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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

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Workers and the Environment

Temporary Entry

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A Note on Terminology

In this analysis, the term "worker" is used to refer to any "natural person" (i.e. citizen) covered by the agreement. A worker's jurisdiction of origin is referred to as their "home country." The jurisdiction receiving the worker is referred to as the "host country." When referring to the CETA signatories generically (either Canada or the EU), the term "Party" is used. The terms "firm," "company," and "corporation" are used interchangeably.

Key Points

Unless otherwise noted, all Articles, Annexes and Appendices referenced in this section refer to ***Chapter 12*** *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.*

- The CETA will ease the movement of certain categories of workers between Parties on a temporary basis. Generally speaking, the temporary entry chapter in the CETA follows the same basic structure as

Canada's other free trade agreements (FTAs), including the NAFTA, that cover the movement of natural persons for business purposes. However, the CETA goes beyond these existing agreements in some important ways.

- The four main categories of workers covered by the CETA are key personnel, contractual service suppliers, independent professionals, and short-term business visitors. Key personnel are divided into business visitors for investment purposes, investors, and intra-corporate transferees (ICTs). ICTs are further sub-divided into senior personnel, specialists, and graduate trainees. Chapter 12 also contains an annex addressing the spouses of ICTs. In total, there are nine distinct categories of workers covered by this chapter's provisions (see *Table 2*), which is broader than any previous Canadian agreement.

- Each category of worker is defined by a mix of objective and subjective criteria, to varying degrees of clarity. Certain language in the text provides considerable room for interpretation, which is concerning. For example, key personnel are delimited by their responsibility for "the proper control, administration, and operation of an enterprise." In practice, it can be difficult to discern whether a worker is truly essential for the "proper operation" of a firm or whether the employer is simply sidestepping the cost of training domestic workers.

- The most problematic provisions in this chapter relate to the specialist sub-category of intra-corporate transferees. Under previous agreements, especially the NAFTA, specialist ICTs have been used by multinational corporations to replace domestic workers or avoid training new ones, among other abuses. In part, this was possible because of vague wording in the agreement texts; under the NAFTA, for example, ICTs merely required "specialized knowledge" to cross the border, which was not clearly defined. Even as recently as the Canada-Korea FTA, Canada has failed to clearly define this important category of workers. In the CETA, the definition of a specialist ICT is more rigorous. Instead of "specialized knowledge," an eligible ICT must have "uncommon knowledge" that has been obtained through "specific academic qualifications or extensive experience with the enterprise." Nevertheless, the decision to permit or reject an ICT is ultimately made by a border services agent, not a bureaucratic review

body. We will have to see if, in practice, European ICTs are treated any differently from American ones.

- "Contractual service suppliers" are the employees of a company in one country who enter another country to provide a contracted service (e.g. when a Canadian manufacturer hires a Dutch consulting firm). These provisions allow the contracted firm to bring their own workers into the host country to carry out the contract, rather than hiring locally. In theory, this system has a high potential for abuse. For example, allowing European construction companies to bid on Canadian procurement contracts and then import all of their own labour could be devastating for the Canadian construction industry. However, in practice, the CSS provisions are so rife with exceptions that they provide limited cause for concern. Essentially all low-skill labour is exempted and sensitive sectors in each country have been further restricted. For example, Canada has completely excluded healthcare and education from the CSS provisions.

- "Independent professionals" are the self-employed workers of one Party who win a contract to provide services in the other Party. The IP provisions are even more restricted than the CSS provisions and similarly provide limited cause for concern.

- The CETA prohibits economics needs tests for all categories of workers covered by the agreement (with some country-specific exceptions). An economic needs test is bureaucratic tool for ensuring that local workers are hired before foreign workers can be brought in. Canada's recently revamped "Labour Market Impact Assessment," which was instituted because of public opposition to the problematic Temporary Foreign Worker Program, would not apply to any European workers entering Canada through the CETA temporary entry provisions.

- Despite the appearance of a labour mobility agreement, this chapter is not intended to provide meaningful economic opportunities to the workers of any Party. Ultimately, Chapter 12 is designed to empower multinational corporations by creating a more flexible labour force. The text is clear that any mobility rights guaranteed by this chapter are not extended to workers directly. Instead, the text gives businesses the right to move their employees across borders with greater impunity. Any benefits to workers in terms of employment or travel opportunities are merely a side effect.

