



Human Rights Commission
Te Kāhui Tika Tangata

Human Rights Commission Submission – Trade For All

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Human Rights Commission submission to Ministry for Foreign Affairs and Trade on Trade For All Agenda

Introduction and Summary

1. The Human Rights Commission (Commission) welcomes the opportunity to make this submission to the Ministry of Foreign Affairs and Trade on the Trade For All Agenda. The Commission welcomes the genuine and open approach that the Government is taking towards consultation and the specific consultations with Māori as Treaty partners. The Commission supports the key principles that will inform the consultations, particularly, in relation to maximising opportunities and minimising risks including in relation to labour rights, gender equality, the rights of indigenous peoples, and poverty reduction.
2. The Commission's submission will focus on two areas that it considers are crucial to the new Trade for All Agenda. First, the need for human rights impact assessment to be built into any trade policy. Second, that priority be given to the Waitangi Tribunal Wai 262 recommendations in relation to engagement with Māori when negotiating trade agreements.

Human Rights Impact Assessments

International obligations and practice

3. New Zealand is legally bound by international human rights treaties that require it to uphold certain freedoms and protections, including in the context of foreign investment and trade. One of these is the International Covenant for Economic, Social and Cultural Rights (ICESCR).¹ The committee of experts (ICESCR Committee) that monitors the implementation of ICESCR has issued a general comment on States' obligations under the Covenant in the context of business activities. According to the ICESCR Committee, compliance with ICESCR requires States to refrain from concluding trade or investment agreements that infringe upon or limit its ability to respect, protect, and fulfil Covenant rights.² The Committee has made the following recommendations to States:

¹ New Zealand ratified the ICESCR in 1978.

² See General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, para. 13

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f24&Lang=en

- a. The conclusion of trade or investment treaties should be preceded by a human rights impact assessment that takes into account both positive and negative human rights impacts.³
 - b. Insert in trade and investment treaties a provision explicitly referring to their human rights obligations.⁴
 - c. Ensure mechanisms for the settlement of investor-State disputes take human rights into account in the interpretation of investment treaties or of investment chapters in trade agreements.⁵
 - d. Ensure human rights impact assessments are accessible to indigenous peoples.⁶
4. Furthermore, Principle 9 of the United Nations Guiding Principles on Business and Human Rights (UNGPs), the authoritative global standard endorsed by the UN Human Rights Council in 2011, provides that:

*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.*⁷

5. The UN Working Group on Business and Human Rights encourages States to develop and enact a national action plan on business and human rights as part of the State responsibility to disseminate and implement the UNGPs.⁸ The Working Group has produced a guidance on the development of the plan. In relation to bilateral and multilateral trade agreements, the guidance suggests that governments should consider taking the following measures under the NPA:

- *Conduct human rights impact assessments prior to concluding trade agreements.*
- *Introduce provisions on human rights in trade agreements, including stipulating that trading partners ratify international human rights instruments and fundamental ILO conventions.*
- *Include in trade agreements an exemption from agreed provisions in cases where the other contracting party violates human rights.*

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid., para. 38, citing the United Nations Declaration on the Rights of Indigenous Peoples, art. 14;

⁷ United Nations Guiding Principles on Business and Human Rights, Principle 9, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

⁸ See <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>

- *Monitoring the human rights impacts of ongoing trade agreements and address adverse impacts where identified.*⁹

European Union

6. The European Union (EU) has made a strong commitment to ensuring trade and investment agreements comply with human rights. The Council of European Union Action Plan on Human Rights and Democracy 2015-2019, adopted on 20 July 2015, sets out five actions that directly relate to trade and investment, including commitments to:

Continue to develop a robust and methodologically sound approach to the analysis of human rights impacts of trade and investment agreements, in ex-ante impact assessments, sustainability impact assessments and ex-post evaluations; ...

