

Potential Impacts of the Proposed Canada-European Union Comprehensive Economic and Trade Agreement (CETA) on the Pace and Character of Oil Sands Development

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November 2010



**Friends of
the Earth
Europe**

Introduction – The Council of Canadians

Canada and the European Union are negotiating a Comprehensive Economic and Trade Agreement (CETA), which is increasingly controversial in Canada as details of the ambitious liberalization project slowly emerge. While the Canadian government and European Commission frequently tout the potential economic gains from a trans-Atlantic free trade pact, they do not discuss publicly the extent to which CETA would constrain the capacity of governments on both sides of the Atlantic to meet other social priorities. The Council of Canadians, The Indigenous Environmental Network and Friends of the Earth Europe present the following legal opinion which examines those constraints as they would affect efforts to regulate the production of, or trade in the Alberta tar sands and consequently have impact on the global development of tar sands. But the findings also more broadly address how CETA would threaten a number of measures designed to lower the carbon and ecological footprint of economic activity.

In Canada, we cannot approach the issue of emissions reduction and ecological protection without confronting the drastically under-regulated Alberta tar sands – the largest industrial, investment, and energy project in the world, with heavy involvement by European-based energy multinationals. Tar sands extraction and processing is the fastest growing source of greenhouse gas emissions in Canada and an important reason why Canada has not, and will not, at least under the current federal and Alberta governments, meet its international climate obligations under the Kyoto Accord. The impacts on the boreal forest, water, and public health, particularly for Indigenous communities living in the area, are severe.

Inaction on climate change and environmental protection in countries such as Canada has led to demands in the EU and with other trading partners for new ways to account for the climate impact of energy and other imports. It is not a stretch to say the Canadian government sees the CETA negotiations as a tool for constraining the ability of the EU to pass regulations or other domestic measures that would differentiate between products based on their carbon content. The proposed EU Fuel Quality Directive, which would categorize crude derived from the tar sands differently than conventional oil, has already suffered from heavy Canadian and Alberta government lobbying. The Canadian government has proven its willingness to contest similar measures in the United States using international trade and investment rules.

CETA also risks granting EU energy companies added investment protections and tools to challenge future Canadian or provincial efforts to regulate tar sands production more effectively. Canadian negotiators have proposed an investor-state dispute resolution mechanism similar to the one that exists in NAFTA. Increasingly, in particular over the past five years, investor claims against Canada of unfair expropriation under NAFTA have been directed at environmental and public health measures. While EU governments and the European public might welcome a reduction in tar sands activity, leading energy firms such as Shell, Total and BP are unlikely to lower their profit margins without a fight.

Climate change and other severe ecological stresses are the most immediate threat to the Canadian and European economies. But through CETA, Canada and the EU would prioritize trade liberalization at the expense of effective environmental regulation. We hope this legal opinion will help spark a debate about the environmental implications of this proposed trade deal, and halt CETA negotiations until the public has the opportunity to consider its ramifications.

Since 1985, the Council of Canadians has brought Canadians together to act for social, economic and environmental justice here in Canada and around the world. We work with community groups, seniors, students, unions and other organizations across the country to promote progressive policies on public health care, fair trade, secure energy, climate justice, clean water and other issues of social and economic concern to Canadians.

Introduction - The Indigenous Environmental Network

The Indigenous Environmental Network (IEN) is a non-governmental, indigenous organization formed in 1990 addressing indigenous rights and environmental and economic justice issues. IEN elevates indigenous knowledge and amplifies indigenous voices and since 1998, has become a leading voice within Canada and the U.S. on climate and energy policy - locally, nationally and globally. IEN implements the Canadian Indigenous Tar Sands Campaign (CITSC) working with the leadership of both First Nations and Métis in the region affected by the Alberta tar sands development.

Aboriginal title encompasses large areas of land throughout Canada. It is a treaty and legal term that recognizes Aboriginal interest in the land. First Nations are not mere stakeholders or the public, but are political and legal entities that have treaty rights with Canada. Despite the concerns of the First Nations, the governments of Alberta and Canada aren't listening. The areas of concern are under Aboriginal Treaties 1, 4, 6, 7, 8 and 11. These are treaties that ensure that lands of First Nations should not be taken away from them by massive uncontrolled development that threatens culture and traditional way of life. The de-watering of rivers and streams to support the tar sands operations is a threat to the cultural survival of these communities. The battle over the tar sands extraction and concerns of who invests in this development comes down to the fundamental human rights of First Nations to exist and have a future with a safe, clean and healthy environment.

Current negotiations between the federal government of Canada and the European Union on a comprehensive free trade agreement will have considerable implication for First Nations in Canada. First Nations are in direct conflict with both provincial and federal governments over Aboriginal and Treaty rights and title in the region impacted by tar sands development. First Nations access to basic human necessities protected under both domestic and international law such as food security (domestically defined as hunting and fishing treaty rights) as well as access to clean drinking water are threatened by CETA.

While treaty rights are recognized in most trade agreements, to the extent that CETA will lead to an expansion of extractive activities by European firms in Canada while giving these companies strong investment protections, these rights will only be further undermined. As this legal opinion shows, efforts to reduce or cut off water permits for tar sands producers would be an easy target for investors claiming unfair expropriation. In that sense, the CETA agreement as currently being negotiated could result in an unacceptable infringement of Indigenous Peoples rights as defined by the UN Declaration on the Rights of Indigenous People and Canadian law.

<http://www.ienearth.org/tarsands.html>

Introduction - Friends of the Earth Europe

Tar sands – bitumen that is extracted and upgraded to produce synthetic crude – has been heavily criticised for its poor environmental and social outcomes, locally and globally. Tar sands generate on average 3 to 5 times more greenhouse gas (GHG) emissions than conventional oil, representing a huge threat to climate protection. Canada is currently the only major centre of production but investment is expanding, including by European oil companies such as BP, Shell and Total.

The EU is committed to tackling climate change and Europe's dangerous dependency on imported fossil fuels by moving to a low-carbon energy path. But for its climate and energy goals to be credible, the EU must take effective policy steps to prevent the "re-carbonization" of our economy that will inevitably result from expanding tar sands production and other forms of unconventional oil. Current levels of tar sands imports into the EU are low but are bound to increase as production and refining capacity expands. Use of such climate-damaging energy products is simply not compatible with the shift to a low-carbon economy. They must therefore be actively discouraged from entering the EU market.

