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CORPORATE REPORT

NO: **R224** COUNCIL DATE: **December 12, 2011**

REGULAR COUNCIL

TO: **Mayor & Council** DATE: **December 7, 2011**

FROM: **City Solicitor** FILE: **0400-01**

SUBJECT: **Comprehensive Economic and Trade Agreement ("CETA") – Potential Impacts on Local Governments**

RECOMMENDATION

The Legal Services Division recommends that Council:

1. Receive this report as information;

2. Adopt the resolution attached as Appendix "G" to this report with respect to the Comprehensive Economic and Trade Agreement ("CETA") that is currently being negotiated between the federal government and the European Union; and

3. Request that the Mayor forward a letter along with a copy of Council's resolution to each of the appropriate Federal and Provincial Ministers, to the Union of BC Municipalities and the Federation of Canadian Municipalities.

INTENT

The purpose of this report is provide information about the Comprehensive Economic and Trade Agreement ("CETA") that is currently being negotiated by the federal government with the European Union and the impact that such an agreement may have on local governments in BC and to recommend a resolution for consideration of adoption by Council in relation to this matter.

BACKGROUND

The City of Surrey has recently received inquiries from local residents with respect to CETA – a trade agreement that is being negotiated between Canada and the European Union. Residents have raised concerns regarding CETA's potentially negative impact on municipal operations, with specific focus directed to the issues of "buying local" and food/water security.

Before it deals with these issues, this report will briefly outline other trade agreements into which Canada has entered and explain in what aspects the CETA diverges from them.

Prior Federal Agreements (AGP, NAFTA, CUSPA)

Canada is already a signatory to a number of multilateral and bilateral trade agreements. These include the World Trade Organization's Agreement on Government Procurement (the "AGP"), the North American Free Trade Agreement ("NAFTA") and the temporary Canada-US Procurement Agreement ("CUSPA").

In terms of chronology, NAFTA came into force in 1994, the AGP in 1996, and the CUSPA was negotiated in 2010.

AGP & NAFTA

The AGP and NAFTA both explicitly prohibit the use of 'offsets' (defined as "any condition or undertaking that encourages local development or improves a party's balance-of-payment accounts"). However, unlike CETA, these two agreements are limited in their application to federal and provincial bodies – they do not include municipalities. The CETA breaks new ground in this regard as a federally-negotiated trade agreement by extending the application of the no-offset principle into the municipal procurement sphere.

CUSPA

A great deal of concern related to the CETA stems from the outcome of a similar agreement the Canadian government negotiated in 2010 with the United States: the CUSPA. During that process, the Federation of Canadian Municipalities ("FCM") appeared before the Standing Committee on International Trade and articulated a number of principles it urged the Federal Government to take into account during negotiations. (These principles, discussed in more detail below, are substantially the same as what FCM has presented in the context of CETA.)

In a legal opinion prepared by Steven Shrybman (referenced in correspondence from a local resident and attached to this report as Appendix "A"), Mr. Shrybman suggests that the CUSPA failed to ensure reciprocity between American and Canadian municipalities with respect to municipal procurement (among other things). According to Mr. Shrybman, American municipalities retained the ability to express preferences for American suppliers while Canadian municipalities would have to open their procurement markets to U.S. bidders for construction services. However, according to Adam Thompson, Policy Advisor at FCM, the above characterization demonstrates a misunderstanding of what was negotiated in CUSPA. Contrary to the preceding paragraph, CUSPA contains an exception from the "Buy American" provisions of the U.S. stimulus package, the effect of which was that Canadian companies could be characterized as American for the purpose of bidding on those contracts. Furthermore, the CUSPA was a temporary agreement which was limited in its scope to American stimulus spending. The CUSPA expired in October 2011. Negotiations between the Canadian and American governments to secure an extension are continuing; the ultimate resolution of the process remains unknown.

Prior Provincial Agreements (TILMA, AIT, NWPTA)

Provincially, British Columbia is a signatory to the BC-Alberta Trade Investment and Labour Mobility Agreement ("TILMA"), the Agreement on Internal Trade ("AIT") and the New West Partnership Trade Agreement ("NWPTA").

In terms of chronology, the AIT came into force in 1995, TILMA in 2007 and the NWPTA in 2010.

TILMA

British Columbia's experience with TILMA is instructive largely because of an issue that arose with respect to the monetary threshold established for municipal procurement. This experience served to emphasize the importance of setting thresholds at a level which would not include procurement contracts required by municipalities for their day-to-day operations.

AIT & NWPTA

All Canadian provinces and territories (with the exception of Nunavut) are signatories to the AIT. The NWPTA, by comparison, is an agreement only between British Columbia, Alberta and Saskatchewan. The NWPTA explicitly states that it is an additional agreement in furtherance of the AIT's objectives and, as with TILMA, the NWPTA includes provisions regarding local government procurement, transparency, and non-discrimination. Different thresholds are established by the NWPTA for procurement of goods, services and construction.

DISCUSSION

What are the concerns regarding CETA?

At the outset, it is important to bear in mind that negotiations between Canada and the EU are ongoing and that the text of CETA has not been finalized. The following commentary should be read in this context, knowing that the final text of an agreement could vary dramatically from the parties' current negotiating positions.

Based on present understanding, CETA will apply to procurement of both goods and services where such procurement rises above a "to-be-determined" financial threshold. Most procurement currently being undertaken by Canadian municipalities would be unaffected by CETA. This is because, with some exceptions (set out below), most municipal procurement activity does not express a preference for local suppliers. This being said, CETA would potentially constrain municipalities in the future if they attempt to link procurement with sustainability and/or local development objectives. This represents a departure from past trade agreements negotiated by the federal government. Examples of current Canadian initiatives, which could be adversely affected by CETA, include:

- Green Energy (in Ontario)
- Local Food Procurement Policy (in Toronto)
- Sustainable wastewater treatment (in Victoria)

Indeed, when one considers the growing trend of "sustainable" practices being adopted by municipalities, it is conceivable that CETA could affect future municipal procurement practices to a much greater degree than would be the case today. In other words, the primary concern with CETA is not that it would prevent municipalities from continuing to act in their present manner, but that it could preclude certain changes in procurement practices from being adopted in the future.

It is also noteworthy that, unlike previous agreements, CETA would potentially apply to water-related procurement. More precisely, it means CETA could apply to municipal Requests for Proposals regarding provision or operation of networks related to the production, transportation and distribution of wastewater and/or drinking water. This prospect has raised concern related to the potential for private entities to bring proprietary claims in respect of water itself (similar to concerns raised in relation to NAFTA).

Another potentially concerning aspect of CETA is the recourse mechanism it provides to unsuccessful bidders. Specifically, CETA would allow unsuccessful bidders to appeal a municipality's decision to the Canadian International Trade Tribunal (and from there potentially to higher Courts), during which time the municipality's procurement process could be ordered suspended until the appeal is resolved. Additionally, municipalities could be ordered to compensate the unsuccessful bidder or risk of litigation (with its associated costs in money and time).

Ultimately, the validity of these concerns will depend on the terms agreed to by Canadian and EU negotiators. These concerns also have the potential to be addressed via the means described in the following section.

Actions taken by organizations that advocate on behalf of Local Governments

A number of municipalities (both within and outside of British Columbia) have identified the aforementioned issues as matters of importance to them. This report will now describe the steps FCM and UBCM have taken in response to the concerns of their member municipalities.

Federation of Canadian Municipalities

The FCM has expressed a clear position with respect to international trade agreements (including CETA): that they support free and fair trade between Canada and the world. To this end, FCM has published a list of seven principles which they maintain should be reflected in any trade agreement into which Canada enters. Specifically, FCM advocates for:

1. Reasonable procurement thresholds;
2. Streamlined administration;
3. Progressive enforcement;
4. Canadian content for strategic industries or sensitive projects;
5. Dispute resolution;
6. Consultation and communication; and
7. Reciprocity.

This list of principles, with an additional explanation of each, is attached as Appendix "B". These principles originally evolved out of the TILMA and CUSPA processes and are intended to respond to the concerns described previously in this report. Of the seven principles, three in particular have been highlighted as part of FCM's meetings and correspondence with the Minister of International Trade:

- Reasonable procurement thresholds;
- Progressive enforcement; and
- Canadian content for strategic industries or sensitive projects.

The issue of procurement thresholds was identified as a concern in the wake of the TILMA. Under TILMA, these thresholds were set at a low level and did not rule out day-to-day municipal procurement needs. FCM is committed to having thresholds under CETA set at higher levels, such that day-to-day procurement needs would be exempt.

"Progressive enforcement" seeks to address the concern that municipalities could become burdened with heavy compliance costs under CETA. It is also an attempt to address the concerns related to potential litigation by unsuccessful bidders, as articulated above.

The issue of Canadian content is particularly important, because this is where certain types of procurement (or procurement relating to specified subject matters) can be made exempt from CETA. As background, subject matters can be made exempt from CETA's application by either the Federal or Provincial Government, depending on which level of government has jurisdiction over the subject. Municipal procurement is an example of a subject matter that is within provincial jurisdiction. Although there will obviously be negotiation between the Provincial and Federal Governments in terms of what will appear on the final list of exemptions, the ultimate decision over matters within provincial jurisdiction is taken by the Province; if a Province steadfastly refuses to have municipal procurement governed by CETA, the Federal Government cannot override such a decision. In terms of expectations as to what will be included by the provinces, CUSPA may provide some guidance. Under CUSPA, the province of Ontario exempted transit projects and British Columbia exempted water projects. FCM has indicated that it anticipates the list of exemptions under CETA to resemble the exemptions under CUSPA.

For a sense of the Federal Government's position regarding these principles, the Honourable Ed Fast, Minister of International Trade, addressed them in a letter sent to FCM President, Berry Vrbanovic, dated August 23, 2011. A copy of his letter is attached as Appendix "C".

Union of British Columbia Municipalities

In tandem with FCM, the UBCM has been addressing this issue for a number of years. Two resolutions specifically dealing with CETA have been adopted and referred to the Provincial Government. Specifically, in 2010 the UBCM membership adopted Resolution B108 that requested the following:

- *a briefing from the Province of BC on the scope and content of trade negotiations with the European Union;*
- *the Federation of Canadian Municipalities to provide sector-by-sector analysis of the potential impacts on local government functions and powers of the procurement regime that the European Union is seeking;*
- *the Federation of Canadian Municipalities to urge the government of Canada not to provide the European Union with access to sub-national government procurement; and*
- *that the provincial government negotiate a clear, permanent exemption for local governments from the CETA.*

The following response from the Provincial Ministry of Tourism, Trade and Investment was forwarded to the UBCM:

The Province has a strong relationship with UBCM, including a legislated duty to consult in the Community Charter that has been exercised under recent internal negotiations such as the British Columbia-Alberta Trade, Investment and Labour Mobility Agreement (TILMA).

