Corporate legal experts fall short on TPP fact check

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On December 18, the ABC published a TPP fact check, which extensively discusses the investor-state dispute settlement (ISDS) provisions of the agreement. Unfortunately, the fact check falls short of providing a balanced evaluation of the ISDS debate. ISDS is a process that allows foreign corporations to sue governments for millions of dollars of damages in international arbitration over changes in law or policy that may have harmed their investment.

On the same day, breaking news revealed that tobacco giant Philip Morris had lost its ISDS case challenging Australia's 2011 plain packaging legislation. The American company had restructured its investment through Hong Kong in order to use an ISDS clause in an obscure Hong-Kong Australia investment treaty. This had been the company's only option because John Howard did not agree to include ISDS in the US-Australia free trade agreement signed in 2004. The tribunal rejected the company's 'treaty -shopping', something that has been accepted by other tribunals in the past. This basic jurisdictional decision took four years and reportedly cost the Australian government $50 million in legal fees.

The TPP contains some restrictions on treaty-shopping, but many other deficiencies of the system have not been addressed. Many Australians are asking why we should agree to ISDS at all.

Unfortunately the ABC fact check on ISDS in the TPP fails to come to grips with why ISDS is such a hot topic of debate, because it relies heavily on quotes from legal experts who are members of corporate law firms. Such firms often represent major corporations in ISDS cases, and are adept at deflecting criticism with complicated legal jargon.

The fundamental flaws of ISDS tribunals compared with the Australian and most national legal systems are that there is no independent judiciary, no precedents and no appeals. Individuals can be corporate advocates one month and sit as arbitrator the next month. In Australia, and most national legal systems judges cannot continue to be practising lawyers because of obvious conflict of interest. Also in most national legal systems, judges have to take note of other similar decisions or precedents and justify their decisions in that context. The decisions of judges can also be appealed to higher courts. This helps to ensure fairness and consistency of decisions. This is why Australia's High Court Chief Justice French and the Productivity Commission have said that ISDS lacks the fundamental principles of a fair legal system. These flaws remain in the TPP. Yet in the fact check, one legal expert confusingly claims that most national systems don't use "strict precedents", and another is quoted as saying "no system is perfect"!

Another legal expert says that the TPP states have agreed to develop a "code of conduct for arbitrators", and "makes allowances for the establishment of an appellate mechanism for reviewing awards issued by ISDS tribunals." The fact is that the TPP does not actually contain either a code of conduct or an appeal system, but merely mentions that they may be developed in future.

Other quotes are misleading by omission. ISDS is not merely an opportunity for investors "to protect their investments overseas against expropriation and to ensure that they are afforded a certain minimum standard of treatment and treated in a non-discriminatory manner." This description hides the fact that many ISDS cases have been taken against health, environment and other public interest regulation. The US pharmaceutical company Eli Lilly is currently suing the Canadian government over a court decision which refused a patent for a medicine which was not sufficiently more medically effective than existing medicines. The US Lone Pine mining company is suing the Canadian

government because the Québec provincial government conducted a review of environmental regulation of gas mining. The French Veolia company is suing the Egyptian government over a contract dispute in which they are claiming compensation for a rise in the minimum wage.

It is also misleading by omission to say that an ISDS tribunal "cannot require the government to change any laws or regulations." What tribunals can do is order governments to pay millions, or in some cases billions of dollars in compensation. This can lead to settlement of cases where governments agree to withdraw regulation in order to reduce the amount of compensation paid.

The most comprehensive figures on known cases from the United Nations Committee on Trade and Development show that there has been an explosion of known ISDS cases in the last 20 years, from less than 10 in 1994 to 608 in 2014. US-based companies are by far the most frequent users. The TPP is particularly dangerous because it will expose Australia to direct cases from US-based global corporations.

Thanks to campaigning from public health groups, TPP governments have agreed to have the option of excluding future tobacco control laws from ISDS cases. But the need for the specific exclusion of tobacco regulation shows that the general "safeguards" for other public interest laws are weak, similar to clauses in other recent agreements, and will not prevent corporations from bringing cases. "Safeguards" in the definitions of "indirect expropriation" and "fair and equitable treatment" for investors are still open to wide interpretations by tribunals.

Procedural improvements for greater transparency and the ability to dismiss frivolous claims earlier are welcome. But they do not address the fundamental flaws that ISDS tribunals have no independent judiciary and no precedents or appeals, and pose a basic challenge to democratic regulation in the public interest.