

› April 2010

Negotiating from Weakness

Canada-EU trade treaty threatens Canadian
purchasing policies and public services

Scott Sinclair



CCPA

CANADIAN CENTRE
for POLICY ALTERNATIVES

CENTRE CANADIEN
de POLITIQUES ALTERNATIVES



CCPA
CANADIAN CENTRE
for POLICY ALTERNATIVES
CENTRE CANADIEN
de POLITIQUES ALTERNATIVES

Please make a donation... Help us continue to offer our publications free online.

We make most of our publications available free on our website. Making a donation or taking out a membership will help us continue to provide people with access to our ideas and research free of charge. You can make a donation or become a member on-line at www.policyalternatives.ca. Or you can contact the National office at 613-563-1341 for more information. Suggested donation for this publication: \$10 or what you can afford.

ISBN 978-1-897569-93-1

This report is available free of charge from the CCPA website at www.policyalternatives.ca. Printed copies may be ordered through the National Office for a \$10 fee.

410-75 Albert Street, Ottawa, ON K1P 5E7

TEL 613-563-1341 FAX 613-233-1458

EMAIL ccpa@policyalternatives.ca

www.policyalternatives.ca

CAW 667
OTTAWA

Acknowledgements

This study was done by the Canadian Centre for Policy Alternatives. The author wishes to thank the dedicated staff at CCPA especially Bruce Campbell, Kerri-Anne Finn, and Tim Scarth for his professional work on layout. The author owes a special debt to Gary Schneider who edited the entire draft and contributed many valuable drafting suggestions. Jim Grieshaber-Otto also reviewed the draft and contributed to several sections.

We are also grateful to the Canadian Union of Public Employees for their financial support of this paper and the CCPA's Trade and Investment Research Project. This is an independent study, the views expressed are those of the author and do not necessarily reflect those of the CUPE.

The author also wishes to thank Corina Crawley, Teresa Healy, Stan Marshall, Blair Redlin, David Robinson, Ken Traynor, Stuart Trew, Steve Staples, and Steven Shrybman for their helpful input, advice and comments. Any errors are the responsibility of the author.

The CETA Threat to Procurement Policies and Public Services

Summary

Ongoing negotiations with the European Union over a new trade agreement have put Canada's progressive procurement policies at serious risk. Government purchasing has long been an important economic development tool, especially when used to advance broader policy goals. Currently, Canadian governments at all levels face a new attack on their ability to use procurement policies to make social, economic and environmental improvements for their citizens. If the restrictions in the proposed Comprehensive Economic and Trade Agreement (CETA) are adopted, Canadian governments will lose a valuable tool for protecting the environment, creating long-term employment and assisting marginalized groups.

Proposed rules would prohibit governments from negotiating or considering "any condition or undertaking that encourages local development", even if the procurement contract is open on a completely non-discriminatory basis to foreign bidders. The most visible target is Ontario's Green Energy Act, which offers subsidies in return for cleaner energy sources and local job creation. Clearly, the new trade treaty is in-

tended to ensure that such progressive policies do not become the norm and spread to other areas of the country.

The CETA also will have an adverse impact on public services, especially those provided by local, territorial and provincial governments. The agreement would promote and entrench new forms of commercialization, especially public-private partnerships. It would also prohibit governments from setting performance requirements that oblige foreign investors or service providers to purchase locally, transfer technology or train local workers. The combined impact of its investment, services and procurement rules would make it far more difficult to reverse failed privatisations. In addition, negotiators are seeking to impose new restrictions on non-discriminatory regulation of a variety of service sectors for the public good.

Government procurement at the sub-federal level is one of the few remaining areas of significant policy flexibility under Canada's international trade treaties. Public services have also been insulated from the full force of previous international trade treaties. Unless citizens and their elected representatives speak up forcefully

and take action soon, the CETA puts the future availability of these policy tools and the continued viability of essential publicly-controlled services — such as waste, water, electricity and public transit — at serious risk.

Introduction

Bargaining from a position of weakness is almost always a recipe for disaster. Yet that is exactly what Canada is doing as it negotiates a new trade agreement with the European Union. In the Comprehensive Economic and Trade Agreement (CETA), the EU is taking direct aim at the use of progressive government purchasing policies at the provincial, territorial and municipal level and at a range of Canadian public services. The federal government, unfortunately, seems all too willing to dispense with these important development tools.

With a few exceptions, traditional trade barriers between Canada and the European Union are already low. Tariffs are already low, averaging less than 3% on most of the top-traded products.¹ Canadian tariffs, for example, average less than 6%.² Accordingly, the main focus of the negotiations is on so-called “non-tariff barriers” and matters that are only peripherally related to trade. Two of the most important of these are government procurement and public services.

To date, Canada has made only limited international trade treaty commitments covering procurement at the sub-national level. The recently signed Canada-U.S. agreement over Buy American required provinces to make procurement commitments under World Trade Organization rules for the very first time.³ Government procurement is often used to advance broader policy goals such as protecting the environment, creating long-term jobs, promoting fair wages and decent working conditions,⁴ and helping marginalized groups gain employment and training. Progressive government purchasing policies, such as those found in Ontario’s Green Energy Act, allow governments to act in the best interests of their citizens.

The absence of sub-national trade treaty commitments provides crucial flexibility, not only for municipalities and provinces to use procurement as a tool for economic development, but also to

safeguard their ability to provide and regulate local services, including drinking water, waste disposal, electricity and other essential local services. From the EU perspective, deep commitments by sub-national governments to cover procurement, especially services, are a “must-have” and clearly threaten the present situation.

Similarly, Canada has partially shielded public services from international trade treaties such as NAFTA. Within existing trade agreements, Canada has a complicated system of exclusions, reservations, and exemptions for health care, education, child care and social services. This system is already flawed and provides only partial protection for vital public services such as health insurance. Since many of these protections apply at the provincial and local level, the EU’s insistence that provinces be directly covered puts these protections at risk.

The European Commission (EC), which negotiates international trade treaties on behalf of the EU, initially resisted proposals for a comprehensive set of negotiations with Canada. Previous work on a Trade and Investment Enhancement Agreement ended in failure in 2005. For the Europeans, two issues stalled the talks: 1) Canadian federal officials were reluctant to commit on matters falling within provincial jurisdiction and 2) the Europeans opposed “cherry-picking” and insisted on a comprehensive, ambitious deal, or none at all.

The Prime Minister’s Office, Quebec Premier Jean Charest, and key elements of the business community, however, persisted in trying to convince the Europeans to engage in new negotiations. They assured European political leaders and the EC of high-level political support for a deal.

Significantly, the Europeans received direct assurances from most provincial premiers and the Council of the Federation that provincial governments would be fully bound by the concluded treaty. At European insistence, the provinces are, for the first time ever in any international trade negotiation, directly represented at the negoti-

ating table.⁵ This involvement will make it very difficult for the provinces to resist pressure to fully implement the treaty in areas of provincial jurisdiction, which includes most services.

The initial reluctance displayed by the European Commission has now been cast aside. The EC is putting considerable effort and resources into the talks.⁶ The largest corporations in both Europe and Canada are fully engaged.⁷ As a result, the Europeans are now in a strong position to push their demands aggressively. Negotiations for the CETA began in May 2009, with a final conclusion planned for 2011.

Concern that the CETA could involve a sweeping expansion of existing trade treaty rights is heightened by scrutinizing the dynamics of the negotiations. The EU is in all ways the dominant party in these negotiations. Canada is not only the smaller and weaker partner, but the Conservative government is also the politically needier participant. While Ottawa has made the CETA a centrepiece of its foreign economic policy, the EU could walk away from these talks at any moment with few domestic political repercussions. In addition, the present Canadian government does not believe in the use of government procurement as a progressive policy tool. The Conservative government has consistently opposed Buy Canadian policies and would welcome international trade treaty obligations that tied the hands of provincial and local governments.

