ) Holdings) could use the NZCFTA to challenge the New Zealand authorities' decision to reject the investors' application (although they could still have challenged alleging that they were not treated as well as nationals of other countries in similar circumstances because the Most Favoured Nation provision does apply to admission of investors).

3.35. With the ratification of the NZSKFTA however, investors from China will be able to use the ISDS in the NZCFTA to challenge decisions being made as part of their "attempts" to invest in New Zealand. They will have standing through their right to "Most Favoured Nation" treatment in Article 139 of the NZCFTA, allowing them to pick and choose the more favourable provisions to them from other New Zealand agreements. Mainland Chinese investors had already been given that right through the agreement the New Zealand government signed with Taiwan (the Agreement between New Zealand and

the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation), though it is possible that the Chinese government would be reluctant to rely on that for political reasons.

3.36. There are also risks in the lack of definition of “attempting”: how substantial must the “attempt” be to gain standing?

Financial Services exclusion and Balance of Payments exception

3.37. ***Summary**: we welcome the exclusion of Financial Services because Finance needs further regulation. It should be permanently excluded and not subject to Most Favoured Nation. However financial investments are still covered, so the risk of hampering needed financial regulation is still present and would allow banks and other financial investors to challenge regulation of the sector using ISDS. If the TPPA is completed, ISDS would allow them access to further rights and room to challenge regulatory decisions. The Balance of Payments exception is also welcome but it is too limited. It could also be undermined by a much weaker exception, if any, in the TPPA.*

3.38. We welcome the exclusion of Financial Services from the Investment and Services chapters of the agreement (e.g. Article 10.3(4)). It should be permanently excluded and made not subject to Most Favoured Nation. Finance is a particularly sensitive area. As noted above, the Global Financial Crisis showed that much greater regulation of finance is required, not less, and further power should not be given to the financial sector such as by allowing banks and other financial institutions to sue should governments need (either directly or through the Reserve Bank) to further regulate their domestic or international activities. It is a critical sector in managing capital flows.

3.39. We are not confident that the standard protection for prudential measures (Article 20.4) is sufficient because it is circular (actions cannot be intended to breach the provisions of in the agreement). Its protection is also limited to “protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system”, so excluding other important economic

objectives of financial regulation such as the level of the exchange rate, medium and long term stability in the Balance of Payments, and the price of assets such as housing.

3.40. However financial investments are covered as part of the definition of "investment", so these problems are not fully avoided and would allow owners of these investments, such as banks, to challenge government measures and if the TPPA is completed could use the Most Favoured Nation provision to obtain further rights.

3.41. We welcome the general exception for Balance of Payments emergencies (Article 20.3: Measures to Safeguard the Balance of Payments) but regret that it is only short term (up to 12 months) and constrained by IMF rules. It cannot be used to *prevent* balance of payments emergencies either on the eve of a crisis or in the way of more permanent preventative measures. However we note, that should the TPPA be concluded it is unlikely that it will have a similar exception or any exception will be very weak. This is because the standard position of the US is to oppose such provisions. It would mean that this provision would be rendered ineffective not only for investors from the TPPA countries but also from South Korea through its Most Favoured Nation status.

Expropriation and Fair and Equitable Treatment

3.42. ***Summary****: the Expropriation provisions (Article 10.9 and Annex 10-B) are improvements over previous agreements but would be undermined by a concluded TPPA and are still subject to unpredictable interpretations by ISDS tribunals. In any case, the majority of objectionable cases are now not using allegations of expropriation but of breach of "Fair and Equitable Treatment" (Article 10.7). The recent Bilcon v Canada case illustrates how dangerous it is.*

3.43. We note that an extensive interpretation of "Expropriation" is given in Article 10.9 and Annex 10-B to try to avoid the totally unacceptable application of the "indirect expropriation" doctrine in ISDS cases in which legitimate public policy such as to protect health or the environment were ruled to be indirect

expropriation of investments. However this would to be weakened by the TPPA should it be concluded, as the agreed Annex in its Investment chapter lacks many of the limitations set out in this agreement and its interpretation by dispute tribunals is unpredictable given their conflicts of interest, lack of use of precedent and lack of appeal processes.

3.44. Further, the majority of objectionable cases are now not using allegations of expropriation but of breach of “Fair and Equitable Treatment” (Article 10.7) which “remains the most relied upon and successful basis for a treaty claim” (United Nations Conference on Trade and Development, 2009, p. 8). The further explanation of this in Annex 10-A is unlikely to have any appreciable effect on tribunals’ interpretation of this. Dr Kyla Tienhaara, a research fellow at the Regulatory Institutions Network in the Australian National University College of Asia and the Pacific, commented on very similar wording in the recently leaked TPPA Investment chapter. She notes that a recent case by the US company Bilcon against Canada under the North American Free Trade Agreement (NAFTA), which we detail further below, in effect over-rode the decision of an independent environmental impact review panel on the basis that it constituted a breach of this standard despite the same “safeguard” existing in NAFTA linking it to customary international law. The tribunal in that case “found that customary international law in this area has evolved over time and in a manner that is more in line with the investor's interpretation of its meaning than with Canada's”. Tienhaara concludes it “would be better to simply exclude the language of ‘fair and equitable treatment’ from the TPP entirely”. India is proposing this for its future investment agreements (Tienhaara, 2015).

