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FR: Lori Wallach and Ben Beachy, Public Citizen's Global Trade Watch  
DT: Wednesday, March 25, 2015  
RE: [Analysis of Leaked Trans-Pacific Partnership Investment Text](#)

After more than five years of negotiations under conditions of extreme secrecy, on March 25, 2015, a leaked copy of the investment chapter for the Trans-Pacific Partnership (TPP) was [posted](#). Public Citizen has verified that the text is authentic. Trade officials from the United States and 11 Pacific Rim nations – Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam – are in intensive, closed-door negotiations to finish the TPP in the next few months.

The leaked text provides stark warnings about the dangers of “trade” negotiations occurring without press, public or policymaker oversight. It reveals that TPP negotiators already have agreed to many radical terms that would give foreign investors expansive new substantive and procedural rights and privileges not available to domestic firms under domestic law.

The leaked text would empower foreign firms to directly “sue” signatory governments in extrajudicial investor-state dispute settlement (ISDS) tribunals over domestic policies that apply equally to domestic and foreign firms that foreign firms claim violate their new substantive investor rights. There they could demand taxpayer compensation for domestic financial, health, environmental, land use and other policies and government actions they claim undermine TPP foreign investor privileges, such as the “right” to a regulatory framework that conforms to their “expectations.”

The leaked text reveals the TPP would expand the parallel ISDS legal system by elevating tens of thousands of foreign-owned firms to the same status as sovereign governments, empowering them to privately enforce a public treaty by skirting domestic courts and laws to directly challenge TPP governments in foreign tribunals.

Existing ISDS-enforced agreements of the United States, and of other developed TPP countries, have been almost exclusively with developing countries whose firms have few investments in the developed nations. However, the enactment of the leaked chapter would dramatically expand each TPP government's ISDS liability. The TPP would *newly* empower about 9,000 foreign-owned firms in the United States to launch ISDS cases against the U.S. government, while empowering more than 18,000 additional U.S.-owned firms to launch ISDS cases against other signatory governments. (These are firms not already covered by an ISDS-enforced pact between the United States and other TPP negotiating governments.)

The leaked text also reveals that all countries involved in the TPP talks – with the potential exception of Australia – have agreed to submit to the jurisdiction of ISDS tribunals. And, Australia has now indicated that it might do the same, “subject to certain conditions.” The tribunals would be empowered to order payment of unlimited government funds to foreign investors over TPP claims. Such compensation orders would be based on the “expected future profits” a tribunal surmises that an

investor would have earned in the absence of the public policy it is attacking as violating the substantive investor rights granted by the TPP.

As revealed in Section B of the leaked text, these tribunals would not meet standards of transparency, consistency or due process common to TPP countries' domestic legal systems or provide fair, independent or balanced venues for resolving disputes. For instance, the tribunals would be staffed by private sector lawyers unaccountable to any electorate, system of precedent or substantive appeal. Many of those involved rotate between acting as "judges" and as advocates for the investors launching cases against governments. Such dual roles would be deemed unethical in most legal systems. The leaked text does not include new conflict of interest rules, despite growing concern about the bias inherent in the ISDS system.

Contrary to claims from the Obama administration that the TPP's investment chapter would somehow limit the uses and abuses of the controversial ISDS regime, much of the leaked text would replicate, often word-for-word, the terms found in past U.S. ISDS-enforced agreements. However, some terms would widen the scope of domestic policies and government actions that could be challenged before extrajudicial tribunals, without offering meaningful new safeguards for those policies. For example, the leaked text could newly allow pharmaceutical firms to use TPP ISDS tribunals to demand cash compensation for claimed violations of the World Trade Organization's (WTO) rules regarding the creation, limitation or revocation of intellectual property rights. Currently, WTO rules are not privately enforceable by investors.

And the leaked text reveals that U.S. negotiators are still pushing, over the objection of most other TPP nations, to empower foreign investors to bring to TPP ISDS tribunals their contract disputes with TPP signatory governments relating to natural resource concessions on federal lands, government procurement projects for construction of infrastructure projects, as well as contracts relating to the operation of utilities. (Text that is not yet agreed in the leaked text appears in square brackets and Public Citizen has seen a version of the text that lists which countries support various proposals.)

Meanwhile, there are no new safeguards that limit ISDS tribunals' discretion to issue ever-expanding interpretations of governments' obligations to investors and order compensation on that basis. The leaked text reveals the same "safeguard" terms that have been included in U.S. agreements since the 2005 Central America Free Trade Agreement (CAFTA). These terms have failed to rein in ISDS tribunals. Indeed, in ISDS cases brought under CAFTA, tribunals have simply ignored the "safeguard" provisions that the leaked text shows are replicated in the TPP. And, given the lack of a substantive appeal mechanism in the ISDS regime, the tribunals' dismissal of the new safeguard language could not be appealed. The leaked text also replicates the same ineffective boilerplate health and environmental "exceptions" to some provisions that are also found in past U.S. pacts.

