



## Expert paper #8

### TPPA LABOUR CHAPTER – NOT A GOLD STANDARD

**Laila Harré**

Key Points: weak protections for labour, unions and workers; past experience of labour clauses; reliance on ILO Declaration on Fundamental Principles and Rights at Work; labour law enforcement issues; voluntary corporate social responsibility; interests of migrant workers ignored; posted workers defined as trade (mode 4).

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Negotiations for the Trans-Pacific Partnership Agreement (TPPA) among twelve negotiating countries – Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam – were concluded in Atlanta, USA on 5 October 2015. The text, released on 5 November 2015, had 30 chapters and many annexes, with parties also adopting bilateral side-letters. The TPPA was signed on 4 February 2016 in New Zealand, which is the formal depositary.

Each party to the negotiations was required to complete its own constitutional processes and requirements before it could take steps to adopt the agreement. The TPPA would come into force within two years if all original signatories notified that they have completed their domestic processes, or after 2 years and 3 months if at least six of them, including the US and Japan and several other large countries, did so.

In January 2017 US President Donald Trump withdraw the participation of his country in the agreement. Discussions continue among the remaining eleven countries about what, if anything, they should do in the absence of the US. Nevertheless, the legal issues arising from the text remain relevant to assessments of the TPPA and future agreements. This research paper is part of a series of expert peer-reviewed analyses of different aspects of the text.

# THE TPPA: LABOUR CHAPTER

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## KEY POINTS

- This is the first time a Labour Chapter in a New Zealand Free Trade/Investment Agreement has been subject to the dispute processes;
- Investor State Dispute Resolution may be available to investors who object to labour law changes;
- There is more scope for non-state actors (eg unions) to raise issues but they cannot take enforcement action;
- There has been a disappointing lack of enforcement of labour commitments under the US FTAs that the TPPA Labour Chapter is modelled on – in fact not a single complaint has progressed to a concluded panel decision;
- New Zealand has not utilised its earlier Labour Co-operation agreements to press trading partners on labour violations;
- Some TPPA parties have been criticised for systematic violations of fundamental labour rights;
- The 1998 ILO Declaration on Fundamental Principles and Rights at Work is the primary source of the TPPA labour standards – this is problematic as it is vague, was not intended for the trade and investment arena and could be interpreted inconsistently with international labour conventions and recommendations;
- There is no clarity as to the content of acceptable conditions of work, which are to be determined by each party;
- There are prescriptive requirements for domestic labour law enforcement procedures and machinery;
- Original and new parties can join the Treaty without meeting the labour standards; although the US has set extra conditions for Vietnam, Brunei and Malaysia (these do not apply between those countries and NZ or a TPPA minus the US);
- States cannot derogate from their labour laws to sweeten trade or investment deals – however this is only if that derogation breaches the principles of the ILO Declaration – or undermines local labour law on working conditions in a free trade zone;
- Countries are required to enforce their labour laws, but action can only be taken by other countries if there is a sustained or recurrent failure to do so;
- The double-soft law on Corporate Social Responsibility (CSR) could be worse than nothing – it could make it more difficult for a country to require corporates to apply CSR rules;
- There is no reference to migrant worker protections and rights, despite the large incidence of migrant workforces in the region;
- Any beneficial impact on labour standards from the TPPA would require parties to show far more commitment to enforcement than has been evident to date, and to add technical assistance, monitoring and public reporting to their policy goals.

# Introduction

The Labour Chapter of the TPPA has received very little attention in the local TPPA debate. Unlike some other chapters, it does not require changes to be made to current New Zealand law. Yet labour, along with land and the environment, is at the heart of trade and investment questions. As New Zealand has already lowered tariff barriers to a negligible level it had little to trade in terms of the market access elements of the TPPA. For this reason, debate in New Zealand has been less focused on the direct employment impacts of the agreement than, for instance, in the US, where the Labour Advisory Committee has estimated manufacturing job losses, resulting from the agreement, at 330,000.<sup>1</sup> The absence of discussion about the rebuilding of an advanced productive sector in New Zealand also narrows the focus of public debate in relation to trade.

Much of the public policy debate in New Zealand has been centred on the TPPA investment Chapter. The analysis of the Investment Chapter which forms part of this series<sup>2</sup> concludes that there is considerable uncertainty as to the impact of the TPPA on regulatory space. I do not deal here with the implications of that analysis for labour rights. However, it should be noted that far-reaching reform of New Zealand labour law which (re)imposed minimum industry standards, or converted contractors into employees, or otherwise deeply impacted the business models of investor-owned operations could lead to disputes in the future. Governments wanting to avoid disputes could choose not to (re)regulate. That is the chilling effect described in the Investment Chapter analysis. Similar clashes would arise should states consider future measures to regulate global value chains.

Labour issues also arise in other ways within the agreement - for instance professional qualifications, licensing and registration requirements feature in Chapter 10 (Cross-Border Trade in Services); Chapter 12 deals with the temporary entry of business persons; and Chapter 15 (Government Procurement) extends New Zealand's existing obligations under WTO's Government Procurement Agreement (GPA) to Brunei, Chile, Malaysia, Mexico, Peru and Vietnam (the other TPPA parties are GPA parties).

This paper looks at how the TPPA is positioned in a long history of attempts to tie trade to labour rights. Some TPPA parties have a reputation for serious violations of labour standards, very low wages and poor working conditions. Some (such as New Zealand in the Hobbit case) have explicitly compromised labour law in order to facilitate trade or investment. Addressing such conduct should, in theory, improve workers' lives in developing countries and protect jobs in industrialised ones from a "race to the bottom".

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1 Report on the Impacts of the Trans-Pacific Partnership by the Labor Advisory Committee on Trade Negotiations and Trade Policy, 2 December 2015, p.23 <https://ustr.gov/sites/default/files/Labor-Advisory-Committee-for-Trade-Negotiations-and-Trade-Policy.pdf>

2 Amokura Kawharu, 'TPPA: Chapter 9 on Investment', Expert Paper #2, December 2015, <https://tpplegal.files.wordpress.com/2015/12/ep2-amokura-kawharu.pdf>

The paper briefly sets out the main elements of the labour chapter and compares it to the labour provisions of New Zealand's earlier bilateral and multi-party free trade agreements. It then consider several issues:

- The record of similar agreements, and the same parties (including NZ and the US), in protecting and improving labour standards through FTAs;
- The problem of relying on the 1998 ILO Declaration on Fundamental Principles and Rights at Work as the primary source of the TPPA labour standards;
- The weakness of rules on acceptable conditions of work compared to much clearer requirements for domestic labour law enforcement procedures and machinery;
- The ability of original and new parties to join the Treaty without meeting the labour standards;
- The limits of the rule against derogating from labour laws;
- Hurdles to prosecuting breaches;
- The double-soft law on Corporate Social Responsibility, which could be worse than nothing; and
- The lack of reference to migrant worker protections and rights.

