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**THE CASE FOR A HUMAN RIGHTS IMPACT ASSESSMENT
OF THE PROPOSED TRANS-PACIFIC PARTNERSHIP
FREE TRADE AND INVESTMENT AGREEMENT**

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1. INTRODUCTION

- 1.1 New Zealand is currently involved in negotiating the Trans-Pacific Partnership Agreement (TPPA) with Australia, Brunei Darussalam, Chile, Malaysia, Peru, Singapore, the United States of America and Vietnam.
- 1.2 All rounds of the negotiations have taken place behind closed doors and away from public scrutiny. Despite publicly expressed concerns about the erosive effects Free Trade Agreements (FTAs) on fundamental human rights, the New Zealand government refuses to make the process more transparent. A petition is currently before the Foreign Affairs, Trade and Defence Committee seeking a hearing into the implications of the agreement and additional measures to deliver a more open process.¹
- 1.3 The lack of disclosure makes it impossible to be precise about the content and human rights impacts of the agreement. However, predicted impacts of the agreement in New Zealand include the introduction of ‘investor-state dispute resolution’ allowing corporations to sue the government, weakening of the Pharmac regime and challenges to GE food labelling laws, amongst other things.
- 1.4 This paper makes the case for a human rights impact assessment of the TPPA. It identifies the importance of ensuring that human rights are not subordinated to commercial interests through trade treaties; examines the concept of human rights impact assessments of trade agreements and a range of precedents for their conduct; and addresses the importance of disclosure of information as a pre-requisite to the effective exercise of the right to participate in public affairs.

¹ Petition of Robert John Reid on behalf of the National Distribution Union and fifteen other people on behalf of their respective organisations Seeking Transparency and Debate on Trans-Pacific Partnership Agreement Negotiations, 12 April 2011; <http://tppwatch.org/2011/04/12/petition-seeks-parliamentary-hearing/>

- 1.5 On the basis of this paper, the New Zealand Human Rights Commission is requested, at the least, to conduct a scoping study of the human rights issues raised by the TPPA negotiations, and discuss the matter and appropriate responses with other human rights bodies in the various participating countries. It is hoped that the scoping study will support the need for a full *ex ante* Human Rights Impact Assessment of the proposed TPPA.
- 1.6 A supplementary dossier will be provided that identifies relevant human rights issues with regard to four areas: health, livelihood, impact on indigenous peoples and democratic decision-making. It is preliminary and indicative, and aims to highlight some of the human rights implications that could arise out of the TPPA, based on analyses of existing Free Trade Agreements.² The dossier draws upon the work of a range of international and national human rights bodies as well as human rights experts.
- 1.7 The research for both papers has been undertaken with considerable assistance from students in the Equal Justice Project in the Faculty of Law at the University of Auckland.

² Particular reference will be made to the following agreements: North American Free Trade Agreement (NAFTA) 1993; US-Chile Free Trade Agreement (US-Chile) 2004; Dominican Republic-Central American Free Trade Agreement (DR-CAFTA) 2004; US-Australia Free Trade Agreement (AUSFTA) 2005; Canada-Peru Free Trade Agreement (Canada-Peru) 2009; Korea-US Free Trade Agreement (KORUS), signed 2007, awaiting US Congressional ratification; US-Colombia Free Trade Agreement (US-Colombia), signed 2006, awaiting US Congressional ratification; US-Andean Free Trade Agreement (US-Andean), inactive since 2005; Thailand US Free Trade Agreement (Thai-US FTA), negotiations suspended 2006; European Union India Free Trade Agreement (EU-India FTA), under negotiation; US-South African Customs Union Free Trade Agreement (US-SACU), negotiations suspended 2006.

2. THE RISK TO HUMAN RIGHTS FROM A TPPA

- 2.1 The parties to the TPPA, including New Zealand, are also parties to many international and regional human rights treaties, although the coverage is far from uniform.
- 2.2 International treaties like the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Labour Organisation (ILO) core labour rights, Convention on the Rights of the Child (CRC), the Declaration on the Rights of Indigenous Peoples (DRIP) and the Cartagena Protocol on Biodiversity carry obligations at international law.
- 2.3 State parties to these treaties are bound to take measures that respect, protect and fulfil their human rights obligations, avoid measures that would constrain their ability to meet those commitments, and not undermine the ability of other countries to comply with their own obligations. Even states that have not ratified agreements are bound by a good faith legal obligation to refrain from acts that could defeat the object and purpose of human rights.
- 2.4 Most states also have human rights obligations under their national Constitutions. The New Zealand government's domestic legal obligations arise in particular pursuant to Te Tiriti o Waitangi 1840, the NZ Bill of Rights Act 1990 and the NZ Human Rights Act 1993.
- 2.5 The UN High Commissioner for Human Rights warned in a forthright report on liberalisation of trade in services in 2002 that the state's human rights obligations must not be subordinated to trade rules; nor should states be subject to sanctions for taking action to protect human rights.³

