CANADIAN ENVIRONMENTAL LAW ASSOCIATION

REPORT ON THE

ENVIRONMENTAL IMPACT

OF THE

CANADIAN & EUROPEAN-UNION COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT ('CETA')

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CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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I. Executive Summary

This report provides a legal environmental analysis of the most recent draft text of the Canadian and European-Union Comprehensive Economic and Trade Agreement (CETA). CETA is planned to be finalized in early 2012.

CETA, in its current state does not effectively protect the environment. The aim of this report is to both educate the Canadian environmental and political community about the potential impacts that this agreement could have on the ability of Canadian governments to enact environmental laws and to provide recommendations for environmental best practice drafting to be included in the final CETA text.

Some of the most controversial elements proposed for CETA include the liberalization of essential public services, such as water, and the inclusion of a controversial investor-state dispute settlement clause. The narrow definition of 'environmental laws' and narrow exceptions for those 'environmental laws' from stringent liberalization provisions are also of concern. A complete consolidated list of drafting recommendations, based on these and other issues, can be found in Section IV of this report.

CETA is a major trade agreement for Canada and should be setting high environmental standards. It must at the very least be redrafted in accordance with current international standards.

II. Introduction

If free trade agreements ('FTA's) are not drafted carefully, they can seriously hamstring the ability of governments to enact legitimate public interest policy. Without appropriate safeguards, FTA's can be detrimental in the long-term, in areas such as public health, reduction of poverty, sustainable development, and environmental protection generally. These issues are of particular relevance as trade negotiations are increasingly taking place bilaterally. Bilateral agreements have been tending to provide for more comprehensive and far reaching agreements compared to multilateral trade agreements.

The environment is central to Canadian prosperity and health. Furthermore, climate change and depletion of non-renewable resources are some of the most serious threats currently facing Canadians, and the world. For these reasons, it is paramount that trade agreements to which Canada is a signatory ensure governments maintain their ability to put in place legitimate environmental protection policy.

1. CETA

The Comprehensive Economic and Trade Agreement (CETA) is a bilateral free trade agreement currently being negotiated between Canada and the European Union.

CETA is said to be Canada's most comprehensive trade agreement ever. It is the largest free trade agreement Canada has ever negotiated with the European Union (EU), which is Canada's second largest trading partner in goods and services.

It is only the second time in Canadian history where parties to a trade agreement include provinces, and the first time that municipalities are bound.[1] In other words, CETA will open up local regulations and policies of provinces and municipalities to direct competition and challenge from the European government, corporations and investors, thereby restricting the regulatory freedom of local governments.

For the European Community it also represents a major centralization of authority, as it is the first time EU member states will not share jurisdiction over international investment protection issues. Under the new European constitution this authority now lies solely with the European Commission.[2]

As such, CETA's impact on future economic, social, and environmental development in Canada and the EU will be considerable. Of critical importance to the Canadian Environmental Law Association ('CELA') is the significant concern that CETA will negatively impact the parties' ability to enact environmental regulation.

CETA presents a critical opportunity for the inclusion of clear and strong environmental safeguards to ensure sustainable economic development in Canada and improve on pre-existing trade agreement environmental standards. These pre-existing standards can be found in other comparable multilateral and bilateral trade agreements as well as by official studies, reviews, and reports referenced throughout this report.

This report will analyze the impact of the most recent CETA draft on governmental powers to enact environmental measures and will provide recommendations for redrafting the CETA text before it is finalized in 2012.

The CETA negotiations were launched on May 6th, 2009 at the Canada-EU Summit in Prague. The ninth and likely final round of negotiations is set to take place in Ottawa from the 17th to the 21st of October 2011.

According to the Canadian government website, the Status of the negotiations as this paper is being written is as follows:

> The negotiating text is now well-advanced, with a number of chapters closed or parked pending further development, and issues in the remaining chapters narrowed down to key differences where solutions are now being actively explored. […] The Government of Canada has made CETA negotiations a priority in its international trade agenda and negotiators continue to move the negotiations forward as quickly as possible. […] with the aim of concluding by 2012.[3]

III. Analysis of the most recent draft

The Canada-EU CETA draft consolidated text post round-VI of negotiations was leaked to civil society.[4] Many sections remain in a preliminary state with significantly differing proposals from Canada and the European Community. Nonetheless, as the negotiations are in their final stages and this is the most recent draft text available, it will provide the basis for this report's analysis and related drafting recommendations, subject to any media coverage of any further developments made in the subsequent three rounds.

This report will analyze the CETA provisions that pose the greatest potential impact on the ability of Canadian governments to enact environmental measures, including:

- general exceptions,
- national treatment principle,
- technical barriers to trade,
- subsidies,
- environment,
- sustainable development,
- expropriation,
- investor-state dispute settlement,
- government procurement, and
- market access to services.

1. General Exceptions

The most recent draft includes an interesting and potentially important new chapter in a very rough state called Chapter [XX] Institutional, General and Final Provisions.[5] This Chapter contains the following note from the EU delegation:

> [EU comment: Exception and related definitions to be discussed in relevant negotiating groups. Placement in the text of the agreement (within the relevant chapters and/or as a separate chapter) to be decided at a later stage][6]

The chapter includes a proposed General Exceptions article incorporating the GATT 1994 Article XX in relation to the following chapters:

- National Treatment,
- Market Access for Goods,
- Rules of Origin,
- Customs Procedures,
- Trade Facilitation,
- Sanitary and Phytosanitary Measures,
- Technical Barriers to Trade,
- Emergency Action, and
- Electronic Commerce.[7]

The GATT 1994 Article XX reads as follows:

> … nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) necessary to protect human, animal or plant life or health;
[…]
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

The Investment chapter is also proposed to be subject to a variation on the GATT Article XX exception. It provides that:

> A party may adopt or enforce a measure necessary (i) to protect human, animal or plant life or health […] or (iii) for the conservation of living or non-living exhaustible natural resources. [8]

As with most exceptions in trade agreements, these are subject to the qualifiers that they must be applied in a manner that does not constitute arbitrary or unjustifiable discrimination between investments or between investors or constitute a disguised restriction on international trade or investment.

The proposed inclusion of these general exceptions, whether within the specified chapters or in a separate chapter, is positive in the sense that the Agreement would not be taking a step backwards in this respect in regards to the protection of environmental regulation; however, neither would it be providing a greater level of protection. It therefore potentially creates space for those opposed to environmental regulation to challenge those federal, provincial, and local environmental regulations on the basis that they are not necessary.

The 'necessity test' as interpreted by trade dispute bodies is an extremely difficult test to satisfy, in order to uphold an environmental law. A Party taking the measure must prove it has:

> i) assessed all other options for meeting a particular environmental goal;
> ii) assessed each to determine the extent to which it will impact on international trade; and
> iii) chosen that option above all others.[9]

The inclusion of the GATT exceptions therefore give rise to the argument that prior WTO decisions in this area would initially be used as precedent for decisions under CETA.

Recommendations

- The general exceptions provisions should be included, whether as an independent chapter or included within the applicable chapters. However, the GATT agreement is an international minimum standard for trade agreements, which does not even set particularly high standards for the protection of legitimate environmental regulation.