Analysis of Key Provisions

Scope of the temporary entry provisions

- The CETA does not limit or impose immigration measures or visa requirements, which are left to the discretion of the Parties (see Article 1).
- Workers entering a country through the CETA's temporary entry provisions are beholden to all labour laws and other regulations in the host country, regardless of the rules and regulations in their home country.
- The CETA ensures that European or Canadian workers providing services in the other Party (GATS Mode 4) are subject to the same national treatment, market access, and most-favoured nation provisions as those granted to other cross-border service suppliers (GATS Modes 1 and 3) (see Article 5). The CETA is the first Canadian FTA to make these economic rights for business visitors explicit.
- Notably, these provisions *do not* apply to the temporary entry provisions *per se*. In other words, if in a future agreement Canada extends greater temporary entry rights to the firms and workers of another country, those rights are not automatically extended to firms and workers in the EU. Article 5 merely guarantees that once workers from one CETA Party have entered the other, they will be treated at least as favourably as any other workers in the host country, regardless of origin. Similarly, there is nothing in Canada's existing agreements, such as the NAFTA, that suggest the temporary entry rules in the CETA will apply to those existing partners.

Categories of workers covered by the CETA

- See *Table 2*.

Reservations and exceptions

- The EU member states have listed dozens of country-specific reservations to their commitments for key personnel and short-term business visitors (see Appendix B). Reservations range from economic needs tests for investors in Austria to a complete carve-out for short-term business visitors in the United Kingdom.

TABLE 2 Categories of Workers Covered by the CETA's Temporary Entry Provisions

	Key Personnel								
			Intra-Corporate Transferees (ICTs)						
Category of worker	**Business Visitors for Investment Purposes**	**Investors**	**Senior Personnel**	**Specialists**	**Graduate Trainees**	**Contractual Service Suppliers**	**Independent Professionals**	**Short-Term Business Visitors**	**Spouses**[85]
Employed in host country[86]	No	Yes	Yes	Yes	Yes	No	No	No	Yes
Quotas or economic needs tests permitted[87]	No	No	No	No	No	No	No	No	No
Maximum length of stay[88]	90 days	1 Year	3 Years	3 Years	1 Year	1 Year	1 Year	90 days	1 to 3 Years
Minimum requirements	Must be working in a "managerial" or "specialist" position for a firm setting up a new enterprise in the host country	Must be working in a "supervisory" or "executive" capacity for a firm committing a "substantial amount of capital" in the host country	Must be working in a "senior position" for a firm with a presence in both Parties; they must exercise "wide latitude in decision making"	Must possess "uncommon knowledge" or an "advanced level of expertise" in the operations of a firm with a presence in both Parties	Must possess a university degree and be employed by a firm with a presence in both Parties; they are transferred for career development purposes only	Must have a university degree (or equivalent) and 3 years professional experience; professional certification is also required in some sectors	Must have a university degree (or equivalent) and 6 years professional experience; professional certification is also required in some sectors	Must be participating in an approved business-related activity[89]	Must be the spouse of an intra-corporate transferee
Sectoral restrictions[90]	None	None	None	None	None	Limited to 37 specific sectors; for Canada, further limited to occupations listed under NOC codes 0 (management) and/or A (high skill)	Limited to 17 specific sectors; for Canada, further limited to occupations listed under NOC codes 0 (management) and/or A (high skill)	None	None

- Canada has listed no reservations for key personnel or short-term business visitors whatsoever.
- Reservations for contractual service suppliers and independent professionals are listed separately (see Annex I). For all sectors, Canada has only committed occupations that fall under National Occupation Classification (NOC) skill level A (university degree) and/or skill type 0 (management occupations). This reservation simply reinforces the requirement that contractual service suppliers and independent professionals have a university degree, as described in Article 8.
- Additionally, Canada has listed 25 sector-specific reservations for contractual service suppliers and independent professionals. Significantly, Canada has taken no commitments (i.e. it is "unbound") in higher education, medical and dental services, nursing, and veterinary services. Canada has also listed partial reservations for the construction and transportation sectors.

