



# Fast Tracking Corporate Power: Investor-State Dispute Resolution and the TPP

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**T**he Trans-Pacific Partnership (TPP) trade deal includes little-known provisions that allow companies to challenge as illegal trade barriers any government policies that purportedly infringe on the companies' profits. The contentious "investor-state dispute resolution" allows a corporation to sue federal, state and local governments if it believes that a law or regulation will negatively affect its bottom line. Foreign companies or investors could challenge regulatory safeguards that protect our families, our communities and our air and water at a global trade tribunal that could overturn the rule and award the investor monetary damages.

Investor-state trade disputes turn democracy on its head by making governments more responsive to the profits of foreign companies than to the health and safety of their own citizens. The North American Free Trade Agreement (NAFTA) was the first trade deal to include the investor-state dispute provisions.<sup>1</sup> Ever since, the right of foreign companies to challenge local governments has been a hallmark of U.S. trade policy.<sup>2</sup>

A foreign company that has "invested" in a trading partner's country can sue for damages at an international tribunal if it alleges that a law or regulation takes away its ability to earn expected profits in that country.<sup>3</sup> For example, if a foreign firm is harmed because a new environmental law curbs pollution from the firm's plants, it could sue to recoup the lost profits from reducing its emissions or cleaning up its factories. State or local laws that banned or even just delayed the controversial practice of hydraulic fracturing (fracking) for natural gas could be at risk, as could state efforts to require labeling of foods made with genetically engineered ingredients.

Companies already aggressively lobby Congress and the executive branch agencies to limit oversight and to block essential consumer and environmental safeguards.<sup>4</sup> Sometimes companies even resort to local courts to prevent regulations from going into effect.<sup>5</sup> The corporate free trade investor-state provisions allow foreign companies to simply sue a country, state or locality, challenging the laws of these regions if the companies' million-dollar lobbying efforts don't succeed in the political and regulatory arena. These suits are becoming more common, with a record number of cases filed in 2012.<sup>6</sup> Since

NAFTA was signed in 1993, more than 500 cases had been filed as of the end of 2012.<sup>7</sup> And there are many surprising places where these cases are waged.

## ***Labeling can be hazardous to your fiscal health: Philip Morris in Australia***

In 2011, Australia passed a public health law to discourage smoking by requiring the use of uniform cigarette packaging to eliminate some of the branding and advertising that is common on cigarette packs.<sup>8</sup> All tobacco sold in Australia would come in a plain, dark brown package, and 75 percent of the package would contain health warnings, with only the remainder allowing for the promotion of brand names and variants.<sup>9</sup>

For U.S. tobacco company Philip Morris, the new Australian law meant that the money the company had invested in marketing its cigarettes was less effective. The cigarette maker argued that the branding itself was the core of the cigarette business.<sup>10</sup> In recognition of its "loss," Philip Morris sued Australia.<sup>11</sup> The cigarette maker lobbied the Australian parliament to prevent this sensible public health law from being passed, bankrolling a lobbying campaign against the law.<sup>12</sup> After losing in the legislature, Philip Morris challenged the law in Australia's high court but lost there, too.<sup>13</sup>

Having failed in its previous attempts to stop this law, Philip Morris is now trying to overturn this public health law using investor-state provisions in a trade pact between Australia and Hong Kong.<sup>14</sup> The investor-state challenge eliminates all those

pesky democratic checks and balances. If it is successful, it puts at risk every public health law that might cut into the profits of a large corporation.

### **Democracy and the environment are overrated: Lone Pine in Quebec**

Fracking injects a mixture of water, sand and chemicals underground under high pressure to crack rock formations and release natural gas — but the often-toxic fracking fluids can and do pollute water supplies.<sup>15</sup> In 2012, the Canadian province of Quebec announced a moratorium on fracking pending further study into the environmental impact of fracking on the Saint Lawrence River.<sup>16</sup>

In November 2012, Lone Pine Resources, Inc., an oil and gas exploration company formed and operating in Canada but incorporated in Delaware, served notice of its intent to submit a claim for arbitration against the government of Canada under NAFTA's investor-state provisions.<sup>17</sup> Lone Pine contended that by revoking all mining rights for a stretch of the Saint Lawrence River, Quebec took away the potential for profit from Lone Pine.<sup>18</sup> The suit asked for damages of \$250 million from the Quebec provincial government.<sup>19</sup>

By the end of 2013, at least 100 U.S. municipalities had enacted fracking bans or moratoria.<sup>20</sup> Since Lone Pine is asking for a quarter-billion dollars, the mere threat of an investor-state challenge to a proposed local fracking ordinance could have a significant chilling effect on local efforts to address emerging environmental or consumer hazards.

