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To: Ministry of Foreign Affairs and Trade

ASEAN-Australia-New Zealand free Trade Agreement (AANZFTA)

Submission of Transparency International New Zealand (TINZ)

Our Expertise

For this submission Transparency International has built its submission on research developed or referred to by our international secretariat in Berlin, and Transparency International UK which runs a business integrity programme that has global reach. We have conferred with both TI and TI-UK on this submission. In addition, within the New Zealand chapter we are fortunate to have the input of Ferdinand Balfoort, one of our 'Members with Delegated Authority'. Ferdinand is a global professional advisor and academic in the areas of corporate governance, compliance and financial reporting. He is experienced in Sarbanes Oxley, FCPA, UK Anti Bribery Act, FATF and other international regulatory compliance, especially for NYSE listed companies with international subsidiaries and operations. TINZ Chair, Suzanne Snively had oversight on the submission. She is an economist with a working background in Sarbanes Oxley, the export sector, trade policy including foreign direct investment, the UN Global Compact, the ETS and the international financial system. The submission is compiled by our CEO, Julie Haggie, and has been endorsed by the TINZ Board.

Transparency International New Zealand's submission focuses on two specific areas:

- Anti-Corruption and Transparency Provisions in Free Trade Agreements
- The importance of aligning free trade deals with our commitments and policies on carbon emissions and biodiversity

Anti-Corruption and Transparency Provisions

We refer to a report prepared in 2018 by the international secretariat for the Transparency International (TI) movement, of which TI-NZ is a chapter. This paper 'Anti-corruption and transparency provisions in trade agreements'¹ sets out a broad range of improvements that can be made to FTA and the reasons for these inclusions. The paper is attached as an addendum to our submission.

The paper puts the case for the anti-corruption potential of trade agreements, and makes a business case for inclusion of deeper anti-corruption and transparency provisions in trade agreements, not least recognition of the current loss of customs revenue due to corruption, estimated by the World Customs Organisation at US \$2 billion worldwide each year. Trade agreements with extensive transparency mechanisms are found to have a greater positive effect on trade flows than those with shallow commitments to transparency. Recent scholarship contends that of all the instruments available to external actors to curb corruption in their development and trading partners, free trade agreements may be one of the most effective (MungiuPippidi *et al*, 2018).

¹ <https://knowledgehub.transparency.org/assets/uploads/helpdesk/Anti-corruption-and-transparency-provisions-in-trade-agreements-2018.pdf>

The paper further references a TI scoping paper (Alemanno and Karttunen 2016) which includes a number of recommendations to improve transparency and anti-corruption during the implementation and operation phase of trade agreements.

The recommendations copied below are largely drawn from that paper. Transparency International NZ strongly encourages MFAT to apply these to the AANZFTA, and all other free trade agreements including regional agreements

TINZ also refers MFAT to the documents presented at a 2018 European Parliament workshop. (presentation attached).

Anti-corruption provisions in EU free trade and investment agreements: Delivering on clean trade, from the Policy Department for External Relations, Directorate General for External Policies of the Union. One of the papers was a report from Alina Mungiu-Pippidi from the European Research Centre on Anti Corruption and State Building. The report puts the case for an improved focus on anti corruption in free trade agreements, and discusses the association between trade and corruption. It also considers the current practice on good governance provisions in international trade agreements.

Anti-Corruption and Transparency Recommendations:

Improve regulatory transparency to the benefit of all stakeholders

Access to information

Ensure that trade agreements (RTA) reiterate the obligation to notify draft regulations to the WTO, and not solely to other negotiating parties to the agreement, in order to reinforce implementation of WTO obligations and to ensure the benefits of transparency accrue to the entire multilateral trading system and its stakeholders.

Transparency for the investment protection framework

Level the playing-field between national and foreign investors

To avoid 'forum shopping' (between domestic and arbitral jurisdictions) by foreign investors the agreements should include the following requirements:

- That foreign and domestic traders and investors are subject to the same legal system and are treated equally (Principle of non-discrimination)
- That the ability of foreign investors to commence an arbitral proceeding is carefully circumscribed and requires that:
 - They are subject to discriminatory treatment from the host State
 - The host State has enacted a discriminatory measure against them
 - The domestic courts fail to act in appropriate time (according to international standards)
 - human rights have been violated.
- In addition, a 'fork-in-the-road' provision, rendering final the investor's choice to submit a dispute in front of a domestic jurisdiction or the arbitral tribunal, would avoid the possibility for foreign investors to cumulate legal proceedings.

Transparency in dispute settlement

Guarantee transparency of arbitral proceedings

- Ensure the incorporation of UNCITRAL transparency rules.

Adopt guidelines on transparency in funding of arbitral cases

Advocate in favour of guidelines on transparency in funding of arbitral hearings, requiring for instance the disclosure of financing by third parties, and granting the arbitrators discretion to decide whether a third-party funder should be considered as a party to the dispute, if its contributions are

significant. In addition, the control of the funders on the proceedings and particularly on the legal strategy should be limited, to keep the interests of funders and litigants well separated.²

Anti-corruption

Integrating ambitious anti-corruption framework in all trade agreements

Include a general commitment to fight corruption, with explicit references to both the UN Convention against Corruption and the OECD Anti-Bribery Convention, inviting all non-parties to join the two conventions. The role of anti-corruption provisions in trade deals is to tailor these commitments to the area of trade and investment, rather than offer competing definitions or interpretations of corrupt practices.

