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STATE OF MAINE

Citizen Trade Policy Commission

March 23, 2018

Ambassador Robert E. Lighthizer
United States Trade Representative
600 17th Street NW
Washington DC
20508

re: ISDS in NAFTA

Dear Ambassador Lighthizer:

The Maine Citizen Trade Policy Commission writes to strongly support your efforts during the current renegotiation to remove Investor State Dispute Settlement (ISDS) from the North American Free Trade Agreement (NAFTA) and to limit the scope of "minimum standard of treatment" and other investment chapter provisions. The Maine Citizen Trade Policy Commission (CTPC) is established in Maine statute "to assess and monitor the legal and economic impacts of trade agreements on state and local laws, working conditions and the business environment; to provide a mechanism for citizens and Legislators to voice their concerns and recommendations; and to make policy recommendations designed to protect Maine's jobs, business environment and laws from any negative impact of trade agreements." In seeking to fulfill its statutory mandate, during its February 26, 2018, meeting, the Commission voted unanimously to send this letter outlining our position.

Over the 15 years of its existence, the Commission has repeatedly called for the elimination of ISDS. We are, therefore, supportive of your position that NAFTA 2.0 should limit ISDS, and urge you to remove it altogether from this and other free trade and investment agreements. As you know, concerns about overbroad investor protections, and about the ISDS process in particular, are long-standing. ISDS provides foreign investors the right to bypass domestic courts (including constitutionally-created Article III courts) and challenge the U.S. government directly before an international arbitration tribunal; a right that home-grown investors do not share. The ISDS panels are neither democratically selected nor accountable to any public entity, nor are they required to consider basic principles of U.S. law (such as sovereign immunity or the "rational basis" standard), nor must they weigh the public interest against the alleged violation of an investor's rights. Under this system, the U.S. government can only be a defendant (the investor takes on no corresponding

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responsibilities), and even when the U.S. government "wins," the U.S. people lose because valuable government resources (an average of \$8 million a case) are expended to defend these often meritless claims.


State governmental actions subject to ISDS challenges under NAFTA have included complaints against state laws banning the aquifer-polluting gasoline additive MTBE, tobacco regulations, and state court judgments. ISDS presents both a direct threat to state government sovereignty, and indirectly chills future policy making. A current and timely example of the latter is the threat by Cooke Aquaculture, a Canadian company, to file an ISDS suit against the state of Washington,¹ seeking \$76 million in damages, unless the state backs down from enacting a proposed ban on the farming of Atlantic salmon, an invasive species, in the state's waters. The Washington state proposal follows the escape of over 200,000 Atlantic salmon from the Cooke's fish farms in the Puget Sound last August, the latest in a series of such accidents. Washington's proposed ban on Atlantic salmon farming would apply to all companies, domestic and foreign.

Moreover, as the Intergovernmental Policy Advisory Council stated in its report assessing the Transpacific Partnership,² there are significant monetary costs associated with ISDS cases. Even though these cases are brought against the U.S. government, states and localities incur legal costs when assisting in the defense of investor-state disputes. As the IGPAC report stated, "the possibility that state or local laws may be challenged (by way of an action against the United States) is itself a chilling factor for those governments considering legislative and regulatory action. While the federal government is responsible for defending investor challenges that are lodged against state and local measures, state resources are heavily taxed during the course of such disputes." IGPAC noted that at the close of the Methanex dispute challenging California's MTBE ban, the federal government was awarded full payment of the millions of dollars in fees and costs that it incurred while defending the case, but the state was not similarly compensated.

We urge you to take this step to ensure that U.S. trade policymaking is at least as inclusive as that of our trading partners.

We look forward to hearing from you.

Sincerely,


Senator Rod Whittamore, Chair


Representative Craig Hickman, Chair

cc:

Governor Paul LePage
Senator Susan Collins
Senator Angus King
Representative Bruce Poliquin
Representative Chellie Pingree

¹ <http://www.cookeseafood.com/cms/wp-content/uploads/2018/02/Press-release-CAP-Senate-hearing-on-HB-2957-Feb.-19.pdf>

² <https://uschinatradewar.com/files/2015/12/Intergovernmental-Policy-Advisory-Committee-on-Trade.pdf>