Promoters of the recently concluded Trans-Pacific-Partnership agreement, which would govern an unprecedented 40 per cent of world trade, promised it would include a revamped Investor-State Dispute Settlement (ISDS) mechanism that would protect public-interest regulation and ensure transparency and openness in trade disputes.

Early analysis of the 6,000-page pact reveals tweaks but none of the sweeping reform some say is urgently needed to rein in a system "in crisis" and under which disputes related to more than 3,000 global trade and investment agreements are settled by private arbitration, bypassing public courts. And may not be appealed.

The basic problem is you've set up a private, parallel system of justice where unaccountable arbitrators get to decide whether a particular public-interest regulation violates the broadly worded terms of the treaty, says Scott Sinclair, a senior researcher at the Canadian Centre for Policy Alternatives (CCPA).

Canada is the most-sued western country under ISDS. And most of those suits involved U.S. companies. But it is claims made by huge multinationals, including Canadian-owned companies, against poorer developing countries that have really given ISDS a bad name – and tarnished Canada's reputation abroad.

Case in point: Gabriel Resources' Rosia Montana gold mine in Romania, which proposed the destruction of four mountaintops, three villages and some ancient Roman ruins to make way for gold and silver extraction.

Outrage over the project sparked the biggest civic protest movement Romania had seen in 25 years. Romanians celebrated when plans for the mine were eventually cancelled in 2013. But this past July, Gabriel launched a lawsuit against Romania under ISDS. Even if Gabriel loses its claim – the company is reportedly demanding $2.56 billion (all amounts in U.S. dollars) in damages for the government's failure to approve its project – the Romanian government and its people are certain to lose millions defending their case.

Canada, like most countries, is already woven into a web of thousands of investment agreements meant to make it easier to do business across borders, says Finn Poschmann, president of the Atlantic Provinces Economic Council. "ISDS frightens a lot of people, and it shouldn't."

ISDS in trade agreements has already cost Canada over $190 million in damage payouts to foreign investors. But when foreign governments stymie projects that threaten the environment and citizens' health and Canadian firms exploit ISDS to extract hundreds of millions of dollars in damages, many of their suits challenging environmental protection, Canada pays an immeasurable price of another sort.

In El Salvador, for example, Canada's Pacific Rim Resources claimed $284 million in

damages – 5 per cent of the Central American nation's GDP – for slapping a moratorium on mining to preserve the country's remaining 3 per cent of unpolluted water. The impoverished country has so far spent more than $12 million defending itself.

ISDS certainly came to the aid of Canada's Gold Reserve Corp in Venezuela in 2009, to the tune of $740 million in damages for expropriation of its mine. And when the Mongolian government withdrew Khan Resources' uranium mining licence in 2010 in favour of a Mongolian-Russian joint venture, the tribunal awarded Khan $104 million. But making Mongolia pay has proven difficult.

No system is perfect, says Brendan Marshall, a director of the Mining Association of Canada.

"When engaged in good faith, [mechanisms like ISDS] have an important role to play in protecting investment," he says.

Canadian investors win only 14 per cent of their ISDS claims, but no investor has ever won a case against the United States, which attracts about 42 per cent of Canada's foreign investment.

Sean Stephenson of Appleton & Associates, a Toronto-based international law firm, maintains that the proposed TPP "is more restrictive than other treaties."

One big change is the exemption of tobacco control laws from ISDS claims. That's in response to American multinational Phillip Morris's claims against Australia's and Uruguay's plain cigarette packaging laws. Australia has spent $35 million so far to defend itself.

While the TPP asserts that states have the right to regulate in the public interest, beyond tobacco it does little to defend that right. Other important laws, in areas such as the environment and climate change, remain vulnerable to challenge by foreign companies, says Lise Johnson of the Columbia Center on Sustainable Investment in New York City.

Most frustrating of all for some critics is the TPP's use of flawed provisions from earlier trade agreements. A big one claimants now seek to exploit is the "fair and equitable treatment" standard, an ill-defined term often incorrectly interpreted by tribunals. Luis Parada, a trade dispute litigator with the Washington, DC, law firm Foley Hoag, says that flaw alone is reason not to ratify the treaty.

On transparency and openness, the TPP does little to distinguish itself from earlier versions of ISDS.

Publication of tribunal results isn't new; it's already mandated by the Central America Free Trade Agreement, for example. Another imported – but still optional – feature is tribunals' power to entertain written submissions from parties not directly involved in a claim. It is

very rare for written submissions to be heard “and even rarer for them to be listened to,” says the CCPA’s Sinclair.

Cory Wanless, a lawyer at Klippensteins Barristers & Solicitors in Toronto, says ISDS provisions grant rights and privileges to investors and corporations but leave out everyone else.

His Ecuadorian clients resorted to suing Canadian miner Copper Mesa in Ontario, seeking justice for assault and threats they had allegedly suffered while protesting the company’s mine in Ecuador. That 2009 suit went nowhere. For its part, Copper Mesa’s separate 2011 ISDS claim against Ecuador for an unknown amount alleging expropriation is still pending.

source: nowtoronto.com