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Municipalities, Progressive Purchasing Policies and the Canada-EU Comprehensive Economic and Trade Agreement (CETA)

By Scott Sinclair

Remarks by Scott Sinclair to the Columbia Institute's Centre for Civic Governance "dialogue session" held on June 3, 2011 in Halifax in conjunction with the Federation of Canadian Municipalities' annual conference.

What is the CETA?

I'd like to begin by thanking the Centre for Civic Governance for inviting me to this dialogue session to update you on an important set of trade and investment negotiations.

Negotiations towards a European Union-Canada Comprehensive Economic and Trade Agreement (CETA) began in 2009. The proposed deal has been described as "more far-reaching than the North American Free Trade Agreement (NAFTA)" and negotiators on both sides have been instructed to aim at a "very high level of ambition."

The talks are now entering their final stages. In July, negotiators will gather in Brussels for Round 8 and will be back in Ottawa for what may well be the final full round in October. The proposed treaty, which involves many matters only peripherally related to trade, could have serious repercussions for Canadians in areas such as drug prices, the orderly marketing of agricultural products, cultural policies, natural resource management and environmental protection.

It could also have profound implications for municipal governments, which have been partially shielded from Canada's previous free trade agreements. The impacts on local governments will be greatest in two areas: public purchasing policies and municipal public services such as water, waste, energy and transit.

At the Brussels meetings, negotiators will formally exchange initial offers detailing what each party is prepared to cover under the government procurement and services chapters. There is evidence that municipalities will be included in the Canadian procurement offer and that the federal government is about to put on the table, for the first time ever, full coverage of water for human use and other essential local services. These initial offers will set the stage for further intensive bargaining as the talks enter the end game.

Abolishing progressive government purchasing policies

Canada's existing commitments covering provincial and local government purchasing under international trade treaties are quite limited. In fact, municipal government purchasing is fully excluded under both the NAFTA procurement chapter and the World Trade Organization's (WTO) government procurement agreement.

But the EU's highest priority in the CETA talks is unconditional access to government procurement, particularly at the sub-national level. I stress "unconditional" rather than "non-discriminatory" access because the proposed restrictions on government purchasing would eliminate the flexibility for governments to use their purchasing power to enhance local benefits, even when contracts are competed openly and do not discriminate on the basis of the nationality of the suppliers.

The EU requests, leaked over a year ago, seek nearly total coverage of purchasing by all public entities at all levels of government.¹ This includes provincial departments, crown corporations and the broader public sector covering academic institutions, social service agencies, hospitals and municipalities. The EU demands also target public authorities involved in ports, airports, transit and energy.

For covered procurements over a certain monetary threshold, there can be no discrimination based on the nationality of the supplier or the national origin of the goods and services being purchased. The proposed thresholds for sub-national governments are approximately \$300,000 for goods and services and \$8 million for construction and concession contracts. These thresholds are quite low by international standards.

Furthermore, although roughly 80% of the number of municipal contracts may fall under the threshold, the remaining 20% of contracts that are over the threshold generally account for 80% of the total value of purchasing.² These larger contracts provide the greatest leverage for the creative use of purchasing to advance public policy goals.

One of the most problematic elements of the procurement chapter is the prohibition of so-called "offsets." Offsets are defined as "any condition or undertaking that encourages local development."

The prohibition of offsets is absolute: "With regard to covered procurement, a Party, including its procuring entities, shall not seek, take account of, impose or enforce any offset."³ Under such restrictions, even voluntary or unsolicited undertakings by potential suppliers to provide local benefits cannot be considered in purchasing decisions. So if a prospective supplier

offers to train local workers, transfer technology, make investments in the community or source a portion of goods and services locally, governments would not be permitted to even consider this in the procurement decision!

It is time for a principled defence of local governments' democratic authority over public purchasing decisions.

