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Globalized Localism: Canada's Government Procurement Commitments under CETA

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This article examines Canada's commitments under the procurement chapter of the Comprehensive Economic and Trade Agreement (CETA) currently awaiting ratification by Canada and the European Union (EU). While the CETA's procurement rules are substantively and procedurally similar to those of the World Trade Organization (WTO)'s Revised Government Procurement Agreement (GPA), Canada's obligations under CETA penetrate deeply into procurement decisions at all levels of government, including notably those made by municipal entities and other local public bodies such as school boards. CETA retains important exceptions which should preserve the rights of government to pursue some social goals in aid of small businesses and economically deprived areas. It also applies monetary thresholds which should help ensure that the agreement's primary focus is on contracts awarded to large multinationals. Despite these restrictions, CETA's fostering of international competition in the previously insulated spheres of government may herald a new era of economic globalization.

INTRODUCTION: THE CETA AND GOVERNMENT PROCUREMENT IN CANADA AND EUROPE

Government procurement has become a key source of economic activity worldwide, particularly in developed countries and in those states in which the public sector makes up a significant component, in some cases up to 15 per cent of GDP.¹ Indeed, when taking into account activities at sub-central and municipal levels, governments are often the largest single purchaser of goods and services in an economy. The new Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union (EU) which is expected to be ratified by 2016 contains detailed rules on liberalizing government procurement. It will provide Canadian and European suppliers of products and services access to each other's procurement processes on a preferential basis, giving them the opportunity to secure valuable government contracts. The overall value of contracts awarded by the Canadian federal government alone was estimated at CDN \$ 15 to 19 billion per year, with the value of tenders from other levels of government considered to exceed these numbers significantly. In 2011 procurements by Canadian municipalities was estimated at CDN \$ 112 billion or almost 7 per cent of Canadian GDP.²

It is not difficult to see why the EU aggressively pursued the negotiation of government procurement in CETA, especially at the sub-central level, as a key component of its economic

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¹ OECD, 'Government at a Glance 2011' (ISSN:2221-4399) 148 <http://dx.doi.org/10.1787/gov_glance-2011-en>

² European Commission, 'Facts and Figures about the EU-Canada Free Trade Deal' (Brussels, 18 October 2013) <http://europa.eu/rapid/press-release_MEMO-13-911_en.htm>.

relations with Canada. For Canadian firms, the EU's government procurement market is one of the largest in the world, estimated to be worth CDN \$3.3 trillion annually.³ Removing barriers to procurement under CETA should also increase competition among suppliers, ensuring that governments and taxpayers obtain value for money in a wide range of sectors. For EU suppliers, CETA's procurement chapter will, for the first time, commit all sub-federal levels of government in Canada to opening their procurement markets to EU bidders, including most notably municipal governments as well as public schools boards. The inclusion of sub-central governments in Canada's CETA procurement commitments is of critical importance given that Canada's federal system accords extensive powers to the provinces,⁴ rendering provincial-level procurement of considerable economic significance. In the long run, CETA's procurement rules should ensure the delivery of better public services at lower cost, even if some of the firms which had benefited from favourable treatment in the past see their profits decline. It is hoped that under tighter rules, local governments may be compelled to seek innovative procurement solutions involving more intelligent contract design and careful risk assessment.⁵

This article will consider some of the key features of CETA's procurement chapter, noting its similarities with the World Trade Organization (WTO)'s Revised Government Procurement Agreement (GPA) and examining Canada's specific commitments in certain sectors and levels of government. These commitments, contained in annexes to the main chapter, have been disparaged by some because they have the potential to encroach on a variety of smaller public entities' ability to use spending to achieve important social goals even as they open up lucrative markets for Canadian firms in Europe.

