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Via email: Lucas.McCall@international.gc.ca, consultations@international.gc.ca

Lucas McCall
Deputy Director, ASEAN
Canada-Indonesia Trade Consultations
Global Affairs Canada Trade Negotiations Division (TCD)
125 Sussex Drive
Ottawa, ON K1A 0G2

Dear Mr. McCall,

Re: Canada-Indonesia Trade Consultations

We are writing on behalf of the Canadian Bar Association's International Law Section, Competition Law and Foreign Investment Review Section and Canadian Corporate Counsel Association (CBA Sections) to offer our views on the scope of negotiations of a potential comprehensive economic partnership agreement (CEPA) between Canada and Indonesia.

Current State of International Trade and Investment

In our view, the international trade and investment landscape is in a state of flux and Canada's trade and investment priorities should be set against this backdrop. These "shifting grounds" include many initiatives and trade policies that significantly impact Canada in the global trading environment.

Canada has entered into several comprehensive trade agreements including the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the Canada-United States-Mexico Agreement (CUSMA), and its most recent agreement with the United Kingdom. Canada's approach to a trade agreement with Indonesia should consider how it can advantage Canadians and Canadian business when viewed against these agreements.

Canada should also consider other agreements and initiatives currently impacting the region, including China's *One Belt, One Road* initiative, the China-conceived Asian Infrastructure Investment Bank, and trade agreements that include Indonesia (e.g., ASEAN and the recently concluded Regional Comprehensive Economic Partnership). Equally important is the persistent concern about the formation of trading blocs and how to better assist Canadians who have not benefited from economic globalization.

The CBA Sections generally support negotiation of a bilateral trade agreement with Indonesia, for the following reasons:

- Given the uncertainty surrounding multilateral initiatives, negotiating directly with likeminded countries and groups of countries appears to be necessary if Canada is to continue to strengthen its trade and investment ties to align with an export diversification strategy.
- Southeast Asia is an economically dynamic part of the world. Canada’s trade and investment in Southeast Asia is expanding quickly—not only in volume, but across many sectors, including oil and gas, mining, high tech, telecommunications, agri-food, financial services, aviation and consumer goods. Yet, Canada has few comprehensive economic agreements in Southeast Asia (the CPTPP and the Canada–South Korea Free Trade Agreement are notable exceptions). As discussions continue on a possible free trade agreement between Canada and the ASEAN, pursuing parallel negotiations with large, high-growth economies such as Indonesia merits consideration.
- Canada and Indonesia established formal diplomatic relations in 1952. Since then, Canada and Indonesia have collaborated in many areas, including trade and investment, good governance, human rights, poverty reduction, and capacity building in the security and counter-terrorism sector.¹ At the plurilateral level, Canada and Indonesia collaborate in the G20, APEC, ASEAN and the United Nations. Canada became an ASEAN dialogue partner in 1977—one of only 10 countries with this designation. Dialogue partners cooperate in many areas including political and security, regional integration, economic interests, inter-faith dialogue, transnational crime and counterterrorism, and disaster risk reduction.
- Indonesia is Southeast Asia’s largest economy and a G20 member with strong economic potential. Indonesia is Canada’s largest export market in the ASEAN region and bilateral trade and Canadian exports reached new heights in 2018. Indonesia is the second-largest destination for Canadian direct investment in Southeast Asia.²

Specific Comments

Model Free Trade Agreement (FTA)

We recommend that Canada use this opportunity to continue to review its model FTA. Canada should rely on the experience and lessons learned from the CPTPP negotiations when negotiating a Canada-Indonesia agreement. Investment provisions and dispute settlement mechanisms – namely modifications to the International Centre for Settlement of Investment Disputes (ICSID) mechanism – merit careful attention.

Trade and Investment

We recommend an industry-focused review of tariff and non-tariff barriers that continue to impede trade and investment for Canadians in Indonesia, including:

- Excessive “luxury” and other “import” taxes on imports such as wine, beer, alcohol and many household goods;
- Investment prohibitions or restrictions preventing foreign direct investment in certain industries (see the negative list³) or requiring local partner participation;
- Import restrictions or industry requirements to sell below import cost (e.g., soy products);

¹ See [Canada-Indonesia Bilateral Relations](#)

² See [Canada-Indonesia Bilateral Relations](#)

³ See [Regulation of the President of the Republic of Indonesia – Number 44 \(2016\)](#)

- Bureaucratic requirements for state-owned enterprises that effectively prevent foreign participation in oil and gas and electricity projects; and
- Ongoing concerns related to transparency and corruption.

