TPP's Investment Rules Harm Public Health

It's Branded as a Trade Agreement, But What's Really at Stake?

Trade officials from nine Pacific Rim nations—Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, the U.S. and Vietnam— are in intensive, closed-door negotiations to sign a Trans-Pacific Partnership (TPP) free trade agreement in 2012. Every Pacific Rim nation from China and Russia to Indonesia and Japan could eventually be included. There are draft texts for many of this pact's 26 chapters, most of which have nothing to do with trade, but rather impose limits on domestic food safety, health, environmental, and other policies. The governments won't release the texts to the public. But over 600 U.S. corporate "trade advisors" have full access. America's worst job-offshoring corporations, global banks, agribusiness, and pharmaceutical giants want this deal to be another corporate power tool like NAFTA (North American Free Trade Agreement.) Consumer, labor, environmental, and other public interest advocates want transparency in the process and a "Fair Deal or No Deal."

A major goal of U.S. multinational corporations for the TPP is to impose on more countries a set of extreme foreign investor privileges and rights and their private enforcement through the notorious "investor-state" system. This system allows foreign corporations to challenge before international tribunals national health, consumer safety, environmental, and other laws and regulations that apply to domestic and foreign firms alike. Outrageously, this regime elevates individual corporations and investors to equal standing with each TPP signatory country's government – and above all of us citizens. This regime would empower corporations to skirt national courts and sue our governments before tribunals of private sector lawyers operating under UN and World Bank rules to demand taxpayer compensation for domestic regulatory policies that investors believe diminish their "expected future profits." These regulatory policies can be anything from health and environmental protection to financial regulation. Indeed, under this regime, corporations can launch attacks on changes in government regulation surrounding patents and other intellectual property rights – something that can cast a chill on efforts to improve access to safe and affordable generics.

If a corporation "wins", the taxpayers of the "losing" country must foot the bill. Over $350 million in compensation has already been paid out to corporations in a series of investor-state cases under NAFTA-style deals alone. This includes attacks on toxics bans, natural resource policies, health and safety measures, and more. In fact, of the over $12.5 billion in the 17 claims now pending under NAFTA-style deals, all relate to public health, environmental, and transportation policy – not traditional trade issues. Even when governments win, they waste scarce budgetary resources defending national policies against these corporate attacks. A review of just some of the outrageous cases brought under this system highlights the extreme peril of these extreme investor privileges and their investor-state private enforcement being included in a TPP:

Investor-state attack on cigarette plain packaging policies:

In the mid-2000s, countries from around the world signed onto the World Health Organization's Framework Convention on Tobacco Control, which aims "to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke…"

In 2008, Uruguay began implementing its obligations under this framework, including through legislation to enhance tobacco warning labels and require plain packaging. In 2010, Australia followed suit. But before the ink was even dry on these efforts, Philip Morris launched investor-state attacks against both countries. While the company is widely considered a U.S. company, the U.S.-Australia Free Trade Agreement doesn't have investor-state arbitration, thanks to the push-back of legislators in both countries at the time of negotiation. So Philip Morris used its Swiss and Hong Kong subsidiaries to launch the attacks, using Bilateral Investment Treaties. The company is requesting investor-state tribunals to block the Uruguayan and Australian legislation from going into effect, and to have taxpayers of these nations compensate the company.

Justice for children poisoned by smelter imperiled by investor-state:

Citizens in La Oroya, Peru suffer from the toxic emissions from a metal smelter owned by Ira Rennert, one of the richest men in the United States.

An in-depth scientific study of the site – deemed among the top 10 most polluted worldwide – noted that sulfur dioxide concentrations at La Oroya greatly exceed international standards, noting that the chemical "damages the respiratory system, aggravates existing respiratory illnesses (especially bronchitis), and diminishes the capacity of the lungs to expel foreign particles such as heavy metals. It leads to a higher mortality rate, particularly when combined with the presence of elevated levels of particulate material." The study found that sulfur dioxide levels doubled in the years after Rennert's acquisition of the complex.

When Rennert's company bought the smelter, it agreed to construct a sulfur plant by 2006, which would help with environmental remediation. But the company did not, and requested – and was granted –extensions in 2006 and 2009.

That same year, the company presented a proposal to the Peruvian authorities to restart the smelter if the environmental commitments were loosened. The Peruvian government refused, and by the end of the year, Rennert had launched an attack under the U.S.-Peru FTA, claiming at least $800 million in damages. Among other claims, the company argues Peru's failure to grant additional extensions constitutes an FTA violation.

Unfortunately, past tribunals have found that countries can violate FTAs by disappointing investors' expectations. Rennert's efforts seem to have succeeded in casting a chill on the Peruvian government, which is slated to loosen the environmental requirements that the company must meet.

Canada reverses ban on toxic gasoline additive after investor-state attack, pays $13 million.

Ethyl Corporation was a Virginia-based chemical company with a long and controversial history. In the 1950s, Ethyl Corporation developed a new gasoline additive called methylcyclopentadienyl manganese tricarbonyl (MMT). MMT, an anti-knocking agent used to improve engine performance, contains manganese – a known human neurotoxin. MMT was banned from use in unleaded gasoline by California, which has its own clean air law, and by the U.S. Environmental Protection Agency, due to environmental and public health concerns. Against this background, the Canadian Parliament imposed a ban on the import and interprovincial transport of MMT in April 1997.

Although the potential hazards to human health were not fully-known, Canada acted in a precautionary manner until more information was available, as had the state of California and the U.S. EPA. But on September 10, 1996, while the prospective ban was being debated in the Canadian Parliament, Ethyl Corporation notified the government of Canada that it would sue for compensation under NAFTA's investment chapter if restrictions were placed on MMT. The Parliament withstood these threats and passed the ban a year later in April 1997. That same month, Ethyl filed a NAFTA investor-state claim against the Canadian government. Initially, Canada objected to the NAFTA suit. On June 24, 1998, however, the NAFTA panel rejected Canada's claims, clearing the way for the case to move forward. Shortly after this initial ruling, the government of Canada decided to settle with Ethyl.

On July 20, 1998, Canada reversed its ban on MMT, paid $13 million in legal fees and damages to the Ethyl Corporation, and issued a statement for Ethyl's use in advertising declaring that "current scientific information" did not demonstrate MMT's toxicity or that MMT impairs functioning of automotive diagnostic systems. This case shows how investor-state rules can cast a chill on public interest regulation.

Growing resistance.

The investor-state system is so extreme that it is losing whatever small political support it ever had. Australia has said it will not include investor-state in its trade deals, and the Korean opposition parties are promising to derail the pending Korea-U.S. trade deal unless investor-state is removed. Latin American countries are pulling out of various arbitration agreements that provide venues for these private corporate attacks. President Obama even campaigned against this system! But career bureaucrats and big business want to stay the course, no matter the cost.

For more information or to find out how you can get involved, visit www.citizen.org/tpp or contact Beatriz Lopez at blopez@citizen.org.