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TAFTA: Context of the Transatlantic Free Trade Agreement Negotiations

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“Transatlantic Trade and Investment Partnership” = **TAFTA**, a Longstanding Project of Large U.S. & EU Corporations

- Many EU consumer, enviro, labor standards better than in U.S. Opportunity for new 21st Century commercial agt. model aimed at raising standards. Huge amount of trade. investment between U.S.- EU. So, rules for this relationship have enormous impact in U.S. and EU – *and globally*. Indeed, U.S. and EU officials say a goal is to set new global norms.
- **2/11/13: Final Report of the U.S.-EU High Level Working Group on Jobs and Growth announces decision to launch, agenda similar to past U.S. FTAs.** <http://www.ustr.gov/sites/default/files/02132013%20FINAL%20HLWG%20REPORT.pdf>
- **Disappointing, but context: TAFTA is longstanding project of Trans-Atlantic Business Dialogue (TABD) recently renamed Transatlantic Business Council (TBC).** TABD convened in 1995 by U.S. Dept. of Commerce & Euro Commission as official dialogue between U.S.-EU business leaders & U.S. cabinet secs & EU commissioners
 - TABD goal: elimination of “**trade irritants**” & “**regulatory convergence**”
 - Some TBC members: Accenture, AIG, AT&T, Audi AG, BASF, BDO, British American Tobacco, British Petroleum, BT, Cisco Systems, Deloitte, Deutsche Bank, Ernst & Young, Experian, Ford Motor Co., GE, Grant Thornton, IBM, Intel,, Johnson Controls, Johnson & Johnson, KPMG, Lilly, Merck & Co., Microsoft, Oracle, Pfizer, Philips Electronics, Phillip Morris Intl., Qualcomm, SAP, Siemens, Statoil, Texas Instruments, Thyssen Krupp, TOTAL, Verisign, Verizon, Xerox
- Consumer groups question notion of homogenized standards given differences reflect different goals/values and democratic governance. But if so, floor, not ceiling (TACD)

Focus of TAFTA Negotiations: Environmental, Consumer Safeguards Targeted for Elimination, Lowering?

U.S.-EU tariffs rates already low. Negotiation will focus on "*regulatory issues and non-tariff trade barriers*". For preview of likely TAFTA agenda, see TPP (Trans-Pacific Partnership): 29 chaps, 5 cover traditional trade matters. Rest are "behind the border" regulatory issues.

TAFTA Code Word Key

- **"Behind the border"**
Non-tariff policies under the jurisdiction of nation, state legislatures and regulatory agencies – from product standards to Buy America procurement rules.
- **"Trade Irritant" see also "non-tariff barrier"**
Domestic policies that affect U.S. or EU business access to the other market.
 - Elements of U.S. financial reregulation, such as Volcker Rule
 - U.S. system of state-by-state insurance regulation
 - Food: EU bans on ractopamine and chlorine rinses; EU GMO labeling/ segregation; EU ban on artificial beef growth hormone
 - EU chemical policy REACH
 - Aspects of EU climate directive
 - EU consumer privacy protections, "safe harbors" policy
- **"Legacy issue"** Trade irritants that have not been settled, see above...
- **"Mutual Recognition"** Accepting goods, services meeting others' laws, not yours.

“Trade” Agreements become delivery mechanisms for package of non-trade policies

- **Cut, weaken or “harmonize” to global norms food, product, other standards. Aka our consumer & environmental safeguards inspection, labeling rules.** Mutual Recognition /Free Passage, International Standards, Equivalence, Regulatory Convergence, **Ceilings, with no floor.** **Precautionary principle-based standards not allowed**
- **Privatize, deregulate services (including deregulation of financial services)**
In U.S. issue is deregulation. Among sectors covered: , banking, securities, insurance, transportation, services incidental to energy, hospitals, education. **Market Access in services = certain forms of service-sector regulation simply forbidden** unless an exception is taken even if domestic and foreign services and firms treated the same: regulatory bans, needs-testing, size limits. EU pushing new disciplines on non-market access domestic regulation re. licensing, technical standards and professional qualifications and a “necessary” test.
- **Financial liberalization**
No speculation taxes, capital controls or other limits on free flows of capital
- **New foreign investor privileges**
 - Pre-establishment market access: no conditions/approvals of foreign acquisitions
 - Compensation for “regulatory takings”
 - Guaranteed minimum standard of treatment (regulatory freeze).
 - Private corporations/investor elevated to equal status with signatory government to privately enforce new rights via suits before international tribunals of private-sector lawyers empowered to order governments to pay unlimited compensation to investors.
- **Extensive intellectual property rights**
Extended copyright protections – **backdoor ACTA for EU.** 20 year monopoly patents covering wide range of subject matter: drugs/testing data, climate/energy technologies. Signatories required to put **CRIMINAL** sanctions for TRIPS/FTA IP violations in their domestic law to be in compliance with pacts.
- **Gov’t procurement : Ban of “buy local” preferences. Labor, green specs limited**
- **Free Movement of data (privacy issues)**

The Hijacking of U.S. “Trade” Agreements...

