Submission of Hon. Laila Harré

to the Foreign Affairs, Defence and Trade Committee on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

Contents

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Scope of submission

This submission refutes claims that the Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP) meets a "gold standard" for labour. Instead, the labour rules in the CPTPP labour chapter are weak and there are weak incentives to enforce them. Further, a resurgent labour movement and reforming government could find investment rules chilling progressive labour law ambitions and impeding policy choice. At a time of unpredictable developments in the world of work, it is vital to protect policy space. Contrary to claims made by advocates for the CPTPP, labour policy space is not specifically protected. There is no doubt that CPTPP rules favourable to investors can be used to limit policy options, including for labour law. It is my submission that:

1. The CPTPP will not contribute to improvements in labour standards, either in New Zealand or partner countries;
2. Policy space for labour law and policy responses to the contemporary and future labour landscape (e.g. arising from the fourth industrial revolution, demographic workforce changes and concerns with deepening inequality) is compromised by the CPTPP; and therefore
3. Parliament should reject the CPTPP.

I wish to be heard by the Committee.

Information about the submitter:

I have thirty years' experience as a practitioner and policy maker in labour law and industrial relations. I have worked under four major legislative frameworks – the IC & A Act, the Labour Relations Act, the Employment Contracts Act and the Employment Relations Act. I contributed to the drafting of the latter as the Associate Minister of Labour. I have held senior trade union roles, including in both large public (NZNO) and private (NDU) sector unions.

I have recently submitted a thesis about international investment agreements and labour law, completing requirements for my LLM (University of Auckland). This submission draws on that investigation.

Part 1: The Labour Chapter

The CPTPP Labour Chapter is modelled on US precedents, notably with Canada and Latin American countries. As a response to criticism of free trade and investment agreements, references to labour standards in international trade and investment treaties have become more widespread, with at least two decades of practice providing an evidence base to assess effectiveness in protecting and improving workers' rights.

Summary of TPP Labour Chapter

The standards	How do the standards apply?	When can another state act?
ILO Declaration on Fundamental Principles and Rights at work: - Freedom of association and collective bargaining - Elimination of forced/compulsory labour - Abolition child labour - Non-discrimination	Must be reflected in law and in practice Cannot derogate from laws to advance trade/investment if that would go below the standard in the Declaration Parties to discourage imports produced by compulsory/child labour	When a breach affects trade or investment between the parties
Acceptable working conditions (as determined by each party) - Minimum wages - Hours of work - Occupational health and safety	Must be reflected in law and in practice Cannot derogate from laws implementing these to advance trade/investment – but only in a special trade or customs area such as an export processing zone or foreign trade zone	When a breach affects trade or investment between the parties
Independent/impartial tribunals - includes detailed requirements for fair procedures, accessibility, right to review and execution of remedies	Must provide access to such tribunals	Where access is not provided – do not need to show impact on trade or investment between the parties
Enforcement of labour laws	Obligation of the parties to enforce, availability of resources is not an excuse	When a sustained/recurrent breach impacts on trade and investment between the parties
Corporate social responsibility	Parties encourage voluntary adoption of CSR labour initiatives	N/A

Labour law requirements and 'no lowering of standards'

The idea of these rules may appear solid. However, when carefully read and considered in the context of political and economic reality it is not.

For instance, Brunei is a party to the CPTPP. Indeed, even before New Zealand had an FTA with Brunei. It included labour standards. The TPP is said to be stronger than this agreement because its

labour chapter is enforceable under the state-to-state dispute resolution process. In 2015 New Zealand imported 332 million dollars' worth of goods from Brunei, 99% of which was oil. Brunei represses freedom of speech, controls popular meetings, has no legal framework for collective bargaining and makes strikes illegal. Unions are not allowed to join international networks, and corporal punishment can follow some workplace crimes. Unions and NGOs are subject to numerous controls, sedition laws are enforced, correspondence, email and social media are monitored. Sharia rules restrict opposite gender interaction outside the family. It's hardly surprising that there are no active unions - the Brunei Oilfield Workers Union is the only known union in recent history and its collective agreement is long expired. Labour bondage of migrant workers is widespread, with migrants imprisoned and caned for various permit problems.

