By JONATHAN WEISMAN

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President Obama with members of his cabinet speaking to the Democratic Governors Association. The Trans-Pacific Partnership is a cornerstone of Mr. Obama's remaining economic agenda

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Credit

Jabin Botsford/The New York Times

WASHINGTON — An ambitious 12-nation trade accord pushed by President Obama would allow foreign corporations to sue the United States government for actions that undermine their investment "expectations" and hurt their business, according to a classified document
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The Trans-Pacific Partnership — a cornerstone of Mr. Obama's remaining economic agenda — would grant broad powers to multinational companies operating in North America, South America and Asia. Under the accord, still under negotiation but nearing completion, companies and investors would be empowered to challenge regulations, rules, government actions and court rulings — federal, state or local — before tribunals organized under the World Bank or the United Nations.

Backers of the emerging trade accord, which is supported by a wide variety of business groups and favored by most Republicans, say that it is in line with previous agreements that contain similar provisions. But critics, including many Democrats in Congress, argue that the planned deal widens the opening for multinationals to sue in the United States and elsewhere, giving greater priority to protecting corporate interests than promoting free trade and competition that benefits consumers.

Photo

Protesters in Miami against the Trans-Pacific Partnership. Critics argue that the planned deal widens the opening for multinationals to sue in the United States and elsewhere. Credit
Joe Raedle/Getty Images

The chapter in the draft of the trade deal, dated Jan. 20, 2015, and obtained by The New York Times in collaboration with the group WikiLeaks, is certain to kindle opposition from both the political left and the right. The sensitivity of the issue is reflected in the fact that the cover mandates that the chapter not be declassified until four years after the Trans-Pacific Partnership comes into force or trade negotiations end, should the agreement fail.

Conservatives are likely to be incensed that even local policy changes could send the government to a United Nations-sanctioned tribunal. On the left, Senator Elizabeth Warren, Democrat of Massachusetts, law professors and a host of liberal activists have expressed fears the provisions would infringe on United States sovereignty and impinge on government regulation involving businesses in banking, tobacco, pharmaceuticals and other sectors.

Members of Congress have been reviewing the secret document in secure reading rooms, but this is the first disclosure to the public since an early version leaked in 2012.

“This is really troubling,” said Senator Charles E. Schumer of New York, the Senate’s No. 3 Democrat. “It seems to indicate that savvy, deep-pocketed foreign conglomerates could challenge a broad range of laws we pass at every level of government, such as made-in-America laws or anti-tobacco laws. I think people on both sides of the aisle will have trouble with this.”

The United States Trade Representative's Office dismissed such concerns as overblown. Administration officials said opponents were using hypothetical cases to stoke irrational fear when an actual record exists that should soothe worries.

Such "Investor-State Dispute Settlement" accords exist already in more than 3,000 trade agreements across the globe. The United States is party to 51, including the North American Free Trade Agreement. Administration officials say they level the playing field for American companies doing business abroad, protect property from government seizure and ensure access to international justice.

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But the limited use of trade tribunals, critics argue, is because companies in those countries do not have the size, legal budgets and market power to come after governments in the United States. The Trans-Pacific Partnership could change all that, they say. The agreement would expand that authority to investors in countries as wealthy as Japan and Australia, with sophisticated companies deeply invested in the United States.

"U.S.T.R. will say the U.S. has never lost a case, but you're going to see a lot more challenges in the future," said Senator Sherrod Brown, Democrat of Ohio. "There's a huge pot of gold at the end of the rainbow for these companies."

One 1999 case gives ammunition to both sides of the debate. Back then, California banned the chemical MTBE from the state's gasoline , citing the damage it was doing to its water supply. The Canadian company Methanex Corporation sued for $970 million under Nafta, claiming damages on future profits. The case stretched to 2005, when the tribunal finally dismissed all claims.

To supporters of the TPP, the Methanex case was proof that regulation for the "public good" would win out. For opponents, it showed what could happen when far larger companies from countries like Japan have access to the same extrajudicial tribunals.

But as long as a government treats foreign and domestic companies in the same way, defenders say, it should not run afoul of the trade provisions. "A government that conducts itself

in an unbiased and nondiscriminatory fashion has nothing to worry about," said Scott Miller, an international business expert at the Center for Strategic and International Studies, who has studied past cases. "That's the record."