Labour Rights

Angella MacEwen, *Canadian Labour Congress*

Key Points

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- Canada has failed to ratify two core International Labour Organization Conventions:
  - No. 98 — Right to Organize and Collective Bargaining, 1949
  - No.138 — Minimum Age, 1973
- Canada has also failed to ratify key conventions on labour mobility, protecting the rights of migrant workers.

Analysis of Key Provisions

- The Chapter on Trade and Labour pays lip service to the beneficial role that decent work and high labour standards play in modern economies. It calls on the Canadian government to ratify three core International Labour Organizations Conventions that it has so far refused to ratify. The Labour chapter even has language insisting on consultations with domestic labour groups "to provide views and advice on issues relating to this Chapter."

- While this language is exactly what we would want to see included in any free trade agreement, it means little without an effective compliance mechanism. Further, any agreement on labour issues will be meaningless insofar as workers' rights are corroded by investor rights provisions.

- The first stage of the compliance mechanism is continuing current domestic inspection and enforcement practices. Dispute resolution follows the model developed in the Labour Co-operation Agreements with Latin American Countries. A Party may request consultations at the ministerial level, and may seek advice from a range of interested stakeholders — from domestic advisory groups to the ILO.

- If this is insufficient, a Party may request that a Panel of Experts be convened. The panel will issue a report with findings of fact and recommendations. While Article 11 on Dispute Resolution states that the obligations under this chapter are binding, there appears to be no mechanism to ensure compliance. There are no financial or other penalties associates with a Party's decision not to follow the panel's report.

Sustainable Development and Environmental Protection

Ramani Nadarajah, *Canadian Environmental Law Association*

Key Points

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- 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).
- The CETA will significantly impact environmental protection and sustainable development in Canada. In particular through:
  - the inclusion of an investor-state dispute settlement mechanism;
  - the liberalization of trade in services; and
  - the deregulation of government procurement rules that 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.
- The inclusion of an investor-state dispute settlement (ISDS) mechanism in the CETA is perhaps the most troubling feature of the agreement. There is no compelling rationale for the inclusion of an ISDS mechanism in the 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 EU trade agreements and the GATS.

- 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 CETA will, for the first time, bind municipal public procurement to international trade and procurement rules. These rules include a ban on offsets, which precludes the use of conditions such as domestic content requirement to encourage local development.
- 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.
- The environment chapter includes a fairly robust definition of environment and provides a dispute resolution process based on a consultative and co-operative approach to cover all obligations within the chapter. However, the environmental provisions are largely aspirational and lack an effective enforcement mechanism.
- 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.

Analysis of Key Provisions

Investor State Dispute Settlement (Chapter 33)

- Modelled on NAFTA Chapter 11 and EU BITs
- Allows foreign investors to by-pass the host government's judicial system
- Foreign investors will be able to bring cases before international arbitration tribunals for alleged breaches of investment protections under the agreement
- Allows foreign investors to challenge domestic environmental laws. Similar provisions in NAFTA Chapter 11 have enabled investor-state cases to be 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 use of pesticides; and
- the ban on hydraulic fracking in the St. Lawrence River Basin.

Trade and Sustainable Development (Chapter 23)

- 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.
- Under the agreement, the Parties aim to:
  - Promote sustainable development through the coordination and integration of the Parties respective environmental measures;
  - Promote dialogue and co-operation between the Parties with a view to developing trade in a manner supportive of environmental protection measures and to uphold environmental objectives in the context of more open trade;
  - Enhance enforcement of domestic environmental laws and to respect environmental international agreements;
  - Promote full uses of economic instruments such as impact assessment and stakeholder consultation in regulation of trade; and
  - Promote public consultation and participation in the discussion of sustainable development issues arising from the agreement and in development of relevant domestic laws and policies.
- However, the CETA references conservation and sustainable management in relation to only two sectors: forestry and fisheries.
- Other sectors, such as mining, energy and transportation, which have also caused extensive damage to the environment, are omitted from the agreement.

- Even in relation to the two named sectors, the CETA is drafted in largely permissive as opposed to mandatory terms, leaving compliance with these provisions to the discretion of the Parties.