³ ECOSOC, 'Economic, Social and Cultural Rights. Liberalization of Trade in Services and Human Rights. Report of the High Commissioner. Executive Summary', E/CN.4/Sub.2/2002/9, 25 June 2002, p 26 & 28

- 2.6 These observations were prompted by a growing number and significance of free trade agreements, and concerns from human rights bodies and academics that the trend towards a ‘trade-related’ human rights regime elevates the imperatives of the market and the economic growth model ahead of internationally recognised social norms that give primacy to human dignity and wellbeing.⁴
- 2.7 When legal obligations from different systems of rights conflict at international law, the competing state obligations have to be appropriately balanced. Human rights cannot be traded off. Rather, as the UN Conference on Human Rights in Vienna observed in 1993: “Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments”.⁵
- 2.8 Human rights rules therefore oblige governments, including the New Zealand government, to take into account their human rights obligations when drafting, negotiating and implementing FTAs. To do so, they require an explicit inquiry into and understanding of those obligations. Such a human rights impact assessment has never been undertaken in New Zealand.
- 2.9 The potential breadth of subject matter, geographical scale and enforcement powers proposed for the Trans-Pacific Partnership Agreement make such an assessment a matter of priority and urgency.

⁴ For a detailed discussion see Jane Kelsey (2008), *Serving Whose Interests? The Political Economy of Trade in Services Agreements*, Routledge UK, chapter 3.

⁵ Armin Paasch, Frank Garbers and Thomas Hirsch, *Trade Policies and Hunger. The impact of trade liberalisation on the right to food of rice farming communities in Ghana, Honduras and Indonesia*, FIAN International, 2003, www.fian.org/resources/documents/others/trade-policies-and-hunger/pdf

3. HUMAN RIGHTS IMPACT ASSESSMENTS OF FREE TRADE AGREEMENTS

3.1 Despite growing awareness that free trade and investment agreements have human rights implications there have been relatively few systematic human rights impact assessments (HRIAs), as opposed to economic, social and environmental impact studies. HRIAs:

endeavour to measure the positive and negative impacts on the enjoyment of human rights that are likely to happen or have already occurred in relation to a specific trade policy or agreement. Their objective is to provide trade policymakers with a better understanding of consequences that their actions can have on human rights, with the view to mitigate the adverse effects of economic and trade policies.⁶

3.2 The UN Special Rapporteur on the Right to Food identified the value of such assessments as:

- Helping to ensure compliance with international obligations;
- Strengthening democratic control and accountability for the effects of these agreements, including consultation with stakeholders; and
- Giving civil society and human rights institutions a voice in assessing these policies.⁷

3.3 The Report of the High Commissioner on Human Rights on Liberalisation of Trade in Services and Human Rights in 2002 also called for greater transparency:

A human rights approach requires a constant examination of trade law and policy as it affects the enjoyment of human rights. Assessing the potential and real impact of trade policy and law on the enjoyment of human rights is perhaps the principal means of avoiding the implementation of any retrogressive measure that reduces the enjoyment of human rights. Human rights assessments of liberalization provide both a set of targets and standards for assessments as well as a methodology for undertaking assessments. Thus, human rights assessments gauge the implementation of trade

⁶3-D, 'Insights on Human Rights Impacts Assessment of Trade Policies and Agreement', http://www.3dthree.org/pdf_3D/HRIAsbackgroundinformation.pdf, Geneva, undated, p.2

⁷Ibid

policies on a set of outcomes according to the subject matter of human rights - health care, education, food security and so on. Further, human rights assessments introduce a methodology for assessments that promotes popular participation and consultation of the people affected by liberalization - the poor, people dependent on public services, rural as well as urban dwellers, small business people and so on. Further, such a consultative process would seek the opinion, not only of trade and industry ministries but also ministries dealing with social issues such as health and education. Further, a human rights approach to assessments emphasizes transparency and accountability so that the outcomes of assessments and negotiation processes in trade forums are open to public scrutiny. Consequently, essential to a human rights approach to trade is a cautious approach to the setting of trade policy and rules, based on sound evidence that any particular strategy will promote the enjoyment of human rights, not only lead to increased investment or economic growth.⁸