Time is critical since unconventional oil resources are about to go global. One new frontier for tar sands development is Africa, a region already highly vulnerable to the impacts of climate change. Apart from making a mockery of climate protection, tar sands production in Canada has resulted in serious damage to local communities and the environment, including destruction of the boreal forest and increased pollution that has impacted on the health and livelihoods of First Nations communities. In countries with weaker political and environmental governance frameworks, the consequences of its expansion are likely to be devastating. In Africa, in particular, progress towards Millennium Development Goal 7 on Environmental Sustainability will be seriously under threat.

If the EU is serious about tackling the interlinked climate and energy challenges faced by European consumers, investors and the private sector, it should assume its responsibility as a global standard-setter, sending a clear signal discouraging the deployment of high-carbon technologies such as the tar sands before they are "locked-in" and start producing for the European market. It can do this firstly, by not giving political or financial assistance to tar sands development. Secondly, the EU can adopt appropriate import regimes to provide incentives for cleaner fuel sources, as California has already done through adoption of a low-carbon fuel standard.

It is clear that while Europe is working to reduce fossil fuels emissions Canada is using CETA negotiations to undermine this process. Canada has already been lobbying to water down the EU's Fuel Quality Directive to treat oil produced from tar sands like conventional sources. EU decision makers should ensure that CETA enhances European climate policy and not the development of Canadian tar sands.

Friends of the Earth Europe campaigns for sustainable and just societies and for the protection of the environment, unites 30 national organisations with thousands of local groups and is part of the world's largest grassroots environmental network, Friends of the Earth International.

<http://www.foeeurope.org/>

November 4, 2010

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Dear Sirs/Mesdames:

Re: Canada-EU Comprehensive Economic and Trade Agreement (CETA)

You have asked for our assessment of the potential impact of the Canada-EU Comprehensive Economic and Trade Agreement (CETA) on the pace and character of development of the Alberta oil sands.

As we know, the exploitation of western Canadian oil sands has attracted both national and international notoriety because of the severity of the environmental impacts associated with the development of these oil resources. These include serious and adverse impacts on the boreal forest, water, and public health - particularly for aboriginal communities living in the area.

However, most international attention has focused on the energy use, or carbon intensity, of oil sands operations because these are estimated to be substantially higher than for conventional oil resources.

Because of the general reluctance of Canadian governments to regulate the oil sands activity to effectively address these impacts, environmental groups and indigenous peoples organizations in the United States and Europe are engaged in campaigns to discourage the purchase and trade of oil sands products. In response, the federal and Alberta governments have invested substantial resources in international lobbying efforts to counter these environmental campaigns.

These competing points of view have come to the fore in the context of CETA negotiations, and parliamentarians in Europe have now raised questions about the potential impact of this

proposed trade agreement on efforts to address the environmental dimensions of oil sands development.

The importance of these issues is also heightened because of Canada's repudiation of its obligations under the Kyoto Protocol and the EU's relatively steadfast determination to meet its own.

While the terms of CETA have yet to be settled, it is clear that this proposed trade treaty is being viewed as an important test of EU priorities, particularly where the challenge of combating climate change conflicts with those of promoting further trade liberalization.

There can be no doubt that current CETA proposals have considerable potential to constrain policy, program and regulatory initiatives needed to address pressing ecological priorities, including those relating to the impacts of oil sands development. It is also clear that Canada regards international trade rules as an important tool for defeating efforts to address climate change and it has already threatened to invoke them for this purpose.

But Canadian policies are not immutable, and future provincial and federal governments may adopt a more responsible and balanced approach. The extent to which the options are available to them at that time will depend to a significant extent on the terms of the trade agreements to which Canada is a Party, including a trade treaty with Europe.

The following assessment of the potential impact of CETA rules on the exploitation of oil sands gives rise to the following conclusions.

Conclusions

1. There are two generic ways in which CETA rules may impact measures established to address the environmental impacts of oil sands development.
 - (i) The first arises from trade-in-goods rules which may be invoked to challenge measures, such as clear fuel standards, that are intended to affect markets for oil sands products by accounting for their larger carbon footprint.
 - (ii) The other arises from CETA investment and services rules that would provide new tools for challenging Canadian measures required to address the environmental impacts of extracting and processing oil sands resources.
2. There is a sharp difference between Canadian and EU proposals concerning international trade-in-goods. Canada seeks to preserve the status quo which it argues prohibits measures that take into account the environmental impacts of extracting and processing bitumen from the oil sands. The EU would establish an exception for trade measures that

are taken to meet EU obligations under multilateral environmental agreements, including the Kyoto Protocol, such as clean fuel standards.

3. There is, however, little apparent difference between the Parties on the question of rules relating to foreign investment and services, including provisions that would allow EU oil companies to invoke international arbitration to challenge and seek monetary compensation for environmental and resource conservation measures taken by Canada to address the impacts of oil sands developments.
4. Because there is little if any trade in oil sands products between Canada and the EU, even strict EU market measures would have no direct bearing on the pace or character of oil sands development. Canada's efforts to discourage such an initiative are motivated by concern for the precedent such measures would establish.
5. The much greater concern arises from providing EU based oil companies with new tools for challenging efforts by Canadian governments to curtail the pace of tar sands development and/or address the serious local, regional and global impacts caused by this development.
6. By proposing new provisions on market access, CETA investment rules would substantially expand already robust foreign investor rights by authorizing challenges to Canadian measures that would limit the expansion of oil sands development by refusing to approve new developments, or restricting the expansion of existing operations.
7. Equally problematic are the consequences of Canada's recent decision to settle a NAFTA claim by awarding a forest company \$130 million in compensation for the expropriation of certain company assets and the cancellation of licenses to use publicly owned natural resources, including water. That settlement invites a similar claim by any oil company denied continuing access to the large volumes of water needed to extract and process bitumen from the oil sands. The exposure to such claims creates a serious new impediment to government efforts that limit the water demands of oil sands producers that already strain the ecological capacity of the region.
8. In certain respects the respective positions of the Parties regarding measures that may impact oil sands production and trade reflect their very different positions on whether the goals of the Kyoto Protocol can and should be met. As we know, Canada has repudiated its commitments to reduce greenhouse gas emissions and has proposed CETA rules that would preclude EU energy measures that would take into account Canada's failure to honour its international environmental obligations.
9. Moreover, the ability of both countries to meet their respective international obligations will be significantly influenced by the provisions of CETA if the treaty is concluded. Because such a trade regime is certain to be equipped with effective dispute procedures, its impact is likely to be far greater than the largely hortatory provisions of international climate change agreements.