WWII-1990s: Bretton Woods” Era



(early 1990s to present day)

Corporate Globalization Era

WTO
(binding dispute settlement)

NAFTA, CAFTA, "Free Trade" Agreements

GATT

GATS

services deregulation, privatization

SPS

limits on food safety, invasive species protection

TBT

limits on environmental, consumer safety, workers' safety standards

TRIPS

intellectual property: 20-year patent terms, trademarks, copyrights

TRIMS

investment: forbids development tools used to regulate investment

AGP

government procurement: forbids recycled-content, sweat-free, other standards

AOA

eliminates quotas (supply management); allows subsidies

It's not really about "trade", but a system of enforceable global governance that is not designed for modification by those who will live the results

What is different with TAFTA (and TPP) is the extent of "behind the border" agenda

- **Typical boilerplate: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."** –Art. XVI-4, Agt. Establishing the WTO (Annexed agreement refers to 16 major "Uruguay Round" agts. only a minority of focus on trade per se.)
- **These rules are enforced by binding dispute resolution via foreign tribunals with ruling enforced by trade indefinite sanctions; No due process; No outside appeal.** Countries must gut laws ruled against. Trade sanctions imposed. In FTAs, including planned for TAFTA also private investor enforcement - U.S. taxpayers must compensate foreign corporations.
- **Permanence – no changes w/o consensus of all signatory countries. So, no room for progress, responses to emerging problems**
- **Starkly different from past of international trade between countries. This is diplomatic legislating of behind the border policies – but with trade negotiators not legislators or those who will live with results making the decisions.**

TAFTA Inclusion of “Investor-State Dispute Resolution” Reveals Proposed Pact’s Corporate Rights Agenda

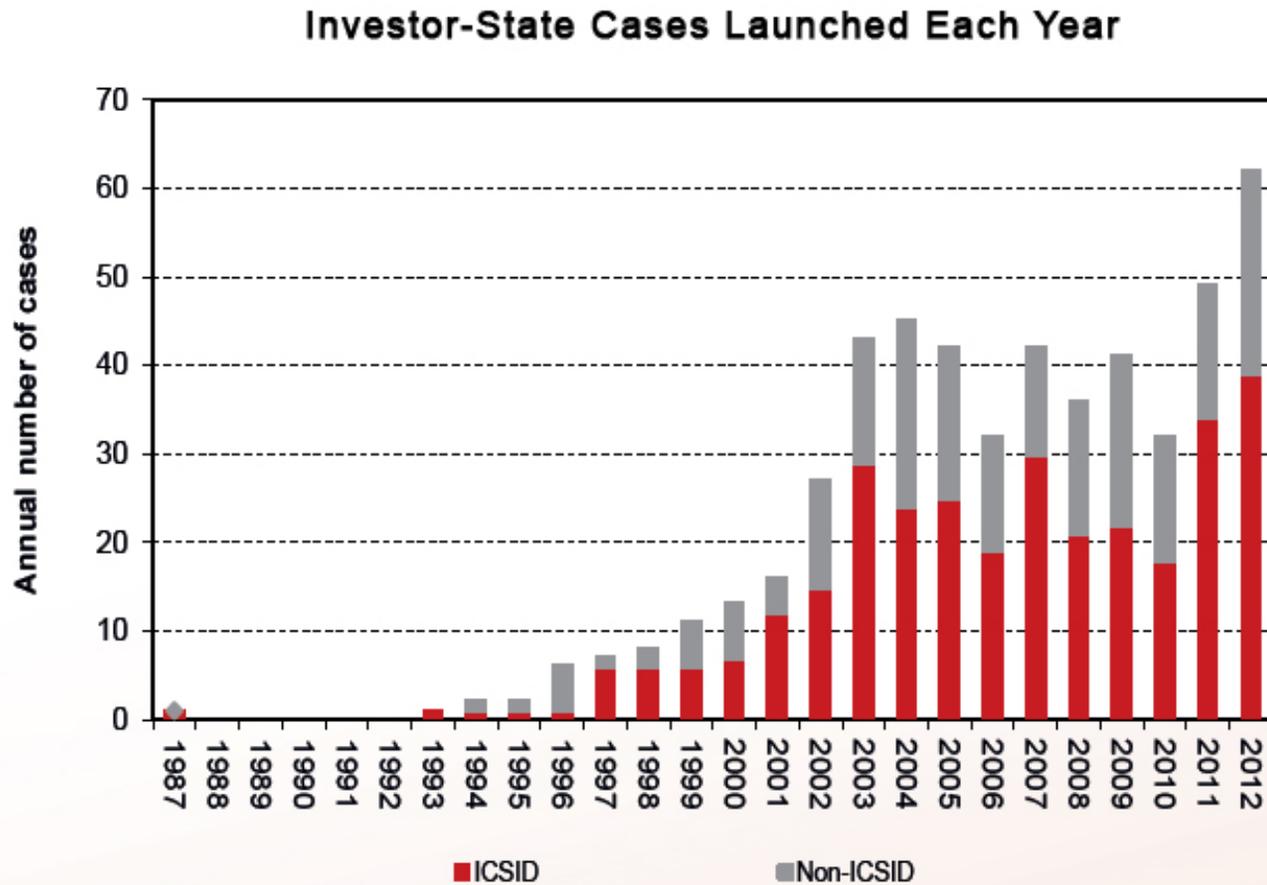
ISDR ostensibly established to provide foreign investors venue to obtain compensation when factory/ land expropriated by a gov’t without reliable domestic court system. *So, why is it in US-EU FTA? Is it US or EU property rights policies or domestic court systems that are a problem?*

