The Mining Association of Canada | L'association minière du Canada

December 6, 2016

The Honourable Chrystia Freeland, P.C., M.P.
Minister of International Trade
125 Sussex Drive
Ottawa, Ontario,
K1A 0G2

Dear Minister Freeland,

We understand that the Government of Canada is considering the creation of an Ombudsperson for Canadian businesses operating overseas and is in the process of designing its mandate. Among the options is a mandate for joint fact finding or an investigatory function.

While in principle the Mining Association of Canada (MAC) is willing to support and work constructively with an Ombudsperson with a mandate for joint fact finding (JFF), MAC strongly opposes creating a semi-judicial mandate with investigatory powers, which we believe is the wrong approach for resolving disputes. The attached brief details the reasons we think that an investigatory approach will not be effective for companies or local stakeholders. In summary they are:

- An investigatory approach can generate conflict both during the investigation (when parties are put on the defensive), and when the findings are issued (when whichever party perceives itself as the "loser" will contest the results);
- Contesting the results will have to be done in federal courts, and therefore an investigatory mandate requires proper standards of evidence, proof and significant resources;
- An investigatory approach ignores the complex nature of these conflicts, which can rarely be resolved simply by evaluating the evidence, reviewing the quality or quantity of data, and assessing the actions of one party;
- An investigative process would be subject to jurisdictional challenges where a parallel process is taking place in the host country (i.e., the appropriate venue); and,
- In most circumstances, a thorough investigation would require an examination of the conduct of the host country, creating additional complexities for the Government of Canada (for example, a host country seeking intervener status during the investigation or appeal stage).

Rather than focusing on identifying who is to blame in a conflict, the focus should be on finding solutions. Canada's contribution to best business practices overseas – environmental protection, respect for human rights, transparency in business practices – ought to be as a facilitator, not an arbitrator that takes the place of host country jurisdiction. Indeed, ever since the Nobel Peace Prize-winning work of the late Rt. Hon. Lester B. Pearson on the Suez crisis, one of the hallmarks of Canada's international reputation is dispute and conflict resolution. The key question is how to enable this through a process whose end result is a strengthening of Canada's reputation as an honest broker, showing consideration to all stakeholders. If the

Government chooses to create an Ombudsperson's office, then we strongly recommend that its mandate be based on Joint Fact Finding (JFF), which would send a clear message that the role is one of support to all parties. As also outlined in the attached, a host of evidence exists to show the success of JFF in resolving conflicts fairly.

MAC puts forward these views for your consideration while taking into account the fact that Canada should not just be, but be seen to be, a global leader in mining. Some would allege that Canada's mining brand is not as positive as it should be. With this in mind, I would like to draw your attention to emerging research by Paul Haslam, Associate Professor of International Development and Global Studies at the University of Ottawa. Prof. Haslam has been studying the causes of conflict associated with mining in Latin America using an innovative quantitative methodology. His analysis shows that while there are higher levels of conflict between communities and foreign owned mining companies than with domestically owned mining companies, there is no statistical difference with respect to the home country of those mining companies. In other words, Canadian mining companies are no more likely to find themselves in conflict with communities than mining companies from any other country. Canada is the only country, however, that has established mechanisms beyond the OECD National Contact Point to help resolve such conflicts and MAC itself is the only national mining association actively implementing and sharing best practices in corporate social responsibility in Canada and abroad. Through our work together, we have already distinguished Canada as a leader in corporate social responsibility.

While the industry is not perfect, the experience of MAC and our member companies is that Canadian companies are welcomed and respected around the world. We are held to a higher standard, and are continually learning and improving. The Government of Canada has itself documented the advanced practices of the industry (http://www.nrcan.gc.ca/mining-materials/mining/corporate-social-responsibility/17221). The Government of Canada's strategy should not be based on a presumption of non-cooperation, but rather leverage the best practices for resolving the complex situations that are most likely to be presented for assistance in resolution. For the rare cases of serious allegations and non-cooperation with voluntary processes, the Canadian courts have shown an increasing willingness to provide a backstop for remedy.