10. If CETA is to serve rather than undermine the goals of combating climate change, Canada's position on trade-in-goods rules must be rejected, as must the position both Parties have apparently adopted on investment and services rules.
11. CETA will provide an important test of the EU's willingness to balance its trade policy objectives with those arising from its commitment to combat climate change. Conversely, it will determine the extent to which Canada is able to consolidate the role that trade agreements now play in frustrating the achievement of environmental goals.

QUALIFICATION

The following analysis is both preliminary and incomplete. It is based on a leaked version of the Parties' respective negotiating texts that is dated January 2010.¹ The text reveals substantial differences between the Parties concerning matters that will play a key role in determining the extent to which CETA may impact policy and law relating to the oil sands. These differences are noted where relevant. Aboriginal organizations have raised a number of concerns related to the intersection of CETA and First Nations rights, particularly in regard to the question of water resources; this is also beyond the scope of this analysis.

PART I: THE POTENTIAL IMPACT OF CETA RULES ON E.U. MEASURES RELATING TO THE OIL SANDS

CETA represents an important test of conflicting objectives between trade liberalization and combating climate change

The potential impact of CETA rules on EU measures relating to oil sands arises from the trade-in-goods provisions of the proposed treaty. These basic trade rules are well established and are not expected to be modified by CETA.

This is reflected by the response of the European Commission (EC) to a question by a member of the European Parliament, which asked the Commission to “Confirm that the EU-Canada FTA will cover trade in this type of oil and how does the Commission justify this in the light of EU environmental priorities?”² The Commission’s response was as follows:

*As to whether the EU-Canada Comprehensive Economic and Trade Agreement (CETA) will cover trade in this type of oil, there is of course no such agreement as yet. Nothing can, therefore, be confirmed. This applies to any question concerning oil from Canada’s oil sands. In a future perspective, the Commission does not envisage that the CETA would change the conditions for any trade in oil derived from oil sands between the EU and Canada. The customs duty on oil in the EU is already set at 0, thus tariff liberalisation under CETA would have no effect on such trade. As to any future regulations concerning trade in oil and oil products in the EU, the CETA will not affect the EU’s ability to enact and implement any such regulations that would be in compliance with the EU’s existing international obligations. In particular, the EU will retain the ability to regulate the trade and/or use of any product for legitimate purposes, in a non-discriminatory manner and based on scientific evidence. Canada has raised the question of the future treatment of oil and oil products derived from oil sands, and the Commission has explained the situation along the lines mentioned above.*³

However, while the basic rules concerning trade-in-goods will not change, the extent to which certain measures may be exempt from having to comply with them is unresolved, particularly as it concerns measures that are taken to implement or give effect to the obligations the Parties may have taken on multilateral environmental agreements (“MEAs”).

² Written Question P-2778/10 by Catherine Bearder (ALDE), to the Commission, Subject: Inclusion of tar sands in EU-Canada Comprehensive Free Trade Agreement. Ms. Bearder also asked the Commission to respond to media accounts that it had acceded to Canadian pressure that it abandon any plan to regard oil emanating from the tar sands as having a larger carbon footprint than oil derived from conventional sources. The Commission’s reply is largely non-responsive but does indicate that the Commission is simply keeping its options open.

³ P-2778/10EN, Answer given by Mr De Gucht, on behalf of the Commission (26.5.2010)

Before considering the respective positions the Parties have taken in this regard, it is important to appreciate that there is, in fact, little if any trade between Canada and the EU in oil products emanating from the oil sands. Nevertheless, Canada has made thinly veiled threats to invoke trade remedies to challenge European measures relating to the carbon intensity of oil sands products should it proceed with such an approach.

Alberta's Environment Minister Rob Renner is quoted as acknowledging that in making such threats, Canada is not seeking to protect a customer base in Europe, but is seeking to ward off a precedent that other countries might follow.⁴

At the center of this conflict are options currently under review for implementing a EU Fuel Quality Directive that mandates that suppliers shrink the carbon footprint of transport fuels. Because the carbon intensity of products derived from the oil sands are estimated to be substantially higher than for conventional oil sources, the EU is being urged to adopt a distinct value for such oil products.

Canada has lobbied vigorously against such an approach, which it characterizes as representing an unwarranted barrier to international trade. However, it has been more explicit about invoking trade rules to challenge clean fuel standards recently adopted by California. Because few, if any, oil sands products find their way to Europe, it is not clear that Canada would have standing to mount a trade challenge to EU standards that have no direct bearing on its ability to trade such oil sands products. Certainly it would not be entitled to establish meaningful retaliatory measures even should it prevail in such a dispute.

Given its determination to discourage the EU from establishing a special value for fuels derived from the oil sands, it is virtually certain that Canada will resist the inclusion of any CETA provision that might truly establish an international trade precedent for balancing trade liberalization with the need to combat climate change.

In several respects the Parties' negotiating positions simply reflect their respective positions on climate change. The EU proposals would expand the scope for climate change related measures within the CETA framework. On the other hand, Canada is unwilling to include the Kyoto Protocol as one of the MEAs listed under CETA, even though it is a signatory to that agreement.