1. CETA'S GOVERNMENT PROCUREMENT CHAPTER

The chief substantive protection afforded by CETA's procurement chapter is its guarantee of national treatment. Article IV outlines the CETA procurement chapter's general non-discrimination provision, allowing for equal market access between foreign and locally supplied goods and services. Under sub-section (1): 'each Party ...shall accord immediately and unconditionally to the goods and services of the other Party and to the suppliers of the other Party ..., treatment no less favourable than the treatment the Party ..., accords to goods, services and suppliers'. Subsection (2) of Art IV extends the non-discrimination obligation to the suppliers of the goods and services themselves, recognizing that formally identical treatment of goods alone can be insufficient to eradicate discrimination against suppliers. Accordingly, this provision states that Party's governmental procurement measures must 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'. These provisions effectively operate as a check on barriers to foreign investment in party states. EU firms will be more

³ Government of Canada, 'Opening New Government Procurement' <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/benefits-avantages/procurement-provisionnement.aspx?lang=eng>>.

⁴ Constitution Act, 1867 s. 92 (CAN) <<http://laws-lois.justice.gc.ca/eng/const/page-4.html#h-17>>.

⁵ For further discussion of these issues see E Uyara, 'Opportunities for Innovation Through Government Procurement: A Case Study of Greater Manchester' (NESTA Project Report, May 2010) <http://socialwelfare.bl.uk/subject-areas/government-issues/social-policy/nesta/1508532010_opportunities_for_innovation.pdf>.

likely to locate their operations in Canada, possibly by merging with a local firm, when they are secure in the knowledge that they will not face discrimination because they are owned by non-Canadian shareholders.

In keeping with a growing trend in international treaties,⁶ CETA's procurement chapter mandates that procurement procedures are fully transparent and as such it restricts the ability of government at any level to circumscribe the agreement's non-discrimination obligations by impairing foreign firms' access to information about procurement opportunities. CETA's rules on transparency and electronic tendering will allow firms from both Canada and the EU to access a single electronic procurement website (one for Canada and one for the EU) that combines information on all tenders and access to public procurement at all levels of government, enhancing the capacity of suppliers from each country to compete in each other's procurement markets. Article IV.4 states that procuring entities shall conduct covered procurement in a transparent and impartial manner, which includes open tendering that avoids conflicts of interest and prevents corrupt practices. There are further transparency and disclosure requirements contained in Article V of CETA's procurement chapter, requiring covered government entities to promptly publish all rules relating to procurement activities as well as to respond to queries regarding this information. Notification procedures for all intended procurements are outlined in detail. There are specific requirements for three types of tendering procedures: open, in which all interested suppliers may bid; selective, in which only those suppliers invited to do so may bid; and limited tendering procedures in which potential suppliers are contacted individually, a method used when there has been no response to an open tender or where extreme urgency makes open tendering impractical. Additional transparency obligations are listed in Article XV, which requires procuring entities to notify promptly all suppliers participating in tenders of their decisions with an explanation of reasons and the identity of the successful bidder.

Article III of the government procurement chapter of CETA contains security and general exceptions using language inspired by the General Agreement on Tariffs and Trade (GATT) of which both Canada and the EU, as WTO members, are signatories. The security exception under subsection (1) uses the familiar self-judging language which removes the scrutiny of such justification from any international tribunal: 'Nothing in this Chapter shall be construed to prevent a Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests ..., or to procurement indispensable for national security or for national defence purposes'. The general exceptions under sub-section (2) are those measures which are necessary to 'a) protect public morals, order or safety; b) ...protect human, animal or plant life or health; c) ... to protect intellectual property or d) relating to goods or services of persons with disabilities, philanthropic institutions or prison labour'. These broad categories, which have the potential to apply to a wide range of government purchasing decisions, are qualified by the chapeau which requires that any such measures must not be '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,' again echoing the well-established language of GATT Article XX. It should be noted that while CETA does not fall within the jurisdiction of the WTO's dispute settlement system (see more below) GATT/WTO jurisprudence on general exceptions could inform the understanding of these terms as seen in the CETA.⁷

⁶ See e.g. UNCTAD, 'Transparency: UNCTAD Series on Issues in International Investment Agreements II' (2012) <http://unctad.org/en/PublicationsLibrary/unctaddiaeia2011d6_en.pdf>.