## Main elements of the TPPA Labour Chapter

A clause by clause summary of the TPPA Labour Chapter is appended. The following table sets out the key standards, when they apply, and when action can be taken by another party.

The Standards	How does the standard apply?	When can another state take action?
<p>ILO Declaration on Fundamental Principles and Rights at work:</p> <ul style="list-style-type: none"> <li>• Freedom of association and collective bargaining</li> <li>• Elimination of forced/ compulsory labour</li> <li>• Abolition child labour</li> <li>• Non-discrimination</li> </ul>	<p>Must be reflected in law and in practice</p> <p>Cannot derogate from laws to advance trade/investment if that would go below the standard in the Declaration</p> <p>Parties to discourage imports produced by compulsory/child labour</p>	<p>When a breach impacts on trade and investment between the parties</p>
<p>Acceptable working conditions (as determined by each party)</p> <ul style="list-style-type: none"> <li>• Minimum wages</li> <li>• Hours of work</li> <li>• Occupational health and safety</li> </ul>	<p>Must be reflected in law and in practice</p> <p>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</p>	<p>When a breach impacts on trade and investment between the parties</p>
<p>Independent/impartial tribunals</p> <ul style="list-style-type: none"> <li>• includes detailed requirements for fair procedures, accessibility, right to review and execution of remedies</li> </ul>	<p>Must provide access to such tribunals</p>	<p>Where access is not provided – do not need to show impact on trade and investment between the parties</p>
<p>Enforcement of labour laws</p>	<p>Obligation of the parties to enforce, availability of resources is not an excuse</p>	<p>When a sustained/recurrent breach impacts on trade and investment between the parties</p>
<p>Corporate social responsibility</p>	<p>Parties encourage voluntary adoption of CSR labour initiatives</p>	<p>N/A</p>

# How the final text of the TPPA Labour Chapter compares to earlier drafts and previous NZ FTAs

Despite the efforts of labour interests to make the TPPA a positive platform for the improvement of working conditions and wages, the consensus of advocates is that the Labour Chapter “does not make significant, meaningful improvements over the nearly decade old George W Bush era standard”<sup>3</sup> and the side agreements made with Vietnam, Malaysia and Brunei are said to represent a “new low”.<sup>4</sup> The final text contains almost no advances on earlier text from the point of view of strengthening labour rights.

It does, however, represent a departure from earlier labour chapters and labour co-operation agreements attached to New Zealand’s bilateral FTAs,<sup>5</sup> as follows:

- the Chapter is subject to the dispute procedures of Chapter 28, so non-compliance could give rise to a loss of benefits under the agreement;
- the Corporate Social Responsibility and “Public Awareness and Procedural Guarantees”<sup>6</sup> are new - the latter provision sets out comprehensive requirements for domestic administrative machinery and effective judicial procedures relating to the enforcement of domestic labour law;
- there is more scope for submissions by non-state actors relating to the Chapter to be received and considered at the state level, albeit only insofar as conduct submitted on relates to trade and investment between the parties<sup>7</sup>. This procedure is limited to “persons of a Party” (nationals) and does not lead into the Dispute process. However, it does require the submission and the result of consideration to be made available to other Parties. This may act as a prompt to other Parties to utilise the Labour Consultation process<sup>8</sup> and ultimately Chapter 28 (Dispute Settlement); and
- three US consistency, or side, agreements (with Vietnam, Brunei and Malaysia) require specific labour law improvements to be made before the agreement is effective between each of these parties and the US.

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3 Public Citizen, ‘Initial analyses of Key TPP Chapters: Secret TPP text revealed: it’s worse than we thought’, November 2015, <https://www.citizen.org/documents/analysis-tpp-text-november-2015.pdf>

4 Ibid

5 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.

6 TPPA, Article 19.8

7 TPPA, Article 19.9 Public Submissions

8 TPPA, Article 19.15

Overall, then, the TPPA Labour Chapter is procedurally stronger than earlier New Zealand agreements. The issues explored in the rest of this paper address the following questions:

- What are the standards that the TPPA aims to protect or achieve – how high (or low) is the bar set?
- How credible are the strengthened procedures, and how likely are they to be activated?

If the intention is to prevent derogation from labour standards and to see standards raised,<sup>9</sup> then both the content of those standards, and their enforcement, matter.

## **Labour standards and trade and investment agreements – what’s the record of similar agreements, and similar parties?**

Labour-related clauses in contemporary international trade and investment agreements have been promoted since the mid-1980s. The ICFTU campaigned for the inclusion of labour standards in the GATT, and since the 1990s unions, human rights organisations and some governments have advocated for them to:

- prevent the lowering of labour standards as an inducement to investment and trade;
- reduce competition based on cheap labour inputs by requiring state parties to pass and enforce domestic labour laws that comply with international labour standards; and
- utilise trade negotiations as a lever to improve working conditions around the world.

According to the NZ Government<sup>10</sup> the TPPA aims to achieve the first two of these purposes and to “strengthen co-operation on labour issues and enhance labour capability of the TPPA parties”.

New Zealand favoured the inclusion of labour provisions from the outset of the negotiations. The precursor agreement, the 2005 Trans-Pacific Strategic Economic Partnership [SEP] package, included labour commitments but these were not subject to disputes procedures.

The TPPA requires certain international standards to be met domestically as a condition of trade. Such vertical arrangements have been sought by advocates of wedding labour standards to trade rules. A primary purpose of contemporary international (free) trade rules is to roll back measures such as tariffs and quantitative restrictions on imports – measures designed to protect industry and jobs by reducing the price advantage attributable to lower costs, including labour costs.<sup>11</sup> In this context the case for such vertical arrangements has found greater political traction as a way of easing resistance to liberalisation. Such arrangements also differ from the kind of

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9 Raising labour standards in TPPA countries has been an explicit claim of advocates. See, for instance the NZ MFAT Fact Sheet on Labour and the Environment, October 2015: “TPP will promote sustainable development and higher standards of environmental and labour protection in the TPP region.” [https://www.tpp.mfat.govt.nz/assets/docs/TPP\\_factsheet\\_Labour-and-Environment.pdf](https://www.tpp.mfat.govt.nz/assets/docs/TPP_factsheet_Labour-and-Environment.pdf)

10 Ibid

11 For a history of US labour standards related to trade see Steve Charnovitz, ‘The influence of international labour standards on the world trading regime: A historical overview’, 126 *Intl Lab Rev* 565 (1987)

import bans trade unions have unsuccessfully advocated – for instance allowing GATT parties to exempt the import of goods whose production endangers workers.<sup>12</sup> Today the only domestically imposed labour standard to have been authorised under WTO rules is the prohibition of imports produced with prison labour.<sup>13</sup> Several countries have included labour standards requirements (including ratification and/or implementation of core ILO conventions) as prerequisites for their programmes under the Generalised System of Preferences.<sup>14</sup>

