Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

Honourable Edward Fast
Minister of International Trade
Room 105, East Block
Ottawa, Ont., K1A 0A6

December 4th, 2012

*Via e-mail & fax*

Dear Honourable Minister Fast,

**Re: need for sustainable development protection in CETA**

To the extent it is possible to encourage sustainable development within the terms of a trade and investment agreement, we urge the federal government to consider the recommendations below before concluding the largest and broadest bilateral comprehensive economic and trade agreement in Canada's history: the Canadian and European Union Comprehensive Economic and Trade Agreement (CETA).

I am addressing the Canadian government on behalf of the Canadian Environmental Law Association (CELA), a public interest law group founded in 1970 for the purposes of using and improving laws to protect public health and the environment. Funded as a Legal Aid clinic specializing in environmental law, CELA represents individuals and citizens' groups in the courts and before tribunals on a wide variety of environmental matters. In addition, CELA staff members are involved in various law reform, public education, and community organization initiatives. Our organization has a long history of engaging in legislative analysis of trade agreements.

On November 24, 2012, Montreal newspaper La Presse released leaked copies of:

- the October 26, 2012 CETA investor-state dispute settlement consolidated text,
- the October 15, 2012 CETA Canadian and European Union services offers, and
- three European Commission memos analysing these most recent Canadian CETA negotiating positions.

This letter will address several critical outstanding sustainable development issues that have become apparent as a result of these leaked documents, specifically, Canada's negotiating position in relation to,

1. an investor-state dispute settlement mechanism,
2. limited services reservations, and
3. extensive public procurement access.

We also recommend the government consider increased transparency, public disclosure, debate and participation in trade and investment negotiations in the future.

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### *1. ISDS*

As we have stated in previous submissions[1] to the federal government in relation to the CETA negotiations, Canada should *not* be entering into investment and trade agreements containing investor-state dispute settlement (ISDS) mechanisms. There is no clear evidence that ISDS mechanisms provide a significant benefit to the economy; however, there is increasing evidence that ISDS mechanisms threaten public interest environmental, safety and health measures.

The above recommendation is particularly important in light of the European Commission's resistance to Canada's request to carve out legitimate health, safety and environment protection measures from the CETA provision on indirect expropriation.[2] Indirect expropriation has been frequently claimed by investors under ISDS mechanisms to challenge Canadian health, safety and environmental protection measures. These claims result in significant arbitration costs and financial penalties or settlements; in addition, they potentially have a more significant impact: a regulatory chill on all levels of Canadian government.[3]

Although CETA does include a General Exceptions provision that allows a Party to adopt or enforce environmental measures "necessary to protect human, animal or plant life or health",[4] this general exception, which parallels the WTO General Agreement on Trade in Services (GATS) Article XX, has been proven through trade tribunal case law to provide limited protection. Its 'necessity' requirement has been interpreted narrowly by the ad hoc commercial tribunals, who appear to be biased towards commercial as opposed to environmental or health interests.[5]

As a result of the proliferation of investor claims against Parties for public interest measures, a global trend is emerging in international trade and investment law: the exclusion of ISDS mechanisms from investment and trade agreements. Countries that have adopted or are considering adopting this policy include: Australia, India, South Africa, and Korea. The rationale for this movement is best summarized in the Australian government's Final Environmental Review of AUSFTA, where the reviewing committee stated:

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[1] Report on the Environmental Impact of the Canadian and European-Union Comprehensive Economic and Trade Agreement, October 2011, CELA publication # 808, available at: http://www.cela.ca/publications/report-environmental-impact-canadian-european-union-comprehensive-economic-and-trade-ag ; see also Comment on Canada's Initial Strategic Environmental Assessment of CETA, April 2012, CELA publication #834, available at: http://www.cela.ca/publications/ceta-comments-canadas-initial-strategic-environmental-assessment.

[2] Leaked July 2012 CETA consolidated Investment chapter.

[3] Canadian Center for Policy Alternatives, NAFTA Chapter 11 Investor-State Disputes (to October 1, 2010) available at: http://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2010/11/NAFTA%20Dispute%20Table.pdf.

[4] Leaked CETA text, Post Round VI. Chapter [XX] Institutional, General and Final Provisions, Article X-02: General Exceptions, 3 at 346 -347.

[5] Steven Shrybman (Sack, Goldblatt, Mitchell LLP), *Potential Impacts of the Proposed Canadian-European Union Comprehensive Economic and Trade Agreement (CETA) on the Pace and Character of Oil Sands Development: a Legal Opinion*, (2011), at p.11.

> In recognition of the unique circumstances of this Agreement- including for example, the long-standing economic ties between the U.S. and Australia, their shared legal traditions and the confidence of their investors in operating in each others markets- the two countries agreed not to implement procedures in this FTA that would allow investors to arbitrate disputes with governments. Government-to-government dispute settlement procedures remain available to resolve investment-related disputes.[6]

Furthermore, from an economic perspective, the Australian Productivity Commission found "no compelling economic rationale for the inclusion of an investor-state arbitration mechanism in its trade and investment agreements."[7] Australia's Trade Policy Statement released on April 12, 2011, explained further that the government will not negotiate treaty protections "that would confer greater legal rights on foreign businesses than those available to domestic businesses" or that "constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses."[8]

Both the European and Canadian judicial systems provide effective protection of investor rights, with additional assurances of transparency, participation of interested parties, and independence, which are not currently provided in the trade tribunals provided for under CETA

Once again, we insist that Canada not support the inclusion of an ISDS mechanism in CETA, or at the very least, that Canada require the inclusion of an environmental, health and a safety measures exception from the indirect expropriation provision and ensure improved transparency, independence, and public participation within the agreement's tribunal procedures.