*Explore ways to extend the existing quantitative analysis in assessing the impact of trade and investment initiatives on human rights.*¹⁰

7. The European Commission *Trade for all* strategy, introduced in 2015, makes a commitment to implementing the trade and investment provisions of the Action Plan on Human Rights and Democracy. The strategy also makes human rights commitments to:

- a. set up dialogue to fight against human rights breaches;
- b. contribute to international target of the elimination of all the worst forms of child labour and the abolition of forced prison labour by working with third countries;
- c. enhance the analysis of the impact of trade policy on human rights both in impact assessments and in ex post evaluations based on the recently developed guidelines; and
- d. propose an ambitious modernisation of EU's policy on export controls of dual use goods that result in human rights violations.¹¹

8. The European Commission first report on the implementation of the strategy included information on the measures taken to ensure trade policy was anchored in universal values.

⁹ UN Working Group on Business and Human Rights, *Guidance on National Action Plan on Business and Human Rights*, pg. 29, http://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf

¹⁰ EU Action Plan on Human Rights and Democracy, pgs. 23-24, https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/action-plan-on-human-rights-and-democracy-2015-2019_en.pdf

¹¹ European Commission, *Trade for all: Towards a more responsible trade and investment policy*, http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf

One of the measures taken in relation to transparency is the regular publication of the EU's negotiating proposals and reports of negotiating rounds, publishing negotiating directives, and creating dedicated "Transparency in Action" webpages.¹² The EU has conducted an Impact Analysis, including detailed consideration of human rights impacts to assess whether it should open negotiations for a Free Trade Agreement with New Zealand.¹³

9. The EU also has in place *Guidelines on the analysis of human rights impacts in impact assessment for trade-related policy initiatives*. The Guidelines focus on the methodology to be followed when carrying out impact assessments, which are conducted before the European Commission proposes a new policy initiative, and sustainability assessments, which are carried out in parallel with major trade negotiations. The guidelines are also applicable *ex post*.¹⁴

Domestic Requirements and Practice

10. In New Zealand, the Government is not required to conduct a human rights impact assessment before signing or ratifying a trade treaty. Nor is it required to directly address human rights in its national interest analysis (NIA).¹⁵ As a result, the NIA for trade agreements, such as the CPTPP only made a cursory statement regarding human rights under its analysis of the social effects of the treaty coming into force:

*The CPTPP includes no inconsistencies with the Human Rights Act 1993 and New Zealand Bill of Rights Act 1990. Its implementation would have no effect on human rights in New Zealand. However, the strong labour obligations in CPTPP could result in improved human rights situations in other CPTPP countries (for example, given obligations to address forced and child labour).*¹⁶

11. The exact statement was made in the NIA for the TPPA. This brief statement does not provide an adequate analysis of human rights impacts raised by many, including the Commission. The statement fails to consider New Zealand's human rights obligations under

¹² European Commission, Report on the Implementation of the Trade Policy Strategy Trade for All, 13 September 2017, http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156037.pdf

¹³ <http://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-289-F1-EN-MAIN-PART-1.PDF>

¹⁴ European Commission, Directorate-General for Trade, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives*, http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf

¹⁵ See Standing Order 398, https://www.parliament.nz/en/pb/parliamentary-rules/standing-orders-2017-by-chapter/chapter-7-NON-LEGISLATIVE-PROCEDURES/#_Toc490063197

¹⁶ <https://www.mfat.govt.nz/assets/CPTPP/CPTPP-Final-National-Interest-Analysis-8-March.pdf>

a number of international treaties that it is bound to and it fails to consider potential human rights impacts on Māori.

12. The lack of consideration by the New Zealand Government of the human rights impacts of trade agreements was raised by the Green Party in its minority view in the Select Committee report on the international treaty examination of the TPPA:

Trade and economic agreements have direct human rights implication and should be judged as such, yet this was missing in the NIA. There should be a “BORA section 7” judgement by the Attorney-General of the treaty, submitted to the House at the treaty examination stage rather than the domestic legislation stage.

13. The Commission urges, New Zealand to uphold its international human rights obligations and to follow the practice of the EU when it comes to the analysis of human rights impacts of trade-related initiatives before entering negotiations, during negotiations and after trade agreements come into force.

