



Canadian
Environmental Law
Association
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Submissions to the Standing Senate Committee on Foreign Affairs and International Trade

Re: An Act to Implement the Comprehensive Economic and Trade Agreement (Bill C-30)

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EXECUTIVE SUMMARY

The Comprehensive Economic and Trade Agreement (“CETA”) between Canada and the European Union was signed in October 2016. Since its inception, the Canadian Environmental Law Association has provided substantive commentary on its implications on sustainable development and environmental protection in Canada.¹

Once ratified, CETA’s investment court system will restrict Canada’s sovereignty and minimize the functioning of our democratic governance and law making powers. The ‘negative listing’ approach employed in Annex II and its listed Reservations are not broad enough to safeguard services which are critical to the protection of the environment and human health. CETA’s statements on sustainable development and environment are perfunctory, as they are not legally binding and do not trigger any enforceable mechanism.

¹ Ramani Nadarajah, *CETA’s Implications on Sustainable Development and Environmental Protection in Canada* (Canadian Environmental Law Association, October 2015) [*CETA’s Implications*].

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INTRODUCTION

The Canadian Environmental Law Association (“CELA”) welcomes this opportunity to provide written comments the Standing Senate Committee on Foreign Affairs and International Trade regarding *An Act to implement the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States and to provide for certain other measures* (“Bill C-30”).

CELA is a non-profit, public interest organization established in 1970 for the purposes of using and improving existing laws to protect public health and the environment. Funded as a legal aid clinic specializing in environmental law, CELA represents individuals and citizens’ groups in the courts and before tribunals on a wide variety of environmental matters. In addition, CELA staff members are involved in various initiatives related to law reform, public education, and community organization.

CELA has a long history of recognizing the consequences of globalization on environmental protection. The expansion of international trade regimes has made it more difficult for countries to develop new and progressive laws and policies. CELA has been at the forefront of discussions and analysis of the environmental implications of international trade agreements.²

COMMENTS ON BILL C-30

I. Investment Court Dispute Settlement

CELA does not support Canada entering into an international agreement that includes an investment court system (“ICS”) which confers greater legal rights to foreign, rather than domestic businesses and investors.

While CETA has sought to distinguish its dispute settlement mechanism from that of other international trade agreements which have relied upon an investor-state dispute settlement (ISDS) model, the objective of the ICS remains the same: they both seek to safeguard investor rights, they operate external to our domestic court system, and its arbitrators retain the authority to interpret our courts’ rulings as questions of fact.

For the following reasons, CELA does not support the establishment of an investment court system.

² See CELA’s *Publications, International Trade Agreements – Commentary*, online: <<http://www.cela.ca/collections/other/international-trade-agreements-commentary>>.

(a) The “right to regulate” – Preamble

CETA’s Preamble states that the “provisions of this Agreement preserve the right of the Parties to regulate within their territories” to achieve legitimate policy to meet, for instance, objectives on health and the environment.³

While the Preamble provides a clear affirmation and legitimization of a country’s “right to regulate,” it remains open to investment court adjudicators to weigh foreign investor rights against the “legitimate policy” of legislatures, governments and courts. As the burden of proof lies with the government to demonstrate that their regulations were “necessary” and “legitimate,” the right to regulate assertion does not sufficiently address the imbalance between Party and investor rights.⁴ Furthermore, as “necessary” and “legitimate” are not defined terms, arbitrators may exercise their discretion to interpret the clause.⁵

It is short-sighted to read CETA’s “right to regulate” clause in isolation of the remaining text. All parts considered, the “right to regulate” is not an unbound freedom and only enjoyed if it is exercised in conformity with CETA obligations and commitments.⁶

(b) The Creation of a Legitimate Expectation – Article 8.10

Article 8.10 of CETA states that Canada must accord the other Party and investors “fair and equitable treatment and full protection.” Article 8.10(4) further explains that when applying this obligation of fair and equitable treatment, a Tribunal may consider whether a “legitimate expectation” was made to a Party or investor that was later frustrated.

