Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

Hon. Ed. Fast
Minister of International Trade &
Minister for the Asia-Pacific Gateway
Room 105, East Block
Ottawa, Ont., K1A 0A6

Environmental Assessments of Trade Agreements
Trade Agreements and NAFTA Secretariat
Foreign Affairs and International Trade Canada
125 Sussex Drive
Ottawa, Ont., K1A 0G2

November 9, 2012

Via e-mail & fax

Dear Hon. Ed Fast and the Trade Agreements and NAFTA Secretariat,

Re: Commentary on the Final Strategic Environmental Assessment of the Canada-China FIPA

The Canadian Environmental Law Association (CELA) is pleased to provide the following comments in response to the Federal Government's Final Strategic Environmental Assessment of the Canada-China Foreign Investment Protection Agreement (FIPA) (the 'Agreement'). These comments will focus on the process of this EA and its failure to address potential environmental impacts.

CELA is 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 initiatives related to law reform, public education, and community organization. Our organization has a long history of engaging in legislative analysis of trade and investment agreements.

I. Flawed International Trade and Investment Agreement EA process

The Final EA fails to consider the regulatory chill presented by the Agreement's terms for governments considering new or increased environmental protection measures. One reason for the EA's failure to identify this major environmental concern is because it was not identified in the consultation process for the Initial EA of the Agreement.

However, environmental concerns are only now being raised by the public because they were only discoverable once a draft text of the Agreement was made public - long after the Initial EA took place. Not surprisingly, no comments were made during the Initial EA process.

As a result of no comments having been received in the Initial EA process, no Draft EA was deemed necessary before producing this Final EA.

> An Initial EA of the Canada-China FIPA was completed in January 2008. […] No public comments were received. In light of the Initial EA's conclusions regarding the unlikelihood of significant environmental impacts in Canada, preparation of a Draft EA was subsequently deemed to be unnecessary.[1]

The EA process for international trade and investment agreements is thus fundamentally flawed, as it is nearly impossible to submit comments of worth at the Initial EA stage because no draft agreement, in any form, is yet available to the public.

Furthermore, as CELA has previously outlined in our submission to the Initial EA of the Canadian European Comprehensive Trade and Economic Agreement (CETA)[2], it is deeply concerning that the Final EA is only released after the last official negotiations have taken place. As a result, comments received during this process appear to have no ability to affect the content of the Agreement. Based on a review of the Framework for Conducting Environmental Assessments of Trade Negotiations, 2001, it is unclear whether comments received during this consultation are required to be considered by the Government and addressed in the Canada-China FIPA negotiation process at all.

Recommendation #1: In the future, full environmental assessments of trade and investment agreements should be conducted before final terms of the agreement are concluded, based on a publicly available draft agreement. This would ensure that the EA process might in effect influence Canada's decision to enter into the agreement or influence its terms, as required by the first guiding principle of the Canadian Environmental Assessment Agency's 'Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals', namely 'early integration.'

Recommendation #2: In addition, comments received by the public throughout the process should be required to be considered and addressed by the government during the EA process.

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[1] Foreign Affairs and International Trade Canada website, 'Final Environmental Assessment of the Canada-China Foreign Investment Protection Agreement (FIPA)', accessed on October 25, 2012, at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/china-chine/finalEA-china-chine-EEfinale.aspx?lang=eng&view=d.

[2] Comments on Canada's Initial Strategic Environmental Assessment for the proposed Canada and European Union Comprehensive Economic and Trade Agreement (April 2012) (CELA publication #834) Available at: http://www.cela.ca/publications/ceta-comments-canadas-initial-strategic-environmental-assessment.

