Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

Submissions to Global Affairs Canada

Re: Consultation on a Potential Free Trade Agreement with China

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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 free trade agreement with China.

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.[1]

COMMENTS ON A POTENTIAL CANADA-CHINA FREE TRADE AGREEMENT

1. Investment Court Dispute Settlement

CELA does not support Canada entering into a trade agreement that includes an investment court system ("ICS"). Investor-state dispute settlement (ISDS) provisions are a widely criticized aspect of trade agreements because they allow foreign investors to by-pass the host government's judicial system and bring cases before international arbitration tribunals for alleged breaches of investment protections.

The ISDS provisions of international trade agreements, such as NAFTA's Chapter 11, have been increasingly used to successfully challenge domestic public interest measures, including environmental laws. CELA reminds Global Affairs of Canada's experience with investment courts, which demonstrates that arbitrators generally tend to rule in favour of investors where

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

environmental regulatory measures have negatively impacted an investment.[2] This includes but is not limited to the cases[3] of:

- *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 at the time, was a suspected neurotoxin and impacted the functioning of emissions control system 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; and

- *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).

Furthermore, CELA would not support the inclusion of a dispute settlement mechanism similar to that developed for the Comprehensive Economic and Trade Agreement (CETA). While CETA sought to distinguish its dispute settlement mechanism from that of other international trade agreements which have relied upon an ISDS model, the objective of the ICS remains the same: it seeks to safeguard investor rights external to our domestic court system and beyond the rights enjoyed by Canadian businesses and companies.

While Canada has applauded CETA for its inclusion of a "right to regulate," investment court adjudicators still retain the ability to weigh foreign investor rights against the legitimate policy of legislatures, governments and courts. Under CETA, because the burden of proof lies with the government to demonstrate that their regulations are "necessary" and "legitimate," the right to regulate assertion does not sufficiently address the power imbalance between party and investor rights.[4]

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2 Ramani Nadarajah, *CETA's Implications on Sustainable Development and Environmental Protection in Canada* (Canadian Environmental Law Association, October 2015) at 2 [*CETA's Implications*]

3 Gus Van Harten, *Sold Down the Yangtze,* (Toronto: IngramSpark, 2015) at 63

4 Linda McQuaig, "CETA will undermine Canadian democracy" (1 Sept 2016) available online: <https://www.thestar.com>

CELA submits that Global Affairs, in its consultation on a potential Canada-China FTA, consider all parts of the proposed text holistically and consider the provisions within which a 'right to regulate' clause must operate.

CELA would object to any trade agreement which incorporates an investment-court model which allows a few private individuals sitting as arbitrators to impose stringent penalties – a cost ultimately borne by Canadian taxpayers – resulting from the good faith actions of Canadian legislators and their law-making responsibilities.

2. Environmental Protection

CELA submits that a Canada-China free trade agreement must include binding environment provisions and include sanctions on parties and investors who do not comply with their agreement obligations. Furthermore, the agreement's environmental protection statement must:

- In its 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.

3. Sustainable Development

CELA submits that a Canada-China free trade agreement must impose 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.

By way of example, CETA encourages its parties to "recall" the United Nations' global environment summits, "recognise" that economic and social development and environmental protection are interdependent and "reaffirm" their commitment to promoting development which "contributes" to the objective of sustainable development. These statements, however, do not necessitate that future development conform to the UN's definition of sustainable development and therefore, lack a tangible benchmark from which sustainable development can be enforced.

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 Canada-China free trade agreement must explicitly allow for the government 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 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 companies and the government. Global Affairs must ensure proper labelling and that that consumers are fully informed about a 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, 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.

CELA submits that Global Affairs must ensure a Canada-China FTA does not jeopardize public services, such as wastewater treatment, or the ability for local governments to make decisions, for instance, about drinking water. Public services are best overseen by our domestic governments, not international trade agreements.

Using CETA as an example, the capacity of public services is limited by virtue of 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.[5] This means that under CETA, government measures will be subject to CETA trade obligations *unless* they are explicitly reserved.

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

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[5] European Commission, Services and investment in EU trade deals using 'positive' and 'negative' lists, online: <http://trade.ec.europa.eu/> at 3

policy. Services which are critical to the environment and human health must be included in the list of exemptions, including:

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

Without inclusion on the exemption list, these services could be subject to trade liberalization secured through the FTA's investor state dispute settlement mechanism.

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. [6]

CELA would not support the inclusion of a negative listing approach, however, should such an approach be employed, essential public services (which are necessary to protect human and environmental health) must be listed as reservations.

6. Local Procurement

CELA requests that Global Affairs be cognizant of a Canada-China free trade agreement's impacts 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 impacts on food security and sustainable agriculture are recognized.

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

7. Labour Rights

CELA submits that occupational health must be explicitly noted in the text of a trade agreement and not compromise the ability of domestic governments to regulate in this area.

8. Aboriginal Rights

CELA submits that the Canada-China FTA must expressly recognized section 35 constitutional rights of aboriginal peoples[7] and incorporate through reference, the United Nations Declaration on the Rights of Indigenous Peoples.

9. Climate Change and a Low-carbon Economy

Provinces in Canada have pursued a variety of approaches to assist Canada's transition to a low-carbon economy. CELA submits that Global Affairs must ensure there is language in the agreement's text which strenuously protects the ability of provinces and Canada to implement the Paris Accord and other climate agreements.

Any trade agreement must also contain binding obligations and an express prioritization of climate action and the reduction of global emissions.

CONCLUSION

There are significant issues threatening the ability of Canadian governments to effectively protect the environment and this must be prevented in any trade agreement. CELA submits that during negotiations, 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); and
- Action on climate change, environmental protection and sustainable development.

We appreciate having this opportunity to provide our comments to Global Affairs Canada and look forward to future submission opportunities.

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[7] The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11

All of which is respectfully submitted this 2nd day of June 2017:

CANADIAN ENVIRONMENTAL LAW ASSOCIATION
Per

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