NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

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

to the

Ministry of Foreign Affairs and Trade

on the

Proposed Free Trade Agreement negotiations between New Zealand and the European Union

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1. Introduction

1.1. This submission is made on behalf of the 31 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 320,000 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 on the proposed negotiations for a commerce agreement[1] between New Zealand and the European Union (EU) ('the EU-NZ agreement') is not intended to be a detailed and exhaustive discussion of our interests and concerns. It lists the areas we have concerns with brief explanations. We do this in the expectation that there will be consultation on a regular and substantive basis if and as negotiations progress. We seek an assurance that this will occur.

[1] We refer to this as a 'commerce agreement' rather than a "free trade agreement" because the proposal goes far beyond 'trade' as the word is generally understood.

1.4. We recognise the importance of the EU as the world's largest economic entity and as a centre of much innovative social thinking. Northern Europe encompasses some of the most successful societies in the world when judged by standards of human welfare, equity, inclusiveness, incomes and productivity. On the other hand, the EU has major problems, as exemplified in its ongoing economic and financial crisis and the destructive response of EU institutions, particularly for some members of the Euro monetary system (the Euro Zone). It is no exaggeration to say that the course of European Union integration is itself in danger, being undermined by a variety of financial, economic and social crises. Relationships with the EU are therefore important but cannot be seen solely as economic ones, and benefits of cooperation should not be limited to economic and commercial interests.

1.5. There are inherent dangers in negotiating with such a large, diverse and often divided entity. As in the US, the most critical negotiations may be among and within the EU members which the European Commission represents. New Zealand could easily lose out. This makes it doubly important that the process is an open one in which the New Zealand public is regularly consulted throughout the process on the basis of full information. We return to process issues below.

1.6. We will strongly oppose an agreement that is negotiated behind closed doors like the Transpacific Partnership Agreement (TPPA) or takes a similar approach which prioritises commercial interests over other factors such as health, safety, equity, economic development, financial stability and the environment. We hope that MFAT and the New Zealand Government will take a very different approach to these negotiations.

1.7. As the public debate over the TPPA shows, there is a powerful groundswell of mistrust and opposition among working people and citizens more generally in New Zealand and internationally in the light of their experience of international commerce agreements like the TPPA. Radical redesign is overdue, and MFAT and the Government cannot ignore this if they wish to make international agreements that have the support of the New Zealand public and are sustainable politically.

2. General

2.1. The TPPA was said by proponents to be a "21st Century Agreement". In fact it reflects the ideology of the 1980s and 1990s and demands of large commercial interests. The big issues of the 21st century include to reverse the growing inequality,

combat climate change (and the deteriorating environment more generally), avert future financial crises, prevent tax avoidance on an enormous scale by the wealthy and international corporations, and stem the erosion of privacy, civil and labour rights. The TPPA either ignores these or is taking its members in the opposite direction.

2.2. We recognise that one agreement cannot be loaded with too many demands. But turning around all these damaging trends should be criteria for setting the terms of a truly 21st century agreement. Provisions should be tested as to whether they help or hinder in achieving this. Reining in the finance system and joint action to prevent tax avoidance fit squarely on the agenda of an agreement like the proposed EU-NZ one.

2.3. The matters in paragraph 2.1 should therefore be criteria for any EU-NZ agreement.

2.4. Secrecy and poor processes have also been major issues for the public, even among those inclined to support agreements like the TPPA. The predominant impact of such agreements is now domestic ('behind the border'), affecting policy and regulatory approaches that are often the result of preferences that have been democratically and collectively determined. Therefore the negotiation of international commerce agreements should be much more like the process of developing and passing legislation, with open circulation and consultation on drafts of the text.

2.5. International commerce agreements are too invasive of domestic policy space to be negotiated excluding all but a privileged few. We would never allow domestic legislation to be treated in this way, and international commerce agreements are more significant than most legislation because of their effect of locking in policies against change by future governments: they are almost like a constitution. Ratification should be by Parliament rather than the Executive (essentially Cabinet).

2.6. The EU Ombudsman has recommended that negotiations should be much more open, including public access to draft texts after they have been tabled in the negotiations. The European Commission has not accepted all of these recommendations, but has been more open with its releases of text in the TransAtlantic Trade and Investment Partnership (TTIP) negotiations. It has been constrained by the still secretive US approach.

2.7. There is therefore an historic opportunity for New Zealand to propose to the EU that the negotiations be opened up in the ways recommended by the EU Ombudsman.

