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New Zealand Human Rights Commission submission on the proposed Free Trade Agreement negotiations between New Zealand and the European Union

The negotiation of a Free Trade Agreement with the European Union differs from other recent multilateral FTAs in that all national parties have ratified all the major UN human rights treaties.

For this reason it creates an unprecedented opportunity to set a new human rights benchmark in international agreements and new standards in the area of how investor/state disputes are resolved.

A path to achieving this would be if New Zealand were to adopt the principles of the EU Trade for All Strategy, either in parallel with the negotiations or embedded in the agreement.

That Strategy requires greater transparency and participation of stakeholders in the negotiation process, the creation of investment courts to replace the investor state dispute settlement processes and proper consideration of human rights.

Adoption of these principles would go a long way to address public and UN concerns about the secrecy surrounding international FTAs, and the potential adverse impacts on human rights.

It would lift New Zealand's implementation of international human rights treaties and policies, to which we are party. These include the United Nations Guiding Principles on Business and Human Rights and the UN Sustainable Development Goals 2030 Agenda.

The EU Trade for All Strategy

In October 2015 the European Commission's Trade for All Strategy¹ was launched. We quote in full the introduction to that policy:

"In recent years we have seen an intense debate about trade across the European Union which has some important lessons for EU trade policy.

It is clear Europeans want trade to deliver real economic results for consumers, workers and small companies. However, they also believe open markets do not require us to compromise on core principles, like human rights and sustainable development around the world or high quality safety and environmental regulation and public services at home. They also want to know more about trade negotiations carried out in their name.

In this new strategy, "Trade for All", the Commission is adapting its approach to trade policy to take all of these lessons on board. As a result, trade policy will become more responsible, meaning it will be more effective, more transparent and will not only project our interests, but also our values.

Making trade more effective means that trade policy must be updated if it is to continue delivering economic opportunities.

The new approach ensures that trade policy will effectively address issues that affect today's value chain-based economy, like services, digital trade and the movement of experts, senior managers and service providers.

Effectiveness also means that trade policy will make sure consumers, workers and small companies can take full advantage of - and adapt to - more open markets. It will help ensure consumers have confidence in the products they buy; that SMEs needs are specifically addressed in all trade agreements; and that tools like the European Globalization Adjustment Fund are working at full capacity.

To make trade negotiations more transparent, the strategy commits to publishing key negotiating texts from all negotiations, as happens in the Transatlantic Trade and Investment Partnership (TTIP).

The third pillar of the strategy is about ensuring EU trade policy is not just about interests but also about values.

The new approach will safeguard the European social and regulatory model at home. The Commission makes a clear pledge that no trade agreement will ever lower levels of regulatory protection; that any change to levels of protection can only be upward; and that the right to regulate will always be protected. The strategy also points to the next steps for the new EU approach to investment protection.

The new approach also involves using trade agreements and trade preference programmes as levers to promote, around the world, values like sustainable development, human rights, fair and ethical trade and the fight against corruption. We will use future EU agreements to improve the responsibility of supply chains.

¹ 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

Finally, the new strategy lays out an up-to-date programme of trade negotiations, to put these principles into practice. The top priority remains major ongoing projects. Europe must seek to reenergise the WTO and conclude TTIP, the Japan free trade agreement and the China investment agreement. However, the strategy also opens the door to new initiatives, when the conditions are right - in the Asia-Pacific region, in particular, but also in Latin America and Africa.

This communication is not the end of the process. The Commission will work closely with the Member States, the European Parliament and civil society to understand their views and work on implementation.

The result will be a stronger trade policy for a stronger European Union.”

The NZHRC particularly welcomes the commitment that:

“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.”

The NZHRC also welcomes the commitments in the Trade for All Strategy to:

- ensure the implementation of the provisions of the EU 2015-2018 Action Plan on Human Rights and Democracy² 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
- propose an ambitious modernisation of the EU’s policy on export controls of dual use goods, including the prevention of the misuse of digital surveillance and intrusion systems that results in human rights violations.

