AMERICANS FOR FINANCIAL REFORM

The Trans Pacific Partnership, Fast Track and Financial Regulation

New leaks from the secret negotiations on the Trans-Pacific Partnership (TPP) trade agreement show that the TPP would create a massive expansion of the system of investor-state dispute settlement. Investor-state dispute settlement would permit individual financial entities to sue the U.S. government for financial damages, claiming that U.S. regulations violated their right to 'fair and equitable treatment' under the trade agreement. These cases would be brought outside of the normal legal system, in extrajudicial trade 'tribunals' that have a record of being highly favorable to industry and would be made up of private sector lawyers.

While it is true that the leaked text appears to contain a reference to protecting some financial regulations, the secretive nature of the TPP negotiations does not permit any conclusions as to how effective these protections would be or whether they would cover the full range of U.S. financial regulations.[1] The passage of Fast Track trade authority would make it effectively impossible for Congress to change the details of the final trade agreement to better protect financial regulation.

The expansion of investor-state dispute settlement (ISDS) under the TPP poses a significant threat to financial regulations being put in place in the US and around the world in the wake of the financial crisis. It could allow financial companies to challenge new rules put in place to protect consumers and investors or ensure the stability of the financial system, and force U.S. taxpayers to pay for any losses in profits claimed due to these rules. The biggest banks already have disproportionate power in shaping global financial regulatory policy, and the distortions in public policy created by that power has had disastrous effects. The last thing we need to is to increase their power still further.

Investor-state dispute settlement has existed in previous trade agreements, but such settlement agreements have mainly been made with developing countries that do not play an important role in the global financial system. This is the first time that this mechanism has been included in a trade agreement with countries that have banks that are among the largest in the world. For example, Japan would be a signatory country, and three of the world's largest thirty banks -- Mizuho, Sumitomo and Mitsubishi UFJ – are Japanese. Furthermore, the TPP is designed as a 'dock-on' agreement that other countries such as China could join easily once it is signed. The

[1] The leaked section states that certain provisions will not apply to financial regulatory measures 'covered by Section KK', but without the text of Section KK it is impossible to tell what is meant by 'covered by' or what types of financial regulations might be fall outside of any protections offered.

addition of China to the TPP would add two more of the world's largest banks to the list of entities with the right to challenge U.S. regulations under the TPP.

By expanding investor-state dispute settlement, the TPP would empower foreign banks from signatory nations bring cases against U.S. financial regulations by alleging that those regulations violated a guarantee of "fair and equitable treatment" for foreign investors. ISDS tribunals have interpreted this guarantee as requiring governments to maintain a "stable and predictable regulatory environment" that does not frustrate the "expectations" of foreign firms when investing in a country. This standard can be violated even when foreign entities are treated similarly to domestic U.S. firms. Due to such vague and sweeping interpretations, this broad government obligation has become the basis for three out of every four ISDS cases brought under trade pacts in which a government has lost.

Opening up the investor-state dispute settlement system would mean that national financial regulations can be directly challenged by industry under the deregulatory commitments in trade agreements. Trade agreements – including the TPP – still include deeply problematic anti-regulation language dating from the 1990s, prior to the global financial crisis. Without ISDS, the effect of this anti-regulation language was limited, because a government-to-government challenge was necessary to bring a case against a regulation. But investor-state dispute settlement could change the playing field dramatically. Any bank from a TPP signatory country that claims disadvantage from a regulation under the broad and vague standard of 'fair and equitable treatment' could bring a private challenge and claim compensation from U.S. taxpayers. That case would likely be heard in a private trade tribunal predisposed to be expansive interpretations of investors' rights. Exposing U.S. financial policies to liability under ISDS could put U.S. taxpayers on the hook to pay off foreign banks who claimed losses from complying with U.S. law, and would chill the development of further financial reforms.

The passage of Fast Track trade authority for the TPP would make it almost impossible for Congress to modify the trade agreement before passage to prevent this outcome. Americans for Financial Reform therefore calls on Congress to reject Fast Track trade authority for the TPP.