3.4 A seminar of experts convened in Geneva in mid-2010 to discuss the rationale, objectives and methodologies for human rights impact assessments of free trade agreements. It concluded that: “The global trade and investment regime has a profound impact on human rights. An alternative regime is needed to ensure that trade and investment support the realization of human rights. HRIAs can contribute to this goal.”⁹

3.5 The seminar also proposed international benchmarks for a credible HRIA process. These include: independence; fair and transparent process; involvement of relevant expertise; participation by a wide range of stakeholders; empirical research that tracks both positive and negative impacts linked to indicators (quantitative and qualitative); attention to the process dimension of the trade/investment negotiations; adequate financing; and a channel to feed recommendations into official processes.

3.6 In a detailed proposal for the HRIA of the Canada-Colombia FTA, James Harrison highlighted methodological questions of timing (ex ante or ex post assessments), subject matter (direct cf indirect impacts on human rights),

⁸ ECOSOC, 25 June 2002, E/CN.4/Sub.2/2002/9, p.5

⁹3-D, op cit, p.3

time period (expected date of ratification). A number of recommendations were made, recognising that each agreement may require a case-by-case approach.¹⁰

4. HUMAN RIGHTS IMPACT ASSESSMENTS OF FTAS

- 4.1 A number of UN bodies have undertaken assessments of the sectoral implications of free trade agreements for rights falling within their mandate. These vary in depth and use diverse methodologies. Most of these reports and resolutions focus on multilateral rather than bilateral and regional agreements.

UN Sub-Commission on the Promotion and Protection of Human Rights

- 4.2 A preliminary report on trade and human rights for the UN Sub-Commission on the Promotion and Protection of Human Rights in June 2000 referred to the World Trade Organisation as a “virtual nightmare” for the human rights of certain sectors of humanity.¹¹ In welcoming the report the Sub-Commission resolved to:

Encourage the Special Rapporteurs on globalization and its impact on the full enjoyment of human rights to examine further the relationship between international human rights law and international economic law, particularly in relation to the functioning of multilateral and plurilateral economic institutions; to focus on guidelines and mechanisms necessary to deal effectively with the phenomenon of globalization and its varied impacts on the full enjoyment of human rights; and to propose further measures

¹⁰ James Harrison, ‘Conducting a Human Rights Impact Assessment of the Canada-Colombia Free Trade Agreement: Key Issues’, Background paper prepared for the CCIS Americas Policy Group, January 2009

¹¹ J. Oloka-Onyango and Deepika Udagama. *The Realization of Economic, Social and Cultural Rights: Globalization and its impact on the full enjoyment of human rights*. (Preliminary Report). Geneva: United Nations Sub-Commission on the Promotion and Protection of Human Rights, 15 June 2000, para 15

<http://www.unhchr.ch/huridocda/huridoca.nsf/2848af408d01ec0ac1256609004e770b/21a92d3d0425a0cec125693500484d2f?OpenDocument&Highlight=2,Oloka-Onyango>

necessary to ensure that the United Nations human rights regime is strengthened to address the challenges presented.¹²

- 4.3 A second resolution focused on the relationship between intellectual property and human rights and called for further reports, monitoring and expert seminars.¹³ The Sub-Commission noted the actual or potential conflict between the implementation of the WTO Agreement on Trade-related Aspects of Intellectual Property (TRIPS) and the realisation of economic, social and cultural rights, in particular the rights of self-determination, food, housing, work, health and education. It also stressed the need for adequate protection of traditional knowledge and cultural values of indigenous peoples against bio-piracy and of their control of genetic and natural resources.
- 4.4 The Sub-Commission requested a report on the human rights implications of the liberalisation of trade in services, especially the General Agreement on Trade in Services (GATS).¹⁴ That report, released in 2002, deemed any deliberately retrogressive measure in the liberalisation process that reduces the state's ability to protect human rights is itself a human right violation.¹⁵

¹² United Nations Sub-Commission on the Promotion and Protection of Human Rights. "Globalization and its impact on the full enjoyment of all human rights" (Resolution 2001/5), 25th meeting, 15 August 2001;

