NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

Submission of the
New Zealand Council of Trade Unions
Te Kauae Kaimahi

to the

Ministry of Foreign Affairs and Trade

on a possible

Investment Protocol to the
Hong Kong - New Zealand Closer
Economic Partnership Agreement

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Wellington

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Contents

1. Introduction

1.1. This submission is made on behalf of the 39 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With over 330,000 members, the CTU is the largest democratic organisation in New Zealand.

1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.

1.3. We are aware that these negotiations are intended to “build on and be broader in scope than the Agreement between the Government of New Zealand and the Government of Hong Kong for the Promotion and Protection of Investments” (NZ-HK IPPA) of 1995, as well as recognising the trade and investment agreements with Hong Kong (2010 New Zealand-Hong Kong, China Closer Economic Partnership Agreement), and with China (2008 New Zealand-China Free Trade Agreement). This submission however approaches the negotiations from a point of view of the principles at stake as much as the specifics of this particular negotiation.

2. General CTU Approach to Trade and Investment Negotiations

2.1. The CTU policy approach on international trade and investment matters is to identify possible risks to the New Zealand economy and local businesses and other interests, whilst recognising the perceived advantages that some sectors may accrue from enhanced access to markets. The CTU has general concerns about the possible negative impacts of a neo liberal approach to free trade which can promote unrestricted access by multinational corporations to land, resources, workers, culture, plant life, indigenous intellectual property rights, and so on without protections for the people of that country. These concerns are both for direct impacts and for unintended consequences.

2.2. However this proposal concerns investment only. Our concerns are heightened in the area of investment for a number of reasons we set out below. In general, the arguments for liberalisation of international investment are very different from those for liberalisation of trade, even if they are defended as if the same logic applied. In the words of perhaps the most prominent academic advocate of free trade, economist Jagdish Bhagwati, it is "The capital myth" which ignores "The difference between trade in widgets and dollars"[1]. Bhagwati's article under this title was written in the wake of the late 1990s Asian financial crisis. The Global Financial Crisis (GFC) we are still experiencing underlines the points he makes there:

> "In the aftermath of the Asian financial crisis, the mainstream view that dominates policy circles, indeed the prevalent myth, is that despite the striking evidence of the inherently crisis-prone nature of freer capital movements, a world of full capital mobility continues to be inevitable and immensely desirable. Instead of maintaining careful restrictions, we are told, the only sensible course is to continue working toward unfettered capital flows; ...

[1] "The capital myth: The difference between trade in widgets and dollars", Jagdish Bhagwati, *Foreign Affairs*, New York, May/Jun 1998, Volume 77, Issue 3, pp. 7-12.

> This is a seductive idea: freeing up trade is good, why not also let capital move freely across borders? But the claims of enormous benefits from free capital mobility are not persuasive.
>
> ... despite the evidence of the inherent risks of free capital flows, the Wall Street-Treasury complex is currently proceeding on the self-serving assumption that the ideal world is indeed one of free capital flows, with the IMF and its bailouts at the apex in a role that guarantees its survival and enhances its status. But the weight of evidence and the force of logic point in the opposite direction, toward restraints on capital flows. It is time to shift the burden of proof from those who oppose to those who favor liberated capital."

2.3. While Bhagwati, correctly at the time, placed the IMF at the centre of advocacy of "liberating capital", it is notable that following the GFC – which perhaps not coincidentally caused extensive damage to the great powers in Europe and the US which control it – the IMF has famously changed its views to favour, at least in some circumstances, capital controls and in general a more cautious view of international investment[2]. The increased use of capital controls has been noted with approval by the IMF, UNCTAD and others, with a strong movement in Europe in support of a form of international transactions tax[3]. Among other restrictions on international capital movements, South Korea has restricted the use of bank loans in foreign currency in order to ensure that foreign currency loans are for overseas use only[4], Brazil is using taxes on foreign exchange transactions, and Malaysia has used various forms of capital control since the financial crisis in the late 1990s. They are of course fundamental to China's economic model. The fact that the same critical thinking does not yet appear in New Zealand in official circles does not mean that such options should be limited or written out of New Zealand's future by investment agreements such as

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[2] For example see "Capital Inflows: The Role of Controls", by Jonathan D. Ostry, Atish R. Ghosh, Karl Habermeier, Marcos Chamon, Mahvash S. Qureshi, and Dennis B.S. Reinhardt, IMF, 19 February 19 2010, SPN/10/04, at http://www.imf.org/external/pubs/ft/spn/2010/spn1004.pdf.
[3] For example see "Sarkozy, Merkel push new tax", http://www.sundaytribune.co.za/sarkozy-merkel-push-new-tax-1.1119551, 17 August 2011.
[4] "South Korea Imposes Currency Controls for Financial Stability", by Kavaljit Singh, http://tinyurl.com/27j4y7b.

that with Hong Kong. Opposition parties and analysts[5] are considering their use as does the NZCTU's Alternative Economic Strategy[6].