Existing trade rules do not accommodate measures needed to combat climate change

It is beyond the scope of this analysis to describe the complex intersection of trade and environmental policy objectives. For present purposes, it is sufficient to describe the problem of according different treatment to goods, that are essentially indistinguishable as finished products, based on the production and process methods for extracting or producing them. Measures that would distinguish between crude oil products on this basis would certainly be vulnerable to challenge as offending trade rules that prohibit import restrictions that

⁴ Geoff Dembicki, Why Europe Could Decide the Fate of Canada's Oil Sands, Oct 20, 2010, TheTyee.ca

discriminate among “like goods” or products. These are set in the basic framework of the General Agreement on Tariffs and Trade (GATT).⁵

While measures that seek to make such distinctions may be defended under certain reservations for environmental and conservation measures that are allowed under Article XX of the GATT, attempts to rely upon these exceptions have consistently proven unsuccessful.⁶

The incorporation of a “Climate Chapter” to CETA

A recent report by the European Parliament’s Committee on International Trade⁷ has called upon the European Commission to ensure that the EU’s commitment to combating climate change is asserted as a prominent feature of any international trade agreements to which the European community is a Party. The Committee’s position is that the European Union’s climate responsibility cannot be limited to greenhouse gas emissions on its own territory because of the substantial production-related emissions associated with imported fuels.

The Committee’s advice is primarily focused on the need to reform the World Trade Organization (WTO), and while there is no specific mention of CETA, the Committee calls upon the EC to incorporate a ‘climate chapter’ to all trade agreements, including free trade and economic partnership agreements. Such a climate chapter would:

- (i) ensure that trade rules are consistent with and play a crucial role in combating climate change;
- (ii) adopt anti-dumping rules to include the issue of a fair environmental price in accordance with global climate protection standards;
- (iii) allow for carbon labelling;
- (iv) establish strict ecological criteria for public procurement;
- (v) incorporate standards, subsidies, taxes, and quotas that differentiate products according to their production process and method, which would be applied to both European and imported products according to climate criteria; and

⁵ Article I and III establish the requirement for most-favoured nation, and national treatment. Article XI prohibits quantitative restrictions for imports.

⁶ See for example the report of the International Centre for Trade and Sustainable Development Sustainability Criteria in the EU Renewable Energy Directives: Consistent with WTO Rules?

⁷ European Parliament: DRAFT REPORT on international trade policy in the context of climate change imperatives (2010/2103(INI)) Committee on International Trade – Sept. 2010

- (vi) differentiate among similar products according to their carbon and energy footprints.

EU proposals for CETA fall short of meeting the Committee's recommendations, but these were formulated several months after the draft trade provisions reviewed here. It therefore remains to be seen whether subsequent iterations of the EC position will incorporate the Committee's views more fully. Nevertheless, the EU proposals in the draft of January 2010, do include elements that reflect the need to reconcile trade liberalization with the obligation to combat climate change. These concern exceptions for measures taken to comply with EU obligations under the MEAs to which it is a Party.

Exception for measures taken in accordance with Multilateral Environmental Agreements

The need to reconcile trade liberalization and environmental policies was recently articulated by the European Parliament International Trade Committee when it stressed that:

... the European Union's trade policies – whether bilateral or multilateral – are a means to an end and not an end in themselves, and that these should be consistent with its objectives to combat climate change and should anticipate the conclusion of an ambitious climate agreement;

Given the risks and uncertainty of relying upon the environment and conservation exceptions of GATT Article XX, if policy and regulatory options are to be preserved, CETA must include more robust safeguards for measures needed to address the challenges of climate change. Arguably the best approach would be to include a “climate chapter” within the treaty as the International Trade Committee has recommended.

While EU proposals currently fall short of advocating such an approach, they do seek to preserve some latitude for climate change related measures by proposing a qualified exception for measures taken to combat climate change. In this regard the European Commission has proposed that the term “environment” be broadened to include “terrestrial and marine ecosystems, atmospheric conditions and climate change issues”.⁸ It has also proposed a significant carve-out for measures taken to implement MEAs, including those relating to climate change. In this regard its draft text provides as follows:

Article 2: Multilateral Environmental Agreements

1. The Parties recognise the value of international environmental governance and agreements as a response of the international community to global or regional environmental problems and stress the need to enhance the mutual supportiveness between trade and environment policies, rules and measures. In this context, the Parties

⁸ See EU text re: Sustainable Development (Labour, Environment), CHAPTER X: COMMON PROVISIONS TO CHAPTERS X+1 AND X+2, Article 6: Definitions, at p. 285 of the consolidated text.

commit to consulting and co-operating as appropriate with respect to negotiations on trade-related environmental issues and other trade-related environmental matters of mutual interest.

2. The Parties shall effectively implement in their respective laws and practices, in their whole territories, the Multilateral Environmental Agreements to which they are parties.

3. The Parties will regularly exchange information on their respective situation and advancements as regards additional ratifications of Multilateral Environmental Agreements or amendments to such Agreements.

4. Nothing in this Agreement shall prevent Parties from adopting or maintaining measures to implement the Multilateral Environmental Agreements to which they are party provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade.⁹

Recognizing that WTO rules provide far less latitude for government measures intended to combat climate change, the European Commission has also proposed that disputes relating to such measures be resolved in accordance with CETA, not WTO rules, by proposing that:

In any dispute referred to in paragraph 1 where the responding Party claims that a matter is subject to Article [X – Multilateral Environmental Agreements] and requests in writing that the matter be considered under this Agreement, the requesting Party, in respect of that matter, may have recourse to dispute settlement procedures only under this Agreement.¹⁰

European Commission proposals represent a significant improvement of the status quo in regard to preserving the policy and regulatory options available to governments to combat climate change in general, and to honour their obligations under the Kyoto Protocol and other MEAs in particular.

However, these safeguards are not unqualified, and would remain at the mercy of dispute bodies that have consistently demonstrated a strong bias in favour of trade liberalization outcomes, often to the prejudice of competing public policy objectives including those reflected in MEAs.

As experience with similar MEA safeguards in NAFTA shows, trade dispute bodies are capable of arriving at perverse outcomes when called upon to assess the validity of measures taken under environmental treaties. For instance, in the *S.D. Myers* case, a NAFTA tribunal was called

⁹ Ibid. P. 292

¹⁰ Chapter [14] Dispute Settlement, Section 1: General Provisions, Article 14.3 Choice Of Forum ss.(2), at p. 331

upon to assess a Canadian ban on the export of PCB wastes, which it was obliged to put in place under the Basel Convention.

