

Investor-State Dispute Resolution: The Monster Lurking Inside Free Trade Agreements

Politics

by Glyn Moody

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<http://www.techdirt.com/articles/20130411/09574122678/investor-state-dispute-resolution-sleeping-monster-inside-free-trade-agreements-begins-to-stir.shtml>

from the *be-very-afraid* dept

We wrote recently about how multilateral trade agreements have become a convenient way to circumvent democratic decision making. One of the important features of such treaties is the inclusion of an investor-state dispute resolution mechanism, which Techdirt discussed last year. The Huffington Post has a great article about how this measure is almost certain to be part of the imminent TAFTA negotiations, as it already is for TPP, and why that is deeply problematic:

Investor-state resolution has been a common component of U.S.-negotiated pacts with individual nations since the North American Free Trade Agreement in 1994. But such resolution is not currently permitted in disputes with the U.S. and EU, which are governed by the WTO. All trade deals feature some kind of international resolution for disputes, but the direct empowerment of corporations to unilaterally bring trade cases against sovereign countries is not part of WTO treaties. Under WTO rules, a company must persuade a sovereign nation that it has been wronged, leaving the decision to bring a trade case before the WTO in the hands of elected governments.

Traditionally, this proposed political empowerment for corporations has been defended as a way to protect companies from arbitrary governments or weakened court systems in developing countries. But the expansion of the practice to first-world relations exposes that rationale as disingenuous. Rule of law in the U.S. and EU is considered strong; the court systems are among the most sophisticated and expert in the world. Most cases brought against the United States under NAFTA have been dismissed or abandoned before an international court issued a ruling.

As this rightly points out, investor-state dispute resolution mechanisms were brought in for agreements with countries where the rule of law could not be depended upon. That makes no sense in the case of the US and EU, both of whose legal systems are highly developed (some might say overly so.) The Huffington Post article quotes Lori Wallach, director of Public Citizen's Global Trade Watch, who explains what she thinks is really going on here: *"The dirty little secret about [the negotiation] is that it is not mainly about trade, but rather would target for elimination the strongest consumer, health, safety, privacy, environmental and*

other public interest policies on either side of the Atlantic," said Lori Wallach, director of Public Citizen's Global Trade Watch. "The starkest evidence ... is the plan for it to include the infamous investor-state system that empowers individual corporations and investors to skirt domestic courts and laws and drag signatory governments to foreign tribunals."

One recent example of the kind of thing that might become increasingly common if investor-state dispute resolution is included in TAFTA and TPP is provided by Eli Lilly and Company. As Techdirt reported earlier this year, the pharma giant is demanding \$100 million as compensation for what it calls "expropriation" by Canada, simply because the latter's courts refused to grant Eli Lilly a drug patent on the grounds that it didn't satisfy the conditions set down in law for doing so.

A new report (pdf) from the UN Conference for Trade and Development (UNCTAD), pointed out to us by IP Watch, reveals just how widespread the use of investor-state dispute resolution mechanisms has already become:

The Issues Note reveals that 62 new cases were initiated in 2012, which constitutes the highest number of known ISDS [investor-state dispute settlement] claims ever filed in one year and confirms that foreign investors are increasingly resorting to investor-State arbitration.

...

By the end of 2012, the total number of known cases reached 518, and the total number of countries that have responded to one or more ISDS claims increased to 95. The overall number of concluded cases reached 244. Out of these, approximately 42 per cent were decided in favour of the State and 31 per cent in favour of the investor. Approximately 27 per cent of the cases were settled.

Although that suggests that states are winning more often than investors, the cost of doing so is a drain on public finances, and ignores cases that never come to arbitration because governments simply give in. And when states lose, the fines can be enormous: the report notes that 2012 saw the highest monetary award in the history of investor-state dispute resolution: \$1.77 billion to Occidental, in a dispute with Ecuador.

As an accompanying press release from UNCTAD points out, this growing recourse to international arbitration

amplif[ies] the need for public debate about the efficacy of the investor-State dispute settlement (ISDS) mechanism and ways to reform it

Unfortunately, against a background of almost total lack of awareness by the public that supra-national structures are being put in place that allow their governments to be overruled, and their laws to be ignored, it is highly unlikely we will get that debate.

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KEI analysis of Wikileaks leak of TPP IPR text, from August 30, 2013

<http://keionline.org/node/1825>

Submitted by James Love on 13. November 2013 - 4:32

KEI Comments on the August 30, 2013 version of the TPP IP Chapter

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Knowledge Ecology International (KEI) has obtained from Wikileaks a complete copy of the consolidated negotiating text for the IP Chapter of the Trans-Pacific Partnership (TPP). (Copy [here](#), and on the Wikileaks site here: <https://wikileaks.org/tpp/>) The leaked text was distributed among the Chief Negotiators by the USTR after the 19th Round of Negotiations at Bandar Seri Begawan, Brunei, in August 27th, 2013.

There have been two rounds since Brunei, and the latest version of the text, from October, will be discussed in Salt Lake City next week.

The text released by Wikileaks is 95 pages long, with 296 footnotes and 941 brackets in the text, and includes details on the positions taken by individual countries.

The document confirms fears that the negotiating parties are prepared to expand the reach of intellectual property rights, and shrink consumer rights and safeguards.

Compared to existing multilateral agreements, the TPP IPR chapter proposes the granting of more patents, the creation of intellectual property rights on data, the extension of the terms of protection for patents and copyrights, expansions of right holder privileges, and increases in the penalties for infringement. The TPP text shrinks the space for exceptions in all types of intellectual property rights. Negotiated in secret, the proposed text is bad for access to knowledge, bad for access to medicine, and profoundly bad for innovation.

The text reveals that the most anti-consumer and anti-freedom country in the negotiations is the United States, taking the most extreme and hard-line positions on most issues. But the text also reveals that several other countries in the negotiation are willing to compromise the public's rights, in a quest for a new trade deal with the United States.

The United States and other countries have defended the secrecy of the negotiations in part on the grounds that the government negotiators receive all the advice they need from 700 corporate advisors cleared to see the text. The U.S. negotiators claim that the proposals need not be subject to public scrutiny because they are merely promoting U.S. legal traditions. Other governments claim that they will resist corporate right holder lobbying pressures. But the version released by Wikileaks reminds us why government officials supervised only by well-connected corporate advisors can't be trusted.

An enduring mystery is the appalling acceptance of the secrecy by the working news media.

With an agreement this complex, the decision to negotiate in secret has all sorts of risks. There is the risk that the negotiations will become hijacked by corporate insiders, but also the risk that negotiators will make unwitting mistakes. There is also the risk that opportunities to do something useful for the public will

be overlooked or abandoned, because the parties are not hearing from the less well-connected members of the public.

The U.S. proposals are sometimes more restrictive than U.S. laws, and when consistent, are designed to lock-in the most anti-consumer features. On top of everything else, the U.S. proposals would create new global legal norms that would allow foreign governments and private investors to bring legal actions and win huge damages, if TPP member countries does not embrace anti-consumer practices.

General provisions, and dispute resolution

The existing multilateral copyright and trade treaties, negotiated in the light of day, generally provide better balance between right holders and users. The WTO TRIPS Agreement is the only multilateral agreement with impressive enforcement mechanisms. The TRIPS agreement is defined not only by the specific provisions setting out rights and exceptions, but general provisions, such as Articles 1, 6, 7,8, 40 and 44, that provide a variety of safeguards and protections for users and the public interest. The US is proposing that the new TPP IPR provisions be implemented with few if any of the safeguards found in the TRIPS, or weaker versions of them.

The dispute resolution provisions in the TPP permit both governments and private investors to bring actions and obtain monetary damages if arbitrators find that the implementation of the agreement is not favorable enough to right holders. This effectively gives right holders three bites at the apple -- one at the WTO and two at the TPP. They can lobby governments to advance their positions before a WTO panel, and/or, the separate dispute mechanisms available to governments and investors in the TPP. There are no opportunities for consumers to bring such disputes.

The addition of the investor state dispute resolution provisions in the TPP greatly increases the risks that certain issues will be tested in the TPP, particularly when the TPP provisions are modified to be more favorable to right holders, or lack the moderating influence of the TRIPS type safeguards which the US is blocking in the TPP.

Access to Medicines

The trade agreement includes proposals for more than a dozen measures that would limit competition and raise prices in markets for drugs. These include (but are not limited to) provisions that would lower global standards for obtaining patents, make it easier to file patents in developing countries, extend the term of patents beyond 20 years, and create exclusive rights to rely upon test data as evidence that drugs are safe and effective. Most of these issues have brackets in the text, and one of the most contentious has yet to be tabled -- the term of the monopoly in the test data used to register biologic drugs. The United States is consistently backing the measures that will make drugs more expensive, and less accessible.