Non-Conforming Measures (Annexes I and II)

3.45. ***Summary****: there is insufficient time to analyse these fully. They do not protect against claims of expropriation or breach of “fair and equitable treatment”. The exception for “any measure for public health or social policy purposes with respect to wholesale and retail trade services of tobacco products and alcoholic beverages” is far too limited and omits other public health dangers such as the drivers of obesity. We are particularly concerned*

at the lack of protection for human and labour rights. General exceptions under Article 20.1(2) include measures "necessary" to protect public morals, protect human, animal or plant life or health, etc are likely to be unavailable under a completed TPPA as the US opposes their application to investment and so they can be sidestepped using Most Favoured Nation. In any case use of the "necessity" test has succeeded only twice in the 40 times it has been invoked as a defence in the World Trade Organisation.

3.46. The lists of Non-Conforming Measures in Annexes I and II contain some exceptions to the applicability of some articles of the Investment chapter (chosen from National Treatment, Most Favoured Nation, Performance Requirements, and Senior Management and Boards of Directors). In the time available we are not able to analyse them thoroughly. However they do not apply to accusations of expropriation or breach of "fair and equitable treatment" which are the basis for most investor claims.

3.47. We note that while there is an exception in Annex II for "any measure for public health or social policy purposes with respect to wholesale and retail trade services of tobacco products and alcoholic beverages", this does not extend to other products which can threaten health such as high sugar or high fat food and drinks. It applies only to distribution services and not for example advertising which is a likely area for regulation in this context (as it is with tobacco and alcohol). Further, the exception applies only to Market Access in Cross-Border Trade in Services (which covers rules on the number and size of firms, restrictions on volume or value of sales and form of ownership) and not Investment. Neither does it apply to Most Favoured Nation or Expropriation.

3.48. There is no exception that would protect the policy space for rules such as plain packaging whose removal or minimisation of company logos and trademarks is the focus of the present ISDS case brought by tobacco multinational Philip Morris against Australia (and a similar one against Uruguay) to oppose its tobacco plain-packaging laws.

3.49. As the Council of Trade Uions we are especially concerned that there are no exceptions for human rights or labour rights, leaving open the ability of investors to challenge government actions taken to protect or strengthen those rights in ways that affect their profits. The Labour chapter of the agreement (Chapter 15) provides no protection, being unenforceable and placing requirements only on the governments of New Zealand and South Korea, not on investors.

3.50. There are general exceptions under Article 20.1(2) which are imported from Article XIV of the GATS agreement under the WTO. These include measures "necessary" to protect public morals or to maintain public order; to protect human, animal or plant life or health; and to enforce laws or regulations which are not inconsistent with the provisions of this agreement including those relating to safety, fraudulent practices, and the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts.

3.51. They are unlikely to be available under the TPPA as the US opposes their application to investment, so if it comes into force, South Korean investors can sidestep these exceptions using the Most Favoured Nation provisions. But even if these exceptions are available, the "necessity" test is exceptionally tough to meet, in addition to additional requirements about arbitrary or unjustifiable discrimination and disguised barriers to trade. Countries attempting to use it have succeeded only twice in the 40 times it has been invoked as a defence in the World Trade Organisation. They are therefore unreliable. Relying on the exception before an ISDS investment tribunal would be even more precarious.

4. Investment – Investor-State Dispute Settlement (ISDS)

4.1. Section B of Chapter 10 provides for Investor-State Dispute Settlement, allowing individual investors to challenge laws, regulations and actions of local and central government where they threaten their interests such as by reducing investors' profits or asset values.

4.2. To be clear at the outset: we call for the deletion of ISDS in this and all other agreements New Zealand enters into.

4.3. These are hugely contentious internationally, and are the main reason for us making this submission given that they will also be part of the TPPA should it be concluded.

Increasing international resistance

4.4. Increasing numbers of countries are now resisting or withdrawing from such provisions. Brazil has never allowed any and has recently signed bilateral agreements on its own model. Germany and France have said they will not allow ISDS in the TransAtlantic Trade and Investment Partnership (TTIP) which the European Union is negotiating with the US. Australia refused to have ISDS provisions in its agreements until the current (Abbott) government changed its policy to “a case by case basis”, and the conservative Howard government insisted on no ISDS in the Australia-US Free Trade Agreement. South Africa, India and Indonesia have declared their intentions to withdraw from agreements that they have signed. There is widespread opposition in the European Commission itself and in other European Union countries. Other countries are considering moving away from these agreements.