New Zealand and the EU have the opportunity to set a new standard in their free trade agreement.

The UN Guiding Principles on Business and Human Rights

New Zealand and the member States of the EU have all endorsed the UN Guiding Principles on Business and Human Rights.

UNGP Principle 8 requires that:

“States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State’s human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.”

The Commentary on UNGP Principle 8 states:

² <http://data.consilium.europa.eu/doc/document/ST-10897-2015-INIT/en/pdf>

“There is no inevitable tension between States’ human rights obligations and the laws and policies they put in place that shape business practices. However, at times, States have to make difficult balancing decisions to reconcile different societal needs. To achieve the appropriate balance, States need to take a broad approach to managing the business and human rights agenda, aimed at ensuring both vertical and horizontal domestic policy coherence.

Vertical policy coherence entails States having the necessary policies, laws and processes to implement their international human rights law obligations. Horizontal policy coherence means supporting and equipping departments and agencies, at both the national and subnational levels, that shape business practices – including those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour – to be informed of and act in a manner compatible with the Governments’ human rights obligations.”

New Zealand should ensure vertical and horizontal policy coherence in the negotiation of all free trade agreements, having regard to all of our international obligations be they related to trade and investment, human rights, labour rights or social development. A human rights impact analysis should be conducted and shared.

UNGP Principle 9 requires States to ensure that trade and investment obligations do not constrain their ability to meet their human rights obligations. UNGP Principle 9 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.”

The Commentary to UNGP Principle 9 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.”

New Zealand should ensure it retains adequate policy and regulatory ability to protect human rights under the terms of any EU NZ FTA, while providing the necessary investor protection.

Five years after the UNGPs were ratified New Zealand has taken no steps to develop a national action plan on business and human rights. Neither, to NZHRC’s knowledge, has it taken any significant steps to educate public servants on the State’s human rights obligations and the responsibility of business as regards the UNGPs.

New Zealand has a very impressive Whole of Government procurement system but there are no requirements in it that suppliers to the New Zealand Government should have a human rights policy, a human rights due diligence process, a remedy process or reporting framework.

MBIE has agreed to involve the Commission in the next revision of the procurement guidelines. New Zealand should commit to complete that work before any FTA comes into force.

We believe that alongside negotiation of the free trade agreement, New Zealand and the EU should work together to strengthen each other's compliance with the UNGPs. This is consistent with the EU Trade for All Policy and with the G7 Leaders Declaration made under the leadership of Germany.

Alignment with G7 Leaders Declaration

In June 2015 the G7 Leaders declared:

“Unsafe and poor working conditions lead to significant social and economic losses and are linked to environmental damage. Given our prominent share in the globalization process, G7 countries have an important role to play in promoting labour rights, decent working conditions and environmental protection in global supply chains. We will strive for better application of internationally recognized labour, social and environmental standards, principles and commitments (in particular UN, OECD, ILO and applicable environmental agreements) in global supply chains. We will engage with other countries, for example within the G20, to that end.

We strongly support the UN Guiding Principles on Business and Human Rights and welcome the efforts to set up substantive National Action Plans. In line with the UN Guiding Principles, we urge private sector implementation of human rights due diligence. We will take action to promote better working conditions by increasing transparency, promoting identification and prevention of risks and strengthening complaint mechanisms. We recognize the joint responsibility of governments and business to foster sustainable supply chains and encourage best practices.

To enhance supply chain transparency and accountability, we encourage enterprises active or headquartered in our countries to implement due diligence procedures regarding their supply chains, e.g. voluntary due diligence plans or guides. We welcome international efforts, including private sector input, to promulgate industry-wide due diligence standards in the textile and ready-made garment sector. To promote safe and sustainable supply chains, we will increase our support to help SMEs develop a common understanding of due diligence and responsible supply chain management.

The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being. We are therefore strongly committed to continuing our engagement in this field with a specific focus on strengthening health systems through bilateral programmes and multilateral structures.

