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CETA's Implications on Sustainable Development and Environmental Protection in Canada

Prepared by:
Ramani Nadarajah
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Canadian Environmental Law Association
T 416 960-2284 • **F** 416 960-9392 • 130 Spadina Avenue, Suite 301 Toronto, Ontario, M5V 2L4 • cela.ca

The Comprehensive Economic and Trade Agreement (CETA) is the largest bilateral free trade agreement Canada has negotiated since the North American Free Trade Agreement (NAFTA). It will significantly impact environmental protection and sustainable development in Canada. In particular, the inclusion of an investor-state dispute settlement mechanism, the liberalization of trade in services, and the deregulation of government procurement rules will impact the federal and provincial governments' authority to protect the environment, promote resource conservation, or use green procurement as a means of advancing environmental policies and objectives.

Furthermore, the CETA is the first Canadian trade agreement to include municipalities and only the second trade agreement in Canadian history to include the provinces. The trade liberalization provisions in the Agreement, in conjunction with recent federal regulatory measures, heighten the risk of privatization of essential public services such as municipal water and wastewater systems in Canada.

This brief is intended to highlight some of the key provisions of the trade Agreement and its implications for sustainable development and the protection and preservation of the environment and human health in Canada.

Investor State Dispute Settlement

The CETA's inclusion of an investor-state dispute settlement (ISDS) system modelled largely on NAFTA's Chapter 11 is perhaps the most troubling feature of the Agreement. The ISDS provisions allow foreign investors to by-pass the host government's judicial system and bring cases before international arbitration tribunals for alleged breaches of investment protections under the Agreement.[1] The ISDS provisions of international trade agreements such as NAFTA's Chapter 11 have been increasingly used to successfully challenge domestic public interest measures, including environmental laws. Canada's experience with the ISDS tribunals demonstrates that they generally tend to rule in favour of investors where environmental regulatory measures have negatively impacted on an investment. This has resulted in the federal government paying out large amounts of monetary damages.[2] Under NAFTA's Chapter 11, for example, investor-state cases have been brought against Canada for the ban on the use of the gasoline additive MMT for health reasons, the export of toxic PCB waste, the ban on the sale and

[1] Legal experts and academics have maintained that the inclusion of ISDS provisions in trade agreements between developed countries with well established judicial systems is unnecessary given that the ISDS system was developed as a mechanism to protecting investors from arbitrary and unfair actions by countries with politically unstable governments and less developed judicial systems. See for example, Gus Van Harten, "Reforming the NAFTA Investment Regime" in *The Future of North American Trade Policy*, Pardee Centre Task Force Report (Nov 2009] online <http://www.ase.tufts.edu/gdae/Pubs/rp/PardeeNAFTACh4HartenFDINov09.pdf>. In 2010, the Australian government announced that it would no longer enter into international trade agreements that included ISDS system with developed nations on the grounds that it would not support provisions that "would confer greater legal rights to foreign businesses than those available for domestic businesses." Gillard Government *Trade Policy Statement: Trading our way to more jobs and prosperity*, online: Australian Government Department of Foreign Affairs and Trade https://www.google.ca/?gws_rd=ssl#q=australian+government+gillard+govenment+trade+policy+statement

[2] Scott Sinclair, *Tar Sands and the CETA*, Briefing Paper Trade and Investment Series (October 2011) at 2. online: Canadian Centre for Policy Alternatives < https://www.policyalternatives.ca/publications/reports/tar-sands-and-ceta>.

use of pesticides, and the ban on hydraulic fracking in the St. Lawrence River Basin. The inclusion of ISDS provisions in the Agreement, thus, poses a significant threat to the federal and provincial government's authority to take measures to protect the environment and human health and safety.[3]

CETA`s Trade Sustainable Development Chapter

The CETA is the first Canadian trade agreement to include a chapter on sustainable development.[4] The Agreement sets out commitments between the EU and Canada to:

- encourage businesses to adopt practices that promote economic, social and environmental objectives;
- recognize the benefits of eco-labelling and environmental-performance goals and standards;
- commit both parties to review, monitor, and assess the impact the Agreement has on sustainable development in Canada and the EU; and,
- establish a civil society forum to foster discussion on sustainable development in the context of trade relations between Canada and the EU and to "help inform the work of CETA's committee on trade and sustainable development."[5]