The EU has made it clear that gaining sweeping access to sub-national procurement is its highest priority. Analysis of the leaked text of the new treaty and related documents, which would be more far-reaching than the NAFTA, demonstrates that the EU is acting not in the best interests of Canadians, but in the best interests of its multinational corporations.

If Canadian citizens and their provincial territorial and municipal governments remain silent and do not forcefully defend their procurement policies, this policy tool will be permanently sacrificed. Governments' ability to provide high-

quality universal, public services would also be eroded. This paper will discuss why that should not be allowed to happen.

Government Procurement

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. These purchases make up a significant portion of public budgets.⁸ Typically, governments are the single largest purchasers of goods and services in the economy.⁹

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 good or service to purchase, under what conditions and from whom, are all important aspects of what many citizens understand as democratic governance. These types of decisions can directly affect how much democratic control citizens have at the local level.¹⁰

Historically, public procurement policies have played key roles in the growth of manufacturing and infrastructure in the developed world. During World War II, massive public spending was used to mobilize industry in North America and Great Britain as part of the war effort. This set the stage for the post-war economic expansion in North America and western Europe. During the post-war era, leading national firms in highly regulated industries such as telecommunications and air transport continued to be nurtured by preferential procurement policies and large public investments.

More recently, governments in countries such as the United States and China have attached “buy local” preferences to their massive stimulus programs. Some governments, including Canada's, have denounced such policies as protectionist. From the perspective of the spending governments, however, they are reasonable

conditions that maximize domestic content and ensure that taxpayers' dollars actually stimulate their own economy.¹¹

While many other countries are far more systematic in the use of government procurement as a tool for local economic development, there are still numerous examples of purchasing policies that provide tangible benefits to Canadians:

- Both Quebec and Ontario require that to qualify for generous public subsidies, producers of renewable energy, such as wind and solar, must meet specific thresholds for the use of local goods and services. Such policies encourage the transition to renewable energies, while creating green jobs and supporting the local development of green technologies.
- Crown corporations have long used preferential procurement policies as tools for regional economic development and to assist marginalized groups. Hydro Quebec's recent wind energy tender included significant conditions requiring successful bidders to create jobs and economic spinoffs within the province, including the Gaspé region. Manitoba Hydro's Northern Training and Employment Initiative creates employment and training opportunities for aboriginal and northern Manitoba inhabitants within their own region.
- Nalcor Energy, a provincial crown corporation that manages Newfoundland and Labrador Hydro, is also a key player developing the province's interests and assets in the offshore oil and gas sector. Nalcor plays a crucial role in provincial efforts to ensure that the exploitation of Newfoundland and Labrador's energy resources benefit its citizens through local purchasing of supplies, services contracting and research and development.
- The Nunavummi Nangminiqqtunik Ikajuuit policy provides for favourable treatment of Inuit entities or individuals and Nunavut businesses or residents in purchasing decisions by the territorial government. This policy is a response to the challenges of creating employment and local business opportunities in the one of the most disadvantaged regions of Canada.
- Buy-local food policies are becoming increasingly popular with municipal governments across the country. Canada's largest city, Toronto, recently adopted a purchasing policy that supports local food production. Other major cities such as Vancouver, and many smaller Canadian communities, are considering similar policies.
- Ontario has ensured that new subway cars for Toronto are produced in Thunder Bay, supporting hundreds of high-skilled, well-paid jobs in a hard-pressed region of northern Ontario.
- Many municipalities still have contracting policies that give preference to Canadian suppliers, allowing them to reject the lowest bid in favour of a Canadian supplier if the local employment, tax and other spin-off benefits outweigh the price difference.
- Across the country, the delivery of a wide range of services, including health, educational, cultural and social services, is focused on local organizations — either public institutions or community-based not-for-profits — meeting local needs.

Existing progressive procurement policies, and the ability to adopt similar ones, are at risk if the proposed restrictions in the CETA are imposed on Canadian federal, provincial, territorial and municipal governments.

Government procurement and trade treaties

Over the last few decades, corporate lobbyists and conservative governments have used trade agreements to attack the use of procurement as a policy tool for economic development. Even for publicly funded purchases, multinational corporations want the right to source goods and services anywhere, without having to negotiate over local benefits or other public policy objectives. During the late-1980s and early-1990s, regional and international trade treaty negotiations shifted the focus of liberalisation beyond tariffs and traditional trade barriers such as import quotas to reducing non-tariff barriers to trade, including procurement policies. Despite these efforts, the coverage of trade treaty rules restricting procurement is still relatively limited, particularly at the provincial, territorial and municipal levels.

In the mid-1990s, Canada included certain federal procurement policies in the NAFTA and the WTO Agreement on Government Procurement (GPA). Further negotiations to extend coverage to sub-national procurement, however, were never finished, as the U.S. refused to give up the ability to apply popular set-aside programs and Buy American preferences.¹² Consequently, Canadian provinces and municipalities retained considerable flexibility in using procurement as a tool for local economic development.

This situation, however, changed dramatically with the Canada-U.S. Agreement on Government Procurement (AGP), which went into effect on Feb. 16, 2010. This accord made significant inroads into Canadian policy flexibility. For the first time, provincial, territorial and municipal government procurement is now subject to an international trade treaty.

The backdrop to this Agreement was the passage of the U.S. stimulus bill, known as the Recovery Act, in February 2009. When the Obama administration chose to direct stimulus spending to U.S. suppliers, the Canadian government

called it protectionism. In July 2009, the Harper government, with the support of many provincial governments, offered to guarantee U.S. suppliers access to Canadian provincial and municipal government procurement. In return, Canada asked for an immediate exemption from the Buy American provisions in the U.S. stimulus bill. The U.S. refused, but the two governments continued to negotiate.

The ultimate Agreement failed to provide a meaningful exemption for Canadian suppliers from the Buy American provisions employed in the U.S. stimulus package. The Agreement has three main elements:

- An exchange of permanent commitments under the WTO GPA;
- A temporary agreement, lasting until September 2011, providing mutual access to certain state, provincial and municipal infrastructure projects;
- A pledge to explore the scope for further negotiations over increased market access in procurement and an agreement to expedite consultations regarding future procurement-related matters.

Under the permanent arrangements, Canada binds certain provincial government procurement under the WTO GPA, while, in exchange, the U.S. will extend its 1994 GPA commitments at the state level to Canada.

Thirty-seven U.S. states have varying levels of commitments under the GPA. The quality of these commitments at the sub-federal level is low. The U.S. has numerous exceptions to its GPA commitments that allow it to continue to apply buy-local procurement preferences, most notably the Buy America restrictions attached to federally-funded mass transit and highway projects. The exceptions also include a variety of “set-asides”, where up to 23% of U.S. federal funding (and varying, but comparable, amounts

at the state level) are reserved for small and/or minority-owned U.S. businesses.

For their part, Canadian provincial and territorial governments (except Nunavut) have agreed to include a range of goods, services and procurement, mainly by government ministries. They have also excluded a range of procurement programs, entities (such as crown corporations) and sectors (such as renewable energy and mass transit) from Canada's GPA commitments. Canadian municipal government procurement is not covered under the permanent GPA commitments.

The second main element is a temporary arrangement, lasting until September 30 2011, providing mutual access to certain infrastructure and construction projects not otherwise covered by the GPA commitments. The U.S. agreed to exempt Canada from Buy American preferences for the remaining projects under seven federally funded programs, but this is not a meaningful concession. Canadian suppliers get to compete for no more than \$US 4–5 billion worth of projects, amounting to only 2% of the \$275 billion of procurement funded under the U.S. Recovery Act. The rest of the stimulus funding falls outside the scope of this deal.

Given how long the negotiations have taken, the fact that only a sliver of total Recovery Act-funded projects are covered, and that most of these funds have already been allocated, Canadian suppliers will see little practical benefit from the temporary commitments.