II. Environmental and Sustainable Development Impacts not Considered by the Final EA

The Final EA concludes,

> As new flows of investment from China into Canada (or Canada into china) cannot be directly attributed to the presence of FIPA, there can be no causal relationship found between the implementation of such a treaty and environmental impacts in Canada. It is for this reason that the claim made in the Initial EA, that no significant environmental impacts are expected based on the introduction of a Canada-China FIPA, is upheld.[3] (emphasis added)

However, environmental and sustainable development concerns from investment protection agreements include a *regulatory chill* on environmental protection measures as a result of the additional legal rights it grants to Chinese investors in Canada, including the right to sue for indirect expropriation, as well as the Agreement's reliance on environmental exceptions and exemptions measures to protect the environment and sustainable development. These concerns will be examined in more detail below.

i. ISDS mechanism

Under Article 20 of the Canada-China FIPA an investor's financial interests will be protected with new legal rights to sue the Canadian Government for measures, including legitimate environmental protection measures that limit their reasonable expectation of profits. This mechanism is referred to as Investor-State Dispute Settlement (ISDS), it is established in Article 20 of the Agreement,

> **Article 20. Claim by an Investor of a Contracting Party**
> 1. An investor of a Contracting Party may submit to arbitration under this Part a claim that the other Contracting Party has breached an obligation […]

The International Institute on Sustainable Development published a resource in 2012 which outlines the types of government public interest health, environmental and social equity measures that have been the subject of claims brought under ISDS mechanisms of investment treaties. They include:

> bans on harmful chemicals; bans on mining; environmental restrictions on the manner in which mining can take place; requirements for environmental impact assessments; regulations regarding transport and disposal of hazardous waste; regulations governing health insurance; measures aiming to reduce smoking; measures affecting the price and delivery of water; regulations aiming to improve the economic situation of minority populations; and measures aiming to increase revenues gained from production and export of natural resources.[4]

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[3] Foreign Affairs and International Trade Canada website, 'Final Environmental Assessment of the Canada-China Foreign Investment Protection Agreement (FIPA)', accessed on October 25, 2012, at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/china-chine/finalEA-china-chine-EEfinale.aspx?lang=eng&view=d.

[4] Bernasconi-Oosterwalder, Cosbey, et.al. 'Investment treaties & why they matter to sustainable development: Questions & Answers' (2012) International Institute for Sustainable Development, at p.7.

The document further clarifies that "in addition to those actual claims, it is estimated that foreign investors often use the threat of such arbitrations to compel governments to alter or abandon regulations which may negatively impact an investor."[5]

The threat of such claims and their substantial costs to defend as well as the substantial financial penalties that result if a Party is found to be in breach of an agreement, may reasonably place a regulatory chill on governments considering new or strengthened environmental regulations. We have outlined these concerns in several of our previous publications.[6]

In comparison to Canada's judicial system, the international tribunals under the Canada-China FIPA lack transparency, consistency, and impartiality (see the September 29, 2012 Toronto Star article: *'Canada-China investment deal allows for confidential lawsuits against Canada'* by Gus Van Harten[7]). By signing the agreements the parties (countries) contractually agree to terms which may require that they abide by decisions of tribunal arbitrators regardless of the Canadian court system and precedents. The hearings are held behind closed doors, the panels are ad hoc and their decisions, which are binding, are relatively unpredictable as arbitration panels are not bound by previous panel decisions, but rather consider them. Furthermore, provincial and local governments are not always provided the right to participate in order to defend their public interest measures subject to tribunal proceedings.

The practical effect of the new legal rights proposed by the Canada-China FIPA was aptly described by analyst Andrew Nikiforuk in an October 11th article in the Tyee,

> By November 1 [2012] three of China's national oil companies will have more power to shape Canada's energy markets as well as challenge the politics of this country than Canadians themselves.

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[5] *Ibid.*

[6] For a recent example, see the Report on the Environmental Impact of the Canadian and European-Union Comprehensive Economic and Trade Agreement (CETA) (CELA publication #808), at pages 22-23:

> To clarify the influence that ISDS have on local policy, as of October 2010, there were 66 investor state claims against under NAFTA's investment chapter, and of those, Canada had paid damages of $157 million. This figure does not include the substantial settlements paid. A 2010 study reported that 40 percent of the investor-state challenges under NAFTA were against public health and environmental policy. The risk of success, or substantial settlement, by a claimant against valid environmental regulation serves as a regulatory 'chill' on governments.
>
> As a result, there has been a move among developed nations away from ISDS mechanisms. The 2004 bilateral free trade agreement negotiated between Australia and the United States ('AUSFTA') provides no direct ISDS mechanism. The reasoning behind this change of direction is explained in Australia's Final Environmental Review of AUSFTA. The reviewing committee stated:
>
> > 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.