The inclusion of provisions on trade and sustainable development is a positive step and recognizes the importance of promoting trade policies in a way that contributes to sustainable development in Canada and the EU. However, the Agreement references conservation and sustainable management in relation to only two sectors, namely forestry[6] and fisheries.[7] Other sectors such as mining, energy, and transportation, which have also caused extensive damage to the environment, are omitted from the Agreement.[8] Moreover, even in relation to the two named sectors, the Agreement is drafted in largely permissive, as opposed to mandatory terms, leaving compliance with these provisions to the discretion of the parties.[9]

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[3] *Ibid*.
[4] Canada, *Technical Summary of Final Negotiated Outcomes: Canada European Comprehensive Economic and Trade Agreement, Agreement-in- Principle,*at 25, online: Government of Canada <http://www.actionplan.gc.ca/en/content/technical-summary-final-negotiated-outcomes.>
[5] Foreign Affairs, Trade and Development Canada, *Opening New Markets in Europe Creating Jobs and Opportunities for Canadians: An Overview*, (Ottawa: Public Works and Government Services Canada, 2013) at 49 online: Foreign Affairs, Trade and Development Canada, <http://www.cela.ca/sites/cela.ca/files/CETA%20report.pdf >.
[6] Draft CETA, Sustainable Development, Article 3bis, p. 250.
[7] Draft CETA, Sustainable Development, Article, 3ter. p. 251.
[8] Kyra Bell-Pasht, *Report on the Environmental Impact of the Canadian & European Union Comprehensive Economic and Trade Agreement ('CETA')" (Canadian Environmental Law Association*, Toronto, October 2011) online: Canadian Environmental Law Association < http://www.cela.ca/sites/cela.ca/files/CETA%20report.pdf>at 19.
[9] Ibid.

CETA's Trade and Environment Chapter

The CETA has an environment chapter which contains provisions similar to those found in free trade agreements between Canada and other countries. These commitments include:

- seeking to maintain high levels of environmental protection;
- ensuring the effective enforcement of domestic environmental laws;
- not derogating from environmental laws in order to attract trade or investment;
- providing for domestic sanctions or remedies for violations of environmental laws; and,
- requiring the parties to ensure a legal framework exists to permit effective action against infringements of its environmental laws.

CETA also includes a fairly broad and robust definition of environmental law. It is defined broadly to cover "all laws or statutory or regulatory provisions, or other legally binding measures that have as their purpose the protection of the environment, including laws related to the management of natural resources."[10]

CETA's environment chapter further provides a general exception clause which is modelled on GATT Article XX. It states that nothing in the Agreement "shall prevent Parties from adopting or maintaining measures to implement the Multilateral Environmental Agreements to which they are party provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the parties or a disguised restriction on trade."[11] While it is premature to assess the scope of protection provided by this provision, it should be noted that the experience with other similarly worded provisions, such as GATT Article XX has not provided any meaningful protection to domestic environmental policies from being successfully challenged as barriers to trade.[12]

Finally, the CETA's environment chapter provides for "enhanced cooperation" between the parties on trade related issues of common interest."[13] A dispute resolution provision, based on a consultative and cooperative approach, covers all the obligations between the parties under the environment chapter. A party may request consultation with another party regarding any matter arising from the environment chapter.[14] In the event that a matter has not been satisfactorily addressed through consultation, a party may request review by a panel of experts[15] which can

[10] Draft CETA, Environment, Article X.2. Definitions, at 237.; See also *Supra* note 4 at 25.
[11] Draft CETA, Environment, Article 2 at 237.
[12] David C. Esty, *Greening the GATT, Trade*, *Environment and the Future*, (Washington DC.: Institute for International Economics, 1994) at 47.
[13] Draft CETA, Environment, Article 9, para 1, p. 241.
[14] Draft CETA, Environment, Article X, Government Consultation, p. 244.
[15] Draft CETAL Environment, Article X, Panel of Experts 72, p. 244.

issue a non-binding report.[16] In the event the panel finds that there has been non-compliance, the only recourse is for the parties to engage in further discussions, identify appropriate measures and to decide upon a "mutually satisfactory action plan."[17] The Agreement does not provide for penalties or trade sanctions to address cases of non-compliance.

