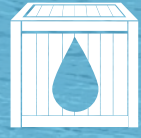


Water for Sale



How Free Trade and Investment Agreements
Threaten Environmental Protection of Water and
Promote the Commodification of the World's Water



About the Author



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Acknowledgments

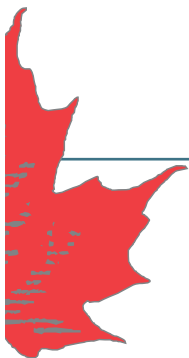
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Table of Contents

Executive Summary	4
The Global Water Crisis	5
The Evolution of Trade	6
Water as a Good	9
Water as a Service	11
Water as an Investment	14
Trade that Protects Water and People	22
The Political Moment	24

Executive Summary

Modern free trade and investment agreements impede the ability of people and their governments to maintain environmental laws and regulations to protect their water. They also pave the way for the privatization and commodification of water. This is done in three ways.

Trade agreements treat water as a “tradable good”, which prohibits any restrictions on the trade of water. Bottled water and water used to produce other goods and commodities fall into this category. Whether water in its “natural state” (lakes and rivers) is tradable is disputed, but once that water is used at all – such as for industry, municipal water systems or hydroelectricity – it is subject to international trade law. Trade exemptions for environmental or conservation reasons are extremely limited.

Water is a “service” in many newer trade agreements that openly promote the commodification and privatization of water services. Through clauses such as “ratchet,” “standstill” and “regulatory cooperation” (which give big service corporations a formal seat at the trade table), trade agreements create new markets for global service corporations and lock in privatization. They do this by restricting public monopolies and government regulations that might interfere with corporations’ right to profit from those same services. These trade agreements have a very narrow definition of public services and are

strict about what can be deemed to be truly public and therefore qualify for an exemption.

Water is an “investment” and therefore subject to the clauses in these agreements that give corporations the same status as governments to challenge laws and trade disputes. Investor-State Dispute Settlement (ISDS) is a key tool used by corporations to knock down environmental rules that protect water and challenge public management of water services. Foreign investors involved in massive land grabs around the world can use ISDS to claim actual ownership of the water used in their operations. ISDS is the most profoundly anti-democratic tool used to promote the interests of transnational corporations in modern times.

To protect water in international trade dealings, water must be removed from all these categories in all trade and investment agreements. The practice and privilege of ISDS must end. People and their governments must be given the right to restrict trade from places or in conditions where water and local communities have been harmed. New trade agreements must be negotiated to give governments the right to protect water and the environment, maintain public management of water, and promote the human right to water. The political moment to have this debate has arrived.



The Global Water Crisis

The planet and its inhabitants – human and other – are facing a water crisis of unprecedented proportion. The UN reports that the demand for water will increase by 55 per cent over the next 15 years. By that time, global water resources will meet only 60 per cent of the world's demand. The water crisis could affect as many as 7 billion people by 2075.¹ A 2016 report from leading scientists warned that two-thirds of the global population currently lives with severe water scarcity for at least one month of every year and almost 2 billion people suffer severe water scarcity for at least half of every year.² Former UN Secretary General Ban Ki-moon gathered 500 scientists together who concluded that our global abuse of water has caused the planet to enter a “new geologic age” akin to the retreat of the glaciers over 11,000 years ago.

Until recent decades, water was considered a public resource and was thought to be so plentiful it was not even included in the 1948 UN Universal Declaration of Human Rights. But as the full extent of the crisis – ecological and human – is being understood and increasingly documented, a mighty contest has grown over who will control the planet's threatened water sources. Quietly, and with great precision, some private sector interests and corporations have been laying the groundwork for water to become a commodity to be traded and sold on the open market like oil and gas. They understand full well that in a world running out of clean water, whoever controls it will be both powerful and wealthy.

At an important UN conference held in Dublin in January 1992, water was declared an “Economic Good” for the first time. Since then, water has been promoted as such by various agencies of the United Nations; the World Water Council, an influential international water policy think tank that holds a major global water forum every three years; the World Bank, which promotes water privatization in the Global South; and the big water utilities and bottled water corporations. More recently,

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corporations in the energy, mining and agribusiness industries have identified the importance of water to their operations and have moved to secure supplies by contracting with local governments or actually buying water sources directly.

Free trade has become a crucial tool to help transnational corporations influence government policy in their favour. Recently, corporations have used trade and investment agreements to challenge public control of water and to bring water into the market system where it is subject to strict corporate-friendly trade rules. This report shows the ways in which free trade and investment agreements are promoting the commodification of the world's water and argues that if the 2010 UN resolution recognizing water as a human right is to be realized, water in all its forms must be removed from all such trade deals forever.

The Evolution of Trade

At one time, trade negotiations between countries were intended to take down tariff barriers to the trade in goods. If an industry sector in one country had a complaint about access or treatment in another country, it had to depend on its own government to state its case. But as corporations outgrew their countries of origin and became transnational, they sought a system that allowed them to move around the globe free of nation-state rules. As a result, free trade today is very different from its original intent. Governments everywhere craft trade agreements under the supervision of their corporate sectors in order to pave the way for companies' easy entrance to markets around the world.

Transnational corporations use the World Trade Organization and bilateral and regional agreements to challenge what they call non-tariff barriers – government regulations in finance, culture, intellectual property rights and public services that hamper their “right to profit.” They also use free trade as a means to get rid of export controls on domestic resources such as food, water, forests, energy, minerals and fish. Large corporations and investors use new powers to bypass their own governments and challenge nation states and their laws as equals.

Corporate-driven free trade and investment deals threaten the environment and water in a number of important ways. Corporations' very existence is based on the growth imperative, and that, in turn, leads to more fossil fuels, more logging, more manufacturing, more mining, more meat production, more commodity exports, more highways and trucks, more pipelines and more shipping. All of this impacts water.

A case in point: the North American Free Trade Agreement (NAFTA). In a report providing a 20-year assessment of the environmental impacts of NAFTA, a number of North American organizations including Red Mexicana de Acción Frente al Libre Comercio (a Mexican network of social and environmental justice groups), the Institute for Policy Studies in the United States, and the Sierra Clubs of both Canada and the U.S. sounded the alarm.

NAFTA has reduced the ability of governments to respond to environmental issues.

NAFTA facilitated the expansion of large-scale, export-oriented farming that relies heavily on fossil fuels, pesticides and genetically modified organisms, the groups said. Commodity trading exploded in those years, fuelled by the high degree of consolidation in the water-intensive meat and grain sectors. NAFTA-induced growth contributed to deforestation in Mexico and higher levels of water pollution and nitrogen runoff. Groundwater levels in some parts of northern Mexico where free trade zones are prevalent declined by as much as 50 per cent. The increase in genetically modified corn exports from the U.S. added large amounts of nitrogen, phosphorus and other chemicals into U.S. waterways as well.

Under NAFTA, Canada gave up control of its energy sector. The “proportionality clause” of NAFTA obligates Canada to maintain a fixed share of energy exports to the U.S. The more Canada exports, the more Canada is obliged to export. This has led to a dramatic increase in energy exports to the U.S., accelerating the depletion of Canada's conventional oil. In turn, this has led to exponential growth in the water-destructive tar sands and has facilitated the trade in environmentally dangerous fossil fuels. This NAFTA rule has compromised Canada's energy security because it has restricted Canada's legal capacity to regulate the extraction and trade in tar sands oil. It has also made it harder for Canada to protect water.