- Individual foreign corporations elevated to level of sovereign government: empowered to skirt domestic laws/courts and privately enforce the terms of a public treaty by directly challenging gov’ts’ policies before foreign tribunals to demand taxpayer compensation.
- Foreign investors given greater rights, privileges above domestic law /firms. Compensation for regulatory costs/policy changes (Vattenfall, Phillip Morris, Eli Lilly, Exxon, etc.)
- US and EU countries submitted to jurisdiction of investment arbitration tribunals operating under rules of World Bank’s ICSID (Int’l Centre for Settlement of Investment Disputes) and or UN’s UNCITRAL (UN Commission on Int’l Trade Law) for investor-state enforcement.
- 3 private sector attorneys, unaccountable to any electorate, many of whom rotate between being “judges” & bringing cases for corps. against govts. (*See Profiting from Injustice <http://corporateeurope.org/publications/profitting-from-injustice>*) Creates inherent conflicts of interest.
- Unlike domestic judges, tribunalists paid by hour . Gov’ts usually ordered by tribunal to pay for share of tribunal costs, even if case dismissed. Costs chill govt action. Filing alone is serious threat: Average cost is \$8M, 1 case now underway legal costs to govt \$50M-plus
- When investor wins, gov’t must pay amount of taxpayer money decided by the tribunal as compensation for the offending policy. ISDR challenges launched against wide array of consumer, health and safety policies, environmental and land-use laws, regulatory permits, financial regs & other public interest polices that investors allege undermine “expected future profits.”

