



# CANARY IN THE COAL MINE

A cautionary tale of trade: Canada's experience of  
Investor-State Dispute Settlement under NAFTA

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*GetUp!*



# THE TPP AND ISDS A CORPORATE ASSAULT ON DEMOCRACY

The Trans-Pacific Partnership (TPP) Agreement is the largest regional trade deal in history – and perhaps the most controversial. Encompassing 11 Pacific Rim nations, as well as the United States, this monstrous deal would set new terms for global business.

At the heart of the TPP are expanded powers for multinational corporations through the highly controversial Investor State Dispute Settlement (ISDS) provisions. These clauses would allow multinational corporations to sue the Australian government in secret extrajudicial tribunals, adjudicated by corporate lawyers. They can award corporations unlimited sums, including for loss of future expected profits, all paid by Australian taxpayers.

**In this way, the TPP threatens public health safeguards, environmental protections and workers' rights, on top of other provisions that undermine access to affordable medicines and internet freedom.**

Despite enormous public concern over the deal in Australia and abroad, the Turnbull Government has flatly refused to undertake an independent cost analysis. This report is a response to this inaction – everyday people stepping up to the plate where our government would not.

Drawing on global data and the specific experience of Canada, subject to ISDS provisions brought in under the North American Free Trade Agreement (NAFTA), this report details the likely risks of enacting the deal here in Australia – from direct legal costs to dangerous 'regulatory chill' that deters governments from pursuing legislation in the public interest.

**The research observes a worrying rise in aggressive, litigious predation by multinational corporations – especially those based in the USA – and notes several egregious examples of corporate overreach.**

## METHODOLOGY

This report draws conclusions about the risks facing Australia under the TPP by first examining international data sets on ISDS cases, and then by considering Canada's experience under the North American Free Trade Agreement (NAFTA).

Canada is an excellent comparator to Australia due to significant political, social and economic parallels between the two countries – including an independent legal system, a comparably sized economy, and similar economic and trading activities.

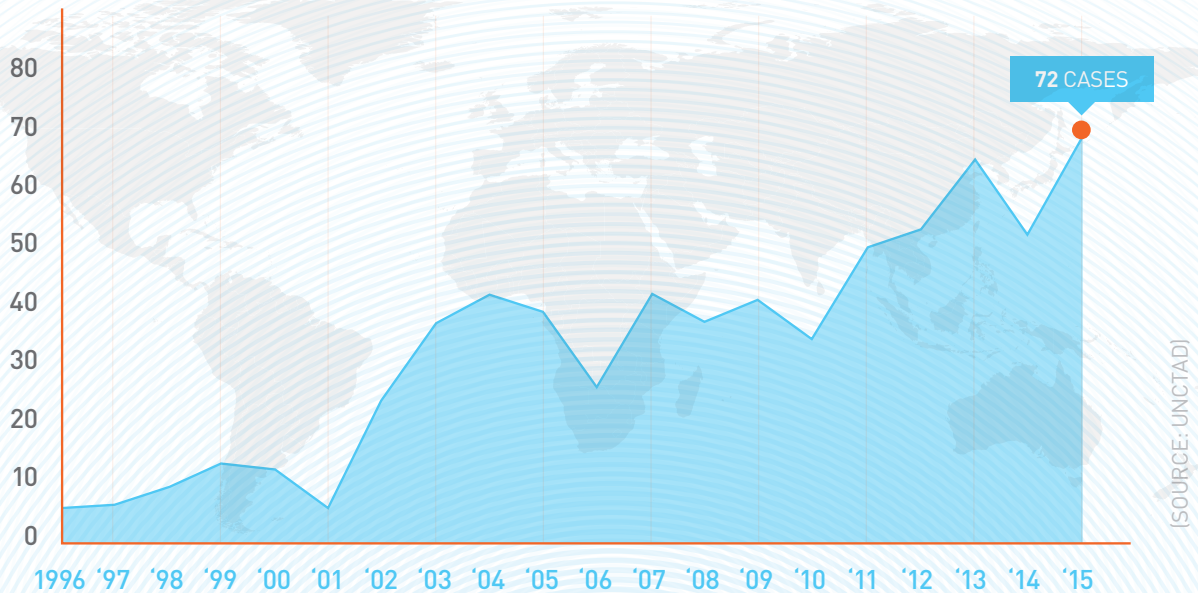
Canada then is Australia's 'canary in the coal mine', whose experience under NAFTA gives us a premonition of the ISDS environment that might emerge in Australia under the TPP.

