

SURPRISE UNDER THE TABLE: INSPIRATIONS FROM THE CANADA-EU CETA FOR ENHANCING GLOBAL AGRICULTURE ENVIRONMENT BY FTAS

DR. XING, LIJUAN *

SYNOPSIS

This article takes two perspectives not commonly found in the extensive literature that has emerged on the subject of “agri-environment and trade.” First, it examines possible positive impacts of the Canada-EU CETA on the agri-environment in Canada by offering comparisons between pertinent regulatory frameworks in the two parties to the CETA on grounds that differences in levels of the integration of environmental concerns into regulations on agricultural issues will result in enhancement of agricultural production method and domestic support strategy for agricultural development in Canada. Second, the article sheds light on possible positive impacts of FTAs on the improvement of the global agri-environment, which has not been widely recognized. Both of these perspectives can help us see how freer trade in the context of addressing sustainable development would help enhance the agri-environment globally even though domestic agri-environmental measures are not on the negotiating tables of FTAs. Some of the main findings in this article include the following: (i) agri-environmental measures adopted by the EU, which are off the negotiating table of the Canada-EU CETA, may produce positive impacts on the agri-environment in Canada as a result of large concessions made by the EU for market access of

* Dr. Xing, Lijuan is an assistant professor at City University of Hong Kong School of Law. The author gives her special thanks to the Center for International Trade and Agriculture at the University of Kansas School of Law, which has provided valuable support for the completion of this article.

Canadian agri-exports; (ii) in addition to prospective freer trade between the two parties, the realization of positive environmental impacts also relies on the differences in levels of environmental protection in the agricultural sector between Canada and the EU; (iii) in Canada, both a shift in agri-production methods toward a more environmentally-friendly method and a reform of domestic support schemes for agricultural development provided by the Canadian government toward a more sustainable approach can be foreseen as potential positive impacts of the CETA on the agri-environment; and (iv) positive environmental impacts can also be expected from most FTAs in the global context of addressing sustainable development, if certain prerequisites are met, as indicated by the CETA case.

INTRODUCTION

Leaders of Canada and the European Union (EU) announced, at the Canada-EU Summit on May 6, 2009 in Prague, Czech Republic, the launch of negotiations toward a Comprehensive Economic and Trade Agreement (CETA). This CETA was based on their *Joint Study on Assessing the Costs and Benefits of a Closer EU-Canada Economic Partnership* publicly released in October 2008 and the *Canada-European Union Joint Report: Towards a Comprehensive Economic Agreement* in March 2009.¹ As the fifth largest agricultural exporter in the world,² the conclusion of the CETA has given Canada a huge opportunity to expand its agri-exports to the EU. The Canadian government foresees an increase of 41.8% in its exports of primary agriculture to the EU, 141.7% in processed foods, and 16.1% in fishing as a result of the prospective concessions in market access made by the EU under the CETA.³ Despite the optimistic estimates for Canada's agri-exports, the CETA negotiations on agri-trade have been predicted to be largely onerous in

¹ Canada, Trade and Development Canada, *Canada-European Union: Comprehensive Economic and Trade Agreement (CETA) Negotiations*, online: Trade and Development Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/negotiations-negociations.aspx>>.

² Canada, Agriculture and Agri-Food Canada, *We Grow a Lot More Than You May Think*, online: Agriculture and Agri-Food Canada <<http://www.agr.gc.ca/eng/about-us/publications/we-grow-a-lot-more-than-you-may-think/?id=1251899760841>>.

³ Canada, Trade and Development Canada, *Initial Strategic Environmental Assessment (ISEA) of the Canada-European Union Comprehensive Economic and Trade Agreement (2012)* at Appendix A - Economic and Environmental Analysis Tables, Table 1: Changes in Canada's exports to the EU in 2007 Prices, online: Trade and Development Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/initialEA-ceta-aecg-EEinitiale.aspx?lang=eng>> [ISEA].

the context of the “stranding” of the Doha Round. “With the Doha Round not yet (and maybe never) completed, all of the [agri-trade] issues, in theory, come under the ambit of the Canada-EU negotiations—*everything is on the table.*”⁴

Although agriculture has a heavy footprint on key environmental issues such as climate change, pesticides, soil protection, water management, biodiversity conservation, genetic resources and general modified organisms (GMOs), the all-embracing negotiations on agri-trade under the CETA have not seemed to emphasize agri-environmental measures. This lack of emphasis is due to the confidence of both sides in the high levels of environmental protection adopted by them respectively. They have agreed to maintain those levels in the context of the CETA negotiations.⁵

Agri-environmental concerns arising from the CETA can be further relieved by the outcome of environmental assessments conducted by Canada and the EU—both parties have observed that possible environmental impacts of the CETA on Canada will be slightly adverse. However, it seems to me that the entire picture of the CETA’s environmental impact is bigger than that general observation. Significant positive impacts are also quite possible in spite of the fact that agri-environmental measures are largely off the negotiating table. I intend to offer my own views by examining the different levels of protection in the EU and Canada, and by exploring how the perceived distinctions may improve the agri-environment in Canada under the CETA.

I begin in Part I of this article by exploring some preliminary distinctions that will help us study both the Canadian and EU approaches toward addressing agri-environmental issues. These approaches have been evident in both the bilateral free trade agreements (FTAs) concluded by the two countries, as well as the environmental assessments they conducted. In Part II, I proceed to offer some observations about differences in the level of protection as reflected by the EU and Canadian regulatory frameworks. I also offer some elaboration on how those distinctions guarantee foreseeable improvements of the agri-environment in Canada. In Part III I turn to the subject which could predict positive environmental impacts of FTAs on the

⁴ Crina Viju, William A Kerr & Cherine Mekkaoui, “Everything is on the Table: Agriculture in the Canada-EU Trade Agreement” Canadian Agricultural Trade Policy and Competitiveness Research Network, online: Canadian Agricultural Trade Policy and Competitiveness Research Network, 2010 <http://www.uoguelph.ca/catprn/publications_commissioned_papers.shtml>.

⁵ ISEA, *supra* note 3.

global agri-environment. I provide a brief review of my views in my Concluding Observations.

I) AGR-ENVIRONMENTAL CONCERNS IN THE FTAs OF CANADA AND THE EU

Environmental concerns, as a cross-cutting issue of bilateral trade relationships, have been addressed in the FTAs concluded by Canada and the EU in the past decades. However, they have been addressed in different manners and at different levels. The differences are further manifested through the approaches and findings of their environmental assessments of the prospective CETA. Nevertheless, agri-environmental measures, which bear a close connection to the level of protection, are not placed on the negotiating table due to certain principles acknowledged by international law.

A) Environmental elements in the FTAs of Canada and the EU

Both parties have used the term “environment” or its equivalent in a broad sense in their FTAs, covering various issues thereunder. A comparison between the pertinent provisions of the FTAs of Canada and the EU reveals some distinctions in their approaches toward addressing environmental concerns in bilateral trade relationships.