- The general exceptions should be redrafted to ensure they will apply to all legitimate environmental and conservation measures by removing restrictive terminology, such as 'necessary' and replace it with terminology such as 'intended to' or 'related to'.

2. The National Treatment Principle

The national treatment principle is a tenet of trade liberalization. It requires parties to give the same treatment to foreign corporations as they provide to their own nationals. It applies to imported goods, services, and intellectual property once they have entered a domestic market. This principle is also relevant to consider when analyzing the government procurement provisions, discussed at 9.

Although it is referred to as the national treatment principle, it is generally applied in such a way that sub-national governments are only held to their own standard, as in NAFTA's Article 1102. In other words, a province is held only to the standard of its own most favourable treatment of foreign nationals, not the standard set by the Federal government or of other provinces or territories.[10]

However, the European Community's CETA proposal for national treatment would hamstring the province's ability to enact certain measures, as they would be held to the national standard. Their proposal reads,

> EU proposal*:* '…products originating in the EU and lawfully placed on the market of any one of the Provinces or Territories may be placed freely on the market of any other province or Territory.'[11]

For example, according to this EU proposal, a province would not be able to restrict the sale of a product if the same product was available for sale in another province or territory. That is, the lowest (least trade restrictive) local standard is held to be the national standard.

On the other hand, the Canadian proposal would not hamstring actions by sub-nationals based on the actions or inactions of another,

> CDN proposal*:* 'The treatment to be accorded by a Party under Paragraph 1 means, with respect to a sub-national government, treatment no less favourable than the most favourable treatment accorded by that sub-national government to any like, directly competitive or substitutable goods, as the case may be, of the Party of which it forms a part.'[12]

The draft text provides exceptions to the national treatment rule, notably:

> EU proposed exception: 'Paragraph 2 is without prejudice to the right of EU and Canada to make mandatory provisions at the level of the Member States, Provinces or Territories *necessary* for the fulfillment of legitimate objectives such as public security and safety; public order; protection of human, animal or plant life or health; protection of the environment;…'[13] (emphasis added)
>
> EU proposed exception to the exception: "The right conferred by sub-paragraph (i) shall be exercised under *exceptional* circumstances …"[14] (emphasis added)

Similar to GATT 1994, the language in this EU proposed exception to the national treatment principle is unnecessarily cumbersome in the sense that it creates space for challenging federal, provincial, and local governments who make environmental regulations on the basis that they are not necessary or intended for legitimate objectives.

Furthermore, the EU proposed exception to this exception is troubling because of its use of the word 'exceptional', which would seem to confer a stricter interpretation of legitimate exceptions than those found in the GATT 1994.

Recommendations

- The Canadian proposed national treatment provision is preferable as it provides more flexibility for local governments to enact location specific public interest policy.
- The exception to the national treatment principle should preclude the ability of governments to challenge environmental regulations on the basis that they are not 'necessary' by removing that term from the provision.
- The exception to the exception should be completely removed as it only serves to provide an insurmountable onus on any party being challenged when enacting environmental measures under the national treatment section.

3. Technical Barriers to Trade

A technical barrier to trade is a restriction that relates to technical regulations, standards, testing, and certification procedures that set out specific characteristics of a product — such as its size, shape, design, functions and performance, or the way it is labeled or packaged before it is put on sale.

Of importance to CELA are labeling standards. When available, product labeling is an important source of information for the public in respect of health, safety and environmental information about a product from both companies and the government.

CETA's draft Marking and Labeling article reads as follows,

> CETA proposal: "With respect to technical regulations relating to labeling or marking requirements, the Parties shall ensure they are not prepared, adopted or applied with a view to or with the effect of creating *unnecessary* obstacles to international trade. For this purpose, such labeling or marking requirements shall not be more trade restrictive than necessary to fulfill a legitimate objective, taking account the risks that non-fulfillment would create..." [15] (Emphasis added)

There is nothing in this article that encourages or ensures proper labeling to ensure that consumers are fully informed, rather, this provision puts in place another 'necessity' test for labeling information and standards.

Recommendations

- The guiding principle for labeling standards should allow for consumers to be fully informed about products, constituent ingredients and relevant environmental standards including eco-labeling.

4. Subsidies

Subsidies are defined by the WTO as a financial contribution provided by a government or public body within the territory of a Member which confers a benefit. This is the definition adopted in CETA. In general, subsidies are prohibited under trade agreements as they are considered a barrier to free trade because they provide an advantage to local businesses, thereby disadvantaging foreign competitors. It is noteworthy that the CETA provision on subsidies is restricted to subsidies as defined in the Agreement on Subsidies and Countervailing Measures (ASCM) and 'does not apply to fisheries subsidies, subsidies related to products covered by Annex 1 of the WTO Agreement on Agriculture and other subsidies covered by the WTO Agreement on Agriculture.'[16]

CETA's Annex X, 'Principles Applicable to Other Subsidies' provides an exception to the subsidy prohibition under Article X.3 for subsidies which are meant to promote economic development in "areas where the standard of living is abnormally low or where there is serious underemployment" and "subsidies to facilitate the development of certain economic activities or of certain economic areas, where such aid does not affect conditions of trade of either Party and competition between the Parties".[17] From this it could be argued that temporary subsidies to encourage the development of a green power industry could be justified under the agreement.

However, when the above provision is read in conjunction with the proposed provision, specifically EU's version, in the article on trade favouring environmental protection (see below) the above interpretation is less likely.

> The Parties shall pay special attention to facilitating the removal of obstacles to trade or investment concerning goods and services of particular relevance for climate change mitigation, [CAN: and adaptation] [EU: in particular renewable energy goods and related services, including through the adoption of policy frameworks conducive to the deployment of best available technologies and through the promotion of standards that respond to environmental and economic needs and minimize technical obstacles to trade.] [18]

While seemingly benevolent on its face, this EU article could potentially be used to argue that barriers to foreign investment in, for example, solar or wind energy production, violated the agreement. As such, this provision could be perceived as a direct attack on Ontario's Green Energy Act, which includes local content quotas with the intent of creating, fostering, and growing the local energy industry.[19]

It is interesting to note that this chapter ends with a note from Canada stating: "No agreement to EU proposed text for this chapter."[20]

Recommendations

- The Canadian government has been spending at least $800 million a year in subsidies for non-renewable energy and environmentally unfriendly industries, including oil, nuclear power, primary mineral exploration and extraction, and for chrysotile asbestos promotion.[21] In order to level the playing field, trade agreements should treat renewable natural resource exploration equitably through allowing green subsidies.

- Although Canada could argue that the chapter on subsidies, referred to above, authorized an environmental subsidy on the basis it was temporary and for the purpose of 'the development of certain economic activities', this exception is narrow and vague. It would be in the interest of promoting growth in the renewable and sustainable energy industries if CETA included an exception for environmental subsidies.[22]

5. Environment

The Environment chapter, on the other hand, contains encouraging wording in the Canadian proposed Article X.1 Context and Objectives,

> The Parties recognize that the environment is a fundamental pillar of sustainable development and enhanced cooperation between the parties to protect and conserve the environment brings benefits which will promote sustainable development, strengthen the environmental governance of the Parties, build on international environmental agreements to which they are party and complement the objectives of CETA.[23]

However, such language is only significant as an interpretive aid to substantive provisions.