4.5. Some countries concerned about ISDS are not abandoning the view that investors are entitled to protection; rather they are developing various alternatives that reflect a more balanced approach. In South Africa’s case it will rely on domestic legislation; India has drawn up an alternative model investment agreement which excludes ISDS, Fair and Equitable Treatment and Most Favoured Nation provisions and its expropriation clause explicitly excludes non-discriminatory regulatory actions pursuing "legitimate public welfare objectives such as public health, safety and environment". Bolivia, Nicaragua, Ecuador and Venezuela have withdrawn from the main convention under which the ISDS dispute tribunals operate (the World Bank’s International Centre for Settlement of Investment Disputes or ICSID).

Growing expert questioning of ISDS

4.6. There is growing expert opinion questioning both ISDS provision and the rationale for investment agreements. The Australian Productivity Commission commissioned a research report on “Bilateral and Regional Trade Agreements” which was published in November 2010 and included an analysis of ISDS (Australian Productivity Commission, 2010, pp. 265–277). It found that ISDS was ineffective in encouraging investment, quoting a WTO research paper that concluded that being party to an agreement with ISDS provisions “had no statistically significant impact on foreign investment into a country”. The Commission found that “There does not appear to be an underlying economic problem that necessitates the inclusion of ISDS provisions within agreements. Available evidence does not suggest that ISDS provisions have a significant impact on investment flows.” Further, “Experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions.” It concluded: “the Commission considers that Australia should seek to avoid accepting ISDS provisions in trade agreements that confer additional substantive or procedural rights on foreign investors over and above those already provided by the Australian legal system.”

4.7. The main United Nations advisory body for developing countries, UNCTAD, also considers ISDS a failure and a risk to countries. In its 2014 Trade and Development Report, it concluded:

> If the reason for establishing ISDS is to respond to failures in national judicial systems that do not provide independent justice or enforce the protection of private property, the appropriate response should be to fix those shortcomings, rather than allowing foreign investors to seek justice elsewhere. The legal framework for international investment based on IIAs [International Investment Arbitrations] and on ad hoc arbitration tribunals has failed so far to provide a legitimate alternative to national courts. As investment disputes often involve matters of public policy and public law, the dispute settlement mechanism can no longer follow a model that was developed for the resolution of disputes

> between private commercial actors. Instead, it should take into consideration the public interests that may be affected in investment treaty arbitration. (UNCTAD, 2014, p. 146)

4.8. A report produced for the U.K. Department for Business, Innovation and Skills on "Costs and Benefits of an EU-USA Investment Protection Treaty", considering among other things the Canadian experience, concluded "In sum, an EU-US investment chapter is likely to provide the UK with few or no benefits. On the other hand, with more than a quarter of a trillion dollars in US FDI stock, the UK exposes itself to a significant measure of costs." It proposed either excluding investment protection provisions from the agreement or at least excluding ISDS (Poulsen, Bonnitcha, & Yackee, 2013, pp. 45–46).

4.9. Legal scholars and law makers have expressed grave concerns at the nature of ISDS processes and the challenge that they present to the domestic legal system. In 2012, over 100 jurists from New Zealand and other countries negotiating the TPPA called for ISDS to be excluded from the TPPA[2]. Led by eminent jurists who have held high public office they included retired judges, Sir Edmund Thomas, Retired Judge of the Court of Appeal of New Zealand and Justice Elizabeth Evatt, former Chief Justice of the Family Court of Australia and former President of the Australian Law Reform Commission, former Speaker of Parliament Professor Margaret Wilson, Bruce Fein, the Associate Deputy Attorney General under the Reagan Administration, and leading investment law scholar Professor Sornarajah from Singapore. Lawyer-parliamentarians included Winston Peters, Metiria Turei and Andrew Little. Professor Jagdish Bhagwati, referred to above, also signed.

4.10. Similarly, over 100 US law professors wrote to the US Congress and Administration opposing ISDS saying "ISDS threatens domestic sovereignty by empowering foreign corporations to bypass domestic court systems and privately enforce terms of a trade agreement. It weakens the rule of law by

[2] See https://tpplegal.wordpress.com/open-letter/

removing the procedural protections of the justice system and using an unaccountable, unreviewable system of adjudication."[3]

4.11. The Chief Justices of both New Zealand and Australia (French, 2014) have expressed concern, particularly at the implications of ISDS for our respective legal systems. As New Zealand's Chief Justice, Sian Elias observed to colleagues at a World Bar Association Conference (Elias, 2014, p. 3):

> Some of the more intrusive impacts of international law on domestic legal systems are now arising in the context of Investor-State Dispute Settlement processes. The Chief Justice of Australia has recently asked whether such processes are set up as "a cut above the courts?". It has clearly been disconcerting for Australia's highest court that it may be argued that one of its decisions is a breach of a bilateral investment treaty. Given the proliferation of bilateral and multilateral investment treaties and free trade agreements containing Investor-State Dispute Settlement processes, we can expect that experience to become not uncommon.
>
> It is feared that Investor State Dispute Settlement processes will undermine capacity to regulate the banking and finance sector or control environmental impacts. It is conceivable that human rights based determinations of domestic courts may similarly give rise to claims. Quite apart from impact on domestic sovereignty and constitutional issues, these disputes impact potentially upon the rule of law within domestic legal systems.

