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

Honourable Ed Fast, Minister of International Trade, &
Canada-European Union Comprehensive Economic and Trade Agreement Secretariat (TEU)
Environmental Assessment – Canada-EU CETA
Foreign Affairs and International Trade Canada
125 Sussex Drive
Ottawa, Ontario, Canada K1A 0G2

Via e-mail & fax

Wednesday, April 25, 2012

Dear Hon. Ed Fast,

Re: comments on the Initial Strategic Environmental Assessment of the CETA negotiations

The Canadian Environmental Law Association (CELA) is pleased to provide the following comments in response to the Federal Government's Initial Strategic Environmental Assessment ('the Assessment') of the Canada and European Union Comprehensive Economic and Trade Agreement (CETA) negotiations. These comments are based on CELA's environmental impact analysis report ('the Report') of CETA published on CELA's website and presented to the Senate Standing Committee on International Trade in November 2011 (see CELA Publication #808, available at www.cela.ca/publications).

CELA is a public interest law group founded in 1970 for the purposes of using and improving 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. In addition, CELA staff members are involved in various initiatives related to law reform, public education, and community organization. Our organization has a long history of engaging in legislative analysis of trade agreements.

I. Introduction

The Assessment fails to consider many environmental concerns that were raised in CELA's Report. Furthermore, the Assessment concludes that "environmental impacts will be minor" based on the premise that "environmental legislation is already in place or will be in place to mitigate negative effects"; however, the issue that is raised time and time again in the Report is the regulatory chill that trade agreements, particularly those featuring Investor-State Dispute Settlement (ISDS) mechanisms, place on governments considering new or strengthened environmental regulations. The major concern that this Assessment does not consider is whether or not CETA will affect the ability of Canadian governments to enact environmental regulations. Currently, many environmental issues in Canada require stricter environmental regulations, and this need will only increase, particulalrly in light of the Assessment's conclusion about increased GHG emissions as a result of increased trade between Europe and Canada.

Below are our comments on selected issues from the Assessment. We would also like our Report on the environmental impacts of CETA to be considered as an Appendix to these comments (link provided below).

II. Public engagement & transparency

Although CELA is pleased to see that Canada is committed to undertaking environmental assessments and associated public consultations of potential trade agreements, it is deeply concerning that the initial environmental assessment is only being released after the last official negotiations have taken place, and that these comments will only be considered in drafting the final assessment that will be released *after* the negotiations are complete.

As a result, comments received during this process appear to have no ability to affect the content of the CETA. Indeed, it appears that any comments that are integrated into the Final Assessment may only influence potential "follow-up and monitoring […] in order to review any mitigation or enhancement measures ultimately recommended by the Final Environmental Assessment report."

In the future, environmental assessments of trade agreements should be conducted earlier in the process so that their findings, and related comments received from the public, may have some influence on Canada's decision to enter into the agreement or influence its terms.

Furthermore, the public is being asked to comment on the conclusions of the Assessment without having access to the CETA text. This does not allow for fullly informed public participation. Luckily, CELA was able to gain access to a leaked copy of a recent CETA draft text, which is the basis of the analysis in our Report, and echoed in the comments below.

III. Procurement

The Assessment concludes, "increased European access to Canadian government procurement is not expected to significantly impact the environment." Further, the Assessment concludes, "government procurement tends to follow strict guidelines and policies with respect to environmental stewardship. This will be the case even after a CETA with the EU is implemented."

On the other hand, CELA's Report concludes that the government procurement provisions provided in the most recent leaked CETA draft text do not provide strong protection for environmental procurement policies. The Report recommends that:

- The environmental procurement exception 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.

- 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.'

IV. Services Trade

In regards to potential environmental impacts caused by trade in services, the Assessment concludes that "negative environmental impacts such as increased energy usage and electronic waste (e-waste) caused by increased trade in services are expected to be mitigated by increases in environmentally sustainable practices in the services sector."

