

Congress of the United States
Washington, DC 20515

December 15, 2010

The Honorable Barack Obama
President of the United States of America
The White House
Washington, DC 20500

Dear Mr. President:

Thank you for your commitment to negotiate a Trans-Pacific Partnership free trade agreement (TPP) that embodies an appropriate balance between investor protections and the public interest. We write to offer our assistance in helping to develop a new standard so that our trade rules will promote the public interest while providing fair treatment for investors.

As you know, we share your concerns regarding overbroad rights for foreign investors in our trade agreements. The existence of these extraordinary rights, which empower foreign corporations to sue our government in international tribunals, bypassing our own courts, undermines state and national efforts to protect public health, safety, and our precious natural resources. Defending against these challenges is costly and exposes the U.S. to potential liability for countless millions. Most importantly, existing investment protections are perceived as incentivizing off-shoring U.S. jobs and establishing rights for foreign investors that extend beyond those granted to domestic investors.

Trade agreements, and the investment provisions contained within them, should ensure that U.S. interests that invest abroad are not treated in a discriminatory fashion, denied legal protections simply because they are foreigners, or denied fair opportunity to seek and achieve redress of grievances. They should not incentivize off-shoring of U.S. jobs, establish substantive rights for foreign investors that extend beyond those granted to domestic investors, or invite challenges in foreign tribunals to non-discriminatory laws that legitimately seek to protect the environment or health and safety of American citizens.

In 2002, Congress confirmed these principles in the Trade Act of 2002 (P.L. 107-210), making clear that trade agreements should provide foreign investors "no greater rights" than are available to U.S. investors under domestic law. Unfortunately, the investment provisions of the trade agreements negotiated by the past Administration did not meet this standard. The existing investor-state language elevates the interests of specific foreign corporations above American public health, environmental, and safety laws.

There is little justification for the presence of investor-state dispute settlement mechanism in a free trade agreement between developed countries with well-established court systems. Australia, New Zealand, and other potential TPP partners meet international standards with respect to the rule of


law. The absence of such an extraordinary mechanism in the U.S.-Australia Free Trade Agreement and the earlier U.S.-Canada Free Trade Agreement provide relevant precedent that counsels against including investor-state dispute settlement provisions in the TPP.


Should, however, investor-state provisions be included in the TPP, we believe that reforms to the current model are critical to avoiding the problems that have arisen under the provisions in existing free trade agreements (FTAs). An improved investment chapter is much more likely to generate broad support and fulfill our shared commitment to reform.


With this letter, we have included a list of possible reforms to the investor-state dispute settlement mechanism that we believe worthy of consideration. We would be pleased to work with you to investigate these and other ideas further. We hope this list of ideas will form the basis of serious conversations about improving our negotiating approach to trade agreements so that they create more domestic jobs and better meet the needs of American working families.

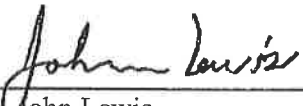
We look forward to working with you and your Administration to help design an agreement that moves America past the stale trade debates of the past, in which nuanced positions were boiled down to simple "for-or-against" debates. As always, we thank you for considering our views on this important issue.


Sincerely,



Rep. Linda T. Sánchez
Member
Committee on Ways and Means



Rep. Henry Waxman
Chairman
Committee on Energy and
Commerce


Rep. Lloyd Doggett
Member
Committee on Ways and Means


Rep. John Lewis
Member
Committee on Ways and Means


Rep. Bill Pascrell
Member
Committee on Ways and Means


Rep. Fortney Pete Stark
Member
Committee on Ways and Means


Rep. Danny K. Davis
Member
Committee on Ways and Means

A STEP FORWARD WITH TPP: SUCCESSFULLY BALANCING INVESTOR PROTECTIONS AND THE PUBLIC INTEREST

Exhaustion Requirement: An exhaustion requirement would require investors to first exhaust local administrative and judicial remedies before resorting to an international arbitral panel. Proponents of the investor-state dispute settlement mechanism argue that developing countries lack adequate rule of law, and that therefore additional layers of investor protection are needed. FTAs can help fill that void by allowing U.S. investors in developing countries to pursue an investor-state case once the investor can show it has actually been denied justice. The absence of such a rule in current FTAs has permitted foreign investors to launch investor-state cases without completing host countries' permitting and other administrative procedures and even to use such challenges to try to influence host countries' domestic legislative and regulatory processes.

