

*A Brief Concerning  
the Investor State Dispute Settlement (ISDS) Provisions  
in the Trans-Pacific Partnership (TPP) Agreement*

**Submitted to:**

Standing Committee on International Trade  
Sixth Floor, 131 Queen Street  
House of Commons  
Ottawa ON K1A 0A6  
Canada

**Submitted by:**

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To the Standing Committee on International Trade:

We are writing this letter to express our concerns over Canada's participation in the Trans Pacific Partnership (TPP).

We wish to start by stating that neither we, as individual citizens, nor the organization we represent, are anti-trade, protectionist or opposed to trade agreements. Canada has received great economic and social benefits from its trade activities, and will continue to do so in the future. However, we are concerned with the recent evolution of trade agreements, and the potential impact this has on Canadian democracy.

In particular, we are concerned with the bias inherent in the TPP's Investor State Dispute Settlement, or ISDS, provisions, which create an imbalance between corporate rights and the rights of citizens, workers, and other groups. The Investor-State Dispute Settlement (ISDS) process lets foreign-based companies sue governments for real or anticipated loss of profits, and the agreement sets up mechanisms for secret tribunals that are not accountable to our legal or legislative system. These provisions preferentially weight investor rights over those of the state and citizens, and violate the principles of democratic investor protections, such as those outlined by a group of over seventy academics in 2010<sup>1</sup>:

- *The protection of investors, and by extension the use of investment law and arbitration, is a means to the end of advancing the public welfare **and must not be treated as an end in itself.** (our emphasis)*
- *All investors, regardless of nationality, should have access to an **open and independent** judicial system for the resolution of disputes, including disputes with government. (our emphasis)*
- ***Foreign investment may have harmful as well as beneficial impacts on society and it is the responsibility of any government to encourage the beneficial while limiting the harmful.** (our emphasis)*
- ***States have a fundamental right to regulate on behalf of the public welfare and this right must not be subordinated to the interests of investors where the right to regulate is exercised in good faith and for a legitimate purpose.** (our emphasis)*

**We recommend that the government of Canada adopt principles similar to these in determining an acceptable framework for ISDS provisions in trade agreements such as the TPP.**

Under the North American Free Trade Agreement (NAFTA), one of the earliest examples where ISDS provisions were enshrined in multi- or bilateral trade agreements, Canada is

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<sup>1</sup> Van Harten, Gus, David Schneiderman, Kyla Tienhaara, and over 70 other academics. August 31, 2010. *Public Statement on the International Investment Regime*: <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/>

considered to be one of the “most sued developed countries in the world.” In the last decade corporations have begun to aggressively use similar clauses in NAFTA and other trade agreements to challenge democratic institutions and public policy, particularly around public health and the environment:

*“Canada has paid American corporations more than \$200 million (approximately €135 million) in the seven cases it has lost and foreign investors are now seeking over €1.75 bn from the Canadian government in new cases. Even defending cases that may not be successful is expensive. Canada has spent over \$65 million (approximately €45 million) defending itself from NAFTA challenges to date. . . The Canadian Centre for Policy Alternatives reports that almost two-thirds of claims against Canada involved challenges to environmental protection or resources management that allegedly interfered with the profit of American corporations.”<sup>2</sup>*

What seems apparent is that, under trade agreements such as NAFTA, the laws and standards that aim to protect the things we value make us the most vulnerable to suits by foreign investors. This puts our labour, environmental, agricultural, health and social policies at risk, and threatens our social fabric, our communities, and our national sovereignty:

*“In the case of NAFTA, Canada agreed to ISDS on this basis with the U.S. and Canada has since faced more foreign investor claims than all but a handful of countries, has paid compensation in response to numerous claims, **and has altered government decisions or decision-making processes in order to accommodate foreign investor interests and to reduce risks of potentially massive liability.**”<sup>3</sup> (our emphasis)*

The TPP, in continuing this tradition, makes it likely that the frequency of litigation – and the threats to our democratic decision making processes - will increase in the future. **We recommend that Canada reject the TPP on the basis that the ISDS provision threatens our democratic processes and leaves us vulnerable to litigation that is motivated solely on the basis of profit recovery, and not for the overall public, environmental and community good.**

Proponents of recent trade agreements have argued that these settlements are not huge figures in terms of national trade balances. However, what cannot be argued is that ISDS provisions are essentially undemocratic, and that on their own they are sufficient reason to reject the TPP. ISDS processes that override our democratic processes must not be included in “trade” agreements of any kind. The cost is too great and the implications for democracy are obvious.

As a local example, Bilcon, a US corporation, proposed to construct and operate a quarry and marine terminal in Digby County, Nova Scotia. In 2007 a joint federal-provincial environmental assessment panel recommended that the proposed project be rejected because of potential negative environmental impacts. Bilcon sued under NAFTA, seeking more than \$100 million in damages, and a split panel ruled in their favour. The tribunal concluded that “the

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<sup>2</sup> Barlow, Maude. October 23, 2015. *Why Canada is One of the Most Sued Countries in the World:* <http://www.globaljustice.org.uk/blog/2015/oct/23/why-canada-one-most-sued-countries-world>

<sup>3</sup> David R. Boyd, John R. Calvert Marjorie Griffin Cohen Stephen Gill Ronald Labonté David Schneiderman Dayna Nadine Scott Kyla Tienhaara and Gus Van Harten. October 17, 2016. *An Open Letter to the Parliament of Wallonia and Belgian Voters on the proposed CETA and its Foreign Investor Protection System:* <https://gusvanharten.files.wordpress.com/2016/10/canadian-academics-open-letter-on-the-ceta-and-wallonia.pdf>

governments' actions frustrated the investors' "legitimate expectations", and that Canada violated the NAFTA's FET obligation<sup>4</sup>. Again, the settlement is deemed by many to be small in terms of Canada's annual trade budget. However, it is a huge amount to pay out to a foreign investor after our legitimate governments have deemed that the project was not advisable from an environmental standpoint and would not serve the best interests of the community. It is also a huge sum to pay out to a foreign investor for expectations of future profit, as opposed to real losses of invested money, and for a settlement determined via a process that occurs outside Canada's normal legal structures.