1) In Canada’s FTAs

As of August 2013, Canada has concluded side agreements on the environment as part of its FTA packages with Chile, Costa Rica, Peru, Colombia, Jordan, and Panama. The coverage of those side agreements is determined based on the definition of “environmental laws” provided therein, which is

...statutory or regulatory provisions of a Party, including legally binding instruments made pursuant to such provisions, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through:

- (a) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants;
- (b) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto; and

(c) the conservation and protection of wild flora or wildlife, including endangered species, their habitat, and specially protected natural areas in the Party's territory.⁶

The above definition can be found in the *Agreement on the Environment between Canada and Jordan* and the *Agreement on the Environment between Canada and the Republic of Panama*. According to that definition, environmental concerns covered by the pertinent FTAs mainly include (i) sustainable use of natural resources; (ii) the prevalence of international environmental obligations over FTA obligations; (iii) a commitment to not weaken domestic law regarding environmental protection; (iv) environmental concerns as general exception to trade measures; (v) maintaining a high level of protection; (vi) enforcement of domestic environmental laws; (vii) conducting environmental assessments; (viii) facilitating trade in environmental goods; (ix) providing remedies for environmental complaints; (x) preserving biodiversity; and (xi) cooperating in establishing complaint mechanisms.⁷ These concerns, however, do not attempt to clarify the issues encompassed in the relationship between trade and the environment or specific targets on environmental protection pursued by the FTAs, etc.

2) In the EU's FTAs

The EU has concluded FTAs with Chile, Korea, Mexico, and South Africa as of August 2013. Environmental provisions are included in the texts of all of its FTAs, and no side agreements on the environment are adopted. Unlike Canada, the EU does not define "environmental laws" or its equivalence in its FTAs. However, all environmental concerns covered by Canada's FTAs have been embraced by the EU's. In addition, the EU has explicitly emphasized both (i) general exceptions to free trade measures justified by Article XX of the *General Agreement on Tariffs and Trade (GATT) 1994*—that is, prohibitions or restrictions on imports, exports, goods in transit or trade in used goods justified on grounds of the protection of health and life of humans, animals or plants, which do not constitute means of arbitrary or unjustifiable discrimination or disguised restrictions on trade;⁸ and (ii) the

⁶ *Agreement on the Environment, Canada and Jordan*, 28 June 2009, Can TS 2012, art 1(1)(c) No 23 online: Environment Canada <<https://www.ec.gc.ca/international/default.asp?lang=En&n=82AC9E31-1>>.

⁷ *Agreement on the Environment between Canada and Panama*, 14 May 2010, Can TS 2013 No 10, online: Environment Canada <<http://www.ec.gc.ca/caraib-carib/default.asp?lang=En&n=F32C0CA6-1>>.

⁸ *Economic Partnership, Political Coordination and Cooperation Agreement, European Union and Mexico*, art 22, 34, 8 December 1997, 276 EUR TS 45, [EU-Mexico FTA].

priority of the fulfillment of legitimate policy objectives, such as the protection of national security, health and the environment, over measures to facilitate trade under FTAs.⁹

The EU has also gone further than Canada in at least two respects with regard to the integration of environmental benchmarks into trade measures under its FTAs. First, the EU has labeled “sustainability” an “attribute,” rather than an “opposite,” of international trade. In other words, international trade that will adversely impact the environment should be eliminated. The EU-Korea FTA explicitly subjects its provisions to *Agenda 21 on Environment and Development of 1992*, the *Johannesburg Plan of Implementation on Sustainable Development of 2002* and the *2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work*, and declares its intent “to promote the development of international trade in such a way as to contribute to the objective of sustainable development and ... to ensure that this objective is integrated and reflected at every level of their trade relationship.”¹⁰ Second, the EU has pushed its FTA partners to materially drive regional cooperation in environmental protection by virtue of FTA obligations.¹¹

B) Agri-environmental issues in the CETA negotiations

Both Canada and the EU have conducted environmental assessments of the prospective CETA. The aims of those assessments, unlike the environmental provisions in FTA texts, are to provide objective evaluation of potential environmental impacts of the implementation of pertinent FTAs. Both parties have detected minor adverse impacts of the CETA on Canada’s environment. Meanwhile, the EU briefly mentions possible positive impacts of the CETA in its report.

1) Environmental assessment conducted by Canada

The Canadian government released an Initial Strategic Environmental Assessment (ISEA) of the CETA in February 2012.

⁹ *The EU-South Korea Free Trade Agreement*, art 6.1, 16 September 2010, 2011 OJ L127/6 [EU-South Korea FTA].

¹⁰ *Ibid*, art 1.1, 13.1(1).

¹¹ *Trade, Development and Cooperation Agreement, European Union and South Africa*, 11 Oct 1999, 1999 OJ L311/3, art 61 [EU-South Africa FTA].

According to the ISEA, “in the aggregate, any direct impacts the CETA negotiations may have on the Canadian environment are likely to be minor.”¹² Specifically, for production within Canada:

With respect to trade in goods, a CETA with the EU is expected to increase Canadian exports in a number of sectors that currently face tariff and non-tariff barriers. The resulting changes in output could generate environmental impacts both as a result of emissions and waste from the production of goods themselves, impacts on resource consumption, as well as effects from increased transportation activity.¹³

Despite the general observation provided above, Canada feels confident that it can partially offset the adverse impacts, on grounds of the following expectations:

It is expected, however, that the majority of these impacts would be offset by a variety of mitigating factors. For example, mitigating factors such as increased efficiencies in production processes resulting from composition and technique effects on production would serve to reduce the environmental effects of such increase in production.¹⁴

Canada also analyzes possible environmental impacts arising from imports from the EU, and concludes that, “[g]iven that both Canada and the EU have high environmental standards, the risks to Canada from potential environmental hazards in goods imported from the EU are expected to be appropriately addressed.”¹⁵

2) Environmental assessment conducted by the EU

The EU relies on Trade Sustainability Impact Assessments (SIA) as a policy tool for the prior assessment of the economic, social and environmental implications of a trade negotiation.¹⁶ In June 2011, the EU released *A Trade SIA Relating to the Negotiation of a Comprehensive Economic and*

¹² ISEA, *supra* note 3.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Colin Kirkpatrick, *Sustainability Impact Assessments* (commissioned report by the European Commission), online: <http://ec.europa.eu/trade/policy/policy-making/analysis/sustainability-impact-assessments/index_en.htm> [SIA].