"Seriously flawed" arbitration process

4.12. ISDS involves arbitration based on commercial arbitration models, with each party nominating one member of a three-person tribunal and then agreeing on a chair, with various methods to choose the chair if agreement cannot be reached. The tribunals are typically international corporate lawyers or academics who rotate between representing clients at such cases and

[3] http://www.afj.org/press-room/press-releases/more-than-100-legal-scholars-call-on-congress-administration-to-protect-democracy-and-sovereignty-in-u-s-trade-deals

adjudicating as members of tribunals. Assertions and concerns about conflicts of interest are rife and real. Despite these concerns there is no appeal process nor are tribunals required to respect the precedents of findings in other cases. Indeed, hearings are often closed to all but the tribunal members and the representatives of the claimant investor and respondent government. The present agreement takes a few steps to open the hearings.

4.13. A prominent and experienced international corporate lawyer who has represented many clients in these and other arbitrations, George Kahale, made an extraordinary speech to an international conference on Investment Treaty Arbitration in March 2014 (Kahale, 2014). He said that “the system that we're celebrating here today is seriously flawed, and in my view it needs a complete overhaul… I'm not going to catalogue today for you all of the troubling aspects of investor-State arbitration. I've just selected my Top Ten for your consideration.” He asked “what can we expect from a system where tribunals are not appointed for their training in international law, where many are part-time with other interests not necessarily consistent with their functions as arbitrators, and where arbitrators are dependent upon the interested parties or the appointing authorities for additional appointments?”

4.14. Number 3 on his list was “the predominance of substantive concepts that are susceptible to abuse. The two most glaring examples are MFN [Most Favoured Nation] and FET [Fair and Equitable Treatment]” some of whose perils have been described above. “With respect to FET,” he said, “I think most of us intuitively sense that the drafters of these 3,000 [Investment] treaties had little or no idea that FET meant anything other than the minimum standard of treatment under customary international law. Even the United States, Canada, and Mexico were taken aback by the expansive interpretations of some tribunals, which is why they entered into the NAFTA interpretation of FET. As for MFN, I'm less interested in the technical argument regarding the scope of MFN clauses than I am in the entire concept. Quite simply, MFN, in all of its forms, is a dangerous provision to be avoided by treaty drafters whenever possible. As a corporate lawyer, I always

try to avoid MFN-type clauses in contracts because of the difficulty in applying them. The same is true with BITs [Bilateral Investment Treaties]. Should an investor from one country benefit from more favorable treaty provisions granted to investors from another when the latter were granted in exchange for benefits conferred outside of the treaty, such as foreign aid, military or diplomatic support, or guaranteed investment levels that the first treaty partner did not confer? The entire concept is unworkable, and States would be well advised to eliminate it from their treaties."

4.15. He also spoke of the apparent "need for speed" leading to legal errors, the fact that "conduct wholly unacceptable for a federal judge in the United States is commonplace in investor-State arbitration" in terms of ethics, pre-judgement of issues, lack of impartiality and conflict of interest – despite these cases having much higher impact than federal judges would normally hear, and lack of appeals process.

4.16. He condemned the inappropriateness of these processes for the "mega cases" that are now arising: "In my view, it's unacceptable to take a cavalier approach to the application of legal principles with claims that exceed the GDP of many nations. You simply cannot approach such a case with the same rules, the same attitudes, the same system used to deal with a small demurrage claim under a charter party." He gave the example of Occidental Petroleum Corporation v. Ecuador. "There, the tribunal awarded $1.8 billion plus interest, not an insignificant sum for a country like Ecuador. What is interesting about that case is not only that it involved a strong dissent arguing that the majority's reasoning could not be followed from Point A to Point B, but also that the tribunal found it appropriate to reduce compensation by 25 percent. Now, I'm not against the reduction, but I'm scratching my head as to how it was that the arbitrators arrived at that figure. If my calculations are correct, it amounts to about $600 million, which itself would have been one of the largest awards in history. Did the arbitrators just throw darts? Did they sit around negotiating percentages, how about 30 or maybe 40? No, that's too high, let's make it 25." In this case, Ecuador won the underlying issue at stake: "I can only assume that Ecuador was and remains puzzled as to how it

is that it can win the underlying issue giving rise to the case and still lose the largest award in ICSID history."