In return, Canada has guaranteed U.S. suppliers access to a range of municipal and crown corporation construction projects until September 2011, when the U.S. stimulus package expires. The value of these contracts can be roughly estimated at more than \$CAD 25 billion. U.S. suppliers will have the opportunity to bid on the full amount of these contracts right up until the September 2011 deadline.

Unfortunately for Canadians, the temporary commitments are remarkably lop-sided, with the bulk of the benefits going to the U.S.

A key demand of Canadian governments when they first entered negotiations with the U.S. in the summer of 2009 was that any deal should protect Canada against Buy American rules in future U.S. legislation. The Agreement did not achieve this objective. Instead, it provides for expedited consultations, at the request of either party, “on any matter related to government procurement.”

The Agreement also fails to provide legal safeguards or guarantees to protect Canada from Buy American preferences in future U.S. legislation. Several pending U.S. bills, including the \$US 100-billion “Jobs for Main Street” legislation, contain Buy American preferences.

Finally, Canada and the U.S. will “enter into discussions to explore an agreement that would expand, on a reciprocal basis, commitments with respect to market access for procurement.” Canada thus finds itself negotiating on two fronts simultaneously.

There are a few silver linings in the Canada-U.S. GPA. The direct impact on municipal government authority is limited to construction services and expires on September 2011. Furthermore, the low quality of the U.S. offer opened the door for Canadian provinces to exclude a range of procurement programs, entities and sectors from Canada's GPA commitments. Finally, the broader public sector (academic, social service and health entities) is not covered under the permanent GPA commitments. But, as discussed below, these exclusions are already being targeted by EU negotiators.

This unbalanced Agreement now serves as the starting point for the CETA negotiations. Provinces and municipalities are on a slippery slope. Unless Canadians speak up forcefully, further negotiations with the U.S. and the EU will certainly mean more dramatic concessions and trade treaty restrictions on the use of government purchasing as a legitimate public policy tool.

The impacts of covering procurement under trade treaties (leaked CETA text)

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 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 despite the assertions by advocates of radical trade liberalisation, improving transparency and accountability does not require sacrificing the powerful contribution government procurement can make to social, economic and environmental goals.

The use of selection criteria that maximize 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 most contribute 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 marginalized groups, and environmental benefits provides a fuller cost accounting, and superior value for money than simply going with the lowest bid without considering local spinoffs 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.

The CETA is broadly similar to the NAFTA procurement chapter and the WTO GPA. Basically, a procurement is covered if:

- its value is equal to or greater than the relevant threshold;
- the type of good or service being purchased is covered; and
- the entity for which the procurement is being done is covered.

For covered procurements, there can be no discrimination in favour of local suppliers or of local goods and services. The text states: “With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not: (a) treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; or (b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of the other Party.”¹³

The chapter, however, goes far beyond simply prohibiting preferences for domestic suppliers.

The procurement rules outlaw any advantage that could be provided through technical aspects of the procurement process, such as the splitting of contracts to stay under monetary thresholds or short-time frames that give the edge to nearby suppliers. They also prescribe in detail how all aspects of the tendering process are to be conducted to ensure expedient access for foreign suppliers.

Ontario's Green Energy Act

The EU has taken direct aim at certain innovative Canadian government procurement policies, including those contained within Ontario's Green Energy Act. The Act is being portrayed by European and federal negotiators as an obstacle that is putting the CETA negotiations in jeopardy.¹⁷

The legislation, passed in February 2009, is intended to significantly boost the production and use of renewable energy in Ontario. By enabling the phase-out of coal-fired electricity generation within the province, it will clearly reduce greenhouse gas emissions and bring tangible environmental benefits on a local and global scale. It also aims to make Ontario a leader in green energy development by building a local renewable energy industry, creating thousands of new jobs, and providing support for community control of renewable energy production.

The Act gives renewable energy producers assured rights to connect to the electricity grid. In order to increase the supply of renewable energy, it also guarantees long-term, premium prices that will spur new investment in renewable energy generation. These "feed-in tariffs" provide above-market rates for different forms of renewable energy. In order to qualify, renewable energy producers must meet minimum domestic content requirements.

The Ontario government predicts that these requirements will create thousands of local jobs. In addition, the Act provides for a range of regulatory and financial support to help local municipalities, cooperatives and aboriginal communities build, own and operate their own renewable energy projects.

The EU strenuously objects to these domestic content requirements, even though contracts to procure renewable energy under the Act and to access the feed-in tariffs are fully open to European companies. In a confidential memo, the EC outlined its objectives in opposing the Act. "In the short term, to convince the governments of Ontario and Canada to abandon the requirement to use domestically produced equipment to produce renewable electricity in order to benefit from high feed-in tariffs. In the medium term, to avoid the Ontario initiative becoming a precedent for other provinces some of which are on the verge of implementing similar schemes."¹⁸ The CETA negotiations have provided the Europeans with the ideal vehicle to intervene in Canadian internal affairs and to stop the development of innovative procurement policies not only within Ontario's renewable energy sector but across the country.

Ironically, if the CETA had been in place in the 1980s and 1990s, the European wind industry might not be the world leader it is today. The Danish wind industry, one of the world's most successful, was built through a combination of financial incentives and local content requirements. In order to spur wind energy development, the Danish government required utilities to buy wind-generated energy at highly subsidized rates. These rates were restricted to members of local cooperatives, living close to the turbines.

The policy was extraordinarily successful in increasing wind generation of electricity while simultaneously encouraging local ownership and acceptance of an environmentally friendly technology. In recent years, after the industry was established, more right-wing Danish governments have removed many of these local ownership requirements.

This economic and environmental success story brought lasting benefits to Denmark. Yet many of the policies Denmark used to launch its renewable energy industry would have been inconsistent with the CETA and similar international trade and investment agreements. Incentives such as making the premium tariffs available only to purchases from locally owned cooperatives would conflict with non-discrimination rules requiring that foreign companies be treated no less favourably than domestic suppliers. The intricate web of regulations restricting the geographical location of windmill owners, their type of housing, their levels of power consumption and trade in wind energy shares were all designed to ensure local community ownership and control of Danish wind resources.¹⁹

Through the Green Energy Act, Ontario has made a significant financial commitment to more desirable, renewable forms of energy. The domestic content rules enhance public acceptance and support for the challenging transition to renewable energy. In return for generous price premiums, wind and solar producers, whether domestic or foreign-owned, simply commit to create jobs and economic benefits within Ontario. This is a reasonable trade-off. The costs of the feed-in tariffs and guaranteed connections are shared by Ontario residents, and so too should the benefits.

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.

Moreover, the 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.¹⁴ These challenges can result in the suspension of the procurement process and/or monetary compensation for non-compliance.

The most problematic element of the procurement chapter, however, is the prohibition of so-called “offsets.” Offsets are defined under the chapter as “any condition or undertaking that encourages local development or improves a Party’s balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar action or requirement.”¹⁵

The prohibition of offsets is absolute and unconditional: “With regard to covered procurement, a Party, including its procuring entities, shall not seek, take account of, impose or enforce any offset.”¹⁶ Under such restrictions, even voluntary or unsolicited undertakings by potential suppliers to provide local benefits cannot be considered in purchasing decisions. Furthermore, such rules prohibit governments from negotiating or considering “any condition or undertaking that encourages local development”, even if the

procurement contract is open on a completely non-discriminatory basis to foreign bidders.

European Union demands

In December 2009, the EU presented its initial market access requests covering procurement to Canada. This document, now leaked (Appendix 1), paints a vivid picture of what is at stake in these negotiations.²⁰

The EU demands go far beyond Canada’s current commitments under the WTO GPA, seeking coverage of nearly every public entity in Canada, at all levels of government.

