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Why Fast Track Is a Dangerous Gift to Corporate Lobbies

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THE HUFFINGTON POST



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Why Fast Track Is a Dangerous Gift to Corporate Lobbies

Posted: 05/19/2015

This post was co-authored with Lise Johnson, head of investment law and policy at the [Columbia Center on Sustainable Investment](#) and Lisa Sachs, director of the Columbia Center on Sustainable Investment.

The Obama Administration is now on track to get "fast track" legislation through the Senate, heading towards a close vote in the House. The end goal is to conclude two major business treaties: the Trans-Atlantic Trade and Investment Partnership Agreement (TTIP) and the Trans-Pacific Partnership Agreement (TPP). The House Democrats are right to withhold their support until key treaty positions favored by the White House are dropped.

One of the key reasons to fight fast track is the Administration's insistence on including Investor-State Dispute Settlement (ISDS) in the two draft treaties. ISDS is a dangerous policy that undermines the case for TPP and TTIP. The ISDS framework is an unjustified grant of exceptional power to multinational companies above and beyond the legal system in which the companies operate.

ISDS allows foreign companies and individuals to sue their "host-country" governments through ad hoc arbitration proceedings rather than through normal administrative and judicial channels in the country. Through this mechanism, foreign investors can challenge domestic laws, regulations, court decisions (including Supreme Court decisions) and other domestic actions in front of party-appointed tribunals, and governments can be ordered to pay the investor millions or even billions of dollars. When governments lose, they have little recourse to challenge the decision, even if the tribunal erred on matters of fact or law.

ISDS's main supporters--basically trade associations, law firms, and some powerful companies--say that ISDS is nothing new, that it has been included in many hundreds of investment treaties over the past several decades. Indeed, it has been, but companies (and their lawyers) have only become aware of it relatively recently. In 1995, only a handful of

ISDS cases had been filed; as of the end of 2014, there had been [more than 600 known claims](#) (since most arbitration can be conducted in secrecy, there may have been many more claims).

The alarming evidence from recent cases shows that investors are using ISDS to contest a virtually unlimited range of government actions including tobacco regulation, measures relating to taxation, environmental regulation, water and electricity tariffs, health insurance regulation, and health and safety restrictions on pharmaceutical imports, among others.

Under normal law, companies and individuals indeed can and do sue host governments regarding various government actions. Yet those lawsuits operate in a legal framework that evolves over time to balance the need to protect investors' economic interests with the government's need to regulate investors and their activities for the safety, health, security, and social interests of other parties. In the US and in many other countries, that balance is reflected in complex and detailed substantive and procedural rules governing who can bring claims against the government, under what circumstances, through what processes, for what types of harms, and for what remedies.

Under ISDS, none of those rules apply. Accordingly, investors can bring cases that they either couldn't have brought or wouldn't have won in domestic courts, and obtain remedies that wouldn't have been available under domestic law.

Many countries in Europe and elsewhere are aghast at the end-run around domestic legal systems, rightly worrying that multinational companies will begin to ride roughshod over labor, environmental, financial and other regulations. These fears are well placed. Many big international businesses are aggressive and operate with impunity. If they can challenge regulations that they don't like, they are sure to try. They treat ISDS claims as corporate lobbying 2.0, a new, powerful way to challenge government action.

Rather than further entrenching ISDS through TPP and TTIP, the opponents of ISDS are absolutely right to call on the US (and other governments) to remove this provision from these draft agreements. As an alternative to ISDS, the governments could agree on state-to-state consultation and dispute settlement mechanisms like those commonly used to settle *trade* disputes under international treaties.

To the extent that US investors cannot get efficient or fair relief in their host countries, the US should be helping those governments to strengthen their domestic legal frameworks so that they are capable of developing and enforcing laws that protect *and* regulate business activities. Not only will such efforts help to improve dispute settlement between investors and states, it will also enable foreign investors to enjoy greater legal security when dealing with consumers, suppliers, and competitors, and will more broadly improve the investment climate of the host country.

ISDS is just one of the gifts to big business hidden in the draft TPP and TTIP agreements. These are treaties written behind closed doors by the lobbyists, for business interests, not for the public's interest. Fast track is a way to jam these lousy provisions down the public's throat, without a proper public airing of the issues. Other dangers include further empowerment of international drug companies to strengthen their patent claims, thereby continuing to gouge consumers with sky-high prices.

President Obama and the Republican Senators know what they are doing. They are handing gifts to the business lobbies out of sight of the American people, and attacking the opponents of fast track as anti-trade or ignorant, when in fact the opponents are merely pro-public interest. If the President and the Republicans believe these draft agreements are so good, and therefore merit fast track, let them make the agreements public, so that the public could say a resounding NO to ISDS and other threats to the common interest hidden within the draft agreements.