<http://www.unhchr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.SUB.2.RES.2001.5.En?Opendocument>

¹³ United Nations Sub-Commission on the Promotion and Protection of Human Rights, "Intellectual property and human rights" (Resolution 2001/21), 26th meeting, 16 August 2001; <http://www.unhchr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.SUB.2.RES.2001.21.En?Opendocument>

¹⁴ United Nations Sub-Commission on the Promotion and Protection of Human Rights. "Liberalization of trade in services, and human rights" (Resolution 2001/4). Geneva: United Nations Sub-Commission on the Promotion and Protection of Human Rights, 25th meeting, 15 August 2001;

¹⁵ ECOSOC, 'Economic, Social and Cultural Rights. Liberalization of Trade in Services and Human Rights. Report of the High Commissioner. Executive Summary', E/CN.4/Sub.2/2002/9, 25 June 2002, p 26 and 28

UN Committee on Economic, Social and Cultural Rights

- 4.5 The UN treaty bodies have also made a series of recommendations to individual States on the issue of intellectual property, access to medicines and the enjoyment of human rights.¹⁶
- 4.6 In June 2004, for example, the UN Committee on Economic, Social and Cultural Rights (CESCR) called on Ecuador, in the context of the proposed US-Andean FTA, to take into account its human rights obligations in “all aspects of its negotiations with [...] regional trade agreements to ensure that economic, social and cultural rights, particularly of the most disadvantaged and marginalized groups, are not undermined.”¹⁷ This recommendation was used by Ecuadorian civil society in September 2004 in order to stem adoption of a draft Presidential decree that aimed to incorporate proposed data exclusivity rules into national law before finalization of the US-Andean FTA negotiations.¹⁸
- 4.7 Similarly, the CESCR report on Costa Rica in 2008 recommended the state “undertake the measures necessary to assess the potential adverse impact of its commitments under CAFTA on economic, social and cultural rights and to ensure that Covenant rights, in particular labour rights, access to health, social security and generic medicines and the intellectual property regimes are not adversely affected.”¹⁹

¹⁶ Davinia Ovet, ‘Free Trade Agreements (FTAs) and Human Rights: A Serious Challenge to Latin America and the Caribbean’, *Puentes*, vol VII, no.1, January-February 2006, p.3; see also Cecilia Chérrez, ‘FTA Facing the Apocalypse’, *Acción Ecológica*, January 2005, <http://www.bilaterals.org/spip.php?article1165>

¹⁷ CESCR, Ecuador, Concluding Observations, E/C.12/1/Add.100, 7 June 2004.

¹⁸ Ovet, op cit, p.3

¹⁹ United Nations, ‘Concluding Observations of the Committee on Economic, Social and Cultural Rights (Costa Rica)’, Committee on Economic, Social and Cultural Rights, (E/C.12/CRI/CO/4: January 2008: para.48).

<http://www.unhcr.org/refworld/publisher,CESCR,CONCLOSURES,CRI,479853232,0.html>

Thailand National Human Rights Commission

- 4.8 To date, only a handful of national human rights bodies have conducted a formal HRIA. The first involving a US FTA was undertaken by the National Human Rights Commission of Thailand in 2007. The initiative following the coup d'état in 2006 that deposed Prime Minister Thaksin Shinawatra; the start of negotiations for an FTA with the US in 2004 was one cause of his unpopularity.
- 4.9 The report examined a wide range of rights covered by the 1997 Thai Constitution, including agriculture, environment, intellectual property, the impact of services and investment on the right to development, socio-economic and cultural rights, community rights, rights to access resource bases, access to medicines and public health services.
- 4.10 The negotiations were heavily criticized as lacking transparency, with a significant impact on people's livelihoods and national sovereignty. The Commission observed that existing US FTAs have obliged the countries signing them to "[a]ccept the US demands that are of a uniform standard with respect to intellectual property, investment liberalization, the environment, etc., all of which have impacted people's livelihood and national sovereignty."²⁰ The result "is like a tsunami that crashes to the shore without warning when one is not prepared to deal".²¹

²⁰ Ad Hoc Coordinating Sub-committee to Review and Examine the Establishment of Thailand-United States Free Trade Area, *Report on Result of Examination of Human Rights Violations, the Thai National Human Rights Commission, 2006*, p. 2. (Thai Human Rights Commission) English version accessible from http://www.measwatch.org/autopage/show_page.php?t=5&s_id=3&d_id=7.

