



Canadian
Environmental Law
Association
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Submissions to Global Affairs Canada

Re: Consultation on the Renegotiation of the North American Free Trade Agreement

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INTRODUCTION

The Canadian Environmental Law Association (“CELA”) thanks Global Affairs Canada for this opportunity to submit comments regarding consultations on a potential renegotiation of the North American Free Trade Agreement (“NAFTA”) with the United States and Mexico.

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 website¹ as well as our archive.²

COMMENTS ON THE RENEGOTIATION OF NAFTA

1. Investment Court Dispute Settlement

(a) *Canada’s Experience with NAFTA Chapter 11*

CELA opposes a renegotiation of NAFTA that would continue the investor-state dispute settlement (ISDS) mechanism currently in Chapter 11 of NAFTA. ISDS provisions significantly impede the ability of sovereign governments to make decisions in the public interest.

The original purpose of ISDS provisions was to protect foreign investments from expropriation in less developed nations. If there is a true claim by a foreign corporation for expropriation as understood in Canadian case law, those claims should proceed in our well-developed court system. National corporations are required to proceed through our courts and foreign

¹ Canadian Environmental Law Association, *Acting Globally - Publication Collection*, available online: <<http://www.cela.ca/collections/acting-globally>>

² Canadian Environmental Law Association Archives, available online: <<http://cela.andornot.com/archives/>>

corporations should be required to do the same. Preferential treatment should not be given to foreign investors.

The ISDS provisions in NAFTA have been used by foreign investors to challenge 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.³ These cases exemplify this trend:

- *Bilcon of Delaware* (lawsuit filed in 2008): the federal and Nova Scotia governments decided to reject a quarry project in Nova Scotia based on the recommendations of a joint review panel that the project was likely to cause significant and adverse environmental effects. The NAFTA tribunal found Canada liable for having breached its Minimum Standard of Treatment and National Treatment obligations. Canada has filed a notice of application in the Federal Court of Canada for the set aside of the Tribunal's award;
- *Ethyl v Canada* (lawsuit filed in 1997): Canada was ordered to pay \$19 million as part of a settlement to a U.S. chemical company as a result of a nation-wide ban on a gasoline additive which was a suspected neurotoxin and impacted the functioning of emissions control systems in vehicles;
- *SD Myers v Canada* (lawsuit filed in 1998): in order to fulfill obligations under an international environmental treaty, Canada banned its export of toxic PCB waste. The NAFTA tribunal found Canada had helped the Canadian competitor of a U.S. company and was ordered to pay an \$8 million award
- *AbitibiBowater v Canada* (lawsuit filed in 2009): following the closure of a pulp and paper mill, Canada enacted legislation to return timber and water rights to the Crown. The federal government settled the claim paying an award of \$130 million in damages to AbitibiBowater (now Resolute Forest Products); and
- *Dow AgroSciences v Canada* (lawsuit filed in 2008): Quebec passed legislation banning certain pesticide uses on a province-wide basis. Following this ban, other provinces in Canada started contemplating similar bans. Dow filed a claim seeking repeal of the ban or, in the alternative, damages and interest in the amount of at least \$2 million. The matter was settled without monetary compensation, but this case highlights how foreign investors can seek to chill legislative action in Canada by threat of lawsuit.

³ 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>>.

Since NAFTA came into force in 1994, Canada has either lost or settled eight cases and paid \$215 million in compensation.⁴ Mexico has paid damages of \$204 million US and the U.S. has yet to lose a NAFTA chapter 11 case. It is in Canada's best interest to push for the exclusion of ISDS provisions in a re-negotiated NAFTA.

CELA submits that Global Affairs, in its consultation on the renegotiation of NAFTA, reconsider the ISDS provisions currently in NAFTA. CELA strongly objects to any renegotiation of NAFTA that retains the ISDS provisions. There is a long history of these provisions being used to directly or indirectly undermine public interest regulation by Canadian legislators under their law-making responsibilities, and to impose stringent penalties ultimately borne by the Canadian public.

(b) Public Participation

Public participation in ISDS proceedings has improved since NAFTA was originally drafted and signed. The tribunal process changed from a private proceeding to a much more open one that allows the public some access. The improvements include greater access to tribunal documents, participation in tribunal proceedings, and observation of tribunal proceedings.⁵ *Amicus curiae* are now allowed to participate in proceedings, however, this right is discretionary and is determined by the tribunal on a case-by-case basis.⁶ Furthermore, there is no robust formal guideline governing how the *amicus* process works.⁷

While CELA applauds the improvements in the area of public participation, there is still no guarantee the public will be able to participate in proceedings.

If the re-negotiated NAFTA is to include an ISDS chapter, CELA urges that there be a clear and accessible process for public participation. This includes, but is not limited to, the requirement that ISDS be required to accept *amicus curiae* submission, as opposed to its discretionary power to accept them currently. A permanent review tribunal should also be established to interpret NAFTA provisions and provide binding precedent.⁸ The members of this panel should reflect the new objectives of NAFTA and not be limited to members with expertise in commercial law.

