

SACHS AND JOHNSON

## TPP would let foreign investors bypass the Canadian public interest

LISA SACHS AND LISE JOHNSON

Contributed to The Globe and Mail

Published Wednesday, Nov. 25, 2015 5:00AM EST

Last updated Wednesday, Nov. 25, 2015 5:00AM EST

*Lisa Sachs is director and Lise Johnson is head of investment law and policy at the [Columbia Center on Sustainable Investment](#).*

In early October, prime ministerial candidate Justin Trudeau promised Canadians “a full and open public debate” on the Trans-Pacific Partnership. With 30 chapters that would bind Canada to sweeping agreements on everything from services to intellectual property to the environment to procurement, there is much to debate.

One deserving a public discussion is the investment chapter, which includes an investor-state dispute settlement (ISDS) mechanism that allows foreign investors to sue state parties for violating broad investor protections contained in the agreement.

Of course, ISDS is not new to Canadian treaties. Canada has been sued many times under such mechanisms. But if that weren't enough to give Canadians pause, a few other recent developments should.

First, the bulk of Canada's investment treaties to date have been reached with developing countries, where Canada's main interest has been to provide the greatest privileges it could negotiate for its own investors without assuming too much risk of fielding incoming claims. Along with other recent agreements, such as those with China and the European Union, the TPP expands such rights to a much larger number of inward investors.

Second, the dozens of times that Canada has already been sued, largely under the North American free-trade agreement, show that private arbitrators have been very willing to second-guess Canadian policy-makers and administrative enforcement, extracting damage awards. While Canadian governments have insisted that the tribunals have gotten it wrong on many issues, they have had little recourse.

Indeed, there have been mounting concerns about ISDS and its ability to challenge legitimate policy. TPP negotiators assured the global public that the deal addressed these concerns. After its public release, we can see that **this is not the case**. In some areas, we see a further evisceration of the role of domestic policy, institutions and constituents, and greater liabilities for governments and domestic stakeholders. For instance, the treaty partners assured the public that language “underscores that countries retain the right to regulate in the public interest, including on health, safety, the financial sector and the environment.” That provision, however, is subject to compliance with all of the other investor protections in the chapter, fully negating the preservation of policy space. Only a handful of very specific measures – those related to tobacco control and taxation, for instance – are selectively excluded from arbitration. This

means that the types of public-interest measures that have been challenged in Canada, including efforts to enforce environmental obligations or to restrict hydraulic fracturing, and court decisions invalidating pharmaceutical patents, remain at risk of continued challenges by foreign investors.

Many of the concerns about how ISDS favours foreign investors over broader public interests are based on the increasing use of the “fair and equitable treatment” standard. Under the guise of improving the FET provision, the TPP drafters did exactly the opposite; the TPP now codifies the approach many arbitrators have been taking by allowing investors’ “expectations” to be a key factor in determining whether a government has breached its obligations. If an investor’s “expectations,” which may be based on general statements of government officials or promotional materials used to attract investors, are then not met, they can sue for damages. This is precisely how a tribunal held Canada liable under NAFTA in the Nova Scotia **Bilcon decision** this year.

Bilcon also illustrates how the non-discrimination standards in these treaties – originally aimed at preventing countries from discriminating against foreign investors on the basis of nationality – are now being used to challenge *any* government action that might impact an investor.

In Bilcon, the investors successfully claimed that Canada had violated the national treatment obligation because the government had denied an environmental permit for a controversial mining project while other projects were allowed to proceed. The fact that those other projects were in different locations, environments and communities was not persuasive to the tribunal. Investors are now using non-discrimination protections to challenge basic regulatory decisions and to prevent the strengthening of environmental and other standards over time. The new TPP language does not prevent that practice.

Importantly, Canada’s legal system has evolved to promote investment within Canada by protecting the rights of investors (and other stakeholders) from improper treatment by the government, giving them various rights of action in domestic courts and administrative processes. However, to balance those rights, the Canadian domestic legal system has also evolved to preserve the fundamental need for government to regulate investment to protect health, safety, security and other public interests.

ISDS allows foreign investors to bypass that very balance. By allowing them to selectively challenge basic contract, administrative or regulatory issues in a parallel process, ISDS undermines the agencies, courts and policy-makers that shape Canadian domestic law. Indeed, a forthcoming analysis shows that less than 20 per cent of the 34 claims filed against Canada under NAFTA would have any case for damages in domestic courts, and only half of those would have had an arguable case for the equivalent damages.

Many of us were hoping for a 21st-century agreement, enshrining our shared goals for global development while buttressing the policies, legal frameworks, democratic processes, transparent national courts and administrative systems of member countries. Alas, the TPP’s investment chapter has left a gaping hole, leaving member states – and their citizens – at the brink.