

The Business Roundtable
Emergency Committee for American Trade
National Association of Manufacturers
National Foreign Trade Council
U.S. Council for International Business

September 19, 2002

The Honorable Grant Aldonas
Under Secretary of Commerce for International Trade
U.S. Department of Commerce
14th and Constitution Avenue, N.W.
Washington, D.C. 20508-4801

Dear Under Secretary Aldonas:

On behalf of the undersigned organizations and our member companies, we are writing to urge your support for high-standard investment protections in the Chile and Singapore free trade agreement (FTA) negotiations in a manner that achieves the balance in U.S. interests that Congress sought in crafting the foreign investment negotiating objective as part of the Bipartisan Trade Promotion Authority Act (TPA Act), enacted in the Trade Act of 2002.

After more than a year of vigorous debate on the nature of the investment protections to be negotiated in new agreements, this summer, the Congress approved and the President signed into law legislation that defines the U.S. negotiating objective on investment. As explained in the accompanying Conference Report, the Conferees emphasized the “priority” of negotiating investment protections and an impartial investor-to-state dispute settlement mechanism, and explained that these protections must be balanced so that U.S. laws and actions would not become more vulnerable to “successful challenges” by foreign investors than by similarly situated U.S. investors. The final TPA Act seeks to achieve this balance through a number of procedural innovations and substantive provisions clarifying traditional investment protections.

As part of this debate, the House and Senate firmly rejected several approaches on investment that would have undermined this balance. In particular, the Kerry amendment in the Senate, the Doggett amendment before the Ways and Means Committee, and the Comprehensive Trade Promotion Authority Act, introduced by Representatives Matsui, Rangel and Levin (H.R. 3019) and by Senator Durbin, would have unnecessarily undermined protections for U.S. investors abroad by lowering the investment standards below the protections already afforded both U.S. and foreign investors under U.S. law.

We are extremely concerned, therefore, by reports about several proposals being considered interagency that would unnecessarily weaken protections for U.S. investment abroad and not achieve the balance that Congress sought. Several of these proposals are not only inconsistent with the express language of the TPA Act and the Conference Report, they were rejected by Congress on several occasions. We are most concerned by the following proposals that would:

- define “fair and equitable treatment” in terms of the “minimum standard of treatment of aliens” under customary international law.
- define expropriation in terms of “property” (rather than “investment”) and “diminution in value,” rather than all of the relevant factors under U.S. law and practice;

- incorporate interim review, rather than appellate or other similar review procedures as Congress specifically sought;
- require judicial finality; and
- create general exceptions for environmental and other laws.

Each of these issues is discussed in depth below and our recommendations are summarized in the enclosed attachment. We urge your careful consideration of these issues to ensure negotiation of strong investment protections in the Chile and Singapore FTAs that will win the ultimate support of Congress when final agreements are reached.

Fair and Equitable Clarification

Issue: Whether to incorporate a clarification of fair and equitable treatment that would equate that rule with the so-called “minimum standard of treatment of aliens” under customary international law.

Recommendation: Any clarification should reflect Congressional directives to incorporate protections for “fair and equitable treatment, consistent with U.S. legal principles and practice, including the principle of due process.” Equating this rule with the “minimum standard of treatment of aliens” under customary international law is inappropriate, particularly in light of the narrow and archaic interpretation that government advocates have given to this standard.