While the provisions in the CETA's environment chapter are laudable, they are largely meaningless because they lack any effective enforcement mechanism. In contrast, compliance with the investment protection provisions in the Agreement can be secured through the ISDS provisions. These provisions confer authority on the arbitration tribunals to order an award, separately or in combination, for damages or restitution of property, as well as costs.[18]

Impact on Essential Public Services that protect the Environment

International trade rules can significantly constrain the capacity of governments to adopt public policy and regulatory measures if they impact investments and services. The extent to which international trade rules do this is a function of the rules themselves and the extent to which government measures have been exempted from a trade agreement.[19]

While CETA provisions relating to investment and services are similar to those under NAFTA and the GATT, CETA will dramatically expand the application of international trade rules to investments and services by virtue of its "negative list" approach. Under CETA, government measures will be subject to the Agreement, unless they are explicitly reserved. The EU has never utilized this approach to the liberalization of trade in services in any previous trade agreements, and has instead relied on a "positive list" that involves agreeing to commitments in specified list of areas.[20] Under the positive list approach the parties determine which public services they would prefer to further liberalize. In other words, the positive list approach limits the application of the trade agreement to specific service sectors that the parties volunteer for inclusion. In contrast, CETA's "negative list" approach dramatically expands the application of the Agreement to trade in service sectors and also exposes both Canada and the EU to the risk of giving market access commitments in areas that they did not intend to cover.[21] Moreover, the negative list curtails the capacity of governments to take steps to adopt policy and regulatory

[16] Draft CETA, Environment, Article XXX, Interim and Final Report, p. 246.
[17] *Ibid*.
[18] Armand de Mestral & Stephanie Mullen, *The Investment Provision of the CETA, Canada-Europe Transatlantic Dialogue, Seeking Transnational Solutions to 21st Century Problems*, CETA Policy Brief Series (October 2013) online: Carleton University http://labs.carleton.ca/canadaeurope/wp-content/uploads/sites/9/CETD_CETA-policy-brief_Investment_De-Mestral-Mullen.pdf at 4.
[19] Legal Opinion from Steven Shrybman to Paul Moist, National President, Canadian Union of Public Employees (10 April 2012) re: Canada –European Union: Comprehensive Economic Trade Agreement (CETA) at 4.
[20] House of Commons, Report of the Standing Committee on International Trade, *Negotiations Toward a Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union*, (march 2012)) (Chair: Hon. Rob Merrifield) at 14-15.
[21] *Supra* note 17 at 2-3.

measures to respond to future challenges that have not yet emerged in broad areas of public policy.[22]

The negative list approach provides for two categories of reservations: Annex I and Annex II. Under Annex I, the reservations apply only to existing exempt measures, however Annex I is "bound" and thus prohibits amendments which would decrease conformity of the measure with CETA requirements, creating what is known as the "ratchet effect." Meanwhile, Annex II reservations are "unbound," which means that they protect not only existing measures, but also allow governments to adopt future policy and regulatory measures in relation to that particular sector which may restrict the rights of foreign investors. Annex II thus affords stronger protection as it allows governments to adopt new measures to respond to future challenges within an exempted sector.

Under the Agreement, the EU has proposed far more extensive reservations than those sought by Canada.[23] The EU, for example, is proposing broad Annex II reservations for all public utilities at the national and local levels,[24] public monopolies whether commercial or otherwise;[25] provision of services related to the collection purification and distribution of water to household, industrial and commercial or other users – including drinking water and water management;[26] research and development in virtually all sectors[27] and energy distribution services (such as pipelines and transmission systems) and supply services.[28]

