Canadian Centre for Policy Alternatives
September 2014

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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ISBN 978-1-77125-147-1

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ACKNOWLEDGEMENTS

This analysis was co-ordinated by the Canadian Centre for Policy Alternatives. Thanks are due to the dedicated staff at CCPA, especially Bruce Campbell, Kerri-Anne Finn, and Tim Scarth for his work on layout. Gary Schneider's skillful editing contributed immensely to the paper.

We are also grateful to Peter Fuchs, Alessa Hartmann and Scott Harris for their helpful input and/or comments. We would also like to thank all of the authors who contributed chapters to this analysis. This is an independent study, the views expressed are those of the individual authors.

Introduction

MORE THAN FIVE years after the May 2009 launch of negotiations between Canada and the European Union toward a Comprehensive Economic and Trade Agreement (CETA), it was announced on August 5, 2014 that "officials have reached a complete text, allowing translation and final legal review to commence."[1]

Less than two weeks later, on August 13, German broadcaster ARD leaked more than 500 pages of the CETA consolidated text, followed the next day by an additional 1,000 pages of annexes.[2] The Berlin-based digital rights group netzpolitik.org subsequently released some additional CETA texts, including tariff offers and side letters.[3] Neither the Canadian government nor the European Commission has publicly discussed the leaked text, despite its availability on multiple websites.

While the leaked CETA text will undergo some changes during the legal review and scrubbing process, both parties have indicated that they now consider the text closed, and that no substantive changes can be made.

Canadian Prime Minister Stephen Harper, President of the European Council Herman Van Rompuy, and President of the European Commission Jose Manuel Barroso will reportedly announce the formal close of negotiations at the EU-Canada Summit on September 26, 2014.

These developments should put to rest any doubts that the leaked documents, upon which this analysis is based, are actually the official CETA text. But they raise deeper, more troubling issues about the secrecy and democratic deficit surrounding this agreement.

Both sides have committed to sign off on the final text before any meaningful public debate can possibly take place. This take-it-or-leave-it approach leaves little room for the citizens of Canada or the EU to assess the CETA's potential impacts, let alone advocate for changes.

Such irrevocability would not be acceptable even if this treaty dealt solely with traditional international trade matters, such as reducing tariffs or eliminating other border restrictions. However, with few exceptions, such traditional trade barriers between Canada and the EU are already very low.

While the European Commission and the Canadian federal government may consider the CETA debate to be closed now that the text is finalized, others still insist on having their say. The final text includes a controversial investor-state dispute settlement (ISDS) mechanism (see section by Peter Fuchs) that a large bloc of parties in the European Parliament, which has a veto over the deal, has indicated it will reject. Many of Europe's 28 member states, which will have to individually ratify the agreement, also have serious misgivings about ISDS.

Major Canadian provinces are concerned about the fiscal impacts of extended patent protection for medicines. Even if the federal government agrees to and honours a commitment to bear the brunt of any increase in health care costs from changes to Canada's intellectual property rights regime, this simply means that taxpayers would pay at the federal rather than the provincial level. And it is all being done to boost the profits of the brand name pharmaceutical industry (see section by Scott Sinclair, Marc-André Gagnon and Joel Lexchin).

Many Canadian municipal governments remain deeply dissatisfied with restrictions in the CETA on their purchasing authority. Given the procurement chapter's coverage of strategic sectors such as renewable energy, mass transit and local food (see sections by Stuart Trew, Angelo DiCaro and Amy Wood), it is not clear that the final text satisfies the conditions laid down by the Federation of Canadian Municipalities, which has been generally supportive of the agreement.

Finally, the influence of grassroots citizens' movements should not be discounted. Particularly in Europe, the Transatlantic Trade and Investment Partnership (TTIP) negotiations between the EU and the U.S. have galvanized public opposition to ISDS, further trade treaty restrictions on public interest domestic regulation (see section by Ellen Gould), and further trade treaty inroads into food security and food safety (see sections by Ann Slater and Terry Boehm, and Amy Wood).

As all the many and varied contributions to this analysis make clear, this treaty is about much more than trade. The CETA is a sweeping constitutional-style document that affects many matters only loosely related to trade, including investor rights, intellectual property protection for pharmaceuticals, government procurement, buy-local food policies, public interest and financial regulation, the temporary movement of workers, domestic regulation and public services, to name just a few of the topics explored in this analysis.

This collection represents the first, most comprehensive analysis of the completed Canada-EU CETA as exposed in recent leaks.[4] It is intended to offer insight into a number of the most important and contentious elements of the agreement. Additional and more in-depth analyses on specific chapters and their potential consequences will be needed as the CETA makes its way through the ratification process in both Europe and Canada, a process which is not expected to be completed before 2016 at the earliest.

Executive Summary

Investment

The CETA contains an investment protection chapter and accompanying investor-state dispute settlement mechanism (ISDS), which together give foreign corporations the right to seek compensation from governments, outside of the regular court system, for measures that may hurt the value of an investment. ISDS is controversial globally for its increased use by investors to challenge environmental protection measures, public health regulations and other public interest legislation. Under similar investment protections in the NAFTA, Canada has already paid out more than $170 million in damages and is facing billions of dollars in current ISDS claims related to resource management, energy and pharmaceutical patents.

The CETA financial services chapter will hamper financial regulators charged with protecting consumers and the overall stability of the financial system. Foreign investors have broader rights to challenge financial regulations through ISDS. A "prudential carve-out" in the agreement does insulate "reasonable" financial regulation from challenge, but this protection is both procedurally and substantively weaker than what is found in the NAFTA. The CETA also restricts certain non-discriminatory financial regulations, such as limits on the size of firms or the growth of risky financial instruments.

Public Procurement

Canada has agreed to cover almost all public procurement by provincial, municipal and MASH sector entities, and by Crown corporations, significantly expanding commitments recently made in the WTO Agreement on Government Procurement.

Covered public entities will be prohibited from applying local content or local training requirements on purchases of goods, services or construction projects over certain low thresholds, from setting aside a portion of spending for local businesses or social enterprises, or from otherwise using public procurement for local development objectives.

Regional development exceptions from previous Canadian trade agreements have been watered down to satisfy EU demands for unconditional access to Canadian procurement markets. These exceptions will only apply to projects in some provinces that cost less than $1 million, are not federally funded, and do not encourage development in an urban centre.

Public Services

The CETA provides multiple grounds for public services to be challenged. The CETA locks in current and future privatizations and could discourage governments from introducing new public services.

Existing liberalization and deregulation of postal services in Canada will be frozen by an inadequate Annex I reservation for existing non-conforming measures, giving future governments little room to reverse this deregulation or expand postal services into new areas.

The negative list approach adopted in the CETA means all public services are covered by these provisions unless explicitly carved out by negotiators. The "list it or lose it" character of these commitments is a high stakes gamble with public services.

The CETA adopts the inadequate protections for public services found in other trade agreements, and compounds the threat to public services by extending the scope of the agreement to new areas.

Regulation

The CETA imposes new obligations on governments in Canada and the EU that will restrict their ability to regulate. Certain types of non-discriminatory regulations are restricted by the agreement, even though they are unrelated to trade.

The CETA imposes requirements on governments to provide corporations with licensing procedures that are "as simple as possible" and do not "unduly complicate or delay" their activities. The public interest in thorough assessments will be sacrificed to the benefit of corporations in construction, mining, oil and gas, and other sectors where applications often invoke public opposition.

The CETA includes a regulatory co-operation process that will further tie the hands of governments by requiring them to consult with foreign governments and investors before instituting new trade-related regulations. The process will be housed in a new body, the Regulatory Cooperation Forum, which is only vaguely defined and appears to be open to the direct influence of corporate lobbyists.

Negotiators failed to include a general exemption for culture in the CETA. The cultural exemption is limited to five of the CETA's nearly three dozen chapters. This exemption is weaker for the EU than it is for Canada.

Intellectual Property Rights

The changes to Canadian patent protection for pharmaceuticals required by the CETA will delay the availability of cheaper, effective generic drugs, driving up health care costs for Canadians. The additional cost of extended patents is estimated at a minimum of $850 million annually, or 7% of total annual costs for patented drugs.

The CETA expands protections for European geographical indications. These provisions will prevent Canadian companies from using dozens of specific food names, especially for wines and cheeses.

Most of the initial, aggressive EU demands on copyright and related rights have been withdrawn from the CETA final text, which is broadly consistent with Canada's *Copyright Modernization Act*. While not perfect, the Act strikes an important balance between the rights of creators to protect and benefit

from their works, and the rights of users to access copyrighted materials for non-commercial purposes, including personal use, education and research.

Trade, Tariffs and Transport

Official projections acknowledge that tariff elimination under the CETA will increase Canada's substantial bilateral trade deficit with the EU. The CETA can also be expected to deepen Canada's disproportionate reliance on exports from extractive industries such as mining and oil and gas relative to higher-value-added manufacturing.

European-made vehicles will gain a 6.1% price advantage as a result of ending Canadian tariffs on automotive trade. The existing large trade imbalance in this strategic industry will get wider with negative implications for the Canadian industry, which is still struggling to recover from the devastating impacts of the last decade. The 2013 market share for European-made vehicles in Canada was at least 100 times larger than the market share of Canadian-made vehicles in Europe. To the extent that companies producing vehicles in Canada experience greater sales in Europe, they are likely to meet that demand from European facilities, not Canadian plants.

The CETA would change the *Coasting Trading Act* to weaken existing Canadian cabotage laws, which currently stipulate that all ships conducting shipping between Canadian ports must be flagged in Canada with crews trained and certified in Canada. The CETA does not appear to dramatically alter the provisions of the 2009 Air Transport Agreement, which largely liberalized air transportation between Canada and the EU.

Agriculture and Food Sovereignty

Despite official claims, the CETA is unlikely to result in significant increases of beef or pork exports from Canada to Europe, since the EU is itself a major exporter of both products. The agreement will almost certainly lead to greater cheese imports from the EU, through a near-doubling of the quota for EU cheese. It is estimated that this will cost Canadian dairy farmers 4% of the domestic cheese market.

Expanded intellectual property rights for multinational seed companies will increase seed costs and undermine farmers' autonomy.

The CETA threatens food sovereignty by increasing the likelihood that buy-local food purchasing programs at the provincial and municipal level will be curtailed because they violate the agreement's procurement obligations. Canada could have reserved the right of hospitals, municipalities and other public bodies to adopt minimum local food requirements in publicly run institutions but failed to do so.

Workers and the Environment

The CETA will give new rights to corporations to move certain categories of workers across borders. These workers are exempt from economic needs tests and other measures designed to ensure a strong and stable domestic labour market.

Although the CETA contains language on workers' rights, it does not include an effective enforcement mechanism to ensure that workers' rights are respected.

The ISDS mechanism and other deregulatory rules in the CETA threaten existing and future environmental regulations. The CETA contains a chapter on sustainable development, but like the labour chapter its language is aspirational and not enforceable.

With limited exceptions, the CETA treats water as any other tradable good, and the delivery of water as it does any other commercial service. After considerable public pressure 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. These reservations give governments the authority to restore public monopolies, where water privatization has failed, but foreign investors can still challenge this decision under the fair and equitable treatment and the expropriation provisions of the investment chapter. The CETA does not provide adequate protection for what should be a universal right: affordable, publicly delivered water and sanitation services.

Investment

Investor-State Dispute Settlement

Peter Fuchs, *PowerShift*

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.*

- The CETA includes a far-reaching investment chapter that will empower foreign investors and multinational corporations. This is widely seen as the 'new EU model' investment treaty, and as a blueprint for what the EU will try to insert into the EU-U.S. Transatlantic Trade and Investment Partnership (TTIP). Under this chapter, Canada and the EU commit themselves to strong market access rules, prohibition of performance requirements, non-discriminatory treatment of foreign investors and high standards of investor protection. Through the proposed investor-state dispute settlement (ISDS) mechanism, foreign investors will be granted the special privilege of suing host governments and claiming compensation for all kinds of state actions, while bypassing domestic judicial systems and their independent courts.

- Widespread opposition to the inclusion of ISDS in the CETA from the general public, parliamentarians and even EU governments has been ignored. The EU has also failed to take into account any conclusions reached from its three-month public consultation on international investment policy in the TTIP, launched in March 2014.
- No convincing justification for the inclusion of ISDS in the CETA (or the TTIP) has been given. Essential questions remain unanswered, including: Why is ISDS even needed in the CETA? Why give foreign investors greater procedural and substantive rights than domestic investors, or anyone else? Why give private, for-profit arbitrators the power to interpret treaties such as the CETA, to decide over questions of public law and to impose fines paid from public funds?
- The CETA fails to clearly and unequivocally confirm the state's right to regulate; instead it undermines that right.
- While granting foreign investors unprecedented new rights, the CETA fails to introduce any binding responsibilities on their conduct.
- The CETA does not require foreign investors to first resort to domestic courts in solving disputes — it actually discriminates in favour of foreign investors.
- While including the new United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-Based Investor-State Arbitration,[5] the CETA fails to address the more fundamental absence of institutional independence and procedural fairness in investor-state arbitration.
- The CETA goes beyond the NAFTA in its investor-friendly formulation of the 'fair and equitable treatment' standard, which is the most dangerous investment protection standard in the sense that it has been used most often and most successfully to attack public policy measures.
- The EU has rejected Canada's request that court and administrative tribunal decisions related to intellectual property rights be excluded from investor-state challenge, in an apparent response to Eli Lilly's ISDS challenge under the NAFTA.
- Reservations and exceptions in the CETA remain complex, fragmentary and tied to notions such as the 'necessity' of public policy meas-

ures, which will then be adjudicated by the arbitration tribunals. Moreover, the reservations do not cover substantive investment protection standards such as 'fair and equitable treatment.'

- Mounting public criticism of the ISDS approach taken in the CETA led to minor improvements related to the definition of indirect expropriation and the Most Favoured Nation treatment clause, but important ambiguities remain, and the danger still exists of arbitrators ruling expansively on these and other clauses.

- In addition to the investment chapter, the CETA's financial services chapter creates several new layers of investor rights, including the possibility of recourse to ISDS (see section on Financial Services by Scott Sinclair).

Analysis of Key Provisions

- **(No) Right to regulate:** The 'right to regulate' is mentioned three times in the agreement. In the preamble, the parties simply 'recognize' that the CETA protects the right to regulate ("RECOGNIZING that the provisions of this Agreement preserve the right to regulate..."), yet the text fails to clearly and unequivocally confirm this right, especially in the investment chapter. The other mentions are to be found in the labour and environment chapters, so that, in effect, the CETA shields the right to regulate from any international obligations to protect labour or the environment but not from all the detailed obligations in the investment chapter. Also in the environment chapter, the right to regulate is limited by formulations which require environmental policies to be implemented "in a manner consistent with the multilateral environmental agreements to which they are a party and with this Agreement," meaning that environmental policies have to be consistent with the CETA — not the other way round (see section on Sustainable Development and Environmental Protection by Ramani Nadarajah).

- **The definitions of investment and investors are very broad:** The CETA definition of 'investment' and 'investor' are overly broad and far beyond what would be advisable from a regulatory or public interest perspective. The CETA defines an 'investment' as, "Every kind of asset that an investor owns or controls, directly or indirectly, that

has the characteristics of an investment." It defines an 'investor' as: "a Party, a natural person or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party. For the purposes of this definition an 'enterprise of a Party' is: (a) an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party"). The reference to 'substantial business activities' is not enough to prevent 'treaty shopping.' For example, U.S. investors in Canada would be able to use the CETA investment provisions and ISDS to challenge European state measures.

- **Worse than the NAFTA — wide and open clause on 'fair and equitable treatment':** The 'fair and equitable treatment' (FET) clause in the CETA is highly problematic and arguably more investor-friendly than NAFTA's controversial minimum standards of treatment clause. The clause should at least specify that the closed list of proscribed government conduct does not go beyond the customary international law standard on the treatment of aliens, to be proven by the claimant. The CETA is explicit in stating that a tribunal "may take into account whether a Party made 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, but that the Party subsequently frustrated." This clarification tilts the balance in favour of the investor and poses a clear threat to the rights of governments to regulate, and especially to alter and strengthen regulatory approaches in response to changing circumstances, new knowledge, investor behaviour, public perceptions of risk, and democratic decision-making. It singles out the 'legitimate expectations' that investors may hold for their investments as an interpretive issue that tribunals may consider — even above issues relating to the public interest. The CETA's wording on FET exposes Canada's totally misleading claim in its October 2013 Technical Summary of the Negotiated Outcomes regarding the provision on minimum standard of treatment in the CETA. In that document, Canada stated it would introduce a "new format for article (sic) but substantively the same as NAFTA (that is, substantively the same as the customary international-law minimum standard of treatment)."[6]

- **FET in the CETA — a potential 'umbrella clause through the back-door':** The CETA no longer includes the customary umbrella clause that Parties must "observe any obligation" in their treatment of investors, as had been proposed by the EU in earlier leaked versions. However, the FET formula regarding a Party's 'specific representation' combines a form of umbrella clause with the concept of 'legitimate expectations' as a reference point for any tribunal seeking to give meaning to the various direct components of FET. This will still allow an arbitration tribunal the flexibility to bring back the essence of an umbrella clause, with the potential to elevate all of a state's contractual obligations with the investor to the level of a treaty obligation, without any of the contractual obligations on the investor (e.g. to submit contractual disputes to a forum agreed before in the contract) receiving the same treatment. A "specific representation to an investor" could reasonably be interpreted to include a written contractual commitment by the state. On the question of an umbrella clause, arbitrators retain the capacity to use the treaty language in a 'creative' way in support of corporate interests. This is yet another example of how Article X.9 of the CETA is a significant expansion of FET beyond the NAFTA context.