So, finding labour rights violations in Brunei is not difficult. But crude oil makes up almost all of Brunei's exports. When the price of oil is set in the world market and by much bigger players, trying to prove that violations impacted on trade between two countries would be a fool's game.

The US has only once prosecuted labour violations under an FTA, alleging systematic failure by Guatemala to enforce its labour laws in breach of the Central American FTA (CAFTA). There, the original complaint was made by the AFL-CIO and several Guatemalan unions to the US Department of Labour in 2008. The US eventually sought arbitration in 2011. Some six years on, the Arbitral Panel issued its decision.[1] It found that while Guatemala had failed to effectively enforce its labour laws to the detriment of fundamental labour rights, the US had not demonstrated it had done so "in a manner affecting trade." This formulation is used throughout the CPTPP labour chapter.

In other words, it is not enough that Brunei (or any other CPTPP country) violates fundamental labour standards, but New Zealand (or another complaining country) would have to show that the violation impacted on its own trade or investment that country.

New Zealand's Employment Relations (Film Production Work) Amendment Act 2010 (the "Hobbit Law") also demonstrates the problem. The law, which overrides the usual tests of employee status, re-classifies some film industry employees as contractors, abrogating their collective bargaining and minimum employment rights. The law was a response to US production company threats to relocate production of the Hobbit movies following court findings that some production workers were employees, not independent contractors. The New Zealand-Malaysia Agreement on Labour

[1] *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR* (Final report of the Panel) 14 June 2017

Cooperation, a side agreement to the NZ- Malaysia FTA was in force at the time. It reaffirmed the parties' commitment to the ILO Declaration principles[2] and stated:[3]

> Neither Party shall seek to encourage or gain trade or investment advantage by weakening or failing to enforce or administer its labour laws, regulations, policies and practices in a manner affecting trade between the Parties.

The Hobbit law derogates from labour laws (and the ILO Declaration principles) by denying certain workers collective bargaining rights. But why and how would Malaysia, the only party with standing to do so, challenge it, using inter-State consultation as provided by the agreement?[4]

According to the International Institute for Sustainable Development there have only ever been four cases of inter-state enforcement of *any* investment agreement provisions.[5]

The TPP is applauded for backing its labour rules with the possibility of sanctions. Yet similar US agreements (e.g. with Peru and Colombia) show that even when rules against lowering labour standards (non-derogation) are technically enforceable, neither investors' home states nor third party states are incentivised to challenge breaches.

Indeed, since the US-Peru Trade Promotion Agreement came into force, *reductions* in Peruvian labour law protection have occurred, and ongoing violations of standards have been reported – including in the non-traditional export (NTE) sector, the sector encompassing textiles, apparel and some agriculture which has benefited most from market access.[6]

A 2014 US Government Accountability Office [GAO] report[7] into implementation of US FTA labour provisions found that only one of five complaints made since 2008 had been resolved by that time. This

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[2] Article 2(2)
[3] Article 2(6)
[4] Article 5
[5] IISD *State–State Dispute Settlement* (October 2014, Investment Treaties Best Practices Series, <www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf>) at 1 "One case was a diplomatic protection claim initiated by Italy against Cuba on behalf of Italian investors. Another claim was brought by Mexico against the United States and related to alleged treaty violations by the respondent state …. In the two remaining cases, host states filed claims in response to investor-state disputes that they were facing at the time, seeking an interpretation of treaty provisions by the tribunal (Peru v. Chile and Ecuador v. United States)."
[6] Office of Trade and Labor Affairs *Public Report of Review of US Submission 2015-01* (Peru) (US Department of Labor, March 2016) at 17 "NTE revenue to the US increased 80%, compared to a 26% increase in total export revenue in the first five years"
[7] *Free Trade Agreements* (Government Accountability Office, Report to Congressional Requesters, November 2014) Accessed at <www.gao.gov/products/GAO-15-160>

was the second GAO report[8] to criticise monitoring and enforcement deficits, finding capacity and procedures remained insufficient even to meet the procedural

The problem of what the real incentives are arises – after all host governments tolerating violations by MNC investors understand those investors can simply move to another country, or even close that legal establishment and establish a new locally incorporated entity.

