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Joint Public Advisory Committee
Commission for Environmental Cooperation
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To the members of the Joint Public Advisory Committee,

The Indigenous Rights Center is a non-profit, indigenous controlled corporation, which engages in strategic advocacy to advance the rights of indigenous peoples in Canada and internationally.

The effects of trade on environmental protection and the recognition and affirmation of indigenous rights continues to be a matter of great concern for indigenous peoples in Canada and elsewhere. Whereas government and industry often portray enhanced international trade in terms of greater economic opportunities, indigenous peoples are often more concerned with the potential impacts of international trade on traditional economies, occupations and livelihoods.

The IRC would like to take this opportunity to raise three issues with the Joint Public Advisory Committee (JPAC) regarding the upcoming 20th anniversary of the North American Free Trade Agreement and the North American Agreement on Environmental Cooperation. These issues are:

- Human rights and environment
- Citizen Submissions
- Article 3 obligations

Human Rights and Environment

The Preamble of the NAAEC recognizes both the Rio Declaration and the Stockholm Declaration. The Stockholm Declaration makes an explicit link between Environment, Development and Human Rights.¹ The Parties are aware of the connection between

¹ United Nations, *Declaration of the United Nations Conference on the Human Environment* (16 June 1972) [Stockholm Declaration].

environmental protection and promotion of human rights. This is an important consideration because the NAAEC is not an international instrument which exists separate and apart from other international environmental instruments or from international human rights instruments. The NAAEC is part of a body of international law and must be interpreted and implemented to complement other relevant instruments.

Similarly, the Rio Declaration builds upon and expands the principles of the Stockholm Declaration. The Rio Declaration articulates connections between international trade and environmental protection and expressly notes the importance of indigenous peoples in sustainable development.² The Rio Declaration, and the overall framework of sustainable development law, recognizes the importance of trade to sustainable development.³

The overall objectives of the NAAEC and the NAFTA are consistent with implementation of the Rio Declaration, particularly Principles 12 and 16. However, implementation of the NAAEC should be consistent with all Principles of the Rio Declaration, including Principle 22.⁴ Principle 22 states, “Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”

The Principles of the Rio Declaration have influenced the development of international environmental law. The *Convention on Biological Diversity*, ratified by Canada and Mexico, recognizes the importance of supporting indigenous customary and sustainable uses of biological resources as a matter of international environmental law.⁵ Pursuit of traditional occupations also receives protection under international human rights law, through the *Discrimination (Employment and Occupation) Convention*.⁶

The Human Rights Council, through various independent experts, has also noted the importance of connections between human rights, the environment and international trade. For example, the United Nations Special Rapporteur on the Right to Food issued Guiding Principles on human rights impact assessments and international trade

² United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development* (14 June 1992) [Rio Declaration]. The recognition of the connection between indigenous peoples and sustainable development is now widely recognized in international law. For example, the Preamble of the United Nations Declaration on the Rights of Indigenous Peoples recognizes “that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment”.

³³ Rio Declaration at Principle 12 and Principle 16. Principle 12 reads in part, “States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.”

⁴ We note, for example, that West Coast Environmental Law has raised issues consistent with Principle 10 of the Rio Declaration.

⁵ *Convention on Biological Diversity*, 1760 UNTS 79, Article 10(c). Note that the Parties to the CBD are currently developing a programme of work to implement Article 10(c) of the Convention.

⁶ *Discrimination (Employment and Occupation) Convention* (ILO No. 111), 362 UNTS 31 (15 June 1960).

agreements in 2011.⁷ The Guiding Principles suggest that human rights are relevant to international trade agreements, such as the NAFTA, as well as related agreements such as the NAAEC.

In 2012, the Human Rights Council created a new mandate for an Independent Expert on Human Rights and the Environment. The role of the Independent Expert is to study human rights obligations which are connected to environmental protection, as well as to promote best practices on connections between protection of environmental resources and human rights.

Indigenous rights are often framed as human rights. This is because indigenous peoples rely on environmental resources for life (food security and water security), pursuit of traditional occupations, preservation and promotion of culture and other human rights. As a consequence, implementation of Principle 22 requires knowledge and sensitivity to human rights, particularly human rights which are relevant to environmental protection.

The United Nations Declaration on the Rights of Indigenous Peoples, endorsed by all three Parties to the NAAEC, represents an articulation of the human rights and other international law obligations of states towards indigenous peoples. Article 29(1) of the UNDRIP states, “Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.” Each of the Parties to the NAAEC has considerable experience in this area, and each has considerable room for improvement.