For the first time, provincial governments have been invited to participate in international trade agreement negotiations, specifically for a proposed Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union. The provinces and territories are active participants in most matters under their jurisdiction, including government procurement. The negotiation of trade agreements includes confidential information which impacts the final outcome of the agreement.

During this time, the Province has been in a position to inform UBCM at the staff level of ongoing trade negotiations and has done so. As negotiations progress, the Province will brief UBCM to receive input on potential negotiating scenarios.

At the 2011 UBCM Convention, the membership adopted Resolution B112, which specifically requested that:

UBCM call on the Government of British Columbia to remove water services from any commitments under the proposed Canada-EU CETA and that the Federation of Canadian Municipalities call on the Government of Canada to remove water services from its negotiations on CETA with the European Union.

UBCM is still awaiting a response from the Province related to this resolution.

Representatives from the B.C. Ministry of Jobs, Tourism and Innovation delivered a presentation on September 29, 2011 to delegates at the 2011 UBCM Annual Convention. This presentation was organized partly in response to the first bullet point from Resolution B108 (above) and provided an update on CETA as it currently exists. A copy of the presentation is attached as Appendix "D".

Next Steps

The FCM focuses its efforts on issues which affect *all* Canadian municipalities and is restrained in its ability to lobby provincial governments.

It would be beneficial for the City to coordinate its activities with UBCM to ensure that Surrey's views with respect to exemptions in CETA are clearly communicated to the B.C. Provincial Government. Further to this point, the B.C. Provincial Government has expressed a willingness to listen to municipalities and has encouraged them to provide input regarding any concerns they may have related to CETA.

The Council of the Village of Slocan recently passed a resolution (the "Slocan Resolution") based on a template prepared by the Council of Canadians. The Slocan Resolution was forwarded to Premier Clark on November 16, 2011, a copy of which is attached as Appendix "E". Comparable resolutions (in addition to those passed by the FCM and UBCM) have been adopted by over twenty municipalities across the country.

For additional background regarding the Council of Canadians' position on CETA, the organization recently made submissions before the Standing Committee on International Trade. A copy of these submissions are attached as Appendix "F".

RECOMMENDATION

Based on the above discussion, the Legal Services Division recommends that Council:

- Adopt the resolution attached as Appendix "G" to this report with respect to the Comprehensive Economic and Trade Agreement ("CETA") that is currently being negotiated between the federal government and the European Union; and

- Request that the Mayor forward a letter along with a copy of Council's resolution related to this report to each of the appropriate Federal and Provincial Ministers, to the Union of BC Municipalities and the Federation of Canadian Municipalities.

CRAIG MacFARLANE
City Solicitor

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Appendix "A" – Legal opinion on CETA prepared by Steven Shrybman
Appendix "B" – Seven Principles as Prepared by FCM for the Federal Government to Apply to CETA
Appendix "C" – Letter from Federal Minister of International Trade to FCM Re: CETA
Appendix "D" –Presentation by B.C. Ministry of Jobs, Tourism and Innovation to UBCM
Appendix "E" – Letter from Village of Slocan to Premier Christy Clark
Appendix "F" – Submissions made by the Council of Canadians before the Standing Committee on International Trade
Appendix "G" – Proposed Resolution for the Consideration of Surrey City Council

APPENDIX "A"

Municipal Procurement Implications of the Proposed Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union

Legal opinion prepared by Steven Shrybman (Sack Goldblatt Mitchell LLP) for the Centre for Civic Governance at Columbia Institute

May 28, 2010

CENTRE FOR CIVIC GOVERNANCE

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USW-2009

Introduction

Purchasing power has long been a key policy tool for municipalities, and is becoming even more important in the face of the extraordinary economic, social, environmental and ecological pressures currently confronting Canadian communities. Procurement choices can play a crucial role not only in promoting local economic development, local food production and green technologies, but also in reducing greenhouse gas emissions and the community's ecological footprint through regional sourcing of goods and services.

It is in recognition of the importance of local procurement to the wellbeing of Canadian communities that the Centre for Civic Governance commissioned this legal opinion. Sub-national public procurement in Canada had largely been left out of earlier international trade agreements, such as NAFTA and the FTAA. But in early 2010, after months of closed door negotiations, the government of Canada signed an agreement which for the first time opened up municipal procurement in construction services to American companies.

Canada gave away a lot in this 'Buy American deal' (the Canada-US Procurement Agreement, or 'CUSPA') but seems to have gained little in return. Most of the protected US stimulus funds that were Canada's rationale for the deal had already been spent, and many US municipalities chose not to put their own procurement powers up for negotiation. The Canadian government has already pledged to extend and expand this 'Buy American' deal when it comes up for renewal in 2011.

While CUSPA is a source of serious concern, Canada's current trade negotiations with the European Union may set an even more worrying precedent. As Steven Shrybman explains in this legal opinion, leaked documents from the current Canada-EU Comprehensive Economic and Trade Agreement (CETA) negotiations suggest that this deal goes much further than CUSPA. The EU has made specific requests for full access to public procurement in cities across Canada, including the right of European multinational corporations to bid on core municipal services, such as public transit systems, water services and wastewater treatment. The leaked CETA documents explicitly propose that environmental and local economic development considerations be excluded as factors in procurement decisions, and the deal would open up opportunities for corporations who don't get their way to tie municipalities up with expensive legal challenges.

Given these serious concerns, it is crucial that the Canadian government consults closely with municipalities and provides objective research and risk assessments regarding the potential economic, social and environmental impacts of CETA before signing any new agreement. We hope this legal opinion will contribute to a wide-ranging public debate on this matter.

Charley Beresford
Executive Director

CENTRE FOR CIVIC GOVERNANCE Columbia INSTITUTE

The Centre for Civic Governance is an initiative of the Columbia Institute, a charitable organization focused on nurturing leadership for inclusive, sustainable communities.

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May 26, 2010

Charley Beresford
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Dear Ms. Beresford:

Re: Comprehensive Economic and Trade Agreement (CETA)

Canada is currently negotiating a Comprehensive Economic and Trade Agreement (CETA) with the European Union (the "EU"). The following provides an assessment of the potential impacts of this proposed trade agreement on municipal government authority.

The federal government has described CETA as the most ambitious free trade initiative to be undertaken by Canada. In truth, many provisions of the proposed text replicate those of the World Trade Organization (WTO) and the North American Free Trade Agreement (NAFTA). Both agreements greatly expanded the scope of international trade law to encompass spheres of domestic policy and law that have little to do with international trade in any conventional sense, including those within the jurisdiction of municipal governments. Indeed the actions of local governments – including those related to waste management, the delivery of water services, and land use planning – can and have been challenged for offending the requirements of international trade law.

The following analysis does not provide a comprehensive assessment of the full scope of CETA rules that are likely to impact municipal governments, for as noted, much of this terrain has already been charted under NAFTA and WTO rules. For example, Canada proposes to provide corporations with a virtually unfettered right to invoke international arbitration to seek damages where they claim a Canadian government or other public body has failed to comply with the investment rules of the regime. While including such provisions in a comprehensive international trade agreement would be unprecedented for the EU, Canada has been dealing with the consequences of according private investors such extraordinary rights for over a decade.

Even so, the consequences of exposing Canadian governments to investor-state claims by countless EU-based corporations are not to be discounted. Because of the serious risks engendered by such investment rules, we have included an example of these litigation risks below in regard to water supply services in light of the EU's pointed demand that such services

be subject to CETA rules and the dominant position of EU-based water service corporations in this sector.

However, the primary focus of the following assessment is on procurement. In this area, CETA proposals would substantially expand the application of trade rules to municipal governments and other public bodies, and the inclusion of sub-national procurement in CETA is arguably the EU's foremost demand. For the moment, the procurement practices of provincial and municipal governments remain largely untrammelled by international treaty obligations. For these reasons, and because procurement can play such an important role in a modern economy, the following analysis provides a detailed assessment of proposed CETA procurement rules.

SUMMARY

[The term "municipalities" is used throughout this analysis as a short form for all MASH sector entities, including schools, hospitals, libraries, power and water utilities, and virtually all other public bodies and institutions which under present proposals would also be subject to CETA procurement rules.]

The current procurement practices of Canadian municipalities are typically open and transparent. EU companies are as entitled to bid in response to municipal tenders as are their Canadian counterparts, and only very rarely do tender calls require some proportion of the goods and services to be provided locally. However, municipalities also recognize the important role that procurement can play towards achieving economic, social, or environmental goals.

Indeed the FCM has stressed the important relationship between infrastructure investment and job creation. Commenting on federal budget commitments, and under the heading "The Road to New Jobs" the FCM put it this way:

> *Turning federal budget commitments into new jobs does not happen automatically. A number of steps are required, with multiple decision points, complex problem-solving, and external barriers and challenges along the way. Each of these milestones must be met by one or more of the three orders of government involved in this national stimulus effort in order to turn a dollar figure shown in a federal budget document into real projects and jobs in Canadian communities.*

Of course a critical decision point concerns the conditions of public procurement, and the FCM has also called upon the federal government to preserve the right of municipalities to insist on local content and job creation as conditions of procurement. In setting out the principles that should guide Canadian trade negotiations, the FCM stressed the importance of:

> *Canadian content for strategic industries or sensitive projects: A trade deal must recognize strategic and public interest considerations before barring all preferential treatment based on country of origin. There may be industries of strategic significance to a particular region, such as transit, or projects where considerations of quality, public benefit, environmental protection or business ethics means that a local government may be allowed to implement minimum Canadian content levels, within reason.*

To put it simply, proposed CETA rules would permanently remove the option of using procurement in this manner. Thus under CETA, municipalities would no longer be able to restrict tendering to Canadian companies, or stipulate that foreign companies bidding on public contracts accord some preference for local or Canadian goods, services, or workers. As a result, municipalities would lose one of the few, and perhaps the most important tool they now have for stimulating innovation, fostering community economic development, creating local employment and achieving other public policy goals, from food security to social equity.

At the same time, municipalities would bear significant administrative costs and litigation risks arising from having to expand the scope of their procurement practices; reporting upon, accounting for and defending their procurement choices; and from having to compensate unsuccessful bidders where CETA procedures and rules are not strictly observed.

