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Making Sense of the CETA

An Analysis of the Final Text of the Canada-European Union Comprehensive Economic and Trade Agreement

Edited by Scott Sinclair, Stuart Trew
and Hadrian Mertins-Kirkwood

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Public Services

Public Services

Ellen Gould, *Independent consultant on international trade issues*
Research Associate with the Canadian Centre for Policy Alternatives

Key Points

Unless otherwise noted, all Articles, Annexes and Appendices referenced in this section refer to ***Chapter 10*** *of the August 2014 final version of the CETA text first leaked by German broadcaster ARD and now available at: http://eu-secretdeals.info/ceta.*

- CETA provides multiple grounds for challenges to public services and makes privatization a one-way street.
- The ambiguous wording of exceptions for public services in the NAFTA and the GATS has been carried over into the CETA. The threat to public services in the CETA is compounded by the fact that it combines the most far-reaching provisions of these agreements and extends them to more areas.
- The top-down structure of the CETA, where the default position is that all sectors are covered unless explicitly excluded, is a first for European Union trade agreements. The CETA's "list it or lose it" character is a high stakes gamble with public services.

- Canada has experience through the NAFTA with the negative listing model, but Canada scheduled much broader reservations for its provinces and municipalities in the NAFTA than it has done in the CETA.
- The CETA has a "ratchet" mechanism so that any existing measures that the Parties have reserved under Annex I can only be changed in the direction of more liberalization and privatization. This mechanism poses particular risks for public services that are being reformed through re-nationalization and re-municipalization. The CETA threatens the right of citizens to democratically choose which services they want their governments to deliver and to change their opinion on this issue over time.
- The CETA provides corporations with an investor-state dispute settlement (ISDS) mechanism they can use to demand compensation when governments decide to deliver new services through the public sector or attempt to reverse a privatization. Threats to use ISDS in treaties like the CETA have exerted a chill effect, successfully dissuading some governments from providing services through the public sector.[20]

Analysis of Key Provisions

- Similar to the one in the NAFTA, the CETA chapter on investment (Chapter 10) includes a broad definition of investments (see Article X.3) for which governments can be compelled to pay monetary compensation if they lose an investor-state suit brought under the agreement. The NAFTA/CETA definition of 'investors' — those who can launch ISDS claims — includes not only those who have an existing investment but also those who "seek to make" an investment (see Article X.3).
- The CETA investment chapter also mimics the NAFTA's treatment of expropriation (see Article X.11.1), covering both direct and indirect expropriation. A judge in a NAFTA case categorized that agreement's definition of expropriation as "extremely broad."[21]
- In an annex to the agreement, the CETA parties have attempted to rein in the definition of indirect expropriation to avoid the challenges to regulation that have occurred under the NAFTA. But the CETA still provides extensive scope for investors to get compensation above

and beyond what they could expect under domestic law[22] if public services are ruled to be an expropriation of their investment.

- In contrast with the NAFTA, the CETA chapter on investment includes prohibitions on placing limits on *market access* (see Article X.2.4) and these prohibitions are modelled on language in the GATS. The CETA market access provisions prohibit limiting access to a market even when limits do not discriminate in favour of local providers.[23] Of particular concern for the provision of public services is the prohibition on "monopolies" and "exclusive suppliers."

- In the CETA, however, the prohibitions on limiting market access are applied not only to services but more generally to "economic activities." Monopolies or exclusive suppliers in areas like electricity generation would be captured by this broad scope.

- The CETA investment chapter only provides exceptions for existing local government measures. Local governments cannot adopt new measures, such as creating monopolies or exclusive suppliers, unless the CETA parties have reserved scope for such measures in Annex II. For example, Canada has an Annex II reservation for water services but none for garbage collection or sewage treatment. Since the EU has not scheduled an Annex II reservation for the telecom sector, no European local government could partner with an exclusive supplier to provide free public wi-fi services as the City of Manchester has done.[24] The EU has expressly excluded all of the telecom sector from the protection of its Annex II reservations.

