

Public services under threat

Roeline Knottnerus, *Transnational Institute*
with **Scott Sinclair**, *Canadian Centre for Policy Alternatives*

Public utilities and services such as health care, education, social services, public transport, energy distribution, water provision, postal services, housing and cultural services are essential to the overall public good and vitally important for economic development, social solidarity and democratic choice.¹ Under expansive trade and investment treaties, however, public services tend to be regarded as actual or potential markets, ripe for commercialization. In this regard, CETA is even more far-reaching than previous trade treaties in the way it limits governments' ability to create, expand, restore and regulate public services.

CETA is the most wide-ranging agreement ever concluded by the EU in the area of services and investment. CETA offers Canadian and European service providers extensive additional opportunities in terms of market access, the protection of their investments and the enforceability of their commercial rights. In CETA, public services are affected by obligations and commitments in the chapters on investment, cross-border trade in services, and government procurement, as well as by cross-cutting rules on market access, non-discrimination (national treatment, most-favoured-nation treatment) and investment protection (notably the controversial and highly problematic *'fair and equitable treatment'* and indirect expropriation clauses).

¹ Markus Krajewski, *'Public services in bilateral free trade agreements of the EU'*, AK Wien, EPSU, FSESP and EGÖD, November 2011.



Photo: Sage Ross, Wikimedia Commons (Creative Commons license)

The European Commission claims public services are fully protected in CETA, as in all EU trade agreements, since investors and service providers from one Party will have to respect all applicable regulations in the other Party's territory. However, CETA does not ensure that the Parties committed to the agreement will remain free to provide and regulate public services as they choose. CETA reduces public policy space in the name of market access and protecting the rights of foreign service providers and investors. It effectively constrains the scope for governments—at the local, state, national and regional levels—to provide public services and regulate them in the public interest.



Photo: Fryderyk Supinski, flickr (Creative Commons license)

Contrary to what the Commission claims, only those services ‘supplied in the exercise of governmental authority’, which means those ‘not supplied on a commercial basis, nor in competition with one or more service suppliers’, are fully excluded from the treaty. There are very few public service sectors where there is no competition between suppliers, and the concepts of ‘competition’ and ‘commercial basis’ are not legally defined. As such, any services supplied for any form of remuneration, or by more than one service provider, can be regarded as being supplied on a commercial basis and/or in competition with other service suppliers. In practice, therefore, this exclusion is very narrow and totally inadequate to protect most public services from trade and investment challenges.²

LIST THEM OR LOSE THEM

CETA’s lack of a comprehensive exclusion for public services forces governments who wish to protect them to rely

² Only core government services of no commercial interest, such as ‘police and judiciary, prisons, statutory social security schemes, border security, air traffic control, etc.’, are protected by the governmental authority exclusion. European Commission, ‘Reflections Paper on Services of General Interest in Bilateral FTAs’, 2011.

on country- or party-specific exceptions known as ‘reservations’. Previous EU trade treaties have done this through a ‘positive list’ approach where member states listed those sectors (or services) they agreed to cover, and under what conditions, under the treaty’s services and investment obligations. In CETA, for the first time, the EU and member states used a ‘negative list’ approach in which all sectors and measures pertaining to trade and investment in services are automatically covered unless governments expressly carve them out in reservations listed within two annexes to the agreement (Annex I and Annex II). This change in approach was a major victory for corporate lobby groups on both sides of the Atlantic who wanted to ensure maximum coverage (maximum liberalization) of services.

Annex I reservations exempt (or ‘grand-parent’) existing measures that would otherwise violate CETA. Governments may change these measures, or amend regulations in sectors protected in Annex I, but only in ways that make them more consistent with the treaty. These reservations are subject to a so-called ‘ratchet clause’: if an exempted measure is amended or eliminated it cannot later be restored. Reservations in Annex 1 can exclude existing measures at the EU level as well as the level of national, regional, territorial, provincial or local governments. For services listed in Annex I, renationalisation or remunicipalisation is not an option. For example, the EU’s Annex I reservation for postal services is very narrow, which means CETA would effectively lock in the current levels of privatisation and deregulation of postal services in Europe.³

Annex II reservations aim to provide flexibility for governments to maintain or adopt

³ Thomas Fritz, ‘Why is trade policy important for workers and public services?’, presentation to seminar ‘Challenging the liberalisation of public services in TTIP and beyond’, Vienna, 15 January 2015 (<http://thomas-fritz.org/english/why-is-trade-policy-important-for-workers-and-public-services>).

measures that would otherwise be inconsistent with CETA's rules related to market access, national treatment, most-favoured-nation treatment, performance requirements, or the make-up of senior management and boards of directors. However, many important European reservations related to public services are ambiguously worded, referring, for example, to 'services which receive public funding or State support in any form are therefore not considered to be privately funded'.⁴ Such vague language creates legal uncertainty about the scope of the reservations and leaves Parties vulnerable to investment claims—where it will be up to arbitrators to decide on the conformity of a contested measure. Other Annex II reservations provide only partial, or incomplete, protection. Drinking water services, for example, are excluded from CETA's market access and national treatment obligations by the EU's Annex II reservations, but wastewater services are not protected.⁵ Moreover, CETA's investment protection disciplines still fully apply to all water services.