The TPP's expansion of the ISDS system would come amid a surge in ISDS cases against public interest policies. While treaties with ISDS provisions have existed since the 1960s, just 50 known ISDS cases were launched in the regime's first three decades combined. In contrast, foreign investors launched at least 50 ISDS claims *each year* from 2011 through 2013, and another 42 claims in 2014. The goal of the ISDS system was ostensibly to provide a means for foreign investors to obtain compensation if a government expropriated their factory or land and the domestic court system did not provide for compensation. Over time, both the rules and their interpretation have been dramatically expanded – a problem that the leaked text shows the TPP would exacerbate. Rather than being an option of last resort, corporations' use of the investor-state regime is surging, with an ever-expanding

range of policies and government actions coming under attack, with few claims involving actual expropriation.

Foreign corporations have used these claims to attack tobacco, climate, financial, mining, medicine, energy, pollution, water, labor, toxins, development and other non-trade domestic policies. Under U.S. “free trade” agreements (FTAs) alone, foreign firms have already pocketed more than \$440 million in taxpayer money via investor-state cases. This includes cases against natural resource policies, environmental protections, health and safety measures and more. ISDS tribunals have ordered more than \$3.6 billion in compensation to investors under all U.S. FTAs and Bilateral Investment Treaties (BITs). More than \$38 billion remains in pending ISDS claims under these pacts, nearly all of which relate to environmental, energy, financial regulation, public health, land use and transportation policies. Even when governments win cases, they are often ordered to pay for a share of the tribunal’s costs. Given that the costs just for defending a challenged policy in an ISDS case total \$8 million on average, the mere filing of a case can create a chilling effect on government policymaking, even if the government expects to win.

### *Textual Analysis*

This initial analysis of the leaked TPP investment text provides a guided tour of this chapter’s many provisions that literally replicate the terms of past U.S. agreements. This includes language providing foreign investors various substantive and procedural rights that extend beyond those provided to domestic firms under domestic law, and the same “safeguard” language that has failed to function effectively in past pacts. This analysis also spotlights differences between a text of this chapter leaked in 2012 and this text, including the elimination of various reform proposals found in the earlier text.

#### **Procedural Rights Only Available to Foreign Investors**

- **Foreign investors alone would be granted access to extrajudicial tribunals staffed by private sector lawyers who rotate between acting as “judges” and representing corporations in cases against governments, posing major conflicts of interest.** The leaked text includes provisions that submit TPP signatory countries to the jurisdiction of World Bank and United Nations investor-state arbitral tribunals. These tribunals, staffed by private sector attorneys (Article II.18.4), would be empowered to order governments to pay investors compensation for what the attorneys deem to be violations of the TPP’s investor rights. The tribunals lack public accountability, requirements to follow precedent, or standard judicial ethics rules. The leaked TPP text itself has no requirement for tribunalists to be independent or impartial. Rather, it relies on weak impartiality rules set by the arbitration venues themselves. In the 48-year history of the World Bank arbitration regime, which is most commonly used, tribunalists have only been disqualified in four of 41 challenges of exhibited bias or conflicts of interest. Rulings by tribunalists with specific conflicts of interest have been allowed to stand. A tribunalist ruling that Argentina had to pay Vivendi Universal \$105 million for reversing a failed water privatization served on the board of a bank that was a major investor in Vivendi. The tribunalist did not disclose the conflict, much less recuse herself, and Argentina’s effort to annul the ruling was dismissed.

However, a deeper conflict of interest is inherent in the ISDS system: private sector lawyers rotate between roles as “judges” in disputes brought by investors against governments, and as advocates

for investors against governments, in a manner that would be deemed unethical for judges in most domestic legal systems. The corporation initiating a case chooses the venue and selects one of the “judges” from a roster. The defending government chooses another, and those two select the third (Article II.21). Since only foreign investors can launch cases and also select one of the three tribunalists, ISDS tribunalists have a structural incentive to concoct fanciful interpretations of foreign investors’ rights and order that they be compensated for breaches of obligations to which signatory governments never agreed. Lawyers that do so while serving as a tribunalist in one ISDS case can increase the number of investors interested in launching new cases and enhance the likelihood that investors will select them for future tribunals.

And, there is no right of appeal on the merits of a decision. Under the World Bank rules, governments can turn to another tribunal of three private sector attorneys to seek annulment of a ruling for limited procedural errors. But annulments are extremely rare. The leaked text, like past U.S. FTAs, includes no meaningful internal appeals mechanism for ISDS rulings. And the text provides for no additional rights of appeal to an outside court or other body. It only includes a reference to the possibility that one day such an appeals mechanism could be created “under other institutional arrangements.” But the leaked text is even weaker on this front than the investment chapters of existing FTAs, which state that were an ISDS appellate body to be created one day by the signatory governments, the governments “shall strive to reach an agreement that would have such appellate body review awards.” The leaked TPP text only states that, in the hypothetical scenario that such an appellate mechanism would someday be created by some unnamed party, the signatory governments “shall consider whether awards...should be subject to that appellate mechanism” (Article II.22.10).