Because Canada had taken into account the potential impact of allowing such exports on its domestic waste processing industry (which it is obliged under the Basel Convention to establish), the Tribunal characterized the ban as an economic, not environmental measure and ruled against it. In doing so, the Tribunal simply ignored Canada's obligation under the Basel Convention to establish and maintain a domestic waste processing industry. It appears to have been entirely ignorant of the political economy of most environmental regulation, which often creates economic opportunity.

If the test for the validity of an environmental measure becomes the absence of any domestic economic winner, few environmental measures will survive. In effect, the Tribunal finessed an obvious conflict between Canada's obligations under NAFTA and the Basel Convention by simply refusing to acknowledge the obvious character of the measure at issue. The S.D. Myers case and others raise a serious question about the competence of existing trade bodies to adjudicate disputes involving environmental measures. Neither EU nor Canadian CETA proposals address this problem.

Nevertheless, as proposed, these CETA rules would ameliorate the present risk of such environmental measures being challenged under the WTO, and would begin to address the fundamental imbalance that now exists under international law between trade liberalization and environmental policy objectives.

Also to be noted is that there are inconsistencies in the Draft Text concerning the manner in which the MEA safeguard is to be stated. One version of this safeguard has been described above, the other which remains to be discussed is set out as Article X.06: *Relation to Environmental and Conservation Agreements*, which provides:

In the event of an inconsistency between an obligation in this Agreement and an obligation of a Party under an agreement listed in Annex X, the latter obligation shall prevail provided that the measure taken is necessary to comply with that obligation, and is not applied in a manner that would constitute, where the same conditions prevail, arbitrary or unjustifiable discrimination or a disguised restriction on international trade.] [EC: for discussion and possible placement in [the] environmental group]¹¹

To begin with, the MEAs listed in the Annex to which this Article refers do not include the Framework Convention on Climate Change, or agreements that are or may be negotiated under this framework such as the Kyoto Protocol.¹²

¹¹ CHAPTER XX: INITIAL PROVISIONS AND GENERAL DEFINITIONS, Section A: General Definitions, p.9.

¹² Annex X.05: Multilateral Environmental Agreements

(a) The *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, done at Washington on 3 March 1973, as amended on 22 June 1979.

Also problematic is the inclusion of the proviso that MEA related measures may be upheld if the Party taking the measure can prove that it is necessary to comply with Agreement. This ‘necessity test’ is one that has been considered on several occasions by trade dispute bodies called upon to interpret the scope of GATT Article XX exceptions that establish a similar test. This has invited trade tribunals to second-guess the results of the complex compromises that underlie most environmental initiatives, notwithstanding their typical lack of relevant qualification or competence. Even more problematic is that, as interpreted by these tribunals, a Party taking the measure is put to the impossible task of proving a negative, namely that it has:

- i) assessed all other options for meeting a particular environmental goal;
- ii) assessed each to determine the extent to which it will impact on international trade; and
- iii) chosen that option above all others.

Not surprisingly, the test has been virtually impossible to meet.

It is also noteworthy that the MEA safeguard being proposed would represent a significant retreat from similar provisions set out in NAFTA, which does not include a ‘necessity test’.¹³ Fortunately, the EU has apparently identified these problems by indicating that these provisions are “*for discussion and possible placement in [the] environmental group.*”¹⁴

(b) The *Montreal Protocol on Substances that Deplete the Ozone Layer*, done at Montreal on 16 September 1987, as amended 29 June 1990, as amended 25 November 1992, as amended 17 September 1997, as amended 3 December 1999.

(c) The *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, done at Basel on 22 March 1989.

(d) The *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, done at Rotterdam on 10 September 1998.

(e) The *Stockholm Convention on Persistent Organic Pollutants*, done at Stockholm on 22 May 2001.

¹³ See NAFTA Article 104 which after listing four MEAs, provides that: such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.

¹⁴ *Ibid.* p.9

PART II: THE POTENTIAL IMPACT OF CETA RULES ON CANADIAN MEASURES RELATING TO THE OIL SANDS

It remains to be seen what final form proposed CETA investment rules will take. Canada is proposing a slightly modified version of the investment disciplines of NAFTA. These include authorizing direct claims by foreign investors to seek monetary compensation for measures that fail to comply with the broadly worded constraints on public policy and law affecting, even if indirectly, foreign investment. Canada's proposals are included in the draft consolidated text without comment by the EU.

Because of the virtually unconstrained access EU oil companies would have to recourse under these private dispute procedures, and the very broadly-worded constraints they would impose, these proposed investment rules represent a serious threat to environmental and conservation measures established to curtail oil sands development or address environmental impacts, including climate change, associated with them. Moreover, the very existence of such constraints acts as strong deterrent to the establishment of such measures.

Several EU based oil companies, including BP, Shell, and Total,¹⁵ have major investments in the oil sands, and would be beneficiaries of the CETA investment rules. It is beyond the scope of this assessment to delve into all of the complexities of CETA investment rules; rather the focus here is on those elements of this investment regime that bear most directly upon the regulation of oil sands activities. The essential architecture of these investment rules engenders the following rights.

The unilateral right of EU oil companies to enforce CETA investment rules

The most important feature of CETA investment rules is the right it would accord EU based oil companies to invoke international arbitration to recover monetary compensation where the rights they are accorded under CETA are breached. These rights currently exist under numerous bi-lateral investment treaties to which EU countries are Parties, usually with developing countries. But such private claims are not permitted under the WTO, nor are they a feature of any agreement between Canada and the EU.

Pursuant to these proposed rules, such investor disputes, including claims to substantial compensation, are decided by international arbitration panels operating in accordance with norms established for resolving private commercial disputes. Because of their pedigree, these procedures have no regard to third party rights or the broader public interest that is often at stake when foreign corporations challenge domestic measures established for valid public policy reasons.¹⁶

¹⁵ Statoil also has a significant stake in the oil sands, but Norway isn't a member of the EU.

¹⁶ C. Chinkin, *Third Parties in International Law*, (Oxford: Clarendon Press, 1993) at 248-249.