At the federal level, they have demanded that Canada cover: “*All* central government entities and *all* other central public entities including subordinated entities of central government whether at central or regional level (emphasis added).”²¹ This would entail a significant expansion beyond Canada’s existing commitments at the federal level under the GPA or the NAFTA.

For greater certainty, the EU specifically lists a large number of federal entities currently not covered under international procurement agreements. Consider just two examples from this European list — the Canadian Wheat Board and the Canadian Space Agency. Hampering the procurement policies of the Wheat Board, which has a statutory monopoly to market wheat and barley grown in western Canada, complements the EU’s publicly-stated goal of dismantling the Board, which it reiterated at the outset of negotiations. The Canadian Space Agency provides hundreds of millions of dollars annually to maintain highly skilled jobs within Canada and to maintain Canada’s leadership in key emerging sectors such as earth observation and satellite mapping. Coverage under the CETA would preclude local and regional benefits programming²² and neuter the space agency’s role in providing leadership and support to Canada’s growing commercial space sector.

The European demands are most intrusive, however, at the provincial, territorial and local government level.

They have, as at the federal level, demanded universal coverage of “*All sub-central government entities including those operating at the local, regional or municipal level as well as all other entities in all Canadian Provinces and Territories whose procurement policies are substantially controlled by, dependent on, or influenced by central, regional or local government and which are engaged in non-commercial or non industrial activities (emphasis added).*”²³

This includes all ten provinces and three territories, including Nunavut, which was the only territorial government excluded from the Canada-U.S. G.P.A. In addition, the EU has listed all Canadian municipalities with populations over 50,000 persons. Its demands, however, are framed to cover all municipalities and their agencies, even those with smaller populations.

The EU document also targets “*All entities operating in the so-called M.A.S.H sector (municipalities, municipal organizations, school boards and publicly funded academic, health and social service entities) as well as any corporation or entity owned or controlled by one or more of the preceding.*”²⁴

The demands do not stop there. They take aim at purchasing by all federal, provincial, territorial and municipal crown corporations, expressly including airports, transport, ports, energy, and drinking water utilities.

The EU has clearly stipulated that Canada cover all airport authorities, ports, and municipal transit authorities including, for example, the Toronto Transit Commission, Société des Transports de Montréal (STM) and Via Rail. Mass transit receives a high level of public investment, and large municipalities have begun to use purchasing in this sector to leverage green jobs and other local benefits.

The EU has also made across-the-board demands for coverage of all provincial crown cor-

porations in the energy sector, including Hydro Quebec, Newfoundland and Labrador Hydro, Hydro One (formerly Ontario Hydro), BC Hydro and Manitoba Hydro. These provincial utilities have played a central role economic development policies at the provincial level and their purchasing policies have often been used to promote local and national economic development.

The EU is also demanding access to the procurement of “*All entities...which are involved in activities relating to the exploitation of a geographical area for the purpose of exploring for or extracting oil, gas, coal or other solid fuels.*”²⁵ Nalcor Energy, the provincial crown corporation that manages Newfoundland and Labrador Hydro, plays an increasingly important role in representing the province’s interests and ownership in the offshore oil and gas sector. The CETA coverage would seriously impair its ability to advance the province’s economic development goals, which prominently feature local benefit requirements.

Another controversial demand is the EU’s insistence that CETA rules cover water, including drinking water. The demand seeks coverage of: “*All entities which provide or operate fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water, or supply drinking water to such networks.*”²⁶

The European Commission has been much criticized in both Europe and developing countries for its aggressive positions around covering water under trade treaties. As a result of this criticism, it retreated somewhat from this stance in negotiations with developing countries and at the WTO, claiming that water for human use should not be covered under trade treaties. But the aggressive demands for Canada to cover water for human use demonstrate that the Commission has given short shrift to such sensitivities in its negotiations with Canada and that its negotiators are still working in the interests of European-based multinational corporations.

Needless to say, agreeing to even a fraction of these demands would virtually eliminate the use of government purchasing as a policy tool by provincial, territorial and local governments.

Broader impact of CETA on public services

Canadians admire many aspects of Europe's rich culture, history and way of life. It therefore seems natural to assume that negotiations between Canada and Europe are likely to lead to a new style of trade agreement that benefits the general public in both regions, or at very least results in a "kinder, gentler" version of the NAFTA. Making such an assumption, however, would be a serious mistake. Far from promoting the quality public services and highly protective regulatory standards that Canadians respect, the CETA negotiations will actually undermine them.

In these talks, European negotiators are striving to advance the interests of European multinational corporations, and particularly to establish new investment rights and open access for multinational service providers.

European multinationals, including Suez Environnement, Veolia Environnement, Deutsche Bank, Price Waterhouse Coopers, DHL Express, and Bilfinger Berger AG, have been leaders in the worldwide efforts to increase market share by eliminating public monopolies and privatizing essential services. Their targets include water, energy, waste management, telecommunications, financial, and postal services. Through the informal Global Services Network, a coalition led by the private sector, these multinationals have worked with U.S. and Canadian corporations to jointly advance their services liberalisation agenda through international trade negotiations.

Since the mid-1980s, Europe itself has undergone an intensive process of privatisation and restructuring public services. This process, begun by right-wing national governments such as Margaret Thatcher's in Britain, has been intensified by the internal market processes driven by

the European integration treaties, the European Court of Justice and the European Commission.

EU rules, which aim to create a single European market for services, have facilitated privatisation and outsourcing within Europe in a variety of sectors, including water, energy, telecommunications, health care, health insurance, postal and private education. Under EU laws, national governments retain the right to provide services of "general interest," but once there is any type of third-party or private sector participation in that services sector, those services are subject to EU treaty rules. These rules restrict the extent and form of state aid to service providers and require that government procurement contracts be tendered without any form of discrimination in favour of local, or community-based (including not-for-profit) providers.

Internationally, EC trade negotiators have aggressively tried to open up the services market through several sets of negotiations, including the General Agreement on Trade in Services (GATS), bilateral free trade agreements and in so-called economic partnership agreements with some of the world's poorest countries.

While the notion may take many Canadians off guard, it is important to understand that European negotiators are working to downgrade regulatory standards and break up some of public services Canadians so value, in order to increase the profit opportunities for European multinationals.

This approach mirrors and complements the efforts of Canada's Conservative federal government to promote the privatization of public services and to reduce government regulation of corporate activity in key aspects of the economy.

For example, the federal government has strongly promoted private-public partnerships (P3s) for the delivery of government services and would certainly welcome international treaty rules that further advance and entrench this privatisation policy. For the government in Ottawa and its business supporters, the negotiation of an

international treaty embodying these goals offers a convenient means to expand and enforce its P3 objectives, particularly in areas under provincial and territorial jurisdiction.

Negotiators representing both jurisdictions, with pressure from corporate lobbies, are pursuing a common, mutually-reinforcing agenda of services liberalisation. Given this situation, the CETA will almost certainly encroach on and pose a serious threat to public services.

The combined impacts of CETA's procurement, investment and services rules

Modern trade treaties intrude into many matters only peripherally related to trade. Of particular concern is the fact that they can reduce the capacity of democratically elected governments to decide who provides or controls services — including essential services such as water, waste, energy, education or health care. These treaties can also restrict governments' ability to regulate services and services investors for public purposes such as consumer, worker or environmental protection.

As we have seen, the CETA, if concluded as planned, would result in unprecedented restrictions on Canadian provincial, territorial and municipal government procurement, effectively abolishing its use as an economic development tool. But the procurement chapter is only one part of a multi-faceted treaty that will diminish governmental authority over services, including public ones, in a number of significant ways.

These include:

- Promoting new forms of commercialisation — especially the proliferation of public-private partnerships.
- Prohibiting governments from setting conditions (performance requirements) that oblige foreign investors or service providers to purchase locally, transfer technology or train local workers.