²¹ Ibid, p. 43 See also Sanya Smith, 'Thai Human Rights Commission Attacks FTA with US', Third World Network, 30 January 2007, <http://www.twinside.org.sg/title2/twninfo492.htm>

Canada-Colombia FTA

- 4.11 Human rights issues were at the core of citizen and CSO mobilization over the Canada-Colombia FTA. An alliance of opposition political parties secured a hearing before Canada's Parliamentary Standing Committee on International Trade. A wide range of civil society organisations from both Canada and Colombia participated in parliamentary hearings, and the committee travelled to Colombia, which further highlighted the issues.
- 4.12 The Standing Committee called for an independent ex ante HRIA of, on the following terms:²²
- [A]n independent, impartial, and comprehensive human rights impact assessment should be carried out by a competent body, which is subject to levels of independent scrutiny and validation; the recommendations of this assessment should be addressed before Canada considers signing, ratifying and implementing an agreement with Colombia.²³
- 4.13 The combination of civil society pressure and the call for an HRIA resulted in a side agreement that each party would undertake an annual report on the human rights impacts of the agreement. This was treated as an important recognition of the mutuality of human rights obligations. However, the lack of any no clear processes or standards associated with the agreement created concerns that the process would be superficial.²⁴

²² Harrison, op cit.

²³ Quoted in Harrison, op cit, p. 9

²⁴ Berne Declaration, Canadian Council for International Co-operation & Misereor (2010). Human Rights Impact Assessment for Trade and Investment Agreements. Report of the Expert Seminar, June 23-24, 2010, Geneva, Switzerland, p. 16

5. THE RIGHT TO PARTICIPATE IN PUBLIC AFFAIRS

- 5.1 According to the UN Human Rights Committee, the right to take part in the conduct of public affairs covers “all aspects of public administration, and the formulation and implementation of policy at the international, national, regional and local levels”.²⁵
- 5.2 Every person and all peoples are entitled to active, free and meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights can be realized. Specifically, this includes the right to take part in the conduct of public affairs, freedom of expression and the right to seek, receive and impart information, freedom of association and assembly, freedom of movement and the right to a remedy.
- 5.3 The Special Rapporteur on the Promotion and Protection of Freedom of Opinion and Expression remarked in April 2010:

The Human Rights Committee has emphasized the importance of the right of citizens to be informed of the activities of public officials and to have access to information that will enable them to participate in political affairs. In a democracy, the right of access to public information is fundamental in ensuring transparency. In order for democratic procedures to be effective, people must have access to public information, defined as information related to all State activity. This allows them to take decisions; exercise their political right to elect and be elected; challenge or influence public policies; monitor the quality of public spending; and promote accountability. All of this, in turn, makes it possible to establish controls to prevent the abuse of power.²⁶

²⁵ Human Rights Committee, General Comment 25 (57), General Comments under article 40, paragraph 5, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996)

²⁶ Report of the Special Rapporteur, Promotion and protection of the right to freedom of opinion and expression, UN Doc. A/HRC/14/23, 20 April 2010, para. 31 (emphasis added).

- 5.4 The increasing levels of participation and disclosure in UN fora pose a direct challenge to the low levels of civil society participation in trade institutions.

US-Thai FTA

- 5.5 The report of Thailand's Human Rights Commission stressed the importance of democratising the treaty-making process, in particular through disclosure of information and public participation. It considered the key to public participation was the disclosure of negotiation information especially the draft texts of both parties and the time frame of the negotiation.²⁷
- 5.6 The Commission recommended a Constitutional amendment that stipulated a public hearing be held and every person has the right to vote on the signing of an international trade agreement or an international treaty which will impact the country. Since 2007, Section 190 of the Constitution requires the National Assembly to approve any treaty that has an immense effect on the economic or social security of the country or results in the binding of trade. Before the conclusion of such a treaty, the Council of Ministers must provide information on it to the public, conduct public consultation and state information to the National Assembly, and the Council must submit negotiation framework to the National Assembly for approval.

EU-India FTA

- 5.7 Human rights impact studies by NGOs have been especially critical of the exclusion of those whose human rights will be most severely affected, while corporate interests enjoy privileged access to information and the negotiations.