We greatly appreciate the support you have provided to our sector and the sense of constructive collaboration you and your department have brought to this issue. We look forward to continuing to work with you to ensure the Canadian brand is strong and respected at home and abroad. Should you wish to discuss any of the contents of this letter further, we would be happy to meet with you at your convenience.

Sincerely,

Pierre Gratton,
President and CEO
The Mining Association of Canada

cc: The Hon. James Gordon Carr, Minister of Natural Resources
The Hon. Stéphane Dion, Minister of Foreign Affairs
The Hon. Marie-Claude Bibeau, Minister of International Development

Att.

Canada is a Global Leader in Responsible Mining

Canadian mining companies operate in more than 100 countries around the world, worth a total value of $153.3 billion in 2013. While some countries host more activity than others, in 2012, Canadian companies were active in 33 of Africa's 55 countries, and in every Latin American country.

There are significant annual investments associated with these assets. In fact, companies listed on the Toronto Stock Exchange and the Venture Exchange raised $969 million in equity capital for Latin American mining projects in 2013, and $801 million for African mining projects for the same year. Despite these investments, Canadian mining companies are facing increasing competition from other mining jurisdictions operating internationally, such as Australia and China. The Toronto Stock Exchange hosts over 1,500 mining and exploration companies, representing the global dominance of Canada's exploration and junior mining sectors. However, in the PwC publication, "Mine 2015: Gloves are off - Analysis of the Top 40 global mining companies", of the top 40 global mining companies only seven were Canadian and none of the top 5 are Canadian.

Canadian direct investment abroad (CDIA), and mining's share of that, is an indicator of the industry's international presence. CDIA totaled $779 billion in 2013, a 10% increase over 2012. Of that, the metallic minerals and metals products sector accounted for $81.4 billion, or 10%. The sector's share of CDIA has held steady at about 10% over the past decade. Clearly, Canada's mining sector is a significant force and represents one of the few sectors of the Canadian economy for which we can rightly claim to be a world class player in a global industry.

Beyond measuring inflows and outflows of industry capital, the impact of a mine's horizontal value change on local communities and host countries' national GDP is considerable. This value chain significantly exceeds the taxes and royalties paid to governments; it has been estimated that between 60 and 80% of all money spent in building and operating a mine remains in the host country through wages and local procurement. As such, Canada's mining sector is also making a significant contribution to raising living standards and poverty eradication.

It is with this backdrop that we underscore the important role the Government of Canada can and ought to play in supporting this important sector of the Canadian economy. Considerable value returns to Canada from its strong, outwardly facing mining sector, and it can and should be a source of pride to the government. Over many years, the Government of Canada has actively supported Canadian mining through the pursuit of free trade agreements with numerous countries in the Americas, and through other instruments such as Foreign Investment Protection Agreements and Double Taxation Agreements with countries around the world. We greatly value the expertise and support of our world class trade commissioner service and look to Global Affairs Canada as a critical partner overseas.

More recently, the Government of Canada has worked with us to help brand Canada and its mining sector as leaders in corporate social responsibility. Canadian mining companies are the

partner of choice for many countries looking to develop their mineral resources and our responsible business practice standards are increasingly sought after by countries looking to mine 'the right way'. One piece of evidence for this is the interest the Mining Association of Canada (MAC) is receiving in our Towards Sustainable Mining Initiative (TSM). With licensing agreements now in place with Finland and Argentina, MAC is currently in discussions with Spain, Ecuador and Botswana for similar agreements and several other countries are also expressing interest.

