TAFTA: Empowering Corporations to Bypass Domestic Courts and Attack Consumer and Environmental Safeguards before Extrajudicial Tribunals

The safety standards on which we rely daily for our food, medicines and cars. The energy and climate policies needed to save our planet. The new financial regulations designed to prevent banks from gambling with our money and creating another crisis. These are policies that should be determined in open, democratic venues where we have a say. But a group of the largest U.S. and European corporations want to rewrite these safeguards behind closed doors. For over a decade, they have pushed for a new U.S. "trade" deal with Europe – the Trans-Atlantic Free Trade Agreement (TAFTA), which corporate proponents have tried to rebrand as the Transatlantic Trade and Investment Partnership (TTIP) – a deal that would roll back consumer protections on both sides of the Atlantic. European Union (EU) and U.S. negotiators launched TAFTA negotiations in July 2013 and plan to finish the sweeping deal by 2014.

A "trade" deal only in name, TAFTA would require the United States and EU to conform domestic financial laws and regulations, climate policies, food and product safety standards, data privacy protections and other non-trade policies to TAFTA rules. This could include obligations for products and services that do not meet domestic standards to be allowed under processes called "equivalence" and "mutual recognition," or obligations to actually alter domestic U.S. and EU policies to conform to existing international standards or to new trans-Atlantic standards negotiated to be more convenient to business. These constraints on policy space would be binding. Failure to comply with TAFTA rules could result in trade sanctions. But it gets worse.

Empowering Foreign Corporations to Directly Attack Public Protections

U.S. and EU officials have also called for TAFTA to grant foreign firms the power to directly attack domestic health, financial, environmental and other public interest policies that they view as undermining new foreign investor privileges and rights that TAFTA would establish. TAFTA could empower individual foreign corporations to drag the U.S. and EU governments before extrajudicial tribunals, comprised of three private attorneys, that would be authorized to order unlimited taxpayer compensation for domestic policies or government actions perceived as undermining firms' "expected future profits." This extreme "investor-state" system already has been included in U.S. "free trade" agreements, forcing taxpayers to pay firms more than $400 million for toxics bans, land-use rules, regulatory permits, and water and timber policies. Just under U.S. pacts, more than $14 billion remains pending in corporate claims against medicine patent policies, pollution cleanup requirements, climate and energy laws, and other public interest polices.

TAFTA could vastly expand the investor-state threat, given the thousands of corporations doing business in both the United States and EU that would be newly empowered to attack standards and safeguards. More than 3,300 EU parent corporations own more than 24,200 subsidiaries in the United States, any one of which could provide the basis for an investor-state claim. This exposure to investor-state attacks far exceeds that associated with all other U.S. "free trade" agreement partners. Similarly, the EU could be exposed to a potential wave of investor-state cases from any of the more than 14,400 U.S.-based corporations that own more than 50,800 subsidiaries in the EU. In sum, TAFTA could newly enable corporate attacks on behalf of any of the U.S. and EU's 75,000 cross-registered firms.

The EU is proposing for TAFTA an even more radical version of investor privileges than that found in past U.S. pacts. But even if TAFTA would simply replicate the sweeping terms of past agreements, thousands of corporations would gain a new tool to undermine the policies on which we all rely. Consider these extreme features:

- **Massive expansion of corporate power:** The "investor-state" dispute settlement mechanism elevates foreign corporations to the level of sovereign governments, uniquely empowering them to skirt domestic laws and courts and privately enforce the terms of a public treaty by directly challenging governments' public interest policies before foreign tribunals. That this regime would even be included in a U.S.-EU pact reveals that its aim is not investor protection, but corporate empowerment. The investor-state system was ostensibly established to ensure that foreign investors operating in countries without reliable domestic court systems could obtain compensation if their factories, mines or land were expropriated. The United States and EU have among the world's strongest domestic court systems and property rights protections. Inclusion of the regime in TAFTA would only provide corporations a new means to attack domestic policies deemed permissible by domestic courts.

