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TPP Leak Reveals Extraordinary New Powers for Thousands of Foreign Firms to Challenge U.S. Policies and Demand Taxpayer Compensation

Unveiling of Parallel Legal System for Foreign Corporations Will Fuel TPP Controversy, Further Complicate Obama's Push for Fast Track

WASHINGTON, D.C.— The Trans-Pacific Partnership's (TPP) Investment Chapter, leaked today, reveals how the pact would make it easier for U.S. firms to offshore American jobs to low-wage countries while newly empowering thousands of foreign firms to seek cash compensation from U.S. taxpayers by challenging U.S. government actions, laws and court rulings before unaccountable foreign tribunals. After five years of secretive TPP negotiations, the text – leaked by WikiLeaks – proves that growing concerns about the controversial “investor-state dispute settlement” (ISDS) system that the TPP would extend are well justified, Public Citizen said.

Enactment of the leaked chapter would increase U.S. ISDS liability to an unprecedented degree by *newly* empowering about 9,000 foreign-owned firms from Japan and other TPP nations operating in the United States to launch cases against the government over policies that apply equally to domestic and foreign firms. To date, the United States has faced few ISDS attacks because past ISDS-enforced pacts have almost exclusively been with developing nations whose firms have few investments here.

The leak reveals that the TPP would replicate the ISDS language found in past U.S. agreements under which tribunals have ordered more than \$3.6 billion in compensation to foreign investors attacking land use rules; water, energy and timber policies; health, safety and environmental protections; financial stability policies and more. And while the Obama administration has sought to quell growing concerns about the ISDS threat with claims that past pacts' problems would be remedied in the TPP, the leaked text does not include new safeguards relative to past U.S. ISDS-enforced pacts. Indeed, this version of the text, which shows very few remaining areas of disagreement, eliminates various safeguard proposals that were included in a 2012 leaked TPP Investment Chapter text.

“With the veil of secrecy ripped back, finally everyone can see for themselves that the TPP would give multinational corporations extraordinary new powers that undermine our sovereignty, expose U.S. taxpayers to billions in new liability and privilege foreign firms operating here with special rights not available to U.S. firms under U.S. law,” said Lori Wallach, director of Public Citizen’s Global Trade Watch. “This leak is a disaster for the corporate lobbyists and administration officials trying to persuade Congress to delegate Fast Track authority to railroad the TPP through Congress.”

Even before today’s leak, U.S. law [professors](#) and those in [other](#) TPP nations, the U.S. National Conference of [State Legislatures](#), the [Cato Institute](#) and numerous members of [Congress](#) and [civil](#)

[society](#) groups have announced opposition to the ISDS system, which would elevate individual foreign firms to the same status as sovereign governments and empower them to privately enforce a public treaty by skirting domestic courts and “suing” governments before extrajudicial tribunals. The tribunals are staffed by private lawyers who are not accountable to any electorate, system of legal precedent or meaningful conflict of interest rules. Their rulings cannot be appealed on the merits. Many ISDS lawyers rotate between roles – serving both as “judges” and suing governments for corporations, creating an inherent conflict of interest.

The TPP’s expansion of the ISDS system would come amid a surge in ISDS cases against public interest policies that has led other countries, such as South Africa and Indonesia, to begin to revoke their ISDS-enforced treaties. While ISDS agreements have existed since the 1960s, just 50 known ISDS cases were launched worldwide in the regime’s first three decades combined. In contrast, foreign investors launched at least 50 ISDS claims *each year* from 2011 through 2013. Recent cases include Eli Lilly’s attack on Canada’s cost-saving medicine patent system, Philip Morris’ attack on Australia’s public health policies regulating tobacco, Lone Pine’s attack on a fracking moratorium in Canada, Chevron’s attack on an Ecuadorian court ruling ordering payment for mass toxic contamination in the Amazon and Vattenfall’s attack on Germany’s phase-out of nuclear power.

“By definition, only multinational corporations could benefit from this parallel legal system, which empowers them to skirt domestic courts and laws, and go to tribunals staffed by highly paid corporate lawyers, where they grab unlimited payments of our tax dollars because they don’t want to comply with the same laws our domestic firms follow,” Wallach said.