Requiring Authentic Investments in Order to Access FTA Rights: An argument in support of FTA investment provisions is that they can increase foreign investment—a worthy goal in these tough economic times. But access to the investor-state dispute settlement mechanism should be premised on investors actually having made substantial, measurable investments, which may include, for example, creating local jobs and supporting local economies. A foreign investor seeking to use an investor-state dispute settlement process should be required to prove that it has made such authentic investments in the country it claims as its home country. An investor should not be able to claim to be from Vietnam and challenge U.S. policies under a future TPP if the relevant investment is a “sham” investment created solely to access the investment rights secured by the TPP. For example, the text should protect against illegitimate challenges by an investor actually owned by individuals from China (a non-Party), Australia (not the claimed “home country”) or the United States (a mere subsidiary boomerang operation). Our current FTAs fall short in this regard; but in creating an entirely new agreement, there is no reason why investors should be able to access the extraordinary investor rights without having actually made what a reasonable person would deem an “investment.”

Do Not Subject Investment Agreements with Public Entities to Investor-State Dispute Resolution: “Investment agreements” between the federal, state, or local governments and foreign investors should not be subject to investor-state enforcement. In response to environmental threats or natural disasters, governments may be forced to change the terms of leases and investment agreements involving natural resources in public lands and waters. Under past agreements, foreign firms alone may seek compensation in international tribunals if the terms are changed due to extraordinary circumstances while domestic firms have no such right.

Limit “Indirect Expropriations”: A Trans-Pacific FTA could include text to clarify that an “indirect expropriation” (also known as a “regulatory taking”) is limited to situations in which the government's actions are akin to that which would be considered a taking under U.S. law (for example, a seizure or transfer ownership of property). The text should clarify that an indirect expropriation does not occur when the government merely acts in a manner that may decrease the profitability of an investment (e.g., when the government acts to limit the amount of sulfur dioxide a factory may emit). This approach would be consistent with both the “no greater rights” principle and customary international law.

Clarify that the “Minimum Standard of Treatment” Does Not Confer New, Substantive Rights: As U.S. State Department lawyers have argued, the *minimum* standard of treatment referred to in current FTAs should refer to a *minimal* set of obligations that reflect customary international law. To clarify that the “minimum standard of treatment” does not require more than customary international law would require, the TPP could reflect the standard the U.S. supported in *Glamis Gold Ltd. v. United States of America*. Such a clarification would be consistent with the “no greater rights” principle.

Narrow the Definitions of “Investment” and “Investor”: The definition of investment and investor should conform to the way those concepts are understood in each nation’s domestic legal system. Prior to the expansive definitions of investment included in current U.S. FTAs and Bilateral Investment Treaties, investors relied on host countries’ domestic standards for such definitional matters. Returning to this reasonable rule would ensure that foreign investors are not granted greater rights than are provided by domestic law. Moreover, if the TPP follows the current model by listing types of investment to be covered, some categories contained in past FTAs should be omitted in order to end the chilling effect the agreements have on U.S. domestic regulations (for example, including futures, options, and derivatives has a chilling effect on financial regulations).

Clarify that Policies to Prevent and Mitigate Financial Crises Are Consistent with the Agreement: The TPP should embody the lessons learned from the financial crisis. Should regulators determine that size limits on individual banks, capital controls, taxes on speculative trading, or additional regulation are needed to promote economic stability, these should not be subject to investor-state challenges.

Clarify that Non-Discriminatory Public Interest Policies Are Consistent with the Agreement: For greater certainty in domestic policy, a future TPP should provide effective exceptions to safeguard non-discriminatory public interest legislation and regulations. For instance, an exception clause could require investors to demonstrate that the *purpose* of a contested law or regulation is actually to discriminate against foreign investors, or alternatively, that the regulation or law in question discriminates *de jure* against foreign firms. In this context, we note with approval Clause 22.2 of the U.S.-Peru FTA, which goes much farther and specifically protects measures each party considers necessary for the protection of its own essential security interests.