Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

Submission to Global Affairs Canada

Re: Notice of Intent to Conduct an Environmental Assessment of the Modernization of NAFTA

Prepared by:
Kerrie Blaise, Counsel
Monica Poremba, Counsel

October 25, 2017

CELA Publication No: 1140
ISBN: 978-1-77189-847-8

Canadian Environmental Law Association

T 416 960-2284 • F 416 960-9392 • 55 University Ave, Suite 1500 Toronto, Ontario, M5J 2H7 • cela.ca

Contents

INTRODUCTION

The Canadian Environmental Law Association ("CELA") welcomes the opportunity to provide the following comments to Global Affairs Canada on its notice of intent to conduct an environmental assessment ("EA") of the modernization of the North American Free Trade Agreement ("NAFTA").[1] CELA is pleased that an intent to conduct an environmental assessment of NAFTA has been triggered early in the renegotiation process.

Background

CELA is a non-profit, public interest organization established in 1970 for the purposes of using and improving existing laws to protect public health and the environment. Funded as a legal aid clinic specializing in environmental law, CELA represents individuals and citizens' groups in the courts and before tribunals on a wide variety of environmental matters.

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

CELA advocates for the integrity and strength of domestic environmental law in light of regional, bilateral and multilateral agreements. We monitor and respond to international agreements that may adversely affect the ability of all levels of government in Canada to enact and enforce environmental laws. CELA's prior comments on international trade agreements can be accessed in our *Acting Globally - International Trade Agreements* publication collection on our website [2] and in our library archive.[3]

COMMENTS ON AN ENVIRONMENTAL ASSESSMENT OF NAFTA

I. Investment Court Dispute Settlement

In order to understand NAFTA's potential impacts on the environment, the Government of Canada must study both the direct effects of investor-state dispute settlement (ISDS) on the protection of Canada's environment and the influence of ISDS on decisions made in Canada, related to environmental protection.

---

[1] Online: http://www.gazette.gc.ca/rp-pr/p1/2017/2017-08-26/html/notice-avis-eng.php

[2] Canadian Environmental Law Association, *Acting Globally - Publication Collection*, available online: <http://www.cela.ca/collections/acting-globally>

[3] Canadian Environmental Law Association, *Archive*, available online: <http://cela.andornot.com/archives>

CELA does not support the current ISDS mechanism in Chapter 11 of NAFTA and has repeatedly called for its removal.[4] CELA also maintains its position that Canada should not enter into any international trade agreement that confers legal rights to foreign, rather than domestic, businesses and investors.

Investor-state arbitration operates external to our domestic court system and does not guarantee the same level of procedural fairness or public openness. Moreover, investment courts are not bound by domestic law. Thus, landmark rulings in Canada which may further environmental protection can be eroded by investment arbitration, where there are limited rights of standing and a lack of statutory duty to consider the public interest.

ISDS also lacks the judicial independence of our domestic courts. For instance, due to the opaque nature of ISDS proceedings, conflicts of interest cannot be policed by the parties or the public, there is no judicial supervision or review of legal or factual errors by ISDS arbitrators, and there is no prohibition on arbitrators undertaking parallel legal work (thus giving rise to the possibility of unverifiable, conflicts of interest in the system).[5]

Inclusion of an ISDS provision in a renegotiated NAFTA would allow foreign investors to continue challenging legitimate governmental decisions and regulations, often made in the public interest. As of January 2015, according to a Canadian Centre for Policy Alternatives study, Canada was the most sued country under free trade tribunals.[6]

We ask that during the EA of NAFTA, the Government of Canada study the impact of NAFTA arbitrations on our domestic ability to further environmental protection. Specifically, as highlighted in the cases detailed below, there are repeated instances in which investment arbitration rulings have inhibited or overridden environmental measures in Canada that were necessary to protect environment and human health.

---

[4] *See* "Submission to Global Affairs Canada, Re: Consultation on the Renegotiation of the North American Free Trade Agreement" (18 July 2017), online: <http://www.cela.ca/comments-NAFTA-renegotiation> and "Submissions to the Standing Committee on International Trade, Re: CETA" (30 November 2016), online: <http://www.cela.ca/submissions-on-CETA>.

[5] Gus Van Harten, "A Port on the Flawed Proposals for Investor State Dispute Settlement (ISDS) in TTIP and CETA" (2015), online: <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1094&context=olsrps>.

[6] Scott Sinclair, "NAFTA Chapter 11 Investor-State Disputes to January 1, 2015" (2015) Canadian Centre for Policy Alternatives, online: <https://www.policyalternatives.ca/publications/reports/nafta-chapter-11-investor-state-disputes-january-1-2015>.

(a) Bilcon of Delaware et al v. Government of Canada

In this case filed in 2008, the federal and Nova Scotia governments decided to reject a quarry project in Nova Scotia. This decision was based on a joint review panel (JRP) which gathered information on the environmental effects and held public hearings. The JRP determined that it would have significant and adverse environmental effects. Though the JRP conducted its own environmental assessment of the project under Canadian law, the NAFTA tribunal found Canada liable for having breached its Minimum Standard of Treatment and National Treatment obligations. Bilcon is currently seeking $443 million US in damages from Canada.

