



Canadian
Environmental Law
Association
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Submission to Global Affairs Canada

Re: Initial Environmental Assessment of Modernization of the North American Free Trade Agreement

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A. Introduction

The Canadian Environmental Law Association (“CELA”) welcomes the opportunity to provide the following comments to Global Affairs Canada on its initial environmental assessment (“EA”) of the modernization of the North American Free Trade Agreement (“NAFTA”).

We note that the initial assessment was conducted before the text of the new Canada-United States-Mexico Agreement (“CUSMA”) was finalized and many of the observations are out of date. We urge Global Affairs Canada to conduct a fulsome Draft Environmental Assessment and Final Environmental Assessment with reference to the text of the agreement.

The CUSMA has been signed in the context of wide-ranging and severe global environmental crises. In addition to António Guterres, the United Nations Secretary General, declaring climate change to be “the most systemic threat to humankind”¹, the IPCC has found that humanity has at most 12 years to drastically reduce GHG emissions to avert a climate crisis.² Threats of the impact of climate change, biodiversity and habitat loss, and poor air and water quality have driven Canada to sign numerous international agreements to combat these environmental threats, such as: the *Montreal Protocol on Substances that Deplete the Ozone Layer*³, the *International Convention for the Prevention of Pollution from Ships*⁴, and the *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*.⁵ As a signatory to dozens of international agreements regulating and prohibiting threats to the environment and human health, Canada recognizes its role in the global community to actively address climate change and other environmental issues, at home and abroad.

Against this backdrop, the CUSMA is wholly inadequate to protect Canadians from the negative impacts of trade on the environment. We fundamentally disagree with the cursory review of the environmental impacts of CUSMA in the initial environmental assessment and urge Global Affairs Canada to conduct a fulsome, scientific, data-driven review of the text and implications of the CUSMA to ensure its environmental impacts are understood.

¹ “Secretary-General’s press encounter on climate change [with Q&A]” United Nations (29 March 2018), online: <<https://www.un.org/sg/en/content/sg/press-encounter/2018-03-29/secretary-generals-press-encounter-climate-change-qa>>

² “Global Warming of 1.5 °C”, Intergovernmental Panel on Climate Change (6 October 2018), online: <http://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf>

³ *Montreal Protocol on Substances that Deplete the Ozone Layer* (with annex). Concluded at Montreal, September 16, 1987 (Montreal Protocol); Chapter 24, art. 24.9(1)

⁴ *International Convention for the Prevention of Pollution from Ships*, done at London, November 2, 1973, as modified by the *Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships*, done at London, February 17, 1978, and the *Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973 as Modified by the Protocol of 1978 relating thereto*, done at London, September 26, 1997 (MARPOL Convention), and any existing and future amendments to the MARPOL Convention; Chapter 24, art. 24.10(1)

⁵ *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)* done at Washington, D.C., March 3, 1973; Chapter 24, art. 24.22(2)

B. Background on CELA

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 website⁶ and in our library archive.⁷

C. Investor-State Dispute Settlement

While CELA strongly disagrees with Global Affairs Canada's conclusion in the initial environmental assessment about the limited environmental impacts of Investor-State Dispute Settlement ("ISDS"), we are supportive of the government's ultimate decision to remove investor-state dispute mechanisms between Canada and the United States from the agreement. We note that Annex 14-D maintains a more limited ISDS mechanism between the United States and Mexico, and Canada and Mexico still have access to an ISDS system under the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*.⁸

The Hon. Chrystia Freeland, Minister of Foreign Affairs of Canada, correctly observed that ISDS acts as a barrier to regulations in the public interest:

The investor-state-dispute resolution system that has allowed companies to sue the Canadian government is also gone between Canada and the United States. Known as ISDS, it has cost Canadian taxpayers more than \$300 million in penalties and legal fees. ISDS elevates the rights of corporations over those of sovereign governments. In removing it, we have strengthened our government's right to regulate in the public interest, to protect public health and the environment, for example.⁹

We have similarly observed that ISDS acts as a deterrent to strong environmental and public interest regulation, and foreign corporations have claimed billions in damages against Canada

⁶ Canadian Environmental Law Association, Acting Globally - Publication Collection, available online: <<http://www.cela.ca/collections/acting-globally>>

⁷ Canadian Environmental Law Association, Archive, available online: <<http://cela.andornot.com/archives>>

⁸ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* Concluded at Auckland, December 30, 2018 [CPTPP] at Chapter 9, Section B, online: <<https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-tpf/text-texte/toc-tdm.aspx?lang=eng>>

⁹ "Prime Minister Trudeau and Minister Freeland deliver remarks on the USMCA" Justin Trudeau, Prime Minister of Canada (1 October 2018), online: <<https://pm.gc.ca/eng/video/2018/10/01/prime-minister-trudeau-and-minister-freeland-deliver-remarks-usmca>>

since its introduction into NAFTA in 1994. The removal of ISDS between Canada and the United States in the CUSMA means decisions can now be made to protect human health and the environment without the risk of an unlimited damages awards to a United States multinational corporation from an investment arbitration panel. We urge the Canadian government to remove ISDS from all future trade agreements.