- **Foreign tribunals would be empowered to order governments to pay unlimited cash compensation out of national treasuries.** The leaked text provides tribunals with discretion to determine the amount of compensation governments must pay investors (Article II.28.1) and also the allocation of costs (Article II.28.3), such as the tribunalists’ fees. Even when governments win ISDS cases, they waste scarce budgetary resources defending national policies against these corporate attacks, as \$8 million in taxpayer funds must be used in an average ISDS case to pay large hourly fees for the tribunals and legal costs. An earlier leaked version of the TPP investment chapter included a proposed provision to standardize hourly fees for tribunalists at the lower end of the range of fees currently paid (about \$375 per hour, compared to the \$700 per hour that some tribunalists receive). But that restriction on tribunalist fees has been scrapped in the recent leak.
- **An overreaching definition of “investment” has been agreed by all parties that would extend the coverage of the TPP’s expansive substantive investor rights far beyond “real property,” permitting ISDS attacks over government actions and policies related to financial instruments, intellectual property, regulatory permits and more.** The definition of “investment” in the leaked text is: “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk” (Article II.1). The text goes on to enumerate as examples: regulatory permits; intellectual property rights; financial instruments such as stocks and derivatives; “construction, management, production, concession, revenue-sharing, and other similar contracts;” and “licenses, authorizations, permits, and similar rights conferred pursuant to domestic law.” The chapter’s new rights and protections would extend to investments already existing before the TPP. It would permit compensation claims even over failed attempts to make an investment, with the low

standard to qualify for attempting to invest being “concrete action or actions to make an investment, such as channeling resources or capital in order to set up a business, or applying for permits or licenses.” The expansive definitions would allow attacks on a vast array of non-discriminatory domestic policies and government actions from health and land use policies to construction permits and financial regulation.

Proposals to narrow the definition of “investment,” and thus the scope of policies subject to challenge, that were included in the earlier version of the text that leaked in 2012 have been eliminated. Also omitted is a proposal from the earlier leaked version that would not have allowed ISDS cases related to government procurement, subsidies or government grants.

- **U.S. negotiators in particular are pushing to expand the scope of coverage to also subject government contracts to ISDS enforcement.** U.S. negotiators are pushing for foreign investors to have greater rights than domestic investors with respect to disputes relating to procurement contracts with the signatory governments, contracts for natural resource concessions on land controlled by the national government and contracts to operate utilities (Articles II.1 and II.18(1)(a)(i)(C)). The United States seeks to allow disputes over such matters between foreign firms and governments to be resolved in ISDS tribunals rather than requiring foreign firms to use the same domestic laws and courts to which domestic firms could bring such disputes. And, U.S. negotiators *alone* are pushing to allow ISDS disputes over such government contracts even if the contracts were signed before the TPP would take effect. Since the beginning of negotiations, almost all other TPP countries have opposed this language, but unlike many other disputed clauses, it remains in the text in brackets. Specifically, ISDS enforcement would be extended to cover “written agreements” ... “between a national authority of a Party and a covered investment or an investor of another Party... that grants rights to the covered investment or investor: (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale; (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government.”
- **An overreaching definition of “investor” and lack of robust “denial of benefits” provisions would allow firms from non-TPP countries and firms with no real investments to exploit the extraordinary privileges the TPP would establish for foreign investors.** The text includes an overreaching definition of “investor” as a person or legal entity that makes an investment as defined in the pact (Article II.1). **This includes firms from non-TPP countries that have incorporated in a TPP signatory country.** Thus, for instance, one of the many Chinese state-owned corporations in Vietnam, a TPP negotiating country, could “sue” the U.S. government in a foreign tribunal to demand compensation under this text. Additionally, the leaked text’s broad definition of an “investor” could allow firms that have made no real investment in a country to drag governments through costly foreign tribunal proceedings. Existing U.S. trade deals include terms whereby an investor that is not native to a nation in the pact can be denied the benefits of the deal. The ostensible goal is to discourage “free riding” and “treaty shopping” by multinational firms. To counter abusive nationality planning, the pacts state that the benefits of the deal can be denied to investors if they are owned or controlled by investors outside of the trade pact signatory countries and they also have no “substantial business activities” in the claimed home nation (or in any signatory country beyond the host country). However, such “denial of benefits” terms are not

particularly robust, since even having a staff person or two and a minor paper trail in the claimed home country can pass the “substantial business activities” threshold. These low thresholds are replicated in the TPP text, allowing Chinese or German investors (for instance) to channel investments through TPP nations in order to obtain the extraordinary TPP foreign investor protections and access the private enforcement regime (Article II.14).