Fragmenting international labour law

Another key concern with the CPTPP Labour chapter (and its predecessors) is that by co-opting the ILO Declaration as the basis of labour norms, there is a risk to the coherence of international labour law, and the ILO supervisory system. The Declaration lists four principle rights:

- freedom of association and the effective recognition of the right to collective bargaining;
- the elimination of all forms of forced or compulsory labour;
- the effective abolition of child labour; and
- the elimination of discrimination in respect of employment and occupation.

ILO officials are concerned that this use of the Declaration risks fragmenting international labour law and weakening rights by making them subject to trade and investment norms.[9] In contrast to ILO Conventions and Recommendations, the principles in the Declaration are not rules themselves. When treaties allow the detail of rules of conduct (actual standards) to be decided outside the ILO system like this, uncertainty and global inconsistency in the setting and enforcement of standards is likely.[10] This risk is compounded by the CPTPP, which makes it explicit that only the Declaration principles and *not* the specific ILO standards they are intended to underpin apply:

> "The obligations set out in Article 19.3 (Labour Rights), as they relate to the ILO, refer *only* to the ILO Declaration."[11]

The result is "vague and undefined,"[12] labour rules, demonstrating the low priority attached to them compared to the level of detail lavished upon the trade and commercial matters covered by the treaty.

[8] The previous report was in 2009
[9] Jordi Agusti-Panareda, Franz Christian Ebert and Desirée LeClercq *Labour Provisions in Free Trade Agreements: Fostering their Consistency with the ILO Standards System*: *Background Paper Social Dimensions of Free Trade Agreements* (International Labour Office, 2014)
[10] At 17.
[11] TPP Chapter 19 n3 (emphasis added)
[12] Michael A Cabin "Labor Rights in the Peru Agreement: Can Vague Principles Yield Concrete Change?" (2009) 109 (5) CLR 1047 at 1072.

Working Conditions

The CPTPP requires legislation to govern "acceptable conditions of work". The scope of such conditions is very narrow - non-derogation from such conditions only applies in free trade zones.[13] Also, parties can set their own benchmarks, again without reference to ILO standards or jurisprudence. So, for instance, as long as hours of work are governed by law they may still be excessive.

Procedural Guarantees

The CPTPP[14] requires public promotion of labour laws, access to information and to independent and impartial enforcement tribunals, with detailed requirements for the conduct of proceedings, review, transparency and so on. The specificity of these rules contrasts with the vagueness of the terms citing the ILO Declaration and the open-ended working conditions rules. The procedural guarantees are absolute, so do not need to affect trade or investment – making them more like the commercial chapters in FTAs, such as intellectual property. On the other hand, the rules are limited in scope, relating only to procedures to enforce "labour laws," which are defined as those laws that relate *directly* to the four "internationally recognised labour rights" and to minimum wages, hours of work and occupational safety and health. [15] So the uncertainty and vagueness remains even here. For instance, the guarantees do not extend to claims related to disciplinary action, dismissal, and the enforcement of collective or other employment agreements which provide above-minimum conditions.

Labour Co-operation provisions

The Labour Chapter also involves labour co-operation machinery. This is comparable to New Zealand's current bilateral FTAs which each set out labour standard expectations underpinned by co-operation mechanisms. [16] Documents provided to the writer by the Ministry of Business, Innovation and Employment[17] reveal that neither New Zealand, nor its trading partners, has prioritised labour co-operation activities. Despite agreements to develop labour work programmes in each case, New Zealand has not initiated any activity to improve working conditions or to give effect to undertakings to "strive to adopt and maintain"[18] laws, policies and practices reflecting the principles of the ILO Declaration.