“These are not unfortunate side effects, but the inevitable result of a model of trade that is designed to protect the interests of corporations instead of the interests of communities and the environment,” say the report authors. The evidence documented in this report

demonstrates that NAFTA has reduced the ability of governments to respond to environmental issues while empowering multinational corporations to challenge environmental policy.³

Particularly hard hit have been Indigenous people. Millions of Indigenous people and peasants were displaced by the land changes in Mexico, many thrown off their land and small farms. Many others have suffered at the hands of global mining companies. The expansion of the tar sands and other forms of extreme energy in Canada has taken place on Indigenous territory with devastating impacts on local water and the health of the communities.

Even without being law, proposed trade agreements are causing governments to modify their regulations in a way that endangers the environment and water. For years, the Canadian government and the Canadian energy industry lobbied hard to stop Europe from downgrading its rating of Canadian tar sands oil under the Fuel Quality Directive, a key piece of European Union (EU) legislation that distinguishes between various kinds of fuel imports based on their CO₂ emissions at source.

In 2014, the EU responded to that pressure and dropped its plan to label tar sands oil as dirtier than other oils, which would have made it harder to import. EU officials, speaking on condition of anonymity, told the Canadian Broadcasting Corporation (CBC) that a desire not to imperil the Canada-EU Comprehensive Economic and Trade Agreement (CETA) was a factor in this decision. This cleared the way for Canada to export oil directly into Europe.⁴ Friends of the Earth Europe predicted that the decision would allow crude from Alberta's water-intensive tar sands unfettered access to Europe.⁵

Sure enough, before the 2015 downturn in oil prices, there was a surge in tar sands exports to Europe through the U.S. While American law prevents the export of its own crude, it has been re-exporting Canadian crude since 2014, reports the U.S. Energy Information Administration. Between 2014 and 2015, these exports to Europe grew 73 per cent. More than two-thirds of Europe's oil refineries have been upgraded to process tar sands crude.⁶

Alberta's tar sands oil is among the dirtiest on Earth. Because it is mined to remove the pure oil from the tarry substance called bitumen, tar sands oil produces far higher greenhouse gas emissions than conventional oil and destroys vast amounts of water in the process. Much of the bitumen is piped long distances in its unrefined state, which requires adding liquid chemicals such as benzene and toluene to move it through the pipes. Spills of this diluted bitumen have devastating impacts on watersheds and wildlife.

The world's growing water footprint has been directly linked to free trade.

Similarly the U.S.-EU Transatlantic Trade and Investment Partnership (TTIP) has also already caused environmental standards to be lowered, even though it is nowhere near ratification. In May 2015, the EU shelved plans to regulate 31 pesticides containing endocrine-disrupting chemicals after an aggressive lobby by European and American chemical companies. The American Chamber of Commerce and the U.S. Trade Mission to Europe threatened EU officials with a trade backlash if these chemicals were banned.⁷

The Canadian government is promoting a free trade agreement with China, but China has made it clear that Canada will have to build a pipeline to the West Coast if any agreement is to move forward. Chinese energy companies are increasing their investments in the tar sands and pipeline companies, and want access to tidewater for their bitumen. The Kinder Morgan Trans Mountain pipeline, which has received federal government approval, would carry heavy oil diluted with chemicals such as benzene and toluene over 1,309 pristine waterways and through five national parks.

Global trade hastens the depletion of the planet's water supplies

Water is already traded in the form of “virtual water” – the water used to produce everything from food commodities to computers. When rice, grain or cattle are exported from one country to another, so is the water that was used to produce them. While some argue that trading water through food should mean that water-rich countries share their bounty with drier countries, in fact, many wealthy nations of the Global North are saving their own water resources by importing the products of land-rich but water-poor countries in the Global South. As global trade has grown exponentially in recent decades, many communities have had their water diverted from local sustainable food production to export-oriented agribusiness corporations.

In fact, the world's growing water footprint is directly linked to free trade. In a 2012 study published by the National Academy of Sciences, world-renowned water

scientist Arjen Hoekstra and his team at the University of Twente in the Netherlands found that more than one-fifth of the world's water supplies go towards crops and commodities produced for export, placing immense pressure on freshwater supplies, often in areas where water governance and conservation policies are lacking.

Their report, based on international trade indicators, shows that patterns in international commerce create disparities in water use and burden water sources. Water supplies follow the flow of goods around the world. “Water consumption and pollution are directly linked to the global economy,” say the scientists.⁸

Importantly, over time, trade agreements themselves are being used to promote the commodification of water by including water as a “good,” a “service” and an “investment.”

Important World Trade Organization (WTO) Principles

Market Access

sets conditions and limits the barriers for the entry of listed goods and services into member states' markets.

Most Favoured Nation

says member states cannot discriminate against their trading partners. What one gets, all get.

National Treatment

prohibits discrimination between imported and domestically produced goods and services and prohibits governments from favouring local suppliers.



Water as a Good

The World Trade Organization (WTO) came into being on January 1, 1995 and replaced and adopted the rules of the General Agreement on Tariffs and Trade (GATT) that had provided rules for the trade in goods since 1948. One of the purposes of the GATT was to list items considered a tradable good and to set the rules for the trade of these goods across borders.

The harmonized tariff schedule used by all countries to classify direct types of goods includes a listing for water. GATT tariff item 22.01 lists: “waters, including natural or artificial mineral waters and aerated waters, not containing added sugar or other sweetening matter nor flavouring; ice and snow” as tradable goods subject to the rules of the WTO. An explanatory note states that the item covers “ordinary natural water of all kinds, (other than sea water).” Article XI of GATT – which was incorporated into the WTO – imposes clear constraints on government policy in regard to tradable goods.

Article XI says, “No party may adopt or maintain any prohibition or restriction on the exportation or sale for export of any good destined for the territory of another contracting party.” Naming water a tradable good in the WTO conformed to the growing trend at the UN and the World Bank to define water as an “economic good.” The same prohibition on restraining the trade in widgets would now apply to water.

Clearly, Article XI would apply to bottled water exports. As both the bottled water industry and the opposition to it grow, there are likely to be more disputes over its cross border trade. According to Transparency Market Research, the global annual market for water will be worth just under \$300 billion by 2020. In volume, annual sales will reach 465 billion litres in that same year.⁹ Governments trying to reduce local water consumption from bottled water manufacturing and export would clearly run afoul of Article XI. The GATT does allow for temporary export restrictions in times of critical shortages – a very hard test for most countries to pass – and its limited allowances for environmental concerns must pass a test of “necessity” which has proven to be difficult at the WTO.

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Free trade makes it difficult to stop bulk water exports

But the bigger question is what this provision means for other kinds of water. This includes water used to produce a product – be it a mineral or a food commodity – that is then exported, as well as exports of raw water, a practice picking up speed around the world.

