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3 December 2010

Rt Hon Julia Gillard, Prime Minister of Australia

Rt Hon John Key, Prime Minister of New Zealand

### **Open Letter to the Prime Ministers of Australia and New Zealand**

#### **Dear Prime Ministers**

The proposed Trans-Pacific Partnership Agreement (TPPA) has been branded a “free trade agreement” by its corporate and government proponents. In reality, the main function of the agreement would be to establish an array of new investor rights and privileges that could undermine vast swathes of important non-trade laws, policies and practices in the nine countries currently involved. These constraints would bind our governments into the indefinite future.

Perversely, the TPPA proposal is being sold as a new agreement for the 21<sup>st</sup> century. In fact, the US is effectively setting the terms for negotiations, based on a standard template that replicates the US North American Free Trade Agreement (NAFTA) model.

We know from the experience in the US, Canada and Mexico that the NAFTA model eliminates the crucial policy space that our governments need to address the employment, climate, financial and energy crises that will dominate the next century. It not only establishes vast new investor rights to acquire land, natural resources, financial and other firms and operate them under deregulated terms - it also elevates private investors to equal status as sovereign government signatories to the agreement. Under the US Free Trade Agreement (FTA) model, foreign investors and corporations are empowered to privately enforce their new “trade” pact privileges by suing signatory governments in foreign World Bank and UN tribunals, seeking monetary compensation for government actions they consider to undermine their expected future profits.

If a TPPA follows that old investor-rights model, decisions on development of our economies, management of our natural resources and land, our access to medicines, cultural content, banking regulation, environment and labour laws, food labelling, tobacco control policies, and much more will be circumscribed from outside the country, with the threat of challenge by foreign firms in private international courts

chilling critical innovations and potentially threatening some existing policies.

Trade agreements should focus on real trade. They should not provide a means for corporations to achieve policies and laws through a back door that bypasses the democratic processes of domestic parliaments.

Moreover, investment rules in an agreement for the 21<sup>st</sup> century should address the damaging by-products of the old model - climate change, food scarcity, financial instability, an employment crisis, natural resource exhaustion, indigenous dispossession and rampant inequality - and make the corporations and investors that are responsible for these crises accountable and liable.

In addition to establishing corporate and investor responsibilities, any future investment agreement must exclude the substantive rules and enforcement mechanism of past investor-rights agreements that make them unacceptable. These include -

**Investor-state enforcement privileges** that elevate individual investors and firms to equal status with our sovereign governments, empowering them to enforce a public treaty's commercial provisions privately by demanding cash compensation from country's taxpayers for government regulatory actions via lawsuits before international tribunals that lack public accountability, standard judicial ethics rules, and appeals processes.

**The empowerment of secretive international tribunals** at the UN and World Bank that supplant domestic courts and apply international agreements to undermine the validity of domestic laws and require our countries to compensate investors and corporations with our taxpayer funds. Arbitrators in those tribunals are not subject to any effective conflict of interest rules and crucial documents and proceedings are closed to the public and press.

**Entitlement to prior consultation** on proposed policies and regulations that guarantee foreign investors more input into domestic decisions than the country's own citizens.

**Vaguely worded provisions guaranteeing foreign investors a "minimum standard of treatment"**, including "fair and equitable treatment," that extend beyond guarantees of due process and confer preferential treatment on foreign firms relative to their domestic counterparts.

**Corporate rights to compensation for regulatory costs** in the guise of protection against "indirect" expropriation by regulations and other government actions that reduce the value of a foreign investment. The threat of massive damages awards can have a "chilling effect" on policymaking, with important policies being reversed or never being implemented. It is misleading

to suggest that annexes and tweaks added to recent FTAs provide effective protection from these threats.

**Far-reaching definitions of “investment”** that must be provided with new protections and privileges under an FTA extend far beyond real property rights and other specific interests in property to include speculative financial instruments, natural resource concessions, procurement contracts and intellectual property rights, over which governments must retain effective regulatory authority.