[13] Article 19.4 (b)
[14] Article 19.8
[15] Article 19.1 Definitions
[16] See: NZ-China FTA (2008) Memorandum of Understanding on Labour Co-operation; NZ-Thailand CEP (2005) Arrangement on Labour; Transpacific Strategic Economic Partnership (NZ, Singapore, Brunei, Chile) CEP (2005) MOU on Labour Co-operation; Malaysia-NZ FTA (2009) Agreement on Labour Co-operation; NZ-Philippines MOU on Labour Co-operation (2008) stand-alone agreement; NZ-Hong Kong CEP (2011) MOU on Labour Co-operation; NZ-Taiwan Agreement on Economic Co-operation (2013) Chapter 16 Trade and Labour; NZ-Korea FTA (2015) Chapter 15 Labour.
[17] "FTA Labour Co-Operation" (MBIE, undated, on file with author)
[18] Typical form of undertaking in NZ bilateral FTAs

At best, New Zealand has responded to requests for technical assistance from counterpart labour administrations, none geared towards the fundamental rights referred to in the Declaration, despite concern regarding violations of fundamental rights in most counterpart countries.

The EU has also favoured a co-operation-based approach in the form of Trade and Sustainable Development (TSD) Chapters in its FTAs. A recent EU "non-paper"[19] notes concern at the complexity and capacity required to implement TSD Chapters. A major study published last month found no evidence that the existence of TSD chapters has led to improvements in labour standards governance in any cases studied, nor any significant prospect of longer-term change.20

None of the EU, US and NZ labour rules for investment demonstrate a record of improving labour standards and working conditions.

No requirement to comply with Labour Chapter to access treaty benefits

Under the TPP, 'Consistency Agreements' between the US and Vietnam, Brunei and Malaysia required labour law and practice changes to be made before the treaty would apply between the US and each of the three states. Following US withdrawal from the TPP, no CPTPP party has adopted the Agreements. This means that the strongest leverage in the TPP to upgrade national labour law has disappeared from the CPTPP. Having said that, experience suggests that even such conditionality is a weak protection - the US imposed such conditions for bringing both its Peru and Colombia FTAs into force, which was possible because of the leverage it exercises through congressional certification of compliance. In the former case the Bush administration,[21] and in the latter the Obama administration,[22] declared the conditions had been met, despite substantial contrary evidence.

Labour Chapter overall

Overall the Labour chapter is substantively weak, and the evidence of both enforceable and co-operation based labour rules in similar treaties points to their weakness as a tool for improving labour standards. If the Committee were to reject the CPTPP it could be confident that doing so would *not* mean throwing the "labour rights baby" out with the "investment protection bathwater." Co-operation on labour issues is not dependent on such treaties and has plenty of scope in other forms of co-operation, principally through the ILO.

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[19] *Services Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements*, European Commission, 2017 accessed at < trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf >

[20] James Harrison, Mirela Barbu, Liam Campling, Ben Richardson, Adrian Smith, *Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters* 2018, https://doi.org/10.1111/jcms.12715

[21] Above n143 at 837.

[22] At 838-840.

Part 2: Policy space and Investor State Dispute Settlement

The CPTPP intrudes into national policy space, including labour policy space. Administrative action, legislation, regulation and even domestic Court judgements are subject to investment rules including national treatment, most-favoured nation status, fair and equitable treatment and rules relating to direct and indirect expropriation. Foreign investors can enforce these rules directly, through ISDS, leading to binding and enforceable awards.

The Committee will be familiar with leading ISDS cases related to social, environmental and other public policy areas. While there have been few ISDS cases related to labour that is not surprising - the explosion in investment agreement arbitration has occurred the period of labour law deregulation and so corporates (including foreign corporates) have had little to complain about. In my submission, demands will increase to address inequalities and challenges arising from both the past thirty years of neoliberal economics and labour law and workforce change, as well as anticipated disruption to traditional work because of the fourth (digital) industrial revolution. As this happens the risk that ISDS claims to protect investors benefiting from the current (de-regulated) norms must rise too.

It is simply wrong to state, as did Trade Minister Parker to TVNZ, that: "If, for example, we changed the regulation related to taxes or environment *or labour laws* or public health or did anything with our public schooling system or our public health system, no, they could not [sue New Zealand using ISDS]"[23] The CPTPP does not exclude the possibility of ISDS over labour measures. Such measures could be held to be indirect expropriation or a breach of fair and equitable treatment standards (FET). No CPTPP language specifically excludes, excepts or limits the scope of ISDS in respect of labour measures,

Labour Measures could be Indirect Expropriation

The Committee will be aware that regulations can be deemed expropriation when they do not involve nationalisation of an investment, or even a benefit to the state, but substantially interfere with the property right (measures going to fundamental rights of ownership or long-term interference with the investment). Under customary international law such expropriation must be compensated, and ISDS allows investors to directly seek compensation without the support of their home government.

