

Submission of the Building and Wood Workers' International (BWI)

to the

Foreign Affairs, Defence and Trade Committee

Parliament of New Zealand

regarding

International treaty examination of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership



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The Building and Wood Workers' International (BWI) is the global union federation for the construction, wood and forestry, building materials and allied sectors. The BWI comprises has over 340 affiliate unions from 130 countries, comprising a total of over twelve million workers.

Sent to:

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1. Introduction

- 1.1 On 8 March 2018 eleven nations signed the so-called Comprehensive and Progressive Trans-Pacific Partnership ('CPTPP') in Santiago, Chile. On 16 March 2018 the New Zealand Foreign Affairs, Defence and Trade Committee issued an invitation for submissions on the treaty.
- 1.2 The BWI has two affiliates in New Zealand, FIRST Union and E Tu. FIRST Union has been particularly involved in the movement to stop the Trans-Pacific Partnership Agreement, as well as its follow-up agreement, the CPTPP. We wish to echo much of the discussion raised in FIRST Union's submission on the TPPA.¹
- 1.3 At the BWI 4th World Congress in Durban in November 2017 a resolution proposed by FIRST was passed entitled 'No to neoliberal trade agreements in the Asia-Pacific'. It noted concern that...

"…agreements like TPP-11 [CPTPP], RCEP and TISA … will promote corporate profits over workers' rights, and could lead to deregulations, restrictions on state action, layoffs and contract out to reduce worker wages and conditions social dumping, rising medical costs, tax evasion, environmental degradation, and fiscal austerity affect key Government and social security programmes".

As well as requesting affiliates resist existing approaches, that resolution demanded stronger protection for workers rights in trade agreements and the creation of an effective labour rights resolution mechanism within these agreements.

- 1.4 As a global union federation, we are aware of the positive impact that globalisation, specifically 'globalisation from below', can have in providing improvements in the quality of life for traditionally marginalised communities.
- 1.5 Accordingly we see the CPTPP as a missed opportunity in that respect, and a continuation of the approach of the previous New Zealand Government in that respect. In particular, a lack of consultation with labour unions and articulation of their demands, both in New Zealand and across the region, has delivered a retrograde agreement that puts the interests of capital owners ahead of the interests of working people and the environment.
- 1.6 Much of the discussion around TPPA/CPTPP has focused on issues like health (i.e. Pharmac), beyond-the-border disciplines imposed by provisions such as the investor state dispute settlement chapter, and intellectual property law. This submission will first analyse the alleged economic benefits of CPTPP, before focusing more specifically on the impact on workers and trade unions. In particular, it aims to make three core points with relation to the impact of TPPA/CPTPP:

¹ https://www.parliament.nz/resource/en-NZ/51SCFDT_EVI_00DBSCH_ITR_68247_1_A499935/a20b410e2ced7f060fc929c82b49045ec084a1f8

- a. That ISDS provisions will restrict the ability of successive governments to address existing deficiencies in labour rights protection;
 - b. That the labour chapter in TPPA (which is wholly incorporated into the CPTPP) is so weak as to be effectively useless in prosecuting labour rights violations; and
 - c. That the overall position for workers' rights protection in Malaysia and Vietnam will be substantially worse than in the original TPPA arrangement.
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2. Questionable economic benefits

- 2.1 Free trade and investment agreements are almost always justified with reference to their alleged economic benefits. The NZ Labour Party, which in opposition became a core part of the resistance to CPTPP's predecessor TPPA, publicly listed strong economic gains as one of its five criteria that must be satisfied for them to sign up to the agreement. They also demanded that an independent economic analysis be undertaken on the completed agreement, however now they are in Government this imperative appears to have fallen off.
- 2.2 The core material change in terms of economic benefits to New Zealand in CPTPP when compared to TPPA is that the United States, the largest economy in TPPA, is no longer a party to the agreement. This has significantly impacted the size of economic benefits that New Zealand could potentially gain. On a group-wide scale, this has massively impacted the potential economic benefits; according to one study income gains for all countries has been reduced by 77%, from \$US492 billion to \$US131 billion.²
- 2.3 That same study suggests that the economic benefits for New Zealand will be roughly halved, from a 2.2% increase in national income by 2030 (\$US6 billion) to a 1.1% increase (\$US 3 billion). The Ministry of Foreign Affairs and Trade (MFAT) estimates for TPPA were much more conservative – that the economy would grow by 0.9% by 2030, NZ\$2.7 billion.³
- 2.4 As prominent NZ economists suggested in a Law Foundation's economic analysis paper, only \$259 million of this figure (0.085% of GDP by 2030) was to come from actual tariff reduction,⁴ which one critic referred to as a case of beer per person per year. The vast majority of the \$2.7 billion figure is made up of "non-tariff barriers", however it should be

