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Comments on Japan's Proposed Participation in the Trans-Pacific Partnership

Public Citizen welcomes the opportunity to comment on the U.S. Trade Representative's (USTR) stated intent to include Japan in the Trans-Pacific Partnership (TPP) negotiations. Public Citizen is a national, nonprofit public interest organization with more than 300,000 members and supporters that champions citizen interests before Congress, the executive branch agencies and the courts. We have conducted extensive analysis on the economic impacts and implications of existing U.S. trade and investment agreements and the expansive model of trade and investment terms that the Obama administration has pursued in the TPP.

The concerns provoked by the proposed inclusion of Japan in the TPP are manifold, including the loss of the U.S. government's prerogative to vet the export of liquefied natural gas to the world's largest importer of the sensitive product, and the lack of a mechanism in the TPP to counterbalance currency manipulation. In these comments, we focus on another primary concern: Japan's inclusion in the TPP would multiply the threat to the public interest posed by the deal's extreme draft investor privileges provisions.

The investor-state dispute resolution (ISDR) mechanism included in the leaked draft TPP investment chapter[1] would empower foreign investors to directly challenge sovereign governments over contested public interest policies in tribunals that operate completely outside any domestic legal system. The ostensible premise for the inclusion of such an extreme procedure and related substantive investor privileges is that some domestic legal systems are too corrupt, incompetent or ill-equipped to hear foreign investors' claims, or that some countries' property rights protections are considerably weaker than those found in U.S. law.

Is it the claim of the U.S. government that either characterization befits Japan's legal system – that its courts are unreliable or its property rights laws are shoddy, and thus U.S. investors require extrajudicial protections? Is it the claim of the U.S. government that either characterization befits the U.S. legal system – that in order to attract Japanese investment, investors require extrajudicial protections because U.S. courts or property rights laws are unreliable and shoddy? Absent such claims, which would be undermined by the high level of cross-investment already existing between the United States and Japan, what would be the U.S. government's basis for insisting on the imposition of the TPP's proposed substantive investor privileges and extrajudicial enforcement?

Indeed, in the World Justice Project's Rule of Law Index, Japan's legal system outranks the U.S.'s own legal system in each of the eight criteria that define a strong commitment to the rule of law.[2] In the investment-relevant category of "regulatory enforcement," Japan ranks as the second highest country in the world for enacting "appropriate and effective enforcement."[3] Given the trustworthy nature of the domestic legal systems of Japan and the United States, it would be absolutely indefensible in the U.S.-Japan context to empower foreign investors, in the

name of rule of law, to circumvent those domestic systems and appeal instead to extrajudicial tribunals comprised of three private attorneys who rotate between serving as "judges" and litigating against governments.

The untenable inclusion of ISDR in the TPP, particularly as applied to Japan, would empower foreign firms to attack domestic health, environmental, and other public interest policies in both countries, demanding taxpayer compensation for non-discriminatory policies implemented to protect the public interest. The substantive investment rules in the draft investment chapter would establish greater substantive "rights" for foreign investors than those provided to domestic firms by the robust property rights protections of existing U.S. and Japanese law. Such broad "rights," coupled with the extreme discretion enjoyed by investor-state tribunals, would significantly hamper each government's ability to regulate on behalf of its citizens. For example, the draft investment chapter would grant foreign investors a "minimum standard of treatment," a vague term that inventive tribunals have interpreted as investors' right to obtain compensation for any government action or policy that contravenes the investors' expectations.[4] When defending itself against investor-state claims, the U.S. government has rightly argued that such broad obligations would cause the government to "lose the power to regulate" in the public interest.[5]

On the basis of such terms in existing U.S. "trade" deals, foreign corporations have launched cases against environmental, energy, land-use, toxics, research and development, water, mining and other non-trade domestic policies applied equally to foreign and domestic firms.[6] So far, investor-state tribunals have ordered governments to pay foreign corporations about $3.5 billion for such policies under U.S. trade and investment deals, while nearly $15 billion remains pending.[7] Even when governments win, they often must pay for the tribunal's costs and legal fees, which average $8 million per case,[8] wasting scarce resources to defend public interest policies. The number of investor-state cases has surged in recent years, with the United Nations Conference on Trade and Development reporting a tenfold increase in the cumulative number of cases since 2000, despite the fact that the system has existed since the 1950s.[9]

