Why the TPP is a Threat to Federalism and National, State and Local Self Determination

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After more than six years of secret negotiations the final text of the Trans-Pacific Partnership (TPP) has been released to the public. A multilateral diplomatic vetting process is now underway. The agreement is also headed for a Congressional vote, though no one is certain when that will occur. Despite deep secrecy surrounding the talks, much was already known about the TPP from leaked drafts. Important elements of the agreement raised early concerns among those cognizant of the impacts of earlier comparable trade and investment agreements. Release of the final text has only heightened those concerns. Essential components have changed little, while a number of safeguards under consideration in earlier drafts, intended to provide some protection for labor, public welfare and the environment, were eliminated in the final rush to seal the agreement. We now can fully appreciate the TPP's implications for state and local governance, political and economic sovereignty, and Americans' quality of life.

Unprecedented Scope and Effect

The TPP is by far the most comprehensive multi-lateral trade, investment and regulatory agreement in history as it proposes to the broadest coverage of market activities yet, and addresses the widest scope of government economic policies and activities to date. The agreement is expected to cover 40% of global markets and is likely to magnify impacts already felt under previous bilateral, free trade agreements (FTAs), bilateral investment treaties (BITs), the North American Free Trade Agreement (NAFTA), the first multi-lateral trade and investment agreement, the Central American Free Trade Agreement (CAFTA) and the World Trade Organization (WTO). These predecessor agreements were signed primarily with developing nations that make few investments in the U.S.

The TPP is the first among several huge multilateral investment agreements now in the pipeline. Like the TPP, the others are designed to impose similar rules on member governments and open up national economies to unconstrained commodity and capital flows. Agreements between North America and Europe are expected to reach 60% of the world's markets and cover up to 80% of the economic activity within those markets.

Domestic government mandates to serve and protect citizens and preserve the environment will be subordinated to TPP rules engineered to "harmonize" national economies and facilitate unobstructed flows of goods and capital. An important goal is to ensure a "stable and predictable" global investment environment. This iteration of the TPP is not the end of the line. Designed as a "docking agreement" the TPP permits more Pacific Rim nations to join the Partnership without legislative oversight (Article I, Section 8 of the U.S. constitution mandates legislative oversight regarding international commerce). TPP's expansion into additional markets in the absence of public debate is thereby guaranteed.

With the TPP many domestic public policies will be open to potentially costly challenges by newly empowered foreign investors, should member governments fail to provide---from the viewpoint of those investors—a sufficiently profitable investment platform. The Investor-State Dispute Settlement (ISDS) "tribunal" process built into the agreement establishes a powerful mechanism that enables foreign corporations and investors to seek elimination of or compensation for offending public policies, laws and regulations that interfere with investor "expectations." To the detriment of national sovereignty, thousands of foreign investors will be newly empowered to appeal unfavorable domestic court rulings or bypass domestic courts all together. Domestic investors and businesses will have no standing in TPP tribunals.

State and local governmental activities potentially subject to ISDS arbitration include but are not limited to concessions for natural resource extraction, land use regulations, operation of utilities, government procurement for critical public facilities, infrastructure and services; licenses and permits, labor protections; financial regulation, and policies protecting public health and the environment. The TPP has the potential to compromise the cultural, political, economic and environmental integrity of nations, states, communities and individuals by establishing an exclusive and favorable set of rules for foreign investors plus a supra-national tribunal system to enforce them.

Besides impacts on state and local governance there are a host of reasons to question the TPP. The agreement extends intellectual property[1] and pharmaceutical[2] patent rights, potentially stifling innovation, delaying introduction of generics and maintaining high drug prices over extended time periods. The pact's strong investor provisions encourage off shoring[3] of jobs to cheap, poorly regulated labor markets. Other intellectual property provisions threaten Internet neutrality[4]. And, for the first time, the TPP allows ISDS challenges against regulation and taxation of financial markets.[5] & [6] The potential for adverse impacts arising from deregulated international capital and commodity markets is compounded by weak to non-existent guarantees and protections for citizens[7], workers[8], communities[9] and the environment[10].