The leaked TPP text does include one new provision aimed at limiting who can launch ISDS cases. This provision is intended to prevent an individual investor from launching an ISDS claim against their own home country. In existing ISDS cases, individuals have launched such claims by setting up business activities in another country covered by an ISDS-enforced agreement and then acquiring “investments” back in their home country as a “foreign investor.” The TPP language states that if an investor “is a natural person, who is a permanent resident of a Party, and a national of another Party, that natural person may not submit a claim to arbitration against that latter Party” (Article II.1). But this provision only applies to “natural persons.” Thus the prohibited individual could evade this limitation by incorporating a business in another TPP country, use that corporation to establish an “investment” back in their home country, and then use the corporation’s newly-acquired “foreign investor” status to launch an ISDS claim against their home government.

- **Claims already decided in domestic courts can be re-litigated in ISDS tribunals for all but four TPP negotiating countries.** A new annex in the leaked TPP investment text states that if a foreign investor pursues a case in the domestic courts of Chile, Peru, Mexico or Vietnam over a government measure claimed as a violation of a foreign investor right, the investor cannot then launch an ISDS case against the government for that same claim under the TPP (Annex II-J). It would appear that for all other TPP negotiating countries, foreign investors are welcome to pursue claims before domestic courts and, if they lose, re-litigate the case before an ISDS tribunal. Indeed, the leaked TPP investment chapter eliminates a proposed provision from an earlier leaked version that would have required foreign investors to choose between pursuing claims before domestic courts or ISDS tribunals.
- **The TPP would grant foreign investors procedural rights that are not available to domestic firms to “sue” governments outside of national court systems, unconstrained by the rights and obligations of countries’ constitutions, laws and domestic court procedures (Section B).** The portion of the leaked text that enumerates the private ISDS enforcement system largely replicates word-for-word the provisions of past U.S. ISDS agreements. However, foreign investors would be granted even more time to launch an ISDS case. While existing U.S. FTAs already allow foreign investors to initiate ISDS cases up to three years after the investor became aware of the alleged violation of their special foreign investor rights, the leaked text would expand that timeframe by another six months (Article II.20.1). This text also abandons a proposal in the 2012 leaked text that would have required a foreign investor to pursue domestic legal avenues before launching an ISDS case. This “exhaustion” requirement would have obliged investors to pursue domestic administrative review before launching an investor-state case. Exhaustion of domestic remedies is a fundamental principle of international law.

What could be the justification for foreign investors to pursue claims against a nation outside of that nation’s judicial system? The track record of ISDS cases reveals a clear answer: to try to obtain greater rights than those provided under national law and through domestic courts. Many of the TPP negotiating countries have strong domestic legal systems. For example, New Zealand, Australia, Singapore and Canada are all ranked by the World Bank as performing better than the

United States with regard to adherence to rule of law. Yet, in a manner opposed by conservative and liberal jurists and policymakers alike, the private “investor-state” enforcement system included in the leaked TPP text would empower foreign investors and corporations to skirt domestic courts and laws and “sue” governments in foreign tribunals, demanding cash compensation from national treasuries for domestic policies that they claim undermine their new investor rights. This would expand an alarming two-track system of justice that privileges foreign corporations in myriad ways relative to governments, domestic businesses or non-governmental organizations.

The recent surge in ISDS attacks has produced rising concerns from legal scholars. A March 2015 letter signed by 139 U.S. law professors urges congressional leaders and the Obama administration “to protect the rule of law and our nation’s sovereignty by ensuring ISDS is not included” in the TPP, stating, “ISDS threatens domestic sovereignty by empowering foreign corporations to bypass domestic court systems and privately enforce terms of a trade agreement. It weakens the rule of law by removing the procedural protections of the justice system and using an unaccountable, unreviewable system of adjudication.” A May 2012 letter signed by former judges, law professors and other prominent lawyers from TPP nations warns: “the foreign investor protections included in some recent Free Trade Agreements (FTA) and Bilateral Investment Treaties (BIT) and their enforcement through Investor-State arbitration should not be replicated in the TPP. We base this conclusion on concerns about how the expansion of this regime threatens to undermine the justice systems in our various countries and fundamentally shift the balance of power between investors, states and other affected parties in a manner that undermines fair resolution of legal disputes.”