Investor-State Dispute Resolution (ISDR) Tribunals—part 2

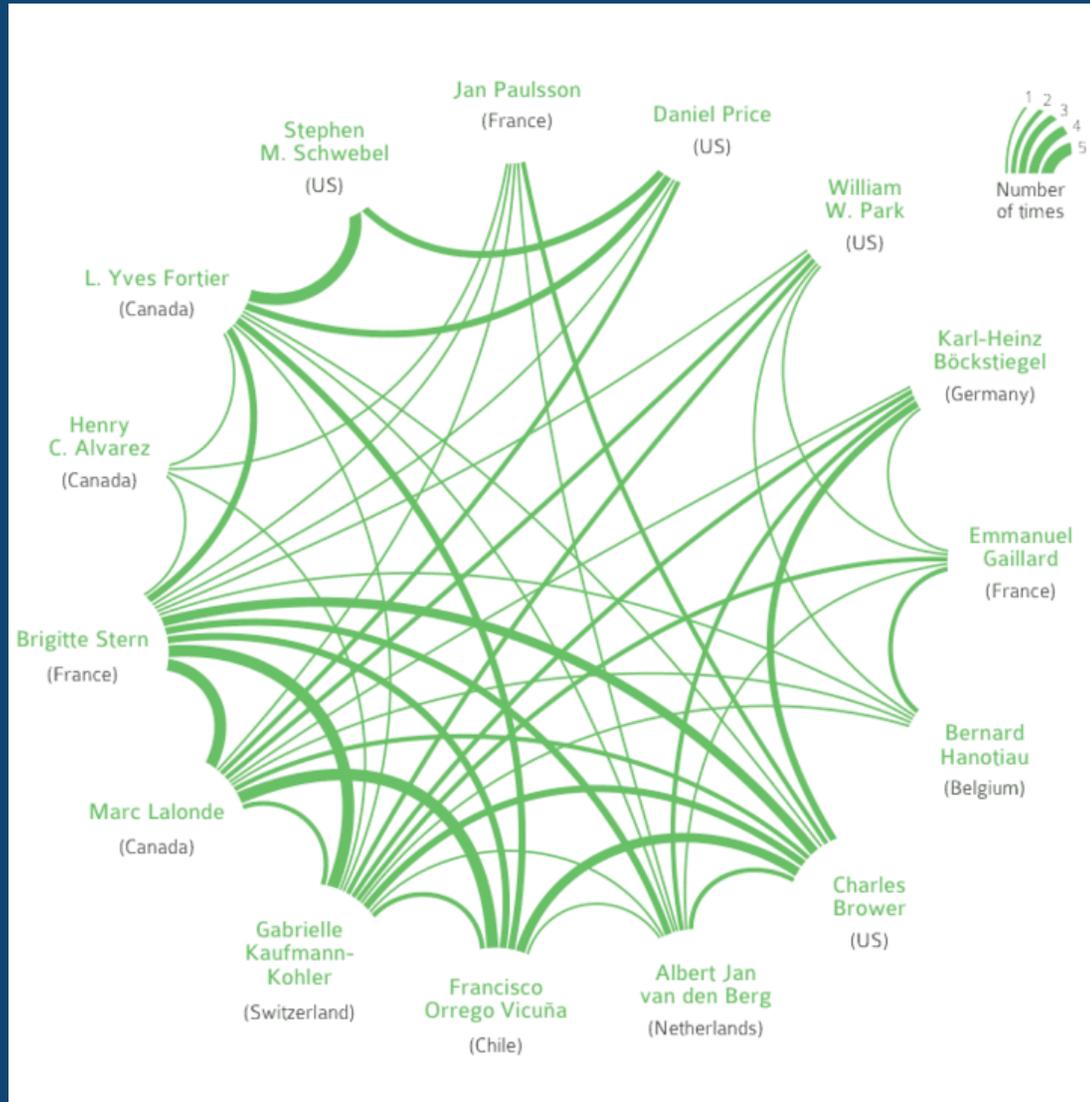
- Tribunals operate behind closed doors - lack basic due process
- Absolute tribunal discretion to set damages, compound interest, allocate costs
 - No limit to amount of money tribunals can order govts to pay corps/investors
 - Compound interest starting date if violation new norm (compound interest ordered by tribunal doubles Occidental v. Ecuador \$1.7B award to \$3B plus
- **Rulings not bound by precedent. No outside appeal. Annulment for limited errors.**
- The number of ISDR cases has soared over last decade. Last year cumulative number of launched investor-state cases was nine times cumulative investor-state caseload in 2000, even though treaties with investor-state provisions have existed since the 1950s.
- ISDR has birthed an entire industry of specialized lawyers and tribunalists (many serving both roles) and specialized equity funds that finance what is lucrative business of raiding government treasuries.
- **Nationality-shopping: Philip Morris International plain packaging cases eg.**
 - PMI moved head office of Oz subsidiary to Hong Kong shortly before it ISDR attacked Oz under HK-Oz Bilateral Investment Treaty (BIT); Claimed to be Swiss-based firm to launch ISDR attack against Uruguay under Uruguay-Swiss BIT; Described itself as a US firm in 2010 USTR submission pro-ISDR in the TPP.
- Under U.S. FTAs/BITs, investors have already pocketed over \$3B in taxpayer money via ISDR cases, while more than \$15B remains in pending claims. More info: “Table of Foreign Investor-State Cases and Claims under NAFTA and Other U.S. Trade Deals,” Public Citizen memo, June 2012. Available at: <http://www.citizen.org/documents/investor-state-chart.pdf>

Epidemic of Investor-State Attacks on Domestic Regulatory Policy



Source: UNCTAD

15 arbitrators alone have captured the decision-making in 55% of the total investor-state cases known today



Source: *Profiting from Injustice* <http://corporateurope.org/publications/profitting-from-injustice>

