http://www.cato.org/publications/free-trade-bulletin/compromise-advance-trade-agenda-purge-negotiations-investor-state

Free Trade Bulletin No. 57

A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement

By Daniel J. Ikenson

March 4, 2014

Introduction

President Obama's major trade initiatives, the Trans-Pacific Partnership, the Transatlantic Trade and Investment Partnership, and obtaining fast-track trade negotiating authority from Congress, have run into a buzz saw of opposition, which has derailed prospects for U.S. trade liberalization for the time being.

What began as the usual objections from the usual suspects—labor unions blaming trade for manufacturing decline and job loss; environmental groups blaming trade for climate change; anti-globalization activists sparing the developing world from development–has grown into a populist backlash against the TPP, which is portrayed as a secretive, corporatist plot to circumvent democratic processes and usurp national sovereignty. The nascent TTIP negotiations have been smeared with a similar taint.

Characterizations of the TPP as a scheme to boost the fortunes of tobacco, oil and gas, banking, and pharmaceutical companies at the expense of worker protections, the environment, public health, and food and product safety have gone viral. And without so much as a single public repudiation of these claims by the president those perceptions are sticking.

As is true of most populist causes, buried beneath the enabling mythology and hyperbole are some kernels of truth. One such truth, which this paper seeks to distill from the vacuous, anti-capitalist hyperventilation surrounding the trade agenda, is that the so-called Investor-State Dispute Settlement (ISDS) mechanism, which enables foreign investors to sue host governments in third-party arbitration tribunals for treatment that allegedly fails to meet certain standards and that results in a loss of asset values, is an unnecessary, unreasonable, and unwise provision to include in trade agreements. Although detractors may not know it by name, ISDS is a significant reason why trade agreements engender so much antipathy. Yet, ISDS is not even essential to the task of freeing trade. So why burden the effort by carrying needless baggage?

Purging both the TPP and the TTIP of ISDS makes sense economically and politically, would assuage legitimate concerns about those negotiations, splinter the opposition to liberalization, and pave the way for freer trade.

What's Troubling the Trade Agenda?

President Obama has failed to make an affirmative case for his trade agenda, and his disinterest in rebutting the flood of damaging portrayals of the TPP has permitted germinating dissent to metastasize into a problem much worse. Meanwhile, the nature of trade, the nature of protectionism, and the substance of trade agreements have changed with the proliferation of cross-border investment and transnational supply chains. As companies establish operations in foreign markets, where they are engaged in direct and more intense competition with incumbent firms, concerns about protectionism are no longer confined to the border.

Protectionism manifests in more subtle ways today. Accordingly, ensuring nondiscrimination against imports, foreign investment, and the operations of foreign companies requires rules that sometimes burrow into areas that were once the exclusive purview of domestic legislatures and regulators. Agreements nowadays include provisions affecting domestic intellectual property laws, environmental and labor standards, data flow and storage requirements, banking regulations, and food and product safety requirements, to name some.

The interplay of domestic governance and trade agreement obligations has raised questions about jurisdiction, sovereignty, and the separation of powers. That some perceive the TPP as secretive has heightened sensitivity about its objectives and implications. So, instead of seeing negotiations on "regulatory coherence" as a commonsense way for businesses to reduce the costs of compliance without compromising public health or safety objectives, some suspect it is a path to gutting compliance obligations altogether. Others see regulatory harmonization as another step toward global governance. Efforts to include provisions extending protection of patents, copyrights, and other forms of intellectual property are perceived by some as attempts to impose through treaty what was unachievable through domestic processes. Negotiations of rules that would help ensure that financial-sector regulations are promulgated in manners that are nondiscriminatory are painted as attempts to weaken domestic safeguards against recurrence of a financial meltdown.

The hallmarks of tighter global economic integration—cross-border investment, transnational supply chains, and intensifying competition—have created tension between the imperative of domestic sovereignty and the growing demand for rules to guard against protectionism and discrimination. One area where this debate has gotten especially heated is tobacco regulation.

Anti-tobacco advocates have been demanding a "carve out" provision, which would excuse lawmakers and domestic agencies from their obligations to craft and enforce tobacco regulations in manners that do not discriminate against imports. The rationale for the safe-harbor provision is that tobacco poses special known risks to public health and human safety and that trade obligations should not interfere with the capacity to regulate such a dangerous product. Recently, 42 of the 50 U.S. state attorneys general signed a letter insisting that such a safe-harbor provision is essential to protecting public health.[1]

But as trade experts have explained, there is nothing about the TPP or any other trade agreement that impedes a government's capacity to protect human life or health. Trade agreements do not prohibit regulating. They merely require that such measures be based on sound science and that discrimination against similar products on the basis of national origin be avoided. The states can ban cigarettes, for example, but not cigarettes "from Indonesia." As Cato trade policy analyst Simon Lester puts it: "Although there may be valid concerns about some of the more recent additions to trade and investment agreements … the core of these rules constrains domestic regulation only to the extent that such regulation discriminates against imports and does not preclude legitimate domestic policymaking."[2]

But if one listens closely to the arguments of anti-tobacco advocates (or reads the letter from the 42 attorneys general), what most oppose is the possibility of tobacco companies suing the U.S. government in third-party tribunals. Creating a tobacco carve out would reiterate a right that governments already possess and would do nothing to safeguard against suits by tobacco companies—or any other companies.

The real ire of anti-tobacco advocates is the Investor-State Dispute Settlement mechanism.

What is Investor-State Dispute Settlement?

The ostensible purpose of ISDS is to ensure that foreign investors—usually multinational corporations (MNCs)—are protected against host government actions or policies that fail to meet certain standards of treatment and that cause the investor economic harm. The ISDS confers special legal privileges on foreign-invested companies, including the right to sue host governments in third-party arbitration tribunals for failing to meet those standards.

Investor-State Dispute Settlement dates back to the era following World War II, when previous European colonies were achieving independence and seeking to attract Western investment. It was borne as an expedient to overcome concerns about expropriation by new governments lacking experience with property rights and the rule of law.[3] But ISDS procedures were rarely used. In fact, from the inception of ISDS in 1959 through 2002, the number of known ISDS claims worldwide stood at fewer than 100.[4] However, during the 10 years between 2003 and 2012, the cumulative total increased to 514 cases.[5] In 2012, claimants initiated 58 ISDS cases worldwide, which was the greatest number of initiations in any year, surpassing the previous record set in 2011.[6]

Provisions for ISDS are included in the 41 U.S. bilateral investment treaties in effect, as well as most of the U.S bilateral trade agreements.[7] American TPP and TTIP negotiators are seeking ISDS rules in those agreements. Proponents argue that ISDS provides assurances against unfair treatment from host governments, strengthens the rule of law, and helps bring otherwise reluctant investors to capital-hungry jurisdictions. But looking more closely, ISDS arguably weakens the rule of law, forces the public to subsidize the risk of MNC investment abroad, and effectively encourages outsourcing.

Eight Good Reasons to Drop ISDS from TPP and TTIP

There are practical, economic, legal, and political reasons to expunge ISDS from current trade negotiations.

First, *ISDS is overkill*. Governments are competing to attract productive investment to keep their citizens employed and their economies growing. Accordingly, it is imperative to maintain smart, transparent, predictable policies that are administered fairly and nondiscriminatorily. Asset expropriation or other forms of shabby treatment of foreign companies is not likely to be rewarded by new investment.

Of course, that doesn't guarantee that policies will never go astray. Sometimes they will. But investment is a risky proposition. Foreign investment is usually more risky. But that doesn't necessitate the creation of institutions to protect MNCs from the consequences of their business decisions. Multinational companies are among the most successful and sophisticated companies in the world. They are quite capable of evaluating risk and determining whether the expected returns cover that risk. Although MNCs may want assurances, they don't need them.

Multinational companies can mitigate their own risk by purchasing private insurance policies. Alternatively, they can condition investment on the host government's agreeing to other protections, contractually. Whether the host agrees would be influenced by the supply of potential investors and the strings they would attach.

Second, *ISDS socializes the risk of foreign direct investment*. When other governments oppose, but ultimately concede to, U.S. demands for ISDS provisions, they may be less willing to agree to other reforms, such as greater market access, that would benefit other U.S. interests. That is an externality or a cost borne by those who don't benefit from that cost being incurred. In this regard, ISDS is a subsidy for MNCs and a tax on everyone else. Taking the argument one step further, ISDS not only subsidizes MNCs, but particular kinds of MNCs. What may be too risky an investment proposition without ISDS for Company A is not necessarily too risky for Company B. By reducing the risk of investing abroad, then, ISDS is a subsidy for more risk-averse companies. It is a subsidy for Company A and a tax on Company B.

Third, ISDS encourages "discretionary" outsourcing. In the global competition to attract investment from the world's best companies, the United States has some enormous advantages. For many decades, the United States has been the world's premier destination for foreign direct investment. But in recent years, the United States has been slipping in a number of important investment-location decision criteria and, accordingly, its share of global foreign direct investment has declined from 39 percent in 1999 to 17 percent in 2011.[8]

While ISDS may benefit U.S. companies looking to invest abroad, it neutralizes what was once a big U.S. advantage in the competition to attract investment. Respect for property rights and the rule of law have been relative U.S. strengths, but ISDS mitigates those U.S. advantages. Access to ISDS could be the decisive factor in a company's decision to invest in a research center in Brazil, instead of the United States. Why should U.S. policy reflect greater concern for the operations of U.S. companies abroad than for the operations of U.S. and foreign companies in the United States? Why should ISDS effectively subsidize outsourcing, and not insourcing?

To be sure, success abroad and success at home are closely correlated. Companies must be able to invest abroad to compete there, and the success of those foreign affiliates tends to be reflected

in the performance of the parent companies at home.[9] But there is a crucial distinction between "discretionary" and "nondiscretionary" outsourcing.

"Discretionary" outsourcing is investment that goes abroad, but doesn't really have to. It is investment in activities that could be performed competitively in the United States, but is chased away by policies that make U.S. investment relatively more expensive. "Nondiscretionary" outsourcing is investment in activities that requires a foreign presence.

While we should not denigrate, punish, or tax foreign outsourcing, neither should we subsidize it, and ISDS subsidizes discretionary outsourcing.

Fourth, ISDS exceeds "national treatment" obligations, extending special privileges to foreign corporations. An important pillar of trade agreements is the concept of "national treatment," which says that imports and foreign companies will be afforded treatment no different from that afforded domestic products and companies. The principle is a commitment to nondiscrimination. But ISDS turns national treatment on its head, giving privileges to foreign companies that are not available to domestic companies. If a U.S. natural gas company believes that the value of its assets has suffered on account of a new subsidy for solar panel producers, judicial recourse is available in the U.S. court system only. But for foreign companies, ISDS provides an additional adjudicatory option.

This inequality of treatment seems to run afoul of the investment provisions in the Baucus-Hatch-Camp legislation (to extend fast-track trade promotion authority to the president), which state that the principal U.S. negotiating objectives regarding foreign investment are to: "[R]educe or eliminate artificial or trade distorting barriers to foreign investment, while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States…"[10]

Foreign investors having recourse to the U.S. legal system and then, if that produces unsatisfactory results, to third-party ISDS procedures arguably constitutes greater substantive rights for them than for domestic investors, whose options are confined to the U.S. legal system.

Fifth, *U.S. laws and regulations will be exposed to ISDS challenges* with increasing frequency. The number of cases is on the rise. Most claims have been brought against developing countries—with Argentina, Venezuela, and Ecuador leading the pack—but the United States is the eighth-largest target, having been the subject of 15 claims over the years.[11]

As the percentage of global Fortune 500 companies domiciled outside the United States continues to increase, U.S. laws and regulations are likely to come under greater scrutiny. The specter of foreign companies prevailing in challenges of U.S. laws outside the U.S. legal system would frustrate further the task of selling trade to a skeptical public and would reward trade critics who have been warning of just such an outcome for many years.

Investor-State Dispute Settlement raises concerns about domestic sovereignty. Among recent cases highlighting these tensions is a suit brought by Philip Morris, Inc. against the Australian government for a law requiring that cigarettes be sold in plain packaging. Philip Morris claims

that the requirement deprives it of its property (trademarks, logos, and labels), which is important for brand recognition and without which its revenues will decrease. Philip Morris may have a legitimate claim, but the optics will not be favorable for trade agreements if the company prevails.

Meanwhile, growing concerns in Europe about the vulnerabilities of environmental and public-safety laws to challenges by foreign corporations—sparked, in part, by a case brought by a Swedish energy company against Germany for its decision to abandon nuclear power—have led the EU to suspend ISDS negotiations in the TTIP for a period of three months, as it collects and evaluates public comments and reconsiders its position. Realistically, it is difficult to conceive of any benefits to including ISDS provisions in the TTIP, given the advanced legal systems in the United States and Europe, unless the wave of the economic future is expected to arrive in a tsunami of international litigation.

Sixth, *ISDS is ripe for exploitation by creative lawyers*. There is a lot of latitude for interpretation of what constitutes "fair and equitable" treatment of foreign investment, given the vagueness of the terms and the uneven jurisprudence. Thus, ISDS lends itself to the creativity of lawyers willing to forage for evidence of discrimination in the arcana of the world's laws and regulations. Among the complaints worldwide in 2012 were challenges related to "revocations of licenses, breaches of investment contracts, irregularities in public tenders, changes to domestic regulatory frameworks, withdrawals of previously granted subsidies, direct expropriations of investments, tax measures and others."[12]

Meanwhile, some agreements are attempting to expand the definition of a breach of the obligation of host governments to provide fair and equitable treatment to include: "targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief." This attempt to broaden the scope for complaints—included in the EU-Canada trade agreement—should be a cause for concern.[13]

Seventh, *ISDS reinforces the myth that trade primarily benefits large corporations*. A persistent myth that has proven hard to dispel permanently is that trade benefits primarily large corporations at the expense of small businesses, workers, taxpayers, public health, and the environment. The fact is that trade is the ultimate trustbuster, ensuring greater competition that prevents companies from taking advantage of consumers. Lower-income Americans stand to benefit the most from trade liberalization, as the preponderance of U.S. protectionism affects products and services to which lower-income Americans devote higher proportions of their budgets.

But by granting special legal privileges to multinational corporations, ISDS reinforces that myth and is a lightning rod for opposition to trade liberalization. It is effectively a subsidy that mitigates risk for U.S. multinational corporations and enables foreign MNCs to circumvent U.S. courts when lodging complaints about U.S. policies. Ultimately, ISDS is unimportant to the task of trade liberalization and its inclusion in trade agreements only strengthens trade's opposition.

Eighth, *dropping ISDS would improve U.S. trade negotiating objectives*, as well as prospects for attaining them. Recently, a group of business associations joined in a statement of opposition to

the requests for a tobacco carve-out provision, arguing that it would be superfluous and set a dangerous precedent that would undermine the settled view that governments are already entitled to regulate in the interest of protecting human life or health.[14] Given their concern for the rule of law and the traditions of the trading system, the statement's signatory organizations should be amenable to a compromise that would include purging ISDS from the TPP and the TTIP in exchange for a denial of the carve-out language.

Such a deal would assuage thoughtful critics of the trade agenda, who do not oppose trade, but who believe trade agreements should be more modest and balanced. Meanwhile, what now appears to be an angry mob protesting trade generally will be thinned out, exposing the unsubstantiated arguments of the professional protectionists who benefit by impeding Americans' freedom to trade.

Conclusion

For practical, economic, legal, and political reasons, ISDS subverts prospects for U.S. trade liberalization. Yet it is tangential, at best, to the task of freeing trade. Any benefits to availing MNCs to third-party adjudication are all but totally overwhelmed by the additional costs. In the proverbial airplane that is down one engine and losing altitude, throwing ISDS out of the cargo hold to reduce unnecessary weight is the best solution.

At this point, it remains unclear whether the president is genuinely committed to doing what it will take to advance his trade agenda. But should he convince himself of the efficacy and righteousness of freeing trade and become interested in putting the necessary pieces together to bridge political divides, jettisoning ISDS and explaining how doing so liberates us from legitimate concern that corporations will run roughshod over domestic laws could go a long way toward selling these agreements to the public.

Notes

1. Inside U.S. Trade's World Trade Online, "Attorneys General From 42 States Call For Tobacco Carveout In Trade Deals," February 6, 2014, www.insidetrade.com.
2. Simon Lester, "Free Trade and Tobacco: Thank You for Not Smoking (Foreign) Cigarettes," Cato Free Trade Bulletin no. 49, August 15, 2012.
3. For a good history of ISDS, see Simon Lester, "Liberalization or Litigation? Time to Rethink the International Investment Regime," Cato Policy Analysis no. 730, July 8, 2013.
4. United Nations Conference on Trade and Development (UNCTAD), "Recent Developments in Investor-State Dispute Settlement (ISDS)," IIA Issue Notes No. 1, May 2013.
5. Ibid
6. Ibid.
7. Shayerah Ilias Akhtar and Martin A. Weiss, "U.S. International Investment Agreements: Issues for Congress," Congressional Research Service, April 29, 2013.
8. Daniel Ikenson, "Reversing Worrisome Trends: How to Attract and Retain Investment in a Competitive Global Economy," Cato Policy Analysis no. 735, August 22, 2013.
9. Ibid., Figures 4, 5, 6, 7, 8, and 9; Matthew J. Slaughter, "American Companies and Global Supply Networks: Driving U.S. Economic Growth and Jobs by Connecting with the World," Business Roundtable, the United States Council for International Business and the United States Council Foundation, January 2013.

10. United States Senate, Bipartisan Congressional Trade Priorities Act of 2014.
11. United Nations Conference on Trade and Development. To date, investors have not prevailed in any of their complaints against the United States.
12. United Nations Conference on Trade and Development.
13. Simon Lester, "An Equal Protection Clause for Investment," International Economic Law and Policy Blog, February 6, 2014.
14. U.S. Chamber of Commerce, et al., "Joint Statement on Proposal to Modify Longstanding "General Exception" Provision and Dispute-Settlement Provision in the Trans-Pacific Partnership (TPP) Negotiations," February 2014, http://www.amcham.com.au/Downloads/99a9e9a3-1e17-4180-a6a6-72dd380a65ca/Joint_Statement.pdf.

Exports not the basis of sustainable local food economies

Bangor Daily News; 3/11/15

By Craig Hickman and Sharon Anglin Treat, Special to the BDN
Posted March 11, 2015, at 1:55 p.m.

As the push for fast-track trade authority intensifies, there has been an onslaught of new promotional materials from the U.S. Department of Agriculture, including Virginia Manuel's Feb. 24 BDN OpEd. These opinion pieces assert that fast-track and new free-trade agreements would increase farm exports and, by extension, improve rural livelihoods. But they don't back up these assertions with specifics, and they are silent on the possible negative impacts on rural communities and our food systems. Further, they never explain how the inherently undemocratic fast-track trade-agreement approval process is necessary or beneficial.

While the national debate on these trade agreements is just getting going, the Maine Citizen Trade Policy Commission published a report last July on the potential impacts of new free-trade agreements on Maine agriculture. That report, co-written by Karen Hansen-Kuhn of the Institute for Agriculture and Trade Policy and John Piotti of the Maine Farmland Trust, also was the subject of two public hearings and highlighted several key concerns.

The report highlighted that Maine's dairy farmers — like all American dairy farmers — have struggled for the past decade because of low-producer prices. One big point of controversy in the Trans-Pacific Partnership talks has been New Zealand's demand to fully open U.S. dairy markets to their exports. This could have huge repercussions for local farmers, who benefit from federal programs to stabilize dairy prices, supplemented by Maine's Dairy Stabilization Program. Those two programs work in tandem to stabilize prices for farmers at minimal cost, a process that could fall apart if an increase in imports drives prices down.

That kind of local program could also be subject to challenge under the special corporate courts that would be established in Trans-Pacific Partnership and the Transatlantic Trade and Investment Partnership. Under the trade deals, foreign investors could sue governments over measures that undermine their expected profits. This provision is coming under attack across the political spectrum from liberal Sen. Elizabeth Warren, D-Massachusetts, to the conservative CATO Institute. Already, Phillip Morris is using this provision to attack Australia's cigarette labeling laws. Could Maine's or Vermont's GMO labeling laws be next?

Another concern raised by the report is the potential impact on Maine's "buy local" food procurement policies, as European negotiators are seeking to eliminate those U.S. state and local procurement preferences in the Transatlantic Trade and Investment Partnership. These programs have contributed to positive changes that are creating jobs, bringing new farmers to Maine and increasing land in production. The number of Maine farmers aged 34 and younger grew by

nearly 40 percent from 2007 to 2012 — from 396 to 551 — far surpassing the 1.5 percent increase nationally. The value of Maine agricultural products has increased 24 percent in five years, and the amount of land in farming increased by 8 percent in the same time period. These successes didn't happen by accident; they resulted from policy choices the Maine trade commission report indicates could be undermined by the Trans-Pacific Partnership and the Transatlantic Trade and Investment Partnership.

