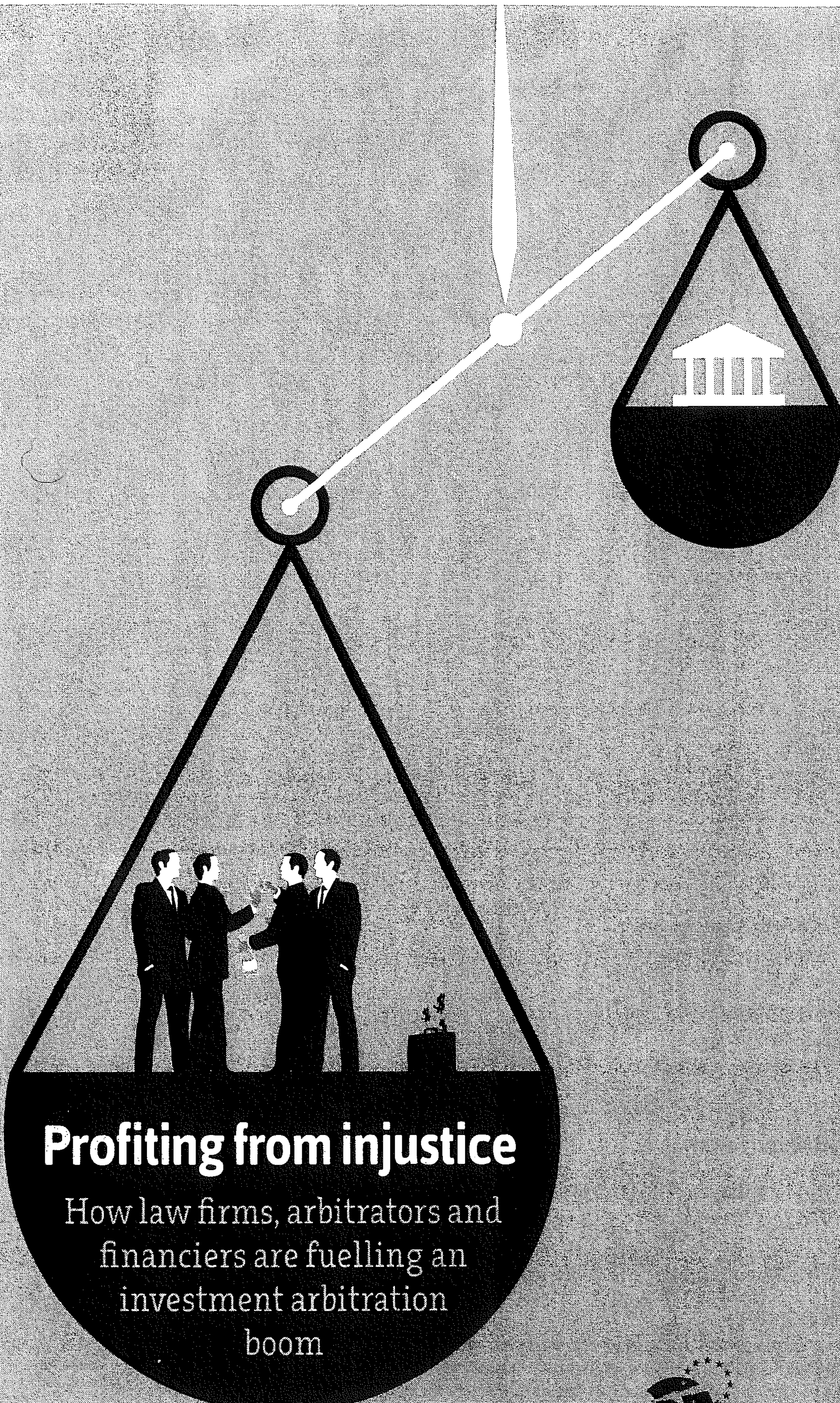

Profiting from injustice

How law firms, arbitrators and financiers are fuelling an investment arbitration boom

CEO

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Printer: Nouvelles Imprimeries Havaux

Brussels/Amsterdam, November 2012

Published by Corporate Europe Observatory and the Transnational Institute

Acknowledgements

We would like to thank, amongst others, Christian Bellak, Nathalie Bernasconi-Osterwalder, Peter Fuchs, Rhea Hoffmann, Taylor St John and Erik Wesselius for discussions and insightful comments to the different drafts of the texts. We are also grateful to Pauline Gairanod for research support. We would also like to thank the German Catholic organisation for development cooperation, Misereor, Germany, for the financial support to the publication.

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Executive summary

The last two decades have witnessed the silent rise of a powerful international investment regime that has ensnared hundreds of countries and put corporate profit before human rights and the environment.

International investment treaties are agreements made between states that determine the rights of investors in each other's territories. They are used by powerful companies to sue governments if policy changes – even ones to protect public health or the environment – are deemed to affect their profits. By the end of 2011, over 3,000 international investment treaties had been signed, leading to a surge in legal claims at international arbitration tribunals. The costs of these legal actions weigh on governments in the form of large legal bills, weakening of social and environmental regulation and increased tax burdens for people, often in countries with critical social and economic needs.

Yet while these financial and social costs have started to become ever more visible, one sector has remained largely obscured from public view and that is the legal industry that has profited from this litigation boom. This report seeks to address that by examining the key players in the investment arbitration industry for the first time. It seeks to shine a light on law firms, arbitrators and litigation funders that have profited handsomely from lawsuits against governments.

The report shows that the arbitration industry is far from a passive beneficiary of international investment law. They are rather highly active players, many with strong personal and commercial ties to multinational companies and prominent roles in academia who vigorously defend the international investment regime. They not only seek every opportunity to sue governments, but also have campaigned forcefully and successfully against any reforms to the international investment regime.

The international investment arbitration system was justified and put in place by Western governments with the argument that a fair and neutral dispute settlement system was needed to protect their corporations' investments from perceived bias and corruption within national courts. Investment arbitrators were to be the guardians and guarantors of this regime.

Yet rather than acting as fair and neutral intermediaries, it has become clear that the arbitration industry has a vested interest in perpetuating an investment regime that prioritises the rights of investors at the expense of democratically elected national governments and sovereign states. They have built a multimillion-dollar, self-serving industry, dominated by a narrow exclusive elite of law firms and lawyers whose interconnectedness and multiple financial interests raise serious concerns about their commitment to deliver fair and independent judgements.

As a result, the arbitration industry shares responsibility for an international investment regime that is neither fair, nor independent, but deeply flawed and business-biased.

Key findings:

1. **The number of investment arbitration cases, as well as the sum of money involved, has surged in the last two decades** from 38 cases in 1996 (registered at ICSID, the World Bank's body for administering such disputes) to 450 known investor-state cases in 2011. The amount of money involved has also expanded dramatically. In 2009/2010, 151 investment arbitration cases involved corporations demanding at least US$100 million from states.

2. **The boom in arbitration has created bonanza profits for investment lawyers paid for by taxpayers.** Legal and arbitration costs average over US$8 million per investor-state dispute, exceeding US$30 million in some cases. Elite law firms charge as much as US$1,000 per hour, per lawyer – with whole teams handling cases. Arbitrators also earn hefty salaries, amounting up to almost US$1 million in one reported case. These costs are paid by taxpayers, including in countries where people do not even have access to basic services. For example, the Philippine government spent US$58 million defending two cases against German airport operator Fraport; money that could have paid the salaries of 12,500 teachers for one year or vaccinated 3.8 million children against diseases such as TB, diphtheria, tetanus and polio.

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3. **The international investment arbitration industry is dominated by a small and tight-knit Northern hemisphere-based community of law firms and elite arbitrators.**

   a) Three top law firms – Freshfields (UK), White & Case (US) and King & Spalding (US) – claim to have been involved in 130 investment treaty cases in 2011 alone.

   b) Just 15 arbitrators, nearly all from Europe, the US or Canada, have decided 55% of all known investment-treaty disputes. This small group of lawyers, referred to by some as an 'inner mafia', sit on the same arbitration panels, act as both arbitrators and counsels and even call on each other as witnesses in arbitration cases. This has led to growing concerns, including within the broader legal community, over conflicts of interest.

4. **Arbitrators tend to defend private investor rights above public interest, revealing an inherent pro-corporate bias.** Several prominent arbitrators have been members of the board of major multinational corporations, including those which have filed cases against developing nations. Nearly all share businesses' belief in the paramount importance of protecting private profits. In many cases concerning public interest decisions, such as measures taken by Argentina in the context of its economic crisis, arbitrators have failed to consider anything but corporations' claims of lost profits in their rulings. Many arbitrators vocally rejected a proposal by International Court of Justice Judge Bruno Simma to give greater consideration to international environmental and human rights law in investment arbitration.

5. **Law firms with specialised arbitration departments seek out every opportunity to sue countries – encouraging lawsuits against governments in crisis,** most recently Greece and Libya, and promoting use of multiple investment treaties to secure the best advantages for corporations. They encourage corporations to use lawsuit threats as a political weapon in order to weaken or prevent laws on public health or environmental protection. Investment lawyers have become the new international 'ambulance chasers', in a similar way to lawyers who chase hospital wagons to the emergency room in search for legal clients.

6. **Investment lawyers, including elite arbitrators, have aggressively promoted investment arbitration as a necessary condition for the attraction of foreign investment, despite evidence to the contrary.** Risks to states of acceding to investor-state arbitration are downplayed or dismissed.

7. **Investment lawyers have encouraged governments to sign investment treaties using language that maximises possibilities for litigation. They have then used these vaguely worded treaty provisions to increase the number of cases.** Statistical study based on 140 investment-treaty cases shows that arbitrators consistently adopt an expansive (claimant-friendly) interpretation of various clauses, such as the concept of investment. Meanwhile arbitration lawyers have taken a restrictive approach in international law when it comes to human and social rights.

8. **Arbitration law firms as well as elite arbitrators have used positions of influence to actively lobby against any reforms to the international investment regime, notably in the US and the EU.** Their actions, backed by corporations, succeeded in preventing changes that would enhance government's policy space to regulate in the US investment treaties that had been proposed by US President Barack Obama when he came to office. Several arbitrators have also loudly denounced nations that have questioned the international investment regime.

9. **There is a revolving door between investment lawyers and government policy-makers that bolsters an unjust investment regime.** Several prominent investment lawyers were chief negotiators of investment treaties (or free trade agreements with investment protection chapters) and defended their governments in investor-state disputes. Others are actively sought as advisers and opinion-makers by government and influence legislation.

10. **Investment lawyers have a firm grip on academic discourse on investment law and arbitration,** producing a large part of the academic writings on the subject, controlling on average 74% of editorial boards of the key journals on investment law, and frequently failing to disclose the way they personally benefit from the system. This raises concerns over academic balance and independence.

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11. **The investment arbitration system is becoming increasingly integrated with the speculative financial world,** with investment funds helping fund investor-state disputes in exchange for a share in any granted award or settlement. This is likely to further fuel the boom in arbitrations, increase costs for cash-strapped governments, and raises concerns of potential conflicts of interest because of a dense web of personal relationships that link financiers to arbitrators, lawyers and investors. Firms such as Juridica (UK), Burford (US) and Omni Bridgeway (NL) have already become an established part of international investment arbitration, in the absence of any regulation of their activities. This financialisation of investment arbitration has even extended to proposals to sell on packages of lawsuits to third parties, in the vein of the disastrous credit default swaps behind the global financial crisis.

Some countries have started to realise the injustices and inconsistencies of international investment arbitration and have initiated a retreat from the system. In spring 2011, the Australian government announced that it would no longer include investor-state dispute settlement provisions in its trade agreements. Bolivia, Ecuador and Venezuela have terminated several investment treaties and have withdrawn from ICSID. Argentina, which has been swamped with investor-claims related to emergency legislation in the context of its 2001-2002 economic crisis, refuses to pay arbitration awards. South Africa is engaged in a thorough overhaul of its investment policy to better align it with development considerations and has just announced that it will neither enter into new investment agreements nor renew old ones due to expire.

The backlash has not gone unnoticed by members of the investment arbitration industry. Some insiders are ready to confront the challenges with proposals for moderate reform, such as greater transparency. But these proposals do not address the inherent flaws and corporate bias of the investment arbitration system. We believe only systemic reform, based around principles that consider human rights and the environment as more important than corporate profits, can deliver necessary change. This must start with the termination of existing investment agreements and a moratorium on signing new ones.

Nevertheless even within the existing system, there are some steps that can be taken to help to roll back the power of the arbitration industry. This report calls for a switch to independent, transparent adjudicative bodies, where arbitrators' independence and impartiality is secured; the introduction of tough regulations to guard against conflicts of interest; a cap on legal costs; and greater transparency regarding government lobbying by the industry.

These steps will not by themselves transform the investor-state arbitration system. Without governments turning away from investment arbitration, the system will remain skewed in favour of big business and the highly lucrative arbitration industry.

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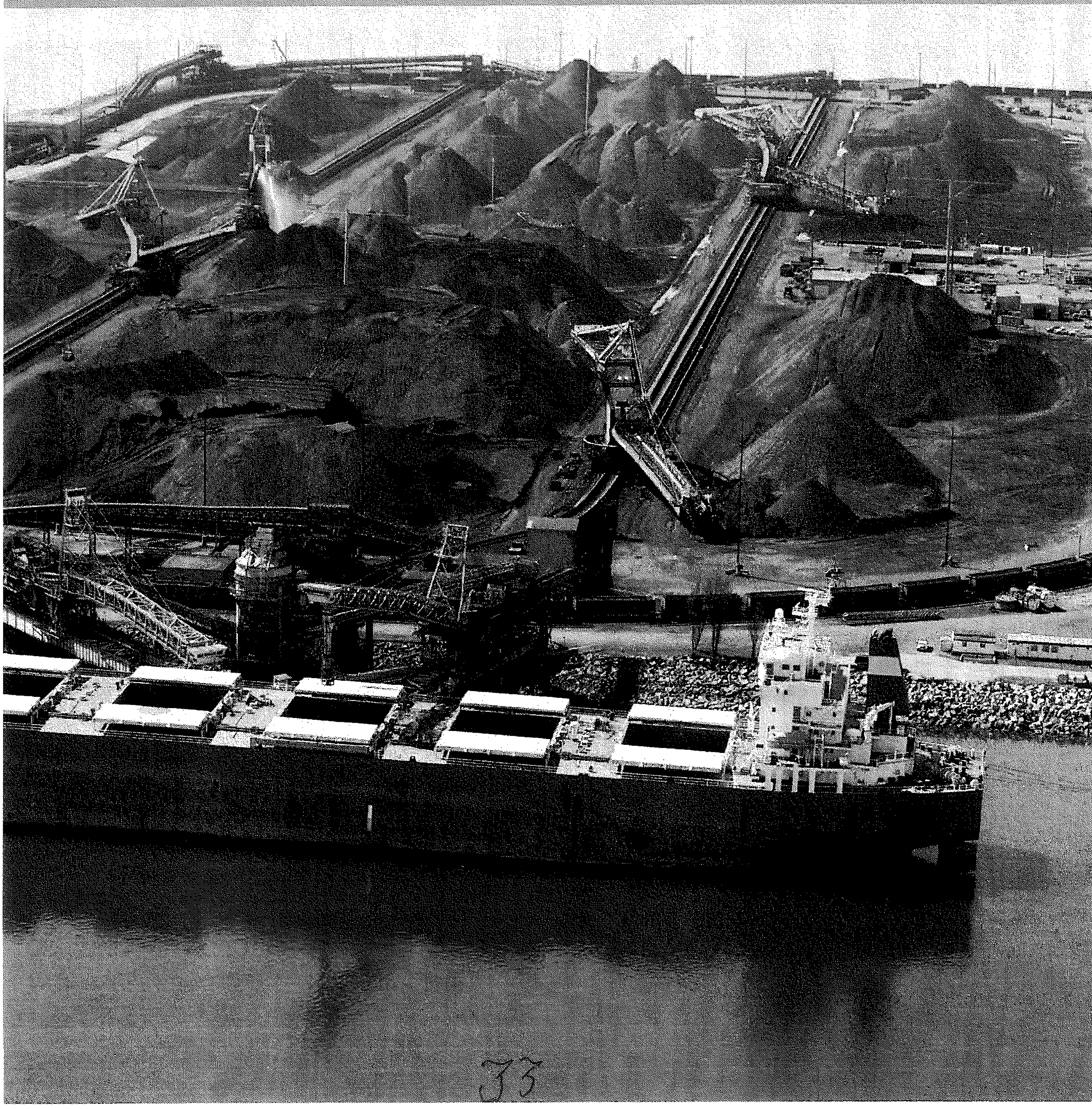
A DIRTY DEAL

How the Trans-Pacific Partnership Threatens our Climate



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EXECUTIVE SUMMARY

After more than five years of closed-door negotiations, the governments of Trans-Pacific Partnership (TPP) countries have finally released the text of the controversial pact. The TPP is a broad trade, investment, and regulatory agreement between the United States and 11 Pacific Rim countries. In its more than 6,000 pages of binding rules, the deal fails to even mention the words "climate change"—a clear sign it is not "a 21st-century trade agreement," as some have claimed.

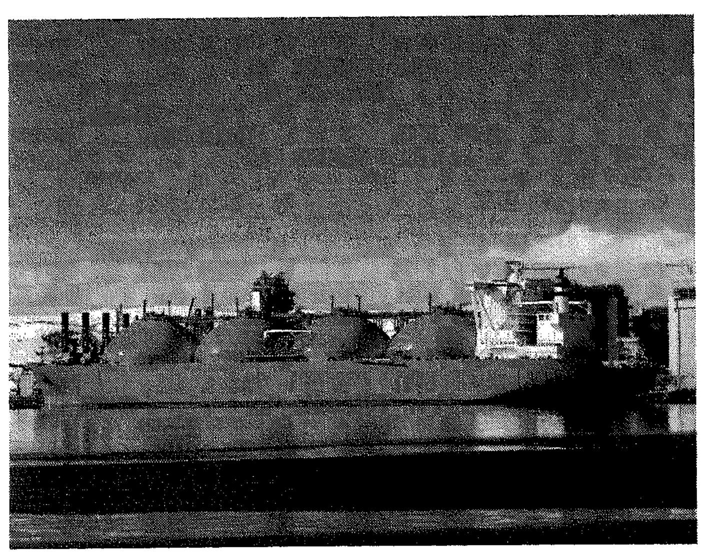
Beyond making no effort to combat climate disruption, the TPP would actually fuel the climate crisis. If approved, the pact would increase greenhouse gas emissions and undermine efforts to transition to clean energy. The TPP's biggest threats to our climate are as follows:

1. THE TPP WOULD EMPOWER FOSSIL FUEL CORPORATIONS TO ATTACK CLIMATE POLICIES IN PRIVATE TRIBUNALS.

- The TPP investment chapter would give foreign investors, including some of the world's largest fossil fuel corporations, expansive new rights to challenge climate protections in unaccountable trade tribunals. This includes the power for investors to demand compensation for climate policies that do not conform to their "expectations" or that they claim reduce the value of their investment.
- These challenges would be brought before trade tribunals, comprised of three private lawyers who could order governments to pay fossil fuel firms for the profits they hypothetically would have earned if the climate protections being challenged had not been enacted.
- Fossil fuel corporations, including ExxonMobil and Chevron, have used similar rules in past agreements to challenge policies. Targeted policies have included a natural gas fracking moratorium in Canada, a court order to pay for oil pollution in Ecuador, and environmental standards for a coal-fired power plant in Germany.
- The TPP would newly extend such foreign investor privileges to more than 9,000 firms in the United States, roughly doubling the number of firms that could use this "investor-state dispute settlement" system to challenge U.S. policies. That includes, for example, the U.S. subsidiaries of BHP Billiton, one of the world's largest mining companies, whose U.S. investments range from coal mines in New Mexico to offshore oil drilling in the Gulf of Mexico to fracking operations in Texas.
- While the Office of the U.S. Trade Representative claims to have inserted "safeguards" into the investment chapter, an analysis of the final text reveals that these so-called safeguards, many of which are not new, are far too weak to protect climate and environmental policies challenged by corporations in private tribunals.

2. THE TPP WOULD LOCK IN DIRTY FOSSIL FUEL PRODUCTION BY EXPEDITING NATURAL GAS EXPORTS.

- The TPP would require the U.S. Department of Energy to automatically approve *all* exports of liquefied natural gas (LNG), a fossil fuel with high life-cycle greenhouse gas emissions, to *all* TPP countries including Japan, the world's largest LNG importer.
- By expediting U.S. LNG exports, the TPP would increase the world's dependence on a fossil fuel with significant climate impacts and would likely displace cleaner energy sources such as renewables.



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- The TPP would encourage construction of new fossil fuel infrastructure in the United States and in importing countries to enable trade in LNG, locking in the production of climate-disrupting fossil fuels for years to come.
- Increased LNG exports, which would be facilitated by the TPP, would also spur more fracking, leading to greater air and water pollution, and increased health risks.

3. THE TPP WOULD INCREASE CLIMATE-DISRUPTING EMISSIONS BY SHIFTING U.S. MANUFACTURING OVERSEAS.

- The TPP would force U.S. manufacturers to compete directly with firms in low-wage countries, like Vietnam and Malaysia. The resulting offshoring of U.S. manufacturing would spur not only U.S. job loss, but also increased climate-disrupting emissions, as production in Vietnam is more than four times as carbon-intensive, and production in Malaysia is twice as carbon-intensive, as U.S. production.
- A TPP-spurred shift in manufacturing from the United States to countries on the other side of the Pacific Ocean would also increase shipping-related greenhouse gas emissions, which are projected to increase by up to 250 percent by 2050 as demand for traded goods rises.

4. THE TPP WOULD IMPOSE NEW LIMITS ON GOVERNMENT EFFORTS TO COMBAT CLIMATE DISRUPTION.

- Renewable energy programs that encourage local job creation could run afoul of TPP rules. The deal includes terms that the World Trade Organization (WTO) used to rule against a successful clean energy program in Ontario that reduced emissions while creating thousands of local jobs.
- The TPP also replicates provisions that the WTO has used to rule against environmentally friendly consumer labels. These rules would prohibit labels seen as "more trade-restrictive than necessary," restricting policy space for energy-saving or other labels that diminish climate-disrupting emissions.
- The TPP's procurement rules would restrict governments' autonomy to mandate "green purchasing," such as requiring energy to come from renewable sources in government contracts. Such policies could be challenged for having the unintended "effect of creating an unnecessary obstacle to trade."

Government officials charged with promoting the TPP typically ignore these threats to our climate, claiming instead that the pact's environment chapter would "preserve the environment." However, the chapter includes no provision that would protect climate and environmental policies from the myriad threats posed by other parts of the TPP.

Moreover, while all U.S. trade agreements since 2007 have required trade partners to "adopt, maintain, and implement" policies to fulfill their obligations under seven core multilateral environmental agreements (MEAs), the TPP environment chapter only includes this requirement for *one* of the seven MEAs. This step backward from environmental protections negotiated under the George W. Bush administration contradicts the requirements of U.S. law for fast-tracked trade agreements, and would allow TPP countries to violate critical environmental commitments to boost trade or investment.

While the TPP environment chapter mentions a range of conservation issues, the TPP countries' obligations are generally weak. Rather than *prohibiting* trade in illegally taken timber and wildlife, for example, the text only asks countries "to combat" such trade with insufficient measures, while allowing governments to avoid this weak commitment at their "discretion."

Even if the TPP's conservation terms included stronger obligations, there is little evidence to suggest that they would be enforced. The United States has never once brought a trade case against another country for violating its environmental commitments in a trade agreement, even amid documented evidence of violations.

The TPP poses a panoply of threats to our climate and environment. The Sierra Club believes that a new model of trade that protects communities and the environment is urgently needed—one that overturns the polluter-friendly model of the TPP.

INTRODUCTION

The Trans-Pacific Partnership (TPP) is a broad trade, investment, and regulatory agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. Eventually, other Pacific Rim nations from Indonesia to China could be included, as the TPP is a "docking" agreement that other countries could join.[1] The deal, which is more than 6,000 pages long, would require each TPP government to conform its domestic policies to a broad array of binding TPP rules.

While government officials charged with promoting the pact have claimed the TPP would "preserve the environment,"[2] the Sierra Club's analysis of the final text reveals that the TPP would actually undermine efforts to combat climate disruption, and could threaten decades of progress on environmental protection.[3]

The health of our planet depends upon our ability to make big changes in our economy. These changes include moving beyond fossil fuels and transitioning to 100 percent clean energy. However, the TPP would create new barriers to this much-needed transition. The agreement would 1) empower fossil fuel corporations to attack climate and other public interest policies in private trade tribunals, 2) expedite natural gas exports, spurring additional hydraulic fracturing ("fracking"), 3) increase climate-disrupting emissions, and 4) impose new limits on climate and environmental regulations.

The pact, meanwhile, fails to even mention the words "climate change"[4]—a dead giveaway that it is not a "21st century trade agreement," as some have claimed.[5] It is hard to imagine significant environmental benefits resulting from the environment chapter's generally weak language, and any *potential* benefits would likely be overwhelmed by the negative effects of the deal's polluter-friendly terms.

After years of extraordinary secrecy, it's finally clear what TPP negotiators were trying to hide: The TPP is a raw deal for communities and our climate.

NEW RIGHTS FOR FOSSIL FUEL CORPORATIONS TO CHALLENGE CLIMATE POLICIES

To solve the climate crisis, we need bold policy changes to fully transition to clean energy. This requires reining in the power of (and pollution from) the fossil fuel industry. Yet, the TPP investment chapter gives foreign investors, including some of the world's largest fossil fuel corporations, expansive new rights to challenge climate protections. This includes a guaranteed "minimum standard of treatment,"[6] which has been interpreted as barring policy changes that do not conform to foreign investors' "expectations."[7]

If a foreign corporation believed a policy change (e.g., a new restriction on fossil fuel extraction) violated its special TPP rights, it could use the TPP's investor-state dispute settlement (ISDS) system to "sue" the government in an unaccountable trade tribunal for the profits it hypothetically would have earned without the new policy.