Business Practices of State-owned Enterprises

A current challenge to the trade regime established after the Second World War is the blurring of lines between private and public sectors' interests and relationships with each other. The challenge is that, on one hand, the global liberal trade regime has been premised on the State's role in promoting fair competition, economic efficiency and prosperity through the private sector. On the other hand, trade and investment by state-owned or state-controlled enterprises may be aimed at satisfying national particularistic interests. The participation of at least certain types of state-owned or controlled enterprises in a regime custom-made for global liberal trade may undermine the success of the system.

We recommend including a chapter on state-owned enterprises and designated monopolies (such as CPTPP Chapter 17) and a chapter on small and medium-sized enterprises (such as CPTPP Chapter 24) to ensure appropriate limitations on the State's ability to distort trade or hinder investment through state ownership or designation of monopolies and to protect the interests of Canada's small and medium-sized enterprises.

Competition Law and Policy

We recommend including a chapter like CPTPP Chapter 16, including, but not limited to the following commitments:

- Adopt, maintain and enforce non-discriminatory laws proscribing anti-competitive business conduct;
- Adopt, maintain and enforce consumer protection laws proscribing fraudulent and deceptive commercial activities;
- Maintain a competition authority to administer those laws with detailed commitments to adhere to the principles of procedural fairness, non-discrimination and transparency;
- Encourage and facilitate cooperation between the parties on issues of competition law enforcement policy; and
- Provide for state-to-state consultations, but exclude the competition policy chapter from both state-to-state and investor-state dispute settlement.

We generally support the process for securing these commitments described in the Competition Bureau's December 2019 submission⁴ to the OECD Global Forum on Competition (Competition Bureau OECD Submission) and we encourage inclusion of all the key competition-related provisions identified at Annex II.

We encourage the Canadian trade negotiations team to closely monitor the negotiation of chapters that will have cross-cutting issues related to competition policy identified at Annex III of the Competition Bureau OECD Submission, including:

⁴ See [Competition Provisions in Trade Agreements](#)

Corporate Social Responsibility (CSR) and Respect for the environment

At a minimum, a Canada-Indonesia CEPA should reflect the contents of CPTPP Chapters 9 and 20 as well as the CSR commitments in the [Plan of Action to Implement the Joint Declaration on ASEAN-Canada Enhanced Partnership \(2021-2025\)](#). Canada should encourage cooperation between Canadian and Indonesian CSR experts and share information and best practices to support green growth, employee development, and sustainable communities.

Any agreement should reflect the parties' commitment to sustainable economic development. Canada should review the report of the United Nation's Human Rights Council and its Universal Periodic Review for Indonesia which raised a lack of mandatory corporate social and environmental responsibility policies.

Transparency and Anticorruption

Any agreement must provide an acceptable level of transparency and allow scrutiny of business practices of all partners. At a minimum, the relevant chapter should reflect CPTPP Chapter 26. However, we recommend using this opportunity to include a stronger chapter.

Equality, Non-discrimination and Human Rights

Canada should ensure that any agreement promotes equality, non-discrimination and human rights both in Canada and Indonesia. Given the potential challenges in the ASEAN region, it will require vigilant and constant attention to ensure that the agreement results in an equitable and fair distribution of economic prosperity. Canada and Indonesia can work together to advance the United Nations Sustainable Development Goals and support the ASEAN Intergovernmental Commission on Human Rights, the ASEAN Committee on the Implementation of the Rights of Migrant Workers and the Committee on the Rights of the Persons with Disabilities.

International Human Rights Generally

We recommend conducting a Sustainability Impact Assessment and a Human Rights Impact Assessment to analyze the potential social and human rights impacts that a trade agreement could have in Canada and Indonesia.⁵

Canada should also consider the existence and protection of strong local civil society organizations when assessing the protection of rights under any agreement. Data and input from these local organizations can contribute to a transparent Human Rights Impact Assessment.

Canada should assess Indonesia's commitment to protecting human rights domestically and its harmonization of local laws with international human rights standards, particularly in the economic setting. This could be done by reviewing the UN's Universal Periodic Review for Indonesia.⁶ Canada should also review Indonesia's status of ratification of international treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.

⁵ See [Sustainability Impact Assessment](#) conducted as part of the European Union and Indonesia free trade agreement negotiations. There was also a recommendation to conduct a [Human Rights Impact Assessment](#) during the European Union-Indonesia negotiations.