Reinforce integrity and ethics requirements for suppliers in government procurement, by including integrity as one of the conditions to be awarded a tender and ensuring high standards of integrity throughout the tender contract. This could include an automatic provision that tenderers and proposed investors, both bodies corporate and individual officers, that are publicly registered as having been found guilty of corruption or bribery, are automatically excluded from any government supplier list.

Reinforce guarantees for effective enforcement of anticorruption provisions.

Submit all anti-corruption provisions to dispute settlement, including those on enforcement of national anti-corruption legislation.

Call for more transparency in the reporting on implementation of anti-corruption commitments, in particular by establishing consultations with civil society in the monitoring of implementation of anticorruption commitments by the OECD Working Group on Bribery and UNODC.

Set up strong anti-corruption measures that meet global standards

- Include enforceable anti-corruption provisions in all the chapters of a trade agreement that are potentially exposed to corruption.

The importance of aligning free trade deals with commitments and policies on carbon emissions and biodiversity

Free trade agreements have been a major contributor to increased international economic growth. However, the cost to the environment of the substantial increase in international trade is severe. The world is heading towards ecological disaster because we are using up too many resources, fuelled by an exponential increase in world debt, per diminishing dollar of economic growth and productivity. Similarly, while economic and productivity growth are needed to meet the demands of a growing world population, the same increases also raise the levels of emissions of Green House Gases and other industrial and production wastes. Transparency International NZ is therefore concerned that trade deals, whether new or reviewed, like the AANZFTA, separate commercial and economic commitments and enablers under the trade deals from commitments on emissions and on environmental sustainability. TI believes that for climate strategies to work, free trade agreement negotiations must be integrated with policy and action on national carbon emissions, and on biodiversity.

At the heart of this is the complex interplay between the reduction of trade tariffs and Non-Tariff Measures (NTM). Logically, where the prices of goods or services drop, demand increases, but often the cost and pricing advantages are secured on the basis of NTM. The impact on the environment is therefore particularly harsh where goods are produced in countries with weak or unenforced environmental

² See also the Asia-Pacific Economic Co-operation (2012) Model Chapter on Transparency for RTAs/FTAs.

standards. There is substantial evidence³⁴⁵ on the links between increased global trade and massive deforestation as a result of the response to demand for beef, soy, palm oil and wood products across a range of countries which do not have strong environmental protection, and the impact of that on world carbon emissions and on the decline of bio diversity. For example, in New Zealand, which has, on paper, good environmental protection law, our substantial increase in dairy production has had an appalling impact on our river health, our carbon footprint and on flora and fauna, including potentially Homo Sapiens.

Greater transparency is needed to enable monitoring and reporting of global, regional and local impacts of trade agreements on carbon emissions and ecology, including biodiversity. Much stronger control systems are needed to slow and rapidly limit the destruction of natural resources and species in the pursuit of economic growth.

Climate change is an existential threat currently faced by the world, far exceeding the global financial crisis. Economic policies and trade agreements must put the environment at the forefront. Conventional business trading, production and consumption approaches and practices that ignore the impact are completely inadequate.⁶

Environmental/climate change Recommendations:

Improve environmental transparency to the benefit of all stakeholders

Target setting

Set targets and goals on emissions from key industries and export sectors covered by the RTA, to encourage partner industries to focus on reducing emissions aligned with national and global obligations and aspirations.

Access to information

Ensure that trade agreements (RTA) reiterate the obligation to annually report not only the gross trade figures between RTA partners, but to include with that an annual report on total emissions attached to those gross trade figures for each partner to the RTA, by industrial sector and export class, as well as against targets.

Product and Service CO2-eq emission labelling

Ensure that the RTA include the obligation to label products and services as to the actual CO2-eq emissions caused in the production and delivery of such products and services. In the case of products, such information is proposed to be added to product labels so that end customers and regulators can transparently monitor and make procurement decisions based on reliable comparatives.

Periodic Review

Ensure that annual review provisions are included to determine where and how interventions may be made to reduce total gross CO2-eq emissions between trading partners that are party to an RTA. This may include analysis of major individual contributors to emissions to allow for action to be taken under the RTA to require annual improvements and targets to be set for improvements.

³ https://www.wto.org/english/res_e/publications_e/wtr10_robolino_herrera_e.htm

⁴ <https://www.semanticscholar.org/paper/Relationship-between-openness-to-trade-and-%3A-from-Faria-Almeida/b37ae18af1fe6a25fd4f2c44565bc7dab4ecc2c6>

⁵ <https://www.ncbi.nlm.nih.gov/pubmed/27605501>

⁶ https://docs.wixstatic.com/ugd/148cb0_90dc2a2637f348edae45943a88da04d4.pdf

Dispute Resolution

Include in the RTA dispute resolutions and sanctions formulae where emission targets and trends are adverse and not meeting targets agreed under the RTA.

Environmental transparency for the investment protection framework

Level the playing-field between national and foreign investors

To avoid 'forum shopping' (between domestic and arbitral jurisdictions) by foreign investors the agreements should include the following requirements:

- That foreign and domestic traders and investors must report the impact of their investments in terms of CO2-eq emissions projected on the basis of cradle to grave environmental reports prepared by reputable independent parties, as part of the investment case assessment by any regulators and any other stakeholders, and to thereby be treated equally (Principle of non-discrimination)
- Equally, that on an annual basis thereafter, such parties must report the actual CO2-eq emissions resulting from their activities against their projected emissions on which basis they were approved as investors.
- Finally, that any RTA has provisions for dispute resolutions and sanctions regimes where there is a consistent failure of such parties to meet projected targets, and /or to take any meaningful action to do so.

For further information on this submission contact:

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