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Environmental Assessment of Trans-Pacific Partnership Free Trade Agreement Negotiations
Trade Agreements and NAFTA Secretariat (TAS)
Foreign Affairs and International Trade Canada
Lester B. Pearson Building, 125 Sussex Drive
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January 29, 2013

To whom it may concern,

The following comments are submitted as part of the Environmental Assessment of the Trans-Pacific Partnership (TPP) Free Trade Agreement Negotiations that Canada has officially joined and which Ministers Moore and Fast announced on October 9th, 2012.

While the secrecy surrounding these ongoing negotiations renders it difficult to know precisely what the full extent of the environmental impacts could be, given the demonstrable negative environmental effects that similar kinds of agreements have had and continue to have in Canada and internationally, there are a number of things we can conclude.

Despite Australia's urging against the inclusion of such measures in the TPP, and despite the Gillard Government's published Trade Policy Statement stating that it will no longer agree to such measures, we can be very certain that the final iteration of the Trans-Pacific Partnership Free Trade Agreement will include investor-state provisions.

While not directly related to trade, there exists ample evidence that the inclusion of investor-state provisions in treaties, such as the TPP or Chapter 11 of the North American Free Trade Agreement (NAFTA), fundamentally erode a government's ability to enact laws, regulations and policies that protect its environment or the health of its citizens. In particular, insufficient attention has been paid to an analysis of the arbitrations under Chapter 11 of NAFTA.

The first of these suits was in 1997, when Ethyl Corporation of Richmond, Virginia, challenged a Canadian statute that had been democratically enacted to protect Canadians from MMT. MMT (Methylcyclopentadienyl manganese tricarbonyl) is a neuro-toxic gasoline additive that posed both health and environmental problems. It was compromising the catalytic converters on Canadian cars, alarming car makers about the potential for voiding their warranties, while also increasing air pollution. As well, its impact in the atmosphere raised concerns it could have neuro-toxic effects on particularly vulnerable populations – children, pregnant women and the elderly. The same company had manufactured, and I believe still does for sale in the developing world, leaded gasoline. The public health experience with leaded gas demonstrated conclusively that if one wanted to increase absorption to the brain of a toxic heavy metal, adding it to gasoline was an effective delivery method. Ethyl Corporation's creative use of the "tantamount to expropriation" language of Chapter 11 was a surprise to the trade and investment community. What they now so sanguinely defend as a "typical FIPA provision," was not the intent of the NAFTA negotiators. I have spoken to a number of them who believed that the Chapter 11 language was only to codify what was clear in international law: that is a nation-state nationalized and expropriated the assets of a foreign corporation, compensation was owed.

As the Ethyl Corporation challenge became known, there was an effort through the Organization for Economic Cooperation and Development to being in an international version of Chapter 11 under the name "Multilateral Agreement on Investment." The OECD chose to consult with global civil society and, as Executive Director of Sierra Club of Canada, I attended a session with OECD negotiators in the Paris headquarters of the OECD. The session was under "Chatham House Rules," meaning I can relate what happened, but not attribute quotes. It was clear from that session that the negotiators within the OECD working on the MAI were shocked that a US-based corporation could use Chapter 11 "tantamount to expropriation" language to claim damages from Canada for the decision to remove a toxic product from trade. The collapse of the MAI negotiations was proximately related to concern of the French government

for protection of its culture, as well as a massive international citizen mobilization, but the Ethyl MMT complaint was a warning of the way the language had morphed into something with the potential to undermine democratic decision-making. Barry Appleton, Canadian lawyer for Ethyl Corp, said at the time, "It wouldn't matter if you were adding liquid plutonium to children's breakfast cereal. If you ban it and a US corporation loses its expectation of profit, you will owe money under Chapter 11." (This quote is a paraphrase of his comment.)

Following the decision of former Prime Minister Jean Chretien to push the MMT matter to a settlement prior to the arbitrators' ruling, a second Chapter 11 case was brought by S.D. Myers of Ohio, complaining of the impact of the ban on export of PCB contaminated waste from Canada. S.D. Myers had hazardous waste incinerators in the US. It had none in Canada, so the term "investor" was a stretch. This matter went to arbitration and Canada lost.

The S.D. Myers ruling is notable for several reasons:

1. It was a law of general application, i.e. PCB exports were banned. There was no way in which the move was discriminatory towards the United States in general, nor to S.D.Myers in particular.
2. It was a move taken consistent with Canada's obligations under the Basel Convention on Hazardous and Toxic Materials. Further, the Basel Convention is specifically referenced in NAFTA as a pre-existing multi-lateral obligation of Canada, exempt from NAFTA requirements.
3. At all material times when Canada banned the *export* of PCB contaminated waste, it would have violated US law to *import* the PCB waste to the United States.

The S.D. Myers case should be a clear warning to anyone looking at the Canada-China Investment Treaty that international arbitration can come to bizarre conclusions. Chapter 11 of NAFTA has had a higher proportion of environmental law challenges than in other areas of public policy. Mexico lost to Metalclad, a US-based hazardous waste disposal company that wished to locate a large toxic facility in San Luis Potosi. The state level government rejected the application and the federal government of Mexico was successfully sued.

