The Trans-Pacific Partnership and the Death of the Republic

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Region: USA

Global Research, April 26, 2015
The Web of Debt Blog

The United States shall guarantee to every State in this Union a Republican Form of Government. — Article IV, Section 4, US Constitution

A republican form of government is one in which power resides in elected officials representing the citizens, and government leaders exercise power according to the rule of law. In The Federalist Papers, James Madison defined a republic as "a government which derives all its powers directly or indirectly from the great body of the people . . . ."

On April 22, 2015, the Senate Finance Committee approved a bill to fast-track the Trans-Pacific Partnership (TPP), a massive trade agreement that would override our republican form of government and hand judicial and legislative authority to a foreign three-person panel of corporate lawyers.

The secretive TPP is an agreement with Mexico, Canada, Japan, Singapore and seven other countries that affects 40% of global markets. Fast-track authority could now go to the full Senate for a vote as early as next week. Fast-track means Congress will be prohibited from amending the trade deal, which will be put to a simple up or down majority vote. Negotiating the TPP in secret and fast-tracking it through Congress is considered necessary to secure its passage, since if the public had time to review its onerous provisions, opposition would mount and defeat it.

Abdicating the Judicial Function to Corporate Lawyers

James Madison wrote in *The Federalist Papers*:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny. . . . "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. . . ."

And that, from what we now know of the TPP's secret provisions, will be its dire effect.

The most controversial provision of the TPP is the Investor-State Dispute Settlement (ISDS) section, which strengthens existing ISDS procedures. ISDS first appeared in a bilateral trade agreement in 1959. According to *The Economist*, ISDS gives foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever the government passes a law to do things that hurt corporate profits — such things as discouraging smoking, protecting the environment or preventing a nuclear catastrophe.

Arbitrators are paid $600-700 an hour, giving them little incentive to dismiss cases; and the secretive nature of the arbitration process and the lack of any requirement to consider precedent gives wide scope for creative judgments.

To date, the highest ISDS award has been for $2.3 billion to Occidental Oil Company against the government of Ecuador over its termination of an oil-concession contract, this although the termination was apparently legal. Still in arbitration is a demand by Vattenfall, a Swedish utility that operates two nuclear plants in Germany, for compensation of €3.7 billion ($4.7 billion) under the ISDS clause of a treaty on energy investments, after the German government decided to shut down its nuclear power industry following the Fukushima disaster in Japan in 2011.

Under the TPP, however, even larger judgments can be anticipated, since the sort of "investment" it protects includes not just "the commitment of capital or other resources" but "the expectation of gain or profit." That means the rights of corporations in other countries extend not just to their factories and other "capital" but to the profits they expect to receive there.

In an article posted by Yves Smith, Joe Firestone poses some interesting hypotheticals:

Under the TPP, could the US government be sued and be held liable if it decided to stop issuing Treasury debt and financed deficit spending in some other way (perhaps by quantitative easing or by issuing trillion dollar coins)? Why not, since some private companies would lose profits as a result?

Under the TPP or the TTIP (the Transatlantic Trade and Investment Partnership under negotiation with the European Union), would the Federal Reserve be sued if it failed to bail out banks that were too big to fail?

Firestone notes that under the Netherlands-Czech trade agreement, the Czech Republic was sued in an investor-state dispute for failing to bail out an insolvent bank in which the complainant had an interest. The investor company was awarded $236 million in the dispute settlement. What might the damages be, asks Firestone, if the Fed decided to let the Bank of America fail, and a Saudi-based investment company decided to sue?

Abdicating the Legislative Function to Multinational Corporations

Just the threat of this sort of massive damage award could be enough to block prospective legislation. But the TPP goes further and takes on the legislative function directly, by forbidding specific forms of regulation.

Public Citizen observes that the TPP would provide big banks with a backdoor means of watering down efforts to re-regulate Wall Street, after deregulation triggered the worst financial crisis since the Great Depression:

> The TPP would forbid countries from banning particularly risky financial products, such as the toxic derivatives that led to the $183 billion government bailout of AIG. It would prohibit policies to prevent banks from becoming "too big to fail," and threaten the use of "firewalls" to prevent banks that keep our

> savings accounts from taking hedge-fund-style bets.
>
> The TPP would also restrict capital controls, an essential policy tool to counter destabilizing flows of speculative money. . . . And the deal would prohibit taxes on Wall Street speculation, such as the proposed Robin Hood Tax that would generate billions of dollars' worth of revenue for social, health, or environmental causes.

Clauses on dispute settlement [in earlier free trade agreements] have been invoked to challenge efforts to regulate big business. The fossil fuel industry is seeking to overturn Quebec's ban on the ecologically destructive practice of fracking. Veolia, the French behemoth known for building a tram network to serve Israeli settlements in occupied East Jerusalem, is contesting increases in Egypt's minimum wage. The tobacco maker Philip Morris is suing against anti-smoking initiatives in Uruguay and Australia.

The TPP would empower not just foreign manufacturers but foreign financial firms to attack financial policies in foreign tribunals, demanding taxpayer compensation for regulations that they claim frustrate their expectations and inhibit their profits.

Preempting Government Sovereignty

What is the justification for this encroachment on the sovereign rights of government? Allegedly, ISDS is necessary in order to increase foreign investment. But as noted in*The Economist*, investors can protect themselves by purchasing political-risk insurance. Moreover, Brazil continues to receive sizable foreign investment despite its long-standing refusal to sign any treaty with an ISDS mechanism. Other countries are beginning to follow Brazil's lead.

In an April 22nd report from the Center for Economic and Policy Research, gains from multilateral trade liberalization were shown to be very small, equal to only about 0.014% of consumption, or about $.43 per person per month. And that assumes that any benefits are distributed uniformly across the economic spectrum. In fact, transnational corporations get the bulk of the benefits, at the expense of most of the world's population.

Something else besides attracting investment money and encouraging foreign trade seems to be going on. The TPP would destroy our republican form of government under the rule of law, by elevating the rights of investors – also called the rights of "capital" – above the rights of the citizens.

That means that TPP is blatantly unconstitutional. But as Joe Firestone observes, neo-liberalism and corporate contributions seem to have blinded the deal's proponents so much that they cannot see they are selling out the sovereignty of the United States to foreign and multinational corporations.

For more information and to get involved, visit:

Flush the TPP

The Citizens Trade Campaign

Public Citizen's Global Trade Watch

Eyes on Trade

Ellen Brown is an attorney, founder of the Public Banking Institute, and author of twelve books including the best-selling Web of Debt. Her latest book, The Public Bank Solution, explores successful public banking models historically and globally. Her 300+ blog articles are at EllenBrown.com.

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