- **Intellectual Property Rights and court decisions:** The interpretive language in the CETA on intellectual property rights and court decisions is weak (see Declaration to Investment Chapter Article X.11 Paragraph 6). It leaves ample room for arbitrators to say: "We are not an appellate mechanism for courts and we allow states to implement as they see fit, but this is all subject to the specific obligations to protect investors" (see section on Pharmaceuticals by Scott Sinclair).

- **Most-Favoured Nation (MFN) language remains open to interpretation:** The CETA's new language on MFN clarifies that substantive obligations in other treaties do not count as treatment, although measures adopted under those agreements *are* treatment. It remains to be seen, however, how arbitrators will deal with the notion of "measures adopted by a Party pursuant to such obligations" (Article X.7.4). The specific text reads: "Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute 'treatment,' and thus cannot give rise to a breach of this article, absent measures adopted by a Party pursuant to such obligations."

- **No ISDS for pre-establishment claims**: The CETA does not allow ISDS claims for pre-establishment (market access) restrictions. Article X.1.4 states: "Claims in respect of Section 2 (Establishment of Investments) are excluded from the scope of Section 6. Claims in respect of the establishment or acquisition of a covered investment under Section 3 (Non-Discriminatory Treatment) are excluded from the scope of Section 6." (Section 6 is the section on Investor-State Dispute Settlement.) Yet these far-reaching investment liberalization elements are still subject to state-to-state dispute settlement, posing inherent risks to government policy space for adopting sustainable economic, environmental and social policies. These obligations largely surpass what has been agreed to in the WTO, and should not be underestimated.

Financial Services

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Key Points

Unless otherwise noted, all Articles, Annexes and Appendices referenced in this section refer to ***Chapter 15*** *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.*

- In early 2013, Canada's financial services negotiators warned EU negotiators that giving foreign investors new CETA rights to sue governments over financial regulation would "create a chilling effect that will have negative consequences for the overall economy of the country."[7]
- Unfortunately, those warnings have gone largely unheeded. The CETA financial services chapter creates several new layers of investor rights and dispute settlement recourse that will hamstring financial regulators charged with protecting consumers and the overall stability of the financial system.

- Having weathered the financial crisis reasonably well, Canada should have been in a strong position to withstand European demands for further restrictions on regulatory autonomy over financial services. Instead, it has bowed to EU and financial industry pressure on most key points.

- Under the CETA, foreign investors would have broader rights to challenge financial regulations through investor-state dispute settlement (ISDS). The CETA expands the grounds for foreign investors to challenge government measures regulating financial services sectors.

- In addition, the agreement includes new disciplines on Domestic Regulation that apply to financial services. These apply to *non-discriminatory* regulations related to licensing requirements and procedures and qualification requirements and procedures for financial services, greatly expanding the degree to which non-discriminatory regulations are subject to binding trade treaty restrictions.

- The CETA's controversial market access rules also restrict certain types of non-discriminatory regulation. These rules prohibit certain broad forms of regulation, such as measures to limit the size of financial firms, even when these regulations treat domestic and foreign firms even-handedly.

- A "prudential carve-out" does insulate "reasonable" financial regulation (e.g. to protect consumers, the safety and soundness of financial institutions, or the stability and integrity of the financial system) from challenge. This protection, however, is both procedurally and substantively weaker than under the NAFTA.

- The CETA will constrain financial regulation in both Canada and Europe. A particular challenge from the European perspective is the negative list approach to reservations, with which European member states and financial services regulators have limited experience. Under this approach, if a non-conforming measure is not listed, it is lost. European member states are already facing a number of ISDS claims related to the aftermath of the financial crisis, so any mistakes or oversights could prove costly.

Analysis of Key Provisions

Domestic regulation

- The CETA disciplines on Domestic Regulation (Chapter 14) are incorporated into the Financial Services chapter in Article 1.6. *Non-discriminatory* regulatory decisions in relation to "measures adopted or maintained by a Party relating to licensing requirements and procedures and qualification requirements and procedures" must be based on criteria that preclude the competent authorities from exercising their power of assessment in an arbitrary manner (Chapter 14, Article 2). These criteria must be clear and transparent, objective, established in advance and made publicly accessible (Chapter 14, Article 2). The Parties must establish independent, arms-length administrative tribunals to adjudicate complaints from foreign suppliers regarding alleged violations of the domestic regulation provisions.
- This type of international trade law restriction on the exercise of non-discriminatory regulation is unprecedented. The GATS Article VI called for the negotiation of domestic regulation disciplines, but these talks have not been completed. Comparable NAFTA obligations regarding Domestic Regulation call for governments to make "best-efforts," but impose no binding restrictions.

Market access

- The CETA's market access obligations prohibit government measures that limit the number of service operations, the value of service transactions or assets, the number of operations or quantity of output, the number of persons supplying a service and the participation of foreign capital, and also any requirements for specific types of legal entities. These "market access" rules are enforced through government-to-government dispute resolution (not ISDS).
- Such regulations are prohibited even when they apply equally to domestic and foreign firms. All such measures must be protected by reservations, or eliminated. For example, Canada, has exempted its "widely held" rule, which limits any single shareholding in a large Canadian bank to less than 35%, from the market access provisions of the CETA.

- Trans-Atlantic consumer protection groups have expressed concerns that these market access rules, which arose before the financial crisis, are outdated and could interfere with beneficial financial regulation, such as limiting the growth or transactions of financial firms "so that they do not become 'too big to fail.'"[8]

- The CETA market access text clarifies that Parties may continue to require financial firms to supply services through "separate legal entities" (Article 6.1[0]). This appears to shield domestic regulations which demarcate pillars of the financial system, for example by separating insurance from banking, or investment from retail banking. Nevertheless, the EU took an unbound reservation exempting its authority in this area.[9]

- Statutory systems of social security, e.g. public health insurance, are excluded from the financial services chapter, but only if there is no competition (Article 1.5). If a province or state allowed private health insurance for medically necessary services, then the obligations under the CETA's financial services chapter would apply. Canada has reserved public automobile insurance in four provinces, but other provinces could not adopt public auto insurance without running afoul of the CETA's market access obligations.

ISDS and financial services

- Due to concerns about insulating regulatory authority from challenge, previous Canadian treaties strictly limited recourse to ISDS with regard to financial services. The CETA will greatly expand the scope for challenges by foreign investors to government measures in the financial services sectors. Article 1.3 incorporates key provisions of the investment chapter into the financial services chapter. The CETA allows ISDS claims related to Article X.3 (National Treatment), Article X.4 (Most-favoured Nation Treatment), Articles X.12 (Investment — Transfers), X.11 (Investment — Expropriation), X.10 (Investment Compensation for Losses), and X.9 (Investment — Treatment of Investors and of Covered Investments).

- The exposure to investor lawsuits based on the national treatment and fair and equitable treatment clauses is of great concern. The CETA's approach contrasts sharply with the treatment of financial services under the NAFTA (Article 1401[2]), where financial regulators were

successful in limiting the application of ISDS to only free transfers of currency, expropriation and some other relatively minor provisions.

The prudential carve-out

- The CETA includes a prudential carve-out for financial regulation that is weaker than its NAFTA counterpart.[10]
- Procedurally, there is a filter that allows the Parties to jointly determine to set aside a claim on grounds that it falls within the prudential carve-out. But they must decide by consensus, or the claim proceeds.
- If a defendant government invokes the prudential carve-out as defence, the matter is referred to a Financial Services committee, and (if the committee cannot agree) to the CETA Trade commission, for decision. These bodies are comprised of representatives of both Parties and operate by consensus. If no consensus is reached, the matter of whether the prudential carve-out applies is left to the investor-state tribunal to decide.
- In most cases, rather than pre-empt a complaint by one of its own investors, a home government will likely let the matter proceed to arbitration. By contrast, under the NAFTA's filter mechanism, if the Parties fail to reach consensus, the defendant government can send the matter to a state-to-state dispute panel for a determination (NAFTA Article 1415).
- Parties may, for prudential reasons, ban risky types of financial services (Article 15.3). Such bans may not discriminate on the basis of nationality. Parties could, for example, ban risky practices — such as naked short-selling[11] — but if challenged they would have to justify this as falling within the prudential carve-out. Otherwise, such a ban would violate CETA's market access obligations.
- Substantively, guidance to tribunals for applying the prudential carve-out exhorts tribunals to defer "to the highest degree possible" to domestic financial regulatory authorities (Annex XX: Guidance on the application of Article 15.1 (Prudential Carve-out) and Article 20 (Investment Disputes in Financial Services)). But the chapter also provides considerable scope for tribunals to impugn prudential regulation on grounds, for example, that it constitutes "arbitrary or unjustifiable discrimination" or a "disguised restriction" on foreign investment.

Reservations and exceptions

- The CETA financial services chapter adopts a "negative list"-approach, meaning its core rules apply unless a government specifically lists measures it wants to exclude from these obligations in an annex to the financial services chapter.

- European member states and financial services regulators have limited experience with negative listing. It will be difficult or impossible to correct mistakes, since the CETA, unlike the GATS, does not provide any procedure for the withdrawal of services commitments. If, for example, in a future dispute the prudential carve-out is interpreted in a restrictive manner, it will not be possible to adjust reservations to safeguard regulatory authority.

- European member states already face a number of ISDS claims related to financial regulation. Foreign investors have turned to investor-state arbitration to try to recover losses incurred during Europe's seemingly interminable financial crisis. In the first investor-state case ever by a Chinese mainland investor, a financial services company is suing Belgium under a 2005 Belgium-China investment protection treaty. Ping An, the largest single shareholder in the Belgian-Dutch bank Fortis, allegedly lost US$2.3 billion when government authorities stepped in to rescue the financial giant and subsequently sold off assets over the objections of minority shareholders. Foreign investors have also filed investor-state claims against both Greece and Cyprus to recover losses incurred under financial restructuring programs.

- The CETA mandates further negotiations to develop disciplines on performance requirements, such as domestic content or technology transfer conditions on investors or service suppliers. If, within three years of entry into force of the CETA, these talks do not result in an agreement, the performance requirements prohibitions in the CETA's investment chapter will automatically apply to the financial sector. Governments will then have a one-time opportunity to negotiate reservations for the performance requirements provisions, but future policy flexibility cannot be preserved as these reservations can only protect existing non-conforming measures (see Article X: Performance Requirements).

Public Procurement

Provincial and Municipal Coverage

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Key Points

Unless otherwise noted, all Articles, Annexes and Appendices referenced in this section refer to ***Chapter 21*** *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.*

- Government procurement — the public purchasing of goods and services of all kinds — can be an important economic development tool, especially when used to encourage broader policy goals such as a transition to green energy. These purchases make up a significant portion of public budgets. The WTO estimates government purchasing at from 10 to 15% of GDP in developed countries,[12] which translates into an estimated $130–$200 billion annually in Canada. Typically, governments are the single largest purchasers of goods and services in the economy. The large amount of public money involved is one reason why government procurement is an important issue.

- Public procurement in Canada by all levels of government is already open, transparent and fair, with recourse for companies who feel they have been treated unfairly. Few if any jurisdictions in Canada prohibit foreign firms from bidding on goods, services or construction projects. Similarly, Canadian firms with a market presence in Europe must legally be treated the same as European firms under the EU procurement directives. It is highly misleading to suggest the CETA will create significant new opportunities for Canadian companies to bid on and win public contracts in the EU since nothing is currently prohibiting them from doing so.

- The real objective of EU negotiators in the CETA with respect to procurement was not to achieve non-discriminatory access at all levels of government, which exists already for EU companies in Canada. EU negotiators sought "unconditional access," which is something quite different. In this respect, the EU won handily while Canadian firms operating in Europe picked up few new opportunities. In other words, on procurement, Canada made unilateral concessions to the EU that will mostly affect municipal governments and other provincial entities previously excluded from trade deals.

- The procurement commitments that Canada has agreed to in the CETA are extensive and will substantially restrict the vast majority of provincial and municipal government bodies from using public spending as a catalyst for achieving other societal goals, from creating good jobs to supporting local farmers to addressing the climate crisis. There are some notable exclusions, for example Infrastructure Ontario, NALCOR and parts of Manitoba Hydro's procurement. With the exception of Ontario's local hydro utilities and procurement of transit vehicles in Ontario and Québec, all municipal government procurement will be covered for the first time by an international procurement agreement. Notably, even these exceptions have been watered down and are weaker than the government portrays (see section on Procurement of Mass Transit Vehicles by Angelo DiCaro). Canada's provincial commitments have also been expanded far beyond existing commitments under the World Trade Organization's Agreement on Government Procurement (GPA) to include most utilities, Crown corporations, and the broader MASH sector (municipalities academic institutes, school boards and hospitals).

- For all goods and services contracts above 200 SDRs (about $328,000 on September 9), or 400,000 SDR for utilities ($657,000), and all construction projects above 5,000,000 SDRs (about $8.2 million), municipal governments, utilities and MASH sector entities will be prohibited from adopting minimum local content requirements, insisting on local training quotas, or applying any other "offsets," which are defined in the CETA as "any condition or undertaking that encourages local development." These prohibitions will almost certainly threaten increasingly popular "buy local" food programs at provincial hospitals, school boards and other public institutions (see section on Local Food Support Programs by Amy Wood). They will certainly outlaw programs like the *Green Energy Act* in Ontario, which required significant local content in solar and wind projects in order for public and private energy producers to benefit from generous feed-in-tariff rates designed to encourage more renewable power generation.[13]

- According to Province of Ontario officials, the thresholds mentioned above will cover roughly 80% of the *value* of all government procurement in the province, notably large infrastructure projects where minimum local content rules would have the most economic development impact. The CETA procurement rules are absolute, meaning they will apply equally to European and Canadian firms. Again, here we see the real meaning of "unconditional" access versus simple non-discrimination.

- Canada and the provinces made these commitments on behalf of municipal governments despite widespread local resistance and even opposition in communities across the country. Since 2010, more than 50 municipalities, including Toronto, Hamilton and Victoria, have passed motions requesting an exemption for local governments from the CETA procurement restrictions.

- Canada has made these extensive procurement commitments for municipal governments at a time when local governments in Europe are demanding more space to use public spending as a catalyst for social and economic development. There is little credible evidence that such "buy local" programs significantly affect global trade patterns, while restricting them undeniably diminishes local democratic authority.

- The CETA requires provincial governments to establish a new process through which European and Canadian companies can dispute procurement decisions made by covered government entities on contracts above the thresholds already mentioned. It also requires that notices of intended procurement must be directly accessible. In the August 1 text of the Government Procurement chapter, it was still unclear whether this would involve the creation of a single point of electronic access to all covered Canadian and European procurements, as requested by the EU.

- It is certainly feasible to implement innovative procurement policies that ensure financial responsibility and transparency while at the same time directing public purchases towards suppliers who contribute the most to goals such as affirmative action, local economic development, environmental protection, job creation and respect for human rights. In fact, assessing the overall benefits of a proposal in terms of local job creation, increased taxes, opportunities for marginalised groups, and environmental benefits provides a more accurate cost accounting and superior value for money than simply going with the lowest bid without considering local spin-offs and community impacts.

Analysis of Key Provisions

Non-discrimination

- Article IV.2 states:

  With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not:

  (a) treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or

  (b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of the other Party.

- The language in Article IV.2, taken from the WTO GPA, applies standard free-trade rules on non-discrimination to public procurement in a way that the GATT does not. In fact, most countries have not agreed to be bound by the GPA because they understand that pub-

lic spending can be a valuable tool for supporting small business or domestic start-up industries, for example renewable energy. The GPA is therefore a plurilateral (voluntary) WTO agreement with few active members, and even among these only a small subset have committed municipal governments under the GPA rules.[14] Many U.S. states also refuse to be bound by GPA- and CETA-like procurement restrictions prohibiting domestic support through public spending.

- We can see in part (b) of these non-discrimination rules why the EU feels it has achieved substantial "unconditional" access to Canadian procurement through the CETA, since covered public institutions will not be able to prefer one bid over another based on the amount of local content each firm would meet. Under the CETA, Canadian municipal governments would be prohibited from considering local content, or establishing a premium on local content at the outset in the request for proposals, while U.S. communities will continue to profit from the flexibility and job-creation potential this gives them.

Prohibition on offsets

- Article IV.6 states: "With regard to covered procurement, a Party, including its procuring entities, shall not seek, take account of, impose or enforce any offset." Like the WTO GPA, the CETA defines offsets as: "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."

- This clause combines with the rules on non-discrimination to significantly constrain how municipal governments and other covered institutions spend public money. In the United States, for example, many states and cities put aside a portion of public contracts for minority-owned businesses or social enterprises. Under both the NAFTA and the WTO-AGP Canada protected the right to set aside a portion of contracts for minority or small businesses. In the CETA, however, Canada has given up this right. Canada reserved the right to use offsets to benefit Aboriginal companies and communities but for all other purposes, for example requiring a firm building a new transit line to train people from disadvantaged groups, or hire from communities along the route, will be prohibited.

Regional development exemption

- The general notes on Canada's procurement offer include a clarification on procurement for regional economic development. Canadian provinces and municipalities retained space in the Agreement on Internal Trade (AIT) to use public spending to encourage development in depressed or under-developed regions. Canadian negotiators attempted but largely failed to retain this space in the CETA.

- Under the General Notes to Canada's procurement offer (GP Market Access–Canadian Offer, Annex X-07), it explains the provinces and territories of Manitoba, Newfoundland and Labrador, New Brunswick, Nova Scotia, Northwest Territories, Nunavut, Prince Edward Island and Yukon "may derogate from the procurement chapter in order to promote regional economic development, without providing undue support to monopolistic activities." However, each province may only do this a maximum of 10 times annually, where the total value of each procurement does not exceed $1 million, is only used to support small firms or employment in *non-urban* areas, and where there is no federal funding involved in the procured project. The regional development carve-out is therefore highly exclusive, cutting off potentially beneficial partnerships between various levels of government and any projects within struggling urban centres.

