Ottawa
Room 518, Confederation Building
Ottawa, Ontario K1A 0A6
Tel.: 613-996-1119
Fax.: 613-996-0850

Ottawa
Pièce 518, Édifice de la Confédération
Ottawa (Ontario) K1A 0A6
Tél. : 613-996-1119
Téléc. : 613-996-0850

House of Commons
Chambre des communes
CANADA

Elizabeth May
Member of Parliament / Députée
Saanich—Gulf Islands / Saanich—Gulf Islands

Constituency
1 - 9711 Fourth Street
Sidney, British Columbia V8L 2Y8
Tel.: 250-657-2000
Fax.: 250-657-2004

Circonscription
1 - 9711, rue Fourth
Sidney (Colombie-Britannique) V8L 2Y8
Tél. : 250-657-2000
Téléc. : 250-657-2004

Environmental Assessment Secretariat
Trade Agreements and NAFTA Secretariat (TCT)
Global Affairs Canada
125 Sussex Drive
Ottawa, ON K1A 0G2

January 30, 2019

Written submission in response to the Canada Gazette Notice

RE: Consultations on the initial environmental assessment report of the North American free trade agreement (NAFTA)

After a tumultuous two years, we have arrived at the Canada-United States-Mexico Agreement (CUSMA), a renewed free trade agreement for North America. These negotiations took place amidst a haphazard trade war, a pressing humanitarian crisis on the US-Mexico border, and profound uncertainties about the justice of liberalized trade for workers, their communities, and democratic self-governance. Minister Freeland deserves no end of praise for her canny negotiating skills with an administration as incoherent and unpredictable as the one currently occupying the White House. Regardless of political stripe, Canadians should celebrate that.

But we cannot lose sight of two singular events that bookended this deal: the Trump administration's intention to withdraw from the Paris Agreement on one end, publication of the Intergovernmental Panel on Climate Change (IPCC) Special Report on the other. Never before has concerted global action been more urgent. Moreover, the actions required to keep global warming to the Paris target of 1.5 degrees – the threshold past which we invite

unprecedented disaster - necessitate a wholesale transformation of our society, not a patchwork of segmented policies.

Before 2017, we may have had a real chance at taking a holistic approach to decarbonizing our system of transcontinental trade. It was our grave misfortune to have as one of our negotiating partners a U.S. administration intent only on lining the pockets of the president's billionaire cronies. In this context, it is tempting to conclude that CUSMA, especially with its new environment chapter, is a landmark success. But, readjust your perspective to include the Paris target and the agreement becomes distressingly inadequate. For all its references to sustainable fisheries, biodiversity, and endangered species, the absence of any reference at all to a low carbon transition, renewables or clean energy – all of which appear in the CPTPP – is egregious in this time of global crisis.

Initial Environmental Assessment Report

It is not enough for an initial environmental assessment of CUSMA to report no significant impact compared to the original agreement. All this does is raise questions about NAFTA's impacts. Canada did not complete its own assessment of the deal as our environmental protection regime was not in place at the time. Instead we relied on a report prepared by the U.S. National Bureau of Economic Research from 1991. Since then, organizations like the Peterson Institute, Sierra Club, and International Institute for Sustainable Development have conducted their own assessments. Of greatest concern has been Chapter 11 Investor State Dispute Settlement and its chilling effect on government policy-making. Other concerns include NAFTA's augmenting effect on the use of pesticides and agro-chemicals, deforestation, depleted water resources, and threats to biodiversity. Though it is true that most of these effects are concentrated within Mexico, the initial environmental assessment's expectation of "minor negative environmental impacts beyond the original NAFTA" is not enough to justify business as usual for any one of these issues.

Given the brevity of the qualitative assessment and the absence of quantitative one, the remainder of this submission will discuss aspects of CUSMA from an environmental perspective, welcoming changes that were needed and highlighting those that would strengthen the agreement.

Chapter 11: Investor-State Dispute Resolution

Without a doubt, the best news out of CUSMA was the removal of the investor-state dispute mechanism, at least between the U.S. and Canada. Canada was the only developed nation to accept ISDS with the U.S., and it is the latter that has an unbroken record in winning cases. NAFTA introduced the first of these inherently anti-democratic processes, which then spread

like a contagion to most of the Free Trade Agreements that Canada has signed to this date, including the CPTPP.

Let's not forget that foreign investment protection agreements (FIPAs), as they are now commonly referred, were devised as a mechanism to protect Canadian and American investors from the Mexican justice system, which at the time was seen as susceptible to corruption and political interference. The Mexican justice system has since undergone substantial reforms. The Canadian government is the most sued under Chapter 11 provisions, the majority of which are not for violations of article 1110 (direct or indirect expropriation). Rather, they make use of other articles to challenge environmental protection, resource management and health care.