Using similar rules in past agreements, foreign investors, including corporations such as ExxonMobil, Dow Chemical, Chevron, and Occidental Petroleum,[8] have launched more than 600 ISDS cases against more than 100 governments.[9] Their targets have included a fracking moratorium in Quebec, a nuclear energy phase-out and new coal-fired power plant standards in Germany, a court order to pay for Amazon pollution in Ecuador, a requirement to remediate toxic metal smelter emissions in Peru, and an environmental panel's decision to reject a mining project in Canada.[10] Corporations' use of the ISDS system has surged: Foreign investors have launched more ISDS cases in *each* of the last four years, on average, than in the first three decades of the ISDS system combined.[11]

The TPP investment chapter replicates many of the most dangerous parts of investment chapters from past agreements, as described below. The TPP, however, would expand these rules more than any past U.S. trade agreement. In one fell swoop, the TPP would roughly double the number of firms that could use this system to challenge U.S. policies, as

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foreign investor privileges would be newly extended to more than 9,000 firms doing business in the United States.[12] That includes, for example, the U.S. subsidiaries of Australian-based BHP Billiton, one of the world's largest mining companies, whose U.S. investments include coal mines in New Mexico, offshore oil drilling in the Gulf of Mexico, and natural gas fracking operations in Texas.[13]

Meanwhile, the TPP would newly empower U.S. corporations to challenge the policies of other TPP countries in private tribunals, on behalf of their more than 19,000 subsidiaries doing business in those countries. The U.S. corporations that would gain this power include oil giants ExxonMobil and Chevron, natural gas fracking pioneer Halliburton, and major coal corporations like Peabody Energy.[14]

While the Office of the U.S. Trade Representative (USTR) claims to have inserted "safeguards" into the investment chapter, a close analysis of the final text reveals that these so-called safeguards, many of which are not new, are far too weak to protect climate and environmental policies challenged by corporations in private tribunals. For example, USTR claims, "New TPP language underscores that countries retain the right to regulate in the public interest..."[15] The language in question, located in the preamble—a space generally reserved for toothless assertions—merely states that TPP governments "resolv[e] to...recognize" their theoretical right to regulate.[16] This good-faith effort at "recognition" would not prevent ISDS tribunals from ordering government compensation to foreign fossil fuel corporations if a government's exercise of its "right to regulate" interfered with the firms' far more enforceable rights under the TPP.[17]

Another TPP provision that some have claimed as a protection for environmental and other public interest policies is actually a legally meaningless clause included in U.S. trade agreements since the 1990s.[18] The provision is a self-cancelling statement that nothing in the investment chapter should prevent a government from implementing an environmental or other public interest policy, so long as that policy is "consistent with" the investment chapter's broad rights for foreign investors.[19] Even ISDS tribunalists have described this as an example of a "diplomatic rather than legal" statement.[20] A recent legal review calls the clause "a nebulous provision that can easily be marginalized."[21]

Without meaningful safeguards, the harmful investment rules in the TPP that threaten climate and environmental policies include:

1. INVESTOR-STATE DISPUTE SETTLEMENT: A PARALLEL LEGAL SYSTEM FOR FOREIGN CORPORATIONS

In a near word-for-word replication from past U.S. trade and investment agreements, the TPP would empower foreign investors to bypass domestic courts and challenge environmental and other public interest policies in trade tribunals.[22] The trade tribunals would be staffed by three private sector lawyers who are able to rotate between acting as "judges" and representing corporations in cases against governments. [23] Despite USTR's claim of a new "safeguard" regarding "arbitrator ethics,"[24] the TPP text includes no code of conduct to limit such conflicts of interest; it merely states that TPP countries will at some unspecified time "provide guidance" on the application of ethical guidelines to ISDS lawyers.[25] As in past agreements, the lawyers would not be bound by any system of legal precedent. They would be empowered to order governments to pay foreign firms compensation for what they deem to be violations of the TPP's broad foreign investor rights, and governments would have no right to appeal their decisions on the merits.[26] The TPP sets no cap on the amount of taxpayer money that tribunals could order a government to pay.[27] Given such unpredictable costs, the mere threat of an investor-state case can be, and has been, enough to dissuade governments from enacting important public interest measures.[28]

2. BROAD DEFINITIONS OF "INVESTMENT" AND "INVESTOR"

The definition of "investment" in the TPP goes far beyond real property and opens up governments to a wide range of cases not even related to actual investments. The final text's definition of investment is: "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[29] That definition would empower foreign corporations to launch ISDS cases against U.S. climate policies even if they merely own a minority share in a company that, in turn, owned a U.S. fracking, oil drilling, or coal mining operation. For example, the TPP would empower an Australian subsidiary of HSBC, a multinational bank, to launch an ISDS case against U.S. policies affecting BHP Billiton's U.S. fossil fuel operations, despite the fact that the HSBC subsidiary only owns a 19 percent share in BHP Billiton.[30]

The TPP investment chapter would even allow foreign investors to launch ISDS cases against policies that affect "written agreements" with governments that give rights to the "exploration, extraction, refining, transportation, distribution or sale" of government-controlled natural resources. Unlike *any* previous U.S. trade agreement, the TPP explicitly states that this covers agreements for the extraction, processing, and transportation of federally owned "oil" and "natural gas."[31] Were a new U.S. climate policy, for example, to restrict a foreign-owned corporation's ability to extract oil or natural gas on public lands under an existing government lease, the firm could ask three lawyers on an ISDS tribunal to order compensation from U.S. taxpayers.[32]

The investment chapter's new rights and privileges for foreign investors would extend to investments *already existing* on the day the TPP would take effect.[33] This means that foreign investors could, for example, launch ISDS claims against policies affecting any existing pipelines, natural gas fracking operations, coal mines, or oil drilling projects in any of the 12 TPP countries. The chapter's similarly broad definition of an "investor" would even allow corporations to launch ISDS cases over failed attempts to make an investment. As long as a foreign fossil fuel firm had "taken concrete action or actions to make an investment," including "applying for permits or licenses," they would be permitted to challenge government policies in ISDS tribunals.[34]

3. "MINIMUM STANDARD OF TREATMENT": AN OBLIGATION TO NOT FRUSTRATE CORPORATE EXPECTATIONS

The TPP guarantees a "minimum standard of treatment" (MST) for foreign investments, which includes a right to "fair and equitable treatment" (FET).[35] These vague obligations for TPP governments largely replicate the language found in previous U.S. pacts and have been the basis of many alarming ISDS rulings, including an order for Ecuador to pay more than $1 billion to Occidental Petroleum, as described below.

Indeed, in three out of every four ISDS tribunal rulings under U.S. pacts in which the government lost, the foreign investor won on the basis of the broad MST/FET obligation.[36] A number of ISDS tribunals have interpreted this standard as a requirement for a government to ensure "the stability of the legal and business framework."[37] This means that a government could face ISDS cases for changing its policies to better protect the climate, the environment, or its citizens, if doing so frustrates the expectations that foreign firms held when they made their investments.

USTR claims to have inserted new "safeguards" in the TPP to narrow the extremely broad MST/FET obligation, such as a provision asserting that "the mere fact" that a government does something "inconsistent with an investor's expectations" is not enough to qualify as an MST/FET violation.[38] This provision, however, would still allow an ISDS tribunal to use frustration of an investor's expectations as *one* reason to rule against a government policy. It would also still allow the tribunal to use the firm's frustrated expectations as the *only* reason for ruling against the government, if the firm could show that its expectations were based on a statement from a government official (e.g., that an official did not foresee future restrictions on fracking).[39] In response to the new provision, longtime ISDS lawyer Todd Weiler stated, "I can't recall any tribunal that, if you put this provision in that agreement, that the result would be different either way."[40]

Even if the new provision were meaningful, an ISDS tribunal could simply ignore it, given that the TPP fails to limit the broad discretion of ISDS lawyers, and still rule against a government on the mere basis that a new policy frustrated a foreign investor's unsubstantiated expectations. Indeed, ISDS tribunals have ignored the last attempt by the U.S. government to narrow the MST/FET standard, opting instead to use a broader interpretation of MST/FET to order government compensation to foreign firms.[41]

4. "INDIRECT EXPROPRIATION": A RIGHT TO COMPENSATION FOR POLICIES THAT REDUCE AN INVESTMENT'S VALUE

Virtually replicating past free trade agreements, the TPP explicitly obligates governments to compensate foreign investors for "indirect" expropriation.[42] Past ISDS tribunals have interpreted this broad obligation as allowing foreign corporations to demand compensation for government policies or actions that have the effect of merely reducing the value of a foreign investment.[43] By contrast, in most domestic legal systems, governments typically are not required to provide compensation unless they actually seize the property of an individual or firm.[44] And the U.S. Supreme Court has consistently ruled that a mere reduction in the value of private property does not require the U.S. government to provide compensation.[45]

The TPP's inclusion of this expansive foreign investor right could allow a foreign corporation, like BHP Billiton, for example, to challenge a new environmental regulation, such as additional permit requirements, as a TPP-prohibited "indirect expropriation" if it diminished the value of its fracking operations. In fact, an annex in the TPP makes explicit that "non-discriminatory regulatory actions...designed to protect public welfare objectives, such as public health, safety, and the environment" can constitute "indirect expropriations" "in rare circumstances."[46] While USTR touts this provision as a "safeguard," it would be up to an unaccountable ISDS tribunal to decide which environmental or other public interest policies fall into the "rare circumstances" loophole.

CORPORATE TRIBUNAL CASES AGAINST CLIMATE AND ENVIRONMENTAL PROTECTIONS

These are not hypothetical dangers. ISDS cases against environmental, health, and other public interest policies are increasing in frequency, while the scope of policies being challenged is widening. These are just a few ISDS cases that exemplify how investment rules can limit a government's ability to mitigate climate disruption, protect the environment, and ensure the safety of its people:

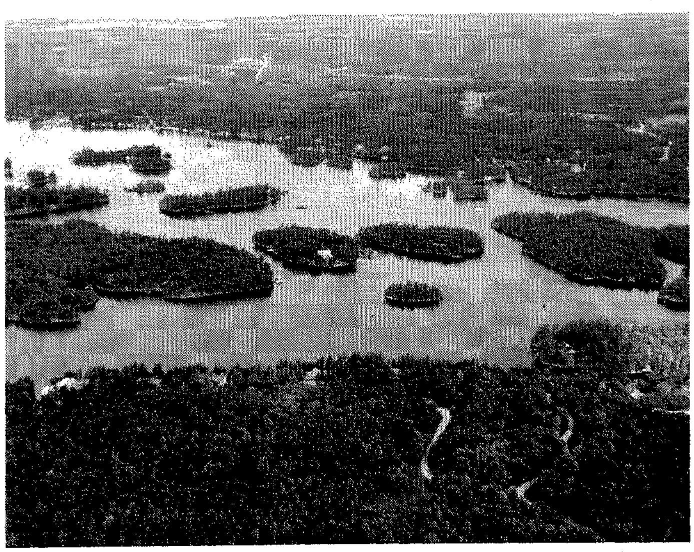
ENVIRONMENTAL IMPACT ASSESSMENT FOR MINING IN NOVA SCOTIA

In 2007, the government of Nova Scotia in Canada rejected a proposal by Bilcon of Delaware, a U.S. mining company, to use invasive "blasting" methods to extract rock near the Bay of Fundy and ship it to the United States.[47] The government acted in response to an environmental impact assessment, which found that the project could harm endangered species, including the North Atlantic right whale and Inner Bay of Fundy salmon.[48] The assessment also highlighted concerns by commercial fishers, indigenous communities, and local residents about threats to the local landscape, diverse wildlife, and community, leading the Novia Scotia and Canadian governments to agree that the mining project threatened "core values that reflect [the local community's] sense of place, their desire for self-reliance, and the need to respect and sustain their surrounding environment."[49]

In response to the government's rejection of the project, Bilcon launched an ISDS case against Canada under NAFTA, arguing that its right to a "minimum standard of treatment" (among others) had been violated.[50] In 2015, two of the three lawyers on the ISDS tribunal ruled against Canada, arguing that the environmental impact assessment frustrated Bilcon's expectations, and thus violated Bilcon's right to a "minimum standard of treatment," because it took into consideration the local community's values, including their concerns about the environment.[51] The dissenting tribunalist warned that the decision would be seen as "a remarkable step backwards in environmental protection," and predicted that "a chill will be imposed on environmental review panels."[52] Bilcon is demanding at least $300 million in compensation from Canadian taxpayers.[53]

FRACKING IN QUEBEC

In September 2013, Lone Pine Resources, a U.S. oil and gas firm, launched an ISDS case against Canada under NAFTA in response to a moratorium enacted by Quebec on shale gas exploration and development, including fracking, under the St. Lawrence River.[54] A Quebec government review has concluded that fracking in the area could pollute the air and water and have "major impacts" on local communities.[55] In launching its ISDS case, Lone Pine claimed the Quebec government acted "with no cognizable public purpose," and violated the firm's "valuable right to mine for oil and gas under the St. Lawrence River."[56] Lone Pine argued that Quebec's fracking moratorium violated NAFTA's guarantee of a "minimum standard of treatment" for foreign investors because it "violated Lone Pine's legitimate expectation of a stable business and legal environment."[57] Lone Pine also called the fracking moratorium a NAFTA-prohibited "indirect expropriation."[58] The firm is demanding $119 million from Canadian taxpayers as compensation, in addition to asking Canada to cover Lone Pine's legal fees.[59]



COAL-FIRED POWER PLANT STANDARDS AND NUCLEAR ENERGY IN GERMANY

In 2007, the government of Hamburg, Germany, granted Swedish energy firm Vattenfall a permit to begin construction of a new coal-fired power plant.[60] In an attempt to allay strong concerns from policymakers and the public that the plant would contribute to climate disruption and could pollute the adjacent Elbe River,[61] the government of Hamburg required Vattenfall to comply with environmental requirements to protect the river[62] Instead of meeting those requirements, however, Vattenfall launched a $1.5-billion ISDS case against Germany und er the Energy Charter Treaty,[63] claiming that the environmental rules constituted an expropriation of its investment and a violation of its right to "fair and equitable treatment."[64] To avoid a potentially costly case, the German government reached a settlement with Vattenfall in 2010 that required Hamburg to abandon its environmental conditions for the coal-fired plant (even ones Vattenfall had already agreed to) and allow the plant to be built.[65] Hamburg complied, and Vattenfall's coal plant there began operating in 2014.[66]

Two years after successfully using ISDS to roll back German restrictions on its coal-fired power plant, Vattenfall decided to launch an ISDS case against German restrictions on nuclear power. Following Japan's Fukushima Daiichi nuclear disaster of 2011, and in the midst of significant public pressure, the German Parliament decided to phase out nuclear power and shift toward cleaner renewable energy sources.[67] In response, Vattenfall, which had investments in German nuclear energy, launched an ISDS case against Germany under the Energy Charter Treaty.[68] Vattenfall is now seeking more than $5 billion from German taxpayers for losses that it may sustain during the nuclear phase-out.[69]

OIL EXPLORATION IN ECUADOR

In 1999, Occidental Petroleum Corporation signed a 20-year contract with Ecuador for oil exploration and production rights in the Amazon rainforest.[70] In accordance with Ecuador's laws on oil production, the agreement explicitly prohibited Occidental from selling its oil production rights without government approval.[71] This legal requirement provided the government the opportunity to evaluate any companies seeking to produce oil within Ecuador's national boundaries. The country had good reason to exercise caution: For nearly three decades, Texaco, which Chevron later acquired in 2001, dumped billions of gallons of toxic water into Ecuador's Amazon region while drilling for oil.[72] Just one year after signing its contract, Occidental violated it (and Ecuadorian law) when the corporation sold 40 percent of its production rights to Alberta Energy Company without formally informing, or seeking authorization from, the Ecuadorian government.[73] In response, Ecuador terminated Occidental's contract and investment, which prompted Occidental to launch an ISDS case against Ecuador under the U.S.-Ecuador Bilateral Investment Treaty.

Although the ISDS tribunal agreed that Occidental broke the law and that Ecuador was within its legal rights to terminate the contract and investment,[74] the tribunal used a broad interpretation of Occidental's right to "fair and equitable treatment" to rule against Ecuador.[75] The tribunalists ordered Ecuador to pay more than $2 billion to Occidental[76]—the largest ISDS penalty at the time, and equivalent to what the Ecuadorian government spends each year on healthcare for half of its population.[77] A later, partial annulment of the decision left the ruling largely intact and left Ecuador with a penalty of more than $1 billion.[78]

LOCKING IN NATURAL GAS EXPORTS AND FRACKING

As scientists and experts have warned, in order to solve the climate crisis we must keep the majority of fossil fuels in the ground.[79] Yet, the TPP would provide a lifeline to the natural gas industry, encouraging increased production of U.S. natural gas for export markets where the industry can earn more than three times what they can earn by selling natural gas in the U.S.[80]

Before authorizing the export of natural gas to most countries in the world, the U.S. Department of Energy (DOE) is required under U.S. law to conduct a careful

PHOTO: ECOFLIGHT

and public analysis to determine whether natural gas exports are in the public interest.[81] But the 1992 amendment to the Natural Gas Act states that DOE must forego this analysis and approve applications "without modification or delay" to export natural gas to any countries with which the United States has a free trade agreement requiring "national treatment for trade in natural gas."[82] Because the TPP includes this requirement,[83] the DOE would be bound under U.S. law to automatically approve *all* exports of U.S. liquefied natural gas (LNG) to all countries in the agreement[84]—including Japan, the world's largest LNG importer.[85] The TPP, therefore, could lock in U.S. natural gas production and LNG exports despite the threats to clean air and water, healthy communities, and a stable climate.

Automatic exports of U.S. LNG to TPP countries would be particularly dangerous. TPP member Japan imported more than 88 million metric tons of LNG in 2014, which amounted to more than 40 percent of global LNG imports. No existing U.S. free trade agreement (FTA) partner comes close to that level of import demand. South Korea is the closest, and its 2014 LNG imports were less than 42 percent of Japan's level.[86] And, since the TPP is a "docking" agreement that additional countries could join in the future, it could create an expanding web of countries with automatic access to natural gas from the United States.[87]

By locking in large-scale LNG exports, the TPP would threaten our environment and climate by:

- **Facilitating Increased Fracking:** The U.S. Energy Information Administration (EIA) estimates that a significant rise in LNG exports above current projections, which the TPP would facilitate, would spur up to a 10 percent increase in U.S. natural gas production.[88] The EIA further predicts that about three-quarters of the increased production would come from shale gas. This would spell a rise in fracking, the dominant extraction method for shale gas.[89] An intrusive procedure, fracking involves pumping millions of gallons of water, sand, and chemicals underground to create pressure, which forces out natural gas. According to a 2015 review of academic studies on the effects of fracking, 69 percent of recent studies have found potential or actual water contamination, 88 percent have found indication of air pollution, and 84 percent have found potential or actual health risks.[90] The U.S. Geological Survey also reports that underground wastewater disposal associated with fracking "has been linked to induced earthquakes."[91]
- **Exacerbating Climate Disruption:** Recent studies find that natural gas has significant climate disrupting impacts, due in part to leaks of methane (a potent greenhouse gas), in the extraction, processing, and domestic transport of natural gas.[92] And LNG has even greater life-cycle greenhouse gas emissions than natural gas, due to the energy needed to cool, liquefy, store, ship, and re-gasify the gas.[93] In fact, DOE estimates that liquefaction, overseas shipping, and re-gasification contribute 21 percent of the life-cycle greenhouse gas emissions of LNG exported from the United States to Asia.[94] DOE's analysis indicates that LNG exports from the United States to Asian TPP countries (e.g., Japan) likely represent higher life-cycle greenhouse gas emissions than LNG shipments from closer LNG-exporting nations (e.g., Australia).[95] By locking in U.S. LNG exports to Japan, the TPP would thus facilitate Japan's use of a more climate-disruptive fossil fuel. A reliable supply of LNG exports from the United States would likely also displace renewable energy production in Japan, spurring further climate disruption. More broadly, since the TPP is a docking agreement for other countries to join, opening our natural gas reserves to unlimited exports to all current and future TPP countries would increase the world's dependence on a fossil fuel with significant climate effects.
- **Locking in Fossil Fuel Infrastructure:** LNG export requires a large fossil fuel infrastructure, including a network of natural gas wells, terminals, liquefaction plants, pipelines, and compressors that all require careful environmental review. For example, whether exporters are expanding old pipelines or building new ones, these construction projects can cut across private property and public land, further fragmenting landscapes and increasing pollution. There are also environmental effects associated with the building of natural gas export terminals, which may require the dredging of sensitive estuaries to make room for massive LNG tankers. Expanding facilities and ship traffic also takes a toll on coastal communities and the environment. Moreover, the construction of new fossil fuel infrastructure to enable LNG exports would lock in the production of climate-disrupting fossil fuels for years to come—years during which we ought to be dramatically reducing fossil fuel production.[96]
- **Potentially Shifting the Domestic Gas Market Toward Coal:** The EIA projects that by raising demand for U.S. natural gas, increased LNG exports would cause U.S. natural gas prices to increase. In the near term, the EIA projects that more expensive natural gas would spur increased use of coal in power generation (with coal rising more than nuclear or renewables).[97] The extent to which this projection would pan out would depend somewhat upon how U.S. states choose to implement the Clean Power Plan. In states with policies that more aggressively seek to phase out coal production (as opposed to focusing more on energy efficiency, for example), such efforts would likely nullify upward pressure on coal use from LNG exports.[98] In states more permissive toward coal, LNG exports could spur a shift, in the short term, toward coal-fired power, causing increased greenhouse gas emissions.

In addition to locking in large-scale exports of greenhouse gas-intensive LNG to TPP countries, including Japan, the TPP would likely increase climate-disrupting emissions by:

- **Shifting Manufacturing to Countries With Carbon-Intensive Production:** The TPP, by eliminating tariffs, would put manufacturing firms in relatively high-wage nations, like the United States and Canada, into direct competition with manufacturing firms in low-wage countries, like Vietnam and Malaysia.[99] The resulting shift in manufacturing to low-wage countries would not only cost U.S. manufacturing jobs, but would also spur higher greenhouse gas emissions. Production in Vietnam is more than four times as carbon-intensive as U.S. production, and production in Malaysia is more than twice as high (due to lower energy efficiency and/or a higher concentration of dirty fossil fuels in energy production).[100]
- **Increasing Shipping:** A TPP-spurred shift in manufacturing from countries like the United States and Canada to countries on the other side of the Pacific Ocean would also increase shipping-related greenhouse gas emissions. The International Maritime Organization (IMO) estimates that international shipping already accounts for 2.1 percent of global greenhouse gas emissions. IMO projects that carbon emissions from shipping will increase between 50 percent and 250 percent by 2050, depending largely on the extent to which demand for traded goods rises.[101] Increased demand for traded goods is a stated objective of the TPP.[102]
- **Escalating Tropical Deforestation Via Cash Crop Expansion:** The TPP would encourage increased production of cash crops, like oil palm, that have played a leading role in destroying carbon-capturing tropical forests. Recent studies have found the expansion of oil palm plantations to be the primary cause of the widespread destruction of carbon-rich peat swamp forests in TPP member Malaysia.[103] Scientists estimate that each hectare of peat swamp cleared for oil palm releases up to 723 metric tons of carbon into the atmosphere.[104] Malaysia is already the world's second-largest exporter of palm oil (the primary product of oil palm).[105] Seven TPP countries currently impose tariffs on palm oil, ranging from 3 to 25 percent, including major palm oil importers like Mexico.[106] The TPP would eliminate or reduce all of these tariffs, encouraging greater oil palm production, and thus increasing climate-disrupting deforestation, in palm oil-exporting TPP countries like Malaysia.[107]
- **Expanding Production and Consumption:** Even the World Trade Organization (WTO) concludes that trade liberalization would likely increase greenhouse gas emissions due to increased production and consumption. A 2009 review by the WTO and United Nations Environment Programme of studies measuring the impact of trade liberalization on greenhouse gas emissions concluded, "Most of the econometric studies suggest that more open trade would be likely to increase CO_2 emissions," due largely to an increase in production and consumption.[108]
- **Increasing Exports of Coal:** While most TPP countries have already eliminated tariffs on the importation of coal and coal products, the TPP would eliminate the few coal tariffs that remain, making the carbon-intensive fuel and energy source more affordable in select TPP countries.[109] For example, Japan would eliminate its 3.2 percent tariff on coke and semi-coke of coal from the United States[110]—a carbon-intensive product for which Japan is the world's second-largest importer and the United States is the world's sixth-largest exporter.[111]

Despite these likely effects of increasing LNG exports, the TPP would strip the ability of the United States to even *examine* whether greater natural gas exports are in the interest of our communities and climate.

NEW LIMITS ON CLIMATE AND ENVIRONMENTAL REGULATIONS

Various other TPP chapters would impose additional limits on the ability of governments to tackle climate disruption and other environmental imperatives. The TPP includes a chapter on Technical Barriers to Trade (TBT), for example, that could limit the ability of governments to establish new energy-saving or environmentally-friendly labels, technical regulations, and standards. The TPP's TBT chapter builds on the WTO TBT agreement, and includes commitments to ensure that technical regulations do not create "unnecessary obstacles to international trade" and are not "more trade-restrictive than necessary."[112] Such expansive requirements have led to a recent string of anti-environment and anti-consumer TBT cases. In 2015, for example, the WTO ruled against the U.S. "dolphin-safe" tuna label—a voluntary label that applies to U.S. and foreign tuna producers, which has contributed to a dramatic reduction in dolphin deaths—on the basis that the label constitutes a "technical barrier to trade."[113] The WTO also recently ruled that a ban on candy-flavored cigarettes and popular country-of-origin meat labels violate the broad TBT rules.[114] The TPP's expansion of those rules would likely leave even less room for climate and environmental labels and standards.

In another example of new limits that the TPP would impose on governments, the chapter on government procurement would limit the ability of governments to mandate "green purchasing" in government contracts or for government purposes. Requirements for recycled content in paper and other goods, or for energy to come from renewable sources, for example, could be challenged under the TPP for having the unintended "effect of creating an unnecessary obstacle to trade."[115]

Green jobs programs could also be challenged as violating TPP rules concerning trade in goods if they included provisions to incentivize local job creation. Indeed, the TPP virtually replicates rules that the WTO used in 2013 to rule against Ontario's successful clean energy program, which reduced emissions while creating thousands of local jobs.[116] Rather than reform decades-old rules to make space for such popular initiatives to combat climate disruption, the TPP would further constrain green policies.