² Peter A. Petri, Michael G. Plummer, Shujiro Urata, and Fan Zhai (October 2017) "Going It Alone in the Asia-Pacific: Regional Trade Agreements Without the United States" (Peterson Institute for International Economics). Available at: <https://piie.com/system/files/documents/wp17-10.pdf>

³ <https://tpp.mfat.govt.nz/assets/docs/TPP%20-%20CGE%20Analysis%20of%20Impact%20on%20New%20Zealand,%20explanatory%20cover%20note.pdf>

⁴ Barry Coates, Rod Oram, Dr Geoff Bertram and Professor Tim Hazledine (January 2016) The economics of the TPPA (The Law Foundation New Zealand). Available at:
<https://tpplegal.files.wordpress.com/2015/12/ep5-economics.pdf>

noted even the authors of this report noted their scepticism on these economic benefits. MFAT has wisely focused more explicitly on actual trade benefits.

- 2.5 Further, as Hazeldine suggests in his 2015 commentary on the commissioned economic modelling, whether the exporter or importer pays the tariff determines our ability to actually capture that benefit. He suggests that “real-world conditions of demand, costs, product differentiation and competition are such as to vary the likely burden of the tariff”, noting that a reasonable assumption would be that the burden of tariffs is roughly halved.⁵
- 2.6 According to the MFAT info page on CPTPP, its tariff reductions have, “the potential to deliver an estimated \$222 million of tariff savings annually, with \$92 million of those [potential] savings starting as soon as the CPTPP enters into force.”⁶ Using the same basic modelling as commissioned by MFAT above, this looks to be around 0.07% of GDP by 2030. That page also notes that while tariff reduction benefits with China were initially estimated at \$115 million a year when we concluded our FTA, NZ exports have since quadrupled, suggesting that CPTPP benefits could grow dramatically. This is true, however it is not a fair comparison – in recent decades China has probably been through the most significant demographic transition seen anywhere across the planet. The same cannot be said about our CPTPP trading partners, and certainly not on the same scale.
- 2.7 Once Hazeldine’s assumption around the ability of New Zealand to actually capture the economic benefits of the agreement’s trade benefits are applied to this figure – that the benefits captured are roughly half of the total quoted trade benefits – this could push the total trade benefits down to as low as NZ\$111 million by 2030, or 0.035% of GDP. Following Hazeldine’s formulation, this might alternatively be referred to as a six-pack of beer a year. For opponents of the deal, this six-pack might be a necessary indulgence to help them forget how quickly their alleged ally, the NZ Labour Party, changed its tune after getting into Government.

3. ISDS and Labour

- 3.1 While there are a growing number of ISDS cases that relate to workers’ rights and industrial relations issues, the fact that they have been clustered in other policy areas reflects the most recent era of globalisation. Like much of the world, the New Zealand labour market is highly deregulated, characterised by weak collective bargaining and poor employment security.

⁵ Professor Tim Hazeldine (December 2015) “No More than a Case of Beer? TPP Trade Liberalisation Benefits for New Zealand”. Available at: <https://tpplegal.files.wordpress.com/2016/01/hazeldine-on-trade-models-021215.pdf>