⁷ NAFTA Art 2101 expressly incorporates GATT Art XX, which CETA's government procurement chapter does not.

Generally speaking, the substantive and procedural obligations undertaken by Canada and the EU in CETA's procurement chapter aim at eliminating discriminatory treatment against foreign suppliers of goods and services in procurement practices in order to promote even competition. They also seek to improve the openness of procurement processes as a way of ensuring fairness, preventing corruption and enhancing the availability of information on procurement activities. As many of the administrative requirements of the procurement chapter could be described as onerous in that they mandate extensive information collection and dissemination, CETA appears to shift some of these costs of participating in public contracts from the private to the public sector, freeing up resources that could be put to more productive uses. While the CETA may accordingly expand the competitive opportunities for international firms, it could raise compliance costs for government entities, including those often less well-resourced sub-central and municipal ones.

2. CETA AND THE REVISED WTO GPA

The chapter on government procurement in CETA is almost identical to the Revised Government Procurement Agreement (GPA) of the World Trade Organization (WTO) which entered into force in April 2014. The GPA is a plurilateral agreement, which means that it is optional, unlike the other treaties concluded during the Uruguay Round of negotiations which created the WTO, such as the GATT itself. The new GPA streamlined the earlier GPA of 1994 and includes provisions on electronic tendering for government contracts as well as further material on transparency and the prevention of corruption. Along with the earlier GPA, which is still in force for those WTO Member states which have not yet accepted the revised version, there are 43 current signatories to the WTO's government procurement regime—including Canada and the EU (along with its 28 constituent states)—all of which have acceded to the revised regime. All Member states of the WTO are eligible to accede to the GPA and ten states are currently engaged in this process. Other WTO members made commitments in their WTO accession protocols to join the GPA in the future, including the large economies of the Russian Federation and Saudi Arabia—China, more notably, has observer status. Clearly liberalizing government procurement practices is of vital concern to the international community.

Like CETA's procurement chapter, the WTO GPA is supplemented by annexes issued by each signatory party. These materials specify which sectors of procurement activity (branch of government, type of good or service) to which commitments contained in the main agreement apply. Only procurement carried out by a covered entity purchasing covered goods, services or construction services of a contract valued above the indicated monetary threshold, and not specifically exempted, are subject to the main agreement's rules. The annexes contain commitments relating to procurement by central government agencies (Annex 1); sub-central government agencies (Annex 2); other entities (Annex 3), goods (Annex 4); services (Annex 5); construction services (Annex 6); and general notes (Annex 7). Some exemptions from coverage by Canada and the EU under their GPA annexes are worthy of mention. First, Canada's and the EU's Annex 1 present extensive lists of central government agencies, committing the same monetary minimum thresholds of 130,000 Special Drawing Rights (SDRs) for goods and services respectively and 5,000,000 SDRs for construction services. SDRs are a unit of currency invented by the International Monetary Fund based on a basket of various currency values. At the time of writing, an SDR was worth roughly CDN \$1.77 or €1.24.

After some delay⁸ Canada included its sub-central governments in GPA coverage under its Annex 2. The minimum threshold for covered procurements is 355,000 SDRs for goods and services and 5,000,000 SDRs for construction services. Some noteworthy omissions of its sub-central GPA procurement commitments are culture-related procurement for the province of Quebec, procurement in some provinces relating to highway construction, any procurement in any province tied to the promotion of environmental protection as long as these are not ‘disguised barriers to international trade,’ and procurement relating to assistance for distressed areas. The EU’s sub-central Annex specifies that it does not cover procurement activities for which commitments were not made by Canada ‘until such time as the EU has accepted that the Parties concerned provide satisfactory reciprocal access to EU goods, suppliers, services and service providers to their own procurement markets’. The EU’s Annex 3 specifies that neither the central government (EU government entities) nor any of its 28 member state governments or their sub-national government agencies commits ‘procurement for the pursuit of an activity...when exposed to competitive forces in the market’ as well as activities relating to the supply of drinking water or electricity. Canada’s Annex 5 on services exempts government-owned research facilities and shipbuilding and EU’s services annex offers a somewhat cautious limitation on its commitments, only promising to extend GPA coverage to services providers from other parties to the extent that those parties have also made commitments in that area. Under the annexes on construction services, Canada does not commit construction procurement on behalf of the Federal Department of Transport (effectively excluding national highways), and the EU again excludes commitments to construction services suppliers from other parties where those parties have not made such a commitment itself under its Annex 6. Canada’s general notes annex clarifies that none of Canada’s procurement commitments relate to urban transportation systems or any measures adopted to support aboriginal peoples. It also exempts agricultural support programs and ‘set asides’ for small or minority owned businesses. The EU likewise exempts agricultural support programs as well as procurement relating to drinking water and energy.