The phrase “legitimate expectation” is notoriously vague and formerly, was an interpretive principle read-in to investment treaties; CETA now expressly endorses it.⁷ The phrase, “legitimate expectation” is not defined in the Agreement and thus its interpretation is open to the discretion of an arbitrator. We do not know whether a legitimate expectation must be created in writing or if a verbal, closed door meeting with an official could trigger this benchmark.⁸

³ *Text of the Comprehensive Economic and Trade Agreement*, Government of Canada, online: <<http://www.international.gc.ca>>, Preamble.

⁴ Linda McQuaig, “CETA will undermine Canadian democracy” (1 Sept 2016) online: <<https://www.thestar.com>>.

⁵ Natacha Cingotti et al, “Investment Court System put to the test” (April 2016) online: <<https://corporateeurope.org>> at 7.

⁶ Scott Sinclair and Stuart Trew, “CETA to be signed unchanged, but less likely to be ratified after Wallonian resistance” (28 October 2016) online: <<http://behindthenumbers.ca/>>.

⁷ Gus Van Harten, “The EU – Canada Joint Interpretive Declaration/Instrument on the CETA: Updated Comments” (2017) Osgoode Hall LJ 13(2) at 7.

⁸ *Ibid.*

CETA contains a chapter titled Transparency (Chapter 27) and thus it would not have been outside the provisions of the existing text to make “legitimate expectation” function within the articles of this chapter. Per Article 27.1, each Party must ensure that “laws, regulations, procedures and administrative rulings” covered by the Agreement are “promptly published or made available” to the other Party. The other Party must also be afforded a “reasonable opportunity to comment.” Therefore, a legitimate expectation could be restricted to an expectation deriving from a law or regulation published pursuant to Article 27.1. This would not only limit ambiguity in interpretation, but instill transparency in the actions of the Parties and investors.

Arbitrators have frequently used the right of foreign investors to receive “fair and equitable treatment” to order a Party to compensate the investor for changing its laws, even when the change resulted from a democratic or judicial process and responded to an issue of national importance or public need.⁹

Without a definition or discussion of the parameters within which a “legitimate expectation” of an investment can be formed, CETA will very likely cause officials to maintain the status quo and not tempt regulatory reform for fear of triggering the Agreement’s investment court mechanism.

(c) Guidance on Interpreting CETA – Articles 8.31 and 8.28

Article 8.31 of CETA states that the Tribunal, when rendering its decisions, shall interpret the text in accordance with the *Vienna Convention on the Law of Treaties* (“VCLT”). The general rule of interpretation stated in Article 31 of the *VCLT* reads:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.¹⁰

CETA provides further direction that a Tribunal, when reaching its interpretation, may consider the domestic law of the disputing Party as a matter of fact. CETA’s ability to interpret domestic law is again reiterated in Article 8.28 which states that a Tribunal’s award can be reviewed on “manifest errors in ... the appreciation of relevant domestic law.” While CETA provides that the Tribunal “shall follow the prevailing interpretation given to the domestic law by the courts ... of that Party,” this does not assist in areas of law where legal precedents are in flux or legal rulings do not support a dominant view.

⁹ Gus Van Harten, *Sold Down the Yangtze*, (Toronto: IngramSpark, 2015) at 58 [*Sold Down the Yangtze*].

¹⁰ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol 1155, p 331 at Article 31.

CETA provides foreign investors with an enclave legal status in a country where they can opt out of a country's court system and proceed directly to an international tribunal whose manifest purpose is the protection of their rights.¹¹ The investment court model utilized in CETA is inherently imbalanced because countries do not enjoy the same ability as investors to allege a breach of the Agreement or enforce an obligation.