Europe's Newly-Centralized Negotiating Model

A new European constitution, the Treaty of Lisbon, was recently approved. One of the major changes is that EU member-states no longer share jurisdiction over international investment protection issues. This authority, termed "competence" in EU law, now resides exclusively with the European Commission. This centralization of authority has important implications for international negotiations and the content of EU bilateral trade treaties, which up until now have not included some of the most controversial elements found in the NAFTA chapter 11 and bilateral investment treaties (BITs), notably protection against direct and indirect expropriation and investor-state dispute settlement. The CETA will be the first European trade and investment treaty to be fully negotiated under the Lisbon treaty arrangement and could set important precedents.

This constitutional shift raises the concern that the EC, with support from the European corporate lobby, will now move towards the NAFTA's more far-reaching approach to investment protection. As the leaked January 2010 CETA text confirms, Canada has proposed the NAFTA chapter 11 model for the CETA. In all likelihood, the CETA investment rules will break new ground in this area, although the pace and substance of the EU's own internal processes around the Lisbon treaty changes will determine how far and how quickly the EC is prepared to go in adopting the NAFTA approach.²⁷

- Establishing new rights for investors that make it far more difficult to reverse failed privatisations.
- And finally, imposing new restrictions on non-discriminatory regulation of a variety of service sectors, including financial services, telecommunications, postal and express delivery, environmental, and transportation services.

In all these areas, the CETA is likely to combine the worst features of the NAFTA and current European approaches to "free trade" agreements.

Promoting new forms of commercialisation

The European procurement request explicitly asks for 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. Although not yet defined in the CETA negotiations, concessions generally are situations where governments or public authorities transfer the management of public works or services — normally governmental responsibilities — to a private party. The EU has clearly taken aim at these services. It specifically requests that: “Works concessions contracts, when awarded by annex 1, 2 and 3 entities, and provided their value equals or exceeds 5,000,000 SDR [CAD \$7.65 million],²⁸ are included under the national treatment regime.” It further notes that “The definition of works concessions and the applicable rules are to be agreed upon during the next Rounds.”²⁹

Within Canada, most such services are delivered by local governments. Until recently, the full exclusion of sub-national governments from the procurement obligations of international trade treaties has protected these public authorities from treaty repercussions when providing services directly or through traditional procurement arrangements.

A public private partnership is a hybrid between traditional procurement and investment. Their growing use has already blurred the line between direct government procurement and other government contractual arrangements with commercial service providers and investors. This development increases the risk that local public authorities can be sued by investors under the NAFTA investment rules and its notorious investor-state dispute settlement system. The greatly expanded coverage of the CETA, if agreed to, would further heighten the risks of trade treaty litigation. This could be initiated by the EU on behalf of its multinational corpora-

tions, or — if Canada’s proposal to incorporate the investor-state process into the CETA is accepted — directly by European multinationals themselves.

Prohibiting governments from setting performance requirements

The restrictions on “performance requirements” in CETA’s investment chapter would mirror and reinforce the procurement chapter’s prohibition on offsets, discussed earlier in this paper. Performance requirements are conditions set by governments that oblige foreign investors to purchase locally, transfer technology, take local partners or train local workers.

The investment chapter is still under negotiation, with the EU and Canada tabling different approaches. While it is not yet known which approach, or what combination of approaches, will be adopted, it is clear that the ability of governments at all levels to apply performance requirements is likely to be seriously restricted. While the investment rules proposed by the EU do not explicitly outlaw performance requirements, the national treatment principle implicitly prevents governments from applying local content, sourcing and other performance requirements to foreign service investors in covered sectors. The NAFTA model, proposed by Canada, goes even further.³⁰ It prohibits performance requirements on investments of any nationality, including those from non-NAFTA countries and even on domestic investors.

An ongoing NAFTA investor-state dispute illustrates the problems with such obligations. Exxon-Mobil, a partner in the Hibernia and Terra Nova oil and gas fields, is alleging that Canadian guidelines stipulating that energy companies active in the offshore invest in research and development within Newfoundland and Labrador are inconsistent with the NAFTA performance requirements. Exxon-Mobil, which in recent years has reported the largest profits in U.S. corporate history, is determined to use the

NAFTA to resist government efforts to ensure that a larger share of rapidly growing natural resource revenues benefit local communities. Incorporating these rules into the CETA would open the door to similar cases being brought by European-based investors.

Locking in privatisation

Modern trade and investment treaties typically include controversial rules protecting foreign investors and investments, including services companies, against “expropriation,” which some property rights advocates define as any government measure which significantly diminishes the value of an investment or deprives investors of market access. The NAFTA’s Article 1110, for example, provides that governments can expropriate foreign-owned investments only for a public purpose and only if they provide compensation according to the NAFTA rules. These provisions can be invoked directly by investors through an investor-to-state dispute settlement process. Reservations (i.e. country-specific exemptions) cannot protect against such expropriation claims. Canada has proposed these expropriation provisions in the CETA negotiations, although the EC has not yet stated whether it will accept this approach.

This expropriation provision, contained in the NAFTA but not in previous European trade agreements, seriously threatens efforts to reform or renew public services. The “extremely broad definition of expropriation”³¹ is weighted in favour of investors. This opens the door to investor-state arbitration claims that measures to expand public services or to restrict private for-profit provision amount to expropriation and that compensation must be paid to foreign investors that are negatively affected.³² Once these same 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 cer-

tainly trigger investor-state challenges and compensation claims.

While EU internal market law creates many problems for public services, it does allow governments the freedom to provide public services directly, and considerable latitude to return privatized services to the public sector with limited constitutional repercussions.³³ For example, public opposition to higher prices and a failure to deliver on promised improvements have left European water multinationals facing increasing opposition from local communities and politicians in their home countries. Many municipalities, including Paris, have taken steps to end water contracts with private operators and others are considering doing so.³⁴ Under the CETA investment rules promoted by Canada, European public authorities could lose their current freedom to bring privatized services back into the public sector without facing compensation claims from disgruntled foreign investors.

Eastern Europeans are already experiencing a taste of what might occur under the CETA. In 2004, the right-wing Slovakian government, with encouragement from the World Bank, introduced reforms which allowed private health insurance companies to operate on a for-profit basis. In 2007, a new left-leaning government, elected largely because of public dissatisfaction over the health insurance privatisation scheme, reversed the policy and required health insurance companies to operate on a not-for-profit basis. Slovakia now faces three investor-state claims for compensation from foreign investors under bilateral investment treaties signed when it was part of Czechoslovakia.³⁵

The CETA investment protection rules, combined with the procurement provisions that facilitate greater foreign participation in delivering public services, would only exacerbate the negative impacts of the NAFTA’s expropriation provisions in Canada.

Restricting public interest regulation

European bilateral free trade agreements typically contain what negotiators term “disciplines,” — but which are actually restrictions — on non-discriminatory regulation of a diverse range of service sectors including financial services, telecommunications, postal and express delivery, and transportation services. In such sectors, governments are required to demonstrate that proposed regulations, even when they treat foreign and domestic service providers even-handedly, are not more burdensome than necessary.³⁶ Adopting such restrictions would hamstring a wide array of public interest regulations, even if completely non-discriminatory, that deal with services.

Restrictions on domestic regulation would provide trade bureaucrats and corporate lobbies in both Canada and Europe with new grounds to contest and erode each other’s regulatory protections for services. While proposals for the complete provisions on domestic regulation were not included in the leaked January 2010 CETA text, certain elements already in that document are very disquieting.