Canada, like the EU, has added a reservation under Annex II for existing and future "collection, purification and distribution of water" by all levels of Canadian government from CETA's market access rules. However, other services which are critical to the environment and human health such as wastewater treatment services and waste management are not included in the list of reservations. This has raised concerns that these services would be subject to a "drastically liberalizing provision secured with investor state dispute settlement mechanism."[29] In the context of municipal wastewater systems, this risk has been heightened by the federal government's new standards for the discharge of wastewater. The *Wastewater Systems Effluent Regulations* which came into effect on June 20, 2012, established national standards for waste water treatment for the first time in Canada. The regulations which were developed under the *Fisheries Act* establish effluent quality limits, which are to be met through secondary treatment or the equivalent prior to the discharge of wastewater. While the regulations are expected to have a positive impact on Canada's aquatic ecosystems, they will also have significant cost implications for municipalities that will be required to upgrade their wastewater systems. It is expected that as many as one thousand Canadian municipal wastewater facilities will need to be

[22] *Supra* note 18 at 9.
[23] *Ibid* at. 2
[24] Draft CETA, European Union Annex II, at 3.
[25] Ibid.
[26] Ibid at 5.
[27] Ibid at. 7-8
[28] Ibid.
[29] Letter from Theresa McClenaghan, Executive Director and Counsel, Canadian Environmental Law Association to Hon. Dalton McGuinty, Premier of Ontario (11 January 2012) re: Ontario's services offer for the Canada and European-Union Comprehensive Economic & Trade Agreement (CETA) online: Canadian Environmental Law Association < http://www.cela.ca/sites/cela.ca/files/L-CETA-ontarioservicesoffer%20%28Jan.11.2012%29.pdf.>.

upgraded at a cost of over $20 billion CAD.[30] The costs projected for the City of Toronto alone are expected to be approximately $207.1 million CAD.[31]

The timing of the regulation in conjunction with the CETA raises concerns that CETA will increase pressure to privatize Canadian wastewater facilities. For instance, municipalities that require substantial capital funding to comply with the new environmental regulations could be vulnerable to European firms looking to gain access to municipal wastewater systems, thereby creating increasing pressure to privatize Canadian wastewater facilities.[32]

Similarly, municipal water systems in Canada are also facing increasing challenges in the delivery of services to their communities due to the costs of meeting commercial and residential demand while maintaining environmental quality. In this regard, issues pertaining to the governance of water systems and use of different delivery models have become increasingly central to the debate on how to ensure a sustainable and safe water supply to communities. The role of the private sector in the delivery of water supply as well as the privatization of public utilities was extensively canvassed in the Walkerton Inquiry.[33] In Part 2 of the Walkerton Report, Justice O'Conner, the Commissioner of the Walkerton Inquiry, observed that a "distinction can be made between different forms of privatization. First, privatization can mean the engagement of a private operating agency to run a water system. Second it can mean a private owner of a water system."[34] With respect to the latter, the Commissioner was explicit that ownership of municipal water systems should not be placed in private hands given the "essentially local character of water services, the natural-monopoly characteristics of the water industry, the importance of maintaining accountability to local residents; and the historical role of municipalities in this field.[35]

Justice O'Connor's comments, although made in the context of municipal water systems, apply equally to municipal wastewater facilities in Canada, which like water systems are owned by a municipal government or a group of municipal governments. In this context, the failure to include wastewater systems and other services crucial to public health and the environment within the Annex II reservations constitutes a serious error in the Agreement.

Impact on Green Procurement

The procurement process is an important mechanism through which Canada's federal, provincial and municipal governments have pursued important public policy objectives, including those

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[30] Kelti Cameron, Meera Karunananthan & Stuart Trew, *Public Water for Sale: How Canada will Privatize our Public Water Systems* (December 2010) (Toronto: The Council of Canadians and the Canadian Union of Public Employees) at 7, online :< http://archive.cupe.ca/updir/CETA_Water_Report_FINAL_-_EN.pdf >.

[31] City of Toronto, Staff Report P: \2013\ ClusterB\TW\pw13003, Impact of New Federal Wastewater Systems Effluent Regulations on Toronto Water, (28 February 20130 at 2, online: City of Toronto <http://www.toronto.ca/legdocs/mmis/2013/pw/bgrd/backgroundfile-56525.pdf >.

[32] *Supra* note 29 at 7.

[33] *Report of the Walkerton Inquiry, Part II, A Strategy for Safe Drinking Water*, Toronto: Queen's Printer for Ontario, at 318.

[34] Ibid 317.

[35] Ibid at 323.

directed at fostering investment in local sustainable development and promoting environmental protection.