Under Article XVII of CETA, as with the Revised GPA⁹ (and also NAFTA¹⁰), both parties to the agreement are required to maintain ‘bid challenge’ procedures for foreign bidders who feel that they have been prejudiced by either bidding procedures or contract awards. This means that the federal government of Canada and each of its provincial governments must maintain independent tribunals to review such challenges and recommend any discrepancies, allowing firms the right to be represented, to receive explanations for the tribunal’s decision, to have it decided in a timely fashion.

For the Canadian federal government this judicial oversight has been fulfilled by the Canadian International Trade Tribunal (CITT).¹¹ This court also satisfies the bid challenge requirements of the GPA, NAFTA and Canada’s Agreement on Internal Trade (AIT) which also contains provisions on non-discrimination and transparency similar to those of CETA’s procurement chapter. There is a well-established practice under the CITT with extensive

⁸ David Collins, ‘Canada’s Sub-Central Government Entities and the Agreement on Government Procurement: Past and Present’ in Sue Arrowsmith and Robert Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press, 2011).

⁹ World Trade Organization, ‘Revised GPA’ Art XVIII < https://wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf>.

¹⁰ North American Free Trade Agreement (1993) 32 ILM 289 art 1017 <<https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement>>.

¹¹ Canadian International Trade Tribunal Act, RS 1984 c.47 (CAN).

jurisprudence under these and other trade agreements.¹² Under Article XVII.7 b) of CETA (the equivalent to XVIII.7 b) of the GPA), when the domestic reviewing body has established that there has been a breach of the agreement, there must be provision for ‘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’. This provision raises the prospect that Canada (and the EU) could be exposed to significant damages claims by aggrieved firms for failure to fulfil its CETA procurement obligations. The bid challenge procedure must also be able to award ‘rapid interim measures’ to preserve the complainant supplier’s opportunity to participate in the original bid, which may include suspension of the contract award. These provisions should not be viewed as an unusual or onerous feature of the agreement, as mechanisms for investor-state dispute settlement coupled with a range of remedial measures are common to regional trade agreements and are enshrined in the International Centre for Settlement of Investment Dispute (ICSID) and United Nations Commission on International Trade Law (UNCITRAL) procedural rules.

It should be noted that CETA’s investor-state dispute settlement feature, in which aggrieved investors can bring claims directly against host states through international arbitration facilities, does not apply to the government procurement chapter but only to its chapter on Foreign Direct Investment. CETA’s general dispute settlement provisions, allowing for claims relating to the interpretation and application of any of the agreement’s provisions brought by one state party against the other, does encompass the government procurement chapter. As such, a supplier has the option of pursuing direct relief through the bid challenge procedure or indirectly by asking its government (Canada or the EU) to seek clarification or interpretation of any aspect of CETA that affects their procurement activities by an international arbitration body constituted pursuant to CETA’s general dispute settlement rubric. The latter course of action seems less pragmatic for firms eager for monetary compensation for specific instances of unfair treatment. The state-to-state dispute settlement procedure may be more appropriate for systemic violations of procurement rules.