While CELA recognizes procedural changes to CETA's text which sought to improve the transparency and competency of Tribunal members, deficiencies remain which question the impartiality of the arbitrators. For instance, while the Tribunal will have 15 permanent members, they are not full time positions. Secondly, as Members are paid on a case by case basis, there is a financial incentive for them to try a larger number of cases. CETA arbitrators should have been appointed as salaried, full time Members in order to safeguard their impartiality.¹²

(d) Canada's Investor Court Experience and the Environment

Canada's experience with investment courts demonstrates that arbitrators generally tend to rule in favour of investors where environmental regulatory measures have negatively impacted an investment.¹³ This includes but is not limited to:

- *Ethyl v Canada* (lawsuit filed in 1997): Canada was ordered to pay \$19 million as part of a settlement to a U.S chemical company as a result of a nation-wide ban on a gasoline additive which at the time, was a suspected neurotoxin and impacted the functioning of emissions control system in vehicles;¹⁴
- *SD Myers v Canada* (lawsuit filed in 1998): in order to fulfill obligations under an international environmental treaty, Canada banned its export of toxic PCB waste. The NAFTA tribunal found Canada had helped the Canadian competitor of a U.S. company and was ordered to pay an \$8 million award; and
- *AbitibiBowater v Canada* (lawsuit filed in 2009): following the closure of a pulp and paper mill, Canada enacted legislation to return timber and water rights to the Crown. The federal government settled the claim paying an award of \$130 million in damages to AbitibiBowater (now Resolute Forest Products).

¹¹ *Sold Down the Yangtze*, *supra* note 9 at 135.

¹² Hadrian Mertins-Kirkwood et al, "Making Sense of CETA – 2nd Edition" (September 2016) online: <<https://www.policyalternatives.ca>>.

¹³ *CETA's Implications*, *supra* note 1 a 2.

¹⁴ *Sold Down the Yangtze*, *supra* note 9 at 63.

CELA objects to CETA’s investment-court model which allows a few private individuals, sitting as arbitrators, to impose stringent penalties – a cost ultimately borne by Canadian taxpayers – resulting from the good faith actions of Canadian legislators and their law-making responsibilities.

II. Annex II Reservations and the ‘Negative Listing’ Approach

CETA’s provisions relating to investment and services are similar to those under the North American Free Trade Agreement (NAFTA) and the General Agreement on Tariff and Trade (GATT); however, CETA dramatically expands its application of international trade rules by virtue of its “negative list” approach. The European Union (EU) has never adopted this approach to trade liberalization in services in any previous trade agreement. Previously, international agreements have relied upon a “positive list” whereby a Party agrees to commitments, listing only those sectors or services which are preferred for liberalization.¹⁵

CETA’s Annex II employs a negative listing approach, where by default, sectors or sub-sectors that are not listed are open to foreign service suppliers under the same conditions as domestic service suppliers.¹⁶ This means that under CETA, government measures will be subject to the CETA trade obligations unless they are explicitly reserved. Annex II lists the sectors which may derogate in the future, from the trade deal.

A negative list approach is extremely restrictive as it curtails the capacity of governments to adopt policy or regulatory measures which respond to future, or emerging broad areas of public policy. For instance, Reservation II-C-11 states, “Canada reserves the right to adopt or maintain a measure with respect to the collection, purification and distribution of water.” However, other services which are critical to the environment and human health were not included in the list of exemptions, including:

- Sewage and wastewater treatment
- Waste management

Without inclusion on the exemption list, these services are subject to trade liberalization secured through the CETA’s investor state dispute settlement mechanism.¹⁷

¹⁵ *CETA’s Implication*, *supra* note 1 at 5.

¹⁶ European Commission, *Services and investment in EU trade deals using ‘positive’ and ‘negative’ lists*, online: <<http://trade.ec.europa.eu/>> at 3.

¹⁷ Letter from Theresa McClenaghan, Executive Director and Counsel, Canadian Environmental Law Association to Hon. Dalton McGuinty, Premier of Ontario (11 January 2012) re: Ontario’s services offer for the CETA online: <<http://www.cela.ca/publications/ontarios-services-offer-ceta>>.