Focus on State and Local Impacts

This paper examines the TPP's Investment Chapter (Article 9), the agreement's primary enforcement vehicle. The recently released final text confirms the TPP will function to constrain national, state and local governments' ability to enhance national, state and local economies, construct and maintain public infrastructure, protect public health and the environment, and preserve the autonomy and integrity of nations, regions, states and communities. Harsh new 'international' market rules will be forced upon state and local governments, communities and, undermining public functions and popular public policies. Governments will be prohibited from using tax dollars to preference domestic businesses or facilitate domestic jobs programs. Public health and environmental regulations will be subject to "private enforcement" of the new rules if foreign investors do not want to comply with domestic laws and regulations.

We hope state and local leaders will closely examine the TPP and its potential impacts. If leaders believe as we do that from a state and local perspective significant problems exist with the agreement, we are asking them to send a strong message to our elected federal representatives and insist they oppose congressional ratification.

The following analysis details what we believe to be compelling reasons to challenge the TPP.

The TPP involves much more than trade; it is primarily an all-encompassing investment agreement that carries the potential to change or invalidate a broad range of national, state and local laws, regulations and policies.

The TPP is the largest multilateral investment agreement ever negotiated. Twelve signatory governments circling the Pacific Rim and comprising 40 percent of global economic activity are parties to the agreement (Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Japan, Peru, Singapore, the United States and Vietnam). TPP negotiations lasted for over six years, shrouded in official secrecy, effectively excluding the public and its representatives. On the other hand, over 500 "advisors" from major transnational corporations and investment banks were intimately involved in the negotiations. In 2015 the U.S. Congress ceded much of its constitutional authority over international commerce, enabling the President to "fast track" the TPP on a rushed timeline toward an up-or-down vote. Only limited debate is allowed and *no amendments*. Once enacted, additional Pacific Rim countries can "dock" onto the agreement via executive invitation or petition and without legislative approval

Not Just a Federal Issue

When asked about issues presented by the TPP, some state and local officials respond that international trade is a "federal responsibility," well outside their purview and concern. They might have a point if the TPP confined its attention to traditional trade issues such as tariffs, trade subsidies and quotas. Although the TPP spans over 5,000 pages divided into 30 chapters and numerous country-specific annexes, only six of those chapters deal with traditional trade issues. The remaining twenty-four focus on the putative "rights" of foreign investors with respect to a vast array of domestic economic and governmental activities. It is clear from analysis of the Investment Chapter text the TPP places the rights of foreign investors *above* those of individuals, domestic businesses, state and local governments and communities. TPP proponents claim "improved" safeguards and guarantees are in place to address public concerns. However, it is proponents' responsibility to demonstrate those measures are indeed enforceable and likely to be effective, particularly in light of the extremely poor record[11] of similar safeguards under earlier agreements. Referenced provisions of the Chapter are drawn from the final TPP text[12] and an analysis[13] compiled by Public Citizen.

Foreign investors will be empowered to sue national governments in ISDS tribunals to force modifications of national, state and local laws, regulations and policies or extract unlimited compensation based on investors' expected future profits.

The TPP Investment Chapter (Article 9) specifies[12] the mechanism by which foreign investors will be able to sue signatory governments. Extra-judicial ISDS tribunals exist to protect investors' market access and profits. The tribunals will be empowered to decree that governments at any level modify offending laws, regulations and policies or face sanctions and potentially unlimited compensation payments to investors (Article 9.28). As with similar suits now adjudicated under NAFTA, even when a government wins a suit it can be forced to pay for all or a portion of the tribunal costs and the opponent's legal fees (Article 9.28.3). One can review past cases[14] under NAFTA and other trade agreements, where otherwise sovereign governments have been forced to reverse course and/or absorb enormous compensation claims. As evident in some suits[11] under NAFTA and CAFTA, the prospect of lengthy and costly litigation can have a chilling effect on governments' willingness and ability to protect their citizens and the environment.

For a glimpse of things to come, the 1997 World Trade Organization (WTO) case over the gasoline additive MMT is illustrative. The Canadian Government banned importation of MMT because it posed significant public health and environmental risks[15]. After all, MMT was banned in the U.S. MMT's manufacturer, the U.S.-based Ethyl Corporation, successfully sued Canada in a NAFTA tribunal. The Canadian Government was forced to withdraw[14] the regulation, pay the Ethyl Corporation $13 million plus legal fees and advertise to the Canadian public that MMT is safe. Today, Canada relies on a voluntary system to keep MMT out of gasoline. Such is how public health and environmental might fare under a much more comprehensive and powerful mechanism found in the TPP agreement.

