



**Submission to the Foreign Affairs, Defence and
Trade Select Committee Regarding the
International Treaty Examination of the Trans
Pacific Partnership Agreement (TPPA)**

11 March 2016

Introduction

1. The New Zealand Human Rights Commission ("Commission") is an independent Crown Entity pursuant to the Crown Entities Act 2004. It derives its statutory mandate from the Human Rights Act 1993 ("HRA"). The long title to the HRA states that the legislation is intended to provide better protection of human rights in New Zealand in general accordance with United Nations human rights Covenants and Conventions.
2. The Commission welcomes the opportunity to provide a submission to the Foreign Affairs, Defence and Trade Select Committee ('the Committee') in relation to the international treaty examination of the Trans Pacific Partnership Agreement ('TPPA').
3. The Commission's submission is confined to the following matters:
 - a. The importance of transparency and public participation in the negotiation and implementation of trade agreements.
 - b. The requirement for States to maintain their ability to meet human rights obligations when pursuing business related policy objectives with other states or business enterprises via treaty agreements. This includes the ability to demonstrate, via a human rights impact analysis or similar, that relevant human rights obligations and requirements have been specifically considered during the negotiation of the agreement and appropriately provided for under the terms of the agreement.
 - c. Concerns about the proposed investor dispute provisions.

4. The Commission's recommendations can be summarised as follows and are set out in more detail later in this submission:
- a. **That the Select Committee recommend that the New Zealand Government develop a Trade Strategy that compels a high level of transparency and participation in future trade negotiations.**
 - b. **That the Select Committee ensure that there has been, or will be, a full and thorough analysis of the detailed TPPA provisions in relation to all domestic and international human rights obligations, including human rights obligations arising from the partnership with tangata whenua in the Treaty of Waitangi. This should identify any potential areas of inconsistency or concern. The analysis should be publicly available.**
 - c. **That the proposed TPPA Dispute Resolution provisions be replaced with a process that provides recourse to a high quality, independent, international commercial court operating openly and transparently under an agreed procedure and legal framework.**

Transparency and Participation

5. Transparency and participation are cornerstones of the democratic process. In order to maintain the trust and confidence of the community it is essential that deliberations and decisions about core matters of public interest take place in a transparent manner. Inadequate or piecemeal approaches to provision of information and lack of participation can breed distrust and disenfranchisement.
6. MFAT's National Interest Analysis states that the "consultation process has been amongst the most extensive a New Zealand Government has taken on any trade negotiation". The Commission has no reason to doubt that claim. However, the New Zealand process does not appear to have been as transparent as that undertaken, for example, by the United States. Nor is it as transparent as the proposed negotiation process for the EU NZ Free Trade

Agreement. While the past cannot be undone, it is important that the relevant agencies and officials take notice and make a commitment to further improve the transparency of future trade negotiation processes. Both the US and EU provide disclosure drafts for consultation. Unnecessary secrecy leads to understandable distrust and suspicion.

7. The United States describes its consultation process on the TPP as follows¹:

"The Obama Administration has taken unprecedented steps to increase transparency and diversify the voices involved in America's trade policy. Those steps have resulted in more public dialogue and outreach on trade agreements like the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (T-TIP) than on any other free trade agreements in history."

The steps the United States have taken to increase transparency are more fully set out in *Appendix 1*.

8. By way of another positive example, the Commission notes the pre-negotiation public consultation process recently undertaken by MFAT in relation to the proposed free trade agreement negotiations between New Zealand and the European Union. A copy of the Commission's submission in this respect is *attached as Appendix 2*. That submission endorses the European Commission's "Trade for All" strategy launched in late 2015. This sets out a new strategy and approach to ensure that trade policy becomes more effective and transparent and that it protects the values of the participating parties as well as their interests. This development is based on a belief that open markets do not require compromise in relation to core principles like human rights and transparency. As part of this strategy, in the interests of openness, there is a commitment to publish key negotiating texts from all trade negotiations.