The report also highlighted that tariff barriers to Maine's exports, particularly in the European Union, already are quite low. The real issue, one that came out strongly in comments at the public hearings, is not whether we can generate a few more farm exports but what we are giving up in exchange.

In the end, what matters is whether trade and agriculture policies help us get to a better food system. The only way to get to that point is through a fair, transparent and inclusive process that takes the best from local innovations, such as farm-to-school programs, farmers markets and consumer protections, and builds on them to provide healthy foods at fair prices. While important, exports are the icing on the cake, not the basis of sustainable local economies.

Perhaps Maine should be exporting the idea of the Citizen Trade Policy Commission. We should be taking a hard look at the impacts of trade agreements in process, based on real information about their contents instead of rushing into a secretive process that could have repercussions for decades to come.

Rep. Craig Hickman, D-Winthrop, is an organic farmer and House chair of the Agriculture, Conservation and Forestry Committee. Sharon Anglin Treat of Hallowell is a former legislator and former co-chair of Maine Citizen Trade Policy Commission, and she serves on an advisory committee of the U.S. Trade Representative.

Trade deal attack on safe food and sustainable agriculture

Friends of the Earth, U.S. Blog

Posted Mar. 12, 2015 / Posted by: Bill Waren

Congress is considering Fast Track trade promotion legislation that is seen as a prerequisite for the approval of two major trade agreements: the Trans Pacific Partnership and the Transatlantic Trade and Investment Partnership. If approved, the two deals would undermine government safeguards related to food safety, food product labeling and gene patents.[1] The trade agreements are being negotiated and drafted in secret with the assistance of lawyers and lobbyists from global agri-business behemoths such as ConAgra, Cargill, Archer-Daniels-Midland, Smithfield and the Biotechnology Industry Organization.

Fast Track" is legislation that rushes trade deals through Congress and sharply limits Congress' authority to oversee debate and amend trade agreements. Fast Track legislation would force the TPP and TTIP deals through on a quick up-or-down vote with no amendments.[2] The historical record shows that it is difficult to gain congressional approval of a major trade deal without fast track authority and difficult to stop a deal under fast track rules."[3]

In this first of a series of blogs on the "Fast Track" attack on safe food and sustainable agriculture, we look in depth at the all-important TPP and TTIP chapters on so-called "sanitary and phytosanitary measures,' aimed at deregulating government safeguards related to food safety, animal welfare, and plant health.

TPP and TTIP provisions on "sanitary and phytosanitary measures" aim to roll back government regulations related to food safety, animal welfare, plant health

The term "sanitary measures" is international trade law jargon for public health policies and regulations related to food safety, while "phytosanitary measures" relates to animal welfare and plant health regulations. Such government regulation is anathema to global corporations engaged in industrial scale agriculture and mass manufacturing of food products. They seek to use international agreements like the TPP and TTIP to roll back SPS regulations, which they regard as "non-tariff barriers to trade." This is clever branding: the TPP and TTIP chapters on sanitary and phytosanitary measures, also known as SPS, are all about deregulation and have nothing to do with international trade per se.

Sanitary measures. Sanitary measures are public health policies and regulations to ensure that food is safe, and nutritious. Such government measures are necessary because .cancer and other life threatening diseases may be caused by food containing pesticide residue, heavy metals or chemicals. Death and disease may also result from food carrying viruses like the one responsible for hepatitis A, parasites like fish-borne trematodes, and bacteria like salmonella or listeria.

Governments may also adopt sanitary measures in order to promote good nutrition. Severe health risks and premature death are associated with a diet of processed foods and beverages loaded with sugar, fats, sodium or chemicals. Heart disease, stroke, diabetes, colon cancer and osteoarthritis are at near epidemic rates among the overweight and obese who consume such unhealthy products. A diet of salty foods is associated with high blood pressure, heart attack and stroke. Excessive meat consumption also presents risks.

Phytosanitary measures. These are government safeguards related to animal welfare and plant health. In terms of animal welfare, a proto-typical government regulation in this area might address animal welfare issues related to large confined animal feeding operations. CAFOs are inhumane, resulting in stress, pain and suffering for the cows, pigs, and chickens, while toxins from accumulating manure spread disease among the animals. Fattening them with feed grain rather than letting them graze also spreads disease. Consequently, animals are treated constantly with antibiotics, resulting in antibiotic-resistant bacteria which present an acute human health risk. The animals are also dosed with pesticides, chemicals and growth hormones, all of which may also be associated with human health risks.

As an example of a plant health issue, consider the problem of "monoculture" and the survival of biodiverse plant species, an issue that may require government intervention. Only a few species of plants are used in most modern farming operations. The UN Food and Agriculture Organization reports that 12 plant species provide 75 percent of the world's supply of food. Such genetically similar plants are at risk as the climate changes and generates more extreme weather. Catastrophic crop failure and hunger, especially in the developing world, could become more widespread. Such monoculture crops are also vulnerable to disease and insects.

How will the TPP and TTIP chapters on sanitary and phytosanitary measures work?

The goal of TPP and TTIP negotiators is to include "SPS-plus" provisions in TTIP and TPP that are even more protective of industry interests than even strict World Trade Organization standards.[4] This would make it easier to challenge safeguards that fall into the categories of sanitary measures related to food safety, such as bacterial contamination, and phytosanitary measures related to animal and plant health, such as animal diseases. Here are a few of the most dangerous elements of the SPS chapters.

A ceiling, not a floor. The purpose of the TPP and TTIP chapters on sanitary and phytosanitary measures is to put a ceiling on such government safeguards and to enforce this downward harmonization of standards with trade sanctions like retaliatory tariff increases authorized by trade tribunals. TPP and TTIP food safety standards are expected to incorporate the standards of the Codex Alimentarius, an industry dominated group that often recommends low standards.

The "necessity test." The SPS chapters in the TPP and TTIP also are likely to contains a strict "necessity test" that must be met in order for government food safety or animal welfare regulations to pass muster in trade litigation. In other words, they must not be more trade restrictive than necessary, and if a more business-friendly standard could be hypothesized, they fail the test.

Mutual recognition of standards: a race to the bottom. Furthermore, countries would be encouraged to recognize the equivalence of each others' safety standards.

Cost-benefit analysis. An assessment in the regulatory review process established in the TPP and TTIP of the economic cost of food safety and animal health regulations to industry relative to hypothetical and less restrictive alternative regulations would likely by required. Rather than food safety experts, trade lawyers and economists, advised by industry representatives, would then judge the technical feasibility of achieving food safety goals in light the economic cost to industry.

SPS-plus rules even more restrictive than WTO standards, TPP and TTIP promise a trade law attack on regulation of genetically engineered food and other food and agricultural products. The history of successful U.S. suits in the WTO challenging European policies on genetically engineered organisms and food safety under the WTO Sanitary and Phytosanitary Measures Agreement should be a warning.[5] TPP and TTIP provisions based on the broad concept of SPS-plus are even more of a threat to food safety regulations than WTO rules.

The U.S. has targeted more effective EU food safety standards.

The U.S. Trade Representatives' Report on Sanitary and Phytosanitary Measures targets EU safeguards related to GE products as "substantial barriers to trade."[6] This threat is not limited to genetically engineered food products. EU food safety measures have been targeted as trade barriers in the USTR SPS report, including restrictions on imports of beef treated with growth hormones, chicken washed in chlorine, and meat produced with growth stimulants (rectopamine). France in particular is targeted for its 2012 ban on use of materials produced using Bisphenol A (which is linked to brain and hormone problems in fetuses and children) in food contact surfaces for food products designed for infants, pregnant women and lactating women. [11]

Released text of EU proposal for TTIP SPS chapters confirms fears.

Text of EU proposals for TTIP for an SPS chapter was first leaked and later released formally to the public. The draft EU proposals for the central text of the TTIP chapter on food safety and animal and plant health reveals a plan for an SPS chapter that works in tandem with TTIP regulatory review provisions, which would lower current European standards and likely preclude higher standards on both sides of the Atlantic by establishing:

- A form of mutual recognition of the safety of imported food from Europe in the U.S. and vice versa that reduces standards to the lowest levels[7];
- An objective that food safety safeguards should generally be enforced in the least trade restrictive manner, rather than the manner that is most protective of public health and the environment;
- A system of "exporter country certification" that would sharply reduce food safety inspections at ports of entry.
- A new transatlantic regulatory review body dominated by trade officials and agribusiness rather than safety experts, to pass judgment on all new food safety and animal welfare regulations in order to promote trade "to the greatest extent possible."[8]

Other chapters in the Atlantic & Pacific trade deals are also a threat

Both the TPP and TTIP also contain chapters on Technical Barriers to Trade and Trade in Goods that threaten food product labeling. Similarly, their Intellectual Property chapters would allow global corporations to patent and take title to human genes as well as the genes of animals and plants. Finally, there is a possibility that the TPP and TTIP chapters on government procurement *might* be used to attack school lunch and other nutrition programs that give a preference to healthier, locally produced food.

There are also a few TPP and TTIP chapters that actually do relate to trade like the ones on trade in goods and provisions on "at the border" inspection of imported goods. The TPP and TTIP could undercut food safety enforcement by granting mutual recognition of other countries' inspection of goods or simply by overwhelming understaffed inspectors with a flood of unsafe food exports.[9]

TPP and TTIP chapters can be effectively enforced by trade tribunals and in the regulatory review process.

Violation of SPS, TBT, IP or other rules can result in an international lawsuit brought by another party to the TPP or TTIP agreement in so-called state-to-state dispute resolution proceedings before a tribunal of trade lawyers. These international tribunals can slap tough sanctions like higher tariffs on any country that fails to deregulate. This would also very effectively chill new legislative and regulatory initiatives to improve the safety of the food we eat and the health of people, animals and plants.

Deregulation is not only enforced by international trade tribunals but also by putting in place regulatory review procedures that can stop new food and agriculture regulations from being promulgated and hamstring efforts to enforce existing regulations.**[10]**

Friends of the Earth is fighting back

The ways in which our farms are managed and the ways in which our food is produced have a chain reaction of consequences for our health and the environment. For just one striking example, the way meat is produced on factory farms affects human health and animal welfare and is related to diet-related disease and animal cruelty. Animals confined in massive feeding operations typically eat a diet of genetically-modified grains and legumes grown with large amounts of toxic pesticides and fertilizer. Mountains of toxic manure pollute the air and water. Overuse of antibiotics contributes to the rise of antibiotic resistance, one of our most serious public health problems. Massive animal feeding operations are also a major driver of climate change, habitat destruction and deforestation.

This is the reason why Friends of the Earth is leading the charge to stop Fast Track trade promotion legislation, the TPP with Japan and other Pacific Rim countries, and the TTIP deal with the European Union. We must ensure our food system is just and sustainable. We want to protect family farmers, food product safety and sustainable agriculture. We want international

rules on trade to embrace the safe and precautionary management of farming, animal husbandry and food manufacturing technologies.

SELECTED ENDNOTES

[1] The United States is negotiating the TPP with, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. But, that would only be the start. The TPP is conceived as a "docking agreement, which other countries could join later," without the need of significant congressional review. The Transatlantic Trade and Investment Partnership agreement is being negotiated with the European Union, consisting of 28 nation-states.

[2] Presidential fast track authority for negotiating trade agreements and its process for congressional approval eviscerates Congress' constitutional authority and political influence over trade agreements, delegating them improperly to Michael Froman, the U.S. Trade Representative. Fast track hands over to the executive branch powers that the founders of our constitution intended for Congress to exercise, including (1) the power to determine which countries join trade negotiations with the U.S., regardless of whether they are repeat violators of environmental and human rights standards; (2) the power to finalize the legal text of trade agreements before Congress votes;(3) the power to write domestic legislation implementing a trade deal by rolling back environmental safeguards and other public interest measures; (4) the power to circumvent ordinary congressional committee review and submit the legislation directly for a mandatory and expedited floor votes in the House and Senate; (5) the power to override House and Senate control of their schedules for floor votes; (6) the power to ban any amendments to a trade agreement; and he power to override other normal congressional voting procedures, including the Senate's super-majority (60 vote) requirement to end a filibuster (extended debate).: http://www.foe.org/news/archives/2013-10-stop-fast-track-authority-for-trans-pacific-trade-de#sthash.1gS3eT9N.dpuf

[3] To make matters worse, these trade deals are typically negotiated in secret, behind closed doors. All this makes for a very undemocratic process in which the interests of corporations – rather than the public – are served. As the Nobel Prize winning economist Joseph Stiglitz stated in a letter to TPP negotiators, "The decision to make the negotiating text secret from the public (even though the details are accessible to hundreds of advisors to big corporations) makes it difficult for the public to offer informed commentary. Joseph Stiglitz letter to TPP negotiators December 6, 2013. http://keionline.org/sites/default/files/jstiglitzTPP.pdf

[4] US- European Union High Level Working Group Report on Jobs and Growth, February 2013 (hereinafter HLWG), http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf, p.4.

[5] Public Citizen, Backgrounder: The U.S. Threats Against Europe's GMO Policy and the WTO SPS Agreement, http://www.citizen.org/documents/GMObackgrndr.pdf; Doug Palmer, US

farmers urge sanctions against EU's GM crop ban, Reuters, July 26, 2010, available at http://in.reuters.com/article/2010/07/27/idINIndia-50441920100727.

[6] Available at, http://www.ustr.gov/sites/default/files/2013%20SPS.pdf.

[7] Id.

[8] For example. **National Pork Producers Council in the US argues:"**As part of the TTIP, U.S. negotiators should seek and receive a broad recognition by the EU of the equivalence of the U.S. pork production and processing system in ensuring product safety. The United States has sought and received such recognition by other FTA partners. A copy of the exchange of letters with Vietnam is provided as an example." http://www.nppc.org/wp-content/uploads/P-National-Pork-Producers-Council-USTR-2013-0019-TTIP-5-10-13.pdf

[0] Draft text of main provisions of E.U. proposal for TTIP chapter an Sanitary and Phyto-sanitary
Measures, http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153026.pdf; http://www.iatp.org/files/2014.07_TTIP_SPS_Chapter_0.pdf

- See more at: http://www.foe.org/news/blog/2015-03-trade-deal-attack-on-safe-food-and-sustainable-agric#sthash.6rZ8WDI4.dpuf

TTIP Ag Rapporteur Says Parliamentary Votes For TTIP Deal Are Lagging

INSIDE U.S. TRADE - *www.InsideTrade.com* - March 13, 2015 25

The European Parliament's agricultural rapporteur for the U.S.-EU trade talks on March 4said that his party — whose support is necessary to pass the Transatlantic Trade and Investment Partnership (TTIP) — is divided over how a potential deal should handle agricultural issues, sanitary and phytosanitary (SPS) rules and an investor-state dispute settlement mechanism (ISDS).

But Paolo De Castro emphasized that the leadership of the Socialists & Democrats (S&D) Group is working hard to convince more S&D members to support TTIP because it will not be possible to pass an agreement without a majority of this group.

The S&D is the second-largest party in the European Parliament, which will have an up-or-down vote on a final deal as the last step in the approval process.

In a March 4 press conference in Washington, De Castro said the S&D Group has yet to take a formal position on TTIP as a whole. A parliamentary source said the S&D Group will decide its priorities for the TTIP negotiations, and signaled that this would occur before the May 18-21 plenary of the European Parliament.

That is when the parliament is slated to vote on a draft resolution outlining the EU lawmakers' position on TTIP. Prior to that, 14 different parliamentary committees — including its agriculture committee, of which De Castro is a member — will weigh in on the resolution with their own viewpoints.

The Italian lawmaker signaled that the TTIP resolution vote could be an early test for the final vote on a TTIP deal. "That will be a crucial vote, because if we don't have a majority, it will be messy," he said.

According to De Castro, the other groups in the parliament that support TTIP — the European People's Party, European Conservatives and Reformists, and the Alliance of Liberals and Democrats — do not have enough votes between them to pass the agreement. "Without S&D, we do not have a majority," he said.

He signaled that the focus has to be on increasing support for TTIP among S&D members because it would be futile to recruit far-left and far-right lawmakers already opposed to the agreement.

"My group has the maximum responsibility," he said. "We have to go very slowly to get a large majority or maximum number of our group in favor. This is what [S&D Group President] Gianni Pittella is doing," he said.

On ISDS, some S&D members are "more pragmatic" than others, according to De Castro. "I think the majority can say, 'OK, but we need to change the part that doesn't work or we don't like,'" he said.

De Castro also noted that while ISDS has become a "hot issue" in many EU member states, it has become particularly sensitive in Austria, Belgium and Germany as a result of concentrated anti-TTIP campaigns being conducted there.

An S&D Group position paper on ISDS released on March 4 describes ISDS as being unnecessary in a trade agreement between two countries with well-developed legal systems and instead endorses the use of national courts or state-to- state dispute settlement to resolve these conflicts.

The drafting of the S&D position paper was very contentious among the group's members, according to an EP source. This source said the first draft initially called for a complete rejection of ISDS in TTIP, but members

ultimately backed off. The final position paper does not call ISDS's inclusion a "red line," nor does it warn that S&D members will vote against it, the source said.

On SPS, some S&D members believe the EU method for developing its standards and its use of the precautionary principle are superior to the U.S. system and that the EU should not accept or recognize the U.S. approach.

The precautionary principle allows EU regulators to impose restrictions even if the science is uncertain, an approach that has been criticized by U.S. government officials and agriculture groups. The U.S. is more prone to allow the use of a given substance unless it is proven to pose a risk.

De Castro advocated a "pragmatic approach" to sensitive agricultural issues in the TTIP, which he noted is more than an agriculture deal because it covers so many bigger issues and has strategic importance. "[T]his is an agreement not built on agriculture," he said.

"We have to find a good balance with all of the issues. Cars, transportation, chemistry, financial services ... We have to find a good balance for everything inside, including agriculture," he said.

De Castro said he relayed his message during his March 4-5 visit to Washington, where he met with U.S. Chief Agricultural Negotiator Darci Vetter, Agriculture Secretary Tom Vilsack, Senate Agricultural Committee Chairman Pat Roberts (R-KS) as well as with House Agriculture Committee Chairman Michael Conaway (R-TX) and Ranking Member Collin Peterson (D-MN). He also met with House Ways & Means trade subcommittee Chairman Pat Tiberi (R-OH).

In his meetings with members of Congress, De Castro said they agreed with the strategic importance of TTIP and that the benefits of the agreement needed to be touted in public more. He added that the debate over TTIP should not be dominated by its detractors.

In a statement to *Inside U.S. Trade*, Pittella said the S&D adopted the ISDS position paper with an overwhelming majority. "It was the result of an intense internal discussion of all S&D members. The agreed text responds to the concerns expressed by our citizens and many civil society organizations and it reiterates our objection to ISDS in TTIP," he said.

Pittella noted that the position paper allows the commission to "radically improve" the ISDS mechanism in the EU's free trade agreement with Canada. At the same time, he indicated that the group would wait until TTIP is concluded before deciding whether to vote for it.

"The rule of law and independent courts must not [be] questioned in trade agreements. Especially with countries like the U.S. that have fully functioning legal systems and in which no risks of political interference in the judiciary have been identified. We will reserve our final judgment [until] the entire package is referred to the European Parliament," he added.

Bernd Lange, the chairman of the European Parliament's International Trade Committee and a member of the S&D Group, expressed similar sentiments in a Feb. 4 interview with *Inside U.S. Trade*. But when pressed on whether that means he would vote against a TTIP deal if it includes ISDS, he declined to respond directly. Instead, he cited an April 2014 position paper by the S&D Group which expresses opposition to ISDS in a final TTIP deal (*Inside U.S. Trade,* Feb. 6).

The day before, Lange said a decision on how the group will proceed will not be taken until a December 2015 party congress (*Inside U.S. Trade*, Feb. 6). A parliamentary source speculated that the S&D party congress could evaluate what kind of potential reforms the European Commission makes to ISDS with respect to the FTA with Canada.

Australian Official Says Nine TPP Chapters Closed, Others Nearing Conclusion

INSIDE U.S. TRADE - www.InsideTrade.com - March 13, 2015

Waikaloa, HAWAII — Australia's chief negotiator for the Trans-Pacific Partnership (TPP) negotiations said ahead of the March 9-15 informal round here that nine out of the agreement's 30 chapters have been closed and that most of the other chapters are nearing conclusion.

The chapters already closed are: competitiveness and business facilitation, cooperation and capacity building, cross-border trade in services, customs, development, regulatory coherence, small and medium enterprises, telecommunications and temporary entry, Australian chief negotiator Elizabeth Ward confirmed to an Australian Senate panel on Feb. 26.

"At this stage that list is still current," she said. "A large number of other chapters are close to conclusion." Ward did not respond directly when pressed by Senator Penny Wong of the opposition Labour Party to identify which chapters were close to conclusion.

The list of completed chapters as cited by Ward shows that TPP countries have been able to close two — customs and cross-border trade in services — since the spring of last year. At that time, Direcon, the Chilean trade agency, identified the other seven chapters Ward cited as the only ones that were already closed.

