

# TPP's Investment Rules Harm the Environment



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

Trade officials from eleven Pacific Rim nations—Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam—are in intensive, closed-door negotiations to sign a Trans-Pacific Partnership (TPP) Free Trade Agreement (FTA) in 2013. Every Pacific Rim nation from China to Russia to Japan 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 about 600 U.S. corporate "trade advisors" have full access. America's worst job-offshoring corporations, global banks, agribusiness, and pharmaceutical giants want this deal to be another corporate power tool like the North American Free Trade Agreement (NAFTA). Consumer, labor, environmental, and other public interest advocates want a transparent process and a "Fair Deal or No Deal."

A major goal of U.S. multinational corporations for the TPP is to impose on more countries a set of extreme foreign investor privileges and rights and their private enforcement through the notorious "investor-state" system. This system allows foreign corporations to challenge before international tribunals national environmental, land use, health 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 empowers corporations to skirt national courts and sue our governments before tribunals of private sector lawyers operating under UN and World Bank rules to demand taxpayer compensation for domestic regulatory policies that investors believe diminish their "expected future profits." Many of these regulatory policies are designed for environmental protection. For example, in 2012, the U.S. Lone Pine company launched a \$250 million NAFTA investor-state case against a Canadian ban on fracking.

If a corporation "wins," the taxpayers of the "losing" country must foot the bill. Over \$380 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 natural resource policies, toxics bans, zoning and permits, health and safety measures, and more. In fact, of the nearly \$14 billion in the 18 claims now pending under NAFTA-style deals, all relate to environmental, public health and transportation policy – not traditional trade issues. Governments have paid out over \$3 billion to investors in investor-state disputes under U.S. FTAs and bilateral investment treaties (BITs) – over 85 percent of this related to oil, mining, gas, and other environmental and natural resource disputes.

A review of just some of the outrageous anti-environment 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:

## Investor-state attack used to pressure for reopening of severely-polluting smelter:

Renco Group Inc., a company owned by one of the richest men in America, invested in a metal smelter in La Oroya, Peru. The site has been designated as in the top 10 most polluted in the world. The firm has been sued in U.S. court on behalf of severely lead-poisoned children in La Oroya. Sulfur dioxide concentrations at La Oroya greatly exceed international standards, with sulfur dioxide levels doubled in the years after Renco's acquisition of the complex. Renco's Peruvian subsidiary promised to install sulfur plants by 2007 as part of an environmental remediation program. Although it was out of compliance with its contractual obligations, the company sought (and Peru granted) two extraordinary extensions to complete the project.

In December 2010, Renco sent Peru a Notice of Intent that it was launching a U.S.-Peru FTA investor-state attack, alleging that Peru's failure to grant a third extension of the remediation obligations constituted a violation of the firm's FTA foreign investor rights. The company is demanding \$800 million in compensation from Peruvian taxpayers. The Renco case illustrates two deeply worrying implications of investor-state arbitration. **Even the mere threat of a case can put pressure on governments to weaken environment and health policies.** Recent developments suggest that the threat of this case was highly effective. While full environmental compliance has yet to be seen, the government has allowed the smelter to restart zinc and lead operations.

That would be bad enough, **but Renco is also attempting to evade justice in U.S. domestic courts through the investor-state mechanism.** Renco has now successfully argued that the U.S. lawsuit filed on behalf of La Oroya's children must be removed from a U.S. state court, where it had a decent chance of success. Renco tried to derail the case this way three times before without success. But after filing the investor-state case, the firm claimed that the matter now involved an international treaty and thus was outside the state court's remit. In January 2011, the same federal judge who rejected the past attempts determined that the existence of the investor-state case made this a federal issue and allowed Renco to terminate the state court case.

## Chevron uses investor tribunal to try to evade justice over Amazonian contamination:

An unprecedented ruling in the 18-year struggle of Ecuadorean indigenous people to force Chevron to clean up horrific toxic contamination in a swath of the Amazon the size of Rhode Island provides a chilling glimpse of how corporations can use international investor tribunals in "trade" agreements to evade justice. After 18 years of losing in U.S. and Ecuadorean courts and endless delay tactics, Chevron was ordered by an Ecuadorean court to pay \$18 billion for cleanup and punitive damages. An appellate court affirmed the decision in January 2012. Chevron turned to an ad hoc "investor-state" tribunal under the U.S.-Ecuador BIT as the last chance to evade justice. In February, that tribunal ordered Ecuador's government to interfere with the country's independent court sys-

tem to halt enforcement of the ruling, even though it had not even determined that it has jurisdiction over the case. The case stems from damage caused to 30,000 indigenous people in the Amazon by Texaco, which operated in Ecuador from 1964 to 1992 and was purchased by Chevron in 2001. During this time, the company admits that it dumped more than 16 billion gallons of toxic water into streams and rivers used by local inhabitants for drinking water. The trial included dozens of technical reports containing evidence of open pits of toxic waste and severe health problems among residents. An Ecuadorean court rejected the tribunal's order. However, the ad hoc panel may still prevent the clean-up from starting, as its ruling may be recognized by other countries whose cooperation is needed to collect the \$18 billion from Chevron, which has no assets in Ecuador now.

