

Making Human Survival Illegal: *The Unintended Consequence of TPP*

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Imagine a world where global multinational corporations have the power to sue any government that passes laws or regulations that have negative impacts on their current or future profits. Imagine that they could bring the case to a private tribunal whose judges are private lawyers working for other large multinational corporations, who sometimes bring cases to the same tribunal on behalf of their corporate employer. Imagine that such private tribunals can override decisions made by the highest courts of the country being sued. Imagine that there is no limit to the amount of taxpayer money the tribunal can order the defending government to pay the corporation who brought the suit. Imagine that the proceedings of these tribunals are both secret and cannot be appealed.

Well, this is the world that twelve nations, including the US, will be living in if they ratify the Trans-Pacific Partnership (TPP) -- a deceptively named “trade agreement” that will have broad impacts on many aspects of social life in the countries that bind themselves to its dictates (TPP 2016). If you think of the system of law in a particular country as its social operating system, then you could say that any nation which signs and ratifies the TPP will effectively override its social operating system with one that elevates current and future corporate profits to the highest value for society.

You might be excused for not knowing much about the actual content of the TTP agreement since it has been negotiated in secret by corporate and trade representatives with no substantial input from either government representatives or civic society. Until recently, most of what we knew about the actual language of the TTP had been leaked by Wikileaks. Finally, after years of secrecy the text of the TPP has been released. It confirms the aphorism that “if you are not at the negotiating table, you are on the menu.” Specifically, national sovereignty and the ability of governments to protect the health of their people and their ecosystems are on the menu.

The Investment Chapter of the TPP (Chapter 9) in fact builds and expands on the investor-state dispute settlement (ISDS) system pioneered in Chapter 11 of NAFTA (North American Free Trade Agreement), signed into law by President Bill Clinton.

As the non-profit organization Public Citizen explains:

The investor-state dispute settlement (ISDS) system, included in various “free trade” agreements (FTAs) and bilateral investment treaties (BITs), fundamentally shifts the balance of power among investors, States and the general public, creating an enforceable global governance regime that formally prioritizes corporate rights over the right of governments to regulate. ISDS provisions elevate individual foreign corporations and investors to the same status as sovereign governments, empowering them to privately enforce a public treaty by skirting domestic courts and directly “suing” signatory governments over public interest policies before extrajudicial tribunals (Public Citizen 2015, 1).

The following real-life examples provide a clear illustration of corporations using the ISDS system to override national jurisdiction and erode national sovereignty:

- After a legal battle that lasted a couple of decades and was compellingly portrayed in the 2009 documentary¹ “Crude,” Ecuador’s highest court upheld a \$9.5B judgment against Chevron Corporation for contaminating large sections of the Ecuador’s Amazon. In spite of the ruling by Ecuador’s highest court, Chevron is using the ISDS provided by a bilateral investment treaty (BIT) between the US and Ecuador to sue the government of Ecuador for the \$9.5B of fines plus the legal fees incurred in the long legal battle.
- Swedish energy company, Vattenfall, successfully launched an investor-state claim against Germany in 2009 over permit delay of a coal-fired power plant in Hamburg. In 2012, it launched another investor-state claim for \$5B of taxpayer compensation for Germany’s decision to phase out nuclear power by 2022 in response to the 2011 Fukushima disaster (Public Citizen 2015, 4).
- In order to address the health damage caused by smoking, Australia passed a plain packaging law in 2011 that requires tobacco products to be sold in packaging dominated by health warnings and with the brand name of the product in standard font size at the bottom of the package. Philip Morris sued the Australian government using both the Australian courts and the ISDS afforded by an Australian-Hong Kong BIT. Despite Australia’s High Court ruling the plain packaging law constitutional and justified as a public health measure, Philip Morris is still pursuing billions of dollars of damage through the ISDS (Public Citizen 2015, 2).