Specifically, proposed CETA procurement rules would:

i) prohibit municipalities from using procurement as a local economic or social development tool by restricting tender calls to local or Canadian companies or by requiring that bidders use some proportion of local or Canadian goods, services or labour in providing the goods and services being tendered;

ii) prohibit municipalities from using procurement for strategic purposes, such as creating or supporting a market for innovative goods and services, including green technologies where the effect would favour Canadian producers or attract investment to Canada;

iii) prohibit municipalities from using procurement for sustainable development purposes such as promoting food security by adopting "buy local" food practices;

iv) require municipalities to shoulder the administrative costs associated with:

- providing the federal government with information and statistics about their procurement practices and activities:
- publishing detailed notices and announcements of intended procurements;
- issuing tenders in accordance with CETA procedures and technical specifications;
- accounting to unsuccessful suppliers for their procurement decisions; and
- defending their actions if challenged, before domestic administrative, judicial and appellate bodies;

v) put municipalities in jeopardy of their procurement processes being slowed or derailed by having to:

- provide unsuccessful EU bidders with sufficient time to appeal their decisions;

- contend with an order suspending the procurement pending the resolution of such an appeal; or

- pay damages to an unsuccessful bidder or bidders where they fail to comply with CETA rules.

The constraints imposed by CETA on municipal procurement options also go well beyond those of the Agreement in Internal Trade (AIT) which allow municipal procurement to favour Canadian goods and services, and which unlike CETA rules, exempt procurement relating to water and water related services.

The Importance of Due Diligence by Municipalities

Given the nature of these constraints, it is surprising that neither federal nor provincial governments have presented an assessment of their impact, nor have they offered any meaningful assessment of what municipalities might gain from abandoning their procurement prerogatives. However, it does appears to be conceded that Canada has little to gain from reciprocal access to EU procurement markets and so will be seeking gains in other areas.

For example, according to an account in a leading trade journal, recognizing that the EU has much more to gain from the inclusion of sub-national procurement in CETA, Canada's Trade Minister is poised to use sub-national procurement as a bargaining chip in exchange for new market access for Canadian beef, pork and grains.[1] We could not, however, find evidence that such a trade-off would be warranted, even if one accepts that it is reasonable to expect municipalities to bear the costs for benefits that other sectors and regions of the country might gain.

We have also included below a brief account of the outcome of recent bi-lateral procurement negotiations with the U.S. to belie the notion that one can rely upon the outcome of such negotiations to produce a balanced agreement that serves Canadian interests. The recently concluded Canada-U.S. Procurement Agreement is a remarkably one-sided agreement under which most benefits flow to U.S. companies, and this is particularly true for temporary provisions that require Canadian municipalities to comply with international procurement rules for the first time. Under these rules, Canadian municipalities must open procurement for construction and related services to U.S. companies, but U.S. states and municipalities, many of which maintain local preferences that effectively exclude Canadian bidders, are under no reciprocal obligation. It appears in that case that the federal government's political imperatives overwhelmed its interest in achieving an outcome that furthered Canadian interests. We believe there are good reasons to be concerned that the same dynamics are at play in CETA negotiations.

If there is any further need to underscore the importance of due diligence by those representing municipalities on the trade file, it is provided by recognizing the permanent character of CETA commitments. The practical and political difficulties of amending an international agreement are such that it is virtually impossible to reinstate the prerogatives of governments once these are

[1] Inside Trade, 28-18-13.

abandoned. Recognizing this difficulty, Canada has proposed an elaborate procedure for modifying the commitments it makes under the CETA regime.[2] But the right to modify commitments is highly qualified, and has not been accepted by the EU. Moreover, in our view Canada's proposal is unlikely to be accepted by the EU because it cuts so directly against the essential purpose of this proposed trade agreement, which is to establish binding and ongoing obligations that may not be amended domestically.

To underscore this point, we are aware of no instance of Canada seeking to amend NAFTA rules, notwithstanding serious dissatisfaction with aspects of the regime – the softwood lumber disputes and investor state claims being two examples. The only reasonable assumption for municipalities to make is that if procurement authority is ceded under CETA, it will not be recoverable.

In light of the outcome of 'Buy America' procurement negotiations with the U.S., and the sweeping constraints on municipal procurement powers engendered by proposed CETA rules, it would be reasonable in our view to call upon the federal government to:

i) undertake and publish a thorough, timely and objective assessment of both the costs and benefits for municipalities of the CETA agenda;

ii) provide an explanation of which sectors are most likely to be the principal beneficiaries of CETA, and how the purported benefits of this trade deal are to be distributed;

iii) engage in effective consultations with municipalities following these analyses and before negotiations are pursued further; and

iv) allow sufficient time for municipalities to solicit public comment from those potentially affected by present proposals.

Most importantly, given the failure of CETA proposals to preserve the right of municipalities to insist on Canadian content for strategic industries as the FCM called for, it would be reasonable to renew calls for the Federal Government to provide clear assurance that it will not trade away the authority of local governments to use procurement to achieve economic, social, environmental, sustainability and other valid public policy goals.

Finally, it is important that the Federal Government's international procurement objectives are being pursued in at least one other major venue – bi-lateral negotiations under CUSPA. Under that Agreement Canada is committed to future discussions to explore an expansion of commitments with respect to market access for procurement.

We believe that Canadian municipalities should be very clear that the preservation of such rights is a necessary precondition for any future support they might offer for the CETA agenda. .

Caveats

[2] See Article XVIII: Modifications and Rectifications to Coverage.

Finally by way of introduction, it is important to qualify the following assessment by noting that it is based on unofficial and leaked copies of draft negotiating texts.[3] Many of the details of current proposals have yet to be ironed out, and in many instances the drafts set out, in bracketed text, the respective negotiating positions of the two parties which remain to be settled. While the federal government has provided ongoing briefings concerning the progress of negotiations it has not been willing to be transparent about the actual details and substance of those negotiations.

THE ROLE OF PROCUREMENT

Before describing the procurement rules set out in the draft CETA text, it is appropriate to describe how public procurement is now being used by Canada and its principal trading partners, for as noted, both the conventional and more innovative uses of procurement would be largely ruled out by these proposed trade rules.

The Conventional Use of Procurement

Public procurement typically involves the expenditure of public funds to acquire goods (eg. computers, transit vehicles and wind turbines) and services (eg. engineering, accounting, waste management and energy conservation) for use by government or other public bodies. Subject to certain requirements concerning transparency and fairness, Canadian municipalities are relatively free to adopt whatever procurement practices they deem to be in the public interest.

In fact, procurement remains one of the few economic levers still available to governments under free trade, and may still be used to promote local economic development and create jobs. The importance of this tool is also explained by the fact that such public spending represents approximately 15-20% of GDP in OECD countries.[4]

Because of their utility and importance, many of Canada's trading partners have also preserved their rights to use procurement for economic and public policy purposes. For example, in the U.S. procurement is routinely used to promote community and local economic development –and preferences for local companies and goods are a ubiquitous feature of dozens of state and local procurement regimes.

Procurement to Foster Innovation and Sustainable Development

In addition to the more conventional uses of public procurement, it is increasingly being seen as providing an important tool for spurring innovation and creating markets for new products and services. Sometimes described as *strategic procurement,* this utilization of public purchasing can create demand for innovative technologies, products or services which stimulate a broader market. In this way public demand can play an important role with respect to the diffusion of new or alternative technologies, since public demand for innovative products also sends strong signals to private users.

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[3] These documents can be found on the website of the Trade Justice Network: (http://www.tradejustice.ca/)
[4] Joint Report on the EU-Canada Scoping Exercise, March 5, 2009.

Green Energy In Ontario

This in fact is the approach that Ontario has recently adopted as part of a green energy initiative under which the government is using public funding and spending to attract and create a market for renewable energy products and producers.

Under the Ontario *Green Energy Act*, 2009, a preferential feed-in tariff programme has been established to encourage the use of renewable energy. The *Green Energy Act* includes significant domestic content requirements for the procurement of renewable energy projects. According to this new policy, at least 25% of wind projects and 50% of large solar projects must contain Ontario goods and labour. These percentages will increase for solar in 2011 (up to 60%), and for wind in 2012 (up to 50%). Ontario sees this initiative as a way to stimulate the economy, provide energy security for the province, and to achieve important environmental goals, including the reduction of greenhouse gases. It is telling that the EU has specifically identified the Act and these programs as offending the principles of the CETA procurement rules it is proposing.[5]

Sustainable Waste Water Treatment and Energy

Another example of strategic procurement is provided by present plans by the Capital Regional District (CRD) of British Columbia to establish sewage treatment works and related facilities. The CRD waste water treatment project is comprised of several elements, including a waste water collection system, two main waste water treatment plants, an energy centre for biogas, waste heat and other energy recovery projects, and resource recovery facilities for biosolids and other waste products.[6] The CRD has identified criteria for assessing the various options for proceeding with its project, including "the ability for the delivery option to provide maximum economic benefit to the CRD and British Columbia in terms of jobs and other economic benefits".

But the CRD also sees procurement as means for promoting environmental innovation with respect to the management of wastewater.[7] In this regard, the CRD plan is seen as an important means for "integrating wastewater management into sustainable water, storm water, solid waste and energy planning for the community." For practical applications of wastewater treatment resources, the possibilities are endless."[8] This type of strategic procurement by the CRD can provide a market for innovative Canadian environmental and energy engineering services and technologies, while achieving its other stated goal of promoting economic development for the region and Canada.

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[5] MAAC 2009 – List of Key Market Access Barriers in Canada under the Market Access Strategy.

[6] Capital Regional District Core Area Wastewater Management Program Potential Program Delivery Options, January 6, 2010.

[7] As noted by the CRD business case "… the CRD is committed to implementing a large number of sustainability initiatives in these Programs. The CRD will demonstrate leadership in the field of wastewater treatment and beneficial reuse, and also aim for carbon neutrality." [G.5 Resource Recovery And Carbon Neutrality - business case]

[8] http://www.wastewatermadeclear.ca/environment/benefits.htm

But as we describe below, under CETA rules the CRD would be prohibited from including "offsets" in procurement contracts for the purpose of encouraging local development "such as the use of domestic content … [or] licensing of technology...." This rule clearly precludes procurement terms that would require any bidder to source environmental engineering services or technologies from Canadian providers, and would defeat the dual purposes the CRD is attempting to achieve.

