



Trade Justice Network  
Réseau pour le commerce juste



April 30, 2014

To: Karel De Gucht  
EU Trade Commissioner

The Right Honourable Stephen Harper  
Prime Minister of Canada

The Honourable Edward Fast  
Minister of International Trade

Dear Sirs:

The CETA negotiations were announced as having been nearly concluded, via an Agreement in Principle, in October 2013 but we understood that some important aspects were not yet finalized. Even now we are hearing conflicting rumours regarding the present 'state of play'. The level of secrecy regarding the negotiations is in itself an extremely worrying sign that the interests of the public at large are not driving developments.

ISDS has come to the public's attention, much more seriously recently in Europe especially, because of the negotiations for the EU - US trade agreement (TTIP). We have, however been clear on this point for some time: we firmly rejected ISDS in our joint position dating from the end of 2009 (see <http://www.epsu.org/a/6087>).

As you are aware, ISDS has become a very controversial issue. Groups in Europe and Canada are legitimately very worried about how extensive the CETA Services and investment Chapter might be. Even if there are market access reservations for public services outside of ISDS, this will not give adequate protection from claims of expropriation or violations of "fair and equitable treatment", e.g. in the case of remunicipalisation.

In short, if there is an ISDS clause, it will be impossible to fully protect public services, or any form of government decision making, from being challenged under an ISDS process.

ISDS will also have an impact on public procurement. Both the EU and Canada claim that procurement disputes will not be subject to investor-state claims, but it is impossible to guarantee that companies will not challenge procurement decisions that interfere with investment expectations. In the EU, the Remedies Directive has fostered legal challenges in a way that was not anticipated.

We would like to repeat our conviction that companies should not have the right over and above citizens to challenge decisions of governments. Can citizens, for example, challenge changes in their pension entitlements before tribunals because these changes

alter the basis of their investment expectations? Of course, the answer is no. Only corporations are given this right.

ISDS provisions exist in North American Free Trade Agreement (NAFTA). Canada has paid millions of dollars to companies for deciding to ban toxic waste, for banning a gasoline additive that was a known carcinogen, and for taking back the water and timber rights of a company that walked away from its obligations in Newfoundland – all because those decisions were challenged by companies. Sweden's state-owned energy company Vattenfall is taking the German government to the International Centre for Settlement of Investment Disputes over the closure of its nuclear power plants. Bulgaria had to pay over 6 million dollars in legal fees, even though the case brought against it by Palma Consortium was thrown out as frivolous and Palma was ordered to reimburse Bulgaria a very small portion of its expenses.

The EU's Sustainability Impact Assessment (SIA) on CETA recommended against including an investor state dispute mechanism. The Assessment recommends only the usual state-to-state dispute mechanism.

We also firmly rejected the use of *negative listing* of commitments. We would like to repeat our concerns regarding the negative list approach to making liberalization commitments. While this issue has not yet become as controversial as ISDS, negative listing is equally as problematic.

Up to today, the EU has followed a *positive list* approach backed up with a broad exclusion of public services. CETA (and TTIP) appears to be based on a negative list approach to public services, which means all that is not excluded is covered. Negative lists make it harder for public authorities to take account of new or changing needs. It is also a very cumbersome process: we have heard that there are 100s of pages of exclusions in CETA. The inclusion of ISDS weakens possibilities under the negative list approach to protect services.

In Canada negative listing in trade agreements has led to many problems, including a virtual ban on any new public services. CETA must not include a negative list approach to making liberalization commitments. On both sides of the Atlantic there is growing evidence of the failure to control market behavior. More, not less, public intervention will be necessary to respond to overlapping financial, economic, social and ecological problems. Trade agreements must not tie citizens' hands behind their backs. An increasing number of studies show that liberalisation does not lead to efficiency gains, on the contrary.<sup>1</sup> Universality, continuity, affordability, democratic control and user protection are important principles that underpin public services. They cannot be traded! Political (not market) intervention is necessary to ensure public services are provided of equally high quality, and to all.

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<sup>1</sup> For example, see major review of research findings on the impact of contracting out of public services in Europe. This firmly calls into question the benefits of getting the private sector to deliver public services. See <http://www.epsu.org/a/8011>

To conclude, we urge the EU and Canada to ensure that CETA upholds the right of governments at all levels to define, organize and regulate public services. It is not possible to set in stone, or foresee, public needs. CETA (and other agreements) must have broad exclusions of public services as well as sufficient policy space to define and regulate public services in the future. The success of the EU Right2Water campaign shows that citizens will not accept water services to be included in trade deals. It is particularly important that any *grey areas* are avoided: healthcare, education and social services for example, need to be entirely excluded, irrespective of organization or type of funding.

Your sincerely,



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cc The Honourable Dave Hancock, Premier of Alberta  
The Honourable Christy Clark, Premier of British Columbia  
The Honourable Greg Selinger, Premier of Manitoba  
The Honourable David Alward, Premier of New Brunswick  
The Honourable Tom Marshall, Premier of Newfoundland and Labrador  
The Honourable Bob McLeod, Premier of Northwest Territories  
The Honourable Stephen McNeil, Premier of Nova Scotia  
The Honourable Peter Taptuna, Premier of Nunavut  
The Honourable Kathleen Wynne, Premier of Ontario  
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The Honourable Philippe Couillard, Premier of Québec  
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