

# BACKGROUND

## TPP: Implications for Canada

6/19/14

### The Trans-Pacific Partnership

- The Trans-Pacific Partnership (TPP) is a trade deal between 12 countries of the Pacific Rim: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the U.S., and Vietnam.
- Trade negotiators have been working on the deal for several years, with hopes of signing a deal this year. The next round of TPP negotiations will likely occur in Vancouver July 3-12.
- Negotiations are taking place in extreme secrecy; though there have been document leaks, no official drafts of any part of the treaty have been released.
- While the public is excluded from negotiations, more than 600 corporate advisors have access to the negotiating text.<sup>1</sup>

### TPP and Corporate Rights

- The TPP will follow the model of the North American Free Trade Agreement (NAFTA), which didn't play well for the U.S. or Canada, and include provisions that allow foreign corporations to sue governments directly—for unlimited cash compensation—over almost *any* domestic environmental or other law that the corporation alleges is hurting its ability to profit.
- While typically disagreements over trade are handled between countries, the so-called "investor-state dispute settlement" (ISDS) cases are heard in private and unaccountable trade tribunals. This means that not only do investor-state cases threaten laws designed to protect our health and environment, they do so in a completely opaque manor. To date, corporations such as Exxon Mobil and Chevron have launched than 500 cases against more than 95 governments.<sup>2</sup>
- In 2013, Canada was the fifth most frequent respondent state for ISDS cases, with three in a single year.<sup>3</sup> Canada has been the respondent to 22 claims total, the fifth most of all 98 respondent countries.<sup>4</sup>
- Among 274 concluded cases in 2013, approximately 57 percent of ISDS cases are ruled in favor of the investor or settled with concessions to the investor.<sup>5</sup>
- States have paid as much as \$935 million in taxpayer funds to investors, and investors' claims range from \$27 million to about \$ 1 billion.
- Even in cases that the state wins, the legal expenses average \$8 million per case and can exceed \$30 million.<sup>6</sup>
- Among vulnerable safeguards are bans and moratoria on fracking, which Big Oil and Gas companies would love to upend.<sup>7</sup>

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<sup>1</sup> "Trans-Pacific Partnership Agreement." *Sierra Club*. 2014. Accessed 18 June 2014.

<http://www.sierraclub.org/Trade/trans-pacific-partnership-agreement>.

<sup>2</sup> United Nations Conference on Trade and Development (UNCTAD). *Latest Developments in Investor-State Dispute Settlement*. 2014. [http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf)

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> "Investor-State Dispute Settlement." Public Consultation: 16 May- 9 July 2012. Organisation for Economic Co-operation and Development. <http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf>

<sup>7</sup> Eberhardt, Pia; Feodoroff, Timothé; Lui, Emma; Olivet, Cecilia, and Stuart Trew. "The right to say no: EU-Canada trade agreement threatens fracking bans." *Transnational Institute, The Council of Canadians*. May 2013. Accessed 19 June 2014. <http://www.tni.org/sites/www.tni.org/files/download/ceta-fracking-briefingen.pdf>.

- This is already happening under existing Free Trade Agreements: Lone Pine, an oil and gas company, is in the process of taking Canada before a NAFTA panel to demand \$250 million in compensation from Canadian taxpayers,<sup>8</sup> alleging that Quebec's moratorium on fracking to study environmental impacts puts a burden on their business and profits, including their "right to mine."<sup>9</sup>
- The investment chapter of the TPP, one of the three leaked chapters of the treaty, would give corporations expansive new rights, including the right to sue governments in non-transparent trade tribunals over public interest regulations alleged to interfere with investors' expected profits.

