

TPP's Investment Rules Harm Public Access to Essential Services



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

Trade officials from twelve Pacific Rim nations—Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam—are in intensive, closed-door negotiations to sign the Trans-Pacific Partnership (TPP), a sweeping Free Trade Agreement (FTA) this year. Every Pacific Rim nation from China to Russia could eventually be included. There are draft texts for many of this pact's 29 chapters, most of which have nothing to do with trade, but rather impose limits on domestic food safety, health, environmental, and other policies. The governments won't release the texts to the public. But over 500 U.S. corporate "trade advisors" have access. America's worst job-offshoring corporations, global banks, agribusiness, and pharmaceutical giants want this deal to be another corporate power tool like the North American Free Trade Agreement (NAFTA). Consumer, labor, environmental, and other public interest advocates want to stop this NAFTA expansion pact.

A major goal of U.S. multinational corporations for the TPP is to impose on more countries a set of extreme foreign investor privileges and rights and their private enforcement through the notorious "investor-state" system. This system allows foreign corporations to challenge before international tribunals national health, consumer safety, environmental, and other laws and regulations that apply to domestic and foreign firms alike. Outrageously, this regime elevates individual corporations and investors to equal standing with each TPP signatory country's government – and above all of us citizens. This regime would empower corporations to skirt national courts and directly challenge our governments before tribunals of private sector lawyers operating under UN and World Bank rules to demand taxpayer compensation for domestic regulatory policies that investors claim frustrate their "expectations." These regulatory policies can be anything from government procurement contracts and environmental protection to financial regulation.

If a corporation "wins", the taxpayers of the "losing" country must foot the bill. Over \$440 million in compensation has already been paid out to corporations in a series of investor-state cases under NAFTA-style deals alone. This includes attacks on toxics bans, natural resource policies, health and safety measures, and more. In fact, of the nearly \$34 billion in the 18 claims now pending under NAFTA-style deals, nearly all relate to public health, environmental, energy, financial and transportation policy – not traditional trade issues. Even when governments win, they waste scarce resources defending national policies against these corporate attacks.

A review of just some of the outrageous cases brought under this system highlights the extreme peril of these radical investor privileges, and their investor-state private enforcement, being included in the TPP:

Argentina attacked by neoliberals after following neoliberal policy.

Argentina has been the number one target of corporations under the investor-state system. The country received awful economic advice from the International Monetary Fund and other international bodies, and the policies that it adopted created significant economic difficulties in the late 1990s and early 2000s. Since that time, more than 50 corporations have attacked Argentina through the country's bilateral investment treaties (BIT) with the United States and European nations, alleging that the country's efforts to pull itself out of economic recession violated their investor rights. Over half of these cases are still unresolved. Argentina has been ruled against in nearly 80 percent of the cases where a tribunal has made it to the final merit stages, and has been ordered to pay out over \$500 million to corporations. Most of these cases relate to sensitive services, like access to water, electricity, and gas.

Undermining water services, democracy and federalism, Take 1.

The French water company Vivendi and affiliated companies launched the first investor-state attack on Argentina. The foreign investor made a deal with Ramón Ortega, the outgoing governor of the province of Tucumán, to take over the provincial water utility he had just privatized. But the move was deeply rejected by local residents, who elected as governor on July 2, 1995 a candidate named Antonio Bussi, who promised to block the privatization. But later that month, the lame-duck governor handed over the concession anyway. In September, customers saw a doubling on average of the invoices they had previously been paying. As any observer might have anticipated, after assuming office in October, Bussi and the provincial legislature took steps to limit invoice increases. The company chafed at these moves. But rather than submit the dispute to provincial courts, as it had contractually committed to do in the deal with Ortega, the foreign investors launched a BIT case. Their lawyer? None other than Daniel Price, one of the architects of NAFTA's investors-state provisions under the

Bush I administration. In its investor-state claim, the company argued that the federal government

should have intervened to block the provincial government from limiting rate increases. The company lost its claim in a 2000 ruling, which said that the federal government should not be held responsible for these provincial-level actions. Vivendi didn't like that result, so tried to get a different one, proceeding to have the case annulled and re-litigated.