²⁷ Thai Human Rights Commission, p. 68

- 5.8 The authors of a study on the FTA negotiations between India and the EU, the world's two largest so-called democracies, claim the negotiations are tailored to corporate interests through an "incestuous relationship with vested interested groups".²⁸
- 5.9 Negotiations are kept behind closed doors with no access for non-governmental organisations, trade unions or even members of the respective parliaments. No negotiating text or position papers have been made available to the Indian public, the Parliament or state governments. Whenever Parliamentarians or members of state governments have questioned the Indian government on the content of the FTA, they have been deflected with superficial information or received nothing at all. Impact studies about the EU-India FTA, which have been commissioned by the government, have also been kept out of the public domain.²⁹
- 5.10 In Europe, even information that has been clearly shared with corporate lobbyists has been withheld from the public and public interest groups. In February 2011 the Corporate Europe Observatory filed a case with the EU General Court challenging the privileged access of business lobby groups to negotiating documentation.³⁰
- 5.11 In the absence of transparency, labour unions, civil society organisations, representatives of the informal sector, dalit and adivasi groups, fishermen and women, farmers' and women's networks have had little chance to understand the implications of the negotiations or to fight for their interests.³¹

²⁸ Pia Eberhardt and Dharmendra Kumar "Trade Invaders: How big business is driving the EU- India free trade negotiation" (Corporate Europe Observatory, Belgium, 2010).

<http://www.corporateeurope.org/global-europe/content/2010/09/eu-india-trade-invaders>

²⁹ Ibid, p. 33

³⁰ <http://www.corporateeurope.org/global-europe/content/2011/03/eu-reporter-eu-india-court-case>

³¹ Eberhardt and Kumar, op cit, p. 33.

- 5.12 The little information that has been leaked has raised serious concerns among groups in India and the EU. They have called for an immediate halt to the negotiations until all information is released and broad consultations including with the most affected groups in India and the EU have been held.

CAFTA

- 5.13 Costa Rica was the only country that subjected ratification of CAFTA to national referendum, obtaining a narrow majority in favour. According to Simon Walker, when Costa Rican negotiators raised their human rights obligations, including the right to health, with the US during the process of negotiating the CAFTA, the US responded that the negotiations were a commercial matter and unrelated to human rights.³²
- 5.14 A Report of the Defensoría de los Habitantes (Citizen Ombudsman) underlines the lack of transparency in providing negotiating texts, noting that the text was withheld from the Legislative Assembly for 'strategic reasons'. The Ombudsman compares this situation with that in the US where the relevant legislation requires the negotiation text to be supplied to Congress. A legal challenge by the Ombudsman and 17 legislators to the constitutionality of CAFTA in July 2007 failed.³³
- 5.15 The Ombudsman's report also suggests that public health officials were not active participants or appropriately represented in the CAFTA negotiations of an agreement that would have significant impacts on the Ministry's functions, and representatives had difficulties in accessing versions of the negotiation text.³⁴

³² Simon Walker, *The Future of Human Rights Impact Assessments*, Intersentia, Mortsel, Belgium, 2009, p. 199. The paper is accessible at <http://igitur-archive.library.uu.nl/dissertations/2009-1111-200128/walker.pdf>

³³ <http://www.technollama.co.uk/cafta-declared-constitutional-in-costa-rica>

³⁴ Walker, op cit, pp. 179- 180.

5.16 The experience with CAFTA led Walker to suggest that the threat posed by the agreement's enforcement provisions related less to the US commencing litigation and more to the combination of political pressure and the threat of legal action. Indeed, a process of US Certification of Costa Rican laws appeared to suggest a high degree of concern on behalf of the Government to meet the demands of the US in order to avoid problems arising.

Release of Information

5.17 The right to take part in the conduct of public affairs and the right to seek, receive and impart information are particularly relevant in the context of trade agreements.³⁵ At the national and international level, governments tend to maintain secrecy and exclude representative civil society organizations from trade policy formulation, while privileging access for commercial interests, in a manner inconsistent with participation and freedom of information.

5.18 The issue of confidentiality poses particular problems for effective and meaningful participation and assessment, given that negotiators have been unwilling to risk strategic advantages in the negotiation process. These are issues that an HRIA will have to take into account through its methodology, particularly given the emphasis placed on public participation and transparency, as well as in its recommendations.³⁶

5.19 There has been no disclosure of draft texts or other documentation relating to the TPPA, either by the parties collectively or by the New Zealand government at the national level.³⁷

³⁵ Ibid, p. 100.

³⁶ Ibid, pp. 97- 98.

