

Submission to the Ministry of Foreign Affairs and Trade on the:

Re-development of the Trade and Labour Framework

Submitted by the New Zealand Council of Trade Unions Te Kauae Kaimahi
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This submission is made on behalf of the 32 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With over 300,000 members, the CTU is one of the largest democratic organisations in New Zealand.

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.

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1. Summary of Recommendations

The NZCTU recommends that:

- 1.1. The Government adopt a prescriptive approach in the revised Framework, clearly outlining (a) New Zealand's objectives regarding labour standards and rights when negotiating FTAs and (b) the desired outcomes of FTAs regarding labour standards and rights.
- 1.2. The revised Framework includes a provision that FTAs support and do not undermine Government's fulfilment of its Tiriti o Waitangi/Treaty of Waitangi obligations, with a particular view to the protection of Māori workers and the achievement of equity goals for Māori.
- 1.3. The revised Framework includes a provision that effective participation and integration of social partners and civil society on issues relating to labour standards and rights must be ensured during all phases of the negotiation, implementation, and monitoring of FTAs. This includes engaging with social partners prior to the opening of any trade talks with other nations.
- 1.4. That "engagement" is clearly and robustly defined and follows a clear set of steps. This definition should include the co-production of labour chapters with social partners and adequate government resourcing to enable social partner engagement.
- 1.5. Ratification and adherence to the ILO's fundamental conventions replace the *Declaration of Fundamental Principles and Rights at Work* (DFPRW) as the basis for New Zealand's Trade and Labour Framework. Although the DFPRW remains an important contextual document, the fundamental conventions provide a more comprehensive set of labour rights and standards and are legally binding if ratified. As such, they provide a stronger basis for the discussion of labour rights and standards in FTA negotiations as well as better accountability post-ratification.
- 1.6. The revised Framework includes a provision that any FTA to which New Zealand is party must include the objective that all Parties to the

agreement work towards ratifying the ILO's fundamental conventions without undue delay.

- 1.7. The revised Framework includes a provision that all FTAs to which New Zealand is party should include specific and binding steps and milestones towards the realisation of the ILO's Decent Work Agenda, as expressed through the ILO fundamental conventions and the strategic objectives of the *ILO Declaration on Social Justice for a Fair Globalisation* (2008) and the *ILO Centenary Declaration for the Future of Work* (2019).
- 1.8. That "decent work" is clearly and robustly defined in the revised Framework, and that the Future of Work Forum's definition of "good work" – agreed to by social partners in the Forum – provides an appropriate resource from which to develop this definition.
- 1.9. The revised Framework includes a non-derogation provision that includes, but also extends beyond, prohibiting derogation with the intent of encouraging trade and investment or attaining comparative advantages.
- 1.10. The revised Framework includes a provision that FTAs to which New Zealand is party must include strong, enforceable provisions addressing the issue of modern slavery.
- 1.11. The revised Framework includes a provision recognising the specific vulnerabilities of certain forms of labour, the specific difficulties faced by certain forms of labour in attaining decent work, and the resultant need for Parties to FTAs to implement and enforce labour standards and rights with a view to securing and promoting decent work for all in specific modes of labour.
- 1.12. The revised Framework includes a provision that non-labour chapters in FTAs to which New Zealand is party must not undermine or contradict the labour standards and rights outlined in the Labour Chapter, these matters being subject to the same enforceability provisions as we recommend for the Labour Chapter itself.

- 1.13. The revised Framework includes a provision that FTAs New Zealand is party to must provide for a periodical review of the impact of the Labour Chapter in consultation with the social partners, and that the impact-assessment process must be transparent, evidence-based, proportionate, independent, and participatory, with an eye to both short- and long-run impacts.
- 1.14. The revised Framework includes a provision that labour chapters in FTAs New Zealand is party to must include a formal dispute settlement process, whereby Parties have recourse to penalties or sanctions.
- 1.15. The revised Framework includes provisions that ensure that labour commitments in FTAs are enforceable in practice as well as law.
- 1.16. The revised Framework includes a provision that labour chapters in FTAs to which New Zealand is party must provide for an adequately resourced monitoring mechanism capable of reviewing and monitoring compliance with labour commitments in consultation with the social partners.