9. **The Commission urges the Select Committee to recommend that the New Zealand Government develop a Trade Strategy that compels a high level of transparency and participation in future trade negotiations.**

¹ <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/january/fact-sheet-transparency-and-obama>

Upholding Human Rights Obligations

10. New Zealand is a signatory to numerous core international human right conventions. These include the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In the context of free trade agreements political, civil, social, economic and cultural rights may all be affected in both a positive and negative manner.
11. Legislation, including the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 also obligate the government to protect, promote and respect certain human rights. International treaties must not fetter or interfere with the government's ability to fulfil these obligations.
12. To be sure that this is the case the Commission would expect there to be clear evidence that the relevant human rights obligations have been identified and specifically considered during the negotiation and drafting of the agreement. This is a core part of the EU Trade for All strategy. Likewise, the Commission would expect that any areas of potential concern or inconsistency have been highlighted and appropriately addressed during the process. The Commission is not aware of any comprehensive human rights analysis of this nature having been undertaken. We acknowledge that the social and cultural effects analysis in the National Impact analysis could be construed as a partial analysis of the human rights impact but this does not go far enough to give the level of assurance required.
13. The Human Rights Analysis at paragraph 7.2.5 of the National Impact Analysis is too narrow. The assurance the Select Committee should be receiving is that: "the TPP includes no inconsistencies with New Zealand's international human rights obligations and no inconsistencies with the Human Rights Act 1993 or the New Zealand Bill of Rights Act 1990. Its implementation would have no effect on human rights in New Zealand." If there is likely to be any appreciable effect on human rights in New Zealand, positive or negative, this should be made clear.
14. If a human rights impact analysis has not been undertaken, it should be in the development of the proposed legislation. In that regard although New Zealand has a longstanding commitment to the development of international human

rights standards, it is less consistent in fully incorporating those standards in the development of legislation and policy. Human rights considerations are generally not at the heart of public policy decision making. New Zealand has no overarching cross Government strategy to ensure that human rights are known and understood by all duty bearers and rights holders (in other words Ministers and other members of Parliament and officials), or that a human rights approach to legislative and policy development is routinely applied by all Government departments.

15. The New Zealand Cabinet Manual expressly requires Ministers to advise the Cabinet of any “international obligations” affected by proposed legislation (Section 7.60 of the Cabinet Manual, Cabinet Office, 2008). However, the Commission’s engagement in the legislative process has revealed that in some cases this requirement appears to be overlooked and there can be little evidence of a transparent and robust assessment of New Zealand’s international human rights obligations in the development of legislation. In the case of any legislation to implement the TPP such an assessment is essential.
16. The United Nations Guiding Principles on Business and Human Rights (“UNGPs”) have been endorsed by New Zealand. These principles, also known as “the Ruggie principles” are intended to enhance standards and practices with regard to business and human rights for the benefit of individuals and communities. They recognise the specialised role of businesses enterprises within society as well as State obligations to protect, respect and fulfil human rights obligations and fundamental freedoms. The principles also require rights and obligations to be matched to appropriate and effective remedies when a breach occurs.
17. UNGP Principle 9 requires states to ensure that trade and investment obligations do not constrain their ability to meet human rights obligations and declares:

States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other states or business enterprises, for instance through investment treaties or contracts”

18. The Commentary to this Principle states:

'Economic agreements concluded by States, either with other States or with business enterprises – such as bilateral investment treaties, free trade agreements or contracts for investment projects – create economic opportunities for States. But they can also affect the domestic policy space of Governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.'

19. This is particularly important in the New Zealand context with regard to the Treaty of Waitangi. The community requires confidence that the full implications of any trade agreement vis a vis human rights obligations generally, and the Treaty specifically, have been fully considered and appropriately addressed. Bare assertions that this is the case are not sufficient. Nor are generally worded 'savings provisions' of uncertain application or force.

20. **The Commission recommends that the Select Committee ensure that there has been, or will be, a full and thorough analysis of the detailed TPPA provisions in relation to all domestic and international human rights obligations, including human rights obligations arising from the partnership with tangata whenua in the Treaty of Waitangi. This should identify any potential areas of inconsistency or concern. The analysis should be publicly available. The Select Committee should ask for an assurance that the TPP includes no inconsistencies with New Zealand's international human rights obligations and no inconsistencies with the Human Rights Act 1993 or the New Zealand Bill of Rights Act 1990. The assurance should confirm that the implementation would have no appreciable effect on human rights in New Zealand. If there is an effect on human rights in New Zealand, positive or negative, it should be made clear and the analysis made public.**

Investor Dispute Provisions

21. The Commission notes that the TPPA provides for the establishment of panels to determine investor disputes in accordance with Chapter 28 of the agreement. There does not appear to be any requirement for the proceedings to be conducted in public nor for broader public interests to be taken into account during any deliberations.
22. The 'Trade for All' strategy referred to above includes the following commitment:

