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Center for International Environmental Law * Clean Water Action * Climatetruth.org *
Community In-power & Development Association Inc. * CREDO * Dakota Rural Action *
Delaware Riverkeeper Network * Earthjustice * Earthworks * Energy Action Coalition *
FLOW (For Love of Water) * Food & Water Watch * Forest Ethics * Friends of the Earth *
Grassroots Global Justice Alliance * Green America * Greenpeace * Hip Hop Caucus *
Honor the Earth * Indigenous Environmental Network * Institute for Agriculture and Trade
Policy * Institute for Policy Studies, Climate Policy Program* Minnesota Public Interest Research
Group (MPIRG) * MoveOn * Oil Change International * PeaceWorks * Physicians for Social
Responsibility * Public Citizen Climate & Energy Program * Rainforest Action Network * Rising
Tide North America * Science & Environmental Health Network * Sierra Club * SustainUS *
U.S. Climate Plan * Wica Agli * Women's Earth and Climate Action Network (WECAN)**

March 9, 2016

Re: Following Announcement of TransCanada's Investor-State Case against the United States,
Environmental Organizations Urge Opposition to Trans-Pacific Partnership

Dear Member of Congress,

The Obama Administration's rejection of the Keystone XL pipeline, which would have expanded the development of one of the dirtiest fossil fuels on the planet, was a historic win for communities and the climate. As environmental organizations fighting against the expansion of tar sands development and harmful trade agreements, we are deeply troubled by TransCanada's announcement that it intends to use the North American Free Trade Agreement's controversial investor-state dispute settlement (ISDS) system to demand \$15 billion from the U.S. public as compensation for this historic project rejection.¹ We are even more concerned that the Trans-Pacific Partnership (TPP) would extend nearly the exact same rules that TransCanada is using² to thousands of new firms operating in the U.S. These would include companies with major investments in fossil fuels, threatening our ability to keep fossil fuels in the ground. We therefore strongly urge you to oppose the TPP.

While we are deeply troubled by TransCanada's announcement, it does not surprise us. For years, environmental, environmental justice, labor, faith, Indigenous, affordable healthcare, consumer, family farmer, small business, and many other groups have stressed that the TPP threatens countries' ability to set public interest safeguards. Countries have already been ordered to pay billions of dollars to foreign investors in ISDS suits, often for policies that protected the environment and public health.³ Last year more than 100 leading U.S. legal scholars detailed ISDS's threats to U.S. public interest policies.⁴

If the Keystone XL rejection is not immune from investor challenges under trade agreements, it is hard to imagine what environmental policies would be safe, especially if the TPP were to pass. In its environmental assessment, the U.S. Department of State found that Keystone XL would have generated the equivalent of up to 8.4 billion metric tons of carbon dioxide over its lifetime,⁵ an amount greater than total annual U.S. greenhouse gas emissions.⁶ The project also would have threatened First Nation communities in Canada;⁷ Indigenous leaders, farmers and ranchers living near the project;⁸ refining

communities in the U.S.;⁹ and people living along the pipeline route. The Obama Administration's rejection of the Keystone XL pipeline was an execution of its legal right, done amidst widespread evidence that the project would hurt communities and the environment. It is therefore egregious that, under NAFTA, TransCanada can demand billions of dollars for a sound policy decision that is squarely within the U.S. law.

Yet fossil fuel corporations are increasingly using ISDS as a tool to undermine environmental policies. The ISDS system of arbitration has already empowered corporations to launch almost 700 cases against the policies of more than 100 governments across the world.¹⁰ Recent cases have targeted a fracking moratorium in Quebec, Canada; restrictions on a coal-fired power plant in Germany;¹¹ and an Ecuadorian court order for Chevron to pay for widespread pollution caused by oil operations in the Amazon.¹² Half of the new ISDS cases launched in 2014 stemmed from investments in power generation, mining, or oil and gas extraction.¹³ Corporations have a good chance of profiting from ISDS suits; more than half of concluded ISDS suits have ended in a loss for the government or settlement with the investor.¹⁴ While losing a case can cost countries millions or billions of dollars, settlements have also required governments to pay corporations millions of dollars in damages and legal fees, and sometimes to even reverse the challenged policies.¹⁵

The TPP would significantly expand the reach of the ISDS system. If approved by Congress, the 12-nation TPP would extend virtually the same broad rights that TransCanada is using¹⁶ to more than 9,000 new foreign-owned firms in the U.S., roughly doubling the number of foreign corporations that could follow TransCanada's lead and bring cases against the U.S.¹⁷ Under the TPP, foreign corporations could use their international investments in the U.S. to challenge a number of new environmental and climate policies, including restrictions on fracking, mining, oil and gas pipelines, offshore drilling, pollution, and greenhouse gas emissions.