[23] TVNZ Q+A: David Parker interviewed by Corin Dann (Press Release, 12 November 2017, <www.scoop.co.nz/stories/PO1711/S00144/qa-david-parker-interviewed-by-corin-dann.htm>) (emphasis added)

The current legal situation is one of considerable uncertainty as to the boundaries between the regulatory space allowed to state and investor protection. This has led to clarifying language in treaties, with a CPTPP Annex providing:[24]

> (b) Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health (n37), safety and the environment, do not constitute indirect expropriations, except in rare circumstances.

The Oxford English Dictionary defines "rare" as "not occurring very often".[25] In my opinion, the only way to interpret this clause is as an assumption by drafters that the effect of regulations will only rarely be severe enough to reach the threshold for (indirect) expropriation. In other words, the word "rare" can only be an expectation and not a rule, as legal outcomes can't be rationed subject to quotas. Further, that expectation is based on assumptions that aggressively interventionist state practice is unlikely, an assumption that may not hold for labour law if a resurgent labour movement and a reforming government work together to respond to deepening inequality and the many workforce challenges we know are ahead.

Based on a reading of recent jurisprudence and scholarship there are various scenarios which could see labour measures rules deemed to be (indirectly) expropriatory, for instance when significant shifts in labour law are not planned for by investors, who have got used to business-as-usual deregulatory laws. Such a radical shift happened in the other direction with the passing of the Employment Contracts Act 1991 (ECA). The Employment Relations Act (ERA) has not marked a restoration of either the status quo ante or a substantial departure from the ECA's individual and enterprise-based approach. Public policy discussion now has moved to imagining far deeper changes to labour law. Keep in mind that even in highly regulated areas ISDS is being used to challenge Government regulation – for instance there is no certainty as to the outcome in the continuing *Lone Pine v Canada*[26] case on fracking, a much more heavily regulated area than labour at present.

Some labour measures may fit neatly within the scope of police powers or non-compensable takings (e.g. directly implementing the ILO norms against the worst forms of child labour); but others have long been accepted by experts as examples of indirect expropriation which would require compensation

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[24] TPP Annex - Two further explanatory notes provide n36 "For greater certainty, whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector"; and n37 deals with pharmaceuticals and related subjects.

[25] https://en.oxforddictionaries.com/definition/rare

26 *Lone Pine Resources Inc. v. The Government of Canada* ICSID Case No. UNCT/15/2

(e.g. 'excessive' increases in the minimum wage, prohibitions on dismissal).[27] Others could well be on the boundary – which we know can result in a chilling effect on governments who may respond to threats of ISDS by abandoning fundamental reforms.

Labour measures are much more likely to interfere with investments to the extent required for indirect expropriation in the service sector. Here, investments derive their principal value from the use of labour. Services now make up an increasing proportion of total foreign investments. Platform-based intermediaries (like Uber and Amazon Mechanical Turk) have invested based on a near-complete transfer of risk to drivers and other workers. A complete restructuring of labour arrangements necessitating minimum (or collectively bargained) wages, leave, paid time off for union education and meetings, and continuous payment through a driver's shift have a similar impact on such companies as the non-renewal of a permit to process hazardous waste, for instance. (an example of a successful indirect expropriation claim). This is exactly the scenario contemplated in the New Zealand Labour Party's "Future of Work" project which declared a responsibility "to ensure that we do not fall victim to 'techno-determinism.'"[28] One recommendation reads:[29]

> S3 – Commission proposal: New employment-relations framework and collective-agreement targets. We propose that a new employment-relations framework is developed, focused on enabling effective unionisation, and that Government sets a target of growing the number of workers covered by collective-employment agreements. This should include expanding the rights of contractors to ensure people who would otherwise be an employee still have the right to be paid the minimum wage, join a union, and participate in collective bargaining.