14. **Accordingly, the Commission recommends that as part of the Trade For All Agenda:**

- a. **Standing Order 398 be amended to require the National Impact Assessment to address New Zealand’s domestic and international human rights obligations, including effects on Treaty of Waitangi rights, as recommended in the Wai 262 Report and by Law Commission in 1997.¹⁷**
- b. **Make it compulsory for a human rights impact analysis, based on domestic and international human rights obligations, not only at the treaty ratification stage, but also at the policy and negotiation phase of trade initiatives, and ex post.**
- c. **Adopt guidelines on the analysis of human rights impact assessments for trade-related policy initiatives, similar to those used in the EU.**

¹⁷ Law Commission, *The Treaty Making Process: Reform and the Role of Parliament* (Wellington: Law Commission, 1997), p 73.

Consultation

15. The Government has an obligation under international human rights law to respect and protect the rights of indigenous peoples to prior consultation and to give or withhold their free, prior and informed consent (FPIC). These obligations are derived from a range of treaties ratified by New Zealand¹⁸ and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), endorsed by New Zealand in 2010. Authoritative human rights bodies have clarified that the UNDRIP, which affirms the right to self-determination and FPIC, should serve as an interpretative guide for international treaties in the context of indigenous peoples' rights.¹⁹
16. The Commission notes that the Independent Monitoring Mechanism June 2018 Report regarding the implementation of the UNDRIP's (IMM Report) recommended that the Government "ensures its trade policy is compliant with Te Tiriti and with its obligations of free, prior and informed consent."²⁰
17. In the context of international trade, international human rights law imposes a duty on states to, at a minimum, consult indigenous peoples, with the objective of achieving agreement or consent, where consideration is being given to measures or programs that may affect such peoples.²¹ These consultations must: (a) be in good faith, in accordance with the communities' customs, and with the aim of reaching agreement; (b) take place during the early stages; and (c) fully inform the communities of the possible risks associated with the project.²²

¹⁸ International Labour Organisation 169 was the first legally binding treaty to explicitly codify the right to FPIC. However, preceding core human rights treaties have been authoritatively interpreted to protect the right. For example, Article 27 of the International Covenant on Civil and Political Rights (ICCPR), ratified by New Zealand in 1978, has been interpreted by the U.N. Human Rights Committee (HRC) to require "not mere consultation but the free, prior and informed consent of the members of the [affected] community". Similarly, the Committee on Economic, Social and Cultural Rights (CESCR) has affirmed that indigenous peoples' FPIC is required under Articles 1 and 15 of the International Covenant on Economic, Social and Cultural Rights; see CESCR, General Comment No. 21, U.N. Doc. E/C.12/GC/21, paras. 2, 36, 37 (Dec. 21, 2009). Likewise, the Committee on the Elimination of Racial Discrimination (CERD) has affirmed that the principle of nondiscrimination implies that indigenous peoples' FPIC must be obtained when their property and cultural rights are impacted by State or private sector actors; see CERD, General Recommendation XXIII Indigenous Peoples (1997).

¹⁹ see e.g., *Case of the Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R., (ser. C) No. 185, para. 18 (Aug. 12, 2008).

²⁰ Report of the Independent Monitoring Mechanism regarding the implementation of the UN Declaration on the Rights of Indigenous Peoples in Aotearoa New Zealand, Human Rights Council Expert Mechanism on the Rights of Indigenous Peoples (June 2018) A/HRC/EMRIP/2018/CRP.2 (9 July 2018), Recommendation 4(b).

²¹ ILO 169, arts. 6, 15.2.

²² *Case of the Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R., (ser. C) No. 172, paras. 133-134 (Nov. 28, 2007); *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Inter-Am. Ct. H.R., (ser. C) No. 245, paras. 165-167, 171, 177-178 (June 27, 2012). See also ILO 169, arts. 6, 15.