The human rights of indigenous peoples can be threatened by environmental laws in two ways. First, overzealous implementation of environmental laws can threaten the continued sustainable use of resources, particularly harvesting practices by indigenous peoples.⁸ Second, failure to enforce environmental laws may threaten key environmental resources upon which indigenous peoples rely.⁹

When international human rights considerations are not integrated into a program of work, it is common for states to ignore the rights, interests and aspirations of indigenous peoples with respect to that program of work. Yet, the rights, interests and aspirations of indigenous peoples are often directly and seriously impacted by bilateral and multi-lateral environmental conventions and their implementation.¹⁰

⁷ Olivier de Schutter, UN Special Rapporteur on the Right to Food, *Guiding Principles on human rights impact assessments and international trade agreements*, A/HRC/19/59/Add.5 (19 December 2011).

⁸ See, for example, *Inuit Tapiriit Kanatami and others v. European Commission*, Judgment of General Court (Seventh Chamber) (25 April 2013).

⁹ See *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247.

¹⁰ For example, the *Convention on the International Trade in Endangered Species of Wild Flora and Fauna*, 993 UNTS 443, or the *Convention between the United States and the United Kingdom for the protection of migratory birds in the United States and Canada* (1916) and the *Protocol between the Government of the United States and the Government of Canada amending the 1916 Convention between*

International trade agreements, including some currently under negotiation, impact indigenous rights and the human rights of indigenous peoples. For example, the Hupacaseth First Nation claims the effects of the proposed and signed *Canada-China Foreign Investment Protection and Promotion Agreement* trigger a duty to consult and accommodate the First Nation on the terms of the treaty.¹¹

International trade law and International Environmental law do not displace the human rights obligations of Parties. Rather, international trade law, international environmental law and international human rights law are mutually supportive and reinforcing bodies of law. As a result international trade instruments, international environmental instruments and international human rights instruments should be mutually supportive.

The IRC encourages the Parties to continue implementation of the NAAEC in a fashion which encourages continued customary and sustainable uses of environmental resources and supports the human rights of indigenous peoples to continue pursuit of traditional occupations, such as wildlife harvesting and fishing. The CEC should make explicit connections between vulnerable populations, environmental degradation and discrimination (environmental justice) as a human rights issue.

The IRC encourages the CEC to enhance implementation of the NAAEC in a fashion which mutually reinforces human rights, international trade and environmental protection. While the IRC identifies some issues with the NAAEC and with the conduct of the Parties, implementation of the NAAEC has been undertaken in a generally mutually supportive manner. This is a credit to various compositions of the JPAC, the Secretariat and the Council itself over the first 20 years of the NAFTA.

The IRC recommends the CEC:

- Continue active engagement with indigenous peoples on issues of customary uses, traditional occupations, application of traditional knowledge and worldviews and indigenous rights.
- Continue work on vulnerable ecosystems, adopting an ecosystem approach which prioritizes vulnerable populations and vulnerable ecosystems
- Sponsor one or more public meetings with the Independent Expert on Human Rights and Environment to discuss North American Environmental Cooperation
- Develop of a broad vision of sustainable development for North America, which includes human rights and with specific emphasis on indigenous rights, interests and aspirations, as well as the rights, interests and aspirations of other vulnerable groups.

the United Kingdom and the United States for the protection of migratory birds in Canada and the United States (1995).

¹¹ Similar terms are contained in the more comprehensive proposed *Canada Europe Trade Agreement*, though the IRC is not aware of any current challenges to that, or any other international trade agreement currently under negotiation.

Citizen Submissions

The IRC adopts the recommendation of West Coast Environmental Law, and likely many others, that the citizen submission procedure should be strengthened. The IRC also raises an issue with the citizen submission procedure that is particular to indigenous peoples.

In terms of the citizen submission procedure of the NAAEC, the Agreement creates an explicit division between environmental laws and First Nations uses of resources. This creates a disturbing precedent and runs contrary to Principle 22 of the Rio Declaration, as well as the principles of complementarity outlined above. As a result, the enforcement provisions and citizen submission provisions of the NAAEC are of limited value to indigenous peoples.

Article 45(2) of the NAAEC states:

For greater certainty, the term “**environmental law**” does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.

Article 45(2) excludes consideration of laws which are directed at supporting aboriginal harvesting from the citizen submission procedure of the NAAEC.

The NAAEC is an attempt to reconcile the potential effects of development with environmental protection. To put it another way, the NAAEC represents a rejection of the ‘environment v development’ paradigm and a commitment by the Parties to pursue a regime of sustainable development through cooperation. As a consequence, omitting consideration of laws which are directed at sustainable uses of resources from the citizen submission procedure is both baffling and troubling.

Since the term ‘sustainable development’ was coined, and even prior to that, indigenous peoples have rejected the notion that conservation must equate to prohibiting uses of resources. Rather, conservation and sustainable development is about sustainably developing resources, not enjoining their use altogether.