¹ <http://www.crudethemovie.com/>

In fact, investor-state dispute settlement systems included now in thousands of bilateral investment treaties have delayed, for two decades, effective regulation of tobacco products in Australia², Canada (Ulbrich 1994), and New Zealand (New Zealand Public Health Commission 1993), where policies to label tobacco products were proposed in the early 1990s. ISDS regimes have caused thousands if not millions of deaths by delaying tobacco product labeling over the last few decades.

But it is in dealing with the challenge of climate change that the TPP and its investor-state dispute settlement system becomes an existential threat to the very survival of our species.

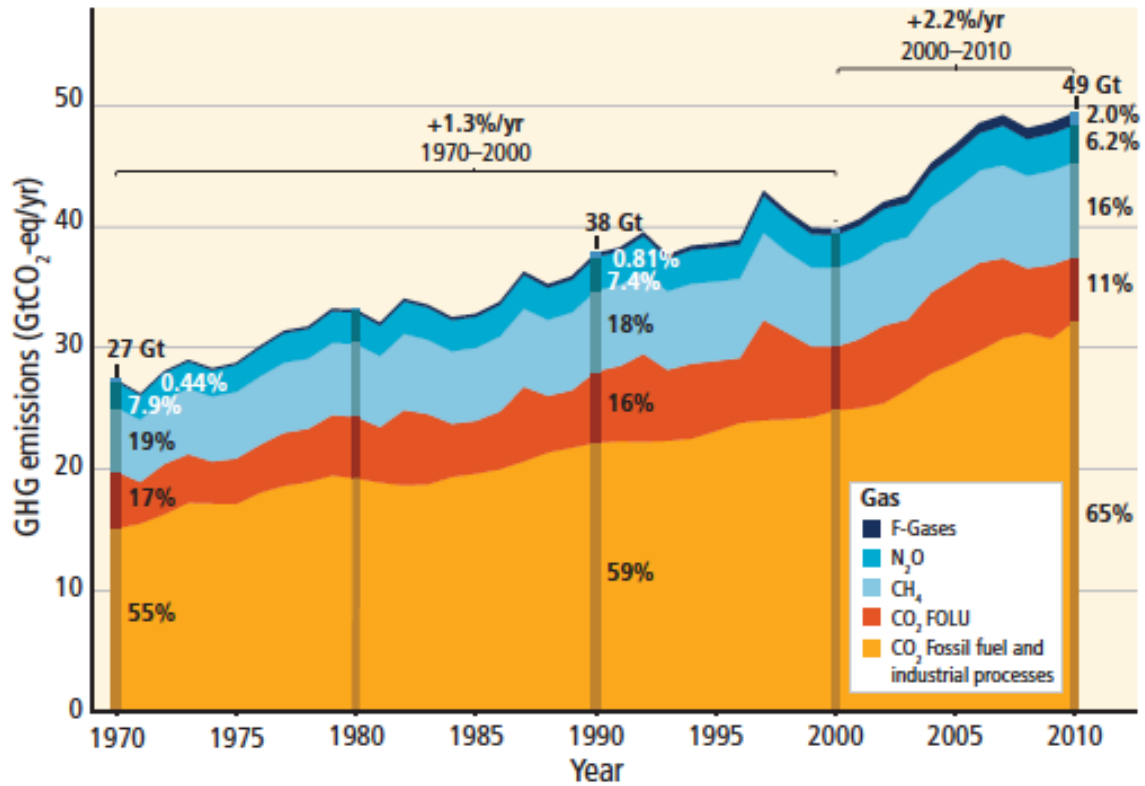
Climate change and rising global temperatures are caused by increases in the atmospheric composition of CO₂ due to our practice of burning fossil fuels. They are affecting global ecosystems in various ways – by changing the timing of seasonal life-cycle events; by shifting the range where species are found, which can disrupt the food web of those species and of our own food web; by increasing pathogens, parasites, and diseases; and by increasing species extinction risk (EPA 2016). An increase in the global world temperature by 2 degrees Celsius above its pre-industrial level, carries with it the risk that global ecosystems will unravel to the point where their ability to support higher forms of life like *homo sapiens* can no longer be taken for granted. The Carbon Trackers Initiative³ estimated that we cannot put more than 565 GT (Gigatons) of Carbon in the atmosphere before breaching the 2 degrees limit, yet there are 2,795 GT of carbon in the proven coal and oil and gas reserves of the fossil-fuel companies, and in the countries (think Venezuela or Kuwait) that act like fossil-fuel companies! So, if we want to survive as a species we need to keep about 80% of the proven fossil fuel reserves in the ground (McKibben 2012).