2. Introduction

- 2.1. The NZCTU welcomes the re-development of the Trade and Labour Framework. A re-developed Framework provides an opportunity to embed strong labour standards and rights in New Zealand's FTA negotiations and ensure that FTAs contribute to the development of a high-wage, high-productivity economy in which decent work is available to all. It is increasingly recognised in multilateral fora that fair and just labour standards and rights and the promotion of decent work are essential components of modern trade agreements.¹ In our view, embedding strong labour standards and rights in FTAs, and ensuring these standards and rights are enforceable, will be critical in helping New Zealand meet the challenges of the 21st century.

¹ See, e.g., G7, *G7 Trade Ministers' Communiqué* (2021), <https://www.mofa.go.jp/mofaj/files/100251122.pdf>

2.2. Below, we discuss what the CTU thinks should be included in a re-developed Framework, addressing the five specific questions asked in the consultation paper.

3. What should be our approach to a Trade and Labour Framework?

3.1. The existing Framework provides a high-level, principles-based approach regarding labour standards and rights in FTAs. This gives New Zealand trade negotiators a high degree of flexibility in negotiations. In the consultation paper, MFAT notes that this flexibility is advantageous given New Zealand's relative lack of leverage as a negotiating party.

3.2. The consultation paper asks if the revised Framework should remain a principles-based approach, or if it should take a more prescriptive approach in which required specific desired outcomes are outlined.

3.3. While recognising the benefits of maintaining some flexibility as a negotiating party with limited leverage, we recommend that a more prescriptive approach is adopted. We recommend that this prescriptive approach outline (a) New Zealand's objectives regarding labour standards and rights when negotiating FTAs and (b) the desired outcomes of FTAs. This is for two reasons:

3.3.1. First, the existing approach is flexible to the point of irrelevance. As the Trade for All Advisory Board (TFAAB) notes in its 2019 report, the existing "Framework appears to be being used more as a framing device rather than as something that is referred back in order to define specific negotiating objectives".² However, because the existing Framework provides only high-level principles as guidance, it is an insufficient guide on (a) New Zealand's aspirations for labour standards, (b) bottom lines for New Zealand that must not be breached, (c) specific commitments that should be sought in the negotiating process, and (d) desired labour standards and rights outcomes for FTAs. A prescriptive Framework would frame negotiations more

² TFAAB, *Report of the TFAAB* (2019), p. 57, <https://www.mfat.govt.nz/assets/Trade-General/Trade-policy/Trade-for-All-report.pdf>

robustly and would provide a resource to which negotiators can refer to in defining specific negotiating objectives and assessing what is acceptable.

- 3.3.2. Second, a prescriptive Framework would contribute to making FTA negotiations more transparent and enabling informed engagement from civil society actors and the wider public. New Zealand has a history of opaque trade negotiations. A lack of transparency and barriers to public engagement are highlighted in the TFAAB's 2019 report as significant issues.³ Because the existing Framework is so vague, it provides civil society actors and the wider public little in the way of what New Zealand's priorities and bottom lines are in trade negotiations. While by no means a panacea, a prescriptive Framework would go some way to addressing this problem and, by doing so, help enable better engagement and inclusion, both of which are key recommendations of the TFAAB report.
- 3.4. We recommend that the revised Framework includes a provision that FTAs support and do not undermine Government's fulfilment of its Tiriti o Waitangi/Treaty of Waitangi obligations, with a particular view to the protection of Māori workers and the achievement of equity goals for Māori.
- 3.5. We further recommend that the revised Framework includes a provision that effective participation and integration of social partners and civil society on issues relating to labour standards and rights must be ensured during all phases of the negotiation, implementation, and monitoring of FTAs. This includes engaging with social partners prior to the opening of any trade talks with other nations.
 - 3.5.1. This includes clearly and robustly defining what "engagement" means. We recommend that such a definition sets out clear expectations that labour chapters will be co-developed, from the outset, with social partners, and that adequate government resourcing is provided to enable effective social partner engagement.

³ TFAAB, *Report of the TFAAB*, p. 20.