We are concerned that investor-state cases such as TransCanada's are heard not in U.S. courts but in private trade tribunals. Three private attorneys bound by no legal precedents, and acting under no meaningful conflict of interest rules,¹⁸ would determine whether the U.S. government acted fairly towards TransCanada in rejecting Keystone XL. In past cases, more than half of these attorneys have rotated between serving as tribunal "judges," and as lawyers representing corporations in ISDS cases against governments.¹⁹ Such tribunals have repeatedly ruled against environmental policies on the basis that they thwarted foreign investors' "expectations."²⁰

The TPP would create a powerful roadblock to environmental and social progress by empowering corporations to demand billions of dollars in compensation for climate and environmental policies. Furthermore, these ISDS cases could be detrimental to the sovereignty and rights of Native Nations in the U.S. and First Nations in Canada in the protection of their lands, territories, and peoples.

In order to protect the U.S.'s ability to make environmental safeguards and other public interest policies, we strongly urge you to oppose the TPP.

Sincerely,

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Institute for Agriculture and Trade Policy
Institute for Policy Studies, Climate Policy Program
Minnesota Public Interest Research Group (MPIRG)
MoveOn
Oil Change International
PeaceWorks
Physicians for Social Responsibility
Public Citizen Climate & Energy Program
Rainforest Action Network
Rising Tide North America
Science & Environmental Health Network
Sierra Club
SustainUS
U.S. Climate Plan
Wica Agli
Women's Earth and Climate Action Network (WECAN)

¹ TransCanada Corporation and TransCanada PipeLines Limited v. The United States of America, Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of NAFTA, January 6, 2015, <http://www.italaw.com/sites/default/files/case-documents/ITA%20LAW%207030.pdf>.

² As Congressman Sander Levin, Ranking Member on the House Committee on Ways and Means, has noted, the TPP failed to include key reforms to NAFTA's ISDS terms, such as a screening mechanism that would have allowed governments to throw out ISDS cases and a clarification that "arbitrary" government conduct does not constitute a breach of the "minimum standard of treatment" obligation. "Levin: Keystone ISDS Case Highlights Need for TPP Investment Changes," Inside U.S. Trade, January 14, 2016, <http://insidetrade.com/inside-us-trade/levin-keystone-isds-case-highlights-need-tpp-investment-changes>.

³ "NAFTA- Chapter 11-Investment," Canada, accessed February 19, 2016, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng>.

⁴ "Leading Scholars, Former Judges Sign Letter Opposing Investor-State Dispute Settlement: ISDS is a Feature of Trade Deals, Including the Trans-Pacific Partnership," Alliance For Justice, May 12, 2015, <http://www.afj.org/press-room/press-releases/leading-scholars-former-judges-sign-letter-opposing-investor-state-dispute-settlement>.

⁵ "Natural Resources Defense Council Backgrounder: Secretary Kerry and President Obama Have Strong Basis to Find the Proposed Keystone XL Tar Sands Pipeline is Not in the National Interest," Natural Resources Defense Council, March 27, 2014, [http://switchboard.nrdc.org/blogs/aswift/Keystone%20XL%20NID%20Backgrounder%20\(Final%203-27-14\).pdf](http://switchboard.nrdc.org/blogs/aswift/Keystone%20XL%20NID%20Backgrounder%20(Final%203-27-14).pdf).

⁶ "Climate Change Indicators in the United States," Environmental Protection Agency, accessed February 19, 2016, <http://www3.epa.gov/climatechange/science/indicators/ghg/us-ghg-emissions.html>.

⁷ Danielle Droitsch and Terra Simieritsch, "Canadian Aboriginal Concerns With Oil Sands: A Compilation of Key Issues, Resolutions and Legal Activities," The Pembina Institute, September, 2010, <https://www.pembina.org/reports/briefingnoteosfntoursep10.pdf>.