The fact that the customs chapter is closed raises the question of whether and how TPP countries have resolved the controversial issue of the de minimis levels that each country will apply to express shipments.

The U.S. had long pressed for TPP countries to establish a de minimis level of $200 for express shipments — under which such shipments are exempt from duties, taxes and formal customs procedures — but other countries including Mexico had resisted that demand. The de minimis level is a key issue for express delivery companies like UPS and FedEx, both of which are closely monitoring the TPP negotiations.

TPP countries have already begun the legal scrubbing of the chapters that have been closed. Sources have said this unusual step is intended to minimize the delay between the conclusion of the negotiations and the signing of the agree- ment, thereby allowing a speedier ratification by signatories (*Inside U.S. Trade*, Dec. 19, 2014).

In addition, U.S. Trade Representative Michael Froman last month urged the International Trade Commission to begin work on the economic analysis of the TPP now and do it quicker than its previous chairman has said would be possible (*Inside U.S. Trade*, Feb. 13).

Jan Adams, deputy secretary at Australia's Department of Foreign Affairs and Trade, seemed to err on the side of caution in outlining the timeline for wrapping up the talks when testifying before the same Senate panel. "We think the TPP is close to conclusion," she said. "I think all of the 12 parties are working very intensely at the moment to aim to conclude in the next few months."

She said TPP countries are "working towards" the goal of concluding the negotiations at a ministerial meeting slated to take place in mid-April. The meeting was earlier set for mid-March, but was pushed back by one month (*Inside U.S. Trade*, Feb. 20).

One informed source said last week that there are already signs the ministerial could be delayed again, possibly to later in April or potentially May.

On the intellectual property (IP) chapter, Adams reiterated that Australia's current negotiating position is to not take on any commitments that would require it to change its current domestic law, including with respect to copyrights and the pharmaceutical benefits system (PBS), which subsidizes medicines for Australians.

But she did not provide an ironclad commitment that the TPP would leave the PBS unchanged, despite being pressed by Wong to do so. Instead, Adams reiterated the Australian government's position that it "will not accept adverse out- comes for the health system, PBS and the price of medicines."

At the same time, she acknowledged that other TPP parties had tabled IP proposals that would require changes to Australian law, and said the government had made "cost impacts" of those proposals. Among the Australian agencies involved in that effort are the departments of Health and Treasury, and IP Australia, she said.

Asked how the TPP would coexist with existing free trade agreements between parties, Adams said that generally the "higher" obligation would prevail. But in the event the two agreements conflict, TPP countries would have to work out how to address the issue in each specific case, she said.

Lawmakers Seek Protection For U.S. Footwear Industry; Differ On Details

INSIDE U.S. TRADE - *www.InsideTrade.com* - March 13, 2015

Waikoloa, HAWAII — Ahead of the Trans-Pacific Partnership (TPP) negotiating round underway here, six members of Congress from New England and Arkansas urged U.S. Trade Representative Michael Froman in two separate letters to ensure that a final agreement does not harm domestic footwear manufacturers in their states. But they differed on the extent to which they called for tariffs to be maintained for imports of Vietnamese footwear.

A Feb. 4 letter signed by Sens. Susan Collins (R-ME), Ed Markey (D-MA), Elizabeth Warren (D-MA) and Jeanne Shaheen (D-NH) called on Froman to avoid eliminating or phasing out duties on products that have been identified as sensitive by U.S. footwear manufacturers, sources said.

That went further than a March 9 letter from Sen. John Boozman (R-AR) and Rep. Rick Crawford (R-AR), which pressed Froman to pursue an approach in TPP that mirrors the treatment given to sensitive footwear products in the U.S.- Korea free trade agreement (KORUS), according to these sources.

This would entail a 12-year phaseout of tariffs on sensitive footwear, with the cuts being backloaded so that they do not begin until year nine. This reflects the position of U.S. companies with domestic footwear manufacturing, which have pressed USTR to adopt an approach similar to the KORUS on tariffs and rules of origin.

The KORUS rule of origin for footwear requires 55 percent of the value to originate from within the region, but with the caveat that the "upper" portion of the shoe — which consists of everything but the sole — must be made in the region.

USTR thus far appears to be heeding these recommendations, although it may be open to some marginal changes on the rule of origin. In light of this, the Arkansas letter may reflect a more realistic position than the senators' demand that tariffs be maintained, sources said.

Both congressional letters warned Froman against trading off U.S. tariffs on footwear for gains in another sector. "It is critical that our trade negotiators avoid any negotiating strategy of using footwear as leverage in trade negotiations that could ultimately result in the loss of footwear manufacturing jobs here in the United States," the four senators wrote, according to informed sources.

One source noted that between the two letters, four signatories — Boozman, Crawford, Collins and Shaheen — are considered gettable votes for a Trade Promotion Authority bill, indicating that their views should hold sway with USTR.

The letters come on the heels of indications by companies in New England and Arkansas that they would expand their current domestic manufacturing footprint if the tariffs on sensitive footwear products are maintained, sources said.

The Rubber and Plastic Footwear Manufacturers Association (RPFMA), which represents U.S. companies with domestic production, has identified 24 U.S. footwear tariff lines at the eight-digit level on which it wants duties main- tained. These cover such products as athletic footwear, work boots and hiking boots.

In general, RPFMA and its members — some of which also produce footwear abroad for import to the U.S. — have argued that the U.S. should maintain tariffs on sensitive footwear in TPP so that domestic manufacturers can compete with countries like Vietnam that have significantly lower wages and less-stringent labor standards.

http://m.bbc.com/news/health-31944575

New global fund to help countries defend tobacco control

18 March 2015

A new global fund is being launched to help developing countries fend off challenges to tobacco control measures by cigarette makers.

The $4m (£2.7m) fund is a joint effort by Bloomberg Philanthropies and the Bill and Melinda Gates Foundation.

They say tobacco control gains are being put at risk by the industry's use of trade agreements and litigation.

But tobacco companies argue they are protecting investments, including intellectual property rights.

The fund has been launched in Abu Dhabi at an international conference on tobacco control.

Five reasons to fret about Obama's trade agenda

Financial Times

By Shawn Donnan and Megan Murphy in Washington

March 19, 2015

After more than half a decade wrangling over rules for everything from data flows to fisheries' subsidies, the US, Japan and 10 other countries are close to finalising one of the biggest trade deals ever struck — the Trans-Pacific Partnership.

Or are they?

To close the deal, Mr Obama needs "fast-track" negotiating authority from Congress, which guarantees that the 535 members of the US legislature will not pile in and try to renegotiate what the administration has hashed out with other countries.

Support is there, but opposition too is fierce. Here are five reasons why Mr Obama will have his work cut out:

Congress is looking increasingly messy

At the start of January, when Republicans assumed a majority in both the House of Representatives and the Senate for the first time in eight years, party leaders said trade and tax reform would be at the top of an economic agenda that had at least some bipartisan support.

Less than three months later, Congress remains gripped by the same dysfunction that has crippled GOP efforts to move forward with key legislative priorities, and has cast doubt as to whether the next two years will be any different to the past six.

Add in the manoeuvring prompted by the 2016 presidential cycle and looming battles on everything from infrastructure spending to immigration, getting anything done seems more difficult by the day.

Trade remains a tough sell in the US

Mr Obama has touted trade as a means of creating jobs and lifting wages, but even he knows it's a tough sell in the US.

Part of the difficulty is that since the North American Free Trade Agreement took effect two decades ago the debate has morphed into panic about jobs migrating to China.

That noise drowns out the improvement to American standards of living courtesy of low-cost imports, grumble proponents of free trade, or how disruption in manufacturing has unleashed innovation elsewhere in the economy.

The result is a jaded US population: a Pew survey last year found that half of them believed trade destroyed jobs.

The left is fighting Obama hard on trade

It is not just the populace: Mr Obama faces opposition from within his own party and the labour unions who have long had close ties to it.

The AFL-CIO, the biggest union in the country, is flexing its muscle, threatening to pull campaign donations from any member of Congress who votes for the Trade Promotion Authority or the TPP.

Elizabeth Warren, the Massachusetts senator who made her name after the 2008 crisis by targeting Wall Street, is now opposing the TPP and the granting of fast-track authority to Mr Obama.

Republicans in Congress want at least some Democratic backing for Trade Promotion Authority, as "Fast Track" is formally known, and the opponents are fighting hard to prevent that happening. Pro-trade Democrats speak with awe of the pressure being applied by unions in their home districts.

Opponents on the right may also be mobilising

Republicans have healthy majorities in both houses of Congress. But they have little control over the Tea party right, particularly in the House of Representatives.

Some prominent Tea party figures such as Senator Ted Cruz have backed the TPP and granting the president the powers he needs. But equally there are some Republicans who will be voting against granting Mr Obama's fast-track authority purely on the basis that they oppose giving him anything.

The question is, how many?

Republicans won 247 of the 435 seats in the House of Representatives in last November's elections. Some estimates have as many as one in five of those Republicans preparing to vote against the Trade Promotion Authority. Were that to happen the president would need 20-30 Democrats to back him — not necessarily easy.

The clock is ticking

The biggest challenge for Mr Obama may be time. Senior TPP negotiators insist that once the US returns to the table with fast-track authority in hand they can close the deal within weeks.

But Mr Obama and his team believe even an accelerated process would take six months to get a deal from the negotiating table to Congress and that a vote to ratify the TPP would be unlikely in a presidential election year — and 2016 is fast-approaching.

So if TPP negotiations are not concluded in the next two to three months, political obstacles mount and the trade pact may languish.

Tim Groser, New Zealand's trade minister, said on Wednesday that inaction by Congress in the coming weeks could see the TPP meet the same ignominious fate as long-stalled discussions in the World Trade Organisation, where 14 years of talks has yielded little.

"This is really a crucial moment," Mr Groser said. "We do not want [the TPP] to suffer the fate of the WTO's Doha round."

TPP in Focus: Investment and Investor-State Dispute Settlement – The Need for Reform

Mar 20, 2015 Issues: TPP in Focus, Trans-Pacific Partnership

http://democrats.waysandmeans.house.gov/blog/tpp-focus-investment-and-investor-state-dispute-settlement-%E2%80%93-need-reform

This is part a series of blog posts about the Trans-Pacific Partnership trade agreement.

Investment chapters in U.S. free trade agreements (FTAs), in particular the dispute settlement mechanism known as "investor-state dispute settlement" (ISDS), have received heightened scrutiny from a broad-range of interested parties. While investment provisions have a long history and respond to unfair actions against investors, the changing scope and nature of globalization require a careful re-examination of ISDS provisions. It is clear that if we are going to maintain provisions that seek to protect U.S. investment abroad we must further reform the ISDS chapter in TPP to ensure that governments preserve the ability to regulate in the public interest.

Countries began negotiating investment agreements back in the 1950s, and the United States began in the 1980s, to provide investors with some basic rights abroad and a method to resolve disputes. Concerns then arose in the United States after some troubling decisions by NAFTA tribunals in the 1990s and early 2000s. In response, the text of U.S. investment agreements was substantially modified in 2002 through 2004 to address those concerns. But since then, the number of ISDS disputes has risen substantially and the kinds of claims have changed as well. A number of Members of Congress, stakeholders, and academics are concerned about these developments and the possibility that ISDS could be used to undermine legitimate public interest laws and regulations.

There are a number of proposals circulating to protect the rights of sovereign nations in the TPP, including: (1) a clarification of the so-called "minimum standard of treatment" obligation; (2) the inclusion of a mechanism for the TPP countries to agree that a claim submitted by an investor should be dismissed; (3) a statement in the text of the agreement that the investment obligations

in TPP are not intended to accord greater substantive rights than domestic investors have under domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in the TPP Agreement; and (4) a recognition of the right of governments to restrict the cross-border transfers of funds where necessary to prevent or mitigate a financial crisis. Others have proposed other reforms that deserve consideration as well.

This blog reviews the history of the investment provisions, explains the continued need for reform, and provides a more detail explanation regarding the proposals mentioned above.

I. Early Rationale for Initial Investment Protections

There is a history of countries discriminating against foreign individuals and companies. For instance, companies have had their facilities taken over by foreign governments without receiving any compensation and have faced discriminatory treatment simply because of their nationality.

To address these abuses, the United States has negotiated bilateral investment treaties (BITs) with 47 countries and FTA investment chapters with 20 countries to date. The United States concluded its first BIT in 1982, largely modeled on European BITs that had been in place since the 1950s. Today, there are over 2,000 BITs in effect worldwide, and there are numerous bilateral or regional trade agreements that include similar investment chapters.

U.S. BITs and FTA investment chapters generally have contained the following provisions:

- Non-Discriminatory Treatment. A party is required to treat investors of another party "no less favorably" than the host country's own investors or investors from third-countries;
- Expropriation. A party is required to compensate the investor of another party when a government expropriates an investment;
- "Minimum Standard of Treatment" (MST). A party is required to provide a minimum standard of treatment, consistent with customary international law, including "fair and equitable treatment" and "full protection and security" for investors; and
- Investor-State Dispute Settlement (ISDS). An investor has the right to submit an alleged breach of the investment provisions to international arbitration. ISDS was designed to depoliticize these disputes and provide a neutral forum to resolve unfair treatment abroad to U.S. investors.

II. Early Concerns Over NAFTA Investor-State Cases

The North American Free Trade Agreement (NAFTA) was the first U.S. trade agreement to include an investment chapter and ISDS. While many of those cases did not involve the United States (and the US Government has never lost an investment dispute), some of the legal reasoning and outcomes in the early NAFTA cases were troubling.

For example, in *Metalclad vs. Mexico*, a U.S. company purchased a hazardous waste landfill in Mexico and was issued permits to operate the landfill from federal and state authorities. The municipal government in Mexico later denied Metalclad a construction permit based on concerns regarding the environmental impact of the project. The NAFTA tribunal found that the municipality breached the MST obligation in NAFTA by denying a construction permit for

environmental reasons (rather than for things like physical construction defects) and faulted Mexico for not ensuring a "transparent" investment environment.

While the MST obligation was intended to be based on customary international law (i.e., a legal obligation derived from a general and consistent practice of states followed by them from a sense of legal obligation), the tribunal did not examine customary international law in its decision. The tribunal also found that these and other government actions constituted an indirect expropriation of the investor's investment, noting that expropriation includes "incidental interference with the use of property which has the effect of depriving the owner, in whole or 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."

III. U.S. Negotiators Respond

In 2004, Congressional Democrats worked with USTR and the State Department to develop a new model that contained several changes to address these issues, including the following:

- Indirect Expropriation. The post-2004 texts include an expropriation annex that:
  - restates the three key factors in the seminal U.S. Supreme Court's Penn Central decision pertaining to "regulatory takings" under U.S. constitutional law;
  - clarifies that "the fact that an action...has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred" (responding to criticisms of the Metalclad decision); and
  - includes a statement that, "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."
- Minimum Standard of Treatment. The texts clarified that parties are only obligated to provide treatment "in accordance with customary international law, including fair and equitable treatment and full protection and security." These concepts "do not require treatment in addition to or beyond that which is required by that [customary international law] standard, and do not create additional substantive rights."
- Eliminating Frivolous Claims. The texts require arbitrators to "decide as a preliminary question any objection by the respondent [government] 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." A respondent government may be entitled to recoup reasonable costs and attorney's fees if the claim was frivolous.
- Transparency and Public Participation in Arbitral Proceedings. The texts require that key documents be made publicly available and provide that the tribunal has the authority to accept amicus curiae ("friend of the court") submissions from any person or entity that is not a disputing party.

In addition, in 2007, House Democrats included in the May 10th Agreement a provision to further clarify the limits of the investment obligations. The following provision was added to the preamble of FTAs with Colombia, Panama, Peru, and South Korea:

[F]oreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law where, as in the United States,

protections of investor rights under domestic law equal or exceed those set forth in this Agreement.

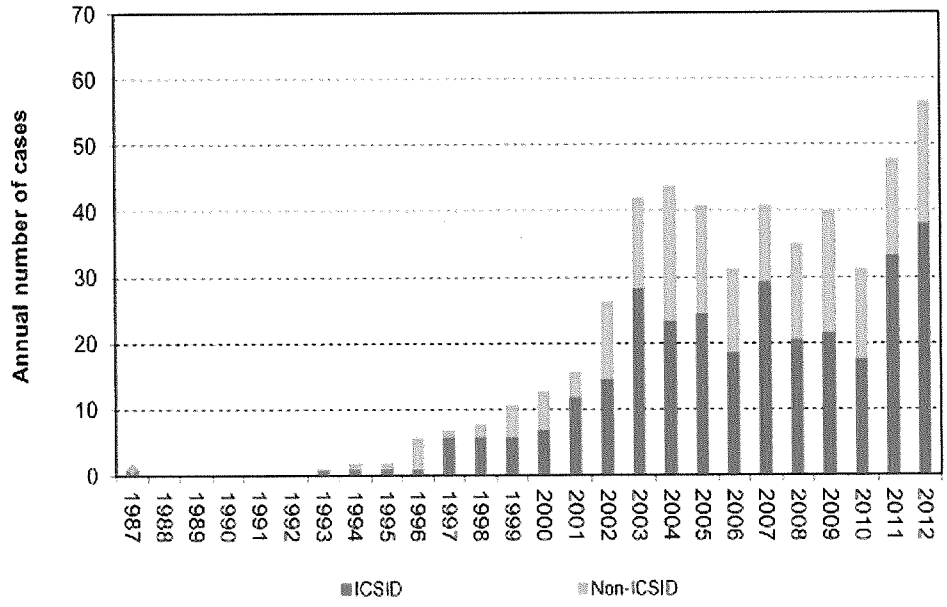
The United States unveiled a new model BIT in 2012 although disappointingly the 2012 model BIT did not include the May 10th preambular language.

IV. Continuing Concerns & the Recent, Further Proliferation of ISDS Cases

Some TPP parties do not support ISDS or are seeking safeguards to ensure that nations preserve their right to regulate. The Economist magazine, the Cato Institute, the European Union, and the German Government have also expressed concerns. The Administration responded to concerns raised recently by Senator Elizabeth Warren, which prompted this reply from the Cato Institute.

The number of disputes has proliferated in recent years, involving increasingly novel and costly challenges to public welfare and environmental regulations, and may have a chilling effect on government actions. For example, Philip Morris recently sued Australia under a Hong Kong-Australia BIT, arguing that cigarette warning labels interfere with its trademarks and constitute an indirect expropriation of its investment.

In a June 2013 paper, the UN Conference on Trade and Development (UNCTAD) noted concerns with ISDS relating to "a perceived deficit of legitimacy and transparency; contradictions between arbitral awards; difficulties in correcting erroneous arbitral decisions; questions about the independence and impartiality of arbitrators, and concerns relating to the costs and time of arbitral procedures." UNCTAD also noted a proliferation of ISDS cases, setting a new record in 2012, as the following chart demonstrates:



Source: UNCTAD

Importantly, most of these cases do not involve U.S. investment agreements, and U.S. investment agreements include many safeguards for government actions that are not found in other agreements. For example, UNCTAD recently listed a number of 'procedural innovations,' all of which have already been included in U.S. agreements: setting a time limit for bringing claims; giving governments a mechanism to interpret existing agreements; allowing the consolidation of claims; enhanced transparency; and removing frivolous claims.

Nevertheless, some recent cases under U.S. agreements are not the kind of cases envisioned when ISDS was first established. For example, Eli Lilly recently sued Canada, arguing that Canada's patentability criteria on medicines violate the investment protections in NAFTA.

There are also still concerns regarding the manner in which tribunals interpret U.S. investment agreements. For instance, tribunals have continued to construe the MST obligation in a broad fashion. Scholars have commented on this continued practice:

[I]nvestment tribunals continue to construe even [customary international law]-based [minimum standard of treatment] provisions to impose broad limits on government authority by accepting, without any evidence of state practice or opinio juris, the pronouncements of previous tribunals as definitive evidence of the standard under [customary international law].

Take, for example, *Railroad Development Corporation (RDC) vs. Guatemala*, a case brought by a U.S. company under the Central American Free Trade Agreement (CAFTA), which included the improvements made to the investment text in the 2004 Model BIT. The tribunal neglected to base its interpretation of the MST obligation on customary international law, instead relying on a previous tribunal's decision in a NAFTA case. Decisions like these suggest that tribunals require even further guidance on what the MST obligation actually means.

V. Necessary Investment and ISDS Reforms

The investment chapter of TPP still needs to undergo further procedural and substantive reforms. The status quo is clearly not satisfactory, especially given the expanding scope of globalization and the clash of interests. Nearly every provision listed by USTR as an improvement for TPP (e.g., enhanced transparency, allowing amicus briefs, removal of frivolous claims, etc.) have been included in past U.S. FTAs for more than a decade. In response to the changing dynamic, USTR has indicated that the TPP "will make absolutely clear that governments can regulate in the public interest" – which would be new. However, that will not be meaningful unless incorporated into specific reforms, and careful attention must be paid to the exact language in any "public interest" provision to ensure that it achieves the goal.