Despite the recent financial crisis that brought the world economy to the brink of collapse, EC negotiators are actively seeking a restrictive necessity test for all regulatory measures taken to ensure the integrity and stability of the financial system. This proposal would be more intrusive than those of any other major international trade treaty and introduce a barrier to government financial regulation more stringent than currently exists in either the GATS or the NAFTA. If accepted, this startling European proposal would considerably weaken the ability of governments to regulate harmful practices in both the formal and informal financial systems and to prevent the recurrence of another financial crisis. This EC proposal also appears to work at cross-purposes to the initiatives of many major governments, including EU member states such as France and Great Britain, to strengthen the

regulatory capacity of governments in order to avoid future crises.

The fact that EC negotiators are backing illogical and intrusive restrictions in the important area of financial service regulation is itself disturbing. But these immoderate demands should also leave advocates of strong public interest regulation very concerned about the potential impact of the CETA on regulatory authority over public services and public interest regulation in other areas.

Conclusion

The CETA negotiations are clearly more concerned with limiting the ability of governments to regulate the activities of multinational corporations and investors than with reducing genuine trade barriers.

In fact, beyond the cliché that the deal will provide Canadian exporters with access to the world’s largest market, there has been no clear articulation by the federal government or its corporate backers of the trade problems that the CETA is intended to solve. In reality, trade between Canada and the EU is already very open and traditional market access barriers are few.

Multinational corporations and their lobbyists want the freedom to structure their global operations as they see fit without government intervention. They also want to reduce their costs of complying with public interest regulations. In the area of intellectual property, they are demanding blatantly excessive and trade-restrictive monopoly protections to defend their profits.

Democratic governments have a duty to reflect and balance interests broader than those of multinational investors and exporters.³⁷ By systematically restricting the role of government and reducing its available policy tools, the CETA would make governments less capable of representing the interests of the majority of its citizens. Once these types of restrictions on public

policy flexibility are locked in by treaty, they are, for all intents and purposes, permanent.

The clash of values between the public and global corporate interests is readily apparent in the ongoing negotiations over procurement in the CETA, as examined in this report. European corporations are less intent on gaining open access to Canadian procurement contracts — which for the most part they already enjoy — than with winning unconditional access to public purchasing. From both a democratic and an economic development perspective, such a demand is unreasonable and illegitimate.

Progressive government procurement policies have a long history of being used to benefit both the public and local industries. In Canada, governments at the provincial, territorial and municipal levels have seen the wisdom in using preferential purchasing to improve environmental standards, create local jobs and assist disadvantaged workers. Instead of supporting these initiatives, the CETA would diminish them.

While Ontario's Green Energy Act is the most visible target of the EU strategy, the CETA obligations, once established, could be employed to attack or pre-empt any government purchasing policies that support or sustain community control or local content. The EU's concern is that Ontario's initiative will succeed and become a trend that will spread.

If the CETA proceeds as planned, Canada would be on the verge of ceding democratic control over most provincial, territorial and municipal procurement, effectively abolishing the use of purchasing to lever economic, environmental and social benefits. In the case of public services, the CETA would increase the pressure for private provision, make it far more difficult to bring privately contracted services back into the public sector. It would also interfere with efforts to apply local employment or other local benefit conditions to private services suppliers where services are contracted out.

In addition, once any deal is reached with the EU, the most-favoured-nation provisions³⁸ of the NAFTA would require that all concessions given to the Europeans be extended to investors and service providers from the U.S. and Mexico. This would only deepen and further entrench the CETA's harmful impacts.

It might be tempting to dismiss the negotiations between Canada and the European Union as a *fait accompli*, especially since the federal Canadian government has already given away many potentially-useful policy levers. But Canadians do so at their peril. They should not lightly give up any tool with so much potential to improve the lives of Canadians, especially on a regional and local scale. 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, especially at the local, territorial and provincial levels, to speak up and take action. They will need to take a principled stand to not only protect their existing progressive procurement policies, but to safeguard the ability of future governments to adopt new measures. Past experience demonstrates that decisive, timely collective action can indeed protect key policy options for the future public good.

Notes

¹ Assessing the Costs and Benefits of a Closer EU-Canada Economic Partnership, A joint study by the European Commission and the Government of Canada, October 16, 2008, p. v.

² One important exception is agriculture, where high Canadian tariffs are essential in order to maintain Canada's supply management system for dairy,

poultry and eggs. The EU has indicated that it will seek greater market access to supply managed commodities and is also demanding the phasing out of the Canadian Wheat Board.

3 The terms of this deal are discussed in greater detail later in this paper.

4 Major Canadian cities, including Vancouver and Toronto, have ethical procurement policies that screen out suppliers, or in certain cases countries, with unfair labour or environmental practices.

5 Quebec has appointed a former premier, Pierre-Marc Johnson, to head its negotiating team.

6 For example, two EC trade officials have been assigned full-time to the European mission in Ottawa for the duration of the talks.

7 See the Canada Europe Roundtable for Business, “Declaration in support of a Canada-EU trade and investment agreement,” signed by 101 of the largest businesses in the two jurisdictions.

8 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.”

9 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.

10 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.

11 To the extent that such conditions helped build political and public support for larger spending initiatives, they make everyone, including their trading partners, better off.

12 “Buy America” refers to conditions attached to federal funding transferred to state and local governments that mandate the use of U.S. steel and manufactured goods in mass transit, highway, airport and port construction projects.

13 Canada-EU Comprehensive Economic and Trade Agreement: Draft Consolidated text, as of January 13, 2010, available at www.tradejustice.ca, Article IV.2, p. 209.

14 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.

15 Canada-EU Comprehensive Economic and Trade Agreement: Draft Consolidated text, as of January 13, 2010, *op. cit.*, p. 204.

16 *Ibid.* p. 209.

17 Doug Saunders, “Ontario foot-dragging imperils Canada-EU pact,” *Globe and Mail*, March 31, 2010.

18 European Commission, Directorate-General Trade, “Market Access Barrier hymn sheet: Canada- Ontario Green Energy Act 2009,” November 10, 2009, p. 1.

19 See, for example, Albert H. Cho and Navroz K. Dubash, “Will Investment Rules Shrink Policy Space for Sustainable Development? Evidence from the Electricity Sector,” World Resources Institute, September 2003; Mark Bolinger, “Community Wind Power Ownership Schemes in Europe and their Relevance to the United States,” Lawrence Berkeley National Laboratory, May 2001; and Danish Energy Agency, “Wind Turbines in Denmark,” November 2009.

20 EU-Canada Comprehensive Economic and Trade Agreement, Government procurement, European Union’s initial request to Canada, December 2009, attached as Appendix 1.

21 *Ibid.*

22 The CSA is currently considering developing Canada’s first satellite launch site, which could be located either in Cape Breton or Churchill, Manitoba. “Space agency eyes Cape Breton for satellite launch,” *The Ca-*

nadian Press, Mar. 28, 2010, available at: http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20100328/space_cape_breton_100328/201003. 28.

23 EU-Canada Comprehensive Economic and Trade Agreement, Government procurement, European Union's initial request to Canada, December 2009, attached as Appendix 1.

24 Ibid.

25 Ibid.

26 Ibid.

27 Currently, there is discussion of a new investment directive from the EC which would address the issue of the status of existing BITs entered into by member governments, the negotiation of new treaties and other investment-related issues.

28 A Special Drawing Right (SDR) is a monetary unit created and administered by the International Monetary Fund. "It is defined as a weighted sum of contributions of four major currencies, reevaluated and adjusted every five years, and computed daily in terms of equivalent United States dollars." See Wikipedia entry at en.wikipedia.org/wiki/Special_Drawing_Rights.

29 EU-Canada Comprehensive Economic and Trade Agreement, "Government procurement, European Union's initial request to Canada, December 2009, Reprinted as Appendix 1 to this paper.

30 The NAFTA investment chapter explicitly prohibits governments from imposing or enforcing certain types of requirements "in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment" (NAFTA Article 1106).

31 Supreme Court of British Columbia, *The United Mexican States and Metalclad Corporation*, Reasons for Judgement of the Honourable Mr. Justice Tysoe, May 2, 2001.