Some of the issues are fairly obvious, such as those requiring the granting of more patents with longer effective terms, or monopolies in test data. Others are more technical or subtle in nature, such as the unbracketed wording of Article QQ.A.5, which is designed to narrow the application of a 2001 WTO Doha Agreement TRIPS and Public Health, and its obligations to provide for "access to medicine for all." By changing the language, the TPP makes it seem as if the provision is primarily about "HIV/AIDS,

tuberculosis, malaria, [US oppose: chagas] and other epidemics as well as circumstances of extreme urgency or national emergency," instead of all medicines and all diseases, including cancer.

Patents on Surgical Methods

An interesting example of how the US seeks to change national and global norms are the provisions in the TPP over patents on surgical methods. The WTO permits countries to exclude "diagnostic, therapeutic and surgical methods for the treatment of humans or animals." The US wants to flip this provision, so that "may also exclude from patentability" becomes "shall make patents available." However, when a version of the IP Chapter was leaked in 2011, the US trade negotiators were criticized for ignoring the provisions in 28 USC 287 that eliminated remedies for infringement involving the "medical activity" of a "medical practitioner." The exception in US law covered "the performance of a medical or surgical procedure on a body." The US trade negotiators then proposed adding language that would permit an exception for surgery, but only "if they cover a method of using a machine, manufacture, or composition of matter." The US proposal, crafted in consultation with the medical devices lobby, but secret from the general public, was similar, but different from the U.S. statute, which narrowed the exception in cases involving "the use of a patented machine, manufacture, or composition of matter in violation of such patent." How different? As Public Citizen's Burcu Kilic puts it, under the US proposal in the TPP, the exception would only apply to "surgical methods you can perform with your bare hands."

Why is the United States putting so much effort into narrowing if not eliminating the flexibility in the WTO agreement to provide exceptions for patents on "diagnostic, therapeutic, and surgical methods for the treatment of humans or animals"? It did not hurt that AdvaMed, the trade association for the medical device manufacturers, hired Ralph F. Ives as Executive Vice President for Global Strategy & Analysis. Before becoming a lobbyist for the medical device industry, Ives was the head of pharmaceutical policy for USTR. And Ives is just one of an army of lobbyists (including former Senator Evan Bayh) representing the medical devices industry. ITAC3, the USTR advisory board for Chemicals, Pharmaceuticals, Health/Science Products And Services, includes not only Ralph Ives, but also representatives from Medtronic, Abbott, Johnson and Johnson, DemeTech, North Coast Medical and Airmed Biotech -- all companies involved in the medical device business. All are considered "cleared advisors" to USTR and have access to the TPP text.

Uncertainty over compulsory licenses on patents

At present, exceptions to exclusive rights of patents may be implemented under a general exceptions clause (Article 30 of the TRIPS), a rules based system (Article 31), or under other provisions, including limitations to remedies, the first sale doctrine, or the control of anticompetitive practices. The option to use the TRIPS Article 31 mechanisms has been proposed by New Zealand, Canada, Singapore, Chile and Malaysia, but is not currently supported by the US, Japan or other countries. This presents significant uncertainty over the freedom to use compulsory licenses. If QQ.E5quater is not accepted, the rules based WTO approach will not be possible, and governments will have to satisfy a restrictive three step test, and run the risk of litigation under investor state dispute resolution provisions of the TPP.

Article QQ.E.5quater: {Other Use Without Authorisation of the Right Holder}

[NZ/CA/SG/CL/MY propose: Nothing in this Chapter shall limit a Party's rights and obligations under Article 31 of the TRIPS Agreement or any amendment thereto.]

Copyright

There is little reason for any language on copyright in the TPP. All of the TPP member countries are already members of the WTO, which has its own extensive obligations as regards copyright, including obligations to implement Articles 1 through 21 of the Berne Convention. The TRIPS has already expanded copyright coverage to software, and provides extensive protections to performers, producers of phonograms (sound recordings) and broadcasting organizations. Moreover, the United States and Australia have proposed that all TPP member countries “ratify or accede” to two 1996 treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty), as well as the 1974 Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite. Despite this, the TPP provides its own nuanced and often detailed lists of obligations. Collectively, the copyright provisions are designed to extend copyright terms beyond the life plus 50 years found in the Berne Convention, create new exclusive rights, and provide fairly specific instructions as to how copyright is to be managed in the digital environment.

Copyright terms

There are significant differences in the positions of the parties on the term of protection. Some countries are opposing any expansion of the term found in the Berne Convention, the TRIPS or the WCT, which is generally life plus 50 years, or 50 years for corporate owned works.

For the TPP copyright terms, the basics are as follows. The US, Australia, Peru, Singapore and Chile propose a term of life plus 70 years for natural persons. For corporate owned works, the US proposes 95 years exclusive rights, while Australia, Peru, Singapore and Chile propose 70 years for corporate owned works. Mexico wants life plus 100 years for natural persons and 75 years for corporate owned works. For unpublished works, the US wants a term of 120 years.

While the US negotiators are indeed promoting US legal norms, they are promoting norms that most experts and consumers see as a mistake, that should be corrected. There is no justification for 95 year copyright terms for corporations, or 70 years of protection after an author is dead, or 120 years for unpublished works.

3-Step Test

One set of technically complex but profoundly important provisions are those that define the overall space that governments have to create exceptions to exclusive rights. The Berne Convention established a system combining “particular” exceptions for the most common and important topics such as quotations, news of the day, public affairs, speeches, uses of musical compensations, and education, and a general purpose exception to the reproduction right that could be implemented in any other case not covered by the particular exception. Any exception not spelled out as a particular exception was subject to a very restrictive three step test. When the WTO incorporated the bulk of the Berne Convention articles, it retained this system, and added additional areas of flexibility, including very broad freedom to apply the first sale doctrine (Article 6 of the TRIPS), to control anti-competitive practices (Articles 8 and 40), and to implement a liability rule approach through Article 44.2 of the TRIPS.

In recent years, the publisher lobby has sought to elevate the 3-step test to a high level filter to limit all copyright exceptions, including the so called "particular" Berne exceptions, as well as anything else that limits exclusive rights. In the TPP, the copyright lobby has succeeded in obtaining a formulation based in part upon the 1996 WIPO WCT treaty, which can be read to provide some recognition of the Berne particular exceptions, but (unlike the 2012 Beijing treaty) does not specifically reference the important agreed upon statements in the 1996 WCT, which support more robust exceptions.

In its current form, the TPP space for exceptions is less robust than the space provided in the 2012 WIPO Beijing treaty or the 2013 WIPO Marrakesh treaty, and far worse than the TRIPS Agreement. While this involves complex legal issues, the policy ramifications are fairly straightforward. Should governments have a restrictive standard to judge the space available to fashion exceptions for education, quotations, public affairs, news of the day and the several other "particular" exceptions in the Berne Convention, and more generally, why would any government want to give up its general authority to consider fashioning new exceptions, or to control abuses by right holders?

Formalities

The TPP goes beyond the TRIPS agreement in terms of prohibiting the use of formalities for copyright. While the issue of formalities may seem like a settled issue, there is a fair amount of flexibility that will be eliminated by the TPP. At present, it is possible to have requirements for formalities for domestically owned works, and to impose formalities on many types of related rights, including those protected under the Rome Convention. In recent years, copyright policy makers and scholars have begun to reconsider the benefits of the registration of works and other formalities, particularly in light of the extended terms of copyright and the massive orphan works problems.

In April 2013 a major workshop on this topic took place in Berkeley, titled: "Reform(aliz)ing Copyright for the Internet Age?" (<http://www.law.berkeley.edu/formalities.htm>), where the benefits and challenges of reintroducing formalities was discussed.

On the issue of formalities, the TPP language is an unnecessary and unwelcome barrier to introducing reforms.

TPM/DRM

The copyright section also includes extensive language on technical protection measures, and in particular, the creation of a separate cause of action for breaking technical protection measures. The US wants this separate cause of action to extend even to cases where there is no copyrighted works, such as in cases of public domain materials, or data not protected by copyright. It is worth noting that the restrictions on breaking technical protection measures include several exceptions, including, for example: "lawfully authorized activities carried out by government employees, agents, or contractors for the purpose of law enforcement, intelligence, essential security, or similar governmental purposes"

In the United States the problem of TPMs and the complicated rulemaking process for exceptions and limitations to anticircumvention measures was part of a recent controversy when the Librarian of Congress refused to renew an exemption to allow the unlocking of cell-phones. After a petition by over 100,000 to the White House, the Obama Administration responded, agreeing that an exemption should exist to permit unlocking of cell-phones. Rep. Zoe Lofgren (D-CA) introduced a bill, co-sponsored with

bipartisan support, called the "Unlocking Technology Act" which would make clear that there is no liability for circumvention of a TPM where circumvention is done to engage in a use that is not an infringement of copyright. Such a bill is potentially threatened by the aggressive proposals on TPMs in the TPP.

The TPP provisions on technological protection measures and copyright and related rights management information are highly contentious and complex, and as a practical matter, impossible to evaluate without access to the negotiating text. Given the enormous public interest in this issue and other issues, it is very unfortunate that governments have insisted on secret negotiations.