### Relationship with Tar Sands

- Tar sands production releases three to four times as much climate-disrupting greenhouse gas emissions than the production of conventional crude oil.<sup>10</sup>
- Despite tar sands' environmental dangers, the Canadian government has threatened to challenge the EU at the World Trade Organization (WTO), arguing that the EU's Fuel Quality Directive (FQD), which helps reduce contributions to climate disruption and air pollution, discriminates against tar sands because it labels the product as "highly polluting."<sup>11 12 13</sup>
- TransCanada, the corporation responsible for Keystone XL, has indicated it may be considering bringing an ISDS case against the U.S. under NAFTA if the U.S. rejects the pipeline.<sup>14</sup>
- If TransCanada can sue the U.S. government for rejecting a pipeline, that would set a precedent for other cross-border tar sands pipelines to be approved to avoid costly ISDSs.
- Canadian Prime Minister Stephen Harper vowed to make the Canada an "energy superpower" by developing Canadian tar sands.<sup>15</sup>
- Much of the Keystone XL tar sands oil would likely be exported to Latin America, particularly to Mexico and Chile, two nations involved in the TPP.<sup>16 17</sup>

### Relationship with Natural Gas

- A TPP provision that calls for "national treatment for trade in natural gas" would undermine the U.S. Department of Energy's authority to regulate natural gas exports, ensuring automatic approvals to any company seeking to export natural gas to a TPP country.<sup>18</sup>

<sup>8</sup> Beltrame, Julian. "Quebec Fracking Ban Lawsuit Shows Perils of Free Trade Deals: Critics." *Huffington Post Business Canada*. 3 Oct 2013. [http://www.huffingtonpost.ca/2013/10/03/quebec-fracking-ban-lawsuit\\_n\\_4038173.html](http://www.huffingtonpost.ca/2013/10/03/quebec-fracking-ban-lawsuit_n_4038173.html).

<sup>9</sup> *Lone Pine Resources v. The Government of Canada*. "Notice of Intent to Submit a Claim to Arbitration." 8 Nov. 2012. <http://www.italaw.com/sites/default/files/case-documents/italaw1156.pdf>

<sup>10</sup> Tar Sands Solutions Network. *Climate Impacts*. June 2014. Accessed on 13 June 2014. <http://tarsandsolutions.org/tar-sands/climate-impacts>

<sup>11</sup> Carrington, Damian. "Canada threatens trade war with EU over tar sands." *The Guardian*. 20 February 2012. Accessed 18 June 2014. <http://www.theguardian.com/environment/2012/feb/20/canada-eu-tar-sands>.

<sup>12</sup> Dirty Diplomacy: Tar Sands Lobbying and the Fuel Quality Directive. *UK Tar Sands Network*. 2014. Accessed 18 Jun 2014. <http://www.no-tar-sands.org/campaigns/dirty-diplomacy-tar-sands-lobbying-and-the-fuel-quality-directive/>.

<sup>13</sup> Canadian Indigenous Tar Sands Campaign. UK Tar Sands Network, and Council of Canadians. "Keep Europe Out of the Tar Sands." Accessed 18 June 2014. [http://www.no-tar-sands.org/wp-content/uploads/2010/12/NTSN\\_Brief-CETA-web.pdf](http://www.no-tar-sands.org/wp-content/uploads/2010/12/NTSN_Brief-CETA-web.pdf)

<sup>14</sup> "TransCanada: No NAFTA Challenge on Keystone." *The Canadian Press*. 2 May 2014. Accessed 18 June 2014. <http://www.baytoday.ca/content/news/national/details.asp?c=61514>.

<sup>15</sup> Greenspon, Edward; Mayeda, Andrew; Penty, Rebecca; & Theophilos Argitis. "How Keystone XL soured the 'special relationship' between Stephen Harper and Barack Obama." *National Post*. 24 April 2014. Accessed 18 June 2014. <http://news.nationalpost.com/2014/04/24/how-keystone-xl-soured-the-special-relationship-between-stephen-harper-and-barack-obama/>

<sup>16</sup> Hargreaves, Steve. "Where Keystone's oil will go." *CNN Money*. 16 September 2013. Accessed 18 June 2014. <http://money.cnn.com/2013/09/16/news/economy/keystone-oil/>

<sup>17</sup> Hargreaves, Steve. "Gasoline: The new big U.S. export." *CNN Money*. 5 December 2011. Accessed 18 June 2014. [http://money.cnn.com/2011/12/05/news/economy/gasoline\\_export/index.htm?iid=EL](http://money.cnn.com/2011/12/05/news/economy/gasoline_export/index.htm?iid=EL)