## Attack on mining, water policies:

Pacific Rim Mining Corp. (a Canadian-based multinational firm also known as Pac Rim) made plans to expand into El Salvador in the 2000s, as the price of gold was climbing. Pac Rim's plan is for an underground mine and the use of a process employing large amounts of water and cyanide to extract gold from the ore it excavated. For decades, there had been no large scale gold mining in El Salvador, a densely populated country with limited clean water supplies. In a country only recently recovered from civil war, opposition to cyanide-leach gold mining united the population. Right and left party presidents pledged to review mining policy, citing the negative health impacts and threats to scarce water resources.

Meanwhile, Pac Rim never completed various studies required to apply for the license to operate the mine, and halted its operations. However, it also reincorporated in the U.S., and months later launched an attack on El Salvador's mining policies under the U.S.-Central America Free Trade Agreement (CAFTA). The firm is demanding \$200 million in compensation from the Salvadoran people, whose average annual income is \$7,200. In 2012, the investor-state tribunal determined on very narrow grounds that the case was outside CAFTA's jurisdiction. Though Pac Rim is a Canadian firm, according to the tribunal, the company could have used CAFTA by merely filing proper ownership papers for its U.S. subsidiary. As the case now proceeds at World Bank-based hearings, El Salvador's mining policy remains unresolved and violence has killed four anti-mining activists.

## \$15.6 paid over denial of permit to toxic waste facility:

In a similar NAFTA case, Mexico was ordered to pay the U.S. Metalclad Corporation \$15.6 million after a Mexican municipality refused to grant the firm a construction permit for a toxic waste facility unless it cleaned up existing toxic waste problems. The facility had been closed when it was owned by a Mexican

firm, from which Metalclad acquired the facility in a transaction that specifically noted the clean up condition for obtaining a permit. The NAFTA tribunal ruled that Mexico violated NAFTA's "minimum standard of treatment" guaranteed foreign investors, because the firm was not granted a "clear and predictable" regulatory environment. It also ruled that a provincial ecological decree amounted to an indirect expropriation, or what is sometimes called a regulatory taking.

## Under investor-state system, corporations get most favorable rights.

There are even outrageous investor-state cases between TPP negotiating parties, including recent attacks by U.S. investors on Vietnam's land use policies and on Peru's oil, gas, and mining policies. But such challenges are not all brought by developed country investors. In 1996, after a four-day visit to the country and minimal due diligence, MTD (a set of Malaysian investors) decided to build a whole new planned community outside of Santiago, Chile. But to do this, they needed to get authorization from both Chile's foreign investment authorities and its environmental zoning authorities.

As is common in many countries, foreign investment authorities are tasked with considering the impact of

foreign inflows on a country's balance of payments. But all developers – national and foreign – have to comply with zoning rules, which are administered by authorities with a whole different set of objectives and expertise. Although MTD passed the first hurdle in April 1997, Chile's zoning authorities promptly started sounding concerns about the ecological impact of the development.

In 2004, an investor-state tribunal ordered Chile to pay nearly \$6 million to MTD, even though the tribunal noted that the investors themselves had not conducted due diligence. To reach this conclusion, the tribunal used the most favored nation provisions of a Malaysia-Chile investment treaty to import a so-called "fair and equitable treatment" provision from a Croatia-Chile bilateral investment treaty, and said

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that this provision requires government to act “as a monolith.” This type of uniformity in policymaking is not remotely possible for TPP nations, many of which have multiple agencies of government at the

national, state and local levels. There are serious questions as to whether this type of uniformity is even desirable, since different agencies may have different objectives to fulfill.

## Timber policy, toxics bans and more lead to corporate pay outs under NAFTA.

The anti-environment cases don't end there.

- S.D. Myers, a U.S. waste treatment company, challenged a temporary Canadian ban of PCB exports that complied with a multilateral environmental treaty on toxic-waste trade. An investor-state tribunal ruled in the company's favor, awarding \$5 million.
- A U.S. timber company challenged Canada's implementation of the 1996 U.S.-Canada Softwood Lumber Agreement. The tribunal dismissed the company's claims of expropriation and discrimination, but held that the rude behavior of the Canadian government officials seeking to verify the firm's compliance with the lumber agreement constituted a violation of the “minimum standard of treatment” required by NAFTA for foreign investors. The panel also stated that a foreign firm's “market access” in another country could be considered a NAFTA-protected investment.
- A U.S. chemical company called Ethyl Corporation challenged a Canadian environmental ban of the gasoline additive MMT under NAFTA's investor-state provisions. Although the panel made no ruling on the merits, the Canadian government revoked the ban and settled for \$13 million in taxpayer compensation.
- Even when a tribunal rules in favor of governments on the merits, governments risk great expense. Methanex, a Canadian corporation, produced methanol, a component chemical of the gasoline additive MTBE. The company challenged California's phase-out of the additive, which was contaminating drinking water sources around the state. The company lost on the merits, and was even ordered to pay the federal government's legal expenses. But the State of California had also expended significant sums on the case, and it remains to be seen if the state's attorneys will be compensated for their time.

## 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](http://www.citizen.org/tpp) or contact Alisa Simmons at [asimmons@citizen.org](mailto:asimmons@citizen.org).