Food Security

Another potential casualty of proposed CETA rules is buy-local food policies such as Toronto's "Local Food Procurement Policy" which was explicitly adopted to "reduce greenhouse gas and smog causing emissions generated by the import of food from outside of Ontario." That policy commits Toronto City Council "to progressively increase the percentage of food being served at City-owned facilities or purchased for City operations from local sources". "Local" is defined as "food that is grown in the Greater Toronto Area, the Greenbelt of Ontario and other regions of Ontario." [9]

The benefits of Toronto's commitment were described as including reductions in:

- climate change and greenhouse gas emissions associated with food transportation and production;
- harmful effects of agricultural chemicals, in particular pesticides and fertilizers;
- the long-term effects of large scale monocultures; and
- increased reliance on imported food and food security issues related to breaks in the food chain due to emergencies or natural disasters.

Here again, proposed CETA rules would rule out these procurement goals.

Strategic Procurement in the EU

One of the ironies here is that Ontario is in many ways following the lead of European countries that have adopted very similar strategies for fostering the development of renewable energy technologies such as wind turbines (Denmark) and photovoltaic cells (Germany). In fact, in Europe these initiatives were often taken up by municipal governments.

For example, s. 2 of Germany's *Renewable Energy Sources Act*, provides for:

> *1. priority connection to the grid systems for general electricity supply of installations generating electricity from renewable energy sources and from mine gas within the territory of the Federal Republic of Germany, including its exclusive economic zone(territorial application of this Act),*

[9] See discussion http://www.torontoenvironment.org/campaigns/greenbelt/localfoodprocurement

> *2. the priority purchase, transmission, distribution of and payment for such electricity by the grid system operators ...*

The U.K. is also committed to using public procurement to foster innovation. Its policy is set out in a publication titled "Driving innovation through public procurement" which shows government departments how they can encourage suppliers to use their capabilities and know-how to innovate in ways that will benefit both public services and the wider economy. The U.K. regards public procurers as having an important part to play "in making the U.K. the best place in the world to be an innovative business or public sector or third sector organisation."

As its responsible Ministry explains:

> *Innovation is a key element in driving greater value for money from public sector procurement. By encouraging suppliers to develop novel techniques to help deliver public services we will continue to drive improvements in the performance of public services."*[10]

Given the very asymmetrical outcome of procurement negotiations with the U.S., which are described more fully below, it is a real concern that the EU may see an opportunity to challenge Ontario's green power initiative while leaving similar EU programs intact.

CURRENT CANADIAN PROCUREMENT PRACTICES

It is beyond the scope of this assessment to canvass the diverse procurement practices of Canadian municipalities and MASH sector bodies. Anecdotal accounts, however, indicate that a great deal of Canadian procurement by these sectors engender few restrictions on the right of EU-based corporations to bid on public tenders. It is also uncommon for tender calls to stipulate that some or all of the goods and services involved be acquired locally or even in Canada. Nevertheless, there are notable exceptions to open tendering when municipalities or MASH institutions feel these are warranted. These, however, are clearly the exception.

IS IT PROTECTIONISM?

When the US government incorporated long-standing local preferences to recent stimulus legislation, Canada was quick to denounce these provisions as protectionist. Putting aside for the moment that similar domestic purchase and assembly requirements have been a feature of U.S. law since the 1930s, and are consistent with its international trade obligations, it is isn't obvious that such measures fit the definition of protectionism in any respect.

To begin with, procurement was not, until the advent of the WTO, a subject for inclusion in an international trade agreement. Under free trade rules, governments must not interfere with trade in goods across international borders, but they have not historically been required to spend public funds on foreign goods or services when they choose not to. Moreover, proposed CETA rules apply to services as well as goods – such as the planning, design, engineering, environmental assessment and management services associated with establishing a green box composting program, not just the green bins, trucks and composters needed to operate such a system.

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[10] http://www.ogc.gov.uk/documents/Innovation_policy_statement.pdf

More important than the label, however, is the very practical question of whether Canada should abandon such an important economic development tool, and why it should do so given the determination of the U.S. and other trading partners to maintain this authority.

SCOPE AND APPLICATION

The EU has tabled its initial request for the application of CETA procurement rules, and is proposing the inclusion of all procurement contracts with a value in excess of $200,000 by the following entities:

- 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, including:
    - in Ontario: the municipalities of Ottawa, Toronto, Hamilton, London, Richmond Hill, Kitchener, Vaughan, Brantford, Windsor, Markham, Greater Sudbury, Burlington, Oakville, Oshawa, St. Catharine's-Niagara, Sherbrooke, Thunder Bay, Kingston, Barrie, Guelph
    - in Québec: the municipalities of Montréal (and/or Ville de Montréal ex-CUM), Québec, Longueil, Gatineau, Trois Rivières, Laval, Chicoutimi-Jonquière
    - in Alberta: Calgary, Edmonton
    - in British Columbia: Vancouver, Richmond, Coquitlam, Burnaby, Abbotsford, Victoria, Kelowna
    - in Manitoba: Winnipeg
    - in other provinces: Regina, Saskatoon, Halifax, St John's (Newfoundland).
- 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.
- 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 – including many run by municipal or regional authorities.
    2. Transport – including the public transit systems of Canada's larest cities
    3. Ports
    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

- 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 Toronto Hydro.

- Services already listed under Canada's current GPA commitments, including:

  - engineering related scientific and technical consulting services and technical testing and analysing services
  - financial management consulting services, public relations services and other management consulting services
  - maintenance and repair of motor vehicles
  - market research and public opinion polling services
  - printing and publishing services
  - telecommunications services
  - courier services
  - construction services

- 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.

As noted, these requests would impose permanent constraints on the exercise of procurement authority by sub-national Canadian governments, including municipalities and other local public entities, for the first time.

THE SUBSTANTIVE REQUIREMENTS OF CETA PROCUREMENT RULES

The essential requirements for procurement under CETA are essentially threefold and require municipalities and other public bodies:

1. to remove any preference for local companies, goods or services as a requirement for or condition of procurement;

2. to carry out procurement in accordance with the specifications and procedures delineated by CETA; and

3. to accord EU bidders with recourse, including the right to claim damages, if CETA rules are not strictly met.

We consider these in turn.

1. Procurement May not Favour Local Companies, Goods, Services or Workers

First, municipalities must provide access to the domestic procurement markets on a non-discriminatory basis. Article IV provides:

> *Non-Discrimination*
>
> *1. With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of the other Party and to the suppliers of the other Party offering such goods or services, treatment no less favourable than the treatment the Party, including its procuring entities, accords to [EU: its own] [CAN: domestic] goods, services and [EU: locally established] suppliers.*
>
> *2. 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.*

Equally important is the fact that these local entities are prohibited from stipulating conditions to a procurement that are intended in any way to encourage local development. In the terminology of international trade law, such a condition is known as an "offset" and is defined under CETA as follows:

> *offset means 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*;[11]

and, under Article IV:6

> *With regard to covered procurement, a Party, including its procuring entities, shall not seek, take account of, impose or enforce any offset.*

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[11] Article I(k)

The ban on offsets is arguably the more serious constraint imposed by the regime, and it is important to note that it applies to all procurement contracts regardless of the national pedigree of the prospective bidders.

This means that where CETA rules apply, procurement can no longer be used as a tool to foster local or Canadian economic or sustainable development, facilitate innovation, promote social goals, support food security, or address local or Canadian environmental problems. At a time when procurement is one of the few economic levers available to governments, CETA rules would take it out of the hands of government and other public bodies.

2. Procurement Must be Conducted in Accordance With CETA Rules

The second general obligation of municipalities is to adopt the procurement procedures and practices delineated by CETA. Because the administrative burden and costs of complying with these rules may be significant, and because non-compliance may give rise to damage claims by would-be or unsuccessful bidders, these substantive and procedural rules are briefly described here.

To begin with, procurement documents such as tender requests and requests for proposals must be drafted in accordance with detailed technical specifications set out by the Agreement.[12] Municipalities must also allow sufficient time for EU suppliers to prepare and submit requests for participation and responsive tenders.

The federal government is obliged to publish information about the requirements, conditions and statistics related to public procurement including by municipal governments and the MASH sector.[13] Much of that information would have to be gathered by municipalities and reported in some manner to the federal government.

Detailed and Summary Notices of Intended Procurements

Municipalities would have direct responsibility for publishing detailed notices[14] of intended procurement,[15] and according to EU proposals this information would be gathered and

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[12] Article IX

[13] Article V, ss. 1-3

[14] Article VI: 2. Except as otherwise provided in this Chapter, each notice of intended procurement shall include:
(a) the name and address of the procuring entity and other information necessary to contact the procuring entity and obtain all relevant documents relating to the procurement, and their cost and terms of payment, if any;
(b) a description of the procurement, including the nature and the quantity of the goods or services to be procured or, where the quantity is not known, the estimated quantity;
(c) for recurring contracts, an estimate, if possible, of the timing of subsequent notices of intended procurement;
(d) a description of any options;
(e) the time-frame for delivery of goods or services or the duration of the contract;
(f) the procurement method that will be used and whether it will involve negotiation or electronic auction;
(g) where applicable, the address and any final date for the submission of requests for participation in the procurement;
(h) the address and the final date for the submission of tenders;

disseminated free of charge through "single point of access".[16] Municipalities are also to be responsible for publishing "a summary notice that is readily accessible, at the same time as the publication of the notice of intended procurement, in English or French."[17] Municipalities are either to be "encouraged" [CAN] or required [EU] to also publish notices of planned procurements as early as possible in each fiscal year.

It is beyond the scope of this assessment to estimate the costs of gathering, translating, and reporting this information. Municipalities may also want to know how the costs of maintaining a single national procurement information system are to be allocated.

Post-Procurement Reporting Requirements

Municipalities would also be responsible for complying with significant post-contract reporting which would entail:

- providing an unsuccessful supplier with an explanation of the reasons why the entity did not select its tender and the relative advantages of the successful supplier's tender, when requested to do so;
- publishing a notice describing the details of the procurement and successful bidder;
- maintaining documentation concerning the procurement for a period of 3 years;
- collecting and reporting relevant statistical information about its procurement, which Canada suggests be presented as annual reports.