Market-based approaches like carbon trading have not been effective at curbing or slowing down the concentration of CO₂ in the atmosphere. Carbon trading began in response to the signing of the Kyoto protocol in 1997. Hundreds of millions of tons of CO₂ have been traded since, yet *the level of emissions has continued to increase, and in fact has accelerated since 2000.*

² In April 1992 the Australian Centre for Behavioural Research in Cancer recommended plain packaging: “Health warnings and contents labelling on tobacco products,” Anti-Cancer Council of Victoria, 1992.

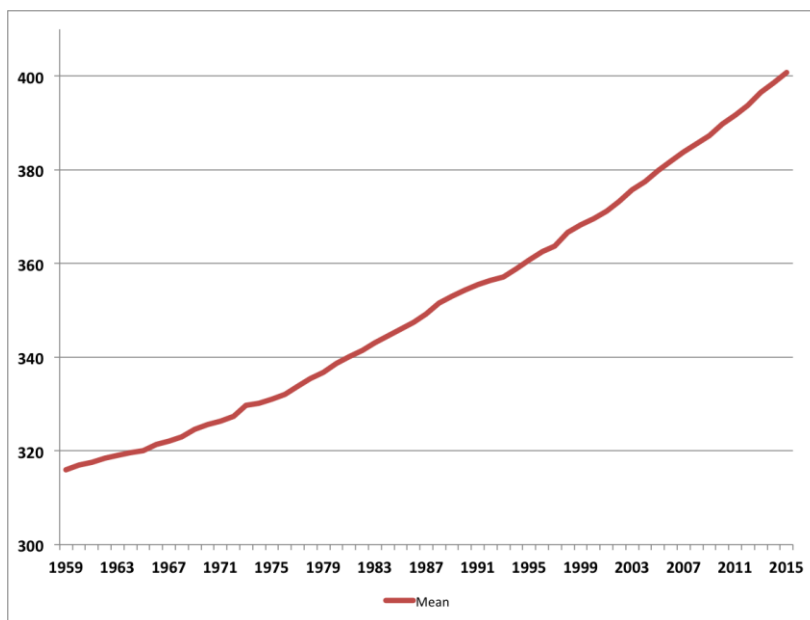
³ <http://www.carbontracker.org/>

Figure 1: Total Annual Anthropogenic GHG Emissions by Group of Gases (1970-2010)



Source: Intergovernmental Panel on Climate Change (2014).

Figure 2: Average Annual Concentration of CO₂ in the Atmosphere (1959-2015)



Source: National Oceanic and Atmospheric Administration (2016).

As a result, the concentration of CO₂ in the atmosphere has continued to increase unabated (Figure 2). This means that the only way to preserve the livability of this planet for humans is to have governments around the world impose taxes on carbon or outright bans on the extraction and sale of fossil fuels. The introduction of such taxes or bans will certainly have a negative impact on the future profits of large multinational corporations as well as those indirectly involved in the extraction, distribution and sale of fossil fuels.