'Environmental Laws'

One of the most important interpretive provisions in the chapter, which determines the scope of protection offered, is the definition of 'environmental laws.'

The Canadian proposed definition of 'environmental laws' reads:

> […] statutory or regulatory provisions of a Party, including legally binding instruments made pursuant to such provisions, the *primary purpose* of which is the protection of the environment, or the prevention of a danger to human life or health, through:
>
> a. the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants;
> b. the assessment, management, control or elimination, as appropriate of chemical substances, as well as other substances and materials to the extent that they are environmentally hazardous or toxic;
> c. the conservation and protection of wild flora or wildlife, including endangered species and their habitat, and specially protected natural areas, in the Party's territory; and
> d. The conduct of environmental impact assessments.
>
> but does not include […] any statutory or regulatory provision of which the primary purpose is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources; (emphasis added). [24]

This definition stands in contrast to the more extensive EU proposed definition,

> "Environmental laws" means laws, regulations, and other legally binding measures *directly applicable on the Parties' respective territories,* the purpose of which is the protection of the environment, the prevention of a danger to human, animal and plant life or health, or the conservation and sustainable use of biological diversity and natural resources, through:
> [EU negotiator's note: it would be possible to remove the references to biological diversity and natural resources, as well as to animal and plant life or health, from the "chapeau" if those notions are integrated in the sub-paragraphs as follows:
> e) the conservation of biological diversity in natural or agricultural ecosystems, including endangered species, their habitat, specially protected natural areas and genetic diversity;
> f) the sustainable use of biological diversity and the elimination or reduction of negative environmental impacts resulting from the use of living and non-living natural resources or of ecosystems]
>
> a. the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants;
> b. the prevention, reduction or control of *noise pollution;*
> c. the evaluation, authorization, management, control or elimination, as appropriate, of chemical substances, including biocides and pesticides, as well as other substances and materials to the extent that they are environmentally hazardous or toxic;
> *d. waste management;*
> e. the protection of forests, wild flora or wildlife in natural or agricultural ecosystems, including endangered species and their habitat, and specially protected natural areas;
> *f. the conduct of environmental impact assessments;*
> g. access to environmental information and *public participation in decision-making.* (Emphasis added)[25]

The EU has also proposed in its Sustainable Development chapter that the term 'environment' be broadened to include 'terrestrial and marine ecosystems, atmospheric conditions and climate change issues.'[26]

The most recent draft contains an important new negotiator's note that reads:

> Negotiators' note: there is agreement that the definition should cover environmental provisions that are found in e.g. laws that also include other provisions not related to the environment.[27]

This note is important as it ensures that laws that have certain elements that do not relate to the environment are still considered 'environmental laws'. However, the negotiator's note does not specify whether laws that are included in legislation predominantly not related to environmental matters could still qualify as environmental laws.

Scientific and technical information

The EU has proposed an important provision regarding scientific and technical information relevant to the defense of an environmental measure:

> Each Party shall, when preparing and implementing measures aimed at environmental protection which may affect trade between the Parties or foreign direct investment, take account of relevant scientific and technical information and related international standards, guidelines or recommendations if they exist, and of the *precautionary principle*. Where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing protective measures.[28] (Emphasis added)

The inclusion of the precautionary principle is important as it enables parties to justify environmental protection measures on the basis of reasonable precaution rather than on established scientific knowledge, which is not always readily available on a timely basis.

The EU in the Trade and Labour Chapter is also proposing a similar provision in relation to health protection and safety at work.[29]

Cooperation on Environmental Issues

The extensive list of proposed environmental cooperation provisions is promising; the list is introduced as follows:

> 1. The parties recognize that enhanced cooperation is an important element to advance the objectives of this Chapter, and they commit to cooperate, through actions and instruments that may include technical exchanges, exchanges of information and best practices, research projects, studies, reports, conferences and workshops, on trade-related environmental issues of common interest, in areas such as […] [30]

The list goes from a) to m) and includes subjects such as climate change policies and carbon markets, research and development on environmental science and technology and the promotion of life cycle management of goods. Also of importance is section 2, which provides for public and civil society input into these cooperation activities.

Furthermore, the CETA draft now contains draft provisions outlining the institutional mechanisms that are meant to implement the environmental cooperation provisions of the chapter as well as enable public participation and transparency in these activities and decisions.[31] Although the Article remains in a very rough draft, it is encouraging as it provides a concrete basis for progress on the provisions and goals outlined in the environment chapter. EU's proposed section 5 of the Article is important as it further provides for the creation of domestic environment or sustainable development advisory groups to provide their views and advice on issues in the Environment chapter, and "are to comprise of independent representative organizations of civil society in a balanced representation of environmental groups, business organizations, as well as other relevant stakeholders […]."[32]

Environmental Consultations & Dispute Settlement

The Draft CETA text further provides for government consultations and a dispute resolution mechanism for any matter arising under the Environment chapter.

In relation to the government consultation provisions, Canada proposes a provision that allows parties to resolve their issues at a Committee level, failing which they can request consultations from a Ministerial Council which is subject to a specific timeline for providing their responses.[33]

The EU proposes that government consultations at the Committee level take into account activities of MEAs[34] (see below) and instead of the Canada request for Ministerial consultations, parties have the ability to request further discussions with a Board on Trade and Sustainable Development, which where appropriate should seek advice from advisory groups.[35] Finally, the EU proposes that "[a]ny solutions or decisions on matters discussed under this article shall be made publicly available."[36]

Both the EU and Canada's environmental disputes provisions create a dispute settlement mechanism that is not binding, but rather requires a public report from an expert panel to be published.[37] The expert panel will constitute experts that are either environmental, business, or trade experts. The panels do not have the ability to provide for monetary remedies.

Multilateral Environmental Agreements

Carving out specific Multilateral Environmental Agreements ('MEA's) from trade agreements ensures that existing environmental protection regimes are not threatened by the pursuit of trade liberalization. It is now a common practice in trade agreements. In the most recent draft CETA text, the MEA carve-out position has been removed from the Environment chapter and moved to one of the final chapters with a note from the EU stating "for discussion and possible placement in the environmental group", the provision reads:

> In the event of an inconsistency between an obligation in this Agreement and an obligation of a Party under an agreement listed in Annex X, the latter obligation shall prevail provided that the measure taken is *necessary* to comply with that obligation, and is not applied in a manner that would constitute, where the same conditions prevail, arbitrary or unjustifiable discrimination or a disguised restriction on international trade.[38]

This drafting is a slight improvement over the parallel NAFTA provisions, which provides that the rights under certain specified MEAs will prevail over NAFTA obligations, as long as the NAFTA parties are party to the MEA, and the measures taken are the *least trade-restrictive available*. This same practice was also adopted in the Canada-Chile, Canada Costa-Rica and Mexico-Chile bilateral trade agreements. However, CETA's negative carve out mechanism remains limiting as it does not provide for any future MEAs and may not include all MEAs to which a party is a member, not to mention that it incorporates a necessity test.