3. Dispute Resolution and Enforcement Procedures

It is likely that the most onerous costs for municipalities from having to comply with CETA procurement rules will arise when claims are brought by unsuccessful bidders. Resolving such claims will engage a multi-staged dispute process that would be demanding of staff resources,

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(i) the language or languages in which tenders or requests for participation may be submitted, if they may be submitted in a language other than an official language of the Party of the procuring entity;
(j) a list and brief description of any conditions for participation of suppliers, including any requirements for specific documents or certifications to be provided by suppliers in connection therewith, unless such requirements are included in tender documentation that is made available to all interested suppliers at the same time as the notice of intended procurement;
(k) where, pursuant to Article VIII, a procuring entity intends to select a limited number of qualified suppliers to be invited to tender, the criteria that will be used to select them and, where applicable, any limitation on the number of suppliers that will be permitted to tender; and
(l) an indication that the procurement is covered by this Chapter.

[15] Article VI 1-2

[16] Idem

[17] Article VI:4

may involve significant legal and compensation costs, and that could potentially derail the entire procurement process.

Stage 1: Disclosure of Information

Municipal procurement practices and decisions can be challenged under CETA by both the EU and unsuccessful bidders. At first instance, municipalities would be obligated to promptly provide the federal government with information explaining whether a particular procurement was carried out in compliance with CETA rules.

Article XVI:1 *(Provision of Information to Parties)* provides:

> *On request of the other Party, a Party shall provide promptly any information necessary to determine whether a procurement was conducted fairly, impartially and in accordance with this Chapter, including information on the characteristics and relative advantages of the successful tender. (subject to certain exceptions where disclosure would eg. impede law enforcement or legitimate commercial interests)*

Stage 2: Challenges by Unsuccessful Bidders

Unsuccessful suppliers are to be accorded the right to challenge the procurement before an independent administrative or judicial body and be given sufficient time to do so. Thus, under Article XVII (Domestic Review Procedures):

> *2. Each Party shall provide a timely, effective, transparent and non-discriminatory administrative or judicial review procedure through which a supplier may challenge:*
>
> *(a) a breach of the Chapter; or*
>
> *(b) where the supplier does not have a right to challenge directly a breach of the Chapter under the domestic law of a Party, a failure to comply with a Party's measures implementing this Chapter,*
>
> *arising in the context of a covered procurement, in which the supplier has, or has had, an interest. The procedural rules for all challenges shall be in writing and made generally available.*
>
> *3. Each supplier shall be allowed a sufficient period of time to prepare and submit a challenge, which in no case shall be less than 10 days from the time when the basis of the challenge became known or reasonably should have become known to the supplier.*

Where a municipality establishes an informal process of review, an appeal to an independent adjudicator must be allowed.[18]

The Canadian International Trade Tribunal

[18] Article SVII:5.

In Canada such disputes are likely to be resolved by the Canadian International Trade Tribunal, and may engender significant legal costs and delay. The CITT currently has responsibility for inquiring into complaints by potential suppliers concerning procurement by the federal government that is covered by the NAFTA, the AIT and the WTO Agreement on Government Procurement (AGP).

There were 131 procurement disputes that proceeded before the CITT last year. The decisions are posted on line and reveal the complexity of such disputes. Many CITT procurement cases involved the participation of several legal teams, and it is not uncommon for such disputes to take months to adjudicate. Moreover, the right to seek judicial review of CITT decisions before the Federal Court of Appeal may also be an option for an unsuccessful bidder that fails before the Tribunal. Not only is the expense of such proceedings typically onerous, but an unsuccessful bidder may be able to tie up the procurement process for many months by making a claim.

Stage 3: Preserving the Rights of Unsuccessful Bidders

In addition to the delay and costs of adjudicating such claims, an unsuccessful bidder is entitled to have its rights preserved while any dispute is resolved, including, for example, by way of an order suspending the procurement process itself.

Article XVII: 7(a) requires each Party to establish procedures that provide for:

> *rapid interim measures to preserve the supplier's opportunity to participate in the procurement. Such interim measures may result in suspension of the procurement process. The procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether such measures should be applied. Just cause for not acting shall be provided in writing;* [emphasis added]

It is not clear whether the suspension of the procurement process will remain a permissive rather than mandatory feature of the regime, but it is obvious that such an eventuality has the potential to seriously derail the plans of both the municipality and the successful bidder.

Stage 4: Compensating Unsuccessful Bidders

Where the complaint of the unsuccessful bidder is borne out, the review body is to have the authority to require the municipality to compensate the unsuccessful bidder or remedy the breach. Article XVII: 7(b) provides:

> *where a review body has determined that there has been a breach or a failure as referred to in paragraph 1, corrective action or compensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both.* [emphasis added]

In light of the fact that the contract would have already been awarded to another bidder, it is likely that compensation would be the usual remedy for non-compliance, unless the procurement process has been suspended pending the outcome of the claim. These costs too may be considerable, for the costs of preparing a bid for a significant project can be very substantial.

Moreover, it is possible that compensation could be payable to more than one unsuccessful bidder where CETA procurement rules are breached.

It is finally worth noting that when formal and expensive legal remedies become available to participants in a process, the threat of litigation may influence the selection process to the prejudice of bidders less able or inclined to litigate if their bid is unsuccessful.

THE SPECIAL CASE OF WATER-RELATED PROCUREMENT

The federal government has made efforts to preserve its sovereign control over water when negotiating international trade agreements, and has been very deliberate about not committing water supply services under the services or procurement agreements of the WTO.[19] Knowing these sensitivities, the EU has nevertheless made of point of requesting that Canada include drinking water services under the CETA procurement agreement. That request is made in the following terms:

> *All Annex 1 and Annex 2 entities [sub-national entities including municipalities] 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.*
>
> *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.*

No doubt the fact that the world's largest water service companies, Veolia and Suez, both of France, and Thames Water of England, are based in EU explains why the EU would make such a problematic request given Canada's reluctance to make such commitments.

The objective of these large water conglomerates is to expand their Canadian markets by winning contracts to establish and/or operate water supply and waste water treatment facilities and services. Companies like Vivendi and RWE (which formerly owned Thames) have bid on

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[19] See for example, Canada's explanatory notes to Appendix 1 of the WTO Agreement on Government Procurement which stipulates that: For the European Union, this Agreement shall not apply to contracts awarded by entities in Annexes 1 and 2 in connection with activities in the field of drinking water, energy, transport or telecommunications.

several public-private partnership schemes to design, build, finance and operate water and waste water systems in Canada.

These companies have also been actively engaged in lobbying for stronger international services, investment and procurement rules to promote the privatization of water and wastewater services. From their perspective, international rules would ideally require municipalities and other entities to tender for such services rather than provide them through municipal or publicly owned water utilities.

The EU proposal to include water supply services does not go that far, but of course it would allow an EU-based transnational water company to bid on any privatization or P3 scheme that was tendered. In this scenario, and as we have seen in the case of the CRD wastewater treatment project, a municipality could not stipulate that the successful bidder use Canadian goods or services for carrying out the project, or impose conditions to the tender that would encourage local development in any other way.

Proposed CETA rules would allow a water conglomerate to get its foot in the door whenever a Canadian municipality or covered water utility tenders for any goods (eg. water treatment technology) or services (eg. for engineering, design, construction, or the operational services) relating to water supply systems. That contractual relationship could then provide a platform for the company to expand its interests in the water or waste water systems.

It is also important to understand these procurement rights in the context of proposed CETA investment rules. As noted, Canada is proposing that EU and Canadian investors be given the right to claim damages for any breach by the Party of the investor rights established by CETA. Similar rights have been written into NAFTA and many bi-lateral investment treaties – the latter typically negotiated with developing nations. Transnational water companies such as Vivendi (now Veolia) and Bechtel have invoked the dispute procedures of these treaties to claim damages when their investments in water privatization schemes have gone sour.[20] Even the threat of such litigation (claims are often in the $10s of millions) can make it difficult for a municipality to extricate itself from a privatization scheme with a company that has the right to make such a claim even where there is good cause for severing the relationship.

In this way, international investment rules provide an important complement to those that facilitate foreign investment. Thus CETA procurement rules open the door for large water conglomerates to establish a stake in municipal water systems, and CETA investment rules effectively lock in those investments.

The most serious threat to public ownership and control of water arises from the risk of private entities being able to establish a proprietary claim to the water itself. Such claims have in fact already been made against Canada under NAFTA rules - in the Sunbelt[21] case arising from a ban

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[20] A summary of these and other investor-state claims can be found on the website of the World Bank Centre for the Settlement of International Investment Disputes (ICSID), at http://icsid.worldbank.org/ICSID.

[21] The Sunbelt claim has been dormant for years, but illustrates the risks associated with allowing foreign investor the open-ended rights engendered by NAFTA investment rules.

by British Columbia on bulk water exports and in the Abitibi case, arising from Newfoundland's decision to reclaim a water use permit and related hydro-power facilities when the company decided to close a paper mill powered by those resources.

Because P3 schemes commonly span decades, they establish an ongoing interest in the water that is necessary for the services being provided. Indeed, schemes to sell the effluent from waste water treatment plants have already been proposed It is not implausible that international investment rules might be invoked to assert an interest in the underlying resource – water. While such a scenario may seem unlikely, the same was said about the Sunbelt and Abitibi claims as well.

EXCEPTIONS

While the scope and application of CETA rules would be unprecedented, the proposed Agreement does set out a limited number of exceptions. For present purposes the most important of these are exceptions are the following:

> *Article II:3*
>
> *(a) the acquisition or rental of land, existing buildings or other immovable property or the rights thereon;*
>
> *(b) non-contractual agreements or any form of assistance that a Party provides, including cooperative agreements, grants, loans, equity infusions, guarantees and fiscal incentives;*
>
> *Article III:2*
>
> *Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Chapter shall be construed to prevent a Party from imposing or enforcing measures:*
>
> *(a) necessary to protect public morals, order or safety;*
>
> *(b) necessary to protect human, animal or plant life or health;*
>
> *(c) necessary to protect intellectual property; or*
>
> *(d) relating to goods or services of persons with disabilities, philanthropic institutions or prison labour.*
>
> *Article IX:6*
>
> *(Technical Specifications and Tender Documentation): For greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment.*

The language of Article III:2 is taken from Article XX of the General Agreement on Tariffs and Trade (GATT), which includes two exceptions that have been invoked, unsuccessfully, to defend environmental measures. The more important of these, which speaks to the conservation of natural resources (Article XX (g)), is not included under Article III and the omission is obviously deliberate. However, the interpretation of the term "necessary" has established such a high bar for environmental and conservation standards to meet that none have survived the challenge.

