



MiningWatch Canada

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Submission to the House of Commons Standing Committee on International Trade regarding Bill C-46, *An Act to implement the Free Trade Agreement between Canada and the Republic of Panama, the Agreement on the Environment between Canada and the Republic of Panama and the Agreement on Labour Cooperation between Canada and the Republic of Panama*

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Notes for a Presentation by Jamie Kneen on behalf of MiningWatch Canada

I'd like to thank you for this opportunity to share our observations on the Free Trade Agreement between Canada and Panama. I apologize that since the invitation came very recently we have not had a chance to prepare a more detailed written brief, or to submit it in advance for translation.

MiningWatch Canada is a pan-Canadian coalition of environmental, Aboriginal, social justice, development and labour organizations that researches and advocates for responsible mining practices and policies in Canada and by Canadian companies abroad. We work with communities affected by Canadian-based mining activities in many parts of the world, and with experts and organizations that are trying to ensure that mining investment is accountable to the affected communities and subject to international standards for environmental protection as well as the protection of workers and the recognition of the rights of Indigenous peoples. Canadian mining investment in Panama has been controversial since the 1990s, and MiningWatch has been monitoring it since our establishment in 1999.

Obviously our remit is not related to trade in nuts and bananas, nor in financial services or many of the other areas covered by this free trade agreement. Many of the agreement's measures sound positive to the untrained ear. However, there are potentially serious difficulties associated with the investment provisions of the agreement, specifically as they relate to environmental planning and protection. There is scant evidence that the environmental side agreement will have any meaningful effect in alleviating them. In addition, the environmental impact of the agreement itself is impossible to gauge given that the Final Environmental Assessment has not been released – if it has even been completed. It was supposed to be released after the conclusion of negotiations on the FTA.

The report that is publicly available, on the Initial Environmental Assessment, is almost completely devoid of meaningful content. While it acknowledges that “[t]he main effect [of the

FTA] is likely to be greater protection for existing Canadian investment in Panama,”¹ it proceeds to completely ignore the environmental implications of such protection. Despite changes in commodity markets and investment patterns that were evident at the time, the report states that “[l]arge changes in investment patterns are not expected to result from the FTA. Therefore, it is concluded that the environmental effects of the Canada-Panama FTA will be minimal to non-existent.”² No evidence is provided for any of these statements, other than that changes had been minor since the 1998 Canada-Panama *Foreign Investment Promotion and Protection Agreement (FIPA)*.³

Realistically, given increasing commodity prices, especially in metals, as well as growing interest and existing investment commitments, it is more reasonable to assume that the FTA could lead to increased Canadian mining investment in Panama with major implications for the environment that should have been taken into consideration in the environmental assessment. One current proposal, Inmet Mining’s Cobre Panamá open-pit copper project on the Petaquilla concession west of Panama City, is forecast to deforest 5900 hectares of mostly primary rainforest in the middle of the Mesoamerican Biological Corridor. This \$4.3 billion project had been identified long before the FTA negotiations, or the environmental assessment, were concluded.

On the same concession, Canadian-based Petaquilla Minerals’ Molejón gold mine has been highly controversial, provoking divisions within the neighbouring communities, being repeatedly accused of deforestation and contaminating local rivers, and fined almost \$2 million for environmental violations.⁴ The Petaquilla concession itself has also been controversial as it grants its owners a series of legal and regulatory exemptions.⁵

At the same time, another Canadian company, Corriente Resources, has been operating illegally in the Ngöbe-Buglé indigenous territory trying to overcome community opposition to a huge open-pit copper mine project so they can first obtain and then sell the property to a larger mining company for development.⁶

There are a handful of other significant Canadian mining interests in Panama, far outweighing any other country’s, though only the Molejón mine is actually in production. This Canadian investment is not a problem in itself; the problems have to do with the conditions of investment and the probable effects of the FTA on those conditions. Environmental protection and legal enforcement and compliance in general in Panama are notoriously weak, even within the framework of existing laws and regulations. The Molejón and Corriente examples demonstrate this.

¹ Foreign Affairs and International Trade Canada, “Initial Environmental Assessment (EA) Report of the Canada-Panama Free Trade Agreement (FTA) Negotiations”, December 18, 2009. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ea-panama.aspx?lang=eng> viewed November 26, 2010.

² *ibid.*

³ Foreign Affairs and International Trade Canada, “Economic Analysis of a Prospective Canada-Panama Free Trade Agreement”, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/analysis-analyse.aspx> viewed November 28, 2010.

⁴ MiningWatch Canada, “Petaquilla: Panamanian Rainforest, Communities Threatened by Mining”, January 4, 2009. <http://www.miningwatch.ca/en/petaquilla-panamanian-rainforest-communities-threatened-mining> viewed November 28, 2010.