Some NAFTA, CAFTA, FTA Environmental Cases

INVESTOR WINS AT TRIBUNAL, IS PAID

- **Exxon-Mobil/ Murphy Oil v. Canada:** non-discriminatory provincial extractive industry R&D fee = performance requirement
- **Metalclad v. Mexico:** toxic waste treatment facility, state-level zoning, permits = regulatory takings violation
- **S.D. Myers v. Canada:** MEA enforcement. Federal-level Basel Convention enforcement/PCB toxic trade ban = discrimination, MST violation
- **Pope & Talbot v. Canada:** timber policy – grumpy provincial gov't official = MST violation

INVESTOR PAID IN SETTLEMENT - CHILLING

- **Ethyl v. Canada:** Canada reverses nation-wide chemical ban, corp. paid \$13 M for lost profits while ban was in effect – US states ban same chemical, MMT a gasoline additive
- **Abitibi-Bowater v. Canada:** Water and timber rights. Firm closes, lays off employees. Canadian province withdraws timber, water concessions that were conditioned on continued operation/use. National government settles case – corp. paid \$122 million

USE OF ISDR FOR LOBBYING, THREAT TO OBTAIN REGULATORY ACTION, INACTION

- **Renco v. Peru:** REOPENING POLLUTING SMELTER - filing used to leverage new permit grant
- **Pac Rim v. El Salvador:** MINING - years of ISDR in very politicized case stall out passage of ban on mineral mining; tribunal voids CAFTA claim, continues same claims based on domestic law
- **Commerce Group v. El Salv.** MINING - years of ISDR stall out passage of ban on mineral mining; tribunal voids CAFTA claim, corp. allowed to file annulment year after deadline ran out

Also, Chevron Ecuador Amazon contamination case under Bilateral Investment Treaty...

U.S. LOSES, DODGES PAYMENT

- **Loewen v. U.S.:** U.S. civil court judgment considered covered gov't action in contract fight of 2 private firms. Canadian firm reorganized as US corp., loses foreign status b4 collecting

He who writes the rules, rules...

Secretive process, with those who will live with the results denied access to draft agreement texts.

U.S. trade advisory system empowers 600 corporate advisors to set U.S. agenda, have access to negotiating texts, negotiators.

Negotiations conducted by USTR, which sees it “constituency” as U.S. industry seeking access, rights in other countries.

“Fast Track” negotiation & approval system delegates away Congress’ constitutional authority over trade policy. Established in 1970s when agreements were mainly about traditional trade matters. Alarming mismatch between current scope and process

Current focus of TAFTA project is on facilitating U.S and EU corporate demands, not on meeting human needs for strong food or product safety or environmental protections; access to essential services and medicines; financial stability; privacy; Internet freedom. Indeed, some rules explicitly constrain governments’ policy space to meet such goals.

Sales pitch is that behind-the-border deregulation/regulatory “convergence” creates gains premised on ‘efficiencies’ obtained from eliminating regulatory differences. If this is premise for why this is a good deal for us, needs to be proved that elimination of regulatory difference equals efficiency gains shared widely versus only bottom-line enhancing...

Claimed Gains from TAFTA?

PREMISE - REGULATORY CONVERGENCE = EFFICIENCY GAIN. Based on anti-regulatory notion of economic gains from deregulation.

- **USTR TAFTA assessment: USITC should assume removal of all NTBs - silly**
- **ECORYS Nederland BV study for EC:** "...Unlikely that all areas of regulatory divergence identified can actually be addressed...would require constitutional changes... lack of sufficient economic benefit to support the effort; set of regulations is too broad... consumer preferences, language and geography... Political sensitivities." ...at most, 50% of all NTMs are within the realm of possibility to be "aligned or even dismantled," while acknowledging that it would be more "realistic" to expect 25 percent of NTMs to be eliminated or "converged" under a U.S.-EU deal. **No consideration of downside costs on consumers, workers, environment. No risk-adjusted estimates of economic costs alongside estimated gains. I.e. not net impact.** Uses gravity regressions, computable general equilibrium model to project relatively small economic gains from convergence/elimination of NTMs. Approach riddled w/ assumptions that could totally skew results (UNCTAD study "Non-Tariff Barriers in Computable General Equilibrium Modeling." Change in assumptions not only changed magnitude of effects, but changed direction of effects—from positive to negative.)
- **Empirical evidence on the efficiency impacts of NTM convergence or removal? Some studies indeed indicate that regulatory convergence within the EU has yielded little or no significant efficiency gains** (eg. Barbara Casu and Philip Molyneux, "A Comparative Study of Efficiency in European Banking," *Applied Economics*, 35: 17, Nov. 2003. Available at: <http://fic.wharton.upenn.edu/fic/papers/00/0017.pdf>.)

Why now? Premise that EU is so desperate for "growth" that critical regulatory policies will be traded away for "growth" **But, what gains?**