The lack of recourse to the WTO state-to-state dispute settlement system under CETA (as opposed to the GPA) may represent the most significant procedural difference between the two agreements. Article 14.3 of CETA’s dispute settlement chapter specifies that recourse to the dispute settlement provisions of CETA are without prejudice to any action that Canada or the EU might bring under the GPA (which allows for access to the WTO dispute settlement procedure). This provision goes on to state however that a party shall not seek redress for the breach of an obligation which is equivalent in substance under CETA and under the WTO agreement in the two fora. Once a dispute settlement proceeding has been initiated under either CETA or the WTO (for procurement purposes based on the GPA), the party shall not bring a claim seeking redress for the breach of a substantially equivalent obligation under the other agreement to the other forum. The only exception for this is if the forum selected fails to make findings on that claim, for example if it refuses to take jurisdiction over the dispute. This is a sensible clarification that should help resolve some of the frustration and expense associated with parallel claims in multiple fora.

¹² One of the first cases in which the CITT considered the WTO GPA was *Re: Keystones Supply Company*, File nos PR-98-034 and PR-98-035 (19 April 1999) (ultimately holding that the GPA did not apply because the relevant supplier was not a GPA signatory). The CITT maintains an on-line searchable database of all of its decisions: <www.citt.gc.ca>.

Among the other notable differences between CETA's government procurement chapter and the Revised GPA are the latter's provisions for special and differential treatment for developing countries, which are of course irrelevant to CETA.

3. CANADA'S SPECIFIC CETA PROCUREMENT COMMITMENTS

In order to fully appreciate the impact of CETA's procurement chapter on the Canadian economy, and to understand the more substantive differences between CETA and the GPA, it is necessary to consider the specific market access commitments Canada has made under CETA. As with the GPA, CETA's procurement chapter is structured in a 'positive list' format, with both central governments, as well as sub-central entities listing the specific agencies and types of procurement contract to which the main agreement's obligations apply. The chief limitation on a government's commitment is that relating to its monetary minimum threshold, expressed in SDRs.

The most significant difference between Canada's commitments under the WTO GPA and the CETA are that the latter agreement lists lower thresholds for some types of procurement at the sub-central level, specifying minimum values of 200,000 SDRs for goods and services, considerably less than those contained in the GPA. The construction services thresholds are the same at 5,000,000 SDRs and provincial procurement linked to crown corporations (government-owned entities but which operate at arm's length from the state) and specified in Annex X-03, have higher thresholds at 355,000 SDRs. In an interesting note under Annex 5, sub-central procurement thresholds will be the higher level of 355,000 SDR when an entity procures consulting services regarding matters of a confidential nature, the disclosure of which could reasonably be expected to compromise government confidences, and can cause economic disruption or similarly be contrary to public interest—the limit is somewhat redundant in light of the national security exception noted above. Federal level thresholds are 130,000 SDRs for goods and services and 5,000,000 SDRs for construction, the same as they are under the WTO GPA.

Although CETA exposes more sub-central government procurement activities to its disciplines than the GPA, in terms of substantial economic impact it is clear that CETA is meant to control relatively large scale public contracting only, allowing governments to give preference to local suppliers in smaller contracts as they wish. As with the GPA, CETA procurement rules apply only to high-value procurement contracts, demonstrating the chapter's primary relevance to larger multinational firms and belying accusations that CETA represents a drastic infringement on the capacity of governments to invoke purchasing practices that are helpful to local suppliers. These generous limits preserve governments' ability to continue to use procurement as an instrument to support community development and to assist small and medium-sized enterprises by offering them purchasing contracts on favourable terms. It should be noted also that CETA's thresholds for goods and services are considerably higher than those found in Canada's domestic Agreement on Internal Trade (which facilitates inter-provincial commerce).

Canada's procurement commitments under its annexes to the procurement chapter of CETA have been criticized for restricting many provincial and municipal government bodies from using public spending to achieve social goals, such as stimulating local employment.¹³

¹³ Stuart Trew and Scott Sinclair, 'Public Procurement: Provincial and Municipal Coverage' (Canadian Centre for Policy Alternatives, September 2014).