⁵ MiningWatch Canada, “Important Information about the Petaquilla Mining Project in Panama”, November 18, 2008. http://www.miningwatch.ca/sites/miningwatch.ca/files/Petaquilla_background.pdf viewed November 28, 2010.

⁶ La Prensa, “Minera opera ilegalmente”, February 11, 2010. <http://www.prensa.com/hoy/negocios/2091084.asp> viewed November 28, 2010.

The danger is that the FTA's investment protections will end up protecting mining investments that are taking advantage of lax governance and the resulting low-cost operating environment, undertaking projects that would be extremely unlikely to be approved in Canada or any other country with more stringent controls, while the Agreement on the Environment provides no enhanced protection, nor recourse for affected communities or public interest organizations.

The present FTA provides ample cause for concerns on both fronts. In terms of environmental protection and environmental planning, the Agreement on the Environment does provide some modest measures for environmental cooperation while the FTA includes a non-derogation clause to protect environmental legislation. Non-derogation is good but hardly sufficient where significant improvement is what is required. At the same time, the Agreement on the Environment follows the recent model of the Colombia and Peru FTAs in omitting access to environmental dispute resolution by citizens, and reducing the joint advisory panels and complaints mechanisms of earlier agreements like NAFTA or the Canada-Chile FTA to a single "coordinator" with no independent powers or capacity and a review panel that can only be invoked by States, not citizens.

This is significant in the case of a country like Panama, where there are serious challenges in establishing the institutional and technical capacity to administer, monitor, and regulate activities like large-scale mining that have not previously existed in the country – activities that have demonstrated the political and technical limitations of state supervision in neighbouring countries like Costa Rica, Honduras, and Guatemala.

There are also disturbing precedents in the abuse of investment protection measures contained in FTAs elsewhere in the region. These may simply involve threats as in the case of Glencairn Gold (now Central Sun Mining), which threatened the Costa Rican government with legal action under the Canada-Costa Rica FTA if its Bellavista project was not exempted from a ban on open-pit gold mining; the mine's leach pad collapsed barely three years after it was inaugurated and the mine has not been operational ever since. They may also involve actual lawsuits as in the current case of Pacific Rim Mining, using its US subsidiary to sue the government of El Salvador under the United States-Dominican Republic-Central America FTA (DR-CAFTA) for not issuing operating permits, despite the company's failure to complete the filings required to obtain such permits and inconsistencies in the information it did submit. There are also numerous examples of successful and unsuccessful (but nonetheless costly) lawsuits under NAFTA.

The investment provisions in this FTA provide similar measures on regulatory expropriation in chapter 9, section 11, though they are limited by exemptions under the corresponding Annex 9.11 for "*reasonable regulations*" to protect the environment.⁷ These exemptions are welcome, but they have not been tested before the International Centre for Settlement of Investment Disputes (or any international trade tribunal) and given the strength of the expropriation protection it is far from clear that the exemptions will be sufficient to allow Panama adequate space to effectively regulate in the public interest.

This applies not just to environmental protection but critically to any effort to change the regulatory environment to enable new measures to promote accountability and transparency, or to generate new revenues from royalties or taxation in support of the state's legitimate efforts to finance its social development obligations. The net effect is to impose barriers to the raising of

⁷ Government of Canada, "Free Trade Agreement between Canada and the Republic of Panama, Chapter Nine: Investment". <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/chapter-chapitre-9.aspx?lang=eng#a-9.37> viewed November 28, 2010.

these domestic standards.⁸ There is an emerging concern on the part of analysts and academics for “the harm done to the public welfare by the international investment regime, as currently structured, especially its hampering of the ability of governments to act for their people in response to the concerns of human development and environmental sustainability.”⁹

In conclusion, while the objectives of enhancing both investment stability and environmental protection are laudable they are not well met by the present text, although determining the likely impacts of the agreement is made difficult by the absence of a serious environmental assessment, and there is no attempt to frame any aspect of the agreement in terms of sustainable development. The FTA as negotiated presents a very real risk of entrenching an ineffective and possibly irresponsible regulatory regime by protecting investments from tougher environmental or fiscal measures.

Thank you for your time.

⁸ Canadian Council for International Cooperation. “Investment Treaties and Extractives Industries: Implications for Human Rights and Sustainable Development – Report of a CCIC Policy Seminar Held May 13, 2009”. http://www.ccic.ca/files/en/what_we_do/trade_2009-08_invest_treaty_conf_report_e.pdf viewed November 28, 2010. It is an open question whether the government of Panama, where tax free zones are a specific strategy for development – or at least for boosting economic activity – is interested in imposing measures to increase state revenue, but this also raises questions of legitimate representation and accountability when the FTA itself has not been the subject of a public debate in either country.

⁹ Legal experts from 24 universities in 9 countries, “Public Statement on the International Investment Regime”, 31 August 2010. http://www.osgoode.yorku.ca/public_statement/documents/Public%20Statement.pdf viewed November 28, 2010.