Discussion: In seeking to clarify the principle of “fair and equitable treatment” consistent with U.S. legal principles and practice and achieve the balance sought by the TPA Act, it is important to begin with Congress’ own language. The TPA Act defines the “fair and equitable treatment” standard as “including the principle of due process.” Equating this rule with the “minimum standard of treatment of aliens” under customary international law is inappropriate, particularly in light of the narrow and archaic interpretation that government advocates have given to this standard. In this regard, we believe that the terms of the NAFTA Clarification of July 31, 2001 lend themselves to an overly restrictive interpretation and, therefore, provide insufficient protection for U.S. investments abroad. Use of that standard will only harm U.S. investors abroad, since foreign investors already enjoy higher standards under the U.S. Constitution and U.S. law. Congress sought to balance U.S. interests on this issue by starting with the principle of “due process.” Additional guidance on clarifying the fair and equitable standard can be found in the Senate Finance Committee Report No. 107-139 (at 15), which instructed that in addition to due process, the concepts in U.S. law “most closely analogous to fair and equitable treatment . . . are . . . the safeguards against arbitrary and discriminatory measures.” This language – not the “minimum standard of treatment aliens” – represents the appropriate point of departure in clarifying this provision.

Clarification of Expropriation

Issue: Whether to incorporate a clarification of expropriation that:

- (1) links the definition to “property” rather than “investment;”
- (2) seeks to use a bright-line test to define indirect expropriations; and/or
- (3) creates an exception for certain types of laws.

Recommendation: Link definition to “investment” as in every previous Bilateral Investment Treaty and NAFTA Chapter 11. Incorporate Supreme Court standard that indirect expropriation issues are complex and must be addressed on a case-by-case basis based on factors, including those identified by the Supreme Court in *Penn. Central Transp. Co. v. New York*, 438 U.S. 104 (1978). Express general rule regarding relationship between expropriation and environmental and public safety and welfare laws in terms of *bona fide* application of laws, and not as a general exception.

Discussion: Expropriation was one of the key issues in the Congressional debate on TPA. Like the TPRG, much of the debate focused on very complex area of regulatory or indirect takings. Attempts by Senators Kerry and Durbin and Representatives, Rangel, Matsui and Levin to limit the definition of expropriation – so that compensation would not be required where there was a “mere diminution” in the value of private property – were rejected as part of broader proposals in both Houses. In the end, the TPA Act struck a balance between U.S. interests and directed U.S. negotiators to seek standards for expropriation “consistent with U.S. legal principles and practice.”

“Property” vs. “Investment”: Congress defined the protections in a negotiating objective on “foreign investment” and seeks protections for “investors.” Defining the coverage of expropriation as separate from or a subset of investment – such as “property” and other interests – is unwarranted. For decades, the United States and countries around the world have defined expropriation in investment treaties as an expropriation of an “investment,” not of “property,” which is subject to divergent definitions under the domestic laws of different nations. There is no reason to shift the U.S. position at this time. Suggestions that the term “investment” is too expansive because some NAFTA claimants have argued a very broad definition of investment are unfounded since these claims have generally been resolved in the government's favor.

Defining expropriation in terms of “property” will add unnecessary complexity to this issue. While the reach of “property” under U.S. law covers essentially the same issues as investment, that is not the case with property definitions in countries around the world, which are oftentimes much more restrictive. Adopting “property” as the starting point will leave U.S. investors abroad with lower protection than foreign investors already receive under U.S. law. Rather than creating a new issue to negotiate and a new issue to litigate, it is most appropriate to define expropriation in terms of investment and, if necessary, work to refine that definition as part of an agreement.

Nor is defining expropriation in terms of “property” in any way prescribed by the TPA Act, which directs U.S. negotiators to seek expropriation and other investment protections for U.S. investors and their investments.

Bright-Line Test and Carve-Out for Certain Laws: Attempts to define indirect expropriations with reference to phrases such as “diminution in value” or to create a carve-out for certain laws were rejected by both the Senate (in the Kerry amendment and the Durbin amendment) and the House (in H.R. 3019).