Damages

One of the largest disappointments in the ACTA negotiations was the failure to sufficiently moderate the aggressive new norms for damages associated with infringements. The TPP negotiation has been far more secretive than the ACTA negotiation, and what is now clear is that as far as the issue damages is concerned, the TPP text is now much worse than the ACTA text. Particularly objectionable is the unbracketed Article QQ.H.4: 2ter, which reads as follows:

2ter. In determining the amount of damages under paragraph 2, its judicial authorities shall have the authority to consider, inter alia, any legitimate measure of value the right holder submits, which may include lost profits, the value of the infringed goods or services measured by the market price, or the suggested retail price.

Aside from the obvious overreaching of requiring consideration of "the suggested retail price," the US is ignoring all sorts of national laws for copyright, patents and trademarks, and TRIPS rules as regards layout-designs (topographies) of integrated circuits, that set different standards for damages in cases of infringements. The following are just a few examples:

Under the Article 36 of TRIPS, damages for certain infringement are limited, by the WTO, to "a sum equivalent to a reasonable royalty such as would be payable under a freely negotiated licence in respect of such a layout-design."

Under the Affordable Care Act, a company infringing on undisclosed patents for biologic drugs is only liable for a reasonable royalty, or no royalty, depending upon the nature of the disclosure.

The US DOJ and the USPTO recently took the position that certain patents infringements related to standards setting activities, should be limited to a reasonable royalty.

The US proposal in the TPP will also prevent the United States from using limitations on remedies for infringement as part of a larger effort to expand access to orphaned copyright works -- an approach that has been endorsed by the US Copyright Office, and by Senator Patrick Leahy.

For several other examples, see: " Two areas where ACTA is inconsistent with US law, injunctions and damages, [KEI Policy Brief](#), 2011:2, as well as: Access to Orphan Works, and ACTA provisions on damages [KEI Policy Brief 2010: 1](#).

Concluding comments

Although there are some areas of agreed to text, the leaked text from August 30, 2013 also highlights the numerous areas where parties have yet to finalize the agreement. That there are over 900 brackets means that there is still plenty of opportunity for countries to take positions that will promote the public interest and preserve consumer rights. These areas include substantive sections of the most

controversial provisions on patents, medicines, copyright and digital rights where there are often competing proposals. The publication of the text by Wikileaks has created a rare and valuable opportunity to have a public debate on the merits of the agreement, and actions to fix, change or stop the agreement.



Seattle to Brussels
Network



A transatlantic
CORPORATE
bill of rights

Investor privileges in EU-US trade deal threaten public interest and democracy

The EU negotiating mandate for a far-reaching free trade agreement with the US reveals the European Commission's plans to assign more powers for corporations in the deal. The proposal follows a persistent campaign by industry lobby groups and law firms to empower large companies to challenge regulations both at home and abroad if they affect their profits. As a result, EU member states could soon find domestic laws to protect the public interest challenged in secretive, offshore tribunals where national laws have no weight and politicians no powers to intervene.

The Commission's proposal for investor-state dispute settlement under the Transatlantic Trade and Investment Partnership (TTIP) would enable US companies investing in Europe to skirt European courts and directly challenge EU governments at international tribunals, whenever they find that laws in the area of public health, environmental or social protection interfere with their profits. EU companies investing abroad would have the same privilege in the US.

Across the world, big business has already used investor-state dispute settlement provisions in trade and investment agreements to claim billions of dollars in compensation against democratically made laws to protect the public interest (see Box 1). Sometimes the mere threat of a claim or its submission have been enough for legislation to be abandoned or watered down. In other cases, tribunals – ad hoc three-member panels hired from a small club of private lawyers riddled with conflicts of interest² – have granted billions of Euros to companies, paid out of taxpayers' pockets.

Box 1

Some emblematic investor-state disputes

Corporations versus public health – Philip Morris v. Uruguay and Australia: Through bilateral investment treaties, US tobacco giant Philip Morris is suing Uruguay and Australia over their anti-smoking laws. The company argues that warning labels on cigarette packs and plain packaging prevent it from effectively displaying its trademark, causing a substantial loss of market share.³

Corporations versus environmental protection – Vattenfall v. Germany: In 2012, Swedish energy giant Vattenfall launched an investor-state lawsuit against Germany, seeking €3.7 billion in compensation for lost profits related to two of its nuclear power plants. The case followed the German government’s decision to phaseout nuclear energy after the Fukushima nuclear disaster.⁴

Corporations versus government action against financial crises – challenging Argentina & Greece: When Argentina froze utility rates (energy, water, etc.) and devalued its currency in response to its 2001-2002 financial crisis, it was hit by over 40 lawsuits from companies like CMS Energy (US) and Suez and Vivendi (France). By the end of 2008, awards against the country had totalled US\$1.15 billion.⁵ In May 2013, Slovak and Cypriot investors sued Greece for the 2012 debt swap which Athens had to negotiate with its creditors to get bailout money from the EU and the International Monetary Fund (IMF).⁶ Both, the UN and the IMF have warned that investment agreements can severely curb states’ abilities to fight financial and economic crises.⁷

Corporations versus environmental protection – Lone Pine v. Canada: On the basis of the North American Free Trade Agreement (NAFTA) between the US, Canada and Mexico, US company Lone Pine Resources Inc. is demanding US\$250 million in compensation from Canada. The ‘crime’: The Canadian province of Quebec had put a moratorium on ‘fracking’, addressing concerns about the environmental risks of this new technology to extract oil and gas from rocks.⁸

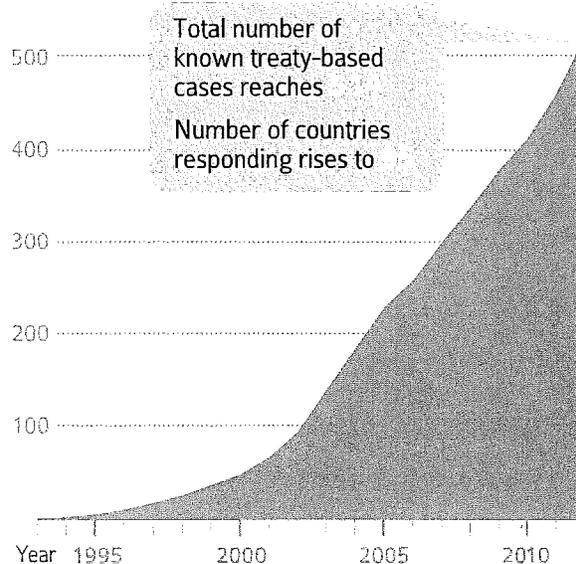
Corporations versus public health – Achmea v. the Slovak Republic: At the end of 2012, Dutch insurer Achmea (formerly Eureko) was awarded €22 million in compensation from Slovakia. In 2006, the Slovak government had reversed the health privatisation policies of the previous administration and required health insurers to operate on a not-for-profit basis.⁹

As the main users of existing international investment treaties, US and European companies have driven the investor-state litigation boom of the past two decades. By far the largest number of the 514 known disputes initiated by the end of 2012 were launched by US investors. They have filed 24% (123) of all cases. Next in line are investors from the Netherlands (50 cases), the UK (30) and Germany (27). Together, investors from EU member states have filed 40% of all known cases.¹⁰

EU and US companies have used these lawsuits to challenge green energy and medicine policies, anti-smoking legislation, bans on harmful chemicals, environmental restrictions on mining, health insurance policies, measures to improve the economic situation of minorities and many more. Now they are enthused about the prospect of an investment chapter in the EU-US free trade deal (TTIP), the biggest investment deal ever negotiated.

Deluge of disputes

Cumulative number of cases. Source: UNCTAD, Down to Earth



Lobbying for the corporate 'gold standard'

Investor-state dispute settlement under TTIP would empower EU and US-based corporations to engage in litigious wars of attrition to limit the power of governments on both sides of the Atlantic. The tremendous volume of transatlantic investment – both partners make up for more than half of foreign direct investment in each others' economies – hints at the sheer scale of the risk of such litigation wars. Additionally, thousands of EU and US companies have affiliates across the Atlantic; under TTIP they could make investor-state claims via these affiliates in order to compel their own governments to refrain from regulations they dislike.

Unsurprisingly, then, corporate lobby groups in both the EU and the US have pressured for the inclusion of investor-state arbitration in TTIP. The European employers' federation BusinessEurope, the US Chamber of Commerce, AmCham EU, the Transatlantic Business Council and other corporate lobby heavyweights all advocate such privileges for foreign investors. This is also part of a hope that an EU-US deal would set a global 'gold standard', a model for investment protection for other agreements around the world.¹¹ More and more countries are questioning and even abandoning investor-state arbitration globally precisely because of negative impacts against the public interest;¹² in response, business is demanding a "signal to the world of our willingness to commit" to their gold standard of investment protection.¹³

The investment chapter of the TTIP should eventually serve as the 'gold standard' for other investment agreements.