This deceptively brief proposal signals potentially radical reform, making the government accountable for increasing collective agreement coverage through "effective unionisation", and extending labour rights to contract workers, a feature of the digital economy. This implies legislation, regulation and institutional support for unionisation well beyond the current remit of the neo-liberal state.

An ISDS panel could well find that the public interest in upgrading the living standards of a section of the workforce (like platform workers) would not outweigh impact on investment value in such a case. If the government knew the likely effect on the investment was jobs in the industry, then that could lead a panel to hold that the labour measure was not *bona fide*, or legitimate or consistent with public welfare.

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[27] Influential sources such as "OECD Draft Convention on the Protection of Foreign Property (OECD, Paris, 1962) text with Notes and Comments" and the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, (1961) 55 American Journal of International Law 545 at 559 cite excessive minimum wages and prohibitions on dismissal as obvious examples of indirect expropriation which would require compensation. Refer above n93 at n187.

28 NZ Labour Party *Future of Work Report* (5 November 2016, <www.futureofwork.nz/>)

29 At 32.

Such issues go to the heart of the contest between labour and capital over the regulatory interventions of the state – a contest that it is completely undemocratic to hand to ISDS panels to adjudicate on.

Another scenario could be a major change to the way work is organised – for instance if to manage the costs of the Living Wage for government contractors, the government decided to facilitate the establishment of worker co-operatives and to partner with these in preference to competitive tendering. Now, three overseas-owned companies dominate the building services sector. Such a move could cripple them and their ability to compete with the new co-operatives in the private sector too. There would probably be evidence that labour advocates hoped for this result, and that politicians turned a blind eye to (or even winked at) the possibility of localisation of the industry. The affected investors could also allege a breach of national treatment requirements (after all they would effectively be prevented from tendering for public contracts where a co-operative is preferred and suffer consequential losses in the private sector). Government (and/or local government) would be ruling out foreign investors as suppliers and giving a leg up to local workers, even though under the WTO Agreement on Government Procurement and the CPTPP, New Zealand allows parties' investors to bid for government services contracts valued at more than 130,000 SDRs (approximately NZD240,000). Building services are not excluded.[30] While CPTPP Article 9.12 says that National Treatment does not apply to government procurement, the definition in Article 1.3 makes it clear that this refers to the procurement process, not the outcome.

Fair and Equitable Treatment

The foregoing scenarios show how labour measures *could* reach a threshold of indirect expropriation. Even more likely is the possibility they would be in breach of the fair and equitable treatment (FET) standard. Establishing a violation of this standard is not dependent on the threshold of loss required for expropriation.

There are many examples of ISDS panels finding against states, even where treaties state that FET should be limited to the minimum standard of treatment under customary international law (CIL), as is the case with CPTPP. In my opinion there are several ways in which labour measures could be especially vulnerable to FET claims.

[30] MFAT "TPP Factsheet: Government Procurement" <www.tpp.mfat.govt.nz/assets/docs/TPP_factsheet_Govt-Procurement.pdf>

Creeping violations - At the same time as the tribunal in *El Paso v Argentina*[31] rejected several earlier pro-investor articulations of the FET requirement,[32] it introduced the notion of a "creeping" standard of unfair treatment, packaging a series of otherwise lawful actions as a breach. Platform work and the digital economy in general present governments with policy challenges across a wide range of areas: labour standards, labour inspection and the boundaries of the employment relationship, taxation, sectoral regulation (e.g. transport, food safety), consumer rights and safety, competition issues, data and privacy to name several. Gaining control of the regulation of such new industrial modes will take time, and the options are not predictable. From radical reform of the employment relationship to requiring platform-based companies to provide access to their data for labour inspection, the potential labour measures are themselves numerous, and could give rise to such a creeping violation of the FET standard, especially when numerous possible non-labour interventions are also considered.

Social and political concerns - labour law development is always a deeply political process and ISDS tribunals are much warier of politically or socially motivated regulation than that based on science. For instance, in *William Ralph Clayton et al v Government of Canada*[33] (*Bilcon*) the panel rejected a planning decision that was based on evidence of a social nature (as would always be the basis of labour regulation).