Estimates of the economic benefits of the TPP for Canada are typically < 1% GDP growth over the next 10–15 years<sup>5,6</sup>. This does not seem to be a substantial gain, especially given that there are many anticipated social, environmental, and economic costs, including an estimated loss of 58,000 jobs<sup>7</sup>. "Free trade" advocates admit that there are winners and losers when countries remove protections around their markets. However, it is increasingly recognized, in organizations such as the IMF, that the "winners" of previous so called free trade agreements have been the "fortunate few," while the earnings of working people have stagnated or dropped<sup>8</sup>. This is a grave concern, since economic and trade policies should support greater, not lesser, equality in Canada and globally. They should also focus on economic models that use true cost accounting and consider the human, societal and environmental costs of trade, and that respect the existing legal and democratic structures in signing states.

More importantly, we believe that economic gains should not be used to justify agreements that privilege investor rights over citizen, community and environmental concerns, and that interfere with government's duty to make decisions and pass laws in the public interest. **We therefore recommend that the government of Canada adopt a trade approach that includes independent, third-party analysis and full cost accounting methodologies, gives full consideration to citizen and community rights and environmental concerns, and ensures our government's ability to make decisions and pass laws for the public, environmental and community good.**

Objections to ISDS provisions have been researched and documented by many individuals and groups, these objections should be carefully considered before Canada ratifies the TPP. We do not think the rules of this trade agreement are appropriate for a modern democratic state, nor do we believe it will adequately serve Canada's citizens. We therefore respectfully ask that you consider our objections and help us bring them forward to the government of Canada. Please urge our government to position Canada as a leader in rejecting the TPP approach to trade negotiations, and

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<sup>4</sup> Geist, Michael. March 2, 2016. *The Trouble With the TPP, Day 42: The Risks of Investor-State Dispute Settlement*: <http://www.michaelgeist.ca/2016/03/the-trouble-with-the-tpp-day-42-the-risks-of-investor-state-dispute-settlement/>

<sup>5</sup> Capaldo, J. A. Izurieta, and J. K. Sundaram. January, 2016. *Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement*. GDAE Working Paper 16-01. Available from: [http://www.ase.tufts.edu/gdae/policy\\_research/TPP\\_simulations.html](http://www.ase.tufts.edu/gdae/policy_research/TPP_simulations.html)

<sup>6</sup> Lakatos, C., M. Maliszewska, F. Ohnsorge, P. Petri, and M. Plummer. *Topical Issue: Potential Macroeconomic Implications of the Trans-Pacific Partnership*. Global Economic Prospects, January, 2016 Chapter 4. Available from: <http://www.worldbank.org/content/dam/Worldbank/GEP/GEP2016a/Global-Economic-Prospect-2016-Implications-Trans-Pacific-Partnership-Agreement.pdf>

<sup>7</sup> Tencer, Daniel. January 20, 2016. *TPP's Economic Impact Will Be Fewer Jobs, More Inequality, New Study Says*. The Huffington Post Canada: [http://www.huffingtonpost.ca/2016/01/20/tpp-economic-impact-canada-us\\_n\\_9029892.html](http://www.huffingtonpost.ca/2016/01/20/tpp-economic-impact-canada-us_n_9029892.html)

<sup>8</sup> Elliot, Larry. September, 2016. *IMF study warns free trade seen as benefiting 'only a fortunate few'*: <https://www.theguardian.com/business/2016/sep/27/international-monetary-fund-world-economic-outlook-globalisation-free-trade>

to use our social, human, scientific and economic wealth in a new approach to trade deals. Specifically, we request that the government of Canada:

- reject the TPP on the basis that the ISDS provision threatens our democratic processes and leaves us vulnerable to litigation that is motivated solely on the basis of profit recovery, and not for the overall public, environmental and community good;
- adopt principles similar to those of VanHarten *et. al.* (2010) in determining the framework for ISDS provisions in trade agreements such as the TPP.
- adopt a trade approach that includes independent, third-party analysis and full cost accounting methodologies, gives full consideration to citizen and community rights and environmental concerns, and ensures our government's ability to make decisions and pass laws for the public, environmental and community good.

We thank you for your time, and for the opportunity to participate in this process.

Sincerely,

Kathryn Anderson, Wilf Bean, David Boyle,  
Rosaria Campbell, Berta Gaulke, Brian Gaulke,  
Margaret Greene, Meghan MacCulloch,  
Ann Manicom, Darlene McIvor

North Shore Nova Scotia Chapter, Council of Canadians

### **The Council of Canadians:**

Since 1985, the Council of Canadians (<http://canadians.org/>) has brought Canadians together to act for social, economic and environmental justice here in Canada and around the world. Our work is built on a strong foundation of timely and strategic campaigns to fight for the values, social programs and progressive policies that Canadians believe in.

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