US Chamber of Commerce to US negotiators¹⁴

Ever since December 2009, when the EU got the power to negotiate investment protection issues through the Lisbon Treaty, industry associations have mobilised against any opportunity this might afford to institute a fairer balance of private and public interests.¹⁵ This is because the Treaty opened a window of opportunity for the EU to learn from the experience of existing investment agreements, address their flaws and develop a new generation of treaties – without investor-state dispute settlement, with investor obligations and more precise and restrictive language regarding their rights. Trade unions, public interest groups and academics from across the world called for such a U-turn.

Industry will oppose any deal in which investment protection is traded off against public policy objectives, including human and labour rights.

Pascal Kerneis, European Services Forum (ESF)

In numerous letters, seminars, breakfast debates and behind-closed-doors meetings with MEPs and the European Commission, corporate lobby groups such as BusinessEurope and national industry bodies such as the German industry federation BDI lobbied against that U-turn. They made clear that industry would oppose any deal in which investment protection was "traded off against public policy objectives, including human and labour rights", as Pascal Kerneis of the European Services Forum (ESF), a lobby outlet for global service players such as Deutsche Bank, IBM and Vodafone, told Commission officials during a meeting on transatlantic investment.¹⁶

While some argue that investor-state dispute settlement need not be part of the TTIP given the demonstrated US and EU commitment to the rule of law, the Chamber insists that the United States and the EU must include these provisions.

US Chamber of Commerce to US negotiators¹⁷

Expanding investor rights

If big business has its way, TTIP's investment protection provisions will be even more slanted in favour of corporations than current EU and US practice. While the European Parliament has repeatedly stressed governments' right to regulate in order to protect the environment, public health, workers and consumers, Peter Chase – a former US government official now with the US Chamber of Commerce in Brussels – has encouraged US negotiators to explain "the dangers of the unneeded social, environmental and 'right to regulate' provisions the European Parliament seeks".¹⁸

US energy giant Chevron, too, is lobbying for an investment chapter which goes beyond the current US model treaty. Having been sued several times by Canadian companies under NAFTA, the US has twice revised its template for international investment treaties to better protect its policy-space. Chevron wants a revival of some of these excessive

Box 2

Risky business: how vulnerable are US and EU governments?¹⁹

- Globally, **514** investor-state disputes were known by the end of 2012.
- **58** claims were launched in 2012 alone, the highest number of known disputes filed in one year.
- US and EU investors have initiated at least **329 (64%)** of all known disputes.
- The US has faced over **20** investment claims under NAFTA's investment chapter.
- **15** EU member states are known to have faced one or more investor-state challenges.²⁰
- The Czech Republic is the **fifth** most sued country in the world.
- **More than half** of foreign direct investment in the EU comes from the US; likewise over half the foreign direct investment in the US comes from the EU.
- Only **8** EU member states, all Eastern European, already have a bilateral investment treaty with the US²¹; TTIP would contain one of the **first** EU-wide investment protection chapters.
- Around **42%** of the known concluded investor-state cases were decided in favour of the state, **31%** in favour of the investor and **27%** of the cases were settled (many of the latter likely to involve payments or other concessions for the investor).
- The highest damages to date, **US\$1.77 billion**, were awarded to US oil company Occidental Petroleum against Ecuador.
- Legal costs in investor-state disputes average over **US\$8 million**, exceeding **US\$30 million** in some cases; they are not always awarded to the winning party.

investor rights such as the 'umbrella clause' in TTIP, which would considerably expand a state's obligations (see annex for more details). Chevron has also proposed that investments protected under TTIP should include "both existing and future investments".²² When an investor-state dispute mechanism is combined with such open-ended clauses, risks for costly legal proceedings grow considerably.

The US-side should clearly explain the dangers of the unneeded social, environmental, and 'right to regulate' provisions the European Parliament seeks.

Peter Chase, US Chamber of Commerce

Paving the way for dirty gas

Chevron is currently engaged in a controversial legal battle with Ecuador. The company initiated arbitration to avoid paying US\$18 billion to clean up oil-drilling-related

contamination in the Amazonian rainforest, as ordered by Ecuadorian courts. The case has been lambasted as "egregious misuse" of investment arbitration to evade justice.²³ No wonder Chevron dedicated its complete contribution to the US government's TTIP consultation to investment protection, "one of our most important issues globally" as they put it.²⁴

Chevron views investment protection as one of our most important issues globally.

Chevron to US trade negotiators

In Europe, Chevron wants the "the strongest possible protection" from government measures to "mitigate the risks associated with large-scale, capital intensive, and long term projects [...] such as developing shale gas". Because of its health and environmental impacts, several EU governments have decided to put a break on shale gas development ('fracking'). TTIP's proposed investment protection chapter would empower energy companies like Chevron to

challenge such precautionary measures because it would oblige governments “to refrain from undermining legitimate investment-backed expectations”, as Chevron demands (see Box 1 for a legal precedent under NAFTA). The mere threat of a million-Euro investor-state lawsuit could be enough to scare governments into submission and weaken or prevent fracking bans and strict regulation. In Chevron’s words: “Access to arbitration [...] increases the likelihood that investors and host states are able to resolve disagreements and negotiations in a successful and equitable manner.”²⁵

I’ve seen the letters from the New York and DC law firms coming up to the Canadian government on virtually every new environmental regulation [...]. Virtually all of the initiatives were targeted and most of them never saw the day of light.

Former Canadian government official, 5 years after NAFTA’s investor-state provisions came into force²⁶

Law firms lobbying for vested interests

Whenever policy-makers in the EU and the US have set out to change international investment treaties in recent years, law firms and investment arbitrators together with industry associations have mounted fierce lobbying campaigns to counter reforms to better balance public and private interests.²⁷ This is not surprising – investment arbitration is big business for them. The tabs racked up by elite law firms can be US\$1,000 per hour, per lawyer in investment treaty cases, with whole teams handling them. The private lawyers who decide these disputes, the arbitrators, also line their pockets, earning daily fees of US\$3,000 and more.²⁸ The more investment treaties and trade agreements with investor-state dispute settlement provisions exist, the more business for these lawyers.

EU and US lawyers dominate the field, seeking out every opportunity to sue countries. Nineteen of the top-20 law firms representing claimants and/or defendants in such disputes are headquartered in Europe or the US, the large majority of them (14) US firms. Out of the 15 arbitrators who have decided 55% of the total investor-state disputes known today, ten are from the EU or the US.²⁹

Since the entry into force of the Lisbon Treaty in Europe in 2009, law firms like Hogan Lovells and Herbert Smith Freehills have been keen to influence the debate, inviting

the European Commission, member state officials and MEPs to “informal but informed” roundtable discussions and webinars with their clients – including several who have sued countries under existing investment treaties such as Deutsche Bank, Shell and energy giant GDF Suez. Their message: there was a need for high standards of investor protection and in particular investor-state arbitration; and investment protection should not be linked to labour or environmental standards.³⁰

One of the main concerns put forward by lawyers was the politicisation of investment policy as a result of the Lisbon Treaty. The involvement of the European Parliament was a particular thorn in their side. At a conference in December 2009, Daniel Price, an ex-US trade negotiator and former co-chair of the Transatlantic Economic Council³¹ who now mainly works as lobbyist, investment lawyer and arbitrator, warned of the potential “steady deterioration” of investment treaties which he had witnessed in the US. The involvement of Congress had led to controversy and later to a review of the US investment policy which Price considered “unhelpful”. This review tried to better balance investor and state rights through more precise legal language. In January 2010, shortly after Price had walked through the revolving door from the Bush administration, he wrote to the Commission official responsible for the investment files and offered “to assist you in thinking through these issues.” He added: “As you know, my group has advised both outbound investors and governments on investment policy issues”.³²

A pure power grab

Some of Price’s arbitrator colleagues have already come out defending TTIP investor-state dispute settlement provisions against more cautious voices warning of litigation risks and questioning the need for extra-judicial enforcement in two sophisticated legal systems such as the US and the EU. Simon Lester, for example, policy analyst of the libertarian Cato Institute and usually a proponent of investor-state arbitration, has warned of the unprecedented litigation risks that such a dispute settlement system would create in the context of the enormous transatlantic investment flows.³³

With the amount of investment that would be covered in a US-EU agreement, US and EU leaders might have to start contemplating the impact of investor-state losses.

Simon Lester, Trade Policy Analyst, Cato Institute³⁴

One of the usual arguments for investor-state arbitration – the need to grant legal security to attract foreign investors to countries with weak court systems – turns to dust in the context of TTIP. If US and EU investors already make up for more than half of foreign direct investment in each others' economies, then it is clear that investors seem to be happy enough with the rule of law on both sides of the Atlantic. This is confirmed by an internal European Commission report from 2011 stating that "it is arguable that an investment protection agreement with the US would be needed with regard to the rule of law."³⁵

What possibly could be the explanation for why you would need extra-judicial enforcement and additional property rights with respect to an agreement with the European Union? Is it the US position that Europe's courts are crappy and that their property laws are scandalous? They are not. Investor-state in TTIP is a pure power grab from corporations.