2.4. We believe that New Zealand's international trade and investment policies should be driven by, and be consistent with, its economic and social development policies. As underlined by the GFC, these include the ability of future governments to control international capital movements, whether it is financial capital or direct investment.

2.5. For the CTU, any analysis of the relative merits of an international commercial agreement must be based on empirically sound research, properly conducted net benefit analysis, and include consideration of:

- employment effects in New Zealand;
- adherence to core labour standards in the partner country;
- the contribution any proposed agreement will make to sustainable economic development in NZ;
- the impact on public and social services;
- the extent to which the agreement is based on principles which will advance equitable commercial relations between countries; and
- the genuine application of the Treaty of Waitangi relationship.

2.6. The CTU continues to be highly concerned at the process followed in international trade and investment negotiations, particularly at the lack of openness including secrecy surrounding the draft text of agreements, which limits consultation on, and input into, the trade agreement documents.

[5] For example Bernard Hickey in "Opinion: Why we must abandon the economic orthodoxy and embrace capital, trade and exchange rate controls", http://www.interest.co.nz/opinion/50803/opinion-why-we-must-abandon-economic-orthodoxy-and-embrace-capital-trade-and-exchange-rate-controls

[6] http://union.org.nz/policy/alternative-economic-strategy

3. Controls on Overseas Direct Investment

3.1. We would oppose any provision which weakened, or further constrained the strengthening, of New Zealand's foreign investment regime in the Overseas Investment Act 2005, or its regulations. We regard this regime as already very weak, particularly its application to business investment which constitutes by far the largest part of overseas investment in New Zealand and the most significant economically.

3.2. Overseas investment policies other than for land (and even for land the controls are acknowledged by almost all political parties to have been weak) have allowed overseas takeover of New Zealand businesses without any quality control. At the least, this bids up asset prices beyond the price a New Zealand investor would pay. This has encouraged speculation on capital gains, whether on property or shares (such as in takeovers by private equity investors in recent years) rather than investing to increase production. Rates of return and interest rates have been bid up beyond what much productive investment can afford.

3.3. If the overseas investment improved the quality of technology, skills and management then increased profit rates could be justified, but there have been many negative examples including privatisations in the 1990s and highly debt-loaded private equity investment in the 2000's. This investment will have increased New Zealand's international liabilities both directly and in choking off productive local investment. The remittance overseas of the income on those liabilities has reduced our level of savings nationally. The income overseas investors receive from New Zealand (from all types of liabilities) is more than the contribution to our GDP of Agriculture, Forestry and Fishing combined. While equity investment has only been 20 to 30 percent of New Zealand's gross international liabilities, it has been responsible for 40 to 60 percent of the investment income remitted abroad between 2001 and 2010[7].

[7] Statistics New Zealand, Balance of Payments and International Investment Position.

3.4. As Supachai Panitchpakdi, Secretary-General of the United Nations Conference on Trade and Development (UNCTAD) and former head of the WTO said when visiting New Zealand last year, “UNCTAD had studied privatisations around the world and observed numerous instances where foreign buyers asset stripped their acquisitions”. He said that the quality of overseas investment was important and that “UNCTAD was seeing more government intervention around the world to determine its composition” reflecting “more articulation of investment policies to support national policies: ‘Are you going to help enhance my labour productivity? Are you going to follow my environmental and competition rules?’”[8] New Zealand does not have those quality controls.