MAC and its members strongly support the goal of positioning Canada as a world leader in responsible business conduct. With our active support, Canada's CSR Strategy was enhanced in 2014, which as a result was recently praised by Professor John Ruggie, former Special Representative on Business and Human Rights to the UN Secretary General. In addition, MAC and its members have worked closely with the Government of Canada to develop and implement a number of additional CSR mechanisms and tools, including:

- Implementation of the *Extractive Sector Transparency Measures Act*;
- the development of OECD guidance for effective due diligence in effective stakeholder engagement, a Canada-Norway sponsored project; and,
- most recently, developing a new membership commitment (pending final approval) requiring the implementation of the Voluntary Principles on Security and Human Rights, something no other mining association in the world has done.

An opportunity now exists for the Government of Canada to implement additional enhancements to the CSR Strategy, which would, in our view, establish Canada as the undisputed global leader in business and human rights. In previous correspondence with you, we have urged you to take steps to enhance the transparency and resourcing of the CSR Counsellor's Office. In addition, we believe Canada should consider the following:

- establishing an ombudsperson focused on JFF, based on the model established by the International Finance Corporation (IFC) Compliance/Advisor Ombudsman (CAO);
- creating a multi-stakeholder advisory body to advise GAC modelled on the Swiss NCP advisory body; and,
- expanding of the CSR Strategy to all Canadian business operating abroad.

In making these recommendations, we emphasize the importance of a focus on sound dispute resolution tools, including JFF, which provide remedy and build and strengthen relationships between companies and communities in complex situations. We also strongly discourage consideration of any non-judicial mechanisms that rely on unilateral investigation and fault finding, which have been shown to only exacerbate conflict. Unilateral investigation and fault finding are better left to judicial mechanisms as a backstop.

1. **Remedy Through Dispute Resolution – the Role of JFF**

Remedy is not dependent on an arbitration model. As we have noted above, the CAO, who has been working to resolve disputes between companies and communities since it was established in 1999, has made a significant shift away from investigation toward JFF. Their approach is described in the CAO's Operational Guidelines which can be found here: http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf. According to the CAO Operational Guidelines, the dispute resolution function makes use of four primary tools as follows:

> **Facilitation and information sharing**
> In many cases, the complaint will raise questions of fact regarding current or anticipated impacts of a project. The CAO Dispute Resolution team may be able to help complainants obtain information or clarifications that result in resolution from the perspective of complainants.
>
> **Joint fact-finding**
> Joint fact-finding is an approach that encourages the parties to jointly agree on the issues to be examined; the methods, resources, and people that will be used to conduct the examination; and the way that information generated from the process will be used by the parties.
>
> **Dialogue and negotiation**
> Where communication among parties has been limited or disrupted, the CAO Dispute Resolution team may encourage the parties to engage directly in dialogue and negotiation to address and resolve the issues raised in the complaint. The CAO Dispute Resolution team may offer training and/or expertise to assist the parties in this process.
>
> **Mediation and conciliation**
> Mediation involves the intervention by a neutral third party in a dispute or negotiation with the purpose of assisting the parties in voluntarily reaching their own mutually satisfying agreement. In conciliation, the third-party neutral may make recommendations to the participants in the conciliation process.

The CAO is not the only organization that has recognized the merits of JFF. *A User's Guide to Effective Joint Fact Finding* published by the Accord 3.0 Network, an organization specializing in fact-finding and consensus building, provides a detailed description of how to conduct JFF processes and provides the following useful definition of what it is:

> Joint Fact Finding (JFF) is an intentional and specialized process that decision makers on all sides of a dispute can use to prevent, manage or resolve fact-intensive controversies. A carefully designed working group made up of stakeholders, rights-holders, and scientific and technical experts, engages in rigorous analytical dialogue. The process carves out key technical and scientific questions that are often at the heart of a

> controversy and maps areas of factual agreement that all parties can respect. Often, this process illuminates the reasons for disagreement and puts those areas in a proper context, thus helping to build a platform for policy agreement.
>
> Depending on the situation, JFF can be embedded as part of a larger consensus-seeking effort or community conversation, or set up as a "stand alone" process.
> (http://www.accord3.com/docs/JFF%20USER%20MANUAL.pdf)