4.17. His final issue was that in his experience, there was a bias against governments in the system.

4.18. Even the right-wing Cato Institute in the US strongly opposes ISDS (Ikenson, 2014). While strongly supporting the TPPA, it sees ISDS as both wrong on its own merits and a lightning rod for opposition to the TPPA. It has publicly joined forces with opponents such as the Ralph Nader-founded Public Citizen watchdog organisation and prominent US Senator and legal academic Elizabeth Warren in strenuous opposition to ISDS. While agreeing with many of the objections to ISDS explained here, it also argues that

> As a practical matter, investment is a risky proposition. Foreign investment is even more so. But that doesn't mean special institutions should be created to protect MNCs from the consequences of their business decisions. Multinational companies are savvy and sophisticated enough to evaluate risk and determine whether the expected returns cover that risk. Among the risk factors is the strength of the rule of law in the prospective investment jurisdiction. MNCs may want assurances, but why should they be entitled to them? ISDS amounts to a subsidy to mitigate the risk of outsourcing. (Ikenson, 2015)

Cases

4.19. Probably the best known ISDS case in New Zealand is that by tobacco multinational Philip Morris opposing Australia's decision to require plain packaging of cigarette packets to combat smoking. Material aspects of the case are that Philip Morris fought the case through the Australian court system and failed. There is no suggestion that Australia's court system is biased or prejudiced, but Philip Morris still is able to use ISDS to oppose this public health measure. Further, Philip Morris is a US headquartered corporation but was unable to use ISDS in the Australia-US FTA because the Australian government sensibly refused to accept it. Instead, Philip Morris

switched ownership of its Australia subsidiary to a Hong Kong subsidiary and is now suing Australia under a Hong Kong-Australia Bilateral Investment Treaty. This form of "jurisdiction shopping" is common, and when added to the possibilities of the use of Most Favoured Nation provisions allowing investors to select the most favourable provisions of any agreement the state is party to, and the unpredictability of the tribunals themselves as described by Kahale, the perils of the process become obvious. We acknowledge that some provisions in this agreement make jurisdiction shopping more difficult, but their interpretation by dispute tribunals is unpredictable.

4.20. There are now hundreds of such cases. The number has increased exponentially in recent years, boosted in part by a growing number of specialist lawyers including some offering their services on a "no win no fee" basis, encouraging investors to take cases, and private equity funds taking over cases to run for a profit. Cases have impacted on health, medicine patents, environmental laws, standards for toxic chemicals, the recovery from financial crises and privatisations, and human rights. They have over-ridden not only government actions and laws but the decisions of courts and tribunals constituted to make environmental decisions. The average cost of each of these cases is huge in itself – estimated by the OECD to be US$8 million. But awards range from tens of millions of dollars to several billion as the case quoted by Kahale illustrates. For some countries these are equal to their health or education budgets.

4.21. A very recent case, decided in March, illustrates some of these issues. The U.S. company Bilcon wanted to establish an open-pit mine and marine terminal in the Canadian province of Nova Scotia. However the local community strongly objected saying it would threaten marine species, commercial fisheries and traditional indigenous hunting areas. The central and provincial governments convened a Joint Review Panel to hear the case. It recommended that because the project would breach "community core values", the central and provincial governments should reject the project, which they did.

4.22. Bilcon challenged the decision under NAFTA. The investor-state dispute tribunal found by two to one that Bilcon had been treated unfairly because similar Canadian panels had approved projects subject to conditions. It considered that "community core values" could not be an "overriding factor". It is now considering the level of "compensation" for Bilcon, which has claimed US$300 million. The third member of the tribunal strongly disagreed, saying it was "a remarkable step backwards in environmental protection", and that "a chill will be imposed on environmental review panels which will be concerned not to give too much weight to socio-economic considerations or other considerations of the human environment in case the result is a claim for damages".

4.23. Note that this involved both the federal government (Canada) and provincial government (Nova Scotia). Canadian central government, having had a number of such findings against it as a result of subnational government actions, is now looking at ways to recover costs from provincial and local governments. Note also that the decision by the tribunal was based on breach of "fair and equitable treatment", as Tienhaara described above. Bilcon could have appealed the Joint Review Panel's decision through the domestic judicial system so the ISDS process effectively gave the investor a further avenue of appeal outside the Canadian judicial system which did not have to take Canadian law into account and was empowered to grant a substantial award which the domestic process would not offer.

4.24. The effect of these cases is not only the direct effects on the government accused of breaching the investment agreement. It is also to "chill" decision making in both it and other governments. In the Philip Morris case, the New Zealand Government has reacted by delaying implementation of our own plain packaging laws until the case is decided, which could take years. The delay will literally cost lives.

Human rights including labour rights

4.25. As mentioned above, the South African government has decided to withdraw from ISDS agreements. It was likely triggered by a case (Piero Foresti, Laura

de Carli & Others v. The Republic of South Africa) (e.g. Peterson, 2007) taken against it by European mining investors which alleged that South Africa's Black Economic Empowerment mining regime violated the terms of investment protection treaties. The then new law vested all mineral, petroleum rights with the South African government to enable it to pursue its Constitution's goal of redressing historical, social and economic inequalities, and ensure that mining companies progressed towards social, labour and development objectives set out in a mining charter. The claimants alleged uncompensated expropriation and denial of fair and equitable treatment and, with amazing effrontery, that they were victims of 'discrimination' by being treated less favourably than Historically Disadvantaged South Africans.