The CETA's procurement provisions have been described as a "game changer" since they allow European companies for the first time, access to municipal government procurement.[36] The Canadian procurement market is estimated to be worth in excess of $100 billion annually and the EU government market is worth approximately $2.7 trillion dollars.[37] Although the federal government has been subject to international trade disciplines under NAFTA and some provincial government entities have been subject to procurement disciplines as a result of the Canada-US Agreement of Government Procurement in relation to US suppliers, Canadian municipalities have remained protected from any international trade disciplines in relation to public procurement.[38] However, as a result of CETA, Canadian government contractors bidding on potentially very lucrative provincial and municipal procurement will now face competition from EU companies.[39]

CETA is the most comprehensive and favourable market access offered by Canada under any free trade agreement and will greatly expand the ability of EU businesses to sell to municipal, provincial and federal governments in Canada.[40] CETA will only apply to contracts above a certain value, that value being approximately equal to the thresholds established by the WTO Government Procurement Agreement but significantly higher than the values set out in the Agreement on Internal Trade, which applies to all government procurement in Canada.[41] Moreover, with the exception of contracts other than construction services contracts, the thresholds are also significantly higher than the Canadian government's commitments under NAFTA.

The threshold for procurement of goods and services for government entities including municipalities is 200,000 Special Drawing Rights (SDRs) which is approximately $315,000.[42] For contracts for procurement by the utilities sector, the threshold is 400,000SDRs ($631,000) and for construction services for all levels of government, the threshold is 5 million SDRs ($7.8 million).[43]

The "national treatment" provisions in CETA's Agreement of Government Procurement raises concerns because it will significantly restrict the municipal government's ability to foster local sustainable development and ensure environmental protection.[44] These provisions require parties to provide the same treatment to goods and services of other parties as they do their own. This

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[36] McCarthy Tetrault, *Canada and the European Union Agree to Historic Trade and Investment Deal*, (18 October 2013) online: McCarthy Tetrault http://www.mccarthy.ca/article_detail.aspx?id=6497 Ibid at 3..

[37] *Ibid*.

[38] *Ibid*.

[39] *Ibid*.

[40] *Supra* note 4 at 17.

[41] *Ibid*.

[42] *Ibid*.

[43] *Ibid*.

[44] Legal Opinion from Steven Shrybman (Sack Golblatt Mitchell LLP) to the Centre of Civic Governance at Columbia Institute, *Municipal Procurement Implications of the Proposed Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union*, (28 May 2010) at 13 -14, online: Centre for Civic Governance <http://www.civicgovernance.ca/municipal-procurement-implications-of-the-proposed-ceta-agreement/>.

principle, known as "non-discrimination," essentially requires parties not discriminate in procurement contracts based on the source of goods or services. Furthermore under CETA, municipal entities would be prohibited from stipulating conditions in public procurement processes that are directed at fostering local development. This type of provision, which is referred to as an "offset" in international trade law terminology, is defined in CETA as:

> An offset means any condition or undertaking that encourages local development or improves a Party's balance of payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar action or requirement."[45]

This ban on offsets under CETA poses a serious constraint to municipal governments as it precludes the use of conditions in the public procurement process that are directed at promoting public interest policies, such as encouraging the purchase of local food or the promotion of domestic investment in green technology.[46]

The City of Toronto's Local Food Procurement Policy, which was adopted in 2008, is one of the measures that may be potentially vulnerable to the CETA's procurement provisions.[47] Under the policy, the City of Toronto has committed to progressively increase the percentage of food in City owned facilities or purchased for City operations from local sources. Under the policy, "local" is defined as "food that is grown in the Greater Toronto Area, the Greenbelt of Ontario and other regions of Ontario.[48] The development of a local food economy, through the use of procurement policies has also been pursued in a number of international jurisdictions as a means of promoting the principles of sustainable development and protecting the environment.[49] Indeed, the City of Toronto's policy expressly states that the benefits of the policy are to "reduce climate change and green house emission associated with food transportation and production as well as the harmful effects of agricultural chemicals, in particular, pesticides and fertilizers.