### **Substantive Rights Available Only to Foreign Investors**

- **The leaked text shows that foreign investors would be able to demand compensation if new policies that apply to domestic and foreign firms alike undermine their “expectations” of how they should be treated.** This includes a right to claim damages for government actions (such as new environmental, health or financial policies) that reduce the value of a foreign firm’s investment (Article II.7 and Annex II-B on indirect expropriation) or that go against the expected level of regulatory scrutiny that an investor might have had when dealing with a previous government (Article II.6 on minimum standard of treatment). After a series of alarming ISDS rulings based on language replicated in the leaked TPP text, annexes were added to U.S. FTAs starting with the 2005 CAFTA with language aimed at defining what sorts of government action should be considered an “indirect expropriation” or a violation of the “minimum standard of treatment” guarantee given to foreign investors. However, ISDS tribunals already have ignored these provisions in cases brought under recent U.S. FTAs that included the so-called safeguards now being touted with respect to the TPP, and instead have continued to develop their own broad interpretations of foreign investors’ rights to rule against governments and order compensation to investors. The leaked TPP text largely replicates these failed annexes, meaning that ISDS tribunals would maintain enormous discretion to order a government to pay a foreign investor merely because the government improved a regulatory policy applying to both domestic and foreign firms. Indeed, the inclusion of the language from past FTAs on a guaranteed minimum standard of treatment for foreign investors and the right to compensation for indirect expropriation directly contradicts the assurances TPP governments have given to legislators and public interest advocates that the pact would safeguard regulatory sovereignty.

- **The provision used in most successful investor compensation demands would be extended.** The most successful (and controversial) basis for investors’ challenges of government policies in past agreements is alleged violations of the guaranteed “minimum standard of treatment” (MST) for investors or the closely linked “fair and equitable treatment” (FET) provision. The leaked TPP text largely replicates the language found in previous ISDS agreements on which tribunals have relied to issue some of the most alarming ISDS rulings to date (Article II.6). Tribunals have often broadly interpreted these terms, effectively fabricating new obligations for governments that do not exist in the actual text of ISDS agreements. Of the 28 known ISDS cases under U.S. trade and investment agreements in which the foreign investor has “won,” 75 percent (21) have found MST or FET violations. (In contrast, only six have found national treatment violations, five have found expropriation violations and three have found performance requirement violations. Some cases found violations of multiple rules.)

While some of the FET violations involved “denials of justice” as that term has long been understood under customary international law (e.g. lack of due process), some tribunals have found FET violations for government regulatory actions that simply contradicted what investors’ argued were their “reasonable expectations.” For instance, in an *Occidental Exploration and Production Co. v. Ecuador* case under the U.S.-Ecuador BIT, a tribunal ruled that the reasonable expectations requirement means that “there is certainly an obligation not to alter the legal and business environment in which the investment has been made.” In defending itself against an investor-state challenge that tried to invoke this sweeping interpretation, the U.S. government argued, “[I]f States were prohibited from regulating in any manner that frustrated expectations – or had to compensate for any diminution in profit – they would lose the power to regulate.” There is no right to compensation in U.S. law merely because a government policy changes after the establishment of an investment in a way that may affect a business operating here.

The TPP includes nothing to forestall these extreme interpretations. Instead, the leaked text includes an annex contained in recent U.S. FTAs that states that the relevant standard under customary international law that is intended for the MST provision is one that “results from a general and consistent practice of States that they follow from a sense of legal obligation” (Annex II-A). This circular language has failed to fix the problem. Though this annex was first included in CAFTA, in two of the first investor-state cases brought under CAFTA – *Railroad Development Corporation (RDC) v. Guatemala* and *TECO Guatemala Holdings v. Guatemala* – the tribunals simply ignored the annex’s attempt to narrow the definition of “minimum standard of treatment” with a requirement that tribunals examine the *actual* practice of nations. Instead, the *RDC* and *TECO* tribunals both relied on an expansive interpretation of the standard concocted by a previous ISDS tribunal, which included an obligation to honor investors’ expectations. On that basis, both tribunals ruled that Guatemala had violated the expanded obligation, and ordered the government to pay millions. The TPP fails to remedy this severe flaw, leaving uncertainty and unpredictability that invites investors to launch more ISDS attacks against public interest policies.

- **Foreign investors would be allowed to use claims of “indirect expropriation” to demand government payments for regulatory costs all firms operating in a country must meet.** Under domestic and international law, governments’ obligation to compensate for expropriation has typically applied to the physical taking of real property, such as when a government expropriates a house to make way for a highway. But the leaked TPP text would provide investors with a right to demand compensation for “indirect” expropriation (Article II.7 and Annex II-B), which can be and has been interpreted by ISDS tribunals to mean regulations and other government actions that



merely *reduce* the value of a foreign investment. The TPP annex on expropriation, as in past U.S. FTAs, makes clear that foreign investors can launch claims of indirect expropriation when the government has not actually taken ownership or control of an investment. This definition of indirect expropriation cannot be justified as reflecting the general practice of states, given that the dominant practice of nations is to provide for compensation only when the government has actually acquired an asset, not when the value of an asset has been adversely affected by regulatory measures.

