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Comment: The leak which offers a rare glimpse into secret EU-US free market talks

By Ian Dunt Wednesday, 12 March 2014

Last week, German Green MEP Sven Giegold took a big risk. He leaked confidential Council of Ministers documents.

Until now, European citizens weren't allowed access to details of how their rights are undermined by foreign corporations. EU-US negotiations on the Transatlantic Trade and Investment Partnership (TTIP), which are taking place in Brussels this week, would give corporations litigation rights over national parliaments, meaning any policy which loses them money will be severely punished in the arbitration tribunals.

That means it will be financially ruinous to get private sector providers out of the NHS or education services. It means weaker US-style consumer protections imposed in Europe. And it means campaigners will be helpless to prevent fracking.

The proposals are the largest trade deal in human history. They are a constitutional game-changer, giving foreign companies rights over national parliaments.

Consequently, they are clouded in mystery. The only sound you can hear are the nervous promises of ministers like Ken Clarke, insisting that anyone worrying about what's going on behind-the-scenes is a conspiracy theorist.

Nothing could be further from the truth. We have proof that investor dispute mechanisms are a threat to national sovereignty. And we know they are systematised and consolidated by the TTIP deal.

Secrecy has surrounded the project because it is so threatening to democracy and consumer rights.

When the EU Commission – the EU's executive arm – consulted on the plans ahead of negotiations it enjoyed the luxury of selecting the experts itself. The official panel advising it agreed to keep all details of the negotiation documents secret.

The panel was not elected. It was hand-picked. And who did they handpick? Overwhelmingly they spoke to corporate lobbyists. According to Max Bank of LobbyControl, 93% of discussions were with corporate lobbyists, while seven per cent represented consumer protection associations, trade unions and civil society organisations.

Other estimates suggest consultations involved 119 meetings with industry representatives and less than ten with other parties.

It's a stitch up.

So last Friday, the German Greens in the European parliament did something rather exciting. They leaked confidential documents related to the deal.

"TTIP threatens to take away democracy's means for social and environmental management of the internal market," Giegold said, as he justified his decision.

The leak contains guidelines for the EU Council of Ministers in negotiations with the United States. It is mostly very open, written in what Giegold calls "bureaucratic German". The most amount of detail is on the investor sections. It says arbitration tribunals should uphold "just and fair treatment" of investors.

That is very vague wording. The precise definition of "just and fair" will be determined in future by the tribunals themselves. We should always be wary of that type of wording when a document is handing a power to a body that is not a parliament, a council or a court.

These things always hinge on the wording. When Argentina signed a treaty with the US guaranteeing "full protection and security" to investors it thought it was talking about physical security. It was only when paying out $165.2 million (£99 million) to Azurix for its decision to reverse the privatisation of water in a province of Buenos Aires that it learned that it referred to a "secure investment environment".

Britain is still sleepwalking through these negotiations, despite the fact that they mark one of the most substantial attacks on parliamentary sovereignty in many years.

In Germany, things are different. The giant manufacturing union IG Metall, which has 2.4 million members, has called for a halt to proceedings, branding them "dangerous" for consumers and workers.

From the other side of the political spectrum, Washington's conservative Cato institute is calling for the investor clauses to be removed because they have become so toxic.

There is a reason the talks are taking place in secret. There's a reason consultations are limited mostly to corporate lobbyists. And there's a reason ministers are so keen to tell fairy stories about waterfalls of money rather than discuss the content of the deal: It's because the investor dispute mechanism sells out the European public to corporations.

It gives private companies rights over those of citizens or national governments.

A little-seen report published by the Transnational Institute and Corporate Europe Observatory earlier this month maps out exactly how these corporate rights are enmeshed into European political life, to the profound disadvantage of citizens.

This is how it works: Amid the European economic crisis, you buy up cheap sovereign bonds of government debt, sold at a discount. Then you holdout – refuse to negotiate a reduction in the value of the bond when the country tries to restructure its debt. Even though you bought the debt at knock-down prices, you stand firm. If the government refuses to pay, you sue them in an international arbitration tribunal. But if any of the debt restructuring programmes affect your investment, you sue the government in question.

In Greece, between 2011 and 2012, the bonds were bought at 50% face value, with speculative funds purchasing about €50 billion (£41 billion). The Troika - the European Commission, the European Central Bank and the International Monetary Fund - came in, injected some cash into the Greek economy, and demanded a harsh austerity programme and restructuring of Greek debt.

The people of Greece had no protection. They faced one of the greatest crisis in living standards in their modern history. But not so for investors. The big European banks, insurers and asset managers who bought up Greek debt were protected by 39 bilateral investment treaties ratified by the Greek parliament.
The investor arbitration tribunals allow investors to challenge anyone who reduces their profits, even if the measures which prompted the lawsuit – such as those of the Troika – came from outside government being sued.

Postová Bank from Slovakia and its Cypriot shareholder, Istro Kapital, are challenging the terms of the Greek restructuring in an arbitration tribunal.

The same is happening in Cyprus, where Greek private equity investor Marfin Investment Group is claiming loss of profits due to the restructuring of Cyprus' main banks. It wants €823 million (£685 million) in compensation after Cyprus was forced to nationalise the Laiki Bank as part of the EU debt restructuring agreement.

Similar legal attacks take place when nations try to cost cut.

Spain used to have one of the world most impressive Solar energy programmes. In 2008 it hosted half the worlds solar energy installations by wattage. But when the crisis hit in 2008, it decided to reverse these subsidies.

Even though some investors entered the market after the crisis started - and were surely aware of the possibility of cuts to subsidies – they went to arbitration. Twenty-two companies – mainly private equity firms – are suing Spain at an international tribunal level.

And it's not even as if the mechanism helps small-or-medium-sized Spanish firms. They were ineligible. The international investment treaties only protect foreign investors.

There is no natural justice here. Governments are being turned into the playthings of over-mighty EU institutions and international finance.

But the governments only ever pay in name. They're not the ones who suffer. They never have to go without food on the table or wear a shirt with holes in it. They don't have to tell their children that they can't have the toy they want. They don't have to sacrifice a weekly meal out or trip to the cinema.

Only the citizens pay. The same people who are excluded from the secret talks.

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