Only Foreign Investors Can Sue Governments and Bypass Courts

Under the TPP, ISDS tribunals will be accessible only to foreign corporations and investors, raising their status well above domestic businesses and equal to that of national governments. Foreign investors will be empowered to sue governments outside of national courts, unconstrained by rights and obligations specified in national constitutions and laws. *State and local government policies and actions will also be subject to investor challenges* (Article 9.2). To repeat, domestic business have no access to ISDS tribunals.

There is no requirement that tribunals be independent or impartial (Article 9, Section B). With the exception of Chile, Peru, Mexico and Vietnam, claims adjudicated in domestic courts will be subject to re-litigation in ISDS tribunals that have the power to overrule domestic court rulings and levy open-ended penalties against national governments (Annex 9-J). To avoid ISDS suits,

national governments will likely pre-empt subnational and local governments, or otherwise enforce restrictions and constraints specified in the agreement or by ISDS rulings.

Due Process Compromised

ISDS tribunals will be staffed by private sector attorneys (Article 9.21.4) who can rotate between roles as "arbitrators" and as advocates for investors. Tribunals will not be subject to public accountability, requirements to follow precedent or adhere to standard judicial ethics rules. Weak standards fail to eliminate potential conflicts of interest among tribunal judges. There are no effective safeguards limiting tribunals' ability to issue ever-expanding interpretations of governments' obligations to investors and to order compensation on that basis. The tribunal business model, in which judges and litigants are compensated hourly, provides an incentive for more expansive rulings that might induce more investor challenges, hence more tribunal business. Even with existing institutions the number of ISDS suits is accelerating. Worse still, there is no appellate mechanism where tribunal decisions can be reviewed on their merits. (Article 9.22.11).

The TPP will constrain how national, state and local governments spend tax dollars, limiting their ability to protect the public, conserve the environment, and provide necessary public goods and services.

The threat of ISDS litigation will shadow a wide variety of public policy and investment decisions. Government initiatives and public investments at all levels, such as 'green jobs' programs, public infrastructure projects, energy conservation programs, creation of municipal utilities, state and local renewable energy initiatives, buy local incentives and transportation infrastructure projects will be vulnerable to ISDS litigation as foreign investors try to land contracts (Article 9.9). Labeling requirements, regulation of industrial activities such as hydraulic fracturing, application of agricultural chemicals and production of genetically modified organisms, along with land use decisions, domestic laws protecting human rights, and policies protecting public health and the environment will be at risk. If deemed to violate ever expanding notions of "minimum standard of treatment" and the closely related concept of "fair and equitable treatment," a country much change the policy or face financial penalties. These two concepts in international trade law have been liberally applied in attempts by investors and corporations to ensure unrestricted flows of foreign goods and capital, and unobstructed opportunities to maximize returns on investments.

Undermining Jobs and Local Preference Programs

The TPP will empower foreign firms to demand compensation from governments for "performance requirements" imposed on domestic and foreign firms alike (Article 9.9). Foreign firms will be able to challenge federal, state and local government preferences that are meant to enhance domestic job creation and business growth. Elimination of preferences will undermine

federal government fiscal policy because federal spending intended to stimulate the domestic economy leave the country instead.

The TPP also undermines[16] the 1933 Buy American Act. This Depression era law requires the federal government purchase American made inputs for the production of government goods like roads and bridges, schools, offices, uniforms, auto fleets, and water projects, thereby recycling tax dollars back into the domestic economy, boosting job creation, expanding small and medium business opportunities and boost household incomes. Four out of five Americans support[17] Buy American preferences because they directly benefits local economies. Although U.S. firms will be able to compete for concessions in overseas procurement markets those are considerably smaller than the vast opportunities in the U.S. American job gains from overseas procurement could be overwhelmed by lost job and business opportunities at home as foreign investors from lower wage countries compete against domestic U.S. producers for procurement contracts.

Threats to Sovereignty and Self-Determination

It is clear from the final text and the agreement's scope the TPP will significantly expand the number of foreign corporations empowered to challenge a vast array of national, state and local policies, laws, regulations and actions. As many analysts, legal scholars, state and local officials and economists have already alluded, years of secret negotiations dominated by transnational corporate interests and devoid of public input have resulted in an agreement that undermines nations' ability to manage their economies, create local business opportunities, and protect communities and the environment. It is imperative that our federal representatives hear from state and local officials now making it clear this "free trade" model is not what Americans need.