THE ENVIRONMENT CHAPTER

One of the 30 TPP chapters focuses on the environment, and USTR often claims the pact would benefit the environment based exclusively on this chapter. And yet, despite the fact that the TPP would likely increase climate-disrupting emissions by enabling corporate challenges to climate protections while increasing carbon-intensive production, fossil fuel exports, shipping, and deforestation, the TPP environment chapter fails to even mention the words "climate change."[117] The environment chapter also excludes core environmental commitments that have been included in all U.S. trade agreements since 2007, including those negotiated by the George W. Bush administration.

Instead, the chapter narrowly focuses on a set of conservation rules that are likely to be too weak to curb environmental abuses in TPP countries. The provisions are also unlikely to be enforced, since violations of environmental terms in existing U.S. trade deals have been repeatedly ignored. Moreover, the environment chapter fails to protect climate and environmental policies from the myriad threats that other parts of the TPP pose.

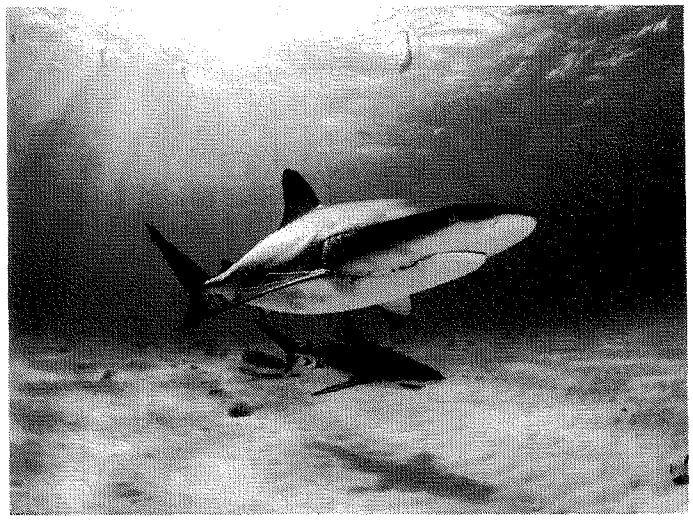
A STEP BACKWARD FROM PAST TRADE DEALS

In some respects, the TPP environment chapter actually takes a step *back* from environment chapters of previous trade pacts. For example, pursuant to a bipartisan agreement between then-President George W. Bush and congressional Democrats,[118] all U.S. FTAs since 2007 have required each of our FTA partners to "adopt, maintain, and implement laws, regulations, and all other measures to fulfill its obligations under" a set of seven multilateral environmental agreements (MEAs).[119] With proper enforcement, this obligation should deter countries from violating their critical commitments in environmental treaties in order to boost trade or investment. The TPP, however, only requires countries in the pact to "adopt, maintain, and implement" domestic policies to fulfill *one* of the seven core MEAs: the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[120] This regression violates the minimum degree of environmental protection required under the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, also known as fast track.[121]

WEAK CONSERVATION RULES

While the range of conservation issues mentioned in the TPP may be wide, the TPP countries' obligations are generally shallow, as detailed in the Sierra Club's textual analysis.[122] Vague obligations combined with weak enforcement may allow countries to continue with business-as-usual practices that threaten our environment. For example:

- **Illegal Trade in Flora and Fauna:** Rather than *prohibiting* trade in illegally taken timber and wildlife—major issues in TPP countries like Peru and Vietnam—the TPP only asks countries "to combat" such trade. To comply, the text requires only weak measures, such as "exchanging information and experiences,"[123] while stronger measures like sanctions are merely listed as options.[124] Moreover, the TPP states that "each Party retains the right to exercise administrative, investigatory and enforcement discretion in its implementation" of the commitment to combat illegal trade in flora and fauna, providing TPP countries a giant escape hatch to avoid fulfilling this already weak obligation.[125]
- **Illegal, Unreported, and Unregulated (IUU) Fishing:** Rather than *obligating* countries to abide by trade-related provisions of regional fisheries management organizations (RFMOs), which could help prevent illegally caught fish from entering international trade, the TPP merely calls on



countries to "endeavor not to undermine" RFMO trade documentation—a non-binding provision that could allow the TPP to facilitate increased trade in IUU fish.[126]
- **Shark Finning and Commercial Whaling:** Rather than *banning* commercial whaling and shark fin trade—major issues in TPP countries like Japan and Singapore—the TPP includes a toothless aspiration to "promote the long-term conservation of sharks...and marine mammals" via a non-binding list of suggested measures that countries "should" take.[127] Meanwhile, the TPP would actually encourage increased shark finning by eliminating the significant shark fin tariffs that major shark fin importers, such as Vietnam and Malaysia, currently impose on major shark fin exporters, such as Mexico and Peru.[128]

LACK OF ENFORCEMENT

Even if the TPP's conservation terms included more specific obligations and fewer vague exhortations, there is little evidence to suggest that they would be enforced, given the historical lack of enforcement of environmental obligations in U.S. trade pacts. In fact, the United States has never *once* brought a trade case against another country for failing to live up to its environmental commitments in trade agreements, even amid documented evidence of countries violating those commitments.

For example, the U.S.-Peru FTA, passed in 2007, included a Forestry Annex aimed at stopping the large, illegal timber trade between Peru and the

United States. The pact not only required Peru "to combat trade associated with illegal logging," but also included eight pages of specific reforms that Peru had to take to fulfill this requirement.[129] The obligations were far more detailed than any found in the TPP environment chapter, and were subject to the same enforcement mechanism.[120]

But after more than six years of the U.S. – Peru trade deal, widespread illegal logging remains unchecked in Peru's Amazon rainforest. A 2014 study in *Scientific Reports* found that about 70 percent of Peru's supervised logging concessions are being used for illegal logging.[131] In an investigation conducted that same year, Peru's own authorities found that 78 percent of wood slated for export was harvested illegally.[132]

For years, U.S. environmental groups have called on USTR to use the rules in the trade deal to counter Peru's extensive illegal logging.[133] Yet to date, Peru has faced no formal challenges, let alone penalties, under the trade pact,[134] despite ample evidence that Peru has violated the pact's rules by illegally cutting Amazonian trees and exporting them for sale to unwitting U.S. consumers.[135] Given that the Peru deal's stronger environmental obligations have failed to halt illegal logging in Peru, it is hard to imagine that the TPP's weaker provisions would be more successful in combatting conservation challenges.

FAILURE TO PROTECT CLIMATE POLICIES

Nothing in the TPP, including the environment chapter, offers adequate protection from the myriad TPP threats that would constrain the ability of countries to combat climate disruption. There is no protection from rules that would allow foreign investors to challenge climate and clean energy policies in unaccountable trade tribunals. There are no meaningful safeguards for green jobs programs that could run afoul of the TPP's procurement rules. There is no flexibility offered to governments who wish to restrict the exports of climate-disrupting fossil fuels. There are no sufficient safeguards for energy-saving labels that could be construed under the TPP as "technical barriers to trade," or for border adjustment mechanisms that could conflict with TPP rules regarding imports. Therefore, the TPP could not only spur increased climate-disrupting emissions, but also inhibit domestic efforts to curb such emissions.

CONCLUSION

The TPP poses a panoply of threats to our climate and environment. The weak conservation provisions of the TPP environment chapter do not change the fact that, under the TPP, governments would *lose* autonomy to enact policies to address the climate crisis, while corporations would *gain* new powers to challenge climate and environmental policies. As the world moves toward a clean energy future, we cannot afford to let the TPP keep us in the fossil fuel-dominated past. The Sierra Club believes that a new model of trade that protects communities and the environment is urgently needed—one that overturns the polluter-friendly model of the TPP.

ENDNOTES

1. See Article 30.4 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Final-Provisions.pdf. "TPP Full Text," Office of the U.S. Trade Representative, accessed November 10, 2015, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text.

2. "The Trans-Pacific Partnership: Preserving the Environment," Office of the U.S. Trade Representative, October 2015, https://ustr.gov/sites/default/files/TPP-Preserving-the-Environment-Fact-Sheet.pdf.

3. "TPP Full Text," Office of the U.S. Trade Representative, accessed November 10, 2015, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text.

4. Philip Bump, "We Made President Obama's Big TPP Trade Deal Searchable," *The Washington Post*, November 5, 2015, https://www.washingtonpost.com/news/the-fix/wp/2015/11/05/we-made-president-obamas-big-tpp-trade-deal-searchable/.

5. Peter Robinson, "TPP: A 21st Century Trade Agreement," United States Council for International Business, September 14, 2015, http://www.uscib.org/tpp-a-21st-century-trade-agreement/.

6. Article 9.6 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

7. Lori Wallach, "'Fair and Equitable Treatment' and Investors' Reasonable Expectations: Rulings in U.S. FTAs & BITs Demonstrate FET Definition Must be Narrowed," Public Citizen, September 5, 2012, http://www.citizen.org/documents/MST-Memo.pdf.

8. These cases include: *Dow AgroSciences LLC v. Canada* (http://www.italaw.com/cases/3407), *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (http://www.italaw.com/cases/1225), *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador* (http://www.italaw.com/cases/257), and *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador* (http://www.italaw.com/cases/767).

9. "Recent Trends in IIAs and ISDS," United Nations Conference on Trade and Development, February 2015, at 5, http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf.

10. For summaries of these and other ISDS cases affecting environmental protections, see "Trading Away Our Climate? How Investment Rules Threaten the Environment and Climate Protection," The Sierra Club, 2014, https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/Investor-State-Climate-FINAL.pdf. See also: "Case Studies: Investor-State Attacks on Public Interest Policies," Public Citizen, 2015, http://www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf.

11. "Recent Trends in IIAs and ISDS," United Nations Conference on Trade and Development, February 2015, at 5, http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf.

12. The figure counts only the U.S. subsidiaries of foreign corporations based in TPP countries that do not currently have an ISDS-enforced agreement with the United States: Australia, Brunei, Japan, Malaysia, New Zealand, and Vietnam. Data on foreign-owned firms doing business in the United States from "Foreign Firms Operating in the United States," Uniworld, extracted September 21, 2015, https://www.uniworldbp.com/search.php.

13. "Resourcing Global Growth: Annual Report 2015," BHP Billiton, 2015, at 36 and 44, http://www.bhpbilliton.com/-/media/bhp/documents/investors/annual-reports/2015/bhpbillitonannualreport2015.pdf?la=en.

14. Data on foreign-owned firms doing business in the United States from Uniworld, "Foreign Firms Operating in the United States," extracted September 21, 2015, https://www.uniworldbp.com/search.php.

15. "The Trans-Pacific Partnership: Upgrading and Improving Investor-State Dispute Settlement," Office of the U.S. Trade Representative, October 2015, https://ustr.gov/sites/default/files/TPP-Upgrading-and-Improving-Investor-State-Dispute-Settlement-Fact-Sheet.pdf.

16. Preamble of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Preamble.pdf.

17. In the words of a recent pro-ISDS law review article, in TPP-like investment agreements "the power to regulate operates within the limits of rights conferred upon the investor." Rudolf Dolzer, "Fair and Equitable Treatment: Today's Contours," *Santa Clara Journal of International Law*, 12: 1, January 17, 2014, at 21, http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1147&context=scujil.

18. See, for example, Varun Sivaram, "TPP: A Small Step in the Right Direction on Climate," Council on Foreign Relations, November 6, 2015, http://blogs.cfr.org/levi/2015/11/06/tpp-a-small-step-in-the-right-direction-on-climate/.

19. Article 9.15 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

20. *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Separate Opinion by Dr. Bryan Schwartz (on the Partial Award), November 12, 2000, at para. 117, http://italaw.com/sites/default/files/case-documents/ita0748.pdf.

21. Andreas Kulick, *Global Public Interest in International Investment Law*, (Cambridge: Cambridge University Press, 2012), at 70-71.

22. See Chapter 9, Section B of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

23. For a summary of such dual roles and the conflict of interest it creates, see Pia Eberhardt and Cecilia Olivet, "Profiting from Injustice," Corporate Europe Observatory and Transnational Institute, November 2012, https://www.tni.org/files/download/profitingfrominjustice.pdf.

24. "The Trans-Pacific Partnership: Upgrading and Improving Investor-State Dispute Settlement," Office of the U.S. Trade Representative, October 2015, https://ustr.gov/sites/default/files/TPP-Upgrading-and-Improving-Investor-State-Dispute-Settlement-Fact-Sheet.pdf.

25. Article 9.21.6 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

26. Tribunal decisions could only be "annulled" on narrow grounds such as "corruption" by a tribunal member or "departure from a fundamental rule of procedure." International Centre for Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, at Article 52, https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf. The TPP text addresses the possibility of an actual appellate mechanism for ISDS decisions by stating that "in the event" that one is created "under other institutional arrangements," the Parties merely commit to "consider" whether it could be used to appeal ISDS decisions. Article 9.22.11 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

27. See Article 9.28 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

28. See "Setting the Record Straight: Debunking Ten Common Defenses of Controversial Investor-State Corporate Privileges," Public Citizen, 2015, at 8-9, http://www.citizen.org/documents/ustr-isds-response.pdf.

29. Article 9.1 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

30. HSBC's subsidiary in Australia is HSBC Australia Nominees Pty Limited. "Resourcing Global Growth: Annual Report 2015," BHP Billiton, 2015, at 309, http://www.bhpbilliton.com/-/media/bhp/documents/investors/annual-reports/2015/bhpbillitonannualreport2015.pdf?la=en. This example spotlights the fact that Article 9.14 of the TPP would allow a firm (e.g., HSBC's subsidiary in Australia) to bring an ISDS case against another TPP government (e.g., the United States) even if it is owned or controlled by a parent firm in a non-TPP country (e.g., United Kingdom-based HSBC), so long as it has "substantial business activities" in the TPP country from which it launches the case (e.g., Australia). Article 9.14 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

31. Article 9.1 of the TPP final text, under the definition of "investment agreement," https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

32. An oil and gas lease with the U.S. Bureau of Land Management, for example, would seem to meet the conditions of an "investment agreement," as it "creates an exchange of rights and obligations, binding on both parties," it "grants rights" to an investor, and the investor relies on it "in establishing or acquiring a covered investment." For a description of the rights and obligations associated with such leases, see "Qs & As about Oil and Gas Leasing," Bureau of Land Management, U.S. Department of the Interior, accessed November 10, 2015, http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/questions_and_answers.html. Such leases could also potentially fall under the TPP's definition of "investment," which explicitly mentions "leases" as a covered item. Article 9.1 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

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36. Lori Wallach, "'Fair and Equitable Treatment' and Investors' Reasonable Expectations: Rulings in U.S. FTAs & BITs Demonstrate FET Definition Must be Narrowed," Public Citizen, September 5, 2012, http://www.citizen.org/documents/MST-Memo.pdf.

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38. Article 9.6.4 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

39. Luke Eric Peterson, "A First Glance at the Investment Chapter of the TPP Agreement: A Familiar US-Style Structure with a Few Novel Twists," *Investment Arbitration Reporter*, November 5, 2015, http://www.iareporter.com/articles/a-first-glance-at-the-investment-chapter-of-the-tpp-agreement-a-familar-us-style-structure-with-a-few-novel-twists/. In addition, the TPP's "most-favored-nation treatment" provision could allow a foreign investor to try to use an older MST/FET definition from an entirely different agreement to circumvent the added provision in the TPP. Foreign investors have used the "most-favored-nation treatment" provision of ISDS-enforced agreements to import substantive foreign investor rights found in other agreements to which the government in the dispute is a Party. See: "Most-Favoured Nation Treatment," United Nations Conference on Trade and Development, 2010, at 59-60, http://unctad.org/en/Docs/diaeia20101_en.pdf. The TPP text makes clear that investors cannot use the "most-favored-nation treatment" provision to access procedural rights in existing agreements, but leaves open the possibility for them to access substantive rights in those deals. See Article 9.5.3 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

40. "TPP Investment Language Aims To Tighten Standard For MST Breach," *Inside U.S. Trade*, November 13, 2015, http://insidetrade.com/inside-us-trade/tpp-investment-language-aims-tighten-standard-mst-breach.

41. For example, the U.S. government and other Parties to the Central America Free Trade Agreement (CAFTA) inserted an annex into that agreement that was intended to narrow the MST obligation by requiring that it align with the "minimum standard of treatment" consistently practiced by governments. But in two of the first ISDS case rulings under CAFTA, tribunals simply ignored the annex, imported a broad interpretation of MST from yet another ISDS tribunal, and used that interpretation to order Guatemala to pay millions of dollars to foreign firms. "Setting the Record Straight: Debunking Ten Common Defenses of Controversial Investor-State Corporate Privileges," Public Citizen, 2015, at 4, http://www.citizen.org/documents/ustr-isds-response.pdf.

42. See Article 9.7 and Annex 9-B in the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

43. The tribunal in *Metalclad Corporation v. Mexico*, for example, concluded, "expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour [sic] of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole *or in significant part*, of the use or reasonably-to-be-expected economic benefit of property, even if not necessarily to the obvious benefit of the host State" (emphasis added). *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award, August 30, 2000, at para. 103.

44. "...[T]he distinction between police-power regulation of property and eminent-domain expropriation of property is fundamental to all [constitutional] property clauses, because only the latter is compensated as a rule. Normally, the will be no provision for compensation for deprivations or losses caused by police-power regulation of property." A.J. Van der Walt, Constitutional Property Clauses: A Comparative Analysis (Kluwer Law International, 1999), at 17. United States law is an exception to this general rule, but compensation for claims of "regulatory takings" under the Fifth Amendment of the U.S. Constitution is still only available in specific instances. Supreme Court rulings indicate that these include when a government measure results in "permanent physical invasion" of a property, causes a complete and permanent destruction of a property's value, constitutes a land-use exaction "so onerous that, outside the exactions

context, they would be deemed per se physical takings," or is otherwise "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537-540, 547-548 (2005).

45. "[O]ur cases have long held that mere diminution in value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California.*, 508 U.S. 602, 645 (1993).

46. Annex 9-B in the TPP final text, at 3(b), https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

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48. "Environmental Assessment of the White Point Quarry and Marine Terminal Project," Joint Review Panel, October 2007, at 57, 102-103, http://www.novascotia.ca/nse/ea/whitespointquarry/WhitesPointQuarryFinalReport.pdf.

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51. *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, at 124-179, http://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf.

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112. Article 8.4.1 of the TPP text incorporates Article 2.2 of the WTO TBT agreement, which includes these requirements. See TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Technical-Barriers-to-Trade.pdf, and WTO text, https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm#articleII.

113. In April 2015, a WTO panel ruled that the U.S. "dolphin-safe" label still did not comply with TBT rules after the U.S. government altered the labeling policy in response to an earlier loss in the same case. After the United States appealed that ruling, the WTO Appellate Body again ruled against the U.S. dolphin-saving label in November 2015. There is no remaining possibility for appeal. "United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products," World Trade Organization, accessed November 25, 2015, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm.

114. "United States — Measures Affecting the Production and Sale of Clove Cigarettes," World Trade Organization, accessed November 11, 2015, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm. "United States — Certain Country of Origin Labelling (COOL) Requirements," World Trade Organization, accessed November 11, 2015, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm.

115. Article 15.12.1 of the TPP final text. Such requirements could also be challenged as contradicting the text's preference for "functional" rather than "design" specifications. Article 15.12.2 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Government-Procurement.pdf.

116. Article 2.3.1 of the TPP final text incorporates Article III of the WTO's General Agreement on Tariffs and Trade (GATT), https://ustr.gov/sites/default/files/TPP-Final-Text-National-Treatment-and-Market-Access.pdf. In 2013, the WTO Appellate Body ruled against the domestic content provisions in Ontario's feed-in tariff program (which incentivized local production of solar panels and wind turbines) on the basis that they violated the national treatment rules of GATT Article III:4. "Canada — Certain Measures Affecting the Renewable Energy Generation Sector," World Trade Organization, accessed November 10, 2015, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds412_e.htm.

117. See Chapter 20 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Environment.pdf.

118. This is known as the "May 10, 2007" deal. See "Peru and Panama FTP Changes," May 10, 2007, Bilaterals.org, http://www.bilaterals.org/IMG/pdf/05_14_07.pdf.

119. See, for example, Article 18.2 of the U.S. – Peru Free Trade Agreement, https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file953_9541.pdf. A footnote on the provision clarifies, "To establish a violation of Article 18.2 a Party must demonstrate that the other Party has failed to adopt, maintain, or implement laws, regulations, or other measures to fulfill an obligation under a covered

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agreement in a manner affecting trade or investment between the Parties."

120. Article 20.17.2 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Environment.pdf.

121. 19 U.S.C. § 4201(b)(10)(A), http://uscode.house.gov/view.xhtml?path=/prelim@title19/chapter27&edition=prelim.

122. "TPP Text Analysis: Environment Chapter Fails to Protect the Environment," The Sierra Club, November 5, 2015, https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/tpp-analysis-updated.pdf.

123. Article 20.17.3 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Environment.pdf.

124. Article 20.17.5 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Environment.pdf.

125. Article 20.17.6 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Environment.pdf.

126. Article 20.16.14e of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Environment.pdf.

127. Article 20.16.4 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Environment.pdf.

128. Vietnam is the world's 5th largest importer of shark fins by value. Malaysia is the world's 8th largest importer of shark fins by volume. Vietnam currently has a 20 percent tariff on shark fin imports, while Malaysia has a 7 percent tariff. Mexico and Peru are the 4th and 5th largest exporters of shark fins in the world by value. Mexico ranks among the top 10 countries in the world for the number of sharks killed each year, and Peru's exports of shark fins to Asia have grown significantly in recent years. Neither Vietnam nor Malaysia has existing free trade agreements with Mexico or Peru that would reduce or eliminate tariffs on shark fin imports from these countries in the absence of the TPP. For tariff schedules, see Annex 2-D of the TPP final text, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text. For trade data, see: United Nations, UN Comtrade Database, accessed November 9, 2015, http://comtrade.un.org/data/. For data on shark kills per year, see: "State of the Global Market for Shark Products," Food and Agricultural Organization of the United Nations, 2015, at 17, http://www.fao.org/3/a-i4795e.pdf. For information on Peru's increasing shark fin exports to Asia, see: "Rise in Shark Fin Exports from Peru Leads to Thousands of Dolphin Killings," *Agence France-Presse*, October 18, 2013, http://www.rawstory.com/2013/10/rise-in-shark-fin-exports-from-peru-leads-to-thousands-of-dolphin-killings/.

129. U.S. – Peru Trade Promotion Agreement, 2007, Annex 18.3.4, https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file953_9541.pdf.

130. U.S. – Peru Trade Promotion Agreement, 2007, Article 18.12, https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file953_9541.pdf.

131. Matt Finer, et al., "Logging Concessions Enable Illegal Logging Crisis in the Peruvian Amazon," *Scientific Reports (Nature)*, 4: 4719, April 17, 2014, http://www.nature.com/articles/srep04719.

132. Bob Abeshouse and Luis Del Valle, "Peru's Rotten Wood," *Al Jazeera*, August 12, 2015, http://www.aljazeera.com/programmes/peopleandpower/2015/08/peru-rotten-wood-150812105020949.html.

133. "US Government Requested to Use Free Trade Agreement to Take Action on Illegal Timber Exports: Peru," Environmental Investigation Agency, April 19, 2012, http://eia-global.org/news-media/us-government-requested-to-use-free-trade-agreement-to-take-action-on-illeg.

134. "Implementation and Enforcement Failures in the US-Peru Free Trade Agreement (FTA) Allows Illegal Logging Crisis to Continue," Environmental Investigation Agency, June 2015, http://eia-global.org/images/uploads/Implementation_and_enforcement__FINAL.pdf.

135. Bob Abeshouse and Luis Del Valle, "Peru's Rotten Wood," *Al Jazeera*, August 12, 2015, http://www.aljazeera.com/programmes/peopleandpower/2015/08/peru-rotten-wood-150812105020949.html.

INSTITUTE FOR AGRICULTURE AND TRADE POLICY
COMMENTARY

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About IATP

Institute for Agriculture and Trade Policy works locally and globally at the intersection of policy and practice to ensure fair and sustainable food, farm and trade systems. IATP is headquartered in Minneapolis, Minnesota with an office in Washington D.C..

The TPP SPS chapter: not a "model for the rest of the world"

KEY FINDINGS

- "Trade in products of modern biotechnology" has been located in Chapter 2, "National Treatment and Access for Market Goods," so that controversies over GMOs or synthetic biology would be judged based on criteria of market access rather than risk assessments of their safety for human health or the environment.
- Provisions establishing an SPS consultative committee led by trade officials will further weaken and possibly conflict with global standards setting bodies on food and plant safety.
- Weakness in the U.S. regulatory agencies to provide the "appropriate level of sanitary and phytosanitary protection" required in the Chapter will be exacerbated by the confidentiality requirements that already hobble U.S. scientific peer review of food and agricultural products.

Overview

MINNEAPOLIS, NOVEMBER 12, 2015 — Proponents of the Trans-Pacific Partnership (TPP) Agreement, and particularly the White House, have insisted that the TPP is a "high standards" agreement. The Sanitary and Phytosanitary (SPS) "measures" affecting food safety and animal and plant health of agricultural trade are part of these "high standards." Indeed, the TPP and the Transatlantic Trade and Investment Partnership (TTIP) are characterized as a "model for the rest of the world" by U.S. Trade Representative Michael Froman.[1] Far beyond any changes in tariffs, the most important U.S. export in the TPP is the making and enforcement of rules by which all TPP members, and any other countries that wish to export to the United States, must abide.

If the U.S. regulatory system and its scientific underpinnings had not been captured by the regulated industries,[2] it might be credible to claim that repeating the mantra of "high standards" might help lead to improvements in public and environmental health and worker safety. TPP proponent support for Congressional regulatory "reform" and lawsuits for "regulatory overreach"[3] indicates to us that what is being exported is a framework for regulatory capture that will be legitimated by reference to binding trade commitments and, in the case of the TPP SPS chapter, by "science."

