CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

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SPEAKING NOTES
OF THERESA MCCLENAGHAN
TO THE
HOUSE OF COMMONS STANDING COMMITTEE ON INTERNATIONAL TRADE:
REGARDING BILL C-23 – CANADA – JORDAN FREE TRADE AGREEMENT AND AGREEMENT ON THE ENVIRONMENT

Thank you for the opportunity to attend to make a presentation to you today. The Canadian Environmental Law Association is an environmental law legal clinic, one of the specialty clinics in the Legal Aid Ontario clinic system, and a forty-one year old federally incorporated not for profit ENGO. In addition to representation of financially eligible groups, families or individuals, we also have a mandate that includes environmental law reform and public legal education.

Introduction

CELA has had the opportunity to review the Canada – Jordan bilateral Free Trade Agreement, and the Agreement on the Environment between those Parties, the subject of Bill C-23 which your Committee is presently studying. Some of my comments today will echo comments I have made before this Standing Committee in earlier Parliaments in reviewing other Free Trade Agreements such as the Canada-Peru agreement and the potential Canada-European Union Comprehensive Economic and Trade Agreement.

Our analysis is premised on advocating that each level of government in Canada can and must act to protect the environment in diverse ways. As we have argued before the Courts, and the Supreme Court of Canada has agreed, we have a strong system in Canada of action on environmental matters by municipal, provincial and federal governments and of course First Nations governments, in addition to action at the international level. In most of the important

environmental issues, action at all scales is essential to strong environmental and environmental health protection. Therefore when we look at the proposed trade agreements and make recommendations, we are primarily concerned with ensuring that those diverse levels of jurisdiction and ability to act in the aim of strong environmental protection is both flexible and well-recognized and protected. I turn now to specific topics under the Canada-Jordan Free Trade Agreement.

National Treatment

In the proposed Canada-Jordan FTA, there is a proposed "national treatment" provision[1]. The Agreement imports the provisions of the GATT providing for an exception relating to environmental measures necessary to *protection of human, animal or plant life or health*[2]. We recommend that in this Agreement, this exception should not be limited with the language of protecting only "necessary" measures, but should be broadened to apply to measures "intended" or "relating" to environmental and health objectives.

Environmental Laws and the Agreement on the Environment

CELA has also reviewed the Environment chapter which refers to the Environment Side Agreement. The definition of "environmental laws" in the Environment Agreement explicitly excludes public and worker health and public safety. CELA submits that the Environment Side Agreement should not be limited only to laws whose "primary purpose" is environmental protection, but includes other laws which may also relate in part to environmental protection. Furthermore, the exclusion of laws relating to public health or worker health and safety is not reasonable. For example, one of Canada's major environmental protection statutes, the Canadian Environmental Protection Act, equally protects human health as well as non-human health. Another example is the recently enacted Canadian Consumer Product Safety Act which has important elements of public health and safety as well as implications for environmental safety in indoor environment contexts.

[1] Chapter 2 Section 1

[2] Chapter 15, Article 15-1

Other improvements to the Environment Agreement would include requiring the Parties to take account of scientific and technical information and of the precautionary principle, which CELA strongly endorses. The precautionary principle along with scientific and technical information is also an important element in occupational health and safety and should be included in this Agreement and in the Labour Cooperation Agreement. This type of language was recently proposed by the EU in the current CETA negotiations, for example.

CELA also prefers more explicit language obliging the Parties to implement in their domestic laws and practices the requirements of Multilateral Environmental Agreements (the Stockholm, Basel, and Rotterdam Conventions and the Montreal Protocol as well as the Endangered Species Trade Convention) to which they are parties, rather than merely providing for the MEAs to prevail in case of an operational inconsistency.[3]

Procurement

With respect to procurement, CELA advocates the inclusion of provisions allowing for Green procurement such as for market transformation in aid of more sustainable practices, products and services.

Expropriation

CELA has reviewed the Canada-Jordan Investment Agreement (not apparently included in your current study).

CELA recommends amendment of the provision that would allow for claims of indirect expropriation in any case involving environmental regulation, even though the draft Canada –

[3] Annex I-5

Jordan Agreement proposes limits (to extremely rare circumstances)[4] on potential claims of indirect expropriation in environmental regulation contexts. As this Committee has heard me say on other occasions, the better approach is that contained in the U.S. – Australia bilateral Free Trade Agreement which does not contain any such provision over and above the regular domestic laws of each Party.

Recently, Australia released a Trade Policy Statement earlier this year (April 12, 2011) which stated that it would not negotiate treaty provisions "that would confer greater legal rights on foreign businesses than those available to domestic businesses" or that "constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses."