Valuation and local food programs

- Article II.6 of the procurement chapter, under the Valuation rules, prohibits municipalities and any other covered public entity from dividing up a proposed contract into separate procurements with the intention of excluding the contract from the CETA procurement rules. This appears to be reasonable on the surface, but in Article II.7 the logic is expanded to collect any "recurring contracts" into single purchases for the purposes of applying the CETA procurement rules. So when any public purchase is recurring, the calculation of the estimated maximum total value is to be based on:

  (a) the value of recurring contracts of the same type of good or service awarded during the preceding 12 months or the procuring entity's preceding fiscal year, adjusted, where possible, to take into account anticipated changes in the quantity or value of the good or service being procured over the following 12 months; or

(b) the estimated value of recurring contracts of the same type of good or service to be awarded during the 12 months following the initial contract award or the procuring entity's fiscal year.

- It is easy to see how "buy local" food policies in schools, hospitals or other municipal institutions, which the federal government has claimed to be safe, could easily surpass the threshold for goods and services purchases, making them vulnerable to challenge from private catering companies that could increase their profits by lowering the amount of local food they purchased. A general exception in the CETA "in respect of agricultural goods made in furtherance of agricultural support programs or human feeding programs" would not seem to apply to preferences at the local level for local food (see section on Local Food Support Programs by Amy Wood).

Procurement of Mass Transit Vehicles

Angelo DiCaro, *Unifor*

Key Points

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- The federal government is claiming that existing rules regarding domestic content in procurement of mass transit equipment have been grandfathered in the CETA. This claim is clearly false. No province outside of Ontario and Québec is now permitted to implement domestic content provisions in transit equipment procurement. The meaning and effect of the Ontario and Québec provisions is significantly downgraded, especially by the broad interpretation now given to the "total value" of those contracts, allowing inclusion of maintenance and service functions, and other non-manufacturing inputs. The "ratchet effect" specified in the CETA text ensures that domestic content rules can only move one way in the future: down.

- Proactive use of domestic procurement rules has been an important policy tool in the development of key high-value manufacturing operations in Canada — from the Bombardier passenger car facility in Thunder Bay to bus factories in Manitoba and Québec to many segments of our aerospace industry. The CETA abandons that policy tool, restricts the procurement decisions of provincial and local governments (for the first time in an international trade agreement), and threatens the future of those key industries in Canada.

Background on government procurement and transit investments

- Government procurement of goods and services is a lucrative market in Canada, pegged at $100–$200 billion annually in some estimates.[15] These purchases range from small office supplies to complex infrastructure projects, including schools, roads and transit systems.

- It is not uncommon for governments to utilize public spending power to extract value for their home economy, often by spurring local demand for labour. This guiding principle underpins long-standing U.S. government purchasing policies like the Buy American Act (requiring strong domestic content in goods used in certain publicly funded projects) as well as Buy-American provisions in the Surface Transportation Assistance Act (requiring all iron/steel inputs for surface transport projects to be sourced from the United States). Domestic (or local) purchasing policies have also been utilized in Canada for major public purchases of ships,[16] aerospace and defence products,[17] as well as transit vehicles and rolling stock, among others.

- These policies continue to be established (and enforced) despite the existence of various WTO agreements covering government procurement, as well as trade agreements like the NAFTA. However, restrictions embedded in the CETA appear to limit and in some cases, weaken or prohibit the use of buy-domestic transit policies at all levels of government, including at the provincial and municipal level. The application of free trade restrictions on purchasing by lower levels of government in Canada is an unprecedented development.

- Transit, including equipment such as buses, subways, light rail and other rolling stock, represents a significant portion of total annual government spending.[18] In fact, Canada's transit infrastructure needs continue to grow alongside greater urban density, traffic con-

gestion, population growth and environmental concerns. The Canadian Urban Transit Association pegs national transit system infrastructure needs at $53.5 billion.[19]

- Over the past 10 years, major transit expansion and renewal projects have been undertaken across Canada, including:
    - Canada Line (or SkyTrain) system in Metro Vancouver
    - Calgary's CTrain light rail transit system expansion
    - Montreal subway car replacement
    - Toronto light rail Transit City project, streetcar replacement
- The value of these four projects alone represents upwards of $4.5 billion. Many more transit expansion projects are being considered or are currently underway in cities and towns across Canada.
- Two provinces (Ontario and Québec) have established "buy-domestic" policies to guide the public purchase of rolling stock equipment in recent years.
- In Québec, the provincial government, in coordination with the Montreal transit authority (Société de transport de Montréal), issued a requirement in 2008 that 60% of rolling stock content must be supplied by Canadian sources, as well as a requirement for domestic final assembly. This policy guided the STM's procurement of more than 300 MR-63 subway cars. There have been additional reports of similar domestic content requirements issued by the government on a project-by-project basis.
- In Ontario, the Ministry of Transportation issued its *Canadian Content for Transit Vehicle Procurement Policy* in September 2008 in the wake of a proposed multi-billion dollar light rail transit procurement issued by the City of Toronto, partially funded by the province. The policy requires that all transit vehicles procured with provincial funding must have at least 25% Canadian content (with some exemptions), in the spirit of promoting "job retention and creation," "economic development," "value for taxpayers' dollars," and protecting "skilled manufacturing jobs."

Analysis of Key Provisions

Limitations on local content for mass transit

- The CETA explicitly covers mass transit procurement issued by all provinces and territories, bound by the terms and conditions expressed in its Procurement chapter, with two specific exemptions listed in Annex X-04. Under the CETA, no provincial or territorial government will be allowed to institute new local content requirements on transit purchases.

- In the *Technical Summary of Final Negotiated Outcomes* released in October 2013, following the announcement of an "agreement-in-principle," the federal government claimed that negotiators had *retained* "a 25% Canadian value for the procurement of public transit vehicles (rolling stock)" in Ontario and Québec. The summary also explains that Québec retains Canadian final assembly requirements (the Ontario policy is silent on final assembly conditions).

- The CETA will prohibit the implementation of any new domestic content provisions in the other eight Canadian provinces.

- While the Québec and Ontario transit procurement policies may have been maintained, significant concessions were made, including in their interpretation and application.

- In Québec, Canadian content requirements for mass transit, reported as high as 60% in certain projects, are now limited to 25%, which represents a significant departure from past provincial practice.

- In both Ontario and Québec, that 25% Canadian-content threshold becomes the *new maximum* in mass transit procurement — another significant concession. Annex X-04 (3) states the following:

  Procuring entities in the provinces of Ontario and Québec, when purchasing mass transit vehicles, may, in accordance with the terms of this agreement, require that the successful bidder contracts ***up to 25%*** *of the contract value in Canada.*

- In Ontario's transit procurement policy, the 25% threshold was expressly understood as a minimum requirement with municipalities granted the ability to raise the threshold as deemed appropriate. The

CETA also denies Ontario the opportunity to impose final assembly requirements on future transit purchases.

- The provisions of CETA also ensure that any subsequent lowering of the 25% threshold in either province will be locked in, permanently, through a "ratchet" effect to prevent future enhancements of Canadian content rules. The CETA text suggests that both parties have agreed to review the mass transit exemption in the event that the United States opts to reduce its local content policy for rolling stock below 25%. That could create pressure to further lower the content threshold.

"Local-content" versus "local value"

- A leaked EU summary of the CETA text released in October 2013 provided further insight on the concessions made. It announced that the final agreement significantly reduced and simplified the requirements of these policies by replacing rules of "local content" with rules around "local value." This expanded definition is expressed in Annex X-04 (3) of the final agreement.

- "Local value" (as explained in the EU summary and Annex X-04) explicitly expands the definition of Canadian content beyond basic parts, components and labour inputs of rolling stock to also include "maintenance and after-sales services." This expanded definition of what qualifies as Canadian content directly undermines the spirit of both the Ontario and Québec policy efforts. It enables successful bidders to satisfy the 25% requirement through service and maintenance contracts that extend over the expected vehicle lifespan (often decades), rather than through Canadian manufacturing activity. In the case of Ontario, where no requirement existed regarding final assembly, this could happen without any investment in domestic production facilities, as was the original intention.

Public Services

Public Services

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Research Associate with the Canadian Centre for Policy Alternatives

Key Points

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- 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 nonconforming 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.

Regulation

Domestic Regulation

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Key Points

Unless otherwise noted, all Articles, Annexes and Appendices referenced in this section refer to ***Chapter 14*** *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 take the Parties to the agreement into uncharted waters with the threats it poses to their right to regulate. The CETA imposes novel obligations on governments that go far beyond the traditional trade agreement requirement not to discriminate between foreign and local corporations.
- Imposing limits on non-discriminatory regulations has proven to be very controversial in the context of the WTO negotiations on services. Yet the CETA's Domestic Regulation chapter (Chapter 14) applies domestic regulation restrictions not only to services but as well to "the pursuit of any other economic activity" (Article 1.1[b]).

- With its broadly worded restrictions on non-discriminatory regulations, the CETA reaches into areas that are not trade-related to dictate to governments specific criteria their regulations must meet.
- The CETA imposes requirements on governments to provide corporations with licensing procedures that are "as simple as possible" and do not "unduly complicate or delay" their activities (Article 2.7). The public interest in thorough assessments will be sacrificed to the benefit of corporations in construction, mining, oil and gas, and other sectors where applications often invoke public opposition.
- The CETA Parties have not taken reservations or exclusions to ensure regulations in many highly sensitive areas are safe from challenge. With the rare exception, no reservations have been scheduled to protect local government regulatory authority.[28]
- The wide variations among EU member states and Canadian provinces in the reservations they have listed suggest the difficulty governments have had coping with the agreement's "top-down" structure.
- With the CETA's top-down structure, governments have to accurately predict how, despite the CETA's complexity and novel provisions, every single one of their existing regulations might be vulnerable to challenge, and ensure they precisely word reservations to avoid such challenges. If they were concerned about protecting the policy space of future governments, they would have had to somehow foresee where new regulations may be needed and ensure these were included in the list of sectors where Chapter 14 does not apply.
- Government claims that the right to regulate has been protected in the CETA are unjustified given the weakness of regulatory protections and exclusions in the agreement and past panel rulings on the limits to the right to regulate under trade agreements.

Analysis of Key Provisions

Definitions and scope

- The CETA's Domestic Regulation chapter (Chapter 14) draws on language in the WTO General Agreement on Trade in Services (GATS), defining its scope very broadly not only as covering licensing requirements and procedures and qualification requirements and proced-

ures but also as all measures "relating to" these regulations and procedures (Article 1.1).[29]

- The CETA departs in a highly significant way from the GATS, applying domestic regulation restrictions not only to services but as well to "the pursuit of any other economic activity" (Article 1.1[b]). Mining, oil and gas, forestry, and fishing are just some of the "other economic activities" captured by this broad scope.

- Unlike the GATS where the draft restrictions on domestic regulation might only apply where governments have committed particular services in a "bottom-up" way, the CETA's Chapter 14 applies to the regulation of all activities unless specific reservations and exclusions have been made (Articles 1.2[a] and 1.2[b]).

- The obligations in Chapter 14 apply to all existing licensing and qualification requirements and procedures unless specific reservations to exclude them have been set out in Annex I. For example, licensing requirements and procedures for the sale of firearms will have to conform to the CETA's regulatory restrictions as no CETA Party has excluded these regulations from their Chapter 14 obligations.[30]

- The CETA Parties have strictly limited their policy space for the adoption of new regulations, as Annex II reservations for the adoption of new measures only apply to a narrow subset of these reservations.[31] For example, Canada has not exempted the education sector, so Chapter 14 will full apply when provinces license private education institutions. Canada's broad Annex II reservation for oil and gas pipelines does not apply to Chapter 14.

- Every level of government — central, regional and local — is covered as well as any "nongovernmental body in the exercise of powers delegated by central or regional or local governments or authorities that grants an authorization" (Article 1.3).

- The reservations governments have scheduled differ widely, with some governments not taking any reservations to protect their regulatory capacity in critical sectors. For example, Poland has listed a reservation for licensing in the energy sector including for LNG installations and electricity distribution but the U.K. has only taken a reservation in the energy sector for licensing oil and gas exploration on its continental shelf. British Columbia and Alberta have taken

broad reservations to be able to maintain their rights "to adopt or maintain *any measure* relating to" the oil and gas sector. However, because the provinces did this under Annex II rather than Annex I, in contrast with Newfoundland, Nova Scotia and PEI, Chapter 14 fully applies to their oil and gas sector. , France, Romania, Ireland, the Czech Republic and Denmark have all banned or placed moratoria on licensing fracking operations but they have not scheduled an Annex I reservation for fracking as Bulgaria has.

Restrictions on regulations

- Parties to the agreement have to ensure that the licensing and qualification requirements and procedures are based on particular criteria to preclude regulators from acting in "an arbitrary manner" (Article 2.1). Specifically, covered regulations will have to be: "a) clear and transparent; b) objective; c) established in advance and made publicly accessible" (Article 2.2).

- Parties have to ensure "that licensing and qualification procedures are *as simple as possible* and do not *unduly complicate or delay* the supply of a service or the pursuit of any other economic activity" (emphasis added) (Article 2.7). Making licensing procedures "as simple as possible" sets an absolute value on the ease with which corporations can get their projects approved to the detriment of all other considerations.

- None of these criteria have been defined so that the CETA provisions themselves are not "clear and transparent" and leave too much discretion to dispute panels to determine what negotiators meant. For example, an analysis of the word "objective" has turned up various meanings for how it is used in the WTO context alone.[32]

- If a dispute panel interpreted "objective" to mean "not subjective," regulations could be overturned if they are based on the regulator's necessarily subjective balancing of different factors such as public input, the scenic impacts of a development and environmental considerations.

- Development and building permits would appear to fall under a broad definition in Chapter 14 of licensing and general community plans could be captured under "measures relating to" these permits.

Yet the CETA Parties have listed no reservations under construction and only two under distribution services to protect local government planning authority. Unlike the CETA's investment chapter, the domestic regulation chapter has no exemption for zoning.

- At the local government level, consideration is often given to public opinion — arguably a subjective consideration — in planning decisions. The City of London, for example, makes public consultation an integral part of its planning approval process. If "objective" is interpreted as meaning "not biased," London's promotion of socio-economic equality through its planning policies could be ruled not objective because it biases these policies in favour of disadvantaged groups. London also requires that a major development proposal has to be assessed by a committee if the public registers as few as four objections against it — a requirement that a dispute panel could rule is "arbitrary," because four objections is an "arbitrary" threshold, not "as simple as possible," unduly complicated, and/or causing undue delays.[33]

- The CETA obligation that regulations must be "established in advance" begs the question, in advance of what? Alternative interpretations include: before any investment is made, before an application is submitted, or before an application is approved. In examining similar wording, the chair of the WTO services negotiations stated it could mean regulations cannot be changed and commented that this would impose a significant limitation on the right of member countries to modify their regulations.[34]

- Since the CETA Parties have chosen to have restrictions on regulations apply not only to services but as well to the pursuit of undefined "economic activities," the CETA could undermine the ability of governments to re-regulate in areas like oil and gas development, mining, and forestry where they have experienced negative consequences from deregulation.

- For example, giving mining companies CETA-enforced rights to have licensing permits "pre-established" could have prevented the British Columbia provincial government from re-regulating to address one of the world's worst mining spills. In response to this recent spill, the B.C. government has imposed new reporting requirements, independ-

ent inspections and delayed the approval process for a new mine,[35] which are all requirements that were not "established in advance."

- Dispute panels could determine that public input, environmental assessments and archaeological studies do not constitute a process that is "as simple as possible." They could also rule that these requirements "unduly complicate or delay" economic activity. In Canada, the LNG industry has requested that the government eliminate requirements for environmental assessments for gas terminals on the basis that the time required posed a "barrier to industry."[36]
- Requirements for authorizations from multiple agencies or levels of government could be challenged as not making the licensing process "as simple as possible" and unduly complicating or delaying approvals. For example, requiring local government permits for the construction of oil and gas pipelines could be challenged under these Chapter 14 criteria.

The right to regulate

- The CETA preamble states that the Parties to the agreement recognize "the provisions of this Agreement preserve the right to regulate within their territories." However, dispute panels have interpreted similar statements in a very restricted way, suggesting the right to regulate only extends so far as Parties to an agreement have not undertaken obligations that limit that right.[37]
- The CETA Chapter 32 exceptions do not apply in the latest draft to its domestic regulation chapter, with the result that if regulations are challenged using provisions of the chapter governments cannot defend them as "necessary" to protect such concerns as human health or the environment. Even if the exceptions are applied, the necessity of a measure can be a very difficult standard to meet.[38]

Regulatory Co-operation

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Key Points

Unless otherwise noted, all Articles, Annexes and Appendices referenced in this section refer to ***Chapter 26*** *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 chapter on regulatory co-operation has to be seen in the context of other trade agreements and the EU Commission's position on regulatory co-operation in TTIP.[39] The question is whether the CETA text could be used to apply a far-reaching model of regulatory co-operation that would allow business lobby groups to exert undue influence in the regulatory process. Due to the vagueness of the provisions in this chapter, this seems to be the case.
- The planned objectives and activities in the chapter will affect the integrity of regulation and in practice will prioritize trade interests above other legitimate interests. Since this regulatory co-operation process will be set up to function permanently after the CETA is ratified, it will affect the regulatory and legislative process and undermine democracy and public oversight in the Parties indefinitely.
- One of the chapter's key principles is that regulatory co-operation should prevent and eliminate unnecessary barriers to trade, enhance competitiveness and enhance innovation. Often these barriers are rules and regulations that protect consumers and the environment.
- The CETA will create a Regulatory Co-operation Forum but this new body is only vaguely described, lacks accountability and remains open to the direct influence of business lobbyists.
- A trade and investment agreement should not deal with rule-making, which is ultimately a constitutional issue.