The low bar set for labour standards in the TPPA (see later discussion) reflects the fraught history of efforts to incorporate labour standards into multilateral agreements. For instance, industrialised countries in Asia and Latin America rejected the push for a social chapter in the WTO as “disguised protectionism’ and an attempt to deprive developing countries of one of their comparative advantages: the ability to use low-cost labour productively.”<sup>15</sup>

This tension between “the two goals behind fair labour standards – promoting human rights and making trade rules fairer”<sup>16</sup> was apparent in President Obama’s rhetoric in favour of the TPPA labour provisions, with elements of both moral intent [“establish enforceable commitments to protect labor, environmental and other crucial standards that Americans hold dear”] as well as a direct pitch to protectionism [“that’s why I’ve made it clear that I won’t sign any agreement that doesn’t put American workers first.”].<sup>17</sup>

When considering the likely impact of the TPPA Labour Chapter, the impact of other agreements and the behaviour of the TPPA parties under them is relevant. Here, this paper looks at:

- Empirical evidence of the impact of labour conditions in trade agreements – and what can make a positive difference
- Experience under similar agreements, particularly those agreements to which the US is a party and on which the TPPA is modelled
- New Zealand’s record under its own bilateral FTA labour provisions

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12 Charnovitz, 572. A specific ban on the manufacture, sale and import of white phosphorus matches – which was motivated in large part by the health of workers in their manufacture is an exception, being the subject of a specific 1906 Convention.

13 GATT Article XX; Prohibited Import under NZ Customs and Excise Act 1996, Schedule 1 <http://www.legislation.govt.nz/act/public/1996/0027/latest/DLM380213.html>

14 Whereby less developed countries have preferential market access without triggering Most Favoured Nation obligations.

15 Nigel Haworth and Stephen Hughes, ‘Trade and International Labour Standards: Issues and Debates over a Social Clause’, *The Journal of Industrial Relations*, 30:2, 1997, 179

16 Charnovitz, 580

17 President Obama, ‘Writing the rules for 21st century trade, 18 February 2015 <https://obamawhitehouse.archives.gov/blog/2015/02/18/president-obama-writing-rules-21st-century-trade>

## Empirical evidence

Empirical evidence of the impact of including labour standards in agreements is scant, but evaluations have been attempted.<sup>18</sup> The following factors, in combination, have been shown to be necessary for trade agreements on labour standards to be most effective:

- coercive measures (threats of removal of benefits under the US GSP) when accompanied by technical and financial assistance;<sup>19</sup>
- direct linking of export opportunities to tightly monitored criteria drawn from the fundamental labour standards and domestic law;
- technical and financial assistance to increase compliance;
- public reporting;
- investors and merchants who are commercially vulnerable to evidence of labour violations;<sup>20</sup> and
- prompt enforcement.

Unfortunately, the North American-style agreements on which the TPPA is based do not reflect this evidence. Failing to provide for the full combination of factors has, predictably, resulted in agreements that are generally regarded as ineffective in improving standards. For example, one commentator on the US-Peru Agreement (a close relation of the TPPA) suggested at the time that, based on the evidence, a “hybrid program”<sup>21</sup> of monitoring, assistance and enforcement should accompany it. No such initiative eventuated. Instead, there have been reductions in labour law protection and ongoing violations of standards in Peru, informing the cynicism with which the AFL-CIO has responded to claims of a “gold standard” TPPA<sup>22</sup>:

“Rather than trying a new model, the TPP incorporates without improvement numerous provisions, including the discretion to indefinitely delay acting on labor rights violations, already known to be ineffective.”

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18 Samira Salem and Faina Rozental, ‘Labor Standards and Trade: A Review of Recent Empirical Evidence’, *USITC Journal of International Commerce and Economics*, Web Version, August 2012, [https://www.usitc.gov/journals/LaborStandardsandTrade\\_final%209\\_12.pdf](https://www.usitc.gov/journals/LaborStandardsandTrade_final%209_12.pdf)

19 Ibid 17, n 67, citing Kimberley Elliot and Richard Freeman, ‘Can Labor Standards Improve under Globalization?’, Washington, DC: Institute for International Economics, 2003

20 Salem and Rozental 17 n65 citing Chikako Oka, “Does Better Labor Standard Compliance Pay? Linking Labor Standard Compliance and Supplier Competitiveness.” Paper presented at the ILO/IFC Better Work Conference, “Workers, Businesses, and Government: Understanding Labour Compliance in Global Supply Chains,” Washington, DC, October 28-29, 2011

21 Michael A Cabin, ‘Labor Rights in the Peru Agreement: Can Vague Principles Yield Concrete Change?’, 109:5 *Columbia Law Review*, (2009) 1047 at 1090

22 AFL-CIO, ‘A Gold Standard for Workers? The State of Labor Rights in Trans-Pacific Partnership Countries’, 8 February 2016, [http://www.aflcio.org/content/download/174525/4153892/file/1628\\_TPPLaborRightsReport.pdf](http://www.aflcio.org/content/download/174525/4153892/file/1628_TPPLaborRightsReport.pdf)

## Experience under the precedent US agreements

What's more, there is only one case of the US invoking FTA dispute procedures in respect of labour violations; alleging systematic failure by Guatemala to enforce its labour laws in breach of the Central American FTA [CAFTA]. That experience does not hold much promise for the TPPA as a weapon against labour exploitation. In that case, the original submission 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, three years later. The matter is still not resolved.

A US Government Accountability Office [GAO] report<sup>23</sup> into the implementation of the labour provisions of US FTAs found that of five complaints made since 2008 only one had been resolved. Despite a 2009 GAO report, which was strongly critical of a lack of monitoring and enforcement, capacity and procedures remained insufficient even to meet the procedural deadlines set out in the Agreements already made.

This failure of monitoring and enforcement is important, because it is the enforceability of the TPPA labour chapter which distinguishes it from earlier NZ FTAs. That enhanced enforceability led to claims that the TPPA met the high standards set by its critics. In its submission on the TPPA the NZ consortium of peak business organisations wrote<sup>24</sup>:

“So in 2008 TPP was seen as a chance to deliver a much higher standard in this space that might become the new international benchmark.

“The TPP outcome reflects the CTU policy agenda (at least at the time TPP was launched) very strongly. We have strong and enforceable disciplines on trade and labour and trade and environment.”