3.5.2. We further recommend that this resourcing includes the appointment of, and provision of resourcing for, special labour envoys on trade. Government has previously appointed industry representatives as trade envoys. For example, in 2019, a representative of the agricultural sector was appointed Special Agricultural Trade Envoy, charged with “engaging with farmer groups and other agriculture sector stakeholders to build support for our free trade agreement negotiations . . . [and] advocating for New Zealand’s agriculture trade interests from the perspective of a practicing farmer and identifying opportunities for New Zealand to commercialise its agricultural expertise offshore”.⁴

4. What international instruments or principles should be reflected in a Trade and Labour Framework?

4.1. In the existing Framework, the *ILO Declaration of Fundamental Principles and Rights at Work* (DFPRW), adopted in 1998 and amended in 2022, is cited as the “appropriate basis for the discussion of labour standards within the framework of trade agreements”.

4.2. We recommend that although the DFPRW remains an important contextual document, the standards required are replaced by ratification and adherence to the ILO’s fundamental conventions.

4.2.1. The fundamental conventions offer (a) a more comprehensive set of labour standards and rights than the DFPRW and (b) are legally binding if ratified. As such, they provide (a) a stronger basis for the discussion of labour standards and rights and (b) a set of concrete minimum labour standards that Parties to agreements are expected to adhere to.

4.2.2. New Zealand has not yet ratified three of the fundamental conventions: C087 – Freedom of Association and the Protection of the Right to Organise; C138 – Minimum Age Convention; and C187 – Promotional Framework for Occupational Safety. This makes us an outlier in the

⁴ See <https://www.beehive.govt.nz/release/new-agricultural-trade-envoy-appointed-0>

developed world.⁵ If the CTU's recommendation were adopted, this would compel New Zealand to move towards ratification of these fundamental conventions, bringing us in line with other developed democracies. This commitment has already been made by New Zealand in signing the EU–NZ FTA.⁶

4.3. In addition, we recommend that the revised Framework includes a provision that labour chapters in FTAs to which New Zealand is party include the objective that Parties must work towards ratifying the ILO's fundamental conventions and their protocols without undue delay.

4.3.1. We recommend that appropriate wording for this provision is provided by the *Model Labour Chapter for EU Trade Agreements*, authored by Stoll et al (2020). Namely: "Each Party, to the extent it has not yet done so, shall ratify, without undue delay, the fundamental ILO conventions and their protocols. The Parties shall regularly exchange information on their respective situation and advancements as regards the ratification of these as well as of priority and other ILO conventions that are classified as up to date by the ILO and their protocols".⁷

4.4. The consultation paper asks if other multilateral instruments should also be included in a revised Framework, citing the *ILO Declaration on Social Justice for a Fair Globalisation* (2008) and the *ILO Centenary Declaration for the Future of Work* (2019) as examples. The consultation paper asks for specific recommendations as to what principles or commitments from these Declarations should be acknowledged in a revised Framework.

⁵ New Zealand is the only developed country, except for the US, not to have ratified C087; the only developed country, except for Australia and the US, not to have ratified C138; and the only developed country, except for Australia, Ireland, Israel, Italy, Netherlands, Switzerland, and the US, not to have ratified C187.

⁶ The recently concluded NZ–EU FTA Labour Chapter states that "Each party shall make continued and sustained efforts to ratify the fundamental ILO conventions if they have not yet done so" (Article X.3, paragraph 5). This effectively compels New Zealand to move towards ratification of C087, C138, and C187.

⁷ Peter-Tobias Stoll, Henner Gött, & Patrick Abel, *Model Chapter for European Union Trade Agreements* (Friedrich Ebert Stiftung, 2020), p. 17, <https://library.fes.de/pdf-files/bueros/singapur/16089.pdf>

4.5. The CTU recommends that the revised Framework includes a provision that all FTAs to which New Zealand is a party must include specific and binding steps and milestones towards the realisation of the ILO's Decent Work Agenda, as expressed through the ILO fundamental conventions, the *ILO Declaration on Social Justice for a Fair Globalisation*, in its four strategic objectives, and the *ILO Centenary Declaration for the Future of Work*, in its three strategic objectives.