## **Defend Your Local Democracy: Stop Fast Track**

Congress is considering giving “fast track” authority to the U.S. administration to accelerate passage of the Trans-Pacific Partnership and its odious investor-state provisions. The investor-state provisions are just one ugly chapter in a book of free trade horrors. But under fast track, Congress can vote trade deals like TPP only up or down; Congress could not amend the TPP to eliminate the investor-state provisions and to protect the right of local communities to pass laws that protect their families and environment.

Ask your Representative and Senators to oppose fast track. To take action, visit: <http://www.foodandwaterwatch.org/global/global-trade/tpp-and-tafta-free-trade-with-a-high-price>.

## **Endnotes**

- 1 Cook, Jeffrey T. “The Evolution of Investment-State Dispute Resolution in NAFTA and CAFTA: Wild West to World Order.” *Pepperdine Law Review*, vol. 34, iss. 4. May 15, 2007 at 1092. Although NAFTA was the first free trade agreement to include an investor-state chapter, some Bilateral Investment Treaties (BITs) and Multilateral Investment Treaties (MITs) included them before NAFTA.
- 2 Biron, Carey L. “US ‘bullying’ TPP negotiators to get deal.” *Asia Times*. December 11, 2013.
- 3 Baker, Brook K. “Corporate Power Unbound: Investor-State Arbitration of IP Monopolies on Medicines – Eli Lilly and the TPP.” American University Washington College of Law, Program on Information Justice and Intellectual Property. *PJIIP Research Paper Series No. 36*. May 2013 at 4.
- 4 See, for example, Rivlin, Gary. “How Wall Street defanged Dodd-Frank.” *The Nation*. April 30, 2013. McGreal, Chris. “Revealed: Millions spent by lobby firms fighting Obama health reforms.” *Guardian* (U.K.). October 1, 2009. Farenthold, David A. “Environmentalists slow to adjust in climate debate.” *Washington Post*. August 31, 2009.
- 5 See, for example, *Am. Meat Inst. v. U.S. Dep’t of Agric.*, No. 13-cv-1033, 2013 U.S. Dist. LEXIS 129099 (D.D.C. September 11, 2013).
- 6 United Nations Conference on Trade and Development. “Recent Developments in Investor-State Dispute Settlement (ISDS).” May 2013 at 2.
- 7 *Ibid.* at 3.
- 8 Government of Australia. Tobacco Plain Packaging Act of 2011. Act no 148 of 2011, at Chapter 1, Part 1 § 3 and Chapter 2, Part 2 § 1.
- 9 Wakefield, M.A. et al. “Introduction effects of the Australian plain packaging policy on adult smokers: a cross-sectional study.” *BMJ Open*. June 12, 2013 at 1.
- 10 UNCITRAL. “Notice of Arbitration between Philip Morris Asia Limited and The Commonwealth of Australia.” November 21, 2011 at Section 1.4.
- 11 *Ibid.* at Section 1.2.
- 12 Davies, Anne. “Big Tobacco hired public relations firm to lobby government.” *Sydney Morning Herald*. September 11, 2010.
- 13 Metherell, Mark. “Big tobacco loses High Court battle over plain packaging.” *Brisbane Times*. August 15, 2012.
- 14 UNCITRAL (2011) at Section 1.1.
- 15 Urbina, Ian. “Regulation lax as gas wells’ tainted water hits rivers.” *New York Times*. February 26, 2011; Caruso, David B. “Pa. allows dumping of tainted wastewater.” *Associated Press*. January 3, 2011.
- 16 Bertrand, Pierre. “Quebec Installs Outright Moratorium on Hydraulic Fracturing.” *International Business Times*. April 4, 2012.
- 17 UNCITRAL. “Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and Chapter Eleven of the North American Free Trade Agreement.” September 6, 2013 at paragraph 2.
- 18 *Ibid.* at paragraphs 16 to 47.
- 19 *Ibid.* at paragraph 58.
- 20 Wines, Michael. “Colorado cities’ rejection of fracking poses political test for natural gas industry.” *New York Times*. November 7, 2013.

### **For more information:**

**web:** [www.foodandwaterwatch.org](http://www.foodandwaterwatch.org)

**email:** [info@fwwatch.org](mailto:info@fwwatch.org)

**phone:** (202) 683-2500 (DC) • (415) 293-9900 (CA)

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