The following are additional reforms that would improve the TPP investment chapter.

i. *Clarification of the Minimum Standard of Treatment*

Investors have argued for more extensive protections under the MST obligation than customary international law provides. For instance, the investor in *Glamis Gold vs. United States* argued that the MST obligation requires a government to compensate a foreign investor who has been

harmed by merely "arbitrary" government action. The Glamis Gold tribunal was not persuaded by this argument and its decision accurately described how customary international law limits a tribunal's interpretation of the MST obligation. This description was fully consistent with the arguments the US Government made in that case.

Consistent with the decision in *Glamis Gold*, the TPP investment chapter should make clear that: (1) the investor bears the burden of proving that an obligation exists under customary international law; and (2) the MST obligation only protects investors against "egregious" or "outrageous" conduct (the so-called *Neer* standard). In the *Neer* case (1926), the U.S.-Mexico Claim Commission expressed the concept as follows: "the propriety of governmental acts should be put to the test of international standards...the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency." This 'minimum standard' best ensures a balance between respect for the sovereignty of nations and the need to protect investors in extreme cases.

ii. A Workable Diplomatic Screening Mechanism

U.S. BITs and FTAs already include a mechanism that allows the two governments to adopt an interpretation of an investment obligation that is binding on an ISDS tribunal. Further, U.S. FTAs have included a diplomatic screening mechanism of sorts, but only for tax measures. This mechanism should be extended more broadly so that it covers other public interest issues, such as environmental and public health measures.

Specifically, the two governments (the government of the claimant/investor and the government respondent in an ISDS case) could agree that a particular claim is not a claim for which an award in favor of the claimant may be granted. In other words, a dispute would not be subject to ISDS if both governments agree that a claim should be dismissed.

iii. *May 10th Preambular Language*

As noted above, the May 10th Agreement contained a provision to be included in the preamble to U.S. FTAs asserting that the agreement does not provide foreign investors with greater substantive rights than U.S. domestic investors. Preambular language such as this can serve as a useful interpretive guide to a tribunal in analyzing investment claims.

Some have argued that other countries will not accept a provision that only references U.S. law (and not the domestic law of other countries). However, a number of foreign countries have already agreed to this language. It was included in the Colombia, Panama, Peru, and Korea FTAs. TPP should also include this language.

iv. *Restrictions on Capital Flows to Prevent and Mitigate Financial Crises*

U.S. investment chapters currently provide that each Party shall permit "all transfers relating to a covered investment to be made freely and without delay into and out of its territory." Such

transfers include "contributions of capital," "profits," and "payments made under a contract." There is a longstanding debate as to whether an exception to this obligation should be made to prevent and mitigate financial crises. The WTO General Agreement on Trade in Services (GATS), the IMF Articles of Agreement, and the OECD's Capital Movements Code each address this issue. However, U.S. negotiators continue to resist including such exceptions in U.S. trade agreements. The Korea and Chile FTAs explicitly address the issue, but each provides an exception in fairly limited circumstances.

Recently, more than 250 economists, including Birdsall, Rodrik, and Stiglitz, has urged "that future U.S. FTAs and BITs permit governments to deploy capital controls without being subject to investor claims[.]"

Other TPP countries have insisted on such an exception. The focus is now on ensuring that the language in the exception is neither too narrow nor too broad.

* * *

Given the proliferation of cases and the inconsistent interpretations of investor-state tribunals, TPP must include reforms to the obligations and procedures related to ISDS. This and other proposals that serve as a guide to a "Path Forward to an Effective Agreement" can be found here.

March 23, 2015

Dear Representative/Senator:

The undersigned organizations, dedicated to government openness, scientific integrity and accountability, write to urge that any trade authority legislation must establish new obligations for executive transparency, including public access to trade agreement texts, which would initiate a new era of openness and public discourse surrounding trade negotiations.

As Congress contemplates whether or how to delegate its constitutional authority over trade policy to the Obama administration, we understand that a Fast Track trade authority bill is expected soon and that it may include revised provisions around transparency in trade negotiations. If the trade authority bill is to actually increase transparency, then it must go much further than simply codifying past practices. At a minimum, any trade authority legislation should mandate that in order for a trade agreement to be granted expedited consideration in Congress, both U.S. draft textual proposals and the consolidated bracketed negotiating texts must be made public at regular intervals during the negotiating process. Trade negotiations such as the Trans-Pacific Partnership (TPP) that have not met these transparency standards should not receive any Fast Track treatment.

Greater transparency is essential because these negotiations are of unprecedented scope with respect to both the subject matter and the countries potentially involved. The current TPP partners sum up to 40 percent of world GDP and the proposed "docking" mechanism could allow other countries to join.

The subject matter now being negotiated extends significantly beyond tariffs and other traditional trade matters. As the United States will be obliged to bring existing and future domestic policies into compliance with the international norms established in the pact, this process would establish policies binding on future U.S. Congresses and state legislatures on numerous non-trade subjects currently under the jurisdiction of these domestic legislative bodies.

In February 2012, many of our organizations wrote to President Obama to urge him to increase the transparency of the Trans-Pacific Partnership (TPP) Free Trade Agreement (FTA) negotiating process.[i] At that time, we pointed out that, without any public access to even the most fundamental draft agreement texts and other documents, important policy decisions that may significantly affect the way we live our lives by limiting our public protections were being made by executive branch trade officials.

We pointed out that, in contrast to the Administration's commitment to creating an "unprecedented level of openness in Government" and its launch of the Open Government Partnership, multiple aspects of the TPP FTA negotiations process utterly fail to meet the most basic standards of transparency. We called on the Administration to, at a minimum, provide access at regular intervals to the draft composite negotiating texts of the pact's various chapters for all congressional staff, the public, and the press.

Unfortunately, more than three years later, this practice has not been adopted in the context of TPP FTA talks. Indeed, the talks have gone even further underground. Even the already insufficient process of formal stakeholder engagement at the negotiating rounds has not occurred since August of 2013, despite at least eight chief negotiators' meetings, 16 intersessional meetings, four ministerial-level meetings, and multiple attempts to conclude the talks. Now the need to release the text is even more urgent, as the most recent mid-2015 deadline is imminent.

Even for U.S. Members of Congress with exclusive constitutional authority over trade, it took years of demands to manage to convince the U.S. Trade Representative (USTR) to allow them to see draft TPP texts. To date, this access remains very time limited and they are not permitted to have any cleared staff or experts with them, take notes, or talk about what they have seen.

While this degree of secrecy vis-à-vis Congress represents a rollback in transparency in trade negotiations relative to the practices of past administrations, if the trade authority bill is to actually increase transparency, then it must go much further than simply codifying past practices. For instance, if a Fast Track bill were to formalize access to draft trade agreement text only for congressional staff *with security clearances*, it would newly create a statutory requirement that trade texts be subject to treatment under the national security classification system. Currently, there is no such legal requirement. Similarly, if the Fast Track bill simply formalizes the past practice of providing Members of Congress access to texts in a secure reading room, this would not promote the values of transparency that is supposedly a centerpiece of this government.

The U.S. government, at a minimum should make public both U.S. draft textual proposals and the consolidated bracketed negotiating texts at regular intervals during the negotiating process, in all future negotiations of this sort, including immediately with the European Union. The goals of a transparent, collaborative, and participatory government with empowered citizens, as well as a "high-standard, 21st century" agreement that advances the health, safety, enterprise and creativity of the American public, require no less.

The current TPP negotiations have been ongoing for more than five years and this transparency standard has not been followed, however, so it would be inconceivable that, if a completed TPP is brought to Congress, it should receive any Fast Track treatment.

Sincerely,

American Library Association
Association of College & Research Libraries
Association of Research Libraries
Center for Effective Government
Center for Media and Democracy
Center for Science and Democracy, Union of Concerned Scientists
Citizens for Responsibility and Ethics in Washington (CREW)
Defending Dissent Foundation
Food & Water Watch
Government Accountability Project
Knowledge Ecology International
Liberty Coalition
OpenTheGovernment.org
Project Censored
Public Citizen
Rural Coalition/Coalición Rural
Special Libraries Association
Sunlight Foundation
U.S. Public Interest Research Group (PIRG)
Washington Coalition for Open Government

---

[i] The secretive TPP negotiations have shut out of the process small business, civil society and other stakeholders who have a direct and long-term interest in the outcome of these negotiations. Yet, under the trade advisory system, representatives from over 500 business interests have direct access and thus, unlike the public, have the ability to influence an agreement that could have an enormous impact on the public in a myriad of ways.

These include patent and copyright, land use, food and product standards, natural resources, professional licensing, government procurement, financial practices, healthcare, energy, telecommunications, and other service sector regulations, and more. Indeed, these texts will affect the cost of prescription drugs, the state of our environment, and our government's ability to protect the public from tainted food, defective products, safe drugs, and will touch every American family. The enforceability and permanence of such binding rules, with later changes to an adopted pact requiring agreement by all signatory countries, necessitates maximal transparency and extreme care on the front end.

Fast Track Trade Authority Must Be Replaced

To Deliver Trade Agreement that Can Deliver Broad Benefits

March 23, 2015

Dear Senator:

Last fall, our organizations were joined by nearly 600 other unions and environmental, consumer, faith, family farm, civil rights, seniors, LGBT and other civil society organizations on a letter outlining the features of a trade authority mechanism that we would support. As negotiations on a prospective trade authority bill continue, we wanted to bring these criteria in the attached letter to your attention.

Given that the administration has failed to incorporate into the Trans-Pacific Partnership the enforceable disciplines against currency manipulation that bipartisan majorities in both the Senate and House support, it is even more critical now that Congress must not cede its leverage over the contents of American trade agreements.

Over the course of our nation's history, Congress has regularly created new trade authority mechanisms as the subject matter of agreements has changed. In order to deal with today's complex trade agreements and accelerating globalization, a 21st century trade authority that includes enhanced mechanisms for Congress to exercise its constitutional authority over trade agreements from start to finish is needed.

While it is important that Congress develop robust and binding negotiating mandates that outline what all U.S. trade agreements must and must not include, as detailed in the attached letter, even more important is the replacement of the outdated and failed Fast Track *procedures.*

Fast Track empowered a president to unilaterally select countries, determine the contents of agreements via negotiation, and sign and enter into them before Congress approved their texts, *regardless of whether a pact met Congress' statutory negotiating objectives defined under the Fast Track delegation.* Fast Track further empowered a president to write and submit legislation to implement the trade agreement and after skirting normal congressional review and mark-up to

be guaranteed votes in both chambers within 90 days. Importantly, neither the implementing bill nor the underlying trade deal could be amended, *regardless of whether a pact met Congress' statutory negotiating objectives.*

The 1988 Fast Track allowed either the Ways and Means or Finance Committees to remove an agreement from expedited consideration before a president signed it and allowed any member of Congress to submit a "disapproval resolution" removing a pact from Fast Track, however these processes proved insufficient to enforce some of Congress' negotiating objectives with respect to the North American Free Trade Agreement and the World Trade Organization agreements.

This reinforces why a new trade authority process must ensure that Congress, not the executive branch, determines when Congress' negotiating objectives have been satisfied as well as requirements for increased congressional and public oversight over the process. To ensure better trade deals that work for all of us, it must open up the negotiating process to public scrutiny. Further, completed agreements must only be subject to expedited consideration if and when Congress determines that the conditions of its delegation are met.

We urge you to seize the historic opportunity to replace the outdated Fast Track procedures that our organizations so strongly oppose and create a new trade negotiating and approval process that would help deliver trade agreements that could benefit workers, communities, and the environment and, therefore, rebuild broad support for trade agreements.

Sincerely,

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)

Citizens Trade Campaign

International Brotherhood of Teamsters

National Farmers Union

Public Citizen

Sierra Club

United Brotherhood of Carpenters

***

The Honorable Ron Wyden

United States Senate

Washington, D.C. 20510

September 10, 2014

Dear Chairman Wyden:

On behalf of our millions of members and supporters, we write to share our objectives regarding 21st century trade agreements and the enhanced congressional oversight needed to ensure that U.S. trade pacts deliver benefits for most Americans, promote broadly shared prosperity, and safeguard the environment and public health. Our organizations oppose the Fast Track model of trade authority and believe that it must be replaced with a new system for negotiating and implementing trade agreements that provides for more congressional and public accountability.

Today's proposed trade agreements, including the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP), extend far beyond traditional trade issues such as tariffs. The TPP is a massive 29-chapter agreement that would establish binding rules on issues related to labor rights, energy and the environment, medicine pricing, patents and copyright, food and product safety, Internet freedom and innovation, government procurement, financial regulation, immigration, healthcare, and more. Similarly, TTIP is an expansive agreement that will focus mainly on eliminating so-called "non-tariff" or "technical" barriers to trade—namely behind-the-border domestic regulatory policies. Indeed, the TTIP is focused more on how national or regional policies are made and the uniformity of regulatory standards than on international trade in its traditional sense.

The old Fast Track Trade Promotion Authority is simply not appropriate given the subject matter covered by today's pacts, such as TPP and TTIP. For this reason, we oppose "The Bipartisan Congressional Trade Priorities Act" (S. 1900), which replicates the overly broad delegation of Congress's constitutional authorities that was provided in the 2002 Fast Track and allows the executive branch to unilaterally select negotiating partner countries, negotiate terms, decide when negotiations are complete and then sign a final pact *before* the full Congress has had an opportunity to approve the contents. Pursuant to S. 1900, signed pacts could then be rushed through Congress—regardless of whether congressional negotiating objectives have been met—with a guaranteed vote in 90 days under rules that circumvent ordinary review, amendment and debate procedures.

In order to deal with today's complex trade agreements and accelerating globalization, a 21st century trade authority that includes enhanced mechanisms for Congress to exercise its constitutional authority over U.S. trade policy is needed. While it is important that Congress develop negotiating mandates that outline what all U.S. trade agreements must and must not include, as explained below, even more important is the replacement of the outdated and failed Fast Track *procedures.* Any agreement that will be considered for expedited approval (i.e. limited debate and no amendments) must include robust and binding provisions that truly mark it as a "21st Century Trade Agreement." However, including strong mandates without a system to guarantee the mandates have been achieved is like having a speeding limit in a school zone without any enforcement personnel. To that end, in this new model of trade authority, expedited consideration of completed agreements should only be available if and when Congress determines that its negotiating objectives have been satisfied and the executive branch has abided by requirements for increased congressional and public oversight over the entire process.

To achieve improved accountability and outcomes, this enhanced process should include:

1. Congressional role in selecting appropriate trade partners: Congress should set criteria, including with respect to human and labor rights compliance, environmental and public health standards, and market access opportunities for U.S. exporters, to determine whether a country is an appropriate trading partner for the United States. Congress must also have the opportunity to determine that a country proposed by the executive branch does not meet such criteria before negotiations commence and is unlikely to be an appropriate partner in the near term, in which case the trade agreement would not qualify for expedited procedures.

2. Mandatory negotiating objectives to ensure trade agreements deliver broad benefits: Congress should set mandatory negotiating objectives outlining what all U.S. trade agreements *must* and *must not* include. Congress must have the opportunity to add agreement-specific objectives.

3. Enhanced transparency to ensure meaningful congressional and public input: The Office of the United States Trade Representative must conduct broad, specific, and systematic congressional and public briefings on the progress that negotiators are making towards meeting the established negotiating objectives. In addition, negotiating texts should be made available to the public so that all stakeholders have the information to provide informed input to elected and appointed officials on the implications of the trade deal.

4. Congressional certification that trade goals have been met before trade negotiations are concluded: When executive branch negotiators believe that they have concluded negotiations, a final text must be released publicly and Congress must certify that the negotiating objectives have been satisfied before the text of a pact can be deemed final. Only such certification could trigger an expedited vote by Congress to approve the agreement.

5. Congressional approval of trade agreements and authorization for the executive branch to sign and enter into agreements: Congress would vote on trade agreements using expedited procedures only if the requirements enumerated above were met. Requiring explicit congressional approval to sign and enter into the agreement enables Congress to ensure that an agreement's contents are acceptable at a time when changes could still be made, if necessary.

6. A mechanism for a sizeable minority of the House or Senate to obtain a vote on a resolution to remove an agreement from expedited consideration: As an additional safeguard, a sizeable minority in either chamber should be able to get a privileged floor vote in either chamber on a resolution to withdraw expedited consideration for any pact for a variety of reasons, such as lack of Congressional or public consultation/input or clear breach of negotiating objectives.

7. **Trade negotiating authority must be considered in conjunction with related trade and economic policy legislation.** For example, trade rules that cannot be enforced provide no real benefits for the American people, our environment, or our economy. Moreover, increased trade without concurrent investments in our infrastructure and workforce will surely result in lost opportunities. Addressing long-standing economic problems such as wage suppression and economic inequality will take more than new trade pacts.

Over the course of our nation's history, Congress has regularly created new trade authority mechanisms as the subject matter of agreements changed. We urge you to seize the historic opportunity to replace the outdated Fast Track procedures that our organizations so strongly oppose and create a new trade negotiating and approval process that would help deliver trade agreements that could benefit workers, communities, and the environment and, therefore, rebuild broad support for trade agreements.

Sincerely,

(National organizations, below. Please see letter on line for full list of state and local organizational signatories.)

350.org

ActionAid USA

Alliance for Democracy

Alliance for Retired Americans

Amazon Watch

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)

American Federation of State, County and Municipal Employees (AFSCME)

American Federation of Teachers

American Friends Service Committee

American Medical Student Association (AMSA)

American Medical Student Association – Just Medicine Campaign

Americans for Democratic Action (ADA)

Association of Professional Flight Attendants (APFA)

Association of Western Pulp and Paper Workers

Backbone Campaign

Black Alliance for Just Immigration

BlueGreen Alliance

Breast Cancer Action

Center for Biological Diversity

Center for Effective Government

Center for Food Safety

Center for International Environmental Law

Citizens Trade Campaign

Colombia Support Network

Columban Center for Advocacy and Outreach

Common Cause

Communications Workers of America

Conference of Major Superiors of Men

Consumer Federation of America

Corporate Accountability International

Cultural Survival

Domestic Fair Trade Association

Earthjustice

Economic Policy Institute

Environmental Investigation Agency

Ethix Ventures Inc.

Fair World Project

Family Farm Defenders

Farm and Ranch Freedom Alliance

Fight for the Future

Food & Water Watch

Food Chain Workers Alliance

Food Empowerment Project

Free Speech for People

Friends of the Earth, US

Global Exchange

GMO Free USA

Gray Panthers

Green America

Greenpeace

Health Alliance International

Health Care without Harm

Health GAP (Global Access Project)

Holy Cross International Justice Office

Institute for Agriculture and Trade Policy

Institute for Policy Studies, Global Economy Project

International Association of Machinists and Aerospace Workers

International Brotherhood of Boilermakers

International Brotherhood of Electrical Workers

International Brotherhood of Teamsters

International Federation of Professional & Technical Engineers (IFPTE)

International Labor Rights Forum

International Union of Bricklayers and Allied Craftworkers

International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW)

IUE-CWA, Industrial Division of the Communications Workers of America

Jobs With Justice

Just Foreign Policy

Justice Party

Labor Network for Sustainability

League of Conservation Voters

Maquiladora Health & Safety Support Network

Medical Mission Sisters Alliance for Justice

Moana Nui

Move To Amend

MoveOn.Org

NAACP

National Black Rank and File Exchange

National Family Farm Coalition

National Hmong American Farmers, Inc

National Latino Farmers & Ranchers Trade Association

National Nurses Organizing Committee / National Nurses United

Natural Resources Defense Council

NETWORK, A National Catholic Social Justice Lobby

New Rules for Global Finance

Nicaragua Center for Community Action

Oil Change International

OpenMedia International

People for the American Way

Physicians for a National Health Program

Physicians for Social Responsibility

Popular Resistance

Presbyterian Church USA

Progressive Democrats of America

Public Citizen

Quaker Earthcare Witness

RootsAction.org

School of the Americas Watch

Service Employees International Union (SEIU)

Sierra Club

Sisters of Mercy of the Americas - Institute Justice Team

Society of Professional Engineering Employees in Aerospace (SPEEA)

Sr. of Charity of Nazareth Western Province Leadership

SumOfUs.org

Task Force on the Americas

The Episcopal Network for Economic Justice

The Rachel Carson Council, Inc.

Unitarian Universalist Global AIDS Coalition

UNITE HERE

United Brotherhood of Carpenters

United Church of Christ Justice and Witness Ministries

United Electrical, Radio and Machine Workers of America (UE)

United Mineworkers of America

United Steelworkers

United Students Against Sweatshops

United Students for Fair Trade

Universities Allied for Essential Medicines

WarIsACrime.org

Western Organization of Resource Councils (WORC)

Women's Voices for the Earth

Worldview

Fast Track attack: Chemical safety and food labels under fire in TPP and TTIP

Friends of the Earth, U.S. Blog

Posted Mar. 24, 2015 / Posted by: Bill Waren

Fast Track trade promotion legislation is expected to be introduced in Congress the second week of April. Global corporations are calling in all their chits from massive campaign contributions to both parties in the hope of rushing the bill through Congress in the next few weeks. Fast Track would grant President Obama power to sign two sweeping trade deals -- even before Congress has a chance to vote on them.