On the contrary, the nature of the protections and the experience to date of enforcement justifies the ambivalence with which local and international unions have greeted the Chapter.<sup>25</sup> These “strong and enforceable disciplines” are entirely reliant on the capacity and political will of governments to prosecute violations. This has led the International Trade Union Confederation (ITUC) to conclude<sup>26</sup>:

“While acknowledging minor reforms, the TPP labour chapter will not prove to be an effective mechanism to guarantee the full enjoyment of fundamental labour rights and workplace

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23 USGAO, ‘Free Trade Agreements. U.S. Partners are Addressing Labor Commitments but More Monitoring and Enforcement are Needed’, GAO-15-160, 2015. <https://www.gao.gov/products/GAO-15-160>

24 BusinessNZ, ExportNZ & ManufacturingNZ, Submission to the Foreign Affairs, Defence and Trade Select Committee on the Trans Pacific Partnership Agreement, 7 March 2016

25 See for instance NZCTU Submission: “The National Interest Analysis describes the Labour Chapter (Chapter 19) of the agreement as ‘the strongest outcome on trade and labour contained in any FTA negotiated by New Zealand to date, in terms of both the scope and nature of its provisions’. That is correct, but only because previous labour chapters, memoranda of agreement and similar have been so weak. They have been at best agreements to consult, with no ability to enforce and little specificity about what they protected.”

26 ITUC, ‘Trans Pacific Partnership Labor Chapter Scorecard. Fundamental Issues Remain Unaddressed’, 27 November 2015, [http://www.ituc-csi.org/IMG/pdf/trans\\_pacific.pdf](http://www.ituc-csi.org/IMG/pdf/trans_pacific.pdf)

standards. The labour chapter still maintains a state-state dispute mechanism which relies entirely on the discretion of TPP governments to prosecute claims against one another; this stands in stark contrast to the investor-state mechanisms available to corporations.”

On the positive side, the final text does give more procedural guidance than earlier text on the public submission process and dispute settlement processes are also clearer. However, most recommendations by unions for improvement to enforcement processes and the development of remedies more suited to violations of labour standards were rejected.<sup>27</sup> Further, attempts to replace the TPPA framework of Labour Councils with an independent and fully resourced labour standards body failed, so the institutional support for labour standards is weaker than NAFTA’s Commission for Labour Co-operation.

## **New Zealand’s record under its own bilateral FTA labour provisions**

Given these weaknesses in the formal dispute machinery and the historical evidence of non-prosecution of labour violations, workers and workers’ advocates would need to have confidence in the non-coercive, co-operative approach to improving labour standards which is also a feature of the TPPA. In determining how likely this approach is to lead to improvements, New Zealand’s own earlier FTAs are a good starting point for analysis. Each of these contains similar labour standard expectations to the TPPA, but with co-operation, rather than sanctions, as the means to achieve them.

Unfortunately, there is little comfort to be gained from the experience to date. Neither New Zealand, nor its trading partners, has prioritised labour co-operation activities. Despite agreements to develop labour work programmes under each of the earlier FTAs, New Zealand does not appear to have initiated any activity aimed at improving working conditions or giving effect to the undertaking to “strive to adopt and maintain”<sup>28</sup> laws, policies and practices reflecting the principles of the ILO Declaration. At most, New Zealand has responded to requests for technical assistance from counterpart labour administrations. None of that assistance has been geared towards the fundamental rights referred to in the Declaration, despite concern regarding fundamental labour rights abuses in several counterpart countries.<sup>29</sup>

The Government may seek to justify this inaction by saying that under those agreements New Zealand lacked leverage. Yet the contrast with the recent forced re-flagging of foreign fishing vessels to impose New Zealand labour law is striking. There, a combination of popular pressure and incontrovertible research drove political change.

In truth, the gap between the intent of New Zealand’s trade agreements and their practice is due to many factors, and includes a lack of ministerial will, the sub-ordination of labour officials to the Treasury and Ministry of Foreign Affairs and Trade (MFAT) officials driving the agenda,

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27 For a more detailed summary see Ibid

28 Typical form of undertaking in NZ bilateral FTAs

29 Writer’s assessment

external pressures, particularly from business, to minimise the impact of agreements, and a lack of domestic pressure from unions or NGOs to use the agreements to contest labour violations in counterpart countries.

Overall, if the purpose of the Labour Chapter is to place meaningful conditions on market access, then based on their actions to date, TPPA parties are not likely to treat the monitoring and enforcement of those conditions as a priority.

## **Issues Related to Definition and Enforcement of Standards**

### **Reliance on the 1998 ILO Declaration is problematic**

The foregoing analysis suggests that the willingness of TPPA parties to expend political and financial resources on improving labour standards through either co-operation or coercion (or both) is likely to be limited. It would take political will (probably through domestic pressure and international solidarity), and the combination of factors referred to in the section on empirical evidence above. If doing so did become a priority, the problem remains that, as with the precedent Labour Chapter in the Peru Agreement, “the labor standards to be enforced remain vague and undefined.”<sup>30</sup>

Central to this problem is the primary source of the standards, the 1998 ILO Declaration on Fundamental Principles and Rights at Work. 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 for the purposes of [the TPPA] the elimination of the worst forms of child labour; and
- the elimination of discrimination in respect of employment and occupation.

Under the TPPA, these are the principles on which domestic law and practice must be based, and from which parties must not derogate in a trade and investment context.

The International Labour Office has raised several concerns with the use of the Declaration in this way, because it risks fragmenting international labour law and weakening rights by making them subject to trade and investment norms.<sup>31</sup> The problem is that the principles in the Declaration were intended to underpin rules of conduct. They are not rules themselves. In contrast, the TPPA (and similar agreements) remove the establishment of rules of conduct (actual standards) from

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30 Michael A Cabin, ‘Labor Rights in the Peru Agreement: Can Vague Principles Yield Concrete Change?’, 109:5 *Columbia Law Review*, 2009, 1047 at 1072

31 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

the ILO system into a separate framework, risking uncertainty and global inconsistency in the setting and enforcement of standards:<sup>32</sup>

“The principles were expressly designed to be translated into specific standards by the ILO’s standard-setting machinery in the form of legal instruments that would then be periodically reviewed and revised to ensure the adaptability of the labour standards system”.

This fragmentation is underlined by TPPA footnote 3, which detaches the principles of the Declaration from the specific ILO standards (conventions and recommendations) that the principles give rise to:<sup>33</sup>

“The obligations set out in Article 19.3 (Labour Rights), as they relate to the ILO, refer only to the ILO Declaration.”