Expanding ISDR to Japan through the TPP would expose the United States to an even greater surge in investor-state attacks against public interest policies, given the large number of Japanese corporations with U.S.-based subsidiaries that could launch an investor-state case. More than 800 Japanese parent corporations own nearly 7,800 subsidiaries in the United States, any one of which could provide the basis for an ISDR claim. This exposure to investor-state attacks far exceeds that associated with all other TPP countries. The number of Japanese-owned subsidiaries in the United States is 20 percent higher than the total number of U.S.-registered subsidiaries originating from all ten other TPP countries combined, meaning that the expansion of ISDR to Japan would more than double the investor-state threat to U.S. public interest policymaking. Similarly, Japan's government would be exposed to a potential wave of investor-state cases from any of the more than 1,800 U.S.-based corporations that own more than 7,100 subsidiaries in Japan. In sum, the expansion of the extreme ISDR regime to Japan via the TPP would newly enable investor-state attacks on democratically-decided policies from the two nations' nearly 15,000 cross-registered businesses.[10]

Given the immense threat that such a surge in ISDR exposure would pose to public interest policymaking, one prerequisite (among others) that must be met for Japan's entry into the TPP to be acceptable is that the U.S. government must make clear at the outset that if investor-state enforcement is included in the TPP, it will not apply between Japan and the United States.

ENDNOTES

[1] The leaked draft chapter can be found at http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf.

[2] The World Justice Project, "Rule of Law Index Scores and Rankings," published 2013, accessed June 4, 2013. Available at: http://worldjusticeproject.org/rule-of-law-index-data.

[3] The index lists the following as the criteria that Japan has met in demonstrating nearly unparalleled commitment to appropriate regulatory enforcement: "Government regulations are effectively enforced…Government regulations are applied and enforced without improper influence…Administrative proceedings are conducted without unreasonable delay…Due process is respected in administrative proceedings…The Government does not expropriate without adequate compensation." The World Justice Project, "Regulatory Enforcement," published 2013, accessed June 4, 2013. Available at: http://worldjusticeproject.org/factors/effective-regulatory-enforcement.

[4] *See* Lori Wallach, "'Fair and Equitable Treatment' and Investors' Reasonable Expectations: Rulings in U.S. FTAs & BITs Demonstrate FET Definition Must be Narrowed," Public Citizen memo, Sept. 5, 2012. Available at: http://www.citizen.org/documents/MST-Memo.pdf.

[5] *Glamis Gold, Ltd. v. United States of America*, Award, Ad hoc—UNCITRAL Arbitration Rules (2009), at para. 576.

[6] For a summary of ISDR cases and claims brought against public interest policies under U.S. FTAs, see "Table of Foreign Investor-State Cases and Claims under NAFTA and other U.S. Trade Deals," Public Citizen memo, Mar. 2013. Available at: http://www.citizen.org/documents/investor-state-chart.pdf.

[7] These figures come from a thorough Public Citizen analysis of all investor-state cases brought under U.S. Free Trade Agreements and Bilateral Investment Treaties.

[8] Corporate Europe Observatory and Transnational Institute, "Profiting from Injustice," CEO and TNI report, Nov. 2012, at 7. Available at: http://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf.

[9] The United Nations Conference on Trade and Development estimates that the cumulative number of ISDR cases ballooned from 50 in 2000 to 514 in 2012. UNCTAD, "Recent Developments in Investor-State Dispute Settlement," IIA Issues Note, May 2013, at 3. Available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf.

[10] All figures in this paragraph come from Uniworld's foreign firms database. Uniworld Business Publications, "Uniworld Online," accessed April 30, 2013.