The EU's Annex II reservation on market access and investment, applicable to all sectors, allows governments to use public monopolies or offer exclusive rights to private operators for services considered public utilities at the national or local level. This reservation, while beneficial, is far from adequate.⁶ The term 'public utilities' is not defined, leaving it open to dispute. Furthermore, the reservation protects against challenges under only one part of CETA's market access rule (Article 8.4.1 [a][i]). For example, governments remain fully exposed to challenges under CETA's controversial provisions on fair and equitable treatment (Article 8.10) and

⁴ See, for example, the European Annex II reservations for Health services and Education services, CETA, Annex II, Schedule of the European Union.

⁵ Certain EU governments, such as Germany, have taken supplementary national reservations that exclude wastewater services.

⁶ For detailed criticism of this wording, which appears in previous EU trade treaties, see Krajewski, 2011.



Photo: Sascha Kohlmann, flickr (Creative Commons license)

expropriation (Article 8.12), against which no reservations are allowed.

LOCKING IN PRIVATISATION AND RESTRICTING THE RIGHT TO REGULATE

Consequently, returning a previously privatised service to the public sector could provoke an investor–state claim that compensation is due to the former private service provider. Sensitive decisions about what level of compensation, if any, is fair or adequate will be not be made by elected governments or the domestic courts, but by CETA's investment arbitration tribunals. Under threat of such claims, initiatives like the drive to remunicipalise water services in France could become a very costly affair indeed.⁷ In this context it is important to note that Canadian pension funds have

⁷ In a recent parliamentary plenary debate on CETA, the Dutch trade minister, L. Ploumen, said the Annex II exemptions preserve the right to determine and regulate public services, including the right to reverse liberalisations. But, for reasons discussed above, this is not a defensible position. See transcript here: <https://www.tweedekamer.nl/kamerstukken/detail?id=2016D23660&did=2016D23660>.



Photo: Icrf, flickr (Creative Commons license)

major shares in privatised water services, for example in the UK.⁸

Except where specific reservations apply, CETA generally prohibits governments from limiting market access, for example through quotas on the number of service suppliers or requirements that they take a specific legal form (such as not-for-profit organisations). Importantly, these market access provisions prohibit limiting access to a market even when such limits do not discriminate in favour of local providers.⁹ These prohibitions are modelled on language in the General Agreement on Trade in Services (GATS), but in CETA the prohibitions on limiting market access are applied not only to services, but more generally to *'economic activities'*.¹⁰

Such restrictions could affect, for example, the prescription quota that some EU member states maintain to curtail the cost of health care, in which doctors are required to prescribe patients a specific share of cheaper, mainly generic pharmaceuticals.

8 Maude Barlow, *'Fighting TTIP, CETA and ISDS: Lessons from Canada'*, Council of Canadians, April 2016, p. 12.

9 Ellen Gould, *'Public Services, in Making Sense of CETA'*, Canadian Centre for Policy Alternatives, September 2014.

10 Ibid.

Under CETA, these rules could be challenged as a breach of market access provisions.¹¹ CETA also bans performance requirements (Article 8.5) that governments frequently use as a tool to harness investment to promote wider societal goals, including the improvement of environmental standards or the stimulation of local employment.

CETA will be the EU's first major free trade and investment agreement with a Party with a similar level of development to its own, whose commercial providers of health care, education, energy, transport or environmental services are likely to have a real market interest in the EU. A clear carve-out exempting all measures related to the provision and regulation of public services would have been infinitely preferable to the current patchwork of reservations that provides only partial and piecemeal protection for vital public services.¹² Contrary to official assurances, public and essential services are not fully protected. CETA, as drafted, conflicts with the freedom of democratically elected governments to provide and regulate public services in the public interest.

11 Thomas Fritz, *'CETA and TTIP: Potential impacts on health and social services'*, working paper commissioned by the European Federation of Public Service Unions (EPSU), April 2016, p.10.

12 Krajewski, *'Model clauses for the exclusion of public services from trade and investment agreements'*, study commissioned by the Chamber of Labour Vienna and the European Federation of Public Service Unions, February 2016: *'the trade agreements signed by the EU since 1995 were agreements with developing countries and emerging markets (e.g. Mexico, Chile, South Korea, Peru, etc.). There are no significant commercial suppliers of public services with a market access interest in the EU in these countries. To the contrary, EU suppliers of public services were interested in market access in these countries. Hence, the EU commitments and the model protecting public services was never put to a real test. This may change significantly with the signature of CETA and even more so TTIP or TiSA'*.