Analysis of Key Provisions

- The regulatory co-operation chapter may create obstacles and delays when it comes to introducing new regulations. Article X.2.4 states that the "Parties may undertake regulatory co-operation activities, on a voluntary basis." However, "if a Party refuses to initiate regulatory co-operation or withdraws from such co-operation, it should be prepared to explain the reasons for its decision to the other Party." Therefore, the Parties must provide an explicit justification if they decide not to accept a regulation as equal.

- Article X.4.4 states that the Parties will endeavor to share "proposed technical or sanitary and phytosanitary regulations that may have an impact on trade with the other Party at as early a stage as possible so that comments and proposals for amendments may be taken into account." This means that information on future legislation could be shared with the other Party even before it has been shared with their Parliaments. If that were the case, the other Party could make amendments and comments before the country's own parliament got their hands on the draft legislation.

- Chapter 26 includes a possible attack on the precautionary principle, by requiring the Parties to "establish, when appropriate, a common scientific basis" (Article X.4.14[d]). An attack on the precautionary principle could weaken EU environmental protection laws and could hinder the EU's introduction of new rules and regulations to protect the environment in the future.[40]

- Article X.6 creates a new body—the so-called Regulatory Co-operation Forum (RCF). Its role is only vaguely described and lacks accountability, which gives a lot of power to the European Commission to shape the role of the RCF. The RCF may be open to the direct influence of business lobby groups. An entry point is Article X.6.3, which states, "The Parties may together invite other interested parties to participate in the meetings of the RCF."

- Article X.8 on "Consultations with Private Entities" points in the same direction. This provision allows the European Commission to set up close consultations with business lobby groups. There is no guarantee or requirement that the input of other "interested persons," whose voices might not otherwise be heard, be included. The pub-

lic, regulators and parliamentarians might not be aware of these consultations until a legislative proposal is presented.

- The fact that the European Union's contact point for Chapter 26 is the Directorate-General for Enterprise and Industry further suggests that these provisions are open to business influence (see Article X.9).
- Related to the chapter on regulatory co-operation is the chapter on Conformity Assessment (Chapter 27). These provisions require the two Parties (Canada and the EU) to appoint outside bodies to conduct assessments on product standards, whether they are equivalent or not. The assessments of these outside bodies have to be accepted. That could put important decisions on regulation and standards in the hands of private bodies. (For a full list of covered products see Chapter 27, Annex I.)

Cultural Exceptions

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Key Points[41]

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

- Canada's cultural exception strategy in the Comprehensive Economic and Trade Agreement (CETA) is threefold:
  1. Expressing cultural considerations in the CETA preamble;
  2. Including an exception for "cultural industries," which is limited to selected CETA chapters; and
  3. Making reservations on specific cultural sectors, regulations and laws, and institutions in the annexes to the CETA.
- The CETA's innovative preamble recognizes cultural diversity protection and promotion as legitimate policy objectives, explicitly refers to the UNESCO *Convention on the protection and promotion of the di-*

versity of cultural expressions, and recognizes the right of states to implement cultural policies and to support national cultural industries.

- The CETA includes an asymmetric cultural exception. For Canada, the exception applies to cultural industries. For the European Union, the exception applies only to audiovisual services.
- The CETA's cultural exception is partial as it is only applicable for certain CETA chapters.
- With respect to province-specific offers, Québec took extra care to mitigate the CETA's negative impact on its cultural policy.
- In conclusion, the best intentions of the negotiating Parties pertaining to the protection and promotion of cultural diversity are there, at least enunciated in the CETA preamble, but the absence of a general exception clause protecting culture is a missed opportunity for both Canada and the EU.

Context

- Rules on international trade and foreign investment may in some cases conflict with legitimate and necessary state policies and regulations aiming at protecting and promoting national cultural identities and cultures.
- WTO and investment tribunal jurisprudence shows that principles of free trade undermine national cultural policies. Liberalization of trade in goods puts at risk subsidy policies on cultural goods, and tariffs and quotas on foreign cultural goods. Similarly, free trade in services rules negatively impact on national policies on audiovisual productions. Bilateral and regional investment liberalization agreements allow foreign investors and large multinational corporations to challenge national regulations on historical and cultural buildings and sites.
- Reconciling rules on free trade and cultural policies has been a rising global concern for the past decades, especially since the creation of the WTO. Former WTO Director General Renato Ruggiero declared in 1997 that, "Managing a world of converging economies, peoples and civilizations, each one preserving its own identity and culture, rep-

resents the great challenge and the great promise of our age. We are only on the threshold of this new era and the future is still unclear."

- It is in this context of growing concerns about the impact of free trade on national identities and cultures that the UNESCO General Conference adopted the *Convention on the protection and promotion of the diversity of cultural expressions* in 2005. Recognizing the "sovereign right" of states "to formulate and implement cultural policies and to adopt measures to protect and promote the diversity of cultural expressions," the UNESCO Convention is the leading international legally binding instrument, which introduced the idea of "cultural exception" in positive international law. Some hope that, since then, culture should no longer be considered as a commercial product, as any other tradable good or services, in international trade law.

- During the bilateral negotiations on the CETA, Québec and France pushed hard to respect and explicitly include a "cultural exception" in the trade deal. Although Canadian and European political leaders and negotiators agreed on the principle, leaked documentation showed that the negotiating parties disagreed on the scope of the cultural exemption and on how to fulfill Canada and EU member state obligations under the UNESCO Convention. This is reflected in the final text.

Analysis of Key Provisions

Cultural considerations in the CETA preamble

- The CETA preamble includes an explicit recognition of the legitimacy of national cultural policies and references the UNESCO *Convention on the protection and promotion of the diversity of cultural expressions*.

- The preamble of a trade agreement may contribute to mitigating the negative impact of liberalization measures it contains. As a treaty must be interpreted "in the light of its object and purpose," trade agreements that include cultural considerations should be interpreted as more "cultural friendly."

- Thus, in cases where free trade rules are in contradiction with cultural protection and promotion policies, panelists or arbitrators would

be more likely to conclude that there is no breach of Canada's international obligations on trade liberalization.

- WTO jurisprudence shows that panelists give some weight to preambles of multilateral commercial treaties. For instance, in the WTO case *United States–Shrimp*, the agreement establishing the WTO, which recognizes the objective of sustainable development and the protection and preservation of the environment, has been decisive in interpreting a provision of the GATT.

- The inclusion of cultural considerations in the CETA preamble is desirable, but as the sole "cultural exception" strategy it is insufficient to protect cultural diversity and to give life to the UNESCO Convention, as well as to ensure that the CETA would have no negative impact on cultural policies at the national and regional levels.

- The CETA preamble aims a the following:

  - Recognizing the promotion and the protection of cultural diversity as a legitimate policy objective;

  - Reaffirming all CETA state Parties' obligations under the UNESCO *Convention on the protection and promotion of the diversity of cultural expressions; and*

  - Recognizing that states have a right that is twofold: (1) the right to preserve, develop and implement cultural policies, and; (2) right to support cultural industries for the purpose of strengthening the diversity of cultural expressions, and preserving their cultural identity, including through the use of regulatory measures and financial support.

- The explicit mention of the UNESCO *Convention on the protection and promotion of the diversity of cultural expressions* is a unique and welcome innovation that should contribute to giving life to the convention and to fulfilling Canada's obligations toward cultural protection and promotion.

"Asymmetric" and "partial" cultural exception

- In the context of the CETA negotiations, it has become clear that Canada and the EU had different interpretations on the scope of the cultural exception. According to Europeans, the cultural exception

should be strictly limited to "audiovisual services." In contrast, Canada suggested a larger scope for the cultural exception to include all cultural industries, which covers "books, magazines, periodicals or newspapers," "film or video recordings," "audio or video music recordings," "music in print or machine-readable form," and "radiocommunications" for the general public.

- The coexistence of two concepts of the cultural exception based on different interpretations of international obligations of the CETA Parties under the UNESCO Convention has led to the creation of an asymmetric cultural exception under the transatlantic trade agreement. In fact, Parties to the CETA agreed on including an exception applicable to "cultural industries" for Canada and to "audiovisuals" for the EU.

- The asymmetric cultural exception is "partial" as it is only applicable in the following CETA chapters:

    - Cross-border Trade in Services;
    - Domestic Regulation;
    - Government Procurement;
    - Investment; and
    - Subsidies.

- The "cultural exception" is not "general" and remains inapplicable to key CETA chapters, including National Treatment and Market Access for Goods (Chapter 3).

- In addition, it is worth noting that Canada and the EU have agreed to "import" Article XX of the GATT on General Exceptions, and to make it applicable to all CETA chapters. However, Article XX of the GATT includes no "cultural exception" *per se* as the provisions limit its scope to the "protection of national treasures of artistic, historic or archaeological value."

- The asymmetric cultural exception in the CETA may negatively impact on the UNESCO Convention's effectiveness and disregard its objective and purpose of protecting the cultural heritage *of and for* the whole of humanity. Moreover, Canada's and the EU's joint decision of a "partial cultural exception," limited to selected chapters as opposed to a general Article XX-type cultural exception, may not be the most effective strategy for protecting and promoting cultural diversity.

Canada's reservations

- In separate annexes to the CETA core agreement text, Canada has submitted the federal government's reservations, some of which seek to protect Canadian cultural policy against liberalization disciplines.
- Canada's key "cultural reservations" concern particularly the investment chapter. For instance, in some cultural industries Canada may refuse a foreign investment if the investment is determined to be incompatible with national "cultural policies, taking into consideration industrial, economic and cultural policy objectives."
- Also, foreign investment in cultural businesses is subject to specific rules under the CETA. Canada federal Annex 1 states, "the specific acquisition or establishment of a new business in designated types of business activities relating to Canada's cultural heritage or national identity may be subject to review...in the public interest."
- As Canadian provinces have participated in the trade deal negotiations, they were invited to submit their own "offers" to the EU, including reservations in areas of provincial jurisdiction. Few "cultural reservations" were made, but Québec's special attention to a "cultural exception" is worth noting. For example, the Québec government included a broad reservation on government procurement market access, making explicit that procurement liberalization disciplines would not apply for public contracts "by Québec entities of works of art from local artists or to procurement by any municipality, academic institution or school board of other provinces and territories with respect to cultural industries." Québec's reservations also provide that the Government Procurement chapter would not apply to "any measure adopted or maintained by Québec with respect to cultural industries."
- In conclusion, and although Canada's exception on "cultural industries" is much broader than the EU's focus on audiovisuals, Canada should have abandoned its traditional concept of cultural exception. In order to fully give life to the UNESCO *Convention on the protection and promotion of the diversity of cultural expressions*, and also to other international legal instruments on the protection of cultural heritage to which Canada is a party, the CETA cultural exception should have been enlarged to cover all types of cultural activ-

ities and heritage, including intangible, underwater, immovable and movable, and natural heritage.

- Although the inclusion of cultural considerations in the CETA preamble is a step in the right direction, it remains insufficient if this strategy is not strengthened by adding a general broad exception on all types of cultural heritage applicable to all of the CETA chapters.

Intellectual Property Rights

Pharmaceuticals

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Key Points

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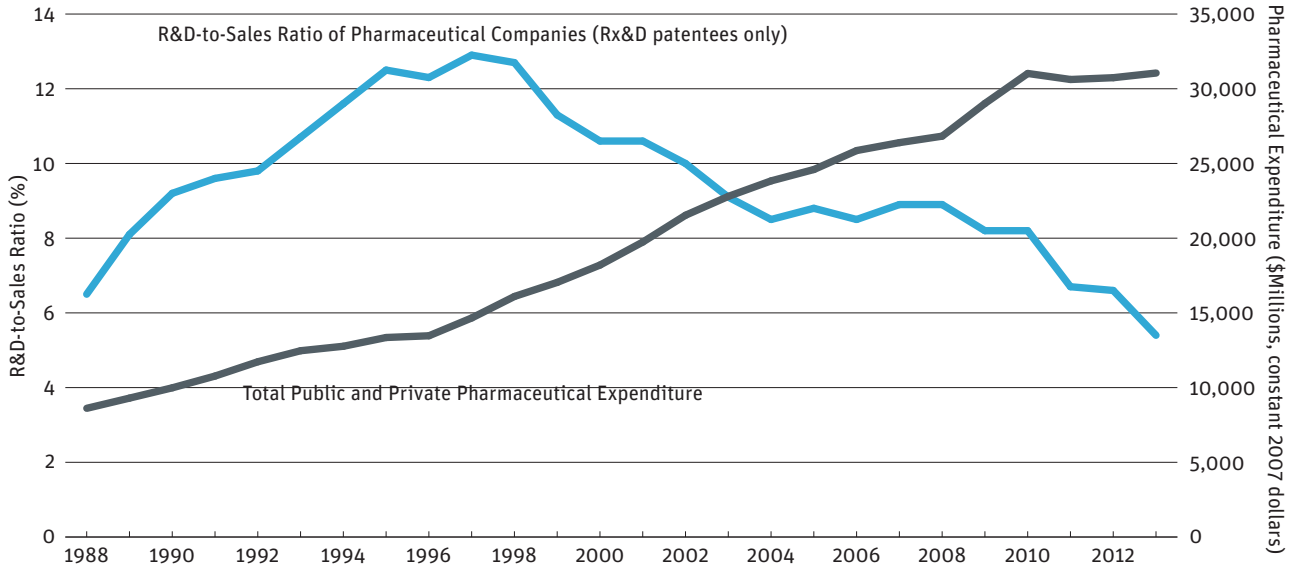
- Canada has the second highest per capita drug expenditures in the world.[42] Moreover, Canada already provides an industry-friendly system of intellectual property protection for pharmaceutical patent holders.

- The changes to Canadian patent protection for pharmaceuticals required by the CETA will delay the availability of cheaper, effective generic drugs, driving up health care costs for Canadians.
- A 2013 CCPA study by Joel Lexchin and Marc-Andre Gagnon concludes that if the CETA was "fully implemented today, it would increase the average market exclusivity for patented drugs by 383 days, or 1.05 years, which would bring an additional yearly cost of $850 million, or seven percent of total annual costs for patented drugs."[43]
- Provinces have demanded compensation for the fiscal impacts of these changes. Yet even if the federal government agrees to and honours such a commitment, it simply means that Canadian taxpayers would pay at the federal rather than the provincial level in order to boost the profits of the brand name pharmaceutical industry. Whether paying for their drugs out-of-pocket or through private insurance, people will be hit twice — through higher drug costs *and* increased federal taxes.
- Despite claims to the contrary by brand name manufacturers, higher drug costs are unlikely to be offset by additional research and development (R&D) expenditures. Since 2003, Canadian brand name manufacturers have consistently failed to meet previous pledges to invest 10% of their sales revenues in R&D. According to the latest data from the Patent Medicines Prices Review Board, the R&D-to-sales ratio for Canadian pharmaceutical companies fell to 5.4% in 2013, the lowest level on record (see *Figure 1*).
- The CETA is the first Canadian trade agreement since the NAFTA to include an Intellectual Property Rights (IPR) chapter.[44]
- Canadian negotiators made unilateral concessions in the CETA that will only affect Canada and will not require changes to the intellectual property rights regime for pharmaceuticals in the European Union.
- Canadian negotiators failed in their efforts to exclude court decisions regarding patents from the CETA's contentious investor-state dispute settlement (ISDS) mechanism. Consequently, the CETA will provide more investor-friendly grounds for challenging decisions made by the Canadian courts that limit IPRs, as the U.S. pharmaceutical giant Eli Lilly has done under Chapter 11 of the NAFTA.

FIGURE 1 R&D Spending vs. Drug Costs in Canada



Source Patented Medicine Prices Review Board. 2013. Patented Medicine Prices Review Board Annual Report 2013. p. 33. http://www.pmprb-cepmb.gc.ca/CMFiles/Publications/Annual%20Reports/2013/2013-Annual-Report_2013-09-15_EN.pdf; Canadian Institute for Health Information. 2013. National Health Expenditure Trends, 1975 to 2013: Complete data tables. http://www.cihi.ca/CIHI-ext-portal/zip/internet/nhex_datatables_2013_en.zip

- Canada's concessions on intellectual property and drug patents in the CETA could set the stage for further gains by the multinational drug lobby in the Trans-Pacific Partnership (TPP) negotiations, where the U.S. is pushing for even higher standards of intellectual property protection.

Analysis of Key Provisions

Patent term extension (a.k.a. patent term restoration)

- Canada has agreed to extend the term of patents by up to two years (Article 9.2). This was supposedly done to compensate brand name drug manufacturers for the time expired between the filing for patent protection and the granting of market authorisation by Health Canada. It should be noted, however, that patents can be extended even if the patent holder itself is responsible for the delay.
- Brand name manufacturers will be able to apply for patent term extension when they submit new drugs for market authorisation (Articles 9.2.3 and 9.2.4). Where a drug is protected by more than one pat-

ent, no "stacking" of patent term extensions will be permitted. But, in such instances, brand name drug manufacturers will be able to choose the most favourable patent for extension.

- The increased costs related to patent term extension will begin to kick in eight to 10 years after the CETA enters into effect.
- It is curious that the CETA labels this system as *sui generis* (of its own kind; unique), since it replicates the European system of patent term restoration, with the exception that Canada has capped the term at two years, rather than five, as in the EU.