Despite the significant findings of this report, it must be acknowledged that the full cost to Canada of its ISDS liabilities may never be publicly known. This is due to undisclosed settlement amounts. As a result, the figures cited below underestimate the true cost of ISDS.

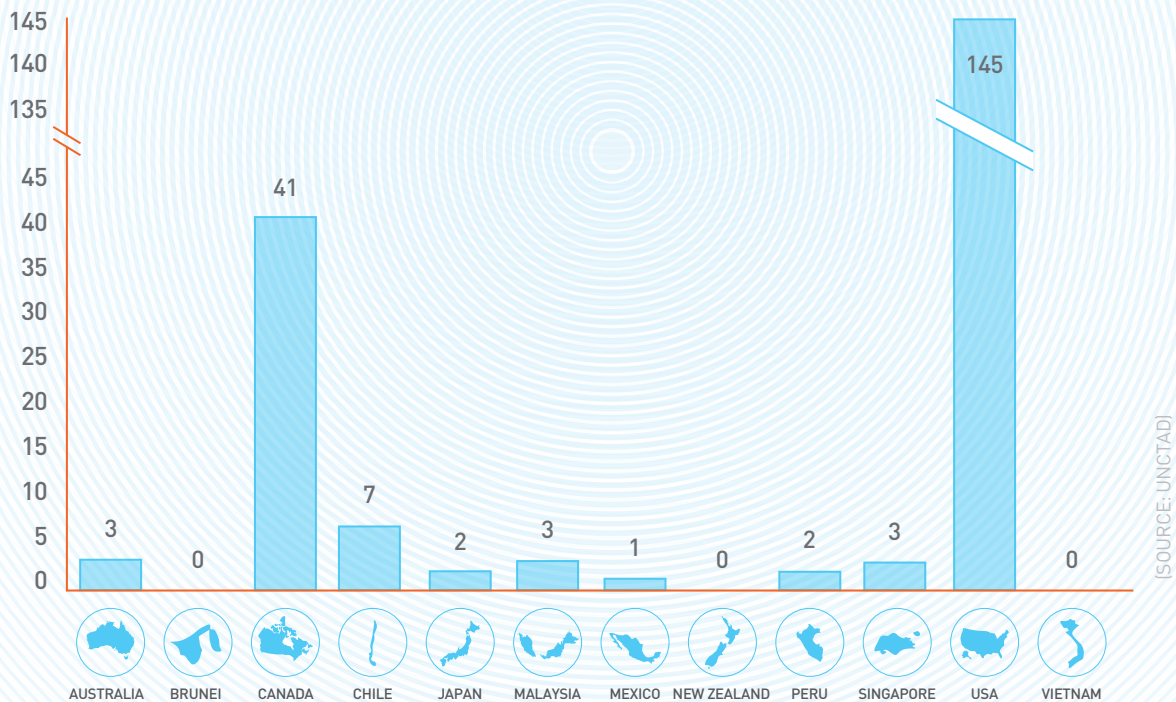


## GLOBAL TRENDS OF ISDS

There have been a total of 739 known ISDS disputes worldwide. The number is steadily on the rise, with 72 cases in 2015 – the highest number in any one year.



The biggest users of ISDS are US multinational corporations. This means that entering into a trade deal with the US that includes ISDS provisions – such as the TPP – places a country at high risk of ISDS suits.