*Trade Agreement (CETA) Between the EU and Canada.*¹⁷ This contains general observations of possible environmental impacts of the CETA on Canada which are quite similar to those provided in Canada's ISEA. Overall, the CETA will have an adverse impact on land and soil usage, water use and quality, biodiversity, air pollution, waste, and fisheries in Canada. These effects would result from a massive increase in production due to freer trade.¹⁸

Various sectors covered by the SIA include agriculture, processed agricultural products (PAPs) and fisheries. It predicts that, "[i]n Canada, significant degrees of liberalisation would produce pronounced [economic] gains for the beef and pork sectors."¹⁹ From the environmental perspective, however, a full removal of tariffs under the CETA will likely have an adverse environmental impact on the agriculture and PAPs sectors because of increased output of Canadian products, according to the SIA, as elaborated below:

This higher demand [for output] will require an intensification of agriculture to be achieved by increasing chemical inputs, changing the distribution of crop production, and potentially encroaching onto marginal or other productive lands. These changes will affect land usage and quality, water usage and quality, air pollution, biodiversity and waste creation ... Liberalisation of beef and pork, in particular, could potentially lead to greater herd size in Canada, potentially leading to increased release of methane as a by-product.²⁰

....

For fisheries, the primary environmental risk is that the CETA could lead to a reduction in fish stocks in certain parts of the Atlantic and increased reliance on aquaculture. Fish farms are associated with a number of environmental impacts, from reductions in water quality to negative interactions with surrounding wild species.²¹

In addition, the EU touches on potential *positive* impacts of the CETA on Canada's environment on the grounds of a foreseeable shift in its

¹⁷ EC, Commission, *A Trade SIA Relating to the Negotiation of a Comprehensive Economic and Trade Agreement (CETA) Between the EU and Canada*, [2011] Trade 10/B3/B06, Final Report.

¹⁸ SIA, *supra* note 16 at 87-100.

¹⁹ *Ibid* at 15.

²⁰ *Ibid* at 16.

²¹ *Ibid* at 50.

“process of production” compelled by pertinent EU standards. One of the focal sectors in that regard is hormone-free beef.²²

The EU basically holds that, even if it makes large concessions for market access of Canadian beef, *actual* gains for Canada “would likely be limited to [being] *moderate*, with EU rules of origin and ban on hormone-treated beef likely to limit potential gains and/or require the passing of an adequate amount of time for Canadian producers to adjust to increased access.” Furthermore, increased access would also likely require “greater investment in processing plants in Canada that meet EU standards.”²³ Meanwhile, the EU explicitly points out in the SIA that “it is unlikely that the [Non-Tariff Barriers] such as the ban on hormone beef will be removed, any increase in beef production that occurs is likely to come from hormone-free beef.”²⁴

In spite of the extra time and investment required by an actual increase in Canada’s beef-exports, the EU acknowledges that the increase in beef output in Canada will benefit the environment there in at least two respects. First, an increase in beef production will have a positive impact on “land and soil usage with potentially more land converted into pasture for cattle” because “[p]asture has a lower degree of soil degradation than cropland, and can be suitable as a habitat for certain species, which could improve diversity.”²⁵

Second, if the CETA enlarges Canada’s access to duty-free exports of hormone-free beef, the production methods of the beef industry within Canada will be positively impacted, as explained below:

While maintaining the EU’s ban on hormone free beef would likely limit Canadian producers’ ability to realise gains from improved market access, it is expected that large enough concessions would stimulate producers to shift some of the production over the long-term to meet EU requirements.²⁶

Positive impacts on Canada’s environment arising from a shift in agri-production methods will not only happen in the beef industry. According

²² *Ibid* at 48.

²³ *Ibid*.

²⁴ *Ibid* at 87.

²⁵ *Ibid*.

²⁶ *Ibid* at 15.

to the SIA, sectors such as crops and fisheries will also experience positive impacts due to shifts in production methods:

[I]f increases in crops like wheat are produced using more sustainable practices, such as no or reduced till, the negative environmental impact can be mitigated because of reduced emissions and chemical inputs. This trend towards more beneficial agricultural practices can potentially be further supported under CETA through Canadian-European cooperation and European preferences for sustainable products.²⁷

....

Increased Canada-EU collaboration could also provide greater impetus for the development of more sustainable fishery practices, such as the use of separate containment tanks in aquaculture, maintaining sustainable Total Allowable Catch levels and sustainable fishing practices.²⁸

C) Agri-environmental concerns off the CETA negotiating table

Although the EU has a perceived potential influence on agri-production methods and other aspects of the agri-environment in Canada, agri-environmental measures have not been placed on the CETA negotiating table. This was done on the basis of two principles recognized by international law. One principle is the right to choose the level of protection enjoyed by individual countries or regional economic integration organizations like the EU. The second principle is the increasing recognition of extra-territorial legally-binding effect of environmental laws in those countries or organizations.

1) Right to choose the level of protection

The right to choose the level of protection enjoyed by both the EU and Canada partly accounts for the distinctions in their levels of environmental protection. That right has been consolidated in international trade agreements under the World Trade Organization (WTO), the WTO jurisprudence, EU legal documents, and certain bilateral FTAs.

²⁷ *Ibid* at 16.

²⁸ *Ibid* at 50.

Article 3.3 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the SPS Agreement)²⁹ is widely accepted as manifesting the recognition of that right within the WTO legal framework. That article states that:

Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.

Paragraphs 1 through 8 of Article 5 of the SPS Agreement, as cross-referred to in Article 3.3 above, focus on “assessment of risk and determination of the appropriate level of sanitary or phytosanitary protection.” In other words, either “a scientific justification” or prescribed “assessment of risk” can justify the exercise of the right to choose a higher level of protection by WTO Members.

In the *EC – Hormones* case (DS 48) under the Dispute Settlement Body (DSB) of the WTO, the right to choose a higher level of protection by the EU, as exercised through the EU’s enactment of its community regulations affecting importation of beef from Canada, is confirmed by the Appellate Body (AB).³⁰ The same attitude was present in the AB’s report for the *EC – Asbestos* case (DS135), which again revolves around the high level of protection adopted by the EU. In that case, Canada complained about France’s ban on the importation of asbestos out of human-health concerns, but the AB confirmed the right of the EU to adopt a higher level of protection as based on the relevant international standards.³¹

Within the EU, the high level of protection is legitimized by Article 174 of the *Treaty Establishing the European Community* (the Treaty),³² which states that, “Community policy on the environment shall aim at a high level

²⁹ *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments - Results of the Uruguay Round, Vol 1, 33 ILM 1125 at 1153 (1994) [SPS Agreement].

³⁰ *European Communities – Measures Concerning Meat and Meat Products (Hormones)* (1998), WT/DS26/AB/R, WT/DS48/AB/R (Appellate Body Report) [Measures Concerning Meat].

³¹ *European Communities – Measures Affecting Asbestos and Products Containing Asbestos* (2001), WT/DS135/AB/R (Appellate Body Report).

³² *Treaty Establishing the European Community*, 10 Nov 1997, 1997 (OJ) C340/3 [The Treaty].

of protection [of the environment].” In the communications from the Commission of the European Communities, the EU resorts to the authorization of that right from the WTO by iterating that:

...each Member of the WTO has the independent right to determine the level of environmental or health protection they consider appropriate. Consequently a member may apply measures, including measures based on the precautionary principle, which lead to a higher level of protection than that provided for in the relevant international standards or recommendations.³³

The right to choose the level of protection has also been highlighted in the FTAs concluded by both Canada and the EU. Article 3 of the *Agreement on the Environment between Canada and the Republic of Panama, Level of Protection*, contains the following provisions:

Recognizing the sovereign right of each Party to establish its own levels of domestic environmental protection and its environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and policies, each Party shall ensure that its environmental laws and policies provide for high levels of environmental protection and shall strive to continue to develop and improve those laws and policies and the environmental government that supports them.