⁸ Mark Hefflinger, "MSNBC'S 'The Ed Show' Meets Cowboy and Indian Alliance at Keystone XL Protests in Washington," Bold Nebraska, April 29, 2014, <http://boldnebraska.org/msnbc-the-ed-show-meets-cowboy-and-indian-alliance-in-dc-to-cover-reject-protect/>.

⁹ "Sen. Boxer Raises Health Concerns about Keystone," USA Today, February 26, 2014, <http://www.usatoday.com/story/news/politics/2014/02/26/barbara-boxer-keystone-xl-pipeline/5846965/>.

¹⁰ "Investment Dispute Settlement Navigator," Investment Policy Hub, accessed February 19, 2016, <http://investmentpolicyhub.unctad.org/isds>.

¹¹ For a summary of these and other cases, see, Ilana Solomon and Ben Beachy, "A Dirty Deal: How the Trans-Pacific Partnership Threatens Our Climate," Sierra Club, December 2015, <https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/dirty-deal.pdf>.

¹² "Corporate Attacks: Environment Case Study: Amazonian Oil Pollution: Chevron v. Ecuador," ISDS Corporate Attacks, accessed February 19, 2016, http://media.wix.com/ugd/7c0358_e481349b14404af28b4fc57227fc81da.pdf.

¹³ "Investor-State Dispute Settlement: Review of Developments in 2014," United Nations Conference on Trade and Development, No. 2, May, 2015, at 4, http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d2_en.pdf.

¹⁴ "Investment Dispute Settlement Navigator," Investment Policy Hub, accessed February 19, 2016, <http://investmentpolicyhub.unctad.org/isds>.

¹⁵ "Corporate Attacks: Health Case Study: Toxic Fuel Additive: Ethyl v. Canada," ISDS Corporate Attacks, accessed February 19, 2016, http://media.wix.com/ugd/7c0358_f2ec74a9eb684b1697284477f2318fc5.pdf.

¹⁶ As Congressman Sander Levin, Ranking Member on the House Committee on Ways and Means, has noted, the TPP failed to include key reforms to NAFTA's ISDS terms, such as a screening mechanism that would have allowed governments to throw out ISDS cases and a clarification that "arbitrary" government conduct does not constitute a breach of the "minimum standard of treatment" obligation. "Levin: Keystone ISDS Case Highlights Need for TPP Investment Changes," Inside U.S. Trade, January 14, 2016, <http://insidetrade.com/inside-us-trade/levin-keystone-isds-case-highlights-need-tpp-investment-changes>.

¹⁷ The figure counts only the U.S. subsidiaries of foreign corporations based in TPP countries that do not currently have an ISDS-enforced agreement with the United States: Australia, Brunei, Japan, Malaysia, New Zealand, and Vietnam. Data on foreign-owned firms doing business in the United States, Uniworld, extracted September 21, 2015, <https://uniworldonline.com/>.

¹⁸ Nathalie Bernasconi-Osterwalder, Lise Johnson, Fiona Marshall, “IV Annual Forum for Developing Country Investment Negotiators: Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel,” International Institute for Sustainable Development, Invest India, South Centre, October 27-29, 2010, http://www.iisd.org/pdf/2011/dci_2010_arbitrator_independence.pdf

¹⁹ A recent study of ISDS cases brought under the rules of the International Centre for Settlement of Investment Disputes (ICSID – the rules system used for a majority of ISDS cases) finds that 53 percent of tribunalists have served as counsel for the investor in other ISDS cases brought under ICSID rules. Among tribunalists chosen by investors, 73 percent have served as lawyers for investors in other ISDS cases under ICSID rules. Michael Waibel and Yanhui Wu, “Are Arbitrators Political?” University of Bonn, 2012, at 27-29, <http://www.unisg.ch/~media/internet/content/dateien/unisg/schools/seps/political%20science/pwdresearchseminarwaibelare%20arbitrators%20political20150506.pdf>.

²⁰ For a summary of these broad foreign investor rights and a sample of such cases see: Ilana Solomon and Ben Beachy, “A Dirty Deal: How the Trans-Pacific Partnership Threatens Our Climate,” Sierra Club, December 2015, <https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/dirty-deal.pdf>