⁶ See [Universal Periodic Review](#), including the National report, Compilation of UN information and Summary of stakeholders' information prepared by the UN Human Rights Council.

Labour Laws, Rights of Workers and Child Labour

Any agreement should address worker protection by trade unions or otherwise. Considering the International Labour Organization's (ILO) reports highlighting broad restrictions on legitimate trade union activities in Indonesia, Canada should value the importance of labour organizations and protections of workers' rights. Poor health and safety regulations, low compensation and forced child labour are factors that Canada should consider when negotiating an agreement with Indonesia.

Canada and Indonesia should ensure that the ILO's International Labour Standards on child labour and recommendations to eliminate child labour are included in any agreement.⁷

Trade and Gender

Pay equity, equal access to education and training, proportional gender representation across professions are all drivers of economic prosperity, societal and individual well-being. Fostering these rights should be a priority for Canada. Canada and Indonesia can continue to support the work of the ASEAN Commission on the Promotion of the Rights of Women and Children.

Recognizing that FTAs can be used to advance women's economic empowerment and gender equality in Canada and around the world, we support the use of a Gender-based Analysis Plus (GBA+) on each chapter of the agreement. We further encourage the adoption and promotion of provisions consistent with an LGBTQIA2S+-based analysis to expand relevant gender identities and sexual orientations that might be empowered through FTA commitments.

Good Governance and Rule of Law

Canadian businesses benefit from an environment where good governance and the rule of law are protected. While foreign companies will benefit from the Canadian environment, it will be important to ensure that Canadian companies are afforded similar protections when doing business abroad. In the absence of these protections, the trading and investment relationship can become skewed in favour of foreign businesses.

Culture

Cultural differences enhance a country's opportunity to distinguish itself when competing for a share of the global marketplace. These differences, however, may require protection against appropriation and decimation by aggressive trade and investment practices. For example, religious and ethnic pluralism, cultural practices of Indigenous people and of rural ways of life, intellectual and other property rights should be protected under trade and investment agreements.

Global Mobility

Generally: Promoting international investment and trade requires removing barriers to the movement of individuals. We recommend including a chapter on the global mobility of individuals to cover occupations such as professionals, intra-company transferees, business visitors and investors – mirroring prior free trade agreements.

For professionals: We recommend using the “negative list” approach for professional occupations - as is the case in agreements such as the CPTPP, the Canada-Peru and Canada-Columbia agreements. This would be preferable to the “positive list” approach in agreements such as the CUSMA.

⁷ See [ILO Worst Forms of Child Labour Convention, 1999 \(No. 182\)](#)

In many of the Canada's free trade agreements with *negative lists*, the education sector's mobility is restricted. Restricting professionals in this sector may not be in Canada's interests as the Trade Commissioner Service lists "education" as one of six sectors offering the greatest opportunity for Canadian companies⁸. If education remains a sector of great opportunity, it will be important to secure labour market access for educational professionals by ensuring they do not appear on the negative list.

Similarly, whether an agreement uses the negative or positive list for professions and technicians, it should secure labour market access for occupations in sectors it identifies as the greatest opportunity for Canadian business in Indonesia. These sectors include aerospace; agriculture, food and beverages, cleantech, infrastructure, building products and related services, and oil and gas⁹.

For investors: To provide greater market access for Canadian investors seeking to establish a presence in Indonesia, it will be important to remove or obtain exemptions from local partner percentages which currently require Canadian investors to include Indonesian owners in businesses in certain sectors. While we appreciate that Indonesia may wish to protect certain industries, a review of industries with local partner percentages should be undertaken to ensure Canadian investors can operate in as many industries as possible without requiring them to bring on a local partner.

Conclusion

We appreciate Global Affairs Canada seeking input on a proposed CEPA with Indonesia. We encourage the negotiation team to consult the CBA during negotiations where necessary. We believe an opportunity to give further and more targeted expert input would strengthen Canada's positions.

Yours truly,

(original letter signed by Marc-Andre O'Rourke for Tina Parbhakar, Navin Joneja and Margot Spence)

Tina Parbhakar
Chair of International Law Section

Navin Joneja
Chair of Competition Law Section

Margot Spence
Chair of Canadian Corporate Counsel Association

⁸ See [Trade Commissioner Service Indonesia](#)

⁹ See [Trade Commissioner Service Indonesia](#)