Similar provisions can also be found in Article 3 of the *Agreement on the Environment between Canada and Jordan* and Article 2.1 of the *Agreement on the Environment between Canada and the Republic of Columbia*. Similar to the provisions in Canada’s FTAs, the preamble of the EU-Korea FTA provides that:

Recognizing the right of the Parties to take measures necessary to achieve legitimate public policy objectives on the basis of the level of protection that they deem appropriate, provided that such measures do not constitute a means of unjustifiable discrimination or a disguised restriction on international trade, as reflected in this Agreement.

³³ EC, Commission, *Communication from the Commission on the Precautionary Principle* at 10, (2001).

2) *Extra-territorial effect of domestic environmental regulations*

The other justification for prospective influence of EU environmental regulations—especially those affecting production methods—on Canada's agri-environment is the increasing recognition of their extra-territorial effect as having been "acquiesced" to by the WTO jurisprudence.

In the *US – Shrimp* case (DS58), the prohibition of the importation of shrimp products imposed by the United States out of environmental concerns over pertinent process of production, rather than the products themselves, was challenged by its trading partners. Although the *application* of the importation ban at issue was found to be a violation of pertinent WTO rules, the ban—which had an *ad hoc* extra-territorial effect regarding production methods in the exporting countries—was not regarded as problematic. On the contrary, the AB points out that the measures at issue—that is, the prohibitions that intervene in the production methods in other countries out of environmental concerns—fall within the measures justified by Article XX(g) of the GATT as exceptions to free trade measures.³⁴

In addition to the WTO jurisprudence, the EU itself has tried to clarify in its FTAs the extra-territorial effect of its regulations on production method. Article 4 of the Annex IV (Agreement on Sanitary and Phytosanitary Measures Applicable to Trade in Animals and Animal Products, Plants, Plant Products and Other Goods and Animal Welfare) to the EU-Chile FTA³⁵ provides that:

"equivalence for trade purposes" ... means the state wherein measures applied in the exporting Party, whether or not different from the measures applied in the importing Party, objectively achieve the importing Party's appropriate level of protection or acceptable level of risk.

With these two prerequisites it is possible for Canadian exporters to face the challenges posed by the environmental protection of the EU. In the coming section, I will discuss how the EU will impact exports from Canada due to its high level of protection.

To sum up, the general principles acknowledged by international law—i.e., the right to choose the level of protection and the extra-territorial

³⁴ *United States – Import Prohibitions of Certain Shrimp and Shrimp Products* (1998), WT/DS58/AB/R at 125-160 (Appellate Body Report).

³⁵ *Agreement Establishing an Association, European Union and Chile*, 18 November 2002, OJ L352/3 [EU-Chile FTA].

effect of domestic or community environmental regulations—can guarantee the prospective influence of the EU's environmental standards on the production methods in Canada. This is so even if those issues are left off the CETA negotiating table.

II) REGULATORY FRAMEWORKS OF THE AGRI-ENVIRONMENT IN THE EU AND CANADA

In addition to the aforementioned theoretical prerequisites for extra-territorial influence of EU environmental regulations, the *realistic* differences in levels of protection of Canada and the EU can lead to further realization of positive impacts of the CETA on Canada's agri-environment.

A) EU regulatory framework

Generally, three aspects of the EU regulatory framework on agri-environmental issues will impact the performance of Canadian exporters: (i) environmental measures applied to agri-imports; (ii) environmental measures universally applied to agri-products originating in the EU and imported from a third country; and (iii) the greening of the Common Agricultural Policy (CAP).

1) Environmental measures applied to agri-imports

Some EU regulations, directives, and decisions exclusively prescribe environmental measures relating to agri-imports. For example, Regulation (EC) No 398/2009³⁶ provides the latest provisions on the protection of species of wild fauna and flora through international trade. Regulation (EC) No 1007/2009³⁷ contains general bans on producing, importing, or marketing seal products for the purpose of animal protection. A major exception to those bans, as prescribed by its Article 3.1, is those products that are produced through a *sustainable method* recognized by the EU:

³⁶ EC, Commission Regulation (EC) No 398/2009 of 23 April 2009 amending Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein, as regards the implementing powers conferred on the Commission, [2009] OJ, L126/5.

³⁷ EC, Commission Regulation (EC) No 1007/2009 of 16 September 2009 on trade in seal products, [2009] OJ, L286/38.

The placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence. These conditions shall apply at the time or point of import for imported products.

Two more examples are given here. Directive 2004/68/EC³⁸ lays down animal health rules for the importation into, and transit through, the Community of certain live ungulate animals. Regulation (EU) No 605/2010³⁹ focuses on animal and public health and veterinary certification conditions for the introduction into the EU of raw milk and dairy products intended for human consumption.

In addition, the significance of import policies on health policy has also been reiterated in various policy documents of the EU, such as the white paper *Together for Health: A Strategic Approach for the EU 2008-2013*,⁴⁰ which establishes universal principles for EU health policy. As long as Canadian producers intend to market their agri-products in the EU market, they have to guarantee that all of the pertinent environmental standards established by the EU—either on product quality or production method—have been satisfied.

2) Environmental measures universally applied to products in the EU market

The EU regulatory framework on food safety adopts an “integrated” approach which “aims to assure a high level of food safety, animal health, animal welfare and plant health within the European Union through coherent farm-to-table measures and adequate monitoring, while ensuring the effective functioning of the internal market.”⁴¹ The following excerpt provides some elaboration on the goals of the “integrated” approach. The passage emphasizes that EU standards must be complied with in and outside the EU:

³⁸ EC, Council Directive 2004/68/EC of 26 April 2004 laying down animal health rules for the importation into and transit through the Community of certain live ungulate animals, amending Directives 90/426/EEC and 92/65/EEC and repealing Directive 72/462/EEC, [2004] OJ, L226/128.

³⁹ EC, Commission Regulation (EU) No 605/2010 of 2 July 2010 laying down animal and public health and veterinary certification conditions for the introduction into the European Union of raw milk and dairy products intended for human consumption, [2010] OJ, L175/1.

⁴⁰ EC, *Together for Health: A Strategic Approach for the EU 2008-2013* (Brussels: COM, 2007).

⁴¹ EC, Directorate General for Health and Consumers, *Health and Consumers*, online: DG Health and Consumers <http://ec.europa.eu/food/intro_en.htm>.