Moreover, unlike the state-to-state dispute procedures, investor-state claims engender no element of reciprocity because foreign investors have no obligations under the treaty they are given the right to enforce. The effect is to remove an important constraint that discourages a state from seeking the enforcement of rules that it must observe itself.¹⁷ While diplomatic and strategic considerations may reduce the likelihood of state-initiated trade challenges to Canadian export or import controls, these factors have little relevance to the concerns of foreign investors. Because investor rights are broadly defined and investor-state claims so readily invoked, these proposed CETA rules present a significant threat to progressive environmental or resource conservation measures that may affect the bottom line of EU companies operating in the oil sands. It is the private right of enforcement that gives the following substantive investor rights their force and effect.

The right to invest and expand operations in the oil sands

Article X.1(4) *Scope and Coverage* of Canada's draft text provides:

Articles [X.04] (Cross-Border Trade in Services – Market Access) and [X.07] (Cross-Border Trade in Services – Domestic Regulation) are hereby incorporated into and made a part of this Chapter and apply to measures adopted or maintained by a Party affecting the supply of a service in its territory by a covered investment.

The Market Access services rules¹⁸ referred to provide as follows:

Neither Party may adopt or maintain, either on the basis of its entire territory or on the basis of the territory of a sub-national government, measures that:

(a) impose limitations on:

(i) the number of service suppliers, whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test;

(ii) the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

(iii) the total number of service operations or the total quantity of services output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; ...

¹⁷ Howard Mann, *Private Rights Public Wrongs*, International Institute for Sustainable Development, 2001.

¹⁸ These rules are imported from Article XVI of the General Agreement on Trade in Services (GATS) under the WTO. However, unlike CETA, GATS Market Access rules apply only to designated services and then only subject to qualifications the Parties may unilaterally nominate. Under CETA investment rules all services are included unless explicitly exempt.

The relevance of these services rules to investment in the tar sands becomes apparent when one appreciates that oil sands production, from mining or in-situ extraction, through upgrading refining and transportation, may be regarded simply as an aggregation of the services involved in each aspect of the production process. Under these rules, any attempt by a Canadian government to regulate the extent or pace of tar sands development by EU based oil companies would arguably be vulnerable to challenge, including by way of the private dispute procedures that would be authorized under the regime (discussed below).

Moreover, by including market access rules as an element of foreign investor rights, Canada is proposing to significantly expand the rights accorded to such investors to establish and expand operations in Canada that currently exist under the National Treatment provision of NAFTA investment rules.

Nevertheless, the obligation to accord foreign investors non-discriminatory, or *National Treatment*, is also included in CETA draft investment rules. Thus, Article X.3: *National Treatment*, provides:

*Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*¹⁹

The important distinction between *National Treatment* and *Market Access* rules is that the former imposes a qualified constraint on government efforts to control the extent or pace of investment – under the latter, that constraint is absolute. Thus if the Alberta government should decide at some point to heed calls, by environmentalists and the industry alike, to slow the pace of tar sands development, it would be entitled to do so under National Treatment as long as its restrictions were applied in the same manner to Canadian and EU oil companies. However, under Market Access rules, any restriction on the: number of service suppliers; the total value of service transactions or assets; the total number of service operations; or the total quantity of services output expressed in terms of designated numerical units in the form of quotas – is simply prohibited.

While the notion of unregulated oil sands development may seem extreme to those concerned with the environment, it is entirely consistent with the free market ideology that provides the essential foundation of the CETA agenda. According to this theory, concern about the environmental consequences of such unconstrained development can be addressed through proper environmental regulation.

¹⁹ National Treatment also applies to government measures which are formally or facially neutral, but which effectively treat foreign goods, investors and service providers in a discriminatory manner. Thus a Canadian ban on PCB wastes, that applied to all companies operating in Canada, was nevertheless found to offend National Treatment because it discriminated against a US company with treatment facilities in the US.

However even that argument is difficult to credit, given the significant constraints CETA rules would impose on the regulatory authority of governments to address the environmental impacts of oil sands operations. These constraints are considered next.

The right to challenge environmental regulation of oil sands activities

There are several provisions of CETA investment rules that would entitle EU based oil companies to challenge environmental regulation of oil sands operations. As noted, Article X.1(4) of Canada's Draft Text would incorporate rules concerning Domestic Regulation which are set out in the Services provision of CETA. These in turn incorporate by reference Article VI:4 of the WTO General Agreement on Trade in Services (GATS).²⁰ Those rules have generated considerable controversy because of the serious constraints they would impose on all manner of service sector regulation, including for environmental protection purposes. However, it is beyond the scope of this assessment to examine the state of play of those negotiations. Rather the focus here is primarily on the expropriation provision that is a central feature of the proposed CETA investment regime, which provides as follows:

1. Neither Party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation"), except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on payment of compensation in accordance with paragraphs 2 and 3. For greater certainty, this paragraph shall be interpreted in accordance with Annex X.9.1 on the clarification of indirect expropriation.

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place...²¹

This provision on expropriation establishes the right to compensation, at fair market value, in every case of direct or indirect expropriation. This unqualified right to compensation represents a substantial departure from Canadian legal principles concerning expropriation, which have always reserved to parliaments and legislatures the right to determine when and to what extent compensation will be paid when governments expropriate property.²² Moreover, the broad

²⁰ Article X-06: Domestic Regulation

The Parties note their mutual obligations related to domestic regulation in Article VI:4 of the WTO General Agreement on Trade in Services (GATS) and reaffirm their commitment respecting the development of any necessary disciplines on domestic regulation. To the extent that any disciplines on domestic regulation are adopted under the GATS, the Parties will, as appropriate, review them jointly with a view to determining whether this Article should be supplemented.

²¹ Canada: Investment Disputes 157

²² Schneiderman, *Nafta's Takings Rule: American Constitutionalism Comes to Canada* (1996) 46 U.T.L.J. 499

definition accorded investments under the proposed rule, which includes intangible property and virtually all equity, debt and contractual interests in an investment, significantly expands the range of property interests that might be entitled to compensation under Canadian law.

In large part this provision replicates Article 1110 of NAFTA, which has been invoked on several occasions to challenge non-discriminatory environmental regulations because expropriation is defined under NAFTA to include measures “tantamount” to expropriation. While some of these claims have failed, others have succeeded, including challenges to Canadian fuel additive regulations and hazardous waste export control measures. Moreover, the very existence of this remedy is sufficient to chill the ambition of a government considering progressive environmental regulation.