The TPP chapter on SPS measures is a mere 18 pages of the total 6,194.[4] Following the Obama administration's November 5 release of the TPP text[5], the U.S. Congress and the public have 90 calendar days to review the text before President Barrack Obama can sign the TPP. Then the clock begins to tick on implementing legislation to accept or reject the 6,194 pages, perhaps as early as May 2016.[6] No amendments are allowed to U.S. trade agreements, according to the Trade Promotion Authority (TPA) that Congress granted to the Obama administration on June 29.[7]

What follows is a critical interpretation of parts of the SPS chapter in the context of how the U.S. regulatory structure operates. Like the confidential USTR-industry dialogue and the intergovernmental negotiations that produced the chapter, the text alone reveals very little about how governments will provide the "appropriate level of sanitary or phytosanitary protection" promised in the World Trade Organization SPS Agreement (Article 5.3). The TPP chapter promises to "build upon and reinforce" (Article 7.2b) that Agreement and the thousands of pages of SPS texts and numerical standards of international organizations referenced in the appendices to the WTO SPS Agreement. But textual explication alone reveals nothing of the capacity of U.S. regulatory agencies to implement and enforce the text to protect public, animal, plant and environmental health and life, per their obligations under U.S. law.

In addition, the negotiators decided to locate provisions on "Trade in Products of Modern Biotechnology" for agricultural trade (Article 2.29) in Chapter 2, "National Treatment and Market Access for Goods," apparently believing that "modern biotechnology" does not pose SPS issues about which there might be controversy. Since the text neglects to reference the relationship of Article 2.29 to the SPS chapter, we are obliged to explain the reference in this short analysis.

The "economic feasibility" of protecting consumers and plant and animal health and life

Although the *Washington Post* has made the TPP keyword searchable[8], there are almost no controversial SPS issues in the chapter—or anywhere else in the agreement—that a keyword search reveals. *Growth hormones, food and agricultural nanotechnology, endocrine disrupting chemicals, antimicrobial resistance to anti-biotics, plant synthetic biology* and so many others. Nothing about them—among other controversial food safety, and animal, plant and environmental health issues or technologies—appears in the SPS chapter. Instead, the chapter describes administrative procedures and consultative arrangements for resolving SPS "issues" insofar as they might impede agricultural trade. "Science," or "scientific principles" or "science-based" rules (Article 7.9), provided they are "economically feasible," are to transcend any one controversy over any one food or agricultural technology or over any one SPS rule.

However, it is crucial to understand how scientific evidence is subordinated and occulted as Confidential Business Information to realizing trade objectives through the regulatory process. Under the TPP rules and trade policy more generally, what trade and regulatory officials deem to be "appropriate" levels of protection are judged on whether SPS measures to provide that protection are potential or "disguised" trade barriers. Such judgments require a use and understanding of "science" that is filtered through confidentiality requirements, which are antithetical to the peer review that scientific consensus methodologically requires. TPP SPS Committee consultations about the science underlying SPS measures "shall be kept confidential unless the consulting Parties agree otherwise" (Article 7.17.6). The applicability of "science" to SPS measures is further qualified according to whether trade and regulatory officials decide the SPS measures are economically feasible.

The "economic feasibility" of the science-based SPS measures to provide the appropriate level of protection is formulated in this provision: "Each Party shall . . . select a risk management option that is not more trade restrictive than necessary to achieve the sanitary or phytosanitary objective, taking into account technical and economic feasibility" (Article 7.6c). "Economic feasibility" provides TPP members with a crucial loophole against providing SPS measures that are science-based.

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For example, since the Congress refuses to fund the Food Safety Modernization Act (FSMA), including its import provisions, inadequately funded and staffed SPS measures of the FSMA are not "economically feasible" to implement and enforce. Because the food and agribusiness industry does not want to pay the fees to expedite trade under the FSMA, they appeal to the presidential Office of Management and Budget to do a "cost-benefit" analysis to delay levying of fees.[9] In the meantime, "science" cools its heels, waiting for lawyers and economists to decide which SPS measures are "necessary" and to what extent, according to cost-benefit analysis, to provide the appropriate level of protection.[10] Cost benefit analysis routinely underestimates the benefits of regulation and overstates the costs.[11]

What the chapter says it aims to do

The chief objective of the chapter is to "protect human, animal and plant life or health in the territories of the Parties while facilitating and expanding trade by a variety of means to seek to address and resolve sanitary and phytosanitary issues" (Article 7.2a). Contrast this objective with the objective of the principles of risk analysis of the Codex Alimentarius, to which the SPS chapter is, in theory at least, legally bound:

> While recognizing the dual purposes of the Codex Alimentarius are protecting the health of consumers and ensuring fair practices in the food trade, Codex decisions and recommendations on risk management should have as their primary objective the protection of the health of consumers. Unjustified differences in the level of consumer health protection to address similar risks in different situations should be avoided.[12]

While the Codex advises its member governments to avoid "unjustified differences in the level of consumer health protection," the primary emphasis in the Codex principles of risk analysis remains consumer health protection, not trade facilitation or expansion.

However, the objective of the TPP chapter is not to improve the "protection of human, animal and plant life or health" itself. Rather, such protection only applies insofar as SPS measures facilitate and expands cross-border trade of food and agricultural goods. So the issues to be resolved are not how best to protect, but how to eliminate or modify any SPS measures (laws, rule-making processes, rules, implementation and enforcement practices, even judicial rulings) that impede food and agricultural trade, if those measures cannot be justified in terms of the trade negotiators' peculiar understanding and use of "science."

"Scientific principles" in the TPP: a practical U.S. regulatory application

Even when the use of scientific principles in determining appropriate standards is discussed in the TPP, the integrity of the science behind the standards is subordinated to the goal of facilitating and expanding trade. The TPP SPS chapter would have citizens, who have been denied access for more than five years to the texts negotiated between the USTR, its industry advisors and foreign trade officials, rely on "scientific principles" and "risk analysis" to protect public and environmental health from whatever application of whichever technology that has products being traded. So, for example, "The Parties recognize the importance of ensuring that their respective sanitary and phytosanitary measures are based on scientific principles" (Article 7.9.1) But there is no definition of "scientific principles." And to judge by current U.S. regulatory practice, the "science" referred to in the text could be the kind of the unpublished corporate science studies that frequently justify U.S. rulemaking and commercial approvals and yet remain "Confidential Business Information."[13]

For example, in June, the U.S. Environmental Protection Agency (EPA) relied on 27 studies by Monsanto, most of them unpublished, to renew the commercial approval for Monsanto's RoundUp, the trademark for glyphosate.[14] There is a long history of U.S. regulatory approval of genetically modified organisms and their accompanying pesticides, using the applicant's unpublished research or a summary thereof without test data and experimental design.[15] Some of the Monsanto studies on glyphosate reviewed by the EPA were from the 1970s, before scientists discovered that glyphosate was an endocrine disrupting chemical that damaged normal human development. (Five independently funded studies were also considered.) In July, the International Agency for Research on Cancer (IARC) released its full report that characterized glyphosate as a "probable human carcinogen,"[16] after having vigorously debated whether the globally used herbicide should be classified as a "known human carcinogen."[17]

The EPA, using Monsanto's unpublished "science" authorized a continuation of U.S. commercialization, and yet just in time to ignore the full IARC findings and without referring to the preliminary IARC summary released in March. The EPA will be able to claim, without fear of a TPP legal challenge, that its risk assessment was based on "scientific principles," whatever they are. But the EPA is far from the only agency battered into submission by members of Congress at the behest of industry.[18] Indeed, White House risk managers will ignore scientific evidence in risk assessments, if industry concerns about "economic feasibility" of both SPS and non-SPS regulatory measures are brought to their attention with sufficient persistence.[19]

Agricultural biotechnology in the TPP

Perhaps because of the negative international publicity over Monsanto's genetically modified seeds, RoundUp and other EPA approved pesticides,[20] the USTR negotiators decided not to include an annex to the SPS chapter on the biotechnology plant varieties that are modified to withstand multiple applications of RoundUp and other herbicides. Instead, "Modern biotechnology" appears in the "National Treatment and Market Access for Goods" chapter, with a definition that limits the application of "modern biotechnology" to agricultural goods (Article 2.21). Article 2.29, "Trade in Products of Modern Biotechnology," is displaced from the SPS chapter, as if there were no SPS issues involved in the genetic modifications of agricultural crops, whether or not they are modified to withstand ever more toxic pesticides.

However, the terms of Article 2.29 indicate that "modern biotechnology" should be logically located within the SPS chapter, e.g. the reference to the Annex 3 of the "Codex Guideline for the Conduct of Food Safety Assessment of Foods Derived from Recombinant-DNA Plants (CAC/GL 45-2003)" (Article 2.29.6b)iii and footnote 13). This reference concerns how TPP parties are to prevent the import of the undefined, "inadvertent low level presence" of GMOs unauthorized for import. Logically, TPP's SPS "competent authorities" would agree to the definitions, sampling and testing methods and numerical amount of "inadvertent low level presence" during negotiations for bilateral SPS "equivalency" negotiations among TPP members (Article 7.8).

For example, the USDA's grain inspection service would inform the "competent authorities" for grain and oilseed imports that the Grain Inspection and Stockyards and Packers Administration (GIPSA)

> does not assess the effectiveness of different detection methods for biotechnology-derived traits nor does it determine the characteristics of fortified samples to a particular degree of accuracy, such as what is performed in the preparation of certified reference materials.[21]

Importing authorities would have to decide whether the GIPSA standards for detecting unauthorized GMOs for import would be adequate to provide the appropriate level of protection for their citizens.

But by putting "modern biotechnology" within the chapter on "National Treatment and Market Access for Goods," the TPP negotiators are able to discuss issues about "trade in products of modern biotechnology" without any reference to the SPS chapter requirements. Instead, any SPS concerns about these products will be discussed in the "Committee on Agriculture Trade (Working Group)," which has no requirement for experts to discuss or demonstrate risk assessment or risk analysis for GMOs. What is particularly remarkable about this Trans-Pacific regulatory evasion is that Article 2.29 will apply to products derived from synthetic biology, the next generation of "trade in products of modern biotechnology." The techniques of synthetic biology are of an order of magnitude more complex than the transgenic plant varieties engineered to withstand multiple applications of a pesticide.

For example, the plant synthetic biology varieties that have received USDA field trial permits do not yet have a reliable safeguard against Horizontal Gene Transfer of DNA or RNA sequences foreign to agricultural or wild plants. According to one research team

> Synthetic biology and other new genetic engineering techniques will likely lead to an increase in the number of genetically engineered plants that will not be subject to review by USDA [U.S. Department of Agriculture], potentially resulting in the cultivation of genetically engineered plants for field trials and commercial production without prior regulatory review for possible environmental or safety concerns.[22]

Three scientific committees reported to the European Commission in early 2015 that

[c]urrently available safety locks used in genetic engineering such as genetic safeguards (e.g. auxotrophy and kill switches) are not yet sufficiently reliable for SynBio. Notably, SynBio approaches that provide additional safety levels, such as the genetic firewalls, may improve containment compared with classical genetic engineering. However, no single technology solves all biosafety risks and many new approaches will be necessary.[23]

TPP negotiators, such as former Biotechnology Industry Organization vice president Sharon Bomer Lauritsen, likely do not care that NGOs or academics point out the logical incoherency of excluding "modern biotechnology" from the purview of the SPS chapter and hence from that of the WTO SPS Agreement. No matter how logically inconsistent it is to put "modern biotechnology" and its synthetic biology successors outside of the SPS chapter, doing so means that trade disputes over the products of "modern biotechnology" will have to be filed with reference to the non-scientific framework of the "National Treatment and Market Access for Goods" chapter.

The most disingenuous provision within Article 2.29 is this: "Nothing in this Article shall require a Party to adopt or modify its laws, regulations, and policies for the control of products of modern biotechnology within its territory." (Article 2.29.3) This provision will certainly be invoked ad nauseam to try to make "modern biotechnology" less controversial among the TPP countries' civil society. However, the passage should come with a footnote, perhaps something such as:

Expect a visit from the U.S. State Department officer for biotechnology and/or the Foreign Agricultural Service representative in your Embassy to discuss how you can adopt our regulations or modify your laws and regulations to better expedite the import of our agricultural products of modern biotechnology. If you refuse the visit, either expect to look for a new job or expect market entry problems for your country's exports.

The likelihood of the realization of this footnote is documented in about 900 Wiki-leaked State Department cables from 2005-2009 analyzed by Food and Water Watch.[24] In these cables, the power of the State Department to cause "voluntary" changes in laws and import regulations to increase trade in agricultural biotechnology products is on full display.

In the current low price environment for agricultural commodities, Monsanto and other biotechnology companies are laying off thousands of employees, cutting research and development budgets and buying back the shares of their equity stock to keep share prices high enough to enable share price-based bonuses.[25] It is only a slight exaggeration to say that without U.S. government intervention share prices would be tanking.

The genetic resources that modern biotechnology modify receive a mention only in the TPP chapter on Exceptions. "Article 29.8: Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources Subject to each Party's international obligations, each Party may establish appropriate measures to respect, preserve and promote traditional knowledge and traditional cultural expressions." It is fitting that the TPP ignore the genetic resource base of modern biotechnology, since the U.S., together with the EU and Japan, have resisted all efforts, to amend the WTO intellectual property agreement on genetic resources and traditional knowledge, to require patent holders of modern biotechnology, both medical and agricultural to disclose the origin of the genetic resources used in their products.[26]

Building on the WTO SPS Agreement or building a TPP Caucus to lobby the WTO SPS Committee?

The Foreign Agriculture Service of the U.S. Department of Agriculture reviews hundreds of foreign SPS measures to determine whether and how they might be inhibiting an expansion of U.S. agricultural exports.[27] In 2012, the World Trade Organization's SPS Committee reported 16 "SPS-specific trade concerns," i.e. SPS measures enacted by WTO members that appeared to violate the WTO SPS agreement.[28] U.S. food and agriculture exporters and importers are unhappy that the putative SPS violations they report to U.S. officials are not resolved more quickly in the WTO process. As a result, the agribusiness lobby has advocated a "WTO plus" SPS agreement that would emulate the U.S. regulatory process, in which their products are invariably approved for commerce.[29]

The "appropriate level of sanitary and phytosanitary protection" in the WTO SPS agreement, adopted in the TPP (Article 7.1 et passim) will be determined by the "competent authorities" in U.S. regulatory agencies. However, in the TPP, the "primary representative" (Article 7.1.2) for the implementation of TPP will not be the "competent authorities," much less the scientists, but in the case of the United States, the Office of U.S. Trade Representative, which has no scientific competence.

The TPP SPS Chapter, purported to "reinforce and build on the SPS Agreement," (Article 7.2b) in fact, may well detract from the use of the WTO SPS Committee to inform WTO members about SPS issues that may result in trade barriers. TPP members will be obliged to participate in the TPP Committee on Sanitary and Phytosanitary Measures "to improve the Parties' understanding of sanitary and phytosanitary issues that relate to the implementation of the [WTO] SPS Agreement and this Chapter" (Article 7.5.3a). The TPP SPS Committee may also develop positions for "meetings held under the auspices of the Codex Alimentarius Commission, the World Organisation for Animal Health and the International Plant Protection Convention" (Article 7.5.3g). This latter provision is ostensibly optional ("may consult") but in a Chapter with so many "shalls" and opportunities for cooperation, it would be a brave, even foolhardy, "competent authority" who did not obey the orders of the TPP "primary representative" (i.e. the trade minister) to not consult.

The status of the WTO SPS Committee and the WTO recognized international standards setting organizations (which are already subject to considerable political pressure by commercial interests) is further weakened in the TPP SPS chapter. The TPP Parties will merely "take into account" the "standards, guidelines and recommendations" of the World Animal Health Organization and International Plant Protection Convention concerning plant and agricultural animal diseases in the TPP territories. (Article 7.7.2) "The [TPP] Parties may cooperate on the recognition of pest- or disease-free areas" (Article 7.7.3). Or they may not, if doing so would harms the trade or investment of a U.S. firm. The relationship of the TPP SPS Chapter to the WTO SPS Agreement and to the international organizations referenced in the Agreement is opportunistic, like that of a parasite.

Dispute Settlement in the TPP SPS Chapter

U.S. agribusiness lobbyists have long complained to their Members of Congress that the WTO dispute settlement system was too slow and does not "fully enforce" SPS related rulings. Members of Congress, in turn, pressed the U.S. Trade Representative for a TTP (and TTIP) SPS chapter that would be "fully enforceable."[30] Did they get their wish fulfilled?

The mention of the TPP state to state dispute settlement chapter is fairly short in the SPS chapter, just two paragraphs. TPP parties to an SPS disagreement are supposed to first resolve their differences through Cooperative Technical Consultations (CTC) with "the appropriate involvement of relevant trade and regulatory agencies" (Article 7.17.5). A note from U.S. horticulture industry advisors to the USTR concerning the U.S.-Chile Free Trade Agreement gives some insight into how the CTC might use "science" to resolve horticulture SPS disputes:

> U.S. negotiators must recognize this factor [the need for U.S. export access to Chilean markets] and seek SPS agreements that are flexible enough to ensure phytosanitary mitigation while at the same time being commercially sound. Simply basing SPS agreements on sound science is not enough.[31]

"Flexibility" will presumably include resolving disputes by "various means" that are not simply invocations of "science," though confidential to be sure.

In keeping with the spirit of Confidential Business Information, "All communications between the course of CTC, as well as all documents generated for the CTC, shall be kept confidential unless the consulting Parties agree otherwise" (Article 7.17.6). Thus the "science" to justify an SPS measure, even if it bears directly on public, animal, plant or environmental health, will remain disclosed only to the "relevant trade and regulatory officials." The disputing Parties cannot proceed to use of the dispute settlement chapter without first having attempt to resolve their differences through CTC meetings (Article 7.17.8). Thus far, it is difficult to see how this dispute settlement procedure is different from that of the application of WTO dispute settlement to SPS disputes.

However, the SPS chapter exempts certain paragraphs and subparagraphs from application of the dispute settlement process (Article 7.18), e.g. as outlined in footnotes two, concerning equivalence of SPS measures and four, concerning risk analysis. There is no clear logic as to why these paragraphs, and not others, are not subject to dispute settlement. Nor is it clear as to whether SPS measures could be subject to the Investor State Dispute Settlement (ISDS) chapter, given the extremely broad definition of what comprises an "investment" in the Investment Chapter.[32]

Parties to a TPP dispute get to choose the forum in which they may settle the dispute, just as they would for an ISDS settlement. (Article 28.4) Perhaps U.S. agribusiness lobbyists and Members of Congress will have their wish for "fully enforceable" fulfilled on the assumption that the World Bank forum, just down the road, will be more attentive to their concerns than a WTO dispute panel in Geneva.

However, because the TPP does include an appellate body (as does the WTO dispute settlement process), to double check that the dispute panelists have correctly interpreted the dispute settlement procedures, the TPP process will be quicker—just 15 months from the panel hearing to its final report (Article 28.18). Furthermore, compensation under the TPP dispute settlement chapter will be more rapid. (Article 28.19 and 28.20). No more malingering or legislative refusal to pay WTO authorized retaliation, as in the U.S. Upland Cotton Subsidies case![33] So if the dispute settlement cases are decided in favor of U.S. agribusiness and compensation is paid in full and/or offending SPS measures are modified or eliminated, perhaps the agribusiness lobby will consider SPS measures, finally, to be "fully enforceable."

Conclusion

The complexity of the SPS text, as well as its relationship to other provisions in the agreement on Regulatory Cooperation, Investment and Dispute Settlement, to name just a few issues, will require additional analysis. For example, the status of "import checks" and inspection and testing is not treated here, though I have discussed inspection and testing bans proposed by the European Commission in the TTIP SPS chapter.[34] The weakened capacity of the Food and Drug Administration to inspect foreign food facilities, in lieu of port of entry import inspection and testing,[35] surely calls into question the contribution of "import checks" to the "appropriate level of sanitary and phytosanitary measures."

Likewise the "transparency" measures and the relation of the SPS chapter to the Regulatory Cooperation and Technical Barriers to Trade chapters certainly will require additional study. Will "transparency" requirements burden smaller governments with endless industry demands for comments to revise and delay regulations until regulations are so riddled with exemptions, exclusions, waivers and postponements as to be ineffective? These and other issues in the TPP deserve a fuller public debate in the next few weeks, before President Obama can sign what he hopes will be a "legacy making" trade deal that is largely about removing regulatory "irritants" to trade.

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TPP
MADE IN AMERICA

the TRANS-PACIFIC PARTNERSHIP

The Trans-Pacific Partnership (TPP) levels the playing field for American workers and American businesses, leading to more Made-in-America exports and more higher-paying American jobs here at home. By cutting over 18,000 taxes various countries put on Made-in-America products, TPP makes sure our farmers, ranchers, manufacturers and small businesses can compete—and win—in some of the fastest growing markets in the world. With more than 95 percent of the world's consumers living outside our borders, TPP will significantly expand the export of Made-in-America goods and services and support American jobs.

★ ★ ★

Upgrading & Improving Investor-State Dispute Settlement

U.S. businesses and investors operating abroad often face a heightened risk of bias and discrimination. Investor-state dispute settlement (ISDS) is a mechanism that provides neutral international arbitration to ensure that Americans doing business abroad receive the same kinds of protections—such as protection from discrimination and expropriation without compensation—that are available to companies and investors doing business in the United States under U.S. law. This mechanism allows for an impartial, law-based approach to resolve conflicts and promotes development, rule of law, and good governance around the world. TPP also serves to modernize and reform ISDS by including clearer language and stronger safeguards that raise standards above virtually all of the other 3,000 plus investment agreements in force today.

THE BASIC FACTS ON ISDS

- **TPP specifically protects the right of governments to regulate in the public interest**. We would never negotiate away our right to do so, and we don't ask other countries to do so either. This is true for public health and safety, the financial sector, the environment, and any other area where governments seek to regulate.

- ISDS ensures that American businesses and investors do not face discrimination, nationalization, or abuse when doing business abroad. Through TPP, we can put in place **higher standards and stronger safeguards** for ISDS.
- ISDS is found in more than **3,000 existing agreements** around the world, covering **180 countries**. The U.S. has taken part in **51 of these agreements with ISDS** over the last 30 years.
- **The United States has never lost an ISDS case.** We have had only **13 cases brought to conclusion against us**, and the United States has **prevailed in every case**. And in part because we have continued to **raise standards through each agreement**, in recent years we have seen a drop in ISDS claims, despite increased levels of cross-border investment. Only one new case has been brought against the United States in the last five years.
- More than **half of companies that initiate ISDS cases are small- and medium-sized businesses or individual investors**, so the millions of American workers they employ stand to potentially benefit from strong ISDS protections.

HOW TPP UPGRADES AND IMPROVES ISDS

TPP includes new ISDS safeguards that close loopholes and raise standards higher than any past agreements. **Some of these new safeguards in TPP include:**

- **Right to regulate**. New TPP language underscores that countries retain the right to regulate in the public interest, including on health, safety, the financial sector, and the environment.
- **Burden of proof**. TPP explicitly clarifies that an investor bears the burden to prove all elements of its claims, including claims on the minimum standard of treatment (MST).
- **Dismissal of frivolous claims.** TPP includes a new standard permitting governments to seek expedited review and dismissal of claims that are manifestly without legal merit.
- **Expectations of an investor**. TPP explicitly clarifies that the mere fact that a government measure frustrates an investor's "expectations" does not itself give rise to an MST claim.
- **Arbitrator ethics**. TPP countries will provide detailed additional guidance on arbitrator ethics and issues of arbitrator independence and impartiality.

- **Clarifying rules on non-discrimination**. TPP explicitly clarifies that tribunals evaluating discrimination claims should analyze whether the challenged treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.
- **Scope of available damages**. TPP explicitly limits damages that an investor can recover to damages that an investor has actually incurred in its capacity as an investor, to address concerns about claimants seeking ISDS damages arising from cross-border trade activity.

TPP also includes a range of important additional ISDS safeguards. Many of these safeguards go beyond what was included in past trade deals like NAFTA. **These key ISDS safeguards include:**

- **Transparency**. TPP requires ISDS panels to "conduct hearings open to the public" and to make public all notices of arbitration, pleadings, submissions, and awards.
- **Public participation**. Members of the public and public interest groups—for example, labor unions, environmental groups, or public health advocates—can make *amicus curiae* submissions to ISDS panels "regarding a matter of fact or law within the scope of the dispute."
- **Remedies**. A government can only be required to pay monetary damages. ISDS does not and cannot require countries to change any law or regulation.
- **Challenge of awards**. All ISDS awards are subject to subsequent review either by domestic courts or international review panels.
- **Expedited review and dismissal of claims**. As in U.S. courts, TPP allows panels to review and dismiss certain unmeritorious claims on an expedited basis.
- **Attorney's fees for frivolous claims**. A panel may award attorney's fees and costs in cases of frivolous claims.
- **Expert reports**. A panel can consult independent experts to help resolve a dispute.
- **Binding interpretations**. TPP countries can agree on authoritative interpretations of ISDS provisions that "shall be binding on a tribunal."
- **Consolidation**. A panel can consolidate different claims that "arise out of the same events or circumstances." This protects against harassment through duplicative litigation.

Columbia Center
on Sustainable Investment
A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

CCSI Policy Paper

Lise Johnson, Lisa Sachs*
November 2015

The TPP's Investment Chapter:

Entrenching, rather than reforming, a flawed system

Introduction

During and following the negotiations of the Trans-Pacific Partnership (TPP), the USTR assured stakeholders that novel features in the TPP's investment chapter would respond to legitimate concerns about the investor-state dispute settlement mechanism (ISDS). Indeed, in our analysis on *Investor-State Dispute Settlement, Public Interest, and US Domestic Law*, we highlighted a number of serious shortcomings of investment treaties and their ISDS protections, including the impact that ISDS has on the development, interpretation, and application of domestic law. Now that the TPP has been publicly released, we can see that unfortunately none of these shortcomings has been resolved. In fact, in some areas, we even see a further evisceration of the role of domestic policy, institutions, and constituents. In their current form, the TPP's substantive investment protections and ISDS pose significant potential costs to the domestic legal frameworks of the US and the other TPP parties without providing corresponding benefits.