Trade and Environment (Chapter 25)

- This chapter sets out commitments by the Parties to:
  - maintain high levels of environmental protection;
  - ensure the effective enforcement of domestic environmental laws;
  - not derogate from environmental laws in order to attract trade or investment;
  - provide for domestic sanctions or remedies for violations of environmental laws; and
  - require the parties to ensure a legal framework exists to permit effective action against infringements of its environmental laws.
- The CETA also includes a fairly broad and robust definition of environmental law. It is defined broadly to cover "laws or statutory or regulatory provisions, or other legally binding measures, the purpose of which is the prevention of a danger to human life or health from environmental impacts."
- The agreement allows parties to rely on the GATT Article XX (General Exceptions) in relation to environmental measures.

  However, experience with those exceptions has only very rarely provided any meaningful protection to domestic environmental policies from being successfully challenged as barriers to trade.
- A dispute resolution provision, based on a consultative and co-operative approach, covers all the obligations between the parties under the environment chapter.
- 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."

- The provisions in the CETA Environment Chapter are largely aspirational and lack any effective enforcement mechanism. In contrast, compliance with the investment protection provisions in the agreement can be secured through the ISDS provisions.

Impact on essential public services that protect the environment

- The CETA will dramatically expand the application of international trade rules to investments and services by virtue of its "negative list" approach. Under the CETA, government measures will be subject to the agreement unless they are explicitly reserved.
- The CETA "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.
- Negative list curtails the capacity of governments to take steps to adopt policy and regulatory measures to respond to future challenges that have not yet emerged in broad areas of public policy
- The negative list approach provides for two categories of reservations, Annex I and Annex II:
    - Annex I: the reservations apply only to existing exempt measures.

      Annex I is "bound" and thus prohibits amendments that would decrease conformity of the measure with the CETA requirements, creating what is known as the "ratchet effect."
    - Annex II: the reservations can apply to new measures.

      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 affords stronger protection as it allows governments to adopt new measures to respond to future challenges within an exempted sector.

- Canada has added a reservation under Annex II to reserve "the right to adopt or maintain any measure with respect to the collection, purification and distribution of water" from the CETA market access rules.
- However, other services that are critical to the environment and human health such as wastewater treatment services and waste management are not included in the list of reservations.
- In the context of municipal wastewater systems, this risk has been heightened by the federal government's new standards for the discharge of wastewater.
    - These new standards are expected to have a positive impact on Canada's aquatic ecosystems, but they will also have significant cost implications for municipalities that will be required to upgrade their wastewater systems.
    - The timing of the regulation in conjunction with the CETA raises concerns that the agreement 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 contracts or concessions related to municipal wastewater systems, thereby creating pressure to privatize Canadian wastewater facilities.
- 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.

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.
- The CETA procurement provisions will give European companies, for the first time, unconditional access to municipal government procurement.

- The "national treatment" provisions and the ban on "offsets" in the CETA chapter on Government Procurement could restrict the ability of municipal governments to foster local sustainable development and ensure environmental protection. An offset is defined in the agreement as "any condition or undertaking that encourages local development or improves a Party's balance-of- payment accounts such as the use of domestic content, the licensing of technology, investment, counter-trade and similar action or requirement." Local food procurement policies, for example, could be affected by these prohibitions.

Water and Water Services

Stuart Trew, *Canadian Centre for Policy Alternatives*

Key Points

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- The treatment of water and water services in international trade agreements remains a controversial issue globally. Where trade and investment treaties like the CETA are designed to govern the supply of goods and services, and the regulation thereof, based on free-market principles, access to clean drinking water and sanitation is considered a basic human right by the United Nations, to be delivered by governments or other not-for-profit entities.

- Investment protection chapters within free trade agreements, or standalone bilateral investment treaties (BITS or FIPAS), effectively protect industrial activities that are harmful to water sources (through pollution or depletion) while offering no recourse for holding polluting companies accountable for their actions. The agreements, including the CETA, do this by granting foreign investors the right to be compensated when a government decision (e.g. a new environmental regulation) has the effect — even unintentionally and when the decision treats domestic and foreign companies equally — of re-

ducing the profitability of an investment (see section on Investor-State Dispute Settlement by Peter Fuchs).