Data protection

- The CETA locks in Canada's current terms of data protection at eight years, with an extra six months for pediatric drugs. This refers to the data submitted to Health Canada by a drug company seeking authorization for a new drug in order to demonstrate that it is safe and effective.
- Canada rejected the EU's push for a ten-year period of "data protection," but agreed to lock in its current terms of data protection, making it virtually impossible for any future government to shorten this time period.
- These provisions go beyond the NAFTA and the WTO Agreement on Trade-related Intellectual Property Rights (TRIPS), which only require five-year terms of data protection.
- In 2006, Canada extended data protection to eight years of market exclusivity with an extra six months if companies have studied a drug in a pediatric population. Generic companies are not allowed to make use of the brand name companies' data in their applications for a minimum of six years.
- It remains unclear if the range of products available for eight years of data protection will be expanded to include products representing a minor change to an existing drug. This is likely not the case, but the text of the CETA is unclear. This point should be clarified either by amending the text, or through a formal exchange of letters between the Parties.

Patent linkage and right of appeal

- Before Health Canada can grant marketing approval to a generic version of a brand name drug, the generic company must obtain a Notice of Compliance, which affirms that all of the relevant patents on the brand name product have expired.
- The *Patented Medicines (Notice of Compliance) Regulations* allow a brand name drug manufacturer whose drug is under patent and listed on the patent register (a list maintained by the Minister of Health of drugs under patent in Canada) to apply to the Federal Court for an order prohibiting the Minister of Health from issuing a Notice of Compliance to a generic drug manufacturer.
- Under this special summary procedure, brand name manufacturers can obtain an automatic stay of two years. The stay expires either at the end of this period, when the patent expires or when the court case is decided, whichever comes first.
- If, at the end of this stay, the generic drug manufacturer wins the summary proceeding, the Minister of Health can issue a Notice of Compliance for the drug in question. Currently, the brand name drug company has no right of appeal. It can, however, still sue the generic manufacturer for patent infringement in the regular courts.
- If the brand name drug company wins the summary proceeding, the Minister of Health is ordered not to issue a Notice of Compliance to the generic drug manufacturer for its drug until the expiry of the patent in question. However, unlike the brand name drug manufacturer, the generic drug manufacturer has the right to appeal.
- The CETA stipulates that brand name manufactures must be provided an equal right of appeal (Article 9 *bis*). "In practice, this means that under CETA there could be a further delay of 6–18 months before generics appear, as the appeal makes its way through the court system."[45]
- Remarkably, despite the fact that the EU itself has no patent linkage system it was able to pressure Canada into changing its own system.
- As Lexchin and Gagnon explain: "CETA will now allow brand name companies the right to appeal decisions made under the *Patented Medicines (Notice of Compliance) Regulations*. However, the generic

companies have received written assurances from the Government of Canada that its implementation of the "Right of Appeal" treaty commitment will also address excessive and duplicative litigation by ending the practice of dual litigation. Dual litigation means that even if brand name companies lose under the NOC linkage regulations, they can launch a separate case under Canada's general patent law. It is this ability to launch a second court case that the federal government has pledged to end." Whether, and how, this pledge to the generic companies will be implemented remains unclear.

ISDS and patent disputes

- Leaked drafts of the investment chapter indicate that the Canadian government had demanded that court and administrative tribunal decisions related to IPRs be excluded from investor-state challenge.[46] This Canadian demand was dropped in the final text. Instead, there is a separate declaration that provides for a future joint review of the operation of the investment rules related to IPR and the possibility of jointly agreed binding interpretations (Chapter 10, Declaration to Investment Chapter Article X.11 Paragraph 6). This declaration is little more than a face-saving gesture for Canada, which provides no substantive protection for court decisions related to IPRs.

Geographical Indications

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Key Points

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- The central idea behind protections for Geographical Indications (GIs) is that certain products have inherent qualities related to their place of production such as soil or climatic conditions (called *terroir*), as well as cultural knowledge and traditions, that differentiate them from similar products. That designation creates a kind of place-based "brand"

that informs consumers about their special qualities and allows producers to charge a premium price.[47] As opposed to the trademark system used in Canada and the U.S. (e.g. Idaho Potatoes or Maine Lobster), where the names are owned by a particular company or trade association, GIs are a collective right. They cannot be bought, sold or assigned to other rights holders. Also unlike trademarks, the EU government takes a direct role in enforcing their protection through international treaties such as the CETA or bilateral agreements.

- The EU has separate registration and protection regimes for more than 1,200 wines, spirits, and agricultural and food products. They are produced and marketed locally or regionally, but some categories, especially wines and cheeses, are widely exported as well. The EU has been seeking to expand protections of geographical indications in its negotiation of bilateral free trade agreements. One of the key points of controversy is whether particular goods, such as "Feta" cheese, are protected GIs or actually common food names, which would not be protected.

Analysis of Key Provisions

Protections for European products

- The CETA would establish protections for a broad range of European products. A leaked technical summary by the European Commission gloated about the outcomes of the CETA talks:

  Another very positive result is the outcome on Geographical Indications (GIs). It is remarkable that Canada — not traditionally a friend of GIs — has accepted that all types of food products will be protected at a comparable level to that offered by EU law and that additional GIs can be added in the future. This is a very satisfactory achievement in itself, but at the same time also a useful precedent for future negotiations with other countries.[48]

- Annex 1 Part A of Article 7 on Geographical Indications lists protections for 173 European food names for products sold in products in Canada. The governments would take action to prevent the use of a GI unless they are produced according to specific standards and from the specific countries identified in the Annex, even when the product is identified as being from Canada. So Canadian producers of, for example, Roquefort cheese, would need to relabel that prod-

uct with a different name. Canadian companies could, however, still use those names for goods outside the protected product class, so the name "Roquefort Bar and Grill" would still be acceptable (although perhaps unappetizing). Annex B has a blank chart for GIs identifying products originating in Canada meaning that no Canadian products are protected. Article 7.7.1 indicates that more items could be added in the future, presumably for either side.

Limited protections for common names

- Certain cheeses that many would consider to have common names have more limited protections, at least for now. Under Articles 7.6.1 and 7.6.2, companies that were selling Asiago, Feta, Fontina, Gorgonzola and Munster before October 18, 2013 can continue to use those names, but new entrants to the Canadian market will be required to add qualifiers such as "kind," "type," "style" or "imitation."

Potential for trade disputes

- These protections could lead to trade disputes by companies or countries exporting those goods to Canada. While European markets are already covered by existing GI protections, they would be new for Canada. Carleton University analyst Crina Viju notes that, "Unless the U.S. recognizes the EU's GIs, Canada will be in the middle and will most probably suffer the consequences of recognizing different intellectual property obligations in two different major bilateral trade agreements, the NAFTA and the CETA."[49] The U.S. Dairy Export Council describes the CETA rules, especially the restrictions on cheeses like Feta as "entirely unacceptable to the U.S."[50] The U.S. dairy industry has already complained to Office of the United States Trade Representative (USTR) about similar restrictions in the EU-South Korea Free Trade Agreement.

- The U.S. Congress has weighed in on the potential for similar restrictions in the Transatlantic Trade and Investment Partnership (TTIP). A May 2014 letter to USTR Michael Froman from 177 members of the House of Representatives focused on GIs for cheese names. That letter, led by the Congressional Dairy Farmers Caucus with support from the National Milk Producers Federation, asserts that, "The EU is taking a mechanism that was created to protect consumers against

misleading information and instead using it to carve out exclusive market access for its own producers. The EU's abuse of GIs threatens U.S. sales and exports of a number of U.S. agricultural products, but pose a particular concern to the use of dairy terms."[51]

Copyright and Related Rights

David Robinson, *Canadian Association of University Teachers*

Key Points

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- After several failed attempts to amend Canada's copyright laws, new legislation was finally enacted in 2012. While not perfect, the *Copyright Modernization Act* strikes an important balance between the rights of creators to protect and benefit from their works, and the rights of users to access copyrighted materials for non-commercial purposes, including personal use, education and research.
- Initial demands from the European Union in the CETA negotiations would have erased much of the progress made in updating Canada's copyright laws. EU demands included copyright term extensions, enhanced legal protections for broadcasters, strict liability rules for Internet service providers (ISPs), and new resale rights and royalties. Most of these provisions mirrored language in the controversial *Anti-Counterfeiting Trade Agreement* (ACTA), which was ultimately defeated in the European Parliament following strong public opposition.
- The result of many of these changes would have been diminished user rights, higher costs for consumers and governments, and a larger deficit of Canada's trade in copyrighted materials with the EU.
- While Canada largely ceded to EU demands on patent protection for pharmaceuticals (see section on Pharmaceuticals by Scott Sinclair), most of the initial EU requests on copyright and related rights have been withdrawn from the CETA text.

Analysis of Key Provisions

Copyright term extension

- Canada's copyright laws follow the international standard of the *Berne Convention for the Protection of Literary and Artistic Works* in granting copyright protection for life of the creator plus 50 years. According to earlier drafts of the CETA text, the European Union had demanded that Canada extend copyright term to life of the creator plus 70 years. This term extension was supported by the Canadian Publishers Council, the publishing industry's lobby group.
- The CETA does not require an extension of copyright terms. Instead, Article 5.1 states simply that the EU and Canada agree to comply with the Berne Convention.

Broadcasting rights

- The initial EU position in the CETA talks included demands for enhanced copyright protections for broadcasters that would have placed new restrictions on copying broadcast programs for personal use or other fair dealing purposes.
- CETA Article 5.2 makes no mention of enhanced copyright protections for broadcasters. Instead, the CETA requires both Parties to provide creators with the right to authorize or deny the broadcast of their works by wireless means and to ensure they are properly remunerated. This is consistent with current law and practice.

Protection of technological measures

- The CETA prohibits the distribution and use of devices that can be used to break digital locks placed on works in electronic format. While this is not a requirement under the international treaties of the World Intellectual Property Office (WIPO), it is consistent with Canada's new copyright legislation.
- This "anti-circumvention" rule is the key weakness of the *Copyright Modernization Act*. By making it illegal to break digital locks in any circumstances, the Act restricts the ability of users to access and reproduce material for non-commercial, fair dealing purposes. The CETA locks in this aspect of Canada's copyright law.

Trade, Tariffs and Transport

Trade and Tariffs

John Jacobs, *School of Public Policy and Administration and Institute of Political Economy, Carleton University*

Key Points

Unless otherwise noted, all Articles, Annexes and Appendices referenced in this section refer to ***Chapter 3*** *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.*

Tariffs

- The CETA removes virtually all (99%) tariff supports for sectors of the Canadian economy with some tariffs being removed immediately upon implementation of the agreement and others within the span of one to eight years. Crucially, the CETA removes the ability of future governments to utilize tariffs to support strategic sectors as Canada competes with the much larger EU economy.

- Tariffs on most Canada-EU trade of industrial goods have already been removed or substantially reduced and are generally low with tariff rates of on average 3.5% for EU exports to Canada and 2.2% for Canadian exports to the EU. Ultimately the economic gains from tariff removal will be minimal, but given that average tariffs are currently higher on EU exports than Canadian exports, the EU economy would gain more from mutual tariff removal.

- The removal of tariffs will create winners and losers in Canada. Canadian sectors facing reduced EU tariffs could benefit through lowering the price of their goods on the European market. Conversely, some producers for the Canadian market will find it difficult to compete with cheaper EU imports following tariff removal.

Canada-EU trade is imbalanced

- Canada is increasingly relying on exports from the extractive industries such as mining and oil and gas; a smaller portion of exports are produced by the manufacturing industry. The mining and oil and gas industries, which in 2003 accounted for 17% of Canada's exports, now comprise 38% of exports to the EU. Canadian manufacturing's contribution to exports to the EU has fallen in relative importance from 81% in 1993 to 75% in 2003 to 56% in 2013.

- Conversely, an increasing portion of Canadian imports from the EU are made up of manufactured goods, increasing from 92% in 2004 to 95% in 2013.

- The value-added composition of Canada's exports to the EU is declining. Canada is increasingly exporting primary commodities and importing finished products produced in EU countries. Gold, Canada's top export, accounts for 32% of the top 25 exports, followed by diamonds (6%), iron ores (6%), uranium (6%) and airplanes (5%). In this list of top exports, 82% are primary or barely processed commodities. This is in sharp contrast to the EU's exports to Canada of which only 17% are primary products. The EU's top exports to Canada are pharmaceuticals (17% of the top 25 exports), automobiles (16%), petroleum products (13%), gas turbines for airplanes (8%) and crude petroleum (5%). Eighty-three per cent (83%) of the EU's exports to Canada are comprised of highly processed or finished products whereas only 18% of Canada's exports are in this category.

- The trend continues in 2014, with the most recent data showing Canada's fastest growing export is crude oil from Newfoundland and Labrador, which has tripled since 2013. Canada's top three exports — gold, crude oil and iron ores — accounted for 50% of Canada's top 25 exports for the first half of 2014.

- The CETA will do nothing to reverse the imbalanced Canada-EU trade trajectory, rather it will exacerbate it by removing the ability of governments to actively facilitate a more productive and value-added manufacturing based economy. In effect, the CETA locks Canada into the current trade pattern.

Canada's ongoing trade deficit with the EU

- Canada's exports to the EU continue to fall short of imports from the EU. Over the past decade, this trade deficit has fluctuated between $12 billion and $21 billion. In 2013, Canada exported $33 billion in goods and imported $53 billion, leading to a $20 billion trade deficit. In other words, Canada imports $1.6 worth of goods from the EU for every $1 in goods it exports.

- Canada's trade balance with the EU is vulnerable to fluctuations in commodity prices. Over the past decade, Canada's trade deficit has been highly correlated to the value of Canada's gold exports. The record-high gold prices over the past decade mask a troubling underlying bilateral trade imbalance between Canada and the EU.

Benefits of the CETA?

- The Canadian government's prediction of large trade benefits from the CETA is highly questionable. Its assessment, made first in a 2008 joint study with the EU, is at best partial as the study did not address the social, health and safety, and environmental costs associated with the reduction of regulatory options, the curtailment of future public services, and other non-tariff elements of the agreement. The economic modeling used in the 2008 joint study does not address key economic policy challenges, such as unemployment, international capital flows, trade imbalances and exchange rate fluctuations, nor does it address the long-term consequences of Canada's reliance on exports of unprocessed non-renewable resources.

Analysis of Key Provisions

Tariffs and trade

- The CETA is designed to increase unconditional access to the Canadian and EU economies by investors from both Parties. It removes tariffs but contains no new measures to create employment or improve local and regional development opportunities.[52] Indeed, various measures within the agreement actively remove the ability of governments to create jobs and encourage local economic opportunities. In effect, the agreement entrenches the subordination of job creation and local economic development to private sector international investment strategies.

Tariffs

- Tariffs are a widely used and successful policy tool to support and advance strategic economic sectors in the context of aggressive trade policies from larger advanced economies.[53] The level of tariffs and the sectors affected vary over time based on the economic conditions and the prevailing policy orientation of the day. The CETA removes virtually all tariffs (99%) from Canada-EU trade. The agreement schedules the removal of tariffs for each product category over a period ranging from immediately, upon implementation of the agreement, to eight years. But perhaps more importantly, the CETA removes the ability of future governments to utilize tariffs to support national and regional economic development objectives (see Annex X.5.1).

- Tariffs on most Canada-EU trade in industrial goods have already been removed or substantially reduced (largely due to multilateral tariff reductions) and are generally low with tariff rates of 3.5% for EU exports to Canada while Canadian exporters to the EU face average rates of 2.2%.[54] The removal of tariffs could create some winners (e.g. in sectors facing reduced tariffs for their exports to the EU), but Canadian producers in the sectors that have been supported by tariffs will likely face difficulties as relatively cheaper EU products enter the Canadian market. This will affect sectors such as processed foods, textiles, clothing, motor vehicles, machinery and equipment,[55] challenging the viability of Canadian producers and reducing employment in these sectors. [56]

Current trade imbalanced

- Canada is increasingly relying on exports of mining and energy products. Exports from extractive industries have increased by 263% over the past decade whereas manufactured and agricultural exports have been relatively stagnant, increasing by 24% over this period.[57] As a result, the mining, oil and gas industries, which in 2003 accounted for 17% of Canada's exports, now comprise 38% of exports to the EU. Conversely, Canadian manufacturing's contribution to exports to the EU has fallen from 81% in 1993 to 75% in 2003 to 56% in 2013. Canada is importing more EU-manufactured goods, increasing from 92% of Canadian imports from the EU in 2004 to 95% in 2013.

- The imbalanced trade between Canada and the EU is exemplified by the top exports. The EU's largest export to Canada is pharmaceuticals, a cutting edge industry with a significant level of research and development. Canada's largest export to the EU is unprocessed gold, a non-renewable resource with minimal level of value added within the Canadian economy beyond extraction.

- The value-added composition of Canada's exports to the EU is declining such that Canada is increasingly exporting primary commodities and importing finished products produced in Europe. Gold accounts for 32% of the top 25 exports followed by diamonds (6%), iron ores (6%), uranium (6%) and airplanes (5%). In total, 82% of Canada's top 25 exports are primary or basically processed products. This is in sharp contrast to the EU's exports to Canada, of which only 17% are primary products. These include pharmaceuticals (17%), automobiles (16%), petroleum products (13%), gas turbines for airplanes (8%) and crude petroleum (5%). Eighty-three percent (83%) of the EU's top exports to Canada are comprised of highly processed or finished products whereas only 18% of Canada's top exports to the EU are in this category.

- The trend is continuing in 2014, with the most recent data showing Canada's fastest growing export is crude oil from Newfoundland and Labrador, which tripled since last year. Canada's top three exports — gold, crude oil and iron ores — accounted for 50% of Canada's top 25 exports for the first half of 2014. Canada is increasingly supplying primary products for EU manufacturing and importing

European finished products, a trade relationship wherein most of the value-added production occurs in the EU.