To assure effective control systems and evaluate compliance with *EU standards* in the food safety and quality, animal health, animal welfare, animal nutrition and plant health sectors *within the EU and in third countries* in relation to their exports to the EU;

To manage *international relations with third countries* and international organisations concerning food safety, animal health, animal welfare, animal nutrition and plant health.⁴²

Based on the “integrated” approach, environmental benchmarks have largely been incorporated into EU farming, food, and feed standards that are applied universally to agri-products originating in the EU, as well as agri-products imported from third countries.⁴³ For instance, Regulation (EC) No 1028/2006⁴⁴ on marketing standards for eggs clarifies in its preamble that: “It is essential, in the interest of both producers and consumers, that eggs imported from third countries comply with Community standards.”⁴⁵ Article 1.1 of that regulation re-emphasizes that principle by providing that: “This Regulation lays down the conditions of marketing within the Community of the eggs produced in the Community or imported from third countries.”

Article 28 of Regulation (EC) No 834/2007⁴⁶ on organic production and labelling of organic products requires that “any operator who produces, prepares, stores, or imports from a third country products shall adhere to the control system established therein.” It also addresses the request for compliance with the EU standards regarding *production methods* as follows:

Organic products imported into the European Community should be allowed to be placed on the Community market as organic, where they have been produced in accordance with production rules and subject to control arrangements that are in compliance with or equivalent to those laid down in Community legislation. In addition, the products imported under an equivalent system should be covered by a certificate issued by the

⁴² *Ibid* (emphasis added).

⁴³ EC, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Agricultural Product Quality Policy, COM(2009) 0234 final.

⁴⁴ EC, Regulation (EC) No 1028/2006 of June 19 2006 on marketing standard for eggs, [2006] OJ, L186/1.

⁴⁵ *Ibid* at para 10.

⁴⁶ EC, Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91, [2007] OJ, L189/1.

competent authority, or recognised control authority or body of the third country concerned.⁴⁷

The request for compliance with the production rules is re-emphasized by Article 32 of that Regulation. Article 32 prescribes that a product imported from a third country may be placed on the Community market as organic, provided that the product complies with the provisions affecting *production* as established by that Regulation or their equivalent in third countries.

Regulation (EC) 1829/2003⁴⁸ on genetically modified food and feed also adopts the approach of universal application. The preamble of the article states that:

In order to provide a high level of protection of human life and health, animal health and welfare, environment and consumer interests in relation to genetically modified food and feed, requirements arising from this Regulation should apply *in a non-discriminatory manner to products originating in the Community and imported from third countries*, in accordance with the general principles referred to in Regulation (EC) No 178/2002.⁴⁹

Article 53 (Emergency measures for food and feed of Community origin or imported from a Third Country) of that regulation clarifies that the trigger for emergency measures on food safety is “[w]here it is evident that food or feed *originating in the Community or imported from a third country* is likely to constitute a serious risk to human health, animal health or the environment, and that such risk cannot be contained satisfactorily by means of measures taken by the Member State(s) concerned.”

Other important legal documents containing environmental standards universally applied to products originating in the EU or imported from a third country include: Regulation (EC) No 1830/2003⁵⁰ concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified

⁴⁷ *Ibid* at para 33.

⁴⁸ EC, Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed, [2003] OJ, L268/1.

⁴⁹ *Ibid* at para 43 (emphasis added).

⁵⁰ EC, Regulation (EC) 1830/2003 of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms and amending Directive 2001/18/EC, [2003] OJ, L268/24.

organisms; Directive 2001/18/EC⁵¹ on the deliberate release into the environment of genetically modified organisms; Regulation (EC) No 852/2004⁵² on hygiene of foodstuffs; Regulation (EC) No 853/2004⁵³ on specific rules of hygiene of foodstuffs; Regulation (EC) No 882 (2004)⁵⁴ as amended by Regulation (EC) No 1029/2008 and Regulation (EC) No 596/2009 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules; Directive 2002/99/EC⁵⁵ on animal health rules; Directive 72/462/EEC⁵⁶ laying down the animal health rules that apply to imports; Directive 96/22/EC⁵⁷ concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of beta-agonists; Directive 2006/88/EC⁵⁸ on animal health requirements for aquaculture animals and products thereof and on the prevention and control of certain diseases in aquatic animals; Directive 2002/32/EEC⁵⁹ on undesirable substances in animal feed; Regulation (EC) No 1831/2003⁶⁰ on additives for use in animal nutrition; Regulation (EC) No 396/2005⁶¹ on maximum residue levels of pesticides in or on food and feed of plant and animal origin;

⁵¹ EC, Commission Directive 2001/18/EC of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC, [2001] OJ, L106/1.

⁵² EC, Regulation (EC) 852/2004 of 29 April 2004 on the hygiene of foodstuffs, [2004] OJ, L139/1.

⁵³ EC, Regulation (EC) 853/2004 of 29 April 2004 laying down specific hygiene rules for the hygiene of foodstuffs, [2004] OJ, L139/55.

⁵⁴ EC, Regulation 882/2004 of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, [2004] OJ, L191/1.

⁵⁵ EC, Commission Directive 2002/99/EC of 16 December 2002 laying down the animal health rules governing the production, processing, distribution and introduction of products of animal origin for human consumption, [2003] OJ, L18/11.

⁵⁶ EC, Commission Directive 72/462/EC on health and veterinary inspection problems upon importation of bovine animals and swine and fresh meat from third countries, [1972] OJ, L302/28.

⁵⁷ EC, Commission Directive 96/22/EC of 29 April 1996 concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of beta-antagonists and repealing Directives 81/602/EEC, 88/146/EEC and 88/299/EEC [1996] OJ, L125/3.

⁵⁸ EC, Commission Directive 2006/88/EC of 24 October 2006 on animal health requirements for aquaculture animals and products thereof, and on the prevention and control of certain diseases in aquatic animals, [2006] OJ, L328/14.

⁵⁹ EC, Commission Directive 2002/32/EC of 7 May 2002 on undesirable substances in animal feed, [2002] OJ, L140/10.

⁶⁰ EC, Regulation (EC) 1831/2003 22 September 2003 on additives for use in animal nutrition, [2003] OJ, L268/29.

⁶¹ EC, Regulation 396/2005 of 23 February 2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin and amending Council Directive 91/414/EEC, [2005] OJ, L70/1.

and Directive 2009/32/EC⁶² on the approximation of the laws of the Member States on extraction solvents used in the production of foodstuffs and food ingredients.

3) *Greening of the CAP*

The EU CAP, which provides the policies that supply domestic support to agricultural production, will also impact prospective *environmental* gains of Canada from the CETA. The CAP supports farmers by providing a range of price guarantees, direct payments, and other instruments, including quotas and tariffs on some imported products. Article 6 of the Treaty provides that “environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3,⁶³ in particular with a view to promoting sustainable development.” Consequently, it is necessary to show that the state aid scheme will not result in an infringement of Community environmental protection legislation, or otherwise cause environmental damage.⁶⁴

As early as the beginning of the 1990s, the European Economic Community (EEC) had given its attention to environmental concerns in agri-production. It initiated reforms of the CAP aimed at “moving away from a policy of price and production support to a policy of farmer income support.”⁶⁵ Agri-environmental commitments of farmers are specified in various EU rules accordingly.⁶⁶ Regulation (EEC) No 2078/92,⁶⁷ through addressing issues of agricultural production methods compatible with the

⁶² EC, Commission Directive 2009/32/EC of 23 April 2009 on the approximation of the laws of the Member States on extraction solvents used in the production of foodstuffs and food ingredients, [2009] OJ, L141/3.