32 For example, in 2003, when the provincial government of New Brunswick, acting on the recommendation of an all-party committee, actively considered the implementation of a public automobile insurance system, private insurance companies threatened legal action under the NAFTA. These threats were undoubt-

edly a factor influencing the NB government's decision not to proceed with the reform. Steven Shrybman and Scott Sinclair, "Public auto insurance and trade treaties", Canadian Centre for Policy Alternatives, June 2004. Available at www.policyalternatives.ca.

33 David Hall, "Alternatives to PPPs: positive action for in-house services", Public Services International Research Unit, University of Greenwich, August 2008. pp.2-3.

34 A new web site, established by the European NGO Corporate Europe Observatory and the Transnational Institute, provides case studies of so-called remunicipalisation of water services within Europe and globally. "The remunicipalisation tracker" can be accessed at www.remunicipalisation.org.

35 See Luke Eric Peterson, "Third BIT claim arises after health policy reversal; state rebuffed in proposal to publish earlier award under same treaty," *Investment Arbitration Reporter*, Vol.3, No.5 April 9, 2010 <http://www.iareporter.com> and David Hall, "Challenges to Slovakia and Poland health policy decisions: use of investment treaties to claim compensation for reversal of privatisation/liberalisation policies," Public Services International Research Unit, University of Greenwich, January 2010, <http://www.psir.u.org/reports/2010-02-H-tradelaw.doc>.

36 The joint EU-Canada scoping report for the negotiations states that "regulatory provisions [covering services] would be a useful complement to market access and non-discrimination and would play a positive role in facilitating the provision of cross-border trade in services." Joint Report on the EU-Canada Scoping Exercise, March 5, 2009, p. 5.

37 One of these fundamental interests is transparency. The CETA negotiating text is only in the public domain only because it has been leaked. The secrecy surrounding these negotiations fuels the well-founded suspicion that if citizens understood what was actually on the table, and how these matters relate only tangentially to trade, public support would evaporate.

38 For example NAFTA Article 1103 applying to investment and NAFTA Article 1203 applying to cross-border trade in services.

Appendix 1

EU-CANADA COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT

Government procurement

European union' initial request to CANADA (DECEMBER 2009)

As agreed during the first procurement negotiation Round for CETA, the EU presents below its initial market access request to Canada. The basis for the EU requests is Canada's current commitments under the WTO-Government Procurement Agreement (GPA).

The EU reserves the right to withdraw, amend, reduce or extend its request in the light of further negotiations with Canada.

In order to facilitate comprehension, the present request follows the current structure of the GPA Annexes and is without prejudice of the final structure of the Annexes that may be agreed during the next Rounds of the CETA negotiations.

Annex 1: Central Government Entities

Thresholds: 130.000 SDR Goods

200.000 SDR Services

All central government entities and all other central public entities including subordinated entities of central government whether at central or regional level, including:

- Bank of Canada
- NAV Canada (air traffic control)
- Canadian Intergovernmental Conference Secretariat
- Marine Environmental Data Services
- Marine Navigation Services
- Infrastructure Canada
- National Art Centre
- Office of the Prime Minister of Canada
- International Trade Canada
- Receiver General Canada
- Veterans Review and Appeal Board
- Canadian Environmental Assessment Agency
- House of Commons
- Senate of Commons
- Courts Administration Service

- Competition Bureau
- Elections Canada
- Canada Firearms Centre
- Canada Council
- Canada Firearms Centre
- Canada Industrial Relations Board
- Canada School of Public Service
- Canadian Artists and Producers Professional Relations Tribunal
- Canadian Forces Grievance Board
- Canadian Grain Commission
- Canadian Human Rights Tribunal
- Canadian Institutes of Health Research
- Canadian Secretariat
- Canadian Security Intelligence Agency
- Canadian Space Agency
- Canadian Wheat Board
- Communication Canada
- Courts Administration Service
- Emergency Preparedness Canada
- Financial Consumer Agency of Canada
- Financial Transactions and Reports Analysis Centre of Canada
- International Joint Commission (Windsor)
- Law Commission of Canada
- Library and Archives Canada
- Library of Parliament
- Military Police Complaints Commission
- National Film Board
- National Round Table of the Environment and the Economy
- Office of Indian Residential Schools Resolution of Canada
- Office of Infrastructure of Canada
- Office of the Controller General of Canada

- Public Safety and Emergency Preparedness Canada
- Public Service Human Resources Management Agency of Canada
- Revenue Canada Taxation
- Social Development Canada
- The Leadership Network
- Transportation Appeal Tribunal of Canada
- Transportation Safety Board of Canada
- Canada Air Transport Security Authority
- Canadian Commercial Corporation
- Canadian Tourism Commission
- Enterprise Cape Breton Corporation
- Export Development Corporation
- Farm Credit Corporation Canada
- Canada Border Services Agency
- Transport Canada (all procurement)
- Department of Public Works and Government Services

N.B: The following entities are currently listed in Annex 3 of Canada's current GPA commitments. The EU considers that Annex 3 should list entities operating in the utilities sectors (as defined below). Accordingly, the EU believes the following entities should be placed in Annex 1 as following:

- Canadian Museum of Civilization
- National Capital Commission
- St. Lawrence Seaway Authority
- Royal Canadian Mint (all procurement)
- Canadian Museum of Nature
- National Gallery of Canada
- Defence Construction (1951) Limited
- National Museum of Science and Technology.

Annex 2: Sub-Central Government Entities

Pursuant to its proposal on uniform thresholds, the EC requests that Canada adopts the threshold of SDR 200,000 for contracts for supply of goods and services of entities covered by this Annex.

(a) All sub-central government entities including those operating at the local, regional or municipal level as well as all other entities in all Canadian Provinces and Territories whose procurement policies are substantially controlled by, dependent on, or influenced by central, regional or local government and which are engaged in non-commercial or non industrial activities, including:

- 10 Provinces: Quebec, Ontario, Newfoundland and Labrador, Prince Edward Island, New Brunswick, Manitoba, Saskatchewan, Alberta, British Columbia, Nova Scotia
- 3 Territories: Yukon, Nunavut, Northwest Territories
- Ontario: Ottawa, Toronto, Hamilton, London, Richmond Hill, Kitchener, Vaughan, Brantford, Windsor, Markham, Greater Sudbury, Burlington, Oakville, Oshawa, St. Catherine's-Niagara, Sherbrooke, Thunder bay, Kingston, Barrie, Guelph
- Québec: Montréal (and/or Ville de Montréal ex-cum), Québec, Longueuil, Gatineau, Trois Rivières, Laval, Chicoutimi-Jonquière
- Alberta: Calgary, Edmonton
- British Columbia: Vancouver, Richmond, Coquitlam, Burnaby, Abbotsford, Victoria, Kelowna
- Manitoba: Winnipeg
- Other: Regina, Saskatoon, Halifax, St John's (Newfoundland).

(b) All entities operating in the so-called M.A.S.H sector (municipalities, municipal organizations,

school boards and publicly funded academic, health and social service entities) as well as any corporation or entity owned or controlled by one or more of the preceding.

Annex 3: All Other Entities

All Annex 1 and Annex 2 entities which exercise one or more of the activities referred to below and in respect of contracts awarded for the pursuit of any of those activities.

And all other entities whose procurement policies are substantially controlled by, dependent on, or influenced by central, regional or local government, and which are engaged in commercial or industrial activities in one or more of the activities listed below.

