TACD Trans Atlantic Consumer Dialogue

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Resolution on Investor-State Dispute Resolution in the Transatlantic Trade and Investment Partnership

Introduction

As the United States (US) and the European Union (EU) continue to negotiate the Transatlantic Trade and Investment Partnership (TTIP), a critical question is whether the agreement will include the private enforcement mechanism known as investor-state dispute resolution.

Investor-state dispute resolution has been included as a chapter in numerous free trade agreements and in Bilateral Investment Treaties (BITs). Yet the private dispute resolution process operates outside the domestic court system and behind closed doors, so the media and consumers on both sides of the Atlantic lack information about what matters are being litigated and the history of outcomes -- even though the number of cases is growing rapidly. As consumer advocates we are very concerned that consumer laws and environmental regulations are regularly challenged as violations of “investor rights.”

TACD Recommendation:

All of the issues about which TACD is most concerned, including regulations to ensure safe foods, regulating emerging technologies, providing financial protections for consumers, ensuring that intellectual property rights safeguard consumer privacy, drug and medical devices, affordable quality services, control of toxic products and substances, tobacco regulation and energy and climate policy could all be caught up in an investor-state system that provides corporations with a new venue to undermine critical consumer safeguards and excludes citizen and consumer input.

TACD recommends that the U.S. and EU exclude investor-state dispute resolution from any trade agreement.

The agreement 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. Experience elsewhere shows how powerful interests from tobacco companies to corporate polluters have used investor-state dispute resolution provisions to challenge and undermine consumer and environmental protections. Investors must not be empowered to sue governments directly for compensation before foreign investor tribunals over regulatory policy (including “indirect” expropriation), contract disputes, nor guarantee a Minimum Standard of Treatment for foreign investors.

Increasing the transparency of investor-state proceedings does not in itself allay our concerns about this unnecessary and undemocratic mechanism, which fundamentally shifts the balance of power between investors, States and other affected parties and locks in a system of enforceable global governance that formally prioritizes corporate rights over the right of governments to regulate and the sovereign right of nations to govern their own affairs. The robust judicial systems and property rights protections on both sides of the Atlantic are sufficient to resolve any claim of unfair treatment by States, and state-state dispute resolution is a sufficient mechanism for resolving legitimate trade-related disputes.

Background

In contrast to the State-State dispute resolution system that exists in the World Trade Organization (WTO), the investor-state system that is incorporated in many free trade agreements and bilaterial investment treaties elevates individual private investors and corporations to equal status with sovereign nations, empowering them to privately enforce the terms of a public treaty.

Tribunals Operate Outside Domestic Court System: Investor-state dispute resolution allows deep-pocketed foreign firms to bypass the domestic court systems of host governments and directly sue national governments for cash awards to enforce the special investor protections contained in an agreement. The governments that are the actual parties to the agreement have no control over the instigation of such cases. Policies and government actions that have withstood challenge by such business interests in domestic courts can be re-litigated before these tribunals. This is now occurring with Phillip Morris' investor-state attack on Australian's cigarette plain packaging rules, which the Australian Supreme Court validated after a series of Phillip Morris challenges in Australia's court system. And, investors can choose investor-state tribunals to launch challenges that would have no basis in domestic law, as there is no requirement that domestic remedies be first extinguished prior to filing such a case. Examples of this include the Swedish Vattenfall Corporation's investor-state suit related to Germany's decision to phase out nuclear power and a French firm's investor-state suit regarding a minimum wage increase in Egypt.

Investors are empowered to bring these cases in closed tribunals that operate outside the domestic court system of the parties. Past US and EU Member States' agreements that contain investor-state provisions submit the signatories of these agreements to the jurisdiction of two international arbitration bodies: the World Bank's International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL). These two entities operate with similar rules and procedures, which exclude the public while providing investors with a sympathetic ear. Consumers have no standing, no capacity to intervene.