CELA argues that exactly the same considerations should apply in Canada's case; Canada should expressly adopt a similar policy for all of its bilateral trade negotiations. Elimination of investor state provisions beyond those remedies available under Canada`s domestic law would be a further significant improvement so as to eliminate claims by private corporations against bona fide regulatory decision making by the Parties.

EXPLICIT APPLICATION TO "TRUE" EXPROPRIATION ONLY

CELA has never argued against appropriate provisions for expropriation in domestic or international law. The common law, and now usually, statutory law, provide important protections for property holders for those situations in which the public interest requires the State to take property. Long-standing examples include takings for highways and electrical transmission lines, for example. However, on the other hand, CELA has long disputed arguments that public interest regulation amounts to expropriation or that any compensation is due when activities are curtailed because of public interest regulation. For example, land use decisions, facility approvals, and pollution emission controls are all situations where regulation is

[4] Annex B-13 (1) of the Investment Agreement

valid in the public interest even though those regulatory actions may either impose costs on property owners, or preclude certain activities.

In the event that Parliament approves a Free Trade Agreement with Jordan, we suggest that expropriation claims be limited to cases of direct expropriation; and not extended to cases of indirect expropriation. At a minimum, claims for indirect expropriation arising out of public interest legislation or regulation for environmental, health, safety and worker rights ought to be completely disallowed under the Agreement.

I would suggest this approach instead of the case by case approach provided in the Canada Jordan Investment Agreement. Even though there is an attempt to clarify that most of these cases do not amount to indirect expropriation, the very fact that the claim may be brought means that there is uncertainty as to the arbitral panels' rulings; and a regulatory chill may still prevail. For example, we had a recent claim being brought by Dow Chemical against Canada for the actions of Quebec in respect of its Pesticide Code. At the time that this claim was filed by Dow, the province of Ontario had enacted amendments to its Pesticides Act dealing with cosmetic use and sale of lawn and garden pesticides and was in the process of consulting with respect to the regulations under that new statute. The Ontario Minister of the Environment felt compelled at the time to make public statements that the fact of the Dow challenge would not cause Ontario to reconsider its approach.

In my opinion, the very fact that these claims can be brought is a problem in its potential to interfere with valid regulatory action in the public interest. The potential for such claims may give greater weight or consideration to the commercial interests represented, even though the contemplated regulatory action by the government is not an expropriation in customary international law or domestic law. And the problem extends, not just to the national government,

but also to all of the provincial and territorial governments; and remains an issue even when the government of Canada undertakes to defend the validity of the sub-national (provincial or territorial) action.

Canada does have a very well established, long-standing and robust system of adjudication of awards for situations of direct expropriation. Providing access to investors to the court system to determine such cases is not a problem. But providing a new remedy to investors under the new Bilateral Trade Agreements, by way of access to commercial arbitral panels, for awards that are predicated claims against governments who have undertaken public interest regulation is definitely a problem.

The Jordan Canada Investment Agreement provides that the determination of whether a measure is an indirect expropriation will be determined case by case. It provides several factors, such as the economic impact of the measure, and the character of the measure and including the provision that:

> *Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation*[5].

If this provision and others like it remain in Canada`s bilateral free trade agreements, it is my hope that arbitral panels will deny any future investor claims made under the bilateral free trade agreements based on the economic impacts of public interest regulation. It is my view that they will, but not simply because of this language in some of the recent bilateral free trade

[5] Annex B-13 (1) Jordan – Canada Investment Agreement

agreements, per se. Rather, the arbitral panel ruling in the recent investor claim by Methanex provided sound reasoning as to why public interest regulation is not expropriation. As international lawyer Howard Mann commented following the Methanex decision in 2005,

> "Thus the tribunal has drawn a sharp line: regulatory measures that are for a public purpose, non-discriminatory and enacted in accordance with due process are not, by definition under international law, expropriations. Not being expropriations or measures tantamount to expropriation, they are not, therefore subject to any compensation.[6]"

Similarly, a 2004 OECD study paper on indirect expropriation and the right to regulate stated that:

> "A very significant factor in characterising a government measures as falling within the expropriation sphere or not, is whether the measure refers to the State's right to promote a recognised "social purpose" or the "general welfare" by regulation. "The existence of generally recognised considerations of the public health, safety, morals or welfare will normally lead to a conclusion that there has been no 'taking'". "Non-discriminatory measures related to anti-trust, consumer protection, securities, environmental protection, land planning are non-compensable takings since they are regarded as essential to the functioning of the state".[7]

However, on the other hand, the arbitral panel rulings are not binding on subsequent panels. Furthermore, the panels would consider each claim on a case by case basis, as noted. One of the

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[6] Mann, Howard, *The Final Decision in Methanex v. United States: Some New Wine in Some New Bottles*; 2005 International Institute for Sustainable Development (IISD)

[77] Yannaca-Small, Catherine, "*Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, 2004, Organization for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs, Working Papers on International Investment November 2004/4 at 16. See also

variables will be the fact that now we may have a multiplicity of bilateral free trade agreements between different parties, each of which protects the right of the state to regulate in the public interest in slightly different ways. And in any event, even considering the paragraph provided in the Canada – Jordan Investment agreement as set out above, there is much room for a hypothetical determined, well resourced and creative investor to make an argument.