⁶³ Article 3 of *The Treaty*, *supra* note 32 covers both agricultural and competition policy.

⁶⁴ Community Guidelines for State Aid in the Agriculture and Forestry Sector 2007 to 2013, 2006/C 319/01 at para 22, 2006 OJ C319/1.

⁶⁵ EC, Commission Regulation 864/2004 of 29 April 2004 amending Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, and adapting it by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the European Union, [2004] OJ, L206/20.

⁶⁶ Eg, EC, Regulation (EC) 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside, [1992] OJ, L215/85; Regulation (EC) 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations, [1999] OJ, L160/80, art 22.

⁶⁷ EC, Regulation (EC) 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside, [1992] OJ, L215/85.

requirements of the protection of the environment and the maintenance of the countryside, erects the basic tone for integrating environmental standards into agri-production methods in the EU. The community aid scheme involving agri-production prescribed by that regulation is expected to promote (a) an environmentally favorable extensification of crop farming, and sheep and cattle farming, including the conversion of arable land into extensive grassland; and (b) ways of using agricultural land which are compatible with protection and improvement of the environment, the countryside, the landscape, natural resources, the soil and genetic diversity, and others.⁶⁸ Requirements of environmental protection become an integral part of the CAP under that regulation.⁶⁹

Environmental requirements gradually became a benchmark for the operation of agriculture-related aid schemes in the EU. Chapter VI of Regulation (EC) No 1257/1999⁷⁰ on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) requires that, "Support for agricultural production methods designed to protect the environment and to maintain the countryside (agri-environment) shall contribute to achieving the Community's policy objectives regarding agriculture and the environment." Chapter VII thereof provides that support may also be available for facilitating the improvement and rationalization of the processing and marketing of agricultural products and thereby contribute to increasing the competitiveness and added value of such products.⁷¹ The support shall also contribute to objectives like protecting the environment.⁷² According to Chapter IX, support shall also be granted for measures relating to farming activities and their conversion, as well as rural activities. Among other objectives, these measures address the "protection of the environment in connection with agriculture, forestry and landscape conservation as well as with the improvement of animal welfare."⁷³

⁶⁸ *Ibid.*, art 1.

⁶⁹ *Ibid.*, preamble.

⁷⁰ EC, Regulation (EC) 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations, [1999] OJ, L160/80, art 22.

⁷¹ *Ibid.*, art 25.

⁷² *Ibid.*

⁷³ *Ibid.*, art 33.

Articles 39 and 40 of Regulation (EC) No 1698/2005⁷⁴ pertain to support for rural development by the European Agricultural Fund for Rural Development (EAFRD). These two regulations focus exclusively on issues of agri-environment and animal welfare payments provided by Member States. Article 88.2 of that regulation clarifies that the prohibited state aid shall not include investments relating to “the protection and improvement of the environment.”

Furthermore, “improving,” (rather than merely “mitigating”) adverse impacts on the environment, has developed into one of the goals of the EU. For example, the preamble of Regulation (EC) No 1257/1999⁷⁵ states that, “the agri-environmental aid scheme should continue to encourage farmers to serve society as a whole by introducing or continuing the use of farming practices compatible with the increasing need to *protect and improve* the environment, natural resources, soil and genetic diversity and to maintain the landscape and the countryside.”⁷⁶ Article 4 of that regulation sets “preserv[ing] and improv[ing] the natural environment, hygiene conditions and animal welfare standards” as some of the objectives of investment in agricultural holdings. The target of improving the environment can also be found in Regulation (EC) No 1234/2007⁷⁷ which establishes a common organization of agricultural markets and specific provisions for certain agricultural products (Single CMO Regulation), as amended by Regulation (EC) No 361/2008⁷⁸ and Regulation (EC) No 491/2009⁷⁹.

A *Budget for Europe 2020* released by the EU in 2011 promises that “the reformed CAP will promote smart, sustainable and inclusive growth” by the “greening of direct payments.”⁸⁰ In June 2013, the EU announced that under the CAP reforms, “specific environmental practices will be a condition

⁷⁴ EC, Regulation (EC) 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development, [2005] OJ, L277/1.

⁷⁵ EC, Regulation (EC) 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations, [1999] OJ, L160/80.

⁷⁶ *Ibid* at para 31.

⁷⁷ EC, Regulation (EC) 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), [2007] OJ, L299/1.

⁷⁸ EC, Regulation (EC) 361/2008 of 14 April 2008 amending Regulation (EC) No 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), [2008] OJ, L121/1.

⁷⁹ EC, Regulation (EC) 491/2009 of 25 May 2009 amending Regulation (EC) No 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), [2009] OJ, L154/1.

⁸⁰ EC, *A Budget for Europe 2020* COM (2011) 0500 final (2013).

for payments to EU Member States from central government coffers.”⁸¹ It is reported in the post-2013 reform that “[t]he ‘Greening’ of 30 percent of direct payments applies to all 27 EU Member States, all rural areas and all farmers.”⁸² The greened CAP payment will be linked to three environmentally-friendly farming practices: crop diversification, maintaining permanent grasslands and conserving five percent, and later seven percent, of areas of ecological interest beginning in 2018—or measures considered to have equivalent environmental benefits.⁸³ In addition, “[a]gri-environmental measures will be stepped up to complement greening practices. These programs will have to set and meet higher environmental protection targets as a guarantee against doubling funding.”⁸⁴

It is foreseeable that the agricultural subsidies to be provided under the post-2013 CAP will significantly facilitate the process of improving production methods or product quality in accordance with EU standards. Moreover, those subsidies are legitimate under the subsidy policies established by the Agreement of Agriculture (AoA). Being domestic—rather than export—support, those payments fall into the scope of Annex 2 to the AoA, and therefore are not multilaterally actionable. A natural result of those payments under the CAP will be, with little doubt, a significant enhancement of the competitiveness of the subsidized EU products over those imported from a third country which have not received equivalent support from that country but have cost more in order to meet the EU standards.

The EU has characterized its approach of integrating environmental benchmarks into the CAP as a “cross-compliance system”—that is, farmers that do not comply with certain requirements in the areas of public, animal and plant health, environment, and animal welfare are subject to reduction of, or exclusion from, direct support.⁸⁵ The following excerpt provides further elaboration on specific measures adopted by the cross-compliance system:

⁸¹ Europe Adopts Greener Agricultural Policy, *Environment News Service* (26 June 2013), online: <<http://ens-newswire.com/2013/06/26/europe-adopts-greener-agricultural-policy/>>.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ EC, Regulation (EC) 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001, [2003] OJ L270/1, art 3(1).