If social considerations make decisions vulnerable to ISDS, then those of a political character are at least as exposed. ISDS enables investors (and arbitrators) to second-guess the political responses of sovereign governments to domestic democratic pressure. Measures motivated by socio-political concerns would be subjected to the primacy of the treaty. This hierarchy is so fundamental to the operation of investment chapters that it is hardly visible. In fact, it can seem so absurd that when, in an analogous context, it was recently pointed out to New Zealand's Deputy Prime Minister that FTAs prevented the new Government from introducing a royalty on bottled water exports, he responded:[34]

> "We are a sovereign nation and you are seeing a restoration of our sovereignty."

[31] *El Paso Energy International Company v. The Argentine Republic* ICSID Case No. ARB/03/15 (Award) 31 October 2011

[32] These included proactive support of foreign investment (from *MTD v Chile*), a program of good governance which no state could achieve (from *Tecmed v Spain*), and an obligation to stabilise the legal and business framework (from *Occidental v Ecuador*)

[33] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada* UNCITRAL PCA Case No. 2009-04 (Award on Jurisdiction and Liability), 17 March 2015

[34] *Audrey Young "Winston Peters and David Parker at odds over whether export tax breaches trade deals" (NZ Herald, Auckland, 30 November 2017)* 5

> Peters said it was not a foreign policy matter: "It is to do with our domestic economy and who runs our economy and who has propriety [sic] over our resources."

Former New Zealand Prime Minister Helen Clark had a similar response in 2000 when she was told the Government could not introduce its local content broadcasting quota policy under the GATS:[35]

> We have unilaterally disarmed ourselves on trade but very few others have been so foolish. We're now left with perfectly legitimate calls for more local content and people saying, 'You can't do that because of Gats [sic].' This seems a bit ridiculous so we're just working out the best way to handle it.

Several cases involve panel's ruling against states where there is a political angle – for instance in *MTD v Chile*[36] where a local authority's zoning decision was as odds with support at the national level for a certain type of development the panel objected to the lack of coherence between the two, finding it breached FET (also a feature of *Bilcon*). The New Zealand government is considering introducing Fair Pay Agreements, empowering administrative bodies to extend the coverage of collective agreements across an industry, to employers who do not consent to a settlement.[37] Even if the correct procedures are followed, in the event of an outcome at odds with expectations (for instance created by government policy or investor discussions with ministers or officials) FET issues could well arise. Even political persuasion can be a breach – as it was in *Biwater Gauff v Tanzania*,[38] where critical statements of an investor made by a government Minister were found to breach the FET obligation. With labour measures so bound to politics, the potential for missteps is real.

The European Court of Justice (ECJ) has dealt with "public interest" and "proportionality" concerns in relation to labour issues in two major cases – *Viking* and *Laval*.[39] There, only strikes for the application of minimum labour standards were considered to be covered by the public interest protection when compared to the rights of companies to movement and establishment. In other words, where workers only demand the minimum under law, then their rights are protected. The same reasoning could well apply in ISDS cases to governments: regulation (such as a Fair Pay Agreements) that meets the economic threshold for indirect expropriation, or otherwise breaches the investors' legitimate

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[35] Eugene Bingham "Spectre of trade wrangle over TV quota" (NZ Herald, Auckland, 30 June 2000)
[36] *MTD Equity Sdn Bhd v Republic of Chile* ICSID Case No ARB/01/7 (Award) 25 May 2004 12 ICSID Rep 6 (2007) para 163 cited in Asha Kaushal "Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime" (2009) 50(2) Harv Int Law J 491 cites *MTD* at 529 n232.
[37] New Zealand Labour Party, "Workplace Relations Policy" (2017 Election Policy, <www.labour.org.nz/workplace_relations_policy>)
[38] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* ICSID Case No ARB/05/22 (Award) 24 July 2008 in Kaushal n305 at 530 n235.
[39] Rebecca Zahn 'The Viking and Laval Cases in the Context of European Enlargement' (2008) 3 Web JCLI <webjcli.ncl.ac.uk/2008/issue3/zahn3.html>

expectations, may be considered disproportionate or unreasonable if the objective is working conditions that are significantly above international labour standards or nationally legislated minima. Remember, excessive minimum wages have long been considered candidates for indirect expropriation.[40]

To summarise, there are many immediately recognisable scenarios under which ISDS could be used to demand compensation for labour measures. Considering the unknown future for labour regulation given the exponential changes anticipated in the world of work, handing ISDS panels the right to adjudicate between democratic decisions and investor interests is of huge concern.