3.5. Inland Revenue, in work for the 2010 Budget and the Tax Working Group[9], analysed Management Magazine top 200 businesses and found evidence of very high debt loading of overseas businesses compared to New Zealand controlled ones, location-specific rents (higher profit rates due to dominance in a market which is specific to the location of the firm in New Zealand) and relatively low levels of exporting – accompanied by high levels of profit. This is significant economically: IRD comment that “Major industries, such as banks and the resource sector, appear to earn economic rents and total about one-quarter of total company tax collections.”[10]

3.6. In addition we have a legacy of privatisations which continue to be a drain on New Zealand and failed to provide technology or expertise which could not have been provided by local ownership. There is also a legacy of private equity owned firms with high debt loadings which became precarious as a result of the financial crisis, and there have been many recent examples of the consequences of their failure due to debt loadings or poor management.

3.7. On top of this, there are specific circumstances with regard to Hong Kong. As well as being a major entrepôt port for trade, it performs a similar function

[8] “NZ urged to harness foreign investment”, by Adam Bennett, *New Zealand Herald*, 22 November 2010.
[9] “Where to from here for tax reform? Rate alignment and the company tax rate”, Inland Revenue Policy Advice Division report to the Minister of Revenue, 28 January 2010 (PAD2010/6).
[10] “Tax policy report: The company tax rate”, Inland Revenue and Treasury report to the Ministers of Finance and Revenue, 12 February 2010 (T2010/373 and PAD2010/43).

for investment. Corporations from around the world register subsidiaries there, either as shelf or holding companies or with a substantive presence. In turn, there are substantial capital movements in and out of Hong Kong simply for tax avoidance or evasion purposes or as a gateway to mainland China. In 2009 for example, China was its leading source of both stock and flow of inward direct investment (36 percent of stock), but of the other nine major sources, four (led by the British Virgin Islands with 32 percent of stock, with Bermuda, Cayman Islands and the Cook Islands also in the list) were tax havens, and in addition both the Netherlands and Singapore can have similar functions. Only the US, Japan and the UK were unambiguously ultimate sources of inward investment and they accounted for only 14% of the investment. Well over half of the stock is in Investment Holding, Real Estate, Professional and Business Services, suggesting it is overwhelmingly motivated by financial returns rather than productive investment.

3.8. Outward direct investment shows a similar pattern, with half going to tax havens, over 40 percent going to the mainland, leaving only 8-9 percent going to the UK, Malaysia, Thailand, Australia and other non-tax-haven countries[11].

3.9. This is not a temporary situation. It was documented in more detail in a submission on the ultimately unsuccessful negotiations for a Hong Kong-New Zealand FTA in 2001[12]. At that time, New Zealand was listed as the fifth largest destination of outward investment from Hong Kong (after mainland China and three tax havens) but much of that appeared to be for tax avoidance purposes.

3.10. A recent study by Statistics New Zealand, "The Ultimate Sources of Foreign Direct Investment"[13] found that virtually none of the apparent equity direct

[11] Data in this paragraph is from "External Direct Investment Statistics of Hong Kong 2009", Census and Statistics Department of Hong Kong, available at http://www.censtatd.gov.hk/products_and_services/products/publications/statistical_report/national_income_and_bop/index_cd_B1040003_dt_latest.jsp, accessed 4 September 2011.

[12] "Globalisation by Stealth", by Bill Rosenberg, ARENA, March 2001, available at http://canterbury.cyberplace.org.nz/community/CAFCA/publications/Trade/GlobalisationByStealth.pdf

[13] "The Ultimate Sources of Foreign Direct Investment", by Mallika Kelkar, Statistics New Zealand, paper presented at the New Zealand Association of Economists Conference, Wellington,June 2011, available at

investment from Hong Kong to New Zealand in 2010 was in fact from Hong Kong. It was simply being channelled through that jurisdiction.

3.11. The use of the Cook Islands as a tax haven by Hong Kong companies is also a concern given New Zealand's special relationship with the Cook Islands.

3.12. We therefore need to be very cautious about the quality of investment from Hong Kong, including its economic contribution (other than financial), its purpose and its stability. The situation calls for greater regulation rather than liberalisation. We return to this later in the submission.

3.13. The evidence also calls for extreme caution in any Most Favoured Nation commitments made in an agreement. Any future more liberal commitments New Zealand may make could be accessed by a large number of investors through Hong Kong through such a provision even if this agreement were tightly constrained. Jurisdiction shopping is discussed below. There is now an extensive record of the use of MFN clauses to extend the effect of investment agreements well beyond their original form. We recommend that no Most Favoured Nation clause should be included in this agreement.

4. Capital management

4.1. As discussed above, we would also oppose any provisions in an investment agreement which constrained our future ability to manage capital flows into and out of New Zealand.