The manual further provides a helpful description of why JFF should be used for dispute resolution:

> Achieving absolute scientific and technical certainty on all public issues is a virtual impossibility. The relevance of facts can also be elusive, misused, cherry picked or exaggerated – especially when they have not been vetted – and can take on a life of their own when repeatedly amplified in the blogosphere. Most often, complex disputes rely on dueling experts, contending studies and contradictory evidence. Given that there will always be controversy, the question is: is there a more productive way to handle a conflict when an important decision must be made?
>
> Joint Fact Finding accomplishes three important objectives. First, it focuses on the best scientific and technical information available and sorts out key factual signals in the white noise of heated disagreements. Second, it is a cooperative process that reduces some of the unnecessary friction that goes on when factions take sides on a big issue. Third, it builds sounder public policy by creating an agreed-upon base of knowledge.

Given that disputes related to business conduct must be at least initially framed in the context of host country regulation, enforcement and judicial systems, a JFF approach is more conducive to achieving remedy without creating a direct conflict with the host country government. While not investigative in approach, JFF nonetheless enables an effective process of discovery that simultaneously brings both parties together, finding solutions that do not put the Canadian government or the Canadian company in conflict with local governance.

2. **Coordinating the CSR Counsellor, NCP and Ombudsperson in an Office of Responsible Business Conduct**

The establishment of an Ombudsperson could create a risk that the CSR Counsellor and the NCP will become marginalized, as it is expected that NGOs will encourage complainants to channel grievances through the former. In order to ensure that all three dispute resolution options remain relevant and able to be brought to bear to address complaints as appropriate, it will be important for GAC to determine how all three fit together.

In order to most effectively evaluate each complaint and ensure the appropriate approach is employed, GAC should establish an Office of Responsible Business Conduct reporting directly to you to support all three mechanisms. Complaints would be received by this office, at which

point they would be subject to an initial assessment. The assessment would determine whether the complaint is substantive enough to warrant the services of the Office and which dispute resolution mechanism would be most effective. In this approach, it will be important to clearly define the mandate of each of the three mechanisms and it would be helpful to align the CSR Counsellor, NCP and Ombudsperson mandates with the CAO dispute resolution tools outlined above:

- The CSR Counsellor could continue to provide early intervention aligned with the CAO's Facilitation and information sharing tool;
- The NCP would continue to provide mediation and dialogue support consistent with the CAO's dialogue and negotiation tool and mediation and conciliation tool; and,
- The Ombudsperson would focus on the Joint fact-finding tool.

With the roles of each mechanism clearly defined in this way, each mechanism maintains a clear role in the dispute resolution tool box and each is able to develop strong competencies to better equip an Office of Responsible Business Conduct to deliver effective remedy across a broad range of types of complaints and across the spectrum of Canadian business sectors operating abroad.

3. Coordination with IFC CAO

One consideration that comes to light in drawing on the IFC CAO model is how a Canadian ombudsperson would navigate a case when the company that is subject to a complaint is both a Canadian company and a client of the IFC. It will be important for Global Affairs Canada (GAC) to anticipate this situation and design an approach that would prevent the two offices from interfering with each other.

To this end, MAC strongly encourages GAC to engage with the IFC CAO to discuss how the two Ombudspersons could work together and coordinate their processes. This would also provide an important opportunity for GAC to hear directly from the CAO on how their dispute resolution and JFF process works.