- Canada's trade with the EU exemplifies the broader challenge facing Canada's integration into the global economy. According to OECD data, Canada's exports are increasingly found in the early stages and low value-added stage of the 'global value chains.' Between 1995 and 2011, Canada's exports of primary commodities as a portion of total exports increased from 12.5% of exports to 27.6% (OECD average 16.6%); exports of manufactured intermediaries have declined from 52.3% to 44.5% (OECD avg. 48.8), and; exports of finished products have declined from 35.2% of exports to 27.7% (OECD Avg. 34.7%).[58] The Canadian economy is exhibiting a comparative advantage in low- to medium-low technology manufacturing and a disadvantage in high- and medium-high technology in contrast with the G7 advanced economies, which exhibit advantages in high- and medium-high technologies.[59]

- The challenge for the Canadian economy is to shift from a reliance on primary commodities to a more diversified economy that includes the development of value-added and high-tech sectors of the economy. The CETA will do nothing to actively reverse the imbalanced Canada-EU trade trajectory. Indeed, it will exacerbate the imbalance by curtailing the ability of governments to develop a more productive and innovative economy through active industrial policies. The CETA provisions prohibit attaching conditions to new investment and acquisitions, for example requiring firms to pursue some research and development locally or to process a certain amount of primary commodities within Canada. The agreement would also disallow provinces from using government purchasing power (procurement) to support local and provincial development (see Chapter 21, Article IV.6).

Canada's trade deficit with the EU

- Canada's exports to the EU continue to fall short of imports from the EU. Over the past decade, this trade deficit has fluctuated between $12 billion and $21 billion, and it is vulnerable to fluctuations in commodity prices. In 2013, Canada exported $33 billion in goods and imported $53 billion, leading to a $20 billion trade deficit. In

other words, Canada imported $1.6 worth of goods from the EU for every $1 of goods it exported. The record-high gold prices over the past decade mask the underlying bilateral trade imbalance between Canada and the EU. Gold accounts for 23% (2013) of the value of Canada's exports to the EU, down from 30% in 2012, but a decade ago gold only accounted for 5% of exports. The size of the trade deficit is highly correlated to the value of Canada's gold exports.[60] If it were not for historically high gold prices the ratio of Canada imports to exports would be in the range of 2:1. Canada is relying on gold to cover a large bilateral trade deficit with Europe.

- The Canada-EU trade pattern is clearly advantageous for the EU economy, benefiting as it does from access to secure and sustainable access to primary commodities. But this raises serious questions about the long-term impact on the Canadian "resource-based" economy as it becomes increasingly vulnerable to the depletion of non-renewable resources and the volatility of commodity prices.

Benefits of the CETA?

- The federal government's argument that the CETA will boost the economy by $12 billion and create 80,000 new jobs is highly questionable. The assertions are based on a study commissioned by the Canadian and EU governments to kick-start the CETA campaign. The study's economic modelling is based on unrealistic assumptions and does not take into account unemployment, trade deficits, international capital flows and fluctuating exchange rates, thereby dismissing many of the real world economic challenges trading economies face. According to Unifor economist Jim Stanford:

  The modellers had to go further, with more farfetched assumptions, to boost their prediction. They assume that invisible, unspecified non-tariff barriers will be fully eliminated by the CETA. They assume Canadian service providers will do as much business in Europe as European firms currently do. Finally, they assume Canadians will save a strong share of new income, all of which is invested in new capital here (thus spurring even more growth). This latter effect alone accounts for over half the predicted $12 billion. Given record consumer debt and growing hoards of corporate "dead money," this saving-and-investing assumption is downright bizarre.

The subsidiary claim that CETA will produce 80,000 new jobs is more than unrealistic. Remember, the CGE [computable general equilibrium] model assumes constant full employment. That's essential, because it prevents any loss in total output from a lack of competitiveness. The predicted GDP gains do not come from more employment, they come from higher productivity."[61]

- Indeed, the joint study upon which the government bases its claim of significant benefits makes no estimate of employment gains. Some have argued that the disproportionate benefit to EU imports following the removal of Canada-EU tariffs will result in the net loss of up to 50,000 jobs in Canada as sectors struggle to adjust.[62] When real world factors such as the changes in exchange rate are added into the equation jobs losses could reach as high as 150,000.[63]
- The federal government's claims further assume that the purported GDP gains will translate into higher household incomes. But the supporting documents are silent as to how the agreement would provide net benefits for workers and local economies. Wealth generated in Canada over the past 30 years has increasingly been captured by the highest income households while overall wages have stagnated. In other words, the historical record indicates if there are to be benefits from the CETA, they are unlikely to reach most Canadian households.
- A thorough and realistic assessment of the potential impacts of the CETA would need to address, along with the real economic issues, the social, health and safety, and environmental costs associated with the reduction of regulatory options and the curtailment of future public services associated with the CETA. It would need to examine the long-term consequences of Canada's reliance on the export of unprocessed non-renewable resources.

Auto Manufacturing

Jim Stanford, *Unifor*

Key Points

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

- Even government reports such as the Canada-EU Joint Economic Study[64] acknowledge that European automotive exports to Canada will grow more substantially after a CETA than Canadian automotive exports flowing back the other way. This implies the existing large trade imbalance in this strategic industry will get wider, with negative implications for a Canadian industry that is still struggling to recover from the devastating impacts of the last decade. The existing bilateral deficit is likely to exceed $7 billion within a few years of the CETA coming into effect.[65] European brands have a much stronger starting share and level of customer acceptance in Canada's market than do Canadian-made vehicles in the European market. The 2013 market share for European-made vehicles was at least 100 times larger than the market share of Canadian-made vehicles in Europe. To the extent that companies producing vehicles in Canada experience greater sales in Europe, they are likely to meet that demand from European facilities, not Canadian plants. Other than niche or inherently North American vehicles (e.g. minivans and muscle cars) there will be little interest on the part of automakers in investing in major marketing and distribution efforts to sell Canadian-made vehicles in Europe.[66]

- On the other hand, European-made vehicles, largely concentrated in higher-end luxury segments of the new vehicle market, will gain a 6.1% price advantage as a result of the CETA, which will translate into incrementally new sales. Those imported products compete directly against several Canadian-made vehicles, including luxury vehicles such as the Oshawa-made Cadillac, Oakville-made Lincolns, the Chrysler 300C assembled in Brampton, and the Cambridge-built Lexus. Canadian plants will lose some incremental sales volumes, as

their European competitors incrementally boost their market share. More worrisome is the impact that this incremental loss of product demand will have on the business case for future investments in Canadian facilities. Automotive stakeholders in Canada have been desperately working to confirm future capital spending in Canadian facilities, in the wake of market shifts, the high Canadian dollar, and the lure of low-wage Mexico. The CETA will not help this effort, and will incrementally hurt it.

Background

- Automotive trade is an important (and very lopsided) part of Canada's overall trade relationships with the EU. In 2013, Canada imported $5.6 billion worth of automotive products from the EU — almost four-fifths of that consisting of finished vehicles, the rest of parts — but exported back only $252 million worth of automotive products, mostly parts. The resulting bilateral auto trade imbalance of over $5 billion makes up one-quarter of Canada's total bilateral merchandise trade imbalance with the EU. Canada's auto imports from Europe have grown rapidly in recent years, as EU-based automakers expanded their market share in the Canadian new vehicle market. Auto imports from Europe grew by 128% between 1999 and 2013. However, Canada's auto exports to the EU plunged by 45% over the same time period, restrained by weak demand conditions in Europe, the high Canadian dollar, and the lack of market penetration there by Canadian-made vehicles.

- Automotive trade patterns are tied up closely with the structure of foreign investment in this industry, which is dominated by a small number of global automotive brands that produce and market their vehicles in many different parts of the world. There is a fundamental structural asymmetry in this regard between Canada and Europe that shapes the nature of bilateral trade. Most of the firms that produce vehicles in Canada also have manufacturing plants in Europe from which they meet almost all of the demand for their products from European customers. In contrast, no European automakers have significant investments or production presence in Canada, meaning that all of the growing demand for their brands is met through imports either from Europe or also, for several of those firms, from their newer operations in Mexico and the deep south of the United States.

- The lopsided nature of bilateral auto trade between the EU and Canada has contributed to the difficult economic conditions faced by the Canadian auto industry in recent years. Europe accounts for about one-third of Canada's large overall international auto trade deficit — a deficit which has clearly contributed importantly to the downturn in output, investment and employment experienced in Canada's auto sector over the last decade.[67] The CETA will cement this damaging, lopsided relationship and make it incrementally worse by cementing national treatment and market access principles, and by incrementally boosting imports from Europe. There will be no measurable increase in Canadian automotive exports going back to the EU, regardless of some unique provisions regarding rules of origin that have been negotiated into the draft CETA text.

Analysis of Key Provisions

- Chapter 3 of the CETA, dealing with National Treatment and Market Access for Goods, specifies that full national treatment will be accorded to imports from the other country (Article 4). This locks in the current damaging trade imbalance in automotive products and prevents Canada's government from taking proactive measures to address that imbalance.[68] This market access commitment confirms that the current state of affairs in this sector is both legitimate and permanent. This represents the first time that Canada has made this commitment in the strategically important auto sector with any major auto producer outside of North America. It signals an abandonment by government of its traditional willingness to manage trade relationships in automotive products to the benefit of Canadian production. This abandonment is cemented in Article 12 of the same chapter, which prohibits import or export restrictions in goods trade with some very narrow exceptions under Article XI of the GATT.

- Article 5 of the same chapter describes tariff elimination on traded goods in line with specific timetables listed in the CETA annexes. For the most important category of automotive trade between the two countries (finished vehicles with engines over 1 litre in capacity), tariffs are eliminated evenly over an eight-year period. (Canada's existing tariff on vehicles is 6.1%; the EU tariff is 10%.) For some other smaller categories of vehicles, including those with electric engines,

tariffs are eliminated slightly faster (six years). It appears that EU tariffs on imports of automotive parts, which currently range from 0 to 4.5%, are eliminated immediately, since there is no specific mention of auto parts in the detailed annexes, implying this sector is covered by the default schedule, which is immediate tariff elimination. Canada has no tariff on auto parts.

- Article 6 of Chapter 3 on goods trade prohibits the use of duty drawbacks as a tool to promote more domestic activity. Under a duty drawback scheme, a company that both imports and exports broadly equivalent products is required to pay duty only on the net difference between those flows. This provides an incentive for exports from domestic facilities, and helps to achieve two-way trade flows. Duty drawback policies have been used in the past as a tool in automotive industrial policy — the former Canada-U.S. Auto Pact was a specific, customized kind of duty drawback — but are explicitly prohibited under the CETA.

- Annex 1 to the CETA chapter on goods trade describes sector-specific rules of origin for a range of industries. The provisions affecting motor vehicles are unique (see p.64 of the annex). For the largest category of passenger vehicles (those with engines over 1 litre in capacity), vehicles must include at least 50% originating content to qualify for tariff-free access to the trading partner. That threshold rises to 55% after seven years. For other categories of vehicles, the content threshold is 55% immediately. If the U.S. signs a free trade agreement (TTIP) with the EU, then the threshold rises to 60% one year after that agreement comes into effect, with U.S. content cumulated with Canadian content for rule of origin purposes.

- There is a clear asymmetry between Canada and Europe regarding rules of origin, resulting from the fact that Canada is just one country whereas Europe possesses an integrated continental supply chain. It is thus much easier for Europe to meet any given domestic content threshold than Canada. Indeed, there are no Canadian-made vehicles possessing more than 50% domestic content; the tariff reduction under the CETA would be meaningless since no Canadian-made vehicles would qualify for the lower tariffs. To address this asymmetry, the draft text includes a "derogation" provision whereby for the first 100,000 vehicles flowing in either direction, a lower domestic con-

tent threshold will apply (just 30% domestic content measured by value, or 20% measured by net cost). This provision would expire one year after the U.S. enters an FTA/TTIP with the EU, since at that time Canada would be allowed to count U.S. content in its exported vehicles toward the threshold. The 100,000-vehicle quota for derogation of the rule of origin applies to both sides, although its real effect is on Canadian exports, since European-made vehicles can easily meet the 55% threshold. However, Canada exports fewer than 5,000 vehicles per year to Europe, so this seemingly large quota is mostly of symbolic value. EU negotiators even described it as "of political rather than economic importance so as to be able to present the car deal as balanced."[69]

- Chapter 20 of the CETA text (on Technical Barriers to Trade) includes a special section on Co-operation in the Field of Motor Vehicle Regulations. The final placement of this section in the CETA treaty has not been determined yet; it may appear somewhere else other than Chapter 20. The language for this section includes seven broad sections on pp. 91–97 of the text. The two sides make a joint commitment to improving vehicle safety and environmental performance, pledge more co-operation in this field (including research), and agree to meet at least annually to review regulatory issues related to motor vehicle production, sale, and use. The most important feature of this agreement is that Canada accepts 17 regulatory standards dealing with vehicle lighting systems, noise standards and bumpers currently listed in a schedule developed by the United Nations Economic Commission for Europe (UNECE, specified in their schedule WP.29[70]). Nominally this is portrayed as a global regulatory benchmark but it reflects European practices. This is the first time a NAFTA member, or any major global auto-producing jurisdiction outside of Europe, has agreed to accept the European regulations as their own, and it sets a significant precedent regarding regulatory harmonization in other areas. Canada also agrees to explore incorporating the European standards in eight other areas, and to provide justification if it decides not to do so.

Marine Transport

Karen Cobb, *Unifor*

Key Points

Unless otherwise noted, all Articles, Annexes and Appendices referenced in this section refer to 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 would have significant negative consequences on the Canadian marine transport sector, including lost jobs in domestic freighting. A coalition of Canadian organizations has formed a committee called The Canadian Maritime and Supply Chain Coalition (CMSCC) to raise public awareness of these concerns.
- Clauses in the CETA would amend the *Coasting Trading Act* to weaken existing Canadian cabotage laws, which currently provide that all ships conducting shipping between Canadian ports must be flagged in Canada with crews trained and certified in Canada.
- The CETA provisions for intra-coastal shipping include the following:
    - The CETA will allow EU-based or EU-owned firms to ship empty containers between ports in Canada on a non-revenue basis by using vessels of any registry.
    - The CETA will allow the shipping of freight between the Ports of Halifax and Montreal on EU-registered vessels. This includes both bulk and container cargo for continuous service using vessels on EU first registries, and containerized on a single voyage where it is part of an international leg using vessels on EU first or second registries.
    - The CETA will allow EU contractors to bid on any federally procured dredging contracts exceeding the procurement thresholds for construction services (5 million SDR or about $8 million).
    - The CETA will allow EU contractors to bid on private dredging contracts of any size.

- European vessels are therefore allowed to ship cargo from Halifax to Montreal without any restrictions on origin of the crew, level of wages and/or working conditions. European operators would also be allowed to carry empty containers in Canadian waters and bid on dredging projects. Other provisions of existing cabotage rules in Canada are preserved by inclusion in Canada's list of exemptions, although past experience indicates that once a partial liberalization is initiated through a trade agreement, pressure builds strongly for further and eventually complete liberalization.
- Moreover, if these provisions liberalizing cabotage in marine shipping are approved in the CETA, it will likely open the door to similar liberalization of rules in air, rail, and road transport. The principle of Canadian content in internal shipping and transportation is challenged directly by the CETA provisions on marine shipping, with both short-term and long-term consequences.

Air Transport

Jordan Brennan, *Unifor*

Key Points

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

- Air transportation between Canada and the EU was largely liberalized already by the 2009 Air Transport Agreement. The CETA does not seem to dramatically alter the provisions of that framework. Restrictions on cabotage and the 25% limit on foreign ownership of voting shares in Canadian airlines seem to remain in place, although the future of that limit remains uncertain given the 2009 changes to the Canada Transportation Act, and the government's signals about deregulating foreign ownership in airlines and more generally. The EU has noted and preserved exemptions to national treatment in several specific areas of this sector (ground handling services, airport operations, etc.) that will limit the impact on European ancillary air transport services.

Profile of Canada's air transport sector

- Canadian airlines already operate in a challenging international environment. Fluctuations in the Canadian dollar have not helped matters. A high Canadian dollar has made it difficult for Canadian airlines to win a fair share of the international air travel business. However, because fuel costs are one of the largest airline expenses, a lower Canadian dollar hurts the airlines insofar as fuel is denominated in U.S. dollars. Relatively higher taxes and airport fees on flights are also a competitive disadvantage insofar as it incentivizes Canadian air travellers to fly out of U.S. airports. Canada experiences a $3.5 billion annual deficit in international trade in air transportation services. A geographical breakdown of that deficit is not available from Statistics Canada, but Canada almost certainly experiences a bilateral deficit in air transportation with the EU.

- Trade and investment liberalisation in air transportation often manifests itself in the "open skies" concept. A full Open Skies policy would liberalize air travel by allowing international carriers to transport passengers and freight domestically. Currently, international carriers are permitted to take customers to two stops within Canada, but not pick up additional customers at the first of those stops. This prevents what is referred to as "cabotage." Air Canada supports the Open Skies concept. Major foreign carriers like Lufthansa are also in favour because it would give them access to the lucrative "MTV club" — the high traffic line running from Montreal through Toronto to Vancouver. Full Open Skies would exacerbate competitive pressures and allow even more non-unionized carriers into Canadian airspace, the combined effect of which would almost certainly be continued downward pressure on wages, benefits, working conditions and employment.

EU-Canada Air Transport Agreement (from the EU Commission website)

- This agreement was ratified in 2009 and replaced bilateral air services agreements concluded between 19 individual EU member states and Canada. The agreement includes a gradual phasing-in of traffic rights, mutual investment opportunities and co-operation on a number of issues including safety, security, consumer protection, en-

vironment, air traffic management and competition law. According to the European Commission, the agreement is "ground breaking" in the aviation world, providing for unprecedented liberalisation of traffic rights as well as foreign investment in airlines.

