Trade Justice Network
Réseau pour le commerce juste

RÉSEAU QUÉBÉCOIS SUR L'INTÉGRATION CONTINENTALE
RQIC

March 20, 2012

Dear Member of the European Parliament,

On the occasion of an 11th round of Canada-European Union negotiations in Brussels this month, we are writing to express our ongoing concerns with the potential inclusion in the Comprehensive Economic and Trade Agreement (CETA) of an investor-to-state dispute settlement mechanism (ISDM). Such a mechanism is increasingly controversial globally, and we strongly feel it is unnecessary in the Canada-EU context. We encourage the European Parliament to follow in Australia's footsteps by insisting that the CETA not include an ISDM, and urge that Canadian, or EU-based firms, settle any disputes over the alleged impacts of public policies on their investments through government-to-government dispute settlement, or our respective domestic court systems.

As you are well aware, the European Commission received a mandate to negotiate an ISDM in its trade agreements with Singapore, India, and Canada. Though the investor-state dispute process is found in many stand-alone, bilateral investment treaties signed between EU member states and developing countries, it has never before been incorporated into an EU-wide trade and investment treaty.

Previous EU trade treaties have not included many of the substantive protections for investors in NAFTA's Chapter 11, such as an extremely broad definition of investment (Article 1139), right of establishment (Articles 1102 and 1103),

compensation for direct and indirect expropriation (Article 1110), minimum standards of treatment (Article 1105), and prohibitions against performance requirements (Article 1106).

Canadian experience under NAFTA Chapter 11 should stand as a stark warning of the dangers to public policy and the public interest if the EU adopts such provisions in its international trade agreements. To date, there have been thirty NAFTA investment claims against Canada. An extremely broad range of public policy measures at all levels of government have been challenged. Moreover, resort to Chapter 11 by foreign investors is growing. More than half the claims against Canada since NAFTA came into force over 15 years ago were initiated during the last five years. Canada has already lost or settled four claims and paid out damages totalling $CAD 157 million.

The most significant examples are:

- In *Ethyl* v. *Canada*, Canada had banned the import/export and inter-provincial trade of a gasoline additive called MMT for health reasons and interference with anti-pollution systems in automobiles. MMT is banned in other jurisdictions, such as California. Ethyl, the manufacturer of MMT, sued, and Canada settled. Under the terms of settlement, Canada paid approximately $16 million for damage to the investor's reputation, issued a statement that MMT did not pose a health or environmental threat, and withdrew the ban.

- In *SD Myers* v. *Canada*, a U.S. company successfully challenged a Canadian ban on the export of toxic PCB wastes. In its defence, Canada cited the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. The tribunal rejected Canada's arguments and awarded the investor $USD 5 million.

- The *AbitibiBowater* v. *Canada* dispute arose in 2008 when the company closed its last remaining pulp and paper mill in the Province of Newfoundland and Labrador. The provincial government enacted legislation to return the company's water use

> and timber rights to the Crown, and to expropriate certain AbitibiBowater lands and assets (for which it offered compensation). The investor sued under the NAFTA and the federal government settled, paying the company $130 million. The case is constitutionally significant because AbitibiBowater was apparently compensated for the loss of water and timber rights on public lands, which are not compensable rights under Canadian law.

These cases may seem far away in time and distance from the EU, but the impacts of this process are now beginning to be felt within Europe. For example, Vattenfall, a Swedish energy company, has already succeeded in a claim against Germany under the EU Energy Charter Treaty related to the regulation of a coal-fired plant in Hamburg and is now threatening to challenge Germany's decision to phase out nuclear power. The Government of Canada's interest in establishing an ISDM in the CETA is clearly related to Canadian investment in mining, energy, and related infrastructure in Europe. Canadian firms are already using investment treaties with Latin American countries to challenge government regulation or prohibition of mining projects due to community opposition or the environmental risks. These firms will not hesitate to bring similar cases against EU member states, putting public policy at risk.

