Who Gets to Write and Interpret the Rules Under TPP?

By Joseph Stiglitz | 03.28.16

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If the Trans-Pacific Partnership (TPP) is enacted, multinational investors will be able to sue the United States and other host country governments in private international arbitration (investor–state dispute settlement, or ISDS) when they feel domestic laws, regulations, or other government actions violate their rights under the new agreement. How will such challenges be handled?

No matter how well contracts or treaties are written, disputes will inevitably arise. And there needs to be a low-cost, expeditious, fair, open, and consistent means of resolving disputes. This is a basic public good provided by every democratic society. The system created by TPP to adjudicate investor disputes, in contrast, fails to meet these basic criteria.

Under TPP, tribunals comprised of three individuals—typically, practicing investment lawyers specialized in this boutique area of international law—would decide whether governments had to pay investors potentially billions of taxpayer dollars because of rule changes intended to improve the health and safety of our workers, food, environment, and financial system. Business could demand compensation for any regulation that resulted in the diminution of their expected profits and value of their investment.

These arbitrators would not be tenured, impartial judges. In the ISDS system, arbitrators rotate between representing investors in investment arbitrations and sitting in judgment on investment tribunals—worse, they can fill these conflicting roles *simultaneously*. This game of musical chairs is played among a relatively small group of lawyers who are either bringing or adjudicating cases against governments; reportedly, 15 arbitrators have decided more than half of all international investment arbitration cases.

Only investors can initiate disputes under this system. They choose not only their own lawyers, but also one of the three arbitrators (with a second chosen jointly by the plaintiff and the defending government). Arbitration lawyers that buck the system risk being culled from the herd. These are glaring conflicts of interest for people asked to judge what is "reasonable" and "fair and equitable" in balancing public and private interests.

Other aspects of this private arbitration system are equally frightening: While arbitrators are supposed to follow rules articulated in investment agreement texts, they have interpreted the texts *very* expansively. Decisions can be—and have been—"legally incorrect," but they cannot be reviewed or appealed except on narrow grounds. Since a tribunal's ruling cannot be appealed on the legal merits, in most cases there is nothing the loser can do. Two individuals can, in effect, thwart the considered deliberation of Congress and the president and completely circumvent U.S. courts.

This process does not even markedly speed up the resolution of disputes, nor is it cheap. Unlike professional judges, arbitrators are paid by the hour, creating perverse incentives to stretch out cases for years even if claims will ultimately be dismissed. Legal fees typically run into the millions for governments, which makes it especially difficult for smaller, poorer countries to fend off threats. For example, Uruguay, which is not a TPP member but is being sued under a similar agreement, was forced to rely on the charity of Bill Gates and Michael Bloomberg to defend its tobacco warning label against Philip Morris International. Australia has spent more than $50 million defending against a separate challenge from

Philip Morris, which was finally dismissed on December 15 on procedural grounds.

TPP's investment dispute adjudication is also strikingly asymmetric: There are no reciprocal responsibilities corresponding to expanded foreign investor property rights. "Host" country governments and citizens cannot sue foreign investors that violate local environment, public health, consumer protection, and labor laws, and they certainly don't have recourse to arbitration tribunals. A balanced system would enable lawsuits to pierce the corporate veil and pass responsibility up through the increasingly complex web of global value chains.

It's not that these problems with the ISDS adjudication mechanism and legal standard were unknown to U.S. negotiators that pushed this system on TPP partners, nor were alternatives unavailable. One option would be relying on domestic courts, or at least requiring that claimants show that domestic remedies have been exhausted and proven unfair before they proceed to arbitration. Another would be relying on state–state dispute settlement, as Brazil has done in its investment agreements, and as the World Trade Organization (WTO) does in trade disputes. Europe, in its negotiations with the U.S. over a Transatlantic Agreement, has proposed replacing investment arbitration with a permanent investment court, which would address many of the issues raised. Even the EU–Canada investment and trade agreement already signed had better safeguards. But the U.S. Trade Representative (USTR), wanting to please America's business community, has shunted these alternatives aside.

The USTR would undoubtedly dispute the interpretations of TPP provided here, but they are based on broad consultation with experts across the world. In past agreements, complexities and ambiguities such as these have provided ample scope for arbitrators to rule repeatedly in favor of corporate interests over the public interests. TPP has clearly not fixed these problems.

If TPP's trade benefits were enormous, the partner nations might not want to forgo those benefits until the agreement could be renegotiated to include stronger safeguards for the public interest. But even government

economists have calculated TPP's benefits to be negligible, and we suggest that they may be negative. Only corporate interests—and only those working against the public interest—have something to lose if these provisions are renegotiated.

President Obama and negotiators need to level with the American people about the dangers posed by this stacked system of private justice. Members of Congress, in weighing this and future agreements, need to insist on an open, fair, and accountable process—and one that focuses more on protecting the public rather than corporate interests.