(b) Ethyl Corporation v. Government of Canada

In 1997, Canada passed the *Manganese-based Fuel Additives Act* which imposed a nation-wide ban on a fuel additive, Methylcyclopentadienyl Manganese Tricarbonyl (MMT). MMT was a suspected neurotoxin and impacted the functioning of emissions control systems in vehicles. The US multinational Ethyl Corporation, the sole supplier of MMT in Canada, launched a lawsuit against Canada under Chapter 11 of NAFTA for $350 million in lost revenue and damages. Despite proven concerns about MMT and the Act receiving royal assent, Canada settled the case with Ethyl for $19 million and also had to issue a statement that MMT was not a health risk nor an environmental risk.

(c) S.D Myers v. Government of Canada

In 1980, the United States Environmental Protection Agency (EPA) banned the import of polychlorinated biphenyl (PCB) waste from Canada. SD Myers Inc., a U.S company engaged in the processing and disposal of PCB, was granted a discretionary exemption from the U.S government to import PCB waste from Canada. Shortly after the EPA's ban, Canada issued an order prohibiting the export of PCB waste to the U.S. In response, SD Myers filed a lawsuit against Canada under Chapter 11 of NAFTA, claiming that it had suffered economic loss as a result of the ban, and that Canada's motivation for the ban was the protection of Canadian PCB remediation business, not environmental and human health concerns. The NAFTA tribunal agreed with SD Myers and ordered Canada to pay an $8 million award.

(d) AbitibiBowater Inc. v. Government of Canada Canada

In 2009, AbitibiBowater (now Resolute Forest Products) closed their last remaining pulp and paper mill that it ran and operated in Newfoundland and Labrador. The Newfoundland and Labrador legislation then enacted the *Abitibi-Consolidated Right and Assets Act* which returned timer and water rights to the Crown. AbitibiBowater sued Canada, claiming that the *Act* canceled its forestry

and water rights in Newfoundland and Labrador. Canada and AbitibiBowater settled the case, with Canada agreeing to pay $130 million in damages.

(e) Dow AgroSciences LLC v. Government of Canada

Dow AgroSciences LLC ("DAS") filed a lawsuit against the Government of Quebec in 2008 under NAFTA in response to Quebec Government's ban on the sale and use of pesticides containing the chemical 2, 4-D on lawns other than golf courses. At the time, Ontario was also considering a sweeping ban on hundreds of pesticide products. DAS, a company operating in the pest control products, seed and agricultural biotechnology sectors, claimed that there was no scientific basis for the ban and that it was arbitrary and unfair, and that the ban resulted in the termination of its commercial activities related to the sale of 2,4-D in Quebec. DAS requested that either the ban be repealed or damages in the amount of at least $2 million. Prior to the tribunal hearing, the parties negotiated a settlement without monetary compensation. This action was "widely perceived as an attempt to bring a regulatory chill on efforts across Canada, particularly in Ontario, Canada's most popular province with a government actively considering a sweeping ban on hundreds of pesticide products."[7]

II. Chapters on Environment, Climate Change and Sustainable Development

During Global Affairs' EA of NAFTA, the Government of Canada must compare the effects of a NAFTA which includes binding environment, climate change and sustainable development provisions, and one which fails to impose sanctions on parties and investors who do not comply with these obligations.

CELA supports the inclusion of an environment chapter in NAFTA, so long as it introduces well-defined terms, and binding and enforceable obligations on parties. Even if the renegotiated NAFTA provides a robust definition of 'environment' or 'sustainable development', it must be accompanied by sanctions for non-compliance.

In conducting this EA, the Government of Canada must also review the effect of NAFTA on Canada's ability to meet its Paris Agreement commitments. Specifically, the EA must consider how NAFTA could *assist* Canada in meeting these targets. The EA must also review how a renegotiated NAFTA could prioritize climate action and reduce global, greenhouse gas emissions.

III. Standard Setting and Public Services

[7] Kathleen Cooper et al, "Seeking a Regulatory Chill in Canada: The Dow Agrosciences NAFTA Chapter 11 Challenge to the Quebec Pesticides Management Code" (2014) 7:1 Golden Gat Envtl LJ 5 at 35

Trade agreements can exacerbate a 'race to the bottom' where the lowest common denominator can be used for standard setting. CELA submits that during an EA of NAFTA, the Government of Canada must review how NAFTA can explicitly allow provincial or federal governments to create standards aimed at furthering environmental protection or human health.

Furthermore, public services are best overseen by our domestic governments, not international trade agreements. Therefore, an EA of NAFTA must consider the trade agreement's impacts on the provisions of public services, such as wastewater treatment, or the ability for local governments to make decisions, for instance, about drinking water or transit.

IV. Aboriginal Rights

CELA reiterates its call for trade agreements to recognize Aboriginal rights and incorporate through reference, the *United Nations Declaration on the Rights of Indigenous Peoples*. Not only must the Government of Canada review NAFTA for its effects on aboriginal rights, we urge Global Affairs to consult with indigenous peoples and communities to ensure their inherent rights are protected from parties' trade and investment rights.

CONCLUSION

CELA is greatly concerned about the impact of international trade agreements on Canada's ability to regulate in the public interest and further the objective of environmental protection.

Global Affairs must ensure that any renegotiated agreement allows Canada, and its provinces and territories, to retain their ability to effectively protect the environment. A renegotiated NAFTA must also ensure investors are held to account for environmental effects and greenhouse gas emissions, and that decision-making is not relegated to a dispute resolution body which confers a higher degree of access to private investors than Canadian citizens.

All of which is respectfully submitted this 25th day of October 2017:

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Kerrie Blaise,
Counsel

Monica Poremba
Counsel