In addition, CETA provides the following provisions to protect MEAs,

> EU proposal: "The parties shall effectively implement their respective laws and practices, in their whole territories, the Multilateral Environmental Agreements to which they are parties."[39]
>
> CN proposal: "Each Party affirms the rights and obligations in the Multilateral Environmental Agreements to which it is a party."[40]

The protection of MEAs suggested in both of these proposed provisions could broadly protect the obligations established under MEAs to which a Party is subject; however, the EU's proposal is preferred as its language is more prescriptive and thus less ambiguous. The EU also proposes the following provision to further clarify the MEA protection granted in the above quoted EU proposed provision,

> Nothing in this Agreement shall prevent parties from adopting or maintaining measures to implement the Multilateral Environmental Agreements to which they are party provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on Trade.[41]

In the case of a conflict between an MEA and CETA, the EU proposes,

> […] In matters related to the respect of multilateral agreements as set out in Article 2, the Parties shall seek advice from the relevant MEAs bodies, and they shall rely on any available pertinent available interpretive guidance, findings or decisions adopted under those MEA's.[42]

Recommendations

'Environmental laws'

- The definition of 'environmental laws' should not use the term 'primary purpose', as proposed by Canada, as it could provide an avenue for unreasonable challenge. For example, were the term 'legally binding instrument' to be interpreted as describing an Act or Regulation, and not a section of the act or regulation, then where the primary purpose of the Act or Regulation was not the protection of the environment, it could be argued that where a section of said instrument related to the protection of the environment, it would not be covered by this section.

- The EU's proposal should be adopted as it is more comprehensive and includes important types of environmental laws, such as public participation, conservation efforts and the protections of forests.

- The provisions of this chapter should apply to any matter arising under the CETA text, rather than 'under this chapter',[43] as it would broaden the scope of issues covered by these specific environmental dispute procedures.

- However, EU's proviso that environmental laws are limited to 'measures *directly applicable on the Parties' respective territories'* could be an obstacle to defending valid environmental laws. This proviso should be removed from the final draft as the environment is interconnected and any thing related to the environment directly in one territory will inevitably impact the environment as a whole.

Environmental Cooperation

- We support the inclusion of an article on environmental cooperation.

- We support the provisions providing for institutional mechanisms that are meant to implement the provisions of the chapter as well as enable public participation and transparency in the activities and decisions made pursuant to this chapter.[44]

- We support EU's proposed section 5 of the Article as it further provides for the creation of domestic environment or sustainable development advisory groups, consisting of 'independent representative organizations of civil society in a balanced representation of environmental groups, business organizations, as well as other relevant stakeholders', to provide their views and advice on issues in the Environment chapter.[45]

Environmental Consultations & Dispute Settlement

- Although it is positive step towards environmental protection to have a dispute settlement mechanism designed specifically for environmental issues, the proposals of both the EU and Canada remain fundamentally flawed in this draft text. The following issues should be resolved to ensure that the environment dispute settlement mechanism is effective in protecting legitimate environmental measures:
  - Environmental experts should not be an optional part of the expert panels, but rather, should be mandatory; and
  - The environmental dispute settlement mechanism should apply to any environmental measure being challenged under CETA, rather than just matters 'any matter arising under this chapter'[46], as it could be narrowing the scope of issues covered by these specific environmental dispute procedures.

- We support the proposal that challenges of environmental measures are not subject to monetary compensation, as it reduces the regulatory chill on all levels of government seeking to put in place environmental regulation.

Multilateral Environmental Agreements

- CETA's draft MEA section, at the very least should be brought up to international standards and remove its necessity requirement.

- Although CETA's draft provision does protect a list of MEAs carved out in its Annex, and any future measures enacted under those MEAs, it does not ensure that any future MEA's to which the parties become a member will be protected. In order to ensure that the existing international environmental protection regime is actually protected CETA should enlist a positive-listing mechanism for MEAs, rather than its current carve out mechanism.

- Furthermore, to ensure those protected MEAs are safeguarded from challenge under CETA, a clause should be included in CETA that provides: when disputes arise under MEAs they should be resolved under the environmental agreement rather then under CETA.

- Alternatively, CETA dispute panels should be required to defer to the MEA experts in relevant disputes, rather than their traditional financial experts, as proposed by the EU.[47]

Scientific and technical information

- This is an important provision to include as it explicitly provides that the precautionary principle can be used as a defense for an environmental law or measure.

6. Sustainable Development

In the CETA draft text sustainable development has been made a marginal issue only supported by the EU. Their proposed Sustainable Development chapter addresses a broad range of issues and concerns that are of significance to environmental groups and to civil society at large. Examples of important issues included in this proposed chapter include mandated transparency and public participation, an emphasis on trade supporting sustainable development (e.g. through the promotion of fair/ethical trade and corporate social responsibility), the creation of a Board on Trade and Sustainable Development, and the creation of a Civil Society Forum. It would also include a broad definition of "Environment" that includes terrestrial and marine ecosystems, atmospheric conditions and climate change issues.

EU also proposes conservation and sustainability articles explicitly relating to two industries: forestry[48] and fisheries.[49] These articles are excellent examples of how trade agreements can be drafted in such a way that the environment is protected while benefitting the economy. The only issue with these proposed provisions is their use of permissive rather than obligatory language.

Recommendations

Sustainable Development

- We encourage the inclusion of the EU proposed Sustainable Development provision and its civic engagement elements.

- We support the inclusion of the EU's proposed fisheries and forests conservation and sustainability with the addition of the prescriptive language 'shall.'

- We encourage the addition of further such provisions, for example in relation to mining and energy sectors.

Conservation of Natural Resources

- In accordance with the Sustainable Impact Assessment conducted on CETA by the European Commission, non-renewable resources such as water should be treated with particular care. Rules governing bulk exports must allow for particularly unbound flexibility in implementing national policies that explicitly protect resources, like water, necessary to support human and ecosystem health and prohibit the export of non-renewable resources.[50]

Climate Chapter

- In accordance with the European Parliament's Committee on International Trade, CETA should incorporate a 'climate chapter', which would,

  (i) ensure that trade rules are consistent with and play a crucial role in combating climate change;
  (ii) adopt anti-dumping rules to include the issue of a fair environmental price in accordance with global climate protection standards;
  (iii) allow for carbon labeling;
  (iv) establish strict ecological criteria for public procurement;
  (v) incorporate standards, subsidies, taxes, and quotas that differentiate products according to their production process and method, which would be applied to both European and imported products according to climate criteria; and
  (vi) differentiate among similar products according to their carbon and energy footprints.[51]

7. Expropriation

Expropriation provisions in trade agreements ensure that foreign investors are duly compensated for state confiscation of private property, or an individual's right in property, for a public purpose. As unanimously proposed within CETA, these provisions can be invoked directly by investors through an investor-state dispute settlement process.

Indirect expropriation, called 'regulatory takings' in the United States, is now generally included in the definition of expropriation in free trade agreements. It is a broad term that covers any government action that diminishes the value of property, such as the provision of investment concessions, like tax cuts, which it subsequently rescinds.[52]

Under CETA's proposed expropriation provisions, a Party is able to defend its environmental measure as being implemented 'for a public purpose and in accordance with due process of law.'[53] However, even under this exception, the government would still be required to compensate the permit holder for the full market value of the rights repatriated to public control.[54]

The inclusion of indirect expropriation provisions in free trade agreements is controversial in environmental advocacy circles because it can result in an action against the state for compensation due to an environmental policy that has the indirect effect of lowering the value of a foreign investment. CETA has included the following limiting language in its indirect expropriation provisions designed, it seems, to minimize such occurrences:

> Except in rare circumstances, such as when a measure or a series of measure is so severe in light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures by 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.[55]

CETA's proposed expropriation provisions would provide foreign investors with the right to compensation, at fair market value, in every case of direct or indirect expropriation. This right to compensation is a right that does not exist under Canadian law, where the right to determine compensation is reserved to parliaments and legislatures.[56]

Recommendations

- Although CETA has provided a strict definition of indirect expropriation, which is an improvement over the NAFTA rules, the extraordinary rights and remedies provided in CETA's expropriation provisions are unnecessary. Canada and the EU have advanced modern legal systems that effectively protect property rights.[57] It is recommended that CETA give foreign investors rights no greater than those of domestic investors in relation to expropriation.