Government procurement—the public purchasing of goods and services of all kinds—can be an important economic development tool, especially when used to encourage broader policy goals such as a transition to green energy. These purchases make up a significant portion of public budgets. The WTO estimates government purchasing at from 10 to 15% of GDP in developed countries,⁴ which translates into an estimated \$130–200 billion annually in Canada. Typically, governments are the single largest purchasers of goods and services in the economy.⁵

The large amount of public money involved is one reason why government procurement is an important issue. Another is the degree of public authority involved. Deciding what type of goods or services to purchase, under what conditions and from whom, are all important aspects of what many citizens understand as democratic governance. These types of purchasing decisions can directly affect how much democratic control citizens have at the local level.⁶

Proponents of binding procurement policies under international trade treaties often stress two supposed advantages: combatting corruption and getting the best value for money. Preventing corruption and ensuring accountability in public spending are certainly legitimate goals. Addressing them requires public procurement systems which are transparent and have built-in mechanisms for verifying and auditing the benefits received for a given public expenditure. But improving transparency and accountability does not require sacrificing the powerful contribution government procurement can make to progressive social, economic and environmental goals.

The use of selection criteria that maximise local benefits and advance public priorities is completely consistent with open, fully transparent public tendering and other safeguards commonly put in place to prevent

corruption. Indeed, as long as the selection criteria are clearly specified early in the tendering process, they can be used to objectively assess the social and economic benefits resulting from public procurement, as well as ensuring fairness and value for money in public spending.

It is certainly feasible to implement innovative procurement policies that ensure financial responsibility and transparency, while at the same time directing public purchases towards suppliers who contribute the most to goals such as affirmative action, local economic development, environmental protection, job creation and respect for human rights.

In fact, assessing the overall benefits of a proposal in terms of local job creation, increased taxes, opportunities for marginalised groups, and environmental benefits provides a more accurate cost accounting and superior value for money than simply going with the lowest bid without considering local spin-offs and community impacts.

The leaked text of the CETA procurement chapter reveals that coverage under its rules would preclude the use of such legitimate and beneficial public procurement policies. Implementing these rules would mean abandoning the use of procurement for development purposes, not merely in relation to European suppliers, but in regard to all suppliers.

Furthermore, the administrative costs associated with compulsory tendering, mandatory time-limits before closing tenders, processing a large number of bids, reporting requirements, administrative review of complaints from unsuccessful bidders, defending bid challenges from unsuccessful bidders, and other aspects of procurement rules found in trade agreements are significant, especially for smaller jurisdictions.

EU negotiators are demanding a single electronic point of access for procurements by all Canadian jurisdictions and entities. No such comprehensive electronic system currently exists, and the costs of establishing one will be shouldered by Canadian taxpayers and thousands of public entities and agencies across the country.

Under the CETA, foreign companies would have the right to challenge both the process and the terms of

covered procurements, creating a significant risk of litigation for public authorities.⁷ Such challenges can result in the suspension of the procurement process and/or monetary compensation for non-compliance.

There would be strict enforcement and dispute settlement mechanisms, comparable to the rules and procedures governing federal procurements under the Canadian International Trade Tribunal. The process would be quite unlike anything municipalities have experienced before, such as the enforcement procedures under the Agreement on Internal Trade.

If municipalities are covered under the CETA procurement provisions, then local governments would lose a valuable policy tool for creating employment, protecting the environment and assisting marginalised groups. They would also be forced to bear significant new administrative costs and litigation risks.

The threat to local public services

Many essential Canadian public services—including water, waste, recycling, and public transit—are provided through local governments.

European multinational companies, including some of the world's largest private utilities, are seeking new rights of market access to provide these public utilities.

The leaked European demands explicitly seek coverage of “concessions” for public works, such as waste, water, electricity, roads, ports and other essential services. Such services are typically either publicly provided or, when privately provided, strictly regulated by governments to ensure quality and safety.

Unless political action is taken soon, the CETA will almost certainly include controversial rules protecting foreign investors and investments, including services companies, against expropriation. Arbitrators have defined expropriation as any government action which significantly diminishes the value of an investment or deprives investors of market access. These rules may be directly enforceable by investors through an investor-state arbitration process similar to the NAFTA chapter 11.