- The language in the CETA and other agreements on the need for sustainable development is extremely weak compared to these enforceable investment protections (see section on Sustainable Development and Environmental Protection by Ramani Nadarajah).

- Though Canadian and EU procurement commitments related to water services as they appear in leaked text are confusing and at times ambiguous, we can say with certainty that procurement of at least some water services by local governments, utilities and Crown corporations is covered, and that this will likely give private water companies a "foot in the door" to establish and expand the private delivery or treatment of water.

- For all these reasons, there was public pressure on Canadian and European Union negotiators to exclude government policy or decisions related to water and water services from any of the trade, investment or procurement disciplines in the CETA. Unfortunately, the final agreement takes a standard piecemeal approach typical of Canada's past free trade agreements that does not adequately protect water sources and that contradicts recent UN resolutions on the human right to affordable, publicly delivered water and sanitation services.

Analysis of Key Provisions

"Water in its natural state"

- The CETA incorporates a NAFTA-like limited exclusion for "water in its natural state" from the terms of the agreement. The same article (Chapter 2, Article X.08) affirms that, "nothing in this Agreement obliges a Party to permit the commercial use of water for any purpose, including its withdrawal, extraction or diversion for export in bulk." However, "Where a Party permits the commercial use of a specific water source, it shall do so in a manner consistent with the Agreement." In other words, once water leaves its natural state and enters into commerce, it is covered by the CETA.

- What this means in practice is that no government (federal, provincial, municipal, First Nations) is obliged to allow a company or in-

vestor to take water out of its natural state for export or use in some kind of commercial venture such as bottling, manufacturing, tar sands production, etc. However, where one company is permitted to do so, the CETA's market access rules (e.g. national treatment, a ban on performance requirements) and investment protections (e.g. minimum standards of treatment) kick in. Water ceases to be an excluded public good but becomes bound up, as a commodity, within the CETA text.

- Bottled water gives us one example of the problem. Canada can say no to an investor's proposal to export bulk water. But there is nothing in either the CETA or the NAFTA to stop a private company from bottling water and shipping it across borders — Canada exports tens of millions of litres of water this way annually — since the commercial use of water must be managed "in a manner consistent with" the agreements. The water becomes a tradable good, like running shoes or oil, and its trade is protected by market access and investment rules. In other words, Canada could not interfere with the bottled water trade, by revoking water taking permits or putting export restrictions, without provoking a trade or investment dispute.

- The tar sands offer another example of how water and trade agreements intersect because of how water-intensive its production is. If the Alberta or federal governments ever decided to limit the amount of water oil companies are permitted to draw in their extraction or production of tar sands, it could easily trigger an investor-state claim on the grounds that the rule change unfairly altered a company's investment opportunities, or that it represented a type of governmental expropriation. The company would not have to prove it was being discriminated against to file a successful challenge. For example, Lone Pine Resources is demanding $250 million in compensation in its NAFTA lawsuit against 's moratorium on fracking.

Drinking water and sanitation services

- After considerable pressure on CETA negotiators from public sector unions, municipalities and others to exclude water services from the agreement, Canada and the EU have taken broad Annex II reservations for Market Access and National Treatment obligations with respect to the collection, purification and distribution of water. The

Canadian Annex reads: "Canada reserves the right to adopt or maintain any measure with respect to the collection, purification and distribution of water." The European language is more specific but essentially serves the same purpose to try to carve out policy space with respect to water services: "The EU reserves the right to adopt or maintain any measure with respect to the provision of services relating to the collection, purification and distribution of water to household, industrial, commercial or other users, including the provision of drinking water, and water management."

- In civil society dialogues, Canadian CETA negotiators referred Canada's existing GATS commitments in the area of water services, which cover integrated engineering and project management services for water supply and sanitation turnkey projects, to argue it was not important to fully exclude water services in the CETA. This ignored or perhaps obscured the fact that the GATS, unlike the CETA, is not enforceable through investor-state dispute settlement, and that it is not possible in the CETA for governments to take reservations against minimum standards of treatment and expropriation clauses in the investment chapter. These strong corporate rights, which are cited by investors in most investor-state disputes against government measures, would be available to any private investor involved in Canadian and EU water delivery or sanitation, regardless of either Party's Annex II reservations.

