



Government of Canada
Permanent Mission of Canada
to the United Nations and the
Conference on Disarmament

Gouvernement du Canada
Mission permanente du Canada
auprès des Nations Unies et de
la Conférence du désarmement

Note No.: GENEV-2809

Reference: Canada's response to the Joint Communication from Special Procedures

The Permanent Mission of Canada to the Office of the United Nations at Geneva presents its compliments to the Office of the High Commissioner for Human Rights and has the honour to refer to the joint letter AL CAN 1/2016 from the Special Rapporteur in the field of cultural rights, the Independent Expert on the promotion of a democratic and equitable international order, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on the rights on indigenous peoples, the Independent Expert on Human Rights and International Solidarity; and the Special Rapporteur on the right to privacy, dated 20 April 2016. The Permanent Mission of Canada further has the honour to submit Canada's response.

The submission consists of one document.

The Permanent Mission of Canada to the Office of the United Nations at Geneva avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights the assurances of its highest consideration.

Geneva, 19 August 2016.



RESPONSE OF CANADA TO THE JOINT COMMUNICATIONS FROM THE SPECIAL
RAPPORTEURS OF THE UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR
HUMAN RIGHTS

Introduction

1. On 20 April 2016, seven Special Rapporteurs from the United Nations Office of the High Commissioner for Human Rights sent a Joint Communication to Canada: reference AL CAN 1/2016.
2. By way of this Communication, the Special Rapporteurs provided information they had received regarding “alleged adverse human rights impacts stemming from certain provisions within the Trans-Pacific Partnership.”
3. At present, the Government of Canada¹ is following through on its commitment to engage Canadians on the outcomes of the Trans-Pacific Partnership (TPP). These outreach efforts have taken place across the country and have included over 250 interactions and meetings with over 450 stakeholders. Those consulted include all provinces and territories, industry, civil society, think tanks, academics, Indigenous groups, students and the general public. The Government has also received over 30 000 letters and emails from interested Canadians, including submissions to the Government of Canada’s TPP consultations webpage. In parallel, the House of Commons Committee on International Trade is also studying the TPP, and has heard from over 260 witnesses and received over 100 written submissions from a broad range of stakeholders and members of the public from across the country.
4. This response provides a general outline of Canada’s approach to trade negotiations, including Canada’s objectives with respect to consultations, public participation, intellectual property and dispute settlement.
5. Canada is a steadfast supporter of the UN and its founding values. Canada takes very seriously its international human rights obligations and is committed to maintaining a constructive dialogue with UN mechanisms, including the Special Procedures, which are a vital aspect of a strong and effective international human rights system.

Canada’s Approach to Trade Negotiations

6. Through the elimination of trade barriers, free trade agreements (FTAs) create a favorable environment for exchange in goods, services, and investment. This reduces trade costs and the cost of goods and services. Trade, or the agreements on which they are based, strengthen linkages across borders improving the sharing of technology,

¹ The “Government of Canada” is a reference to the Canadian federal government, while a reference to “governments” means the federal, provincial and territorial governments combined.

ideas, democracy and the rule of law. These agreements improve local standards of living and build favourable conditions for development.

7. Canada's multilateral, bilateral and regional FTAs are just one of the many instruments that fall under the broader trade policy umbrella. Domestic and international trade policy is a broad concept and can include initiatives such as trade promotion, trade missions, foreign investment attraction, funding programs for business growth, foreign investment protection and promotion agreements (FIPAs), among others. All of these tools work in tandem with one another, including with FTAs, to help open new markets for Canadian exports and promote Canadian economic growth and prosperity for the benefit of all Canadians.
8. Canada's trade agreements are crafted to be consistent with other international treaties, including international human rights treaties, and to allow governments to continue to progress work in other areas of public policy to address matters of international significance. As a trading nation, Canada views international trade and investment as essential to our standard of living. FTAs are also just one of many instruments that can contribute to improving the standard of living for people all around the world.
9. Canada's objectives in FTAs are centered on advancing economic interests in a manner consistent with our values, and are centred on good governance, transparency, and the rule of law. This is achieved, in part, through FTAs that provide opportunities to address both tariff and non-tariff barriers that Canadian exporters face in the global market place. FTAs can also contribute to the promotion of good governance by establishing strong environment, labour, transparency and anti-corruption standards while respecting human rights and encouraging fair and sustainable international economic activity.

Public Participation in Setting Free Trade Agreement Objectives

10. FTAs are primarily economic agreements that are informed by the needs of Canadians and Canadian businesses. Before embarking on exploratory discussions with a foreign market or region, the federal government engages in a series of outreach initiatives, including with provinces and territories, which are designed to solicit feedback on a variety of trade areas from across the country. These outreach initiatives are published online and are rolled-out at various stages.
11. This extensive outreach informs the decision-making process regarding whether to enter into negotiations. When a potential trade negotiation is considered, a Notice of Intent is published in the *Canada Gazette* and views are solicited within a specified timeframe. This notification is part of the Government of Canada's domestic engagement process with all Canadians, including businesses, civil- society organizations, individual Canadians and Indigenous peoples, as well as with provincial and territorial governments. The process solicits advice and views on priorities, objectives and concerns across a broad spectrum of issues, including human rights, to help outline the

objectives of a specific negotiation. Any information is considered public, unless explicitly stated otherwise, and contributors have the option to deliver their views in person, in writing, by email, fax or mail.