8. Investor-State Dispute Settlement

Investor-state dispute settlement ('ISDS') mechanisms are a widely criticized aspect of trade agreements. They are criticized not only by environmental and human rights groups, but by developed nations, such as the United States and Australia, as exemplified in their 2004 trade agreement, AUSFTA.

In the most recent CETA draft text, Canada has proposed a variation of the NAFTA chapter 11 model ISDS. The negotiations on this issue are largely concluded. As opposed to state-state dispute settlement ('SSDS') mechanism, where states are allowed to sue states for breaches of trade agreements, the ISDS mechanism empowers individual investors to sue governments for such breaches.[58] It grants investors considerable international power, with no reciprocity under the trade agreement. In other words, individual investors can sue but cannot be sued under the trade agreement.

Often, as with NAFTA, where ISDS mechanisms are outlined in their quintessential form, the tribunal proceedings are closed, third party submissions are restricted**,** and the arbitration panel consists of arbitrators operating in accordance with norms established for resolving private commercial disputes, with "no regard to third party rights or the broader public interest."[59]

To clarify the influence that ISDS have on local policy, as of October 2010, there were 66 investor-state claims against under NAFTA's investment chapter, and of those, Canada had paid damages of $157 million. This figure does not include the substantial settlements paid.[60] A 2010 study reported that 40 percent of the investor-state challenges under NAFTA were against public health and environmental policy.[61] The risk of success, or substantial settlement, by a claimant against valid environmental regulation serves as a regulatory 'chill' on governments.

As a result, there has been a move among developed nations away from ISDS mechanisms. The 2004 bilateral free trade agreement negotiated between Australia and the United States ('AUSFTA') provides no direct ISDS mechanism. The reasoning behind this change of direction is explained in Australia's Final Environmental Review of AUSFTA. The reviewing committee stated:

> 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 others markets- the two countries agreed not to implement procedures in this FTA that would allow investors to arbitrate disputes with governments. Government-to-government dispute settlement procedures remain available to resolve investment-related disputes.[62]

This reasoning applies equally to the relationship between Canada and the European Union, as both are higher income developed nations with reliable legal systems.

Furthermore, from an economic perspective, the Australian Productivity Commission found "no compelling economic rationale for the inclusion of an investor-state arbitration mechanism in its trade and investment agreements."[63] Australia's Trade Policy Statement released on April 12, 2011, explained further that the government will not negotiate treaty protections "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."[64]

However, Canada has not yet indicated its acceptance of this new research, as indicated by its CETA proposal of a NAFTA chapter 11 model. The Canadian stance on ISDS mechanisms was clarified by the Canadian Minister of International Trade, Stockwell Day, in the following 2009 statement,

> I can assure you that Chapter 11 of NAFTA and similar investment protection agreements have served Canada well. A clear set of rules for conducting international business is one of the key reasons for NAFTA's success. Trade and investment rules that are clearly understood and mutually agreed upon protect the flow of trade and investment capital for everyone's benefit. […] Chapter 11 ensures that investors are treated fairly and in accordance with international law by setting out dispute resolution procedures. This reduces the risk of arbitrary treatment of Canadian investments abroad and increases the ability of Canadian companies to compete on an equal footing with their U.S and Mexican competitors. At the same time, NAFTA contains the necessary exceptions and reservations for public services, including health and environment. As such, our ability to set policy in the public interest on environmental, cultural and social issues has not been and will not be compromised…[65]

Recommendations

- CETA should follow the lead of the United States and Australia bilateral trade agreement, and not include any ISDS mechanism. CETA already provides that investors are entitled to the same treatment as nationals and, accordingly, domestic law (both common law and statutory) would be available to foreign corporations for recourse.

- In addition, similar to AUSFTA, CETA should provide for the traditional state-state dispute settlement mechanism in combination with detailed provisions on dispute settlement applicable to the environment chapter.

- CETA should set new benchmarks for investment protection so that environmental policies are not challenged as trade barriers.

- Alternatively, if the ISDS mechanism remains in CETA's final draft, we urge that the recommendations from the European Commissions' Sustainability Impact Assessment (SIA) are included, namely, that the role of domestic courts should be enhanced to handle disputes rather than the current international system.[66]

- The SIA also recommends that certain essential services be excluded from ISDS mechanism, such as health care and education services.[67]

- Sub-local governments should also be ensured of their ability to participate in any arbitrations that relate to their actions, so that the have the ability to defend themselves, as recommended by the Federation of Canadian Municipalities.

- Similarly we support the SIA's suggestion of establishing an ISDS monitoring body:

> It would be composed of representatives of all governments in the EU and Canada (national level, provinces and territories and municipalities), academics, and civil society. All members would commit to periodic dialogues on the impacts investor-state provisions/ISDS in CETA are having in terms of causing regulatory chill and other reductions on policy space.[68]

9. Government Procurement: Performance Requirements & Offsets

Government procurement refers to government purchasing of goods and services. It is a very important element of trade agreements as these contracts can make up a substantial percentage of a country's economy and represent an important space for governments to enact policies that promote the public interest. By liberalizing government procurement, governments gain access to cost effective purchasing, and corporations gain access to governmental markets in which they can compete for substantial contracts.

Within government procurement contracts, certain elements are specifically banned under most free trade agreements. Performance requirements are provisions within a government procurement contract that require foreign investors to 'purchase locally, transfer technology, take local partners, or train local workers.'[69] Offsets are benefits offered by a supplier bidding for a government contract to make their bid more attractive, for example offers of investments in the local community.

The prohibition of offsets and performance requirements included in CETA would restrict the ability of national and sub-national governments to use government contracts, above a specified monetary threshold, to enact environmental protection policies.

As drafted, these provisions restrict voluntary or unsolicited undertakings by potential suppliers to provide local benefits or the consideration of 'any condition or undertaking that encourages local development' even if the bidding process is transparent and fair.[70] This is one of the few tools available to local governments to foster local, sustainable development.

The environmental policy exception to the government procurement provisions reads:

> …Nothing in this Chapter shall be construed to prevent a party from imposing or enforcing measures…necessary to protect human, animal or plant life or health.[71]

Again, the use of the word 'necessary' restricts the ability of parties to enact environmental regulation because such regulations would be open to challenge on the basis of not meeting the stringent requirement of necessity.

Recommendations

- It would be far more favourable to environmental policymakers if the word 'necessary' is replaced with 'intended to' or 'relating to.' The latter alternative is found in GATT Art. XX (g); this lower bar being one reason that in WTO disputes this section is more often used as a justification for a trade exception.