Governments **lose or settle ISDS cases far more often than they win them**. Cases are either settled or the corporation wins in **52%** of global ISDS cases, whilst the state wins in a mere 36% of suits. In the case of Canada, more than half of ISDS cases have involved claims against provincial or territorial government measures.



## CANADA: AUSTRALIA'S CANARY IN THE COAL MINE

The North American Free Trade Agreement (NAFTA) is a trilateral agreement signed by Canada, Mexico, and the United States of America. It came into force on 1 January 1994.

Under NAFTA, Canada has been hit with 39 ISDS claims – all from American corporations and investors. A massive 69% of those cases have been initiated since 2006. This is in line with global trends noting that ISDS disputes are becoming increasingly the norm. The rise is widely attributed to growing awareness of NAFTA's ISDS provisions amongst US investors.

Canada has lost or settled 11 cases and won six since 1994. The corporations that have pursued ISDS cases against Canada have been mining and energy companies, and the service sector.

Canada has lost or settled a startling 62.7% of the cases brought against it. Based on available data – which does not include the costs of all the cases Canada settled – Canada has paid out at least **\$216.7 million Canadian dollars (CAD) in damages and settlements**.<sup>1</sup> Two further settlements are undisclosed and one case is still pending an award on damages.

## THE DANGERS OF “REGULATORY CHILL”

Perhaps the most worrisome trend has been the mounting evidence of “regulatory chill”. It is a phenomenon that sees governments reverse or fail to pursue important regulations due to fear of ISDS lawsuits.

For evidence, we need look no further than the corporate law firms themselves, who are actively advertising ISDS as a useful tool “to assist lobbying efforts to prevent wrongful regulatory change”.<sup>2,3</sup>

Further, executives of energy giant Chevron praised ISDS as a mechanism for deterring governments from implementing environmental safeguards, explaining that “that the mere existence of ISDS is important as it acts as a deterrent”.<sup>4</sup>

**What makes this trend even more worrying is that the main issues pursued in ISDS cases are health and environmental matters, rather than trade issues.**

There are significant **non-recoverable legal costs** even when a government wins. On average, Canada recovered just 26.4% of its legal costs and spent an estimated **CAD 17.3 million on the cases it won**. Canada has spent an estimated average of **CAD 4.5 million in non-recoverable legal costs and arbitration fees per case**.

## INDUSTRIES USING ISDS TO SUE CANADA



<sup>1</sup> This value is based on information provided in Sinclair, S. 2015. “NAFTA Chapter 11 Investor-State Disputes to January 1, 2015”, available at: [https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2015/01/NAFTA\\_Chapter11\\_Investor\\_State\\_Disputes\\_2015.pdf](https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2015/01/NAFTA_Chapter11_Investor_State_Disputes_2015.pdf) and the Government of Canada's summaries of NAFTA disputes on their website: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng>.

<sup>2</sup> Coleman, M., Low, L., Norton, P., Davidson, S., Pryce, J., Aldridge, H. and T. Innes. 2014. “Foreign Investors’ Options to Deal with Regulatory Changes in the Renewable Energy Sector”, 23 September 2014, available at: <http://www.steptoe.com/publications-9867.html>

<sup>3</sup> Tienhaara, K. 2011. “Regulatory Chill and the Threat of Arbitration: A View from Political Science” in C. Brown and K. Miles (eds) *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press), 606-627.

<sup>4</sup> “TTIP: Chevron lobbied for controversial legal right as ‘environmental deterrent’”, The Guardian, 26 April 2016, available at: <https://www.theguardian.com/environment/2016/apr/26/ttip-chevron-lobbied-for-controversial-legal-right-as-environmental-deterrent>.



## CASE STUDY: SCARED TO REGULATE AGAINST TOXIC POLLUTANTS

Methylcyclopentadienyl manganese tricarbonyl (MMT) is a potentially dangerous fuel additive used to increase the level of octane in unleaded gasoline. MMT produces manganese, which is a potent neurotoxin.

Due to growing concerns about the potential health impacts, in 1997 the Canadian Government banned the import and interprovincial trade of MMT.<sup>5</sup>

**In response, US corporation, Ethyl Corporation, sued the Canadian Government under NAFTA's ISDS provisions.**

Canada settled the case, which included a full reversal of the ban and a payout of USD \$13 million in legal fees and damages, as well as a statement declaring that current scientific information did not demonstrate any harmful effects of MMT.

In 2006, experts at the international meeting on the Prevention of the Neurotoxicity of Metals called for the immediate cessation of adding organic manganese compounds to gasoline – as in MMT – in all nations.<sup>6</sup>

**As a direct result of ISDS, Canadian people were exposed to harmful pollutants for six years longer than they would have otherwise been.**

This is a telling example of regulatory chill – the Canadian Government backed down from regulating a public health threat due to legal action from a multinational corporation who benefitted from stopping that regulation.

## CASE STUDY: FRACKING AND 'REGULATORY CHILL'

In 2011, the Quebec provincial government revoked all mining rights in the St Lawrence area, including exploration permits. This followed assessments that fracking would impact local marine life and that the effects of spills on wildlife, as well as fishing, tourism and recreation, could be devastating.

**In September 2013, American firm, Lone Pine Resources, sued the Canada under NAFTA's ISDS provisions seeking USD \$118.9 million in compensation.**

The case is ongoing, but if Canada loses, we could expect to see a significant chilling effect on similar regulatory efforts elsewhere in the country and other parts of the world. Such concerns are especially pertinent in the Australian context, where fracking is widespread and governments are moving to restrict activities.

The Canadian people have suffered significantly due to the ISDS provisions of NAFTA, which have opened the door to costly lawsuits from US multinationals, at the expense of environmental and health safeguards.

**Even more shocking than the vast amounts of public money poured into corporate coffers, are costs that can never be truly quantified – the illness, the irreparable environmental damage, and the degradation of democracy.**

## CONCLUSION

Although it is called a “trade” agreement, the TPP is not about trade. Of its 30 chapters, only six deal with traditional trade issues.

**Rather, the TPP trades away our democratic right to create laws in the public interest – at a significant cost to all of us.**

Fortunately, there's still time to stop this dirty deal. The enabling legislation to enact the TPP will need to pass the Australian Senate. We urge the Senate to carefully consider the numbers and examples laid out in this report.

**Canada is Australia's canary in the coal mine – and we would be fools to ignore the early warning signs.**

<sup>5</sup> As MMT is not produced in Canada, the ban ensured the removal of MMT from all Canadian gasoline. The particular approach of a trade ban was adopted by the government because it had been determined that MMT did not meet the requirements for prohibition under the Canadian Environmental Protection Act.

<sup>6</sup> The Declaration of Brescia on the Prevention of the Neurotoxicity of Metals, Brescia, Italy, 17-18 June 2006, available at: <http://www.unep.org/transport/pcfv/PDF/Brescia-Declaration.pdf>

<sup>7</sup> Claimant's Memorial, *ibid*.





This report was made possible by the generous donations of 2,064 GetUp members.

This group of everyday Australians chipped in together to do what the Turnbull Government would not: commission an independent cost analysis of the Trans-Pacific Partnership's controversial Investor State Dispute Settlement clause.

The full research report, that this summary report is based upon, was authored by Dr Kyla Tienhaara, a top trade and global governance researcher from the Australian National University. It will be submitted to the Senate Inquiry into the proposed Trans-Pacific Partnership Agreement, due to report back by 7 February 2017.

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This is a summary of the full report, which is available here:

**[getup.org.au/canary-in-the-coalmine](http://getup.org.au/canary-in-the-coalmine)**