D. Energy Proportionality

CELA is also supportive of the removal of the energy proportionality clause in CUSMA. The rule prohibited Canada from restricting or reducing oil exports to the United States or Mexico.¹⁰ Article 605 in NAFTA was counterproductive to Canada's efforts to meet international climate change mitigation goals and transition to a low-carbon future, as it required the exports of oil, gas and electricity to remain constant.¹¹

E. Environment Chapter – Chapter 24

Despite the Initial EA determining in its qualitative assessment that Chapter 24 "...could have positive impacts on the environment," the negotiated language of the agreement falls far short of providing "comprehensive and enforceable provisions" that would promote high environmental standards.

Vague Language

The Initial EAs observation that it would seek "high-ambition and enforceable" environmental provisions in the Environment Chapter has not been achieved.

Chapter 24 often uses vague language that will be difficult to enforce. For instance, in Article 24.10, the parties shall "take measures" to prevent the pollution of the marine environment.¹² According to footnote 10, a violation of this provision can only be demonstrated if a Party can demonstrate that the other Party has failed to take measures to prevent the pollution of the marine environment "in a manner affecting trade or investment between the Parties".

Article 24.13 includes a vague, unenforceable recommendation for the Parties to "encourage" enterprises to adopt and implement voluntary best practices of corporate social responsibility related to the environment.¹³

Despite Canada's goal to include a provision to support efforts to address climate change, the text of CUSMA does not mention climate change.

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], Article 605

¹¹ "Escaping Mandatory Oil Exports: Why Canada needs to dump NAFTA's energy proportionality rule", Council of Canadians (14 June 2018), online: <<https://canadians.org/nafta-energy-proportionality>>

¹² Chapter 24, art. 24.10(1)

¹³ Chapter 24, art. 24.13(2)

Enforcement Mechanisms Have Never Been Used

The North American Agreement on Environmental Cooperation (“NAAEC”) included dispute resolution mechanisms detailing a process for consultation between parties and ultimately resolution by an arbitral panel. The process could in theory result in the imposition of monetary penalties against the offending Party by the panel. However, Articles 22 through 36 of the NAAEC, which establish that process, have never been used.

Articles 24.29 – 24.32 maintain a consultation and then arbitration process to resolve disputes under the Environment Chapter. However, it is difficult to imagine that the parties will now utilize this process if they have not done so to date. Any environmental assessment of the agreement must account for the clear reticence by the Parties to use these provisions.

Citizen Complaints - Factual Record Process was Not Improved

Article 24.27 preserves the right of individuals or non-governmental organizations to file a submission asserting that a Party is failing to effectively enforce its environmental law and request that a factual record be created. The timelines for completing the process have been reduced from what was available under the NAAEC, which will be extremely challenging for Commission for Environmental Cooperation staff in some cases.¹⁴ A two-thirds vote is still required to allow the preparation of a factual record to proceed.¹⁵

CUSMA does nothing to address the significant deficiency in factual records, namely that they do not assign blame or fault for a government failing to effectively enforce its environmental laws. Article 24.28.7 does allow the Environment Committee to “provide recommendations to the Council on whether the matter could benefit from cooperative activities”.¹⁶

F. Good Regulatory Practices – Chapter 28

There is no detail or explanation of how Global Affairs Canada concluded that the chapter on good regulatory practices could have a positive impact on the environment. CELA is concerned that this chapter will instead become an obstacle to improving environmental protections and public interest regulations. Regulatory cooperation can result in the weakening of regulations designed to protect human health and the environment.

Public interest regulations must be understood first and foremost as a way to improve the lives of the people living in all jurisdictions and the environment, not as a barrier to trade and private profit. The precautionary principle must be paramount. The test for any changes to regulatory standards should be whether the public interest is better protected by the change.

For instance, Canada is currently reviewing its chemicals management regime under the *Canadian Environmental Protection Act, 1999*, SCC 1999, c 33 (“*CEPA*”). The European Union’s

¹⁴ See Chapter 24, Art. 24.28.1, 24.28.5, 24.28.6

¹⁵ Chapter 24, Art. 24.28(2)

¹⁶ Chapter 24, Art. 24.28.7

Registration, Evaluation, Authorization and Restriction of Chemicals (“REACH”) regime is more precautionary and places a greater and appropriate responsibility on industry to investigate and disclose potentially harmful effects of its chemicals, as opposed to the “risk-based” approach used in Canada and the United States which effectively places the burden on government to examine the safety of an existing chemical. The good regulatory practices chapter in CUSMA may constrain any Canadian reform that would make its chemicals management system more precautionary and protective of human health and the environment, like the European Union’s REACH system.