4.5.1. The *ILO Declaration on Social Justice for a Fair Globalisation* calls upon Members of the ILO "to place full and productive employment and decent work at the centre of economic and social policies" by pursuing "four equally important strategic objectives".⁸ These objectives are: (1) Promoting employment by creating a sustainable institutional and economic environment; (2) Developing and enhancing measures of social protection; (3) Promoting social dialogue and tripartism; (4) Respecting, promoting and realizing the fundamental principles and rights at work. As noted in the Declaration, "The four strategic objectives are inseparable, interrelated and mutually supportive. The failure to promote any one of them would harm progress towards the others". A further important contextual point is that this Declaration affirms that "the importance of the employment relationship should be recognized as a means of providing legal protection to workers".

4.5.2. The *ILO Centenary Declaration for the Future of Work* calls upon Members of the ILO to develop a "human-centred approach to the future of work" by pursuing three strategic objectives.⁹ These objectives are: (1) Strengthening the capacities of all people to benefit from the opportunities of a changing world of work; (2) Strengthening the institutions of work to ensure adequate protection of all workers; (3) Promoting sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.

⁸ ILO, *ILO Declaration on Social Justice for a Fair Globalization* (2008), p. 9, https://www.oitcinterfor.org/sites/default/files/edit/docref/globaliz_0.pdf

⁹ ILO, *ILO Centenary Declaration for the Future of Work* (2019), pp. 6-7, https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_711674.pdf

4.6. We recommend that the revised Framework includes a clear and robust definition of what constitutes “decent work” and that the Future of Work Forum’s definition of “good work” – agreed to by social partners in the Forum – provides an appropriate resource from which to develop this definition. The Future of Work Forum’s definition of good work is expected to be finalised in early 2023.

4.6.1. Both above-cited ILO Declarations are illustrations of the ILO’s “Decent Work Agenda”. The ILO describes “decent work” as “opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and human dignity”.¹⁰

4.6.2. In the CTU’s view, this definition would be strengthened by drawing on the definition of “good work” that was agreed to by social partners in the Future of Work Forum. This definition adapts and extends the ILO’s definition to the New Zealand context.

4.6.3. The CTU defines good work as “work (mahi) that has a lasting positive impact on the worker, the employer, and the wider community. It is work that enhances the mana of workers, affords good pay and conditions, and where both employers and employees are treated with respect and dignity. Good work must be the sum of the aspirations of tangata whenua and tauwi in their working lives”. The CTU further identifies eight core elements of what constitutes good work: (1) lifelong learning and mana āheinga; (2) fair wages and economic security; (3) free from worker exploitation; (4) worker voice; (5) health and safety and wellbeing; (6) meaningful and fulfilling; (7) productive; and (8) environmentally sustainable.¹¹

¹⁰ ILO, “Measuring Decent Work with Statistical Indicators”, *Working Paper No. 2* (2002), p. 2, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/publication/wcms_079089.pdf

¹¹ See *CTU Definition of Good Work* (2022), <https://www.mbie.govt.nz/dmsdocument/23304-ctu-definition-of-good-work>

5. What elements or principles in the existing (2001) Trade and Labour Framework should be included in the redeveloped Trade and Labour Framework?

- 5.1. If the DFPRW were to be kept as the basis for New Zealand's Trade and Labour Framework, we recommend that it is updated to include the fifth principle of the DFPRW – “a safe and healthy working environment”. The 1998 Declaration was amended at the 2022 International Labour Conference to include this fifth principle. Including this fifth principle would bring New Zealand into line with international standards here.
- 5.2. To be clear, this is not the CTU's preferred recommendation. Our preferred recommendation, as outlined above, is that although the DFPRW remains an important contextual document, the ILO's fundamental conventions, the *ILO Declaration on Social Justice for a Fair Globalisation*, and the *ILO Centenary Declaration for the Future of Work* provide a stronger basis for New Zealand's Trade and Labour Framework.
- 5.3. We support the inclusion of a non-derogation provision in the revised Framework. New Zealand's FTAs should prohibit Parties from deliberately undermining their labour standards and rights to encourage trade and investment or attain a comparative advantage in terms of labour costs. However, we recommend that this non-derogation provision extends beyond prohibiting only derogation with the intent of encouraging trade and investment or attaining a comparative advantage. As Stoll et al note, focusing on “a specific regulatory intent implies [...] that derogating measures taken with other intents remain permissible”.¹² In our view, any derogation from Parties' obligations under labour chapters should be prohibited, regardless of intent.
 - 5.3.1. We recommend that the wording of Article X.4 in the *Model Labour Chapter for EU Trade Agreements* is consulted in the development of this provision.