By way of example, consider the *Wastewater Systems Effluent Regulations* which came into effect June 20, 2012 and established the first ever, national standards for waste water treatment. While these regulations benefit the ecological health of Canada's aquatic ecosystems, they in turn impose a significant cost on municipalities who are required to upgrade their wastewater systems.¹⁸

The timing of this regulation in conjunction with CETA raises concerns that the Agreement will increase pressure on Canadian wastewater facilities to privatize. For instance, the costs of retrofits in the City of Toronto alone, are expected to be over \$207 million.¹⁹ Therefore, municipalities that require substantial financial input to ensure compliance with the new regulations may look to European firms to gain access to municipal wastewater systems and in turn, increase pressure to privatize Canadian wastewater facilities.

Democratically elected governments are best placed to provide the necessary transparency and accountability to ensure high standards for sanitation, environment and health. This was conclusively found by Justice O'Connor, the Commissioner of the Walkerton Inquiry who observed:

A distinction can be made between different forms of "privatization" in relation to water systems. First, privatization can mean the engagement of a private operating agency to run the water system. Second, it can mean private ownership of the water system.... In not recommending the sale of municipal water systems to the private sector, my conclusion is based on several considerations: the essentially local character of water services; the natural-monopoly characteristics of the water industry; the importance of maintaining accountability to local residents; and the historical role of municipalities in this field.²⁰

CELA does not agree with the negative listing approach used in Annex II and objects to the lack of essential public services (which are necessary to protect human and environmental health) listed as Reservations. Public services are best overseen by our domestic governments, particularly when public safety must override cost concerns, and we again call upon Canada to not deviate from this position and reconsider the essential public services listed in Annex II.

¹⁸ *CETA's Implications*, *supra* note 1 at 6.

¹⁹ *CETA's Implications*, *supra* note 1 at 7.

²⁰ *Report of the Walkerton Inquiry, Part II, A Strategy for Safe Drinking Water*, Toronto: Queen's Printer for Ontario at 317 and 323.

III. CETA's Implication on the Environment and Sustainable Development

CETA lacks binding environment, climate change and sustainable development provisions and fails to impose sanctions on parties and investors who do not comply with their Agreement obligations. CETA's statements on the foregoing are permissive, as opposed to mandatory, and leave compliance up to the discretion of the parties.

(a) *The Environment – Articles 24.1, 24.15 and 24.16*

CETA's environmental safeguards, unlike many of the strong, binding and fully enforceable Articles of the Agreement, are mainly voluntary and lack sanctions. Article 24.1 in the Trade and Environment chapter provides a robust definition of environmental law, defining it broadly as “all laws or statutory or regulatory provisions, or other legally binding measures that have as their purpose the protection of the environment, including laws related to the management of natural resources.”

First, while this principled environmental law definition may be laudable, it is largely meaningless because, unlike the investment protection provisions which can be secured through an investment court award, it lacks sanctions for non-compliance. Pursuant to Article 24.16, Parties with a dispute that arises in the context of the Trade and Environment chapter, will “only have recourse to the rules and procedures provided for” in the Chapter. The dispute resolution process available within the Trade and Environment chapter is party-to-party consultation (see Article 24.14), with the result being a non-binding report produced by the Tribunal. Even if a report were to make a finding of non-compliance, the only recourse for further action between the parties is to discuss a “mutually satisfactory action plan” (per Article 24.15).

Second, without clearer carve-outs for public service exemptions (as discussed in Section II, above) CETA will only increase investor-state lawsuits against legitimate government policies and actions which serve to further environmental protection.