Chemical manufacturers, global food and agriculture combines and GMO pushers like Monsanto are lining up votes for the Fast Track legislation in order to grease the skids for approval of the Trans-Pacific Partnership with Japan and other Pacific Rim countries and theTransatlantic Trade and Investment Partnership with the European Union. Two of the highest priorities for these companies are to roll back chemical safety regulations and food product labeling laws. Hidden in the text of the TPP and TIIP deals will be chapters on so-called Technical Barriers to Trade, or TBT, which will expose people and the planet to dangerous chemicals and deny consumers the right to know what is in the food they eat.

TBT & product labeling. Global corporations seek to use the TPP and TTIP deals to undercut consumers' right to know what is in their food and whether the food is produced in a humane manner protective of animal welfare. The goal of TPP and TTIP negotiators is to include "TBT-plus" provisions that are more restrictive of protective regulations than tough World Trade Organization standards.

This call for "TBT-plus" is astounding given that several TBT challenges in the WTO, paired with allegations of discrimination under the GATT agreement on Trade in Goods, have already succeeded in undermining important environmental and public health measures. For example, the WTO Appellate Body found that the U.S. dolphin-safe labeling program violates the WTO agreements.[i] Similarly, plaintiffs have recently succeeded in a WTO challenge to U.S. measures related to country of origin labeling, or COOL.[ii] According to the WTO, these so-called TBT standards … "involve significant costs for producers and exporters."[iii]

The dolphin-safe tuna and COOL labeling cases suggest that environmental and public health labeling measures, more generally, would be at severe risk of a TBT-plus challenge, including government measures related to eco-labels and labels for energy efficiency, organic food, and sustainable agriculture.

The tuna–dolphin litigation illustrates how insensitive international trade tribunals can be to arguments based on anything other than pure commercial considerations. Mexican fishing ships off the Pacific coast follow pods of dolphins that swim with tuna. Fishers intentionally target

dolphins, "setting upon" them to catch the tuna swimming underneath. The ships use dangerous purse seine nets that encircle both the dolphins and the tuna. Mothers can be killed or separated from calves in the chase. Over 6 million of these intelligent, social mammals have been killed in the fishery since the late 1950s. Consumer boycotts and "save the dolphin" demonstrations over the course of many years resulted in a U.S. program for dolphin safe labeling for tuna products. Most Mexican commercial fishing operations, however, continued to ignore U.S. dolphin-safe practices. They can still sell their tuna products in the U.S., but may not display the U.S. Department of Commerce dolphin safe label. But, this modest and humane labeling program has been repeatedly attacked with success before international trade tribunals.

TBT & dangerous chemicals. Chemicals regulation such as the European REACH (Registration, Evaluation, Authorization and Restriction of Chemicals) system and effective schemes in several U.S. states, such as California, are put at serious risk by the TPP and TTIP chapters on Technical Barriers to Trade. The U.S. trade representative has already targeted REACH[iv] in a USTR report, which names REACH as a trade barrier.[v].

All this would strongly encourage the downward harmonization of toxic chemicals regulation in Europe and U.S. states toward the lowest common denominator -- namely, the U.S. federal government's Toxic Substances Control Act. TSCA has been characterized by the President's Cancer Panel as perhaps "the most egregious example of ineffective regulation of chemical contaminates."[vi]

The effect of TPP and especially TTIP chapters on technical barriers to trade would be profound as it would limit regulators' access to the tools they need to effectively regulate the roughly 85,000 chemicals in commerce and to effectively protect human health and the environment. A growing body of scientific evidence is demonstrating that many chronic illnesses on the rise in the industrialized world are linked to exposure to toxic chemicals, including many cancers, learning disabilities, asthma, Alzheimer's and Parkinson's disease, and fertility problems.[xvii] For example, 216 chemicals are associated with increases in breast cancer, including 73 found in consumer products or food. Among the many chemicals suspected of causing learning and developmental disabilities are organophosphate pesticides, such as melaththion. Everyday solvents such as methanol and trichloroethylene are associated with Parkinson's disease. Endocrine disruptors, such as BPA, which is found in plastic and the linings of cans and other food packaging, interfere with hormones and may be associated with adverse health impacts including infertility, early puberty and breast cancer, just to name a few.

The effects on wildlife can be similarly profound.[xviii] For example, synthetic chemicals are causing infertility in animals, from alligators, to polar bears, to some species of fish. PFOS (Perfluorooctanesulfonic acid) used in stain repellants is a cancer-causing chemical that has been found in European dolphins, tuna and birds like the common cormorant. The list goes on. Neonicotinoid pesticides are a key factor in the global die-off of bees, which threatens not only their survival but also a vast array of plants and commercial crops that depend upon bees for pollination. Neonicotinoid pesticides have been restricted by the E.U, and some U.S. localities. These important regulations are put at risk by TTIP. [xix]

Other TPP & TTIP chapters compound the problem

The TBT chapters of the Atlantic and Pacific deals will work in tandem with other provisions to heighten the threat of chemical pollution and denial of the public's right to know what is in their children's food. For example, regulatory review chapters of the TPP and TTIP will encourage inappropriate use of cost-benefit analysis, inhibiting government regulators from applying the "precautionary principle" when assessing the safety of toxic chemicals, food imports and genetically engineered products, among others. Overbroad concepts of "discrimination" in the TPP and TTIP chapters on trade in goods could similarly be used to challenge food product labeling laws and chemical safety regulations. The privatization of nature would also be encouraged. As just one example, a leaked version of the TPP chapter on intellectual property provides international legal protections for patents on plants and animals, giving corporations monopolies over the use of parts of the genetic code that are our common natural and human heritage. Provisions on Sanitary and Phytosanitary measures would encourage suits to roll back food safety and animal welfare safeguards.

Stop the Fast Track attack

People power is the way to stop Fast Track legislation. Concerned citizens can make a difference by reaching out to friends and neighbors, communicating to the local press and local elected officials, and by sitting down with their members of Congress to talk about the threat that Fast Track poses to chemical safety, food labeling and so many other sensible environmental safeguards.

SELECTED ENDNOTES

---

[i] *US-Tuna II, a*vailable at, http://www.worldtradelaw.net/reports/wtoab/us-tunamexico(ab).pdf

[ii] *US-COOL, a*vailable at, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm.

[iii] World Trade Organization, Technical Information on Technical Barriers to Trade, https://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm

[iv] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, available at, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1907:EN:NOT

[v] U.S. Trade Representative, 2013 Report Technical Barriers to Trade, available at, http://www.ustr.gov/sites/default/files/2013%20TBT.pdf.

[vi] The President's Cancer Panel Report, available at, http://www.saferchemicals.org/resources/presidents-cancer-panel.html

OTTAWA — The Globe and Mail

Published Tuesday, Mar. 24 2015, 6:13 PM EDT

Last updated Tuesday, Mar. 24 2015, 6:23 PM EDT

A NAFTA arbitration panel has ruled against Canada in a claim by a U.S. company that wanted to develop a quarry in Nova Scotia, although a dissenting member of the panel warned that the decision will be seen as a "remarkable step backwards" in environmental protection.

Bilcon proposed the expansion of a quarry near Digby on the shore of the Bay of Fundy in September, 2002, but the Nova Scotia and federal governments rejected it after a joint review panel recommended it not proceed. The family-owned company – which is registered in Delaware – will now seek $300-million in damages after the arbitration panel declared that it was denied a fair environmental hearing.

More Related to this Story

The Bilcon decision has raised a number of concerns about the investor-state dispute settlement provisions that are commonplace in international agreements, ranging from the North American free-trade agreement, to the Canada-China foreign investment agreement, to the proposed Trans-Pacific Partnership currently under negotiations.

A dissenting member of the panel – University of Ottawa law professor Donald McRae – warned that the ruling represents a "significant intrusion" into domestic jurisdiction and will "create a chill" among environmental review panels that will be reluctant to rule against projects that would cause undue harm to the environment or human health.

There is a growing concern in legal circles that the arbitration panels are expanding their mandate – including substituting their decision-making role for domestic courts – and that they cannot be appealed, Toronto trade lawyer Larry Herman said Tuesday. The Bilcon decision "will feed ammunition to those who oppose international arbitration as a form of dispute settlement," he added.

It's the second high-profile NAFTA loss for Canada. Last month, Ottawa was ordered to pay Exxon Mobil Corp. and Murphy Oil Ltd. $17.3-million after a NAFTA panel ruled that Newfoundland and Labrador had violated the trade agreement by imposing retroactive research-spending requirements on its offshore oil producers.

The ruling will also serve as a precedent should TransCanada Corp. decide to launch a NAFTA challenge against the Obama administration's handling of the Keystone XL pipeline review.

"The fact that the Keystone XL project has been subject to purely political delays … in my view, gives TransCanada a good argument that the U.S. has breached the international standard of full protection and security," Mr. Herman said.

The three-person NAFTA panel was chaired by Bruno Simma, a University of Michigan law professor who served a nine-year term as judge on the International Court of Justice in The Hague. The ruling was posted by the International Arbitration Reporter website.

In the majority ruling, the panel outlined a litany of problems that arose when Nova Scotia and Ottawa determined that an environmental review was required after the province had courted Bilcon to invest in the quarry. It noted the company's contention that the federal fisheries minister at that time, Liberal Robert Thibault, represented the riding, opposed the project and wanted to "drag out" the review process.

The majority also criticized the review panel for assessing whether the project was consistent with "community core values" – a requirement, it said, that had not been properly communicated to Bilcon. But Mr. McCrae said the "community core values" standard was merely a restatement of the company's requirement to show the project did not unduly affect the "human environment" in the area.

The two-person majority insisted their ruling would not set back environmental protection.

"Lawmakers in Canada and the other NAFTA parties can set environmental standards as demanding and broad as they wish and can vest in various administrative bodies whatever mandates they wish," they wrote. But investors must be given a fair opportunity to have their case heard on its merits, they added.

Max Moncaster, a spokesman for federal International Trade Minister Ed Fast, said the government is "disappointed" with the decision and is "considering all available options," although he did not say what those might include. There is no appeal allowed.

Nova Scotia denies quarry deal, says province not liable for NAFTA damages

NAFTA tribunal ruled in favour of U.S.-based Bilcon; company seeking compensation

By Paul Withers, CBC News Posted: Mar 24, 2015 1:29 PM AT Last Updated: Mar 24, 2015 3:20 PM AT

A NAFTA tribunal's March 17 ruling says it was unjust for officials to encourage the expansion of the Whites Point quarry, but later determine the area a "no go" zone for such a development.

A NAFTA tribunal's March 17 ruling says it was unjust for officials to encourage the expansion of the Whites Point quarry, but later determine the area a "no go" zone for such a development. (www.ecologyaction.ca)

Paul Withers

Reporter

Paul Withers is an award-winning journalist whose career started in the 1970s as a cartoonist. He has been covering Nova Scotia politics for more than 20 years.

Nova Scotia says there is no agreement with Ottawa that obliges it to pay some of the damage award coming to a U.S. company that was improperly stopped from opening a quarry in Digby County.

New Jersey-based Bilcon successfully appealed the decision to reject its quarry proposal for Digby Neck to an international NAFTA tribunal.

Nova Scotia taxpayers may be on hook for NAFTA defeat

After the tribunal ruling last week, Bilcon's lawyer, Barry Appleton, suggested Nova Scotia will be on the hook for yet-to-determined compensatory damages since the province was held partly responsible and a cost-sharing side deal exists.

Nova Scotia disagrees.

"No cost-sharing agreement exists between Nova Scotia and the government of Canada in this particular case," Nova Scotia Environment Department spokesperson Heather Fairbairn said in an email to CBC News Tuesday.

"We are seeking clarity from the government of Canada — as the lead on this file — about what its next steps will be. We have no additional information at this time."

On Tuesday, Premier Stephen McNeil told reporters he expects Ottawa to pick up the cost.

"At this point we believe it's Ottawa," McNeil said.

"The announcement came down on Friday. We're looking at it. Ottawa is looking at it. It's our belief the challenge is with NAFTA, this is the federal government," he added.

Bilcon successfully argued it had been unfairly blindsided by a joint review panel created by the province and Ottawa to examine the project.

The panel rejected the quarry on the grounds it compromised "community core values," a vague criteria never actually raised at the hearing.

"Bilcon had been denied a fair opportunity to know the case it had to meet and to address it," the tribunal wrote in its decision.

The tribunal said the joint review panel did not properly assess the environmental effects of the proposed quarry and, wrongly, completely ignored mitigation measures.

"The rigorous and comprehensive evaluation was not in fact carried out... There was in fact a fundamental departure from the methodology required by Canadian and Nova Scotian law."

PUBLICCITIZEN

215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

FR: Lori Wallach and Ben Beachy, Public Citizen's Global Trade Watch
DT: Wednesday, March 25, 2015
RE: Analysis of Leaked Trans-Pacific Partnership Investment Text

After more than five years of negotiations under conditions of extreme secrecy, on March 25, 2015, a leaked copy of the investment chapter for the Trans-Pacific Partnership (TPP) was posted. Public Citizen has verified that the text is authentic. Trade officials from the United States and 11 Pacific Rim nations – Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam – are in intensive, closed-door negotiations to finish the TPP in the next few months.

The leaked text provides stark warnings about the dangers of "trade" negotiations occurring without press, public or policymaker oversight. It reveals that TPP negotiators already have agreed to many radical terms that would give foreign investors expansive new substantive and procedural rights and privileges not available to domestic firms under domestic law.

The leaked text would empower foreign firms to directly "sue" signatory governments in extrajudicial investor-state dispute settlement (ISDS) tribunals over domestic policies that apply equally to domestic and foreign firms that foreign firms claim violate their new substantive investor rights. There they could demand taxpayer compensation for domestic financial, health, environmental, land use and other policies and government actions they claim undermine TPP foreign investor privileges, such as the "right" to a regulatory framework that conforms to their "expectations."

The leaked text reveals the TPP would expand the parallel ISDS legal system by elevating tens of thousands of foreign-owned firms to the same status as sovereign governments, empowering them to privately enforce a public treaty by skirting domestic courts and laws to directly challenge TPP governments in foreign tribunals.

Existing ISDS-enforced agreements of the United States, and of other developed TPP countries, have been almost exclusively with developing countries whose firms have few investments in the developed nations. However, the enactment of the leaked chapter would dramatically expand each TPP government's ISDS liability. The TPP would *newly* empower about 9,000 foreign-owned firms in the United States to launch ISDS cases against the U.S. government, while empowering more than 18,000 additional U.S.-owned firms to launch ISDS cases against other signatory governments. (These are firms not already covered by an ISDS-enforced pact between the United States and other TPP negotiating governments.)

The leaked text also reveals that all countries involved in the TPP talks – with the potential exception of Australia – have agreed to submit to the jurisdiction of ISDS tribunals. And, Australia has now indicated that it might do the same, "subject to certain conditions." The tribunals would be empowered to order payment of unlimited government funds to foreign investors over TPP claims. Such compensation orders would be based on the "expected future profits" a tribunal surmises that an

investor would have earned in the absence of the public policy it is attacking as violating the substantive investor rights granted by the TPP.

As revealed in Section B of the leaked text, these tribunals would not meet standards of transparency, consistency or due process common to TPP countries' domestic legal systems or provide fair, independent or balanced venues for resolving disputes. For instance, the tribunals would be staffed by private sector lawyers unaccountable to any electorate, system of precedent or substantive appeal. Many of those involved rotate between acting as "judges" and as advocates for the investors launching cases against governments. Such dual roles would be deemed unethical in most legal systems. The leaked text does not include new conflict of interest rules, despite growing concern about the bias inherent in the ISDS system.

Contrary to claims from the Obama administration that the TPP's investment chapter would somehow limit the uses and abuses of the controversial ISDS regime, much of the leaked text would replicate, often word-for-word, the terms found in past U.S. ISDS-enforced agreements. However, some terms would widen the scope of domestic policies and government actions that could be challenged before extrajudicial tribunals, without offering meaningful new safeguards for those policies. For example, the leaked text could newly allow pharmaceutical firms to use TPP ISDS tribunals to demand cash compensation for claimed violations of the World Trade Organization's (WTO) rules regarding the creation, limitation or revocation of intellectual property rights. Currently, WTO rules are not privately enforceable by investors.

And the leaked text reveals that U.S. negotiators are still pushing, over the objection of most other TPP nations, to empower foreign investors to bring to TPP ISDS tribunals their contract disputes with TPP signatory governments relating to natural resource concessions on federal lands, government procurement projects for construction of infrastructure projects, as well as contracts relating to the operation of utilities. (Text that is not yet agreed in the leaked text appears in square brackets and Public Citizen has seen a version of the text that lists which countries support various proposals.)

Meanwhile, there are no new safeguards that limit ISDS tribunals' discretion to issue ever-expanding interpretations of governments' obligations to investors and order compensation on that basis. The leaked text reveals the same "safeguard" terms that have been included in U.S. agreements since the 2005 Central America Free Trade Agreement (CAFTA). These terms have failed to rein in ISDS tribunals. Indeed, in ISDS cases brought under CAFTA, tribunals have simply ignored the "safeguard" provisions that the leaked text shows are replicated in the TPP. And, given the lack of a substantive appeal mechanism in the ISDS regime, the tribunals' dismissal of the new safeguard language could not be appealed. The leaked text also replicates the same ineffective boilerplate health and environmental "exceptions" to some provisions that are also found in past U.S. pacts.

The TPP's expansion of the ISDS system would come amid a surge in ISDS cases against public interest policies. While treaties with ISDS provisions have existed since the 1960s, just 50 known ISDS cases were launched in the regime's first three decades combined. In contrast, foreign investors launched at least 50 ISDS claims *each year* from 2011 through 2013, and another 42 claims in 2014. The goal of the ISDS system was ostensibly to provide a means for foreign investors to obtain compensation if a government expropriated their factory or land and the domestic court system did not provide for compensation. Over time, both the rules and their interpretation have been dramatically expanded – a problem that the leaked text shows the TPP would exacerbate. Rather than being an option of last resort, corporations' use of the investor-state regime is surging, with an ever-expanding

range of policies and government actions coming under attack, with few claims involving actual expropriation.

Foreign corporations have used these claims to attack tobacco, climate, financial, mining, medicine, energy, pollution, water, labor, toxins, development and other non-trade domestic policies. Under U.S. "free trade" agreements (FTAs) alone, foreign firms have already pocketed more than $440 million in taxpayer money via investor-state cases. This includes cases against natural resource policies, environmental protections, health and safety measures and more. ISDS tribunals have ordered more than $3.6 billion in compensation to investors under all U.S. FTAs and Bilateral Investment Treaties (BITs). More than $38 billion remains in pending ISDS claims under these pacts, nearly all of which relate to environmental, energy, financial regulation, public health, land use and transportation policies. Even when governments win cases, they are often ordered to pay for a share of the tribunal's costs. Given that the costs just for defending a challenged policy in an ISDS case total $8 million on average, the mere filing of a case can create a chilling effect on government policymaking, even if the government expects to win.

Textual Analysis

This initial analysis of the leaked TPP investment text provides a guided tour of this chapter's many provisions that literally replicate the terms of past U.S. agreements. This includes language providing foreign investors various substantive and procedural rights that extend beyond those provided to domestic firms under domestic law, and the same "safeguard" language that has failed to function effectively in past pacts. This analysis also spotlights differences between a text of this chapter leaked in 2012 and this text, including the elimination of various reform proposals found in the earlier text.

Procedural Rights Only Available to Foreign Investors

- **Foreign investors alone would be granted access to extrajudicial tribunals staffed by private sector lawyers who rotate between acting as "judges" and representing corporations in cases against governments, posing major conflicts of interest.** The leaked text includes provisions that submit TPP signatory countries to the jurisdiction of World Bank and United Nations investor-state arbitral tribunals. These tribunals, staffed by private sector attorneys (Article II.18.4), would be empowered to order governments to pay investors compensation for what the attorneys deem to be violations of the TPP's investor rights. The tribunals lack public accountability, requirements to follow precedent, or standard judicial ethics rules. The leaked TPP text itself has no requirement for tribunalists to be independent or impartial. Rather, it relies on weak impartiality rules set by the arbitration venues themselves. In the 48-year history of the World Bank arbitration regime, which is most commonly used, tribunalists have only been disqualified in four of 41 challenges of exhibited bias or conflicts of interest. Rulings by tribunalists with specific conflicts of interest have been allowed to stand. A tribunalist ruling that Argentina had to pay Vivendi Universal $105 million for reversing a failed water privatization served on the board of a bank that was a major investor in Vivendi. The tribunalist did not disclose the conflict, much less recuse herself, and Argentina's effort to annul the ruling was dismissed.