2.8. We urge MFAT and the Government to radically revise their approach to both content and process.

3. Goods trade

3.1. New Zealand has few operative tariffs affecting EU goods. We must ensure that there are strong and enforceable provisions for countervailing measures against dumping and subsidies. These should also apply on environmental grounds. For example if New Zealand were to develop an effective emissions trading scheme or carbon tax, we should be able to prevent imported goods undercutting locally produced ones because of lower standards in some EU states. We recognise that at present environmental dumping of this kind is unlikely because the EU has stronger carbon-reduction measures than New Zealand, but this may not always be true and other issues may arise for other areas of environmental protection.

3.2. We recognise the significant difficulties that will arise in negotiating increased (let alone free) agriculture access to the EU. New Zealanders should be given a realistic assessment of the possible outcomes at the outset rather than the excessively optimistic and misleading official view of the TPPA given to the public during most of the period of its negotiations.

3.3. The economic gains from goods trade are therefore likely to be very small.

4. Sanitary and Phytosanitary measures (SPS)

4.1. It is vital that New Zealand's border protections against unwanted pests and diseases be maintained. It should not be compromised by excessive pressure on border control processing times for narrow commercial reasons.

5. Technical Barriers to Trade (TBT)

5.1. These should not compromise health and safety, including public health measures and food safety. We are in particular concerned that labelling requirements should not discourage regulation of labelling for public health purposes (like cigarette plain packaging is being required to reduce smoking). Governments' right to regulate should not be undermined.

6. Investment

6.1. We strenuously oppose any provision for Investor-State Dispute Settlement (ISDS) as an unnecessary encroachment on sovereignty and giving excessive power to corporate interests. We can give detailed reasons for this and will do so on request. The tide of world opinion is against these provisions with Germany and France opposing them in the TTIP, and South Africa, India and Indonesia all extricating themselves from such agreements while Brazil has refused to accede to any.

6.2. The original justification for such processes was that some states have corrupt or otherwise unreliable or undeveloped justice systems, unable to deal fairly with investment disputes. Neither New Zealand nor the EU are such states. This justification therefore disappears.

6.3. We are aware that the EU is developing its own alternatives to the arbitration procedures which are in New Zealand's ISDS agreements including the proposed TPPA. The EU's proposals (the so-called Investment Court System or ICS) are a significant procedural improvement on the standard procedures including a standing court system with controls over conflicts of interest, precedent and appeal. However even these are rejected by large sections of EU society in the context of the TTIP negotiations including much of their judiciary. In November, the European Association of Judges (EAJ) published a statement on the proposal which rejected the need for ISDS even with these refinements, stating:[2]

> The EAJ does not see the necessity for such a court system. The judicial system of the European Union and its member states is well established and able to cope with claims of an investor in an effective, independent and fair way. The European Commission should promote the national systems for investor's claims instead of trying to impose on the Union and the member states a jurisdiction not bound outside the decisions both of the ECJ and the supreme courts of the member states.

6.4. Opposition to ISDS or ICS between the EU and New Zealand will be even more vehement because of the quality of the regulatory and judicial systems in both jurisdictions.

6.5. We would oppose any further restriction on New Zealand's right to regulate foreign investment. Instead, the negotiations should return increased policy space to future governments for this purpose.

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[2] See http://www.iaj-uim.org/iuw/wp-content/uploads/2015/11/EAJ-report-TIPP-Court-october.pdf

6.6. One aspect of this is to allow greater freedom to amend and extend the Overseas Investment Act and regulations under it. A second aspect is to roll back constraints on performance requirements for overseas investors. There is strong and increasing evidence that the quality of overseas investment in New Zealand is poor (Rosenberg, 2015 provides a summary). Performance requirements are one way to ensure New Zealand reaps benefits from this investment. For example the restrictions on performance requirements in Article 9.10 of the TPPA are excessive.

7. Services

7.1. There should be a clear and explicit exclusion for public services which leaves governments free to determine which areas of the economy and society should be in direct public control or ownership. The standard exclusion for "services supplied in the exercise of governmental authority" is defined as any service that is supplied neither on a commercial basis nor in competition with one or more service suppliers. Given the increased encroachment of private provision on public services, this definition is increasingly inadequate. For example all levels of public education are in competition with private providers, and the borderline between public and private is increasingly difficult to draw. Similar blurred lines result from the contracting out of public services in health and social security. The line should therefore be self-determined by governments.

7.2. Again, we are aware of similar strong concerns in New Zealand, European society and the European Parliament around these issues.