Lori Wallach, Director Global Trade Watch at Public Citizen³⁶

Growing public outcry

Citizens and organised civil society, on the other hand, oppose investor-state dispute settlement. According to a statement by the Transatlantic Consumer Dialogue, supported by consumer groups from the EU and the US, TTIP "should not include investor-state dispute resolution. Investors should not be empowered to sue governments to enforce the agreement in secretive private tribunals, and to skirt the well-functioning domestic court systems and robust property rights protections in the United States and European Union."³⁷ The federation of US trade unions, AFL-CIO, similarly argues that "given the advanced judicial systems of both the US and EU", investor-state dispute settlement "is an unwarranted risk to domestic policy-making at the local, state and federal levels."³⁸ Digital rights activists, environmentalists and health groups have also come out against the threat of a corporate assault on democracy.

The US National Conference of State Legislators, which represents all 50 US state parliamentary bodies, has also

announced that it "will not support any [trade agreement] that provides for investor-state dispute resolution" because it interferes with their "capacity and responsibility as state legislators to enact and enforce fair, nondiscriminatory rules that protect the public health, safety and welfare, assure worker health and safety, and protect the environment."³⁹ MEPs from the Greens, Socialists and the Left Group in the European Parliament seem equally concerned.

It doesn't make any sense to apply this system in relations between the EU and the United States. Any claim should go through ordinary judicial system.

MEP David Martin, Socialists & Democrats⁴⁰

When US-Congressman Alan Grayson alerted the public that TTIP would include an investor-state system allowing consumer protection, environmental safeguards and labour laws to be "struck down by international tribunals", this generated nearly 10,000 angry comments from citizens in little more than 24 hours.⁴¹

Why are our representatives thinking about handing over our sovereign rights to huge corporations who care nothing about us?

One of many concerned citizens in her contribution to public TTIP consultation in US⁴²

Beware of the EU agenda

Some EU member states also seem to question the need for investment protection clauses between two legal systems which are as sophisticated as in the EU and the US. Some fear a flood of claims from the US with its more aggressive legal culture. There are concerns that the US financial sector could attack policies to tackle Europe's economic crisis such as bail-outs and debt restructuring. On the other hand, member states such as Germany and the Netherlands, which support far-reaching investor rights, rather want to avoid pro-public interest legal language which is more common in the US and which, in their view, would 'dilute' investment protections.

But the US government and the European Commission seem to be determined to use TTIP to empower foreign investors to bypass local courts and sue states directly at international tribunals when democratic decisions impede their expected profits. In its negotiation mandate, the Commission made detailed suggestions for a "state-of-the-art investor-to-state dispute settlement mechanism" and investor rights which mirror the proposals from business lobby groups.⁴³ The proposal will put many policies at risk and most likely create a chilling effect on governments looking to pass new rules to protect the environment and society (see annex).

It is high time that governments and parliaments on both sides of the Atlantic grasp the political and financial risks of investor-state dispute settlement and axe the plans for this looming transatlantic corporate bill of rights. The European Parliament in particular should put a leash on the Commission which is obviously disregarding MEPs' call for "major changes"⁴⁴ in the international investment regime (see annex).

Why on earth should legislators grant business such a powerful tool to rein in democracy and curb sound policies made in the interest of the public?

ANNEX:

The devil is in the (TTIP) detail

Trade speak: what the EU wants to negotiate ⁴⁵	Translation: what it means in practice ⁴⁶
The investment protection chapter "should cover a broad range of investors and their investments [...] whether the investment is made before or after the entry into force of the Agreement".	Definitions of "investor" and "investments" are key because they determine who/what is covered by the chapter. A broad definition not only covers actual enterprises in the host state, but a vast universe ranging from holiday homes to sovereign debt instruments, exposing states to unpredictable legal risk. Broad definitions also open the door to mailbox companies abusing the treaty via "treaty shopping", allowing, for example, a US firm to sue the US via a Dutch mailbox company.
Intellectual property rights (IPR) should be included in the definition of 'investments' to be protected by TTIP.	The investor-state disputes of tobacco company Philip Morris against Uruguay and Australia show the risks of this proposal (Box 1). In another IPR-based claim, US drug giant Eli Lilly is attacking patent laws in Canada whereby a medicine's patentability must be demonstrated when filing a patent ⁴⁷ . Public health lawyers have lambasted TTIP-like deals a "booby trap for access to medicines". ⁴⁸
Investors should be treated in a "fair and equitable" (FET) way, "including a prohibition of unreasonable, arbitrary or discriminatory measures".	A catch-all provision most relied on by investors when suing states. In 74% of the cases where US investors won, tribunals found an FET violation. In <i>Tecmed v. Mexico</i> , for example, the tribunal found that Mexico had not acted "free from ambiguity and totally transparently". Due to environmental concerns, a local government had not relicensed an operating waste treatment plant. ⁴⁹ The EU is likely to propose a broad version of the clause, even protecting what investors consider their 'legitimate' expectations from 'unpredictable' policy change. A ban on a chemical found to be harmful to public health could be considered a violation of this provision. Investors will also be enabled to challenge scientific justifications of a policy and 'arbitrary' or 'unreasonable' relationships between a policy and its objective.
Investors should be protected "against direct and indirect expropriation", including the right to compensation.	From a certain, investor-friendly view, almost any law or regulatory measure can be considered an 'indirect expropriation' when it has the effect of lowering future expected profits. Several tribunals have interpreted legitimate environmental and other public policies in such a way.
The agreement should also include an "umbrella clause".	This would bring all obligations a state assumed with regards to an investment under the TTIP 'umbrella' (like a contract with one investor), multiplying the risk of costly lawsuits.
The agreement should guarantee the "free transfer of funds of capital and payments by investors".	This provision would allow the investor to always withdraw all investment-related monies, reducing the ability of countries to deal with sudden and massive out- and inflows of capital, balance of payment and other macroeconomic crises.
Investment protection "should be without prejudice to the right of the EU and the Member States to adopt and enforce [...] measures necessary to pursue legitimate public policy objectives such as social, environmental, security, stability of the financial system, public health and safety in a non-discriminatory manner".	This paragraph provides false comfort. It links public policy to a necessity test, placing a big burden of proof on governments to justify their actions. Is Australia's plain packaging law for cigarette packs necessary to protect public health? Was Germany's exit from nuclear energy necessary? Might there not have been other, more effective measures? It would be up to an offshore tribunal of private lawyers with lack of accountability to decide.

<p>The arbitrators who decide investor-state claims should be independent.</p>	<p>This responds to widespread concerns about conflicts of interest among the 3-lawyer panels which ultimately decide investor-state disputes. Unlike judges, they have no flat salary but earn more the more claims they rule on. Existing codes of conduct have not prevented a small club of arbitrators from deciding on the majority of investor-state disputes, paving the way for more business in the future with expansive, investor-friendly interpretations of the law. Whether the EU will tackle the conflicts of interest of these 'entrepreneurial arbitrators' remains to be seen. Just claiming that they are independent clearly won't be enough.</p>
<p>There should be a "possibility of binding interpretation of the Agreement by the Parties".</p>	<p>This should allow governments to monitor and control how the law that they created is interpreted. Following a wave of investor claims under NAFTA, the US, Canada and Mexico have issued such joint clarifications of vaguely formulated investor rights. In practice, arbitrators have proven that they are willing to ignore these 'binding' interpretations.⁵⁰</p>
<p>Investors should be able to use "as wide a range of arbitration fora as is currently available under the Member States' bilateral investment agreements".</p>	<p>The institution that administers an investor-state dispute matters: for example, when it appoints arbitrators or resolves conflict of interest claims against them. A "wide range" of fora could include purely business-orientated organisations such as the Paris-based International Chamber of Commerce (ICC), one of the world's most influential corporate lobby groups. Can such a business site really be considered an independent forum for an investor-state dispute?</p>
<p>"The investor-to-state dispute settlement mechanism should contain safeguards against manifestly unjustified or frivolous claims".</p>	<p>Another paragraph providing false comfort. None of the controversial attacks on sound public policies mentioned in Box 1 would be dismissed under such a mechanism – because they are based on allegations of real violations of investment treaties as these tend to be so broad. Claims are only considered frivolous when there is a complete lack of legal merit. Under existing rules, states can already ask arbitrators to swiftly dispose of frivolous claims, but not a single such case is known.⁵¹</p>
<p>"Consideration should be given to the possibility of creating an appellate mechanism applicable to investor-to-state dispute settlement under the Agreement".</p>	<p>Unlike in proper court systems, decisions by investor-state arbitration panels are non-reviewable (except for annulment proceedings that address a narrow range of procedural errors and are not heard by judges but by another arbitration tribunal). An appeal mechanism could contribute to more coherent decisions, but as things currently stand, this is a long way from becoming a reality.</p>

Endnotes

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“ Why are our representatives thinking about handing over our sovereign rights to huge corporations who care nothing about us? ”

One of many concerned citizens in her contribution to the public TTIP consultation in the US



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Network**

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TNI seeks to provide intellectual support to those movements concerned to steer the world in a democratic, equitable and environmentally sustainable direction.

www.tni.org

November 8, 2013

The President
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. President:

The organizations below are, like you, dedicated to ensuring the sustainability of public programs that provide access to affordable health care. But we write today to express our deep concern that provisions being advanced by the United States Trade Representative (USTR) for the Trans-Pacific Partnership (TPP) Agreement will undermine this goal by limiting the ability of states and the federal government to moderate escalating prescription drug, biologic drug and medical device costs in public programs. We are also concerned that the final trade agreement will bind the U.S. to a 12-year market exclusivity period for brand-name biologic drugs, contrary to the Administration's proposal in its most recent and previous budgets to reduce the exclusivity period.