  However, a deeper conflict of interest is inherent in the ISDS system: private sector lawyers rotate between roles as "judges" in disputes brought by investors against governments, and as advocates

for investors against governments, in a manner that would be deemed unethical for judges in most domestic legal systems. The corporation initiating a case chooses the venue and selects one of the "judges" from a roster. The defending government chooses another, and those two select the third (Article II.21). Since only foreign investors can launch cases and also select one of the three tribunalists, ISDS tribunalists have a structural incentive to concoct fanciful interpretations of foreign investors' rights and order that they be compensated for breaches of obligations to which signatory governments never agreed. Lawyers that do so while serving as a tribunalist in one ISDS case can increase the number of investors interested in launching new cases and enhance the likelihood that investors will select them for future tribunals.

And, there is no right of appeal on the merits of a decision. Under the World Bank rules, governments can turn to another tribunal of three private sector attorneys to seek annulment of a ruling for limited procedural errors. But annulments are extremely rare. The leaked text, like past U.S. FTAs, includes no meaningful internal appeals mechanism for ISDS rulings. And the text provides for no additional rights of appeal to an outside court or other body. It only includes a reference to the possibility that one day such an appeals mechanism could be created "under other institutional arrangements." But the leaked text is even weaker on this front than the investment chapters of existing FTAs, which state that were an ISDS appellate body to be created one day by the signatory governments, the governments "shall strive to reach an agreement that would have such appellate body review awards." The leaked TPP text only states that, in the hypothetical scenario that such an appellate mechanism would someday be created by some unnamed party, the signatory governments "shall consider whether awards…should be subject to that appellate mechanism" (Article II.22.10).

- **Foreign tribunals would be empowered to order governments to pay unlimited cash compensation out of national treasuries**. The leaked text provides tribunals with discretion to determine the amount of compensation governments must pay investors (Article II.28.1) and also the allocation of costs (Article II.28.3), such as the tribunalists' fees. Even when governments win ISDS cases, they waste scarce budgetary resources defending national policies against these corporate attacks, as $8 million in taxpayer funds must be used in an average ISDS case to pay large hourly fees for the tribunals and legal costs. An earlier leaked version of the TPP investment chapter included a proposed provision to standardize hourly fees for tribunalists at the lower end of the range of fees currently paid (about $375 per hour, compared to the $700 per hour that some tribunalists receive). But that restriction on tribunalist fees has been scrapped in the recent leak.

- **An overreaching definition of "investment" has been agreed by all parties that would extend the coverage of the TPP's expansive substantive investor rights far beyond "real property," permitting ISDS attacks over government actions and policies related to financial instruments, intellectual property, regulatory permits and more.** The definition of "investment" in the leaked text 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" (Article II.1). The text goes on to enumerate as examples: regulatory permits; intellectual property rights; financial instruments such as stocks and derivatives; "construction, management, production, concession, revenue-sharing, and other similar contracts;" and "licenses, authorizations, permits, and similar rights conferred pursuant to domestic law." The chapter's new rights and protections would extend to investments already existing before the TPP. It would permit compensation claims even over failed attempts to make an investment, with the low

standard to qualify for attempting to invest being "concrete action or actions to make an investment, such as channeling resources or capital in order to set up a business, or applying for permits or licenses." The expansive definitions would allow attacks on a vast array of non-discriminatory domestic policies and government actions from health and land use policies to construction permits and financial regulation.

Proposals to narrow the definition of "investment," and thus the scope of policies subject to challenge, that were included in the earlier version of the text that leaked in 2012 have been eliminated. Also omitted is a proposal from the earlier leaked version that would not have allowed ISDS cases related to government procurement, subsidies or government grants.

- **U.S. negotiators in particular are pushing to expand the scope of coverage to also subject government contracts to ISDS enforcement**. U.S. negotiators are pushing for foreign investors to have greater rights than domestic investors with respect to disputes relating to procurement contracts with the signatory governments, contracts for natural resource concessions on land controlled by the national government and contracts to operate utilities (Articles II.1 and II.18(1)(a)(i)(C)). The United States seeks to allow disputes over such matters between foreign firms and governments to be resolved in ISDS tribunals rather than requiring foreign firms to use the same domestic laws and courts to which domestic firms could bring such disputes. And, U.S. negotiators *alone* are pushing to allow ISDS disputes over such government contracts even if the contracts were signed before the TPP would take effect. Since the beginning of negotiations, almost all other TPP countries have opposed this language, but unlike many other disputed clauses, it remains in the text in brackets. Specifically, ISDS enforcement would be extended to cover "written agreements" ... "between a national authority of a Party and a covered investment or an investor of another Party... that grants rights to the covered investment or investor: (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale; (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government."

- **An overreaching definition of "investor" and lack of robust "denial of benefits" provisions would allow firms from non-TPP countries and firms with no real investments to exploit the extraordinary privileges the TPP would establish for foreign investors.** The text includes an overreaching definition of "investor" as a person or legal entity that makes an investment as defined in the pact (Article II.1). **This includes firms from non-TPP countries that have incorporated in a TPP signatory country.** Thus, for instance, one of the many Chinese state-owned corporations in Vietnam, a TPP negotiating country, could "sue" the U.S. government in a foreign tribunal to demand compensation under this text. Additionally, the leaked text's broad definition of an "investor" could allow firms that have made no real investment in a country to drag governments through costly foreign tribunal proceedings. Existing U.S. trade deals include terms whereby an investor that is not native to a nation in the pact can be denied the benefits of the deal. The ostensible goal is to discourage "free riding" and "treaty shopping" by multinational firms. To counter abusive nationality planning, the pacts state that the benefits of the deal can be denied to investors if they are owned or controlled by investors outside of the trade pact signatory countries and they also have no "substantial business activities" in the claimed home nation (or in any signatory country beyond the host country). However, such "denial of benefits" terms are not

particularly robust, since even having a staff person or two and a minor paper trail in the claimed home country can pass the "substantial business activities" threshold. These low thresholds are replicated in the TPP text, allowing Chinese or German investors (for instance) to channel investments through TPP nations in order to obtain the extraordinary TPP foreign investor protections and access the private enforcement regime (Article II.14).

The leaked TPP text does include one new provision aimed at limiting who can launch ISDS cases. This provision is intended to prevent an individual investor from launching an ISDS claim against their own home country. In existing ISDS cases, individuals have launched such claims by setting up business activities in another country covered by an ISDS-enforced agreement and then acquiring "investments" back in their home country as a "foreign investor." The TPP language states that if an investor "is a natural person, who is a permanent resident of a Party, and a national of another Party, that natural person may not submit a claim to arbitration against that latter Party" (Article II.1). But this provision only applies to "natural persons." Thus the prohibited individual could evade this limitation by incorporating a business in another TPP country, use that corporation to establish an "investment" back in their home country, and then use the corporation's newly-acquired "foreign investor" status to launch an ISDS claim against their home government.

- **Claims already decided in domestic courts can be re-litigated in ISDS tribunals for all but four TPP negotiating countries.** A new annex in the leaked TPP investment text states that if a foreign investor pursues a case in the domestic courts of Chile, Peru, Mexico or Vietnam over a government measure claimed as a violation of a foreign investor right, the investor cannot then launch an ISDS case against the government for that same claim under the TPP (Annex II-J). It would appear that for all other TPP negotiating countries, foreign investors are welcome to pursue claims before domestic courts and, if they lose, re-litigate the case before an ISDS tribunal. Indeed, the leaked TPP investment chapter eliminates a proposed provision from an earlier leaked version that would have required foreign investors to choose between pursuing claims before domestic courts or ISDS tribunals.

- **The TPP would grant foreign investors procedural rights that are not available to domestic firms to "sue" governments outside of national court systems, unconstrained by the rights and obligations of countries' constitutions, laws and domestic court procedures** (Section B). The portion of the leaked text that enumerates the private ISDS enforcement system largely replicates word-for-word the provisions of past U.S. ISDS agreements. However, foreign investors would be granted even more time to launch an ISDS case. While existing U.S. FTAs already allow foreign investors to initiate ISDS cases up to three years after the investor became aware of the alleged violation of their special foreign investor rights, the leaked text would expand that timeframe by another six months (Article II.20.1). This text also abandons a proposal in the 2012 leaked text that would have required a foreign investor to pursue domestic legal avenues before launching an ISDS case. This "exhaustion" requirement would have obliged investors to pursue domestic administrative review before launching an investor-state case. Exhaustion of domestic remedies is a fundamental principle of international law.

  What could be the justification for foreign investors to pursue claims against a nation outside of that nation's judicial system? The track record of ISDS cases reveals a clear answer: to try to obtain greater rights than those provided under national law and through domestic courts. Many of the TPP negotiating countries have strong domestic legal systems. For example, New Zealand, Australia, Singapore and Canada are all ranked by the World Bank as performing better than the

United States with regard to adherence to rule of law. Yet, in a manner opposed by conservative and liberal jurists and policymakers alike, the private "investor-state" enforcement system included in the leaked TPP text would empower foreign investors and corporations to skirt domestic courts and laws and "sue" governments in foreign tribunals, demanding cash compensation from national treasuries for domestic policies that they claim undermine their new investor rights. This would expand an alarming two-track system of justice that privileges foreign corporations in myriad ways relative to governments, domestic businesses or non-governmental organizations.

The recent surge in ISDS attacks has produced rising concerns from legal scholars. A March 2015 letter signed by 139 U.S. law professors urges congressional leaders and the Obama administration "to protect the rule of law and our nation's sovereignty by ensuring ISDS is not included" in the TPP, stating, "ISDS threatens domestic sovereignty by empowering foreign corporations to bypass domestic court systems and privately enforce terms of a trade agreement. It weakens the rule of law by removing the procedural protections of the justice system and using an unaccountable, unreviewable system of adjudication." A May 2012 letter signed by former judges, law professors and other prominent lawyers from TPP nations warns: "the foreign investor protections included in some recent Free Trade Agreements (FTA) and Bilateral Investment Treaties (BIT) and their enforcement through Investor-State arbitration should not be replicated in the TPP. We base this conclusion on concerns about how the expansion of this regime threatens to undermine the justice systems in our various countries and fundamentally shift the balance of power between investors, states and other affected parties in a manner that undermines fair resolution of legal disputes."

Substantive Rights Available Only to Foreign Investors

- **The leaked text shows that foreign investors would be able to demand compensation if new policies that apply to domestic and foreign firms alike undermine their "expectations" of how they should be treated.** This includes a right to claim damages for government actions (such as new environmental, health or financial policies) that reduce the value of a foreign firm's investment (Article II.7 and Annex II-B on indirect expropriation) or that go against the expected level of regulatory scrutiny that an investor might have had when dealing with a previous government (Article II.6 on minimum standard of treatment). After a series of alarming ISDS rulings based on language replicated in the leaked TPP text, annexes were added to U.S. FTAs starting with the 2005 CAFTA with language aimed at defining what sorts of government action should be considered an "indirect expropriation" or a violation of the "minimum standard of treatment" guarantee given to foreign investors. However, ISDS tribunals already have ignored these provisions in cases brought under recent U.S. FTAs that included the so-called safeguards now being touted with respect to the TPP, and instead have continued to develop their own broad interpretations of foreign investors' rights to rule against governments and order compensation to investors. The leaked TPP text largely replicates these failed annexes, meaning that ISDS tribunals would maintain enormous discretion to order a government to pay a foreign investor merely because the government improved a regulatory policy applying to both domestic and foreign firms. Indeed, the inclusion of the language from past FTAs on a guaranteed minimum standard of treatment for foreign investors and the right to compensation for indirect expropriation directly contradicts the assurances TPP governments have given to legislators and public interest advocates that the pact would safeguard regulatory sovereignty.

- **The provision used in most successful investor compensation demands would be extended.** The most successful (and controversial) basis for investors' challenges of government policies in past agreements is alleged violations of the guaranteed "minimum standard of treatment" (MST) for investors or the closely linked "fair and equitable treatment" (FET) provision. The leaked TPP text largely replicates the language found in previous ISDS agreements on which tribunals have relied to issue some of the most alarming ISDS rulings to date (Article II.6). Tribunals have often broadly interpreted these terms, effectively fabricating new obligations for governments that do not exist in the actual text of ISDS agreements. Of the 28 known ISDS cases under U.S. trade and investment agreements in which the foreign investor has "won," 75 percent (21) have found MST or FET violations. (In contrast, only six have found national treatment violations, five have found expropriation violations and three have found performance requirement violations. Some cases found violations of multiple rules.)

  While some of the FET violations involved "denials of justice" as that term has long been understood under customary international law (e.g. lack of due process), some tribunals have found FET violations for government regulatory actions that simply contradicted what investors' argued were their "reasonable expectations." For instance, in an *Occidental Exploration and Production Co. v. Ecuador* case under the U.S.-Ecuador BIT, a tribunal ruled that the reasonable expectations requirement means that "there is certainly an obligation not to alter the legal and business environment in which the investment has been made." In defending itself against an investor-state challenge that tried to invoke this sweeping interpretation, the U.S. government argued, "[I]f States were prohibited from regulating in any manner that frustrated expectations – or had to compensate for any diminution in profit – they would lose the power to regulate." There is no right to compensation in U.S. law merely because a government policy changes after the establishment of an investment in a way that may affect a business operating here.

  The TPP includes nothing to forestall these extreme interpretations. Instead, the leaked text includes an annex contained in recent U.S. FTAs that states that the relevant standard under customary international law that is intended for the MST provision is one that "results from a general and consistent practice of States that they follow from a sense of legal obligation" (Annex II-A). This circular language has failed to fix the problem. Though this annex was first included in CAFTA, in two of the first investor-state cases brought under CAFTA – *Railroad Development Corporation (RDC) v. Guatemala* and *TECO Guatemala Holdings v. Guatemala* – the tribunals simply ignored the annex's attempt to narrow the definition of "minimum standard of treatment" with a requirement that tribunals examine the *actual* practice of nations. Instead, the *RDC* and *TECO* tribunals both relied on an expansive interpretation of the standard concocted by a previous ISDS tribunal, which included an obligation to honor investors' expectations. On that basis, both tribunals ruled that Guatemala had violated the expanded obligation, and ordered the government to pay millions. The TPP fails to remedy this severe flaw, leaving uncertainty and unpredictability that invites investors to launch more ISDS attacks against public interest policies.

- **Foreign investors would be allowed to use claims of "indirect expropriation" to demand government payments for regulatory costs all firms operating in a country must meet.** Under domestic and international law, governments' obligation to compensate for expropriation has typically applied to the physical taking of real property, such as when a government expropriates a house to make way for a highway. But the leaked TPP text would provide investors with a right to demand compensation for "indirect" expropriation (Article II.7 and Annex II-B), which can be and has been interpreted by ISDS tribunals to mean regulations and other government actions that

merely *reduce* the value of a foreign investment. The TPP annex on expropriation, as in past U.S. FTAs, makes clear that foreign investors can launch claims of indirect expropriation when the government has not actually taken ownership or control of an investment. This definition of indirect expropriation cannot be justified as reflecting the general practice of states, given that the dominant practice of nations is to provide for compensation only when the government has actually acquired an asset, not when the value of an asset has been adversely affected by regulatory measures.

Moreover, the right to compensation for indirect expropriation in the leaked text applies to much wider categories of property than those to which similar rights apply in U.S. law. To the limited extent that indirect expropriation compensation is permitted in U.S. law, it has generally been held that the requirement of compensation for "regulatory takings" under the Fifth Amendment of the U.S. Constitution primarily applies to regulations affecting *real* property (i.e. land). However, the broad provisions of the leaked TPP investment chapter, like existing FTAs, enable foreign investors to claim "indirect expropriation" if government regulations implicate their personal property, intellectual property rights, financial instruments, government permits, money, minority shareholdings or other forms of non-real-estate property.

An earlier version of the leaked TPP investment chapter included a proposed provision that attempted to safeguard public interest regulations from indirect expropriation claims, stating, "non-discriminatory regulatory actions … that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety and the environment do not constitute indirect expropriation." Instead, the recent leaked TPP investment chapter, like past U.S. FTAs, includes a clause containing a loophole that undermines this attempted safeguard. It states that non-discriminatory health, safety, environmental and other public interest regulations could indeed be challenged as indirect expropriations "in rare circumstances" (Annex II-B). The loophole would grant ISDS tribunals discretion to determine when such non-discriminatory public interest policies constitute an indirect expropriation. The leaked text also eliminated, in favor of terms granting tribunals ample discretion over the meaning of indirect expropriation, an alternative provision that would have explicitly restricted indirect expropriation claims to instances when a government "deprivation of the investor's property" is "(a) either severe or for an indefinite period; and (b) disproportionate to the public purpose."

- **Foreign corporations could be newly empowered to privately enforce public agreements concerning intellectual property in ISDS challenges to government policies that ensure access to affordable medicines.** Unlike past U.S. FTAs, the leaked TPP investment text could empower foreign investors to claim that government policies that ensure access to affordable medicines constitute TPP-prohibited "expropriations" of intellectual property rights if deemed to violate the terms of the WTO's Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement (Article II.7.5). WTO rules can only be enforced when one government formally challenges another government before a WTO tribunal. There is no right in the WTO for a corporation to directly challenge sovereign governments. But with this new provision in the leaked TPP investment text, individual firms could be empowered to privately enforce the terms of the WTO's monopoly protections for pharmaceutical firms, and directly challenge governments for alleged violations of these protections. In addition, the signatory governments of TRIPS, including TPP governments, deliberately included ambiguous language in TRIPS to grant flexibility to each government to interpret the terms in line with domestic priorities. But the leaked TPP investment text could empower the three private lawyers of ISDS tribunals, which have a clear track record of

interpreting vague terms broadly to favor foreign investors, to impose their binding interpretation of TRIPS' intentionally flexible terms on the very governments that negotiated those terms. This move, which risks making TRIPS obligations enforceable via ISDS, could restrict governments' policy space to ensure access to affordable medicines.

- **Domestic policies that apply equally to domestic and foreign firms could be challenged by foreign investors under the TPP.** The TPP text would allow investors to claim that government actions (such as new environmental, health or financial laws) violate "national treatment" or "most favored nation" rules, ostensibly intended to prohibit discriminatory treatment, even when the laws are facially neutral and lawmakers did not intend to harm foreign investors (Articles II.4 and II.5). Such claims could be used if a foreign investor's own business model resulted in the firm experiencing a slightly higher burden in complying with a non-discriminatory law. For example, a government's carbon emission controls could disproportionately impact foreign investors if most domestic energy firms used less carbon-intensive sources of energy than their foreign-owned counterparts. While a proposed footnote in the leaked text suggests that differences in treatment of foreign investors may be allowed "on the basis of legitimate public welfare objectives," the ISDS tribunal would have full discretion to judge whether a government's public welfare objectives are "legitimate" and whether the alleged difference in treatment of foreign investors owes to those objectives. In any case, the footnote has not been accepted, with one country "still consulting" and another "still considering."

- **Policies to create domestic jobs, support domestic businesses or foster economic development would be subject to foreign investors' demands for compensation.** The leaked TPP investment chapter, like past U.S. FTAs, would empower foreign firms to demand compensation from governments for "performance requirements" imposed on domestic and foreign firms alike (Article II.9). Foreign firms would be able to challenge policies used by many governments to support local job creation and business growth (for example, by requiring firms to purchase inputs from domestic businesses). In a recent ISDS case brought against Canada under the North American Free Trade Agreement (NAFTA), a tribunal ruled that Canada's non-discriminatory requirement for oil companies to contribute to research and development in one of the country's poorest provinces violated such "performance requirement" provisions. The leaked TPP text goes even further than past U.S. FTAs in listing additional performance requirements that can be challenged.

- **Most TPP countries have decided to expose decisions regarding the approval of foreign investments to ISDS challenge.** An annex in the leaked text states that a government's decision, done in accordance with domestic laws, on whether to approve a given foreign investment in its territory shall not be subject to ISDS enforcement (Annex II-H). But the annex only applies to four of the 12 TPP negotiating countries (Australia, Canada, Mexico and New Zealand). For the remaining countries, the leaked TPP text would apparently empower foreign firms to challenge such decisions before ISDS tribunals. In the United States, for example, the Committee on Foreign Investment in the United States (CFIUS) reviews planned foreign investments to determine whether they pose threats to national security. CFIUS has the authority to recommend to the president that investments deemed as threatening not be authorized. In cases where the president acts on such recommendations, the leaked TPP text would appear to empower foreign firms to retaliate by asking foreign tribunals to order taxpayer compensation. The leaked TPP investment chapter has no national security exception clause, and, because the TPP text is secret, it is unclear whether any general security exception applicable to the entire TPP would apply or be effective.