Supreme Court standards on indirect expropriations have adopted a complex, fact-based analysis. Indeed, the Court has rejected any set formula for determining what is a regulatory taking. As stated by the Supreme Court in its most recent decision in *Tahoe-Sierra Preservation Council* (2002), “we have generally eschewed any set formula for determining how far is too far, choosing instead to engage in essentially ad hoc factual

inquiries.” See also *Penn Central v. New York City* (1978); *Goldblatt v. Hempstead* (1962). Rather, the Court examines several different factors, including “[t]he economic impact of the regulation on the claimant and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations” and “the character of the governmental action,” including “[t]he purposes served, as well as the effects produced.” *Penn Central*, 438 U.S. at 123. U.S. negotiators should draw from this extensive jurisprudence in clarifying expropriation protections to provide appropriate coverage consistent with U.S. constitutional and other legal protections.

We believe that defining expropriation as described above will also address concerns that these protections somehow inhibit appropriate rulemaking, particularly with respect to environmental, public safety and welfare laws. Under U.S. legal principles and practice, the *bona fide* application of nondiscriminatory, generally applicable regulatory measures designed and applied in a manner to protect public health, safety, the environment or other public welfare interests does not typically rise to the level of an indirect expropriation. In clarifying this point, it is important to focus on the application of the laws, not just their purpose (as the Kerry and Doggett amendments had proposed). Furthermore, while recognition that certain laws of general application may not rise to the level of an expropriation is appropriate, language creating a general exception for such laws is not. The latter construction was rejected several times by Congress and will merely create a safe harbor through which countries can evade the reach of these protections. Furthermore, there is no precedent for such a wholesale exclusion of certain laws from the reach of these standards under U.S. law or practice.

Review Mechanisms

Issue: Whether and the extent to which the United States should seek an interim review process to provide parties to an investor-to-state dispute the opportunity to comment on a panel’s preliminary ruling.

Recommendation: Incorporate Article 52 of the ICSID Convention (of which the United States, Chile and Singapore are members), which lays out appropriate standards for a review mechanism consistent with Congressional directives.

Discussion: The TPA Act directs negotiators to seek an appellate body or similar review mechanism to provide coherence in the resolution of investment disputes. The TPA Act is silent, however, on whether every panel decision needs to be reviewable or just some decisions or whether there should be a single appellate body that would be available across all agreements (as specified in the Senate bill) or a separate appellate body or review mechanism per agreement, either of which would provide coherence to the resolution of disputes. Obviously, there are many ways that an appellate body or review mechanism could be developed. Given the imperative of concluding the Chile and Singapore agreements quickly, we believe that the TPA Act’s provisions could be best implemented by incorporating the Article 52 annulment provision from the ICSID Convention, to which the United States, Chile and Singapore are all parties. Use of this established mechanism would also permit the United States to gain greater experience with regard to a review mechanism to determine in the future whether a more extensive mechanism (e.g., every award may be subject to review) or a single standing entity is required.

This outcome is preferable to an “interim review” that merely would allow the same parties to reargue their case before the same body, creating delay with little possibility of effective review. If an interim review procedure were adopted, we would strongly oppose any possibility of politicizing this process, through expanding or limiting the parties that could comment on a preliminary decision or the use of binding interpretations to change ongoing cases. Such provisions would undercut the integrity of the dispute settlement process. We would also oppose unnecessarily delaying the arbitration process for such a limited process by allowing several interim reviews of the same case.

Finality/Exhaustion.

Issue: Whether to negotiate a requirement that claims that arise wholly within the context of a judicial proceeding (*e.g.*, judicial bias, corruption or other misconduct) must be pursued through all judicial avenues (*i.e.*, judicial finality or exhaustion) prior to filing an investor-to-state claim.

Recommendation: **Oppose the adoption of a judicial finality requirement, which would nullify the cornerstone of investment protections.**

Discussion: Requiring judicial finality would turn back the clock on investment protections by decades. The United States has been a chief proponent of the need for investor-to-state dispute settlement in large part to address very real and significant concerns that foreign courts are oftentimes underdeveloped and inadequate, lack basic due process standards, and/or are too corrupt to adjudicate claims promptly, fairly or in a non-discriminatory manner. The ability to use the investor-to-state dispute settlement system is a cornerstone of the protections negotiated in U.S. Bilateral Investment Treaties and in NAFTA Chapter 11.