In "Upgrading & Improving Investor-State Dispute Settlement," the USTR highlights how the "TPP upgrades and improves ISDS" and "closes loopholes and raises standards higher than any past agreements." Below, we respond to the USTR's claims, showing that ISDS in TPP has not been improved as USTR suggests. There are a number of problems from previous trade agreements that have been carried over into the TPP, and new provisions added to the TPP that do not appear in other US FTAs and that raise additional concerns. A forthcoming brief will discuss those issues in more depth; this note focuses specifically on the particular improvements that the USTR claims to have made to ISDS.

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Claims and Responses

USTR Claim: "Right to regulate. New TPP language underscores that countries retain the right to regulate in the public interest, including on health, safety, the financial sector, and the environment." (Point 1).

Unfortunately, while the TPP might "underscore" that countries retain the right to regulate in the public interest, the agreement does not actually protect that right.

In article 9.15, the TPP states, "Nothing in [the Investment Chapter] shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure *otherwise consistent with this Chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives." (emphasis added)

That article provides no real protection. Rather, it simply notes that the government can regulate in the public interest as long as, when doing so, the government complies with the Investment Chapter's requirements regarding treatment of foreign investors and investments. The words, "otherwise consistent with this Chapter," thus negate any protections otherwise purported to be given under that article. Consequently, and as under other investment treaties with ISDS, good faith measures taken in the public interest can still be successfully challenged under the agreement as violating the TPP's investor protections. That means a continued risk of claims that we've seen, such as claims seeking damages for:

- efforts to strengthen and enforce environmental obligations;
- efforts to restrict imports of adulterated drug products;
- efforts to regulate and restrict smoking;
- zoning measures relating to investment in or near protected areas;
- measures regarding location and design of hazardous waste facilities, and transport of hazardous waste;
- efforts to restrict profits of pharmaceutical companies;
- application of bankruptcy law;
- judicial decisions interpreting domestic intellectual property law and policy; and
- government efforts to regulate tariffs and terms of service for essential public utilities.

Notably, the provision here can be contrasted with the TPP's treatment of other specific measures and policy issues. In the article on exceptions, for example, the TPP parties agreed to prevent investors from arguing that taxation measures violate the infamously vague and problematic fair and equitable treatment ("FET") obligation (discussed further below). That decision to carve out taxation from the FET obligation evidences the state parties' unwillingness to trust ISDS tribunals with the broad powers such tribunals otherwise have to interpret that potentially expansive FET obligation. Environmental, health, and safety measures – while similarly complex and important of matters of law and policy – are not similarly safeguarded from the uncertainties of ISDS decisions.

Likewise, when investors challenge certain measures relating to financial services regulation, officials of the state parties to the treaty have the right to decide whether a "prudential measures" exception applies. Any determination the government officials make is binding on the tribunal. Again, this evidences the states' unwillingness to permit ISDS tribunals to decide complex issues with significant policy implications. In contrast, there is no such filter mechanism in the TPP for other areas of public interest regulation, such as environmental protection and public health, which would help to preserve the policy space of the state parties.

A third narrow issue that the TPP protects against ISDS challenges is liability for "tobacco control measures". This provision, adopted in response to the particularly controversial cases Philip Morris and its affiliates have filed against Australia[1] and Uruguay[2] to challenge those countries' anti-tobacco regulations, aims to protect government action in one important area of health policy; in so doing, it implicitly recognizes that the TPP's investment protections and ISDS mechanism can be used to challenge good faith, non-discriminatory measures taken to address undeniably serious issues of public concern, despite the language in article 9.15. While "tobacco control measures" are indeed deserved of protection from investor claims, so, too, are other measures to address environmental, health, and safety concerns, which necessarily remain vulnerable to challenge.

With the TPP, we thus see governments taking some steps to protect their ability to take action in certain discrete areas. Given the specific exclusions and filter mechanisms for taxation, financial services, and tobacco-related measures, the omission of other public-interest related measures from those explicit carve outs means that other measures remain exposed to claims. So despite the claim that the TPP preserves the right of states to regulate in the public interest, many crucial areas of law such as environmental and health-related measures, which been targets of a number of ISDS cases filed to date, are not similarly safeguarded from investors' challenges.

USTR Claim: "Burden of proof. TPP explicitly clarifies that an investor bears the burden to prove all elements of its claims, including claims on the minimum standard of treatment (MST)." (Point 2).

USTR Claim: "Expectations of an investor. TPP explicitly clarifies that the mere fact that a government measure frustrates an investor's 'expectations' does not itself give rise to an MST claim."(Point 4).

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[1] Philip Morris Asia Limited v. Australia, UNCITRAL, PCA Case No. 2012-12. More information about this case is available at http://www.italaw.com/cases/851.

[2] Philip Morris Brands Sàrl v. Uruguay, ICSID Case No. ARB/10/7. More information about this case is available at http://www.italaw.com/cases/460.

These two changes ostensibly try to narrow tribunals' interpretations of the "fair and equitable treatment" or "FET" obligation.[3] The FET obligation has morphed over roughly the last 15 years from a relatively unknown and unused protection into the most common standard on which investors initiate and succeed on challenges to conduct by all branches (executive, legislative, and judicial) and levels (local, state, and federal) of government.

Many of the concerns about how investment treaty protections and ISDS favor foreign investors' rights and expectations over broader public interest aims are based on the increasing use of the FET standard, so improvements to this provision are essential. Unfortunately, the language added to the TPP text fails to address these concerns.

As the text of the TPP itself recognizes, the first "change" is language that merely confirms the standard rule in ISDS disputes: the investor bears the burden of establishing its claims. This is nothing new. It simply reiterates what is generally understood, so as hopefully to limit disputes on this point.

Importantly, however, expansive interpretations of the FET provision are not due to a failure by tribunals to impose a burden of proof *on the claimant*, but are due to the common practices of tribunals to treat that burden as being satisfied with only minimal evidence.[4] In light of the ease with which arbitrators have determined that they can identify the elements of an FET claim, merely reiterating the standard rule that the claimant has the burden to establish those elements will likely have little effect on reducing tribunal overreach.

The second change regarding the FET obligation not only fails to constitute an improvement but actually represents a step backward from previous US positions. In previous cases, the US has clearly asserted that investors' "legitimate expectations" are not elements of the FET obligation[5] and "impose no obligations on the State" under that provision.[6] In contrast, the new language, which states that a breach of an investor's "expectations" does not *alone* give rise to an MST claim, implicitly recognizes that "expectations" may in fact be relevant to establishing a violation of the FET standard.

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[3] Because the treaty states that the "FET" obligation incorporates and does not require conduct beyond that mandated under the "minimum standard of treatment", this note uses the terms "FET" and "MST" interchangeably.

[4] This can be seen in recent cases decided under US treaties in which the tribunals determined that the FET obligation prohibits "arbitrary" conduct, vaguely defined. *See, e.g.*, Teco v. Guatemala, ICSID Case No. ARB/10/23, Award, December 19, 2013, para. 454; Bilcon v. Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, paras. 442-444. This can also be seen in cases in which tribunals have determined that the FET obligation protects investors' "expectations". *See, e.g.*, Bilcon, paras. 427-454. *See also*, Mesa v. Canada, PCA Case No. 2012-17, Second Submission of the United States, June 12, 2015, paras. 14-19 (stating that the tribunal erred in determining the contents of the FET obligation based on reference to other tribunal decisions rather than state practice and opinio juris).

[5] Spence Int'l Inv. LLC v. Costa Rica, ICSID Case No. UNCT/13/2, Submission of the United States of America, April 17, 2015, para. 17.

[6] *Id.* para. 18. *See also* Mesa v. Canada, PCA Case No. 2012-17, Second Submission of the United States, June 12, 2015, para. 18.

This new language codifies – rather than corrects – problematic decisions such as the March 2015 NAFTA award in *Bilcon v. Canada.*[7] In that case, the majority of the tribunal[8] indicated that interference with investors' economic "expectations", standing alone, would not violate the FET obligation but was a factor to take into account in determining whether there had been a breach of that treaty provision.[9] Applying that approach, the tribunal gave disproportionate legal significance to the allegedly "reasonable expectations" of the investors that had been generated by non-binding statements of certain Canadian officials and general promotional materials designed to help the region attract new mining investments. Those "reasonable expectations", the tribunal determined, were later frustrated by federal and provincial environmental approvals processes, which ultimately resulted in decisions by federal and provincial officials to deny the investors their requested environmental permits. That the governments' actions frustrated the investors' "legitimate expectations" led the tribunal to conclude that Canada violated the NAFTA's FET obligation.

This case is instructive for assessing the TPP's "improvement": while the TPP states that the interference with an investor's "expectations" will not, *on its own*, constitute a violation of the FET obligation, it leaves the door wide open for future application of the *Bilcon* approach. Under that approach, a tribunal identifies what it considers to be reasonable or legitimate expectations – which may have been generated by a wide range of even non-binding government conduct and need not rise to the level of actual "rights" – and then strictly scrutinizes government actions or inactions to determine whether the investors' expectations were wrongly frustrated.[10] Frustration of investor "expectations" thus remains a key factor that can be used by tribunals to distinguish between government conduct that does, and does not, violate the FET obligation.

In summary, while there are two minor changes to the text of the FET obligation in the TPP, those changes are far from being adequate to ease – much less resolve – valid

[7] Bilcon v. Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015

[8] One arbitrator in this case dissented, critiquing the majority's review of the facts and its application of the FET obligation. According to the dissenting arbitrator, the majority's approach is a "significant instruction into domestic jurisdiction," "will create a chill on the operation of environmental review panels," and will result in investors being able to "import[] a damages remedy that is not available under Canadian law." (para. 49). Even more problematically, the dissenting arbitrator stated, the majority's decision was an "intrusion into the environmental public policy of the state." (*Id.*). Bilcon v. Canada, Dissenting Opinion of Professor Donald McRae, March 10, 2015.

[9] *Id.*

[10] *See also Bilcon*, para. 572. In *Bilcon*, the tribunal added that when investor "expectations" are frustrated, that is considered to be a "special circumstance[]" in which changes in or application of government law and policy are more likely to be successfully challenged. The tribunal noted that some tribunals "express a cautious approach about using investor expectations to stifle legislative or policy changes by state entities that have the authority to revise law or policy." It added, however, that such authority is "not absolute; breaches of the [FET obligation] might arise in some special circumstances" such as when they are "contrary to earlier specific assurances by state authorities that the regulatory framework would not be altered to the detriment of the investor." Tribunals' protection of *expectations* (as opposed to *rights*) generated by "specific assurances" provides investors greater protection against regulatory change than they are provided under US domestic law. See Lise Johnson and Oleksandr Volkov, *Investor-State Contracts, Host-State "Commitments" and the Myth of Stability in International Law*, 24 AM. REV. INT'L ARB. 361 (2013)

concerns about the risk that investors will continue to be able to use this provision to expand the strength of their economic "expectations" at the expense of broader public interests.

The FET obligation has only figured in ISDS jurisprudence for 15 years, but has inspired disproportionate ire, uncertainty, litigation, and liability in that time. With the TPP, it is crucial to avoid entrenching and exacerbating well-recognized existing problems, and to seize the opportunity to make real improvements.

One such improvement would be to exclude the FET obligation altogether, or to exclude it from ISDS and leave it only subject to state-to-state dispute resolution. Alternatively, the TPP could clearly rein in the standard so that it is expressly limited to a protection against denial of justice after exhaustion of local remedies – a much narrower, but still significant protection.[11]

USTR Claim: "Dismissal of frivolous claims. TPP includes a new standard permitting governments to seek expedited review and dismissal of claims that are manifestly without legal merit." (Point 3).

USTR Claim: "Expedited review and dismissal of claims. As in U.S. courts, TPP allows panels to review and dismiss certain unmeritorious claims on an expedited basis." (Point 12).

USTR Claim: "Attorney's fees for frivolous claims. A panel may award attorney's fees and costs in cases of frivolous claims." (Point 13).

These three provisions attempt to address the same problem: how to prevent, or ensure relatively prompt dismissal of, frivolous or meritless investor claims. While it is better to

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[11] Indeed, this narrower view of the FET obligation would be consistent with positions taken by the United States in ISDS disputes, in which US attorneys have stated that the FET obligation does not reach far, if at all, beyond the obligation not to deny justice to foreign investors. In *Spence v. Costa Rica*, for example, the United States explained:

> Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, which is expressly addressed in Article 10.5, concerns the obligation to provide "fair and equitable treatment," which includes, for example, the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings.

Spence, Submission of the United States of America, April 17, 2015, para. 13. *See also* Apotex Holdings Inc. v. United States, ICSID Case No. ARB(AF)/12/1, Counter-memorial on Merits and Objections to Jurisdiction of Respondent United States of America, December 14, 2012, para. 353. ("Sufficiently broad State practice and opinio juris thus far have coincided to establish minimum standards of State conduct in only a few areas, such as the requirements to provide compensation for expropriation; to provide full protection and security (or a minimum level of internal security and law); and to refrain from denials of justice. In the absence of an international law rule governing State conduct in a particular area, a State is free to conduct its affairs as it deems appropriate.").

Experience with ISDS disputes to date illustrates that unless the treaty itself clearly limits the scope of the FET obligation, arbitrators are willing to interpret it expansively.

have such provisions than not, these provisions, as drafted, will not have an appreciable effect on limiting such claims.

First, some other agreements, including the US-DR-CAFTA[12] and US-Peru FTA,[13] already have very similar provisions regarding dismissal of meritless claims, as do ICSID's Arbitration Rules, which govern many ISDS cases.[14] The US-DR-CAFTA and US-Peru FTA, for example, state:

> … a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26 [Awards].[15]

In the TPP, the text adds the words in bold:

> … a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 9.28 [Awards] **or that a claim is manifestly without legal merit.**[16]

The minor change in wording in the TPP does not represent a significant improvement over previous treaties.

Second, although the USTR states that the TPP's mechanisms for early dismissal of frivolous claims are based on the US Federal Rules of Civil Procedure, the TPP's protections for governments are actually significantly narrower than those provided under the Federal Rules.[17]

Third, even without the language in the TPP expressly stating that tribunals may award attorneys' fees and costs against investors that file frivolous claims (and respondent states that assert frivolous defenses), tribunals already had this power.[18] As data show, however, tribunals have been reluctant to use this authority.[19] Typically, tribunals order each side – the investor and the state – to bear its own costs (which on average amount to roughly \$4.5 million for each side),[20] irrespective of who wins or loses. In some cases, such as when a claim or defense is obviously frivolous, the tribunals have ordered the losing

[12] Art. 10.20(4)-(6).
[13] Art. 10.20(4)-(6).

[15] US-DR-CAFTA, art. 10.20(4); US-Peru FTA, art. 10.20(4).
[16] Art. 9.22(4) (emphasis added).
[17] See discussion in LISE JOHNSON, NEW WEAKNESSES: DESPITE A MAJOR WIN, ARBITRATION DECISIONS IN 2014 INCREASE THE US'S FUTURE EXPOSURE TO LITIGATION AND LIABILITY 10-12 (CCSI January 2015), http://ccsi.columbia.edu/files/2014/03/Brief-on-US-cases-Jan-14.pdf.
[18] *See, e.g.*, ICSID Convention, art. 61(2); 2010 UNCITRAL Arbitration Rules, art. 42. Other US treaties pre-dating the TPP have also included this provision. See US-DR-CAFTA, art. 10.20(6).
[19] Matthew Hodgson, *Counting the Costs of Investment Treaty Arbitration*, 9 GLOBAL ARB. REV., March 24, 2014. http://globalarbitrationreview.com/news/article/32513/.
[20] *See id.* (finding that average costs for respondent states were US\$ 4,437,000 and US\$ 4,559,000 for claimants).

party to pay the legal fees and costs of the winning party. Tribunals, however, have been more likely to require losing states to cover the costs of winning investors, than to require losing investors to cover the costs of winning states.[21] Simply reiterating the power of tribunals to award costs in favor of states is not likely to change these trends.

USTR Claim: "Arbitrator ethics. TPP countries will provide detailed additional guidance on arbitrator ethics and issues of arbitrator independence and impartiality." (Point 5).

This is a very important potential development. Private arbitrators are not bound by the same rules of independence, impartiality, and public integrity that domestic systems require of judges. And despite the fact that very serious concerns have been raised about arbitrator ethics in ISDS disputes for years,[22] there has been no serious effort among the arbitration community to commit to any meaningful self-regulation. As the TPP does not actually resolve this issue but punts it back to the parties to address in the future, it remains to be seen whether this provision will actually help to resolve these concerns about arbitrators.

USTR Claim: "Clarifying rules on non-discrimination. TPP explicitly clarifies that tribunals evaluating discrimination claims should analyze whether the challenged treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives." (Point 6).

Recent NAFTA decisions such as *Bilcon v. Canada* and *Apotex II v. United States*[23] illustrate the very real need to prevent continued abuse of treaties' non-discrimination standards (i.e., the national treatment obligation and the most-favored nation treatment obligation). The TPP, however, does not provide an adequate solution.

The non-discrimination obligations in investment treaties aim to prevent states from discriminating against covered foreign investors/investments, whether that discrimination is in favor of domestic investors/investments (the national treatment obligation) or in favor of other foreign investors/investments (the most-favored nation treatment obligation). However, rather than using those non-discrimination obligations to protect against and recover for *nationality-based discrimination*, foreign investors and investments are using those treaty provisions to challenge *any* disparate government treatment.

In *Bilcon v. Canada*, for example, the investors successfully argued to the tribunal that Canada had violated the national treatment obligation because officials had denied their environmental permit for a controversial mining project, while other mining projects had been allowed to proceed. As Canada highlighted, those other environmental approvals

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[21] *Id.*

[22] NATHALIE BERNASCONI-OSTERWALDER ET AL., ARBITRATOR INDEPENDENCE AND IMPARTIALITY: EXAMINING THE DUAL ROLE OF ARBITRATOR AND COUNSEL (IISD 2010).

[23] Apotex Holdings and Apotex Inc. v. United States, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014 [hereinafter "*Apotex II*"]. This case is discussed *infra*, n.26.

had involved proposals for projects of different scope, in different locations, and raising different concerns. Those differences, Canada, argued, meant that the Bilcon project was not in "like circumstances" with other mining projects, and that the government was justified in treating the Bilcon project differently than other mining projects.

The tribunal, however, disagreed with Canada. The tribunal determined that the "adverse treatment" accorded to the Bilcon investment as compared to other "similar" extractive industry projects was not "a rational government policy," and was inconsistent "with the investment liberalizing objectives of the NAFTA."[24] The tribunal therefore found that Canada had violated the national treatment obligation. Notably, the tribunal reached this conclusion even though it declined to conclude that Canada's decisions denying the Bilcon project's environmental permits were motivated by any intent to discriminate against the investors based on their nationality.[25]

This case evidences how non-discrimination obligations can be used by investors and tribunals to second-guess regulatory decisions and prevent strengthening of environmental and other standards over time.[26] Even in cases where there is no evidence of nationality-based discrimination, states can be held liable.

The risk of claims is particularly high in the context of administrative enforcement actions that often and, in some cases, necessarily result in disparate treatment of different actors. As Judge Richard Posner has explained, public agencies must use their resources efficiently.[27] Depending on the context, this may mean that an agency will prioritize

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[24] *Bilcon*, para. 724.

[25] *Bilcon*, paras. 685-731.

[26] Another dispute raising these issues was *Apotex II v. United States*, ICSID Case No. ARB(AF)/12/1. In *Apotex II*, the Canadian claimant alleged that the US Government violated the most-favored nation treatment obligation when the Food and Drug Administration (FDA) restricted imports of its pharmaceutical products due to sub-standard manufacturing practices. The Canadian company did not dispute that it had in fact violated relevant manufacturing standards; rather, it argued that the US violated the NAFTA's non-discrimination obligation by restricting its imports but not similarly restricting imports from other overseas drug manufacturers that had similarly violated required manufacturing standards.

Reviewing Apotex's claims, the ISDS tribunal agreed that US regulators did treat foreign drug manufacturers differently when taking enforcement actions against various problem companies located in different parts of the world. Based on that finding of disparate treatment, and despite the lack of any evidence of government intent to discriminate on account of nationality, the tribunal stated it *would find* the US Government liable for breaching its non-discrimination obligations unless the Government could establish that the various companies were not in "like circumstances" and that the Government therefore could legitimately accord them different treatment.

Ultimately, the tribunal agreed with the US Government that the companies were not in "like circumstances"; nevertheless, the tribunal's willingness to second guess the Government's action absent any allegation that the FDA's enforcement decisions were erroneous, and absent any evidence that they were motivated by the investor's nationality, highlights how vulnerable states are to litigation and potential liability arising out of enforcement actions taken against foreign-owned companies. Given the reality that governments lack the resources to investigate and prosecute all violations of the law, and must exercise their discretion regarding when, how, and against which company or companies to take action, these types of claims may become common strategies for companies trying to frustrate enforcement decisions.

[27] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 662-665 (5th ed 1998).

taking action based on such factors as how easy or cost-effective the case will be to prove (which may also depend on the resources the defendant is willing to expend to defend the case), how important the case is for setting precedent, the severity of the violation, and/or the gains to the agency that will be generated through enforcement. Allowing a foreign investor to challenge any instance of disparate treatment on the ground that other projects were allowed to proceed or were not sanctioned (or not sanctioned as severely) for violations of the law, and allowing tribunals to scrutinize enforcement decisions based on their (unreviewable) conceptions of what is "rational" or "legitimate", undermines the very nature and means of administrative enforcement.

In order to prevent future similar cases, one approach for the TPP could have been to clearly specify that a foreign investor seeking to recover on a non-discrimination claim must establish that the government *discriminated against it on account of its nationality*. Yet the language in the TPP contains no such requirement.

Rather, the TPP's language is similar to that in previous US treaties. The national treatment obligation, for example, states:

> Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[28]

In order to purportedly clarify interpretation and application of the Investment Chapter's non-discrimination obligations, the TPP text adds a footnote stating that, when determining whether different groups of investors or investments are in "like circumstances" and are, therefore, entitled to equal treatment, the tribunal is to look at the "totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives."[29]

This new language will not be effective in preventing future *Bilcon-* and *Apotex II-*[30] type cases. Instead of requiring investors to establish nationality-based discrimination, this language invites foreign investors to pressure governments by bringing speculative claims through ISDS and asking tribunals for a second opinion on whether they agree that government actions or policies differentiating between investors (on grounds other than nationality) were "legitimate".

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[28] Ch. 9, art. 9.4(2).

[29] Ch. 9, n.14. There is also a "Drafter's Note on Interpretation of 'In Like Circumstances' under Article II.4 (National Treatment) and Article II.5 (Most-Favoured-Nation Treatment)." That note, however, similarly fails to clearly indicate that discrimination on account of nationality is a required element to establish a breach. Moreover, the legal force of this "Drafter's Note" is unclear. Unlike, for example, Annex 9-A, which clarifies the TPP parties' "shared understanding" on the meaning of "customary international law," and Annex 9-B, which confirms the parties' "shared understanding" on the meaning of an expropriation, the "Drafter's Note" is not made part of the TPP's text.

[30] *See supra* n.26.

Notably, this standard under the TPP differs markedly from the standard for establishing discrimination on account of race or nationality in violation of the Equal Protection Clause of the US Constitution. To establish that a facially neutral law that has disparate impacts on different individuals or entities violates Constitutional protections against race- and nationality-based discrimination, a plaintiff must prove an intent or motive to discriminate on those grounds.[31] The US Supreme Court has also explained that discriminatory intent or motive is more than an "awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[32]

Under these standards, if there were a US environmental law that, on its face, equally applied to all foreign- and domestic-owned firms, but that resulted in more domestic-owned firms being granted environmental permits than foreign-owned firms, the foreign firms could argue that the government's disparate treatment of their applications violated the Equal Protection Clause. To succeed on their claim, they would need to establish that the disparate treatment was motivated by the government's intent to discriminate against the firms based on their nationality. Under the TPP, in contrast, no such showing would need to be made. In contrast to the claim by USTR that the protections in investment treaties "are designed to provide no greater substantive rights to foreign investors than are afforded under the Constitution and U.S. law,"[33] the rights given to foreign investors to challenge any law, regulation, or action that affects it differently from other investors are substantially greater than the rights provided all investors under US domestic law.

USTR Claim: "Scope of available damages. TPP explicitly limits damages that an investor can recover to damages that an investor has actually incurred in its capacity as an investor, to address concerns about claimants seeking ISDS damages arising from cross-border trade activity." (Point 7).

This is a useful clarification. The United States, Mexico, and Canada had already made this argument before NAFTA tribunals; but, despite agreement by all three NAFTA parties on this point, at least one tribunal has rejected their position.[34]

Through this clarification, the TPP states prevent future tribunals from similarly adopting their own idiosyncratic interpretations and disregarding states' intent.

USTR Claim: "TPP also includes a range of important additional ISDS safeguards. Many of these safeguards go beyond what was included in past trade deals like NAFTA. These key ISDS safeguards include:

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[31] Washington v. Davis, 426 U.S. 229, 243-245 (1976).
[32] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (internal citations omitted).
[33] USTR, "Fact Sheet: Investor-State Dispute Settlement" (March 2015), https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds.
[34] *See* Cargill v. Mexico, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, pp. 125-160; *see also* Mexico v. Cargill, Court File No. C52737, Factum of the Intervenor of the United States of America, December 31, 2011 (Ont. Ct. App.), pp. 12-14.

Transparency. TPP requires ISDS panels to 'conduct hearings open to the public' and to make public all notices of arbitration, pleadings, submissions, and awards. (Point 8).

Public participation. Members of the public and public interest groups—for example, labor unions, environmental groups, or public health advocates— can make amicus curiae submissions to ISDS panels 'regarding a matter of fact or law within the scope of the dispute.'" (Point 9).

Since the NAFTA was concluded over ten years ago, there have been significant improvements in a number of treaties to increase transparency of ISDS. Nevertheless, the language on transparency in the TPP represents a step backward as compared to other recent US trade agreements. Moreover, the fact remains that ISDS is a process that excludes a range of interested and affected stakeholders.

