

February 4, 2011

Hon. Craig Emerson, Trade Minister,
Department of Foreign Affairs and Trade of Australia

H.R.H. Prince Mohamed Bolkiah, Minister
Ministry of Foreign Affairs and Trade of Brunei Darussalam

Hon. Alfredo Moreno Charme, Minister
Ministry of Foreign Affairs of Chile

Hon. Tim Groser, Trade Minister
Ministry of Foreign Affairs and Trade of New Zealand

Hon. Martín Pérez Monteverde, Minister
Ministry of Foreign Trade and Tourism of Peru

Hon. Lim Hng Kiang, Minister
Ministry of Trade and Industry of Singapore

Ambassador Ron Kirk, Trade Representative
Office of the United States Trade Representative

Re: Investment

As trade unions representing millions of working men and women in the countries currently negotiating the Trans-Pacific Partnership (TPP) Trade Agreement, we write to express concern about the ongoing trade negotiations. We are not opposed in principle to trade agreements; however, we can only support a trade agreement if it is balanced, foments the creation of good jobs, protects the rights and interests of working people and promotes a healthy environment. In past trade agreements, one of the most troubling aspects has been the inclusion of investment chapters that provided excessive rights to multinational corporations at the expense of regulators and ordinary citizens. Many of us have raised serious and well-documented concerns on this issue in past negotiations only to have seen them ignored in the final agreement. This cannot happen again.

This letter sets forth the view among the undersigned trade unions regarding the changes that we must see in the TPP regarding the investment chapter in order to view it as a truly “21st Century” trade agreement.

1. Replace investor-state dispute settlement with a state-to-state mechanism.

The investor-to-state dispute resolution (ISDR) mechanism found in the investment chapters of previous trade agreements and in bilateral investment treaties, and which is currently being proposed in the TPP negotiations, continues to raise very significant concerns. ISDR elevates corporations to the same level as governments, allowing the former to directly challenge the administrative, legislative and judicial decisions of the latter in an unaccountable, international tribunal with no appellate mechanism. Further, unlike judges in national court systems, international arbitrators often lack the expertise or understanding of national laws and societal values at issue in a dispute and thus risk undermining them. ISDR also provides another incentive for capital to move from well-developed regulatory and judicial environments into riskier (and often less expensive) environments in search of greater profit. Thus, the TPP should instead provide for state-to-state dispute settlement, which would allow disputes to be resolved in an open process where both state parties would be able to present their legal arguments on behalf of aggrieved corporations. It would also importantly guarantee the critical role of governments in determining and protecting the public interest.

In 2010, the UN Conference on Trade and Development (UNCTAD) issued a thorough report noting the downsides of ISDR and suggested alternatives, including alternative dispute resolution (which seeks to resolve disputes through negotiation or amicable settlement such as conciliation or mediation) and policies seeking to prevent conflicts between investors and states from escalating into formal disputes.

Most importantly, the government of Australia has already expressed its objection to ISDR in the TPP. We applaud its position and urge the other parties to reject any efforts to include ISDR in the TPP.

2. Minimum Standard of Treatment

Customary international law (CIL) has established minimum standards of treatment with regard to foreign investors and investment in only a few areas: 1) the obligation to provide internal security and police protection to foreign investors and investment; 2) the obligation not to “deny justice” by engaging in “notoriously unjust” or “egregious” conduct in judicial or administrative proceedings, and 3) the obligation to provide compensation for expropriation. The minimum standard of treatment does not prohibit either conduct that frustrates an investor’s “expectations” concerning an investment or “arbitrary” conduct. This interpretation of international law, we believe, should be incorporated into the text of the investment chapter in order to limit expansive interpretations of the minimum standard of treatment that may provide investors rights far beyond those found in CIL.

3. Definition of Investment

The definition of “Investment” in recent trade agreements is much broader than the real property rights and other specific interests in property that are protected, for example,

under U.S. law, and includes “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.” Thus, we urge negotiators to narrow the definition of investment to exclude the expectation of gain or profit and the assumption of risk. We also urge that no special protections be given to financial instruments such as futures, options, and derivatives.

Additionally, the investment chapter shall not afford to foreign investors additional protections prior to the establishment of the investment in the territory of another party.

4. Indirect Expropriation

Despite recent, though as yet untested, reforms in some trade agreements, there remains the potential that the indirect expropriation provisions of trade agreements could be applied in a manner that would give foreign investors greater rights than those property protections found in the legal systems of some TPP members. Thus, the TPP must clarify that an indirect expropriation occurs only when the government acts indirectly to seize or transfer ownership of an investment, and not when the government merely acts in a manner that decreases the value of profitability of an investment. This approach would be consistent with the general practice of states that forms the basis of customary international law.

5. National Treatment

The broad scope of the “national treatment” non-discrimination principle in FTAs leaves the principle open to interpretations by international tribunals that could have negative consequences for appropriate environmental, health and safety, labour, indigenous peoples, and other public interest protections. The principle could be interpreted by tribunals as prohibiting regulatory actions that result in “de facto” discrimination, even when there is no facial or intentional discrimination involved. For example, an otherwise neutral regulatory action to protect the environment that results in a disproportionate impact on a foreign investor could run afoul of this standard. Thus, negotiators should explicitly limit national treatment to instances in which a regulatory measure is enacted for a primarily discriminatory purpose. Further, parties should be allowed to maintain existing exceptions to these rules and to retain some flexibility to modify rules in order to take into account the interests of local communities and sustainable development.

6. Labor

TPP negotiators must ensure that labor laws and regulations be included in the list of legitimate public welfare objectives, the non-discriminatory regulation of which will not constitute indirect expropriation nor a breach of minimum standards of treatment. In general, improvements in labour laws and regulations should not be allowable causes for action under the investment provisions, and the labour chapter should prevail in case of conflict.

7. Investment, Financial Services, and Financial Stability

There is a close relationship between investment and financial services. Investment provisions should protect the right of national authorities to take action on the basis of prudential needs and stability of the financial system. Provisions guaranteeing investors the right to remit and receive funds by way of profits, capital, or for any other purpose should not override the rights of national authorities to act to prevent financial instability nor to take action should a crisis (such as balance of payments) occur. This includes the ability to use capital and exchange controls, and to limit or prevent the use of high risk financial instruments or commercial practices. The relationship between investment and financial services further underlines the dangers in investor-state dispute settlement.

8. Taxation

Investment provisions should not apply to taxation measures taken by authorities in any member nation. Governments must retain the right to maintain and change taxation policies without the threat of challenge on the basis that they reduce the value or profitability of a foreign investment or constitute unfair or inequitable treatment.

We urge your prompt attention to these concerns and expect to see them addressed in future negotiating rounds.

Ged Kearney, President
Australian Council of Trade Unions (ACTU)

Arturo Martinez Molina, National President
Central Unitaria de Trabajadores (CUT) – Chile

Helen Kelly, President
New Zealand Council of Trade Unions (NZCTU)

Julio César Bazán Figueroa, Presidente
Central Unitaria de Trabajadores (CUT) – Peru

Mario Huaman Rivera, Presidente
Confederacion General de Trabajadores
de Peru (CGTP)

John De Payva, President
National Trade Union Congress (NTUC)-Singapore

Richard L. Trumka, President
American Federation of Labor &
Congress of Industrial Organizations (AFL-CIO)