4. Negative Experiences with Unilateral Investigation

Experience has shown that unilateral investigative processes are not effective non-judicial mechanisms. In its 10-year review, the Office of the Compliance Advisor / Ombudsman (CAO) of the International Finance Corporation (IFC) found (http://www.cao-ombudsman.org/publications/documents/CAO_10Year_AR_web.pdf):

> "...complaints often represent situations where two or more parties have become stuck in a cycle of conflict. Lack of trust, respect, and imbalances of power often lay at the heart of the problem, rather than evidence presented by one side or the other, or the quality or quantity of data. In these contexts, we have found that we can be much more

> effective if we focus our attention on how to change the dynamics of the conflict, rather than imposing our own judgment and solutions." (p. 28)

Unilateral investigative processes pit one side against another, often resulting in 'dueling' experts and opposing opposing facts. Other pitfalls identified by the IFC's CAO include:

> Early on, CAO's ombudsman assessments included both technical analyses and an opinion on the merits of a concern, mixed with neutral recommendations about how the parties might work together. This approach led to confusion for those involved. BTC and IFC responded either in agreement when the Ombudsman "ruled" in their favor or in disagreement when the Ombudsman found fault with some aspect of the project. Complainants often were uncertain about their role, the next steps in resolving a case, and how recommendations to BTC and IFC would be implemented. (p. 23)

> Almost every case brings a dizzying array of interests, issues, people, and organizations. This complexity brings with it contradictions. Sometimes local managers differ from their Boards about the right response to a problem; sometimes international NGOs differ from local community members about what their next steps should be. (p. 26)

> Typically when the ombudsman team arrives in a community or project site and starts discussions with people in response to a complaint, expectations are extraordinarily high. Early on, the CAO recognized that it was presented with an impossible responsibility. On the one hand, every party in the dispute—the claimants, the company, and IFC/MIGA—wanted a quick judgment. But, they would accept this judgment from the CAO only if we said they were right. We found that when we made judgments at this early stage of the process, as we did in 2005 in Guatemala in response to a complaint against the Marlin gold mine (see p. 114), the CAO was drawn into the conflict. We could no longer claim to be neutral, nor were we able to maintain the trust and confidence of all of the parties to encourage adoption of the "solutions" that we proposed. The cycle of conflict simply continued. (p. 27)

More often than not, disputes at the local level are based on misunderstandings, poor communication and lack of trust, with shades of grey that make determinations of fault difficult. It should only be the complex and contentious disputes that are brought to a home country body such as an ombudsperson based in Canada. In this context, unilateral investigative processes, which create winners and losers, further reinforce conflict and provide no basis on which to resolve the dispute in ways that can result in the rebuilding of relationships between the parties.

Such investigative mechanisms require rigorous rules of procedure to protect all participants and are therefore legalistic in nature. They require the establishment of time consuming and costly appeal processes that will further lengthen the time it takes to reach conclusion and delay access to remedy and justice. This also creates a "lose-lose" situation for a company,

since even if the findings exonerate the company, the situation on the ground will likely not improve.

The experience of the IFC CAO has been recognized here in Canada. During a lecture at Ryerson University in 2012, Meg Taylor, Vice President, International Finance Corporation (IFC) Compliance/Advisor Ombudsman (CAO), explained the following:

> *It takes time to build the trust of the company that you will be an independent facilitator and not take sides...in the early days where it didn't go well when we started this office, we combined a report looking at the situation on the ground and ... a semi-compliance opinion on it. That was the wrong way to go and once we realized we were part of the problem we stopped and asked three people to come and do a review of the way we were working and identify for us where our mistakes were and then we repositioned ourselves under the ombudsman function as the neutral facilitator. We don't have an opinion on anything. We come to listen to you, all the parties, and provide that space for you to sort out that problem.*
>
> *(https://ryecast.ryerson.ca/12/watch/1680.aspx at the 49 minute mark)*

This statement reveals the error of deriving opinion from assessment before participation and fact finding and represents a critical evolution in the CAO process that has led to a significant shift away from investigation to JFF.

As the only outcome of an ombudsperson process is likely the making of recommendations, the process to arrive at those recommendations should be focused on ensuring both sides have engaged with and understand the process. This will increase the likelihood that both sides will be able to accept the outcomes and use them as a foundation for resolving differences and moving forward. According to Peter Adler, director of Accord 3.0, "JFF creates a needed safe harbor for technical and scientific discussions between all sides, gets to the heart of the substantive issues, and reduces some of the unnecessary friction and contention that attend important policy debates. Because findings are jointly developed, the outcomes are likely to be more credible, useful, and durable."

