

## DELIVERED BY EMAIL

Hon. Ed Fast  
Minister of International Trade  
House of Commons  
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October 16, 2015

Re: Environmental implications of the Trans-Pacific Partnership trade agreement

The Canadian Environmental Law Association writes to express our concerns about the potential for the recently signed Trans-Pacific Partnership (“TPP”) trade agreement to harm our environment and undermine Canadian environmental policy. We strongly object to the secrecy surrounding the negotiation and signing of the TPP agreement. We look forward to the opportunity to review the agreement in full. Because of the secrecy to date and the exclusion of public-interest groups from consultations on the agreement, the government must carefully consider the comments of public-interest groups about the details of the agreement before deciding whether to ratify it.

### **Investor-State Dispute Settlement**

We oppose the inclusion of an investor-state dispute settlement (“ISDS”) provision in the TPP agreement. ISDS provisions significantly impede the ability of sovereign governments to make decisions in the public interest. No detail has been provided in the Department of Foreign Affairs, Trade and Development’s Technical Summary of the Agreement about how this ISDS provision “preserves the full rights of governments to legislate and regulate in the public interest”.<sup>1</sup>

ISDS provisions in other trade agreements are increasingly being used by foreign investors to challenge legitimate, public-interest regulation and decision-making. This trend is exemplified in Bilcon of Delaware Inc.’s successful use of the ISDS provision in the North American Free Trade Agreement (“NAFTA”) to challenge the federal and Nova Scotia governments’ decision, based on the recommendations of a joint review panel, to reject a quarry project in Nova Scotia.<sup>2</sup>

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<sup>1</sup> Department of Foreign Affairs, Trade and Development, Technical Summary of the Agreement, October 6, 2015 (“Technical Summary of the Agreement”), Investment Chapter and Institutional Provisions Chapter <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/understanding-comprendre/index.aspx?lang=eng>>

<sup>2</sup> *The Claytons and Bilcon v Government of Canada* (2015), Permanent Court of Arbitration Case No. 2009-04 (Ch 11 Panel) (“*Bilcon*”)

The dissenting member of the NAFTA panel in *Bilcon* observed that the decision will be seen as a “remarkable step backwards in environmental protection”.<sup>3</sup>

The danger of the ISDS provision is made clear by the ability of state parties to exclude claims challenging tobacco control measures from ISDS in the TPP.<sup>4</sup> That exception should include all measures designed to protect the environment and other public-interest matters.

The original purpose of ISDS provisions was to protect foreign investments from expropriation. If there is a true claim by a foreign corporation for expropriation as understood in our case law, those claims should proceed in our well-developed court system. National corporations are required to proceed through our courts. Preferential treatment should not be given to foreign investors.

We also stress that the inclusion of an ISDS provision in the agreement has the potential to undermine any gains potentially provided by the environment chapter.

## Environment Chapter

Despite the Department of Foreign Affairs, Trade and Development’s assurance that the TPP provides “ambitious environmental obligations” and access to dispute resolution mechanisms to enforce these obligations, there is currently no detail on how these provisions will deliver on that promise or the scope of these provisions.<sup>5</sup> We support the inclusion of enforceable environmental protection in the agreement, but cannot comment on the effectiveness or suitability of the mechanisms included in the TPP until the full text of the chapter has been released.

Yours truly,

**CANADIAN ENVIRONMENTAL LAW ASSOCIATION**



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<sup>3</sup> Dissenting opinion in *Bilcon*, para 51

<sup>4</sup> Technical Summary of the Agreement, Institutional Provisions Chapter

<sup>5</sup> Technical Summary of the Agreement, Environment Chapter