Submission to the government of Canada's consultation on a possible Canada-Ecuador free trade agreement

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On behalf of the Trade and Investment Research Project (TIRP) of the Canadian Centre for Policy Alternatives (CCPA), I am pleased to provide the following comments on Canada's proposal to begin free trade negotiations with Ecuador. While these comments focus on one potential aspect of these negotiations—the inclusion of an investor-state dispute settlement (ISDS) process—the CCPA contributed to, and entirely supports, the separate submission to this consultation from the Americas Policy Group.

The CCPA is a charitable research institute and Canada's leading source of progressive policy ideas, whose work is rooted in the values of social justice and environmental sustainability. Since 1999, TIRP has pooled the expertise and resources of Canadian academic and non-governmental researchers to examine and critique the impacts of trade and investment treaties on social, environmental and economic development policy at home and abroad.

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Inclusive trade and investor-state dispute settlement are incompatible

From recent media reports, the CCPA understands the Ecuadorian government would like any future Canadian free trade agreement to include strong investment protections and an investor-state dispute settlement (ISDS) process to enforce them. According to Ecuadorian Ambassador to Canada Carlos Játiva, the extra-legal protections for foreign investors provided for by ISDS would attract more Canadian investment to Ecuador's mining and infrastructure sectors.

Canada should reject this request and take additional steps to remove itself from trade deals and investment treaties that include ISDS. What little credibility there is left in the international investment arbitration regime has been fundamentally eroded by global concerns about the incompatibility of ISDS with the achievement of human rights, including the rights of Indigenous Peoples, and urgent commitments to lower greenhouse gas emissions under the Paris Agreement.

According to a July 2021 report of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises:

> Most international investment agreements protect investors and their rights to the exclusion of the rights of individuals and communities. They also constrain the regulatory ability of States to act robustly to discharge their international human rights obligations. Moreover, they offer investors a special privilege to enforce their rights through binding international arbitration, but do not provide a similar right to rights holders affected by investment-related projects (p.22).

Latin American countries are regular targets of contentious and extremely costly ISDS claims from oil, gas and mining firms, many of them based in Canada. These ISDS cases have challenged policies to defend human rights, including Indigenous rights, protect the environment, and uphold national laws with respect to taxation or contracts. Mining bans affecting domestic and international investors equally, and stricter regulation or appropriate taxation of mining and energy projects, are frequently attacked by Canadian companies under investment treaties and free trade agreements with Latin American countries.

Having lost a massive $2 billion USD investor-state claim to Occidental Petroleum Corporation in 2012, Ecuador terminated its investment treaties, including a Foreign Investment Protection Agreement (FIPA) with Canada, in 2017 and withdrew from the International Center for Settlement of Investment Disputes (ICSID) Convention. While sunset clauses in many of these treaties ensure investors will be able to sue Ecuador in ISDS proceedings for many years to come, the country's coordinated exit from the ISDS regime—a moment of clarity—continues to inspire.

Unfortunately, the current Ecuadorian government is seeking to rejoin ICSID and to include ISDS in new trade and investment treaties, putting the country at continued risk of illegitimate and expensive claims from mining firms. Given Canada's continued pursuit of bilateral investment treaties and free trade agreements containing ISDS (e.g., with ASEAN, Indonesia, and Taiwan), the CCPA is highly concerned that the government will agree to reanimate the defunct FIPA in any new free trade deal with Ecuador.

Recent updates to Canada's investment treaty language do not adequately address imbalances in the ISDS regime that favour the profits of foreign investors over other governmental priorities and to the detriment of reasonable discretion in policy-making. For example, the environmental exception in the Canada-Colombia Free Trade Agreement proved useless in the highly troubling Colombian government loss to Canadian mining firm Eco Oro over constitutionally enacted environmental protections in the country's sensitive *páramos* ecosystem.

Canada's 2021 Model Foreign Investment Protection Agreement—the basis for the new Canadian investment treaty and FTA negotiations—claims to claw back some governmental sovereignty in investor-state disputes. But it does so through a meek "right to regulate" clause taken from the Canada-EU Comprehensive Economic and Trade Agreement (CETA) and through other clarifications, of dubious value, with respect to the kinds of state action that would breach an investor's broad and vague right to "fair and equitable treatment."

These untested reforms to investment treaty language, far from fixing the democratic deficit in ISDS, ultimately sustain a system in which investors get special rights—outside domestic law—to challenge government decisions they don't like. It is telling that Koch Industries, in its current ISDS dispute against Ontario's cancellation of cap-and-trade, cites the 2021 model FIPA language on fair and equitable treatment as proof of Canada's acceptance of a very *broad* rather than clawed-back standard of protection.[1]

Canada and Ecuador must radically break from the ISDS regime: to uphold human rights, including Indigenous rights and the rights of nature; to be able to hold multinational companies accountable for human rights violations and environmental crimes; to create the necessary policy space for governments to tackle the climate emergency; and so that increased two-way trade and investment can truly benefit the widest number of people possible.

European nations are withdrawing *en masse* from the Energy Charter Treaty, whose ISDS process is regularly used by fossil fuel companies to penalize governments over legitimate environmental policy choices. The European Commission is now endorsing a coordinated EU-wide withdrawal from the treaty, which it claims to be incompatible with the continent's green transition goals.

Canada has also taken limited steps away from ISDS, by removing it from the renegotiated Canada-U.S.-Mexico Agreement (CUSMA), for example. Explaining this decision in a 2018 press conference, Canadian Minister Chrystia Freeland said, "ISDS elevates the rights of corporations over those of sovereign governments. In removing it, we have strengthened our government's right to regulate in the public interest, to protect public health and the environment, for example."

Broad-based consultations needed before start of negotiations

Canada's current free trade agreements (FTAs) and investment treaties provide strong rights and privileges to private commercial interests, but contain much weaker safeguards for workers, Indigenous Peoples, and the natural world.

A standard free trade deal with Ecuador—where most Canadian interest and investment is in mining and extractives—would be particularly harmful to Indigenous and other rural communities, especially but not only if it includes ISDS. Market access commitments in goods and services, and chapters on digital trade, technical and food safety standards, and intellectual property rights, could also do more harm than good to farmers, workers, women, and more vulnerable groups in Ecuador.

The CCPA urges the Canadian government to engage more broadly with civil society in both Canada and Ecuador—prior to launching trade negotiations—about how our bilateral economic and cultural ties can be strengthened without undercutting workers, violating Indigenous rights and title, and weakening democratic choice.

Notes

1 Koch Industries makes this claim in a response to Canada's counter-memorial on the merits of the case, which was removed from the ICSID website in February shortly after the publication of a news article about the case in *The Narwhal*: https://thenarwhal.ca/cnrl-cenovus-oil-cleanup-subsidies/.

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