The role of government procurement in achieving social justice, including mitigating inequality, has been noted by a number of commentators.¹⁴ While the procurement chapter has general exceptions for certain public policy goals—including the potentially expansive ‘public morals and public order’—and, as noted above, are controlled by the requirement that they are necessary and not disguised restrictions on trade. WTO case law has shown that these exceptions are incredibly difficult tests to pass.¹⁵ In addition to lower coverage thresholds at the provincial level, Canada’s CETA procurement commitments go beyond existing commitments under the GPA because they include most utilities, crown corporations, and the broader so-called MASH sector (Municipalities, Academic institutes, School boards and Hospitals). Canada’s sub-central commitments under the GPA exclude MASH sector procurement in all provinces except Ontario and Quebec.¹⁶ The activities of these bodies are often intimately tied to the needs of local communities, even while their purchasing activities may not be as economically significant, particularly when it falls under specified thresholds. Municipal governments, utilities and MASH entities are prohibited from adopting minimum local content requirements for all goods and services contracts above 200,000 SDRs or 400,000 SDRs for utilities and all construction projects above 5,000,000 SDRs. In this regard, it should be recognized that Article II.6 of CETA’s procurement chapter prohibits municipalities and MASH entities from dividing up a proposed contract into separate procurements with the intention of excluding the contract from CETA’s rules—preventing governments from making larger contracts look like small ones. This includes ‘recurring contracts’—effectively consolidating a series of smaller transactions into one for the purposes of a total valuation. This methodology, which is also seen in Article 6 of the Revised WTO GPA, has the potential to capture many smaller varieties of purchases, such as ‘buy local’ policies in schools, hospitals or other municipal agencies. A number of Canadian cities objected to the inclusion of these provisions in the CETA.¹⁷

When contracts exceed these levels, such entities cannot impose local training quotas, nor can they apply any other ‘offsets’. Offsets are defined in CETA (as they are in the GPA, where they are also prohibited) as ‘any condition or undertaking that encourages local development or improves a Party’s balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar action or requirement’.¹⁸ This interdiction is in keeping with prohibitions contained in Canada’s other regional trade agreements, such as NAFTA, and is echoed in the WTO’s Trade Related Investment Measures Agreement (TRIMs). The logic behind these prohibitions is simple: performance requirements such as offsets are generally economically inefficient, ultimately resulting in a waste of government expenditure and a causing a damaging distortion of trade or investment in favour of non-competitive suppliers. While they may benefit the immediate recipient in the short term, they are harmful to the economy at large.¹⁹

Some key exceptions that address social objectives, even if they may represent minor distortions in the market for public contracts, are specified in Canada’s CETA procurement annexes. Under Annex 7 which contains general provisions, healthcare services and research

¹⁴ E.g. Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement and Social Change* (Oxford University Press, 2007).

¹⁵ E.g. *China-Rare Earths*, WT/DS431/AB/R (7 August 2014).

¹⁶ GPA, Canada Annex 2 note 5.

¹⁷ Trew and Sinclair (n 12) 26.

¹⁸ Art IV.6, definitions Art I k).

¹⁹ See e.g. Gary Clyde Hufbauer and Jeffrey Schott, *Local Content Requirements: A Global Problem* (Peterson Institute for International Economics, 2013).

and development services are not included, likely removing contracts conducted by hospital and universities from the scope of CETA and allowing domestic preferences in these fields. Neither the Canadian federal government, nor any of the provinces, are bound in their procurement practices from measures relating to aboriginal peoples. As in the GPA, procurement relating to cultural matters is also excluded for Quebec. Subsection 4 of this Annex also specifies that the provinces and territories of Manitoba, Newfoundland and Labrador, New Brunswick, Nova Scotia, Northwest Territories, Nunavut, Prince Edward Island and Yukon ‘may derogate from the procurement chapter in order to promote regional economic development’. While seemingly broad, there are a number of conditions applied to this exception. First, each of these listed regions may only do this a maximum of 10 times annually. Second, the total value of each procurement cannot exceed CDN \$1 million. Such derogations must only be used to support small firms or employment in non-urban areas, and there can be no federal funding involved in the project. Finally there are strict notification requirements for any procurement pursued under these arrangements, including an explanation of the circumstances tendered at least 30 days in advance. It is worth observing that under the WTO GPA, Canada reserved its capacity to set aside a portion of government contracts for minority owned or small businesses.²⁰ Such reservation does not appear in the CETA, however such exceptions may have been redundant given the relatively low monetary thresholds of the chapter’s coverage.