4.26. The claim was eventually settled by agreement, but the claimants considered that "had they exhausted the administrative process in South Africa, they would not have received the new order rights on the terms that they have now received them". ISDS had given them leverage against redressing the evils of apartheid.

4.27. The South African government announced in 2010 that it would terminate existing BITs and take a different approach in future. It had many reasons, including that ISDS presented "profound and serious risks to government policy", was ineffective in attracting investment, and that "BITs do not adequately take into account in particular the conditions found in South Africa, the complexities of our socio-economic challenges and the broad objectives of government policy".

4.28. This illustrates the potential of ISDS cases (and indeed all investment cases) to impact upon highly sensitive matters of human rights, in favour of investors. There have been other cases impacting on the human rights of indigenous peoples in Latin America (for example Burlington Resources vs Ecuador).

4.29. Human rights authorities have repeatedly warned about the dangers. The most recent example is a statement by Alfred de Zayas of the US[4], an expert

[4] http://t.co/gMi4N4tUof

in human rights and international law who was appointed as the first Independent Expert on the promotion of a democratic and equitable international order by the UN Human Rights Council, in 2012. As well as expressing concern at the secrecy surrounding the negotiation of trade agreements like the TTIP and TPPA, he wrote:

> The expert is especially worried about the impact that investor-state-arbitrations (ISDS) may have on human rights, in particular the provision which allows investors to challenge domestic legislation and administrative decisions if these can potentially reduce their profits. Such investor-state tribunals are made up of arbitrators, mostly corporate lawyers, whose independence has been put into question on grounds of conflict of interest, and whose decisions are not subject to appeal or to other forms of accountability. The apparent lack of independence, transparency and accountability of ISDS tribunals also entails a prima-facie violation of article 14 of the International Covenant on Civil and Political Rights (ICCPR), which requires that suits at law be adjudicated by independent tribunals. It has been argued that ISDS tilts the playing field away from democratic accountability, favouring "big business" over the rights and interests of labourers and consumers.
>
> Prior experience has shown that transnational corporations have sued States on account of their social legislation, labour laws, minimum wage provisions, environmental and health protection measures. Such lawsuits entail a frontal attack on democratic governance, in particular on the exercise of the State responsibility to legislate in the public interest, thus undermining both the commitment to the rule of law and to domestic and international democracy.

4.30. He emphasised that all States are bound by the UN Charter and thus all international treaties must conform with the Charter, whose provisions "stipulate the principles of equal rights and self-determination of peoples, respect for human rights and fundamental freedoms, sovereign equality of States, the prohibition of the threat of and the use of force and of intervention

in matters which are essentially within the domestic jurisdiction of States". Otherwise the treaties and decisions by dispute tribunals would be null and void. He called for a moratorium on on-going negotiations while a review of these issues is carried out.

4.31. As he noted, ISDS impacts can also include labour rights. In a case launched in 2012, Veolia vs Egypt, the French group Veolia which has New Zealand operations including Auckland's urban rail service and Papakura's water supply, claimed that "changes to local labour laws – including recent increases in minimum wages – have impacted negatively on the company despite contract provisions designed to buffer the concessionaire from the financial implications of any such legal changes", according to specialist publication *Investment Arbitration Reporter* (1 July 2012). This and other cases (e.g. Noble Ventures, Inc. vs Romania, UPS vs Canada) make it clear that labour rights and conditions will be accepted by tribunals as matters to be considered. This emphasises the imbalance in power and rights that these systems represent.

5. Tariffs: no cost-benefit analysis

5.1. We have insufficient time to thoroughly analyse other parts of the agreement but make the following brief points.

5.2. On tariffs, it is acknowledged even by the Government that the settlement is weak. Our largest single export, milk powder, is excluded apart from a small quota. Nonetheless we acknowledge that the small gains are important to some sectors. Unfortunately they are largely in sectors such as horticulture and forestry where jobs are low quality, poorly paid and particularly in agriculture and horticulture are increasingly being filled by immigrant labour (often temporary labour) because New Zealanders will not take the jobs. This encourages continued low wages and poor conditions in these industries rather than working towards raising skill levels and more attractive working conditions and incomes. There is therefore doubt as to how much of the benefits will flow through to New Zealand workers.

5.3. We are not given any estimate of the net economic impact of this agreement on New Zealand. The benefit of the tariff reductions is quantified simply as the projected tariff savings of $65 million in the first year (equivalent to approximately 0.03% of GDP) with promises of elimination of "most of" the current $229 million in 15 years. But there is no serious attempt to quantify or evaluate the total economic effect, let alone social and other impacts nor to include services, investment and so on in an overall assessment. Even just in goods trade, we don't know if, and by how much, the tariff reductions might increase exports to South Korea, nor to what extent that increase may come from displacing exports from other markets. Nor do we know more than the sketchiest details of the impact of lowered tariffs in New Zealand on jobs and increased imports.