¹² Stoll et al., *Model Chapter for European Union Trade Agreements*, p. 10.

6. What new elements or principles should be included in a Trade and Labour Framework?

6.1. Addressing modern slavery.

6.1.1. Practices of modern slavery, defined by the ILO as “situations of exploitation that a person cannot refuse or cannot leave because of threats, violence, deception, abuse of power or other forms of coercion”, are widespread. The ILO estimates that in 2021, 49.6 million people were in conditions of modern slavery.¹³ The ILO’s current ambition is to end modern slavery by 2030.

6.1.2. MBIE has provided advice to Government that addressing modern slavery requires an “all-of-government approach”. Addressing modern slavery was also identified as a priority by the TFAAB in its 2019 report.¹⁴ The Government’s 2020 plan of action to combat modern slavery outlines a commitment to preventing modern slavery, protecting victims of modern slavery, and ensuring enforcement tools are adequate to disrupt and prosecute businesses and individuals engaged in practices of modern slavery.¹⁵

6.1.3. A revised Trade and Labour Framework could contribute to these objectives by including a provision addressing modern slavery. We therefore strongly support inclusion of the principle that “Aotearoa New Zealand’s FTAs should seek to include provisions addressing the issue of modern slavery” in the revised Framework, as suggested in the consultation document.

6.1.4. We recommend that particular emphasis is placed on addressing the prevalence of forced labour, human trafficking, and slavery-like practices across supply chains. To this end, the revised Framework

¹³ ILO, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (2022), p. 2, https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_854733.pdf

¹⁴ TFAAB, *Report of the TFAAB*, p. 58.

¹⁵ New Zealand Government, *Combatting Modern Forms of Slavery: Plan of Action against Forced Labour, People Trafficking and Slavery* (2020), <https://www.mbie.govt.nz/dmsdocument/13568-combatting-modern-forms-of-slavery-plan-of-action-against-forced-labour-people-trafficking-slavery>

should include the objective of eliminating modern slavery from supply chains.

6.1.5. We further recommend that stronger wording is used than that suggested in the consultation document – i.e., “Aotearoa New Zealand’s FTAs must include strong and enforceable provisions addressing the issue of modern slavery, with special attention given to the prevalence of modern slavery in supply chains”. In our view, the revised Framework should clearly set out that this is a bottom line for New Zealand in FTA negotiations.

6.1.6. MBIE defines modern slavery as “severe exploitation that a person cannot leave due to threats, violence or deception. It includes forced labour, debt bondage, forced marriage, slavery and human trafficking”.¹⁶ We support this definition and recommend that further definitional work is done to clarify exactly what each of these terms mean.

6.1.7. We recommend that the list of international legal instruments summarised by the ILO in its 2022 *Global Estimates of Modern Slavery* are consulted in the development of the addressing modern slavery provision.¹⁷ To this end, it should be noted that New Zealand has ratified the ILO Forced Labour Conventions (C029 and C105) and the Protocol of 2014 to the Forced Labour Convention (P029). These instruments commit Members who have ratified them to actively suppress forced or compulsory labour. A fuller list of the multilateral instruments that

¹⁶ See <https://www.mbie.govt.nz/business-and-employment/employment-and-skills/plan-of-action-against-forced-labour-people-trafficking-and-slavery/modern-slavery/>

¹⁷ These are: the ILO Forced Labour Conventions C029 and C105; the Worst Forms of Child Labour Convention, 1999 (C182); the Protocol of 2014 to the Forced Labour Convention, 1930; the Forced Labour (Supplementary Measures) Recommendation, 2014 (R203); the United Nations 1956 Convention on Slavery and Slavery-like Practices; the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons (2000) supplementing the UN Convention against Transnational Crime; the UN Convention on the Rights of the Child; and the UN Convention on the Elimination of all Forms of Discrimination Against Women. See ILO, *Global Estimates of Modern Slavery*, p. 6, endnote 6.