³⁷ Letter to the Ministers of Trade for the TPPA Countries from the Peak Union Bodies of Australia, Chile, New Zealand, Peru, Singapore, and the US 10 May 2010; Letter to Rt Hon John Key and Hon Tim Groser seeking release of draft TPPA text and documentation signed by 850 people, 10 February 2011; similar letters from civil society organisations in Australia, Chile, Malaysia and the US were presented to the Heads of Delegation at the Santiago round of negotiations in February 2011.

5.20 A petition presented to the New Zealand Parliament in April 2011,³⁸ which reflected the terms of previous requests by civil society across the TPPA countries,³⁹ asked that:

(a) the Foreign Affairs Defence and Trade Committee convenes a hearing into the potential implications for New Zealand of the TPPA as a matter of urgency; and

(b) the Parliament resolves that the New Zealand government publish simultaneously on its website all documents that it tables at the TPPA negotiations and proposes to all the other the TPPA negotiating parties at the forthcoming negotiations that they agree collectively to

(i) Create and maintain a public website which governments and civil society can post information and participate as equals in a dialogue and debate;

(ii) Post the draft text of each chapter as it is completed to open them to expert and public scrutiny;

(iii) Post countries' position papers on specific subjects that are tabled during negotiations; and

(iv) Guarantee that all civil society has equal access to information and engagement with the process, regardless of whether they are supportive or critical of the proposed agreement, ending the privileged treatment that pro-TPPA corporate lobby groups have enjoyed to date.

5.21 The argument that the current level of secrecy is common practice for free trade negotiation is not supported by the facts. These are numerous recent examples of disclosure that has engendered significant informed debate.

Free Trade Area of the Americas (FTAA)

5.22 The closest analogy to the Trans-Pacific free trade negotiations is the multi-party Free Trade Area of the Americas – indeed, the ambition is ultimately to convert the TPPA into a Free Trade Area of the Asia Pacific. In 2001 the 34

³⁸ Petition of Robert John Reid and 14 others, 12 April 2011, op cit.

³⁹ 'End Secrecy on TPP Trade Talks – Petition', *NZ Herald*, 13 April 2011

participating governments agreed to release the draft text for public scrutiny and debate. The first negotiating text was released in July 2001. This 250-page document was a compendium of inputs from all countries, with square brackets to indicate wording that was not agreed although it did not indicate individual countries' positions. The text was in all four official languages of the negotiations.

- 5.23 The US Trade Representative Robert Zoellick hailed the decision to release the text, saying, "This is an important step in an international trade negotiation-make [sic] public at such an early stage the text under negotiation [and] we believe that the availability of the text will increase public awareness of and support for the FTAA."⁴⁰ The Office of the USTR invited comments on the draft text, although the 6-week deadline made any deeper analysis problematic. A second draft text was made public in November 2002 and a third in November 2003.

Multilateral Agreement on Investment (MAI)

- 5.24 Plurilateral negotiations among OECD countries for a Multilateral Agreement on Investment (MAI) began in secret in 1995. There are strong parallels with the investment chapter of the proposed TPPA, with demands from corporations extending far beyond the investor rights that were envisaged in the MAI. A draft bracketed text of the MAI was officially released and posted on the Internet in April 1998, a year after a leak of the text in March 1997 had generated a vigorous informed debate. The leaked text had indicated country positions, which were removed from the official draft. A number of participating governments tabled the document in their parliaments, along with their list of proposed reservations. In New Zealand, the availability of the draft text enabled detailed analysis and discussions with MFAT officials on the meaning and implications of the complex legal provisions.

⁴⁰HKTDC, 'FTAA Draft Text Released After Months of Delay', 23 July 2001, <http://info.hktdc.com/alert/us0114c.htm>

Anti-Counterfeiting Trade Agreement (ACTA)

5.25 The Anti-Counterfeiting Trade Agreement is another highly relevant plurilateral negotiation. ACTA was proposed in 2006 and talks were formally launched in mid-2008, around the same time the US-P4 negotiations began. Three versions of draft texts were leaked between 2008 and 2010, generating in-depth analysis and an international controversy over US-led demands. The parties then agreed to demands from the public and politicians for greater transparency and released an official draft text of the agreement in April 2010. A second draft text was released in October, before the conclusion of negotiations in November of 2010.