4.2. Besides foreign direct investment, the other main form of overseas investment into New Zealand is financial debt. Bank lending, until the global financial crisis forced the intervention of the Reserve Bank, has been funded in substantial part by overseas borrowing by the big four Australian banks which dominate New Zealand's financial system. The use of these sources was not "demanded" by New Zealanders, but was a decision taken by the banks in order to continue their volume of lending. The ready availability of,

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http://www.stats.govt.nz/browse_for_stats/Corporate/Corporate/nzae-2011/ultimate-sources-foreign-direct-investment.aspx, accessed 4 September 2011.

for New Zealand purposes, limitless funds, assisted the property price bubble which reduced the affordability of housing and rural property. When offered such funds it is hardly surprising that New Zealanders accepted them (as they did in the boom preceding the 1987 share market crash). At March 2011, 77 percent of New Zealand's net international liabilities were owed by the banks.

4.3. New Zealand is very vulnerable to short term flight of capital from the country, freezing of international financial markets as occurred in 2008, and the excessive reliance on overseas finance as described above. Retaining a wide range of direct capital and currency management options is therefore vital. The failure of the policy tools of the pre-GFC economic and financial orthodoxy to manage the crisis, leading to revisiting and refreshing policies from previous decades, shows how important it is to retain such options.

4.4. Such policies can be explicitly banned or restricted in investment agreements, through provisions which deny state parties the right to constrain capital movements. They can also be indirectly constrained through provisions which guarantee investors the right to remit capital, profits and other funds at will. In regard to profits and other funds, while in theory there is a distinction between capital and current funds, in practice the line can be impossible to draw. The right to remit profits can be used to remit large sums that have exactly the same effect as capital remittances.

4.5. The policy issues and the constraints in trade and investment agreements are discussed in some detail in the UNCTAD G-24 Discussion Paper, "Policy Space to Prevent and Mitigate Financial Crises in Trade and Investment Agreements"[14]. We urge MFAT to adopt a precautionary position as outlined in that paper.

[14] "Policy Space to Prevent and Mitigate Financial Crises in Trade and Investment Agreements (Discussion Paper No. 58)", by K.P. Gallagher, May 2010. G-24 Discussion Paper Series, United Nations Conference on Trade and Development. Retrieved from http://www.unctad.org/en/docs/gdsmdpg2420101_en.pdf, 4 January 2011.

5. Expropriation, Minimum Standard of Treatment

5.1. The widespread concerns about expropriation provisions in investment agreements and investment chapters of broader agreements are well known. The particularly pernicious “creeping expropriation” concept (or measures “having effect equivalent to” expropriation in the words of the NZ-HK IPPA) has now had widespread application in other agreements such as the North American Free Trade Agreement (NAFTA). It threatens legitimate measures taken by governments to, among other matters in the public interest, protect public health, the environment or to recover from financial crises.

5.2. While less publicised, the Minimum Standard of Treatment provisions, especially including those relating to “fair and equitable treatment”, are now becoming increasingly commonly used as an “expropriation-lite” attack on government measures where it is difficult to establish creeping expropriation.

5.3. These concerns have been brought to public attention, probably for the first time in New Zealand and Australia, by the threat by tobacco transnational Philip Morris to sue the Australian government under its bilateral investment agreement with Hong Kong if Australia takes action to reduce cigarette smoking by, among other measures, mandating the nature of labelling on cigarette packets. We note that Philip Morris has made a similar threat against Uruguay and in that case has begun its action. Not only is this an appalling and unethical abuse of power by a large corporation attempting to undermine actions to improve public health, but it illustrates the use of “jurisdiction shopping”. Philip Morris claims to be a US corporation when lobbying the US to include investment provisions in the Transpacific Partnership Agreement (TPPA) to protect its dangerous products, a Swiss corporation in taking action under a Switzerland-Uruguay investment agreement against Uruguay, and a Hong Kong corporation in taking action against Australia. It vividly illustrates the care that must be taken in any agreement signed by New Zealand, but is particularly true of Hong Kong because of the nature of its economy and regulatory environment as has already been demonstrated.

5.4. Even if Philip Morris is unsuccessful, the “chilling” effect of the threat of such actions makes it ever more difficult for governments to take actions needed for a broad range of objectives in the public interest. It has been noted by one expert that the threat in 1994 by R J Reynolds Tobacco Company to take action against Canada in similar circumstances under NAFTA deterred the Canadian government from taking legislative action[15].