6. Labour chapter

6.1. Chapter 15 on Labour is little more than weakly aspirational. It does not apply to the core ILO conventions (only to the Declaration of Fundamental Principles and Rights at Work and its Follow-Up, 1998). It has no mechanism for unions and workers to make complaints about breaches. It has no enforcement provisions if a complaint is upheld. Its core is in Article 15.2 where there are undertakings that "The Parties shall not fail to effectively enforce their labour laws" and "Neither Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its laws or regulations" both referring to those adopted or maintained to respect four "principles embodied in the ILO Declaration". So it does not prevent the two governments from lowering higher standards down to the minima.

6.2. Similar unenforceable principles are in other agreements such as with Malaysia. Yet the New Zealand government ignored them in passing the amendments to the Employment Relations Act at the behest of Warner Brothers which lowered labour standards for workers in the film and gaming industry by allowing employers to class them as self-employed contractors, removing their rights as employees.

6.3. Ministers' statements at the time were explicit that it was done to affect trade and investment. For example, following the passage of the legislation, the Minister of Economic Development, Gerry Brownlee, who had been involved in the negotiations, described the amending legislation as follows:

> The legislative clarification is also a signal to investors throughout the world that New Zealand is a place that values the creative industries, and we expect to see a steady flow of further investment in the years ahead.(Brownlee, 2010)

6.4. We have little faith that the undertakings in this Chapter will be any better respected, and we will have no way to ensure that it is.

7. Services (Chapter 8)

7.1. We have longstanding concerns about services provisions such as this one, but will not traverse them here for lack of time. They centre around the social and cultural character of many services which will be undermined by treating them as commercial products. We have especial concerns regarding the effect on public services and the barriers it places in the way of reversing privatisations. These concerns are intensified in the present agreement in that it incorporates the requirement in Article 8.10 (Domestic Regulation) that measures relating to qualification requirements and procedures, technical standards and licensing requirements should be "not more burdensome than necessary to ensure the quality of the service" in order to increase trade in services. This privileges commercial considerations over broader social, environmental, and cultural objectives. As noted above the "necessity" test is difficult to satisfy. This creates reluctance or inability to regulate even when it is the best course to follow.

7.2. We have noted that Services do not include Financial Services at this time and submit that this should become permanent.

7.3. Article 8.7 (Local Presence) states that "Neither Party shall require a service supplier of the other Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the

supply of cross-border trade in services." We are concerned that this will make it very difficult for clients or consumers to enforce their rights, and for other law enforcement to occur for some services.

8. Government procurement

8.1. The Committee recently had before it the accession of New Zealand to the Agreement on Government Procurement (GPA) in the WTO. We requested but were denied the opportunity to make a full submission on this. The Government Procurement chapter in this agreement presents very similar concerns, but with some unique features.

8.2. In particular, it differs significantly from the GPA in that government procurement is included as a form of investment under Chapter 10 of this agreement (with certain exceptions relating to performance requirements, National Treatment, Most Favoured Nation and Senior Management and Boards of Directors). Any government actions with regard to procurement are therefore subject to the threat, costs and uncertainty of ISDS, regardless as to whether the procurement is committed under the NZSKFTA. Where borderline interpretations of the GPA by governments are less likely to be challenged under its State to State dispute procedures, disaffected investors are more likely to challenge decisions on their own behalf under ISDS. Such decisions could include any remedial action a government considers it needs to take during a contract or changes in the use of contract conditions for wider purposes.

8.3. Other than the availability of ISDS, this chapter will be largely redundant when, as the Government has announced its intention to do, New Zealand joins the GPA. South Korea is also a member of the GPA. The commitments to the GPA are broader than under this agreement. It is not obvious why Government Procurement should be included in this agreement, particularly given that it increases risks through the application of ISDS.

8.4. Government Procurement agreements prevent preference being given to local suppliers for economic development purposes. They hamper governments' ability to use their purchasing to raise health and safety and

employment conditions above the legal minimum (such as paying a Living Wage) and require responsible contracting. They prevent future governments from boycotting supplies from other countries where gross human rights abuses are occurring, as happened with racist apartheid South Africa.

8.5. The GPA offer covers 11 District Health Boards. That raises questions whether those DHBs are free to choose between suppliers on the basis of whether they are not for profit or whether they also deal in tobacco or unhealthy high-sugar foods. It also covered KiwiRail, preventing it from favouring local suppliers for its future rolling stock maintenance and purchases.

8.6. The text of this NZSKFTA chapter is worded very similarly to the GPA. However it explicitly includes Public Private Partnerships ("build-operate-transfer contracts; and public works concession contracts" – Article 13.3(2)(b)). We have not had time to make a more thorough comparison.