## Relationship with Renewable Energy

- FTAs have restricted governments' ability to incentivize local energy companies to explore renewable initiative and programs.
- The Dispute Settlement Body (DSB) of the World Trade Organization (WTO) has mandated revisions to Canadian initiatives that encouraged renewable energy.
- Ontario's Feed-In Tariff (FIT) Program promoted renewable energy programs that support local businesses, but it was challenged before the WTO. Ontario had to then weaken the FIT Program and get rid of domestic content requirements for its large energy producers.<sup>19</sup>

## Lessons learned from NAFTA

- NAFTA allows companies to operate under lower environmental standards by freely relocating to areas with weaker regulations or enforcement.<sup>20</sup>
- Investors can abuse foreign investment protection provisions of Chapter 11 by suing foreign national governments when regulations interfere with profits.<sup>21</sup>
- NAFTA helped expand destructive farming practices involving pesticides, genetically modified organisms, and fossil fuel dependence.<sup>22</sup>
- The Proportionality Clause in NAFTA restricts Canada's regulatory capabilities over its tar sands/ oil industry by requiring a fixed proportion of fossil fuel exports to reach the United States each year.<sup>23</sup>
- Therefore, even if Canada has an energy shortage, it is legally obligated to continue supplying oil to the U.S.

## [Additional References:]

1. *Earthjustice, Friends of the Earth, IPS, Public Citizen, and the Sierra Club. "Investment rules in trade agreements: Top 10 changes to build a pro-labor, pro-community and pro-environment Trans-Pacific Partnership." Policy Brief, August 8, 2010. Accessed June 13, 2014: <http://www.citizen.org/documents/InvestmentPacketFINAL.pdf>*
2. *Meltzer, Joshua. "The Trans-Pacific Partnership Agreement, the environment and climate change." Voon, Tania (ed.), Trade Liberalisation and International Co-Operation: A Legal Analysis of the Trans-Pacific Partnership Agreement, 2014. Accessed 18 June 2014. [http://www.brookings.edu/~media/research/files/papers/2013/09/trans%20pacific%20partne%20meltzer/meltzer%20tpp%20environment%20chapter\\_version%202.pdf](http://www.brookings.edu/~media/research/files/papers/2013/09/trans%20pacific%20partne%20meltzer/meltzer%20tpp%20environment%20chapter_version%202.pdf)*
3. *"Trans-Pacific Partnership Agreement." Sierra Club: 2014. <http://www.sierraclub.org/responsible-trade-program/trans-pacific-partnership-agreement>*

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<sup>18</sup> Solomon, Ilana. "Raw Deal: How the Trans-Pacific Partnership Could Threaten Our Climate." *Sierra Club Responsible Trade Program*. 2013. Accessed 18 June 2014. [http://action.sierraclub.org/site/DocServer/0584\\_TPP\\_Report\\_03\\_low.pdf?docID=14641](http://action.sierraclub.org/site/DocServer/0584_TPP_Report_03_low.pdf?docID=14641)

<sup>19</sup> Dispute Settlement Body. "Communication from Canada." *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, World Trade Organization (5 June 2014). [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-HTML.aspx?Id=125097&BoxNumber=3&DocumentPartNumber=1&Language=E&Window=L&PreviewContext=DP&FullTextSearch=](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-HTML.aspx?Id=125097&BoxNumber=3&DocumentPartNumber=1&Language=E&Window=L&PreviewContext=DP&FullTextSearch=)

<sup>20</sup> "Responsible Trade Program: The North American Free Trade Agreement (NAFTA)." *Sierra Club*. 2014. Accessed 18 June 2014. <http://vault.sierraclub.org/trade/globalization/nafta.aspx>.

<sup>21</sup> Ibid.

<sup>22</sup> "NAFTA: 20 Years of Costs to Communities and the Environment." March 2014. *The Sierra Club, Sierra Club Canada, The Mexican Action Network on Free Trade (RMALC), The Institute for Policy Studies, & The Council of Canadians*. [http://action.sierraclub.org/site/DocServer/0642\\_NAFTA\\_Report\\_05\\_web\\_high.pdf?docID=15301](http://action.sierraclub.org/site/DocServer/0642_NAFTA_Report_05_web_high.pdf?docID=15301).

<sup>23</sup> "Trans-Pacific Partnership Agreement." *Sierra Club*. 2014. Accessed 19 June 2014. <http://www.sierraclub.org/Trade/trans-pacific-partnership-agreement>.