5.5. We are aware that in the New Zealand-China FTA and subsequent agreements, New Zealand has included statements which attempt to prevent the use of expropriation provisions against actions taken by the government for public welfare, health, safety and the environment[16] and assume it will attempt to include something similar in this case. To our knowledge such intentions to restrict the use of “expropriation” have yet to be tested, and it is not clear that they are wide enough to permit all government actions that are in the public interest. In addition, we note that it does not apply to Minimum Standard of Treatment provisions which are increasingly being used in ways very similar to those that have raised concerns about Expropriation provisions. Again, it is not clear that the provisions which New Zealand is now including to “clarify” Minimum Standard of Treatment are broad enough.

5.6. One specific concern we have in addition to the potential use of such provisions to prevent or discourage justified government regulatory action in areas already mentioned, is that they could be used against labour conditions and rights. A paper outlining this case has previously been made available to MFAT and is appended to this submission. There should therefore be an explicit labour carve-out from the provisions of this agreement.

6. Dispute resolution

6.1. The above provisions are threatening enough to public interest measures governments may wish to take, but the addition of Investor State Dispute

[15] “Philip Morris v. Uruguay: Will investor-state arbitration send restrictions on tobacco marketing up in smoke?” by Matthew C. Porterfield & Christopher R. Byrnes, *Investment Treaty News,* Issue 4. Volume 1. July 2011.

[16] In Annex 13 of the New Zealand-China FTA: “Except in rare circumstances to which paragraph 4 applies, such measures taken in the exercise of a state's regulatory powers as may be reasonably justified in the protection of the public welfare, including public health, safety and the environment, shall not constitute an indirect expropriation.”

Resolution (ISDR) provisions, allowing individual investors to take action against a government for damages or reversal of measures the government has taken, multiplies the risk many times.

6.2. We are aware to date of awards of US$326.9 million against NAFTA countries and over US$430 million (plus interest) against Argentina for actions taken during its financial crisis alone under its various investment agreements. These actions and awards demonstrate an unacceptable imbalance between wealthy corporations and the needs of the people of a country. They greatly privilege investors and hamstring governments that wish to act in the public interest.

6.3. We note that the Australian government has now taken a position against allowing ISDR in its future agreements. The rationale for this position was strengthened not only by examples such as those above (and particularly the Philip Morris action against Uruguay), but also the findings of Australia's Productivity Commission in its 2010 "Report on Bilateral and Regional Trade Agreements". This report found no evidence that ISDR encouraged greater overseas direct investment or for many other arguments used to justify it. On the contrary it found that "experience in other countries demonstrates that there are considerable policy and financial risks arising from [ISDR] provisions". It pointed out that such procedures give foreign investors rights greater than those available to domestic investors. It recommended against ISDR being included in future agreements.

6.4. In New Zealand's context ISDR makes even less sense. ISDR actions are very expensive and time consuming to both the investor and the government involved. It is most unlikely that the great majority of New Zealand companies, which are small by international standards, will find it practicable to make use of them. The costs, distractions, and aggravation of a poor relationship with the foreign government are likely to make them worse off than taking alternative routes. It is in practical terms only available to large corporations, which in any case have more bargaining power with foreign governments, and the internal resources to deal with such disputes in other ways.

6.5. It is absurd to run such large domestic risks solely for the benefit of a small number of the largest corporations investing from New Zealand – some of which may only have a New Zealand presence, and not New Zealand ownership.

6.6. For all these reasons we strongly oppose ISDR.

7. Term

7.1. It is common for bilateral investment agreements to have long terms. The initial term of the existing NZ-HK IPPA was for fifteen years, and was to remain in force for a further fifteen years if no notice of termination was given after fourteen years. This is far too rigid given changing experience with investment, the regulation of the financial system, and with agreements such as this. Any such agreement should be able to be terminated on the application of either party after no more than one year.

8. Conclusion

8.1. In this submission, we have provided evidence for our strong concerns with an agreement such as that proposed with Hong Kong.

8.2. Unless our concerns are addressed, we are opposed to such a treaty being signed.

9. Appendix: Interaction between Labour and Investment provisions in international agreements

Introduction

Concerns have been raised that the investment chapter of a "free trade" agreement such as is proposed in the Transpacific Partnership Agreement could allow investors to challenge labour laws, rights and practices. The purpose of this brief paper is to establish that there is an issue to be addressed.