- Strengthen the agricultural and forestry sectors by trying to promote quality agricultural products. The reform includes measures concerning the establishment of young farmers and conditions for taking early retirement;
- Improve the competitiveness of rural areas with the aim above all of improving the quality of life of rural communities and creating new sources of income for farmers and their families;
- Preserve the environment and European rural heritage via agri-environmental measures such as organic farming. To help the further 'greening' of the CAP, the traditional compensatory allowances in support of farming in less-favoured areas will be extended to areas where farming is restricted by the existence of specific environmental constraints.⁸⁶

In brief, both the gradually rising level of protection of the agri-environment and the increasing greening of the CAP have imposed challenges on Canadian agri-exporters.

B) Canadian regulatory framework

Despite the fact that Canada also adopts a high level of protection, the Canadian approach of addressing agri-environmental concerns has been piecemeal;⁸⁷ the degree of integration of environmental concerns into agricultural legislation in Canada is much lower than that in the EU. In Canada, environmental laws and agricultural laws are largely separate, especially at the federal level. On the one hand, the *Canadian Environmental Protection Act* of 1999 and the *Canadian Environmental Assessment Act* of 2012 do not address any agricultural aspects of the environment. On the other hand, the major consolidated acts in Canada regarding agricultural finance, production and products, including the *Canadian Agricultural Products Act*, the *Farm Debt Mediation Act*, the *Feeds Act*, the *Fertilizers Act*, the *Health of Animals Act*, the *Meat Inspection Act*, the *Pest Control Products Act*, the *Plant Protection*

⁸⁶ Europa, *Reform of the Common Agricultural Policy (CAP)*, online: Europa

<http://europa.eu/legislation_summaries/agriculture/general_framework/160002_en.htm>.

⁸⁷ Environment Canada Sustainable Development Office, *Planning for a Sustainable Future: A Federal Sustainable Development Strategy for Canada*, (2010), online: Environment Canada <<http://www.ec.gc.ca/dd-sd/default.asp?lang=En&n=F93CD795-1>> [FSDS].

Act, and the *Seeds Act*, do not incorporate specific environmental benchmarks into their provisions.

Canada issued the *Federal Sustainable Development Act* (FSDA) in 2008, in order to “respond to the limitations of the previous approach to sustainable development planning and reporting.”⁸⁸ The FSDA requires the Minister of the Environment to develop a Federal Sustainable Development Strategy (FSDS), and expects to provide the legal framework for developing and implementing the FSDS that will make environmental decision-making more transparent and accountable to Parliament.⁸⁹ However, the FSDS developed in October 2010 has yet to address the integration approach. Instead it set a relatively moderate task for the Canadian government in the coming years regarding sustainable development. The 2010 FSDS requires the Canadian government to measure, monitor, and report environmental issues. It also necessitates transparency in decision-making. Furthermore, the targeted level of protection as reflected by the FSDS remains “to minimize the environmental impacts of its policies and operations,”⁹⁰ which seems less ambitious than that of the EU (i.e. to improve the environment).

C) Non-illusive challenges for Canadian exporters

Following the normative analysis about the differences in levels of protection adopted by the EU and Canada as demonstrated by their regulatory frameworks, empirical studies are provided in this subsection for the purpose of further supporting my argument that those differences do exist and have imposed challenges on Canadian exporters. One example can be found in the EC – *Asbestos* case (DS135), despite the fact that the product at issue is not agricultural. In that case, the high level of protection adopted by the EU out of human health concerns, which was regarded unreasonable by Canada, was found justifiable by the AB. If we narrow our focus to disputes over agri-trade between the two parties, evidence for the existence of those differences is still solid.

Under the DSB, Canada and the EU have been opposing parties in three disputes under the AoA: the EC – *Hormones (Canada)* case (DS48), the EC – *Approval and Marketing of Biotech Products* case (DS292), and the EC –

⁸⁸ *Ibid* at 3.

⁸⁹ *Ibid*.

⁹⁰ *Ibid* at 7.

Seal Products case (DS400). All of them revolve around agri-environmental measures adopted by the EU. In the *EC – Hormones (Canada)* case (DS48), Canada complained of certain EU measures prohibiting the importation of livestock and meat from livestock that have been treated with certain substances that have a hormonal action. Disagreeing with Canada's argument, the AB does not find the EU's measures as constituting "discrimination or a disguised restriction of international trade," and as a result did not challenge the level of protection adopted by the EU.⁹¹

In *EC – Approval and Marketing of Biotech Products* case (DS292), Canada complained about the EU measures that affect the approval and marketing of products that contain, consist of, or are produced from, genetically modified organisms ("GM products"). The AB, again, gives respect to the high level of protection that the EU chose in order to address human health concerns. In the *EC – Seal Products* case (DS400), where the Panel has not presented its report, Canada complained about certain EU measures which prohibit the importation and marketing of seal products. The reason for these restrictions is the protection of animals.

These three cases have revealed that the agri-environmental measures themselves, as well as the level of protection adopted by the EU, have become a major bone of contention in the Canada-EU agri-trade relationship. In addition, the EU standards and level of protection tend to be held as justifiable under the multilateral trading system in most circumstances. The challenges faced by Canadian exporters arising from the perceived differences in environmental standards and levels of protection between Canada and the EU are real, as has been illustrated by those trade disputes.

Furthermore, the EU seems to be determined to push its high level of protection on the rest of the world in a firm manner. In the *Draft Strategy on Environmental Integration in the External Policies of the General Affairs Council* of 2004, the EU sets "promoting mainstreaming of environmental considerations" as one of the targets of its trade negotiations, as reflected in the following excerpt:

Promoting mainstreaming of environmental considerations in the outcome of trade negotiations, ... in bilateral and regional negotiations and agreements, with a view to achieving sustainable development (e.g. on investment regulation, intellectual property

⁹¹ See *Measures Concerning Meat*, *supra* note 30.

rights, use of incentives to promote environmental protection, promotion of trade in environmental goods and services, etc.).⁹²

The *European Action Plan for Organic Food and Farming* of 2004 provides one EU action as “reinforc[ing] recognition of EU organic farming standards and inspection systems in third countries by obtaining a negotiation mandate from the Council.”⁹³ The EU’s *International Aspects of Agricultural Policy* of 2012 characterizes the policies regarding the strengthening of agri-environmental measures as having a direct bearing on the *international* aspects of its agricultural policy.⁹⁴

To summarize, both the agri-trade disputes between Canada and the EU, and the EU’s explicit declarations regarding the enforcement of its environmental standards in the international arena, have shown that Canadian exporters’ challenge of meeting an increasingly enhanced level of protection is not illusive.