7.3. We would oppose any extension of commitments on private education. It makes regulation of the sector increasingly difficult by for example forbidding economic needs tests to prevent oversupply and excessive competition that puts stability of institutions and quality of provision at risk.

7.4. These are illustrations of the difficulties inherent in liberalisation of services: "barriers" to trade are frequently desirable regulation put in place for social, cultural, equity, environmental or economic development purposes. We do not believe that commercial interests (international trade) should be prioritised over these needs. It certainly has a place, but increasing international trade is not necessarily or always the most important objective for New Zealanders.

8. Financial services

8.1. We would be particularly concerned at any further liberalisation of financial services, and our concerns are even more intense when liberalisation is in tandem with ISDS which gives already powerful financial institutions such as banks the power to sue the government for regulatory actions.

8.2. The problems of the finance sector highlighted by the Global Financial Crisis (GFC) require more regulation rather than less, and any agreement such as this should focus on reining in the finance sector rather than further liberalisation.

8.3. Liberalisation of the finance sector, and particularly international financial liberalisation, is also a transmitter of increasing inequality. Some forms of finance may reduce inequality, but these tend to be ones such as access to credit by low-income households, which are less attractive for overseas investors. These findings have been demonstrated in a number of studies (for example, Furceri & Loungani, 2013; International Labour Office, 2013; Jaumotte, Lall, & Papageorgiou, 2013; Naceur & Zhang, 2016). International liberalisation also allows rapid contagion when financial crises strike, and financial and economic crises in themselves raise inequality and may negate economic benefits from increased goods trade. International agreements should be focused on finding ways to better control international finance rather than further deregulation (liberalisation).

8.4. In particular it is important that New Zealand regains and retains policy space to use capital and currency controls, and to manage the New Zealand dollar exchange rate. These policies should not only be reserved for times of crisis, but also to prevent the factors arising (such as large inward mobile capital flows) which can later lead to crises, to improve the effectiveness of monetary policy and to ensure the New Zealand dollar is not chronically overvalued as it has been for several years.

8.5. There is also an increasing body of research that suggests there can be “too much finance”, in the sense that too large a finance sector can reduce economic growth and increase instability as well as having negative social effects (Arcand, Berkes, & Panizza, 2012; Cecchetti & Kharroubi, 2012, 2015; Sahay et al., 2015).

8.6. Therefore it is inappropriate to be seeking increased international involvement in our financial system, making it easier for overseas financial corporations to offer services and risky financial products in New Zealand, and making it more difficult to

control the risks in those services. The priority should be better control of international financial systems.

8.7. We would also oppose any pressure to offshore financial services such as servers or call centres. There are security, privacy, financial stability and employment reasons to retain full regulatory control over these decisions in New Zealand.

9. Labour mobility

9.1. The recent case of maintenance workers brought in from China to work on rail rolling stock in inferior conditions and underpaid by New Zealand standards raises a number of issues. MBIE apparently took the view that they were not part of the New Zealand labour market and therefore not subject to New Zealand labour law. In addition there have for some time been very high net immigration levels raising unemployment and depressing wages. Some of this is driven by previous international agreements on student and working holiday visas.

9.2. We therefore have increasing concern at international agreements raising requirements or expectations for temporary entry for work of various kinds in New Zealand, with decreasing control over numbers, skills and working conditions.

9.3. Any person permitted to work in New Zealand under labour mobility provisions, including Cross-Border Services Mode 4, should be subject to collective agreements and employment law applying to other workers in the same workplace or industry.

10. Government Procurement

10.1. We are aware that the EU is a signatory to the Agreement on Government Procurement in the WTO, to which New Zealand recently acceded. We are very concerned that this has limited future New Zealand Governments' ability to assist local firms and to boycott goods from other countries on human rights grounds. We have never had an official response to our concerns that it would prevent or hamper New Zealand governments from placing responsible contracting requirements on suppliers, such as to pay a Living Wage and have above legal minimum health and safety standards.

10.2. We would therefore oppose any extension of government procurement commitments and call for clear protections for the use of government procurement for social purposes to raise employment, health, safety and environmental standards.

11. State-owned enterprises

11.1. The agreement should place no constraint on New Zealand's use of state owned entities for non-commercial objectives such as to improve work, social, cultural or environmental conditions, or as vehicles for economic or regional development.

11.2. Neither should it prevent their procurement practices from favouring local suppliers.

12. Intellectual Property

12.1. We would oppose any extension of copyright or patent terms. Given the current levels of intellectual property rights in New Zealand, any extension would be a further restriction on trade and innovation which raises prices for working people in New Zealand, and discourages many desirable forms of economic development which would otherwise be based on copying and enhancing the protected intellectual property.