Even the act of calling the fact-finding stage of the ombudsperson process an investigative stage raises significant risks for all parties involved, and potential resistance to participation. For companies to have trust and a willingness to engage with an ombudsperson, as Meg Taylor points out, it is critical that the ombudsperson be viewed as a neutral and unfettered observer. A process that involves passing judgment will dissuade companies from participating or encourage them to bring a formal legalistic, rather than a collaborative, approach. Companies and communities may both determine that the courts are a more reliable source of arbitration than an ombudsperson, or may doubt the ability of a Canadian arbitrator to fully account for the range of stakeholders and fully understand the context of a dispute, and may therefore choose not to participate.

Companies refusing to participate would put Global Affairs Canada in the position of having to characterize more companies as 'not acting in good faith' and make more recommendations for withdrawing trade commissioner support services and EDC financing for companies. This could lead to undermining the legitimacy of the process, cause harm to Canada's reputation as a global mining leader and as a defender of fair and due process and, possibly, discourage companies from basing themselves in Canada and taking advantage of Canada's wide-ranging financial, legal, engineering and other expertise.

5. Beyond Joint Fact Finding

MAC recognizes that there may be rare cases where parties may be unable or unwilling to reach a solution through JFF. As outlined above, we strongly believe that an approach based on JFF will significantly reduce the possibility of such cases arising, in part based on the experience of the IFC CAO, as well as the experience of the Canadian CSR Counsellor. However, we do not believe an investigatory approach is warranted even in such cases. All of the drawbacks of an investigatory approach explained above would still apply; in fact, they would likely be even more protracted in the rare cases where JFF is not effective. There is simply no evidence that non-judicial investigatory processes are effective in such circumstances. The IFC CAO, for example, does not embark on investigation of company activities when the ombudsman's conflict resolution process fails; rather, their compliance assessment and audits focus on the actions of the IFC itself, and whether the role played by the IFC in the specific project was consistent with the IFC's on guidelines:

> When the CAO conducts a compliance investigation, our focus is on the actions of IFC/MIGA—not their client company. Since we made this operational change in 2006, the model has worked much better (CAO 10 Year Review, p. 27)

Rather than creating a non-judicial investigatory mechanism for these rare cases, we would recommend that the Government of Canada take a case-specific approach that would take into consideration the nature of the specific issue(s), the context, and the potential to leverage other political, diplomatic, and/or legal channels. Creating a non-judicial investigatory mechanism, in our view, would do more to harm those cases where JFF can be successful, than it will help solve the very rare cases where JFF is not effective.

6. A World Leading Approach to Responsible Business Conduct and Dispute Resolution

With this in mind, MAC is in agreement that there are significant benefits to Canada in further strengthening its approach to responsible business conduct. By adding an ombudsperson with a clear mandate for dispute resolution using JFF modelled on the IFC CAO approach to the existing leadership already shown by establishing consequences for companies who refuse to participate in a dispute resolution process, Canada will not only play an important role in helping communities and Canadian companies resolve disputes and build more collaborative relationships, but will be setting the global standard for Responsible Business Conduct.

Canada can further reinforce that leadership with the adoption of a multi-stakeholder advisory panel consistent with the recommendation we made in our letter dated July 7th, 2016. Recognition for the importance and leadership of such a panel comes from the same report in which Prof. John Ruggie praised Canada's leadership role for our NCP, *Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015.* Adoption of an advisory panel would also provide additional independence for an Office of Responsible Business Conduct.

While JFF and a multi-stakeholder advisory panel are both being used effectively elsewhere, the combination of these two elements with the adoption of an ombudsperson with a strong mandate for dispute resolution using JFF will be globally groundbreaking and will allow Canada to demonstrate unprecedented global leadership in the area of responsible business conduct.