The US-Peru Agreement was the first to incorporate the ILO Declaration as the primary source of labour standards. The TPPA seems to have inherited the approach without review. This is indicative of the expedience with which labour matters have been treated in successive negotiations and agreements. Far from being an integral part of the US-Peru Agreement, the labour provision was a minimalist position tacked on to get it across the line with a new Congress. Indeed, at the time, the US rejected an offer by Peru to refer to the relevant ILO conventions in the interpretation of the obligations under the agreement.<sup>34</sup> That is ironic, as developing countries are often portrayed as the main impediment to binding labour standards. The US has only ratified two of the ILO’s eight fundamental conventions, C105 on forced labour, and C182 on child labour. As with the TPPA, a footnote in the Peru Agreement “unhinges the ILO Declaration’s principles from the standards developed in the corresponding ILO Conventions.”<sup>35</sup>

This is a critical weakness. Without the substance of the eight core ILO conventions and any future ILO standards giving further expression to the Declaration, the list of rights contained in the Declaration lacks the substantive content that the trade setting requires. No doubt the argument could be made in a dispute setting that the core Conventions are implicitly incorporated. However the history of the Peru negotiation and the language of the TPPA appears deliberate in this regard – rather than incorporating the Declaration as a whole, the principles are explicitly listed, and the footnote emphasises the separation. This has led to criticism of a “vagueness” not suited to a bilateral trade agreement setting. In the trade agreement setting there must be certainty, and the generality of the Declaration fails to provide this:<sup>36</sup>

“While murdering union leaders might clearly violate any notion of freedom of association, it is much less clear whether, for example, forbidding union organizers from entering the parking lot outside the factory or preventing union members from meeting on factory property also violates the basic grammar of the right.”

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32 Agust-Panareda et al, 17

33 TPPA Chapter 19 n3

34 Cabin, 1080

35 Cabin, 1073 citing Charnovitz n178

36 Cabin, 1090

Further, trade negotiators don't have the same excuse as the ILO for vagueness – the need for a global (and tripartite) consensus. Justifying vagueness as necessary to avoid protectionism also doesn't wash. The TPPA provides ample procedural barriers to the prosecution of violations. The implementation of ILO standards requires careful, detailed and precise definition at state level to have effect. This level of detail is as important as the detail lavished upon the trade and commercial matters involved in TPPA-type deals. The lack of detail in this case only serves to increase the perception that labour matters are not taken seriously in the process.

How this would play out in an enforcement context is not clear. Notwithstanding the footnote, a dispute process could still draw on the content of specific ILO standards and jurisprudence in determining a case. There is precedent for doing so.<sup>37</sup> There is also some ability to confer with the ILO in the interpretation of the principles:

- parties, by agreement, can consult with the ILO when engaged in dialogue over a matter arising from the Chapter<sup>38</sup>;
- ILO can be asked for advice as an “independent expert”<sup>39</sup>; and
- A Disputes Panel convened under Chapter 28 could seek technical assistance from the ILO.

While involvement of the International Labour Office in a consultative role would reduce the risk of inconsistent application of international labour law, it falls short of more stringent methods to do so - such as reference to the ILO supervisory bodies or the authoritative determination mechanisms contained in the ILO Constitution; the International Court of Justice<sup>40</sup> or a specialised tribunal<sup>41</sup>.<sup>42</sup>

## **Rules on acceptable conditions of work are weak, requirements for domestic labour law enforcement machinery are stronger**

The final TPPA text requires parties to regulate for “acceptable conditions of work” and not merely to enforce existing regulation. However, the scope of such conditions is narrow, and the definition of “acceptable conditions of work” is in the hands of each party.

As with the Declaration, the TPPA does not reference ILO Conventions and Recommendations (which would provide a much clearer benchmark for enforcement and allow parties to draw on existing international jurisprudence):<sup>43</sup>

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37 See Cabin, 1082-1087 for a full discussion of the means by which ILO standards and jurisprudence could be sources of interpretation in the context of the US-Peru Agreement

38 TPPA Article 19.11

39 TPPA Article 19.15.8 (Labour Consultation))

40 ILO Constitution Article 37.1

41 TPPA Article 37.2

42 Agust-Panareda et al, 24-25

43 ITUC, supra n26, [http://www.ituc-csi.org/IMG/pdf/trans\\_pacific.pdf](http://www.ituc-csi.org/IMG/pdf/trans_pacific.pdf)

“Thus, a party may still comply with this text merely by having laws governing hours of work, even if the maximum hours of work are excessive.”

In contrast, Article 19.8 which sets out procedural guarantees, is much more prescriptive. It requires the public promotion of labour laws, access to information, and access to independent and impartial enforcement tribunals. The provision sets out detailed requirements for the operation of such tribunals, including:

- fair, equitable, transparent proceedings;
- due process of law;
- reasonable fees and time limits and no unwarranted delay;
- public hearings;
- the right to support/defend a case including the right to present evidence or information;
- decisions based on information/evidence that parties had the opportunity to be heard on; with reasons given and decisions in writing available to the parties and within the law, to the public;
- review or appeal as appropriate under the Party’s law; and
- effective remedies executed in a timely manner and enforcement provisions.

As has been previously noted, these detailed requirements are novel for New Zealand. Their specificity contrasts with both the uncertain meaning given by the agreement to the rights referred to in the Declaration, and unfettered domestic control of law related to working conditions. There is also no express requirement for a Party to demonstrate that non-compliance with these requirements affects trade or investment. This is a much clearer set of rights as a result – making it more like other TPPA provisions (such as intellectual property) which are enforceable regardless of the impact of breaching them on trade and investment.

There is uncertainty as to the scope of these requirements. They relate only to procedures to enforce “labour laws” and labour laws are defined<sup>44</sup> as only those laws that relate *directly* to the four “internationally recognised labour rights” and to minimum wages, hours of work and occupational safety and health. This seems to exclude procedures relating to disciplinary action, dismissal, and the enforcement of collective or other employment agreements which provide above-minimum conditions, for example.

## **Becoming a Party to the Agreement does not depend on conforming to the labour standards**

Compliance with the various labour requirements is not a pre-condition to becoming a Party to the Agreement. Countries which fall significantly short of the most fundamental benchmarks established by the ILO Declaration (on Freedom of Association, forced labour, child labour, and discrimination) and working conditions (minimum wages, hours of work, health and safety) can join the Agreement. Future parties are also able to join without conforming to the labour standards.

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44 TPPA Article 19.1 Definitions

The statutory US Labour Advisory Committee for Trade Negotiations and Trade Policy has provided a detailed report of each party's current level of compliance.<sup>45</sup>

The parties include some countries where labour rights are systematically and seriously violated. In Brunei, for instance, only one union (representing the workers at Shell Oil) is active. There are repressive conditions for organising. Migrant workers (and especially domestic workers) can be imprisoned and caned for overstaying visas. Bondage to brokers is common with widespread exploitation and violent abuse in the workplace.

Concern has also been raised in relation to freedom of association in Vietnam (the US gives Vietnam 5-7 years to achieve this standard or risk its market access), and to the human rights/labour rights situation in Mexico (which indicates weak enforcement of the NAFTA labour agreement) and in Malaysia.