8.7. Commitments under it are limited to New Zealand's central government departments and do not include a number of DHBs, Crown Agencies, and State Owned Enterprises such as KiwiRail.

9. Temporary immigration

9.1. Two side letters provide for the entry of temporary entry for work of up to 200 South Koreans in skilled occupations; and up to 3,000 multiple entry working holiday visas each year allowing temporary work. While some of the 200 skilled occupations relate specifically to Korea (such as Korean Language Instructors) others are generic: film animators, biomedical engineers, forest scientists, food technologists, veterinarians and software engineers. Up to 50 of each are allowed at any one time without labour market testing.

9.2. Our concern is not specific to South Korea. It is that New Zealand is signing an increasing number of such agreements, reducing our flexibility to control immigration. There are numerous cases of exploitative and poor working conditions suffered by migrants, and it is clear that the current level of immigration is holding back wage growth and encouraging employers to

disregard long term considerations in their employment practices including skills, training, wage levels, working conditions and secure employment. It does not encourage New Zealanders to gain skills, or if they do, to remain in New Zealand. These are important and sensitive matters with national and long term implications. Immigration policy should not be subject to international agreements such as this.

10. Process

10.1. The CTU continues to be highly concerned at the process followed in international trade and investment negotiations. This includes the lack of openness, particularly as to draft text of the agreements during negotiations, which limits consultation on, and input into, the trade agreement documents.

10.2. In this case, consultation with the CTU was minimal and almost entirely at our instigation.

10.3. We note that the European Union is starting to take a much more open approach in these matters (European Commission, 2014), at the urging of its Ombudsman. They are recognising the high and growing public interest in the matters these agreements impact. The European Ombudsman concluded about the TTIP, which is equally intrusive into domestic policy space as the TPPA:

> Traditional methods of conducting international trade negotiations, however, are characterised by confidentiality and limited public participation. Those traditional methods are ill-equipped to generate the legitimacy necessary for the TTIP agreement, which, in its most ambitious form, could result in a transatlantic single market, with binding rules in a wide range of areas impacting on citizens' daily lives. (European Ombudsman, 2015)

10.4. The current Parliamentary examination is unfortunately token: Parliament has no power to ratify or refuse to ratify the agreement. That power remains with the executive. While we appreciate a somewhat longer time than usual for submissions to this Committee, it is still inadequate given the complexity

and size of the agreement (almost 1,600 pages including 21 chapters, numerous annexes and appendices, plus side letters and arrangements).

10.5. Further, the document comes to Parliament already signed, with political commitment to its current provisions and deals done that are difficult to unravel. Whatever the good intentions of this Select Committee, this consultation is one of form rather than substance.

10.6. We have read the National Interest Analysis (NIA). As described above, it is inadequate and fails to carry out its purpose if it is to inform New Zealanders of the balance of impacts of the agreement. For example, it concludes the NZSKFTA “is not expected to have any discernible negative social effects” (p.69) without considering the potential impact of investor-state disputes under the Investor-State Dispute Settlement (ISDS) provisions. As detailed above, these disputes have impacted the ability or willingness of governments to regulate in areas that may conflict with investor interests such as the environment, public health, financial stability, and human rights including employment rights.

10.7. Further, it consistently takes the approach that where the NZSKFTA rules leave New Zealand’s status quo rules in place there is no negative impact. Yet status quo rules are decided by the Government of the day. Present Governments may find they have to change them in the light of experience, and future Governments may want to change them because they have different economic, social, environmental, or cultural priorities. To say this has “no discernible social effects” is shallow sophistry.

10.8. It describes as advantages constraints on the South Korean authorities such as “rachet clauses” which prevent them ever re-regulating in certain industries and public policy areas, but fails to point out the same applies to New Zealand and fails to analyse the consequences for this and future generations. It also fails to analyse important interactions with other agreements to which New Zealand is or is negotiating to be party.

10.9. A National Interest Analysis written by the same government agency that negotiates such agreements, which consequently has a huge interest in

defending the outcome for professional, reputational and political reasons, is unlikely to be objective, probing, critical and balanced. It is of little value in weighing up the benefits of an agreement. A fit-for-purpose National Interest Analysis demands a truly independent process with sufficient expertise and variety of perspectives to determine the impact of the agreement.

11. Conclusion

11.1. This agreement may have small economic advantages to New Zealand in goods trade, although that has not been rigorously established. Other elements contain substantial dangers to New Zealand's future wellbeing. In particular it is completely unacceptable that New Zealand continues to agree to ISDS provisions.

11.2. The process of treaty negotiation and approval is simply inadequate, especially for important and complex agreements such as this. This Parliamentary examination is no substitute for much greater openness, including releases of draft text, during negotiations, and a full expert, balanced and public examination of the proposals, including hearing public submissions, before they are signed. Other countries are finding much better ways to do this.

11.3. We wish to appear before the Committee to speak to this submission.

12. References

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