G. Agriculture – Chapter 3

CELA disagrees with the Initial EA’s conclusion that there are no foreseen environmental impacts arising out of the agriculture chapter.

The overarching goal of the agriculture chapter should have been to ensure Canada’s agriculture sector is sustainable, and that Canada’s obligations under the Paris Agreement are not compromised. As indicated in “Canada’s Mid-Century Long-Term Low-Greenhouse Gas Development Strategy,” the agricultural industry is a large contributor to GHG emissions, especially through the emission of methane gas¹⁷. With this in mind, it is concerning that the Chapter on agriculture makes no reference to sustainability, sustainable agriculture, or even the environment.

Chapter 3 of CUSMA erodes Canadian agricultural supply management programs. Supply management programs promote sustainable farming practices, as they place limits on how much farms produce.¹⁸ By weakening Canada’s supply management system for eggs, dairy, and poultry, this chapter encourages an increase in production, which in turn promotes factory-farming practices which are detrimental to the environment. This type of activity is contrary to the vision of sustainable agriculture described within Canada’s Climate Action plan:

In the context of a global and growing demand for food products, alternative approaches like local food movements, organic and/or urban agriculture or family farmers networks can play an important role in shaping the future of agriculture.¹⁹

With American dairy and poultry entering the Canadian market, there are also concerns about exposing the Canadian public to recombinant bovine growth hormone (rBGH). In 1999, Health Canada denied Monsanto's application for approval of recombinant bovine growth hormone (rBGH), which would increase milk in cattle, due to concerns about animal health and animal

¹⁷ “Canada’s Mid-Century Long-Term Low-Greenhouse Gas Development Strategy”, Government of Canada (2016), online: <http://unfccc.int/files/focus/long-term_strategies/application/pdf/canadas_mid-century_long-term_strategy.pdf>

¹⁸ Ben Lilliston, “New NAFTA” continues damaging climate legacy”, Institute for Agriculture & Trade Policy (17 October 2018), online: <<https://www.iatp.org/documents/new-nafta-continues-damaging-climate-legacy>>

¹⁹ “Canada’s Mid-Century Long-Term Low-Greenhouse Gas Development Strategy”, Government of Canada (2016), online: <http://unfccc.int/files/focus/long-term_strategies/application/pdf/canadas_mid-century_long-term_strategy.pdf>

welfare.²⁰ Despite rBGH being banned in Canada and Europe, these growth hormones are permitted and used in the United States.²¹ With CUSMA granting entry of American milk into the Canadian market, there are increasing health concerns surrounding milk containing rBGH, since this growth hormone "can trigger an increase in another hormone called IGF-1 which has the capacity to impact humans", and there is no labelling on American milk to indicate the presence of rBGH.²²

An environmental assessment should also consider the impact of Section B of Chapter 3, focusing on Agricultural Biotechnology, which will impact farming practices. Article 3.14(4) seeks to reduce disruptions to trade in products of agricultural biotechnology including genetically engineered crops. Genetically engineered crops promote monoculture commodity crop production.²³ By promoting the trade of products like genetically engineered soy or corn, there will be an expansion of these seeds on the market, intensified farming practices, and an increase in GHG emissions. A closer assessment of provisions encouraging trade in agricultural biotechnology should be conducted, in particular by examining its impact on Canada's ability to meet its GHG reduction targets.

H. Conclusion

CELA disagrees with the conclusion of the initial EA that CUSMA will not have negative environmental implications. We urge Global Affairs Canada to conduct a fulsome environmental assessment of the CUSMA now that its text has been released.

²⁰ Lucy Sharatt, "No to Bovine Growth Hormone: A Story of Resistance from Canada", from: *Redesigning Life? The Worldwide Challenge to Genetic Engineering*, edited by Brian Tokar (London: Zed Books, 2001), online: <<https://cban.ca/wp-content/uploads/BGH-Chapter-Redesigning-Life.pdf>>

²¹ Rebecca Joseph, "Reality Check: Do Canadians need to worry about growth hormones in dairy post-USMCA?", *Global News*, 10 October 2018 (online): <<https://globalnews.ca/news/4533226/canadians-growth-hormones-dairy-usmca/>>

²² *Ibid.* See also: "Hormones, cows and the new trade deal: what you need to know", *CBC News* (4 October 2018), online: <<https://www.cbc.ca/news/canada/usmca-milk-hormones-1.4849423>>; "Bovine Growth Hormone (rBGH)", *Council of Canadians* (online): <<https://canadians.org/rbgh>>

²³ Ben Lilliston, "'New NAFTA' continues damaging climate legacy", *Institute for Agriculture & Trade Policy* (17 October 2018), online: <<https://www.iatp.org/documents/new-nafta-continues-damaging-climate-legacy>>