⁶ See: <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/cptpp-overview/>

- 3.2 On a day-to-day basis, BWI affiliates across the Asia-Pacific union and beyond are pushing to reverse this trend and increase employment protection and labour standards. In this light, our very real fear is that ISDS claims filed by foreign investors might prevent the campaigns launched by our affiliates and other progressive actors in both the public and private sector from effectively reversing this trend to increase labour standards and employment protection.
- 3.3 CPTPP's ISDS provisions (another of the Labour Party's criteria on an acceptable TPPA agreement) are fundamentally unchanged, with the exception of removing state contracts from their coverage.
- 3.4 The costs associated with ISDS are rarely factored into cost-benefit analyses of trade agreements. Presumably, however, since their higher degree of protection is intended to encourage investors to pursue investments in that country, there would be value in studying this connection. In its 2010 report 'Bilateral and Regional Trade Agreements', the Australian Productivity Commission struggled with this question:

There does not appear to be an underlying economic problem that necessitates the inclusion of ISDS provisions within agreements. Available evidence does not suggest that ISDS provisions have a significant impact on investment flows ... Experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions.⁷

- 3.5 Investors looking to invest across borders already have a multitude of risk protection mechanisms available to them, including political risk insurance. The case for this subsidy has not been made out, and risks breaking the link between risk and reward that ought to encourage due diligence in investment. The conservative US Cato Institute, which has been outspoken in its opposition to ISDS in trade agreements, argues that while investment is inherently risky,

...that doesn't mean special institutions should be created to protect MNCs from the consequences of their business decisions. Multinational companies are savvy and sophisticated enough to evaluate risk and determine whether the expected returns cover that risk. Among the risk factors is the strength of the rule of law in the prospective investment jurisdiction. MNCs may want assurances, but why should they be entitled to them? ISDS amounts to a subsidy to mitigate the risk of outsourcing.⁸

- 3.6 As well as providing a regulatory subsidy for investors, ISDS claims impose a heavy cost on states, both in terms of legal costs of compliance and the quantum of awards. Figures from the OECD indicate that the average legal costs associated with defending an ISDS claim have now reached US\$8 million. The legal costs involved for Australia defending its plain-packaging legislation reached to US\$ 60 million, a high watermark for now.

⁷ Australian Productivity Commission. (2010). Bilateral and regional trade agreements: Productivity Commission research report. Melbourne, Australia: Productivity Commission. Retrieved from <http://www.pc.gov.au/projects/study/trade-agreements>

⁸ Ikenberry, D. J. (2015, February 26). Hyperbole Aside, Elizabeth Warren Is Right About the Risk of Investor-State. Retrieved from <http://www.cato.org/blog/hyperbole-aside-elizabeth-warren-right-about-risk-investor-state>

- 3.7 The real winner of this legal bonanza is the small number of law firms that have monopolized this area of law. Research from the Corporate Europe Observatory indicates that three boutique law firms were involved in over 130 investment arbitrations in 2011 alone.⁹ However increasingly investors aren't even required to front these legal costs – private equity firms are now funding ISDS claims on a speculative basis, such that they engage the investor with the potential claim, cover the legal costs and then receive a proportion of the award. Here there is practically no risk and a responsible chance of a reward - there is practically no reason that an investor wouldn't take such a case.
- 3.8 Past ISDS cases have challenged significant points of law and public policy. Where a challenge to these policy arise, Government officials may be forced to make significant trade-offs and difficult economic calculations as to whether future policies are worth risking the costs of an expensive lawsuit and award. These cases have a chilling effect on democracy, undermining the ability of peoples' movements (such as the labour movement) that organise democratically within their community our country to make political and legal changes for the better.

Veolia (France) v Egypt – In 2012 the multinational services operator Veolia lodged a claim against the Egyptian Government for \$110 million, in part due to the decision by the Egyptian Government to introduce a minimum wage for public sector workers. This case was one of a host of cases filed against the post-dictatorship governments that emerged out of the Arab Spring, hampering the ability of those young democracies to reflect the new social compact in those countries.

Noble Ventures v Romania - Another case involved a firm called Noble Ventures Inc that had invested in a privatised Romanian steel mill. They argued, among other things, that the failure of the Romanian government to protect the company from labour unrest was a breach of the obligation to ensure and equitable treatment. While the claim was ultimately dismissed, the arbitration panel did not rule out labour unrest as grounds for such a claim. And, considering the expanding scope of ISDS claims in recent years, this is well within the realm of possibility.