There are exceptions to automatic accession. These are the Consistency (side) Agreements on labour between the US and, respectively, Vietnam, Malaysia and Brunei which set out specific law changes required for application of the TPPA between the US and each of the three. Critics argue that previous agreements of this nature, such as the Colombia Action Plan<sup>46</sup> have lacked power. The acceptance of Colombia's compliance with the entry requirements was in the hands of the US government, who allowed the agreement to come into effect before there was evidence of compliance in either law or practice.<sup>47</sup> Such plans may suffer from a lack of clearly stated enforcement benchmarks:<sup>48</sup>

“Legal changes, without benchmarks for enforcement performance, do not work well for economically vulnerable workers. When they try to exercise their new “rights,” but continue to face repression, they become even more discouraged. Commitments to change laws and decrees, without measurements that assess whether new unions are forming, whether wage theft is being addressed, whether passports are no longer being confiscated, whether women are actually receiving equal opportunities, and the like do not by themselves create meaningful changes. Viable and effective worker organizations must be supported by the legal structures of the country—not merely tolerated—and they must be adequately resourced. Robust resource commitments are woefully lacking in the side letters.”

Of course New Zealand has already concluded FTAs with two of the worst offenders in the TPPA stable – Brunei and Malaysia – and has not activated its labour co-operation agreements to improve things there.

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45 Labor Advisory Committee, *Supra*, n.1, 69ff

46 USTR, Labor in the U.S. Colombia Trade Agreement, <https://ustr.gov/uscolombiatpa/labor>

47 AFL-CIO, *Supra*, n.22, 4

48 Labor Advisory Committee, *Supra*, n.1, 67

## **Prohibitions on lowering labour standards (derogation) are more binding than in some other NZ FTAs, but the bar is low**

Derogation is the reduction of standards, to facilitate trade or investment. The Labour Chapter<sup>49</sup> prohibits derogation from labour laws in certain circumstances. The rules against derogation apply from the pre-investment stage, prohibiting waiver or other derogation from labour regulation (or an offer to do so) to attract investment or make a trade.

The TPPA reflects the stronger language relating to derogation of the NZ-Korea FTA: “no Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations.” In contrast, the NZ-China Memorandum of Understanding on Labour Cooperation (MOU) merely recognised “that it is inappropriate to encourage trade or investment by weakening or reducing the protections offered in domestic labour laws, regulations, policies and processes.”<sup>50</sup>

In general, the prohibition on derogation only relates to the standards defined by the ILO Declaration. As has been discussed, this is an uncertain platform for standards. Derogation from conditions of work (minimum wages, hours of work, and occupational safety and health) is only prohibited in a special trade or customs area. This means that working conditions can be reduced as an inducement for investment or trade in most territory covered by the TPPA. In any case, conditions of work are entirely in the hands of each party with no absolute standard applying.

In its submission on the TPPA, the NZCTU has argued that the 2010 “Hobbit law” calls into question the non-derogation rules and the requirement in Article 19.3 for labour laws to conform to the four principles of the ILO Declaration and domestic working conditions protections. Parliament passed the Employment Relations (Film Production Work) Amendment Act 2010 to facilitate the production of the Hobbit movie in New Zealand. The Hobbit law is said to derogate from the standards of the UN Declaration, because it prevents a class of workers from engaging in collective bargaining by deeming them to be independent contractors. Further, it exempts such workers from coverage of minimum wage, hours of work or OSH standards applied to employees.

The NZCTU states “If [the NZ Government] either asserts that the Warner Brothers Amendment is compliant with the Labour Chapter, or agrees that the amendment is not compliant and fails to repeal it, the weakness of the Chapter will have been amply demonstrated.”<sup>51</sup> The Government has not responded.

There is no avenue for national organisations to challenge an alleged breach of this nature, a logical outcome of a non-transparent negotiating process which excluded civil society. For a waiver or derogation of labour standards to breach the agreement it must affect trade (including trade in services) or investment between the parties. The requirement to prove an *effect* on trade or

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49 TPPA, Article 19.4

50 NZ-China Memorandum of Understanding 2008, Clause 4

51 NZCTU Submission to the Foreign Affairs, Defence and Trade Committee on the Trans-Pacific Partnership Agreement, 24 March 2016, 67, <http://www.union.org.nz/wp-content/uploads/2016/11/160324-NZCTU-submission-on-the-TPPA.pdf>

investment has been said elsewhere to “require complicated evidentiary showings”<sup>52</sup> compared to the requirement in many other agreements to show only *intent* to ease trade or investment. It is up to other parties – rather than the affected workers or their unions – to address their concerns through the consultation and dispute processes.

## **TPPA parties must enforce their labour laws – but it will not be easy to challenge a failure to do so**

TPPA parties are required to enforce their own labour laws. However, there is a very high threshold for one party to complain that another has failed to do so. Negotiators overrode advocates who argued that a complaint should be possible in the event of a single egregious breach. Instead there must be “sustained or recurrent failure” to enforce labour laws.

As with the prohibition on derogation, non-compliance must affect trade or investment between the parties. The ITUC points out that this adds a hurdle to enforcement that is absent from the NAFTA Labour side agreement. In that case, it is not necessary to demonstrate actual impact on trade or investment. Instead, the issue of impact is addressed in relation to penalties.<sup>53</sup>

On the other hand, it is not necessary to demonstrate an effect on trade or investment if there is a breach of the more prescriptive procedural guarantees (i.e. the more detailed requirements for access to domestic labour law enforcement machinery). So, if a country fails to establish or operate enforcement machinery that complies with these rules, another party could invoke formal consultation and dispute processes.

## **The Corporate Social Responsibility clause may restrict regulatory space**

As explained above, the most successful initiatives linking trade and labour standards to date have had the following elements: the incentive/sanction (market access/loss of benefits); clear and comprehensive criteria (for instance derived from a combination of domestic law and specific ILO standards); public reporting; technical and financial assistance to comply; rigorous monitoring and reporting; and the involvement of investors or merchants who face reputational pressure in relation to labour standards in the value chain.

The last of these criteria is captured by the notion of Corporate Social Responsibility (CSR) in Article 19.7. There is a comparable provision in the Investment Chapter - Article 9.17 [Corporate Social Responsibility]:

“The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies

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52 Andrea K. Bjorklund, *Yearbook on International Investment Law and Policy* 2013-2014, OUP, 2015, 40

53 ITUC, *Supra* n.26

those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.”

This formulation has been described as “double-soft law,”<sup>54</sup> because it *encourages* (rather than requires) a private party to do something *voluntarily*. In comparison, the CARIFORM-EU Economic Partnership Agreement (2008) imposes an obligation on Parties to take measures, including regulatory action, to ensure investors comply with core labour standards.<sup>55</sup> It is possible that TPPA might in fact prevent a state from doing more than encouraging voluntary measures. In other words, the two CSR clauses could restrict the space for regulatory action.