- The inclusion of the phrase 'or to protect the environment' should also be added.

- It is also recommended that a specific allowance for green procurement be included, similar to the provision in the WTO Government Procurement Agreement ('GPA') that states:

> Nothing in this Agreement shall be construed to prevent any provincial or territorial entity from applying restrictions that promote general environmental quality in that province or territory, as long as such restrictions are not disguised as barriers to international trade.[72]

- Similarly, offsets should not be fully prohibited, but rather an 'offset justification' provision should be included. The provision could generally be drafted like Article XVI (2) of the GPA, which allows offsets for certain policy considerations when 'used only for qualification to participate in the procurement process and not as criteria for awarding contracts. Conditions shall be objective and non-discriminatory.'

10. Market Access to Services

Trade liberalization ultimately aims to provide full and open market access to the trade in services, so that, for example, they are run in a non-discriminatory fashion, without performance requirements, and not subject to public monopolies.

However, public monopolies over certain services can play an important role in providing environmental protection. For example, establishing waste collection monopolies can allow municipal governments to consolidate the waste stream, reduce waste and increase recycling. The public provision of electricity and water aims to ensure universal access and maintain environmental and sanitation standards. Public control of mass transit is now often used to leverage green jobs and reduce carbon footprints.

The current CETA draft permits state and private run government regulated monopolies so long as they do not operate in a way "that creates obstacles to trade and investment".[73] The EU proposes that these provisions from the Monopolies and State Enterprises chapter apply "except as otherwise provided".[74] Meanwhile, the EU proposed provisions in the investment market access article provides that parties cannot limit market access to investments through, among other measures, numerical quotas, monopolies, exclusive service suppliers, the requirement of an economics needs test, or the participation of foreign capital.[75] In essence this provision would not allow monopolies that restrict sources of investments and therefore, ownership. Restricted ownership is very much the nature of state-run monopolies.

However, the proposed General Exceptions provisions referred to above at 1 provide that the investment chapter is subject to the exception that a Party may adopt or enforce environmental measures necessary to protect human, animal or plant life or health or necessary for the conservation of living or non-living exhaustible natural resources.[76] Canada also proposes that any Investment chapter provision that is inconsistent with any other CETA chapter shall be read down to the extent of that inconsistency.[77] The general exception is limited in its applicability, due to the 'necessity' requirement, while the Canadian provision, if adopted, would make the EU proposed investment market access provisions redundant. It is clear that these provisions will need to be significantly amended for the final draft.

CETA proposes opening universal public services, except those included in a carve-out list, to privatization and international competition and making them subject to CETA provisions.[78] Canada pushed for this negative-listing mechanism. The EU, in particular, is looking for significant market access to Canadian services, more than any prior trade agreement with Canada has ever provided. They have requested access to such public sectors as crown energy corporations, natural resource extraction, public transit, universities, healthcare, and drinking water.[79]

In September and in early October 2011, the Province and Territory governments will finalize their services and investment offers to the EU that are set to be exchanged before the 9th round of trade talks in Ottawa this October. So far, these offers are said to be secret.

The EU has proposed an exception for 'public services' based on the General Agreement on Trade and Services 1995 (GATS). However, GATS has been criticized as weak in this respect as it qualifies 'public services' as any service that is not provided for economic compensation, which has been interpreted broadly by the European Courts. So, for example, services like public transport and post-secondary education, would be not be covered under this exception, as these services have user-fees.

Recommendations

- ***The Canadian Environmental Law Association does not support the liberalization of essential public services, such as drinking water and waste disposal.*** The risks associated with this kind of trade activity are highlighted by cases such as the Aguas Argentina Concession.[80]

- The negative listing approach is restrictive and does not allow for effective long-term planning. CETA should enlist a positive listing approach, as the EU has used in previous bilateral agreements and as was used in GATS. Under a positive listing approach, parties can determine which public services they would prefer to further liberalize rather than which ones they don't.

- In order to effectively keep services outside of the agreement, they need to be totally excluded and not only excluded on the basis of existing legislation, thereby providing for future regulatory needs.[81]

- Alternatively, if the current market access provisions are maintained under CETA, even with the phase-in period and a one-time opportunity to protect non-conforming measures and certain services in a list of carve outs, provinces, territories, and municipalities should take immediate steps to remove public services from the scope of the proposed CETA, or move to have municipalities exempted altogether from the scope of CETA, as resolved by the Union of B.C. Municipalities.[82]

- The general exception should not include the term ``necessary`` as it makes the exception rarely applicable since the ``necessity`` of a particular environmental measure over another environmental measure that would also be effective is often difficult to gage.

IV. Conclusion

There are significant issues threatening the ability of Canadian governments to effectively protect the environment under the current draft CETA text. This must be prevented in the final agreement.

Should the CETA negotiations proceed, then at the very least, the draft CETA needs to be improved in many respects including incorporation of they types of provisions included in this paper as drawn from the recommendations of the Canadian Government's Model Investment Agreement, the Sustainable Impact Assessment conducted by the European Union as well as the findings of the Australian Productivity Commission.

The trend of economic liberalization and globalization, as enacted through multilateral and bilateral trade agreements, is increasingly threatening the ability of governments to enact legitimate public interest policy. These policies are increasingly attacked as 'barriers to trade' under international tribunals that are often restricted to expertise in trade law, rather than, for example, environmental or health law.

Environmental policy measures needs to be secured rather than threatened, ideally with a broad exclusion for legitimate and broadly defined environmental policy. This exclusion would ensure that local authorities are secure in their capacity to regulate for the benefit of the environment without fear of international litigation. It is critical that investor-state disputes and compensatory claims do not threaten appropriate public sector regulation.

As Scott Sinclair from the Canadian Centre for Policy Alternatives wrote:

> Democratic governments have a duty to reflect and balance interests broader than those of multinational investors and exporters. By systematically restricting the role of government and reducing its available policy tools, the CETA would make governments less capable of representing the interests of the majority of its citizens.[83]

V. Consolidated Recommendations

In summary, in order to ensure that governments maintain their ability to enact environmental protection policy, it is suggested that the following drafting recommendations are incorporated into the final CETA text:

Generally

- Broad exceptions for environmental protection policy, in particular, the removal of necessity requirements.
- Include a broad definition for 'environmental laws.'
- Include a climate chapter.
- The precautionary principle should be listed as a valid defense for the enactment of environmental policy.
- There should be unbound flexibility for governments to put in place policy to protect non-renewable resources necessary to support human and ecosystem health.

National Treatment principle

- Flexibility for local governments to enact geographically specific public interest policy.

Government Procurement & Offsets

- Include an allowance for green government procurement policies.
- Exclusions for sub-national governments.
- Include an 'offset justification' provision.

Limiting Technical Barriers to Trade

- Labeling standards should be guided by the precautionary principle and should enable eco-labeling requirements.

Subsidies

- Allow for environmental subsidies.

Environmental Consultations & Dispute Settlement

- Environmental experts should not be an optional part of the expert panels, but rather, should be mandatory.
- The environmental dispute settlement mechanism should apply to any environmental measure being challenged under CETA, rather than just matters under the environment and trade chapters.
- Environmental measures under dispute should not expose parties to the threat of monetary compensation, as this serves as a regulatory chill to governments considering putting in place environmental legislation.

