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THE COUNCIL OF CANADIANS / LE CONSEIL DES CANADIENS
ACTING FOR SOCIAL JUSTICE

Rina Young, Manager, Trade and Environment
Environment and Climate Change Canada
International Affairs Branch

via email ***rina.young@canada.ca***

September 10, 2018

Re: Consultation on Canada-Mercosur and Canada-Pacific Alliance Free Trade Agreements

Dear Ms. Young:

In response to Environment and Climate Change Canada's (ECCC) consultations respecting the ongoing negotiations of the Canada-Mercosur and Canada-Pacific Alliance Free Trade Agreements (herein, the "FTAs"), the undersigned organizations collectively make the following submissions.

In order for Canada's trade agenda to be truly progressive and ambitious, Canadian trade agreements must hold member states and multinational corporations accountable for environmental, human health and Indigenous right impacts. This includes requiring each member state to respect national climate commitments in line with their Nationally Determined Contributions under the *Paris Agreement.* Further, we submit that Canada's obligation to protect these rights not only exists domestically, but in

its extraterritorial activities facilitated by FTAs. The following recommendations are made in support of these principles.

As the text of the FTAs has not been released, these comments are premised on the guidance provided by ECCC and Global Affairs Canada, who have expressed that the text is based on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP")[1] and the Comprehensive Economic Trade Agreement ("CETA").[2]

1. The enforcement of environmental laws must not be restricted to matters affecting trade

A weakness of a CPTPP-like environment chapter is that a party's environmentally detrimental actions will not be regulated in general; rather, such action will only be of issue if it affects trade between the parties. For this reason, we do not support the adoption of text similar to the CPTPP's general commitment in Article 20.3(4), which provides no party shall "fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties" (emphasis added).

The CPTPP's Article 20.12(9) similarly provides for dialogue regarding a sustained or recurring course of action or inaction by a subnational level of government *only if* it affects trade or investment between the parties. This threshold for compliance is weaker than the requirement in Article 22(1) of the North American Agreement on Environmental Cooperation (NAAEC), the environmental side-agreement of the NAFTA, which allows a party to challenge actions that show a "persistent pattern of failure by that other Party to effectively enforce its environmental law," but does not require that the complainant show how those actions affect North American trade or investment flows.[3]

We therefore recommend the removal of the condition that the enforcement of environmental laws be contingent upon affects to trade and investment and the clause "in a manner affecting trade or investment" be removed from the proposed FTAs.

2. FTAs should place stringent, positive obligations on multinationals to uphold environmental, labour and Indigenous rights

The United Nations has recognized that increasing demand and growth in competition for natural resources, which stands to be accentuated by FTAs, has caused a 'global land rush,' placing Indigenous

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[1] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership,* Government of Canada. Available at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/index.aspx?lang=eng, Article 20.3(4) **[CPTPP]**

[2] *Comprehensive Economic and Trade Agreement*, Government of Canada. Available at: http://www.international.gc.ca, Preamble **[CETA]**

[3] *North American Agreement on Economic Co-operation*. Article 22(1). Commission for Environmental Cooperation. Available at: http://www.cec.org/about-us/NAAEC

peoples, local communities and the environment under unsustainable pressure.[4] Accordingly, the exploitation of natural resources and the large-scale of extractive industries constitute "one of the main causes of enduring conflict over land tenure and the main cause of water and soil contamination."[5]

With large Canadian corporations already controlling approximately 50-70% of the Latin American mining industry[6] (a sector identified for Canadian investment under the proposed FTAs), there is a real threat that unless the FTAs in this region place stringent, positive obligations on multinationals to uphold environmental protection, labour and Indigenous rights, FTAs will increase the opportunity for destructive, environmentally unsustainable and socially unjust activities.