12. The Government of Canada also undertakes a two-step approach to assess the environmental impact of prospective FTAs and FIPAs. Environmental assessments assist negotiators in integrating environmental considerations into the negotiating process by providing information on the potential environmental impacts of the proposed trade agreement. As with the *Canada Gazette* process, Canadians are welcome to submit their views and the assessments are publicly available on the Global Affairs Canada website. Advice from non-governmental advisory groups is also sought and used to inform future work on environmental assessments of trade. As part of this process, an initial environmental assessment is carried out during the early stages of the negotiations. Upon conclusion of negotiations, a final environmental assessment is prepared based on the negotiated outcomes.
13. Once negotiations are underway, the Government of Canada's positions are further informed through ongoing engagement. In addition to regular liaison with provinces and territories, officials also meet and engage with indigenous groups, representatives from industry, civil society, foreign governments as well as Parliamentarians.

Accountability in Policy-Making

14. Much of Canada's legislative jurisdiction related to FTAs is at the federal level. However, FTAs can also affect areas of provincial jurisdiction and, as a result, provinces and territories play key roles in shaping Canada's international trade agenda. During trade negotiations, Global Affairs Canada and relevant departments across Government are in regular contact with provincial and territorial counterparts, both formally and informally.
15. At any time during a trade negotiation, Parliamentary committees may opt to study trade initiatives and invite negotiators to testify and shed light on any aspect of the agreement, as well as call a number of witnesses to get a wide range of views. To participate in these studies, Canadians can provide written submissions, request to appear before the committee, attend the meetings as an observer, and listen to the meeting broadcasts online. Meeting transcripts, minutes, and written submissions are also made available online. Upon concluding a study, Parliamentary committees will generally prepare a report and table it in the House of Commons or Senate as appropriate. When requested, the Government would provide an official response to the report and its recommendations, which would also be available online.
16. After an agreement has concluded, it is translated into Canada's official languages (English and French), and is legally reviewed before being signed. According to the *Policy on the Tabling of Treaties in Parliament*, the Agreement must be tabled in the House of Commons for 21 sitting days before the Government can take legal steps to

bring the treaty into force, to provide members with time to review, debate and introduce motions related to the Agreement. Should the Agreement's implementation require legislation, such legislation would undergo full Parliamentary scrutiny, including debate, committee study, and numerous votes, before being passed in line with Parliamentary procedure.

Intellectual Property in Canada's Trade Policy

17. Canada's approach to intellectual property policy (IP) development, is generally to seek to balance the interests of innovators and creators of IP with those of users of IP and the broader public policy objectives in the interests of all Canadians. Domestically, for example, Canada's 2012 amendment to modernize its copyright legislation provided new abilities for right holders to protect and enforce their rights in the digital environment, while also providing new exceptions to allow users to legitimately access and enjoy works. It also included a notable and distinctively Canadian framework for Internet service provider liability, which takes into account the interests of all stakeholders in establishing a balanced regime that conveys information about possible infringement concerns and protects the privacy of users, while respecting Canada's legal framework based on transparency and due process to preserve the interests of all parties.
18. Internationally, Canada pursues intellectual property objectives that reflect its domestic values, priorities and legal obligations. Canada takes seriously its commitments and obligations made in all international agreements. Canada also recognizes that such agreements are designed to serve the countries involved as well as the interests of those countries' populations. For example, commitments under the WTO Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) not only contain obligations, but also include important flexibilities and exceptions. Canada views as important a party's ability to utilize the exceptions in the WTO/TRIPS Agreement, as affirmed by the 2001 Doha Declaration of the TRIPS Agreement and Public Health and the WTO General Council Decision of August 30, 2003, to secure important public health objectives. Since the 2001 Doha Declaration, the intellectual property chapters of Canada's FTAs have consistently reflected these principles.
19. These principles are also reflected domestically. For instance, Canada was the first country to take concrete steps toward implementing the August 30, 2003 WTO General Council decision, which provides the conditions under which a WTO Member can export a generic version of a patented pharmaceutical product to an eligible importing least-developed country. The implementation of the Decision in 2004 under Canada's Access to Medicines Regime (CAMR) put in place a mechanism to facilitate access to generic versions of patented drugs and medical devices to least-developed and developing countries. Canada was the first to exercise this flexibility. In September 2008, Canada announced that the first shipment of lower-cost generic medicine to combat HIV/AIDS had been sent to Rwanda by a Canadian pharmaceutical company. This was followed by a second shipment of medicine in 2009.

20. Canada's strong support for the multilateral framework established through the WTO and the World Intellectual Property Organization is also reflected in its bilateral and regional engagement on intellectual property issues. Canada's approach affirms the importance of the multilateral rules, and any additional elaboration of rules or initiatives is designed for the mutual advantage of Canada and its trading partners.