- **Foreign corporations could demand compensation for capital controls and other macro-prudential financial regulations that promote financial stability.** Like past U.S. FTAs, the leaked TPP text requires that governments "shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory" (Article II.8). This obligation restricts the use of capital controls or financial transaction taxes, even as the International Monetary Fund (IMF) has shifted from opposing capital controls to officially endorsing them as a legitimate policy tool for preventing or mitigating financial crises. In a December 2014 letter to the Obama administration, Senator Elizabeth Warren (D-Mass.), member of the Senate Banking Committee, and Sens. Tammy Baldwin (D-Wis.) and Edward Markey (D-Mass.) urged the Obama administration to not replicate in the TPP terms from past U.S. FTAs "that could limit the ability of the government to use capital controls." In another letter that same month led by Congresswoman Maxine Waters (D-Calif.), the ranking member of the House Financial Services Committee, leading House Democrats made clear to the Obama administration their opposition to the inclusion of such restrictions on capital controls in pending trade deals. In February of that year, U.S. Federal Reserve economists backed capital controls in a study finding they "can lead to a significant welfare improvement." And in a February 2012 letter signed by more than 100 prominent economists, including Jagdish Bhagwati of Columbia University and former IMF officials Olivier Jeanne of Johns Hopkins University and Arvind Subramanian (formerly of the Peterson Institute for International Economics, now chief economic adviser to the government of India), demanded that such provisions be excluded from the TPP, stating, "The U.S. government's rigid opposition to capital controls does not reflect the global norm." This followed a January 2011 letter to the Obama administration signed by more than 250 economists, including Nobel laureate Joseph Stiglitz, Harvard economics professors Ricardo Hausmann and Dani Rodrik (formerly at Harvard University, now at the Institute for Advanced Study), and José Antonio Ocampo (a former executive secretary of the UN Economic Commission on Latin America and the Caribbean, and Colombia's former Minister of Finance), noting that past U.S. FTAs and BITs "strictly limit the ability of our trading partners to deploy capital controls." Yet the leaked TPP text would replicate the past U.S. template, defying the post-financial crisis consensus that policy space for capital controls must be preserved.

Exceptions and Limitations

- **Proposed new "safeguards" would not adequately protect governments' ability to regulate speculative and destabilizing flows of capital.** TPP negotiating parties have offered two competing "temporary safeguards" to allow the use of limited types of capital controls, subject to a litany of conditions, that would otherwise violate the expansive obligations of the investment chapter's free transfers provisions (Article CCC.3). Both proposals would only apply to capital controls enacted for certain reasons (e.g. to remedy balance of payments crises or "exceptional" macroeconomic problems), while capital controls used for other policy objectives (e.g. to prevent destabilizing asset bubbles) would still be subject to ISDS challenges. Both proposals would require capital controls to be temporary and "phased out progressively," making the "safeguards" useless for capital controls of a more permanent nature, such as those relating to capital inflows that are designed to *avoid* balance-of-payments and other macroeconomic problems. For example, the capital management policies of Chile, a TPP negotiating party, involve standing laws of general application that were not implemented in response to a specific crisis, but to avoid the conditions that could cause one. (Indeed, the United States alone is opposing a separate TPP annex that would

allow Chile to maintain or enact capital controls that are consistent with its own domestic laws to ensure financial stability (Annex II-E).)

With respect to the broader "temporary safeguard" proposals, the United States and Canada seek to impose limits on the use of capital flow management policies that would go even further than the limits proposed by all other TPP countries, requiring capital controls to be terminated within one year. This restriction would preclude the use of capital controls for longer-lasting financial crises. The proposal would have failed to safeguard, for example, the capital controls that Malaysia, also a TPP negotiating party, implemented in 1997 in response to the Asian financial crisis, which were phased out slowly *over a decade.*

Both versions of the proposed "safeguard" for capital controls would also only apply to those capital controls that an ISDS tribunal (not the government's central bank) deemed "necessary." The version supported by the United States and Canada, meanwhile, would require an even longer and more onerous litany of conditions. Governments, not ISDS tribunals, should have the authority to decide when capital management measures are needed and how they should be implemented. These narrow "safeguards" proposed for the TPP would fail to adequately protect governments' policy space to use capital controls to prevent or mitigate financial crises. The only additional new language to limit the leaked text's expansive free transfers obligations is a footnote that would partially exempt social security programs from those terms (Article II.8, footnote 21).

- **The TPP provision on environmental, health and other regulatory objectives is meaningless.** The leaked text includes a provision, largely copied from past U.S. pacts, on "Investment and Environmental, Health and other Regulatory Objectives" that provides no meaningful safeguard against ISDS challenges to public interest policies (Article II.15). The provision includes self-cancelling language stating that that a signatory government may enact public interest protections, *so long as doing so does not conflict with the sweeping rights that the pact gives to foreign investors*. But it is precisely when investors' broad rights conflict with environmental, health or other regulatory objectives that a government needs an agreement to specify that its right to regulate trumps its obligations to foreign investors. For such instances, this provision appears to be inapplicable. Indeed, a tribunalist in the *S.D. Myers v. Canada* NAFTA ISDS case noted that this provision, also included in NAFTA, was among those referred to by trade analysts as "'tautologies' or as 'diplomatic, rather than legal' statements." A recent legal review from Cambridge University Press concluded that this clause "falls short in failing to add more than a nebulous provision that can easily be marginalized."

  In an earlier leaked version of the TPP investment chapter, one country proposed an additional paragraph to this text that read: "The Parties recognise that it is inappropriate to encourage investment by relaxing its health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment of an investor." This proposed language has been omitted from the current leaked text. Finally, while a few TPP negotiating countries have tried to exempt specific domestic public interest policies from the broad obligations of the investment chapter (e.g. health policies for Australia, procurement policies for Malaysia, cultural policies for Canada), none of these exceptions have been accepted by the other TPP negotiating countries (Annexes II-I, II-L, II-M).

- **A new article makes a hortatory reference to encouraging corporate social responsibility.** Language included in this recent leak of the TPP investment chapter is even weaker than the already-hortatory "corporate social responsibility" language proposed in an earlier leaked version. While the earlier language stated that each signatory government "should encourage" firms to *voluntarily* incorporate principles of corporate social responsibility, the approved language in the more recent leak merely notes that the signatory governments "reaffirm the importance" of such non-binding encouragement (Article II.16).

- **Australia alone has indicated that it might not be subjected to the jurisdiction of ISDS tribunals under TPP** (footnote 29). No other country has listed an objection to being subject to the private investor-state corporate enforcement regime. This would impose new obligations for Japan, New Zealand, Malaysia, Brunei and Vietnam – the countries involved in TPP negotiations that do not have existing U.S. FTAs. A note in the leaked text indicates that even Australia is considering subjecting its laws and taxpayers to ISDS under the TPP, "subject to certain conditions." This would impose novel obligations on Australia, as Australia successfully resisted U.S. pressure to include ISDS in the existing U.S.-Australia FTA.

- **Foreign investors could not invoke procedural ISDS provisions from other agreements, but could still try to invoke even broader substantive rights for foreign investors than found in the TPP.** While the "most-favored nation treatment" provisions of ISDS-enforced pacts are supposed to simply require governments to treat foreign investors from a pact's signatory countries no less favorably than investors from other countries, foreign firms have successfully used these provisions as a loophole to "import" broader foreign investor privileges from other pacts. Doing so has allowed foreign firms to launch ISDS cases against governments for allegedly violating obligations to which the governments never agreed. The leaked TPP text includes a new provision that appears aimed at partially closing this loophole, indicating that foreign investors cannot use the "most-favored nation treatment" obligation to import procedural rights from other pacts (Article II.5.3). However, the provision would not prevent foreign investors from importing broader substantive rights found in other pacts. For example, the language would appear to allow tribunalists to grant a foreign investor, upon its request, access to definitions of "indirect expropriation" and "minimum standard of treatment" that are even more expansive and more favorable to investors than those included in the TPP, posing an even greater threat to public interest policymaking.

- **The United States, unlike most other TPP countries, has chosen to subject sovereign debt restructuring to ISDS challenges.** A new annex in the leaked investment chapter seeks to ensure that disputes related to sovereign debt and sovereign debt restructuring are not subject to the full range of investment chapter disciplines (Annex II-G). But a footnote states that the partial safeguards for sovereign debt restructuring "do not apply to Singapore or the United States." That is, were Singapore or the United States to negotiate a restructuring of its sovereign debt that applied equally to domestic and foreign investors, foreign investors alone would be empowered under the TPP to challenge the non-discriminatory restructuring before an ISDS tribunal, claiming violations of any of the broad substantive foreign investor rights provided by the investment chapter.

Trans-Pacific Partnership Seen as Door for Foreign Suits Against U.S.

The New York Times

By JONATHAN WEISMAN

MARCH 25, 2015

http://www.nytimes.com/2015/03/26/business/trans-pacific-partnership-seen-as-door-for-foreign-suits-against-us.html?ref=business&_r=0

WASHINGTON — An ambitious 12-nation trade accord pushed byPresident Obama would allow foreign corporations to sue the United States government for actions that undermine their investment "expectations" and hurts their business, according to a classified document.

The Trans-Pacific Partnership — a cornerstone of Mr. Obama's remaining economic agenda — would grant broad powers to multinational companies operating in North America, South America and Asia. Under the accord, still under negotiation but nearing completion, companies and investors would be empowered to challenge regulations, rules, government actions and court rulings — federal, state or local — before tribunals organized under the World Bank or the United Nations.

Backers of the emerging trade accord, which is supported by a wide variety of business groups and favored by most Republicans, say that it is in line with previous agreements that contain similar provisions. But critics, including many Democrats in Congress, argue that the planned deal widens the opening for multinationals to sue in the United States and elsewhere, giving greater priority to protecting corporate interests than promoting free trade and competition that benefits consumers.

The chapter in the draft of the trade deal, dated Jan. 20, 2015, and obtained by The New York Times in collaboration with the group WikiLeaks, is certain to kindle opposition from both the political left and the right. The sensitivity of the issue is reflected in the fact that the cover mandates that the chapter not be declassified until four years after the Trans-Pacific Partnership comes into force or trade negotiations end, should the agreement fail.

Conservatives are likely to be incensed that even local policy changes could send the government to a United Nations-sanctioned tribunal. On the left, Senator Elizabeth Warren, Democrat of Massachusetts, law professors and a host of liberal activists have expressed fears the provisions would infringe on United States sovereignty and impinge on government regulation involving businesses in banking, tobacco, pharmaceuticals and other sectors.

Members of Congress began reviewing the secret document last week in secure reading rooms, but this is the first disclosure to the public since an early version leaked in 2012.

"This is really troubling," said Senator Charles E. Schumer of New York, the Senate's No. 3 Democrat. "It seems to indicate that savvy, deep-pocketed foreign conglomerates could challenge a broad range of laws we pass at every level of government, such as made-in-America laws or anti-tobacco laws. I think people on both sides of the aisle will have trouble with this."

The United States Trade Representative's Office dismissed such concerns as overblown. Administration officials said opponents were using hypothetical cases to stoke irrational fear when an actual record exists that should soothe worries.

Such "Investor-State Dispute Settlement" accords exist already in more than 3,000 trade agreements across the globe. The United States is party to 51, including the North American Free Trade Agreement. Administration officials say they level the playing field for American companies doing business abroad, protect property from government seizure and ensure access to international justice.

But the limited use of trade tribunals, critics argue, is because companies in those countries do not have the size, legal budgets and market power to come after governments in the United States. The Trans-Pacific Partnership could change all that, they say. The agreement would expand that authority to investors in countries as wealthy as Japan and Australia, with sophisticated companies deeply invested in the United States.

"U.S.T.R. will say the U.S. has never lost a case, but you're going to see a lot more challenges in the future," said Senator Sherrod Brown, Democrat of Ohio. "There's a huge pot of gold at the end of the rainbow for these companies."

One 1999 case gives ammunition to both sides of the debate. Back then, California banned the chemical MTBE from the state's gasoline, citing the damage it was doing to its water supply. The Canadian company Methanex Corporation sued for $970 million under Nafta, claiming damages on future profits. The case stretched to 2005, when the tribunal finally dismissed all claims.

To supporters of the TPP, the Methanex case was proof that regulation for the "public good" would win out. For opponents, it showed what could happen when far larger companies from countries like Japan have access to the same extrajudicial tribunals.

But as long as a government treats foreign and domestic companies in the same way, defenders say, it should not run afoul of the trade provisions. "A government that conducts itself in an unbiased and nondiscriminatory fashion has nothing to worry about," said Scott Miller, an international business expert at the Center for Strategic and International Studies, who has studied past cases. "That's the record."

Similar chapters exist in the North American Free Trade Agreement and the Central American Free Trade Agreement, but their use has been limited against the United States. Over 25 years, according to the trade representative's office, the United States has faced only 17 investor-state cases, 13 of which went before tribunals. The United States has lost none.

Civil courts in the United States are already open to action by foreign investors and companies. Since 1993, while the federal government was defending itself against those 17 cases brought through extrajudicial trade tribunals, it was sued 700,000 times in domestic courts.

In all, according to Public Citizen's Global Trade Watch, about 9,000 foreign-owned firms operating in the United States would be empowered to bring cases against governments here. Those are as diverse as timber and mining companies in Australia and investment conglomerates from China whose subsidiaries in Trans-Pacific Partnership countries like Vietnam and New Zealand also have ventures in the United States.

More than 18,000 companies based in the United States would gain new powers to go after the other 11 countries in the accord.

A similar accord under negotiation with Europe has already provoked an outcry there.

Senator Brown contended that the overall accord, not just the investment provisions, was troubling. "This continues the great American tradition of corporations writing trade agreements, sharing them with almost nobody, so often at the expense of consumers, public health and workers," he said.

Under the terms of the Pacific trade chapter, foreign investors could demand cash compensation if member nations "expropriate or nationalize a covered investment either directly or indirectly." Opponents fear "indirect expropriation" will be interpreted broadly, especially by deep-pocketed multinational companies opposing regulatory or legal changes that diminish the value of their investments.

Included in the definition of "indirect expropriation" is government action that "interferes with distinct, reasonable investment-backed expectations," according to the leaked document.

The cost can be high. In 2012, one such tribunal, under the auspices of the World Bank's International Centre for Settlement of Investment Disputes, ordered Ecuador to pay Occidental Petroleum a record $2.3 billion for expropriating oil drilling rights.

Under the Trans-Pacific Partnership, a member nation would be forbidden from favoring "goods produced in its territory."

Critics say the text's definition of an investment is so broad that it could open enormous avenues of legal challenge. An investment includes "every asset that an investor owns or

controls, directly or indirectly, that has the characteristic of an investment," including "regulatory permits; intellectual property rights; financial instruments such as stocks and derivatives"; construction, management, production, concession, revenue-sharing and other similar contracts; and "licenses, authorizations, permits and similar rights conferred pursuant to domestic law."

"This is not about expropriation; it's about regulatory changes," said Lori Wallach, director of Global Trade Watch and a fierce opponent of the Pacific accord. "You now have specialized law firms being set up. You go to them, tell them what country you're in, what regulation you want to go after, and they say 'We'll do it on contingency.'"

In 2013, Eli Lilly took advantage of a similar provision under Nafta to sue Canada for $500 million, accusing Ottawa of violating its obligations to foreign investors by allowing its courts to invalidate patents for two of its drugs.

All of those disputes would be adjudicated under rules set by either the International Centre for Settlement of Investment Disputes or the United Nations Commission on International Trade Law.

The Obama administration pressed for — and won — clear transparency rules mandating that tribunals be open to the public and arbitration documents be available online. Outside parties would also be allowed to file briefs.

"Here's what I can tell you as these negotiations proceed," President Obama told reporters in Brussels last year when questioned on the trade deals in the works. "I have fought my entire political career and as president to strengthen consumer protections. I have no intention of signing legislation that would weaken those protections."

There are other mitigating provisions, but many have catches. For instance, one article states that "nothing in this chapter" should prevent a member country from regulating investment activity for "environmental, health or other regulatory objectives." But that safety valve says such regulation must be "consistent" with the other strictures of the chapter, a provision even administration officials said rendered the clause more political than legal.

One of the chapter's annexes states that regulatory actions meant "to protect legitimate public welfare objectives, such as public health, safety and the environment" do not constitute indirect expropriation, "except in rare circumstances." That final exception could open such regulations to legal second-guessing, critics say.

The flaws in the geopolitical case for the TPP

The Financial Times

By Alan Beattie

March 25, 2015

http://blogs.ft.com/the-world/2015/03/the-flaws-in-the-geopolitical-case-for-the-tpp/

As the Trans-Pacific Partnership does or doesn't approach completion, arguments for and against have had another airing, including the contention that the deal is worth doing for foreign policy reasons to enhance the US's geopolitical standing in Asia.

This is an appealing fall-back for those who don't like the deal's content, but is at best one of the weaker arguments in favour. Whether or not agreements help strategic alliances, the intrusive and one-sided nature of pacts negotiated with the US can arouse resentment as well as cooperation.

There is an intuitive appeal to the geopolitical use of trade agreements. But quickly scanning the two main bilateral trade deals the US has signed over the past decade in the region, Australia and South Korea, it is hard to see much strategic impact. In both nations, belief in the US's economic power and future superpower status have either stagnated or declined over the past decade. Other geopolitical issues, such as America's ability to serve as a military counterweight to Chinese or North Korean belligerence, are surely far more important.

And rather than blithely assuming that a consenting trade partner is a happy trade partner, the US might also look at whether the content of TPP is conducive to future good relations.

Australia, for example, seems to have been rather bruised by its experience during the negotiation of the US-Australia trade deal. It conceded a fair amount and was asked to give up more – witness the pressure to rewrite the country's public healthdrugs purchasing scheme at the behest of American Big Pharma. But it had few of its own demands met, including more access to the ludicrously-rigged US sugar and dairy markets. Australia has been surly about the TPP from the beginning, owing something to its previous experience.

The participation of countries in the TPP has less to do with enthusiasm for importing the US economic model than a grudging acceptance that yet more tribute has to be paid in order to retain access to the US market. Negotiating a trade deal with the US is not a particularly pleasant business, and nor is it becoming happier over time. You are essentially presented with a US model agreement that contains a decreasing proportion of actual free trade and an increasing proportion of intellectual property protection, and invited to sign.

It's not clear that a country's affection for the US will increase after being required to rewrite its patent and copyright law every few years on a model dictated by, respectively, the Pharmaceutical Research and Manufacturers of America and the Recording Industry Association of America. The US itself does not offer much liberalisation. It is highly unlikely to substantially dismantle its agricultural subsidy and protection regime to allow Australian and New Zealand farmers abundant access to its dairy market or stop its rice subsidies disadvantaging Vietnamese rice exports in world markets. America's trading partners are thus on a permanent treadmill of enforced policy change in order to keep their trade access to the US.

Meanwhile, Chinese trade deals tend to ask less liberalisation from (and offer less liberalisation to) their negotiating partners. Instead, Beijing presses on with a highly attractive proposition to regional emerging markets: cheap money from the Asian Infrastructure Investment Bank.

On that subject, the declining influence of the World Bank is a cautionary tale. Under American influence structural adjustment programmes in sub-Saharan Africa and elsewhere for years it attempted to forcibly export US-style deregulation using the bank as a lever. It may have made the US powerful; it did not make the US popular.

The eagerness of emerging markets to bypass the World Bank by setting up their own development banks, such as the Corporación Andina de Fomento, is testament to that. The US may have thought that it, through the World Bank, was enthusiastically welcomed. It has discovered that, frequently, it was at best grudgingly tolerated.

At the moment, the US is essentially using its huge domestic market as a tool to remake other economies in its image. It is likely to work for some time to come, given the prize on offer. But Washington should not delude itself that trade deals which inflict political pain on the US's negotiating partners will necessarily function as durable and positive elements of a wider diplomatic relationship.

How the Leaked TPP ISDS Chapter Threatens Intellectual Property Limitations and Exceptions

Posted by Sean Flynn on March 26, 2015 Add comments

I released a statement earlier today opining that the today's leak of the Investor State Dispute Settlement (ISDS) chapter proposed for the Trans Pacific Partnership (TPP) agreement (available at https://wikileaks.org/tpp-investment/WikiLeaks-TPP-Investment-Chapter.pdf) would give new rights to private companies to challenge limitations and exceptions to copyrights, patents, and other intellectual property rights in unaccountable international arbitration forums. This note gives further background and analysis supporting that statement.

A.

Following a recent trend, explained below, the leaked ISDS chapter of the TPP proposes to give private companies the ability to enforce public international law whenever a local regulation "either directly or indirectly" expropriates any "investment." (Art. 11.7). The term "indirectly" opens the process to consideration of what in U.S. constitutional law is referred to as a "regulatory taking" – that is a regulation or regulatory action that diminishes the value of property, even if the government does not take ownership of the property.

The term "investment" is incredibly broad, including

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.

Like the 2012 U.S. Model Bilateral Investment Treaty, the definition of "investment" explicitly includes "intellectual property," as well as "other tangible or intangible, movable or immovable property."