12.2. In particular we would strenuously resist any actual or effective increase in the protection of medicines that would raise their price, restrict their availability or delay the entry of generic or biosimilar products.

13. Labour

13.1. The strongest Labour provision New Zealand has signed is that in the proposed TPPA. As labour law expert, Victoria University Professor Gordon Anderson said in a recent seminar, it is weak and ineffectual. It does not require adherence to international labour conventions, only to the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998). It does not require countries who are not party to important ILO conventions (such as the US) to join them. The minimum standards it mentions are a limited subset of the important ones. Little of the Chapter is enforceable and for the parts that are enforceable, the experience of our US colleagues, the AFL-CIO, with similar US Labour agreements is that it is impossible in practice to enforce. Workers and unions cannot require or trigger enforcement with respect to the actions of their own governments: it relies on other state parties.

13.2. The representations of the international union movement on these matters in the TPPA were largely ignored. The profound weakness of the Chapter stands in stark contrast to the great increases in powers given to investors and other corporate entities in the TPPA.

13.3. In addition, there is nothing to prevent labour conditions being the subject of challenge under the investment chapter, and in particular through ISDS. There are cases which provide precedent for this concern. We can provide references on request.

13.4. None of these serious faults should be repeated in future agreements.

13.5. New Zealand has breached its previous, much weaker, labour agreements associated with international commerce agreements, such as with Malaysia. The most egregious breach was in enacting the Employment Relations (Film Production Work) Amendment Act 2010, which stripped numerous labour rights from workers in the film and gaming industries for the express and publicly stated purpose of attracting investment and services. The New Zealand Government therefore has little credibility in this area.

13.6. We propose that if the proposed EU-NZ agreement proceeds, intensive international union participation should be invited in the development of effective labour provisions, including but not limited to a Labour chapter. In the present case this would involve the CTU and the European Trade Union Confederation (ETUC).

13.7. A Labour Chapter should include commitments to ratify and implement fully all ILO Core Conventions, as well as other up-to-date conventions. Breaches of such commitments should attract economic consequences. A monitoring mechanism involving the parties' social partners should be instituted and they should be able to initiate complaints.

13.8. The ETUC has called for 'social mainstreaming' of the whole of such agreements so that labour considerations are not only dealt-with in the labour chapter but in others (such as for government procurement) to include adherence to the relevant ILO Conventions and Recommendations. Similarly, they call for investor responsibilities to be included in investment chapters (including the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights). We support those calls.

14. Environment

14.1. Our concerns regarding standard environment chapters are similar to our discussion above of labour chapters. They are weak unenforceable and trumped by investor rights and the threat of challenge, particularly under ISDS. To create an

acceptable chapter requires intensive work including the participation of non-governmental environmental organisations.

15. Regulatory coherence

15.1. We are highly concerned at provisions under this heading or under ‘transparency’ provisions which entitle overseas suppliers and investors to be consulted over law and other rule or policy changes. This is especially true in an environment where consultation with New Zealanders has become more limited, time and resource constrained, and bodies set up for this purpose have been dismantled or populated with predominantly business representatives.

15.2. We are also concerned that cost-benefit analyses required in such processes are weighted towards identifiable costs to the detriment of unquantifiable but important social, cultural and environmental values.

15.3. In addition, many of the consultations made use of under these provisions are likely to be ones which are of high commercial interest to the suppliers or investors but which are sufficiently specialised that most New Zealanders will be unaware of opportunities for consultation or have little relevant expertise, or lack the time and resources to participate effectively. Despite those obstacles, the matters may be important to their well-being. These processes can therefore be very one-sided opportunities for commercial interests to dominate public policy making.

15.4. It is imperative that the right to regulate through our democratic institutions and processes is protected not just in theory but in practice. This includes preserving a role for the ‘social partners’ (unions and representatives of business) at EU, national and sectoral levels.

16. Exceptions

16.1. We are very concerned that current general exceptions for purposes such as health, safety and conservation of natural resources, usually imported from the GATT or GATS agreements or similarly phrased, carry high risks of being successfully challenged and so cannot be relied on. They do not clearly and unambiguously protect human, including labour, rights. New Zealand’s standard Treaty of Waitangi exception requires revising and strengthening. All should apply to the entire agreement, and all should to a much greater extent be self-defined and not subject to challenge by other states or investors.

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