

The Trans-Pacific Partnership: Undermining U.S. Sovereignty & Expanding Corporate Power

The Trans-Pacific Partnership Free Trade Agreement (TPP) also known as “NAFTA on Steroids” is poised to become the largest trade agreement ever. Current negotiating countries account for 38% of world economic activity and include currently being negotiated by 12 countries including the U.S., Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. The TPP has been negotiated in secret – except for the 600 corporate advisers who get to see the text and work closely with the U.S. negotiators. The TPP poses a special threat to our sovereignty and democracy.

■ The TPP Expands Corporate Rights and Power.

In 2012, the Investment Chapter of the TPP was leaked. The TPP would enable foreign corporations to challenge any U.S. law, rule or regulation that could breach the expansive investment rights granted in the TPP and adversely impact their “expected future profits” or represent a change from their “expectation of a stable regulatory environment.” This language is similar to other trade agreements such as NAFTA, CAFTA, and many bilateral trade pacts.

■ **The Investor State Dispute Settlement (ISDS) process.** ISDS is a provision in a number of free trade agreements including the TPP that grants a foreign corporation the right to initiate dispute settlement proceedings against a government for failure to enforce the special investor protections contained in trade agreements. These challenges are heard before private UN or World Bank tribunals. ISDS is quite different than the State-to-State dispute resolution system in the World Trade Organization.

■ Examples of Corporations using Trade Agreements and ISDS to Undermine Domestic Laws.

There are over \$14 billion in pending claims filed by corporations against sovereign governments using the ISDS provisions of trade agreements that have language similar to the TPP. The corporations are challenging the laws and regulations in a number of countries relating to environmental protection, labor standards, energy, public health, land use and transportation. Here are just a few examples.

— A French firm, Veolia, used ISDS to challenge Egypt’s minimum wage.

— A US corporation attacked the Peruvian government’s decision to regulate toxic waste and close a dangerously polluting smelter. Peru reversed its decision after the US Renco Corp filed an ISDS case demanding \$800 million in compensation.

— Phillip Morris used ISDS to challenge anti-smoking laws in Australia and Uruguay after failing to undermine the health laws in domestic courts.

— Lone Pine Corporation is using ISDS to sue Canada for \$250 million because Quebec instituted a moratorium on fracking in order to conduct a study on environmental impacts.

■ **Elevating Corporations to the level of a Sovereign Nation.** ISDS elevates corporations to equal status with sovereign nations, empowering them to privately enforce the terms of a public trade treaty.

— ISDS allows corporations to by-pass domestic court systems and directly sue national governments for cash awards to enforce the special investor protections contained in an agreement.

— The governments that are the actual parties to the trade agreement have no control over the instigation of such cases.

— Policies and actions that have withstood challenge by such corporations in domestic courts can be re-litigated before tribunals.

— There is no requirement that domestic remedies be extinguished before filing such a case.

■ **International Tribunals By-Pass and Operate Outside Domestic Court Systems.** Foreign corporations are empowered to bring cases to closed tribunals that operate outside of the domestic court systems.

— The TPP refers directly to World Bank and United Nations tribunals.

— Cases are heard by private-sector attorneys, unaccountable to any electorate, many of whom rotate between being “judges” and bringing cases for corporations against governments.

— Very limited conflict of interest rules in terms of who can serve as an arbitrator.

— Arbitrators are paid by the hour with a standard fee of \$3,000 per day which is split between the corporation and the government.

— There are no appeals on the merits of tribunal decisions.

(Continued)

CASE STUDY: PHILIP MORRIS ISDS SUITS AGAINST AUSTRALIA and URUGUAY

■ Philip Morris v Australia:

In 2011, Australia passed the Tobacco Plain Packaging Bill that requires health warnings on cigarette packages to cover 75% of the front and 90% of the back of packages and banned brand logos and colorful designs. Philip Morris filed a suit challenging the law in Australia's court system. The High Court ruled against Philip Morris. But Philip Morris also challenged the plain packaging legislation outside of Australia's courts by using the ISDS process laid out in the 1993 Australia-Hong Kong Bilateral Investment Treaty. Philip Morris Asia Limited (which is based in Hong Kong) claimed that the tobacco legislation breached the investment provisions of the treaty, constituted an expropriation, and had a detrimental impact on its investment. Philip Morris is seeking compensation on "the order of billions of Australian dollars." The challenge is being heard before a UN trade tribunal.

■ Philip Morris v Uruguay:

The Uruguayan government introduced legislation that limits marketing of tobacco to one product per brand and requires 80% of tobacco packaging to display graphic health warnings. Philip Morris International filed a request for arbitration with the World Bank's International Center for the Settlement of Investment Disputes (ICSID) alleging, among other things, that the Uruguayan laws subjected its investments to "unreasonable" measures in violation of Article 3(1) of the Switzerland-Uruguay Bilateral Investment Treaty. The arbitration was brought by Philip Morris International, an American company with operations in Switzerland.

Importantly, Philip Morris International not only claimed monetary damages but also sought injunctive relief, requesting that ICSID suspend the impugned regulations. Although injunctive relief of this nature lacks precedent, there is little limiting ICSID's ability to award it either in Uruguayan or Australian arbitrations. If Philip Morris International is successful in its claim against Uruguay, particularly in the claim for injunctive relief, it could create a precedent for powerful multi-national companies to have a serious influence on the law-making ability of States who have entered into trade agreements.

■ Philip Morris and the TPP:

Philip Morris submitted formal comments to the United States Trade Representative (USTR) – the executive branch agency that is negotiating the TPP – arguing that Australia's plain packaging regulations would be "tantamount to expropriation" of its intellectual property rights. Philip Morris also complained about the broad authority delegated to Singapore's Minister of Health to restrict tobacco marketing. In order to address these "excessive legislative proposals", Philip Morris urged the USTR to pursue strong protections for Intellectual Property and to include the ISDS mechanism in the TPP.



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 7