As for the right to apply technical specifications to promote the conservation of natural resources or protect the environment (Article IX:6), this exception would not allow for the types of conditionality attached to Ontario's green energy program or allow the Capital Region of British Columbia to use procurement to spur environmental innovation by Canadian companies. In other words, while these environmental exceptions should be noted, they will have no material impact on moderating the prohibition of CETA procurement rules on any procurement condition, green or otherwise, that would encourage, either directly or indirectly, local development.

A CAUTIONARY TALE

In February, 2010, Canada entered into the Canada-U.S. Procurement Agreement (CUSPA)[22] which was comprised of three elements, one of which included temporary Canadian procurement commitments for construction projects by many municipalities. In return, the federal government claimed the agreement would secure access to U.S. stimulus spending by exempting Canada from the "Buy American" provisions of the *Recovery Act*.

However, when the details of the deal were finally made public, it was apparent that Canada had gotten very little in exchange for opening its procurement markets to U.S. construction companies. Remarkably, Canada had agreed to an arrangement that obligated Canadian provinces and municipalities to open their procurement markets to U.S. bidders for construction services, but imposed no reciprocal obligation on U.S. states and municipalities.[23]

In fact, extensive state and municipal procurement preferences for local companies, goods and services that are ubiquitous in the U.S. were unaltered under CUSPA.[24] This means that while a U.S. construction company is entitled to bid on certain Canadian municipal construction projects, Canadian companies have no similar right to bid on U.S. projects. There are also CUSPA asymmetries concerning the scope of goods covered and remedies available for non-compliance that also clearly favour the U.S.

The federal government's claim that it had secured access to U.S. stimulus spending also didn't stand up to scrutiny. According to an uncontroverted assessment carried out by the Canadian Centre on Policy Alternatives (the CCPA), even if taken at face value, Canadian companies

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[22] Agreement Between the Government of Canada and the Government of the United States of America on Government Procurement, February 3, 2010.

[23] Idem., Part B, Temporary Agreement on Enhanced Coverage, Article 6: Canada's Sub-Central Coverage.

[24] Canada maintains an extensive list of US state and local procurement restrictions and preferences, see Government of Canada, U.S. State Procurement Preferences at http://www.canadainternational.gc.ca/sell2usgov-vendreaugouvusa/opportunities-opportunites/opportunities-debouches.aspx?lang=eng

gained access to less than 2% of the approximately $US 275 billion of procurement funded under the *Recovery Act*.[25] But this access is subject to several qualifications and exclusions that greatly reduce the value of even this modest access to US procurement.

"Deal or No Deal"

The obvious question is why the Federal Government would have committed Canadian governments and municipalities to such a one-sided arrangement, and two possible explanations come to mind. The first is that Canadian trade officials are extremely poor negotiators. The other is that the political imperative to conclude a deal was such that the government felt compelled to accept an agreement on any terms, regardless of how disadvantageous the terms may be for Canada.

Unfortunately, CETA negotiations appear to reflect similar dynamics to those at play in the case of CUSPA. The Federal government once again has made a public political commitment to negotiating a ground-breaking free trade deal with a trading partner that did not initially see the rationale for a bi-lateral arrangement with Canada, at least until it understood how determined Canada was to conclude a deal. EC trade negotiators will be as hard-nosed as their U.S. counterparts, and quite ready to take advantage of the federal government's need for a 'successful' outcome to its trade initiative.

These dynamics strongly reinforce the need for municipalities to be vigilant in following the progress of CETA negotiations and to be precise about its collective bottom line. When FCM appeared before the Standing Committee on International Trade to discuss CUSPA, it declined to either endorse or reject that arrangement and reminded the Committee of the principles it had urged the Trade Minister to adopt in pursuing any trade initiative.

We believe it would be prudent to revisit those principles in light of the outcome of CUSPA negotiations, and for municipalities to seek a clear assurance from the Federal Government that it will not trade away the authority of local governments to use procurement to achieve economic, social, environmental, sustainability and other valid public policy goals.

Sincerely,

Steven Shrybman
SS:lt/cope 343

[25] Scott Sinclair, Negotiating from Weakness, Canada-EU trade treaty threatens Canadian purchasing policies and public services, April 2010. http://www.policyalternatives.ca/publications/reports/negotiating-%E2%80%89weakness

APPENDIX "B"

FCM FEDERATION OF CANADIAN MUNICIPALITIES FÉDÉRATION CANADIENNE DES MUNICIPALITÉS

Backgrounder

FCM has developed seven principles for the federal government to apply to CETA or any future trade deal:

1. **Reasonable procurement thresholds:** Inappropriately low or broad procurement thresholds may force municipalities to tender projects when tendering is neither practical nor financially justified.

2. **Streamlined administration:** Ensuring that municipal procurement policies are free-trade compliant will likely create new costs and may require specialized expertise. The administrative design of these rules must be as streamlined as possible and developed in close cooperation with municipal procurement practitioners.

3. **Progressive enforcement:** Enforcing provisions of any deal should be progressive, starting with verbal or public warnings before moving to financial penalties, and should recognize and not penalize inadvertent non-compliance, particularly in cases where municipalities do not have the expertise to appropriate apply the rules.

4. **Canadian content for strategic industries or sensitive projects:** A trade deal must recognize strategic and public interest considerations before barring all preferential treatment based on country of origin. There may be industries of strategic significance to a particular region, such as transit, or projects where considerations of quality, public benefit, environmental protection or business ethics means that a local government may wish to implement minimum Canadian-content levels. This should be allowed, within reason.

5. **Dispute resolution:** A dispute-resolution process, like the one in NAFTA, may require a careful review of the municipal role in that process so they can appropriately defend their policies and by-laws as an order of government.

6. **Consultation and communications:** Consultation and communications during negotiations are required to ensure any resulting agreement responds to municipal concerns.

7. **Reciprocity:** Canada´s negotiating position must support reciprocity in Canadian and foreign municipal procurement practices.

APPENDIX "C"

Minister of International Trade and
Minister for the Asia-Pacific Gateway

Ministre du Commerce international et
ministre de la porte d'entrée de l'Asie-Pacifique

Ottawa, Canada K1A 0G2

AUG 2 3 2011

Mr. Berry Vrbanovic
President
Federation of Canadian Municipalities
24 Clarence Street
Ottawa ON K1N 5P3

Dear Mr. Vrbanovic:

I am writing to voice my appreciation for our telephone conversation of August 4, 2011, during which we discussed the strong ongoing cooperation between the Federation of Canadian Municipalities (FCM) and Foreign Affairs and International Trade Canada (DFAIT) through the Joint Working Group on International Trade. We also discussed the FCM's views on the negotiations of a Canada–European Union (EU) Comprehensive Economic and Trade Agreement (CETA). I was pleased to hear of FCM's continuing support for Canada's economic plan, which includes creating jobs and raising Canadians' standard of living through trade.

Further to those discussions, I would like to take this opportunity to share further information with you on the CETA negotiations. With one in five Canadian jobs linked to trade, deepening and broadening Canada's trading relationships is a key priority for Prime Minister Harper and our government. The Canada–EU relationship holds great potential for growing Canada's collective prosperity. The successful negotiation of CETA would give Canadian-based businesses preferential access to the EU, which remains the wealthiest single market in the world despite the EU's current financial difficulties. Removing barriers to trade in goods and services is expected to deliver by 2014 a 20-percent boost to our bilateral trade with the EU and a gain of more than $12 billion in Canada's annual gross domestic product.

A Canada–EU CETA would deliver new jobs and economic benefits across a broad range of industries located within municipalities all across Canada. These industries include aerospace, chemicals, plastics, wood products, aluminum, fish and seafood, light vehicles and automotive parts, agricultural products (such as wheat, beef and pork), and service sectors (such as transportation and environmental, engineering and computer services).

We have now had eight successful and productive rounds of negotiations in which considerable progress has been made. We continue to work toward a conclusion of the negotiations by 2012.

Our government is committed to keeping Canadians informed of the negotiations and to consulting as extensively as possible with key stakeholders to ensure that an agreement delivers the greatest economic benefit possible to hardworking Canadians. I appreciate the FCM's views and contributions to this effort. I can also assure you that our government will not finalize an agreement unless it is in the best long-term interests of Canadians.

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Canada

During our discussion on August 4, 2011, you again raised the seven principles on government procurement developed by the FCM and sent to my predecessor the Honourable Peter Van Loan, on September 22, 2010. In identifying these principles, you have clearly articulated the key interests of Canada's municipalities. As promised, I have included below more information on how I see each of those seven principles applying within the context of the CETA negotiations.

With respect to **procurement thresholds**, the dollar-value thresholds for municipalities under CETA are likely to be consistent with those that exist for sub-central government entities in the World Trade Organization (WTO) Agreement on Government Procurement. These thresholds are approximately C$340,600 for both goods and services and approximately C$8.5 million for construction. Any contract that fell below these dollar-value thresholds would not be subject to the CETA procurement obligations.

Streamlined administration could indeed facilitate any adjustments required as a result of CETA. While some government entities may be taking on international trade commitments for the first time under CETA, procurement systems within Canada's provinces, territories and municipalities are generally open and transparent. This should mean that changes required to implement CETA are not likely to be substantial.

The letter of September 22, 2010, from the FCM also addresses requirements for **Canadian content**. As you may know, non-discrimination and the prohibition of offsets are basic obligations for procurement in international trade agreements. However, I recognize the importance of maintaining flexibility in government procurement to address local needs and priorities. Under CETA, municipalities would retain the ability to use various instruments to promote local economic development, such as non-contractual agreements, which are not subject to CETA (e.g., grants, loans or fiscal incentives), or the procurement of goods and services that are not subject to the CETA procurement obligations (e.g., below threshold or for excluded goods or services). Furthermore, CETA will not affect the ability of municipalities to use selection criteria such as quality, price, technical requirements or relevant experience, or to consider social and environmental factors in the procurement process, so long as these are applied in a non-discriminatory manner.

It is also important to remember that CETA will not affect the ability of municipalities to regulate. To be clear, nothing in any of Canada's international trade agreements can force countries to privatize or to deregulate services. All of Canada's international trade agreements preserve the right of countries to regulate, and to introduce and amend regulations to meet policy objectives. These agreements do, however, require governments at all levels to act in accordance with certain principles, such as non-discrimination. Governments are still free to pursue their regulatory objectives and have a wide array of choices for implementing such objectives.

Another key component of international procurement obligations is the availability of recourse, both through a bid-challenge process (suppliers and procuring entities) and dispute settlement (party-to-party). Canada and the EU will be required to provide administrative or judicial review

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procedures through which a supplier may challenge the award of a covered procurement contract. There will also be a **dispute settlement** process under CETA (party-to-party), where each party to the agreement may challenge the consistency of any measure of the other party regarding covered procurement with the provisions of the agreement.

