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To: Investment Trade Policy Division (TMV)
Global Affairs Canada
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October 10, 2018

Re: Foreign Investment Promotion and Protection Agreements (FIPAs) and Investor-State Dispute Settlement (ISDS)

I welcome this opportunity to comment on Canada's Foreign Investment Promotion and Protection Agreements (FIPAs). Canada should pursue trade agreement based on principles that protect human rights, workers' rights, jobs, and community rights; that recognize limits to resources, and ensure that Canada retains its Charter position on limiting property rights; and that uphold environmental protection.

I support trade built on the principles of global equity, Canadian sovereignty, human rights, and the environment. Over the last twenty years, international free trade agreements have become an important part of Canada's economy. Despite acknowledged benefits, there are some clauses and sections in these agreements that are not balanced. They put foreign and corporate business interests first.

Trade has been historically understood to concern itself with the rules for trade of goods and resources. Under the General Agreement on Tariffs and Trade (GATT), this understanding of trade expanded to trade in services. The World Trade Organization agreement arising from the Uruguay Round of GATT, acknowledged increasing aspects of trade beyond trade in material things. But it was Chapter 11 of the North American Free Trade Act (NAFTA) that created a new animal in the world of trade negotiations; one that has nothing to do with trade. The Investor-State Dispute System (ISDS) conveys superior rights to foreign corporations. It allows foreign corporations to allege that a state action at any level of government in a country where the "investor" hopes to gain profits has taken an action reducing that expectation of profits. That foreign corporation has rights to launch an arbitration process, which depending on the agreement can take place entirely in secret, but which in no case – even under the so-called Investment Court in the Canada-European Union Comprehensive Economic and Trade Agreement, actually operates with rules of transparency and participation found

in our courts. The word "investor" is in quotation marks because ISDS agreements have operated to privilege foreign corporations over national, democratically elected governments even when the so-called investor has not made any tangible investments in the country against whom they successfully arbitrate.

It is a Trojan horse for corporate rule hidden within trade agreements. The degree to which it has been adopted is startling, given that it advantages no group in society as much as global ambulance chasing lawyers.

As a nation, Canada has rightfully recognized that trade agreements must consider gender. Goal 5 of the United Nations' Sustainable Development Goals (SDGs) puts it clearly: "It has been proven time and again, that empowering women and girls has a multiplier effect, and helps drive up economic growth and development across the board."

As a proponent of the Declaration on Trade and Women's Economic Empowerment in Buenos Aires last December, Canada must ensure that efforts in this area go beyond pink washing. Canada should continue to push for transparency in trade agreements and for the inclusion of gender equality in any future agreements. The impact of trade policies on women and gender minorities is far reaching and is not always apparent in a short time frame; Canada should continue to use gender disaggregated data, which contribute to a better understanding of these issues. Improved consultation processes with civil society and marginalized groups are required, as well as ensuring that a gender lens is applied to the agreement in its entirety, not only the chapter on gender and trade.

Now that NAFTA has been renegotiated, the government should turn its focus to opening a global dialogue to rescind all existing bi-lateral FIPAs between and among all countries to rebalance corporate rights and domestic sovereignty. Further, it's time to negotiate a new Multilateral Agreement on Corporate Rights and Responsibilities. The effort from 1995 to 1998 to negotiate a Multilateral Agreement on Investment in the OECD failed as it lacked balance. I encourage this government to work with progressive administrations around the world to press for new global negotiations to create a level playing field for multinational corporations and uphold countries' sovereignty. The template would be based on the European Union's (EU) in which no country's environmental and labour laws can fall below the very most rigorous of any EU state. By ensuring that all corporations in the world must adhere to minimum standards to protect children, the environment and labour rights, no company could gain competitive advantage by trampling on these fundamental elements of responsible corporate citizenship.

With regards to ISDS, it was a relief to see that Chapter 11 of NAFTA is being phased out in the new United States-Mexico-Canada Agreement (USMCA) – this is the angle that Canada should pursue for all future trade agreements.

The backgrounder on ISDS by Global Affairs Canada on the PlaceSpeak website states that ISDS "has been the object of attention in recent years, including for reasons of perceived lack of transparency, potential conflicts of interests by arbitrators, and inconsistency in arbitral decisions." This attention is wholly justified; these cases are not taken to court. They go to arbitration.

