

**Submission to the Standing Committee on International Trade**  
**Renegotiation of the North American Free Trade Agreement**

by the

**Environmental Coalition of Prince Edward Island**  
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October 12, 2017

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This brief submission will focus on two aspects of NAFTA that we believe should be changed in the interests the environment – Investor State Dispute Settlement provisions, and the inclusion of water as a tradable good. We would also like to offer some comment on the NAFTA Advisory Council on the Environment that was recently established by federal Minister of the Environment, Catherine McKenna, and the need for a new formulation for international trade agreements, which would make addressing climate change and environmental protection a priority, for the health and wellbeing of people and the planet.

## **1. Chapter 11 – Investor State Dispute Settlement**

The Investor State Dispute Settlement mechanism contained in NAFTA has proved costly to the Canadian government, and as a consequence, to anyone who pays taxes in this country. We are sued more than any other country – there have been upwards of 35 suits against us, according to the government’s own website, and we have paid out millions of dollars in rewards to foreign investors. It is important to note that a large proportion of the cases that are brought forward have been concerned with environmental matters.

The ISDS provisions create a “regulatory chill”, causing reluctance among legislators to implement policies, laws and regulations that protect the environment but which might be seen by foreign investors as interfering with their profit-making.

ISDS allows corporations to bypass Canadian courts when they perceive they have been treated unfairly or wronged. The independent tribunals that hear ISDS cases don’t have to consider the broader impact on the environment, and the need for government to regulate to protect our land, water and air.

Among the cases against Canada are two that are of particular concern to people living in Prince Edward Island:

- Lone Pine Resources, Inc sued Canada for over \$100 million, because the province of Quebec banned fracking in 2011, which resulted in the revocation of oil and gas exploration licenses located beneath the St. Lawrence River, granted to Lone Pine’s Canadian subsidiary. This case is still active.

In PEI (located squarely in the middle of the Gulf of St Lawrence, dependent on the Gulf for its livelihood, derived from fisheries and tourism) as in Quebec, people have been vocal in their support for a ban on fracking for natural gas. This was also a common theme in presentations made to government in public consultations regarding a (yet to be enacted) Water Act for PEI in 2016. We do not wish our government's decision-making in this area to be influenced by foreign investors.

- The Delaware-based rock mining company, Bilcon, sued Canada for over \$100 million in 2008. (The case is still active.) Their plan to build a quarry and marine terminal in Digby Neck, Nova Scotia, was rejected by an environmental impact assessment review panel after a process that involved comprehensive consultation with experts and community. The company claimed they had been unfairly treated, and that the decision of the review panel did not adhere to proper standards. The arbitration panel agreed. This suit threatens the integrity of Canadian environmental review processes.

Several recent events have made it quite clear that good environmental assessment, including meaningful and in-depth public consultation, is important to the people of Prince Edward Island. When a water bottling plant was proposed by a private company in a rural area of PEI, people reacted strongly, not only to the idea of extracting and bottling water, but to the lack of due process. The same passion was shown when a company managed to avoid an environmental assessment when it proposed an expansion of an existing operation, from producing genetically modified salmon eggs for export, to producing fully grown fish. Although the expansion is in a completely different location and of a much larger scale, a permit was granted based on the original environmental impact assessment. That decision continues to be a topic of concern, and environmental groups, ECOPEI among them, are working hard to make sure environmental assessment processes are strengthened.

*Our recommendation is that Chapter 11 on Investor State Dispute Settlement be eliminated from NAFTA.*

## **2. Water**

In Prince Edward Island we are anxiously awaiting the final draft of a provincial Water Act. The process leading to the development of the act was a fine example of public consultation. An impressive number of individuals and groups presented to provincial officials their ideas about what should be included in the act. Over and over those officials heard from Islanders that they wanted the act to recognize water as a human right, and as a common good.

It was in 2010 that the United Nations formally recognized the human right to water, and acknowledged that access to clean water for drinking and sanitation is essential to the recognition of all other human rights.

However, in NAFTA, water is considered a tradable good, an investment and a service. All three of these ways of defining water are problematic.

Defining water as a tradable good contradicts the idea of water as a human right. As a tradable good, water can be exported for profit. And, NAFTA's proportionality clause could prevent us from stopping exports of water to the United States, even in times of drought.

Defining water as a service under NAFTA presents the possibility of privatization of water services, which again contradicts the idea of water as a human right and as a common good. Privatization restricts access and unfairly affects people who are living in poverty.

Defining water as an investment opens the door to suits (under the ISDS) when policies designed to protect water are seen by foreign investors to threaten their financial wellbeing. The chilling effect described previously in this submission could mean less protection for water, both in terms of quantity and quality.

*Our recommendation is that water, as a tradable good, a service and an investment, must be removed from NAFTA.*

### **3. NAFTA Advisory Council on the Environment**

The concept of an advisory council on the environment is a good one. But we join with other groups across Canada in expressing our concern that the group that has been convened by Minister McKenna is weighted heavily towards industry representatives, to the almost exclusion of environmental or community representatives. Among the council members are former oil company and insurance company executives, corporate lawyers, and retired politicians who have no apparent connection to or knowledge of environmental issues, but who do seem to be well connected to the resource sector. While it may be important – given the focus of the council is a trade agreement – to include some from the business sector, it is equally as important to have people involved who can examine NAFTA through the lens of environmental protection. *We ask that the Minister of the Environment adjust the membership of the Advisory Council to include people with knowledge of environmental issues.*

#### **4. A New Framework for International Trade Agreements**

Trade agreements should be good for communities, people and the environment. In a time of rapid climate change and environmental catastrophes, we need a framework for trade that addresses climate change and is designed with environmental sustainability at its core.

Environmental degradation is clearly visible in Prince Edward Island – soil depletion and erosion, fish kills due to intensive agriculture, anoxia in our waterways – many of the issues are directly related to our reliance on an industrial form of agriculture that fits well into our current trade regime.

*Our recommendations:*

- In order to protect the land, water and air upon which we all rely, an “environmental lens” should be applied to all government policy, including trade agreements.*
- Climate change commitments such as those made within the Paris Accord, should be embedded into NAFTA and other trade agreements.*
- Protections for the environment and for policies designed to protect the environment should be “carved out” in NAFTA and other agreements.*

For more information about this submission please contact Ann Wheatley, member of ECO-PEI, [ann@cooperinstitute.ca](mailto:ann@cooperinstitute.ca).

#### **About the Environmental Coalition of Prince Edward Island:**

The Environmental Coalition of Prince Edward Island was formed in 1988. Its main goal is to develop public awareness and understanding of issues that affect PEI's land, water and forests and all of the living things that are part of our ecosystem. Its flagship project, the Macphail Ecological Forestry Project, combines protection of the natural areas with wildlife enhancement, forest stewardship, watershed protection, environmental education and ecological research.