- Under the agreement, EU airlines and Canadian airlines are allowed to operate direct flights between any point in Canada and any point within the EU. The agreement also removes all restrictions on the number of weekly flights between Canada and the EU, and the capacity and prices offered by airlines. Further traffic rights will be liberalized gradually in parallel with the opening up of investment opportunities in airlines. The agreement will establish a fully Open Aviation Area between the EU and Canada. Nationals will be allowed to establish operations in the other Party's territory and invest in each other's airlines.

- The agreement also addresses safety, security and environmental issues. Both sides agreed to closely co-operate in order to mitigate the effects of aviation on climate change. In the field of safety and security, the agreement envisages the mutual recognition of each other's standards and one-stop security. Specific provisions to improve consumer protection are also included.

- Some provisions of the agreement depend on Canada liberalizing its existing limits on foreign ownership of Canadian airlines, from the current 25% (of voting shares) to the 49% threshold currently in place in the EU. (In practice higher levels of foreign investment in Canadian airlines are already allowed through non-voting shares or holding companies.) The federal government amended the Canada Transportation Act in 2009 to *allow* Cabinet to raise this threshold, but so far Cabinet has not implemented these new rules.

Analysis of Key Provisions

- In terms of the scope of the CETA, it will apply to: (i) aircraft repair and maintenance services; (ii) the selling and marketing of air transport services; (iii) computer reservation system services; (iv) ground handling services; and (v) airport operation services (see Chapter 10, Article X.1.2 and Chapter 11, Article X-01.2[e]).

- "Airport operation services" does not include the ownership of, or investment in, airports or airport lands, or any of the functions carried out by a board of directors in addition to air navigation services. This seems to imply that means the activities of Canadian airports and NAV Canada, the firm that owns and operates Canada's civil air navigation service, would be exempt from the requirements of the CETA.

- Also excluded from the investment provisions are activities that pertain to the exercise of government authority, which is understood to mean an activity that does not have a commercial basis or would not be in competition with one or more economic operators.

- Also excluded are "related services in support of air services and other services supplied by means of air transport." This includes services where an aircraft is being used to carry out specialised activities in sectors including agriculture, construction, photography, surveying, mapping, forestry, observation and patrol, and advertising where this specialised activity is provided by the person that is responsible for the operation of the aircraft (see Chapter 11, Article X-01.2[e]).

- "Selling and marketing of air transport service" means opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution.

- Existing rights and obligations under the Agreement on Air Transport between Canada and the European Community will remain unchanged by the CETA.

- Parties to the agreement are obligated to provide national treatment, which means treatment no less favourable than the most favourable treatment accorded, in like situations, by that government to its own service suppliers and services (Chapter 11, Article X-02). This does not mean that foreign nationals or firms are exempt from securing licensing, certification, registration, authorisation or the like.

- Parties are also obligated to provide for most favoured nation treatment when it comes to service suppliers and services of the other Party. This means treatment no less favourable than that it accords, in like situations, to service suppliers and services of any non-Party. With respect to a government in Canada other than at the federal

level, or with respect to a government of or in a European member state, the treatment accorded, in like situations, by that government in its territory must apply to services or service suppliers of any third country (Chapter 11, Article X-04).

- The market access (Chapter 11, Article X-05) provision eliminates restrictions on the number of service suppliers (whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test), the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test, and the total number of service operations or the total quantity of services output expressed in terms of designated numerical units in the form of quotas or an economic needs test.
- It is unclear if or how this provision will alter Canada's existing foreign investment limits, including the existing 25% rule on foreign voting equity ownership of airlines, or "net benefits" test.
- The national treatment, most favoured nation and market access articles do not apply to local government. Nor do they apply to national or sub-national levels of government as set out in Annex I or to sectors or sub-sectors as set out in Annex II (more on this below).
- And finally, courier services are subject to the provisions of Chapter 11 on Cross-Border Trade in Services, and Chapter 10 on Investment, subject to applicable reservations as set out in the Parties' schedules (see section on Postal Services by Kathie Steinhoff). This does not include the grant of air traffic rights to courier service suppliers. Such rights are subject to the Agreement on Air Transport between Canada and the European Community and its Member States.

Annex I: Reservations for Existing Measures and Liberalization Commitments

- Under "supporting services for air transport" and "rental of aircraft," the EU outlines reservations pertaining to aircraft, operating licenses and computer reservation systems, for example, but the language is complicated and hard to interpret (Annex I, pp. 7–8). For ground handling services, establishment within the EU area may be required. The level of openness of ground handling services depends on the

size of airport. The number of providers in each airport may be limited. For "big airports" this limit may not be less than two suppliers. This does not affect the EU's rights and obligations under the EU-Canada Agreement on Air Transport. For airport operations, establishment within the EU is required. Airport operation services may be subject to individual concession or licence from public authorities.

- There are a number of reservations pertaining to the ownership and operation of civilian aircraft and for ground handling services in Belgium, but they do not seem significant (see Annex I, pp. 23–24). Likewise, Polish aviation law limit foreign participation in airport operation services to 49 percent (Annex I, pp. 129–30).

Annex II: Reservations for Future Measures

- Under "maintenance and repair of aircraft," the EU (minus Hungary, Estonia, Austria, Latvia and Poland) "reserves the right to adopt any measure with respect to requiring establishment or physical presence in its territory and prohibiting the cross-border provision of maintenance and repair services of aircraft and parts thereof from outside its territory" (Annex II, p. 10).

- Under "service auxiliary to air transport" and pertaining to the most favoured nation reservation, the EU "reserves the right to adopt or maintain any measure which accords differential treatment to a country pursuant to existing or future bilateral agreements relating to the following Auxiliary Air Transport Services: (a) the selling and marketing of air transport services; (b) computer reservation system (CRS) services; and (c) other services such as ground-handling and airport operation services. In respect of maintenance and repair of aircrafts and parts, the EU reserves the right to adopt or maintain any measure which accords differential treatment to a country pursuant to existing or future Article V trade agreements (Annex II, p. 15).

- Other less significant reservations include Denmark's reservation of the right to adopt or maintain any measure with regard to the provision of airport guard services (Annex II, p. 48). In Lithuania, maintenance and repair services of rail transport equipment are subject to a state monopoly (Annex II, p. 88).

Agriculture and Food Sovereignty

Agriculture

Ann Slater, *National Farmers Union*
Terry Boehm, *National Farmers Union*

Key Points

Unless otherwise noted, all Articles, Annexes and Appendices referenced in this section refer to 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 expanded intellectual property rights enforcement tools under the CETA will give multinational seed companies more control of Canadian farms, increase seed costs and destroy farmers' autonomy, especially when taken in conjunction with Canadian Bill C-18 *(The Agricultural Growth Act)*.
- The CETA will not lead to significantly more beef or pork exports from Canada to Europe.
- The CETA will not open up export markets for genetically modified crops, although the regulatory co-operation provisions create new

channels for industry to apply pressure to weaken EU food safety standards (see section on Regulatory Co-operation by Alessa Hartmann).

- Canadian dairy farmers will lose 4% of the domestic cheese market.
- Local food procurement policies for government entities will be significantly undermined.

Analysis of Key Provisions

Intellectual Property Rights (Chapter 22)

- Chapter 22, Article 12 states, "The Parties shall co-operate to promote and reinforce the protection of plant varieties based on the International Convention for the Protection of New Varieties of Plants (UPOV)." In December 2013, the Canadian government introduced Bill C-18, *The Agricultural Growth Act*, an omnibus agricultural bill that amends several agricultural laws, including Canada's *Plant Breeders Rights (PBR) Act*. The changes to the PBR Act under Bill C-18 will give global seed companies much more control over seeds in Canada by moving Canada from UPOV '78 to UPOV '91.
- Bill C-18 passed second reading on June 17, 2014 and is now in the hands of the Standing Committee on Agriculture and Agri-Food.
- Canada does not permit patenting of higher life forms such as plants but does allow gene sequences, such as those used in genetically modified crops, to be patented.
- Both PBRs and patents are forms of intellectual property rights and the seed industry uses both PBRs and gene patents to increase their control of and revenues from commercial seed production and distribution worldwide.
- Chapter 22, Article 18 of the CETA gives intellectual property rights holders the ability to use the courts to seek injunctions against suspected infringers, such as farmers suspected of selling or storing farm-saved seed, before determining whether there has been an actual violation. Judges will be granted the authority to order the seizure of assets, equipment and inventory of suspected infringers and any third parties they believe are helping the suspected infringement — before the case is ever heard in court.

- The 2004 Supreme Court of Canada decision in the *Monsanto v. Schmeiser* case ruled that a farmer can be found in violation of patent rights regardless of how patented genes in seed arrive on the farmer's land. If the courts interpret PBR infringement in the same fashion, even farmers who use older seed that is not PBR-protected might be accused of infringement if their crops contain small amounts of a PBR-protected variety.

- Article 18 would also allow the seizure of a farmer's property, crop and bank account on the mere suspicion of PBR or patent infringement. As a result a farmer could lose everything and would have no means to mount a defence. To avoid such risk, farmers may decide to simply purchase seed every year, increasing their costs and decreasing the diversity of crop varieties grown each year. This "litigation chill" will lead to a loss of both farmer autonomy and agricultural biodiversity and to a massive transfer of wealth from Canadian farmers to foreign-based seed companies.

National Treatment and Market Access for Goods (Chapter 3)

- Chapter 3, Annex X.5 (Tariff Elimination) gives new duty-free access under Tariff Rate Quotas (TRQs) for 45,840 metric tonnes of beef/veal (carcass weight equivalent) and 75,000 metric tonnes of pork (carcass weight equivalent), both phased in over six years.

- Without the CETA, the EU already gives Canada tariff-free access for over 23,000 tonnes of hormone-free beef. We do not fill that existing quota now.

- The EU has not changed its position opposing the use of hormones in beef production.

- The EU imports most its beef from Brazil, Argentina and Uruguay. Brazil banned the use of growth hormones in beef in 1991 to maintain the European market.

- The EU's exports of pork exceed Canada's total pork production. Europe prohibits pork produced with ractopamine, which is commonly used in Canadian pork production.

- Canada has three abattoirs that meet the EU standards for beef and seven that meet EU standards for pork.

- The promised gains for beef and pork farmers are therefore illusory.
- Annex X.5 also gives the EU new market access to Canada for 16,000 tonnes of fine cheese and 1,700 tonnes of industrial cheese, both phased in over six years.
- Canadian dairy farmers will lose 4% of the domestic cheese market, which is equivalent to all the milk produced in Nova Scotia, and the growing number of artisanal cheese producers using local dairy ingredients and serving specialty markets in Canada will find it harder to thrive.
- European dairy farmers obtain 40% of their income from state subsidies while Canadian dairy farmers receive their dairy income from the marketplace through cost of production formula determined by the milk marketing boards.

Dialogues and Bilateral Co-operation (Chapter 29)

- The CETA will not open Europe's doors to biotechnology products from Canada. There is no commitment by the European Union to lift restrictions on imports of genetically modified organisms. In Chapter 29, the EU has agreed only to discuss biotechnology issues (see Chapter 29, Articles X.01 and X.03).

Government Procurement (Chapter 21)

- Under this chapter, municipalities, schools, hospitals, prisons, universities and other government entities will lose the ability to implement local food procurement policies, thus removing an important policy tool that is currently and increasingly being used to support Canadian farmers and strengthen Canada's food sovereignty (see section on Local Food Support Programs by Amy Wood).

Fish Products

Jim Stanford, *Unifor*

Key Points

Unless otherwise noted, all Articles, Annexes and Appendices referenced in this section refer to ***Chapter 3*** *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.*

- Canadian fishing stakeholders have generally judged that the provisions of the CETA, including the partial elimination of minimum processing requirements, are a worthwhile trade-off for the elimination of EU tariffs on our seafood exports to Europe. Of course this does not imply that the CETA as a whole is beneficial for Canada. And the concessions made in the fish deal will likely spill over into other government policies and regulations, including domestic processing requirements, in other sectors.

Background

- Canada exports close to $400 million worth of fish products to EU countries each year, primarily from the east coast, and mostly comprised of processed seafood. Import flows back the other way are small, generating a trade surplus of around $350 million per year. Exports have been limited by various EU quotas, by weak demand in Europe (reflecting the economic crisis there), and the high Canadian dollar.

- Canada's fisheries industry comprises various sub-sectors, including larger offshore boats (usually with a corporate structure of ownership), smaller independent inshore fishers, and fish processing plants. Employment in processing operations has declined by one-third over the last decade, reflecting fluctuating stocks, technological change, the consolidation of smaller plants, and a drive by fish processors to have Canadian-caught fish processed in cheaper offshore plants. Newfoundland and Labrador has a rule requiring (with certain exceptions) fish caught in province to be landed and processed on shore, although the usefulness of this rule in defending fish processing jobs has been debated. For example, some argue that the

rule undermines Canadian exports by making the overall product more expensive.

- A key priority for fishing communities in recent years has been to protect current federal rules limiting the market sale of commercial fish licenses, and requiring the owners of licenses to also operate those licenses. Policy has also prevented large fish processing companies themselves from attaining fish harvest quotas. This has prevented the consolidation of fishing quotas into large commercial blocks, which would eliminate access by smaller operators to the harvest.

Analysis of Key Provisions

- The CETA would eliminate (after three years) the existing Newfoundland and Labrador prohibition on exports of raw fish as it applies to EU-bound exports. This provision is described in Article 12 on National Treatment and Market Access of Goods. However, in practice it will be increasingly difficult for Canada to maintain those prohibitions on trade with *any country* once they have been abolished for the EU.
- The schedule for tariff reduction is specified in a partial tariff offer schedule included with the leaked documents. For most fisheries products, the EU applies a phase-out Schedule D, with tariffs phased out evenly over eight years. In some cases the phase-out is faster: four years for frozen lobster and crab, six years for prepared lobster, mussels, and snails. It seems that Canadian tariffs on fish and seafood imports are eliminated immediately, since any sectors not included in the tariff offer schedule are allocated to Schedule A, which is immediate elimination. Since Canada's fish imports from Europe are small and do not generally compete directly against Canadian equivalents the impact of this Canadian tariff elimination will also be small. The elimination of EU tariffs will likely provide a significant boost to Canada's fish product exports to the EU.
- Special provisions regarding quotas for EU imports of duty-free processed shrimp and prawns are described in Annex X.5.8. This allows for tariff-free imports of up to 23,000 metric tonnes of processed shrimp for the first seven years of the CETA. The quota is administered on a first-come, first-served basis. These products currently face a 20% EU tariff, which would normally be phased out evenly over

eight years under the CETA. This provision, therefore, gives limited tariff-free access to Canadian producers right from implementation of the CETA rather than waiting for the phase-out. The tariff codes for this provision are 1605.20.10 and 1605.20.99.

- Similarly, Annex X.5.9 allows for a quota of EU imports of duty-free frozen cod, up to 1,000 metric tonnes, also in the first seven years. Without it, Canadian frozen cod producers would face a 7.5% EU tariff that is being phased out over eight years. As with shrimp, this gives accelerated tariff-free access for up to 1,000 metric tonnes. The tariff code for this provision is 0304.29.29.
- Existing rules prohibiting the sale of fish quotas, and requiring the separation of fish quotas from fish processing corporations, are listed as exemptions by the federal government and hence are not directly affected by the CETA. However, past experience indicates that by requiring regulations like this to be listed as negative exemptions (to a presumed unrestricted benchmark), it sets the stage for future efforts to weaken or eliminate restrictions. And the CETA would certainly prohibit the extension of these rules to other products. In this regard, the CETA still restricts the ability of Canadian governments to actively manage any resource stocks in the interests of harvesters.

Local Food Support Programs

Amy Wood, *Canadian Centre for Policy Alternatives*

Key Points

Unless otherwise noted, all Articles, Annexes and Appendices referenced in this section refer to ***Chapter 21*** *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.*

- Public procurement of food is an important driver of local food security because it ensures market access for small-scale food producers and reduces the risk associated with the volatility of export markets.[71] Buy-local public procurement also increases consumer choice, stimulates regional economies and represents an alternative to conventional distribution channels.

- Procurement policies supporting local food are on the rise in several provinces, including Ontario (with the 2009 commitment of $24 million to local procurement and the city of Toronto's 2008 pledge to have 50% local food in city services),[72] Nova Scotia (where ninety percent of processed dairy products are locally procured for health care and justice institutions), and British Columbia (where 14,000 schools procure food locally). In Ontario in particular, municipalities, academic institutions, school boards and hospitals, commonly known together as the MASH sector, represent an attractive market for local food producers, with total meal values estimated to be $285 million per year.[73]

- In Canada, local food procurement is limited by a number of international agreements, including the General Agreement on Tariffs and Trade (GATT), the World Trade Organization Agreement on Government Procurement (GPA), the North American Free Trade Agreement (NAFTA) and the Agreement on Internal Trade (AIT). However, none of these existing agreements significantly curtail the procurement of local food. Both the 1994 and 2012 versions of the WTO GPA exempt municipalities and the broader public sector entirely and allow for policy space to procure local food and food services.

- Under the CETA, market access for procurement is extended to all levels of government, which includes the broader MASH sector. This means that it will no longer be permissible for governments at the federal, provincial or municipal level to give purchasing preference to goods or services from local companies or individuals if the contract exceeds a given threshold. The CETA goes against provincial commitments to increase local food provision[74] and threatens the ability of municipalities, provinces and public institutions to procure local food and food services.

- The CETA threshold for the procurement of goods and services by sub-central entities is 200,000 SDRs (approximately $330,000 CDN), which is far lower than the 355,000 SDRs (approximately $590,000 CDN) required by NAFTA and the WTO GPA. Preferential food service contracts above these thresholds, which, to date, have been unaffected by international trade law, are now prohibited under the CETA. This is higher than the AIT thresholds of $25,000 CDN for goods and $100,000 CDN for services. However, it is difficult to compare these

numbers because the earlier international agreements did not include municipal entities and the AIT provides for various exclusions and exceptions that are not allowed under the CETA.

