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. The 12 countries currently negotiating the TPP account for 38% of world economic activity and include the U.S., Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. Negotiators have refused to release the text of the TPP to the public but have given access to members of special advisory committees which are dominated by hundreds of corporate officials, lawyers and lobbyists. However, based on leaked text, previous trade agreements, news reports and public statements, we can safely conclude that 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. It expands corporate power by containing a range of investment rules and rights. Provisions include special guarantees for a "minimum standard of treatment" for relocating firms; undermining the ability of governments to restrict the movement of capital; compensation for loss of expected future profits as a form of indirect or regulatory takings; the right to acquire land, natural resources and factories without governmental review; and applying all such protections to a very broad definition of investment. These provisions and rights make it much safer for corporations to invest overseas further promoting the offshoring of investment and jobs.

Investor State Dispute Settlement (ISDS). 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 rights and protections contained in the agreement. These challenges are heard before UN or World Bank tribunals staffed by private lawyers. The corporations can seek compensation for the alleged loss of any expected future profits. The system of expanded corporate rights and their private enforcement through ISDS elevates corporations and investors to equal standing with the sovereign nations that sign the TPP. The language in the TPP is similar to other trade agreements brokered by the U.S. including NAFTA, CAFTA and many bilateral trade pacts. However, ISDS is quite different from 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 $38 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 of corporations using ISDS to challenge public interest laws in a number of sovereign nations.

— A French firm, Veolia, used ISDS to challenge Egypt's increase in the minimum wage.

— A U.S. 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 initiation 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.

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— 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.

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 Countries:

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 Minster 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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