⁴ "NAFTA lawsuits target Canada the most, United States hasn't lost yet", *Financial Post* (28 June 2017), online: <<http://business.financialpost.com/business-pmn/nafta-lawsuits-target-canada-most-us-hasnt-lost-yet/wcm/216e2b30-e431-4443-9708-18d84786cfe3>>.

⁵ Kathleen Cooper et al, *Seeking a Regulatory Chill in Canada: The Dow Agrosociences NAFTA Chapter 11 Challenge to the Quebec Pesticides Management Code*, (2014) *Golden Gate University Environmental Law Journal* 7(1), p 25

⁶ *Ibid*, p 27

⁷ *Ibid*, p 37

⁸ *Ibid*, p 38

2. Climate Change & Energy

(a) Climate Change Considerations

As it currently stands, NAFTA not only lacks the strength to support environmental protection, it also does not specifically address climate change. Since NAFTA was announced at the end of 1990, this is unsurprising. Concerns about climate change were only beginning to gain acceptance, with the Intergovernmental Panel on Climate Change being established in 1989 by the World Meteorological Organization and the United Nations Environment Program. Their first report, concluding that the world had been warming and would continue to warm, was released in 1990. This led to the United Nations Framework Convention (UNFCCC) being signed in 1992 and entering into force in 1994. NAFTA negotiations were completed by the end of 1992 and NAFTA entered into force on January 1, 1994. The rise of awareness of climate change coincided with the NAFTA negotiations and signing, and did not give sufficient time to allow for consideration of these issues in the text of the agreement.

It is now well established that climate change is a threat to life on Earth, and any trade agreements must be negotiated with this in mind. Global Affairs must ensure that the agreement includes language that effectively protects the ability of Canada and its provinces and territories to implement the Paris Agreement and other climate agreements. The re-negotiated NAFTA must also contain binding obligations and an express prioritization of climate action and the reduction of global emissions. It must not allow foreign companies to use dispute settlement mechanisms to challenge Canadian laws that are enacted both provincially and federally with the aim to combat climate change and meet our obligations under the Paris Agreement.

(b) Energy Resources

When NAFTA was first negotiated, there was widespread belief that Canada's abundant supplies of oil, including in the Alberta tar sands, would provide an abundant supply of oil for export. Currently, Chapter six of NAFTA reflects this belief and contains a proportionality clause, giving the U.S. unrestricted access to our energy resources, requiring that Canada continue exporting oil and gas to the U.S. in the same proportion as the previous three years. This provision essentially removes Canadian jurisdiction from its energy resources and denies first access to Canada's own resources, even in circumstances of domestic shortage. Furthermore, Canada agreed to give the U.S. national treatment when it came to energy, not charging the U.S. more than it charges Canadian customers. We now know that the extraction of oil and other fossil fuels must be strictly regulated in order for Canada to meet its obligations under the Paris Agreement. The proportionality clause and any national treatment provisions must be removed from the re-negotiated NAFTA in order to protect Canadian jurisdiction over its own resources.

On the other hand, Mexico refused to agree to these energy provisions and was exempted out of this clause during the original negotiations. Canada should demand a similar exemption to regain control of our energy resources and give Canada the freedom to meet our Paris climate commitments and transition to a low-carbon economy.

CELA further submits that the objective of transitioning to a low-carbon economy must be integrated into the text of the re-negotiated NAFTA. The agreement must not limit the ability of countries and sub-national jurisdictions to enact Border Carbon Adjustments, or other provisions that facilitate effective carbon pricing policies. Re-negotiated NAFTA must also create a requirement on the signatory countries to eliminate all fossil fuel subsidies.⁹

3. Environmental Protection and Sustainable Development

CELA submits that the goals that are currently in the preamble of NAFTA related to environmental protection be added to the text of the agreement so that they are binding on the parties. This includes that each of the parties to the agreement resolve to “undertake each of the preceding [goals] in a manner consistent with environmental protection and conservation; preserve their flexibility to safeguard the public welfare; promote sustainable development; [and] strengthen the development and enforcement of environmental laws and regulations.”¹⁰

A revised NAFTA must also include binding obligations or responsibilities on investors to meet the goal of sustainable development, as defined by the 1992 United Nations Conference on Environment and Development.

The inclusion of environmental protection and sustainable development statements must:

- In their definition, include the protection of human health
- Be mandatory - as opposed to permissive - so that compliance is not left up to the discretion or good will of investors

Any actions pursued by Canada, the provinces or municipalities which serve to further environmental protection must be exempt from the agreement’s investment court system in order to fully safeguard the legitimate right of governments to regulate.

⁹ Green Budget Coalition, “Recommendations for Budget 2017”, (2016) online: <<http://greenbudget.ca/wp-content/uploads/2016/11/Green-Budget-Coalitions-final-Recommendations-for-Budget-2017-November-7-2016.pdf>>.

¹⁰ *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico, and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) [NAFTA], Preamble.

