

# **TPP: A Flawed Trade Agreement that Benefits Corporations at the Expense of Society**

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# Three key parts

- Trade
- Intellectual Property rights (pharmaceuticals)
- Investment agreement

# Why TPP should be rejected

- Each deeply flawed, but investment agreement is worse  
Grounds by itself for rejecting TPP
- TPP is far from the “gold standard” in trade agreement that was promised
- We will note several important ambiguities—where USTR claims the agreement means one thing, others looking at say another
- *The one thing about this agreement that is unambiguous is that it is ambiguous*
  - And that will give rise to uncertainty, and multiple suits
  - Enriching lawyers, at the expense of taxpayers or ordinary citizens

# 1. Trade

- Tariffs among partners are already very low—except in “sensitive areas”
  - TPP boast of 18,000 tariff cuts for US disingenuous
  - Includes tariffs on pork in Muslim Brunei and Malaysia; tropical, poor Vietnam will eliminate tariffs on skis, snowplows, and caviar
  - More than half of categories, US exported nothing, for remaining 7,500 categories, few exports
- For US, net economic impact of increased trade estimated (by agency of US government) to be 0.0%
  - Other more realistic estimates, taking into account employment effect, show negative overall impact

Trade benefits *at best* are small, but *rewriting the rules of the market economy for the benefit of corporations* will have significant long run runs

- For US and Canada, any relatively balanced trade agreement destroys jobs
  - We export relatively capital intensive goods, import relatively labor intensive goods
  - New thinking: trade has particularly adverse effect on inequality, outweighing the limited benefits on overall economy
  - Actually, long standing perspective: with imperfect risk markets or costly redistribution, trade liberalization may not be desirable
    - Roger Guesnerie, Second Best Redistributive Policies: The Case Of International Trade *Journal of Public Economic Theory*, [Volume 3, Issue 1](#), pages 15–25, January 2001, David Newbery and J. E. Stiglitz, “Pareto Inferior Trade,” *Review of Economic Studies*, 51(1), January 1984, pp. 1-12

- Hurts labor in other ways
  - Weakens bargaining position, by facilitating investment abroad
  - Rules of origin especially weak—made in China goods, containing less than 10% TPP content, can enter as “Made in Japan”
    - Little more than the label

# Further Objectionable aspects (trade)

- Really a managed trade agreement, not a free trade agreement
  - Managed for corporate interests
- Undermines multilateral system
- Maintains protection of agriculture—US will be exporting rice grown in a desert with multiple subsidies

# Does nothing about climate change

- Not paying full costs of environment important subsidy—and any true free trade agreement should eliminate such subsidies
  - under TPP rules, government policies to incentivize more environmentally sustainable goods and services—by distinguishing between how goods are processed and produced, even with voluntary labeling—can be challenged as illegal “technical” trade barriers unless a government listed a policy exception in the existing agreement
- Expanded investor rights allows firms to sue if government changes rules to make firms pay full costs or restrict environmental damage
  - Canada already has multiple suits
  - TransCanada \$15 billion suit against US over Keystone
  - Lone Pine is challenging Canada’s moratorium on hydro-fracking under St. Lawrence



## 2. Pharmaceuticals

- Changes rules of the game against generics
- Upsetting key balance between generics and Big Pharma
- Hatch Waxman Act saved country \$100 billion *per year* from greater use of generics
  - Provides key evergreening provision
  - Extended data exclusivity for biologics
  - Places constraints on use of formularies
  - Any change in regulation—including IPR—which diminishes market value object of suit
- Net effect: higher costs, less access
  - Ironic that Obama is undermining his signature achievement, Obamacre

# 3. Investor agreement

- More than ensuring property rights protection in countries where we have less faith in their judicial system
  - US is demanding same agreement in TTIP
  - If there is a problem with legal system/property rights system, should fix it
- Far more than preventing discrimination
  - Actually introduces discrimination—foreign investors have more rights than domestic investors
  - Will encourage “inversions”—further weakening tax base

# Four key flaws

- For what can an investor sue?
  - Virtually any change in rules which adversely affects profits
  - Only “carve out” is tobacco
- Making clear that changes in regulations for health, safety, environment, and even the economy would be subject of suit (outside of tobacco)
  - Actually extended the realm of things for which suits could be brought
  - Government contracts for the “exploration, extraction, refining, transportation, distribution or sale” of government-controlled natural resources
  - Making it impossible for one government to reverse mistakes of previous governments
- Effectively a “**regulatory takings**” provision, rejected by Congress, administration, courts
  - Reverse of “polluter pay”—we would now have to pay people not to harm us

- The arbitration panel doesn't consider whether the regulation was reasonable, whether it for instance reasonably balances public interests with the costs to the firm
- One-sided calculation. Has the firm lost profits as a result of the regulation, which violates some vaguely defined "minimum standard of treatment."