- **Three corporate lawyers as "judges":** The tribunals authorized to rule against government policies are comprised of three private sector attorneys, unaccountable to any electorate. Many of the tribunalists rotate between serving as "judges" and bringing cases for corporations against governments. In the small "club" of international investment tribunalists, there are 15 lawyers who have been involved in 55 percent of the total investment-state cases known to date. There is no appeal mechanism for their decisions.

- **Corporate right to avoid new regulation:** Under this system, corporations can challenge policies or government actions that they allege as violating special substantive new investor "rights" that TAFTA would grant. These "rights" are phrased in vague, broad language and tribunals have increasingly interpreted them to be far more expansive than those afforded to domestic firms under domestic laws. This has included the "right" to a regulatory framework that conforms to a corporation's "expectations" – meaning that governments should make no changes to regulatory policies once a foreign investment has been established. Another right is to obtain compensation for "indirect expropriation" – meaning governments must pay if a regulatory policy diminishes the value of an investment even if such a policy applies equally to domestic and foreign firms. Investors have no obligations to governments. Investors decide if and when to initiate cases.

- **Wide array of policies attacked:** Foreign investors have used these broad privileges to demand taxpayer compensation for consumer health and safety policies, environmental and land-use laws, government procurement decisions, energy and climate policies, water and mining laws, financial regulations and other non-trade domestic policies applied equally to foreign and domestic firms. For example, Egypt's minimum-wage increase and a Peruvian anti-toxic emissions policy are now being attacked by EU and U.S. corporations, respectively, under deals enshrining investor privileges. And U.S. tobacco behemoth Philip Morris has launched investor-state cases against progressive anti-smoking laws in Uruguay and Australia, after failing to undermine the health laws in domestic courts. U.S. pharmaceutical corporation Eli Lilly has mounted an investor-state attack against Canada's ability to set its own patent standards, a prerogative that is essential to ensuring access to affordable medicines. And Swedish energy firm Vattenfall has used the investor-state regime to demand billions in compensation from Germany over its coal-fired electricity plant regulations and its phase-out of nuclear energy.

- **Billions in taxpayer compensation:** There is no limit to the amount of money a tribunal can order a government to pay a foreign corporation. In one recent case, a tribunal ordered Ecuador to pay over $2 billion to an oil firm. Even when governments win, they often must pay for the tribunal's costs and legal fees, which average $8 million per case, wasting scarce resources to defend public interest policies against corporate challenges.

- **Surge of corporate attacks:** The annual number of new investor-state cases has more than doubled over the last ten years, with UNCTAD reporting a tenfold increase in the cumulative number of cases since 2000 (despite the fact that the system has existed since the 1950s). More cases were launched in 2012 than ever before. An entire industry of third-party financing and specialized law firms has sprung up to raid public treasuries via investor-state cases.

Multinational corporations that have profited most from this extreme system, such as Chevron, are those most loudly calling for its expansion via TAFTA. Chevron has been using an investor-state case in attempt to evade justice after 18 years of losing litigation in U.S. and Ecuadorian courts. Chevron now faces an $18 billion judgment in Ecuadorian courts in a case brought by indigenous communities suffering from the dumping of billions of gallons of toxic sludge in a wide swath of Ecuador's Amazonian region. In response, Chevron launched an investor-state counterattack and asked a three-person tribunal to help halt the ruling. The tribunal obliged, ordering Ecuador's government to defy its own constitution and interfere with the independent judiciary to block enforcement of the $18 billion order to clean up the egregious damage. In an initial ruling in the case, the tribunal simply ignored U.S. and Ecuadorian courts' determination on the merits of the claim, declaring that some of the indigenous communities' rights to pursue the case "no longer exist." In its formal comments on TAFTA, Chevron calls for the deal to expand the investor-state system, candidly stating, "Chevron's ability to do business globally and protect our shareholder investments depends on strong mechanisms for resolving disputes."

For more information, visit stop-tafta.org