The provisions of the procurement chapter will not be in force immediately upon completion of the CETA negotiations. After completion of the negotiations, several steps will need to be taken before the agreement can be brought into force in Canada. These steps include: preparation of the legal text; signing of the agreement; submission of the agreement to the House of Commons under the government's Policy on Tabling of Treaties in Parliament; and debate and passage of the implementing legislation. The process provides municipalities with sufficient time to become familiar and ready to operate in accordance with the rules of the procurement chapter. Any party-to-party dispute under CETA would be between the Government of Canada and the EU. In other words, the EU would not be able to bring a case directly against a municipality. In the case of a dispute between the parties under CETA, the **dispute settlement process will be progressive** (gradual). There would likely first be discussions between officials in an attempt to resolve the issue. At a later stage, ministerial involvement might occur. A dispute would formally begin with a request for consultations, which provides the parties with another opportunity to discuss the matter. There will likely also be a non-binding mediation before the matter is referred to a dispute settlement panel.

Once concluded, CETA will provide Canadian suppliers with improved access to one of the largest procurement markets in the world. According to the European Commission, the EU procurement market is estimated at C$2.4 trillion, or 16 percent of gross domestic product. Ensuring an overall balance of commitments, or **reciprocity**, is one of Canada's priorities in these negotiations. On this point, please note that all EU regional and local authorities (municipalities) are already included in the EU's WTO Agreement on Government Procurement commitments, and we expect this to be the case under CETA as well.

I appreciate your continued interest in further **consultation and communication**. Our government is committed to keeping key Canadian stakeholders informed of the negotiations and to consulting as extensively as possible to hear the views of Canadians. The joint working group between the FCM and DFAIT has been an excellent resource and forum for consultations, and we will continue to keep the FCM Working Group members informed as trade negotiations progress. We will also continue to work in partnership with the provinces and territories to address questions and concerns affecting areas under their jurisdiction, including those of municipalities.

The benefits of concluding an ambitious agreement with government procurement commitments extend beyond simply the access that Canadian-based firms would gain to EU procurement markets. The implementation of international government procurement commitments provides a set of common principles and rules upon which Canadian governments, at all levels, base their procurement practices. Consistency of rules and procedures between Canadian jurisdictions

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facilitates access for Canadian-based suppliers and their ability to prepare responsive bids in a timely manner. Government procurement commitments under Canada's international trade agreements ultimately increase competition, thereby allowing governments to ensure better value for taxpayers for the goods and services that are procured.

Thank you again for taking the time to share the views of the FCM. I look forward to our future discussions.

Sincerely,

The Honourable Ed Fast, P.C., M.P.

APPENDIX "D"

CANADA - EUROPEAN UNION TRADE NEGOTIATIONS WORKSHOP

Presented at the Annual Convention of the
Union of British Columbia Municipalities

September 29, 2011
2:30 PM to 4:30 PM

BRITISH COLUMBIA
The Best Place on Earth

Ministry of
Jobs, Tourism
and Innovation

Outline

1. Why Trade?
2. What Trade Agreements do
3. Existing Commitments
4. Impacts on Municipalities
5. Update on Canada-European Union and Other Negotiations
6. Questions & Answers

Why Trade?

- British Columbia is highly trade dependent
- We produce more than our domestic market consumes
- 1 in 5 jobs in British Columbia is dependent on trade

Benefits of Trade

- Achieve economic growth and prosperity
- Increase opportunities, jobs and investment
- Gain access to a wider choice of products and services
- Obtain best quality and price for consumers and taxpayers
- Encourage the exchange of ideas, research, innovation and latest technological advancements

Trade Agreements - What they do

- Reduce costs for businesses and consumers through the elimination of tariffs
- Provide open, non-discriminatory treatment of businesses, workers and investors
- Protect important public policy objectives such as environment, health, public services
- Reconcile unnecessary and burdensome differences in standards and regulations

Trade Agreements - What they don't do

- Require local government to choose lowest priced goods and services
- Erode local government authority over public policy goals, so long as they are non-discriminatory
- Force privatisation/commercialisation of public services
- Compromise water quality/safety
- Restrict the ability of government to protect consumers and the health, safety and well-being of workers

Existing Commitments

- <u>International</u>
  - World Trade Organization
    - General Agreement on Tariffs and Trade
    - General Agreement on Trade in Services
    - General Agreement on Government Procurement
  - North American Free Trade Agreement
  - Canada – United States Procurement Agreement

- <u>Domestic</u>
  - Agreement on Internal Trade
  - Trade, Investment and Labour Mobility Agreement
  - New West Partnership Trade Agreement

Principle Commitments applicable to Municipalities

- Recognition of worker certification – must recognize equivalence of other Canadian worker qualifications
- Investment – must treat investors in a non-discriminatory manner
- No residency requirements
- Subsidies – must avoid targeted subsidies that harm the economic interests of others
- Procurement

Procurement Requirements

- Local governments in British Columbia have been obligated to procure in an open and non-discriminatory manner since the terms of the national Agreement on Internal Trade were extended to them in 2002
- When procuring goods, services or construction, the process must be **open and non-discriminatory**
- Specific obligations contained in AIT, TILMA and NWPTA

Procurement obligations for regional, local, district or other forms of municipal government in British Columbia

Thresholds	New West Partnership Trade Agreement	Agreement on Internal Trade	Canada-US Procurement Agreement (temporary)*
Goods	$75,000	$100,000	N/A
Services	$75,000	$100,000	N/A
Construction	$200,000	$250,000	$8,500,000

*Temporary agreement in effect until September 30, 2011

Canada's International Trade Negotiations

- India
- USA
- European Union

Canada – European Union Negotiations towards a Comprehensive Economic and Trade Agreement

- Joint study 2008
- Negotiations started May 2009
- Comprehensive: tariff and non-tariff barriers, goods and services, regulatory cooperation, investment, labour mobility, and procurement

Provinces and Territories at the table for the first time (in areas of provincial jurisdiction)

- Services & Investment
- Environment
- Labour
- Regulatory Cooperation and Technical Barriers to Trade
- State Enterprises
- Procurement

Municipal Feedback

- Consultations with your Members, Executive and businesses in your community
- Federal government (e.g. Federation of Canadian Municipalities, Canada Gazette, Canadian Industry and Sector Associations)
- April 2011 Presentation to UBCM Executive
- Work closely with Ministry of Community, Sport and Cultural Development
- Industry consultations and survey

We've heard issues of concern :

- Municipal Procurement
- Water
- Privatization and Commercialization of Public Services

Municipal Procurement

- A key "ask" of the European Union is that all provincial ministries, Crowns, and the MASH sector are covered
- Considerable flexibility, high thresholds
- Do not have to accept lowest bid
- Businesses in your communities gain access to vast EU market opportunities

Water

- Water, in its natural state, is not considered a good
- Federal and provincial measures prohibit the bulk removal of boundary waters
- Trade agreements do not set safety standards for drinking water
- All companies operating in Canada, both domestic and foreign, must respect Canadian laws and regulations.

Privatization of Public Services

- Trade agreements do not require countries to privatize or deregulate their public services
- Decisions to either privatize or deregulate in certain public sectors are guided by domestic policy decisions, not by foreign governments or suppliers

Timelines & Next Steps

- Eight rounds of negotiations completed
- Round 9 scheduled for October
- Negotiations to be concluded in 2012
- Ratification and implementation period

Useful links for more information

Ministry of Jobs, Tourism and Innovation
http://www.gov.bc.ca/jti/

Department of Foreign Affairs and International Trade Canada-EU Negotiations
http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/can-eu.aspx?view=d

Contacts

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BRITISH COLUMBIA
The Best Place on Earth

Ministry of
Jobs, Tourism
and Innovation

Questions?

APPENDIX "E"

THE CORPORATION OF THE VILLAGE OF SLOCAN

P.O. BOX 50, SLOCAN, B.C. V0G 2C0

TELEPHONE (250) 355-2277
FAX (250) 355-2666
admin@villageofslocan.ca

November 16, 2011

FROM THE OFFICE OF THE MAYOR

The Honourable Christy Clark
PO Box 9041 Stn Prov Govt
Victoria BC V8W9E1

Dear Premier Clark:

Re: Canada- European Union Comprehensive Economic & Trade Agreement Negotiations

At the November 14th regular meeting of the Village of Slocan Council we considered the potential impacts on BC municipalities of the Canada-European Union Comprehensive Economic & Trade Agreement (CETA) that is currently being negotiated. Our Council then passed the following resolution (2011/382):

WHEREAS the government of Canada and the European Union have been negotiating a trade agreement known as the Comprehensive Economic and Trade Agreement (CETA); and

WHEREAS the European Union and EU-based corporations are insisting on unobstructed access to procurement by subnational governments --including municipalities, school boards, universities, hospitals and other provincial agencies -- which could significantly reduce or eliminate the right to specify local priorities when public money is invested in goods, services or capital projects; and

WHEREAS Canadian municipalities have expressed growing concerns with trade agreements and their potential impacts on municipal programs and services and local autonomy; and

WHEREAS unobstructed access to Canadian municipal procurement by both EU and Canadian corporations, combined with investment protections in CETA on government concessions related to transit, water, electricity and other social services delivered locally may encourage privatization and reduce economic development options for local communities; and

WHEREAS the provincial and territorial governments have been actively involved in negotiating CETA with the European Union:

THEREFORE BE IT RESOLVED that the Council of the Village of Slocan request:

- a briefing from the British Columbia Government on the scope and content of trade negotiations with the European Union, including the details of its procurement, services and investment offers to the EU;
- the Federation of Canadian Municipalities provide a sector-by-sector analysis of the potential impacts on municipal functions and powers of the procurement regime that the European Union is seeking, and which exists already in the WTO Agreement on Government Procurement;
- the Federation of Canadian Municipalities urge the government of Canada not to provide the European Union with access to subnational government procurement;
- Municipal staff review the available information on the impact CETA will have on municipal governments, with special emphasis on procurement and the delivery of social services;
- the Government of British Columbia negotiate a clear, permanent exemption for local governments from CETA; and
- that this resolution be sent to the Union of British Columbia Municipalities for consideration and circulation.

We hope that you will consider these requests, and we eagerly await your reply on these matters.