Piero Foresti & others v South Africa – In 2007 investors from Italy and Luxembourg lodged a claim against South Africa for US\$350 million, claiming that rules pursuant to the Black Economic Empowerment Act (that had aimed redress historic injustices from the apartheid era) had affected their investment. The claim was dropped in 2010 after the investors were granted new licenses with a much lower share divestment requirement attached to them.

Renco (US) v Peru – In 2010 US investor Renco notified Peru that, despite failing to fulfil its commitments and clean up grievous pollution created by its La Oroya smelter, it was launching an investor-state case against the country for US\$800 million. The case began in October 2007 when a US law firm filed a series of personal injury lawsuits against Renco in Missouri state courts on behalf of 162 sickened Oroyan children.¹⁰ Renco settled in October

⁹ Corporate Europe Observatory (2012) "Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom". Available at:

<http://corporateeurope.org/trade/2012/11/chapter-3-legal-vultures-law-firms-driving-demandinvestmentarbitration>

¹⁰ <https://www.citizen.org/documents/rencola-oroya-memo.pdf>

2010 and agreed to pay \$65 million to clean up the site. Renco subsequently launched the ISDS claim, and in doing so was able to escape the jurisdiction of the Missouri courts. The case was decided in favour of the Peruvian Government in June 2016, after which Renco immediately announced they would appeal the case.¹¹ Renco's poor business practices have resulted in the poisoning of many workers, their families and their communities, and now Renco are using ISDS to delay and counter-claim against the Peruvian Government.

Abitibi-Bowater (US) v Canada – In 2008 the Canadian forestry giant AbitibiBowater (which is registered in Delaware for tax purposes) closed its pulp and paper mill in grand rapids, putting 800 employees out of work. At the same time AbitibiBowater asserted its rights to sell its assets, including timber harvesting licences and water use permits. These assets had been granted conditional to production, and so the Newfoundland government moved to re-appropriate them. AbitibiBowater filed a US\$500 million claim against the Government under NAFTA's ISDS provisions, and a US\$130 million settlement was reached in 2010.¹² The cost of severance packages and pensions for workers, as well as bills owing to local business and relation to environmental remediation of mill and mining sites were dumped on the Canadian Government.¹³

- 3.9 The United Nations Conference for Trade and Development (UNCTAD) World Investment Report 2015 described the current international investment regime as facing a 'legitimacy crisis'. A number of countries are currently in the process of withdrawing from their existing investment agreements (e.g. South Africa, Indonesia, Argentina and Poland, Ecuador, Venezuela and Bolivia). Resistance to ISDS has been the key plank of opposition to the Trans-Atlantic Trade and Investment Partnership (TPPA's Transatlantic sister agreement) which has now been put on the backburner after a massive popular campaign supported by nearly 3.5 million people.¹⁴
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4. Ineffective labour chapter

- 4.1 Workers in many TPPA countries face extremely poor conditions of work, low wages, poor to non-existent health and safety standards and negligible protection. Critics have long argued that trade and investment liberalisation can further drive down labour standards, creating a race to the bottom in wages and conditions.¹⁵ On a purely economic level, the

¹¹ <http://www.bloomberg.com/news/articles/2016-07-18/peruwins-arbitration-dispute-withrenco-over-smelter-cleanup>

¹² <http://www.theglobeandmail.com/report-on-business/ottawapays-abitibibowater-130-millionfor-expropriation/article1378193/>

¹³ <https://www.policyalternatives.ca/publications/commentary/130-million-nafta-payout-sets-troublingprecedent>

¹⁴ <https://www.theguardian.com/commentisfree/2016/jul/08/ttipdead-brexit-brussels-free-market>

¹⁵ See e.g. Anuradha RV and Nimisha Singh Dutta 'Trade and Labour under the WTO and FTAs' Centre for WTO Studies. Available at:

<http://wtocentre.iift.ac.in/Papers/Trade%20Labour%20Study.pdf>

reduction of labour rights can create unfair competition in a marketplace, engendering an incentive to deregulate labour markets and repress trade union organising. The opposite view would hold that the implementation of labour standards is a fundamentally protectionist exercise. The TPPA's Labour Chapter seeks to address these concerns in some manner. However the obligations contained are ultimately far too vague and the enforcement mechanism provided far too weak to be useful.