# a. Increasing range of cases

- “It wouldn’t matter if a substance was liquid plutonium destined for a child’s breakfast cereal. If the government bans a product and a U.S.-based company loses profits, the company can claim damages.”
- Arbitrators ordered Canada to pay American waste disposable company S.D. Myers \$5.6 million because it prohibited the export of toxic industrial waste—
  - exports that were banned by international treaty and applied to Canadian and foreign firms alike
  - imports banned by US

*Cont’d*

# Increasing range of cases

- Minimum wages
- Affirmative action
- Environmental impact assessments
- Sovereign debt disputes
- *South Africa is pulling out of its investment agreements because of constraints imposed in remedying legacies of apartheid*

## b. Who can bring a suit?

- *Any* investor
- But who is an investor
- Goes well beyond “real” investors in the economy
- Bond holders, or companies providing services, with little *real* investment in the economy.

**Agreement highly asymmetric**

*No one else can bring a suit for a violation of TPP*

## c. Damages

- Not just recovery of investments
- But compensation for loss of “expected profits”
  - Highly subjective and speculative
- Gives rise to large awards, large incentive to sue



# d. Dispute adjudication

- Private arbitration panels
  - Rather than public courts
  - Privatizing one of key functions of government
- System is costly, in time and money
  - Small group of lawyers making large amounts of money
- One of three arbitrators appointed by company suing, other chosen with his consent
- Arbitrators can have conflicts of interest—litigant in one case, judge in another
  - Giving rise to perverse incentives

*Cont'd*

# Dispute adjudication

- No system of appeal, precedent
- Effect: 2 individuals, one an explicit appointment of the business sector, can overturn a decision of congress and the president, based on a careful balancing of costs and benefits, public interests and private profits, imposing billions of dollars of penalties

# Chilling effect on regulation

- Worry about threat of suit induces government not to pass regulations
- Perhaps one of the intended effects
- With adverse effects on environment, health, safety, economy—every aspect of our society: even inequality, one of growing problems of the day
- Country can be sued if it raised interest rates, restricts usury, predatory lending, excessive credit card fees, or mandates affirmative action
  - Not just theoretical possibility—in different countries, some of these have been subject to suit
  - Arbitrary outcomes of arbitrations means there will be uncertainty about outcomes—but no appeal

# Benefits

- Irony: for all the costs, little evidence that there are significant benefits *even to developing countries*
- Even less likely that it will result in more investment in Canada, US
- Flow of capital out of the country will lead to lower wages, lower GDP

# US Claim that it has never lost a suit

- Perhaps evidence that the Courts are not really fair
  - Incentives of “judge”
- Canada has lost many cases
- Number of cases is likely to grow
  - Under current treaties, only 10% of foreign investment into US is covered
  - With TPP and TTIP, number rises to 70%
  - Much from advanced countries who know how to use legal system for their advantage
- Major point: One doesn't rewrite the rules, change the legal structure, in the hope that one will prevail when one is sued

# Agreement may be particularly bad for Canada

- Canada has lost many cases—doesn't have seeming influence that the US does
- Concern that IPR rules are biased toward the US and will disadvantage Canadian innovators
- Possible big effect on auto industry
- Canada's ability to pursue its cultural policies may be circumscribed
- Increased health care costs
- Regulations of internet, telecom
- One sided certification process: TPP doesn't go into effect until US President certifies Canada has taken measures to bring itself into compliance
  - Implying it is US interpretation of terms that prevails

# There are alternatives

- What is covered: Discriminatory treatment
  - *A country has the sovereign right to make regulations to protect its citizens and environment*
  - *Foreign investors should not have more rights than domestic investors*
- Who is covered: Real investors
- Compensation: Recovery of investment
- Who can bring case: Governments
- Who adjudicates: TPP panel of judges (like WTO), with normal judicial standards (precedence, appeal, clear rules of evidence)
- When can a case be brought: Only after exhaustion of domestic remedies

# TPP needs to renegotiated

- Negotiated in secret
  - With corporate interests at the table, others not
- Result is what one would have expected
- In good trade agreements, consumers in all countries benefit from lower tariffs, monopolistic producers in both countries lose as a result of loss of protection
  - In bad trade agreements, citizens in all countries lose, and producers win

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# TPP needs to renegotiated

- This is a bad trade agreement
  - Workers lose
  - Those who need access to drugs lose
- This is a fundamental rewriting of the rules of the market economy, providing a regulatory taking for foreign corporations, encouraging inversions, and discouraging important regulations to protect health, safety, the environment, and the economy
  - Especial attention to global environmental issues, like climate change
  - A change from the polluter pays principle—polluters pay for the damage they impose—to we pay polluters not to pollute