These ISDS provisions allow foreign corporations to bypass our judicial system and seek financial compensation in secretive arbitration tribunals that are made up of corporate lawyers who have a vested interest in perpetuating this arbitration system. There are no appeals. There is no access to a Canadian court before being thrust into arbitration.

While "international arbitration" may sound fair and neutral, the reality is different. A 2012 report, "Profiting from Injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom," (Corporate Europe Observatory, Transnational Institute, Brussels, Amsterdam, November 2012), provides some disturbing details of the world of global arbitration.

The report concluded that, "rather than acting as fair and neutral intermediaries, it has become clear that the arbitration industry has a vested interest in perpetuating an investment regime that prioritises the rights of investors at the expense of democratically elected national governments..."

Below are some of the report's key findings:

- There is a huge increase in the number of such cases – from 38 cases in 1996, to 450 in 2011;
- The cost to a country of fighting an investor challenge is on average $8 million (US$), and rises to over $30 million (US$) in some cases;
- Elite arbitration lawyers charge as much as $1,000/hour;
- Poor countries have to spend scarce resources on lawyers to battle global multi-nationals. For example, the Philippines spent $58 million defending a claim by German airport operator Fraport. That amount of money could have paid the salaries of 12,500 school teachers for the year;
- A small group of elite international lawyers handle a large proportion of the cases. 15 lawyers alone decided 55% of all known investor-state disputes; and
- They are often associated with firms that advise governments to enter into such treaties.

Understanding the difference between an investor state agreement and a trade deal is critical. Note that the Investor-State agreements have a number of acronym descriptors – ISDS, FIPAs, Investor-State. This alphabet soup may not have intentionally further disguised this stealth attack on national sovereignty, but disguised it unquestionably is.

Canada has lost, or caved and settled to avoid losing, more environmentally premised attacks through the ISDS of Chapter 11 of NAFTA than any other country. We have considerable experience in this area, yet little awareness that such is the case. Canadians, in particular, need to understand that our losing track record under Chapter 11 is not because our government, federal or various provincial governments, have behaved in ways that were rooted in trade discrimination. To lose when taken to Chapter 11 arbitration does not require that our actions were unreasonable, discriminatory, trade disruptive or unsupported by science. All we have to have done is act to reduce a foreign corporation's expectation of profits. In the most recent Chapter 11 loss, a US corporation ignored its right to pursue its complaint in our federal courts. This was an unprecedented move to opt for a secret arbitration tribunal instead of open courts. US mining company, Bilcon of Delaware, asked a

secret NAFTA arbitration panel for $300 million in damages against Canada. No Canadian corporation in similar circumstances could have sought this amount, nor accessed a private tribunal.

Bilcon's proposal for a basalt quarry in Digby Neck, Nova Scotia had been rejected by a joint Federal-Provincial Environmental Assessment Panel back in 2007. The panel found the proposal to be so seriously damaging to the environment that no mitigation was possible. Transiting shipments of basalt through the Bay of Fundy to build highways in New Jersey threatened the survival of the most endangered whale species on the planet – the North Atlantic Right Whale. It threatened existing economic activity in tourism and the lobster fishery. It offended community values.

Based on the panel's recommendations, the project was rejected by Progressive Conservative Nova Scotia Environment Minister Mark Parent and federal Conservative Environment Minister John Baird. Then Bilcon opted for Chapter 11 of NAFTA. The local community had no access to the secret proceedings. Neither did the Canadian environmental law community.

In spring of 2015, two out of three arbitrators found for Bilcon. The dissent by the only Canadian arbitrator, Prof Don McRae of University of Ottawa Law School, outlined the outrageous nature of the ruling. McRae noted that the Bilcon Chapter 11 ruling does unprecedented damage to Canadian sovereignty and to the integrity of the environmental assessment process. NAFTA Chapter 11 cases are virtually impossible to win on appeal. In May 2018 Canada lost the bid to overturn the NAFTA ruling.

It is time to shine a light on these investor-state agreements. It is time for a multi-lateral review and re-negotiation of the lot of them to an agreed upon international template to fairly protect investors without undermining national sovereignty, as well as domestic health, labour and environmental laws. These ISDS provisions are anti-democratic in their very nature and undermine the sovereignty of nation states. Investor state provisions have no place in trade agreements.

Thank you again for opening this dialogue amongst Canadians. I would be happy to meet to discuss these issues further.

Sincerely,

Elizabeth May, O.C.
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