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Trade Deal Would Let Firms Sue Governments, WikiLeaks Says

By Carter Dougherty

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(Bloomberg) -- Companies would be able to sue foreign governments that seize or significantly damage their business, under the terms of a trade pact being negotiated by the U.S. and 11 other countries, according to a classified document.

The procedure contained in the Trans-Pacific Partnership has rekindled a debate in the U.S. over whether environmental protection laws and other domestic rules would be endangered.

The anti-secrecy organization WikiLeaks posted online the details of what's known as the investor-state dispute-settlement procedure. The New York Times reported last Wednesday that it obtained the 56-page draft of this part of trade deal in conjunction with WikiLeaks.

That the governments were negotiating details of the procedure was known, because it was disclosed in a previously leaked draft of the confidential text in 2012. Such procedures also are part of existing accords, such as the North American Free Trade Agreement.

Still, the new text, dated Jan. 20, sparked criticism.

"It is outrageous that we have to continue to rely on leaked texts to expose the details of this trade pact -- and that every leak confirms the threats of the Trans-Pacific Partnership to clean air and water," Ilana Solomon, director of the Sierra Club's Responsible Trade Program, said in an e-mailed statement.

Fast Track

President Barack Obama's administration argues that the procedure isn't a threat to U.S. laws, saying it offers protection against underdeveloped legal systems in other nations. The administration is asking Congress to grant it fast-track negotiating authority for the Pacific agreement, allowing for an up-or-down vote on the deal with no amendments.

Labor unions, which have opposed fast-track authority, vowed to use the leaked details to ratchet up their lobbying against the measure.

“These 56 pages must be a wake up call for our nation,” Larry Cohen, president of the 700,000-member Communications Workers of America, said in an e-mailed statement. “We must be defenders of democracy first and push aside the special interests of multinational corporations.”

Daniel Ikenson, director of the Herbert A. Stiefel Center for Trade Policy Studies at the Cato Institute and a critic of this provision of the deal, predicted the disclosure would sway few minds on Capitol Hill.

‘Political Impact’

“I have problems with this, many on the left have problems with this,” Ikenson said in an interview. “I don’t know that this has a political impact.”

He said the document, though classified, doesn’t include much more than what is on U.S. government websites, and reflects the U.S. negotiating position worked out in a public process in 2012.

At best, the leak will embolden critics in Congress who charge trade negotiations shouldn’t be so shielded from public view, said Derek Scissors, a resident scholar at the American Enterprise Institute dealing with Asia economic issues.

“Some secrecy is necessary in trade discussions but we have gone far beyond what works,” Scissors said. “It creates the impression of a cabal.”

The draft text of the pact raises the possibility that an investor could sue over “indirect expropriation,” meaning a government wouldn’t have to seize property but only act in such a way that reduces its value. That could trigger a lawsuit charging the government hurt the “expectations” of investors.

Difficult Obstacle

Yet the text contains provisions suggesting that suing on the basis of expectations would be difficult.

The procedure, in which companies can submit claims to arbitration and seek monetary damages, has drawn criticism from environmental, labor and consumer-advocacy groups since the 1990s. Senator Elizabeth Warren, a Massachusetts Democrat, complained about it in a Feb. 15 article in the Washington Post, prompting a response from Jeffrey Zients, director of Obama’s National Economic Council.

Zients said the procedure is merely an international version of the U.S. Constitution’s requirement that expropriation of private property requires restitution.

“When government takes its citizen’s property from them –- be it a person’s home or their business –- the government is required to provide compensation,” Zients wrote.

In addition to Nafta, the procedure is part of dozens of bilateral treaties aimed at promoting investment. A study by the Center for Strategic and International Studies found that while companies did attempt to use the procedure to challenge domestic laws, they are mostly unsuccessful.

About a third of the cases were settled before arbitration while governments won 45 percent of the time. Companies won the remaining 22 percent, but obtained damages for pennies on the dollar of what they’d sought.