The TPP broadens definitions of "investor" and "investment" to cover much more than is allowed under U.S. law.

Perhaps the most unsettling TPP characteristics are its over-reaching definitions of "investor" and investment. The TPP definition of "investor" effectively includes any entity incorporated in a TPP signatory country that "invests" in another signatory country. For example, Chinese corporations with subsidiaries in Vietnam will have standing to sue other TPP members in ISDS tribunals even though China not a TPP signatory. Investors in any signatory country will be able to incorporate or establish subsidiaries in another signatory country and then use those "foreign" subsidiaries to invest back in their countries of origin, with standing to sue in an ISDS tribunal (Article 9.1).

Public Interest Guarantees Weak

The case[18] of Phillip Morris Tobacco Company versus Australia is a classic example of "forum shopping" whereby parties based in countries outside the agreement sue signatory governments. Phillip Morris, a U.S. corporation established a subsidiary in Hong Kong that in turn established a trading subsidiary in Australia in order to sue Australia in an ISDS tribunal under a 1993

bilateral agreement. Phillip Morris opposes Australia's plain packaging law, which intended to reduce tobacco consumption. The cost to the Australian government to defend the law is expected to be $50 million, and much more if Australia loses in the tribunal. Such forum shopping is still possible with the TPP. With or without shopping around, investors will be able to employ ISDS tribunals to attack public health and environmental protections.

While the final TPP text explicitly excludes tobacco firms, though not their host governments, from initiating tobacco suits in ISDS tribunals, the potential for similar attacks against other domestic policies emerges in striking relief. The fact that TPP negotiators were compelled to explicitly "carve out" tobacco from the ISDS process underscores the ineffectiveness of ostensibly built-in public welfare and environmental guarantees so loudly touted by TPP proponents. Given a history of ever expanding ISDS interpretations of investor rights, the increasing frequency with which tribunals are used to challenge public health and environmental policies, the need for a special tobacco "carve out" is indicative of a problematic agreement. Perhaps one should not be too surprised at a product that emerges from years of super-secret negotiations among corporate executives, international investment bankers and various government interlocutors.

Expansive Definition of "Investment"

The TPP likewise adopts a very broad definition of a protected "investment" that crosses well beyond conventional boundaries defined in U.S. law or as in "takings," which falls under the Fifth Amendment:

> [E]very 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 9.1).

Forms that an investment may take include:

> "an enterprise; shares, stock and other forms of equity participation in an enterprise; bonds, debentures, other debt instruments and loans; futures, options and other derivatives; turnkey, construction management, production, concessions, revenue sharing, and similar contracts; intellectual property rights; licences (sic), authorisations (sic), permits and similar rights conferred pursuant to a Party's law, and other tangible or intangible, movable or immovable property, and related property rights such as leases, mortgages, liens and pledges, (Article 9.1).

Investment Agreements

Also captured in the investment definition are so-called "investment agreements" between foreign investors and central governments, further expanding the range of covered activities to include:

> [N]atural resources that a national authority controls, such as oil, natural gas, rare earth minerals, timber, gold, iron ore and other similar resources, including for their exploration, extraction, refining, transportation; distribution or sale" and "to supply services on behalf of the Party for consumption by the general public for: power generation or distribution, water treatment or distribution, telecommunications, or other similar services supplied on behalf of the Party for consumption by the general public; or to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams or pipelines or other similar projects; provided, however, that the infrastructure is not for the exclusive or predominant use and benefit of the government." (Article 9.1, Section A).

While such "investment agreements" formally involve central governments, it is clear from the list of activities falling within the definition, there will be profound state and local implications regarding the agreement's coverage, depending upon the specifics of the covered activities. For example, given the potential for an ISDS suit, will a local community be able to convince the federal government to modify terms of hydraulic fracturing concessions to protect local air, water, landscape and neighborhood values?

The Chapter's final iteration may even extend liability to investments existing *before* the TPP. Recent language effectively permits compensation claims even over failed attempts to make an investment, since an "investor" needs only to take "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" (Article 9.1, Footnote 12). For example, an entity that has been "experimenting" with a new technology then incorporates to bring the technology to market *after* TPP implementation, and with full investor rights.