A review of cases involving Canadian multinationals illustrates the history of environment and human rights abuses abroad:

- ***Clark v. Barrick Gold Corporation, 2013, United States District Court (Southern District of New York)*** The Pascua-Lama Mine project, located in both Chile and Argentina, was in close proximity to glaciers which supplied water to more than 70,000 local farmers. Barrick Gold, a Canadian mining company, was able to secure permission from the Chilean and Argentinian governments to develop and operate the mine in exchange for strict promises that it would undertake wide-ranging efforts to limit environmental degradation and harm to surrounding glaciers and water sources. Barrick Gold repeatedly promised its shareholders and investors that it was compliant with the respective governments' regulations.

  In 2012, Barrick Gold announced that its CEO was terminated after reports of its unlawful environmental behavior began to surface. In April of 2013, Barrick Gold announced it had suspended construction to address the company's environmental violations. On May 24th, 2013, at the conclusion of the Chilean Environmental Superintendent's intensive four-month investigation of the project, the regulator placed a substantial fine on the company, finding it had been unlawful in its reporting of environmental issues – citing Barrick's environmental compliance efforts as not "correct, truthful, or provable."[7]

- ***Recherches internationales Québec v. Cambior Inc, 1998 CanLII 9780 (QC CS)*** One of the worst environmental disasters to occur in gold mining history took place in Guyana in 1995, when the dam of an effluent treatment plant ruptured at the Omai Gold Mine (then owned by Canadian-based international gold producer Cambior Inc.), resulting in effluent being released into the main water source. The leak resulted in cyanide, heavy metals, and many other unknown pollutants, being deposited in the Essequibo River. The 23,000 victims sued Cambior for $69

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[4] *Violation of rights of indigenous peoples in the word.* Article Q. European Commission. Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2018-0279+0+DOC+PDF+V0//EN

[5] *Ibid*

[6] *Canadian Mining in Latin America: Exploitation, Inconsistency, and Neglect,* Council on Hemisphere Affairs (2014) Available at: http://www.coha.org/canadian-mining-in-latin-america-exploitation-inconsistency-and-neglect/

[7] *Clark v. Barrick Gold Corporation, 2013, United States District Court (Southern District of New York),* Available at: http://www.barrickgoldsecuritieslitigation.com/docs/Barrick%20-%20Complaint.pdf

million.[8]

- ***Choc v. Hudbay Minerals Inc, 2011 ONSC 4490*** Widow Angelica Choc sued Hudbay Minerals Inc. (a Canadian mining company operating in Guatemala) for the murder of her husband, a respected Indigenous leader and outspoken critic of mining practices. In a related action, eleven women sued the company for various sexual assaults perpetrated by the company's private security personnel.[9]

Given Canada's track record and the extensive damage to the environment which can be caused by the sectors promoted in the FTAs, the text must not rely on guidance-based, discretionary statements.

Article 22.1 of CETA, for instance, encourages parties to "recall" the United Nations' global environment summits and "recognise" that economic, social development and environmental protection are interdependent and "reaffirm" their commitment to promoting development which "contributes" to sustainable development While these are laudable statements, they do not require that these principles "shall" be obligations of trade and investment and "shall" be subject to an enforcement mechanism similar to the investment protection provisions in the Agreement; hence, the provisions are largely meaningless.

3. The continued inclusion of investor-state dispute settlement undermines democratic principles of law-making and justice

We do not support Canada's continued inclusion of dispute resolution mechanisms where investment arbiters – operating external to our domestic court system and lacking accompanying procedural safeguards and independence – are able to review Ministerial and agency decisions, make enforceable damage awards, and constrain the application of domestic laws.