New Zealand has ratified is provided in the *Combatting Modern Forms of Slavery Report*.¹⁸

6.2. Protecting vulnerable workers.

6.2.1. It is increasingly well recognised that certain modes of labour are particularly vulnerable to exploitation and do not provide access to decent work.¹⁹ These modes of labour include contract workers, platform workers, labour hire, temp workers, domestic workers, migrant workers, and posted workers.

6.2.2. We therefore recommend the revised Framework include a provision recognising the specific vulnerabilities of certain forms of labour and the specific difficulties faced by certain forms of labour in attaining decent work. Concomitantly, we recommend the revised Framework include a provision outlining a requirement for Parties to FTAs to implement and enforce labour standards and rights with a view to securing and promoting decent work for all in specific modes of labour.

6.2.3. Migrant workers are a specific case in which FTAs could play an influential protective role. Labour chapters could include provisions ensuring migrants have accurate information, are informed of their rights, have access to representation (including union representation), and have protection from unscrupulous agents who may extort high fees from migrants and misrepresent the situation migrants will find themselves in when they arrive in New Zealand.

6.2.4. Posted workers are another specific case in which FTAs could play an influential protective role. Posted workers are becoming increasingly common and New Zealand has inadequate protections for them. While their rights and working conditions will be mainly defined in domestic law and employment agreements, FTAs should contain

¹⁸ New Zealand Government, *Combatting Modern Forms of Slavery*, p. 7.

¹⁹ See, e.g., Tripartite Working Group on Better Protections for Contractors, *Report to the Minister for Workplace Relations and Safety* (2021), <https://www.mbie.govt.nz/assets/tripartite-working-group-on-better-protections-for-contractors-december-2021.pdf>; and MBIE, “Better Protections for Vulnerable Contractors”, <https://www.mbie.govt.nz/have-your-say/better-protections-for-contractors/>

principles underpinning posted workers' rights and conditions. These could include, for example, requirements on all jurisdictions to have laws protecting posted workers, provision of assistance (such as through labour inspectors), guarantees of access to representation, and principles requiring that the use of posted workers should not undermine employment, wages, and conditions of local workers.

6.3. Consistency of labour standards and rights across all FTA chapters.

6.3.1. In the past, New Zealand has negotiated and ratified FTAs in which labour standards and rights outlined in the Labour Chapter may be undermined by other chapters. A prime example was the Investor-State Dispute Settlement mechanism outlined in Chapter 9 of the TPPA, which enabled investors to challenge laws and regulations of governments if they are perceived to undermine their commercial interests.²⁰

6.3.2. We recommend that the revised Framework includes a provision that non-labour chapters must not undermine or contradict the labour standards and rights outlined in labour-specific chapters, these matters being subject to the same enforceability provisions as we recommend for the Labour Chapter itself. In our view, this is necessary to prevent different chapters pulling in different directions on the issue of labour standards and rights.

6.4. Periodical impact assessment of labour chapters.

6.4.1. To ensure that labour chapters in FTAs New Zealand is party to are consistent with the recommended objectives outlined above, robust impact assessment processes are required.

6.4.2. We recommend that the revised Framework include a provision that FTAs New Zealand is party to must provide for a periodical review of the impact of the Labour Chapter in consultation with the social partners, and that the impact assessment process must be

²⁰ The New Zealand Government ratified the TPPA in 2017. The withdrawal of the United States from the TPPA led to its re-development as the CPTPP.

transparent, evidence-based, proportionate, independent, and participatory, with an eye to both short- and long-run impacts.²¹