First, the TPP adds language not contained in other US trade agreements which states that each government "should endeavor to apply [its laws on freedom of information] in a manner sensitive to protecting from disclosure information that has been designated as protected information" in ISDS proceedings. This provision can potentially be used to prevent information submitted or issued in the ISDS proceedings from being disclosed to the public even if such information could otherwise be released to the public under the US Freedom of Information Act.

Second, in the US (as in many other countries), agreeing to ISDS in the first place represents a significant shift of power to the federal executive branch (the "Government") to decide how to litigate and resolve investor-state disputes. This shift of power comes at the expense of a wide variety of other stakeholders both within and outside of that branch, including state and local governments, and citizens impacted by investments.

Given the myriad effects any given ISDS dispute can have on a wide range of government agencies, private sector industries, and various non-governmental organizations, there is a legitimate concern about whether the Government is actually willing and able to represent adequately all of those stakeholders' interests.[35] Indeed, as US courts have stated, when an individual's or entity's "concern is not a matter of 'sovereign interest,' there is no reason to think the government will represent it."[36]

Under domestic law, to ensure that such diverse concerns are in fact represented in US court cases, US statutes and court doctrines guarantee that, in appropriate cases, private individuals and entities can actually intervene in and become party to a case involving the Government in order to protect their own interests.[37] ISDS, however, provides no such

[35] Kleissler v. United States Forest Serv., 157 F.3d 964, 974 (3d Cir. Pa. 1998); *see also* Am. Farm Bureau Fed'n v. United States EPA, 278 F.R.D. 98, 111 (M.D. Pa. 2011).
[36] Mausolf v. Babbitt, 85 F.3d 1295, 1303 (8th Cir. Minn. 1996).
[37] FED. R. CIV. P. 24(a) (under which a moving party can intervene in a dispute as a matter of right if it "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest"), and 24(b) (under which a court may

safeguards. There is no right for interested or affected domestic constituents to intervene in those Government-defended arbitrations. Under the language of the TPP, the only avenue that interested or affected individuals or entities can pursue to ensure their positions are raised before an ISDS tribunal is to try to make a submission to the tribunal as an *amicus curiae*, a potentially useful, but relatively powerless option that the tribunal has significant latitude to allow or disallow.[38] Consequently, the vast range of constituents that may be affected by ISDS disputes must simply hope that the Government represents their interests in ISDS cases when adopting litigation strategies or settlement options.

As has been recognized by US courts and commentators, giving the government such broad powers to unilaterally determine what arguments to make and what settlements to adopt can significantly – and negatively – impact the rights and interests of non-parties to the litigation.[39] Indeed, it has been often noted that the government's efforts to dispose of cases through settlements are not always consistent with public interests.[40] In this context, as one academic has noted, "consent of the *Government*" to resolve a case is not necessarily the same as "consent of the *governed*."[41] Accordingly, some mechanisms exist in US law for public and court oversight of settlement agreements and consent decrees. These include state and federal rules requiring the Government to give the public notice of and an opportunity to comment on certain settlement agreements the

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permit a moving party not covered by 24(a) to intervene if it "has a claim or defense that shares with the main action a common question of law or fact.").

[38] Federal legislation implementing US trade agreements also include provisions regarding the relationship between state and federal law. Implementing legislation for the NAFTA, for example, states that "the States will be involved (including involvement through the inclusion of appropriate representatives of the States) to the greatest extent practicable at each stage of the development of United States positions regarding matters [that directly relate to, or will have a direct impact on, the States] ... that will be addressed ... through dispute settlement processes provided for under the Agreement." 19 U.S.C.S. § 3312(b)(5). Such provision, however, does not constitute a guarantee that the affected US state's positions will prevail.

[39] *See, e.g.*, Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*, 16 U. PA. J. CONST. L. 637, 647-649 (2014); *see also* Kleissler v. United States Forest Serv., 157 F.3d 964 (3d Cir.1998); United States v. Union Elec. Co., 64 F.3d 1152 (8th Cir. 1995).

[40] Recognizing this reality, there are federal and state law checks over certain settlement agreements entered into by the government; these require government settlements of disputes to be in the public interest, and permit judicial review of settlements to ensure that requirement is satisfied. *See, e.g.*, 42 U.S.C.S. § 9622 (requiring settlement agreements under the Comprehensive Environmental Response, Compensation, and Liability Act to be in the public interest); United States v. Akzo Coatings of Am., 949 F.2d 1409, 1435 (6th Cir. 1991) ("[I]n addition to determining whether a [consent] decree is rational and not arbitrary or capricious, we must satisfy ourselves that the terms of the decree are fair, reasonable and adequate -- in other words, consistent with the purposes that CERCLA is intended to serve.' ... Protection of the public interest is the key consideration in assessing whether a decree is fair, reasonable and adequate."). New Jersey Dep't of Envtl. Protection v. Exxon Mobil Corp., UNN-L-3026-04, 23, Super. Ct. N.J. (August 25, 2015) ("New Jersey caselaw concerning settlements shows that New Jersey courts generally review settlements to ensure fairness, reasonableness, consistency with the governing statute, and public interest."). *See also* Morley, *supra* n.39 (discussing concerns regarding consent decrees and settlement agreements).

[41] Morley, *supra* n.39 (emphasis added).

Government might enter into,[42] and doctrines preventing enforcement of settlement agreements that try to skirt or otherwise violate the law.[43]

The rules of ISDS in the TPP, however, do not include those protections. There is no mechanism for public oversight of proposed or actual settlement agreements agreeing to pay funds or to reverse existing laws or policies. Indeed, even if the Government's commitment in a settlement agreement were illegal or unconstitutional under US law, the Government would still likely be bound to that settlement agreement as a matter of international law and could be held liable under the TPP for violating the settlement.[44] The power of the Government to determine whether and how to try to settle ISDS claims, therefore, is largely unchecked.

One can imagine, for example, a decision by the Government to settle an ISDS case brought by a foreign investor challenging a state environmental law banning use of a particular chemical deemed harmful.[45] In that settlement, the company would agree to drop its case if the Government conceded that the chemical was in fact safe, and committed to take action against the state to invalidate the state's law if the state did not do so itself.[46] The state (and/or entities within it such as environmental groups or the environmental protection agency), might maintain serious legitimate concerns regarding the safety of the chemical, and contend that the measure was in fact consistent with the TPP. Nevertheless, those entities would not have been a party to the ISDS arbitration, nor would they have been able to control the Government's defense of the ISDS case or its

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[42] See *supra* n.40.

[43] Morley, *supra* n.39, at 644, 683-688.

[44] *Id.* If US law governed the settlement agreement, several doctrines may result in the settlement agreement being deemed void or unenforceable. If entered into in the context of the TPP, however, the parties could presumably decide to have the settlement agreement controlled by non-US law. Yet even if governed by and illegal under domestic law, ISDS cases decided to date indicate that that would not prevent a tribunal from attempting to hold the Government to the terms of the settlement agreement. (Railroad Development Corp. v. Guatemala, ICSID Case No. ARB/07/3, Award, June 29, 2012, para. 234; Kardassopolulos v. Georgia, Decision on Jurisdiction, July 7, 2007, paras. 182-184). If the settlement agreement were invalidated by a domestic court, the investor would then likely be able to pursue damages against the Government.

[45] *See, e.g.*, Jeremy Sharpe, *Representing a Respondent State in Investment Arbitration, in* LITIGATING INTERNATIONAL INVESTMENT DISPUTES: A PRACTITIONER'S GUIDE (Chiara Giorgetti ed., 2014) (citing the example of *Dow Agrosciences LLC v. Canada*, a NAFTA case, in which the parties agreed to a settlement agreement "memorializing withdrawal of [the investor's] arbitration claim and [the] Government of Quebec's statements concerning the safety of a certain pesticide." (*Id.* n.104). Like the TPP, the NAFTA contains language limiting arbitral awards to monetary remedies or restitution of property. This example is therefore also useful to show that different forms of relief can be agreed to in the context of settlement agreements.

[46] The settlement agreement could be embodied in an order issued by the tribunal. Although the TPP states that final *awards* may only award monetary damages or, in some cases restitution, the TPP recognizes that *orders* could order injunctive relief or other remedies. If the state ultimately failed to comply with the settlement agreement, an ISDS tribunal could also presumably issue an award of damages against the respondent state if the tribunal retained jurisdiction over the dispute or if the investor brought a separate case based on breach of the settlement agreement. As illustrated *supra*, note 45, there is also authority for the proposition that the treaties' provisions stating that awards may only order monetary damages or restitution do not prevent governments from agreeing to provide other forms of relief.

settlement decision.[47] If the state did not agree to comply with the terms of the order, the federal Government could potentially sue the state based on preemption grounds.[48] There is also a risk that the Government could withhold federal funds appropriated by Congress in order to try to compel compliance with the order.[49]

It is possible to envision many other cases in which the Government could sacrifice disfavored domestic laws or policies through decisions on how to defend and resolve ISDS cases. In short, the provision in the TPP calling for greater transparency and input by interested parties as *amicus curiae* is a step better than the total confidentiality of many ISDS cases under other treaties; but the provisions calling for governments to defer to tribunals' determinations on confidentiality are a step backward on transparency as compared to other recent US agreements and, overall, the ISDS mechanism continues to fall far short of ensuring that the interests of the various affected parties are represented.

USTR Claim: "Remedies. A government can only be required to pay monetary damages. ISDS does not and cannot require countries to change any law or regulation." (Point 10).

The US's investment treaties have long contained provisions stating that ISDS tribunals may only order payment of monetary damages or, in some cases, restitution. Thus, this is not a new development. Nevertheless, it is important to highlight some limits of this assertion.

First, while this may be technically true, the awards may be such that the government is effectively required to abandon or change its laws or regulations.

Second, as the TPP expressly recognizes, the tribunal can order other types of relief as "interim measures" while the dispute is pending.[50]

Third, respondent states defending the cases could presumably consent to provide other forms of relief as part of a settlement agreement recorded as part of a tribunal's order or award.[51]

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[47] See *supra* n.38 (referring to US requirements to consult).

[48] Implementing legislation of the NAFTA and other US agreements recognize the ability of the United States to sue US states to declare a law or its application invalid. *See, e.g.*, 19 U.S.C.S. § 3312(b).

[49] See William S. Dodge, *Investor-State Dispute Settlement between Developed Countries: Restrictions on the Australia-United States Free Trade Agreement*, 39 VANDERBILT J. INT'L L. 1, 20-21 (2006):

> The National Conference of State Legislatures (NCSL) has sought assurances "that the federal government will not shift the cost of compensation under a Chapter 11 award to states whose measures are challenged and will not withhold federal funds otherwise appropriated by the Congress to a state as a means of enforcing compliance with provisions of NAFTA." The NCSL has also asked the federal government not to "seek to preempt state law as a means of enforcing compliance with NAFTA without expressly stated intent to do so by the Congress." The federal government has provided only the latter assurance.

(Internal citations omitted).

[50] Ch. 9, art. 9.22(9).

[51] *See supra* n.45.

Fourth, if the challenged measure is a measure taken by a local or state government entity, federal preemption may require the local or state government to actually abandon that measure.

USTR Claim: "Challenge of awards. All ISDS awards are subject to subsequent review either by domestic courts or international review panels." (Point 11).

Review and enforcement of international arbitral awards is primarily governed by two treaties – the New York Convention and the ICSID Convention – and the TPP does not change that.

Under each of those treaties, arbitral awards can only be challenged on narrow grounds. Errors committed by an ISDS tribunal when reviewing the facts or interpreting the law, for example, are not bases for overturning awards under either the New York Convention or the ICSID Convention.

The New York Convention allows challenges to arbitral awards to be brought before domestic courts, and also allows awards to be challenged on the grounds that they are inconsistent with public policy. The ICSID Convention, in contrast, does not permit challenges to be brought before domestic courts. Challenges must be brought before a new panel of private arbitrators. And unlike under the New York Convention, under the ICSID Convention, there is no possibility to challenge awards on the ground that they violate public policy.

Under both the New York Convention and ICSID Convention, challenges to awards are only very rarely successful. There is no system of appeals similar to what exists in domestic courts.

Notably, however, what is not reflected in the USTR's claim is that the TPP contains a new annex to the investment chapter, Annex 9-L, which further expands the role of arbitration and enforcement of arbitral awards under the New York and ICSID Conventions, and minimizes the role of domestic courts. More specifically, new provisions added in that annex dictate that certain contracts between the federal government and investors or investments[52] must be decided through arbitration.[53] Even if

[52] Article 9.18 of the TPP allows investors to arbitrate claims that the government has violated an "investment agreement." An "investment agreement" is defined in Article 9.1 as the following (explanatory footnotes omitted):

> **Investment agreement** means a written agreement that is concluded and takes effect after the date of entry into force of this Agreement between an authority at the central level of government of a Party and a covered investment or an investor of another Party and that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 9.24(2) (Governing Law), on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, and that grants rights to the covered investment or investor:
> (a) with respect to natural resources that a national authority controls, such as oil, natural gas, rare earth minerals, timber, gold, iron ore and other similar resources, including for their exploration, extraction, refining, transportation, distribution or sale;

the contract required litigation of any contract dispute in domestic courts, the investor would be able to override that provision and take its claim to international arbitration instead. If the foreign investor opts for arbitration, the government will have to comply with that choice, losing its right to defend the case before domestic courts, as well as its rights under domestic law to appeal decisions that incorrectly interpret applicable contract law or make errors in reviewing the relevant facts.

Looking at implications for US law, these new requirements are a significant change from current practice and inconsistent with longstanding federal policy embodied in the Tucker Act. That law requires claims against the federal Government seeking compensation for contract breach to be litigated in the Court of Federal Claims and reviewed in the Federal Circuit.[54] To help enforce that policy, other courts scrutinize plaintiffs' claims to ensure that they do not seek to avoid "the Court of Federal Claims' exclusive jurisdiction" by artfully framing their complaints as tort instead of contract suits.[55]

> (b) to supply services on behalf of the Party for consumption by the general public for: power generation or distribution, water treatment or distribution, telecommunications, or other similar services supplied on behalf of the Party for consumption by the general public; or
>
> (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams or pipelines or other similar projects; provided, however, that the infrastructure is not for the exclusive or predominant use and benefit of the government.

[53] Annex 9-L(A)(1). This provision provides that, even if the contract between the federal government entity and foreign investor/investment had a contractual provision that required litigation of any or all disputes in US courts, the TPP would override that exclusive forum selection clause and mandate arbitration of the dispute.

Annex 9-L(A) states:

> 1. An investor of a Party may not submit to arbitration a claim for breach of an investment agreement under Article 9.18.1(a)(i)(C) (Submission of a Claim to Arbitration) or Article 9.18.1(b)(i)(C) if the investment agreement provides the respondent's consent for the investor to arbitrate the alleged breach of the investment agreement and further provides that:
>
> (a) a claim may be submitted for breach of the investment agreement under at least one of the following alternatives:
>
> > (i) the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the Party of the investor are parties to the ICSID Convention;
> >
> > (ii) the ICSID Additional Facility Rules, provided that either the respondent or the Party of the investor is a party to the ICSID Convention;
> >
> > (iii) the UNCITRAL Arbitration Rules;
> >
> > (iv) the ICC Arbitration Rules; or
> >
> > (v) the LCIA Arbitration Rules; and
>
> (b) in the case of arbitration not under the ICSID Convention, the legal place of the arbitration shall be:
>
> > (i) in the territory of a State that is party to the New York Convention; and
> >
> > (ii) outside the territory of the respondent.

[54] See 28 U.S.C. §§ 1491(a)(1), 1346(a)(2). This law is referred to as the "Tucker Act". Tucker Act claims for $10,000 or less may also be litigated in federal district courts. Those claims, however, may only be reviewed on appeal in the Federal Circuit. See Union Pac. R.R. Co. v. United States ex rel. United States Army Corps of Eng'rs, 591 F.3d 1311, 1314-1315 (10th Cir. 2010).

[55] *Union Pac. R.R. Co., supra* n.54, at 1314.

This policy and practice of centralizing judicial authority "has an obvious purpose—uniformity" in interpretation, application, and development of principles and norms of US contract law.[56] This enables the federal government to "use the same language in its contracts ... and be confident that it will have the same contractual rights and obligations everywhere."[57]

The ISDS provisions in the TPP, however, abandon that policy, and allow international arbitral tribunals – not judges of the Federal Court of Claims – to interpret and apply US contract law. This gives ISDS tribunals the ability not even granted to other US state or federal courts to shape the meaning of US contract law and to issue decisions without any possibility of having their erroneous decisions appealed.

Other "Additions"

Many of the "upgrades and improvements" referred to by the USTR have been expressly or implicitly included in agreements since at least the NAFTA. These include the following:

> **USTR Claim: "Expert reports. A panel can consult independent experts to help resolve a dispute." (Point 14).**
>
> Similar language can be found in other treaties including the NAFTA (art. 1133), and US-Peru FTA (art. 10.24).
>
> **USTR Claim: "Binding interpretations. TPP countries can agree on authoritative interpretations of ISDS provisions that 'shall be binding on a tribunal.'" (Point 15).**
>
> This has been a common feature of US treaties since NAFTA (art. 1131), and can be an important mechanism for states to exert some control over arbitral tribunals. There appear, however, to be limits to its actual use. For example, although the provision has been included in the NAFTA and all other investment treaties/investment chapters concluded by the US since the NAFTA, this mechanism has only been used *once* to clarify the interpretation of a substantive protection. (It was used to clarify the meaning of FET under the NAFTA in 2001).
>
> **USTR Claim: "Consolidation. A panel can consolidate different claims that 'arise out of the same events or circumstances.' This protects against harassment through duplicative litigation." (Point 16).**

[56] *Id.* at 1315.
[57] *Id.*

While a useful provision, this was also included in the NAFTA (art. 1126) and has been a common feature of other US agreements concluded since that treaty (see, e.g., US.-Peru FTA, art. 11.25).

Conclusion

Overall, the US claims to have made a number of improvements to the ISDS system and investment protection standards included in the TPP. While reforms would of course be welcome, the changes that have been made to the TPP do not address the underlying fundamental concerns about ISDS and strong investment protections; in some cases, the changes represent just small tweaks around the margins, while in other cases, the provisions represent a step backwards. At their core, ISDS and investor protections in treaties establish a privileged and powerful mechanism for foreign investors to bring claims against governments that fundamentally affect how domestic law is developed, interpreted and applied, and sideline the roles of domestic individuals and institutions in shaping and applying public norms. For this reason, the TPP should drop ISDS altogether, or replace it with a new and truly reformed mechanism that addresses the myriad concerns that are still lurking in the TPP.

http://www.iatp.org/blog/201511/tpp-fine-print-biotech-seed-companies-win-again

TPP Fine Print: Biotech Seed Companies Win Again

Posted November 16, 2015 by Ben Lilliston

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After six years of secret negotiations, the dozen countries that make up the Trans Pacific Partnership (TPP) have finally made the text public. The full implications of the broad-reaching, 30 chapter, 5000-plus page deal will be analyzed intensely in the coming months leading up to a U.S. Congressional up or down vote. Big concerns about the deal's impact on public health, workers, the environment and the legal rights of corporations are already being raised. A close look at the Intellectual Property Rights (IPR) chapter shows how just a few lines in TPP can turn into a big win for an industry—in this case, the biotech seed industry.

The IPR chapter, a draft version was posted by Wikileaks last month, has already received considerable criticism because of its lengthy patent protection for drugs, which could lead to high costs of essential medicines. But the chapter also requires patent protection important to another sector—the seed biotech industry. Companies like Monsanto and Syngenta depend on strong patenting regimes to control the market for genetically engineered crops. The IPR chapter largely reflects the wish list that BIO, the biotech industry's powerful trade group, outlined when TPP negotiations began in 2009.

The IP chapter requires all 12 TPP countries to join a number of global intellectual property treaties. One of those treaties is the International Convention for the Protection of New Varieties of Plants 1991 (UPOV 91). That agreement updated the 1978 treaty in several important ways that emphasize the rights of seed companies over farmers' rights, according to an analysis by Public Citizen and Third World Network (TWN). UPOV91 requires IP protection to be provided for all plant varieties; it requires protection for 20 to 25 years; and it stops farmers and breeders from exchanging protected seeds, a common practice of farmers in many countries around the world.

Of the TPP countries, Brunei, Malaysia, Mexico and New Zealand are not yet members of the UPOV 91. Chile is also not yet a member, though it is already required to become a member under a previous Free Trade Agreement with the U.S. Under the TPP, these countries could face major changes to laws and rules that protect farmers' rights when it comes to plant breeding and seed saving. The TPP IPR chapter also requires any additional countries that join the TPP to become members of UPOV 91. Countries currently considering joining the TPP include South Korea, Indonesia, the Philippines and Taiwan—none of which are members of UPOV 91.

In order to join the UPOV91, countries have to apply to the UPOV91 Office of the Union, which then reviews the country's laws on plant variety protection and declares which laws need to be changed, or added, in order to come into compliance and join the convention. Malaysia has already gone through this process, and in order to join the treaty, they will have to change their laws in order to: lengthen the patent time protection for seed companies, prohibit farmers from exchanging seed they have saved and remove anti-biopiracy provisions which protect plants from patents.

Changes in plant patent laws could become very controversial in Mexico. Farm groups in Mexico, considered the birthplace of corn, are leading a campaign called "Sin Maíz, No Hay Paíz" (Without corn, there is no country) that advocates for a ban on GMO corn. They have been successful, and the ban is current facing a legal challenge. Farm organizations argue that the country's biodiversity and genetic resources are at risk from contamination of GMO corn. Monsanto hopes to double its sales in Mexico over the next five years if the ban is struck down.

Strong opposition may also arise in New Zealand, which currently has not approved any GMO crops for commercialization, requires any imported GMO foods to be labeled, and uses its GMO-free status as an export marketing tool. Brunei is just developing its regulatory framework for GMO crops.

The TPP also requires countries and any future country participants to join the Patent Cooperation Treaty (PCT) and the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, which would make it easier to apply for a patent, according to the Public Citizen/Third World Network analysis. Malaysia, New Zealand and Vietnam have not joined the Budapest Treaty.

The argument for patent protection is that it spurs innovation, but that assertion is questionable in the case of plants. A 2011 study looking at vegetable varieties over the last century found a "clear demonstration that massive amounts of innovation occur without the stimulus of patent or PVP law." In the U.S., where strong plant patent protection exists and GMOs for commodity crops are widely used, research published this year by Kansas State University found that U.S. cropping systems are becoming markedly less diverse and the "homogenization of agricultural production systems" could have "far-reaching consequences" for the food system.

Maintaining genetic diversity in crop and animal production is seen as a critical tool for adapting to climate change, according to a report published earlier this year by the FAO. The report concluded:

It is likely that climate change will necessitate more international exchanges of genetic resources as countries seek to obtain well-adapted crops, livestock, trees and aquatic organisms. The prospect of greater interdependence in the use of genetic resources in the future underscores the importance of international cooperation in their management today and of ensuring that mechanisms are in place to allow fair and equitable—and ecologically appropriate—transfer of these resources internationally.

The international battle over the patenting of plants by biotech companies versus the rights of farmers is not a new one. The biotech industry has won a favorable patent regime through free trade agreements, and through the World Trade Organization's TRIPS (Trade Related Aspects of Intellectual Property Rights) Agreement. Farmers have fought to protect their rights on seeds through the International Treaty on Plant Genetic Resources, which grants farmers the right to save and share seed. The conflict between these international regimes continues.

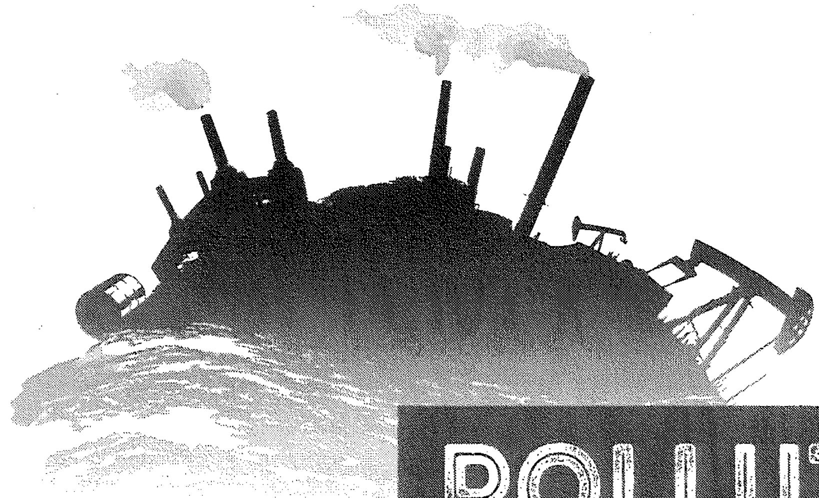
This past summer, the Alliance for Food Sovereignty in Africa (AFSA) strongly opposed an effort by some African governments to comply with UPOV 91 through stronger patent protection. According to AFSA, the initiative's "underlying imperatives are to increase corporate seed imports, reduce breeding activity at the national level, and facilitate the monopoly by foreign companies of local seed systems and the disruption of traditional farming systems." AFSA's concerns were consistent with a recent paper by Australian researchers looking at the impact of intellectual property law on food security in Least Developed Countries. The paper concluded that the one-size-fits-all approach to plant patents found in trade rules like TRIPS do not work in countries reliant on traditional agriculture.

The UN Special Rapporteur on the Right to Food has been particularly critical of trade agreements that require the implementation of UPOV 91, urging instead that countries undertake a Human Rights Assessment (including the Right to Food) prior to signing any trade agreements. In 2012, the FAO's Committee on Food Security's High Level Panel of Experts called for countries to adopt the International Treaty on Plant Genetic Resources for Food and Agriculture and urgently implement provisions on farmers' rights to conserve and curate genetic resources in order to adapt to climate change.

The U.S. government's requirement that countries join UPOV 91 as part of free trade agreements is starting to see resistance. Last year, Guatemala repealed plant variety legislation, known as the Monsanto law. That law had been passed in order for Guatemala to join UPOV 91 as required under the Central American Free Trade Agreement (CAFTA). The law had sparked massive protests from farmers and indigenous movements.