With respect to policies used by public programs to manage spending on prescription drugs and medical devices, the following are examples of existing laws or proposals that could be subject to challenge by manufacturers under the Korea free trade agreement and the reported TPP proposals made by the USTR:

- The Affordable Care Act's discounts for prescription drugs under Medicare Part D;
- The Administration's proposal to save \$134 billion over 10 years through rebates under the Medicare program for low-income beneficiaries;
- Section 340B of the Public Health Services Act which includes a formula that the Department of Health and Human Services uses to set reduced prices for medicines supplied for outpatient care through nonprofit clinics, community health centers and safety net hospitals;
- Use of preferred drug lists and other mechanisms that state Medicaid programs have implemented to control costs;
- Application of comparative research funded by the Affordable Care Act, which will allow payers to make reimbursement decisions based on clinical comparisons of treatments; and
- Decisions by state Medicaid programs to remove drugs from their formularies, because they do not prove to be efficacious or because they have significant health risks.

While the free trade agreement with Korea included a footnote that excluded Medicaid from the pharmaceutical and medical device provisions in that agreement, there is at least one press report that New Zealand, one of the TPP countries, has told the United States that the reimbursement proposal is completely unacceptable unless the United States were to apply it to all U.S. federal or state-level drug pricing and reimbursement programs, including Medicaid.ⁱ

We are also concerned that the reported U.S. proposal requires a lopsided appeals process that affords rights only to manufacturers and not to other stakeholders. Like the agreement reached with Korea, the reported U.S. proposal for TPP sets a standard for reimbursement amounts that is based on “competitive market-derived prices” or amounts that “appropriately recognize the value of the patented” products. Preferred drug lists, statutorily specified discounts or rebates would violate these standards, as would reimbursement policies that discourage the use of costlier new drugs or treatments that are not more effective than existing drugs or treatments.

Lastly, we urge the Administration to make the negotiating process transparent. While USTR proposals are developed in close and formal consultation with the pharmaceutical and medical device industries through the Industry Trade Advisory Committee, this process excludes health care advocates and the broader public. While the USTR may have a position that its TPP proposals will not affect existing U.S. laws or limit choices available to future lawmakers, the ultimate arbiter of these provisions will not be the USTR, but will be international arbitration forums. That makes it critical that negotiators have access to a full range of views and analysis through an open and public process.

We appreciate that international trade has the potential to raise the standard of living and quality of life for people in the United States and around the world. However, the proposals that have been advanced by the USTR related to the pharmaceutical, biologic and medical device industries could do the opposite by undermining access to affordable health care for millions in the United States and around the world. As trade negotiations move forward, we urge you to ensure that the TPP agreement and future trade agreements do not limit the tools available to states or the federal government to manage pharmaceutical and medical device costs in public programs and that agreements do not bind the U.S. to a 12-year exclusivity period for brand-name biologic drugs. We further urge that the process be made transparent to allow public input.

Thank you for considering our concerns.

Sincerely,

AARP
Alliance for Retired Americans
Alliance for a Just Society
American Federation of State, County and Municipal Employees
Center for Medicare Advocacy
Coalition on Human Needs
Community Catalyst
Consumers Union
Families USA
Health Care for America Now

Medicare Rights Center
National Association of Counties
National Committee to Preserve Social Security and Medicare
National Senior Citizens Law Center
National Women's Law Center

cc: The Honorable Kathleen Sebelius, Secretary, Department of Health and Human Services
Sylvia Mathews Burwell, Director, Office of Management and Budget
Ambassador Michael B.G. Froman, U.S. Trade Representative
Marilyn B. Tavenner, Administrator, Centers for Medicare and Medicaid Services
Cindy Mann, Director, Center for Medicaid and CHIP Services
Elizabeth Richter, Acting Director, Center for Medicare

¹ *Inside U.S. Trade*, November 4, 2011.

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the guardian

This transatlantic trade deal is a full-frontal assault on democracy

Brussels has kept quiet about a treaty that would let rapacious companies subvert our laws, rights and national sovereignty

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George Monbiot

The Guardian, Monday 4 November 2013 15.31 EST



David Cameron with Barack Obama at a state dinner in Cameron's honour in 2012 at the White House. Photograph: Mandel Ngan/AFP/Getty Images

Remember that referendum about whether we should create a single market with the United States? You know, the one that asked whether corporations should have the power to strike down our laws? No, I don't either. Mind you, I spent 10 minutes looking

for my watch the other day before I realised I was wearing it. Forgetting about the referendum is another sign of ageing. Because there must have been one, mustn't there? After all that agonising over whether or not we should stay in the European Union, the government wouldn't cede our sovereignty to some shadowy, undemocratic body without consulting us. Would it?

The purpose of the Transatlantic Trade and Investment Partnership is to remove the regulatory differences between the US and European nations. I mentioned it a couple of weeks ago. But I left out the most important issue: the remarkable ability it would grant big business to sue the living daylights out of governments which try to defend their citizens. It would allow a secretive panel of corporate lawyers to overrule the will of parliament and destroy our legal protections. Yet the defenders of our sovereignty say nothing.

The mechanism through which this is achieved is known as investor-state dispute settlement. It's already being used in many parts of the world to kill regulations protecting people and the living planet.

The Australian government, after massive debates in and out of parliament, decided that cigarettes should be sold in plain packets, marked only with shocking health warnings. The decision was validated by the Australian supreme court. But, using a trade agreement Australia struck with Hong Kong, the tobacco company Philip Morris has asked an offshore tribunal to award it a vast sum in compensation for the loss of what it calls its intellectual property.

During its financial crisis, and in response to public anger over rocketing charges, Argentina imposed a freeze on people's energy and water bills (does this sound familiar?). It was sued by the international utility companies whose vast bills had prompted the government to act. For this and other such crimes, it has been forced to pay out over a billion dollars in compensation. In El Salvador, local communities managed at great cost (three campaigners were murdered) to persuade the government to refuse permission for a vast gold mine which threatened to contaminate their water supplies. A victory for democracy? Not for long, perhaps. The Canadian company which sought to dig the mine is now suing El Salvador for \$315m – for the loss of its anticipated future profits.

In Canada, the courts revoked two patents owned by the American drugs firm Eli Lilly, on the grounds that the company had not produced enough evidence that they had the beneficial effects it claimed. Eli Lilly is now suing the Canadian government for \$500m, and demanding that Canada's patent laws are changed.

These companies (along with hundreds of others) are using the investor-state dispute rules embedded in trade treaties signed by the countries they are suing. The rules are enforced by panels which have none of the safeguards we expect in our own courts. The hearings are held in secret. The judges are corporate lawyers, many of whom work for companies of the kind whose cases they hear. Citizens and communities affected by their decisions have no legal standing. There is no right of appeal on the merits of the case. Yet they can overthrow the sovereignty of parliaments and the rulings of supreme courts.

You don't believe it? Here's what one of the judges on these tribunals says about his work. "When I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all ... Three private individuals are entrusted with the power to review, without any restriction or appeal procedure, all actions of the government, all decisions of the courts, and all laws and regulations emanating from parliament."

There are no corresponding rights for citizens. We can't use these tribunals to demand better protections from corporate greed. As the [Democracy Centre](#) says, this is "a privatised justice system for global corporations".

Even if these suits don't succeed, they can exert a powerful chilling effect on legislation. One Canadian government official, speaking about the rules introduced by the North American Free Trade Agreement, remarked: "I've seen the letters from the New York and DC law firms coming up to the Canadian government on virtually every new environmental regulation and proposition in the last five years. They involved dry-cleaning chemicals, pharmaceuticals, pesticides, patent law. Virtually all of the new initiatives were targeted and most of them never saw the light of day." Democracy, as a meaningful proposition, is impossible under these circumstances.

This is the system to which we will be subject if the transatlantic treaty goes ahead. The US and the European commission, both of which have been captured by the corporations they are supposed to regulate, are pressing for investor-state dispute resolution to be included in the agreement.

The commission justifies this policy by claiming that domestic courts don't offer corporations sufficient protection because they "might be biased or lack independence". Which courts is it talking about? Those of the US? Its own member states? It doesn't say. In fact it fails to produce a single concrete example demonstrating the need for a new, extrajudicial system. It is precisely because our courts are generally not biased or lacking independence that the corporations want to bypass them. The EC seeks to replace open, accountable, sovereign courts with a closed, corrupt system riddled with

conflicts of interest and arbitrary powers.