Firstly there might be a claim that their case is one of the "rare circumstances". They might also argue that the measure is very "severe"; that it wasn't "reasonable"; that it wasn't adopted "in good faith"; perhaps that the measure was discriminatory; and possibly that the measure was not designed to protect legitimate public welfare objectives. Other arguments can be anticipated. I would hope, if such claims continue to be provided for in this and other bilateral free trade agreements, that future panels would follow Methanex. But that is only a hope, and I suggest that the better course would be to remove the ability to bring such claims under the free trade agreements in the explicit drafting. In my opinion, providing recourse for true expropriation is sufficient; or at the very least, should not extend to the case of claims based on public interest regulation. In that case, the "Indirect Expropriation", paragraph quoted earlier should have deleted the first three lines and modified the remaining paragraph so as to then read,

> "Measures of a Party that are designed and applied to protect public welfare objectives, including but not limited to such matters as health, safety, workers' rights and the environment, do not constitute indirect expropriation."

Furthermore, I would recommend that investor claims in these cases be procedurally precluded by the Parties and explicitly removed from the jurisdiction of arbitral panels under the investor claims procedures in the relevant Agreements.

PATCHWORK OF POTENTIAL INVESTOR CLAIMS

The proliferation of bilateral free trade agreements both by Canada and by other nations is establishing a patchwork of rules pertaining to the protection (or lack thereof) of the sovereign right of Canada and the provinces (and other nations) to establish environmental, health, safety and labour rights legislation and regulation as governments see fit. The very existence of such a patchwork makes the assessment of "risk" of trade challenges very problematic to the governments and itself will become a greater chill on appropriate regulatory action for the well-being of Canadians.

As I have noted, the very fact that the claims by non-domestic investors can be brought, is itself problematic and interferes with democratic decision making in the public interest. A further complication is the proliferation of the bilateral agreements and the varying mechanisms for "protecting" environmental regulation. Interpretive annexes versus inclusion in the main agreement; separate environmental agreements in addition to the main free trade agreement; and definitional differences are among the variables.

In addition there are differing provisions with respect to access by the public to such disputes once claims are made. Again, the very fact that issues such as the "reasonableness" or "legitimacy" or "good faith" of decisions made by sovereign democratic federal and provincial / territorial governments in Canada may be put in issue and adjudicated by commercial trade arbitrators is a fundamental flaw in the structure of the Canada – Jordan Investment agreement, and the other similarly framed agreements[8]. Canadians have the expectation, and the right, to have their governments make public interest regulatory decisions to the best of their ability, as they determine appropriate to do upon a consideration of all of the factors before them. You, as

[8] For further elaboration of this line of argument, see also Cosbey, Aaron, *NAFTA's Chapter 11 and the Environment: Discussion Paper for a Public Workshop of the Joint Public Advisory Committee of the Commission for Environmental Cooperation of North America*, 2003 International Institute for Sustainable Development

Members of Parliament are in the position to most keenly understand the responsibility that is imposed upon you in making decisions regarding environment, health, safety and worker rights, for example, and I would submit this responsibility includes protecting the public interest decisions of this and future Parliaments, as well as those of your provincial and territorial colleagues, from "investor rights" claims of indirect expropriation.

I hope these comments are of assistance and would be happy to discuss these views further.

Conclusion

CELA strongly encourages improvements in language of the entire Canada-Jordan FTA and the Environment side Agreement so as to ensure the most beneficial provisions that support strong environmental protection and regulation by the Parties and the most sustainable approaches in order to ensure that there are no intentional nor unintentional restrictions on the ability of the Parties to pursue those protections.

CELA recommends that the Committee advise the Government that it should return the Agreement to negotiation and take into account the above recommendations including some of the more preferred expressions of environmental protection that we suggested above in order to ensure that the Agreement will not compromise Canadian governments' mandates and scope for strong, precautionary, and protective environmental regulation in Canada.

CELA also recommends that the government adopt a trade policy statement similar to that adopted by Australia last year whereby it would not accord to non domestic investors any greater rights than domestic investors.

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Thank you once again for the opportunity to present our comments to you, and I look forward to any questions you may have.

Theresa McClenaghan
Executive Director and Counsel

Canadian Environmental Law Association