Of the 41 cases made against our government, 17 have been resolved, with Canada on the losing end of nine of them. This 46% success rate translates to one-third of a billion dollars in taxpayer money, $95 million in legal fees alone. It is the secrecy of these tribunals, combined with the blatant conflict of interest in permitting arbitrators to represent complainants in other cases, which enables corporations to achieve such staggering success through ISDS. Indeed, as Professor Gus van Harten writes, "Much of the compensation ordered by tribunals has been for expected profits that the investor might have earned, based on speculative assessments. ISDS litigation itself became the investment." Our domestic courts, existing because of our democracy and so co-responsible for its integrity, are much more prudent with the public purse. It is a relief that future disputes will take place through the courts and other legitimate administrative bodies.

All the same, with three years until the new regime comes into force, we must heed Public Citizen's warning and watch for corporations to take every advantage they can with the current rules. Civil advocacy groups must continue to shed as much light on these disputes as possible to counteract regulatory chill; governments are responsible for the public's interest and the public's alone.

Resources

Water

Of the threats to Canadian sovereignty posed by CUSMA, the agreement's stipulations with regards to water are of chief concern. Like NAFTA before it, CUSMA threatens Canada's control over our water. A side-letter to the agreement serves only to distinguish water in its natural state as a *not* a good, from water out of its natural state (e.g., in a bottle, as wastewater, when used in a service, etc.) as a regular commodity capable of being exported for a price. As stewards of 9% of the world's renewable water, we cannot simply treat it like any other resource.

The issue of freshwater will only become more vital as we face the effects of climate change and the accompanying scarcity of water resources. We must act to enshrine, enforce and strategically implement the 1987 Federal Water Policy to meet the requirements of sustainable water management – equity, efficiency and ecological integrity. We must remove all mentions of water as a good from CUSMA, in addition to passing federal legislation to prohibit bulk water exports, building on the current law banning exports from trans boundary basins. Canada can also work to ensure the removal of similar language from CETA, and other trade deals based on the NAFTA template.

Energy

The removal of the proportionality clause is a second laudable victory from the negotiations. This clause, which required a fixed percentage of energy commodities to be exported to the U.S., makes harder the transition to a low carbon economy. However, there is now a prohibition on limiting exports and imports between the countries. This could potentially interfere with supply-side climate policies, according to the *Canadian Centre for Policy Alternatives.* We know that the vast majority of Canada's fossil fuels must remain in the ground if we are to stay within our proportion of the global carbon budget. Accomplishing this will require supply-side policies. But if economic instruments like a resource export tax, regulatory approaches like introducing export quotas, or government restrictions like prohibiting further pipeline infrastructure are made impossible because of this provision in CUSMA, we are taking valuable tools off the table at a time when the climate crisis requires the broadest range of solutions.

Raw Logs

The continuation of Chapter 19 dispute resolution offers Canada an important vehicle to arbitrate against the U.S. for its lumber tariffs. We cannot forget the thousands of jobs and dozens of mills that are under threat without a settlement to the longstanding softwood lumber dispute in place. We must cease the practice of exporting raw logs, and focus on keeping value-added jobs in Canada by implementing a substantial whole log export tax. The environment chapter contains references to sustainable forestry practices. As stewards of a vast forest heritage – 300 million hectares or 10% of all the world's forests – I hope to see a national management strategy, with long-term, environmental sustainability as a priority.

Regulatory Practices

The language of regulatory 'cooperation' pervades the agreement, raising concerns over Parliament's power to protect the environment, ensure food safety, and control the use of hazardous chemicals. This is particularly the case with respect to CUSMA's new labelling rules – great for transnational agribusiness, worrying for consumers, their communities, and the environment. For instance, companies like Monsanto-Bayer will be able to keep pesticide safety data secret for ten years. The *Canadian Environmental Protection Act* promised 'cradle to grave' regulation of toxic substances. The Environment Commissioner's 2018 fall report made clear that the government is falling well short of that mark. Canadians should be secure in the knowledge that their government conducts

comprehensive, evidence-based screenings of hazardous substances that could impact their health and the health of their environments. Because of CUSMA, Health Canada will not be able to go ahead with its own proposal to register products *before* they go on the market. The new agreement's 'risk-based' approach puts the onus on individuals, not industry, to prove harm.

Finally, it is disturbing to see that the chapter on 'Good Regulatory Practices' will allow American and Mexican corporations to challenge regulations here before they are finalized, and even request that existing regulations be repealed. This appears to be a reformulation of the threat that ISDS poses to our national sovereignty.

Enforcement

Our environment minister has proudly touted the enforcement provisions laid out in Chapter 24, but scratch the surface and one finds little to inspire confidence. As the International Institute for Sustainable Development reports, much of this language of enforcement is echoed in all U.S. trade agreements but it has been ineffective in preventing regulatory backsliding. More to the point, the language used is merely aspiration. Again, the omission of climate change and relevant multilateral environmental agreements (MEA) is a major false-start for a new era of trade in the twilight of a livable world. Also of concern is the removal of Article 104, which since 2007 identified five MEAs that would take precedence in the event of an inconsistency with NAFTA.

We must see the results we were promised, but which failed to materialize, under NAFTA. Not one of the 91 submissions to the North American Commission for Environmental Cooperation (CEC) led to a sanction or enforcement order, in spite of President Clinton boasting in 1993 that there would be proactive engagement. For the first six years of its existence, the North American Development Bank - set up to fund cleanups identified by the Border Environment Cooperation Commission – funded just 20 projects. This amounted to 5% of an allocated $3 billion (USD), even though the total cost of remediation was estimated to be $20 billion at the time. By 2016, only 60 projects were completed, for a total investment of $700 million.