Yours truly,

Madeleine Perriere
Mayor

cc: *-Village of Slocan Council*
-UBCM Member Municipalities
-Alex Atamanenko, MP BC Southern Interior
-Katrine Conroy, MLA West Kootenay Boundary
-Board of Directors, Regional District of Central Kootenay

APPENDIX "F"

Submission to Standing Committee on International Trade

Regarding the Canada-European Union Comprehensive Economic and Trade Agreement (CETA)

Stuart Trew, Trade Campaigner

The Council of Canadians

November 22, 2011

Introduction

Founded in 1985, the Council of Canadians is Canada's largest citizens' organization, with tens of thousands of members from coast-to-coast-to-coast. We work locally, nationally and internationally to promote policies on fair trade, access to clean water, energy security, public health care, and other issues of social and economic concern to Canadians.

Since negotiations on the proposed Canada-EU Comprehensive Economic and Trade Agreement (CETA) began in 2009, we have come to understand CETA not as a simple trade deal, but more broadly as an agreement on economic governance. CETA will set new legal limits on social and environmental policy in ways that compromise our democracy. For this and other reasons, the negotiations have been criticized by a growing number of environmental, labour, Indigenous, student and farmers' groups on both sides of the Atlantic.

A recent collective request from a few dozen Canadian groups to meet with Canada's international trade minister was turned down on the grounds that we all have access to Canada's top CETA negotiator in briefings following each of the past nine rounds. However, during the last briefing with DFAIT in October, civil society groups were told there are no plans to produce a report summarizing their feedback, as is the norm in the European Union. The negotiators were not even taking notes of what we were saying.

So these parliamentary hearings into the CETA negotiations are truly the first opportunity for groups like the Council of Canadians to go on record with their concerns. While we have publicly called for the negotiations to stop and for an informed public debate to decide the scope and content of any deal with the EU, I recognize the committee is not likely to take this same position. I would like to use this opportunity instead to propose a few changes to Canada's negotiating position that would limit the potential for CETA to undermine the public interest in a number of important areas.

1. **Transparency**

Canadian MPs should have the same access to CETA documents as their European Union counterparts. For example, I understand that members of the EU trade committee have access to Canada's and the provinces' services and investment offers, and potentially their procurement offer as well. The former were exchanged shortly before the last round of CETA negotiations in October. Procurement and goods offers were exchanged in July. Access to those offers would provide this committee with a much better sense of the scope of the proposed agreement, including where it may fall short in the protection of public services or strategic sectors, which I will get to in a moment. I have not seen this information but it's difficult to understand why Canada's trade committee should not be able to see information that MEPs are studying right now in Brussels.

2. **Investment Protection**

There should be no investor-to-state dispute process in CETA as there is in NAFTA and Canada's other trade agreements. This is the preference of the EU parliament as expressed in a June 8 resolution on the Canada-EU trade deal.[1] The resolution says that, "given the highly developed legal systems of Canada and the EU, a state-to-state dispute settlement mechanism and the use of local judicial remedies are the most appropriate tools to address investment disputes."

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[1] See the text of the resolution here: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0257+0+DOC+XML+V0//EN&language=EN

The same advice was provided to the European Commission in a Sustainability Impact Assessment of CETA by a consulting firm. The report, released this summer, states there is "no solid evidence to suggest that [investor-state dispute settlement] will maximise economic benefits in CETA beyond simply serving as one form of an enforcement mechanism." The assessment adds that policy space reductions caused by this dispute process "would be enough to cast doubt on its contribution to net sustainability benefits."[2]

Investment protections in trade agreements or standalone bilateral treaties give foreign investors incredible rights to bypass local courts in order to sue sovereign states before international tribunals if they feel they have not been treated fairly. The lack of clarity in what constitutes fair treatment, and the lack of transparency in the proceedings, has given arbitrators enormous leeway in deciding what constitutes acceptable government policy. Investors are increasingly using this kind of arbitration to challenge social, environmental and economic regulations that affect their profitability.

This committee recently studied last year's $130-million settlement with AbitibiBowater under NAFTA's Chapter 11 investor protections. Since then, Ontario has been the target of an expensive $275-million NAFTA claim by a Brazilian-owned cement firm because it was denied approval for a quarry outside of Hamilton, Ontario. And we learned this week that Philip Morris will be suing the Australian government under a bilateral treaty with Hong Kong because of the former's plain packaging law for cigarettes.

I urge the committee to consider the position of the Australian government on investor-state arbitration. Partly in response to the threat of an investment challenge by the cigarette maker, the Gillard government released a new trade policy document in April that discontinues Australia's former practice of negotiating investor-state dispute procedures in trade agreements. The policy says:

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[2] Final SIA report (pg. 337): http://www.eucanada-sia.org/docs/EU-Canada_SIA_Final_Report.pdf

> *If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries.*[3]

In other words, the Gillard government believes it is not its job to absorb the risk that firms take when investing in foreign countries. The new trade policy also insists that foreign firms operating in Australia should be entitled to the same legal protections as domestic businesses. Investment treaties, on the other hand, discriminate against local firms by giving foreign firms more rights to challenge government policy.[4]

If this committee is not prepared to recommend against investor-state protections in CETA, it could push for simple reforms to the process. For example, Canada and the EU could agree that firms must exhaust local legal remedies before moving to investment arbitration, as the EU parliament's resolution suggests.

3. Public Services and Water

The public services exception in CETA needs to be broad and precisely worded to protect the right of governments to regulate in areas such as health care, education or water delivery and sanitation. Provincial and local governments must also insist on maximum space to maintain or create new public monopolies or universal programs in these areas – even where some degree of private-sector involvement currently exists. If Canada's reservations are too narrow, unclear or incomplete when it comes to public services, we risk inviting expensive compensatory claims by investors that feel government regulations or social services interfere with their profits.

On water, it is our understanding that the EU has taken a broad exclusion for water services and utilities, not only to protect existing public utilities from competition from the private sector, but to make sure governments at all levels have the right to remunicipalize previously privatized utilities in the future. We

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[3] Trading our way to more jobs and prosperity, Gillard Government Trade Policy Statement, April 2011, pg 14: http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf
[4] Ibid, pg. 16

understand Canada has not taken a similar reservation in its own offers to the EU. We feel this example underlines the importance of this committee having access to the Canadian and EU offers so that it can play a stronger role in assessing the risks and benefits of the proposed trade agreement.

4. Local Procurement

This committee has heard several witnesses already on the issue of procurement. We share the view that procurement commitments at the municipal level and lower—the so-called MUSH sector—are not worth the sacrifice to local autonomy and policy space.

In almost all cases, local procurement happens in Canada in a completely transparent and fair way. There are no restrictions to EU firms bidding on Canadian contracts. And in the vast majority of cases, municipal councils make decisions based on value for money.

The net result of CETA commitments on procurement will be to prohibit local governments from adopting "Buy Local" or "Buy Canadians" policies, or from otherwise considering the value of local, sustainable development when tendering for goods, services or construction projects over certain thresholds. Japan's WTO challenge of the Ontario Green Energy Act, which the EU joined this fall, shows how the EU will use trade and procurement rules to undermine job-creation strategies in their trading partners.

Who loses from a blanket prohibition on local hiring or content requirements? Mostly it will be small and medium-sized businesses as they are out-bid by their considerably larger European counterparts. This is already happening in Canada in the P3—Public-Private Partnership—market, according to the Canadian Construction Association.[5] The Sustainability Impact Assessment I referenced earlier also predicts bigger gains for EU firms.

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[5] Canadian Construction Association discusses training, public-private partnerships, by Kelly Lapointe, Daily Commercial News: http://www.dcnonl.com/article/id47542/--canadian-construction-association-discusses-training-public-private-partnerships

Municipal governments are clearly a bargaining chip in CETA in exchange perhaps for modest gains for fish, pork or beef exports. The Council of Canadians believes that instead of pursuing policy space-limiting procurement deals, Canada should encourage "Buy Canadian" policies on major municipal infrastructure or other projects funded in whole or in part by the federal government.

Finally, I understand the Federation of Canadian Municipalities has made its support for CETA conditional on seven principles being met in the agreement.[6] These include progressive enforcement, a municipal role in dispute settlement, and protection for strategic industries or sensitive projects.

Without access to the offers on procurement, services and investment it's difficult to know if this last condition has been met for which sectors and by which provinces. We strongly feel this committee should take seriously the preference of a growing list of municipalities, including the Union of B.C. Municipalities, to exclude the MUSH sector entirely from CETA's procurement chapter.

Conclusion

The Council of Canadians will continue to campaign for transparency and an end to the EU trade talks until the public has had a chance make an informed decision about whether they are in Canada's best interests. Experience with past trade deals shows there is little to no room in Canada to make amendments once a deal is signed.

Clearly CETA is about much more than trade. As such, I hope this committee considers how it might take on a greater role in studying the negotiating texts as their European counterparts are doing, and in proposing amendments where suitable to protect public services and other important policy areas.

Thank you.

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[6] FCM Backgrounder: http://www.fcm.ca/Documents/backgrounders/backgrounder_CETA_EN.pdf

APPENDIX "G"

Proposed Resolution

WHEREAS the government of Canada and the European Union have been negotiating a trade agreement known as the Comprehensive Economic and Trade Agreement (CETA); and

WHEREAS Canadian municipalities including the City of Surrey are concerned with the potential impacts of such a trade agreement on municipal programs and services and on local autonomy; and

WHEREAS the provincial and territorial governments have also been actively involved in negotiating the terms of the CETA with the federal government and with the European Union:

THEREFORE BE IT RESOLVED that the Council of the City of Surrey request:

- That the Government of British Columbia provide information to municipalities on the scope and content of trade negotiations with the federal government and European Union related to CETA, including the details of procurement, services and investment offers to the EU with a description of how such proposals if adopted in the agreement will affect municipal governments in BC;
- That the Federation of Canadian Municipalities undertake a sector-by-sector analysis of the potential impacts on municipal functions and powers of the procurement regime that the European Union is seeking and circulate such information to member municipalities as soon as it is available;
- That the Government of Canada undertake and publish for municipalities across Canada thorough, timely and objective assessments of both the costs and benefits of the CETA agenda to municipalities;
- That the Government of Canada and the Government of BC provide an explanation of which sectors are most likely to be the principal beneficiaries of CETA and how the benefits of CETA will be distributed;
- That the Government of Canada and the Government of BC engage in effective consultations with municipalities with the above-referenced analyses in hand before any trade agreement is finalized with the EU; and
- That the Government of Canada and the Government of BC solicit comments from all the parties that will potentially affected by the proposed trade agreement before finalizing any such agreement.