For example, a recent case under GATT resulted in the revocation of Ontario's Energy Minister's authority to impose domestic content requirements, pursuant to the *Green Energy and Green Economy Act, 2009*, feed in tariff program. In an effort to revive the Ontario manufacturing sector after the 2008 global financial crisis, Ontario sought to create jobs in the renewable energy sector by requiring a certain percentage of goods, services and labour to be from Ontario.²¹ Japan and the EU filed complaints with the World Trade Organization, alleging that Ontario's *Green Energy and Green Economy Act, 2009*, had violated GATT by discriminating between locally produced and imported goods

²¹ CETA's Implications, *supra* note 1 at 10.

and services. This resulted in then Energy Minister, Minister Chiarelli, changing domestic content requirements under the Act.²²

(b) Climate Change – Articles 24.9 and 24.12

With regard to climate change, CETA contains two statements. First, Article 24.9 states that Parties shall “pay special attention to the removal of obstacles to trade or investment in goods or services of particular relevance for climate change mitigation” and secondly, Article 24.12 states that Parties recognize the importance of committing to “issues of common interest” such as “trade-related aspects of the current and future international climate change regime, as well as domestic climate policies.”

CELA urges the lack of statements and binding obligations on climate change under CETA to be reconsidered. A recent report from Ontario’s Environmental Commissioner found that:

Compared to the majority of the world’s countries and population ... Canada and Ontario score very poorly. Canadians...have some of the world’s highest per capita emissions, higher than most other developed countries, even other northern countries with cold climates.²³

If we are serious about fighting climate change, there must be closer consideration and study of the impacts of CETA, which currently does not prioritize climate action or the reduction of global emissions.

(c) Sustainable Development – Article 22.1

Article 22.1 of CETA encourages the Parties of CETA to “recall” the United Nations’ global environment summits dating from 1992 to 2006, “recognise” that economic and social development and environmental protection are interdependent and “reaffirm” their commitment to promoting development which “contributes” to the objective of sustainable development.

Article 22.1 only serves to rouse a Party’s environmental moral conscience. It does not instruct that future development meet the 1992 United Nations Conference on Environment and Development’s foundational definition of sustainable development nor

²² The Canadian Press, “Ontario to change green energy Law after WTO ruling” *The Globe and Mail* (29 May 2013) online: <<http://www.theglobeandmail.com>>.

²³ Environmental Commissioner of Ontario, “Ontario’s Carbon Footprint – Beyond the Reported Numbers” (22 November 2016) online: <<https://eco.on.ca/reports/>> at 58.

provide any tangible benchmark from which sustainable development under CETA can be measured.

Like CETA's environment and climate change provisions, the Articles on sustainable development do not impose legally binding obligations or responsibilities on investors.

CONCLUSION

On Monday, November 28, 2016, the Seattle to Brussels Network released the joint statement, "European and Canadian civil society groups call for the rejection of CETA."²⁴ CELA was one of nearly 500 civil society organizations to express concern and objections to the Comprehensive Economic and Trade Agreement.

CELA's concerns about CETA have only mounted in the recent weeks where, despite growing controversy from both sides of the Atlantic, Canada seeks to expedite its implementation.

- Instead of demonstrating diplomatic leadership by promoting the ability of our domestic court system to provide sound and equitable judicial dispute resolution, Canada has opted for investor state arbitration.
- Rather than safeguarding essential public services, which are responsive to the health and environmental needs of Canadians, Canada has sought to open up our public assets to foreign privatization and rule.
- Despite assurances from Canada that we will combat climate change, "together,"²⁵ we have chosen to endorse and bind our country to an international agreement which does not carefully consider its repercussive efforts on the climate, environment and sustainable development.

We appreciate having this opportunity to provide our commentary and appeal to the Standing Senate Committee on Foreign Affairs and International Trade to recognize our concerns.

²⁴ Seattle to Brussels Network, News Release, "Over 450 European and Canadian civil society groups urge legislators to reject CETA" (28 November 2016) online: <www.s2bnetwork.org>.

²⁵ Environment Canada, "Climate Change – The Science Compels us to Act" (2016) online: <<https://www.ec.gc.ca>>.