We will continue to take steps to foster access to quality jobs for women and to reduce the gender gap in workforce participation within our own countries by 25% by 2025, taking into account national circumstances including by improving the framework conditions to enable women and men to balance family life and employment, including access to parental leave and childcare. The private sector also has a vital role in creating an environment in which women can more meaningfully participate in the economy. We therefore support the UN Women's Empowerment Principles and call on companies worldwide to integrate them into their activities. We will coordinate our efforts through a new G7 working group on women.”

New Zealand should ensure that the EU NZ FTA reflects the principles of the G7 Leaders Declaration.

SDG Agenda 2030

EU Member States and New Zealand have recently endorsed the UN SDG 2030 Agenda. The Danish Institute of Human Rights has developed a comprehensive human rights analysis of each SDG Goal and Target³ and the proposed indicators for each Target are being finalised now.

This can be used to guide the EU and New Zealand in a human rights impact analysis of the agreement.

EU NZ PARC

New Zealand and the EU have also negotiated a new “Partnership Agreement on Relations and Cooperation”(PARC)⁴ The EU Delegation to New Zealand advised the NZHRC in November 2015 that:

- the PARC was in the final EU internal procedural stages before being officially signed
- contained commitments to support democracy, the rule of law and human rights, including at multilateral level and in third countries, and
- will be legally binding (unlike the Joint Declaration of 2007 which it supersedes).

The NZHRC would urge MFAT to conduct and make public a human rights impact assessment of the first draft of the EU NZ FTA and then conduct and make public a human rights impact assessment of the final version of the EU NZ FTA.

Develop a New Zealand “Trade for All” Policy

The NZHRC believes that New Zealand should adopt its own version of the Trade for All Strategy alongside the development of an EU/NZ Free Trade Agreement. We believe this would mitigate many civil society concerns about participation in decision making and the secrecy that have surrounded the negotiation of such agreements in the past (a summary of these by the UK-based Business & Human Rights Resource Centre is attached as Appendix 1).

There is the potential in these negotiations to:

- ensure EU and New Zealand policy coherence between long existing obligations in regard to labour and human rights and more recent developments such as the United Nations Guiding Principles on Business and Human Rights, the OECD Guidelines on Multi-national Business, the Sendai Declaration on Disaster Risk Reduction, the SDG Agenda and the environmental protection obligations agreed in Paris last year
- clarify the obligations of the State as regards the conduct of business and the State’s expectations of the responsibility of business, and
- set new standards in the area of how investor/state disputes are resolved.

It would be a great pity if this opportunity was missed.

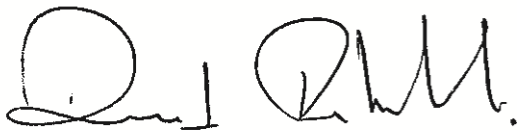
³ <http://www.humanrights.dk/human-rights-guide-sdgs>

⁴

http://eeas.europa.eu/delegations/new_zealand/press_corner/focus/focus_items/30october_pressrelease_key_eupresidents_en.htm

Please contact me on 04-474 2714 or by email davidr@hrc.co.nz if you have any enquiries or would like further information.

Yours sincerely

A handwritten signature in black ink, appearing to read 'D. Rutherford'.

David Rutherford
Chief Commissioner
New Zealand Human Rights Commission

Appendix 1

Concerns of UN Experts About Previous Free Trade Agreements

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.⁵ 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.

Professor John Ruggie, who drafted the UN Guiding Principles on Business and Human Rights, is another UN Expert. He shares the concerns. He has described the UNGPs and 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.

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:⁶

“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.

⁵ UN experts voice concern over adverse impact of free trade and investment agreements on human rights” <http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E> Statement by the Independent Expert on the promotion of a democratic and equitable international order, Alfred de Zayas, on the upcoming signing the Trans-Pacific Partnership

⁶ <http://business-humanrights.org/en/investor-state-dispute-settlement-isds/investor-state-dispute-settlement-isds-background>

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 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.