DE18-70

THE COUNCIL OF CANADIANS / LE CONSEIL DES CANADIENS

Monday, October 29, 2018

Dear Mayor Fougere and Council,

Re: Amendments to The Regina Administration Bylaw No. 2003-69.

My name is Jim Elliott, Chairperson of the Regina Chapter of the Council of Canadians.

I am here to caution you against making revisions to The Regina Administration Bylaw as it relates to the Canadian-European Union Comprehensive Economic and Trade Agreement or CETA.

Canadian municipalities are under threat of **not being able to protect its citizens** from actions made by trans-national corporations. Regina's municipal services are under threat of being taken away from local companies and local businesses will be forced out of the procurement process by foreign investors and multinational corporations.

Further, the tendency of municipalities and governments to relinquish their ability to regulate and protect its citizens through **regulatory chill** means that you will be told that you will not be able to help your citizens and your neighbours.

At Executive Committee, I included for your reading and review two documents that outline the implications of CETA as it relates to Canada, Canadians and the variety of sub-national governments and what is at stake.

Finally, I would like to respond to comments made by your solicitor in the discussions at Executive Committee early this month. In which he said **"we are not parties to the agreement"**. I refer you to the attached report[1] developed in cooperation of the Federation of Canadian Municipalities (FCM) in which it clearly includes information on

[1] International Trade Agreements and Local Government: A Guide for Canadian Municipalities developed in cooperation with the Federation of Canadian Municipalities. http://www.international.gc.ca/trade-agreements-accords-commerciaux/ressources/fcm/complete-guide-complet.aspx?lang=eng

obligations resulting from recent agreements signed by Canada, notably CETA. I have also communications with another chapter representative in which their city got exemptions included under CETA. FCM was part of that negotiation and I believe we are members of FCM.

The report attached to this presentation makes additional requirements around procurement that were likely not part of previous general procurement procedures as European trans-national corporations have access to your procurement of goods and services. It should be noted that recent announcements around upgrades to the Water Treatment Facility exceed the monetary threshold of CETA[2] and the rules under CETA, even the recent announcements.

Article 19.17 requires Parties to provide an administrative or judicial review procedure to allow suppliers to challenge any procurement decisions that they believe run contrary to the obligations of the Chapter[3]. So a European trans-national corporation may be able to challenge your procurement decisions.

My recommendation tonight is that you not make any modifications to the Administration Bylaw that relates to CETA.

Yours sincerely,

Jim Elliott, Chairperson
Regina Chapter, Council of Canadians

cc. Sujata Dey, Council of Canadians

[2] Ibid. Page 33.
[3] Ibid. Page 32.

International Trade Agreements and Local Government: A Guide for Canadian Municipalities

Note: This document is provided for information purposes only and does not in any way constitute legal advice or represent legal interpretations by the Government of Canada. Municipal measures would need to be assessed on a case-by-case basis. Municipalities should seek legal advice, as appropriate.

Introduction

A Guide for Canadian Municipalities
Developed in Cooperation with the Federation of Canadian Municipalities

This Guide is intended to help municipalities deal with day-to-day questions that may arise regarding provisions in Canada's trade agreements relevant to areas of municipal activity, i.e., regulation (e.g., zoning and environmental regulation), government purchasing, financial assistance and public-private partnerships. The Guide builds on previous discussions and collaborative efforts between the Government of Canada and the Federation of Canadian Municipalities (FCM). In 2001, the Joint Working Group on International Trade was formed between the FCM and Global Affairs Canada. The Joint Working Group was established at the request of the FCM to provide an on-going forum for discussion on issues relating to international trade agreements. In November 2014, the Joint Working Group was renewed and strengthened to promote greater collaboration between the respective work of the Federation of Canadian Municipalities and the Department in areas of trade promotion, trade policy, two-way investment and international activities;

In November 2001, the FCM submitted a document entitled *Municipal Questions Respecting Trade Agreements* to the Joint Working Group. The Department provided a written reply in April 2002. To continue with these efforts to respond to questions from the FCM, Global Affairs Canada undertook to prepare the current Guide. The first edition of the Guide was launched in 2005 and it has been updated through the years. This version includes information on obligations resulting from recent agreements signed by Canada, notably the Canada-European Union Comprehensive Economic and Trade Agreement (CETA).