In 2007, the company finally got a different investor-state panel to agree with it, even though there was some evidence that the arbitrator appointed by Vivendi had a conflict of interest. (She served on the board of Swiss bank UBS, which had an interest in the outcome of the case.) The tribunal ordered Argentine citizens to pay the company over \$100 million – essentially concluding that the Argentine federal government should have violated its own constitution by intervening in provincial affairs, to allow a foreign investor (that flouted its contractual obligations and failed to take into account the obvious political risk to its investment) to jack up rates on a poor population.

Undermining water services, Take 2.

While many in the United States were shocked to a standstill by the tragic events of 9-11, the U.S. water company Azurix (an Enron subsidiary) and its law firm King & Spalding launched an investor-state attack on Argentina on September 19, 2001. The company's complaint? The company took over the newly privatized water concession of the province of Buenos Aires on July 1, 1999. As with the case with Tucumán, the first invoices the company sent out represented a stark price increase for many customers. The provincial govern-

Cont'd ment responded by capping price increases. The provincial government and Azurix differed as to whether these and other measures were allowable under the contract. But, as with the Tucumán case, the company went beyond Argentine contracts, laws, and democracy, and claimed the greater rights provided under the BIT. Like in the Vivendi case, the investor-state tribunal determined that the Argentine federal government was liable for these actions, and awarded the company over \$165 million.

Undermining gas services.

Also in 2001, CMS Gas Transmission Company, a U.S. investor, launched an attack on Argentina, claiming that the country's financial rebalancing policies violated its investor rights relative to its investment in a privatized gas distribution company. By that time, the one-to-one dollar-to-peso currency peg that the IMF had urged on Argentina had become unsustainable. Argentina took steps to bring the currency down to a sustainable exchange rate and to control capital outflows – which put burdens on citizens and investors alike.

But while the citizens had to simply swallow the costs as an unhappy consequence of botched policies implemented by leaders in the 1990s, investors got insurance against the costs of economic change. An investor-state panel awarded CMS over \$133 million, stating that the financial stability measures and limitations on gas utility increases violated the company's BIT rights. CMS eventually sold this "financial claim" to none other than a "vulture fund" subsidiary of Bank of America, who has been at the forefront of attempting to seize assets of Argentina in the United States. The bank, which had to be bailed out by the U.S. government after the global financial meltdown, has also lined up the Obama administration's support. Anytime the Inter-American Development Bank votes on aid to help Argentine development, the Obama administration instructs its delegate to vote against Argentina until they pay the investor-state award.

Undermining electricity services.

Law firm King & Spalding was involved in the BIT world again in the case it brought against Argentina for El Paso International Energy Company, which had invested in Argentina's electricity sector. This case also related to Argentina's economically-necessary move away from the currency peg. The tribunal, which handed down its ruling in October 2011, found that the company was guaranteed better treatment than Argentine citizens and investors. They also

found that, while none of the specific complaints that the company made actually violated any provision of the U.S.-Argentina investment treaty, found that all the complaints taken together showed that the company had been treated in a "creeping" unfair fashion. Fairness is relative though, when Argentine citizens are alone forced to bear the costs of economic change. Now, Argentina's taxpayers have been ordered to pay the company over \$43 million.

Growing resistance.

The investor-state system is so extreme that it is losing whatever small political support it ever had. Australia has said it will not include investor-state in its trade deals. South Africa and India are among the countries now conducting critical reviews of the regime. Brazil has always refused it. Latin American countries are pulling out of various arbitration agreements that provide venues for these private corporate attacks. President Obama even campaigned against this system! But career bureaucrats and big business want to stay the course by expanding the extreme system through the TPP, no matter the cost.

For more information or to find out how you can get involved, visit www.citizen.org/tpp or contact Alisa Simmons at asimmons@citizen.org.