Cases are heard by three private-sector attorneys, unaccountable to any electorate, many of whom rotate between being "judges" and bringing cases for corporations against governments, creating inherent conflicts of interest. Indeed, there are extremely limited conflict of interest rules with respect to who can serve as an arbitrator. Unlike domestic judges, arbitrators are paid by hour. The standard fee is $3000 per day and the costs are typically split between the investor and government, even when a case is ultimately dismissed. This means that the mere filing of a case can have a chilling effect on a

policy. For instance, Peru reversed its closure of a heavy metal smelter - implicated in severe lead poisoning in the community - after the U.S. Renco Corporation filed an investor-state case demanding $800 million in compensation for the closure.

There are no appeals on the merits for tribunal rulings and very limited grounds to seek annulment of decisions. Tribunals can impose unlimited damages on government treasuries in addition to costs. Under this system, large firms have succeeded in obtaining multi-million and even billion dollar awards from governments (taxpayers) for non-discriminatory public health, consumer, and environmental policies that the firms claim to have impaired their investor rights.

The Rules Have Escaped Their Original Justification: These special investor protections were originally created early in the 20th century ostensibly to help foreign investors obtain compensation for *direct* expropriation of private property by national governments in developing nations with poorly functioning domestic court systems.

In the past few decades, these rules have escaped their original intent and the issues being litigated have little to do with direct expropriation (or nationalization) of private property. National, provincial and local regulatory policies and decisions that undermine the "future expected profits" of an investor have been challenged as "indirect" expropriations or as violating the guaranteed "minimum standard of treatment" the agreements require governments to provide foreign investors. Even adverse domestic court rulings have been challenged as "expropriations," including the newest $500 million suit by US pharmaceutical giant Eli Lilly against Canada alleging that Canadian federal court rulings regarding two patented drugs violate the firm's investor rights.

The US has included these special investor protections in a wide range of free trade agreements (such as the North American Free Trade Agreement (NAFTA) between Canada, the US and Mexico) and in BITs. EU member countries have entered into approximately 1400 BITS with investor-state enforcement since Germany signed the first one in 1959. The 2009 Treaty of Lisbon empowered the European Commission (EC) to formulate a common investment policy for inclusion in free trade agreements and BITS. Although it was contested by some member countries and parliamentarians, the final Council of the EU authorization of the Commission for the TTIP negotiations includes investor-state dispute resolution.

Number of Cases Growing Rapidly: The number of such cases is growing exponentially, with fewer than 50 litigated from the 1950s until 2000 but now there are 514 known cases as of the end of 2012[1]. The growing number of investor-state cases, rulings and awards against states, plus the broad range of policies attacked has created alarming implications for the ability of nations to set nondiscriminatory policies in the public interest.

As a result, some nations have begun to reject this regime. After a multi-year government review involving diverse private sector stakeholders, South Africa has given notice that it will terminate its agreements with investor-state dispute resolution under a provision that allows this after a set number

[1] UNCTAD "Recent Developments in Investor-State Dispute Settlement (ISDS)", May 2013 http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf

of years. And India is now reviewing all of its agreements with investor-state clauses. After a multi-year review under the past conservative government, Australia concluded that the investor-state regime was not in its national interest. It refuses to be subjected to the US-proposed expansion of the investor-state system through the Trans-Pacific Partnership (TPP).

The Substantive Investor Rights Enforced By Investor-State: In past US free trade agreements, as well as US and EU BITS, there are six primary substantive investor privileges:

- Compensation for "Indirect Expropriation": This guarantees foreign investors compensation from the Treasuries (i.e., from the taxpayers) of governments for any government policy or action that is "tantamount to" an "indirect" expropriation. Compensation for government regulatory policies that may lessen the value of an investment is not generally available in U.S. or EU domestic court systems.

- Guaranteed Minimum Standard of Treatment: This is an extremely elastic standard that includes reference to "fair and equitable treatment." This standard has been repeatedly interpreted by tribunals to mean that an investor must be compensated for any government action that undermines an investor's expectations. Such expectations are imputed by the tribunal. Increasingly, tribunals are ordering compensation for any change to policy that affects an investment. This catch-all clause has been the most successful claim for investors and has dramatically expanded corporate investor protections. Attempts by the US in its recent free trade agreements to limit arbitrators' continuing imposition of new obligations on States using this standard has proved ineffective, as arbitrators have simply ignored new annexes inserted ostensibly to limit arbitrators' discretion and the regime provides no outside appeal to rectify such conduct.