- 4.2 Since 1994, the United States has demanded the inclusion of some form of labour provisions in all of its bilateral and regional free trade agreements. This began with the North American Agreement on Labour Cooperation (NAALC), which complemented NAFTA, and has continued since then.¹⁶ Unfortunately, these provisions have consistently disappointed unions and labour organisations and the labour provisions in the TPP are similarly disappointing.
- 4.3 In 2007 the US adopted the so-called "May 10 Standard" or "model" labour protection language to safeguard international labour standards. This language is embodied by reference to the fundamental declaration,¹⁷ as well enforcement mechanisms and sanctions. It is argued that the strength of the US model is that it wed trade liberalisation to international labour norms.¹⁸ For the first time the May 10 Standard's unitary enforcement mechanism allowed trade sanctions to be brought for violations of labour rights.
- 4.4 While a step forward, trade union confederations and global union federations have criticised the US model as being too weak and practically unenforceable. In 2012 an alternative trade union movement model labour and dispute resolution chapter was proposed,¹⁹ that was endorsed by labour centres in Australia (ACTU), Canada (CSN and CLC), Japan (RENGO), Malaysia (MTUC), Mexico (UNT), New Zealand (NZCTU), Peru (CATP, CGTP and CUT), Singapore (NTUC), and the US (AFL-CIO). The TPP labour chapter that has appeared in the final text fails to respond to those recommendations, continuing the trend of vague obligations married to a high evidential standard, and relying on a state-state dispute settlement mechanism.
- 4.5 Many will argue that the presence of a labour chapter that at least tries to improve standards but fails (or only achieves marginally) is still better than nothing. We do not agree with this analysis. Where trade in industries in which labour rights violations occur is facilitated or expanded by trade agreements, a poorly designed labour chapter nonetheless provides legitimacy to that agreement, while simultaneously wasting the time of those workers and unions that attempt to engage with it.

¹⁶ The other US FTAs with labour rights are US-Israel, NAALC/NAFTA, US-Cambodia Textile Agreement, US-Jordan, US-Singapore, US-Chile, CAFTA-DR, US-Australia, US-Colombia, US-Bahrain, US-Morocco, US-Panama, US-Korea, US-Peru, US-Oman.

¹⁷ EU FTAs, on the other hand, include specific reference to the ILO Core Conventions themselves. It is believed that the reference to the Fundamental Declaration is included (rather than the conventions) because the US has ratified only three of the eight core conventions, however it is bound by the Fundamental Declaration by virtue of being an ILO member state.

¹⁸ Page 8

<http://www.eastwestcenter.org/sites/default/files/filemanager/pubs/pdfs/75Brownrev20160510.pdf>

¹⁹ <http://www.ituc-csi.org/the-union-proposal-for-the-labour?lang=en>

- 4.6 Chapter 19 of the TPPA on Labour presents some minor changes to the May 10 Standard, however they are only minimal and they will likely not have a material impact on the ability of workers and unions to address labour rights violations. The core “enforceable” provisions of the chapter are contained in Article 19.3. Article 19.3.1 requires each party to “adopt and maintain in its statutes and regulations, and practices thereunder”, stating the rights under the ILO Declaration (freedom of association and collective bargaining, forced and compulsory labour, child labour, and discrimination).⁷ This is distinct to the EU approach in its trade agreements, which reference the individual conventions, thus setting a higher degree of protection and precision.
- 4.7 19.3 governs both labour rights and certain “acceptable conditions of work”. 19.3.2 states that parties must also “adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.” This list of conditions falls short of recommendations made by the ITUC to include conditions around worker representatives, termination of employment, compensation in cases of occupational injuries and illnesses, and social security and retirement.⁸ And, while parties are not to derogate from labour standards (19.4(b)), labour standards are not to be used for protectionist purposes (19.2.2).
- 4.8 On the face of it these obligations seem to provide strong protection for labour rights. Exhibiting evidence of violations of these rights, however, is insufficient to trigger a claim under the chapter’s dispute machinery. As footnote 4 notes, establishing a violation of one of these obligations requires the Party to not only “demonstrate that the other Party has failed to adopt or maintain a statute, regulation or practice”, but it must be “in a manner affecting trade or investment between the Parties.” The obligations contained in 19.3.2 are even more problematic, on the basis that there are no standards for these requirements, meaning the minimum wage could be set at effectively nothing, maximum working hours could be set at 23 hours a day, and so on. To make matters worse, footnote 5 explicitly states that the satisfaction of these obligations is “as determined by that Party.” In other words, states are empowered to determine whether they have adequately complied with the provision themselves.
- 4.9 The ITUC argues that the chapter’s non-derogation (19.4(b)) obligation is drafted weakly. By excluding the clause “acceptable conditions of work” (19.3.2) from its scope it allows a country to weaken its wage, hour and health and safety laws to attract trade and investment without sanction. Secondly, states are entitled to weaken their laws related to a fundamental right to attract trade and investment, so long as they are not weakened to the point where they are inconsistent with that the minimum right. In other key areas the deal is also lacking. For example, the provisions with regard to forced labour only requires parties to “discourage” trade in such goods “through methods it considers appropriate” (Article 19.6).
- 4.10 Proponents of the deal have noted that TPPA contains “enforceable” labour rights, however the AFL-CIO argue that the proper yardstick ought to be whether there are sufficient provisions to provide confidence that they will actually be enforced.¹⁰ Past experience indicates that there is little evidence that these cases ever reach a resolution. The first ever labour case brought under a free trade agreement, filed under the Central American Free Trade Agreement’s labour chapter, regarding Guatemala’s legal compliance, is now more

