UNIONS FOR NUPGE PUBLIC GOOD

Trade and Investment Agreements and the Threat to Public Services

Backgrounder

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The National Union of Public and General Employees (NUPGE) is a family of 13 Component unions. Taken together, we are one of the largest unions in Canada. Most of our 425,000 members work to deliver public services of every kind to the citizens of their home provinces. We also have a large and growing number of members who work for private businesses.

The office of the National Union of Public and General Employees is on the traditional and unceded territory of the Algonquin peoples and is now home to many diverse First Nations, Inuit, and Métis peoples.

We recognize the crimes that have been committed and the harm that has been done and dedicate ourselves as a union to moving forward in partnership with Indigenous communities in a spirit of reconciliation and striving for justice.

Bert Blundon, President

Jason MacLean, Secretary-Treasurer

Trade and Investment Agreements and the Threat to Public Services

This backgrounder examines the impact of international trade and investment agreements on public services in Canada. It explains how various aspects of these trade and investment agreements make public services vulnerable.

Since January 1989, when the Canada-United States Free Trade Agreement

entered into force, Canada has signed a number of trade agreements. 3 of these have in recent years received significant attention:

1. The North American Free Trade Agreement (NAFTA) between Canada, the United States, and Mexico came into force on January 1, 1994. It will soon be replaced by the Canada-US-Mexico Agreement (CUSMA), often referred to as the new NAFTA.
2. The Comprehensive Economic and Trade Agreement (CETA) with the European Union, which has been in effect provisionally since September 2017.
3. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) with 10 other Pacific Rim countries, which entered into force December 2018.

Treaties designed to liberalize

These free trade agreements are treaties, which are supposed to facilitate trade and eliminate trade barriers by eliminating tariffs either immediately or over a certain number of years. And they are designed to *liberalize* sectors of economic activity, or goods and services. Liberalizing means removing any impediments to foreign direct investment. In so doing, those who promote these agreements say that they create an open, competitive, and rules-based international marketplace that offers greater certainty and stability for investment and growth.

But the reality of free trade is much more complicated. Many studies show that these trade agreements have a negligible impact on the overall growth of the economy. And the removal of tariffs constitutes such a small aspect of these agreements, it is fair to say that these agreements actually have little to do with trade.

For example, many of the provisions in CUSMA, such as its Chapter 28 on Good Regulatory Practices, dictate how governments must research, draft, and implement public policies that address everything from meat inspections, to chemical toxicity, to water quality. Many of the regulatory provisions in CUSMA affect all regulations, even if not trade related. And all this might weaken public protections and pose a threat to public safety.

What is more troublesome is what these agreements actually do in the wording of their texts: they create and enforce very comprehensive, complex, bureaucratic, and confusing regimes of rules and obligations that each country must follow. And these rules and obligations guarantee the rights and powers of foreign investors.

Focus on governance

So these agreements are not really free trade agreements. They are actually governance agreements. That means they confer on foreign investors significant rights, protections, and remedies. For this reason, it's more accurate to call them *trade and investment agreements.*

There are a number of reasons why labour unions must be concerned about trade and investment agreements like NAFTA/CUSMA, CETA, and the CPTPP. Let's focus here on just one: they pose a serious threat to public goods and social services in Canada.

This backgrounder will outline the following closely related mechanisms of these agreements, and will explain how they threaten public goods and social services:

1. The ratchet and standstill provisions.
2. The negative-list model

Briefly, the argument presented here is as follows:

- The protections for public goods and social services set forth in these agreements are vague and insufficient.
- They contain rules and obligations that require governments to make laws and adopt policies only in the direction of greater conformity with the agreements.
- They prohibit governments from reversing privatization, effectively locking it in.
- They make it impossible for governments to expand and strengthen social services in the future.
- They jeopardize the ability of governments to regulate in the public interest.
- They contribute to regulatory chilling in public services, as well as in other areas of public policy.

How agreements lock in liberalization and privatization

How these agreements threaten public services is through specific mechanisms designed to lock in liberalization and privatization.

In other words, once a sector of economic activity, or a public good or social service is opened up to competition, privatization, or foreign investment, the trade and investment agreements make it difficult, if not impossible, to reverse those changes—at least not without significant penalties and recompense.