## **Migrant workers’ interests were ignored by the negotiators**

Migrant workforces are significant in many TPPA countries, and specific reference to their rights had been sought by trade unions and NGOs. The TPPA does not advance protections beyond encouragement for co-operation to deal with migrant worker discrimination and other forms of workplace discrimination. An obligation to treat migrant and local workers equally and an annex on fair recruitment promoted by the ITUC was rejected.

There is also the issue of “Mode 4” labour, or posted workers; that is the temporary movement of people to deliver a service. New Zealand’s commitments under Chapter 12<sup>56</sup> include installers or servicers of machinery or equipment who are entitled to entry of up to three months a year.<sup>57</sup> In a recent case workers were brought to New Zealand by the Chinese supplier of railway carriages to remove asbestos from the carriages. The New Zealand union whose collective agreement would cover such work in normal circumstances was denied standing to seek a declaration from the Employment Relations Authority as to whether posted workers should at least be covered by New Zealand statutory working conditions (eg minimum wages).<sup>58</sup> In other words, a local union with a clear stake in the workplace and work concerned could not even take a case to explore the limits of the Mode 4 rights in the NZ-China FTA.

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54 Vid Prislán and Ruben Zandvliet, ‘Labor provisions in bilateral investment treaties: Does the new US Model BIT provide a template for the future?’, 92 *Columbia FDI Perspectives*, April 2013, 17

55 Ibid, 17

56 TPPA Chapter 12 (Temporary Entrance for Business Persons)

57 TPPA Annex 12-A, para 5

58 *RMTU v Kiwirail Ltd*, [2017] NZERA, 6

## Conclusion

Public discussion of the relationship between labour standards regulation and the TPPA has been minimal in New Zealand. Indeed, Government and the business lobby have been satisfied with simply promoting the Agreement as a “gold standard” for the protection and enhancement of labour rights. There has been no detailed government or business response to concerns raised by the New Zealand Council of Trade Unions, informed as they are by international unions, the ILO and scholars. Nor has the Government demonstrated the effectiveness of such provisions.

Given the lack of monitoring or evaluation of earlier bilateral and multi-party labour commitments connected to trade agreements, the impression is given that labour standards are very much peripheral to the thinking of TPPA proponents.

The TPPA does give greater weight to its labour chapter than earlier NZ agreements, by making it subject to formal state-to-state consultation and dispute processes. However, the content of the standards remains vague. In the case of the fundamental rights and principles referred to in the ILO declaration, the TPPA is silent on the content of the rights and specifically detaches them from the much deeper body of international labour standards and jurisprudence. Whether laws and practices consistent with the Declaration are adopted and maintained can only be contested by other state Parties, and only if trade or investment between the parties is affected. In respect of working conditions protections, the actual standards are left to each country to determine for itself. Derogation from these rights can only be contested through the dispute process if they impact on trade or investment and affect special trade or customs areas.

The requirement to enforce labour laws is also only contestable to the extent that it impacts on trade and investment between the parties, and only if the behaviour is sustained or recurring. Exceptionally, the TPPA is much more prescriptive regarding domestic labour law enforcement processes. There is no express requirement to demonstrate that non-compliance with that regime affects trade or investment between the parties.

As reported here, state Parties to the agreements that set the precedent for TPPA have a disappointing record of prosecuting violations. New Zealand does not appear to have ever used its own labour co-operation agreements to raise concerns with counterparts such as Malaysia or Brunei, despite clear violations of fundamental labour rights.

Any possibility of the TPPA Labour Chapter positively impacting labour standards would require real political commitment from Parties. On-the-ground monitoring would need to be a priority, with conduct measured against detailed criteria drawn from both domestic and international labour law. Technical assistance would need to be provided, reports published, and investors and merchants made commercially vulnerable to evidence of labour violations. Enforcement, with the potential for benefits to be lost, would need to be a credible threat. Such an approach would be at least technically consistent with the agreement – if not current practice.

Moving beyond the constraints of the current agreement, the analysis contains many suggestions for making the link between trade and investment agreements and labour standards more effective. For instance, agreements would embrace, rather than detach, ILO conventions and recommendations, and ILO jurisprudence. The interpretation of standards would not be subject to trade and investment priorities, rather trade and investment would be subject to the standards

as they are understood in the ILO context. This could extend to a requirement to meet standards before obtaining the benefits of the agreement. Monitoring and enforcement processes would be responsive to international solidarity and civil society pressure and participation.

As mentioned in the introduction, this paper has addressed only the Labour Chapter, and has referred only briefly to the implications of other chapters for labour laws or standards – for example the potential for investment disputes to challenge new regulation - or the broader impacts of the agreement for workers and their families.

## Postscript

On 23 January 2017 President of the United States of America, Donald Trump, signed an executive order withdrawing the US from the TPPA. Four months later, on 17 May, the Prime Ministers of New Zealand and Japan agreed in Tokyo to commit to early implementation of the agreement, without the US. At an APEC Ministerial meeting in Vietnam a few days later:<sup>59</sup>

“Ministers agreed on the value of realising the TPP’s benefits and to that end, they agreed to launch a process to assess options to bring the comprehensive, high quality Agreement into force expeditiously, including how to facilitate membership for the original signatories.”

New Zealand has committed to implementation without renegotiation.

As the labour chapter was not leaked during the negotiation period and all negotiating documents are still secret, it is not known whether, and to what extent, it would have been different without the US at the table. However, one thing is clear. The Consistency Agreements between the US and each of Brunei, Malaysia and Vietnam will not apply to a “TPP 11”. Those agreements required law and practice changes to be made before the agreement would apply between the US and each of the three states. Notwithstanding critique of the approach (see the analysis herein), if implemented, those agreements would have required changes such as:

Vietnam<sup>60</sup>: freedom of association, non-interference in union affairs, the right to strike in support of multi-employer sector level collective agreements, right to strike in the oil and gas industry, the right to strike in relation to rights-based dispute, strengthened provisions related to forced labour and discrimination.

Malaysia<sup>61</sup>: greater protections from government interference for unions, union membership and strike action, increased scope for collective bargaining, limiting sub-contracting and out-sourcing where used to frustrate collective bargaining, greater sanctions against forced labour, greater protection for migrant workers, strengthening prohibitions on child labour and discrimination.