While CETA's environment chapter seeks to limit dispute resolution to conciliation and mediation, and the text's preamble affirms a party's "right to regulate" with regards to the environment,[10] these provisions are not sufficient when viewed in light of the text's entirety. For instance, CETA allows parties and investors to seek review by investment tribunal when a "legitimate expectation" is created but later frustrated.[11]

As the recent decision *Canada (Attorney General) v. Clayton,* 2018 FC 436 (commonly known as the *Bilcon* case) illustrates, not only do investment tribunals have the authority to award damages against Canada

[8] *Recherches internationales Québec v. Cambior Inc*, 1998 CanLII 9780 (QC CS)
[9] *Choc v. Hudbay Minerals Inc*, 2011 ONSC 4490
[10] *Comprehensive Economic and Trade Agreement*, Government of Canada. Available at: http://www.international.gc.ca, Preamble **[CETA]**
[11] *Ibid,* Article 8.10(4)

when "legitimate expectations" are allegedly breached, Canada's domestic courts have "no power to intervene" in either reviewing or overturning the tribunal's decision.[12] As the NAFTA tribunal held:

> The Nova Scotian governmental authorities had created legitimate expectations on the part of the Investors by clearly and repeatedly indicating that Bilcon was welcome to pursue its coastal quarry and marine terminal project at the Whites Point location (emphasis added).[13]

When Bilcon's proposed quarry failed to receive the approval of a federal-provincial joint environment review panel, the investor alleged Canada violated certain terms of its NAFTA obligations and sought damages in excess of half a billion dollars.[14] The *Bilcon* decision affirms that domestic courts are limited in their ability to review decisions of investment tribunals.

In dismissing Canada's application to set aside the NAFTA tribunal award, the Federal Court recognized that the tribunal's decision "raises significant policy concerns," including the:

> [E]ffect on the ability of NAFTA Parties to regulate environmental matters within their jurisdiction, the ability of NAFTA tribunals to properly assess whether foreign investors have been treated fairly under domestic environmental assessment processes, and the potential "chill" in the environmental assessment process that could result from the majority's decision.[15]

Despite the shortcomings noted by the court, Canadian officials continue to include investment tribunals within trade agreements, which by design favour large firms who are able to threaten investor claims in light of government standards and regulations aimed at environmental protection. For these reasons, we do not support the inclusion of investment tribunals in trade agreements, as relied upon CETA and CPTPP, and continue to urge that they not be used as a baseline for the Mercosur and Pacific-Alliance FTAs.

4. FTAs should include a mechanism whereby the public can submit complaints, and request reviews or investigations of parties' actions

While CETA and CPTPP's environment chapters include provisions that parties be open to receiving and considering submissions from the public,[16] they lack description and procedural details. Furthermore, the public lacks awareness about their existence and potential use.

We request a citizen complaint mechanism be included in the text of the proposed FTAs. Provisions should detail the structure of the public complaints process, provide opportunities for decision

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[12] *Canada (Attorney Genera) v. Clayton,* 2018 FC 436
[13] *Ibid,* para 43
[14] *Ibid,* para 36
[15] *Ibid,* para 198
[16] *See* CETA, *supra* note 9, Article 24.7(3) and CPTPP, *supra* note 1, Article 20.9

reconsideration, and include a request for investigation procedure, whereby the ECCC is required to pursue environmental compliance investigations of parties and investors' activities.

CONCLUSION

The opening-up of trade in the Mercosur and Pacific-Alliance countries, accompanied by CETA and CPTPP environment chapters which lack stringent and enforceable obligations, will increase existing pressures on land, water and the environment. In light of Canadian multinationals' demonstrated disregard for upholding environmental and social values, we are deeply concerned by Canada's promotion of trade and investment in the natural resource and extractive sectors when there is not an accompanying imposition of binding environment and climate, labour and Indigenous rights standards.

While Canada has signalled its interest in chapters respecting the environment, labour and Indigenous rights, they are not of equal force or effect to investors' rights which can be established through investment-court provisions. FTAs must protect actions to defend these rights from foreign investor claims of resulting economic losses.

We reiterate that Canada's progressive trade agenda must not only hold member states and multinationals accountable for environmental, human health and Indigenous right impacts, but must also ensure Canada's obligation to protect these rights exists in all extraterritorial activities facilitated by FTAs.

Yours very truly,

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