Investor-state rules could be used to smash any attempt to save the NHS from corporate control, to re-regulate the banks, to curb the greed of the energy companies, to renationalise the railways, to leave fossil fuels in the ground. These rules shut down democratic alternatives. They outlaw leftwing politics.

This is why there has been no attempt by the UK government to inform us about this monstrous assault on democracy, let alone consult us. This is why the Conservatives who huff and puff about sovereignty are silent. Wake up, people we're being shafted.

Twitter: [@georgemonbiot](https://twitter.com/georgemonbiot). A fully referenced version of this article can be found at monbiot.com

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This EU-US trade deal is no 'assault on democracy'

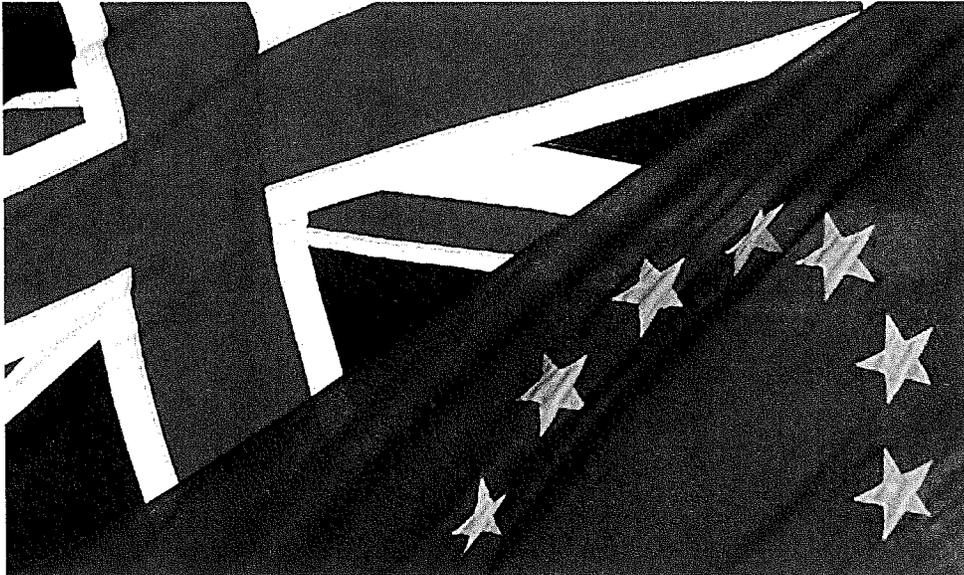
Ignore George Monbiot's polemic – the Transatlantic Trade and Investment Partnership is an astonishingly good deal for the UK economy

• George Monbiot: [This transatlantic trade deal is a full-frontal assault on democracy](#)



Ken Clarke

theguardian.com, Monday 11 November 2013 08.01 EST



The Transatlantic Trade and Investment Partnership would see the UK economy grow by an extra £10bn per annum'. Photograph: Stefan Wermuth/Reuters

On Monday, [EU and US negotiators are meeting in Brussels](#) for the second round of negotiations over what has become known as the [Transatlantic Trade and Investment Partnership \(TTIP\)](#).

Despite its byzantine name, the TTIP is in fact a trade deal between the EU and the US:

an astonishingly bold project which aims to create a free market encompassing the 800 million peoples of Europe and America, potentially boosting our collective GDP by £180bn.

Not that you would know that if you read [George Monbiot's contribution on these pages a week ago](#). In one of the more conspiracy theorising polemics I have read in some while, he described this wealth-creating, free-trading, economic stimulus simply as "a monstrous assault on democracy" by institutions, "which have been captured by the corporations they are supposed to regulate". Monbiot is entitled to his view, but even on a highly selective reading of the facts, I cannot see how his argument stands up.

Take the effect we hope that the TTIP will have on the UK economy alone. According to the best estimates available, an ambitious deal would see our economy grow by an extra £10bn per annum. It could see a rise in the number of jobs in the UK car industry of 7%. British companies – of all sizes – currently pay £1bn to get their goods into the US – this cost could be removed altogether. Perhaps most importantly in the long-term, such a deal would safeguard the liberal trading rules which we British depend on – but which the growing economies of the east are less keen on – or generations to come.

I have never had Monbiot down as an ungenerous character, but to ignore all of this in favour of blowing up a controversy around one small part of the negotiations, known as investor protection, seems to me positively Scrooge-like. Investor protection is a standard part of free-trade agreements – it was designed to support businesses investing in countries where the rule of law is unpredictable, to say the least. Clearly the US falls in a somewhat different category and those clauses will need to be negotiated carefully to avoid any pitfalls – but to dismiss the whole deal because of one comparatively minor element of it would be lunacy.

This talk of shadowy corporations is all the more misleading given that, in my view, the deal's advantages will prove to be far more noticeable for smaller enterprises than for larger corporations. This is because the most important task for the regulators will be to establish that where a car part or a cake or a beauty product has been tested as safe in the EU, the US will allow its import without requiring a whole new series of similar-but-slightly different tests – and vice versa. This is not about reducing safety levels. It is simply common sense. Would any of us on holiday in the US decline to hire that all-American SUV, or say no to that unfeasibly enormous vat of fizzy pop on the grounds that the regulations "are not the same as the EU's"?

And while it is of course true to say that these changes will help big business, it is also true to say that big business often has a vested interest in overly complex regulation.

They can afford armies of staff to satisfy reams of regulation, but their smaller rivals cannot and so are squeezed out. So while leftwing radicals can attempt to skew the facts, it's my view that the TTIP is much more a deal for the small widget maker from the West Midlands than it is for the multinational corporate giant.

There is, of course, a long way to go if we are to make this a reality. Governments on both sides of the pond hope we will reach a conclusion on most aspects of a deal before 2014 is out. Meeting that target would be a major economic achievement. It would also be a serious political victory for Britain in Europe, demonstrating not only the enormously increased clout the UK enjoys on the world stage as part of the EU, but also that other EU leaders are heeding his calls for the institution to reform and focus on the vital issues of trade and competitiveness.

Far from carping from the sidelines, as advised by Monbiot, we British have a major part to play in what could be one almighty success story. We should knuckle down and get to it.

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November 12, 2013

General Keith Alexander
Director
National Security Agency
9800 Savage Rd.
Fort Meade, MD 20755

The Honorable Michael Froman
United States Trade Representative
600 17th Street, NW
Washington, DC 20508

Dear General Alexander and Ambassador Froman,

The New York Times reports on November 3 that wide-reaching efforts by the National Security Agency to collect data are driven in part by the agency's "customers" -- a range of other government agencies that includes the Office of the U.S. Trade Representative.

In light of this and other disclosures, we are writing to ask if the NSA, or other national security agencies, have surveilled any U.S. organizations or individuals advocating on U.S. trade policy. We ask you to disclose any such surveillance, whether or not it occurred at the request of USTR; whether or not it involved communications with foreign nationals; and whether or not it occurred within U.S. borders.

Core American principles ranging from the right to privacy to the right to petition our government are at stake. Simply put, we believe that our organizations -- as well as all others advocating on trade policy matters -- have right to an assurance that their operations are not under surveillance by U.S. government agencies. We trust you agree.

We look forward to your reply.

Access (AccessNow.org)
American Medical Student Association
Center for Digital Democracy
Center for Effective Government
Center for Financial Privacy and Human Rights
Center for Food Safety
Center for International and Environmental Law
Center for Media and Democracy
Center for Rights
Citizens for Ethics and Responsibility in
Washington (CREW)
Citizens Trade Campaign
Coalition for Sensible Safeguards
Communications Workers of America
Consumer Action
Consumer Federation of America
Consumer Watchdog
Defending Dissent Foundation
Electronic Frontier Foundation
Fight for the Future

Food & Water Watch
Friends of the Earth, U.S.
Friends of Privacy USA
Government Accountability Project
Greenpeace
Health GAP
Institute for Agriculture and Trade Policy
Just Foreign Policy
Knowledge Ecology International
National Legislative Association on Prescription
Drug Prices
Openthegovernment.org
Organic Consumers Association
Privacy Times
Project On Government Oversight (POGO)
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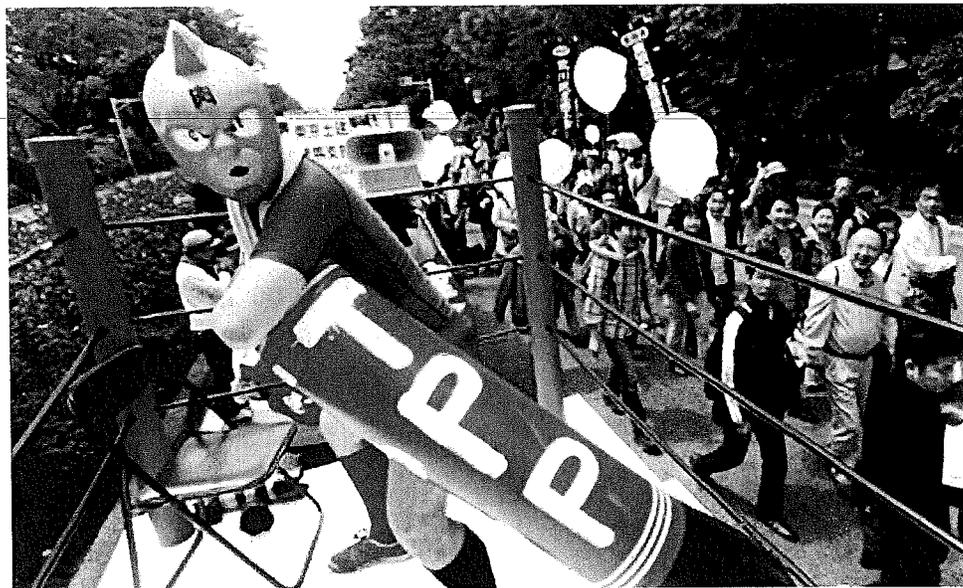
theguardian