'EU bilateral agreements will begin the transformation of the old investor-state dispute settlement into a public Investment Court System composed of a tribunal of first instance and Appeal Tribunal operating like traditional Courts. There will be a clear code of conduct to avoid conflicts of interest and independents judges with high technical and legal qualifications comparable to those required for members of permanent international courts, such as the International Court of Justice and the WTP Appellate Body'
23. On 2 June 2015 a number of United Nations Special Rapporteurs and Independent Experts issued a statement on the secrecy surrounding the negotiation of free trade agreements and the potential adverse impact of these agreements on human rights. This group of experts have tended to favour a binding human rights and business treaty such as that currently being promoted by Ecuador and South Africa as the primary solution to these concerns.
24. Professor John Ruggie, who drafted the UN Guiding Principles on Business and Human Rights, is another UN Expert who shares these concerns. He has described the UNGPs as the "end of the beginning". By that he means that States are going to have to develop mechanisms to deal with the impunity of corporations and other human rights concerns. However, he sees this as a process of developing fit for purpose mechanisms designed for particular problems.
25. One of the most concerning areas for human rights experts are the Investor State Dispute Resolution processes found in most current free trade agreements. Those concerns have recently been summarised well by the Business and Human Rights Resource Centre:

"There has been much concern over the chilling effect these international trade agreements have on human rights policy since they allow investors to bring claims against states in ISDS when a governmental measure negatively impacts the value of the investment, or the investor feels they were treated unfairly. These claims can arise when, for example, a state legislates to protect public health, such as banning pollutants, or to improve labour standards.

The UN Guiding Principles on Business and Human Rights note that "the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so." In June 2015, various UN Rapporteurs on human rights issued a statement about their concern over the adverse impact of investment agreements on human rights. They noted that the experience of ISDS "demonstrates that the regulatory function of many States and their ability to legislate in the public interest have been put at risk."

States do not want to be the recipients of investor claims. It is expensive and may deter future investment. The outcomes of these claims are unpredictable. This leads to the situation whereby decisions of governments to regulate for human rights are influenced by threat of an investor claim. A striking example was when the Swedish nuclear company, Vattenfall, took a case against Germany for pollution measures, and the German government settled and agreed to lower pollution controls rather than continue with ISDS. There are several factors that contribute to the regulatory chill of human rights policy.

No doctrine of precedence

There is no doctrine of precedence in ISDS. Arbitrators do not have to rely on previous cases when making their decision. This leads to inconsistent outcomes on cases with similar facts, and uncertainty of what conduct investment agreements requires of States. This may lead states to avoid regulations that could be a possible claim under ISDS.

Limited human rights defences

Human rights and public policy considerations are generally regarded as outside the scope of investment arbitration. ISDS claims are treated primarily as commercial disputes. This is problematic when the governmental action at

issue was carried out to protect a public interest. If the tribunal declares that it does not have jurisdiction to hear human rights law, then this limits the government's the ability to defend its actions.

Lack of public policy expertise

The denial of jurisdiction to address human rights is linked to issue that the arbitrators sitting on these tribunals are often inexperienced in human rights or environmental law. Parties may choose arbitrators in cases but the World Bank's International Centre for Settlement of Investment Disputes, for example, requires that arbitrators have competence in fields of law, commerce, industry and finance. Arbitrators who have the necessary level of expertise in these areas may not be well versed in public policy and be able to determine whether a government has acted appropriately in an area that affects human rights.

Lack of transparency & civil society participation in arbitration

The lack of transparency is another issue that limits the protection of human rights. People affected by an issue of public interest are not guaranteed the opportunity to monitor the arbitration. Most of the time, consent of both parties is needed for the award to be made public. There is no way of knowing the number of claims, their details and implications. The lack of public oversight is particularly troublesome when considering that decisions made against the government require rewards out of the state's tax revenue."

26. In its recognition of these concerns a number of recent Free Trade Agreements including those between prospective TPP partner Canada and the EU and prospective TPP partner Vietnam have adopted a new investor court process. This is also the process being proposed by the EU in the TTIP FTA negotiations with the United States.
27. In its Trade for All strategy the EU states "EU bilateral agreements will begin the transformation of the old investor-state dispute settlement into a public Investment Court System composed of a Tribunal of first instance and an Appeal Tribunal operating like traditional courts. There will be a clear code of conduct to avoid conflicts of interest and independent judges with high technical and legal qualifications comparable to those required for the members of permanent

international courts, such as the International Court of Justice and the WTO Appellate Body.”