Article XI was incorporated into NAFTA, and the Canada-U.S. Free Trade Agreement that preceded it, and caused a political firestorm in Canada. Living next to an increasingly thirsty neighbour to the south, over the last several decades Canadian business and political leaders have come up with a variety of commercial water export schemes. These were quickly rejected because of strong public resistance. But the recent prevalence of drought in the American south and west has kept the issue of Canadian water exports alive, promoted by a variety of think tanks and business lobbies. Even former Prime Minister Jean Chrétien mused in 2011 that Canadians should not be afraid of opening up this debate.

The Canadian government and trade proponents assured Canadians that water in its “natural state” – that is, in rivers and lakes – is not a good and therefore nothing in NAFTA could force a government to start exporting water. But how “natural” is water that is already being used to generate power, irrigate crops, support industry or provide water to homes and businesses? Clearly, the

minute any province commenced with commercial water exports, water would become a tradable good subject to the GATT Article XI prohibition on export controls. (In Canada, the federal and provincial governments share responsibility for water. Some experts believe that it is within the constitutional right of an individual province to allow commercial water exports. Others say the federal government would have to give its approval as well.)

“Once the tap is turned on, it stays on”

In a 1999 legal opinion, Canadian trade expert Steven Shrybman said that once the commercial export of water is started, it would be very difficult to stop it. He noted that under Article 315 of NAFTA, Canada is precluded from ever reducing “the proportion of total export shipments of the specific good (in this case water) made available to that party relative to total supply” and that all water in Canada, including from provinces other than the one that started the export process, might be affected.

In fact, because of the “national treatment” provision of NAFTA, one province could not open up commercial bulk water transfers to another province without opening up water to its NAFTA partners. This means, said Shrybman, the U.S. is entitled to a proportional share of Canada’s water resources in perpetuity. “Once the tap is turned on, it stays on,” he said, unless Canadian water is also rationed to Canadians.¹⁰

Various attempts to introduce export bans on Canada’s water, most recently in 2012, could be challenged under the WTO and NAFTA. While it is important that Canada banned bulk transfers of water, Shrybman reminds us that under international law, domestic rules must comply to a country’s international trade obligations, not the other way around. NAFTA rules trump domestic rules.

Free trade makes it harder to set environmental standards on imports

GATT rules would also make it very difficult for one country to ban or restrict either water imports, or the import of goods requiring water in their production over environmental or conservation concerns. Constitutional law expert Dr. Alix Gowlland Gualtieri with the UK/Swiss-based International Environmental Law Research Centre explains that the most favoured nation and national treatment provisions of GATT require equal treatment of a good, regardless of the country of origin or the conditions under which it was produced. As well, says Gualtieri, quotas or bans on the export of water for conservation purposes could be challenged as a form of protectionism.¹¹

As concerns about the global water crisis grow, the ability of the GATT/WTO rules to tie the hands of governments to protect water resources, or to set trade and import standards that protect the water resources of other countries, is clear and disturbing. Any domestic rules a government might adopt to protect the world’s dwindling water resources by setting environmental standards on the import of water or to protect water used in the production of imports could be challenged under the GATT/WTO rules as they exist.

People and their representative governments might want to limit food commodities imported from a country where big agribusiness is depleting local water sources, or they might want to restrict clothing or plastic toy imports whose production is destroying local water sources with toxic dyes and chemicals, or ban mineral imports from places where transnational mining companies are poisoning the local drinking water supplies. GATT/WTO rules make this very hard to do.

Defining water as a tradable good poses a clear and present danger to the health of the world’s threatened water sources. By defining water as a tradable good and then placing such onerous restrictions protecting the commercial trade in water and the trade in goods and commodities that use water, free trade agreements remove the democratic rights of people and their governments to establish the kind of standards and protections so desperately needed by the watersheds of the world and the people and other species that depend on them for life.

Water as a Service

In 2010, the United Nations General Assembly adopted a resolution recognizing the human rights to water and sanitation. Close to 2 billion people still have no access to clean water and 2.4 billion people are without access to sanitation.¹² Essential to ensuring the human right to water is maintaining water delivery and wastewater treatment as public services delivered on a not-for-profit basis.

The privatization of water services has been tried in many countries and discredited. Multiple studies show that private water utilities cut jobs and services, skirt pollution rules and raise water rates. In a February 2016 U.S. survey of the 500 largest American community water systems, Washington-based Food and Water Watch found that for-profit privately owned systems charge 58 per cent more than large publicly owned systems. The survey also showed that water systems are publicly owned and operated in the 10 most affordable cities for water of the 500 systems surveyed.¹³

Around the world, municipalities are rejecting water privatization. The Transnational Institute and Public Services International Research Unit have been following water privatizations globally, as well as the trend to reject this model of water delivery and return to a public system. In their March 2015 book, *Our Public Water Future, The Global Experience With Remunicipalisation*, they report that the growing trend of cities returning water services to public control has now spread to 37 countries, affecting 100 million people.

The groups document that between March 2000 and March 2015, 235 municipalities have remunicipalized their previously privatized water systems. Ninety-four cities in France alone, including Paris, which saved money for both its ratepayers and sustainable water programs, have brought their water services under public management.¹⁴

Free trade promotes water privatization

Modern trade and investment agreements include services and openly promote the commercialization and privatization of water services. NAFTA was the first regional trade agreement to include a services chapter. The General Agreement on Trade in Services (GATS) is a treaty of the WTO that came into effect January 1, 1995 to extend the multilateral trading system to the services sector of all WTO members. The Canada-EU Comprehensive Economic and Trade Agreement (CETA), a far-reaching deal between Canada and Europe, has a services chapter, as does the proposed Transatlantic Trade and Investment Partnership (TTIP) between the U.S. and the EU.

The Trans-Pacific Partnership (TPP) is a massive proposed trade and investment agreement thousands of pages long, originally involving 12 countries until President Donald Trump took the U.S. out of it. It also contains a services chapter. The Trade in Services Agreement (TiSA) is a project of 23 members of the WTO, including the U.S. and the EU, with a collective services market of 1.6 billion people and a combined GDP of more than \$50 trillion – two-thirds of the world's economy. It came into being over corporate concerns that the GATS process was moving at a glacial pace and was not aggressive enough in opening up the global trade in services.

These agreements aim to create new markets for global service corporations by pushing aside or restricting public monopolies and government regulations that might interfere with the corporate right to profit from those same services. All have a very narrow definition of public services and are strict about what can be deemed to be truly public and therefore, qualify for an exemption.

As the European Trade Union Confederation explains, the service must be in the exercise of government authority and not supplied in any substantial way on a commercial basis or in competition with private service suppliers. Since almost everywhere, government services exist alongside private competitors, this definition is of

little use in protecting much of what most people would consider to be a public service.¹⁵ The Transnational Institute says that public amenities such as health care, social services, education, postal, water and wastewater services are often financed in a mixed system and therefore do not fall under TiSA's narrow exclusion for governmental services. They "henceforth could be privatized at the drop of a hat."¹⁶

Governments cannot introduce new public services not listed as exemptions.

The new generation of trade deals are more dangerous

There are several ways in which these more recent regional service agreements are more aggressive – and dangerous – than the GATS/WTO.

First, there is a difference in the way a government chooses to exempt certain sectors. The GATS largely uses a "positive list" approach whereby countries offer up only those areas they want to liberalize for trading purposes. NAFTA introduced for the first time a "negative list" approach to its trade in services chapter, which means that all services are on the trade table unless specifically listed for exemption. It is often called the "list it or lose it" approach and is clearly intended to cover more services from the beginning. Governments are pressured by their corporate sectors and one another to limit the exemptions they list. It is also easy to forget to list all aspects of a service intended for exemption. CETA, TTIP and the TPP all adopted the negative list.

Leaked drafts of TiSA show that this deal has a mixture of negative and positive list approaches but the services covered will be greatly expanded from the GATS. The positive list approach will apply to market access, but participating governments will have to liberalize ser-

vices in "essentially all modes and sectors" and, unless specifically exempted, all services will be subject to national treatment. This means that all foreign services providers (corporations) and their products will be able to bid for domestic service contracts and governments will not be able to favour their own service sectors in the agreed upon areas.

As well, CETA, TTIP, the TPP and likely TiSA include "ratchet" and "standstill" clauses that promote the privatization of public services. Standstill clauses lock governments into current levels of liberalization. If a municipality has a private water service when the deal is signed, that is where it must remain. "Ratchet" means that any change in status of a service can only go in a direction that is compatible with the liberalizing goals of the trade deal. If a municipality had a public water service protected by an exemption, but decides to try a public-private partnership, it cannot change its mind and go back to a publicly managed system. As well, governments cannot introduce new public services not listed as exemptions.

TiSA would lock in privatization of key water services, such as wastewater services, says the Canadian Centre for Policy Alternatives. In a 2014 study, CCPA researcher Scott Sinclair and Hadrian Mertins-Kirkwood from Carleton University's Institute of Political Economy, said that once any government makes a market access commitment, TiSA would make it difficult, or even impossible, for future governments at all levels to restore public services, including those instances where private service delivery has failed. While TiSA (same with CETA and the TTIP) would not force governments to privatize public services, its standstill and ratchet clauses would lock in existing and future privatization of public services because it would freeze current levels of privatization and commercialization, say the authors.¹⁷

Further, CETA and the TTIP are the first regional free trade agreements to apply to subnational government procurement, giving foreign service corporations the right to compete for state, provincial and municipal procurement and public service contracts – the mother lode in terms of total government spending. Local governments will be limited in their ability to favour local companies and local economic development, and will be

substantially restricted from using public spending to achieve other goals such as encouraging local employment or addressing climate change.

Early leaked documents also showed that there was a push for TiSA, unlike GATS, to apply to procurement, opening up a whole host of government service contracts to foreign service competitors. “Water for human use” was exempted in GATS, but the EU, while promising to protect European water collection, purification, distribution and management services in TiSA, was promoting the inclusion of sewage, refuse disposal, and sanitation – all areas of great interest to the major European water corporations that have lucrative private operations in these sectors in the Global South.¹⁸ More recent leaks indicate that the opposition to including procurement in TiSA may have been successful with the parties open to dropping it.

All the new generation of trade and service agreements also have provisions openly promoting deregulation – a dangerous trend in a world running out of clean water. Both the TPP and TiSA introduce a form of “necessity test” requiring governments to prove to their trade department or a dispute panel that planned standards are no more burdensome than necessary. CETA introduces “regulatory cooperation” that commits the parties to a process whereby any differences in regulations – including environmental rules – are subject to scrutiny by corporate lobbyists and put under closed-door pressure to be modified.

TTIP goes so far as to institutionalize the right of corporate lobbyists to vet proposed public interest regulations. The American-based Center for International Environmental Law (CIEL) says that large chemical and manufacturing corporations on both sides of the Atlantic have been the driving force behind the regulatory cooperation provisions in the TTIP. Regulatory cooperation is intended to reduce the cost of doing business by minimizing regulation, and defaulting domestic rules to international rules set during trade negotiations with the “significant involvement” of the regulated industries in question.¹⁹

Governments considering new regulations or changes to current regulations must inform both partner governments of these changes (CETA, TTIP) and even foreign service corporations (TiSA) which, in the name of “transparency,” will have the right to challenge proposed regulations for being “more burdensome than necessary.”²⁰

Finally, most of the new generation of free trade agreements include something not yet adopted by the GATS/WTO: investor-state rights for corporations and private investors. This might be the biggest threat of all when people and their governments try to protect watersheds and the human right to water.



“Filterhalle Wasserwerk Am Staad” by C.Koennecke via Flickr (modified). CC by-sa 4.0

Water as an Investment

Investor-State Dispute Settlements (ISDS) grant private investors from one country the right to sue the government of another country if it introduces new laws, regulations or practices – be they environmental, health or human rights – that cause the foreign investor to lose money. Foreign investors gain a legal process outside of a country's own courts and closed to its domestic companies. Originally used to protect private companies from wealthy countries against the threat of nationalization in poorer countries, ISDS has dramatically expanded in recent decades. ISDS essentially privatizes the dispute settlement system and is profoundly undemocratic.

NAFTA was the first trade agreement among “developed” countries to include ISDS and, as a result, Canada is now one of the most ISDS sued countries in the world. Cases can come before a three-person binding private arbitration panel, usually made up of highly paid trade lawyers, instead of a country's own courts. A country's domestic companies do not have access to this special treatment and decisions are binding.

NAFTA cases sound the alarm

Of the 80 known NAFTA investor-state claims, 37 have been against Canada, 22 have targeted Mexico, and 21 have targeted the U.S. The U.S. government has never lost a NAFTA investor-state case or paid any compensation to Canadian or Mexican companies, whereas Canada and Mexico have each paid American corporations more than \$200 million in 14 cases they have lost or settled. This is evidence that even though trade agreements appear to treat all parties equally, the more powerful are usually more immune to trade challenges.²¹

Foreign investors are now seeking more than \$2.6 billion in new cases from the Canadian government. Even defending cases that governments win is expensive. Canada has spent over \$65 million defending itself from NAFTA challenges to date. Importantly, reports the Canadian Centre for Policy Alternatives, almost two-thirds of claims against Canada involve challenges to environ-

mental protection or resource management that allegedly interfere with the profit of American corporations.

A number of cases have targeted water protection laws, such as bans on chemicals and water-destructive energy operations. Mexico had to pay American waste management company Metalclad more than \$15 million when, in 1997, the local government refused to let the company continue dumping toxic waste after the government found out the company had improperly dumped over 20,000 tons of hazardous waste, contaminating the surrounding water sources.

Ethyl, a U.S. chemical corporation, successfully challenged a Canadian ban on imports of its gasoline, which contained MMT, an additive that is a suspected neurotoxin. The Canadian government repealed the ban in 1998 and paid the company \$13 million for its loss of revenue. S.D. Myers, a U.S. waste disposal firm, challenged a similar ban on the export of toxic PCB waste. In 2000, Canada paid the company over \$8 million.

In 2006, Quebec banned 2,4-D, a pesticide that harms groundwater and has been shown to be toxic to mammals and aquatic life. In 2011, the Quebec government was forced to publicly acknowledge that the chemical does not pose an “unacceptable risk” to human health after chemical giant Dow Agro Sciences threatened Canada with a \$2 million NAFTA challenge.

In 2013, Lone Pine, a Canadian energy company, sued the Canadian government through its American affiliate for \$250 million CDN because Quebec introduced a temporary moratorium on all fracking activities under the St. Lawrence River until further studies are completed. Environmentalists and local communities were concerned that fracking exploration would threaten the fragile ecosystem of the St. Lawrence. It is important to note that this challenge involves a domestic company using a foreign subsidiary to sue its own government, a practice likely to grow with an increase in investor-state agreements.

Delaware-based Bilcon Construction is claiming over \$300 million CDN in damages from the Canadian government after winning a 2015 NAFTA challenge when an environmental assessment panel rejected the company's plan to build a quarry and marine terminal in an environmentally sensitive area of Nova Scotia to ship basalt aggregate through the Bay of Fundy – site of the highest tides in the world. The Canadian government is contesting this ruling, saying the NAFTA panel overstepped its mandate.

The environmental non-profit legal team at Ecojustice fighting the NAFTA ruling on behalf of several environmental groups says this case represents the worst that can come out of ISDS rules. It shows that governments now have to pay huge sums of money for an alleged breach of their domestic environmental laws not proven in their own courts. "If every negative environmental assessment risks hundreds of millions of dollars under an ISDS system run amok, how many environmental assessments will governments allow to be negative, and what does that mean for the future of environmental protection?" ask the Ecojustice lawyers.²²

ISDS thwarts alternatives to the water-damaging tar sands

NAFTA is also shaping North American energy policy. In a 2007 study, University of Toronto law professors Joseph Cumming and Robert Froehlich argued that U.S.-owned oil companies operating in the tar sands could sue Canada under NAFTA for hundreds of millions of dollars in compensation for lost profits should restrictions be placed on their profligate and polluting water use. They also warned that the threat of such lawsuits alone could prevent the Alberta government from taking the steps necessary to protect its water.²³

This warning is not theoretical. Many new laws or changes to laws are not enacted because of the "chill effect" of free trade. The Canadian government adopted a new policy soon after NAFTA was ratified whereby all new laws and any changes to existing laws have to be vetted by trade experts to ensure they are not challengeable under the deal's ISDS rules.

Foreign investors are now seeking over \$2.6 billion from the Canadian government through investor state claims under NAFTA and other trade agreements.

It was as a result of intense pressure of the energy lobby in Canada that the former government of Stephen Harper gutted the country's three most important water-protection laws: the Fisheries Act, the Canadian Environmental Assessment Act and the Navigable Waters Protection Act. Currently, 99 per cent of all lakes and rivers in Canada are unprotected by federal law against any pipeline carrying tar sands crude on, under or beside them. Should the current Trudeau government fulfil its promise to reinstate these laws, it could face ISDS challenges from American companies (under NAFTA) and Chinese companies (under the Foreign Investment Promotion and Protection Agreement between Canada and China) currently operating in the Alberta oil patch.

And although Canadian pipeline giant TransCanada suspended its \$15 billion NAFTA challenge in February 2017 for refusal of the Keystone XL pipeline, the suspension is temporary and the company reserves its right to re-invoke it. TransCanada had claimed that former U.S. President Barack Obama violated the agreement when he vetoed the pipeline. The company, invited by President Donald Trump, resubmitted its application to build the pipeline. Keystone would pass through the heart of six American states as well as indigenous lands and imperil the ground and surface water of both agricultural lands and wilderness.

The rights of corporate investors grow

NAFTA is not the only place ISDS is found. In fact, according to the United Nations Conference on Trade and Development (UNCTAD), there are now over 3,500 ISDS agreements (mostly bilateral) in the world – with one concluded every other week. Corporations have used ISDS to launch challenges against government measures 767 times as of January 1, 2017. A record 74 were filed in 2015 and another 62 in 2016. Corporations from rich countries have filed the majority of ISDS cases.²⁴

Many disputes are dealt with under the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) or tribunals of the International Chamber of Commerce and several others. Like NAFTA panels, lawsuits brought to these bodies are decided by highly paid private arbitrators, not by independent judges. Private international arbitration has been used to challenge the right of governments to require that cigarettes be sold in plain packages and the phase out nuclear power, to name just two. As with NAFTA, many of these challenges dispute the rights of governments to protect water from environmental harm and people from human rights abuses by foreign transnational corporations.

El Salvador is the water-scarcest county in Latin America. Meera Karunanathan, director of the Ottawa-based Blue Planet Project, reports that 98 per cent of El Salvador's water is contaminated, much of it from metal mining. Australian-based OceanaGold (which purchased Canada's Pacific Rim Mining) sued El Salvador for over \$300 million because the government refused to issue a permit to the company to build a new mine and placed a moratorium on mining. The government enacted the moratorium after a strong public outcry over water contamination and international condemnation of the murder of four anti-mining community activists. While the ICSID finally decided the case in El Salvador's favour, the government still had to pay \$24 million to defend its right to protect its water and is left with the cleanup of the contaminated sites.

Mining Watch Canada reminds us that the ICSID panels have no obligation to take into consideration matters related to the water and land that local communities

There are now over 3,500 ISDS agreements (mostly bilateral) in the world.

rely on, threats and violence that have arisen from the conflict, or the sovereign right of people to decide what is best for their well-being and environment. The El Salvador case was denied on the narrowly focused technicalities of the country's mining laws and the inability of the company to show land ownership of the area of its mining concession.

Canadian gold mining company Gabriel Resources is suing the Romanian government for an estimated \$4 billion after massive public opposition and lack of compliance with the country's environmental laws caused the government to halt production of the company's operation in the town of Rosia Montana. The mine would have used 240,000 tons of toxic cyanide, leaving behind a waste lake of cyanide-contaminated water the size of 420 football fields. Gabriel Resources' legal costs are backed by a Wall Street hedge fund that will take a part of any monetary award. The only way to avoid paying out this exorbitant amount of money will be to allow the mine to open.²⁵

Ben Beachy, a trade expert with Sierra Club US, says that big mining companies love free trade deals. To date, he reports, mining corporations have used ISDS tribunals to sue over 40 governments more than 100 times. In two-thirds of the concluded cases, governments have been ordered to pay mining companies, or have settled with them, which can either mean handing over payment to the companies or weakening domestic laws. In the 44 publicly available mining cases pending, mining corporations are demanding more than \$53 billion from governments.

Beachy is particularly concerned about the impact of these decisions on Indigenous people. Many mining operations around the world are located in what should be

Water & Investor-State Dispute Settlements

Trade agreements commonly include investor-state dispute settlement (ISDS) provisions, which grant investors the right to sue foreign governments if they introduce new laws or regulations – be they environmental, health or human rights – that cause the investor to lose money.

All figures in Canadian Dollars.

Canada: paid \$131 million to American pulp and paper giant AbitibiBowater for water rights.

El Salvador: paid over \$24 million in legal costs to defend against a lawsuit by an Australian company after rejecting a mining permit over water concerns.

Panama: being sued for \$268 million by an American company for refusing to extend mining rights on a newly created reserve.

Colombia: being sued for \$16.5 billion by a Canadian company over a cancelled mining exploration permit.

Bolivia: being sued by a Canadian mining company for \$386 million.

Argentina: ordered to pay the French water utility giant Suez \$405 million.

Estonia: facing a \$140 million lawsuit filed by UK-based United Utilities over a cap on water rate increases.

Slovakia: being sued for \$100 million after refusing to allow a bulk water export pipeline to a factory in Poland.

Romania: being sued for \$4 billion by a Canadian gold mining company over a lake of cyanide-contaminated water.

protected First Nations lands. In 2016, a private tribunal of three lawyers ordered Ecuador to pay over \$24 million to Canadian mining company Copper Mesa when the government terminated its mine project in the face of intense local opposition. The tribunal ruled in favour of the company while acknowledging that Copper Mesa had used armed men to fire guns and spray mace at local indigenous populations, “not as an accidental or isolated incident, but as part of premeditated, disguised and well-funded plan to take the law into its own hands.”

Another Canadian mine, South American Silver, is suing Bolivia for \$386 million for revoking a silver mine project that was strongly opposed by indigenous communities. In a submission to the tribunal, Beachy reports, the corporation said that the broad rights it enjoys under ISDS cannot be degraded “in order to uphold the putative rights of indigenous communities.”²⁶

A December 2016 report by Friends of the Earth International, Transnational Institute and several other organizations has found that corporations (mostly European) have launched 50 ISDS lawsuits worth at least \$31 billion against 11 of the 16 countries of the Asian region, including China, currently negotiating a new trade agreement. The Regional Comprehensive Economic Partnership (RCEP) will include an ISDS provision and the groups warn that compensation claims against public spending and government regulation will likely skyrocket in the region if it is adopted because it would grant corporations an exclusive right to bypass domestic legal systems.²⁷

Corporations are winning everywhere. A 2015 report by UNCTAD found that 60 per cent of decided cases favoured the private investor and just 40 per cent favoured governments, showing that corporations are steadily and successfully challenging government regulations and public control.²⁸ The bigger the corporation, the bigger the settlement it gets, reports Osgoode Hall trade expert Gus Van Harten. In a January 2016 legal brief, Van Harten and private practice lawyer Pavel Malysheuski showed that the main global beneficiaries of ISDS are overwhelmingly companies with more than \$1 billion in annual revenue, with the biggest wins going to companies with more than \$10 billion.²⁹

Water corporations use free trade to challenge public water services

The silent rise of a powerful international investment regime has ensnared hundreds of countries and put corporate profits before human rights and the environment. This “investment arbitration boom” is costing taxpayers billions of dollars and preventing legislation in the public interest. And it is directly challenging the right of governments to protect water as a public service and the right of their people to affordable water.

In her chapter of the book *Our Public Water Future, The Global Experience with Remunicipalisation*, Transnational Institute’s Satoko Kishimoto shows that national commercial law already protects companies when a municipality breaks a contract and remunicipalizes its water services. But, she notes, transnational water companies want the added corporate protection of ISDS, a tool they use to thwart the will of local communities. She outlines in great detail a number of cases where investors have used these new powers to fight public control of water.

In April 2015, the World Bank ordered Argentina to pay the utility giant Suez \$405 million after that country took its water back into public hands. Argentina had plenty of evidence that the company had not fulfilled its contract and had dramatically increased water tariffs, leaving millions of its citizens unable to pay their water bills. This was only one of several disputes the country lost with other foreign water corporations over private water contracts.

In April 2015, the World Bank ordered Argentina to pay the utility giant Suez \$405 million after that country took its water back into public hands.

Estonia is currently facing a \$140 million investor lawsuit because public authorities refused to allow United Utilities, the UK company that runs Estonia’s water services, to increase water rates. The government passed a law in 2010 giving it the authority to cap the company’s profits at what it determines to be a “reasonable level.” The company is seeking all the profit it would lose over the lifetime of its contract up to 2020.

Kishimoto also demonstrates that the threat alone of an ISDS case before a secretive and industry-biased international tribunal can be enough to convince a local government to stick with private water despite poor performance.

She gives the example of Bulgaria’s capital, Sofia, whose residents suffered from illegal water price increases since the city signed a contract with a private company whose major shareholder is French giant Veolia. In 2011, the city disconnected 1,000 households from the water supply and prosecuted 5,000 more for non-payment of water bills at the direction of the company. Citizens had collected enough signatures to hold a referendum on remunicipalization of their water services, but the city didn’t allow it, fearing a threat that the company would sue Bulgaria under the Vienna International Arbitral Centre.

The right to regulate water is not protected in the new deals

Trade proponents claim that they have protected the “right to regulate” in agreements such as CETA, TTIP and the TPP. They assure us they have protected water by exempting it from these deals. They also claim they have protected the right to maintain public water services and even return to public management if a municipality chooses to do so after an attempted privatization. However, as Scott Sinclair of the Canadian Centre for Policy Alternatives reminds us, the right to regulate must be done in a manner compatible with governments’ obligations under these deals, including their ISDS rules.

The TPP would greatly limit the right of local authorities to make key decisions about public management of water services.

Under enormous public pressure, Canada and the European Union did exempt drinking water (collection, purification and distribution) in CETA, but only for market access and national treatment, not for investment. These reservations do give governments the right to restore public management of water where private systems have failed. But as Pia Eberhardt of Corporate Europe Observatory points out, there is no exception in CETA that shields public services from investor-state claims by foreign companies. CETA clearly states if a party permits the commercial use of a specific water source, it shall do so in a manner consistent with the deal. Any municipality wanting to remunicipalize its water services will have to be prepared to pay dearly for this “right.”

And CETA does not protect sanitation services. Only Germany exempted waste management services, including sewage and sanitation, and only for market access.

For every other country, privatized wastewater services cannot be remunicipalized and any municipality that tries will run afoul of the market access, national treatment *and* investment provisions of the deal.

Further, governments would have their hands tied in introducing new rules that appear unfriendly to business, such as across-the-board restrictions on water privatization. They would be permitted to require municipalities investing in new water infrastructure to contract only to a public-private partnership (P3) and not permit them to choose a public option. The former Harper government of Canada required a municipality needing funding to upgrade its water or build new infrastructure to adopt a P3 model in order to receive federal government funds. This would be allowed.

But if a government were introduce new rules to allow *only* the public management of water, the regulatory cooperation mechanisms would give foreign private water utilities the right to voice a negative opinion and the ISDS provision would give them the right to challenge this initiative and force it to survive the “necessity test” through a dispute panel.

Municipalities around the world are picking up on a Canadian initiative and becoming Blue Communities, where they undertake to recognize water as a human right, a public trust not to be privatized, and promote public tap water over bottled water. Could governments be sued for pre-empting P3s in this way? It’s very likely they could.

It is important to remember that the world’s two biggest water utilities – Suez Environment and Veolia – are headquartered in France and big supporters of these new service agreements.

A February 2016 “expert paper” written by New Zealand law professor Jane Kelsey says the binding and enforceable rules of the Trans-Pacific Partnership go further than any previous agreement and will impose new constraints on local governments’ authority and autonomy to regulate and make decisions, including about water services. The ISDS provisions of the TPP would greatly limit the right of local authorities to make key decisions about public management. If a municipality decides to

try a P3, it cannot favour a domestic supplier and once privatized, foreign investors will be able to challenge any attempt to remunicipalize the service and even any attempt by local governments to block water rate hikes.³⁰

While it appears that TiSA will not include an ISDS provision (apparently the EU, stung by the backlash against ISDS in CETA and TTIP, does not support including ISDS in this deal), the Australian Institute of International Affairs warns there is a backdoor for investor-state claims. A summer 2016 Wikileaks release of the latest round of these secretive talks shows that the EU has proposed a dispute resolution system that allows a complainant to challenge government regulation under either the WTO or another trade agreement it is party to. The EU has confirmed this proposal and is seeking public comments.

“This means that even if the TiSA dispute resolution system nominally bars foreign investors from bringing disputes against governments, a private investor may choose to initiate a dispute for any breach of TiSA rules that affects their foreign investment rights under a separate applicable bilateral investment treaty. In other words, foreign investors can still use the ad hoc international tribunals of investment arbitrators to claim that such breaches violated their ‘legitimate expectations of fair and equitable treatment’ – the common formula to initiate investor-state disputes.”³¹

ISDS rules could be used to protect land and water grab investors

Transnational corporations could one day use their new investor-state powers to claim the actual water resources of countries in which they operate.

Dr Howard Mann and Carin Smaller of Canada’s International Institute for Sustainable Development write that ISDS gives foreign investors new rights to land and water as they become increasingly commodified and subject to global trade rules. The growth in investments in actual land and water, not just crop purchases, increases the potential to shift rights from domestic to foreign players, providing “hard rights” for foreign investors, including “potentially disastrous” compensation claims.³² Jane Kelsey agrees and says that the TPP

Private investors own an area of land in Africa three times the size of Great Britain.

will give foreign investors in land and water grabs rights closed to domestic investors, because only foreign investors can use the power of ISDS challenges.

There is a dangerous precedent. In 2010, the Canadian government paid North American pulp and paper giant AbitibiBowater (now Resolute Forest Products) \$131 million after it successfully used NAFTA to claim compensation for the “water and timber rights” it left behind when it abandoned its 100-year-old operation in Newfoundland, leaving the workers with unpaid pensions. The provincial government reclaimed its assets after the company’s departure, saying the company only had the right to use these resources as long as it was providing jobs. This is a particularly disturbing precedent, because it gives a foreign investor leave to claim compensation for the water it had a right to use while operating in another jurisdiction.

Think of what this could mean for transnational mining companies that require water for their operations in foreign countries. Or what it means for big agribusiness that uses – and removes from the local watershed – vast amounts of water for the production of commodities for export in a variety of countries. Private investors own an area of land in Africa three times the size of Great Britain. Imagine being able to claim private ownership of the water halfway around the world. Imagine what this means for the rights of local communities to clean water and the UN promise that water is a human right.

In June 2015, 10 UN rapporteurs on various aspects of human rights issued a statement drawing attention to “the potential detrimental impact” that free trade agreements such as CETA and the TPP may have on the enjoyment of human rights as enshrined in legally binding UN instruments. “Our concerns,” said the experts “relate to the right to life, food, water and sanitation,

health, housing, education, science and culture, improved labour standards, an independent judiciary, a clean environment and the right not to be subjected to forced resettlement.”

The experts noted that investor-state rules provide protection for investors, but not for states or for their populations. In looking at the history of ISDS settlements, the UN human rights experts concluded that “the regulatory function of many States and their ability to legislate in the public interest have been put at risk.”³³

The travesty of these trade agreements that favour the investment “rights” of global corporations is that they have enforcement mechanisms unknown to all other international agreements and treaties. From international labour standards and the prohibition against torture, to the UN recognition of the human right to water, all other such agreements are voluntary. Even the 2015 Paris climate accord has no mechanism to enforce its application. Where an international environmental or human rights agreement comes up against a trade agreement with an investor-state mechanism, the rules of the latter are enforceable and superior.

Simon Terry, executive director for the Sustainability Council of New Zealand, said, “The environment, including water protection, is a significant casualty under the TPP. There is a gross asymmetry in the rights and means accorded organizations that would seek to protect the commons for the public good, and rights and means accorded foreign investors to protect private wealth. Adopting the lens of the foreign investor when making broad governance changes through the TPP has sidelined the opportunity to properly integrate management of the economy with management of other domains – such as the environment.”³⁴

The Seattle to Brussels Network, made up of many development and human rights groups, research institutes and labour unions, says that today’s international investment regime is part of a highly enforceable “architecture of impunity” for transnational corporations (TNCs) and does nothing to protect the rights of people affected by their behaviour. “There are no binding obligations for TNCs on human or labour rights as well as environmental protection, and affected individuals and communities have no recourse to international justice when TNCs

violate their rights. Internationally, the regulation of TNCs is limited to self-regulation in the form of voluntary codes of conduct, and essentially non-enforceable recommendations by the international community...

“As a result, we are faced with an appalling regulatory asymmetry where TNCs receive supreme protection through international ‘hard law’ via the powerful ISDS enforcement mechanism, while human rights and the environment are only protected through non-enforceable ‘soft law.’”³⁵

Unfortunately, blindly following a “market knows best” pro free trade ideology, the Canadian government and the European Commission are currently promoting the creation of a permanent International Multilateral Investment Court, which would forever lock in ISDS. To silence critics, they introduced an Investment Court System into CETA that they claimed improved the controversial aspects of the existing ISDS clause, which they now want to apply more widely. The court would have full time, judicially qualified members appointed by States, not corporations. It would be efficient, transparent and impartial and would serve to weed out frivolous claims. Proponents claim that these improvements would make the court the “gold standard” for progressive trade dispute settlement and are promoting it with many countries.

While there are some procedural improvements with the proposed court, it continues to be the exact wrong model moving forward if we are to protect the planet’s water and the human right to water. It would legitimize the notion that foreign investors have special and separate rights unavailable to domestic investors and would still allow them to bypass a country’s domestic courts. Only private investors and corporations would have the right to take a dispute to this court. Local communities and human rights and environmental groups experiencing violations by a foreign corporation would have no similar access to this court.

And this court would do nothing to right the imbalance between the “hard law” of free trade and ISDS that protects corporations – in fact it would deepen this bias – and the “soft law” currently surrounding international human, labour and environmental rights.

Trade that Protects Water and People

Water must be removed from trade agreements

Given the threat to water of existing and proposed trade and investment agreements, it is urgent to remove all references to water as a good, service or investment in all present and future treaties. Water is not like anything else on Earth. There is no substitute for it – people and the planet cannot survive without it. Water must not be considered a commodity in any treaty between governments, and corporations should have no right to challenge domestic or international protections of water.

Water in any form should be struck from the list of harmonized tariffs, or else the GATT rules rewritten to exclude commodified types of water in any form. Water must not be considered a tradable good in any current or future trade or investment agreement. As well, the GATT prohibition on establishing environmental screens on imports and exports of water, or of commodities and other tradable goods that contain water, must be eliminated.

ISDS provisions must be dropped from all current and future trade and investment agreements. Foreign investors must return to using the domestic courts of the countries in which they are operating and with whom they have a dispute. Canada and Europe should abandon the dangerous move to set up a permanent investor-rights court. Trade agreements must make it clear that all governments have the right to have and create regulations and laws that protect the environment and natural resources such as watersheds. Regulatory cooperation provisions must be dropped or amended so that corporations do not have a seat at the trade table in deciding environmental and human rights standards.

All trade and services agreements must clearly recognize the right of governments to have and maintain essential public services such as water and sanitation and to return these services to public management after a failed privatization experiment. This will be much easier to do once the ISDS provisions of trade deals are gone. As well, the ratchet and standstill provisions that lock in water privatization must be removed from all trade agreements.

Water must not be considered a tradable good in any current or future trade or investment agreement.

Source water can be protected in trade agreements

How could trade negotiations take into account the effect of trade agreements on water? Arjen Hoekstra, an expert on virtual water, says officials should ask (and have to answer) how much water was consumed to make a product in the different stages of its supply chain; how much water was polluted and with what type of pollution; whether the water consumption took place in areas where water is scarce or abundant; whether downstream users or the ecosystem were affected by the water consumption; and whether the water consumed could have been used for an alternative purpose with a higher social benefit.

Hoekstra says that two cotton shirts that may look identical may have had totally different water footprints depending on where the cotton was produced. For example, cotton from Uzbekistan and Pakistan can be directly associated with the desiccation of the Aral Sea and the pollution of the Indus River.

As well, because water is usually given away to export-oriented agribusiness and often even subsidized by governments, water is not considered a factor of importance in the establishment of production and trade patterns. This allows water-intensive crops to be exported on a large-scale from areas where water is scarce and overexploited, says Hoekstra.

Under the “non-discrimination” principles of most favoured nation and national treatment in current trade

agreements, however, the consideration of the origin of a product and the possible negative impact it has on local water supplies is not permitted. Furthermore, because there are no internationally binding agreements on the sustainable use of water in the production of goods and services, trade disputes with respect to freshwater protection are settled by the WTO under rules that allow domestic environmental laws to be taken into account, but are limited and have been found ineffective in disputes.

Governments should have the right to ban products that harm water in their own countries. “Fair international trade rules should include a provision that enables consumers, through their governments, to raise trade barriers against products that are considered unsustainable... or are responsible for harmful effects on water systems and indirectly on the ecosystems of communities that depend on these water systems,” Hoekstra writes in a paper for the World Trade Organization.

This way, one country could favour imports of a product from another that can guarantee that the product’s water footprint is not located in catchments where environmental flow requirements are violated, or where ambient water quality standards are not met. Hoekstra also recommends an international water label for water-intensive products that would indicate whether the product meets a certain set of sustainability criteria.³⁶

A combination of domestic bans or restrictions on water takings for export in water-scarce areas; establishing licence fees for the sustainable domestic takings of raw water; a system to ban imports that harm the ecosystems and watersheds of the country of origin; and removing water as a tradable good, service or investment from all trade and investment treaties would provide the framework to protect water in international trade.



“Munich River” by Diego Cambiaso via Flickr (modified). CC by-sa 2.0

The Political Moment

The purpose and rules of trade have profoundly changed since the post war Bretton Woods international institutions were established to rebuild a shattered world economy and promote international economic cooperation. Those of us critical of the way these deals have evolved are criticized as being “anti-trade,” which is an easy and unfair way to dismiss our concerns. Over the decades, trade and investment agreements have come to be driven by transnational corporations and industry lobbies whose interests they serve above all.

And the process has become even more secretive. Canadians and Europeans didn’t learn about the contents of CETA until it was signed in principle by the Harper government in October 2013 (although there were some controlled “briefings” by government officials), and TiSA is still being negotiated almost entirely in secret. Anything we learn about these deals ahead of time comes from leaks. If they are so good for us, why are they negotiated behind closed doors?

There is a powerful movement growing around the world to reassess the purpose and goals of trade. Yes, people, industry and governments will continue to trade across borders. Yes, a hungry world needs to trade food. Yes, people and nations want to be able to share their bounty with the world.

But what would trade agreements look like if they promoted a more sustainable model of food production, one based on fewer chemicals, better soil protection, mixed farms that allow the land and water to heal, and respect for farmers’ rights? What would trade agreements look like if they promoted alternative, more sustainable sources of energy such as wind, solar, thermal, tidal and energy-efficient retrofitting? Jobs in these energy sectors are more plentiful and safer.

What would trade agreements look like if they had to take into account their water and environmental footprints at home and in other countries? What would they look like if, instead of giving preferential treatment to global corporations, they established binding hu-

man rights and environmental obligations on corporations and placed capital controls on runaway financial speculation like the kind that caused the 2008 economic crash? What would they do for the three-quarters of the world’s working age population that is in the “precarious” workforce, with low pay, no security and no pensions, if trade agreements adopted the core labour rights of the International Labour Organization? What would they look like if they took into account the free, prior and informed consent of Indigenous peoples now enshrined in the UN Universal Declaration on the Rights of Indigenous Peoples?

One thing is certain: the backlash against the ISDS provisions of the new generation of trade and investment agreements is growing and not just among civil society. Many countries, including South Africa, Bolivia, Brazil, India, Malaysia and Australia, have either rejected ISDS outright or have expressed serious reservations about it. Anger about the way NAFTA has hollowed out Middle America played a key role in the U.S. 2016 presidential elections and now NAFTA is back on the negotiating table!

More than 3.5 million Europeans signed a petition against CETA and TTIP and the privileges their ISDS provisions give to global corporations. Reactions in the European Parliament against the ISDS provisions of CETA almost doomed it at that stage and opposition at the national level could still defeat it. The fact that TTIP still contains an ISDS clause means it is likely dead. And international public opposition to the ISDS provision of the TPP as well as many other aspects of that agreement doomed it in the U.S. long before President Trump refused to sign it.

The world is ready for a movement to ban all forms of ISDS in trade agreements and reassess their current structures altogether. The growth-at-all-cost imperative is not sustainable and neither are the trade and investment agreements fuelling it. We can find a better way to trade.

Now is also the time to adopt a binding treaty on transnational corporations and human rights, a campaign spearheaded by Friends of the Earth International and supported by hundreds of organizations around the world. Many countries of the Global South support such a treaty, while most European and OECD countries, as well as big business lobbies, oppose it. The UN Human Rights Council has adopted the UN's Guiding Principles on Business and Human Rights. However, these guidelines are entirely voluntary and of little use to communities whose water has been destroyed by foreign mining and oil giants. The Global Movement For a Binding Treaty is gaining strength at the UN and elsewhere. Such a treaty would serve as a strong counter balance to the power transnational corporations have been given by free trade.³⁷

We find ourselves at a very important moment. Not in years has the political climate been so right for this discussion. Deep criticism of economic globalization and free trade is coming from all across the political spectrum. NAFTA's hollowing out of jobs and communities resulted in a passionate condemnation of the deal from left wing Democratic candidate Bernie Sanders and right wing (now President) Donald Trump. The latter

has refused to endorse the TPP, leading many to say that it is dead although a number of member countries are trying to revive it. NAFTA is in for a major overhaul if it is not entirely gutted. Opposition in Europe and Asia to CETA, TTIP and the TPP has been – and continues to be – fierce. Opposition to TiSA is growing as we learn more about it.

There has never been a better time for a debate about the nature of these free trade and investment agreements and their purpose. There has never been a better time to talk about their impact on the world's water or the human right to water. There has never been a better time to reign in the power of transnational capital and transnational corporations and recognize the sacred democratic authority of people, communities and their governments to protect water and human rights.



"STOP TTIP CETA 10.10.2015 Belin" by Foodwatch via Flickr (modified). CC by-sa 2.0

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