Requiring U.S. investors to pursue an action that arose precisely because of a corrupt or inadequate judicial system through all judicial avenues of that same system essentially nullifies the investor-to-state protections in those cases. It denies U.S. investors abroad access to a prompt, objective dispute settlement system. As a result, it will undermine the very U.S. investment that so benefits the U.S. economy, U.S. workers and U.S. companies. This provision is very broad and could apply in almost any contract, expropriation or other dispute between a private party and a foreign government that the government brings before a local court. Furthermore, including a futility exception, as some have suggested, will not cure the flaws with this proposal as investor-state tribunals are likely to be extremely reluctant to find – and investors would have an extraordinarily difficult time proving – that a foreign judicial system is so tainted that pursuing a claim is “futile.”

It is noteworthy that despite the extensive debate on the investment negotiating objective during the TPA debate, no member of Congress proposed incorporating such a judicial finality provision in the TPA Act. Indeed, the Conference Report speaks to the exclusion of the exhaustion/judicial finality provision in future agreements:

“The Conferees recognize that the procedures for resolving disputes between a foreign investor and a government may differ from the procedures for resolving disputes between a domestic investor and a government and may be available at different times during the dispute. Thus, the ‘no greater rights’ direction does not, for instance, apply to such issues as the dismissal of frivolous claims, the exhaustion of remedies, access to appellate procedures, or other similar issues.”

Conference Report to H.R. 3009, the Trade Act of 2002, Rept. 107-624 at 156 (emphasis added).

General Exceptions

Issue: Whether to exempt certain laws and regulations (*e.g.*, environmental, health and safety) from the investment rules.

Recommendation: Reject general exceptions approach, which is not consistent with U.S. practice and was rejected by the House and Senate on several occasions.

Discussion: Investment protections are not designed and, despite the critics, have not been applied in a manner that upsets the normal regulatory process. The safeguards that Congress inserted in the TPA Act, including no greater substantive rights, consistency with U.S. legal principles and practice and the procedural innovations, will further help ensure that bona fide, generally applicable environmental, public safety, health, welfare and other laws and measures that are applied in a non-discriminatory manner are not undermined by these protections.

In the United States, there are no blanket exceptions for environmental, public safety, health, welfare or other similar laws from due process standards, expropriations, or other relevant laws. Indeed, subjecting these laws to scrutiny to ensure their appropriateness and fairness is one of the hallmarks of the U.S. legal system.

Efforts to seek any general exceptions for such laws should be rejected. Indeed, in striking the balance between U.S. interests, Congress rejected the Kerry and Doggett amendments, as well as the Durbin Amendment and the H.R. 3019, which specifically sought carve-outs from the investment protections for certain laws. These proposals were rejected by both the Senate Finance and House Ways and Means Committees and by the Senate and House as well.

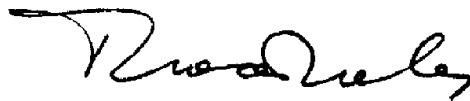
Thank you for your consideration of our comments. We look forward to working with you as further consideration is given to the U.S. negotiating position on investment in the context of the Chile, Singapore, FTAA and other negotiations.

We are sending identical letters to other senior officials who are participating in this policy review.

Sincerely,



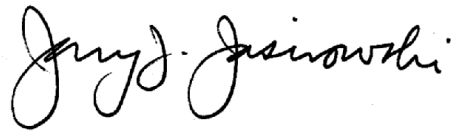
Calman J. Cohen
President
Emergency Committee for American Trade



Thomas Niles
President
U.S. Council for International Business



William Reinsch
President
National Foreign Trade Council



Jerry Jasinowski
President
National Association of Manufacturers



John Castellani
President
The Business Roundtable

Encl.