Structure

Part I of the Guide provides a description of the trade agreement provisions most relevant to municipalities, including the WTO agreements, NAFTA and CETA.

Part II of the Guide sets out a series of key questions designed to assist municipalities in assessing the potential application of Canada's trade agreements to their activities. To illustrate their practical use, the key questions are then applied to example scenarios provided by the Federation of Canadian Municipalities (FCM).

Annex A provides a more general history and overview of the trade agreements.

Annex B contains additional details on NAFTA Chapter 11 regarding investment.

Annex C contains a Glossary of Terms.

Annex D includes Useful Contacts.

Annex E includes General Steps in Preparing for Negotiating, Implementing and Managing Free Trade Agreements.

Purpose

This Guide is intended for use by municipal officials at a number of different levels.

Annex A provides an overview of Canada's trade agreements while Annex B and Part I provide a more detailed account of the specific provisions in those agreements that are most likely to be relevant to municipalities. These sections of the Guide, therefore, are intended to offer a basic but comprehensive introduction to Canada's trade agreements. Part II of the Guide then provides the more focused guidance sought by the FCM as to when and how specific provisions of those agreements might apply to the programs and activities of municipal governments. This section, therefore, is necessarily more complex and technical. It takes the reader to the next level of detail, proceeding through a series of questions designed to help identify which trade agreement provisions might be applicable in given circumstances. To help illustrate the practical application of this approach, the questions are used in example scenarios provided by the FCM as representative of the types of situations that municipalities might need to address.

Accordingly, Part II is directed toward municipal officials for use in a selective and targeted way, as they focus on specific trade agreements and provisions in the context of relevance to a given municipal program or activity.

The Guide is a unique source of information on Canada's trade agreements in one location. As such, it is hoped that it will prove to be a widely useful resource and practical planning tool for municipal officials, regardless of their familiarity with the subject area.

This guide does not, however, provide legal advice and the applicability of trade provisions and the related exemptions, exceptions and reservations to municipal measures need to be assessed on a case-by-case basis. Municipalities should seek legal advice, as appropriate.

The Importance of Trade Agreements to Canada

Canada's participation in international trade agreements is driven by a fundamental reality: we must look outward for our prosperity, given that we have an abundance of production in natural resources, manufactured goods and services but only a relatively small domestic market. This means it is critical for Canada to gain access to foreign markets and investment, and to secure and enhance that access through enforceable rules.

It has been in recognition of this reality that successive Canadian governments pursued:

- the first modern trade agreement with the United States concluded in 1935;
- the first major multilateral trade agreement, the General Agreement on Tariffs and Trade (GATT), which entered into force in 1948;
- eight subsequent rounds of negotiations under the GATT to further liberalize trade, including the Uruguay Round which established the World Trade Organization (WTO) in 1995;
- the Canada-U.S. Free Trade Agreement (FTA), which entered into force in 1989;
- the North American FTA (NAFTA), which entered into force with the United States and Mexico in 1994 (at that time, NAFTA superseded the Canada-US FTA); and
- bilateral FTAs with Israel (1997), Chile (1997), Costa Rica (2002), Peru (2009), the European Free Trade Association (2009), Colombia (2011), Jordan (2012), Panama (2013), Honduras (2014), Korea (2015) and Ukraine (2017);
- the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union (2017)

In addition, Canada is in negotiations toward free trade agreements with more than 24 countries. Canada also has a series of Foreign Investment Promotion and Protection Agreements (FIPAs) and bilateral Science and Technology (S&T) agreements and arrangements – all of which help to make Canada more attractive to investors. Canada also has 31 bilateral FIPAs in force and is in the process of launching and negotiating more.