We were given assurances that s. 1114(2) in NAFTA would prevent a race to the bottom on environmental protection, but that is not we have seen, particularly from Canada and the U.S. During a period of one year under the former Harper administration, the Canadian government successfully stopped three separate CEC investigations into Canadian misconduct, including BC salmon farms, polar bear protection and Alberta's tailings ponds. More recently, we saw Minister McKenna hold back on releasing the new methane emission regulations in response to the EPA's first set of rollbacks in 2017. Though I am pleased to see the continuation of the CEC under CUSMA, we must redouble our commitment to its principles and put in place mechanisms to ensure that the Commission operates free from political interference.

CUSMA introduces a new governance structure, the Environment Committee, which is charged with implementing Chapter 24. The committee is required to meet just once every two years after the initial meeting within one year of CUSMA'S coming into force. From a public accountability point of view, it is troubling that the Committee's decisions and reports may be published only with a consensus agreement, and that the annual public meeting mandated under Article 9 of the *North American Agreement on Environmental Cooperation* will be eliminated in lieu of one mandatory public session at the Committee's biennial meetings.

Most troubling is the weakening of the citizen petition process. This process has been very useful in protecting the environment in Canada, the U.S. and Mexico. The citizen submission process features reduced timelines for the decision to and then preparation of a factual record. New rules further constrain the submission process, such as the requirement for private remedies to be pursued before the Secretariat reviews any claims. Further, the prohibition against basing claims only on "mass media reports" is somewhat troubling at a time of both increased distrust in the media (egged on by political parties for their own gain) and increased muzzling of government departments. Investigative journalism is more crucial than ever, yet the phrase "mass media reports" seems to cast aspersions on the integrity of that work. Hugh Benevides, former Canadian legal officer for the Secretariat, points out that CUSMA will require a two-thirds vote at council for a factual record to proceed, even though the U.S. is party to other agreements where just one party's support will suffice. That said, very little can come out of a factual record, as they do not assign responsibility nor offer any solutions. At most, the Environment Committee can use it to recommend to the CEC Council any matters that could benefit from cooperative activities.

The areas outlined for the CEC's Work Program activities are manifold and of vital importance for achieving our sustainable development goals. Unlike Chapter 24 in CUSMA, the Work Program article of the new *Environmental Cooperation Agreement* mentions "low emissions," "clean energy," and the threat of "extreme weather events." Welcome additions all, but less impactful without the recognition of "climate change." Broadly speaking, the language in the *ECA* is dedicated towards raising awareness and promoting better practices but lacks a focus on implementation. Seen as a whole, I am not convinced that there is enough here to fulfill former Quebec premier and international trade expert Pierre-Marc Johnson's recommendation to enhance meaningful cooperation between NAFTA's Free Trade Commission and the CEC.

Solidarity with Mexico

While CUSMA is not exactly a victory for Canadians, there is no doubt that Mexico has received an even worse end of the bargain. Most obvious is the continuation of ISDS between the two countries. Granted, there are marginal improvements to the process that will kick in after three years, for instance the rule that foreign investors must exhaust or pursue local remedies for at least 30 months before undertaking ISDS. Annex 14-E establishes a separate ISDS regime for certain "covered sectors" that happens to include nine American oil firms who signed contracts with the outgoing Mexican

government. This should be amended so that only uncompensated cancellations of these contracts can be reviewed, *not* the environmental or health policies we can expect from Mexico's new liberal administration. Dispute settlement aside, there is also the matter of provisions that make it easier for agribusinesses to force Mexico into approving GMO crops. There is also greater danger that companies like Dow-Dupont and Monsanto-Bayer will displace or patent the country's more than 60 indigenous corn varieties.

Mexico must not be abandoned by Canada. We should use our economic influence and clout to help protect the economy and people of Mexico.

Conclusion

North America's new trade deal improves upon the original in certain respects, but read against the context of the climate emergency, its inadequacies are hair-raising. The elimination of Chapter 11 dispute settlements will go towards restoring Canada's ability to regulate in the public interest. Without the energy proportionality clause, Canada can move full steam ahead with a transition off of fossil fuels. Nevertheless, the emphasis on regulatory cooperation and the weakness of CUSMA's environmental enforcement mechanisms – including the attenuated presence of multilateral environmental agreements – are in grave need of reconsideration.

It is time we rethink how we structure free trade. Trade isn't just about the export and import of goods and services. Trade agreements also impact human rights, labour standards, cultural diversity, environmental laws, and even constitutional rights. CUSMA has taken some steps forward, but without a thoroughgoing approach to decarbonizing trade across this continent, we will not only be delaying the inevitable but making that transition more difficult for Canadian workers, their communities, and our democracy.

Best regards,

Elizabeth May, O.C.
Member of Parliament
Saanich-Gulf Islands
Leader of the Green Party of Canada