There are at least three investor-state disputes whose scope indicates that labour and similar issues would be accepted as valid causes for an investor claim under typical provisions of a bilateral investment treaty or an investment chapter. There may well be others: many such cases are not made public and in the absence of a case database of those that are publicly available it is not possible to be sure whether there are other such cases.

The paper outlines some possible bases for investor claims with respect to labour matters, and summarises relevant aspects of the three disputes.

There is therefore cause for concern that there are problematic interactions between investment provisions of international agreements and labour legislation, rights and practice. Investment provisions and investor-state disputes in particular could act to negate employment rights and law. The two areas – Labour and Investment – cannot be dealt with in isolation.

Bases for investor claims

Government measures or practices affecting labour could form the basis for claims of "indirect expropriation" or of a breach of the "fair and equitable treatment" component of "minimum standards of treatment" provisions which are standard in an investment chapter or agreement.

The former would require that such measures contributed to a substantial loss of profitability or value of an investment. That is a possibility when there is a change that for example significantly increases labour costs.

However it is more likely that the requirement for "fair and equitable treatment" would provide a basis for claim. This has been interpreted by dispute tribunals to include an "obligation to maintain a stable and predictable legal and business framework in line with the investor's legitimate expectations" [17]. It has been "the most relied upon and successful basis for a treaty claim" according to UNCTAD[18]. It would be especially likely to succeed if there were specific undertakings or understandings given when the investment was undertaken. Bad faith or malicious intention of the host state does not have to be present.

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[17] There is a discussion of these matters in "Latest developments in investor-State dispute Settlement", UNCTAD, IIA MONITOR No. 1 (2008), p. 4ff, available at http://www.unctad.org/en/docs/iteiia20083_en.pdf, and the 2009 issue (see next footnote). See also "State Practice and the (Purported) Obligation under Customary International Law to Provide Compensation for Regulatory Expropriations", (4 January 2011 draft), by Matthew C. Porterfield, Senior Fellow, Harrison Institute for Public Law, Georgetown University Law Center.

[18] "Latest developments in investor-State dispute Settlement", UNCTAD, IIA MONITOR No. 1 (2009), p. 8, available at http://www.unctad.org/en/docs/webdiaeia20096_en.pdf.

To illustrate with a dispute that did not include labour issues, in *PSEG v. Turkey* the tribunal ruled *inter alia* that legislative changes by the government of Turkey which affected the investment (a power plant project) “seriously breached” the fair and equitable treatment obligation[19]. Turkey was required to pay over US$9 million compensation plus over eight years of interest, and costs of over US$13 million, while PSEG paid costs of over US$ 7 million.

The employment law change which was part of the deal that the New Zealand government made under pressure from Warner Brothers to continue the production of the film, the Hobbit, in New Zealand, is a case in point. A future government wanting to restore the law to the status quo could well be subject to claim by Warner Brothers and other investors in a film or TV production in progress at the time.

Cases

1. Noble Ventures, Inc. vs Romania

See *Investment Treaty News*, October 26, 2005 (attached):

“The US firm invested in a privatized steel mill, Combinatul Siderurgic Resita (CSR), located in Resita, Romania. Following the conclusion of privatization agreements in August of 2000, Noble quickly fell out with Romanian privatization authorities.

The firm alleged that Romania failed to provide full protection and security, fair and equitable treatment, and treatment in accordance with international law, contrary to its treaty commitments. The US investors also accused Romania of expropriating their investment without compensation, and of failing to live up to obligations undertaken towards the firm.

Among its specific charges, Noble accused authorities of misrepresentations during the privatization process; *of failing to protect Noble officials from labour unrest*; and of using bankruptcy laws to deprive Noble of its investment.” [my emphasis]

While the claim was dismissed, the dispute panel discussed the labour aspect in its decision and did not rule it out as a cause for claim as such. (The panel’s decision is available at http://ita.law.uvic.ca/documents/Noble.pdf)

2. UPS vs Canada

This was a dispute under NAFTA which attracted widespread concern in Canada and several groups including unions sought to intervene as amicus curiae. There has been considerable analysis of it.