7. What should New Zealand's approach to the enforceability of labour commitments be in a Trade and Labour Framework?

- 7.1. The current Trade and Labour Framework states that “dialogue and consensus will be preferred to penalties or sanctions as a way of making progress on labour standards issues. The Government’s aim will be to focus discussion of labour issues and provide a forum for action and progress to be made, by consensus and not coercion, in a bilateral context”.
- 7.2. Although we agree that dialogue and consensus is preferable, in theory and where possible, to penalties or sanctions, dialogue is likely to be drawn out and inconclusive without the possibility of penalties and sanctions. Penalties and sanctions play an important role in forcing Parties to come to the table; they therefore increase the likelihood that progress on labour standards and rights will actually be made via dialogue and consensus.
- 7.3. New Zealand now has two decades of experience with unenforceable commitments in labour provisions, and this has allowed clear breaches of New Zealand’s commitments to occur – the clearest and most egregious being the amendment to the Employment Relations Act under pressure from Warner Brothers in October 2010 (the “Hobbit Law”). This law change had the effect of stripping employees in the film and video-game industry of their labour rights in order to gain an international trade and investment advantage, clearly expressed as such by Ministers at the time.
- 7.4. The unenforceable model has been proved ineffectual and it is therefore time to strengthen our approach to the enforceability of labour commitments.
- 7.5. We have four specific recommendations to strengthen the enforceability of labour commitments in the revised Framework.

²¹ See Stoll et al., *Model Chapter for European Union Trade Agreements*, p. 44.

- 7.6. First, we recommend that the revised Framework include a provision that labour chapters in FTAs New Zealand is party to must include a formal dispute settlement process whereby Parties have recourse to penalties or sanctions in a reasonable time frame.
- 7.7. Second, as noted in paragraph 3.5, effective participation and integration of social partners and civil society on issues relating to labour standards and rights must be ensured during all phases of the negotiation, implementation, and monitoring of FTAs. This includes engaging with social partners prior to the opening of any trade talks with other nations.
- 7.8. Third, labour commitments should be enforceable in practice – i.e., have clear mechanisms through which social partners and civil society actors can identify and report breaches to labour standards officers, participate in proceedings, and receive sufficient and timely information on progress in their investigation; evidentiary standards for proving that a breach has been made that are feasible to meet; a clear dispute-settlement mechanism through which breaches can be resolved or ruled upon in a simple and timely way; and adequate resourcing to enable non-state actors to identify breaches of labour chapters, make complaints, and engage in the process of dispute resolution and enforcement. We note that, to this end, it is also necessary to strengthen the capacity of the Labour Inspectorate to ensure compliance through monitoring and enforcement mechanisms.
- 7.8.1. We make this recommendation in the light of the experience of US-model labour provisions (such as in the CPTPP). The weaknesses of the US model have been well documented.²² We obviously have no experience yet of the EU–NZ FTA enforcement mechanism. Although it is a significant step forward to have enforceability, the agreement is

²² For example: ITUC, “Fears Over Trans-Pacific Partnership Confirmed” (2015), <https://www.ituc-csi.org/fears-over-trans-pacific> and the model labour chapter linked from there; Stoll et al., *Model Chapter for European Union Trade Agreements*; CTU, “Submission on the Transpacific Partnership Agreement” (2016), section 16 and appendix, <https://union.org.nz/160324-nzctu-submission-on-the-tppa>; Avalon Kent, “Set Up to Fail: Limitations of Labour Disputes under FTAs Exposed by the CAFTA-DR Labour Dispute” (2017), available upon request from the NZCTU.

light on detail, and we have concerns that it may be as difficult to use as the US model.

7.8.2. We have discussed these concerns and alternatives with officials over several years, including an intensive roundtable in 2017. This submission is not the place to go into detail, but we can refer officials to documentation and are available to discuss the matters further as the new Framework develops, and in the case of each FTA.

7.9. Fourth, and complementary to the above recommendations, FTAs should provide for an adequately resourced monitoring mechanism capable of regularly reviewing and frequently monitoring compliance with labour commitments in relevant agreements, in consultation with the social partners.

8. Conclusion

8.1. Embedding strong labour standards and rights in New Zealand's FTA negotiations is crucial to ensuring that future trade agreements contribute to the development of a high-wage, high-productivity economy in which decent work is available to all. Implementing the recommendations made in this submission will help contribute to this goal and ensure that the future is a bright one for all workers.

8.2. The CTU thanks the Ministry of Foreign Affairs and Trade and the Ministry of Business, Innovation and Employment for the opportunity to engage with this work. We look forward to further engaging on the development of the revised Trade and Labour Framework.