- What this means in practice is that Canadian and EU governments, including municipalities, are free to privatize or partially privatize (through public-private partnerships or P3s) public water systems whenever they like. But they are less free to remunicipalize those private services in the future, if service levels are inadequate or the private service becomes too expensive. The Market Access reservation would give governments the ability to re-instate public monopolies but investors have new rights to challenge the same decision through private investment tribunals.

- For example, in 2012 an investment tribunal awarded a private health care company, Achmea, €22 million ($31 million), to be paid by the Slovak government, in compensation for Slovakia's reversed health privatization in 2006. Private water companies in Argentina have similarly fought and won investor-state cases related to remunici-

palization. So while nothing in the CETA can compel Canadian or European governments to privatize, once they have it will become excessively difficult (and expensive) to reverse course. A perfectly legitimate public choice related to a service as fundamental as water delivery and treatment is essentially criminalized by agreements like the CETA.

- It is important to note here that the Canadian government is strongly encouraging municipalities to go private for water infrastructure and services, as discussed below. Meanwhile the trend almost everywhere else in the world, including the United States, is toward remunicipalization, which is more affordable and more democratically accountable.

Procurement of water services

- A final threat to public water comes from the CETA's procurement chapter, though the commitments as they appear in leaked text are confusing and at times ambiguous on the extent of Canada's commitments. We can say with certainty that procurement of at least some water services by local governments, utilities and Crown corporations is covered, and that this will likely give private water companies a "foot in the door" to establish and expand the private delivery of what the United Nations considers to be an essential public service best delivered by the public sector.

- The general notes on Canada's overall procurement commitments (Chapter 21, Annex X-07), state that purchases by covered procuring entities "in connection with activities in the fields of drinking water, energy, transport and the postal sector" are excluded, "unless such contracts are covered by Section B of Annex X-03." That Annex, on procurement by Crown corporations and other government-owned entities like utilities, does cover the "Provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water and treatment of wastewater, or the supply of drinking water to such networks," although at somewhat higher thresholds than other goods and services (see section on public procurement). This would appear to mean that procurement of water services by Crown corporations and public utilities is covered by the CETA procurement rules.

- In Chapter 21, Annex X-05, which lists the specific services in Canada that covered government bodies are required to procure in a manner consistent with the agreement, we note both "Sewage and refuse disposal, sanitation and similar services" (CPC code 94) and "Integrated engineering services" (CPC code 8673). Subclass CPC 86732 of the latter covers "Integrated engineering and project management services for water supply and sanitation works turnkey projects," which includes "planning and pre-investment studies, preliminary and final design, cost estimation, construction scheduling, inspection and acceptance of contracts as well as technical services, such as the selection and training of personnel and the provision of operation and maintenance manuals and any other engineering services provided to the client that form part of an integrated bundle of services for a turnkey project."

- Obviously private sector involvement in water services — the technology, engineering and maintenance training required to build and operate complex water systems — is necessary for any government utility to properly function. Turnkey projects are by their nature turned over to the public once completed, unlike public-private partnerships, where a private firm or consortia agrees to operate the utility over a fixed period and at a profit. Procurement *by* P3s appears to be largely excluded from the CETA procurement rules, perhaps because of a reluctance to instruct private entities how to do their business. However, procurement *of* water services (at least sanitation and possibly drinking water) by utilities or municipal governments deciding *between* a P3 or fully public system appears to be covered. This will have consequences for the management of local water systems.

- As trade lawyer Steven Shrybman explained in a legal opinion for the Columbia Institute:

  Proposed CETA rules would allow a water conglomerate to get its foot in the door whenever a Canadian municipality or covered water utility tenders for any goods (e.g. water treatment technology) or services (eg. for engineering, design, construction, or the operational services) relating to water supply systems. That contractual relationship could then provide a platform for the company to expand its interests in the water or waste water systems.