It should be said at the outset that these agreements do not explicitly force governments to privatize public goods or social services. But they do contain a complex array of obligations, rules, and commitments specifically designed with an objective: to gradually open all aspects of a country's economy to foreign investment. And they do contain specific provisions that are designed to lock in any kind of liberalization or privatization that governments might voluntarily implement.

Standstill and ratchet

There are 2 related mechanisms that have the power to lock in liberalization and privatization. These are known as the **standstill** and **ratchet** provisions. These mechanisms form an integral part of CUSMA, CETA, and the CPTPP. The words **standstill** and **ratchet** do not actually appear in the texts of these agreements. But they are terms used by trade policy experts, and by the Government of Canada to describe how specific chapters of these agreements work in practice.

Under the **standstill** provision, whatever goods or services are open to foreign investment at the time of signing, must always remain open. Essentially, when a country signs the agreement, it cannot then restrict foreign investment in any good or service that's already open. Governments cannot pass any new laws, policies, or regulations that would make foreign investment more restrictive than those that were in place when the agreement came into force.

In this way, these trade and investment agreements create a minimum standard of liberalization by preventing governments from adopting any laws or regulations that would restrict foreign investor access to any open sector or service. And this minimum standard is irreversible.

Furthermore, the **ratchet** provision prohibits future governments from reversing any previous government's voluntary liberalization or privatization of goods or services. Governments can adapt their economic policies only in the direction of greater conformity with the agreement. This mechanism effectively locks in any privatization or liberalization efforts made by the government of the day. It thus restricts future governments' ability to make changes.

For example, should a government choose to privatize a particular good or service, or open it up to foreign investment, that good or service is henceforth bound by the agreement. And any future government that seeks to reverse such liberalization or privatization, and tries to bring such goods or services back into the public realm, would face challenges that could result in massive financial penalties and compensation to foreign investors.

In summary, the **standstill** and **ratchet** provisions prevent governments from reducing or reversing privatization in the future. Governments will not be allowed to implement new regulations or restrictions on trade and investment in goods and services.

How these 2 mechanisms interfere with democracy

Perhaps the most concerning implication of the standstill and ratchet mechanisms is that they foster an irreversible trend, preventing citizens from changing their minds. For example, the democratic will of citizens will be thwarted when they demand a policy change because deregulation or privatization turns out to be a failure. Or if citizens demand greater welfare-enhancing public policies, or if they elect governments with a mandate to make public goods or social services less liberalized, democratic choices will be overruled by these agreements.

As a result, the standstill and ratchet provisions in practice interfere with democracy, because they undermine the usual ebb and flow, and ongoing dialogue, of policy-making in a democratic society by prohibiting positive change.

The Negative-List Model

We've been looking at the standstill and ratchet mechanisms of trade and investment agreements. In practice, the ratchet is connected to what is known as the negative-list approach. This is contrasted with what is known as a *positive-list* approach.

Comparing positive and negative lists

With a **positive-list approach**, unless some good or service or economic sector is specifically mentioned or listed in the agreement, it will not be bound by or subject to the rules of the trade and investment agreement.

In contrast, under a **negative-list approach**, all goods and services are subject to the rules and obligations of the agreement, unless specifically reserved or carved out and listed in the annexes of the agreement. This approach, which NAFTA pioneered, has become increasingly common in trade treaties, and it is found in CUSMA, CETA, and the CPTPP.

How the negative list determines the future of public and social services

What this means is that under a negative-list approach, all aspects of a country's economic activity (all goods and services or anything else open to foreign investment) must adhere to the provisions of these agreements, unless that country successfully negotiates a particular exclusion or carve-out for it. The word these agreements use for exclusion is *reservation*, and all the reservations are specifically listed in the country- specific sections of the agreements. The lists of reservations, which are part of the agreements, are typically at the end in annexes.

What is fundamentally problematic about the negative list is that if for some reason (be it intention, negligence, error, or simply the impossibility of predicting the future) a country fails to reserve some good or service or economic sector, the people and the government cannot change their minds. In practice, this means that if some unanticipated new economic activity emerges, something that could not be predicted and included as a reservation, or if a country has not negotiated a reservation for a particular social service in the agreement, then the sector or service would automatically be bound by all the rules and obligations of the agreement.