The TPP IPR chapter represents yet another in a long list of actions by the U.S. government to advocate on behalf of biotech seed companies—including a WTO challenge to European GMO regulations and using State Department attachés to pressure governments to accept GMOs. The industry's influence within the office of the U.S. Trade Representative (USTR) is considerable. USTR's Assistant Agriculture Specialist is a former VP at BIO, the industry's lobbying group. BIO also sits on the USTR's Advisory Committee on Intellectual Property and has had access to the TPP negotiations and text over the last six years.

The TPP's IPR chapter provides a glimpse into what this new mega free trade deal is all about. The chapter's requirement that countries grant patent protection for multinational biotech seed companies has little to do with trade and nothing to do with respecting farmers' innovations, their livelihoods or countries' food security. It is about asserting, in a very raw way, corporate power over sovereign nations and the farmers who live there.



POLLUTERS' PARADISE

DECEMBER 2015

How investor rights in EU trade deals sabotage the fight for energy transition

Avoiding catastrophic climate change is the defining challenge of our time. If we are to have a chance of preventing extremely dangerous levels of global warming, much of the world's fossil fuels – oil, coal and gas – must be left in the ground, unexploited. Societies need to move to an energy system based on renewable sources like sun, wind and water.

This colossal change will require strong action from public authorities. But their ability to introduce the right laws and regulations is severely constrained by a little-known but very powerful legal system. This international investment regime has ensnared many countries in its legal nets in the last decades.

Thousands of trade and investment agreements signed between countries allow multinational companies to sue governments if changes in policy – even in rules to protect the environment or fight climate change – are deemed to reduce their profits. By the end of 2014, there were 608 of these investor lawsuits known to be taking place within international tribunals. The costs of these suits weigh heavily on governments, in the form of hefty legal bills and weakened social and environmental regulations.

A growing number of investor-state lawsuits target government initiatives in the energy sector, ranging from the phase out of nuclear power to moratoria on environmentally-risky shale gas development ('fracking'). As law firms make money each time that an investor sues a state, this encourages more and more corporate lawsuits: for example, over legislation in the renewables sector.

Despite the evident risk to energy transition, even more trade and investment deals are in the pipeline that would empower corporations to challenge strong government action on climate change. Amongst them is the Transatlantic Trade and Investment Partnership (TTIP), currently under negotiation between the EU and the US, and the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, for which ratification could start in 2016.

Yet while big polluters are lobbying heavily for these deals, a growing movement is turning against the corporate power grab. Indeed, there is now more public scrutiny and debate about trade and investment agreements than there has been in years.

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Association Internationale de Techniciens, Experts et Chercheurs

Corporate Europe Observatory

Power Shift

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Box 1: ENERGY POLICIES UNDER ATTACK IN INVESTOR-STATE DISPUTES

Corporations against environmental restrictions on coal – Vattenfall vs. Germany I: In 2009, Swedish energy multinational Vattenfall sued the German government, seeking €1.4 billion in compensation for environmental restrictions imposed on one of its coal-fired power plants. The case, which was based on the Energy Charter Treaty, a multilateral agreement about investments in the energy sector, was settled after Germany agreed to water down the environmental standards.[1]

Corporations against phasing out nuclear energy – Vattenfall vs. Germany II: In 2012, Vattenfall launched a second lawsuit via the Energy Charter Treaty, seeking €4.7 billion for lost profits related to two of its nuclear power plants. The legal action came after Germany decided to phase out nuclear energy, following the Fukushima nuclear disaster. The German government has already spent over €3.2 million to defend the case, and expects a total of €9 million in legal costs.[2]

Corporations against fracking moratoria – Lone Pine vs. Canada: In 2011, the government of the Canadian province of Quebec responded to concerns over water pollution by implementing a moratorium on the use of hydraulic fracturing ('fracking') for oil and gas exploration. In 2012, the Calgary-based Lone Pine Resources energy company filed an investor-state lawsuit based on the North American Free Trade Agreement (NAFTA), challenging the moratorium. Lone Pine, which filed the case via an incorporation in the US tax haven Delaware, is seeking US$109.8 million plus interest in damages.[3]

Corporations against 'buy local' rules – Mesa Power vs. Canada: In 2011, Texas-based energy company Mesa Power filed a NAFTA claim against Canada for a total of CAD$775 million. The case concerns the Province of Ontario's Green Energy and Green Economy Act. Amongst other objections, Mesa Power is challenging 'buy local' requirements obliging wind and solar firms to source parts of their materials from local suppliers in exchange for access to certain support schemes.[4] These rules helped to maximise the economic and social benefits of green investments in the region, which initially helped gather broad political support for the Act.

Corporations against research requirements – Mobil Investments and Murphy Oil vs. Canada: In 2007, Mobil Investments (a subsidiary of the world's richest energy company, US oil giant ExxonMobil) and Murphy Oil Corporation sued Canada under NAFTA, challenging a 2004 requirement adopted by the Province of Newfoundland and Labrador that off-shore oil firms must invest a portion of revenues in local research and development. NAFTA (implemented in 1994) included a 'reservation' for such requirements. But the arbitration tribunal ruled against Canada, arguing that the research rules were illegal under NAFTA and that the reservation only protected rules that were in place in 1994. Canada was ordered to pay CAD$17.3 million plus interest in compensation.[5]

Corporations against oil taxes – Perenco vs. Ecuador: In 2008, Anglo-French company Perenco sued Ecuador based on its bilateral investment treaty with France. The case is one of several concerning the country's tax on windfall profits in the oil sector. While the tribunal has already ruled against Ecuador (the compensation sum is still to be determined), it has also indicated that it holds Perenco liable for breaching Ecuadorian environmental law. Ecuador had claimed that Perenco's oil fields had created an "environmental catastrophe" in the Amazon.[6]

More and more investment disputes are being filed (see Box 2 on page 4), and many of them are initiated by fossil fuel and energy companies. As Lexpert, an online news portal about the business of law, recently noted: "If a single industrial sector might be called the cradle of international ...arbitration, it would be the energy business. Especially oil and gas."[7] In short, the energy sector is driving the growth in international arbitration.

> "Energy companies are particularly keen to turn to arbitration."
> *Tom Sikora, counsel with ExxonMobil*[8]

In November 2015, nearly half of all cases pending at the World Bank's International Centre for Settlement of Investment Disputes (ICSID), where most investor-state disputes are tried, related to oil, mining, gas, electric power and other energy.[9] Challenges relating to the generation and supply of energy have surged in recent years: around 30 per cent of the new cases filed at ICSID in the last two years were energy-related – compared to between 5 and 13 per cent in the previous years.[10] Looking at the full history of all known investor-state lawsuits globally, the Energy Charter Treaty – a multilateral treaty signed after the Cold War to integrate the Soviet and Eastern European energy sectors into Western markets – has become the most frequently invoked legal basis for the corporate claims.[11]

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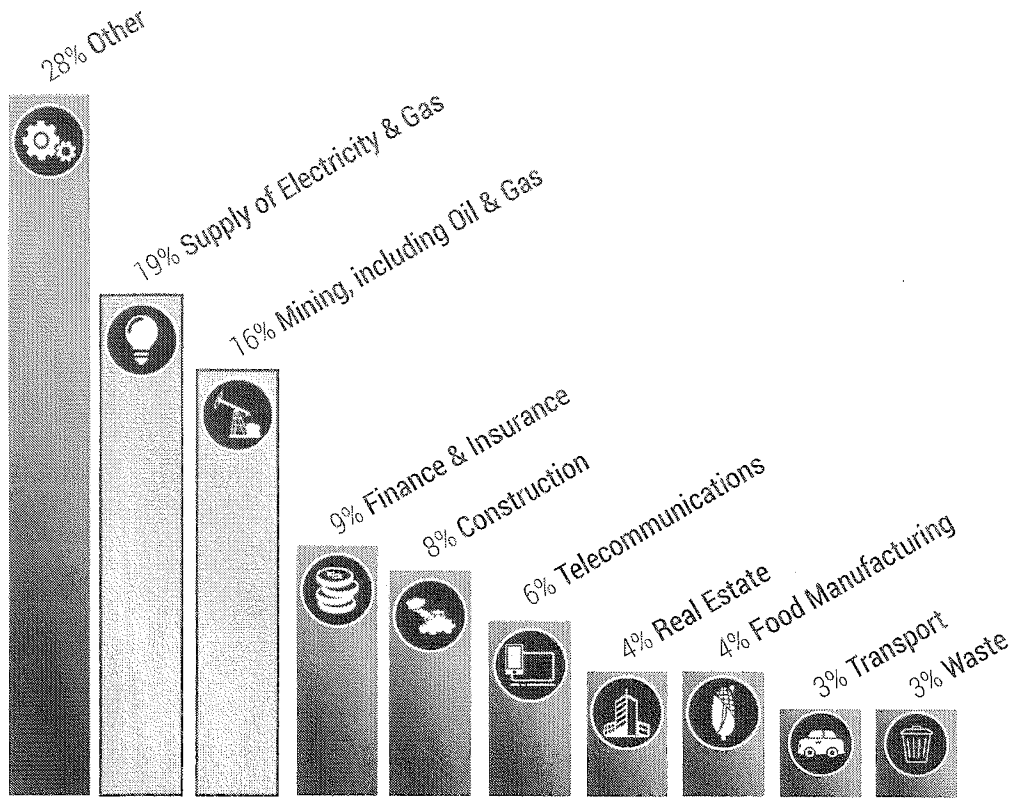
35 PER CENT OF ALL INVESTOR-STATE CLAIMS RELATE TO OIL, MINING, GAS AND ELECTRICITY

Source: UN Conference on Trade and Development (UNCTAD)[12]



> "As the anti-fossil fuel forces gain strength, extractive companies are beginning to fight back using a familiar tool: the investor protection provisions in free trade agreements."
> *Naomi Klein, journalist and author*[13]

Fossil fuel and energy companies have used these lawsuits to challenge environmental restrictions on coal-fired power plants, government decisions to phase out nuclear energy, and fracking moratoria (see Box 1). Polluters have also used the threat of costly investor lawsuits in attempts to pressure governments to accept controversial energy projects such as the Keystone XL oil pipeline from Alberta, Canada to the US state of Nebraska.[14] Now these same companies are enthused about the prospect of far-reaching rights for foreign investors in upcoming trade agreements, such as the EU-US free trade deal TTIP and the EU-Canada CETA.

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Box 2: WHAT YOU NEED TO KNOW ABOUT INVESTOR-STATE DISPUTE SETTLEMENT (ISDS)[15]

- States have signed more than **3,200** international investment treaties.
- These treaties give **sweeping powers** to foreign investors, including the ability to file lawsuits directly against states in international tribunals in the case of alleged violations of the treaties' provisions. These international lawsuits usually circumvent local courts.
- Investor-state cases have mushroomed in the last two decades from a total of three known treaty cases in 1997 to a record high of over **50** new claims filed per year in 2012 and 2013.
- Globally, **608** investor-state disputes were counted at the end of 2014, but due to the opacity of the system the actual figure could be much higher.
- Cases are usually decided by a tribunal of three private lawyers, the **arbitrators**, who have a financial stake in the system and a number of conflicts of interest.[16]
- Investors have triumphed in **60 per cent** of investor-state cases where there has been an actual decision on the merits of the case, whereas states have won only **40 per cent** of the time.
- Award figures may reach up to 10 digits. The highest known damages to date, **US$50 billion**, were ordered against Russia, to the former majority owners of oil and gas company Yukos.
- To date, the main financial beneficiaries have been large companies and rich individuals, with **64 per cent** of the money from known awards of **over US$10 million** having gone to companies with over **US$10 billion** in annual revenue. Another **29 per cent** of these awards have gone to companies with between **US$1-10 billion** in annual revenue, or to individuals with over **US$100 million** in net wealth.[17]

POLLUTERS LOBBYING FOR CORPORATE RIGHTS

US-based oil and gas multinational Chevron, for example, is lobbying for "a world-class investment chapter" in TTIP. The company has had several meetings behind closed doors with the EU's TTIP negotiators.[18] Chevron focused its entire response to the US government's TTIP consultation on investment protection, in its opinion "one of our most important issues globally".[19] Chevron is currently suing Ecuador to avoid having to pay US$9.5 billion to clean up oil drilling related contamination in the Amazonian rainforest, as ordered by Ecuadorian courts. The case has been lambasted as an "egregious misuse" of investment arbitration as a way to evade justice.[20]

> "A strong investment protection regime within the TTIP would allow us and other US businesses to better mitigate the risks associated with large-scale, capital-intensive, and long-term projects overseas."
> *Chevron to US negotiators[21]*

> "Investment access and protection rules must be included in the TTIP, especially Investor-to-State Dispute Settlement (ISDS)."
> *American Petroleum Institute to EU negotiators[22]*

In its contribution to the European Commission's consultation on investor rights in TTIP, Chevron has attacked proposals to reform the system so as to preserve countries' right to regulate,[24] and has even proposed to expand the corporate privileges granted in TTIP.[23] Several other corporate lobby groups in which big oil and energy play an important role have put forward similar positions, amongst them the International Association of Oil and Gas Producers ("working on behalf of the world's oil & gas exploration and production companies"), the European employers' federation BusinessEurope (providing special services to companies such as Areva, EDF, Enel, ExxonMobil, General Electric, Lukoil, Repsol, Shell, Statoil, and Total), the Transatlantic Business Council (representing over 70 Europe and US-based multinationals including BP, Chevron, ExxonMobil, and Statoil), and the European Roundtable of Industrialists (bringing together 50 bosses of EU-headquartered multinationals such as Shell, Repsol, Eni, Engie, Total, and E.ON).[25]

MAKING ACTION AGAINST CLIMATE CHANGE ILLEGAL

If big business has its way, it will become close to impossible for governments to take the necessary measures to prevent catastrophic global warming. Such measures would massively bite into the profits of fossil fuel and energy companies, potentially violating the investor privileges in treaties such as the proposed TTIP and CETA, and putting governments on the hook for billions.

Take the existing oil, gas and coal reserves. Climate scientists agree that a large share of these resources needs to stay in the ground if we do not want to wreck the planet. They estimate that if we are to stay below a total global temperature increase of two degrees, humankind can only emit 565 more gigatons of CO_2 into the atmosphere. However the amount of carbon that is already in the reserves of the major oil, gas and coal companies is much higher than that, totalling 2,795 gigatons. This means that the fossil fuel industry has five times as much oil, coal and gas assets in its books as climate scientists think is safe to burn.[26] Preventing the exploitation of these assets – for example through hefty taxes, by forcing plants to close down, or by adopting other rules about the extraction, sale or trade of dirty fuels – would profoundly eat into corporate profits. And this in turn would potentially make governments liable for breaching several provisions in trade and investment agreements (see Box 3 on page 6).

> "Current trade and investment rules provide legal grounds for foreign corporations to fight virtually any attempt by governments to restrict the exploitation of fossil fuels."
> *Naomi Klein, journalist and author*[27]

Or take the example of renewable energy. Getting us off fossil fuels and onto the green energy path will require a range of aggressive steps – from price guarantees to straight subsidies – in order to give green energy a fair shot at competing. But these types of regulatory measures could be penalised, as they violate the standard provisions in international investment treaties (see Box 3). As one of the world's busiest law firms in investor-state lawsuits, K&L Gates, writes: "With respect to ... changes in the renewable energy sector, international investment treaties could be of assistance ... in one of the following two ways. They could be used either as a tool of pressure against further governmental action in the green energy sector, or, alternatively, they could be considered as an exit strategy, which allows an investor to recoup a part or the totality of its loss associated with the frustrated project."[28]

LEGAL SHARKS CIRCLING ENERGY TRANSITION

Several international law firms are already alerting multinational corporations to the investment arbitration regime as a potential route to defend their profits in the energy sector. For the lawyers, this is a great opportunity to trawl for business. Due to the explosion in the number of international investment disputes against states over the past two decades, investment arbitration has become a money-making machine in its own right. Legal costs for investor-state disputes average over US$8 million per suit, and can exceed US$30 million in some cases. The tabs racked up by elite law firms can be US$1,000 per hour, per lawyer – with whole teams handling cases. The arbitrators, the lawyers who sit on the tribunals that ultimately decide the cases, also earn handsome fees: at the most frequently used tribunal for investor-state claims, the ICSID, arbitrators earn US$3,000 per day.[29]

> "Should you let a group of foolish lawyers interfere with saving the planet?"
> *Nobel Prize-winning economist Joseph Stiglitz*[30]

DISSUADING GOVERNMENTS FROM CLIMATE ACTION

In the context of energy crises and transitions, arbitration lawyers have also encouraged their clients to use the threat of a costly lawsuit as a way to scare governments into submission. Law firm Steptoe & Johnson, for example, praised investment protection "as a highly important tool" for energy producers and their lobby groups "in advocating against legislative changes to renewable energy regulations".[31] These changes could be anything, from renewable energy targets to subsidies.

Global law firm Dentons' 'practical tip' for investors affected by energy subsidy cuts reads like this: "In considering whether to bring a claim ... investors should bear in mind that around 30 to 40 per cent of investment disputes typically settle before a final award is issued. Commencing a claim can create leverage to help the investor reach a satisfactory result."[32]

> "Chevron argues that the mere existence of ISDS is important as it acts as a deterrent."
> *EU Commission official about a meeting with Chevron on ISDS in TTIP, 29 April 2014*[33]

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One can easily imagine how companies, seeing their extractive dreams threatened by democratic opposition or tough anti-pollution regulations, could file, or threaten to file, costly investor lawsuits to dissuade governments from strong action to combat climate change. French multinational Total and US-based oil and gas company Schuepbach, for example, have already challenged the introduction of a ban on fracking in the French courts.[34] The inclusion of investor-state dispute settlement in more trade deals such as TTIP would give corporations an extra tool – and in some cases a second chance – to challenge public interest policies.

"It may well be possible to use investment treaty protections as a tool to assist lobbying efforts to prevent wrongful regulatory change."

Law firm Steptoe & Johnson on "Foreign Investors' Options to Deal with Regulatory Changes in the Renewable Energy Sector"[35]

Box 3: A HIT LIST OF MEASURES IN THE ENERGY SECTOR FOR INVESTMENT ARBITRATION LAWYERS

Renewable energy targets: In a briefing about "foreign investors' options to deal with regulatory changes in the renewable energy sector", US-based law firm Steptoe & Johnson has explained to producers of dirty energy that they "may well have strong arguments" for making the case that the introduction of binding production targets for renewable energy violated their "legitimate expectations that the proportion of energy from non-renewable sources would not be decreased". According to Steptoe, green energy targets could result in a breach of the 'fair and equitable treatment' standard in investment treaties, potentially paving the way for multibillion-euro compensation awards.[36]

Subsidy cuts: Dozens of global law firms have alerted their multinational clients to "international investment treaties as a possible shield against government cutbacks in subsidies for the green energy sector",[37] specifically mentioning curtailed incentive schemes in the renewables sector in Spain, the Czech Republic, Italy, Romania, Greece, and Bulgaria (see Box 4).[38] The arguments put forward by the lawyers – that the policy changes violate the 'fair and equitable treatment' standard and amount to indirect expropriation in that their effect is to deprive the investment of its economic substance – could easily apply to cutbacks in state support for fossil fuels such as coal.

Rejection of dirty energy projects: When indications mounted in 2015 that US President Obama would reject the controversial Canada-US Keystone XL pipeline due to environmental concerns, the arbitration industry started to bang the war drums. "With veto, it's time for the NAFTA option," wrote investment lawyer Todd Weiler. He encouraged project developer TransCanada to sue the US for discrimination (because the US had previously approved pipeline projects that were similar to Keystone) and for the violation of NAFTA's fair and equitable treatment standard ("which includes a prohibition against exercising legitimate regulatory authority for an improper purpose" such as pleasing "the Democratic Party's most generous campaign donors"). Weiler suggested that TransCanada's lawyers should quickly "pose awkward discovery questions" and demand documents from the US, as "refusal to fully comply with such demands can be construed as an admission of the facts in the claimant's case."[39]

Fossil fuel taxes: Investment lawyers regularly alert companies to international arbitration as a potential forum to challenge taxes on fossil fuels. As a lawyer of US-based law firm King & Spalding explains: "The economics of an independent power project or of an oil and gas project can be severely impacted if a host State changes the tax regime applicable to the project after an investor has committed its capital." While some agreements explicitly exclude tax matters from their scope, according to the lawyer, contracts with "specific stabilization commitments" can fill the gap and protect investors from "adverse changes" in tax regimes.[40] One can easily see how such arguments could be used to squash hefty taxes intended to prevent the exploitation of more fossil fuels.

Exits from dirty energy: When Swedish energy firm Vattenfall sued Germany over its phase out of nuclear power (see Box 1 on page 2), law firm Baker & McKenzie outlined "the possible routes that may be taken in the English courts if the UK government were to take a similar course of action."[41]

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Box 4: COMBATING CLIMATE CHANGE THROUGH INVESTMENT ARBITRATION?

Several EU states are currently being sued over rolled-back incentives for renewable energy production which proved too costly in times of economic crises. Spain is the defendant in more than 20 known claims, the Czech Republic in seven, Italy in three and Bulgaria in two. Investment lawyers have referred to these and other cases to point out that investor-state claims could be an effective tool to force states to take the necessary steps to combat climate change.[42]

Renewable energy cooperatives and environmental organisations have indeed condemned the Spanish and other governments for curbing subsidies to an industry that is seen as a real alternative to dirty energy and the climate crisis. Ordinary citizens who had invested in the sector were also massively affected by the cuts in support schemes. However, the general population has no recourse to investor-state arbitration, while powerful international investors have the resources and legal avenues to sue.

It is also important to note that several of the lawsuits in the renewables sector were launched by speculative funds trying to make windfall profits. Even though they invested when the countries were already in full-blown crisis mode and were busy cutting the support schemes, the funds are now claiming that their expectations of profits were undermined by the change in government policy.[43] This speculative use of investment protection is fostered by specialised companies such as European Solar Holdings, which advertises itself as a "vehicle for yield-seeking investors into renewable energy assets in the EU" with the "strongest possible investment protection currently available".[44] But state support should go to local and national renewable energy initiatives, and not to international investment funds seeking to ensure big profits and risk-free business protected by investment agreements.

Also, private equity investors and investment fund managers are interested in businesses that yield high returns, and not in ethical investment. It just happened that this business was renewable energy in countries like Spain. Ian Simm, Chief Executive of Impax Asset Management, one of the funds suing Spain, puts it clearly: "We don't have an ethical mandate per se. ... We're trying to make money for investors in this area [energy, water, food and waste]. We are often attractive for ethical investors, because what we do fits their objectives, but we also manage funds for investors who would say they are agnostic on ethical investing, at best! They're attracted by exposure to a high growth area. ... They ought to be able to make good, if not better, returns in the long term from this area than from anything else."[45]

As a result, other analysts have highlighted the risks that investment arbitration poses to countries' ability to combat climate change. Gus van Harten, an investment law expert teaching at the Osgoode Hall Law School in Toronto, Canada, has argued that "faced with risks of uncapped financial liability due to ISDS claims, states may be deterred from implementing measures to fulfil their climate change responsibilities". He has developed an exemption clause intended to protect a future climate agreement from the adverse affects of investor-state dispute settlement.[46] In October 2015, the European Parliament adopted a resolution including this 'carve-out'.[47]

> "Faced with risks of uncapped financial liability due to ISDS claims, states may be deterred from implementing measures to fulfil their climate change responsibilities."
> *Gus van Harten, Professor at Osgoode Hall Law School*

GROWING PUBLIC OUTCRY

As corporate lawyers and dirty energy producers lick their lips in anticipation of more rights for foreign investors in trade deals such as TTIP and CETA, a growing movement around the world is becoming attuned to the democratic threat represented by these treaties. Indeed, there is now more public scrutiny and debate about trade and investment agreements than there has been in years.

More than 3.2 million people across the EU have signed a petition against TTIP and CETA "because they include several critical issues such as investor-state dispute settlement ... that pose a threat to democracy and the rule of law".[48] When the European Commission organised a public consultation on the issue in 2014, the vast majority of the 150,000 contributions protested against the proposed excessive rights for foreign investors in TTIP. It was not only trade unions, consumer and health groups, environmentalists, and digital rights activists that spoke out, but businesses and governments as well.[49]

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The US National Conference of State Legislatures, which represents the legislative bodies in all 50 states, has also announced that it "will not support any [trade agreement] that provides for investor-state dispute resolution" because it interferes with their "capacity and responsibility as state legislature to enact and enforce fair, nondiscriminatory rules that protect the public health, safety and welfare, assure worker health and safety, and protect the environment".[50]

> "Why create these rigged, pseudo-courts at all? What's so wrong with the US judicial system? Nothing, actually."
> *Elizabeth Warren, Democratic Senator from the United States*[51]

Some governments, too, have realised the injustices of investment arbitration and are trying to get rid of the system. South Africa, Indonesia, Bolivia, Ecuador and Venezuela have terminated several bilateral investment treaties. South Africa has developed an investment bill that does away with some of the fundamental and most dangerous clauses in international investment law. India's new draft model investment treaty does the same.[52] In Europe, Italy has withdrawn from the Energy Charter Treaty (ECT), notably after having been hit by ECT-based claims in the renewables sector.[53]

A GLOBAL CORPORATE BILL OF RIGHTS

Still, many of our governments are determined to hand out even more dangerous legal weapons to corporations in the form of new and expanded trade deals. The CETA deal between the EU and Canada, for which ratification could start in 2016, empowers foreign investors to bypass local courts and sue states directly in international tribunals when democratic decisions impact their expected profits.[54] The Trans-Pacific Partnership (TPP), which was recently concluded by the US and 11 other countries from the Pacific Rim, does the same.[55] The US government and the European Commission seem determined to enshrine similarly excessive investor rights in the proposed TTIP.