However, the variant of Article 1110 replaces the concept of a measure being “tantamount to expropriation” with that of “indirect expropriation”. While this may reduce the likelihood of challenges to environmental regulations of general application, such as those that regulate tailings ponds, air emissions or site reclamation, it does not preclude them. Unlike measures related to foreign investment which would be exempt from CETA investment dispute procedures,²³ nothing in the proposed text would prevent an EU based oil company from invoking international arbitration to claim compensation arising from the costs or impacts of oil sector regulation.

As noted, simply the exposure to such claims may act as a significant deterrent to such regulation. However, the right to bring a claim does not guarantee success, and Canada has proposed that “indirect expropriation” be defined in a manner that would make it more difficult to succeed with such a claim than is the case under NAFTA. Thus “Indirect Expropriation” is to be defined as follows:²⁴

The Parties confirm their shared understanding that:

1. Indirect expropriation results from a measure or series of measures of a Party that has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

2. The determination of whether a measure or series of measures of a Party constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

(a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the

²³ Supra note 1, Annex X-34.1; Exclusions from Dispute Settlement, p. 172

²⁴ See Annex X.9.1: Indirect Expropriation, Draft Text at p.170

economic value of an investment does not establish that an indirect expropriation has occurred;

(b) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and

(c) the character of the measure or series of measures.

3. Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.

The addition of Annex X9.1 does represent a distinct improvement over NAFTA rules, nevertheless given the chilling effect of exposure to such claims, one must ask why – given the fully developed state of Canadian and EU law relating to the protection of property – it is necessary to accord wealthy corporations with such extraordinary rights and remedies.

However, the most problematic aspect of this proposed rule on expropriation is not the opportunity it creates for harassing environmental protection initiatives, but rather its potential use to secure ongoing access to the resource and energy inputs necessary to sustain and grow oil sands production. This problem is considered next.

The right to water for oil sands production

As we know, oil sands production depends upon the availability of large amounts of water and energy as inputs to the extraction and production process. A description of oil sands water demands prepared by an authoritative environmental group illustrates the pressure being exerted on regional water resources:

- Each barrel of oil requires 2 to 4.5 times as much water to produce.
- Approved and operating oil sands operations are allowed to withdraw 349 million cubic metres (m³) of water per year—that’s enough water to meet the needs of a city of two million people, a population twice the size of the City of Calgary.
- Planned oil sands projects will increase water withdrawals more than 50% higher to 529 million m³ per year— more water than is used by the City of Toronto in a year.
- Oil sands represent 65 % of the water withdrawals from the Athabasca River.

- Almost all of the water withdrawn from the Athabasca River for oil sands operations winds up in toxic tailings ponds – contaminated water from these ponds is recycled to the extent possible and is not released back into the ecosystem.
- Continued water withdrawals in the winter when river flows are naturally lower threaten the sustainability of fish habitats.²⁵

At some point these pressures must prompt government action to address the unsustainable use of water resources. If this intervention restricts access to provincial waters, the results may reduce production and profits for companies dependent upon unrestricted access to water.

This scenario is one considered in an article published in the prominent *University of Toronto Law Journal*. While the point of departure is a US oil company asserting rights under NAFTA investment rules, the scenario is one that would apply equally to an EU based oil company asserting rights under CETA. Moreover, as noted, proposed CETA market access rules would substantially expand the opportunity to assert the type claim the article describes:

*An [oil company] owns all, or a portion of, an Alberta oil sands development. To facilitate bitumen recovery, the corporation holds a water license under Alberta's Water Act. ... due to a lengthy period of drought the Director, pursuant to his or her powers under s.55(2) of the Water Act, cancels or suspends the corporation's water license on the basis that the aquatic environment of a particular region is in critical danger. This outcome could clearly result in a significant loss of investment. The water license itself has substantial value since bitumen recovery is not possible, or at a minimum is substantially more expensive, without a readily available water supply. Considering the magnitude of [foreign] investment which exists in Alberta's oil sands, as well as the industry's extreme reliance on water for resource recovery, such an example is within the realm of possibility. Accordingly, this hypothetical creates an interesting and reasonable case study to assess NAFTA's influence on Canada's environmental sovereignty.*²⁶

The authors argue that their scenario has parallels with a successful NAFTA investment claim in the *Metalclad* case. In *Metalclad*, a local government in Mexico denied the claimant's application for a permit to operate a waste disposal site because of concerns about groundwater impacts. The Tribunal reasoned that since the federal government had already issued necessary environmental approvals, it must have been satisfied that it was consistent with environmental protection to do so. The subsequent withholding of necessary permits because of groundwater concerns was therefore unjustified and compensation was awarded to the company. They posit a

²⁵ Dan Woyillowicz and Chris Severson-Baker; Down to the last drop? The Athabasca River and Oil Sands, Pembina Institute, May 2006

²⁶ Cumming, Joseph; Froehlich, Robert, NAFTA chapter XI and Canada's environmental sovereignty: investment flows, article 1110 and Alberta's Water Act. University of Toronto Faculty of Law Review, 3/22/2007

similar argument being made should the government of Alberta attempt to restrict water takings it has already approved.

However, there two other and more likely ways in which CETA investment rules might be invoked to challenge efforts by government to restrict access to water for oil sands production. The first would invoke the market access rights Canada is proposing to establish. Thus any restriction of existing water taking rights, or a refusal to issue new permits, would consequently limit the number, value or services outputs of those providing water services or services that are dependent upon water inputs contrary to market access rules.

The other and more problematic argument would simply assert a proprietary interest in existing water taking permits. Thus any attempt to limit water takings under such a permit would be challenged as a direct expropriation of the permit holder's property. Unfortunately, the recent settlement of a NAFTA investment claim provides strong support for this contention. Because of the importance of this case, it is worth describing in some detail.

Establishing propriety rights to water: *AbitibiBowater v. Canada*

AbitibiBowater is a large forest sector company that announced in 2008 that it would close its pulp and paper mill in Newfoundland, and sell the mill and associated hydroelectric plant, and the water and timber licenses necessary to operate both facilities.