- Free Transfers: This provision forbids countries from employing common macro-prudential financial regulations, such as capital controls or speculation taxes. Under this term, governments may not inhibit foreign investors' movement of capital in or out of nations. US free trade agreements do not even include the limited exception to this rules provided for in the WTO for balance of payments emergencies.

- National Treatment: This requires governments to treat foreign investors established in a signatory country no less favorably than domestic investors with respect to all phases and aspects of investment, from the initial establishment of an investment to the sale of the investment. By requiring national treatment "pre-establishment", this provision creates a right of "market access" for foreign investors to acquire land, natural resources, utilities, telecommunications and broadcast operations, and other investments that are often subject to domestic preferences or review with respect to anti-trust and other considerations.

- Most Favored Nation (MFN): This provision requires governments to give foreign investors from signatory nations no less favorable treatment than the best treatment given to investors of another signatory nation or non-signatory nations, even if that treatment is better than that given to domestic investors. This rule can and has been interpreted to mean

that any investment right that the host nation grants to *any* country under *any* treaty must be granted to all nations to whom the host country has MFN obligations. As a result, even if a US-EU free trade agreement had more limited substantive investor rights, the most expansive privileges granted in past agreements would be "written in" to the new pact.

- Ban on Performance Requirements: Most conditions on investment, such as rules requiring goods to be manufactured containing a certain level of domestic content, or the employment of locals or the development of local infrastructure, are forbidden. These measures are geared toward shaping the terms of foreign investment to ensure local economies, and not just foreign investors, benefit from the foreign direct investment.

US free trade agreements and US and EU BITS cases have involved a wide range of issues including national rules providing access to generic medicines, financial regulations, reversals of failed water and electricity privatizations, transportation public-private partnerships, toxic waste trade, and environmental conditions on mining, oil and gas policy. Provincial policies on gasoline additives, water policy, pesticide usage, renewable energy programs and fracking, as well as local permitting and zoning decisions regarding hazardous waste dumps and gold mines have been targeted. Over $3.5 billion in compensation has already been paid out to corporations in a series of investor-state cases between the US and other nations just under US agreements with investor-state dispute resolution[2]. Legal costs for one EU corporate attack have totaled $58 million to date, before a ruling has been issued.

Consumer Case In Point: Eli Lilly Claims Canadian Federal Court Rulings On Drug Patents Constitute "Expropriation"

In November 2012, the US firm Eli Lilly and Company brought a $100 million dollar case under NAFTA against the government of Canada. Eli Lilly launched its NAFTA case after Canadian courts invalidated Eli Lilly's monopoly patent rights for an attention deficit hyperactivity disorder (ADHD) drug called Strattera. While the compensation demand relates to revocation of the Strattera patent, Eli Lilly makes clear in its formal "Notice of Intent" to Canada that it is not only challenging the invalidation of its particular patent, but Canada's entire legal doctrine for determining an invention's "utility" and, thus, a patent's validity. The company followed its initial complaint about Strattera with another regarding Canada's invalidation of the company's patent for Zyprexa, which is used to treat schizophrenia, raising its demand to $500 million. The firm is claiming violations of NAFTA's "expropriation" rules, its minimum standard of treatment rules and its national treatment rules.[3]

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[2] Public Citizen, "TABLE OF FOREIGN INVESTOR-STATE CASES AND CLAIMS UNDER NAFTA AND OTHER U.S. TRADE DEALS", March 2013. http://www.citizen.org/documents/investor-state-chart1.pdf

[3] Eli Lilly and Company v. The Government of Canada, Notice of Intent to Submit a Claim to Arbitration under NAFTA, Nov. 7, 2012). Available at: http://italaw.com/sites/default/files/case-documents/italaw1172.pdf