Moreover, the right to compensation for indirect expropriation in the leaked text applies to much wider categories of property than those to which similar rights apply in U.S. law. To the limited extent that indirect expropriation compensation is permitted in U.S. law, it has generally been held that the requirement of compensation for “regulatory takings” under the Fifth Amendment of the U.S. Constitution primarily applies to regulations affecting *real* property (i.e. land). However, the broad provisions of the leaked TPP investment chapter, like existing FTAs, enable foreign investors to claim “indirect expropriation” if government regulations implicate their personal property, intellectual property rights, financial instruments, government permits, money, minority shareholdings or other forms of non-real-estate property.

An earlier version of the leaked TPP investment chapter included a proposed provision that attempted to safeguard public interest regulations from indirect expropriation claims, stating, “non-discriminatory regulatory actions ... that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety and the environment do not constitute indirect expropriation.” Instead, the recent leaked TPP investment chapter, like past U.S. FTAs, includes a clause containing a loophole that undermines this attempted safeguard. It states that non-discriminatory health, safety, environmental and other public interest regulations could indeed be challenged as indirect expropriations “in rare circumstances” (Annex II-B). The loophole would grant ISDS tribunals discretion to determine when such non-discriminatory public interest policies constitute an indirect expropriation. The leaked text also eliminated, in favor of terms granting tribunals ample discretion over the meaning of indirect expropriation, an alternative provision that would have explicitly restricted indirect expropriation claims to instances when a government “deprivation of the investor’s property” is “(a) either severe or for an indefinite period; and (b) disproportionate to the public purpose.”

- **Foreign corporations could be newly empowered to privately enforce public agreements concerning intellectual property in ISDS challenges to government policies that ensure access to affordable medicines.** Unlike past U.S. FTAs, the leaked TPP investment text could empower foreign investors to claim that government policies that ensure access to affordable medicines constitute TPP-prohibited “expropriations” of intellectual property rights if deemed to violate the terms of the WTO’s Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement (Article II.7.5). WTO rules can only be enforced when one government formally challenges another government before a WTO tribunal. There is no right in the WTO for a corporation to directly challenge sovereign governments. But with this new provision in the leaked TPP investment text, individual firms could be empowered to privately enforce the terms of the WTO’s monopoly protections for pharmaceutical firms, and directly challenge governments for alleged violations of these protections. In addition, the signatory governments of TRIPS, including TPP governments, deliberately included ambiguous language in TRIPS to grant flexibility to each government to interpret the terms in line with domestic priorities. But the leaked TPP investment text could empower the three private lawyers of ISDS tribunals, which have a clear track record of

interpreting vague terms broadly to favor foreign investors, to impose their binding interpretation of TRIPS' intentionally flexible terms on the very governments that negotiated those terms. This move, which risks making TRIPS obligations enforceable via ISDS, could restrict governments' policy space to ensure access to affordable medicines.

- **Domestic policies that apply equally to domestic and foreign firms could be challenged by foreign investors under the TPP.** The TPP text would allow investors to claim that government actions (such as new environmental, health or financial laws) violate “national treatment” or “most favored nation” rules, ostensibly intended to prohibit discriminatory treatment, even when the laws are facially neutral and lawmakers did not intend to harm foreign investors (Articles II.4 and II.5). Such claims could be used if a foreign investor’s own business model resulted in the firm experiencing a slightly higher burden in complying with a non-discriminatory law. For example, a government’s carbon emission controls could disproportionately impact foreign investors if most domestic energy firms used less carbon-intensive sources of energy than their foreign-owned counterparts. While a proposed footnote in the leaked text suggests that differences in treatment of foreign investors may be allowed “on the basis of legitimate public welfare objectives,” the ISDS tribunal would have full discretion to judge whether a government’s public welfare objectives are “legitimate” and whether the alleged difference in treatment of foreign investors owes to those objectives. In any case, the footnote has not been accepted, with one country “still consulting” and another “still considering.”
- **Policies to create domestic jobs, support domestic businesses or foster economic development would be subject to foreign investors’ demands for compensation.** The leaked TPP investment chapter, like past U.S. FTAs, would empower foreign firms to demand compensation from governments for “performance requirements” imposed on domestic and foreign firms alike (Article II.9). Foreign firms would be able to challenge policies used by many governments to support local job creation and business growth (for example, by requiring firms to purchase inputs from domestic businesses). In a recent ISDS case brought against Canada under the North American Free Trade Agreement (NAFTA), a tribunal ruled that Canada’s non-discriminatory requirement for oil companies to contribute to research and development in one of the country’s poorest provinces violated such “performance requirement” provisions. The leaked TPP text goes even further than past U.S. FTAs in listing additional performance requirements that can be challenged.
- **Most TPP countries have decided to expose decisions regarding the approval of foreign investments to ISDS challenge.** An annex in the leaked text states that a government’s decision, done in accordance with domestic laws, on whether to approve a given foreign investment in its territory shall not be subject to ISDS enforcement (Annex II-H). But the annex only applies to four of the 12 TPP negotiating countries (Australia, Canada, Mexico and New Zealand). For the remaining countries, the leaked TPP text would apparently empower foreign firms to challenge such decisions before ISDS tribunals. In the United States, for example, the Committee on Foreign Investment in the United States (CFIUS) reviews planned foreign investments to determine whether they pose threats to national security. CFIUS has the authority to recommend to the president that investments deemed as threatening not be authorized. In cases where the president acts on such recommendations, the leaked TPP text would appear to empower foreign firms to retaliate by asking foreign tribunals to order taxpayer compensation. The leaked TPP investment chapter has no national security exception clause, and, because the TPP text is secret, it is unclear whether any general security exception applicable to the entire TPP would apply or be effective.