Newfoundland accused the Company of renegeing on commitments to continue its pulp and paper operations, including as a condition of its timber and water licenses, and passed legislation expropriating the company's assets and providing for the reversion of its water and timber rights to the province as the owner of those resources. That legislation allowed for but did not commit Newfoundland to paying any particular level of compensation for the rights, lands and assets being reclaimed or expropriated from the company.

It is clear that Newfoundland was expropriating certain private property owned or leased by AbitibiBowater, including its mill, but under Canadian law the company had no proprietary interest in provincial water and forest resources, only a permit to use them for certain purposes. The water and forest lands at issue were not deeded to the company, and its right to maintain or transfer them were subject to provincial law. Typically, provincial statutes authorizing water taking permits and forest licenses allow the province to impose conditions on those grants and authorize the responsible Minister to rescind those licenses where it is in the public interest to do so.

As for expropriation, Canadian governments are entitled to take private property to achieve a public purpose, such as highway construction. Unlike the United States, private property is not protected under the constitution, and the proposal that Canada follow the US model was rejected when the constitution was repatriated in 1982 and the *Charter of Rights and Freedoms* incorporated to it. In the case of expropriation, governments are free to determine the extent to which compensation will be paid for expropriated property. Proposed CETA investment rules

would negate this prerogative. Thus the CETA rule on *Expropriation and Compensation* provides in part that:

A Contracting Party shall not expropriate ... an investment in its territory of an investor of another Contracting Party except ... accompanied by payment of prompt, adequate and effective compensation ... equivalent to the fair market value of the expropriated investment ...

In other words, under CETA NAFTA, foreign investors have an unqualified right to compensation when governments expropriate their property, and that compensation must reflect the fair market value of the property at issue.

This explains why AbitibiBowater filed an arbitration claim under NAFTA investment rules seeking \$500 million in compensation, rather than seeking recourse in the Canadian courts. While the company relied upon various provisions of the treaty's investment rules, the right to compensation under Article 1110 was foremost. Moreover, in addition to claiming compensation for the physical assets taken by the province, the company also claimed compensation for the expropriation of specific "Water and Waterpower Rights"²⁷ and of certain "Timber Rights and Rights to Land".²⁸

These aspects of its claim raised profound questions about the nature of public ownership and control of forest land and water resources which are held by provincial governments on behalf of the people of the province.

Rather than defend Newfoundland's right to determine the use of such public resources, the federal government agreed to settle the company's claim for \$130 million. While the terms of this settlement have yet to be disclosed, in any scenario the result is problematic.

By settling the case, Canada has established a precedent that it must respect in future cases because of its obligation to accord foreign investors *National Treatment*.

The implications for any effort by Alberta to restrict water taking under an existing permit, or one that may be issued in the future, are obvious. In effect, by granting such permits, Alberta is

²⁷ These included water rights in relation to Grand Falls, Bishop's Falls, Star Lake, Buchans Charter Lease Section 8, and even a potential hydroelectric generation at Red Indian Falls (estimated 44MW capacity) and the Badger Chutes (estimated 22 MW capacity) on Exploits River.

²⁸ These included the following claims: (1) 2000 square miles generally Charter Lease Section 8 comprising the Red Indian Lake watershed in west-central Newfoundland (2) 1619 hectares in the vicinity of 1907 Lease Section 3, (3) 965,585 hectares at various locations Non-Renewable Licenses in central Newfoundland (4) 111,163 hectares located in central Private Reid Lots and western Newfoundland, including in particular the Reid Lot 59 lands (including the Grand Falls Mill, Grand Falls House, the AbitibiBowater Mill Manager's House, the Ambient Air Monitoring Station, and considerable additional lands suitable for residential and commercial development) (5) 72,782 hectares located in central Crown Reid Lots - 725 hectares comprised of lots on Victoria River.

effectively giving an EU oil sands producer a permanent and proprietary claim to water which it may protect under CETA investment rules.

Finally, it is important to note the potential role that GATT environment and resource conservation exceptions might play in defence of measures to curtail unsustainable water use. In this regard, the draft CETA text provides:

For the purposes of Chapter X (Investment):

(a) *a Party may adopt or enforce a measure necessary:*

(i) to protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life or health,

(ii) to ensure compliance with domestic law that is not inconsistent with this Agreement, or

(iii) for the conservation of living or non-living exhaustible natural resources;

(b) *provided that the measure referred to in sub paragraph (a) is not:*

(i) applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or

(ii) a disguised restriction on international trade or investment.

[EC comment: for discussion in groups dealing with services, investment, and sustainable development]²⁹

It is beyond the scope of this opinion to parse the substantial body of trade jurisprudence that has considered, but accorded very narrow scope, to these reservations. The more important point is that even if a measure manages to satisfy the “necessity” and other tests established by these reservations, it would not obviate the requirement to compensate an investor if the measure was found to have directly or indirectly expropriated its property.

Thus, as noted, under the proposed CETA expropriation rule:

Neither Party may nationalize or expropriate a covered investment either directly, or indirectly ... except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on payment of compensation ...

²⁹ Supra note 1, Investment p. 359

Thus under the proposed rule on expropriation, a Party might rely upon the exception for conservation measures to defend its measure as being implemented “for a public purpose and in accordance with due process of law”. But under the above-noted provision, this would not obviate its obligation to compensate the permit holder for the full market value of the water rights repatriated to public control.

In other words, a Party “may adopt or enforce a measure” that seeks to terminate all or some portion of a water-use permit if it can establish that the measure is “necessary ... for the conservation of living or non-living exhaustible natural resources”. Following from *AbitibiBowater*, it would nevertheless have to compensate the permit holder for having expropriated its property.

In sum:

The conclusions drawn from this analysis have been set out above and will not be repeated here. Suffice it to say that the proposed trade agreement between Canada and EU will have a substantial impact on efforts to address the local, regional and global impacts of oil sands developments. If CETA fails to significantly improve on the norms for such trade agreements, it will only add to the serious impediments that now exist under NAFTA and WTO agreements to establishing effective measures to combat climate change. Moreover, present proposals for CETA investment rules would seriously exacerbate current problems by providing EU based oil companies with new rights to challenge efforts to contain the pace or character of oil sands development.

Yours truly,



Steven Shrybman
SS:lbr/cope 343

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