Once such rules are in place between Canada and the European Union, expanding public services into

areas where substantial foreign investment interests are already established will almost certainly trigger investor-state challenges and compensation claims.

Under the CETA investment rules, Canadian and European public authorities could also lose their freedom, in future, to bring privatised services back into the public sector without facing compensation claims from disgruntled foreign investors. Any rights won by European investors under CETA will be automatically extended to U.S. and Mexican investors under the NAFTA.

In summary, coverage under procurement rules will work in tandem with the services and investment rules to promote and lock in commercialisation of municipal public services.

Time to take action

Now is the time for municipal leaders to take action, to speak up forcefully in a principled defence of local governments' policy flexibility and democratic choice. There is a strong case for keeping municipalities out of the CETA through—as the Union of BC Municipalities has already called for—a clear, permanent exemption.

I will conclude by suggesting where and to whom this case should best be made.

The Federation of Canadian Municipalities' consultations with federal officials are useful to gain information - information which I hope is being widely shared with cities and towns across the country.

Federal negotiators, however, have a strong built-in interest in getting municipalities covered to the fullest extent possible. They regard municipal government procurement—valued at over \$100 billion annually—as one of their key bargaining chips

in international trade negotiations. In other words, they view your purchasing authority as “negotiating coinage” that can be traded off to secure market access gains in other areas.

But despite federal pressure for ambitious coverage, the actual decisions regarding whether and to what extent municipal purchasing will be committed will be made by provincial governments. It is therefore crucial for you to meet with provincial cabinet ministers, premiers and negotiators to express your concerns.

There is also an important opportunity to reach out across the Atlantic to European local governments and their elected officials, to make common cause in defending local policy autonomy.

Last, but not least, progressive municipal leaders must speak out publicly and build support and awareness among their own citizens and electors.

Local governments should not lightly give up policy tools with so much potential to improve the lives of Canadians. Indeed, we need to protect and enhance the ability of governments to obtain the greatest return for their citizens when purchasing goods and services. The type of economic, social and environmental benefits that progressive government procurement policies can bring will be sorely needed as Canada moves forward into the 21st century.

It is crucial for citizens and their elected representatives at the local level to speak up and take action now. You will need to take a principled stand not only to protect existing progressive procurement policies and local public services, but to safeguard the democratic authority of future governments. Past experience with other trade negotiations demonstrates that decisive, timely collective action can indeed protect key policy options for the future public good.

Notes

1. See Scott Sinclair, "Negotiating from Weakness: How the proposed Canada-EU trade treaty threatens Canadian purchasing policies and public services" which is available at www.policyalternatives.ca. The leaked EU requests are reproduced in Appendix 1 to that document.
2. These estimates are derived from the 80/20 rule of thumb applied by government procurement professionals.
3. Canada-EU Comprehensive Economic and Trade Agreement: Draft Consolidated text, as of January 13, 2010, op. cit., p. 204, available at <http://tradejustice.ca/en/section/3>.
4. The Canadian Oxford Dictionary defines "procurement" as "the act of buying or purchasing, especially by a government." Another definition is: "the purchasing of goods and services on behalf of a public authority such as a government agency."
5. "Government purchasing typically represents between 10 and 15 per cent of national GDP in developed countries." WTO, Trade Topics, "Government Procurement," http://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm.
6. Jim Grieshaber-Otto, Canadian Centre for Policy Alternatives, "Stampeded: The Canada-U.S. Procurement Agreement—Implications for local governments," Presentation to "Resilient Communities: Cool Ideas for Locally-Elected Leaders On the Radar Screen: Emerging issues panel and discussion, Centre for Civic Governance, Columbia Institute, Harrison Hot Springs, B.C., March 26, 2010.
7. Steven Shrybman, Sack Goldblatt Mitchell LLP, "Legal opinion regarding the Victoria Capital Regional District Wastewater Program and the Canada-U.S. Agreement on Government Procurement", March 1, 2010.