- Foreign corporations could demand compensation for capital controls and other macro-prudential financial regulations that promote financial stability.** Like past U.S. FTAs, the leaked TPP text requires that governments “shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory” (Article II.8). This obligation restricts the use of capital controls or financial transaction taxes, even as the International Monetary Fund (IMF) has shifted from opposing capital controls to officially endorsing them as a legitimate policy tool for preventing or mitigating financial crises. In a December 2014 letter to the Obama administration, Senator Elizabeth Warren (D-Mass.), member of the Senate Banking Committee, and Sens. Tammy Baldwin (D-Wis.) and Edward Markey (D-Mass.) urged the Obama administration to not replicate in the TPP terms from past U.S. FTAs “that could limit the ability of the government to use capital controls.” In another letter that same month led by Congresswoman Maxine Waters (D-Calif.), the ranking member of the House Financial Services Committee, leading House Democrats made clear to the Obama administration their opposition to the inclusion of such restrictions on capital controls in pending trade deals. In February of that year, U.S. Federal Reserve economists backed capital controls in a study finding they “can lead to a significant welfare improvement.” And in a February 2012 letter signed by more than 100 prominent economists, including Jagdish Bhagwati of Columbia University and former IMF officials Olivier Jeanne of Johns Hopkins University and Arvind Subramanian (formerly of the Peterson Institute for International Economics, now chief economic adviser to the government of India), demanded that such provisions be excluded from the TPP, stating, “The U.S. government’s rigid opposition to capital controls does not reflect the global norm.” This followed a January 2011 letter to the Obama administration signed by more than 250 economists, including Nobel laureate Joseph Stiglitz, Harvard economics professors Ricardo Hausmann and Dani Rodrik (formerly at Harvard University, now at the Institute for Advanced Study), and José Antonio Ocampo (a former executive secretary of the UN Economic Commission on Latin America and the Caribbean, and Colombia’s former Minister of Finance), noting that past U.S. FTAs and BITs “strictly limit the ability of our trading partners to deploy capital controls.” Yet the leaked TPP text would replicate the past U.S. template, defying the post-financial crisis consensus that policy space for capital controls must be preserved.

### **Exceptions and Limitations**

- Proposed new “safeguards” would not adequately protect governments’ ability to regulate speculative and destabilizing flows of capital.** TPP negotiating parties have offered two competing “temporary safeguards” to allow the use of limited types of capital controls, subject to a litany of conditions, that would otherwise violate the expansive obligations of the investment chapter’s free transfers provisions (Article CCC.3). Both proposals would only apply to capital controls enacted for certain reasons (e.g. to remedy balance of payments crises or “exceptional” macroeconomic problems), while capital controls used for other policy objectives (e.g. to prevent destabilizing asset bubbles) would still be subject to ISDS challenges. Both proposals would require capital controls to be temporary and “phased out progressively,” making the “safeguards” useless for capital controls of a more permanent nature, such as those relating to capital inflows that are designed to *avoid* balance-of-payments and other macroeconomic problems. For example, the capital management policies of Chile, a TPP negotiating party, involve standing laws of general application that were not implemented in response to a specific crisis, but to avoid the conditions that could cause one. (Indeed, the United States alone is opposing a separate TPP annex that would

allow Chile to maintain or enact capital controls that are consistent with its own domestic laws to ensure financial stability (Annex II-E.)

With respect to the broader “temporary safeguard” proposals, the United States and Canada seek to impose limits on the use of capital flow management policies that would go even further than the limits proposed by all other TPP countries, requiring capital controls to be terminated within one year. This restriction would preclude the use of capital controls for longer-lasting financial crises. The proposal would have failed to safeguard, for example, the capital controls that Malaysia, also a TPP negotiating party, implemented in 1997 in response to the Asian financial crisis, which were phased out slowly *over a decade*.