**Pre-establishment rights for investors** that remove the host government’s right to review foreign investment proposals to ensure that they meet the public interest.

**Constraints on capital controls and other financial regulatory tools** that can minimise hot money flows and excessive concentration of financial investors, restrict the sale of risky financial products and services, and open prudential measures to investor and state challenge. Again, the misleadingly termed “prudential carve-out” does not provide effective protection for these measures.

**The subsidiary loophole** that allows corporations to bypass their domestic courts by using “trade” pacts and their foreign subsidiaries located in a FTA or Bilateral Investment Treaty partner nation to attack their domestic laws from outside the country.

We note that the US-Australia FTA does not contain the outrageous provision on investor-state disputes, and the Australian government remains opposed to its inclusion in any TPPA. We applaud that position as an important first step, and urge the government to adopt a similarly forward thinking position in relation to the other matters we have raised.

We also note that the New Zealand Prime Minister has described the inclusion of such powers in a TPPA as “far-fetched” and expects that New Zealand would support Australia’s position. Minister of Trade Tim Groser subsequently stated in Parliament that the government would carefully safeguard the sovereignty of New Zealand to entertain good public policy in accordance with the principles of open government. It is clear that the only way to achieve that outcome is not just to reject investor-state disputes procedures, but also to pursue an investment agreement that is premised on the principles outlined above.

Across the political spectrum in our countries, opposition is building to investor-rights agreements that threaten to lock us into policies and approaches that have proved a failure.

Our governments must re-think the dangerously outdated NAFTA-style approach to

investment and genuinely engage with their citizens to develop a new model investment agreement that is genuinely fit for the 21<sup>st</sup> century.

Sincerely,

Australian Council of Trade Unions (ACTU)  
New Zealand Council of Trade Unions (NZCTU)  
Australian Catholic Social Justice Council (ACSJ)  
Friends of the Earth, Australia (FOE)  
Public Health Association of Australia (PHAA)  
Public Health Association of New Zealand (PHA)  
Australian Fair Trade and Investment Network (AFTINET)  
Music Council of Australia (MCA)  
Australian Education Union (AEU)  
Australian Manufacturing Workers Union (AMWU)  
Australian Nursing Federation (ANF)  
Australian Writers Guild (AWG)  
Australian Services Union (ASU)  
Community and Public Sector Union - State Public Services Federation (CPSU - SPSF)  
Construction, Forestry, Mining and Energy Union (CFMEU)  
Finance Sector Union (FSU)  
Media Entertainment and Arts Alliance (MEAA)  
FinSec Union of New Zealand  
Maritime Union of New Zealand (MUNZ)  
National Distribution Union of New Zealand (NDU)  
New Zealand Tertiary Education Union (TEU)  
UNITE Union  
New Zealand Society of Authors  
Aid/Watch  
Campaign Against Foreign Control of Aotearoa (CAFCA)  
New Zealand Not for Sale  
Catholics in Coalition for Peace and Justice (CCJP)  
President-elect, Methodist Church of New Zealand John Roberts  
Anglican Christchurch Diocese  
Anglican Care Canterbury and Westland  
Economic Reform Australia (ERA)  
Edmund Rice Centre for Justice and Community Education  
Combined Pensioners and Superannuants Association of Australia (CASPA)  
Franciscan Missionaries of Mary (F.M.M)  
Nature Conservation Council New South Wales (NCCNSW)  
Pacific Institute of Resource Management, NZ (PIRM)  
Our Water Our Vote, New Zealand  
Pacific Calling Partnership  
Public Interest Advocacy Centre (PIAC)

SEARCH Foundation

The Grail

The Alliance to Expose GATS

West Australian Regional Meeting of the Religious Society of Friends

WTO Watch Qld

Global Peace and Justice Auckland (GPJA)

Workers Institute for Scientific Socialist Education (WISSE)