A re-negotiated NAFTA must also reflect the changes in international environmental law, which have taken place since its first iteration. Specifically, but not limited to these examples, NAFTA must include language that prevents the abrogation of the polluter pays principle, the precautionary principle, and the prior informed consent principle.¹¹

4. Standard Setting and Harmonization

CELA is greatly concerned by the acceptance of harmonization provisions in trade agreements which erode the ability of governments to act in the public interest. Trade agreements can exacerbate a ‘race to the bottom’ where the lowest common denominator is used for standard setting. CELA submits that a renegotiated NAFTA must not undermine the ability of federal or sub-national governments in Canada to create environmental standards for protection or health reasons.

Also of importance to CELA are labelling standards. CELA notes that labelling is a highly significant aspect of consumer information and education and, where adequately in place and enshrined in law, provides a strong foundation for informed choices. When available, product labelling is an important source of information for the public in respect of health, safety, and environmental information about a product from both the manufacturers and the government. Global Affairs must ensure proper labelling is protected. Global Affairs must ensure that the ability of the federal government to enact proper labelling rules is protected under a renegotiated NAFTA, and that consumers are fully informed about products’ constituent ingredients and relevant environmental standards, including eco-labelling.

5. Public 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, and implement policies to reduce waste and increase recycling. The public provision of electricity and water aims to ensure universal access and maintains environmental and sanitation standards. Public control of mass transit is now often used to leverage green jobs and reduce carbon footprints.

¹¹ For examples where similar language is included in an international agreement, see *Agreement on the European Economic Area*, 3 January 1994, OJ No L 1, art 73.2.

Global Affairs must ensure a re-negotiated NAFTA does not undermine the ability of federal or sub-national governments in Canada to provide, and regulate the provision of, public services, such as wastewater treatment. Public services are best overseen by our domestic governments, not international trade agreements.

Using the Canada-European Union Comprehensive Economic and Trade Agreement (“CETA”) as an example, the capacity of public services is limited in that agreement through the agreement’s “negative listing” approach. CETA’s Annex II employs a negative listing approach where sectors that are not listed are open to foreign service suppliers under the same conditions as domestic service suppliers.¹² This means that under CETA, government measures will be subject to CETA trade obligations *unless* they are explicitly reserved.

CELA does not support the use of the negative listing approach to protect public services. A negative listing approach is extremely restrictive as it curtails the capacity of governments to adopt policy or regulatory measures which respond to future, or emerging broad areas of public policy. If this approach is used in the re-negotiated NAFTA, the list of exemptions must include services which are critical to the environment and human health, including:

- Drinking water provision
- Sewage and wastewater treatment
- Waste management
- Transit

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

A distinction can be made between different forms of “privatization” in relation to water systems. First, privatization can mean the engagement of a private operating agency to run the water system. Second, it can mean private ownership of the water system.... In not recommending the sale of municipal water systems to the private sector, my conclusion is based on several considerations: the essentially local character of water services; the natural-monopoly characteristics of the water industry; the importance of maintaining accountability to local residents; and the historical role of municipalities in this field.¹³

¹² European Commission, Services and investment in EU trade deals using ‘positive’ and ‘negative’ lists, online: <<http://trade.ec.europa.eu/>> at 3

¹³ Report of the Walkerton Inquiry, Part II, A Strategy for Safe Drinking Water, Toronto: Queen’s Printer for Ontario at 317 and 323

In order to effectively protect human and environmental health, essential public services must be excluded from the trade agreement's trade liberalization provisions and any investor state dispute settlement mechanism.

6. Local Procurement

CELA requests that Global Affairs be cognizant of a renegotiated NAFTA's impact on local procurement and domestic content requirements.

For instance, it is important that Global Affairs ensure during negotiations that local agricultural economies are not eroded, and that the re-negotiated agreement protects against negative impacts on food security and sustainable agriculture.

7. Labour Rights

CELA submits that occupational health must be explicitly protected in the text of the agreement. A re-negotiated NAFTA must not compromise the ability of domestic governments to regulate in this area.

8. Aboriginal and Treaty Rights

CELA submits that Aboriginal and treaty rights must be recognized in the re-negotiation of NAFTA, including the section 35 constitutional rights of aboriginal peoples.¹⁴ Any new agreement must incorporate through reference the United Nations Declaration on the Rights of Indigenous Peoples. Furthermore, Global Affairs must consult with Canada's Indigenous peoples throughout the re-negotiation of NAFTA to ensure that Aboriginal rights are respected and protected in any new trade agreement.

CONCLUSION

After decades of experience with NAFTA, it is clear that the agreement has negatively affected the ability of Canada's governments to protect the environment. Any re-negotiated agreement that takes the place of NAFTA must ensure that Canada and the provinces and territories retain the regulatory tools to be able to effectively protect the environment and address the challenges of climate change.

¹⁴ The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s.. 35.

During the renegotiations, Global Affairs must champion:

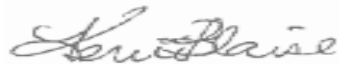
- The ability of our domestic court system to provide sound and equitable judicial dispute resolution;
- Public services, which are responsive to the health and environmental needs of Canadians (and not public assets open to foreign privatization and rule);
- Action on climate change, environmental protection and sustainable development; and
- Protection of the Aboriginal and treaty rights of Canada's Indigenous peoples.

All of which is respectfully submitted this 18th day of July 2017:

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