However, our Report concludes that the 'negative-listing' approach enlisted by CETA to exempt certain services from the services provisions of CETA does not effectively protect the environment. Our recommendations for improvements to the services provisions include,

- 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.
- 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.
- 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 guage.

We hope that the Assessment's flagging of a potential e-waste issue results in related monitoring by the Canadian Government.

V. Trade in Goods

The Assessment concludes, "[g]iven that both Canada and the EU have high environmental standards, the risks to Canada from potential environmental hazards in goods imported from the EU are expected to be appropriately addressed." Again the conclusion of the Assessment is that environmental impacts will be mitigated by environmental regulations already in place. This issue has already been addressed above and is discussed in further detail in the Report.

The Assessment further concludes that, "[f]acilitating the movement of goods can increase environmental impacts such as those in the transport sector, but can also have positive indirect effects through the reduction of transaction costs." This is an irrelevant conclusion to be included in an

environmental assessment. Furthermore, it is erroneous as it suggests that negative environmental impacts can be offset directly by economic benefits.

The Assessment finds that the subsidy provisions within CETA do not **"**have any direct environmental effects." In contrast, the CELA Report recommends that the CETA subsidy provisions should be re-drafted in light of the following,

- 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. In order to level the playing field, trade agreements should treat renewable natural resource exploration equitably through allowing green subsidies.
- The exception in the most recent draft for subsidies for 'the development of certain economic activities' 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.

VI. Dispute Settlement

The Assessment concludes that "[t]o the extent that [dispute settlement] provisions strengthen environment stewardship they could have positive indirect effects." Perhaps this comment is referring to the possibility that environmental protection regulations might be upheld when challenged under the dispute settlement provisions by trade dispute panels. However, these panels tend to favour commercial as opposed to environmental or public interests and have a history of applying environmental exceptions narrowly. This concept is discussed in greater detail in the Report.

The Report recommends that to more effectively protect the environment,

- CETA should follow the lead of the United States and Australia bilateral trade agreement, and not include any Investor-State Dispute Settlement (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.
- 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.
- The SIA also recommends that certain essential services be excluded from ISDS mechanism, such as health care and education services.
- Sub-local governments should also be ensured of their ability to participate in any arbitration 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.

In regards to the potential environment-specific dispute mechanism proposed in the most recent CETA draft, the Report recommends:

- 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 'any matter arising under this chapter', as this might narrow the scope of issues covered by these specific environmental dispute procedures.
- CELA also supports 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.

VII. Institutional, General and Final Provisions, Transparency

In discussing the environmental impacts of the general exceptions and multilateral environmental agreements ('MEAs') the Assessment concludes:

- Such provisions could provide for a general exception allowing for the adoption and enforcement of measures to protect animal or plant life or health, and measures relating to the conservation of exhaustible natural resources.
- Such provisions would allow the Parties to implement the trade related multilateral environmental agreements to which they are parties.

On the other hand, the Report recommends that in order to effectively protect environmental laws the general exception provisions be re-drafted as follows:

- 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'.
- 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.
- This proviso should be removed from the final draft as the environment is interconnected and anything related to the environment directly in one territory will inevitably impact the environment as a whole, and potentially other territories.

In regards to CETA provisions relating to the application of multilateral environmental agreements, in order to more effectively protect the environment the Report recommends:

- 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.

VIII. Conclusion

In short, we submit that the Assessment arrives at incorrect conclusions about the potential environmental impacts of CETA, that it does not fully consider potential impacts to the environment, and that it does not allow for effective public participation, nor does it appear to have any substantive impact on Canada's position in relation to the CETA negotiations.

For further analysis of environmental impacts of CETA, and references for the recommendations provided above, please see our Report at http://www.cela.ca/publications/report-environmental-impact-canadian-european-union-comprehensive-economic-and-trade-ag.

Thank you for taking the time to consider our comments. We would be pleased to discuss these submissions further at any time.

Sincerely,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION