AUSTERITY and its ALTERNATIVES

Trade Treaties, Privatization, & Austerity

Scott Sinclair
Canadian Centre for Policy Alternatives

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McMaster University

www.altausterity.mcmaster.ca | @altausterity

ABOUT US

Austerity and its Alternatives is an international knowledge mobilization project committed to expanding discussions on alternatives to fiscal consolidation and complimentary policies among policy communities and the public. To learn more about our project, please visit www.altausterity.mcmaster.ca.

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About the Authors

Scott Sinclair (scott@policyalternatives.ca)

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ALT AUSTERITY

Introduction

Time and time again, we witness austerity programs that result in privatisation and the hollowing out of public services. This takes many forms: forcing the sale or transfer of public assets to private hands; reducing or eliminating public services and thereby opening previously public or not-for-profit sectors to commercial exploitation; facilitating public-private partnerships, more focussed on generating attractive rates of return than meeting public needs; or offloading formerly, or properly, government functions such as regulation or standards setting to the private sector. The results have been painful, both socially and economically.

Since the mid-1990s, free trade agreements (FTAs) have played an important supporting role in furthering commercialisation (a term which encompasses but is broader than privatisation) of services. Broadly speaking, FTAs lock in austerity-driven privatisation and commercialisation through supranational, constitutional-style policy restrictions.[i]

Over the last twenty-five years, the scope of regional and bilateral FTAs has been continually expanded to cover services and investment matters. Recurring negotiations and more far-reaching FTAs exert pressure for public and essential services to be opened to international competition and contestable by multinational firms. Although the changes routinely inflicted under structural adjustment or austerity programs are swifter and more brutal, FTAs reinforce the privatisation and commercialisation of public services.

Trade in Services and Public Services

Since NAFTA and the General Agreement on Trade in Services (GATS) were signed in the mid-1990s, most subsequent bilateral and regional FTAs have included binding obligations to protect investment and liberalize cross-border trade in services.

GATS included a built-in agenda that required successive rounds of talks aimed at "achieving a progressively higher level of liberalization." The first of these planned rounds faltered amidst civil society mobilization that contributed to the collapse of the Seattle Ministerial Conference in 1999. Eventually, the services talks got underway as part of the 2001 Doha Development Agenda, but ultimately these services talks faltered as the result of north-south conflicts that paralyzed the entire Doha round.

In 2012, a group calling themselves the Really Good Friends of Services, attempted to revive talks in Geneva by pursuing a plurilateral Trade in Services Agreement (TiSA) among like-minded, mostly developed country governments. But after the election of Donald Trump as U.S. president in November 2016, TiSA talks also faltered.

Due to the prolonged impasse in Geneva, the impetus for further coverage of services was taken up under a new generation of regional and bilateral FTAs, that included trade-in-services obligations modelled on either GATS or NAFTA, or a hybrid approach, depending on the countries involved.

Most recent FTAs have also included investment protections (for example prohibiting direct and indirect expropriation without compensation and requiring so-called fair and equitable treatment) along with investor-state enforcement mechanisms that have shifted the balance of power from progressive-minded governments towards investors and multinational corporations.

This push for services liberalization and investor rights generates conflict between commercial interests and both the public and the not-for-profit service sectors. Clearly, international trade in services can only occur where sectors are open to competition and services are commercial in character. Because public services deliberately limit commercialisation and for-profit provision, they can readily be construed as "non-tariff barriers" to increased services trade.

This animus towards public services is reflected in the rules governing cross-border trade in services. Services liberalization agreements tend to treat public services grudgingly - as market impediments that, if they are to be preserved at all, must be specifically excluded from FTA obligations. A progressive trade policy framework, by contrast, would regard public services as desirable and legitimate forms of service provision to be encouraged and supported (rather than merely tolerated) by international trade rules.

Indeed, advanced public services are hallmarks of economic and social progress and should be an important goal of development. They play an essential role in equalizing opportunity, reducing inequality and redistributing wealth. They also underpin economic development by providing infrastructure and other public goods that the private sector is incapable of delivering as fairly or efficiently. Hence, opening public services to profit-making – under the guise of increasing international trade in services – can undermine social well-being and the public interest.

Many essential services such as electricity, water, public transit, education and health care are best provided publicly or on a not-for-profit basis. Among the many reasons public services are more desirable in such sectors are the higher financing costs associated with private, for-profit providers and the demand for higher returns for their shareholders. Commercial entities also face greater pressure to restrict coverage and reduce the quality of services in order to lower costs and boost profits.

The right of governments to reverse privatisations, to expand existing public services, and to create new ones has long been a flashpoint in trade negotiations and debates. Public sector unions, for example, have been in the forefront of campaigns to resist further services trade liberalization, including through the now-

stalled Trade in Services Agreement (TiSA).[ii] In the wake of failed experiments with privatisation of essential services, many municipal and local governments have also pushed back against expanded services agreements and insisted that their rights to re-municipalize privatised services - bringing them back under public control - be fully protected under services and investment trade pacts.[iii]

FTAs and Public Services

FTAs only rarely compel governments to privatize public services. But by providing new legal rights to multinational services corporations, they facilitate commercialization and lock in privatization. Contrary to standard official assurances, modern trade agreements can also interfere with the ability of future governments, at all levels, to expand existing public services or create new ones.

Taking their cue from GATS, subsequent cross-border trade in services chapters typically exclude "services provided in the exercise of governmental authority." But, as in GATS, these are defined as "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers."[iv]

As has been repeatedly pointed out by experts and analysts from across the political spectrum, this exclusion is extremely narrow and for practical purposes useless in protecting public services. The problem is that *public services* are rarely delivered exclusively by government on a strictly non-commercial basis. Public service systems typically consist of a complex, continually shifting mix of governmental and private funding, and public, private not-for-profit, and private for-profit delivery.

Because of the weakness of this general exclusion, governments must rely on reservations, or country-specific exemptions, to shield their public and not-for-profit services. Such reservations vary widely and can also be of limited effectiveness. Many regional FTAs, including NAFTA, the Canada-EU Comprehensive Economic and Trade Agreement (CETA) and the proposed U.S.-Mexico-Canada Agreement (USMCA), employ a negative list approach, meaning all services are covered unless governments explicitly exempt them from key treaty obligations.

Under the negative list approach, there are typically two types of allowable reservations: bound (or Annex I), which only protect existing measures, and unbound (or Annex II), which are stronger and allow for a degree of future policy flexibility. The scope of such reservations varies greatly by country, often depending on the ideological orientation of the party in power when the FTA is negotiated. Typically, existing public services at the state, provincial and local government levels are sheltered by the weaker, bound reservations. Most national governments have also protected key sectors, such as health, public education and social services, through stronger unbound reservations.

Especially in areas where only the weaker Annex I protection applies, which commonly includes wastewater, waste management services and private health insurance, once a sector is opened to international firms, FTAs make it difficult or impossible for future governments to restore or expand public services without facing trade treaty challenge. Even the stronger Annex II reservations are not fully effective, because certain investment protection obligations (including indirect expropriation and minimum standards of treatment[v]) are not reservable.

Nature of FTA Restrictions

Modern FTAs go well beyond providing legal guarantees of non-discriminatory treatment (or national treatment) for foreign services or investment. Current agreements prohibit certain types of public policy measures even if they do not discriminate against foreign firms or services. Such proscriptions have significant implications for public services.

For example, so-called "market access" rules prohibit monopolies, including public monopolies, in any committed sector. Once a services sector (for example, wastewater, sanitation, transit or private education) is committed, it is meant to remain permanently open to foreign competition.

The same market access rules also prohibit any measure that "restricts or requires specific types of legal entity or joint venture through which an enterprise may carry out an economic activity."[vi] Consequently, a non-discriminatory policy requiring, for example, that services be delivered exclusively through not-for-profit service providers, as is common with many community-based social services such as child care, housing or addiction counselling services, must be exempted or eliminated. This is referred to as "listed or lost" in trade treaty parlance.

Investor protections can also be directly invoked by foreign corporations. Using an investor-state dispute settlement (ISDS) mechanism, they can contest the "indirect expropriation" of market share and future profits that occurs when public services effectively close off sectors to commercial exploitation, or reverse privatisations.

New Provisions in FTAs That Threaten Public Services

The FTA negotiating agenda around public services has not stood still. At the insistence of corporate lobbies, recent agreements are broader in scope and contain new, more intrusive provisions. The still-to-be ratified USMCA, for example, contains tougher restrictions on state-owned enterprises (SOEs) and monopolies. These new provisions, ostensibly aimed at China and other "socialist-market economies", could also interfere with the ability of government enterprises such as postal providers or energy utilities to fulfil their public service roles.

The general thrust of such provisions, also included in more limited forms in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership and CETA, is to oblige publicly owned enterprises to act strictly "in accordance with commercial considerations". Such a requirement tends to defeat the public purpose of a state-owned enterprise or crown corporation.

USMCA rules acknowledge that an SOE can have a "public service mandate", defined as "a government mandate pursuant to which a state-owned enterprise makes available a service, directly or indirectly, to the general public in its territory."[vii] But even when fulfilling their "public service mandate", an SOE would be prohibited in its supply of services from treating its own citizens more favourably than "persons of another Party or of any non-Party".

From a public services perspective, it is problematic that a publicly funded and mandated enterprise, whether providing postal, energy, social or other services, should be barred from supporting the citizens, taxpayers and communities who created and sustain it.[viii] Such provisions reinforce a general trend in the neo-liberal era to corporatize state-owned entities and the services they provide so that they are increasingly run on a commercial, profit-driven basis, becoming "more private than public in their orientation."[ix]

Another regressive feature of recent FTAs are stronger requirements for so-called regulatory cooperation. CETA, for example, enjoins the parties to adopt good regulatory practices as a foundation for regulatory cooperation to "support the development of compatible regulatory approaches among the Parties, and reduce or eliminate unnecessarily burdensome, duplicative, or divergent regulatory requirements." These "good" practices include the use of regulatory impact assessments and cost-benefit analyses, and emphasize the trade and commercial impacts of regulation. They are more conducive to deregulation than to the promotion of high standards.

Although voluntary, such regulatory cooperation forums provide corporate lobbyists and foreign firms with direct, privileged access to national regulators and decision-makers. Moreover, central agencies such as the Treasury Board Secretariat in Canada or Office of Information and Regulatory Affairs in the U.S. routinely screen proposed regulations to ensure conformity with international trade and investment commitments. Such pressure and scrutiny tend to instill a commercial logic among regulators, in contrast, for example, to a precautionary approach to public protections.

Beyond Coping: Reconciling Trade Agreements and Vibrant Public Services

Progressive trade rules would positively empower public services, not merely accommodate them. The first step in realising this aim would be to include a fully effective, unequivocal exclusion for public services in all new and existing trade and

investment agreements. Such a carve-out should ensure that all levels of government can create new public services, expand existing ones, and reverse privatisation without incurring compensation claims or facing sanctions under trade and investment treaties.

In work done for the European Federation of Public Service Unions, German legal scholar Markus Krajewski has proposed wording for such a model clause that reads: "This agreement (this chapter) does not apply to public services and to measures regulating, providing or financing public services. Public services are activities which are subject to special regulatory regimes or special obligations imposed on services or service suppliers by the competent national, regional or local authority in the general interest."[x]

Progressive agreements would also recognise the critical role that state-owned enterprises can and have played in national and regional economic development. It is precisely the ability to consider more than narrow commercial interests that enables state enterprises to fulfil this goal. As long as all developmental criteria are applied in a transparent manner, without corruption or cronyism, SOEs should have the ability to favour local goods, services and suppliers and to provide their goods and services on preferential terms to citizens and residents, without trade treaty interference.

Likewise, FTAs should in no way impede the expansion of existing, or the establishment of new, public monopolies. Publicly authorised monopolies, such as public postal services or public health insurance, have proven to be efficient, equitable and vital means to deliver universal services.

ISDS is by far the most pressing FTA-related threat to public services. Investor-state challenges related to public services are becoming commonplace, ranging from investor claims related to the reversal of water privatization in Argentina to the rolling back of privatized health insurance in Slovakia and Poland. Governments are far more cautious in bringing cases than foreign investors, as they must consider the possibility of a challenge against their own similar practices. Foreign investors, on the other hand, have nothing to lose but their legal fees (which may even be covered by third-party funders). Consequently, abolishing ISDS[xi] would represent an essential first step towards reconciling international trade and investment rules with vibrant public services.

Many of these potential reforms, such as an effective general exemption for public services, are *technically* reasonably straightforward. The most difficult obstacles to meaningful change are political. Defending public services from trade treaty threats leads to the essentially political question of how to build the strength of social movements and progressive governments to challenge austerity and the broader neo-liberal agenda.

Given the destructiveness of runaway climate change and rising inequality, progressives certainly cannot afford to wait until the current framework for

international trade and investment is reformed before acting. Time is limited, and the state and public services can and must play a key role in addressing both these existential challenges.

In the face of continuing trade or investment treaty threats, it is essential to vigorously support governments at all levels in reversing privatization. The right of governments to reverse privatisations, to expand existing public services, and to create new ones has long been a flashpoint in trade negotiations and debates. In the wake of failed experiments with privatisation of essential services, many municipal and local governments have also pushed back against expanded services agreements and insisted that their rights to re-municipalize privatised services - bringing them back under public control - be fully protected under services trade pacts.[xii]

It should not be forgotten that after seven years of negotiations, CETA was delayed and almost derailed by regional government and civil society opposition. To address such concerns and to get the deal over the hurdle of European signature, the parties released an interpretive declaration that included some extraordinary assurances regarding the autonomy of governments to provide, regulate, create and expand public services. While these assurances are of limited legal effectiveness, they are politically significant.

Such events should embolden progressive governments to fully utilize existing flexibilities and to challenge the boundaries of unjust or unreasonable trade and investment restrictions. Recognising the obstacles that current trade and investment rules pose to progressive economic and ecological transformation does not entail giving in to their chilling effect.

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[i] See Stephen Gill and Claire Cutler, eds. *New Constitutionalism and World Order*, (Cambridge University Press, 2014); Clarkson, Stephen. "Canada's Secret Constitution: NAFTA, WTO and the End of Sovereignty?" Canadian Centre for Policy Alternatives. 2002; Schneiderman, David. "Banging Constitutional Bibles: Observing Constitutional Culture in Transition." University of Toronto Law Journal 55(3) 833-852. 2005; and McBride, Stephen, "Reconfiguring Sovereignty: NAFTA Chapter 11 Dispute Settlement Procedures and the Issue of Public-Private Authority" Canadian Journal of Political Science / Revue canadienne de science politique, 39:4 (December/decembre 2006) 1–21.

[ii] See Scott Sinclair "TiSA Troubles: Services, democracy and corporate rule in the Trump era", Rosa Luxemburg Foundation and Canadian Centre for Policy Alternatives, July 2017. https://www.policyalternatives.ca/publications/reports/tisa-troubles.

[iii] Satoko Kishimoto and Olivier Petitjean, eds. "Reclaiming Public Services: How cities and citizens are turning back privatisation", Transnational Institute, June 2017. https://www.tni.org/en/collection/remunicipalisation.

[iv] USMCA, Cross-Border Trade in Services, Chapter 15 Definitions and Article 15.2 (3) (c).

[v] "Minimum standards of treatment" is the term used in U.S.-style investment treaties. In European treaties this provision is known as fair and equitable treatment.

[vi] CETA Article 8.4.1 (b)

[vii] USMCA Article 22.1 "Definitions".
[viii] These intrusive provisions apply initially only to federal entities. But USMCA calls for further negotiations, beginning within six months after ratification, to apply these restrictions to SOEs owned or controlled by state and local governments and to any public monopolies designated by sub-national governments (Annex 22-C).
[ix] McDonald and Ruiters, eds., *Alternatives to Privatization: Public Options for Essential Services in the Global South*. Introduction, 2012.
[x] See Markus Krajewski. "Public Services in Bilateral Free Trade Agreements of the EU." November 2011. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1964288.
[xi] As has been agreed between Canada and the U.S. in the yet-to-be ratified USMCA.
[xii] Satoko Kishimoto and Olivier Petitjean, eds. "Reclaiming Public Services: How cities and citizens are turning back privatisation", Transnational Institute, June 2017. https://www.tni.org/en/collection/remunicipalisation.