28. Details of benefits, as described by the EU’s Trade Directorate, of the Investment Court system can be found in its “Factsheet on the Benefits of an Investment Court System”² In summary the benefits are stated to be: Clear rules applied by impartial judges through a transparent and neutral process are in the interest of States and investors alike; A more cost effective and faster investment dispute resolution system; and Special provisions for SMEs.
29. Further details of the provisions found or proposed in these modern free trade agreements can be found in Section F “Resolution of Disputes between Investors and States’ of the Canada EU Free Trade Agreement³ or in the EU’s proposal for Investment Protection and Resolution of Investment Disputes as tabled for discussion with the United States under the TTIP FTA negotiation.
30. **The Commission does not support the proposed TPPA Dispute Resolution provisions and strongly recommends that they be replaced with recourse to a high quality, independent, international commercial court operating openly and transparently under an agreed procedure and legal framework. That may not now be possible in the context of the TPP but could be achieved in time by New Zealand entering into bilateral arrangements with TPP partners, such as Canada and Vietnam, who have favoured investment court provisions in recent free trade agreements with the EU. New Zealand should also endorse investment courts as its preferred solution in free trade negotiations with the EU.**

² [http://europa.eu/rapid/press-release MEMO-15-6060_en.htm](http://europa.eu/rapid/press-release_MEMO-15-6060_en.htm)

³ http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

Appendix 1

To date, those steps as described in the United States Government factsheet have included:

"A MORE ROBUST PUBLIC CONVERSATION

The Administration is working to cast a wide net to draw in the views of the public and to share information at every step of the negotiating process. To that end, for the negotiations currently ongoing, the Administration has:

Solicited public comments on negotiation aims, priorities and concerns, including through the Federal Register.

Held public hearings inviting input on the negotiations.

Organized first-of-a-kind stakeholder events where the negotiations are suspended so that a diverse group of stakeholders can meet with negotiators. These sessions are open to the public and provide a valuable opportunity for U.S. negotiators to hear and respond to critiques and suggestions.

Shared information on the current status of negotiations through blog posts, trade policy updates, press releases, statements, conference calls with stakeholders and the press, and tweets.

PUTTING OUR OBJECTIVES FRONT AND CENTER

The USTR website includes information – in plain English – that will help the public understand our core objectives and priorities in trade negotiations, including:

Detailed summaries of negotiation priorities on TPP and T-TIP.

Fact sheets on key negotiation topics.

Press conferences following negotiating rounds.

Recaps of negotiating rounds.

WORKING HAND-IN-HAND WITH CONGRESS, THE PEOPLE'S REPRESENTATIVES

The administration has worked closely with the people's representatives in Congress as we pursue our ambitious trade agenda. This has included:

Providing access to the full TPP negotiating texts for any Member of Congress, including for Members to view at their convenience in the Capitol, accompanied by staff members with appropriate security clearance.

Holding nearly 1,700 Congressional briefings on TPP alone, and many more on T-TIP, TPA, AGOA and other initiatives.

Providing Members of Congress with plain English summaries of TPP chapters to assist Members in navigating the negotiating text.

Previewing U.S. proposals with Congressional committees before taking them to the negotiations.

Working with Congress to update them on the state of the negotiations and get feedback every step of the way.

HEARING FROM MORE DIVERSE INTERESTS

Congress established a system of Advisory Committees to get input from affected industries. The Obama Administration has grown the size and membership of our trade advisory committees to add voices that were initially left out of the process. In doing so we have worked to ensure strong representation from:

Labor unions,

Environmental groups,

Faith organizations,

Public health and consumer advocates,

Consumer organizations,

Local and state officials,

Farmers, ranchers, small business, and many more diverse interests.

These advisors receive full and equal access to U.S. negotiating proposals and work with our negotiators in an interactive process that includes regular updates on the negotiations, the opportunity to review U.S. proposals before they are tabled, and the chance to provide meaningful input into negotiating proposals and decisions. Over the past year, USTR has been soliciting additional nominations for candidates to further represent labor and non-industry interests, as well as further representatives of agriculture, services, and other sectors of the economy. We welcome additional participants and are open to new ideas on how we can expand input.

We are always looking for new ways to engage the public and to seek views that will help inform and guide our trade policy, and enhancing transparency will remain a priority, consistent with the ability to deliver on our ultimate mission, which is to deliver

agreements that achieve the maximum possible benefit for the American people. That's our focus."