WikiLeaks publishes secret draft chapter of Trans-Pacific Partnership

Treaty negotiated in secret between 12 nations 'would trample over individual rights and free expression', says Julian Assange

Alex Hern and Dominic Rushe

theguardian.com, Wednesday 13 November 2013 13.12 EST



Demonstrators protest against the Trans-Pacific Partnership (TPP) after the May Day rally in Tokyo, Japan. Photograph: EPA/Kimimasa Mayama

WikiLeaks has released [the draft text](#) of a chapter of the Trans-Pacific Partnership (TPP) agreement, a multilateral free-trade treaty currently being negotiated in secret by 12 Pacific Rim nations.

The full agreement covers a number of areas, but the chapter published by WikiLeaks focuses on intellectual property rights, an area of law which has effects in areas as diverse as pharmaceuticals and civil liberties.

Negotiations for the TPP have included representatives from the United States, Canada, Australia, New Zealand, Japan, Mexico, Malaysia, Chile, Singapore, Peru, Vietnam, and Brunei, but have been conducted behind closed doors. Even members of the US

Congress were only allowed to view selected portions of the documents under supervision.

"We're really worried about a process which is so difficult for those who take an interest in these agreements to deal with. We rely on leaks like these to know what people are talking about," says Peter Bradwell, policy director of the London-based Open Rights Group.

"Lots of people in civil society have stressed that being more transparent, and talking about the text on the table, is crucial to give treaties like this any legitimacy. We shouldn't have to rely on leaks to start a debate about what's in them."

The 30,000 word intellectual property chapter contains proposals to increase the term of patents, including medical patents, beyond 20 years, and lower global standards for patentability. It also pushes for aggressive measures to prevent hackers breaking copyright protection, although that comes with some exceptions: protection can be broken in the course of "lawfully authorised activities carried out by government employees, agents, or contractors for the purpose of law enforcement, intelligence, essential security, or similar governmental purposes".

WikiLeaks claims that the text shows America attempting to enforce its highly restrictive vision of intellectual property on the world – and on itself. "The US administration is aggressively pushing the TPP through the US legislative process on the sly," says Julian Assange, the founder and editor-in-chief of WikiLeaks, who is living in the Ecuadorean embassy in London following an extradition dispute with Sweden, where he faces allegations of rape.

"If instituted," Assange continues, "the TPP's intellectual property regime would trample over individual rights and free expression, as well as ride roughshod over the intellectual and creative commons. If you read, write, publish, think, listen, dance, sing or invent; if you farm or consume food; if you're ill now or might one day be ill, the TPP has you in its crosshairs."

Just Foreign Policy, a group dedicated to reforming US foreign policy, managed to crowdfund a \$70,000 (£43,700) bounty for Wikileaks if the organisation managed to leak the TPP text. "Our pledge, as individuals, is to donate this money to WikiLeaks should it leak the document we seek." The conditions the group set have not yet been met, however, because it required the full text, not individual chapters.

Related to the TPP is a second secret trade agreement, the Transatlantic Trade and Investment Partnership (TTIP), which ties together regulatory practices in the US and

EU. George Monbiot, [writing in this paper](#), referred to the treaty as a "monstrous assault on democracy". Ken Clarke, the minister without portfolio, [replied](#) that it "would see our economy grow by an extra £10bn per annum".

Campaign group Fight for the Future has already collected over 100,000 signatures in an [online petition](#) against what it calls the "extreme Internet censorship plan: contained in the TPP.

Evan Greer, campaign manager for Fight for the Future, said: "The documents revealed by WikiLeaks make it clear why the US government has worked so hard to keep the TPP negotiations secret. While claiming to champion an open Internet, the Obama administration is quietly pushing for extreme, SOPA-like copyright policies that benefit Hollywood and giant pharmaceutical companies at the expense of our most basic rights to freedom of expression online."



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The New York Times

November 12, 2013

House Stalls Trade Pact Momentum

By ANNIE LOWREY

WASHINGTON — The Obama administration is rushing to reach a new deal intended to lower barriers to trade with a dozen Pacific Rim nations, including Japan and Canada, before the end of the year.

But the White House is now facing new hurdles closer to home, with nearly half of the members of the House signing letters or otherwise signaling their opposition to granting so-called fast-track authority that would make any agreement immune to a Senate filibuster and not subject to amendment. No major trade pact has been approved by Congress in recent decades without such authority.

Two new House letters with about 170 signatories in total — the latest and strongest iteration of long-simmering opposition to fast-track authority and to the trade deal more broadly — have been disclosed just a week before international negotiators are to meet in Salt Lake City for another round of talks.

“Some of us have opposed past trade deals and some have supported them, but when it comes to fast track, members of Congress from across the political spectrum are united,” said Representative Walter B. Jones Jr. of North Carolina, who circulated the Republican letter.

Without fast-track authority, however, the other countries in the negotiations might balk at American requests since they wouldn't be sure the final deal would remain unchanged. And getting both houses of Congress to agree to the final deal might be close to impossible without the fast-track authority, which the Obama administration has requested and which is being pursued in the Senate by Max Baucus, Democrat of Montana and the chairman of the Senate Finance Committee, along with the top Republican on the committee, Orrin G. Hatch of Utah.

“This could be the end of T.P.P.,” said Lori Wallach of Public Citizen, a watchdog group that has opposed the deal, formally called the Trans-Pacific Partnership. “All these other countries are like, ‘Wait, you have no trade authority and nothing you've promised us means anything? Why would we give you our best deal?’ Why would you be making concessions to the emperor who has no clothes?”

Michael B. Froman, the United States trade representative, said that he continued to work with Congress on fast-track authority, also known as trade promotion authority.

“We believe that Congress should have a strong role in determining U.S. trade policy — and one of the best ways they can do that is to pass a law codifying their direction to the administration for negotiating trade agreements,” Mr. Froman said. “We will continue to consult with Congress on the importance of T.P.A. as a longstanding tool for shaping U.S. trade policy on behalf of the American people.”

The Obama administration has conducted a behind-the-scenes campaign to win over congressional offices and key members — in particular, key committee members — informed.

“Everything we do with trade policy is done hand-in-glove with Congress,” Mr. Froman said in recent remarks, where he also emphasized that there was no trade agreement yet, and that the administration continued to get feedback from Congress about what to include in the deal.

But coming to an agreement at home might be as much of a hurdle as doing so internationally. Senate aides said that the overloaded congressional calendar posed a challenge to passing fast-track authority by the end of the year, but that they thought it still had enough bipartisan support to win passage in the Senate.

“The legislative window is closing,” said Sean Neary, a spokesman for Senator Baucus. “This is a priority.”

The greater challenge lies in the House, where opposition to the fast-track authority comes from both policy and process concerns, and from a range of liberals, conservatives and moderates.

Many members have had a longstanding opposition to certain elements of the deal, arguing it might hurt American workers and disadvantage some American businesses. Those concerns are diverse, including worries about food safety, intellectual property, privacy and the health of the domestic auto industry.

Others say that they are upset that the Obama administration has, in their view, kept Congress in the dark about the negotiations, by not allowing congressional aides to observe the negotiations and declining to make certain full texts available.

“We remain deeply troubled by the continued lack of adequate congressional consultation in many areas of the proposed pact that deeply implicate Congress’ constitutional and domestic

policy authorities,” said the House Democrats’ letter, circulated by Representative Rosa DeLauro of Connecticut and George Miller of California.

The House Democratic letter has about 151 signatories. On the Republican side, 22 lawmakers signed a similar letter. Other members have signaled their opposition independently, meaning that roughly 40 percent to 50 percent of House members have signaled that they have concerns about, or oppose, the use of fast-track authority.

The T.P.P. as outlined is aimed at reducing barriers, cutting red tape and harmonizing international regulations, though it is also expected to include numerous provisions protecting a wide variety of interests, both at home and abroad, from increased competition.

This article has been revised to reflect the following correction:

Correction: November 13, 2013

An earlier version of this article referred incorrectly to the position of roughly 40 to 50 percent of House members on a pending issue involving a trade agreement with Pacific Rim nations. They have signaled that they have concerns about, or oppose, the use of fast-track authority to push through such an accord, not that they do not support the pact itself.