Indirect Expropriation---Beyond 'Takings'

Under the TPP, foreign investors will be able to bring claims of *"indirect expropriation*" against governments and demand compensation for regulatory costs imposed equitably on all firms if those costs reduce the value of an investment (Article 9.7 and Annex 9-B). This provision goes far beyond the traditional requirement for compensation when a government acquires or directly expropriates the entire investment. Nor is indirect expropriation limited to real property as in "takings" under U.S. law. For example, a foreign investor (though not a domestic counterpart) might launch an ISDS suit if a statewide waste water disposal requirement is imposed on oil and gas drilling operations even though the cost of compliance reduces profitability for *all* operators.

Taken together, these expansive definitions of "investor" and "investment" will enable attacks on a vast array of non-discriminatory domestic policies and government actions. The term "non-discriminatory" refers to laws, regulations and policies that apply equally to domestic and foreign investors. Though domestic investors will have to comply, foreign investors will be able to sue in ISDS tribunals to avoid compliance and even win compensation. For example, suppose a foreign corporation buys a permit to drill for oil and gas. Then suppose a state government imposes more stringent pollution standards thereby reducing the value of these investments for everybody. The foreign company could sue in an ISDS tribunal claiming "indirect expropriation" because the government did not provide the investor a stable and predictable investment environment as was to be expected. Domestic companies must comply with the new standards.

Thousands of corporations, including a vast number of foreign subsidiaries of U.S. firms based in TPP countries, will be newly empowered under the TPP, increasing the likelihood for ISDS suits aimed at overturning U.S. policies, laws and regulations.

Most existing U.S. trade and investment agreements are primarily with developing nations having relatively few investments in the U.S. The TPP will link the U.S. to important *developed* nations, home to much larger numbers of transnational corporations that export significant volumes of foreign direct investment, that also possess the wherewithal to engage in sustained litigation. Nearly 9,300 additional foreign firms will be newly empowered to challenge U.S. policies, laws and regulations at every level of government, nearly doubling U.S exposure to potential ISDS suits. Of the more than 9,500 foreign subsidiaries in the U.S. from countries with U.S. FTAs and BITs, only two, Canada and Singapore, are among the top 20 exporters of foreign direct investment. Other similar agreements are in the works, including the Trans-Atlantic Free Trade Agreement (TAFTA), the Trans-Atlantic Trade and Investment Partnership (TTIP) and the Trade in Services Agreement (TiSA). All are modeled on the same ISDS framework as the TPP. If just the TPP and TAFTA are enacted, 15 of the top 20 exporters of foreign direct investment will be able to sue the U.S. in ISDS tribunals. Together, the four pending agreements carry the potential to increase U.S. exposure to suits by a factor of five[11]. As the rate of ISDS suits has accelerated[14] under existing agreements tribunals have been issuing ever expanding interpretations of investor rights. The TPP will unleash the potential for many more challenges over a wide and expanding variety of issues from many new sources possessing the market power and resources to take on the U.S. government in sustained litigation.

Yes, the United State Has Lost ISDS Suits

Despite often repeated claims by TPP boosters that "the U.S. has never lost an ISDS suit," that claim is only true for NAFTA. The relevant fact is that the U.S. has lost numerous cases under the WTO's similarly constituted though more limited dispute settlement regime. According to

WTO data[19], dozens of challenges have been made against U.S. laws, regulations and policies. The U.S. has lost 90 percent of those, including 100 percent involving public interest laws. Overall, countries sued by investors or other countries have lost 92.7 % of all cases prosecuted under the WTO.

Two important precedent setting WTO rulings against the U.S. are the recent dolphin safe tuna case[20] in which the U.S. was ordered to desist from labeling Mexican tuna imports, and the just concluded 'country of origin' meat import labeling case[21] brought against the U.S. by Canada. The latter case was over public health concerns that sprang up over a case of Mad Cow-Disease in some Canadian cattle. The U.S. was ordered to withdraw the labeling requirement (repeal of the requirement passed as a rider on the 2016 Omnibus Budget Bill). The claim that the U.S. has never lost a NAFTA trade dispute may be true for now, but this somewhat deceptive claim obscures the fact that foreign investors and corporations have successfully prosecuted numerous successful suits against the U.S. and that with the passage of TPP, similar actions against U.S. policies are likely to proliferate.