Both versions of the proposed “safeguard” for capital controls would also only apply to those capital controls that an ISDS tribunal (not the government’s central bank) deemed “necessary.” The version supported by the United States and Canada, meanwhile, would require an even longer and more onerous litany of conditions. Governments, not ISDS tribunals, should have the authority to decide when capital management measures are needed and how they should be implemented. These narrow “safeguards” proposed for the TPP would fail to adequately protect governments’ policy space to use capital controls to prevent or mitigate financial crises. The only additional new language to limit the leaked text’s expansive free transfers obligations is a footnote that would partially exempt social security programs from those terms (Article II.8, footnote 21).

- **The TPP provision on environmental, health and other regulatory objectives is meaningless.** The leaked text includes a provision, largely copied from past U.S. pacts, on “Investment and Environmental, Health and other Regulatory Objectives” that provides no meaningful safeguard against ISDS challenges to public interest policies (Article II.15). The provision includes self-cancelling language stating that that a signatory government may enact public interest protections, *so long as doing so does not conflict with the sweeping rights that the pact gives to foreign investors*. But it is precisely when investors’ broad rights conflict with environmental, health or other regulatory objectives that a government needs an agreement to specify that its right to regulate trumps its obligations to foreign investors. For such instances, this provision appears to be inapplicable. Indeed, a tribunalist in the *S.D. Myers v. Canada* NAFTA ISDS case noted that this provision, also included in NAFTA, was among those referred to by trade analysts as “‘tautologies’ or as ‘diplomatic, rather than legal’ statements.” A recent legal review from Cambridge University Press concluded that this clause “falls short in failing to add more than a nebulous provision that can easily be marginalized.”

In an earlier leaked version of the TPP investment chapter, one country proposed an additional paragraph to this text that read: “The Parties recognise that it is inappropriate to encourage investment by relaxing its health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment of an investor.” This proposed language has been omitted from the current leaked text. Finally, while a few TPP negotiating countries have tried to exempt specific domestic public interest policies from the broad obligations of the investment chapter (e.g. health policies for Australia, procurement policies for Malaysia, cultural policies for Canada), none of these exceptions have been accepted by the other TPP negotiating countries (Annexes II-I, II-L, II-M).

- **A new article makes a hortatory reference to encouraging corporate social responsibility.** Language included in this recent leak of the TPP investment chapter is even weaker than the already-hortatory “corporate social responsibility” language proposed in an earlier leaked version. While the earlier language stated that each signatory government “should encourage” firms to *voluntarily* incorporate principles of corporate social responsibility, the approved language in the more recent leak merely notes that the signatory governments “reaffirm the importance” of such non-binding encouragement (Article II.16).
- **Australia alone has indicated that it might not be subjected to the jurisdiction of ISDS tribunals under TPP** (footnote 29). No other country has listed an objection to being subject to the private investor-state corporate enforcement regime. This would impose new obligations for Japan, New Zealand, Malaysia, Brunei and Vietnam – the countries involved in TPP negotiations that do not have existing U.S. FTAs. A note in the leaked text indicates that even Australia is considering subjecting its laws and taxpayers to ISDS under the TPP, “subject to certain conditions.” This would impose novel obligations on Australia, as Australia successfully resisted U.S. pressure to include ISDS in the existing U.S.-Australia FTA.
- **Foreign investors could not invoke procedural ISDS provisions from other agreements, but could still try to invoke even broader substantive rights for foreign investors than found in the TPP.** While the “most-favored nation treatment” provisions of ISDS-enforced pacts are supposed to simply require governments to treat foreign investors from a pact’s signatory countries no less favorably than investors from other countries, foreign firms have successfully used these provisions as a loophole to “import” broader foreign investor privileges from other pacts. Doing so has allowed foreign firms to launch ISDS cases against governments for allegedly violating obligations to which the governments never agreed. The leaked TPP text includes a new provision that appears aimed at partially closing this loophole, indicating that foreign investors cannot use the “most-favored nation treatment” obligation to import procedural rights from other pacts (Article II.5.3). However, the provision would not prevent foreign investors from importing broader substantive rights found in other pacts. For example, the language would appear to allow tribunals to grant a foreign investor, upon its request, access to definitions of “indirect expropriation” and “minimum standard of treatment” that are even more expansive and more favorable to investors than those included in the TPP, posing an even greater threat to public interest policymaking.
- **The United States, unlike most other TPP countries, has chosen to subject sovereign debt restructuring to ISDS challenges.** A new annex in the leaked investment chapter seeks to ensure that disputes related to sovereign debt and sovereign debt restructuring are not subject to the full range of investment chapter disciplines (Annex II-G). But a footnote states that the partial safeguards for sovereign debt restructuring “do not apply to Singapore or the United States.” That is, were Singapore or the United States to negotiate a restructuring of its sovereign debt that applied equally to domestic and foreign investors, foreign investors alone would be empowered under the TPP to challenge the non-discriminatory restructuring before an ISDS tribunal, claiming violations of any of the broad substantive foreign investor rights provided by the investment chapter.