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59 [https://www.national.org.nz/trans\\_pacific\\_partnership\\_tpp\\_agreement\\_ministerial\\_statement](https://www.national.org.nz/trans_pacific_partnership_tpp_agreement_ministerial_statement)

60 <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-VN-Plan-for-Enhancement-of-Trade-and-Labor-Relations.pdf>

61 <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-MY-Labor-Consistency-Plan.pdf>

Brunei<sup>62</sup>: greater ability to form and join unions, sanctions against employer and government interference in union affairs, collective bargaining procedures, access to administrative reviews, strengthened prohibitions on forced labour (including of migrants), child labour and discrimination, introduction of a minimum wage for private sector workers.

Under a TPP 11 these conditions will no longer apply, weakening the agreement further from the perspective of labour standards.

## **Annex: Summary of the TPPA Labour Chapter**

The Labour Chapter (Chapter 19) provides as follows:

### **19.2 Statement of shared commitment**

Affirms obligations of ILO membership including under the Declaration on Fundamental Principles and Rights at Work and its Follow Up 1998 - specifically recognising the caveat in the Declaration that trade should not be used for protectionist purposes.

### **19.3 Labour Rights**

1. Requiring the four principle rights referred to in the Declaration to be adopted and maintained in law and practice. These are:
  - 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 for the purposes of [the TPPA] the elimination of the worst forms of child labour
  - the elimination of discrimination in respect of employment and occupation.

A footnote emphasises that the ILO obligations relate only to the rights contained in the Declaration (i.e. there is no direct reference to ILO Conventions and recommendations).

2. Requiring adoption and maintenance through law and practice of acceptable conditions of work including minimum wages, hours of work and occupational safety and health; “acceptable conditions of work are as determined by the Party”.

Establishing a violation of this provision requires a Party to demonstrate that the other Party has failed in a manner affecting trade or investment between the Parties.

### **19.4 Non Derogation**

This provision prohibits the waiver of or other derogation from laws implementing labour rights (as set out in 19.3.1) if a waiver would be inconsistent with a right set out in that paragraph (i.e. a right listed in the ILO Declaration) and is done in a manner that affects trade or investment between the parties. It also prohibits waiver of or derogation from laws implementing rights covered by 19.3 in a special trade or customs area.

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62 <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-BN-Labor-Consistency-Plan.pdf>

### **19.5 Enforcement of labour laws**

Prohibits sustained or recurrent failure to enforce labour laws in a way that affects trade or investment between the parties. Failure isn't excused by resource allocation decisions. Resources can be reasonably allocated between enforcement of labour rights and working conditions provided this occurs in a way that is consistent with the Chapter.

### **19.6 Forced or compulsory labour**

Reiterates that earlier articles contain obligations in respect of forced or compulsory labour, including child labour, this provision requires Parties to discourage (through initiatives considered appropriate by them) imports produced by such labour from other sources.

### **19.7 Corporate social responsibility**

Parties should "endeavour to encourage enterprises to voluntarily adopt CSR initiatives on labour issues that have been endorsed or are supported by the Party."

### **19.8 Public awareness and procedural guidelines**

Requires the public promotion of labour laws and access to information and access to independent and impartial enforcement tribunals. The provision goes on to specify requirements for such tribunals including:

- fair, equitable, transparent proceedings
- due process of law
- reasonable fees and time limits and no unwarranted delay
- public hearings
- the right to support/defend a case including the right to present evidence or information
- decisions based on information/evidence that parties had the opportunity to be heard on; with reasons given and decisions in writing available to the parties and within the law, to the public
- review or appeal as appropriate under the Party's law
- effective remedies executed in a timely manner and enforcement provisions

### **19.9 Public submissions**

Requires domestic procedures enabling public submissions to the Party in respect of the Chapter. Parameters are included for receiving and considering such submissions and publishing the results of consideration.

### **19.10 Co-operation**

Encourages and includes guidelines for co-operation to improve labour standards and workers' well-being, quality of life and principles and rights in the Declaration. Stakeholders, including worker and employer representatives, should be involved in identifying and undertaking opportunities for co-operation - whether bilateral, multilateral and with or without regional and international

organisations including ILO. The parties will also caucus and use their leverage in multilateral fora to advance shared interests in addressing labour issues.

20 potential areas of co-operation are listed, with others as decided by the parties. Suggestions are made as to the form of co-operation.

#### **19.11 Co-operative labour dialogue**

A process is established for Parties to raise matters arising under this Chapter with each other. Outcomes, where reached, are to be public - unless the Parties agree differently.

#### **19.12 Labour Council**

This is comprised of senior governmental representatives at the Ministerial (or other) level. It will meet within a year of the entry into force of the agreement and then two-yearly. The Council will consider matters relating to the Chapter, guide priorities for the Parties' co-operation and develop, oversee and evaluate a work programme for the priorities. The Council is to facilitate public awareness of the Labour Chapter and is a forum for wider discussion among the Parties. There will be a five-year review of the operation of the Chapter by the Council to the Commission.

#### **19.13 Contact point**

Provides for the appointment and role of a national contact point in relation to the Chapter - in each Party's labour ministry or equivalent.

#### **19.14 Public engagement**

The Council is to provide a means of input for persons interested in the Chapter, and parties are required to establish or maintain a consultative or advisory labour body or equivalent to enable the public, including worker and business representatives, to provide views relevant to the Chapter.

#### **19.15 Labour consultations**

Establishes a process for a Party to initiate consultation with another Party over matters relevant to the Chapter, and for the inclusion of other Parties in the consultation. Consultations can be elevated to the Council representatives of the relevant parties. Any resolution is documented, and if there is no resolution the requesting Party may access the Chapter 28 dispute provisions. Consultations are confidential.

#### **Side Agreements**

The US has concluded Consistency Agreements with Vietnam, Brunei and Malaysia. These detail labour law and administration changes which are pre-requisites for the application of the TPPA to the US and each of the counterparts. In the case of Vietnam a longer timeframe for implementation is contemplated and the US will be able to suspend tariff reductions without recourse to the disputes process if it considers that consistency has not been achieved. The agreements are subject to the Dispute Chapter, with the exception of 28.13 (third party participation).

This research paper was authored by Hon Laila Harré, BA, LLB, Member of Parliament (Alliance) 1996-2002 and Minister of Women's Affairs and Associate Minister of Labour in the Labour-Alliance coalition government from 1999 to 2002. Later National Secretary for the National Distribution Union. The paper was peer reviewed by Professor Nigel Haworth, professor of human resource development in the Faculty of Business and Economics at the University of Auckland. This is one of a series of research papers coordinated by Professor Jane Kelsey and Barry Coates that are posted on [www.tpplegal.wordpress.com](http://www.tpplegal.wordpress.com). The research papers have been prepared under tight time constraints and are not comprehensive. Financial support for the series of research papers has been provided by the New Zealand Law Foundation. While we gratefully acknowledge their support, responsibility for the content rest with the authors. This series has been designed by Michael Kanara and Eleanor McIntyre with support from the New Zealand Public Service Association.