- Let's look at one potential situation where coverage of water services in the CETA procurement chapter will interfere with the autonomy and democratic choice of local governments. For some time, Canadian municipalities have been asking the federal government for badly needed infrastructure funding. In 2007, the Federation of Canadian Municipalities estimated the infrastructure deficit to be around $123 billion, with about $31 billion needed for water infrastructure alone. Rather than see this as an opportunity to encourage economic development in its own right, the federal government put roadblocks in the way of accessing this money in the form of a P3-screen. As the FCM explained in a 2014 fact sheet to municipal governments (emphasis added):

  As part of the [National Building Canada Fund] application process, any project with capital costs in excess of $100 million will be required to undergo a P3 (public-private partnership) screen, which will be administered by PPP Canada. While this was telegraphed in Budget 2013, a significant addition to this process is that ***the decision of PPP will be considered final and binding****. This is a concerning change in policy. Local governments are the experts on the infrastructure needs and capacities of their communities and* ***removing this decision from locally elected officials will potentially distort local priorities****. Furthermore, a P3 screen is not a simple process of checking boxes on a checklist. Infrastructure Canada's website suggests that* ***a P3 screen will add 6–18 months to the application process****. As is, the screen will all but ensure that major projects over $100 million will not be able to go forward in this construction season.*

- Even if municipalities or water utilities had the ability to choose between the private (P3) and public option after going through the lengthy P3 screen for water services and construction projects funded partly by the NBCF, the CETA would have compromised the decision in two ways. First, because private water companies would be able to dispute infrastructure contracts (e.g. wastewater treatment) they do not win under the CETA procurement rules. Municipalities, already bogged down by a lengthy and intrusive P3 screen, could find themselves further delayed when, at the end of the process, a private consortia decides a municipal decision to keep water in public hands violates the tendering rules of the CETA. This danger becomes even more acute if the decision of PPP Canada is final and binding.

- Though the CETA investment rules do not apply to public procurement, a P3 consortia that "seeks to make, is making or has made an investment" in Canada would profit from the agreement's strong investment protections. These include a prohibition on performance requirements (e.g. no domestic content or hiring rules on water projects). More importantly, P3 firms would get guarantees to "fair and equitable treatment" such that a breach of "a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment," could be grounds for millions if not hundreds of millions of dollars in compensation to be decided by a private investment tribunal.

- Surely the federal government's strong encouragement of P3s for local water infrastructure, including a P3 screen, and specifically a decision by PPP Canada requiring a local government to go the private route in exchange for federal funds, would create an expectation on the part of private water companies that could trigger an investor-state dispute (if, for example, public opposition to a P3 or private water leads to a reversal of the PPP decision.) It is admittedly difficult to know how an investment tribunal would rule in such a case—an ambiguity that fuels public opposition to these ad hoc corporate courts.

- In summary, the CETA creates new barriers and problems for municipal governments, utilities and Crown corporations with respect to infrastructure, notably water projects. These all come down to the tendency of agreements like the CETA to facilitate the transfer of public assets into private hands (and to keep them there). It is short-sighted in the extreme when, in fact, the global trend is toward remunicipalization of previously privatized water, transit, energy and postal systems. As CCPA senior trade researcher Scott Sinclair points out in a recent report about public services and international services agreements, the German energy sector gives us a very good example of the benefits of public ownership and the reasons we should protect the right to remunicipalize:

  Since 2007, hundreds of German municipalities have remunicipalized private electricity providers or have created new public energy utilities, and a further two thirds of German towns and cities are considering similar action. Dis-

satisfaction with private electricity providers in the country is due mainly to a poor record in shifting to renewable energy. There is little market incentive to pursue green energy options, so the municipalities are taking the transition to renewables into their own hands. Local governments have also found that monopolistic or oligopolistic private energy companies tend to inflate energy prices, whereas remunicipalization brings prices down.

- "Decisions about how best to deliver a public service vary according to circumstances," writes Sinclair. "The ability to respond to new information, changing conditions or shifting public opinion is an essential freedom for democratic governments concerned with how best to serve the public interest." In order to protect that essential freedom, the CETA would need to be redrafted to fully exclude water and water services, to shield public decisions related to water from trade or investment disputes, and to encourage rather than restrict the ability of local governments to reverse course where privatization fails.