D) Foreseeable positive impacts on Canada’s agri-environment

As indicated by the EU’s SIA, Canada’s actual economic gains from agri-trade under the CETA are subject to a prospective shift in its agri-production methods as compelled by the EU rules. That shift will only take place if market access concessions made by the EU for Canadian agri-exports are large enough. Freer trade brought about by the CETA, along with the higher level of protection adopted by the EU, can make agri-production methods in Canada more sustainable. This change would impact Canada’s environment in a positive way.

The CETA negotiations regarding agri-trade will guarantee the satisfaction of the first prerequisite for the CETA’s positive environmental impacts (i.e. freer trade). Additionally, the differences in levels of protection of the agri-environment in Canada and the EU, as discussed in subsections III(A), III(B), and III(C), will ensure the satisfaction of the second prerequisite for a positive impact from the CETA to occur (i.e. a higher level of protection

⁹² Council of the European Union, *Draft Strategy on Environmental Integration in the External Policies of the General Affairs*, 6927/02 RELEX 37 ENV 149 POLGEN 13, (Brussels: EC, 2002) at 7.

⁹³ EC, Commission, (2004) 415 final (Brussels: EC, 2004) SEC 739.

⁹⁴ EC, Commission, *International Aspects of Agricultural Policy*, 2012, at 4, online: <http://ec.europa.eu/agriculture/consultations/advisory-groups/international/2012-03-12/report_en.pdf>.

adopted by the EU as the importing party). Consequently, it is reasonably foreseeable that the CETA will positively impact Canada's agri-environment.

Potential positive impacts will not solely be due to a shift in agri-production methods. Canada's legal framework and policies relating to domestic support for agricultural development could also be enhanced. As pointed out in subsection III(A)(3), the Canadian government does not promote the environment through financial support of agri-exports. These agri-exports have to compete with EU products, which will be subsidized. This is mainly due to the greening of the CAP in the post-2013 era. In order to satisfy the high EU standards, the agri-production cost paid by Canadian producers will naturally be much higher than that paid by EU farmers. If Canadian exporters intend to retain their competitive advantages in the EU market or even enlarge the scale of exports as allowed by the prospective CETA, they will have no choice but to request financial support from the Canadian government at a level similar to that received by EU farmers. The Canadian government, in order to ensure the realization of maximum economic gains from the CETA, will probably consider providing the requested support. Furthermore, in order to guarantee that the support it provides is not multilaterally actionable, the Canadian government will have to provide domestic, instead of export, support—that is, the financial support for the shift in agri-production method will be available for all Canadian farmers, instead of for Canadian exporters only. Consequently, all Canadian farmers will get an opportunity to be aided financially by the government if they adopt a more sustainable method of agri-production.

III) POSSIBLE POSITIVE IMPACTS OF GLOBAL FTAS ON THE AGRI-ENVIRONMENT

The perceived positive impacts of the CETA on Canada's agri-environment have inspired me to reflect on similar impacts of all FTAs in this regard, especially in the global context of addressing sustainable development.

A) The diffusion effect

The fact that positive environmental impacts discussed in this article are emerging from bilateral FTAs will not weaken the possibility of achieving a global improvement of the environment. This is because a large FTA network has appeared at the international level and its environmental impacts will have a diffusion effect. Canada is not the only FTA partner of the EU

whose environment will benefit from the EU standards; all of the EU's FTA partners can expect environmental gains from freer trade with it, but to different extents. Simultaneously, as Canada's environmental standards and policies are enhanced under the CETA, its FTA partners will acquire further environmental gains from freer trade with it. A domino effect will then take place within the FTA network—the agri-environment in the global arena will generally be improved, to different degrees in different regions.

The approach of achieving positive environmental impacts from bilateral trade agreements possesses its own advantages over the multilateral or unilateral approach. First, at the multilateral level, the international community has not achieved any consensus on agri-environmental standards. The multilateral approach also does not provide individual countries with sufficient impetus or confidence to lead multilateral negotiations on pertinent issues. Bilateral arrangements, on the contrary, make the parties feel like they are holding more flexibility and discretion because: (i) individual countries can freely select their FTA partners based on their level of protection; (ii) the extent to which the exporting party in an FTA can be influenced by the level of protection adopted by the importing party is partially determined by the level of economic gain the former wants from freer trade with the latter. Second, unilateral measures integrate environmental benchmarks into domestic agricultural legislation without increasing market access for imports from a third country. Bilateral agreements, on the other hand, safeguard a stronger motive for the exporting party to an FTA to participate in more sustainable agri-trade—that is, huge economic gains from freer trade brought about by the FTA.

B) Prerequisites

It is worth laboring the point that it is not necessary for both parties to an FTA to adopt a high level of protection in order to produce positive environmental impacts by freer trade. If (a) differences exist in levels of protection between the two parties; and (b) the importing party adopts a higher level of protection than the exporting party, the third condition required for the expected positive environmental impacts to occur is market access concessions from a third country which are large enough to ensure a strong motive for the exporting country to adopt changes. The fourth condition (which is to be discussed further in the coming subsection) is that

the agri-environmental measures and their application should not constitute disguised trade restrictions.

C) Concerns over agri-environmental measures as disguised trade barriers

The SPS Agreement requires that the measures it covers should not be employed as trade barriers in disguise.⁹⁵ In this regard, the EU practice may also be a point of reference for other countries. In the EU context, many agri-environmental measures are applied universally to products originating in the EU and imported from a third country.⁹⁶ That practice has added some difficulties for the DSB when it attempts to decipher whether or not the pertinent measures constitute “disguised trade barriers,” even if they reflect an extremely high level of protection. In addition, the EU has explicitly required those measures to be applied in a non-discriminatory manner.⁹⁷ If these two practices—the establishment of non-discriminatory agri-environmental measures and the non-discriminatory application of those measures—are complied with, the concerns over pertinent measures as disguised trade barriers can be largely, if not completely, dismissed.

CONCLUDING OBSERVATIONS

Agri-environmental measures adopted by the EU are off the negotiating table of the Canada-EU CETA, but may still positively affect Canada’s agri-environment. In addition to prospective freer trade between the two parties (which serves as one of the prerequisites for the CETA’s positive environmental impacts), differences in levels of agri-environmental protection between Canada and the EU are also present. Those differences are evidenced by: (i) the approaches of addressing environmental concerns in their FTAs; (ii) the perspectives and findings of the environmental assessments conducted by them; (iii) the levels of integration of environmental benchmarks into their regulatory frameworks regarding product quality, production methods, and trade in agriculture; and (iv) the trade disputes over agri-environmental measures between them. Within Canada, both (a) a shift toward more environmentally friendly agri-production methods and (b) a reform of the domestic support scheme for

⁹⁵ SPS Agreement, *supra* note 29, art 2.

⁹⁶ See s (II)(A)2.

⁹⁷ See note 49 and its accompanying text.

agricultural development provided by the Canadian government with an increased focus on sustainability can be foreseen as the CETA's potential ways of positively impacting the Canadian agri-environment. Positive environmental impacts can also be expected from most FTAs in the global context of addressing sustainable development if certain prerequisites are met, as indicated by the CETA case.