Similar chapters exist in the North American Free Trade Agreement and the Central American Free Trade Agreement, but their use has been limited against the United States. Over 25 years, according to the trade representative's office, the United States has faced only 17 investor-state cases, 13 of which went before tribunals. The United States has lost none.

Civil courts in the United States are already open to action by foreign investors and companies. Since 1993, while the federal government was defending itself against those 17 cases brought through extrajudicial trade tribunals, it was sued 700,000 times in domestic courts.

In all, according to Public Citizen's Global Trade Watch, about 9,000 foreign-owned firms operating in the United States would be empowered to bring cases against governments here. Those are as diverse as timber and mining companies in Australia and investment conglomerates from China whose subsidiaries in Trans-Pacific Partnership countries like Vietnam and New Zealand also have ventures in the United States.

More than 18,000 companies based in the United States would gain new powers to go after the other 11 countries in the accord.

A similar accord under negotiation with Europe has already provoked an outcry there.

Senator Brown contended that the overall accord, not just the investment provisions, was troubling. "This continues the great American tradition of corporations writing trade agreements, sharing them with almost nobody, so often at the expense of consumers, public health and workers," he said.

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Under the terms of the Pacific trade chapter, foreign investors could demand cash compensation if member nations “expropriate or nationalize a covered investment either directly or indirectly.” Opponents fear “indirect expropriation” will be interpreted broadly, especially by deep-pocketed multinational companies opposing regulatory or legal changes that diminish the value of their investments.

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Included in the definition of “indirect expropriation” is government action that “interferes with distinct, reasonable investment-backed expectations,” according to the leaked document.

The cost can be high. In 2012, one such tribunal, under the auspices of the World Bank’s International Centre for Settlement of Investment Disputes, ordered Ecuador to pay Occidental Petroleum a record $2.3 billion for expropriating oil drilling rights.

Under the Trans-Pacific Partnership, a member nation would be forbidden from favoring “goods produced in its territory.”

Critics say the text's definition of an investment is so broad that it could open enormous avenues of legal challenge. An investment includes "every asset that an investor owns or controls, directly or indirectly, that has the characteristic of an investment," including "regulatory permits; intellectual property rights; financial instruments such as stocks and derivatives"; construction, management, production, concession, revenue-sharing and other similar contracts; and "licenses, authorizations, permits and similar rights conferred pursuant to domestic law."

"This is not about expropriation; it's about regulatory changes," said Lori Wallach, director of Global Trade Watch and a fierce opponent of the Pacific accord. "You now have specialized law firms being set up. You go to them, tell them what country you're in, what regulation you want to go after, and they say 'We'll do it on contingency.'"

In 2013, Eli Lilly took advantage of a similar provision under Nafta to sue Canada for $500 million, accusing Ottawa of violating its obligations to foreign investors by allowing its courts to invalidate patents for two of its drugs.

All of those disputes would be adjudicated under rules set by either the International Centre for Settlement of Investment Disputes or the United Nations Commission on International Trade Law.

The Obama administration pressed for — and won — clear transparency rules mandating that tribunals be open to the public and arbitration documents be available online. Outside parties would also be allowed to file briefs.

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"Here's what I can tell you as these negotiations proceed," President Obama told reporters in Brussels last year when questioned on the trade deals in the works. "I have fought my entire political career and as president to strengthen consumer protections. I have no intention of signing legislation that would weaken those protections."

There are other mitigating provisions, but many have catches. For instance, one article states that “nothing in this chapter” should prevent a member country from regulating investment activity for “environmental, health or other regulatory objectives.” But that safety valve says such regulation must be “consistent” with the other strictures of the chapter, a provision even administration officials said rendered the clause more political than legal.

One of the chapter’s annexes states that regulatory actions meant “to protect legitimate public welfare objectives, such as public health, safety and the environment” do not constitute indirect expropriation, “except in rare circumstances.” That final exception could open such regulations to legal second-guessing, critics say.

Correction: March 26, 2015

An earlier version of this article misstated when the document was made available to members of Congress. Drafts have been available for review soon after being written; the latest document was not made available until last week.

A version of this article appears in print on March 26, 2015, on page B1 of the New York edition with the headline: Trade Pact Seen as Door for Suits Against U.S..

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