Among the most important extensions of coverage in CETA’s procurement disciplines relate to mass transit services. While not specifically referring to mass transit, Canada’s central government procurement commitments under the GPA excluded urban rail and urban transportation equipment, systems, and components.²¹ Such projects, such as the ongoing multi-billion dollar extension of the Toronto subway system, have the potential to generate significant revenues for domestic firms. CETA prohibits federal as well as provincial governments from imposing new local content requirements on transit purchases, with two specific exemptions for Ontario and Quebec listed in Annex X-04. Although the Ontario’s and Quebec’s discriminatory transit procurement laws can be kept, CETA imposes severe restrictions on their implementation. In Quebec, Canadian content requirements for mass transit, often believed to be as high as 60 per cent for some projects, are now limited to 25 per cent, which is also the maximum Canadian-content for Ontario’s mass transit contracts. Quebec retains the right to insist that ‘final production’ of any mass transit vehicles must take place in Canada. It is noteworthy that Bombardier, the Canadian multinational transportation company which constructs vehicles such as subway trains and which supplied Montreal’s subways, is located in Quebec. These provisions demonstrate hard-fought concessions on the part of Canada’s largest and most vote-rich provincial governments.

A full discussion of the EU’s commitments under CETA’s procurement chapter is beyond the scope of this article. At a general level, the EU’s specific commitments, which run to many pages in order to cover each of the EU’s member states, appear to be less restrictive than those made by Canada and its provinces, granting Canadian firms extensive market access across many spheres of economic activity. There are notable exceptions relating to ports, utilities, shipbuilding and broadcasting, which are consistent with limits placed in the Revised GPA.²² At least with respect to services, the EU’s willingness to make further government procurement commitments once Canada reciprocates is evident in the phrase: ‘The EU stands ready, should the ongoing revision of EU legislation on public procurement result in a widening

²⁰ Revised GPA (n 9) Annex 7 note 2.

²¹ *ibid* Annex 7 note 1 b).

²² *ibid* Annex 7.

of the scope of services and services concessions covered by that legislation, to take up negotiations with Canada in view of extending the mutual coverage of services and services concessions of this Chapter'.²³ The EU's apparent comfort with a liberalized procurement regime may reflect the legacy of its common market, which has underpinned the deep economic integration of its geographically and culturally disparate constituent member states for decades. The EU is by its nature a collectively-minded institution in a way that Canada, despite its membership in NAFTA and its federation of partially autonomous provinces, is not. Canada's cautious procurement commitments of its sub-central governments, in particular the MASH sector, may equally demonstrate the greater importance of localism in Canadian society, possibly itself the consequence of Canada's highly dispersed population comprised of many geographically isolated communities. Suggestions by civil society groups that the MASH sector's crucial 'buy local' practices will be harmed by the new regime are not convincing²⁴— it is not clear that there was ever much of a 'buy local' culture in these institutions as many insist. Still, to the extent that there is that a greater tendency for governmental policy to be pursued by towns and cities in Canada than in places like the EU, there is a need for these entities to embrace efficient procurement practices which include bridging the local-global divide so that they might better meet challenges faced at the local level, such as neighbourhood revitalization.²⁵