See *Investment Treaty News*, Nov. 21, 2005 (attached) for a summary at that point:

[19] PSEG Global, Inc. v. Republic of Turkey, ICSID case No. ARB/02/5, Award (Jan. 19, 2007), paras. 250-256. See also Porterfield, *op cit.*

“UPS filed its arbitration under NAFTA’s Chapter 11 in 2000, alleging that express-courier services provided by Canada Post Corporation (Canada’s public postal service) receive more favorable treatment than that accorded to UPS’s Canadian subsidiary…

In a joint application made by the Canadian Union of Postal Workers (CUPW) and an advocacy group, The Council of Canadians, the would-be amicus curiae observe that the UPS arbitration has the potential to impact upon jobs and pensions of CUPW members, as well as upon other universal public services in Canada…

UPS has argued in pleadings before the tribunal that Canada Post competes unfairly with UPS, *by keeping wages low, thanks to the denial of collective bargaining rights to certain postal workers*. UPS argues that this conduct runs afoul of Canada’s obligations under Article 1105 of NAFTA to provide “treatment in accordance with international law”. Indeed, counsel for UPS argue that Canada’s failure to permit collective bargaining, and other rights such as freedom of association, is in violation of international labour and human rights covenants and customary international law, which constitutes a failure on Canada’s part to live up to its aforementioned NAFTA Article 1105 obligations.

This claim has been contested by lawyers for Canada. They insist that the argument is ‘misplaced’, and that, in any event, UPS, as a foreign investor, does not have standing to allege breaches of rights owed to Canadian postal workers. In a filing before the tribunal, Canadian Government lawyers argue that ‘(A) NAFTA Chapter 11 tribunal is not the proper forum for a dispute over the application of labour law to Canada Post,’ and that other complaints mechanisms exist for claims related to international human rights and labour standards.” [my emphasis]

In the end the dispute panel, in a majority decision, found against UPS. Once again, however it did not rule out consideration of labour law. While it dismissed this aspect of the UPS claim, it did so on the basis that UPS did not in the end pursue them. (Papers relating to this claim are available at http://www.naftalaw.org/disputes_canada_ups.htm.)

9.1.

3. Piero Foresti, Laura de Carli & Others v. The Republic of South Africa

See *Investment Treaty News*, February 14, 2007 (attached) and various other issues.

“European-based investors in South Africa’s mining industry have mounted an international arbitration against the South African Government alleging that that country’s new Black Economic Empowerment (BEE) mining regime violates the terms of investment protection treaties concluded by South Africa with Italy and Luxembourg…

The Mineral and Petroleum Resources Development Act (MPRDA), which came into force in May of 2004, served to vest all mineral and petroleum rights with the South African Government.

Under the new framework, businesses must apply to the South African Government – within a given time frame - for a right to convert their former holdings into “new-order” rights, which are held and used under license from the state.

As part of this conversion process, South Africa's Department of Mining and Energy will take into account the South African Constitution's overall goal of redressing historical, social and economic inequalities - and the progress of applicant companies in meeting targeted *social, labour and development objectives* set out in a broad-based socioeconomic empowerment mining charter.

In legal terms, the claimants say that the MPRDA extinguished their ownership of mineral rights in South Africa, without providing "prompt, adequate and effective compensation" as required under South Africa's investment treaties.

The claimants also allege that they have been denied fair and equitable treatment – as required under South Africa's treaties – by virtue of being forced to divest 26% of their investments to Historically Disadvantaged South Africans (HDSAs) In addition, the claimants allege that they are victims of 'discrimination' – contrary to the fair and equitable treatment guarantee – thanks to their being treated less favourably than Historically Disadvantaged South Africans." [my emphasis]

ITN editor and author of this article, Luke Eric Peterson, notes that "the Belgian and Italian Governments both made diplomatic representations to the South African government - warning that the BEE policies lead to potential breaches of investment protection treaties in force," so the claim was not without basis. In a commentary in the same issue he discusses the implications for "delicate human rights issues" of such investment agreements.

This claim was largely settled by the investors coming to agreement with the South Africa Government and the dispute panel issued an award only on costs (though it usefully including a summary of the claim). It is notable that the claimants considered that "had they exhausted the administrative process in South Africa, they would not have received the new order rights on the terms that they have now received them" (paragraph 94 of the award decision) so despite the panel not being asked to reach a decision, the process enabled the investors to extract a better deal from the South African Government than they would have been entitled to under domestic law. The decision is available at
http://ita.law.uvic.ca/documents/PieroForesti_v_SouthAfrica_Award.pdf

29 March 2011