Available at: http://www.cela.ca/sites/cela.ca/files/CETA-report-2011.pdf.

[7] Available at: http://www.thestar.com/opinion/editorialopinion/article/1264290--canada-china-investment-deal-allows-for-confidential-lawsuits-against-canada.

***Recommendation #3*:** As CELA has recommended on numerous occasions, Canada should follow suit with other countries such as Australia, India, and South Africa, and refuse to negotiate trade and or investment agreements including ISDS mechanisms. Such a stance would support Canada's commitment to sustainable development and environmental protection outlined in the *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals,* and the Treasury Board *Policy on Management of Real Property.*

ii. Indirect Expropriation

Under Article 10 of the Agreement, China and Chinese investors are granted the right to sue Canada for direct or indirect expropriation except where expropriated for "a public purpose, under domestic due procedures of law, in a non-discriminatory manner and against compensation."

Indirect expropriation gives investors the right to sue for government measures that result in a reduction in reasonably expected profits. It is defined in Annex B. 10 of the Agreement.

> **Annex B.10. Expropriation**
> The Contracting Parties confirm their shared understanding that:
> 1. Indirect expropriation results from a measure or series of measures of a Contracting Party that has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

The Annex also includes some protection against a Party being sued on the basis of indirect expropriation on account of public interest measures,

> **Annex B.10. Expropriation**
> 3. Except in rare circumstances, such as if a measure or series of measures is so severe in light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, a non-discriminatory measure or series of measures of a Contracting Party that is designed and applied to protect the legitimate public objectives for the well-being of citizens, such as health, safety and the environment, does not constitute indirect expropriation.

However, as CELA recommended in our report on the proposed Canada and European-Union Comprehensive and Economic and Trade Agreement (CETA),

> […] expropriation provisions would provide foreign investors with the right to compensation, at fair market value, in every case of direct or indirect expropriation. This right to compensation is a right that does not exist under Canadian law, where the right to determine compensation is reserved to parliaments and legislatures.[8]

The threat of being sued for measures that limit the profits of foreign investors could reasonably deter a government from undertaking a wide array of legitimate environmental protection measures. As a result, the report recommends that even with a strict definition of indirect

[8] Report on the Environmental Impact of the Canadian and European-Union Comprehensive Economic and Trade Agreement (CETA) (CELA publication #808), at p.21, available at: http://www.cela.ca/sites/cela.ca/files/CETA-report-2011.pdf.

expropriation, as provided in the Annex B to this Agreement, the extraordinary rights and remedies provided are unnecessary and trade agreements should not give foreign investors rights greater than those of domestic investors in relation to expropriation.

iii. Reliance on Environmental Exceptions

Environmental measures are protected to a limited extent by provisions included in the Agreement, namely:

> **Article 33. General Exceptions**
> 2. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:
> (b) necessary to protect human, animal or plant life or health; or
> (c) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

These exceptions are a further basis for the Final EA's conclusion that the FIPA presents no environmental threats. However, these exceptions still provide room for environmental protection measures to be challenged by an individual investor as being 'unnecessary' or not applied in an arbitrary or unjustifiable manner' and subsequently sue Canada for lost income. As we have outlined in our 2011 report on CETA, the necessity test has been interpreted by trade dispute bodies as an extremely difficult one to satisfy.[9]

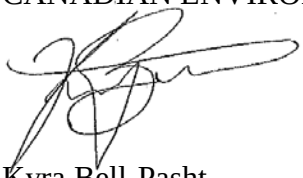
Conclusion

In short, we submit that the Final EA does not allow for effective public participation, nor does it appear to have any substantive impact on the text of the Agreement. In addition, we submit that arrives at incorrect conclusions about the potential environmental impacts of the Canada-China FIPA.

Thank you for this opportunity to provide our comments. Should you have any questions please contact Kyra Bell-Pasht at (416) 960-2284 ext. 224 or at kyra@cela.ca.

Sincerely,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Kyra Bell-Pasht
Counsel

[9] *Ibid*, at.p.7, available at: http://www.cela.ca/sites/cela.ca/files/CETA-report-2011.pdf.