- Both the CETA investment chapter and cross-border services chapter (Chapter 11) borrow wording in the GATS that is sometimes claimed to carve out public services, exempting "activities carried out in the exercise of governmental authority" (see Chapter 10, Article X.1.2(c) and Chapter 11, Article 1.1(a)), which are defined as "an activity carried out neither on a commercial basis nor in competition with one or more economic operators" (see Chapter 10, Article X.3 and Chapter 11, Article 8). A senior European trade official has described this exception as "very narrow."[25] In the education sector, for example, the fees required by higher education institutions could be interpreted to mean they operate "on a commercial basis." Since public universities can be seen as competing for students with private colleges they could be interpreted to be "in competition with one or more economic operators."

- The weakness of the governmental authority exception is particularly problematic in the context of the CETA's top-down structure. For example, Canada did not make any GATS commitments for the education sector but has only taken a reservation for *public* education and training under the CETA, leaving the blurred line between public and private up to a trade or investment panel to clarify in the event of a dispute. The Canadian government used to rely on a "belt and suspenders" strategy to protect public services like education — not making GATS commitments in sensitive sectors because of the acknowledged weakness of the governmental authority exception. That caution is gone in Canada's approach to the CETA negotiations.
- Despite concerns about the weakness of the governmental authority exception for public services, Germany alone among the CETA governments has taken a broad Annex II reservation for health and social services across all five core CETA obligations: market access, national treatment, most-favoured nation treatment, performance requirements, and senior management and boards of directors. The reservation states:

  Germany reserves the right to adopt or maintain any measure with regard to the provision of the Social Security System of Germany, where services may be provided by different companies or entities involving competitive elements which are thus not 'Services carried out exclusively in the exercise of governmental authority.'

- The CETA parties have scheduled reservations in Annex II excluding services that are "considered as public utilities" in the case of the European Union and "services to the extent that they are social services established or maintained for a public purpose" in the case of Canada. These qualifications on public service carveouts have been criticized as ambiguous when they have been used in other trade agreements.[26]
- The European Union's general Annex II reservation for public utility services only shields these services against the application of the CETA market access obligation. National treatment applies to some EU "public utility" services, such as environmental services. That

means when services like waste management are opened up to private provision, European local governments will not be able to discriminate in favour of local service suppliers.

- The CETA's national treatment obligations do not apply to "subsidies, or government support relating to trade in services, provided by a Party" (Article X.14.5). Accordingly, governments are allowed to subsidize public or local services on a preferential basis.
- The EU has declared it has offensive interests in trade negotiations to get market access for European corporations to services that were previously public in sectors such as telecommunications, energy, and postal services.[27] The following section examines what impact the CETA could have in Canada's postal sector.

Postal Services

Kathie Steinhoff, *Canadian Union of Postal Workers*

Key Points

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- The federal government has only partially protected postal services.
- Canada took an Annex I reservation rather than a stronger Annex II reservation.
- In previous leaked drafts, Canada had proposed an Annex II reservation for postal services. In response to European pressure, Canada moved to a weaker Annex I reservation.
- An Annex II reservation would have protected existing or future non-conforming measures and allowed for future policy changes. For example, an Annex II reservation would have given our government the policy flexibility to reverse postal deregulation that is not working.
- Instead of adopting this stronger exclusion, Canada took an Annex I reservation that will protect Canada Post's existing exclusive privil-

ege to handle letters, but lock in current and future government decisions to deregulate Canada Post.

- As it stands now, the CETA will lock in deregulation of outbound international letters.

Why is this significant?

- Canada Post has an exclusive privilege to handle letters in Canada so that it is able to generate enough money to provide affordable postal service to everyone, no matter where they live.
- The corporation used to have a right to handle both domestic and international letters. However, the 2010 federal omnibus budget bill included legislation removing international letters from Canada Post's exclusive privilege. This move eroded the Crown corporation's revenue-generating capacity.
- Canada's decision to take an Annex I reservation means that current and future federal governments will not be able to democratically decide to reverse deregulation of international letters. This is not only undemocratic, it is also short-sighted. It is quite possible that a future government may wish to expand services provided by Canada Post, which would be significantly constrained under the CETA as drafted.
- The CETA also includes an "Understanding on Courier Services" that affirms foreign companies are able to make investor-state claims like the one made by United Parcel Service (UPS) under the NAFTA. While Canada prevailed in this case, it is difficult to predict the outcome of a similar investor-state claim under the CETA because such a claim would be adjudicated under the CETA rules pertaining to services and investment.