



Level 3, Suite 3B, 110 Kippax St
Surry Hills, NSW, 2010
Phone: 02 9212 7242
Fax: 02 9211 1407
Email: campaign@aftinet.org.au
ACN 097 603 131
ABN 83 659 681 462
www.aftinet.org.au

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Critique of likely TPPA investment chapter challenges limits on regulatory sovereignty

The fifth round of Trans-Pacific Partnership Agreement (TPPA) negotiations begin on Monday 13 February 2011 in Santiago, Chile between Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, the United States of America and Vietnam.

The talks will seek to advance negotiations on a draft investment text that was compiled in Auckland in December 2010. Because that text is being kept secret, experts have prepared their own mock text based on existing US free trade agreements (FTAs) with TPPA countries as the basis for analysing the constraints the Agreement might impose on governments' ability to regulate in the public interest.

The analysis of this mock text, published today, shows that a TPPA could, amongst other impacts:

- open more land and natural resources to foreign ownership or control, an issue that is already highly sensitive in a number of TPPA countries;
- make it harder to require that foreign investors employ and train locals, transfer technology and reinvest profits; and
- make it harder for governments to take public health initiatives on issues like smoking, alcohol or breast feeding.

The investment chapter also reveals major constraints on governments' ability to adopt pre-emptive measures and responses to financial crises, including capital controls. A separate draft text and analysis have been prepared specifically on this issue and are also being released today.

These problems are compounded by the right of investors to sue governments directly through international arbitration for monetary compensation. Some cases involving these kinds of treaties seek tens of billions of dollars.

There is no persuasive reason for governments to endow investors with such powers. There is no convincing evidence that they increase foreign investment flows, a potential consideration for developing countries in the talks, such as Malaysia and Vietnam. Yet even if these kinds of rights were given to investors in the TPPA, studies show that this would not necessarily increase foreign direct investment.

Investment provisions including broad definitions of investment, pre-establishment rights, expropriation, minimum standard of treatment, free movement of capital and investor-state arbitration have already caused developed and developing country governments significant problems, therefore the analysis recommends these not be included in any TPPA.

Harvey Purse from the Australian Fair Trade & Investment Network and a co-author of the analysis said that Australians were deeply opposed to these powers when the free trade agreement was negotiated with the US. "We fought hard to stop the right of investors to sue the government and succeeded. Now the US is having a second shot through the TPPA."

"Philip Morris is already demanding these rights in the TPPA in order to attack our anti-smoking laws", Purse pointed out.

Sanya Reid Smith from Third World Network and a co-author of the paper noted that strong investor rights have already created problems for developed and developing country governments, leading legal scholars to conclude that 'There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration'.

"Given this, a TPPA that is being concluded for the entire 21st century must not repeat these mistakes of the past", Ms Smith said.

Contacts:

Sanya Reid Smith, Third World Network, +41786637321

Harvey Purse, Trade Justice Campaigner, AFTINET - +61 2 9212 7242