The extension of the investment chapter to intellectual property raises complicated issues about the relation between the two. The separate intellectual property chapter is subject only to the traditional public international law enforcement mechanism of state-to-state consultation or litigation. To address the connection between the two chapters and their divergent enforcement mechanisms, the proposed treaty states (Art. 11.7(5)):

The Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter QQ._ (Intellectual Property Rights) and the TRIPS Agreement.

The TPP leak adds a new footnote (18) not included in the model BIT or any other agreement, which states:

For greater certainty, the Parties recognize that, for the purposes of this Article, the term "revocation" of intellectual property rights includes the cancellation or nullification of such rights, and the term "limitation" of intellectual property rights includes exceptions to such rights.

On first glance, it may appear that these passages protect intellectual property policy decisions from ISDS cases. The problem is in the qualifications – limitations and exceptions are only protected from ISDS attack "to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter QQ._ (Intellectual Property Rights) and the TRIPS Agreement." These qualifications invite ISDS tribunals to determine the extent that revocations, nullifications or exceptions to rights are consistent with TRIPS and the IP chapter of the agreement – a broad jurisdiction indeed.

B.

The TPP clause appears to be the least protective of several recent options for dealing with intellectual property in the ISDS chapter.

The Comprehensive Trade and Economic Agreement (CETA) between Canada and the European Union http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/10.aspx?lang=eng states Art. X.11(6):

For greater certainty, the revocation, limitation or creation of intellectual property rights to the extent that these measures are consistent with TRIPS and Chapter X (Intellectual Property) of this Agreement, do not constitute expropriation. Moreover, a determination that these actions are inconsistent with the TRIPS Agreement or Chapter X (Intellectual Property) of this Agreement does not establish that there has been an expropriation.

A separate "Declaration to Investment Chapter Article X.11 Paragraph 6" states:

Mindful that investor state dispute settlement tribunals are meant to enforce the obligations referred to in Article X.17(1): Scope of a Claim to Arbitration of Chapter x (yyy), and are not an appeal mechanism for the decisions of domestic courts, the Parties recall that the domestic courts of each Party are responsible for the determination of the existence and validity of intellectual property rights. The Parties further recognize that each Party shall be free to determine the appropriate method of implementing the provisions of this Agreement regarding intellectual property within their own legal system and practice. The Parties agree to review the relation between intellectual property rights and investment disciplines within 3 years after entry into force of the agreement or at the request of a Party. Further to this review and to the extent required, the Parties may issue binding interpretations to ensure the proper interpretation of the scope of investment protection under this Agreement in accordance with the provisions of Article X.27: Applicable Law and Rules of Interpretation of Chapter x (Investment)."

CETA X.11(6) permits (although does not require) that inconsistent actions be subject to compensation. The rest of the "declaration" about avoiding the use of ISDS as a defacto appeal mechanism contains helpful ideas that are not operationalized in the text of the investment chapter. It appears that Eli Lilly's claim that the invalidation of its patent by a court violates the IP chapter and constitutes an expropriation could have been brought as easily under CETA's investment chapter as under NAFTA (or the leaked TPP).

India recently published a draft investment treaty, which states among the areas excluded from ISDS coverage:

(v) the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, *to the extent that such issuance, revocation, limitation or creation is consistent with the Law of the Host State.* (emphasis added).

Making IP law ultimately accountable to *domestic law* rather than an IP chapter is certainly more protective of local regulatory autonomy. But the India proposal fails to make clear who has exclusive authority to determine whether the intellectual property policy at question is "consistent with the Law of the Host State." Can the ISDS panel make this ultimate determination?

The better solution would remove any ability to bring an indirect expropriation claim for intellectual property. e.g.

This Article does not apply to any claim of indirect expropriation of intellectual property. For further clarity, it does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights.

One might add before the period above ", which may only be subject to enforcement actions under this treaty through the state-to-state process delineated in Chapter XX." Such a rule would retain, rather than attack, the traditional model of state-to-state enforcement of public international law on intellectual property rights.

C.

The threat from poorly worded and considered ISDS chapters is real. Two ongoing ISDS cases involve private companies challenging the failure to grant or the regulation of the use of intellectual property as expropriations of their investments, even though the countries at issue did not directly expropriate anything.

Philip Morris has sued Uruguay and Australia, under bilateral investment treaties with Switzerland and Hong Kong, respectively, to challenge restrictions on branding on cigarette packages .

Eli Lilly v. Canada involves claims that two invalidations by Canadian courts of patent extensions for new uses of known medicines (the medicines were both developed in the 1970s) expropriate investments protected by NAFTA's Chapter 11 ISDS system.

These kind of claims are a rupture in the fabric of international intellectual property law. State-to-state enforcement has been the norm for the last 130 odd years of international intellectual property law, from the first multilateral treaties on copyrights and patents in the 1880s up through the World Trade Organization's Agreement on Trade Related Intellectual Property Rights (TRIPS).

State-to-state dispute settlement is an important check and balance in the process that reduces litigation. Governments are more wary litigators than many companies. The reasons are many – governments seek to maintain complex diplomatic relations, they are loathe to take on the costs of litigation, and since they must live by the rules their own litigation establishes, they are more cautious in taking aggressive interpretations of international law that could limit their own regulatory freedom. We thus see relatively few international intellectual property cases litigated, including under the 20 years of TRIPS and its stronger enforcement forum in the WTO.

This restraint is good. Imposing international disciplines on what kind of domestic policies a country can have – the vertical relationship between state and citizen rather than state to state — is controversial and against what most of international law seeks to do.

"Investor-state dispute settlement" (ISDS) proceedings began as limited exceptions to the general rule of state-to-state enforcement. ISDS regimes evolved from an customary international law right to compensation for the expropriation of property through nationalizations of foreign assets. Treaty law beginning in the late 1950s, coinciding with a period of increased decolonization around the world, permitted private foreign companies to seek redress for expropriations in the form of financial compensation awards through arbitration panels.

The problem ISDS sought to address was that liberal constitutionalism with modern property rights had not ascended to the dominance it has today. Many countries were following nationalist or communist models in which there might be no local redress for the takings of private property by the state. But today nearly every country in the world has a constitutional property clause. And while despotism still exists – so does insurance against losses from despotic regimes. It is not clear we need ISDS at all today.

Rather than wither on the vine, ISDS is radically expanding. Between 1987 and 1992, one investor-state case was filed. Between 2009 and 2013, 242 ISDS cases were filed. (Economist).

NAFTA was the first free trade agreement to include both an intellectual property chapter (Chapter 17) and an investment chapter (Chapter 11). Following the general trend in both trade and international law, the general enforcement mechanism (Chapter 20) is state-to-state. NAFTA Chapter 11 includes an investor-state dispute settlement system applicable to the enforcement of only that chapter.

Similar to the TPP leaked ISDS chapter, NAFTA Art. 1110(7) states:

This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, *to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen* (Intellectual Property) (emphasis added)

If that provision had ended before the italics, the implication would be that any IP issues between the parties would have to be solved through state-to-state enforcement – the historical international rule. But by including the last clause evoking the extent of consistency with Chapter 17, it invites ISDS to be used by private companies to challenge the revocation, limitation or creation of intellectual property rights as inconsistent with the intellectual property chapter. Which is exactly what Eli Lilly did.

Eli Lilly claims that the invalidation of two patent extensions for new uses of known products is a violation of the Chapter 17 requirement that Canada "shall make patents available for any inventions, whether products or processes, in all fields of technology, provided that such inventions are new, result from an inventive step and are capable of industrial application" (the same language included in Article 27 of TRIPS). In that case, both sets of memorials (aka legal briefs) accept that Article 1110(7) invites the ISDS panel to decide whether Canada's actions are consistent with the IP chapter of NAFTA, although they of course differ on the result of that interpretation. (See Canada's Memorial, failing to challenge jurisdiction of ISDS panel to interpret Chapter 17).

A more conservative approach – which would reinforce rather than rupture the 130 odd years of exclusive state-to-state enforcement of international intellectual property law – would be to restrict the determinations about violations of IP chapters (and of TRIPS) to the traditional public international law state-to-state enforcement processes erected for that purpose.

D.

The implications of using ISDS systems to privately enforce consistency with free trade agreement intellectual property chapters are profound. The most recently leaked IP chapter of the Trans-Pacific Partnership Agreement is 77 pages long with 7 annexes, addendums, and non-papers, 32,018 words, including 265 footnotes (KEIonline.org). These words can give rise to legions of disputes about their meaning, especially when the meaning of the words can affect the bottom line of well-resourced companies. Do we really want all of those disputes to be capable of being heard in an ISDS tribunal?

We can predict some disputes. Each year, the U.S. Trade Representatives holds an open forum for U.S. industry to make complaints about other countries intellectual property systems, leading to the so-called "Special 301 report." Peruse this year's industry submissions (e.g. from IIPA) and you will find dozens of complaints that foreign governments are not adhering to their treaty rights on issues ranging from establishing internet service liability rules to extending patent and data monopoly rights for medicines.

And here is a major one lurking in the shadows. Many copyright intensive industries are hostile to the U.S. fair use doctrine and many of the decisions of courts emanating from it. There have been arguments raised from time to time that the doctrine or its applications are contrary to the so-called Berne 3-step test requiring that limitations and exceptions to rights be limited to certain special cases, not conflict with a normal exploitation of the work and not unreasonably prejudice the legitimate interests of the author (see this rebuttal from Gervais et al.). No other country has attempted to sue the U.S. or the nearly dozen other countries around the world that have fair use. But will the content industry be so reticent with such challenges in the future? With the TPP ISDS chapter, they will not have to in 40% of the global economy.

Interview: Green solidarity on the U.S.-Europe trade deal

Monday, March 30, 2015 7:49 PM
http://www.foe.org/news/blog/2015-03-interview-green-solidarity-on-the-us-europe-trade-deal

Friends of the Earth, US Blog

Posted Mar. 30, 2015 / Posted by: Adam Russell

Through the Friends of the Earth International network, we have been collaborating with Friends of the Earth Europe and all the Friends of the Earth national affiliates across the continent to influence public opinion on both sides of the Atlantic by exposing the corrupt influence Big Oil, Wall Street, global agricultural giants, and other selfish interest groups pushing for the Transatlantic Trade and Investment Partnership trade deal between the U.S. and EU. This is an essential part of our campaign to stop the Fast Track bill, to be considered in Congress any day, which would grease the skids for the TTIP and the TPP deal with Japan and other Pacific nations.

The big money interests and polluting industries have falsely claimed that European opponents of TTIP are anti-American. In reply, Gwen Buck of Friends of the Earth England, Wales, and Northern Ireland asked me to sit for an interview to explain why a broad coalition of environmental and public interest groups in the United States share exactly the same views as our partners in Europe.

Below are a few excerpts from the interview, edited for length. Read the full version here.

Gwen Buck: What would be the implications for the United States ... if the Transatlantic Trade and Investment Partnership went ahead?

Bill Waren: We do have some idea of what is in TTIP negotiating text thanks to the somewhat more open European process, and thanks to whistle-blowers who have revealed secret documents.

The TTIP regulatory review provisions worry me most. They have nothing to do with trade and everything to do with setting up institutions and procedures to effect deregulation. There would ...be inappropriate use of business-friendly, cost-benefit analysis. This process gives disproportionate weight to quantitative data and economic costs, while diminishing the importance of qualitative benefits such as health and protecting wild places... If an environmental benefit cannot be measured in dollars and cents, then its value is unfairly discounted. For example, food safety standards would be lowered if the undervalued "benefit" of protecting the food we eat is outweighed by the "cost" to corporate profits. How does one put a price, discounted to "present value," on a human life or nature itself?

...The investment chapter in TTIP shows that firms would be able to sue governments for potentially billions in financial damages if environmental or public health regulations interfere with future profits. This would discourage positive government action like restricting oil and gas drilling, imposing pollution controls, limiting the use of fracking, or even stopping construction of the Keystone XL pipeline.

TTIP would stymie congressional action to more effectively regulate chemicals associated with breast cancer, autism and infertility. More immediately, it could undermine effective toxic chemical regulation currently on the books in California and other states. TTIP would also undercut GMO labeling initiatives in the U.S.

Gwen Buck: With the UN Paris climate talks happening this year, what impact will TTIP have on the U.S.'s ability to limit its carbon emissions?

Bill Waren: As a result of the boom in environmentally-destructive fracking, the fastest-growing natural gas and oil producer in the world is now the United States. Dirty energy companies are some of the businesses pushing for TTIP to be ratified. This would help them export to global markets, where they can demand higher prices for coal and gas. Meanwhile, Canada wants to transport tar sands oil through the Keystone XL pipeline, to refineries in Texas, which if TTIP goes ahead, will be shipped overseas where they can sell it far more profitably than in the U.S.

Recently leaked EU documents exposed the EU's intention to increase US oil and gas exports to Europe. EU negotiators at TTIP talks want the U.S. to scrap its current legal prohibition on crude oil exports and its licensing restrictions on natural gas exports. TTIP would encourage increased US coal, oil and gas exports to the world that will fuel continued global warming. The huge extra demand for fossil fuels as a result of TTIP threatens to turn the U.S. into an EU fracking colony.

Gwen Buck: The U.S. is currently in the process of negotiating the Trans Pacific Partnership as well as TTIP. What has been the general public's reaction to these new mega trade deals and what are people's concerns?

Bill Waren: The big focus of public concern in the U.S. today is Fast Track trade promotion legislation that may come up for a vote in the U.S. Congress imminently. Fast Track legislation would sharply limit Congress' role in trade policy by forcing TPP and TTIP deals through on a quick up or down vote, with little debate and no amendments. ... In effect, a vote to approve Fast Track is a vote to approve TTIP and TPP unseen -- because the public and press are denied access to the secret negotiating text.

Read the rest of the interview on Friends of the Earth England, Wales and Northern Ireland's blog.

Independent Expert calls for an end to secret negotiations of free trade and investment agreements until public consultation and participation is ensured and independent human rights impact assessments are conducted

3/31/15

https://dezayasalfred.wordpress.com/2015/03/31/independent-expert-calls-for-an-end-to-secret-negotiations-of-free-trade-and-investment-agreements-until-public-consultation-and-participation-is-ensured-and-independent-human-rights-impact-assessment/

GENEVA – The Independent Expert on the promotion of a democratic and equitable international order, Alfred de Zayas, is alarmed by the general lack of awareness concerning the adverse effects that existing bilateral and multilateral free trade and investment agreements have already had on the enjoyment of human rights in many countries, particularly in the developing world. He is concerned about the secrecy surrounding current negotiations for trade treaties like the Transatlantic Trade and Investment Partnership (TTIP), the Trans-Pacific Partnership (TPP) and the Trade in Services Agreement (TISA), currently under discussion, which have excluded key stakeholder groups from the process, including labour unions, environmental protection groups, food-safety movements and health professionals. The expert maintains that proactive disclosure by governments, genuine consultation and public participation in decision-making are indispensable to render such agreements democratically legitimate.

"Fast-tracking" adoption of such treaties is tantamount to disenfranchising the public. Therefore, Parliaments should call for a moratorium on all pending free trade and investment agreements until independent human rights impact assessments are conducted and the public is properly consulted. Scarce reports indicate that these agreements are not about trade facilitation but essentially about deregulation, which is a "lose-lose" proposition for everybody except transnational corporations.

The expert is especially worried about the impact that investor-state-arbitrations (ISDS) may have on human rights, in particular the provision which allows investors to challenge domestic legislation and administrative decisions if these can potentially reduce their profits. Such investor-state tribunals are made up of arbitrators, mostly corporate lawyers, whose independence has been put into question on grounds of conflict of interest, and whose decisions are not subject to appeal or to other forms of accountability. The apparent lack of independence, transparency and accountability of ISDS tribunals also entails a *prima-facie* violation of article 14 of the International Covenant on Civil and Political Rights (ICCPR), which requires that suits at law be adjudicated by independent tribunals. It has been argued that ISDS tilts the playing field away from democratic accountability, favouring "big business" over the rights and interests of labourers and consumers.

Prior experience has shown that transnational corporations have sued States on account of their social legislation, labour laws, minimum wage provisions, environmental and health protection measures. Such lawsuits entail a frontal attack on democratic governance, in particular on the exercise of the State responsibility to legislate in the public interest[FD1], thus undermining both the commitment to the rule of law and to domestic and international democracy.

The Independent Expert recalls that because all States are bound by the United Nations Charter, which is akin to a World Constitution, all bi-lateral and international treaties must conform with the Charter, in particular with articles 1, 2, 55 and 56, which stipulate the principles of equal rights and self-determination of peoples, respect for human rights and fundamental freedoms, sovereign equality of States, the prohibition of the threat of and the use of force and of intervention in matters which are essentially within the domestic jurisdiction of States. Article 103 of the Charter stipulates that "in the event of conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present charter shall prevail." In other words, provisions of free trade and investment agreements and decisions of ISDS arbitrators must conform with the UN Charter and must not lead to a violation, erosion of or retrogression in human rights protection or compromise State sovereigntyand the State's fundamental obligation to ensure the human rights and well-being of all persons living under its jurisdiction. Such agreements or arbitral decisions are null and void as incompatible with Article 103 of the UN Charter and contrary to international *ordre public*.

Similarly, universal and regional human rights treaties, including the ICCPR, the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human and Peoples Rights, as well as ILO Conventions on labour standards and WHO Conventions, including the Framework Convention on Tobacco Control (in force 27 February 2005, 168 signatories),the Framework Convention on Climate Change and the Biodiversity Convention must take precedence over trade and investment agreements.

Already in 1989 the European Court of Human Rights held in *Soering v. United Kingdom* that the obligations under ECHR are superior to those under extradition treaties. This judicial precedent is *mutatis mutandis* applicable to free trade and investment agreements. Moreover, to the extent that free trade and investment agreements lead to gross violations of human rights, mass dislocation and migration, the suicide of ruined and desperate farmers and peasants, usurpation of State sovereignty and subversion of democratic governance, they are *contra bonos mores* and therefore null and void (Art. 53 Vienna Convention on the Law of Treaties (VCLT), *jus cogens;* Art. 38 ICJ Statute, general principles of law). Under no condition can ISDS tribunals hinder States in the fulfilment of their fundamental duties to regulate domestic policies in economic, social and labour matters. Arbitration awards and punitive damages assessed against States because of changes in their labour laws (including raising the minimum wage), measures to protect the environment, regulation of toxic waste disposal, public health standards, medical hygiene etc. shock the conscience of mankind, violate the good faith requirement of treaty implementation (art. 26 VCLT), constitute a gross abuse of rights and unjust enrichment. Ontologically capitalism and investment entail risk-taking. The progressive improvement of health and social legislation is an important goal of a democratic and equitable international order – and as such a thoroughly foreseeable risk that investors must accept.

Regional Human Rights Courts including the Inter-American Court on Human Rights, the European Court on Human Rights and the African Court on Human and Peoples Rights are called upon to reaffirm the principle that human rights obligations necessarily take precedence over trade and investment agreements. The UN Treaty bodies, including the Human Rights Committee and the Committee on Economic Social and Cultural Rights, should reaffirm this principle in their jurisprudence on individual cases, in general comments and in concluding observations.

The new Forum on human rights, democracy and the rule of law, created at the 28th session of the Human Rights Council, could consider devoting its first session to the usurpation of governmental functions by transnational enterprises that have no democratic legitimacy.

The Independent expert calls on the Human Rights Council to systematically review the compatibility of certain provisions of free trade and investment agreements with human rights norms, as part of the UPR procedure. The Council should also consider tasking its Advisory Committee with a study on the impact of free trade and investment agreements and how to modify them so as to promote rather than hinder human rights. This would be a logical and necessary continuation of the work on globalization conducted by the Sub-Commission on the Promotion and Protection of Human Rights. Special Procedures mandate holders, including the Working Group on Business and Human Rights, the Special Rapporteur on the Right to Food[1], the Special Rapporteur on the Right to Health, and the Special Rapporteur on the independence of judges and lawyers should consider continuing to pay attention to this issue e.g. by preparing studies on the impacts of such agreements in the context of their mandates.

Finally, the General Assembly should refer pertinent legal questions to the International Court of Justice for advisory opinions and recommendations, including the primacy of human rights treaties over other treaties, the necessity to carry out human rights impact assessments, the responsibility of States to regulate the activities of transnational corporations operating in their territories and the level of compensation owed to victims of violations of human rights.
A moratorium on on-going negotiations is necessary to prevent the establishment of economic and financial structures that foreseeably will lead to gross violations of human rights worldwide and ultimately may lead to situations where international peace and security are threatened. Special procedures mandate holders have a preventive vocation which is more important than their task to propose curative measures after the fact. We are not just firemen – we are also whistleblowers.

Alfred de Zayas (United States of America) was appointed as the first Independent Expert on the promotion of a democratic and equitable international order by the UN Human Rights Council, effective May 2012. Learn more, log on
to: http://www.ohchr.org/EN/Issues/IntOrder/Pages/IEInternationalorderIndex.aspx