Extraction of unconventional natural gas provides a good example of a sector in Europe that could be vulnerable to investment disputes under ISDM in the CETA. While France has declared a ban on hydraulic fracturing ("hydrofracking" — whereby natural gas is extracted from hard or difficult-to-reach rock formations using a high-pressure combination of water and chemicals to loosen the earth), Britain, Poland, and other countries are looking favourably at the new but controversial process. At the same time, the European Commission is considering applying rules on the process that would apply to all member states. Canadian energy firms could acquire rights to bypass the European court system and directly challenge European regulatory measures governing hydrofracking through the ISDS of the CETA.

Canadian CETA negotiators have explained in several civil society briefings that the CETA investment provisions will reform the NAFTA process in an attempt to weed out "frivolous" cases (i.e., against legitimate public policy). However, some EU member states are pushing for stronger investment protections than exist even in the NAFTA (for example, related to minimum standards of treatment).

Furthermore, both Canada and the EU Commission insist that investor-state dispute settlement provisions in trade agreements or stand-alone investment treaties are an important means of attracting inward, and encouraging outward, foreign-direct investment. But there is little evidence that this is actually the case. The lack of evidence proving such assertions, considered next to the real risks to public policy space from such investment protections, led the experts conducting the EU's Sustainability Impact Assessment of the CETA to conclude the ISDM was not necessary:

> *Regarding investor-state dispute settlement (ISDS) specifically, the conflicting costs and benefits of such a mechanism make it doubtful that its inclusion in CETA would create a net overall (economic, social, and environmental) sustainability benefit for the EU and/or Canada. There is no solid evidence to suggest that ISDS will maximise economic benefits in CETA beyond simply serving as one form of an enforcement mechanism, just as state-state dispute settlement is also an enforcement mechanism. And the policy space reductions caused by ISDS allowances in CETA, while less significant than foreseen by some parties, would be enough to cast doubt on its contribution to net sustainability benefits. As such, the Study's assessment suggests that a well-crafted state-state dispute settlement mechanism might be a more appropriate enforcement mechanism in CETA than ISDS.*[1]

The NAFTA investment regime was originally characterized as an exceptional remedy aimed at situations where the domestic courts, specifically in the Mexican regime of that era, could not be trusted to redress valid investor concerns. There is no justification for such a mechanism between jurisdictions, such as the EU and Canada, that have mature, democratic systems of justice that

1 SIA, pg. 337: http://www.eucanada-sia.org/docs/EU-Canada_SIA_Final_Report.pdf

are available to protect all investors regardless of nationality. This was the position taken by the European Parliament in a motion from June 2011, which stated that "given the highly developed legal systems of Canada and the EU, a state-to-state dispute settlement mechanism and the use of local judicial remedies are the most appropriate tools to address investment disputes."[2]

The Australian government recently went a step further by discontinuing its practise of including ISDM in trade and investment agreements. A 2011 policy statement says:

> *(T)he Government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses. Nor will the Government support provisions that would 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. The Government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme.*[3]

Over fifteen years of experience has clearly shown that the sweeping powers and protections afforded to investors under bilateral investment treaties and the NAFTA Chapter 11 have repeatedly been invoked in order to frustrate the legitimate exercise of democratic governmental authority. In too many cases, those efforts have succeeded. It would be highly undesirable if this deeply flawed approach, especially investor-state arbitration, were entrenched and expanded in the CETA.

While the India negotiations are advanced, it is likely that the CETA with Canada be the first opportunity for the Commission to exercise its new mandate on investment protection in an international treaty and will set an important precedent. It is our understanding that the chapter on investment protection has

2 European Parliament: http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2011-0344&language=EN

3 http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html#investor-state

not yet been finalized in the CETA negotiations. We sincerely believe that there is still time to affect the outcome of these negotiations and to remove ISDM from the CETA as proposed by the European Commission's SIA report.

We look forward to hearing from you.

Sincerely,

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