In other words, if something isn't listed, it must always conform to the rules of the trade and investment agreement. The government cannot change its mind at some future time and adopt policies or laws that would shield that sector or activity from foreign investors.

For this reason, the negative-list model has been described as a "list it or lose it" approach—the government cannot pass any new law or adopt any new measure that would be considered discriminatory to foreign investors because it would violate the terms of the agreement and could be vulnerable to massive financial penalties.

This is also true for social services: unless reserved, any new or unanticipated public services would not be protected, and thus could not be expanded or enhanced in the future.

Thus, by default, the negative-list approach effectively expands the scope of these agreements into the realm of public goods and social services. It is a barrier to expanding public goods and social services into new or unanticipated areas, and it severely diminishes the authority of current and future governments to govern them.

2 Kinds of annexes

To complicate matters further, in agreements like CPTPP, CETA, and CUSMA, there are 2 ways countries can list their reservations; that is, there are 2 kinds of annexes:

1. Annex I is for reservations for "existing" non-conforming measures.
2. Annex II is for reservations for "future measures," or "new or more restrictive" measures.

What **non-conforming** means is that the things listed in the Annexes do not conform to the rules of the agreement: they are excluded or reserved.

The implications of the words **existing** and **new** (or **future**) is important:

Anything listed in Annex I cannot be changed unless the change increases the conformity of what is listed to the rules and obligations of the agreement. This is the ratchet effect: existing measures that do not conform to the obligations of the agreement are listed in Annex I, and they can be changed only in one direction—increased conformity with the agreement's rules and obligations.

For those sectors or activities listed in Annex II, a country is permitted to adopt new or more restrictive measures that do not conform with the obligations imposed by the agreement.

Does Annex II offer better protection? What the Free Traders will say

In contrast to Annex I, in Annex II, the agreements allow the possibility that new non-conforming measures can be adopted. In other words, in the future, a government can adopt policies that would exclude that activity or service to a greater degree from the rules and obligations of the agreement. If a country successfully negotiates such a demand that certain activities or sectors be excluded, they are listed in Annex II.

Annex II is supposed to offer stronger protection to safeguard public goods and social services. That means it is supposed to permit the Canadian government to adopt policies or laws that would protect such goods or services in ways that were not anticipated, and that would not be in conformity with the trade agreements.

Because of the distinction between Annex I and Annex II reservations, supporters of these agreements will claim that they do protect public goods and services, that Canada's social programs are shielded from their rules and obligations.

Inconsistent wording problematic

It is true that Canada did negotiate some reservations in areas broadly construed as public goods and social services. But such reservations are not consistent across the agreements. For example, in CETA there is an Annex II reservation for the "collection, purification and distribution of water" (Reservation II-C-11). But no such reservation exists in either CUSMA or the CPTPP.

On the other hand, while all 3 treaties have an Annex II reservation for "Aboriginal Affairs," the language is not consistent among the agreements.

In CUSMA, for example, the language says that

> Canada reserves the right to adopt and maintain measures related to the rights recognized and affirmed by section 35 of the *Constitution Act, 1982,* or those set out in self-government agreements between a central or regional level of government and indigenous peoples.

But in CETA and the CPTPP, Canada "reserves the right to adopt or maintain a measure denying investors…their investments, or service suppliers of a Party, any rights or preferences provided to aboriginal peoples."

Wording for "social services"

With regard to social services, in all 3 treaties—CETA (Reservation II-C-9), the CPTPP, and CUSMA (Reservation II-C-6)—in each respective Annex II, there is identical language establishing a blanket reservation:

Canada reserves the right to adopt or maintain a measure with respect to the supply of public law enforcement and correctional services, as well as the following services to the extent they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care.