Multilateral Environmental Agreements (MEAs)

- Include a positive listing mechanism for external MEAs.
- Remove any references to necessity.
- Environmental disputes arising under MEAs should be handled under their dispute settlement mechanisms rather than under any CETA dispute mechanism.

Expropriation

- The definition of indirect expropriation should be limited.
- Foreigner investors should not be granted rights greater than those of domestic investors in relation to expropriation.

Investor-State Dispute Settlement Mechanisms

- Following the lead of the United States and Australia, CETA should not include an ISDS mechanism.
- Any included dispute settlement mechanism should ensure that tribunal members are required to defer to environmental experts when dealing with environmental matters.
- A monitoring group on investments should be established.

Market Access

- CETA should not open essential public services like water and sewage treatment to market access.

VI. Appendix: referenced trade agreements

Below is an outline of some of the most relevant trade agreements referenced throughout the report.

AUSFTA
The Australia-United States Free Trade Agreement 2005 (AUSFTA) is a comprehensive bilateral trade and investment agreement, similar to CETA. It is particularly relevant to the analysis of CETA, because it is a recent agreement between two wealthy developed nations.

AUSFTA is unique in that it strayed from the status quo amongst international free trade agreements by not including the controversial investor-state dispute settlement (ISDS) mechanism. This decision was based on significant research and findings that outline the potential risks to legitimate public interest policy and the limited overall economic benefits of such provisions. The Australian findings that support the AUSFTA shift should be considered by Canada before finalizing any trade agreements.

FIPA
The Canadian Model Foreign Investment Promotion and Protection Agreement 2003 (FIPA) is a bilateral agreement that represents Canada's trade policy in relation to the protection of foreign investments and forms the basis of Canadian bilateral investment agreement negotiations.

FIPA seeks to ensure that foreign investors will not be treated worse than similarly situated domestic investors or other foreign investors; they will not have their investments expropriated without prompt and adequate compensation; and, in any case, they will not be subject to treatment lower than the minimum standard established in customary international law. As well, in most circumstances, investors should be free to invest capital and repatriate their investments and returns.

It was developed under the auspices of the OECD (Organization for Economic Cooperation and Development). In 2003, Canada updated its FIPA model to reflect, and incorporate the results of, its growing experience with the implementation and operation of the investment chapter of the NAFTA.

GATS
The General Agreement on Trade and Services 1995 (GATS) was one of the many agreements that resulted from the World Trade Organization's 1994 Uruguay Round of negotiations. GATS was inspired by similar objectives as the General Agreement on Tariffs and Trade (GATT), although GATS focuses on the regulation of international trade in services, as opposed to GATT's focus on goods.

All WTO Members, some 140 economies at present, are Members of the GATS.

The GATS applies in principle to all service sectors, with two exceptions. Article I(3) of the GATS excludes "services supplied in the exercise of governmental authority". These are services that are supplied neither on a commercial basis nor in competition with other suppliers. Cases in point are social security schemes and any other public service, such as health or education, that is provided at non-market conditions. Further, the Annex on Air Transport Services exempts from coverage measures affecting air traffic rights and services directly related to the exercise of such rights.

GATT

The General Agreement on Tariffs and Trade (GATT) is a multilateral agreement regulating and liberalizing trade among about 150 countries, originally signed in 1947. GATT continued to be re-negotiated, and in 1994, 117 of its member countries completed the Uruguay Round of negotiations, which produced the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations ('the Final Act'), in which was included the 1994 amendments to GATT.

The Final Act also created the World Trade Organization (WTO), which came into being on January 1, 1995. The WTO implements the agreement, provides a forum for negotiating additional reductions of trade barriers and for settling policy disputes, and enforces trade rules.

Many of the disputes heard by the WTO are the result of challenges under Article XX of GATT, 'General Exceptions', which lays out a number of specific instances in which WTO members may be exempted from GATT rules. Of relevance to this analysis are the Article XX subsections that provide exceptions for government measures, namely, necessary for the protection of human, animal or plant life or health, or relate to the conservation of exhaustible natural resources.84

GPA

The World Trade Organization's plurilateral agreement on Government Procurement was negotiated in parallel with the Uruguay Round in 1994, and entered into force on 1 January 1996. It is a plurilateral treaty administered by a Committee on Government Procurement, which includes the WTO Members that are Parties to the GPA, and thus have rights and obligations under the Agreement.

It is to date the only legally binding agreement in the WTO focusing on the subject of government procurement. Canada and dozens of other WTO members are parties to this agreement.

NAFTA

In January 1994, Canada, the United States and Mexico launched the North American Free Trade Agreement (NAFTA) and formed the world's largest free trade area.

NAFTA provides the quintessential example in its Chapter 11 of an investor-state settlement dispute ('ISDS') mechanism. Although it is not the first trade agreement to incorporate such a mechanism, NAFTA has seen a proliferation of cases brought under this provision.

VI. Endnotes

[1] First trade negotiation to include provinces and municipalities: Canada-U.S. agreement over Buy American (February 16, 2010) required provinces to make procurement commitments under World Trade Organization rules for the very first time; under the draft CETA text, the provinces have the right to pull out of the agreement on 6 months notice (see Chapter X "Final Provisions" Art. X.05 as proposed by the EU, at 323, 324), but could the federal government invoke the POGG argument in such a situation?

[2] Treaty of Lisbon; Scott Sinclair, Negotiating From Weakness, (Ottawa: Canadian Centre for Policy Alternatives, 2010) [hereinafter Negotiating] at 15.

[3] Canadian Government. Foreign Affairs and International Trade Canada. *Canada-European Union: Comprehensive Economic and Trade Agreement (CETA) Negotiations, Status of the negotiations.* Online at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/can-eu.aspx (accessed October 5, 2011).

[4] Canada-EU Comprehensive Economic and Trade Agreement: Draft Consolidated text - post Round VI [hereinafter Draft CETA].

[5] Draft CETA, Chapter [XX] Institutional, General and Final Provisions, EXCEPTIONS, at 345.

[6] *Ibid.*

[7] *Ibid*, Article X.02: General Exceptions, 1 at 346.

[8] *Ibid,* 3(a) at 347.

[9] Steven Shrybman (Sack, Goldblatt, Mitchell LLP), *Potential Impacts of the Proposed Canadian-European Union Comprehensive Economic and Trade Agreement (CETA) on the Pace and Character of Oil Sands Development: a Legal Opinion,* (2011) [hereinafter Legal Opinion] at FN 14.

[10] Canadian Federal Government. Foreign Affairs and International Trade Canada. Dispute Settlement NAFTA - Chapter 11 – Investment, Background Materials on NAFTA Chapter 11, Essay papers on investment protection - *Ad Hoc Experts Group on Investment Rules Essential Disciplines of the National Treatment Obligation under NAFTA Chapter Eleven,* Jon R. Johnson, Goodman's LLP, (December 2, 2001). Online at http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/treatment.aspx?lang=en (accessed July 15th, 2011).

[11] Draft CETA, Chapter A, National Treatment and Market Access for Goods, Article 4: National Treatment, 2, at 5.

[12] *Ibid,* 2 at 6.

[13] *Ibid,* at 4(i) at 5.

[14] *Ibid*, at (4)(iii) at 6.