### *2. Services*

All services, except those specifically listed in each Party's Annexes, are subject to CETA's provisions.[9] Canada pushed for this negative-listing mechanism - a reversal of the traditional positive listing process included under NAFTA and GATS.

The services offers are made in two separate Annexes:

- Annex I reservations apply to "*any existing* non-conforming measures that are maintained by the national or sub-national (provincial or municipal) levels of government"; while,
- the items listed in Annex II apply to "any measures that *are maintained or to be adopted* by the national or sub-national levels of government with respect to sectors, subsesctors or activities." [emphasis added]

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[6] Final Environmental Review of the US-Australia Free Trade Agreement, July 2004.
[7] The Australian Productivity Commission. *Bilateral and Regional Trade Agreements*. Research Report. (November 2010.)
[8] Australia's Trade Policy Statement released on April 12, 2011.
[9] Council of Canadians & CUPE, *Water for Sale: How Canada will Privatize our Public Water Systems* (December 2011) online at http://www.canadians.org/media/trade/2010/16-Dec-10.html.

The October 2012 Canadian services offers has added a reservation in Annex II for the existing and future **"**Collection, Purification and Distribution of Water; Road Transport Services" of all levels of Canadian government from CETA's Market Access rules. More specifically, provinces and territories "reserve the right to adopt or maintain measures that impose limitations on the number of investors or investments in the form of numerical quotas, monopolies, exclusive service suppliers or the requirement for an economic needs test" in the following sectors or sub-sectors:

- Collection, purification and distribution of water, and
- Intra-city bus transportation.

We are happy to see the inclusion of these new reservations in Canada's Annex II. However, we believe the government should go further and exclude all public utilities from all aspects of CETA. EU has already done so under the GATS and has proposed to do so in their Annex II in regards to CETA's Market Access provisions.

Of particularly importance is the *full* exclusion of all drinking water, sewage, and waste water treatment services. These services are critical services that are essential to the protection of human health and the environment. To provide this protection, these services require high sanitation, environmental and health standards. Democratically elected governments are best placed to provide the necessary transparency and accountability to ensure high standards and universal access. This was well established in our 2001 report prepared for the Inquiry on public versus private ownership established during the Walkerton Inquiry, (CELA publication #405) available at: http://s.cela.ca/files/uploads/public_private_paper.pdf.

Canada's Annex II proposed exception for services supplied in the exercise of government authority which is "neither supplied on a commercial basis, nor in competition with one or more service suppliers" does not go far enough, as 'commercial basis' has been historically interpreted narrowly by trade tribunals, particularly in light of increasing government adoption of user fess and public-private partnerships in the delivery of essential public services.

### *3. Procurement*

In terms of Canada's CETA procurement offer, even the European Commission (EC) describes it as very generous in its October 15, 2012 CETA State of Play memo,

> The Public Procurement market access offer that Canada made in July 2011 is the most ambitious and comprehensive offer Canada and its provinces have made to any partner, including the US. It also outreaches the mutual commitments between the different Canadian Provinces in the Agreement on Internal Trade (AIT). The outcome regarding the inclusion of regional and local government entities, including agencies, crown corporations, and the MASH sector (municipalities, academia, schools and hospitals) is highly satisfactory. Thus, the offer fulfills our expectations, including regarding the expansion of procurement to the sub-central level (Provinces and Territories) and to the Canadian Crown corporations and already now provides for very considerable added value with regard to the existing situation. (emphasis added)

However, it appears that based on the same EC document that the EU will nonetheless be pushing for further concessions, namely: access to public procurement of public urban transport, energy, and the removal of Canadian provincial regional development clauses. Canada should not concede to these requests.

Government procurement represents an important space for governments to enact policies that promote the public interest.

We urge the government to reconsider its offer and exclude regional and local government entities and the MASH sector from CETA's public procurement provisions. Furthermore, we urge the government to enable the consideration of offsets and performance requirements, and more particularly green procurement, under CETA's procurement provisions. These are important tools for governments to support local and green development.

For further details about these recommendations aimed at ensuring sustainable development protection within CETA's public procurement provisions, please refer to pages 24-26 of CELA's October 2011 CETA report (CELA publication #808) at: http://www.cela.ca/publications/report-environmental-impact-canadian-european-union-comprehensive-economic-and-trade-ag.

**Conclusion**

As you know the proposed terms of this agreement would be the most expansive to which Canada has ever been bound. Its terms will likely set a new standard for future investment and trade agreements to which Canada and the European Union will be bound. As a result, it is critical that we do our best to set standards that most effectively support sustainable development and protect the public interest.

If you have any questions about the above comments, please contact Kyra Bell-Pasht at 416-960-2284 ext 224 or at kyra@cela.ca.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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