18. Under UNDRIP, New Zealand is obliged to consult and cooperate in good faith with Māori to obtain FPIC before adopting and implementing legislative or administrative measures that affect them.²³ Furthermore, FPIC should be obtained prior to any project affective their lands, territories or resources.²⁴
19. The Commission agrees with the concerns raised by the IMM in its report regarding the implementation of UNDRIP in New Zealand that recommendations from the Waitangi Tribunal's report on the TPPA (as well as its 2011 report on the Wai-262 claim), have still not been addressed.²⁵
20. The Waitangi Tribunal's Wai 262 Report undertook a broad assessment of the Crown's policies and practices in respect of international instruments in light of the meaning of the Treaty and its principles. The Tribunal identified a number of problems with the Crown's strategy for engagement with Māori on international treaties and recommended changes to the strategy. Among the concerns were:

*How the strategy is carried out in practice, in terms of providing consistent and full information to the right people at the right time, so as to consult effectively with Māori when their interests are (sometimes vitally) affected.*²⁶

21. The Tribunal concluded that the Treaty of Waitangi entitles Māori interests to a reasonable degree of protection when those interests are affected by international instruments. The Tribunal said:

We ... acknowledge that the Crown has to operate in a complex and rapidly changing international environment. There is no doubt that New Zealand is a small player with limited influence in the international processes. In this context, the Crown has to evaluate all of New Zealand's many and varied interests so as to arrive at a national position. It then has to find the best way to advance that position when more powerful currents may be pulling it elsewhere. In this environment, engagement with Māori ... is not always going to be perfect. But, as we have said, Māori are not just another interest group; Māori are

²³ UNDRIP, Article 19.

²⁴ UNDRIP, Article 32.1

²⁵ Report of the Independent Monitoring Mechanism regarding the implementation of the UN Declaration on the Rights of Indigenous Peoples in Aotearoa New Zealand, Human Rights Council Expert Mechanism on the Rights of Indigenous Peoples (June 2018) A/HRC/EMRIP/2018/CRP.2 (9 July 2018) Para 20(d)

²⁶ Waitangi Tribunal, Ko Aotearoa Tēnei: Te Taumata Tuarua, vol 2, p683

*the Crown's Treaty partner and their interests are always entitled to active protection, to the extent reasonable in all the circumstances.*²⁷

22. More specifically, the Waitangi Tribunal Report on the TPPA criticised the Crown's consultation before the TPPA text was completed. The Tribunal agreed and adopted the findings of the Wai 262 Tribunal and raised concern that the Crown did not adequately take the Wai 262 recommendations into account and the strategy was not updated. In particular, the Tribunal criticised the Crown's consultation before the TPPA text was completed, noting:

*Our main concerns are the status of Māori as Treaty partners as opposed to general stakeholders; the transparency of the Crown in its decision-making; and the process by which the Crown informs itself of Māori interests.*²⁸

23. The Tribunal concluded:

It seems to us that, contrary to the findings of the Wai 262 Tribunal, the Crown did not seek or provide a realistic opportunity for Māori to identify their interests in the TPPA as a Treaty partner. The secrecy or confidentiality of the development of Crown policy in relation to the TPPA and its negotiating positions compounded this difficulty, and is likely to have been a factor in low levels of engagement between the Crown and Māori (whether initiated by either party) prior to the lodging of these claims.

24. The Commission welcomes the approach taken to consult specifically with Māori on the Trade For All Agenda. The Commission would encourage the findings of the Wai 262 be carefully considered as part of the process. Consultation with Māori should not be a one off exercise and strategies must be carried out in practice when any new Trade-related activity is being considered by the Government and full information provided to the right people at the right time.²⁹

25. The Commission recommends that recommendations from the Waitangi Tribunal in the Wai 262 and TPPA claims, are carefully reviewed, and where relevant adopted, when forming its Trade for All Agenda.

²⁷ P. 682

²⁸ Waitangi Tribunal Report on the Trans Pacific Partnership Agreement 5.2.2

https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_104833137/Report%20on%20the%20TPPA%20W.pdf

²⁹ Waitangi Tribunal, Ko Aotearoa Tēnei: Te Taumata Tuarua, vol 2, p683