Despite the significant economic, environmental and nutritional benefits associated with the use of local food procurement policies, there is a growing concern that the these types of initiatives may run afoul of international trade and procurement policies. These concerns were evident during the passage of Bill 36, the *Local Food Act, 2013* which was enacted by the Ontario government in November, 2013. The purpose of the Bill was to foster successful and resilient local food economies and systems throughout Ontario, to increase awareness of local food in Ontario, including the diversity of local food, and to encourage the development of new markets for local food. The Bill sought to achieve these objectives by providing authority to the Minister to establish goals or targets to improve food literacy in respect of local foods, encourage increased use of local food by public sector organizations, and increasing access to local food.

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[45] *Ibid*.
[46] Ibid. See also Lazar Konforti, *International Trade Law and Local Food Policy in Canada*, (December 2010) ((Montreal, Quebec, Équiterre) at 24.
[47] *Ibid*.
[48] Ontario, City of Toronto*, Local Food Procurement Policy and Implementation Plan*, (6 October 2008) online: City of Toronto < http://www.toronto.ca/legdocs/mmis/2008/gm/bgrd/backgroundfile-16137.pdf >.
[49] Kyra Bell -Pasht*, POSSIBLITIES FOR LOCAL FOOD AGREEMENT IN ONTARIO: TRADE AGREEMENT RESTRICTIONS & HOW OTHER JURISIDICTIONS HAVE AVOIDED THEM*, (Toronto: Canadian Environmental Law Association February 11, 2013) at 8-12, online: Canadian Environmental Law Association <http://sustainontario.com/wp2011/wp-content/uploads/2013/02/PFTF-Kyra-Bell-Pasht-Local-Food-Procurement-Feb.2013-FINAL.pdf>.

There are, however, no provisions in the Act regarding the use of local food procurement policies to achieve its objectives, despite recommendations made to this effect prior to the passage of the Bill.[50] Indeed, the failure of the Ontario government to include local food procurement provisions in Bill 36 appears to be due to concerns about the possibility of violating international trade law rules.[51]

Public procurement can also be a means of fostering innovation of new technology and creating and promoting markets for new services and products.[52] Ontario's *Green Energy and Green Economy Act, 2009* ('Green Energy Act') used such an approach to boost production and use of renewable energy in the province. The Act provided authority for the establishment of FIT programme which offered above market rates to renewable energy producers for the provision of different forms of renewable energy provided they met local content requirements, whereby a minimum percentage of goods, services and labour had to be from Ontario. The goals of the Act were to address the impacts of climate change by reducing Ontario reliance on non-renewable energy (including coal) whilst also helping create jobs in the manufacturing sector that had been hit hard by the 2008 global financial crisis.[53] The Act, which was modelled on similar renewable energy programs in Europe, created tens of thousands of jobs in Ontario and generated billions of dollars in investments in the renewable energy sector. [54]

In 2013, Japan and the European Union (EU) filed complaints with the World Trade Organization (WTO) on grounds that the Green Energy Act's FIT programme's local content requirements conflicted with international trade rules. The case raised, for the first time, the interpretation of the General Agreement on Tariffs and Trade (GATT) provisions which excluded government procurement policies from the "national treatment" obligations that require parties not to discriminate on the basis of whether goods are imported or locally produced. The WTO panel found that the FIT programme did not qualify as government procurement, because the energy which was purchased by Ontario Power Authority was subsequently resold on a commercial basis by the Ontario government and by other public hydro entities.[55] Canada appealed the decision and the WTO Appellate body upheld the ruling albeit for different reasons.

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[50] See J. Castrilli, *Submissions to the Standing Committee on Social Policy on Bill 36, Local Food Act, 2013* (Toronto: Canadian Environmental Law Association, October 1, 2013) at 4, online: Canadian Environmental Law Association http://www.cela.ca/sites/cela.ca/files/Submissions-October-1-13-to-Standing-Committee.pdf.The Canadian Environmental Law Association written submission states "... in order to ensure that Bill 36 makes progress in achieving its purposes it should require the Minister to establish targets in relation to local food procurement, subject to certain criteria. Local food procurement is an important tool for supporting local food systems because it represents a potentially reliable increase in demand upon which local food systems can thrive."

[51] Ontario, Legislative Assembly, Official Report of Debates, (Hansard), 40th Parl. 2nd Sess. No. SP-20 (8 October 2013), at 309 (Ernie Hardeman).