Public Citizen’s analysis of the [leaked text](#) is available [here](#). It shows:

- **The TPP would grant foreign investors and firms operating here expansive new substantive and procedural rights and privileges not available to U.S. firms under U.S. law**, allowing foreign firms to demand compensation for the costs of complying with U.S. policies, court orders and government actions that apply equally to domestic and foreign firms. This includes:
 - **Foreign investors would be empowered to challenge new policies that apply equally to domestic and foreign firms on the basis that they undermine foreign investors’ “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 (what the leaked text calls “indirect expropriation”) or that change the level of regulation a foreign investor experienced under a previous government (a violation of what the text calls a “minimum standard of treatment” for foreign investors).
 - **The leaked TPP text largely replicates the “minimum standard of treatment” language found in previous U.S. pacts that tribunals have used to issue some of the most alarming ISDS rulings.** Tribunals often have broadly interpreted this vague “right” to fabricate new obligations for governments that do not actually exist in the texts of ISDS-enforced pacts, such as “not to alter the legal and business environment in which the investment has been made.” Due to such expansive interpretations, the “minimum standard of treatment” obligation has been the basis for three of every four ISDS cases “won” by the foreign investor under U.S. pacts.
 - **The text allows foreign investors to demand compensation for claims of “indirect expropriation” that apply 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 is generally available only for government actions affecting *real* property (i.e. land). But the leaked text would allow 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.

- **Foreign corporations could demand compensation for capital controls and other macro-prudential financial regulations that promote financial stability.** This obligation restricts the use of capital controls or financial transaction taxes, even as the International Monetary Fund has shifted from opposing capital controls to officially endorsing them as legitimate policy tools for preventing or mitigating financial crises. Proposed provisions touted as “temporary safeguards” for capital controls would fail to protect many standard forms of capital controls, including those successfully used by TPP governments in the past to ward off financial crises.
- **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. But the leaked TPP investment text could empower individual foreign investors to directly challenge governments over policies to ensure access to affordable medicines, claiming that they constitute TPP-prohibited “expropriations” of intellectual property rights if ISDS tribunals deem them to violate WTO rules.
- **There are no new safeguards that limit ISDS tribunals’ discretion to create ever-expanding interpretations of governments’ obligations to foreign investors and order compensation on that basis.** The leaked text reveals the same “safeguard” terms that have been included in U.S. pacts since the 2005 Central America Free Trade Agreement (CAFTA). CAFTA tribunals have simply ignored the “safeguard” provisions that the leaked text replicates for the TPP, and have continued to rule against governments based on concocted obligations to which governments never agreed. The leaked text also abandons a safeguard proposed in the 2012 leaked TPP investment text, which excluded 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.” Today’s leaked text eviscerates that clause by adding a fatal loophole that has been found in past U.S. pacts.
- **Most TPP countries, including the United States, have decided to expose decisions regarding the approval of foreign investments to ISDS challenge.** Australia, Canada, Mexico and New Zealand have reserved the right to pre-approve foreign investors. But the United States took no exception for reviews by the Committee on Foreign Investment in the United States of planned foreign investments to determine whether they pose threats to national security.
- **The amount that an ISDS tribunal would order a government to pay to a foreign investor as compensation would be based on the “expected future profits” the tribunal surmises that the investor would have earned in the absence of the public policy it is attacking as violating the substantive investor rights granted by the TPP.**

- **The text would submit the U.S. government to the jurisdiction of World Bank and United Nations tribunals. All TPP nations have agreed to be so bound** with the potential exception of Australia, which has indicated that it might do the same, “subject to certain conditions.”
- **None of the structural biases or conflicts of interest inherent in the ISDS system would be remedied.** TPP ISDS tribunals would be staffed by highly paid corporate lawyers unaccountable to any electorate or system of legal precedent. They still would be allowed to rotate between acting as “judges” and advocates for the investors launching cases against governments. Corporations launching cases would still directly select one of the “judges.” The text includes no requirements for tribunal members to be impartial, reveal conflicts of interest or recuse themselves in instances of direct conflict. There is no internal or external mechanism to appeal the tribunal members’ decisions on the merits, and claims of procedural errors would be decided by another tribunal of corporate lawyers. The leaked text provides tribunals with discretion to determine the amount of compensation governments must pay investors and the allocation of costs, such as the tribunal members’ fees. A proposal that appeared in the 2012 leak of the text to standardize hourly fees for tribunal members at the lower end of the range of fees currently paid (about \$375 per hour, compared to the \$700 per hour that some tribunal members receive) has been eliminated.
- **An overreaching definition of “investment” 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.** Proposals in the 2012 leak of the text that would have narrowed the definition of “investment,” and thus the scope of policies subject to challenge, 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.
- **An overreaching definition of “investor” 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.** Thus, for instance, one of the many Chinese state-owned corporations in Vietnam could “sue” the U.S. government in a foreign tribunal to demand compensation under this text.
- **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 of construction for infrastructure projects, as well as contracts relating to the operation of utilities.** (In the leaked chapter, text that is not yet agreed upon appears in square brackets; Public Citizen has seen a version of the text that lists which countries support various proposals.)

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 ISDS 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. Even when governments win cases, they often are ordered to pay for a share of the tribunal's costs. With costs just for defending a challenged policy in an ISDS case totaling \$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.

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.

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