Forcing Changes in Policies, Laws and Regulations

Once the TPP is ratified, the President and Congress will be tasked with rewriting thousands of federal laws and regulations to meet conditions mandated by the agreement. In order to avoid exposure to ISDS litigation, many state and local laws will have to be rewritten. This system adjustment will seriously erode state and local autonomy, subjecting states, communities and populations to the prerogatives of foreign investors, banks and corporations.

Required conformity to the TPP plus a greatly increased potential for ISDS litigation will likely induce the federal government to restrict state and local government discretion, employ pre-emptive measures against state and local governments, and undermine self-determination over a wide range of public functions and economic activities. Not only are U.S. laws and regulations at all levels be at risk, the financial cost to American taxpayers will rise as foreign investors win open-ended compensation for disappointed expectations. Tax revenues will be siphoned off to pay financial compensation and legal fees rather than go to public purposes. Policies intended to mitigate externalities, such as congestion and pollution arising from new foreign investment, will be subject to challenge. Even new policies to mitigate climate change and move away from fossil fuels will become targets to newly empowered actors affiliates of Exxon, Shell and BP. It's notable, though in the context of this agreement not surprising, that the words "climate change" appear nowhere in the nearly 6,000 page TPP text.

Opportunities to exploit cheap foreign labor will be significantly expanded, inducing capital exports and offshoring American jobs.

The TPP will create vast new opportunities[3] for investors to exploit[22] large low-wage work forces in countries that have few or non-existent labor rights and protections. Some countries, such as TPP signatory, Malaysia, are well known bastions of abusive labor conditions, human trafficking and de facto slavery. Collective bargaining is illegal in Viet Nam where wages are 65 cents an hour. Mexico is well known for its poor labor conditions, which saw scant improvement under NAFTA. Consistent with its NAFTA and CAFTA predecessors, the TPP's expansive notion of investor rights combined with compensation awards for regulatory changes will effectively increase protections and reduce risks for domestic corporations choosing to off shore American jobs to these cheap and abusive labor markets.

Weak Labor Protections

Language in the Labor Chapter contains a variety of convenient loopholes undermining enforcement of several labor provisions. Examples of weak, easily circumvented language include: "[E]ach Party retains the right to exercise reasonable enforcement discretion and to make bona fide decisions with regard to the allocation of enforcement resources," (Article 19.5); signatories "shall discourage" the importation of goods manufactured with child labor (Article 19.6); governments "shall endeavor to encourage" enterprises to adopt "social responsibility initiatives" (Articles 19.7) and they "shall promote public awareness of labor laws" (Article 19.8). The first requirement enables governments to underfund enforcement for "bona fide" reasons. Pinning posters on walls might satisfy the last three requirements. Nowhere are there provisions mandating enforcement of labor rights or prohibitions against abuses such as those enumerated by the International Labor Organization (ILO) Declaration.

Emblematic of the low priority given to the welfare of American workers, as distinct from that given to the profits of foreign investors, is the Obama Administration's recent upgrade of Malaysia's U.S. State Department human rights status[23]. This change was approved despite no evidence of improvement, the presence on Malaysian soil of many well-publicized forced labor operations and the recent discovery of several mass graves[24] in Malaysian migrant trafficking camps. Without that upgrade Malaysia would not have qualified as a U.S. trading partner.

Impacts on Jobs and Wages

Many states and communities are still struggling to recover from the 2007-08 recession. Despite claims by TPP promoters that the agreement will create investment opportunities for U.S. innovators and entrepreneurs, there is ample reason to believe the TPP may hurt more than help local economies. As is well documented with respect to NAFTA and CAFTA, the potential for TPP induced job losses in the U.S. from capital flight and off shoring to low-wage markets is substantial, as is the potential for increased downward pressure on U.S. wages. While the TPP may boost some U.S. exports, the lure of ultra-cheap labor in TPP places such as Vietnam,

Malaysia, Mexico Brunei and Peru, where governments are unable or unwilling to protect or improve conditions for their domestic labor forces, will likely induce offsetting capital flows and create more opportunities to offshore American jobs.