Investment and Dispute Settlement

21. Investment is an important element of the overall commercial relationship between trading partners. Investment obligations in trade agreements aim to provide a level playing field by encouraging a transparent and predictable investment environment.
22. Canada recognizes that companies investing in foreign countries commit large sums of capital that are potentially vulnerable to the actions of foreign governments, such as expropriation of property without compensation. Since the North American Free Trade Agreement, and in all of Canada's trade agreements that include investment chapters, Canada has included an investor-state dispute settlement (ISDS) mechanism. These ISDS mechanisms provide a means of enforcing basic investor protections through access to an independent arbitral tribunal to resolve conflicts between an investor and a host State with respect to obligations in a specific free trade agreement.
23. A foreign investor could go to a domestic court to address its complaint to the extent that the issue amounts to a breach of domestic law; however, domestic courts cannot address an alleged breach in an international agreement. Similarly, ISDS tribunals have no authority to interpret domestic law or to challenge the rights and protections awarded to Canadians under the *Constitution of Canada* and the *Canadian Charter of Rights and Freedoms* (the *Charter*).

Preservation of Public Services, Culture and Indigenous Rights

24. Since Canada's trade agreements are crafted to be consistent with other international and domestic legal instruments, each trade agreement contains exceptions from obligations to ensure the Government retains its right to regulate in areas of domestic importance and in the public's interest. Furthermore, Canada's trade policy cannot supersede protections and obligations afforded to all Canadians, including Aboriginal peoples, through the *Constitution of Canada* and the *Charter*.
25. With respect to retaining the right to regulate, all of Canada's trade agreements that include services and investment obligations exclude public services. This means that Canadian governments at all levels retain the ability to maintain or establish regulations, subsidies, administrative practices or other measures in the areas of health, public education, and social services that have a public purpose, based on Canadian objectives and priorities.

26. The preservation and promotion of the diversity of cultural expressions is a core objective for the Government of Canada. This is demonstrated, among other activities, by Canada's active and continued leadership in the implementation of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression. Canada also takes seriously its obligations related to culture and freedom of expression, as provided in the International Covenant on Economic and Social Rights and the International Covenant on Civil and Political Rights. Through various mechanisms, Canada excludes cultural industries in all of its FTAs so that Canada and the provinces and territories can maintain existing cultural policies and programs with respect to cultural industries, as well as retain the full flexibility to develop new ones in the future.
27. An equally important core objective of Canada is ensuring that the rights of Indigenous peoples' under the *Constitution of Canada* and the *Charter* are not compromised by obligations Canada enters into in trade agreements. Commitments made in free trade agreements are consistent with Canada's commitments to Indigenous peoples, and under Canadian law cannot supersede Canadian constitutional protections for Indigenous peoples. If Canada determines that adherence to an obligation in a trade agreement may lead to an adverse impact on an Indigenous group's Treaty rights,² Canada is obligated to consult with those groups. To ensure that the constitutionally-protected rights of Indigenous peoples are not compromised by free trade agreements, Canada routinely considers how these rights might be relevant in particular areas and, as appropriate and wherever necessary, includes exceptions or exclusions for domestic Indigenous measures in the areas of government procurement, services and investment, environment and state-owned enterprises.
28. Global Affairs Canada welcomes input from Indigenous peoples on FTAs and other initiatives through formal and informal processes (e.g. *Canada Gazette* notices, webinars, etc.), and throughout any negotiating process. Canada also participates in international discussions on issues related to genetic resources, traditional knowledge and traditional cultural expressions of indigenous peoples at the World Intellectual Property Organization where these issues are regularly discussed. These meetings are open to observers and have in the past included representatives of Canada's Indigenous organizations.
29. The Government of Canada is committed to building renewed nation-to-nation relations with the Indigenous peoples of Canada based on recognition of rights, respect, cooperation, and partnership. Our Government also believes that meaningful and open engagement with Indigenous peoples is an important aspect of the development and implementation of Canadian trade policy. In the fall of 2016, the Government will engage

² Modern treaties are constitutionally-protected agreements negotiated between Canada, the Indigenous group, and the relevant province or territory, that set out the rights and obligations of each of the parties.

in focused discussions dedicated to developing a strategy for enhanced engagement with Canada's Indigenous peoples on the Government's international trade and investment initiatives. Representatives from Canada's National Indigenous Organizations, their members, as well as members of Indigenous business and academic communities, have been invited to attend to initiate this dialogue.

Conclusion

30. The Government of Canada has made a commitment to an open, transparent and fully democratic debate on international trade, and views this as the only way to build Canada's future.
31. Canada is an open society, both politically and economically. Canada's support for a rules-based system for international trade arises out of a recognition that respect for diversity and human rights contributes to healthier societies. Economies function more efficiently where people are free to express and share ideas and where peoples' fundamental equality is recognised and protected by law. There is no inconsistency between commitments made in our free trade agreements and commitments made for the protection and promotion of human rights.
32. Canada would like to thank the Special Rapporteurs for the opportunity to respond to their letter of 20 April 2016.