It is vitally important to recognize that since international law does not have direct effect in Canada, CETA is not legally binding on any of Canada's affected procuring entities until it is ratified by the federal and provincial governments (under the Canadian Constitution the municipal governments only have delegated authority through provinces).²⁶ This requires specific enabling legislation or regulations. With the exception of the federal government, no Canadian province or territory has yet enacted the procurement obligations of the WTO GPA or even the AIT. This is problematic because, according to the Supreme Court of Canada,²⁷ the commitments contained in these agreements do not create freestanding rights that can be legally enforced. It is far from clear that when CETA is finally ratified that any provincial or territorial governments in Canada, other than perhaps the federal government, will enact it into law by legislation or regulation. Furthermore, if the relevant sub-central jurisdictions do not establish a bid challenge mechanism, meaning a domestic tribunal to hear allegations concerning any breaches of obligations contained in the procurement chapter of CETA, the disciplines themselves do little to protect an aggrieved bidder. The only way to create a truly effective government procurement agreement is to provide parties with the genuine ability to challenge government decision-making when breaches occur and to provide appropriate relief. Although the WTO GPA required provincial / territorial authorities to develop bid challenge mechanisms, whether through an independent, quasi-judicial body like the CITT or conventional judicial or administrative processes, none has done so yet. As such, disappointed bidders currently do not have a route through which to complain when one of these sub-central governments fails to respect the agreement's procurement obligations. It is uncertain whether the provincial governments of Canada will ever create a proper bid challenge pathway for bidders under the GPA, let alone CETA. This is precisely why the much maligned investor-

²³ Annex 5 notes.

²⁴ E.g. Trew and Sinclair (n 12).

²⁵ N Bradford, 'Neighbourhood Revitalization in Canada: Towards Place-Based Policy Solutions' in D Manley et al (eds), *Neighbourhood Effects or Neighbour-Based Problems?* (Springer, 2013).

²⁶ Constitution Act, 1867 (n 4) s. 92(8).

²⁷ *Northrop Grumman Overseas Services Corporation v Attorney General of Canada and Lockheed Martin Corporation*, [2009] 3 SCR 309 (5 November 2009) (CAN).

state dispute settlement, which as noted above does not apply to CETA's procurement chapter, is such an essential feature of regional trade agreements.

4. CONCLUSION

Commentators have praised CETA, including its procurement provisions, for its capacity to expand opportunities for Canadian and EU firms in each other's markets and to enhance competition.²⁸ Yet with respect to procurement at least, CETA actually provides very little beyond what Canada has already committed under the WTO GPA. Much of the language of CETA's procurement chapter is taken directly from the GPA and should come as no surprise to procuring entities in Canada or to well-advised Canadian firms seeking opportunities in EU markets. Still, civil society groups are concerned that changes brought about by CETA have the potential to infringe upon key procurement activities of some smaller governmental agencies in Canada. As a consequence of its lower thresholds and extensive coverage of a wide range of local entities, CETA will impair the ability of provincial and municipal governments to use procurement as an instrument of economic and social development, however worthy or misguided (or non-existent) such initiatives may be.

CETA, like the GPA, will also require Canadian provinces and municipalities to bear the potentially significant administrative costs associated with the provision of information about their procurement practices and available tenders, including accounting to unsuccessful bidders of the reasons for their decisions. Since these must be challengeable before administrative procedures where monetary damages may be awarded, procurement decisions at all levels will need to be approached with caution. If the Canadian provinces ever ratify CETA and create the required tribunals, Canadian provincial and municipal governments may witness their procurement initiatives being frustrated by delays as a consequence of both disclosure and bid challenge rules. While the economic advantages of enhanced market access for trillions of dollars of public contracts must be welcomed, open and fair government procurement comes at the price of closer scrutiny over a wide range of policy decisions, especially at the local level. Surely this must be viewed as an acceptable burden in societies like Canada and Europe which are governed by the rule of law. If surrendering some aspects of localism to the forces of international competition can also be seen as the next stage of globalization, then CETA's procurement regime represents a milestone in international economic governance.

²⁸ E.g. D Kiselbach, 'The Canada-EU Free Trade Agreement Demystified: New Opportunities for Trade, Investment and Government Procurement' (2014) 9[2] GT & CJ 52.