5.26 In an overwhelming vote of 633 to 13, the EU Parliament voted for a resolution on ACTA that addresses a wide range of criticisms that civil society groups made of the process and substance. The Director of NGO Knowledge Ecology International described the EU Parliament's vote as:

a powerful move against secrecy in trade negotiations, and a timely reminder of important substantive concerns about the agreement. The US Congress needs to reflect upon the EU vote, and reassess its hands-off attitude toward the ACTA negotiation. The United States government now stands isolated as the only real barrier to making this negotiation more open. The recent leaks of the ACTA text illustrate how willing the negotiators are to meeting in secret to reshape global norms on intellectual property policy, without providing balance or safeguards for the public or for innovators.⁴¹

5.27 The resolution was accompanied by a threat that “unless Parliament is immediately and fully informed at all stages of the negotiations, it reserves its right to take suitable action, including bringing a case before the Court of Justice in order to safeguard its prerogatives”. The European Parliament also called on the Commission to conduct an impact assessment of the

⁴¹ www.keionline.org/blog

implementation of ACTA with regard to fundamental rights and data protection, ongoing EU efforts to harmonise intellectual property rights enforcement measures, and e-commerce, prior to any EU agreement on a consolidated ACTA treaty text, and to consult with Parliament in a timely manner about the results of the assessment.

- 5.28 New Zealand Trade Minister Hon Tim Groser publicly welcomed the release of the ACTA text:

New Zealand has supported public release of the negotiating text, in response to strong public interest, and I am pleased that we have now reached agreement with the other participants in this negotiation. This will make the ACTA negotiations more accessible to the public and I hope that it will help the process of reaching a final agreement.⁴²

- 5.29 As with the MAI, there is a direct parallel between the content of ACTA and the proposals for the TPPA. Leaks of the proposed IP chapters from the US and New Zealand earlier this year have enabled experts to analyse their relative implications for crucial areas of domestic policy, such as medicine prices, access of materials by libraries and future control of the Internet. These documents have also informed a complaint to the UN Special Rapporteur on Health, which would have been extremely difficult without access to the text itself.

WTO Documents

- 5.30 All TPPA negotiating parties are members of the World Trade Organisation (WTO). The WTO has responded to criticisms about the lack of transparency in its processes by posting a range of documents on its website.⁴³ These

⁴² 'Groser Welcomes Release of ACTA Negotiating Text', 18 April 2010, <http://www.scoop.co.nz/stories/PA1004/S00184.htm>

⁴³ http://www.wto.org/english/tratop_e/dda_e/tnc_e.htm. The WTO website also hosts a number of commentaries and publications, although these rarely contain any critical content.

include the minutes of meetings of sectoral and subject committees and sub-committees and formal Member communications.

- 5.31 The WTO has also posted various documents relating to the Doha round negotiations, including those produced by the Trade Negotiations Committee, progress reports by chairs of the various sectoral and subject committees, and negotiating drafts on agricultural modalities, non-agriculture market access modalities, rules, including anti-dumping, horizontal subsidies disciplines and fisheries subsidies, and services, including the chair's text on disciplines on domestic regulation.

Unilateral release of GATS 2000 negotiating documents

- 5.32 The General Agreement on Trade in Services (GATS) was one of the package of agreements that resulted from the Uruguay round of GATT negotiations and the creation of the World Trade Organisation in 1995. A new round of negotiations to extend the each Member's sectoral coverage under the GATS began in 2000 and was incorporated into the Doha round negotiations when they were launched in 2001.
- 5.33 These negotiations generated international demands for transparency as people became concerned about the implications of the GATS for domestic law and policy. This pressure intensified following the leaking of requests that the EU made of other WTO Members. Subsequently, a number of governments including New Zealand decided unilaterally to make public the schedules of their 'offers' of new commitments to other countries.
- 5.34 The New Zealand Ministry of Foreign Affairs and Trade (MFAT) launched a public consultation phase in 2003, which was informed by a summary of requests that other Members made of New Zealand. Over 200 submissions were received. The March 2003 Cabinet paper concerning New Zealand's

initial services offer was released under the Official Information Act. The New Zealand government then unilaterally released the initial conditional offer itself, with a 10-page summary and request for further input. The government subsequently posted a summary of its revised offer with the actual text on the MFAT website and a guide on how to read GATS schedules. All these documents were posted on the MFAT website.⁴⁴

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⁴⁴ <http://www.mfat.govt.nz/Trade-and-Economic-Relations/NZ-and-the-WTO/Improving-access-to-markets/0-gats-consultation1.php>