Arguments in favour of agreements are based on Annex II

Because of these Annex II reservations, those who promote these agreements will give 2 reasons why there is really nothing to worry about:

1. They will say that public and social services are excluded or shielded from the obligations of these trade agreements because the Government of Canada negotiated reservations.
2. They will claim that even if a social service is privatized now, nothing will stop a future government from reversing the privatization and bringing the service back into public administration. The proof of this, they will argue, is that "social services" are mentioned in Annex II, which allows governments to adopt "future measures" (new measures) that do not conform with the obligations of the trade agreement.

Reply to the Arguments of Free Traders

At first glance, their arguments appear to be true. It seems that social services are shielded from trade and investment agreements like CUSMA, CETA, and the CPTPP.

But this is not entirely true for 5 reasons.

1. Lack of a definition

The most significant problem is that a "public purpose" is not defined in any of these agreements. This is problematic because different governments do not share the same interpretation regarding what constitutes a public purpose or what belongs in the public realm. This is not just semantics, but could have a direct impact on social services. A good illustration is the privatization of laboratory services in Alberta. In 2019 when he was leader of the Opposition, Jason Kenney opposed a plan to put all laboratory services under the public ownership and administration of a public agency called Alberta Public Laboratories, a wholly-owned subsidiary of Alberta Health Services. Part of this plan included the building of a new superlab in Edmonton.

One of the reasons Kenney opposed the idea was that he did not agree that lab services are an example of public health services. As he put it, they "will not actually touch patients or heal people," and lab tests "are already handled effectively by the private sector." As Premier of Alberta, Kenney cancelled the plan to bring lab services into public ownership and control.

2. Unclear language

The language around what actually qualifies as a social service is either unclear or ambiguous. This has specific implications for health care and health services. For example, the annexes in these agreements do not include the various ancillary and support services that ensure the ongoing functioning of social services. This means that necessary health services such as ambulance services, laboratory and technology services (MRI, X-rays, diagnostic imaging), respiratory therapists, social workers, counselors, cleaning services, maintenance, and administration, are not necessarily included in the Annex II reservation for social services.

What this means is that if a government chooses to privatize a part of the health care system, it is not clear whether a future government can reverse this privatization. Again, Alberta offers an illustration of how this might work in practice: because lab services are not specifically mentioned in Annex II, it is not clear whether they are actually excluded from these trade agreements.

3. Provincial services are listed in Annex I, not in Annex II

Another reason for concern is that 2 trade agreements (CUSMA and CPTPP) offer very weak protection for provincial social services. In both CUSMA and CPTPP, provincial, territorial and local governments are mentioned in a general Annex I reservation that allows them to

maintain “existing non-conforming measures.” The problem here is that anything listed in the Annex I reservation is subject to the ratchet provision. In practice this means that any privatization that happens would be locked in and irreversible.

4. Cost and financial claims prohibit changes.

Once foreign investors or services providers become established in what was previously a socialized or nationalized sector, or in part of that sector, efforts to re-socialize it, or put it back into public administration, would almost certainly result in claims for compensation from the investors or providers. This is especially true with foreign investors who are party to the CPTPP, because it has a robust invest settlement mechanism that allows foreign investors the power to sue governments for unlimited amounts of financial compensation.

5. The negative list controls the scope of agreements.

The negative list implies that, in the future, any new services created for a public purpose will not be protected by the reservation. Rather, they will be subject to the provisions of the agreement because they were not identified in the text. This greatly reduces the democratic control that both current and future governments will have over public and social services, and their ability to keep them public.

Conclusion

This backgrounder has examined how the standstill and ratchet mechanisms, and the related provision of the negative list, are key ways that trade and investment agreements pose a threat to public goods and social services.

They encourage governments to liberalize and privatize those goods and services. They render virtually impossible the ability of governments to reverse privatization or expand social services. And so these trade agreements jeopardize the ability of governments to regulate in the public interest. And they contribute to regulatory chilling in public services as well as in other areas of public policy.

All this has serious consequences not just for our public and social services but also for the Canadian people who rely on them, and for the millions of public sector workers across the country who deliver them every day. or-state dispute

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The National Union of Public and General Employees is an affiliate of the Canadian Labour Congress and a member of the Public Services International.

e national@nupge.ca p 613-228-9800 f 613-228-9801 NUPGE.ca 15 Auriga Drive, Nepean, Ontario, Canada K2E 1B7