Aside from well documented job losses[25] and trade deficits[26] following the passage of NAFTA, here is a small sampling[27] of things to come should the TPP go into effect. The U.S./Korean Free Trade Agreement (KORUS) was touted by the Obama Administration as a likely export bonanza and major job creator. Far from generating the trade surpluses and 70,000 jobs hyped by the Administration, KORUS raised only $.8 billion in exports, an increase of just 1.8% between 2011 and 2014. Meanwhile, imports from Korea increased by $12.6 billion, or 22.5%. The U.S. trade deficit with Korea grew by $11.8 billion, an increase of 80.4% in just three years. Instead of job gains, KORUS resulted in a net loss of more than 75,000 American jobs, mostly in manufacturing. In other words, one might expect still more "structural" job losses with the usual long term state and local impacts.

Many State and local officials oppose the TPP.

The potential for significant impacts from the TPP has not gone unnoticed by some state and local leaders. The National Conference of State Legislators (NCSL), a bipartisan organization representing all 50 states, issued a statement[28] in 2015 addressed to the U.S. Trade Representative (USTR) regarding ISDS private rights vis-à-vis domestic laws and regulations intended to serve a public purpose:

> NCSL will not support Bilateral Investment Treaties (BITs) or Free Trade Agreements (FTAs) with investment chapters that provide greater substantive or procedural rights to foreign companies than U.S. companies enjoy under the U.S. Constitution. Specifically, NCSL will not support any BIT or FTA that provides for investor/state dispute resolution. NCSL firmly believes that when a state adopts a non-discriminatory law or regulation intended to serve a public purpose, it shall not constitute a violation of an investment agreement or treaty, even if the change in the legal environment thwarts the foreign investors' previous expectations.
>
> NCSL believes that BIT and FTA implementing legislation must include provisions that deny any private action in U.S. courts or before international dispute resolution panels to enforce international trade or investment agreements. Implementing legislation must also include provisions stating that neither the decisions of international dispute resolution panels nor international trade and investment agreements themselves are binding on the states as a matter of U.S. law.

In addition, the NCSL affirms constitutional federalism and opposes the elevation of private rights to the level of sovereign nations:

> NCSL will only support trade agreements that preserve state law and the authority of state legislatures.

> Implementing legislation for trade and investment agreements must also be crafted to include protections for our constitutional system of federalism. Reservations must be made to trade and investment agreements to "grandfather" existing state laws that might otherwise be subject to challenge. NCSL opposes private rights of action in U.S. courts or international dispute resolution panels based on international trade or investment agreements.

And,

> NCSL believes that all international services agreements entered into by the United States must include provisions that preserve the right of federal, state, and local governments to provide and regulate services in the public interest on a non-discriminatory basis.

In a stinging rebuke[29] of the TPP entitled *Don't Let TPP Gut State Laws*, New York Attorney General Eric Schneiderman describes how the ISDS system might play out at the state level in real time.

> To put this in real terms, consider a foreign corporation, located in a country that has signed on to TPP, and which has an investment interest in the Indian Point nuclear power facility in New York's Westchester County. Under TPP, that corporate investor could seek damages from the United States, perhaps hundreds of millions of dollars or more, for actions by the Nuclear Regulatory Commission, the New York State Department of Environmental Conservation, the Westchester Country Board of Legislators or even the local Village Board that lead to a delay in the relicensing or an increase in the operating costs of the facility.
>
> The very threat of having to face such a suit in the uncharted waters of an international tribunal could have a chilling effect on government policymakers and regulators.

Schneidermann further notes that although earlier agreements including NAFTA and a large host of bilateral investment treaties (BIT) contained investor-state provisions, TPP is a different game altogether:

> Proponents of TPP note that similar tribunal constructs have been included in other international trade agreements involving the United States, often in order to encourage and protect our investments in countries with shaky, corrupt or even nonexistent civil justice systems. But more than in past trade agreements, a number of the nations expected to participate in TPP have the resources and legal sophistication to exploit the agreement and turn it against our laws and system of justice.

Several Colorado leaders oppose the TPP.