[52] *Supra* note 43 at 7.

[53] Scott Sinclair, *Saving the Green Economy: Ontario's Green Energy Act and the WTO*, (Ottawa: Canadian Centre for Policy Alternatives November 2013) at 5- 7, online: Canadian Centre of Policy Alternatives https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office%2C%20Ontario%20Office/2013/11/Saving_the_Green_Economy.pdf.

[54] *Ibid*.at 7.

[55] *Ibid* at 4.

Following the WTO's decision, Ontario's Energy Minister, Bob Chiarelli announced that the Ontario government would comply with the WTO ruling. [56] On December 11, 2013 the Ontario government introduced Bill 153, *Complying with International Trade Obligations Act*, which repeals the authority for the Minister to impose domestic content requirements under the FIT programme. The Bill, if adopted, would curtail the Ontario government's ability to pursue sustainable development by building a robust renewable energy sector and address climate change whilst also promoting local development and job benefits in the province.

While the WTO ruling turned on a specific set of facts particular to that case, it raised serious concerns about the extent to which government can use public procurement policies to promote sustainable development and protect the environment. It also exposed the limits that international trade rules can impose on governments' authority to pursue legal and policy options to address complex environmental and economic issues.

CONCLUSION

CETA as drafted would have significant implications for sustainable development and environmental protection in Canada. These include the ISDS mechanism, the dramatic expansion of trade in services and extensive public procurement access provision, and the lack of any enforcement mechanism in the Agreement's chapter on the environment and sustainability.

The inclusion of an ISDS system mechanism in CETA is perhaps the most troubling feature of the Agreement. ISDS provisions in other trade agreements such as NAFTA have been utilized by foreign investors to successfully by-pass domestic courts to challenge federal and provincial environmental regulatory measures before international arbitration tribunals. There is no compelling rationale for the inclusion of an ISDS mechanism in CETA given that both the EU and Canada are democratic jurisdictions with efficient and fair justice systems that can effectively protect investor rights.

The CETA is the first time the EU has signed a trade agreement with a "negative listing" approach to trade in services, a reversal of the traditional "positive listing" approach used in other trade agreements such as NAFTA and GATS. This means that all services other than those expressly reserved are subject to trade liberalization under CETA. While Canada has included the collection, purification and distribution of water for all levels of Canadian governments from CETA's market access rules, it has not included other services necessary to protect the environment and human health such as waste management and wastewater systems.

CETA will provide the most comprehensive and extensive market access to public procurement under any free trade agreement to which Canada has been a signatory. CETA will allow, for the first time, access for foreign investors to the municipal public procurement process. Although CETA will only apply to contracts above a certain threshold, they are significantly higher than the Canadian government's commitments under NAFTA. The public procurement provisions also include a ban on offsets, which precludes use conditions such as domestic content requirement to encourage local development. The ban on offsets will constrain local

[56] "Ontario to change green energy Law after WTO ruling", *The Globe and Mail* (9 May 2013) online: The Globe and Mail< http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/ontario-to-change-green-energy-law-after-wto-ruling/article12236781/>.

governments' ability to use the public procurement process to promote important policy objectives, such as sustainable local development and environmental protection.

The CETA is unique in that it is the first time in Canada that a free trade agreement has included a chapter on sustainable development. However, the Agreement only references conservation and sustainability in relation to the forestry and fisheries sectors. Other sectors, such as mining, energy and transportation sectors which have also caused extensive damage to the environment are omitted from the Agreement. Furthermore, even in relation to the two named sectors, the Agreement is drafted in permissive, as opposed to mandatory terms, leaving compliance to the discretion of the parties.

The environment chapter includes a fairly robust definition of environment and provides a dispute resolution process based on a consultative and cooperative approach to cover all obligations within the chapter. The agreement however, does not provide for penalties or trade sanctions to address non-compliance with its provisions. Consequently, while the provisions are laudable they are largely meaningless as they fail to provide for any binding enforcement mechanism. This is in sharp contrast to the investor protection provisions in the agreement which can be secured through the ISDS provisions that confer authority on international arbitration tribunals to order an award, separately or in combination, for damages or restitution of property as well as costs.