215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

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Contact:
Nicholas Florko, (202) 454-5108
nflorko@citizen.org

TransCanada Demands $15 Billion in NAFTA Investor-State Tribunal for XL Pipeline Rejection

Statement of Lori Wallach, Director, Public Citizen's Global Trade Watch

"Canadian corporation TransCanada is skirting our courts and laws to demand that an extrajudicial NAFTA investor-state tribunal help it to extract $15 billion from U.S. taxpayers because our government decided an oil pipeline is not good for our nation or the environment.

Days before President Obama's State of the Union address, here is exactly the type of attack on U.S. environmental policy that the president insisted could never happen under the controversial investor-state corporate tribunal regime in his Trans-Pacific Partnership trade deal under which U.S. investor-state liability would be doubled."

Background**: Almost all of the 50 past U.S. ISDS-enforced pacts are with developing nations with few investors here, which is why the United States has managed largely to dodge ISDS attacks to date**. Only a handful of cases have been filed against the United States, all by Canadian firms under NAFTA. **With Japanese, Australian and other firms newly empowered to launch ISDS attacks against the United States, the TPP would *double* U.S. ISDS exposure.** M**ore than 1,000 additional corporations in TPP nations, which own more than 9,200 subsidiaries here, could newly launch ISDS cases against the United States.** Currently, under ALL existing U.S. investor-state-enforced pacts, about 9,500 U.S. subsidiaries for foreign firms have such powers. The TPP would subject U.S. policies and taxpayers to an unprecedented increase in ISDS liability at a time when the types of policies being attacked and the number of ISDS case are surging. Just 50 known cases were launched in the regime's first three decades combined while about 50 claims were launched in *each* of the last four years.

The controversial ISDS regime elevates individual foreign investors to equal status with the sovereign governments signing a trade or investment deal**. One class of interests – foreign firms – can *privately enforce a* public treaty by skirting domestic laws and courts to challenge U.S. federal, state and local decisions and policies on grounds not available in U.S. law and do so**

before extrajudicial tribunals authorized to order payment of unlimited sums of taxpayer dollars. Compensation orders could include the "expected future profits" a tribunal surmises that an investor would have earned in the absence of the public policy it is attacking. tribunals have ordered billions in compensation under existing U.S. pacts alone for toxic bans, land-use policies, financial stability measures, forestry rules, water services, economic development policies, mining restrictions and more. Pending claims under U.S. pacts total more than $25 billion.

- **TPP tribunals are staffed three private sector attorneys allowed to rotate between acting as "judges" and as advocates for investors** launching cases. Such dual roles would be deemed unethical in most legal systems.

- **There is no requirement for tribunalists to be independent or impartial in NAFTA or the TPP.**

- **There is no system of outside appeal on the merits of a decision. (Nor is an appellate body established within TPP**.) The text retains tribunalists' full discretion to determine how much a government must pay an investor.
- **There is no "exhaustion" requirement – that foreign firms seek redress in domestic legal and administrative venues before resorting to ISDS.** Instead, foreign investors can forum shop.

- **Even when governments win, under TPP rules they can be ordered to pay for the tribunal's costs and legal fees, which average $8 million per case.**

The TPP would expand U.S. ISDS liability by widening the scope of domestic policies and government actions that could be challenged. ***<u>For the first time in any U.S. free trade agreement</u>***:

- **The provision used in most successful investor compensation demands would be extended to challenges of financial regulatory policies.** The TPP would extend the "minimum standard of treatment" obligation to the TPP Financial Services Chapter's terms, allowing financial firms to challenge policies as violating investors' "expectations" of how they should be treated. The "safeguard" that the U.S. Trade Representative (USTR) claims would protect such policies repeats an ambiguously written World Trade Organization (WTO) provision that has not been accorded significant deference in the past.

- **Pharmaceutical firms could use TPP to demand cash compensation for claimed violations of World Trade Organization rules on creation, limitation or revocation of intellectual property rights**. Currently, WTO rules are not privately enforceable by investors.

- **Proposals included in leaked earlier drafts to extend even the TPP's weak general exceptions for environmental and health policies to the Investment Chapter were rejected**. Instead of real safeguards to stop attacks on nations' environmental, health and other regulatory policies, the TPP text replicates the same self-cancelling provision included in past U.S. pacts, although with more types of policies listed in the ineffective clause. The provision, which limits the rule of construction to only environmental and other policies that *already are* *consistent* with the agreement makes the measure meaningless. A safeguard is only needed to protect policies that would otherwise violate the agreement's rules. The relevant provision (Article 9.15) reads "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure **otherwise consistent** with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives." (emphasis added)

- **The only meaningful new ISDS safeguard included in the final TPP text is a carve-out for tobacco-related public health measures that allows countries to elect to remove such policies from being subject to ISDS challenges, either in advance or once a policy is attacked**. Leading health groups, pro-free-trade former New York City mayor Michael Bloomberg and TPP nations like Malaysia pushed for years for more expansive terms. These proposals would have prevented all TPP challenges to tobacco-related health policies, including by other governments and would have excluded tariff cuts on unprocessed tobacco and tobacco products that would result in the lowering of the price of cigarettes. The final tobacco provision makes clear that government-to-government challenges to tobacco control measures are allowed as is tariff elimination on tobacco and tobacco products. But even with these unfortunate limitations, the final provision is considerably better than past ISDS tobacco control exception proposals. It provides an example of how a meaningful trade pact safeguard against ISDS attacks could be structured. That said, because the TPP's Investment Chapter includes a Most Favored Nations provision, a tobacco company could demand the better investor rights provided in other ISDS-enforced investment agreements the regulating country has enacted. (Indeed, the TPP tobacco language was motivated in part by various subsidiaries of Phillip Morris using the ISDS clauses of various countries' ISDS-enforced agreements to attack Australian and Uruguayan tobacco control policies.) However, even with those not insignificant caveats, this real carve-out from ISDS liability for various forms of health-related tobacco control policies makes apparent how ineffective and meaningless the chapter's language advertised by the White House as protecting other health policies and the environment actually is (Article 9.15). The tobacco provision also begs the question why only tobacco control policies are excluded from ISDS attacks, given no other provision of the Investment Chapter nor the TPP's General Exceptions Chapter provides any meaningful safeguard or effective exception to stop ISDS attacks on other public health measures, from toxins bans to patent policies to pollution cleanup requirements. (For more on the TPP's tobacco-related provisions, see the text analysis from Action on Smoking and Health.)

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