The Investment Chapter of TPP will allow corporations to file multi-billion dollar lawsuits against any government signatory to the TPP that dares to take the only effective measures to prevent climate catastrophe – carbon tax or bans on carbon extraction and sale. As ISDS lawsuits managed to delay the implementation of tobacco labeling laws in Australia, New Zealand and Canada for decades, *it is easy to imagine that the large oil companies will manage to delay effective climate regulation past the point of no return. The unintended consequence of TPP will be to make human survival illegal.* We need to do what we can to prevent the TPP from becoming our society’s new operating system. The survival of our species depends on it. While the TPP has been finalized and signed by the twelve Pacific Rim nations that participated in its drafting on February 4th 2016 in Auckland, New Zealand, it has not been ratified yet by the assenting vote of the twelve governments. Our task now is to urge Congress to oppose the TPP to prevent its ratification.⁴

What would an effective policy response to the TPP look like? How would we draft an international agreement that protects the global ecosystems and ensures widespread prosperity across national boundaries?

We need to recognize that the health of global ecosystems is at the very core of our long-term survival. Earth’s living biosphere, the result of 3.8 billion years of evolution, has gifted us with an amazing endowment of natural resources and services essential for our survival – oxygen production, soil fertility, water purification, nutrient recycling, climate regulation, crop pollination and disease control, among others. But, since Nature does not charge us for the ecosystem services it provides nor for its natural resources, economic activity in the industrial era has depleted and severely damaged global ecosystems. This is what economists call externalities - the cost generated by an economic transaction between two economic agents that is borne by a third unrelated party. Environmental pollution is an example of an externality, which is usually the consequence of an economic activity whose beneficiaries do not bear the brunt of the effects of such pollution.

The Economics of Ecosystems and Biodiversity, an initiative hosted by the UN Environment Programme, published an extensive study of externalities worldwide called “Natural Capital at Risk: The Top 100 Externalities of Business⁵” in April 2013. The study used environmental

⁴ http://org.salsalabs.com/o/1034/p/dia/action3/common/public/?action_KEY=18673

⁵ <http://ek4t.com/wp-content/uploads/2014/10/Natural-Capital-at-Risk.pdf>

economics techniques to quantify, in monetary terms, the value of unpriced natural capital used by business worldwide (ecosystem services from land and from water), and the pollution it generated in the form of greenhouse gas emissions, air, land and water pollutants, and waste. The results were shocking. Global economic activity in 2009 used \$7.3T of unpriced natural capital to generate about \$60T in global GDP. In other words, we are using Nature as a business in liquidation to subsidize our global economic activity and growth!

The TPP was drafted and negotiated in secret over the last seven years by corporate and trade representatives with the sole focus of protecting corporate profits. An international agreement aimed at protecting global ecosystems and ensuring widespread prosperity across national boundaries will require a completely different process. Civil society, representatives of labor unions, environmentalists, biologists, scientists and ethicists will need to be engaged in an open and transparent process open to public scrutiny and participation to discuss the best way to achieve a globally shared prosperity while at the same time protecting and enhancing the global ecosystems on which our long term survival depends.

The TPP's secret tribunals are going to be run by corporate lawyers aiming to compensate corporations for the potential loss of future profits that might result from government legislation to protect the environment or social priorities. However, if we engage in a more participatory and open process, we might have Rights of Nature tribunals inspired by the Universal Declaration of the Rights of Mother Earth,⁶ which pursue the worst abuses by corporate polluters; or we might have tribunals inspired by the UN Universal Declaration of Human Rights;⁷ or the UN Declaration on the Rights of Indigenous Peoples⁸. Of course, economic growth and development are a necessary (but insufficient!) condition for shared prosperity, and business plays a key role in the global economy as well as in creating the conditions for human prosperity. However, business activity needs to be conducted in a manner that does not harm global ecosystems or communities worldwide. There is no justification for economic activity that violates human rights or the rights of indigenous people, or undermines the ecosystems on which our long-term survival depends. Business activities that are only possible through the subsidies provided by social or environmental externalities have no right to exist.

⁶ <https://pwccc.wordpress.com/programa/>

⁷ <http://www.un.org/en/universal-declaration-human-rights/>

⁸ http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

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