1. Airports

All entities, as per the above definition, which provide airport or other terminal facilities to carriers by air, including:

- Greater Toronto Airport Authority
- Vancouver International Airport Authority
- Aéroports de Montréal
- Calgary Airport Authority
- Edmonton Regional Airport Authority
- Winnipeg Airport Authority
- St John's Airport (New Brunswick)
- Regina Airport Authority
- Saskatoon Airport Authority
- Charlottetown Airport Authority
- Aéroport de Québec
- Prince George Airport Authority
- Kelowna International Airport Authority
- Victoria International Airport Authority
- Greater London International Airport Authority

- Ottawa McDonald-Cartier International Airport Authority
- Thunder Bay International Airport Authority
- St John's International Airport Authority (Newfoundland/Terre-Neuve)
- Gander International Airport Authority
- Halifax International Airport Authority
- Charlottetown International Airport Authority
- Greater Fredericton Airport Authority
- Greater Moncton Airport Authority
- Airport of Yellowknife
- Airport of Iqualit
- Airport of Whitehorse.

2. Transport

All entities, as per the above definition, which provide or operate networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable, including:

- Toronto Transit
- Metrolinx (Ontario)
- Ontario Transit
- Société des Transports de Montréal (STM)
- Agence Métropolitaine des Transports (Québec)
- Translink Vancouver
- OC Transpo (Ottawa)
- Edmonton Transit System (ETS)
- Calgary Transit
- Winnipeg Transit
- Halifax Transit
- Saskatoon Transit
- Regina Transit
- Société de Transport de Laval

- Réseau de Transport de Longueuil
- Via Rail
- GO Transit.

3. Ports

All entities, as per the above definition, which provide maritime or inland port or other terminal facilities to carriers by sea or inland waterway, including:

- Oshawa Harbour Commission
- Halifax Port Authority
- Hamilton Port Authority
- Montreal Port Authority
- Nanaimo Port Authority
- North Fraser Port Authority
- Port Alberni Port Authority
- Prince Rupert Port Authority
- Quebec Port Authority
- Saguenay Port Authority
- Saint John Port Authority
- Sept-Îles Port Authority
- St. John's Port Authority
- Thunder Bay Port Authority
- Toronto Port Authority
- Trois Rivières Port Authority
- Vancouver Fraser Port Authority
- Windsor Port Authority
- Belledune Port Authority.

4. Drinking water

All entities, as per the above definition, which provide or operate fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water, or supply drinking water to such networks, including:.

- EPCOR Edmonton

- Toronto Water and Emergency Services
- Municipal water and wastewater treatment entities.

5. Energy

(a) All entities, as per the above definition, which provide or operate fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity, or the supply of electricity to such networks including:

- Ontario Power Generation
- BC Hydro
- EPCOR (Edmonton)
- Hydro Ottawa
- Hydro Quebec
- Newfoundland and Labrador Hydro
- Hydro One (formerly Ontario Hydro)
- Manitoba Hydro-Electric Board
- Toronto Hydro
- Saskpower
- Veridian
- Aurora Hydro Connections Ltd.
- Hamilton Hydro
- New Brunswick Power Corporation

(b) All entities, as per the above definition, which provide or operate fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat, or supply gas or heat to such networks, including:

- Manitoba Hydro-Electric Board
- Saskenergy

(c) All entities, as per the above definition, which are involved in activities relating to the exploitation of a geographical area for the purpose of exploring for or extracting oil, gas, coal or other solid fuels. (Canada is to furnish an indicative list.)

Annex 4: Services

Based on the United Nations Provisional Central Product Classification (CPC) system, the EU requests Canada to offer bilaterally, in addition to the services already listed under Canada's current GPA commitments, the following services:

- Full coverage of 867, including engineering related scientific and technical consulting services and technical testing and analysing services
- Full coverage of 865, including financial management consulting services, public relations services and other management consulting services
- Full coverage of 886 "repair services incidental to metal products, machinery and equipment"
- 6112 "maintenance and repair of motor vehicles"
- 6122 "maintenance and repair of motorcycles and snowmobiles"
- 712 "other land transport services"
- 87304 "armoured car services"
- 73 "air transport services"
- 812 and 814 related to insurance services
- 864 "market research and public opinion polling services"
- 871 "advertising services"
- 88442 "printing and publishing services"
- 752 "Telecommunications services"
- 7512 "Courier services"
- 8868 "Repair and maintenance for maritime transport".

NB: The EU considers that the category "shipbuilding" falls under supplies. Should Canada consider shipbuilding as a service category (See Notes to Annex 4 of Canada's GPA commitments), the EU requests its opening.

Annex 5: Construction services and works concessions

(a) Construction services:

Definition:

A construction services contract is a contract which has as its objective the realization by whatever means of civil or building works, in the sense of Division 51 of the Central Product Classification.

List of Division 51, CPC: All services listed in Division 51.

(b) Works concessions.

Works concessions contracts, when awarded by annex 1, 2 and 3 entities, and provided their value equals or exceeds 5 000 000 SDR, are included under the national treatment regime.

N.B: The definition of works concessions and the applicable rules are to be agreed upon during the next Rounds.

> ABOUT THE CENTRE

The Canadian Centre for Policy Alternatives is an independent, non-profit research institute funded primarily through organizational and individual membership. It was founded in 1980 to promote research on economic and social issues from a progressive point of view. The Centre produces reports, books and other publications, including a monthly magazine. It also sponsors lectures and conferences.

> AU SUJET DU CENTRE

Le Centre canadien de politiques alternatives est un institut de recherche indépendant et sans but lucratif, financé en majeure partie par ses membres individuels et institutionnels. Fondé en 1980, son objectif est de promouvoir les recherches progressistes dans le domaine de la politique économique et sociale. Le Centre publie des rapports et des livres, ainsi qu'une revue mensuelle. Il organise aussi des conférences et des colloques.



CCPA

CANADIAN CENTRE
for POLICY ALTERNATIVES
CENTRE CANADIEN
de POLITIQUES ALTERNATIVES

www.policyalternatives.ca

> NATIONAL OFFICE

410-75 Albert Street, Ottawa, ON K1P 5E7
TEL 613-563-1341 FAX 613-233-1458
ccpa@policyalternatives.ca

BC OFFICE

1400-207 West Hastings Street, Vancouver, BC V6B 1H7
TEL 604-801-5121 FAX 604-801-5122
ccpabc@policyalternatives.ca

MANITOBA OFFICE

309-323 Portage Avenue, Winnipeg, MB R3B 2C1
TEL 204-927-3200 FAX 204-927-3201
ccpamb@policyalternatives.ca

NOVA SCOTIA OFFICE

P.O. Box 8355, Halifax, NS B3K 5M1
TEL 902-477-1252 FAX 902-484-6344
ccpans@policyalternatives.ca

SASKATCHEWAN OFFICE

Suite B 2835 13th Avenue, Regina, SK S4T 1N6
TEL 306-924-3372 FAX 306-586-5177
ccpasask@sasktel.net

> BUREAU NATIONAL

410-75 rue Albert, Ottawa, ON K1P 5E7
TÉLÉPHONE 613-563-1341 TÉLÉCOPIER 613-233-1458
ccpa@policyalternatives.ca

BUREAU DE LA C.-B.

1400-207 rue West Hastings, Vancouver, C.-B. V6B 1H7
TÉLÉPHONE 604-801-5121 TÉLÉCOPIER 604-801-5122
ccpabc@policyalternatives.ca

BUREAU DE MANITOBA

309-323 avenue Portage, Winnipeg, MB R3B 2C1
TÉLÉPHONE 204-927-3200 TÉLÉCOPIER 204-927-3201
ccpamb@policyalternatives.ca

BUREAU DE NOUVELLE-ÉCOSSE

P.O. Box 8355, Halifax, NS B3K 5M1
TÉLÉPHONE 902-477-1252 TÉLÉCOPIER 902-484-6344
ccpans@policyalternatives.ca

BUREAU DE SASKATCHEWAN

Pièce B 2835 13e avenue, Regina, SK S4T 1N6
TÉLÉPHONE 306-924-3372 TÉLÉCOPIER 306-586-5177
ccpasask@sasktel.net