It must be stressed that the nature of the full environmental impacts of Chapter 11 of NAFTA has never been assessed. I submit that the chilling effect of the Ethyl Corporations and S.D. Myers was profound. I am aware of a letter warning Alan Rock when he was Health Minister that removing the registration of pesticides for use in lawns for cosmetic purposes could give rise to Chapter 11 suits, so the move was not made. We have no way of assessing the "chilling effect" of the Chapter 11 cases that Canada has lost. In my opinion, there is a compelling case that the Ethyl and S.D. Myers case have resulted in failures of the Canadian government to regulate and/or ban toxic substances that they would have in the pre-Chapter 11 era. A thorough review of the regulatory process by the Commissioner for Environment and Sustainable Development, within the office of the Auditor General, assessing why certain pesticides and toxic substances have not been banned could provide empirical evidence of the chilling effect. In my view that is the single greatest environmental threat in this treaty. I believe municipal, provincial, territorial and the federal government will find themselves second-guessing policy and law-making related to environmental quality, health and safety based on how they imagine the investors awarded these powers by the TPP might respond.

More recent instances of such investor-state provisions being used to challenge sustainability or environmental protection measures here in Canada, and by Canadian firms abroad, are equally troubling. This past November, US energy company Lone Pine Resources launched a Chapter 11 challenge against the Quebec government, demanding $250 million in compensation. The damages that Lone Pine is alleging emerge from Quebec's adoption of a province wide moratorium on hydraulic fracturing (or fracking), and related suspension of exploration rights in the Gulf of St. Lawrence, pending the results of a comprehensive review into the negative environmental impacts of the practice. Such cases represent clear barrier to environmental protection and regulation in Canada. As stated by company spokesman Shane Abel, "We think that the expropriation is arbitrary and without merit," he said. "… We think that's a clear violation of the NAFTA agreement."[i]

In practice, findings that such a regulatory decision is "arbitrary" are themselves arbitrary, since a many government decisions, such as those resulting from a democratic change in government, can be viewed as "arbitrary" from the perspective of investors. This creates a basis for arbitration claims in any area of Canadian policy. And while guarantees against arbitrary and uncompensated expropriation are important to ensure a stable investment climate, in reality, the domestic courts in any of the countries participating in the ongoing Trans-Pacific Partnership negotiations would provide sufficient protection for investors against such risks.

At minimum, I would insist that any inclusion of investor-state arbitration clauses into the Trans-Pacific Partnership Free Trade Agreement include clearly stated exceptions against claims of expropriation for any laws or regulations pertaining to environmental, social, or labour policies that a future government may want to pursue. Yet while better than nothing, even here such exceptions present unacceptable risks to Canadian's sovereign, democratic rights to govern ourselves, including in environmental protection.

As explained by investment law expert Gus Van Harten, "The catch is that these exceptions are always uncertain and, ultimately, in the arbitrators' hands. Arbitrators have often decided that a measure was not "necessary", for example, where a less restrictive option was available to a government."[ii] The potential environmental impact of this degree of power being vested in an unelected and unaccountable body is both direct, wherein an arbitral panel may award damages in response to environmental laws or regulations that, in its sole opinion, are not strictly "necessary", creating pressure for them to be rescinded, and indirect, wherein the implicit threat of such legal action is sufficient to pre-empt a government from enacting an environmental law or regulation that could even potentially be challenged using the dispute resolution mechanism likely to be included in the TPP.

As described above, and for the reasons listed here, the Government of Australia has commissioned a major national review of the impacts of investor-state dispute resolution on the Australian economy and environment. Published in November, 2010, the 400 page "*Bilateral and Regional Trade Agreements Productivity Research Report*" formed the backbone of the "*Gillard Government Trade Policy Statement*", from April, 2011. The *Policy Statement* arrives at some conclusions that are particularly relevant in considering the environmental impact of the Trans-Pacific Partnership.

Describing the negative impact of investor-state mechanisms on the ability of an elected government to pursue laws and regulations in the public interest, the *Policy Statement* states:

> Some countries have sought to insert investor-state dispute resolution clauses into trade agreements. Typically these clauses empower businesses from one country to take international legal action against the government of another country for alleged breaches of the agreement, such as for policies that allegedly discriminate against those businesses and in favour of the country's domestic businesses.

> The Gillard Government supports the principle of national treatment – that foreign and domestic businesses are treated equally under the law. However, the Government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses. Nor will the Government support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses. The Government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme.[iii]

Australia has, in no uncertain terms, identified the linkage between investor-state provisions and the erosion of democratic control over the laws governing its social, environmental, and economic spheres. As a direct result, as a matter of policy the Government of Australia "will not support [investor-state] provisions in trade agreements that constrain our ability to regulate legitimately on social, environmental or other similar important public policy matters."[iv] When it comes to our domestic ability to enact environmental laws or regulations, Canada would do well to heed Australia's example during these negotiations.

I urge the Trade Agreement Secretariat to make public the terms of this Agreement currently being negotiated in our name.

Sincerely,

Elizabeth May O.C., M.P.
Member of Parliament for Saanich-Gulf Islands
Leader of the Green Party of Canada

[i] Gray, Jeff. "U.S. firm to launch challenge to Quebec fracking ban". http://www.theglobeandmail.com/globe-investor/us-firm-to-launch-nafta-challenge-to-quebec-fracking-ban/article5337929/ November 15, 2012

[ii] Gus Van Harten, "**Don't be fooled by the spin on the Canada-China treaty",** http://www.troymedia.com/2012/11/07/dont-be-fooled-by-the-spin-on-the-canada-china-treaty/ November 7, 2012.

[iii] *Gillard Government Trade Policy Statement*, (p.14). April, 2011.

[iv] Ibid.