October 31, 2016

Standing Committee on International Trade
House of Commons
131 Queen Street, Sixth Floor
Ottawa, ON
K1A 0A6
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Re: Trans-Pacific Partnership Agreement (TPP) Public Consultation

We write to urge the government to reject the Trans-Pacific Partnership ("TPP") in its current form.

The Chapter 9 Investor-State Dispute Settlement ("ISDS") provisions will restrict the government's ability to legislate or make decisions to protect the environment. Foreign corporations are given the power to challenge strong environmental measures brought in by governments if it would interfere with their profits.

The Environment Chapter does nothing to counterbalance this corporate power. The TPP does not require the parties to provide minimum levels of environmental protection. Instead, TPP parties may decide to set low environmental standards and give low priority to environmental concerns, and there is no way to challenge those decisions or require any improvement to environmental policy.

Background

The Canadian Environmental Law Association (CELA) is an Ontario legal aid clinic focused on environmental law and policy. CELA has a long history of analyzing the environmental implications of trade agreements. Our top priority is to represent low income individuals and communities, and to speak out for those with less influence and who receive less of a say in government decision-making.

Ecojustice is an independent non-profit organization supported by over 100,000 Canadians. Ecojustice has a staff of lawyers and scientists who provide legal assistance to individuals and groups working to improve and enforce environmental laws.

Chapter 9: Investor-State Dispute Settlement

We oppose the inclusion of any investor-state dispute settlement ("ISDS") provisions in the TPP agreement. ISDS provisions significantly impede the ability of sovereign governments to make decisions in the public interest. Canada has often been a target of ISDS cases and legitimate public policy and environmental decisions have been challenged. The inclusion of ISDS in the TPP will radically expand the reach of these anti-democratic provisions.

ISDS provisions in other trade agreements are increasingly 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 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.[1] The dissenting member of the NAFTA panel in *Bilcon* observed that the decision will be seen as a "remarkable step backwards in environmental protection".[2]

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 Canadian 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 ISDS provisions in the TPP will undermine any protection potentially provided by the Environment Chapter.

Chapter 20: Environment Chapter

The Environment Chapter will not counterbalance the environmentally detrimental effects of the TPP agreement as a whole. The language of the chapter is weak and unenforceable. The reach of the chapter is limited by its application to only federal environmental laws and actions that detrimentally affect trade.

The dispute resolution mechanisms that apply to the Environment Chapter are not likely to be effective. The state-state dispute resolution mechanisms depend on the political will of one TPP party to challenge another TPP party on its environmental record. Similar provisions in previous trade agreements have not been used in the past. The citizen suit provisions are very limited and citizens have no way to follow up on unsatisfactory responses to their complaints.

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[1] *Bilcon of Delaware v Government of Canada* (2015), Permanent Court of Arbitration Case No. 2009-04 (Ch 11 Panel) ("*Bilcon*")

[2] *Bilcon,* at para 51, Professor Donald McRae, dissenting

(i) The language in the Environment Chapter needs to be strengthened

The primary reason that the TPP will not protect the environment is that the language in the Environment Chapter is vague and discretionary. Environmental standards are not set. Instead, the parties only agree to "take measures to" protect the ozone layer, to protect the marine environment from ship pollution, and to combat the illegal trade of wild fauna and flora.[3] The parties will "promote and encourage" the conservation and sustainable use of biological diversity.[4] Similar discretionary and vague language permeates the chapter.

Unlike the strong, enforceable rights provided to foreign investors by the ISDS provisions, the Environment Chapter includes only weak, unenforceable obligations regarding corporate social responsibility. TPP countries are to "*encourage* enterprises… to adopt *voluntarily,* into their policies and practices, principles of corporate social responsibility that are related to the environment" (emphasis added").[5]

In an act of climate change denial, the TPP also does not refer directly to climate change or government commitments to combat climate change. Instead, Article 20.15 refers only to "low emissions" and notes that "each Party's actions to transition to a low emissions economy should reflect domestic circumstances and capabilities".[6] This provision is at odds with the government's commitment to seriously combat climate change. The government's environmental commitments in the recent Paris Agreement under the United Nations Framework Convention on Climate Change can only be successful if they are not undermined by other policies.

(ii) The Environment Chapter should cover both federal and provincial environmental law

The definition of "environmental law" in Article 20.1 should be expanded to include both federal and provincial laws. Sub-national governments do not appear to have been included in the negotiation of this chapter.

In many federal jurisdictions, including Canada and Australia, environmental laws are made and enforced by both national and regional governments. The effectiveness of the chapter is severely limited by the narrow definition of environmental law to only include federal law.

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[3] *Trans-Pacific Partnership*, 4 February 2016 (not in force) ("*TPP*"), arts 20.5(1), 20.6(1), 20.17(5)
[4] *TPP,* art 20.13(2)
[5] *TPP,* art 20.10
[6] *TPP,* art 20.15(2)

(iii) Environment Chapter should encompass more than environmentally detrimental actions that impact trade

Chapter 20 should be strengthened to include protections for the environment at least as strong as those in the North American Agreement on Environmental Cooperation ("NAAEC"), the environmental side agreement to NAFTA. While the NAAEC allowed a party to challenge actions that demonstrated a "persistent pattern of failure by that other Party to effectively enforce its environmental law", most of the provisions in the Environment Chapter in the TPP require parties to further demonstrate that the environmentally detrimental decisions would affect trade between the parties.[7]

(iv) The state-state dispute resolution provisions are unlikely to be used by TPP parties to enforce the chapter

The Environment Chapter includes state-state dispute resolution provisions, which means that one TPP party can challenge another TPP party about their compliance with the chapter. However, these provisions are unlikely to be used. They depend on the political will of the TPP parties to use the provisions to enforce the chapter. Similar dispute resolution schemes in past trade agreements have not been successful.

The Environment Chapter provides for at least three levels of confidential consultations between the parties before a party can seek resolution of an issue before an arbitration panel.[8]

If any matter does proceed to arbitration under Chapter 28, public participation is not assured and is restricted to written submissions. Disclosure requirements are also limited and the chapter contemplates some documents not being released to the public until just before the final report of the arbitration panel is released.[9]

(v) The citizen complaint provisions are very limited

Chapter 20 provides little scope for citizens to challenge TPP parties if they are not living up to their commitments in the Environment Chapter. Citizen groups may only challenge their own governments through written submissions. A TPP party is required to respond in a "timely manner", but a citizen cannot follow up if they are unsatisfied with the response.[10]

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[7] *TPP,* arts 20.3(4), 20.12(9), ch 20 fn 5, 8, 23
[8] *TPP,* arts 20.20(2), 20.21(1), 20.22(1), 20.23(1)
[9] *TPP,* arts 28.13(d)(i), 28.13(d)(ii), 28.13(e)
[10] *TPP,* arts 20.9(1), 20.9(4)

Conclusion

The TPP Environment Chapter will not adequately protect the environment from the environmentally detrimental impacts of the rest of the TPP, including the ISDS provisions. We therefore urge the government to reject the TPP in its current form.

Yours Truly,

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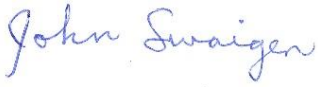

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