Thirteen local officials along Colorado's Front Range have acknowledged the potential minefield that lies ahead with passage of the TPP. In a letter[30] recently conveyed to Congressman Jared Polis, these officials who reside in Congressman Polis' congressional district wrote:

> Current provisions under the TPP would give foreign companies the right to challenge local environmental standards and laws. This so-called Investor State Dispute Resolution was first introduced under the North American Free Trade Agreement. Ever since, the right of foreign companies to challenge local governments has been a hallmark of U.S. trade policy. Foreign companies that have "invested" in a trading partner's country can challenge national, state or local laws or regulations at an international tribunal by alleging the law or regulation takes away its ability to earn expected profits. The company can seek monetary damages for rules that purportedly infringe on profits.
>
> The threat of this type of lawsuit is very real. In 2012, Quebec placed a moratorium on hydraulic fracturing, or fracking, to study the effects on the St. Lawrence River. In response, 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.

The thirteen signatories include Fort Collins City Councilmen Bob Overbeck and Ross Cunniff, Boulder County Commissioners Elise Jones, Deb Gardner and Cindy Domenico, Longmont City Councilwoman Polly Christensen, RTD Director from District 1 Judy Lubow and Boulder City Councilmembers Lisa Morzel, Mary Young, Suzanne Jones, Sam Weaver and former Boulder Councilmembers Macon Cowles and Tim Plass.

Additionally, Colorado House Majority Leader Dicky Lee Hullinghorst and State Senator John Kefalas have expressed strong opposition to the TPP.

Americans overwhelmingly oppose trade deals that export jobs and damage local economies.

Though the mainstream media has done its best to downplay or ignore the TPP, particularly the more pernicious characteristics, a significant majority of Americans are anything but sanguine about its likely impacts. Damage done to jobs and communities by agreements like the WTO, NAFTA CAFTA, and more recently, KORUS are etched into Americans' collective memory.

A June 2015 *New York Times/CBS News* poll[31] reports that 63 percent of the U.S. public believes that "trade restrictions are necessary to protect domestic industries" while only 30 percent think "free trade must be allowed, even if domestic industries are hurt by foreign competition." Democrats, Republicans and Independents overwhelmingly support protection of domestic businesses over "free trade" at any cost. A recent Ipsos poll[32] found that 84 percent of the U.S. public believes that "protecting American manufacturing jobs" is more important than "getting Americans access to more products."

These findings are relevant to the TPP, which protects firms that offshore[22] U.S. jobs to countries such as Vietnam, where minimum wages average less than 70 cents an hour. A May 2015 poll

by the Pew Research Center confirmed[33] dominant public opinion is that so-called 'free trade' has hurt Americans. And, a June 2015 *NBC News / Wall Street Journal* poll[34] confirmed that sentiment when it found a plurality of the U.S. public believes that free trade has hurt the United States. Public Citizen provides a large compilation[35] of polls that demonstrate the American public's strong, cross-partisan, cross-regional opposition to TPP-like trade agreements and the resulting impacts.

More recently, over a million petitions opposing the TPP were delivered to Congress decrying the Agreement's clear threat to American workers, the rule of law, national sovereignty and the environment.

Legal scholars call ISDS tribunals a threat to democracy.

Not just the public is concerned about the TPP. More than 100 legal scholars from around the U.S. reviewed the leaked TPP text and came away quite wary of the potential impact of ISDS tribunals. In a letter[36] to Congress, the Alliance for Justice took issue with ISDS litigation *outside and in place of* the domestic judicial system:

> 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.
>
> ISDS grants foreign corporations a special legal privilege, the right to initiate dispute settlement proceedings against a government for actions that allegedly cause a loss of profit for the corporation. Essentially, corporations use ISDS to challenge government policies, actions, or decisions that they allege reduce the value of their investments. These challenges are not heard in a normal court but instead before a tribunal of private lawyers.
>
> This practice threatens domestic sovereignty and weakens the rule of law by giving corporations special legal rights, allowing them to ignore domestic courts, and subjecting the United States to extrajudicial private arbitration. Corporations are able to re-litigate cases they have already lost in domestic courts. Further, they are able to do so in a private system lacking procedural protections. As more multi-national corporations are based outside of the U.S., more such challenges will be brought against the U.S.

The U.S. Trade Representative and TPP supporters so far dismiss public concerns about the TPP and the ISDS process as ill-informed and overblown. The USTR claims the U.S. has not lost a trade dispute, a claim we know to be inaccurate. Others assert the ISDS process is no big deal because the U.S. has a quality judicial system. Clearly, if foreign investors can bypass a nation's judicial system, the relevance of that system, regardless of its "quality," is fatally compromised.

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