



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

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SPEAKING NOTES
HOUSE OF COMMONS STANDING COMMITTEE ON INTERNATIONAL TRADE
STUDY ON THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT
BETWEEN CANADA AND THE EUROPEAN UNION

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.

CELA has had the opportunity to review drafts of the proposed Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA). Unfortunately the process has not been as transparent as we would argue for, and our analysis has been based on copies of the draft agreements “leaked” to civil society. We are concerned that the CETA in its current state of negotiation and drafting does not sufficiently protect the environment in Canada. We have prepared an analysis which includes recommendations for improvements to the CETA text.

There is a proposed “national treatment” provision, to be applicable to provinces as well as at a national level. CELA notes that language providing for an exception relating to fulfillment of legitimate objectives such as public security, safety, public order, protection of human, animal or plant life or health and protection of the environment should not be limited with the language of “necessary” measures but should be broadened to measures “intended” or “relating” to such objectives. Furthermore, CELA submits that there should be no limitation of this exception to “exceptional circumstances” as was proposed in the EU proposal in the last draft CETA.

The draft CETA deals with Marking and Labelling and proposes that requirements not be more trade restrictive than necessary. CELA notes that marking and labelling are highly significant aspects of consumer information and education and provide a strong foundation for informed choices. Accordingly the Agreement should allow consumers to be fully informed as to product constituents and ingredients and relevant environmental standards including eco-labelling.

CELA has also reviewed the draft Environmental Laws chapter and prefers the more expansive definition of “Environmental Laws” found in the EU proposal which, for example, includes explicit reference to conservation and sustainable use of biological diversity. In addition, CELA

prefers the EU approach which does not limit the application of the Environmental Laws chapter only to laws whose “primary purpose” is environmental protection, but other laws which may also relate in part to environmental protection. CELA also notes with approval the broader EU definition of “environment” in the Sustainable Development chapter to include “terrestrial and marine ecosystems, atmospheric conditions and climate change issues”, as well as a broader definition of “environmental laws”.

As well, in the Environment Chapter, the EU has proposed taking 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 CELA approves that EU proposal in respect of employment law as well.

Another significant proposal in the Environment Chapter constitutes the creation of domestic environmental or sustainable development advisory groups to provide views and advice on issues in the Environment chapter comprising “independent representative organizations of civil society in a balanced representation of environmental groups, business organizations as well as other relevant stakeholders.” CELA agrees with this EU proposal since many of the provisions in the Environment chapter are relevant to interpretation of the CETA and some are statements of intent which will be fulfilled depending upon state practice. A proactive approach to realizing the objectives of the Environment Chapter would be very helpful.

CELA also prefers the EU proposal obliging the Parties to implement in their domestic laws and practices the requirements of Multilateral Environmental Agreements to which they are parties.

There has been a proposal in the last draft CETA to the effect that challenges to environmental measures would not be subject to monetary compensation. CELA agrees with this provision because to provide otherwise has the potential to operate as a substantial regulatory chill on environmental decision making by the Parties at both national and sub-national levels.

Importantly, the EU has proposed a Sustainable Development chapter in the CETA, which CELA supports. For example, it includes mandated transparency and public participation, supports fair / ethical trade practices, and as already mentioned, would establish a Civil Society Forum and includes a broad definition of “Environment” with better inclusion of terrestrial and marine ecosystems, atmospheric conditions and climate change issues.

CELA recommends deletion of the proposed Expropriation provisions, even though the draft CETA proposes limits on potential claims of indirect expropriation in environmental regulation contexts. A 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. The Regulatory Impact Statement at the time noted that both of those countries were mature nations with well developed court systems and economic systems and no special provision was required to deal with indirect expropriation. For example, the reasoning was explained by a review committee in 2004 as follows:

“In recognition of the unique circumstances of this Agreement, including for example, the long-standing economic ties between the U.S. and Australia, their shared legal traditions and the confidence of their investors in operating in each other’s markets, the two countries agree not to implement procedures in the FTA that would allow investors to arbitrate disputes with governments. Government-to-government dispute settlement procedures remain available to resolve investment-related disputes.”

More 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 apply in the case of Canada and the European Union nations and that elimination of investor state provisions would be a significant improvement so as to eliminate claims by private corporations against bona fide regulatory decision making by the Parties.

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.

CELA has a concern about the impact of the proposed CETA on essential public services such as provision of drinking water and waste water treatment. CELA has consistently supported public ownership and governance of these systems and strongly opposes any provisions which would provide for privatization of these systems, for accountability, safety and affordability reasons.

There is a proposed General Exceptions provision which would provide that the CETA is not to prevent the Parties from adopting measures “necessary to protect human, animal or plant life or health” or relating to the conservation of exhaustible natural resources. CELA supports such a paragraph, but argues that it should be more broadly drafted to broadly include environmental protection measures and to remove the terminology “necessary to” and replace it with “intended to” or “related to” said measures.

In conclusion, CELA would submit that there are promising environmental protection provisions in the last draft of CETA supported by both Parties; some provisions proposed by Canada which are preferable, and several provisions proposed by the EU which would be better for environmental protection. In other cases, CELA recommends deleting provisions or changing the approach. CELA strongly encourages stringent evaluation of the entire CETA, including all preambles, general language, operative provisions, interpretive provisions, chapters and any other instruments such as Annexes or side agreements or letters which may be contemplated, so as to ensure the most beneficial provisions that support strong environmental protection and regulation by the Parties and the most sustainable approaches under the CETA. Our analysis has given a number of examples, and as the negotiation and drafting proceeds, if CETA is to ultimately be adopted by the Parties, we urge a strong environmental, conservation, health, labour, safety and sustainability analysis of the entire Agreement in order to ensure that there are

no intentional nor unintentional restrictions on the ability of the Parties to pursue those protections.

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

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