Indigenous peoples have been engaged in the sustainable use of resources since time immemorial. Most modern recognized forms of indigenous rights involve continuing uses of resources. Divorcing customary uses of resources by indigenous peoples, as well as uses of resources by others, such as recreational users, suggests an irrational division between environmental laws which support sustainable development (i.e. sustainable uses of resources) and those which exist for any number of other reasons.

In Canada, consideration of aboriginal rights is central to a range of environmental policy-making processes. Where aboriginal rights, particularly aboriginal harvesting rights, are ignored by governments, courts can issue orders compelling consultation with rights holders.¹² Consultation with indigenous peoples is also a requirement under US

¹² *Adam v. Canada (Environment)*, 2011 FC 962.

law¹³ and under Mexican law.¹⁴ While the specifics of the duty to consult in each of the Parties, as well as the mechanisms for implementation may vary, there is little doubt that the reason consultation is a universally recognized obligation in North America is that each Party recognizes the importance of natural resources to indigenous peoples.

The IRC strongly urges the Parties to reconsider the Article 45 exception to aboriginal harvesting rights. This exception prevents resource users from raising issues of implementation of treaties, modern claims agreements and common law rights to support environmental protection and conservation initiatives.¹⁵ The existence of this exception in Article 45 generates a considerable hindrance to examination of the direct application of aboriginal rights to support conservation and protection initiatives and undermines the close connections between indigenous harvesting activities and environmental law and policy in each of the Parties.

Failing this, the IRC strongly recommends the Council continue to accept communications under the citizen submission procedure which involve implementation of an 'environmental law' as defined under Article 45 and which nonetheless implicate implementation of indigenous rights, particularly harvesting rights. Further, the IRC notes that whether a Party has complied with its obligation to secure free, prior and informed consent, to consult, or to accommodate is often centrally important to whether a Party is properly implementing its environmental laws. In other words, whether a Party has complied with its obligations in such matters should already be considered admissible for the purposes of the CEC citizen submission procedure.

For its part, the Council, the Secretariat and the JPAC have been remarkably accommodating in recognizing and supporting the role of indigenous peoples in the CEC over the past 20 years. However, the continuing exclusion of laws which support sustainable uses from the definition of 'environmental law' in the NAAEC needs to be revisited.¹⁶

The Indigenous Rights Centre recommends that the JPAC:

¹³ See Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments* (6 November 2000) online: <http://ceq.hss.doe.gov/nepa/regs/eos/eo13175.html>.

¹⁴ *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 28 ILM 1382 (1989) [ILO 169].

¹⁵ One example is the increasing practice of indigenous peoples asserting inherent land rights in order to develop indigenous protected areas or 'tribal parks'.

¹⁶ For example, section 5(c) of the *Canadian Environmental Assessment Act, 2012* states that 'environmental effects' include a range of uses, including aboriginal uses of environmental resources. A restrictive reading of the NAAEC would suggest that s. 5(c) may not fall within the definition of an 'environmental law' under the NAAEC because the primary purpose of s. 5(c), it could be argued, is to support aboriginal harvesting rights. The IRC considers this an absurd and discriminatory interpretation as the CEAA 2012. Absurd because the CEAA 2012 is clearly an 'environmental law' and discriminatory because such an interpretation would exclude consideration of environmental effects related to aboriginal peoples, but allow examination of environmental effects on the general population (defined elsewhere in CEAA 2012).

- Recommend the Parties amend Article 45 to delete the omission or issue an interpretation directive to the Secretariat to allow complaints regarding aboriginal uses to proceed through the citizen submission process
- Strengthen the citizen submission process to provide greater accessibility; by reducing admissibility requirements
- Encourage the Secretariat to consider submissions regarding consultation with indigenous peoples on actions taken pursuant to environmental legislation and regulations as directly related to implementation of ‘environmental laws’ for the purposes of the citizen submission procedure

Article 3 obligations

One of the concerns which was prevalent at the time NAFTA was negotiated and signed by each of the Parties was the likelihood of ‘regulatory backsliding’ of environmental laws. In essence, this means that a North American trade agreement could initiate a ‘race to the bottom’ in terms of environmental regulation, as each Party would compete for international investment flows by reducing the extent that each protects the natural environment.

One of the objectives of the NAAEC, in the view of the Indigenous Rights Centre, is to prevent such a ‘race to the bottom’ in terms of environmental legislation. Thus, NAAEC Article 3 of the NAAEC requires each Party to “strive to continue to improve those laws and regulations.” In the opinion of the Indigenous Rights Centre, Canada has breached its obligation under Article 3 of the NAAEC by reforming its environmental laws and regulations to weaken protections for the environment.

The purpose of Canada’s Responsible Resource Development Plan is clear – to streamline environmental legislation in order to attract both foreign and domestic direct investment in Canada’s expansive natural resource extraction sector.¹⁷ This objective is not itself incompatible with increased environmental protection so long as legislative and regulatory reforms are focused on reducing duplication in the regulatory process.