than eight years old, and still no ruling has been issued.¹¹ That case, filed by AFL-CIO and six Guatemalan unions, alleged that the Guatemalan government had failed to prevent repression of union activity, blacklisting, violence and intimidation (including the assassination of two union officers). Like that trade agreement, the TPPA's labour chapter has no mechanism requiring parties to advance to the next stage of dispute settlement when an earlier stage proves ineffective (Article 19.5). There are no deadlines for public submissions, so claims may also suffer from similar endless "administrative delays" (Article 19.9). This same issue arose in a claim filed regarding labour violations in Honduras, in which petitioners have waited for two and half years for an initial report.

5. Malaysia and Vietnam

- 5.1 Once the US pulled out of the TPPA, Malaysia and Vietnam were left as two of the largest economies in terms of population. According to econometric studies by groups like the Peterson Institute for International Economics and the World Bank, Malaysia and Vietnam stood to benefit the most from TPPA's trade liberalisation in relative GDP terms. However the departure of the US from this agreement will actually result in a substantially worse situation for working people from Malaysia and Vietnam. That is because under the TPPA, the US had negotiated bilateral agreements with each country (as well as Brunei, although their population is very small in comparison).
 - 5.2 According to the International Trade Union Confederation's Global Rights Malaysia has a ranking of 4 (indicating systematic violations of rights), while Vietnam has a ranking of 5 (no guarantee of rights). These bilateral agreements were designed to bring Malaysian and Vietnamese labour law in line with obligations under the ILO Core Conventions, in particular Conventions 87 and 98 on freedom of association and collective bargaining.
 - 5.3 For social movements in these countries – particularly the Malaysian trade union movement – new rules that strengthened these rights (the subject of long-running international campaigns) were seen by many as an adequate trade-off for the other, more distasteful parts of the agreement. Put more cynically, the bilateral agreements undermined the opposition that the union movement – the backbone of resistance to TPPA – could muster.
 - 5.4 With a Labour-led Government now in Aotearoa New Zealand, it is the contention of the BWI that workers in different jurisdictions should not be actively undermining each other in this way, but rather acting in consistent solidarity. That no effort was made to ensure workers' rights were adequately protected in Malaysia and Vietnam in the absence of the bilateral agreements is disappointing to say the least.
 - 5.5 This could have been a prime opportunity for New Zealand to show leadership in the Asia-Pacific region and take steps to promote improved labour rights performance from some of our major trading countries with whom we have long-standing diplomatic and economic ties. Given the public statements direction that the new Government has made about pursuing labour and human rights through trade agreements, this is a matter of great concern.
 - 5.6 With negotiations for the Regional Comprehensive Economic Partnership (RCEP) ongoing – also involving Malaysia and Vietnam – it is hoped that the New Zealand Government will pursue a similar approach of bilateral agreements with this countries in this space.
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