[15] Draft CETA, Chapter C: Technical Barriers to Trade, Article 7: Marking and Labeling, at 61.

[16] *Ibid,* Chapter F: Trade Defence Instruments, 2. Subsidies, Article x1: Definition and Scope, 3 at 94.

[17] *Ibid*, Annex X: Principles applicable to other subsidies, 2(c) and (e) at 96.

[18] *Ibid*, Article X.5: Trade Favouring environmental protection, 2, at 324-5.

[19] Negotiating at 11.

[20] Draft CETA, Chapter F: Trade Defence Remedies, 2. Subsidies, at 97.

[21] Recommendations for Budget 2011. Green Budget Coalition. Accessed online at

<http://www.greenbudget.ca/pdf/Green%20Budget%20Coalition's%20Recommendations%20for%20Budget%202011%20(November%202010).pdf> (accessed August 7th, 2011).

[22] Friends of the Earth and the Centre for International Environmental Law recommend against using existing WTO subsidy rules because these "focus on trade effects rather than on environmental effects." Instead, the exemption for environmental subsidies could be restored in the Agreement on Subsidies and Countervailing Measures. This exemption was originally made part of the agreement on a temporary basis but it was allowed to lapse in 2000 after WTO Members could not agree on renewing it; Ellen Gould, *First do No Harm, the Doha Round and Climate Change* (March 2010, Canadian Centre for Policy Alternatives) at 15-16.

[23] CETA Draft, Chapter K Sustainable Development (Labour, Environment), Trade and Environment, Article X.1: Context and Objectives, at 318.

[24] *Ibid,* Article X.2: Definitions, at 318.

[25] *Ibid,* EU proposal, Article 13, Definitions, at 319.

[26] *Ibid,* Sustainable Development Chapter, Article 6: Definitions, 8 at 344.

[27] *Ibid.*

[28] *Ibid,* Article 8, Scientific and Technical Information, at 321.

[29] *Ibid,* Chapter X+1: Trade and Labour, Article 6: Scientific and Technical Information, at 301.

[30] *Ibid,* Chapter K, 2: Trade and Environment, EU proposes Article 9, Canada proposes Annex 1: Cooperation on Environmental Issues, 1 at 327.

[31] *Ibid,* Article ? Institutional Mechanisms at 329, and Article X at 331; see also Article 10: Institutional Mechanisms, 5 at 331.

[32] *Ibid,* at 331.

[33] Draft CETA, Chapter K, 2: Trade and Environment [CN Article X.: Government Consultations, CN: 4. at 332]; [EU Article 12: Panel of Experts, 2 at 333].

[34] *Ibid,* EU Article 12: Panel of Experts, 6 at 334.

[35] *Ibid,* Article X.: Government Consultations, EU: 5 at 332.

[36] *Ibid,* 6 at 332.

[37] *Ibid,* [EU Article 12: Panel of Experts, 8 at 334]; [CN: Article X: Dispute resolution, 7 at 333].

[38] CETA Draft, Chapter L: Dispute Settlement and Institutional Matters, including Horizontal Issues and Transparency, 3. Initial Provisions and General Definitions, Article X.06: Relation to Environmental and Conservation Agreements, at 358.

[39] *Ibid,* Multilateral Environmental Agreements, 2 at 321.

[40] *Ibid.*

[41] *Ibid,* at 322.

[42] *Ibid,* Article X.: Government Consultations, 4 at 332.

[43] *Ibid,* at 331.

[44] *Ibid,* Article ? Institutional Mechanisms at 329, and Article X at 331; see also Article 10: Institutional Mechanisms, 5 at 331.

[45] *Ibid,* at 331.

[46] *Ibid.*

[47] CETA Draft, Chapter K, 2: Trade and Environment, Article X.: Government Consultations, EU: 4 at 332.

[48] *Ibid,* EU: Article 6: Trade in Forestry Products, at 325.

[49] *Ibid,* EU: Article 7: Trade in Fisheries Products, at 326.

[50] Council of Canadians, Tradeblog, *EU report on CETA recommends modest protections for cities and pared-down investment treaty,* (March 30th, 2011) online at http://www.canadians.org/tradeblog/?p=1435.

[51] Legal Opinion at 7.

[52] Apurba Khativada, *Indirect Expropriation of Foreign Investment* (2008, online at www.ksl.edu.np) at 18.

[53] *Supra note 6,* Article X.9, Expropriation (1) at 104.

[54] Legal Opinion at 2; see for example *Abitibi Bowater v. Canada*.

[55] CETA Draft, Chapter G: Investment, Article X.9.1: Indirect Expropriation, 3 at 105.

[56] Supra note 55.

[57] *Ibid.*

[58] *Dow v. Canada; Bilcon v. Canada*.

[59] *Supra note 10,* at footnote 16.

[60] Meri Koivusale, Ronald Labonte & Scott Sinclair, *The Proposed E-U Canada Trade Agreement Raises Health Concerns in Both Canada and the European Union*, (June 26, 2011) [hereinafter Health Concerns] at 2.

[61] Scott Sinclair, *NAFTA Chapter 11 Investor-State Disputes,* (2010, Canadian Centre for Policy Alternatives).

[62] Final Environmental Review of the US-Australia Free Trade Agreement, July 2004.

[63] *Bilateral and Regional Trade Agreements*. The Australian Productivity Commission. Research Report. November 2010.

[64] Australia's Trade Policy Statement released on April 12, 2011.

[65] Letter received by the Canadian Environmental Legal Association February 13th, 2009 in response to a letter from CELA requesting that Canada renegotiate the terms of NAFTA's Chapter 11 .

[66] European Commission, Final Draft CETA Sustainability Impact Assessment (March 2011) at 405.

[67] *Ibid.*

[68] *Supra,* note 38.

[69] Negotiating at 16.

[70] Negotiating at 12.

[71] CETA Draft, Chapter H: Government Procurement, Article III: Security and General Exceptions, (2)(b) at 234.

[72] Note 7 of GPA Annex 2.

[73] *Ibid,* EU: Article X-02: Principles, 1 at 290.

[74] CETA draft, Chapter: Monopolies and State Enterprises, CN: Article X-02, EU: Article X-03, Monopolies, EU: 1 at 290.

[75] CETA Draft, Chapter G: Investment, EU: Article X.3: Market Access, 1 at 99.

[76] *Ibid,* Chapter [XX] Institutional, General and Final Provisions, Article X-02: General Exceptions, 3 at 346 - 347.

[77] *Ibid,* CN: Article X.2: Relation to Other Chapters, 1 at 98.

[78] Council of Canadians & CUPE, *Water for Sale: How Canada will Privatize our Public Water Systems* (December 2011) online at http://www.canadians.org/media/trade/2010/16-Dec-10.html.

[79] EU-Canada Comprehensive Economic and Trade Agreement, Government procurement, European Union's initial request to Canada, December 2009; Negotiating at 13.

[80] *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 and *Anglian Water Group v. Argentine Republic* (UNCITRAL arbitration proceeding).

[81] Health Concerns at 3.

[82] Union of British Columbia Municipalities, Resolution C24 & B108.

[83] Negotiating at 18.

[84] Article XIV of the GATS contains the same introductory clause and the same paragraph (b) — but it does not contain an equivalent to paragraph (g).