DESPITE THE REFORM TALK, ISDS IS AS ALIVE AND DANGEROUS AS EVER

In the face of fierce opposition to the investor rights provisions in agreements such as CETA and TTIP, the European Commission and some EU member states have come up with a number of proposals for 'reforming' the system. But these proposals do not reduce the risk that exclusive corporate rights pose to democracy, public budgets and public policy, including in the energy sector. Here are four reasons why:

1. ***The EU's proposals contain the same substantive investor rights that corporations have been referring to when challenging measures to protect the public interest in previous cases.*** Nothing in the EU's proposals would stop investors from attacking policies such as fracking moratoria, phase-outs of dirty energy, or measures to rapidly move away from fossil fuels.

Box 5: WHAT DIFFERENCE DO CETA AND TTIP MAKE?

While existing trade and investment treaties already severely limit the policy space that governments have to fight climate change, the inclusion of investor-state dispute settlement (ISDS) in CETA and TTIP would massively expand the investment arbitration system – and multiply liability and financial risks for governments on both sides of the Atlantic.

- So far, only **9** EU member states, all of them Eastern European, have a bilateral investment treaty with the US;[56] only **8** have one with Canada.[57] These treaties cover a mere one percent of US and Canadian investment in the EU. The investor rights included in CETA and TTIP would bring that coverage to 100 per cent.
- Of the **51,495** US-owned subsidiaries currently operating in the EU, more than **47,000** would be newly empowered to launch ISDS attacks on European policies and government actions.[58]
- With CETA, **four out of five** US firms operating in the EU – that is a total of **41,811** – could become eligible for an ISDS case against the EU and its members if investments are structured accordingly.[59]
- EU, US and Canadian companies are already the most frequent users of investment arbitration. They are responsible for launching **over 80 per cent** of all known investor-state disputes globally.[60]
- A number of mega treaties currently under negotiation (including TTIP) are together estimated to expand ISDS coverage to **over 80 per cent** of the world's investment flows – from a mere **15-20 per cent** coverage today despite thousands of existing treaties.[61]

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2. ***Nothing in CETA or in the EU's TTIP proposal would stop governments from 'voluntarily' repealing measures when a lawsuit has been filed or threatened by a deep-pocketed company.*** Examples of such 'regulatory chill' include the watering down of environmental restrictions for a coal-fired power plant when Germany settled the first Vattenfall claim (see Box 1 on page 2), as well as New Zealand's announcement that it will delay its 'plain tobacco packaging' legislation until tobacco giant Philip Morris' claim against Australia's anti-smoking rules has been resolved.[62]

3. ***The people deciding future CETA and TTIP lawsuits will have strong incentives to interpret the law in favour of the investor,*** as the arbitrators (re-labelled 'judges' in the Commission's latest proposal for TTIP) are paid per case, usually earning US$3,000 a day. In a one-sided system in which only investors can sue, this is a strong incentive for pro-investor rulings that pave the way for additional future claims – and more appointments, money and power for the arbitrators.

4. ***Neither CETA nor the Commission's TTIP proposal contain meaningful measures to reduce the risks of investor-state disputes for public budgets.*** Future damages awards could amount to serious raids on public budgets (see Box 2 on page 4). Tribunals could arguably even demand compensation for expected future profits.

Overall, the EU's 'reforms' of the investment arbitration regime do not reduce the risks for public interest legislation, taxpayers and democracy. They are purely an attempt to salvage an increasingly-contested legal regime, concocted to enrich a small elite, by making it more acceptable with reforms around the edges.[63]

"If the trade rules don't permit all kinds of important measures to deal with climate change – and they don't – then the trade rules obviously have to be rewritten. Because there is no way in the world that we can have a sustainable economy and maintain international trade rules as they are. There's no way at all."

Steven Shrybman, lawyer[64]

HOW TRADE TRUMPS THE PLANET

Extreme investor rights are not the only elements in international trade deals with the potential to sabotage energy transitions. The aggressive protection for patents in the intellectual property sections of these agreements impede the free transfer of green technologies. Public procurement provisions can stand in the way of 'buy local' renewables programmes, which are often needed to convince local politicians to support green energy. Energy chapters like the one foreseen in TTIP can prevent restrictions on oil, coal and gas exports, locking in yet more fossil fuel dependency. And TTIP's proposed regulatory cooperation chapter could give corporations extensive new rights that could kill any prospective energy transition measures at birth – from strict energy efficiency standards to financial rules on dirty energy.[65]

In fact, the green energy programmes needed to lower global emissions have increasingly been challenged under the World Trade Organisation (WTO). The US for example has attacked China's wind subsidy programme as well as India's Solar Mission. India has in turn taken aim at green energy programmes in the US, and China has objected to various renewable energy programmes in the EU. And Japan and the EU have challenged the Green Energy and Green Economy Act in the Canadian province of Ontario, which has also been targeted in an investor-state dispute (see Box 1 on page 2).

"This doesn't change anything because the standards on the basis of which judgements are rendered remain the same."

Nigel Blackaby, lawyer with Freshfields on the EU's proposal for an investment court in TTIP[66]

NO MORE SPECIAL RIGHTS FOR POLLUTERS

It is high time that governments, parliaments, and the public grasp the political and financial risks of the existing trade and investment regime. In a time when all attention should be focused on averting a global climate catastrophe, there is simply no space for agreements that would send emissions soaring and make many solutions to climate change illegal. Existing treaties that allow private companies to sue governments over laws that impinge on their profits – from tough antipollution regulations to the bold steps needed to move to green energy – should be abolished, and plans for supplemental corporate bills of rights in proposed treaties such as TTIP and CETA should be axed.

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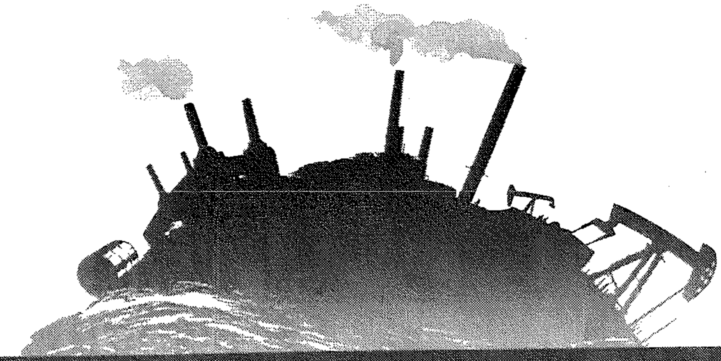

Published by Association Internationale de Techniciens, Experts et Chercheurs (AITEC), Corporate Europe Observatory (CEO), PowerShift and the Transnational Institute (TNI)

Amsterdam/ Berlin/ Brussels/ Paris
December 2015

This publication was made possible through European Commission funding to the project "Making EU Investment Policy work for Sustainable Development". The European Commission can not be held responsible for the content of this publication.

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http://www.commondreams.org/newswire/2015/12/18/hidden-omnibus-comply-world-trade-organization-congress-kills-country-origin

Hidden in the Omnibus: To Comply With World Trade Organization, Congress Kills Country-of-Origin Meat Labels That 90 Percent of Americans Support

For Immediate Release
Friday, December 18, 2015

WASHINGTON - Congress' elimination of country-of-origin meat labels (COOL) for pork and beef that consumers rely on to make informed choices about their food is a glaring example of how trade agreements can undermine U.S. public interest policies, Public Citizen said today.

A week after the World Trade Organization (WTO) approved $1 billion in annual trade sanctions against the United States unless and until the policy was terminated, a provision to kill the popular consumer labels for beef and pork was tucked into the omnibus package passed today. Three weeks ago, the WTO also issued a final ruling against U.S. dolphin-safe tuna labels, ordering the elimination of the popular environmental policy.

Claims that trade pacts cannot harm U.S. consumer and environmental policies are a mainstay of the administration's effort to build support for the Trans-Pacific Partnership (TPP), which faces opposition from an unprecedentedly diverse coalition of organizations and members of Congress.

In his May 2015 speech at Nike headquarters, President Barack Obama said that critics' warning that the TPP could "undermine American regulation – food safety, worker safety, even financial regulations" was "just not true." He said: "They're making this stuff up. No trade agreement is going to force us to change our laws."

"Today's elimination under orders by the WTO of consumer labels we all rely on in the grocery store makes clear that trade agreements can – and do – threaten even the most favored U.S. consumer protections," said Lori Wallach, director of Public Citizen's Global Trade Watch.

"The omnibus included a dangerous rider that will gut our nation's mandatory Country of Origin Labeling laws. This is wrong. We cannot let trade agreements change our rigorous standards - something that will only become more commonplace under the proposed Trans-Pacific Partnership," said U.S. Rep. Rosa DeLauro (D-Conn.), a leading congressional advocate for consumer protection and food safety.

Implementation of the TPP would dramatically increase the prospect of U.S. public interest policies being undermined. The TPP includes constraints on food safety that extend beyond the

WTO. The pact would roll back the environmental standards included even in George W. Bush's trade pacts and would empower individual foreign corporations directly to launch attacks on public interest policies using the TPP's controversial investor-state dispute settlement regime.

"These WTO rulings should unite lovers of Flipper and haters of mystery meat with the majority of Americans whose jobs and wages would be undermined by the TPP to ensure Congress does not approve the pact," Wallach said.

Today's congressional action is not a first. In response to previous WTO rulings, the United States has rolled back U.S. Clean Air Act regulations on gasoline cleanliness rules successfully challenged by Venezuela and Mexico and Endangered Species Act rules relating to shrimping techniques that kill sea turtles after a successful challenge by Malaysia and other nations. The U.S. also altered auto fuel efficiency (Corporate Average Fuel Economy) standards that were successfully challenged by the European Union.

After the final WTO merits ruling against COOL in May, Obama's Agriculture Secretary Tom Vilsack also contradicted Obama's claim that trade pacts cannot undermine domestic consumer policies, announcing: "Congress has got to fix this problem. They either have to repeal or modify and amend it."

COOL requires meat sold in the United States to be labeled to inform consumers about the country in which animals were born, raised and slaughtered. COOL is supported by 90 percent of Americans, according to a recent poll, but has been under attack by Mexican and Canadian livestock producers and the U.S. meat processing industry.

The Canadian and Mexican governments challenged the policy and in 2011 won an initial WTO ruling. In 2013, the Obama administration altered COOL to remedy the WTO violations. The new rules provided consumers more information. Mexico and Canada had sought to weaken COOL and obtained a WTO ruling against the new policy and then authorization to impose more than $1 billion in trade sanctions annually against the United States until it weakened or ended COOL.

Background: Congress enacted mandatory country-of-origin labeling for meat in the 2008 farm bill. This occurred after 50 years of U.S. government experimentation with voluntary labeling and efforts by U.S. consumer groups to institute a mandatory program.

Canada and Mexico claimed that the program violated WTO limits on what sorts of product-related "technical regulations" WTO signatory countries are permitted to enact. In November 2011, the WTO issued an initial ruling against COOL. Canada and Mexico demanded that the United States drop its mandatory labels and return to a voluntary program that would not provide U.S. consumers the same level of information as the current labels. The United States appealed.

In June 2012, the WTO Appellate Body affirmed that COOL violated WTO rules. In response, the U.S. government altered the policy. However, instead of watering down the popular program as Mexico and Canada sought, the U.S. Department of Agriculture's new May 2013 rule strengthened the labeling regime. By providing more information to consumers, the new rule remedied the violations cited in the WTO ruling. Mexico and Canada then challenged the new U.S. policy. In May 2015, the WTO ruled that the new U.S. policy still violated WTO rules. Mexico and Canada initiated a WTO process to determine the level of trade sanctions that they could impose on the United States until it eliminated or weakened COOL.

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Public Citizen is a national, nonprofit consumer advocacy organization founded in 1971 to represent consumer interests in Congress, the executive branch and the courts.

http://www.theage.com.au/comment/the-dismissal-of-a-case-against-plain-cigarette-packaging-is-good-news-for-taxpayers-20151218-glrb53.html

The dismissal of a case against plain cigarette packaging is good news for taxpayers

December 20, 2015

Kyla Tienhaara

Australia has prevailed in an international legal dispute brought by tobacco giant Philip Morris. This is good news for the government and for taxpayers, who now won't have to pay a penny to the company in compensation. The government and its legal team should be congratulated for their success and for standing up for health policy in the face of multiple legal challenges.

However, ultimately the decision is more a victory for common sense than a vindication of the government's plain packaging policy. And for several reasons, it provides cold comfort to anyone concerned about investor-state dispute settlement.

For those not familiar with the case, the basics facts are as follows. In 2010, the Labor federal government announced a new policy requiring that all tobacco products be sold in dull brown packages with large health warnings and no logos or other branding except for the name of the product in a plain and simple font. The Tobacco Plain Packaging Act was passed into law in December 2011.

Several tobacco companies accused the government of "expropriating" their intellectual property and launched a case in the High Court. The High Court ruled against the companies in 2012. Five countries (allegedly at the behest of tobacco companies) also launched trade disputes against Australia in the World Trade Organisation. Ukraine has suspended its lawsuit but the others have yet to be resolved.

As if that weren't enough, Philip Morris also initiated separate international arbitration proceedings in June 2011 through ISDS. How it did this is crucial to understanding yesterday's news.

Philip Morris is ostensibly an American company. However, there is no ISDS clause in the Australia-US free trade agreement and the Trans Pacific Partnership was not yet signed when the plain packaging legislation was introduced. The TPP text was only released in November 2015 and has yet to be ratified or come into force. In any case, despite fierce lobbying, the TPP specifically excludes ISDS cases related to the regulation of tobacco products.

With no clear path to arbitration, Philip Morris took the extraordinary measure of restructuring its investment through an Asian subsidiary, based in Hong Kong, in order to take advantage of a bilateral investment treaty signed with Australia in 1993.

While much of what happened in the ISDS case remains under the wraps of a confidentiality order, it appears that Australia was able to convince the tribunal that Philip Morris should not be permitted to plead the merits of its case because it engaged in "treaty shopping". In other words, it was an American investor when plain packaging was introduced and only adopted a "flag of convenience" in order to access arbitration.

Treaty shopping is a serious problem in international arbitration, and tribunals have come to different conclusions about whether or not to permit it. As such, any decision that rejects a company's efforts to shift nationality in this way is to be welcomed.

However, the dismissal of the case on procedural grounds means that we will never get a ruling on the substance of Philip Morris' claims. As such, the award contributes nothing to the bigger debate about the conflict between investment protection and public policy.

Indeed, the company's own press release says as much. Philip Morris International senior vice president and general counsel Marc Firestone has stated that there is "nothing" in the ISDS award "that addresses, let alone validates, plain packaging in Australia or anywhere else".

What this means is that any country that is contemplating plain packaging – France has just joined the list of countries pursuing the policy – still has cause for concern. This is especially the case because tobacco companies don't show any sign of giving up their legal campaign.

In this regard, poor countries are in the worst position because they can't afford even a preliminary defence in an ISDS case. It has been reported that Australia has spent $50 million defending plain packaging in arbitration. Uruguay has been mired in its own dispute with Philip Morris for even longer than Australia and has to rely on funding from a foundation set up by former New York mayor Michael Bloomberg because it can't afford to pay its legal fees.

The high cost of ISDS makes the threat of arbitration a potent tool for the tobacco companies. Political satirist John Oliver revealed earlier this year that several countries including the tiny nation of Togo have been intimidated by the legal threats of tobacco giants. The potential for "regulatory chill" isn't diminished by Australia's victory on Friday.

There are also other reasons why any celebration of this decision should be muted. First, it took more than four years for the tribunal to decide what should have been a fairly straightforward jurisdictional issue. This says a great deal about the claims that arbitration is a more efficient system than domestic courts.

Second, we don't yet know if Australia will be able to recoup its costs – there is no hard and fast "loser pays" rule in ISDS.

I do not highlight these issues because I wish to diminish the hard won success of the government's legal team or dampen the joy that health advocates will undoubtedly feel at being given this "early Christmas present". Rather, I only wish to caution that we should be wary of anyone who suggests that the decision demonstrates that ISDS isn't problematic.

Australia dodged a bullet on this one. That doesn't mean we are bullet-proof.

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TPP is a giftwrapped wealth-transfer to China

http://boingboing.net/2015/12/27/tpp-is-a-giftwrapped-wealth-tr.html

5:46 am Sun Dec 27, 2015

Writing in the *Globe and Mail*, University of Toronto Munk Chair of Innovation Studies Dan Breznitz explains how the TPP -- negotiated in secret without any oversight or accountability -- will enrich a few multinationals at the expense of US and Canadian growth, making the whole trade zone less competitive and more ripe to be overtaken by Chinese firms.

In sealing the broken patent and copyright system, the insane trade secrecy regime, and Investor-State Dispute Resolution systems beneath a lacquer of unbudgeable trade obligations, the US government has hung weights around the necks of new entrepreneurs and businesses.

Interestingly, this critique comes from a "Hayekian," right-wing proponent of free market capitalism, who says that by going far beyond trade, this "trade agreement" will cripple the economies of all who sign it.

Finally, the TPP continues to enshrine the very questionable usage of investor-state dispute-settlement mechanisms – special courts in which foreign investors can sue countries, states and local authorities but cannot be sued back. This elevates one economic actor (investors) to a status above all others in an economic transaction, and induces strategic behaviour by investors that aims to influence regulatory decisions, instead of letting consumers make their choices known through the market. There is no economic rationale for these mechanisms, only a very questionable (and extremely inefficient, in cost terms) political gamble that some time in the future, they might put China at a disadvantage. It's time that we put these mechanisms in their proper place – the trash bin of history.

All this extra cost, risk and uncertainty will have chilling effects that will stifle market experimentation. This leads to yet another problematic "benefit" of the TPP: Decreasing the Hayekian (as in Friedrich Hayek) efficiency of the market. That is, the ability of the markets to act as the best-learning and constantly improving system mankind has ever developed.

Inside U.S. Trade today:

The Year Ahead: TTIP In Push For 2016 Deal, Regulatory Agenda May End Up Being Pared Back

December 29, 2015

As the end of 2015 approaches, U.S. and EU trade officials are entering a new year without the "outline" of the Transatlantic Trade and Investment Partnership (TTIP) that political leaders had expressed hope for last summer. But what is becoming clear to both sides is that if a deal is to come together under the Obama administration, it will fall far short of the sweeping U.S.-EU regulatory alignment project that it was initially framed to be.

The plan of action for 2016, as laid out in private conversations by U.S. officials, is not focused on the regulatory cooperation side of the agenda. Instead, it envisions an exchange of modest government procurement market access offers by February. By summer of the new year, the aim is to be in the "middle game" of the negotiations, during which both sides envision having all the text of the deal essentially agreed and further advancement on sensitive areas. Exactly what this advancement would entail is not clear, although the EU has indicated it wants at least some inkling that the U.S. will agree to grant new protections to geographical indications (GIs) in this timeframe. U.S. and EU sources contend the main body of the text could come together rather quickly, and will likely be an amalgam of pieces borrowed from the Trans-Pacific Partnership (TPP) on issues like state-owned enterprises, along with portions on issues like sanitary and phytosanitary (SPS) measures that deal more specifically with U.S.-EU challenges.

Under this plan, the notoriously elastic "end game" would begin in the fall. This will be the final stage where deals are cut on on sensitive agricultural tariff lines, longstanding trade barriers rooted in SPS measures, and other sticking points, sources said. This ambitious scenario foresees the conclusion of the TTIP negotiations during the lame-duck session of Congress, or even just before Obama leaves office in 2017. But what this kind of rush to wrap up would necessarily mean, sources on both sides of the Atlantic say, is that some components of TTIP's regulatory agenda must be left for later — becoming items in a future work program to be taken up by regulators, or else left by the wayside entirely. Whether the EU, which is seen as more wedded to the sectoral regulatory aspect of the talks, is willing to go along with this will depend on both sides' ability to tee up a package that sufficiently addresses other key priorities like procurement so that a scaled-down deal could still be defended as economically meaningful. Already, the U.S. has tamped down expectations for its first procurement offer in February.

Overshadowing all of this is TPP, Obama's legacy trade policy priority. Until the administration can secure Congressional approval of the Pacific deal, observers say it is unlikely to expend the focus or political capital on issues needed to close a deal with Europe, such as procurement and GIs.

But political leaders on both sides have also framed the TTIP initiative in a broader geopolitical context, with Russia encroaching on Ukraine and the Syrian refugee crisis introducing new challenges to the EU. Advocates for TTIP acknowledge the possibility that substance may be sacrificed if President Obama urges leaders in major members states like Germany, the UK and France to pressure the European Commission to conclude.

At this point, it's doubtful Congress will approve TPP before the November presidential election. That leaves almost no time to conclude a TTIP agreement before Obama's term expires. Bernd Lange, the chair of the European Parliament's International Trade Committee, has said he doubts that TTIP can be concluded in 2016 and that it may be delayed indefinitely if TPP does not pass in 2016 (Inside U.S. Trade , Dec. 18, 2015).

The elections themselves may have an impact, too, said Daniel Hamilton, executive director of the Center for Transatlantic Relations at Johns Hopkins School of Advanced International Studies. If a Republican candidate wins the election — depending on who in the crowded field it is — the EU might hit the brakes knowing that the new administration will surely demand to put its own stamp on the deal.

Progress in the TTIP's so-called "sectoral" regulatory talks — those dealing with the weedy differences in how each side regulates cars, chemicals, pharmaceuticals and other industrial sectors — has been slow. While there are some hints of progress on cars, sources say, regulators particularly on the U.S. side have not gotten the political direction to identify and pursue specific outcomes. As a result, many agree that any sectoral regulatory outcomes will be small if a TTIP deal is wrapped up in 2016. This might suit the U.S. just as well, according to Hamilton. The Obama administration is so keen to say that it achieved a trade deal with the EU "that they're willing to go for 'TTIP light,'" he said in an interview.

From the start, it has been clear that the EU has been more enamored of the "sectoral" aspect of TTIP, claiming this is where the real economic efficiencies and savings for businesses are to be reaped. The EU auto industry, for one, sees this component as essential in order to balance the inevitable tariff cuts. The U.S. tariff on passenger vehicles is 2.5 percent, while the EU tariff is 10 percent. The U.S., while not the rejecting the sectoral approach, has focused intensively on what it calls "regulatory coherence" — the notice-and-comment style procedures followed by U.S. regulatory agencies that U.S. Trade Representative Michael Froman has said the European Commission should mimic.

The U.S. is perceived as needing to secure some outcomes on this objective in order to credibly claim that it has made progress toward greater regulatory alignment with Europe. The European Commission has shown willingness to make its legislative and regulatory procedure more transparent in ways that would partially satisfy U.S. demands, under its own "Better Regulation Agenda" (Inside U.S. Trade , July 10, 2015).

Whether the U.S. is willing to settle for that remains to be seen, although even some of the biggest U.S. business champions on this front privately concede the U.S. is unlikely to

convince the the EU to subject its process of drafting new laws to notice-and-comment style procedures.
Another critical fight that will have to be settled — and has made very little progress, sources close to the talks say— surrounds the issue of what is an "international standard." This battle has played out in the negotiating group on Technical Barriers to Trade (TBT), as well as between private standards groups. At its most basic level, this is a simple question of whether the EU is willing to endorse in its laws and regulations the standards that private-sector industry leaders in the U.S. draw up. In reality, this involves challenging the interests of EU and European national standards-setting bodies that would be loathe to see their role diminished. Froman has made this exceedingly technical fight a priority, highlighting it as a big part of his first major policy speech on TTIP in Europe in October 2013, following the launch of negotiations in July of that year (Inside U.S. Trade, Oct. 4, 2013).

The standards issue is one "which is really down in the weeds, but is also really quite critical," Hamilton said. "They haven't unlocked the door on this yet, but that doesn't mean they can't." The degree to which the EU will make concessions on those sensitive points depends, of course, on what it gets in return. Formally, the EU has rejected the notion of a "TTIP light" agreement. But what exactly TTIP light means is open to interpretation. It may ultimately be that a package that includes new procurement market access, protection for commercially significant GIs, and a few modest sectoral regulatory outcomes is enough for Brussels. Regulators have begun to nibble at the edges of some of these issues. The U.S. Food & Drug Administration (FDA) has been actively assessing whether it can rely more on EU regulators in inspecting the manufacturing practices of EU pharmaceutical firms by observing EU audits; the EU has done the same for the U.S. (Inside U.S. Trade , May 1, 2015).

But FDA by the 2015 was only expected to cover a fraction of the 28 EU members states through these visits. Earlier this year, an FDA official said the agency had not decided whether it could begin to rely on the inspections of certain member states it has reviewed and slowly phase in others. That approach has proved problematic before, over EU claims it would give some companies in those member states an unfair advantage.
In the automobile sector, the main objective of the U.S. and EU industry — to have regulators on both sides recognize each other's standards as effectively equivalent in protecting passengers in a crash — took a big hit this year when a joint project conducted by independent U.S. and EU research institutions concluded data do not support that claim (Inside U.S. Trade, Aug. 14, 2015).

The UK-based consulting firm Transport Research Laboratory (TRL), one of the institutions that participated in that study, has conducted another study on crashworthiness with a different methodology that is still in the process of being reviewed. One industry source said that the U.S. National Highway Traffic Safety Administration (NHTSA) had received a copy of the report but had been silent on it; a TRL spokeswoman on Dec. 22 declined to comment on the conclusions of the study.

The industry source, however, said NHTSA had given signals it was more seriously evaluating the results of a separate study conducted by TRL that aimed to evaluate the effectiveness of a subset of U.S. and EU car safety regulations dealing with visibility and lighting. That study found key differences between these sets of standards in some areas, but also found that interior mirrors provide an equivalent level of safety in the EU and U.S., for instance.

Outside of the TTIP context but related to it, the U.S., EU and Japan have put forward a proposal at the multilateral Working Party 29 body in Geneva that aim to foster smoother implementation of so-called Global Technical Regulations (GTRs) for autos. These are intended to be a way for auto-producing nations to harmonize certain standards, but the system has not delivered on this promise; the U.S. has often ended up altering GTRs prior to adopting them because its regulatory system requires it to take into account input from stakeholders.

A trilateral "white paper" on how to address this issue and others was discussed at the Working Party 29 meeting in November and is expected to see further discussion at a session in March, the industry source said. The U.S. and EU car industries are also hoping to complete by the next TTIP round, slated for the week of February 22, a study showing the potential economic benefits of granting mutual recognition of certain safety standards.