Yet Canada’s new *Canadian Environmental Assessment Act, 2012* is regressive in many ways. Many of the changes introduced make protection of the environment an issue to be guided by political considerations, rather than by evidentiary considerations. The IRC will focus on only one example of such a change, the introduction of a two step process to determine whether environmental assessments are necessary under Canadian law. This change directly affects the ability of indigenous peoples to participate in environmental

¹⁷ Natural Resources Canada, *Responsible Resource Development and related legislative, regulatory and policy improvements to modernize the regulatory system for project reviews*, Online: <http://www.nrcan.gc.ca/environmental-assessment/regulatory-system/6297> (last accessed 20 August 2013). The description notes the purpose of the Plan is, “To fully capture the benefits of Canada’s natural resources sector for all Canadians, this suite of actions will create a modern regulatory system to support economic growth and investment while protecting the environment and ensuring socially-responsible development.”

review processes and raise issues related to environmental impacts on harvesting rights or valuable cultural resources.

Under the *CEAA 2012*, a project cannot be subjected to an environmental assessment unless the project is specifically listed by regulation, or unless the Minister elects to make an assessment mandatory. The latter, Ministerial designation under s. 14(2) of the *CEAA 2012*, is an exercise of political authority by the Minister.

If a project is listed under regulation as eligible for an environmental assessment, the *CEAA 2012* requires a screening process to be completed within 45 days of receipt of a project description. The Act provides only 20 days for the public to comment on a proposed project.¹⁸ This substantially limits public participation in reviews of large, complex projects, leaving regulators to work mainly with documents provided by the proponent. Based on this information, the government must decide whether an environmental assessment is warranted.

In the case of First Nations, section 9(c) may not even be constitutional. Under Canada's Constitution, the Crown is required to consult and accommodate First Nations whenever conduct is contemplated which might adversely affect claimed First Nations rights.¹⁹ Even at the lowest end of the duty to consult and accommodate, there is a "duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice."²⁰ Providing notice means providing information directly to First Nations, Inuit or Metis peoples with actual or claimed rights may be impacted. Simply placing information on a website is insufficient to meet the bare minimum requirements of notice to rights holders.²¹

The screening process also poses a threat to foreign investors. Providing such levels of discretion to the Minister (and in other contexts, particularly with respect to approvals for major projects and pipelines, to the federal Cabinet) means that Canadian reforms to environmental legislation will likely result in decisions based on amorphous political calculations, rather than evidence related to environmental impacts.

As many resource decisions under *CEAA 2012* will be made under the cloak of Cabinet secrecy, it is highly unlikely that indigenous peoples, environmental groups or industry interests will be able to secure the evidence they need in order to determine how Cabinet came to a decision to approve or reject a major project on environmental grounds.

It is extremely likely that section 14(2), the screening process to determine whether an environmental assessment is necessary, and other provisions of Canada's environmental

¹⁸ *CEAA 2012*, s. 9(c).

¹⁹ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 37.

²⁰ *Haida Nation* at para 43.

²¹ This is particularly the case for rights holders, which do not have access to internet resources. Perhaps ironically, this issue could be addressed through a policy requiring the Crown to provide notice directly to First Nations, Inuit or Metis peoples that a project is being screened which might affect their actual or claimed rights. However, the IRC is not aware that any such policy exists, nor does the government appear particularly interested in addressing this shortcoming of the *CEAA 2012*.

legislation could be used to peremptorily enjoin projects advanced by foreign investors under the guise of ‘environmental considerations’. The challenges of obtaining information on such decisions due to Cabinet secrecy issues outlined above means the ability for indigenous peoples, environmental groups and foreign investors²² to seek legal remedies may be remarkably limited under CEEA 2012.

Under the NAAEC, Parties are required to continuously improve environmental legislation. In implementation of its Responsible Resource Development Plan, and through other budgetary measures, Canada has substantially weakened protection of the environment. Moreover, Canada’s reforms to environmental legislation may provide Canada to discriminate against foreign investors, while at the same time making challenges under Chapter 11 more difficult.

The Indigenous Rights Centre recommends:

- Parties should report to the Council how they are implementing Article three on an annual basis, and invite comments on such reports from the public, through the JPAC.

The challenges of reconciling indigenous rights, international trade obligations and sound environmental stewardship are greater today as they were in 1994. The IRC makes these recommendations in the hope that the Parties to the NAAEC seek not only to reflect on the progress of the last 20 years, but to seek a renewal of the Agreement – one which integrates human rights considerations, one which is inclusive of indigenous peoples and one which is capable of dealing with major continental and global environmental issues.

Sincerely,

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²² In this case through Chapter 11 of the NAFTA. It may be difficult for a foreign investor to demonstrate discrimination if the investor cannot access information about whether a decision was made for legitimate environmental reasons or as a bar to a particular foreign investment.