Labour measures are not specifically protected in the CPTPP

I have presented evidence that labour measures could be subject to ISDS. Here, I submit that protections for regulatory space in the CPTPP do not safeguard labour measures. Safeguards include exceptions and exclusions (carve-outs). The strength of a safeguard can be evaluated by the protection it provides for the type of measure in question *and* by its capacity to minimise litigation. This latter point is important. For instance, tobacco companies are known to litigate to discourage tobacco control measures. One unsuccessful Philippines defence is believed to have cost the public up to USD58 million.[41]

Other submitters will have noted that the WTO-style general exception clause does not apply to the investment chapter. Even if it did, it is my submission that it would not give protection to labour measures, which are not directly covered by the general exception. Because the exception does not apply it is not necessary to elaborate on my opinion here. For what it is worth I doubt that the extension of the WTO general exception to investment chapters would be of much benefit anyway – a matter that can be elaborated on in the Government's trade policy review.

Other treaty terms which may protect regulatory space (to a greater or lesser extent) are carve outs (including reservations in negative list annexes), clauses recognising the right to regulate, and preambles. The CPTPP does not carve-out labour measures from investment disciplines, or even, as is the case with tobacco control, from the scope of ISDS. Negative list annexes are a limited form of carve out that can be used to preserve existing and future non-conforming measures (depending on the annex in which they are listed) in relation to certain services or investment rules, such as national treatment or

[40] Herein n267.
[41] Above n325.

senior management and board of directors.[42] No such reservations protect regulatory space for labour measures in relation to FET or indirect expropriation claims.

The CPTPP has a standard clause recognising the right to regulate:[43]

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.

The first thing to note is that labour measures are not directly specified. Second, any regulation captured must be consistent with the investment disciplines in the Investment Chapter. The clause is completely circular and does not modify investor rights.

Preambles may help states to defend measures. The CPTPP preamble states:

> [The Parties recognise] their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals.

Again, there is no specific reference to labour measures. The notion of "legitimate public welfare objectives" is always contentious in the labour area, where the evidence for welfare is always contested and never clear in advance of implementation. Further, it is the Labour Chapters that gives expression to the objectives in the preamble, that Chapter does not constrain the operation of the investment rules.

[42] See e.g. NZ Annexes to TPP <www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Annexes/Annex-II.-New-Zealand.pdf>
[43] Article 9.16: Investment and Environmental, Health and other Regulatory Objectives (emphasis added)

Conclusion

My aim in this submission has been to refute claims made by the Government that the CPTPP reflects a "gold standard" for labour rights. The Labour Chapter is not a high-water mark for labour protection, but hollow promises muddied by vague terms with little incentive for enforcement. New Zealand's own record of holding trading partners to account on labour rights is dismal, as the foregoing shows. If any value is to be gained from these clauses, then the Government must do far better in monitoring and following up concerns through the consultation and enforcement processes. Resources should be provided for this – both to the state sector and to the NZCTU and/or interested NGOs and academics.

Of even greater concern is the potential risks of the CPTPP and treaties like it to progressive labour law reform. The nature of investor protections is to put boundaries on the contest between labour and capital over the regulatory power of the state. The whole purpose of such agreements is to limit regulatory options. It is only because the age of ISDS has co-existed with the age of labour law deregulation that ISDS cases over labour measures are rare. Anticipated and deep change to workplaces and workforces arising from the digital revolution mean that handing the right to limit our policy choices to unelected panels of adjudicators is an affront to our confidence in our own ability to develop and implement a fair and sustainable policy response.

I urge the Committee to reject the CPTPP.

ends