- There may still be some potential to buy local food outside of the CETA procurement chapter. Buying "local" food could be legally permissible if labels or technical specifications do not make reference to political boundaries (i.e. national or provincial origins).[75] Thus, social and environmental criteria, such as carbon footprint limits, could arguably be defensible.[76] Another potential avenue to buy local food would be through geographical indicators, although Canada has made significant concessions to the EU in this area (see section on Geographical Indications by Karen Hansen-Kuhn).

Analysis of Key Provisions

Non-discrimination

- Article IV.2 affirms the principles of national treatment and MFN status for government contracts, which is consistent with the WTO GPA (see section on Public Procurement by Stuart Trew). As Trew points out, the EU achieved non-discriminatory access as well as "unconditional access" at the municipal level, because Canada unilaterally gave up sub-central government autonomy for procurement. The CETA will forbid minimum local content requirements and prevent provincial and municipal government bodies from using public spending to further food security aims.

Scope and Coverage

- Annex X-02 (Sub-Central Government Entities) covers all government entities, unless otherwise indicated by the province/territory (see *Table 2*). Although there are some exceptions, the vast majority of provinces and territories have given up most rights to procure sub-nationally in exchange for market access. None of the listed exceptions have significant relevance to local food purchasing.

- There is much resistance at the municipal level, and over 50 communities have voiced their discontent about the CETA procurement rules.[77]

- Annex X-04 (Goods) states that unless otherwise specified and subject to Paragraph 2, this agreement covers all goods. This includes food preparation and serving equipment, agricultural supplies and live animals.

General Exceptions

- Annex X-07 (General Notes) states that procurement does not apply "in respect of agricultural goods made in furtherance of agricultural support programs or human feeding programs." The terms "agricultural support programmes and human feeding programmes" are used ambiguously and it is unclear what constitutes such a program. In the EU list of exceptions, human feeding programmes specifies food aid including urgent relief aid as an example, but this qualifier is not used in the Canadian list of exceptions. Similar language on agricultural support programs or human feeding programs appears in the WTO GPA.
- There is room for technical requirements on social or environmental indicators such as organic labeling or freshness.
- Although Article III (Security and General Exceptions) ensures that nothing in the agreement prevents a Party from enforcing measures to "protect public morals, order or safety, or necessary to protect human, animal or plant life or health," there is no evidence to date that public procurement could be excluded through these measures.
- In Article II.3 there are exceptions for international assistance and development aid, but this has no relevance for domestic buy local programs.

Thresholds

- The threshold for government goods and services is 200,000 SDRs (approximately $330,000 CDN) each. For context, the average family of four spends $8,535 annually on food.[78] While smaller procurement initiatives such as staff cafeterias, vending machines in public spaces and childcare services could conceivably have contracts under the 200,000 SDR threshold, larger contracts will no longer be feasible. For example, the Region of Waterloo owns Sunnyside Home, a live-in care facility that has a $1 million annual contract with Sysco to

provide local food for its residents.[79] Many institutions in the MASH sector have made recent commitments to increase their local food content requirements,[80] which the CETA would prohibit.

- Local food advocates in Waterloo, Ontario see the 200,000 SDR threshold as a major impediment to the area's local food movement, as promoted by groups such as the Waterloo Food System Roundtable and TransitionKW.[81] Other groups, such as Sustain Ontario, have also expressed concern that large institutional contracts would exceed this threshold.

Valuation

- Subdividing food contracts allows smaller producers greater market access opportunities, but is prohibited in the CETA on the basis that it would be an intentional exclusion by a Party (see Article II.6).
- Article II.7 provides very specific stipulations for defining "recurring contracts." Forbidding multiyear or recurring contracts would significantly curtail the ability of the MASH sector to establish local food contracts. Where price is the sole criterion in determining contracts (see Article XIV), smaller companies are at a comparative disadvantage because they have higher costs per unit. This also has health implications because purchasing food based solely on price excludes consideration of other factors such as freshness or nutritional value.

Technical Specifications

- Article IX.1 states: "A procuring entity shall not prepare, adopt or apply any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of creating unnecessary obstacles to international trade." The phrase "with the effect of creating unnecessary obstacles to international trade," has been routinely adopted in agreements since the WTO Agreement on Technical Barriers to Trade (TBT). The same language was used in the 2013 EU-Iraq Partnerships and Co-operation Agreement in reference to procurement.
- As outlined in Article 2 of the TBT, technical regulations must "not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create." This

has been tried in the WTO dispute settlement system, notably in the 1999 European Communities-Asbestos case. Underpinning this case was a preference for scientific based evidence, which could make it difficult for countries to use the precautionary principle to justify domestic supports for local foods. However, there is some latitude on grounds of health risk, but the evidence needs to be conclusive. Although a legitimate objective can be the protection of the environment (included in Article 2.2 of the TBT), technical standards such as certification schemes for organic content or freshness could cause a trade dispute if they are deemed overly restrictive.[82]

Enforcement

- Under the procurement rules of the CETA, prospective foreign suppliers will gain new rights to dispute any perceived unfairness or local bias in tendering decisions before a federal or provincial administrative tribunal. Such semi-judicial bodies have the authority to award compensation to foreign suppliers and to compel governments to re-tender the contract.[83]
- In addition, the CETA's investment rules would allow foreign investors to bypass domestic court systems and instead use the investor-state dispute settlement process (see section on Investor-State Dispute Settlement by Peter Fuchs). The tribunals can order governments to compensate investors allegedly harmed by public policies, laws, or regulations.

TABLE 1 Summary of Provincial and Territorial Procurement Commitments

Province/Territory	All government entities[84]	Exceptions
British Columbia	Yes	The Legislative Assembly and its independent offices.
Alberta	Yes	The Legislative Assembly, the Legislative Assembly Office, the Office of the Auditor General, the Office of the Chief Electoral Officer, the Office of the Ethics Commissioner, the Office of the Information and Privacy Commissioner and the Office of the Ombudsman.
Manitoba	Yes	
Saskatchewan	All ministries, agencies, Treasury Board Crown corporations, boards, commissions; (ii) municipalities; and (iii) school boards and publicly-funded academic, health and social service entities.	
	All departments, governmental agencies; and parapublic organizations as defined by the *Act Respecting Contracting by Public Bodies*	
Ontario	All provincial ministries and classified agencies but does not include energy agencies, agencies of a commercial or industrial nature, and Ontario Infrastructure and Lands Corporation; (ii) school boards and publicly-funded academic, health and social service entities; and (iii) municipalities but does not include municipal energy entities.	Offices of the Legislative Assembly
New Brunswick	An extensive list of departments, secretariats, academic institutions and agencies is given (see Annex).	
Nova Scotia	All public sector entities as defined in the *Public Procurement Act.*	(i) any listed intergovernmental or privatized governmental unit if the Province does not own or control a majority of it; (ii) any entity listed or described in Annex X-03 Section A, whether as an inclusion or exclusion; (iii) Emergency Health Services (a division of the Department of Health) in respect of ground ambulance-related procurement, for Emergency Health Care purposes; (iv) Sydney Tar Ponds Agency; (v) Nova Scotia Lands Inc.; and (vi) Harbourside Commercial Park.
Prince Edward Island	All departments, agencies; (ii) municipalities; and (iii) school boards and publicly-funded academic, health and social service entities.	
Newfoundland and Labrador	Yes	
Yukon	Covers 14 departments and one agency only.	
Northwest Territories	All i) ministries, agencies; (ii) municipalities; and (iii) school boards and publicly-funded academic, health and social service entities.	The Legislative Assembly and procurement subject to the Northwest Territories Business Incentive Policy.
Nunavut	Yes	The Legislative Assembly and procurement subject to the Nunavummi Nangminiqaqtunik Ikajuuti Policy.

Workers and the Environment

Temporary Entry

Hadrian Mertins-Kirkwood, *Canadian Centre for Policy Alternatives*

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.

Notes

1 "Complete Canada-EU Text Reached." Government of Canada, Foreign Affairs Trade and Development Canada, Deputy Minister of Foreign Affairs, Assistant Deputy Minister Public Affairs, Corporate Communications, E-Communications. Accessed September 18, 2014.

2 "Freihandelsabkommen CETA Ebnet Weg in Paralleljustiz." *Tagesschau.de*. Accessed September 18, 2014.

3 "Europäisch-Kanadisches Freihandelsabkommen: Wir veröffentlichen sämtliche Geheime CETA-Dokumente (Update)." *Netzpolitikorg*. Accessed September 18, 2014.

4 The cover note of the documents leaked on August 5 states: "Member States will find the full set of corresponding texts attached, including consolidated version of all chapters, annexes, declarations, understandings as well as side letters agreed with Canada. This is the complete outcome on the basis of which the EU and Canada will proceed with the legal scrubbing and translations, before submitting the Agreement to the Council for conclusion."

5 The new UNCITRAL rules are accessible at: http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency.html.

6 See Government of Canada. 2013. *Technical Summary of Final Negotiated Outcomes: Canada-European Union Comprehensive Economic and Trade Agreement*. http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ceta-aecg/ceta-technicalsummary.pdf

7 The quotation is from an internal EU description of the Canadian negotiating position. See Heather Scoffield. May 29, 2013. "EU, Canada's differences over financial services holding up free trade pact: documents." Canadian Press. http://business.financialpost.com/2013/05/29/eu-canadas-differences-over-financial-services-holding-up-free-trade-pact-documents

8 Trans Atlantic Consumer Dialogue. October 2013. *Resolution on Trade Rules and Financial Regulation*. www.consumersinternational.org/media/1402116/tacd-finance-resolution-on-trade-rules-and-financial-regulation-green.pdf

9 "The EU reserves the right to adopt or maintain any measure requiring a financial institution, other than a branch, when establishing in a Member State of the EU to adopt a specific legal form,

on a non-discriminatory basis." See "Reservations Applicable throughout the European Union (EU)" in *CETA Reservations — EU Annex II*.

10 In a positive development, the CETA prudential carve-out omits the qualification: "Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement" which appears in the WTO GATS and post-NAFTA bilateral FTAs. This progress is potentially undone, however, by the CETA's interpretive annex.

11 "In short selling, investors borrow stocks to sell them, betting that they can buy them back at a lower price and profit from the difference." Financial Times Lexicon. "Definition of naked short selling." http://lexicon.ft.com/Term?term=naked-short-selling

12 "Government purchasing typically represents between 10 and 15 per cent of national GDP in developed countries." World Trade Organization. 2014. "Government Procurement — WTO and government procurement." http://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm.

13 In a controversial ruling in 2013, a WTO dispute panel found that Ontario's domestic content requirement on green energy projects violated general non-discrimination rules in the GATT despite Canada's insistence that as a form of government procurement the Green Energy Act should have been excluded. The Ontario government has since cancelled the feed-in-tariff program and local content rules that triggered the dispute (brought by the EU and Japan). However, as long as municipalities and energy utilities are excluded from procurement obligations at the WTO or in the CETA, these public bodies still have room to adopt local content requirements. See Scott Sinclair. November 2013. "Saving the Green Economy: Ontario's Green Energy Act and the WTO." Ottawa: Canadian Centre for Policy Alternatives. https://www.policyalternatives.ca/publications/reports/saving-green-economy

14 There are 15 Parties to the GPA comprising 43 countries, more than two thirds of them in the EU. See World Trade Organization. 2014. "Agreement on Government Procurement — Parties, observers and accessions." http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm.

15 McCarthy Tétrault. October 18, 2013. "Canada and the European Union Agree to Historic Trade and Investment Deal." http://www.mccarthy.ca/article_detail.aspx?id=6497 The WTO also predicts government procurement typically represents 10–15% of a developed nation's GDP. See World Trade Organization. 2014. "Government Procurement — WTO and government procurement." http://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm.

16 In June 2010 the federal government announced its $35-billion National Shipbuilding Procurement Strategy. The manufacturing of combat and non-combat vessels was awarded, exclusively, to Canadian suppliers.

17 Canada's Industrial and Regional Benefits (IRB) policy ensures that 100% of the value of any publicly-funded defence or security-related project is realized by the Canadian economy, regardless of which company (foreign or domestic) successfully bids on the contract.

18 Canadian Labour Congress. 2009. "Municipalities Matter — Procurement." http://www.canadianlabour.ca/action-center/municipality-matters/procurement

19 Canadian Urban Transit Association. 2014. "Transit Infrastructure Needs for the Period 2010–2014." www.cutaactu.ca

20 "Trade treaty 'chill': New Brunswick abandons public auto insurance in face of trade treaty threat." Canadian Centre for Policy Alternatives — Newsroom. June 30, 2004. https://www.policyalternatives.ca/newsroom/news-releases/trade-treaty-chill-new-brunswick-abandons-public-auto-insurance-face-trade-tr

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27 The European Commission has stated: "We have important offensive interests in certain privatised public utilities/sectors, notably in Telecommunications, Postal, and Energy." Cited in Marcus Krajewski. November 2011. "Public Services in Bilateral Trade Agreements of the EU. p. 33. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1964288

28 See Annexes I for Canada and the EU. Bulgaria and France have reserved the right for restrictions on department stores.

29 The GATS domestic regulation provisions would also apply to technical standards, but since standards can be incorporated into licensing requirements these too could be captured by "measures relating to licensing requirements" under CETA Chapter 14.

30 Article 5(b)(i) of Chapter 32 (Exceptions) provides an exception for the "traffic in arms" but this would not normally cover retail gun sales. At this point, Chapter 32 does not apply to Chapter 14.

31 For Canada: Social Services, Aboriginal Affairs, Minority Affairs, and the collection, purification, and distribution of water (see section on Water and Water Services by Stuart Trew), as set out in Canada's schedule to Annex II, and cultural industries. For the European Union: Health, education, and social services, gambling and betting services, the collection, purification, and distribution of water, as set out in the EU's schedule to Annex II, and audio-visual services.

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40 The precautionary principle enables rapid response in the face of a possible danger to human, animal or plant health, or to protect the environment. In particular, where scientific data do not permit a complete evaluation of the risk, recourse to this principle may, for example, be used to stop distribution or order withdrawal from the market of products likely to be hazardous. See also: "The precautionary principle." European Union — Summaries of EU Legislation. 2011. http://europa.eu/legislation_summaries/consumers/consumer_safety/l32042_en.htm

41 Note to readers: For more information and detailed analysis on how to protect cultural heritage in the context of trade agreement negotiations, please refer to IREC's research note: "Commerce et culture : protéger la culture dans les accords commerciaux" (2012) (French version only) available online: http://www.irec.net/upload/File/commerceculturereaecgoctobre2012(1).pdf

42 See Organization for Economic Co-operation and Development. 2013. "Health at a Glance, 2013: OECD Indicators." http://www.oecd-ilibrary.org/docserver/download/8113161e.pdf

43 Joel Lexchin and Marc-André Gagnon. October 31, 2013. "CETA and Pharmaceuticals: Impact of the trade agreement between Europe and Canada on the costs of patented drugs." Canadian Centre for Policy Alternatives.

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61 Jim Stanford. October 31, 2012. "Government's Got It Wrong on $12 Billion GDP Boost." *Embassy Magazine*.

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65 This estimate, and a more complete discussion of the effects of a CETA on Canada's auto industry, is contained in: Jim Stanford. 2014. *CETA and Canada's Auto Industry: Making a Bad Situation Worse* (Ottawa: Canadian Centre for Policy Alternatives).

66 One exception to this general rule is Ford, which plans a major marketing effort to sell the Canadian-made Edge CUV in Europe.

67 In 1999 Canada enjoyed a $15 billion automotive trade surplus. By 2013 that had disintegrated into an $18 billion deficit, corresponding to the loss of tens of thousands of jobs in vehicle assembly and parts.

68 Governments in many countries have intervened to reduce damaging trade imbalances in key sectors like auto. For example, in the early 1980s Canada restricted a surge of vehicle imports from Japan, to provide some breathing room and time for adjustment for domestic producers. Several countries took similar measures in the wake of the 2008–09 global financial crisis. Any of these interventions will be prohibited under CETA.

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73 Estimate calculated by Linda Varangu, Partnership Director of the Canadian Coalition for Green Health Care. January 21, 2013.

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82 For a more rigorous analysis of the TBT, see Arthur E. Appleton and Michael G. Plummer. 2005. "The Agreement on Technical Barriers to Trade" in *The World Trade Organization: Legal,*

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83 "Is CETA good for cities? Debunking the myths about the benefits of EU-Canada free trade." Trade Justice Network.

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85 Under the CETA, the spouses of ICTs are granted treatment in the host country equivalent to the treatment granted to ICTs of the host country in the spouse's home country (see Annex XXX — Understanding on Spouses). For example, the wife of a German intra-corporate transferee to Canada receives the same legal treatment in Canada as a Canadian intra-corporate transferee would receive in Germany.

86 Denotes whether workers in each category are legally employed by — i.e. receive remuneration from — a company based in the host country (these workers typically require work permits). If not, the worker remains employed in their home country. For example, a French intra-corporate transferee in Canada must be employed by the Canadian branch or affiliate that received them. In contrast, a French contractual service supplier in Canada must remain employed by the French company that won the contract.

87 By default, economic needs tests are not permitted for any category of worker covered by the CETA. However, many EU member states have listed sector-specific or category-specific exceptions in their schedules of commitments.

88 Extensions are possible at the discretion of the host country government.

89 There are 11 approved activities for short-term business visitors: meetings and consultations, research and design, marketing research, training seminars, trade fairs and exhibitions, sales, purchasing, after-sales or after-lease service, commercial transactions, tourism personnel, and translation and interpretation.

90 In addition to the general restrictions, country-specific exceptions are listed in each Party's schedule of commitments.

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