The initial focus of our trade agreements, particularly with the GATT, was on removing tariff barriers and quantitative import restrictions to trade in goods. Since the 1990s, the focus, at both the multilateral and bilateral levels, has shifted towards trade liberalization and the establishment of a rules-based system for services, intellectual property, investment and non-tariff barriers to trade in goods.

On services, the Uruguay Round resulted in the conclusion of the General Agreement on Trade in Services (GATS), the first multilateral framework aimed at reducing existing barriers to trade in services and preventing new barriers from being erected in the future. The Uruguay Round also saw the negotiation of the first binding agreement on the protection of intellectual property rights (TRIPS), a critical asset in the new knowledge-based global economy. NAFTA contains similar provisions on services and intellectual property and deals with the protection of investment.

In the area of non-tariff measures for goods, multilateral agreements dealing with standards, technical regulations and conformity assessment procedures for goods also have been negotiated. The Agreement on Technical Barriers to Trade (TBT), the successor to the GATT Standards Code, was strengthened during the Uruguay Round and a new Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) was concluded.

Work to expand the benefits of the international trading system continues on a number of fronts. In November 2001, a new round of multilateral trade negotiations was launched at the 4th World Trade Organization (WTO) Ministerial Conference in Doha, Qatar. Ministers agreed to continue negotiations on trade in agriculture and services and begin negotiations to further liberalize trade in non-agricultural goods, to strengthen rules on subsidies, trade remedies, and dispute settlement

and to negotiate on certain aspects of trade and the environment and intellectual property rights. Regrettably, the Doha negotiations are at an impasse. WTO Members, however, have found some success in advancing negotiations with narrower, more targeted focus. For example, the WTO successfully concluded a multilateral agreement on Trade Facilitation designed to streamline the passage of goods across borders.

In addition, and in effort to maintain negotiating momentum, smaller groups of WTO members have been pursuing negotiations on a plurilateral basis (i.e. not all WTO members are involved). Parties to the plurilateral WTO Information Technology Agreement (ITA) were recently successful in concluding negotiations on an expanded ITA. In addition, Canada is part of the plurilateral Environmental Goods Agreement negotiations, and recently announced plans to participate in plurilateral negotiations aimed at eliminating harmful fisheries subsidies.

More information on current WTO negotiations and Canada's involvement at the WTO can be found on the Global Affairs Canada website.

Canada participates in these agreements and negotiations for a simple reason: it is in the Canadian interest to do so. The benefits include: a clear and stable framework to conduct business; secure and improved access to markets for Canadian exporters: protection for Canadian investors abroad; access to greater choices and better prices for Canadian consumers; and, increased productivity and efficiency for the Canadian economy. These contribute to higher standards of living for Canadians as well as for our trade and investment partners. International trade is very important to Canada's medium-sized open economy. There is ample evidence of this. In 2016, Canada is the world's 12th and 9th largest merchandise exporter and importer, respectively. Since the GATT came into effect in 1948, global trade, as measured by world imports, has increased nearly 260 times over. For Canada, total two-way trade in goods and services reached over $1.3 trillion in 2016 or around $3.6 billion every day. From 2011 to 2016, our merchandise trade with the U.S. and Mexico has grown by 18.6 per cent to $713.5 billion. Total stock of foreign direct investment in Canada rose to nearly $826 billion in 2016, surpassed by the stock of Canadian direct investment abroad of $1,049 billion that year. An estimated one in six Canadian jobs is linked in part to exports with Canada's total trade in goods and services equal in size to 64.4 per cent of our gross domestic product in 2016. While obtaining these very substantial benefits, Canada has not given up any of our core values or policies. Canada retains the right to regulate in the public interest, including in areas such as public health and safety, education, social services and the environment. Canada also safeguards its right to promote and preserve cultural diversity.

However, the broad consensus around the benefits of trade has been under criticism recently, both in Europe and the United States, as well as in Canada. A number of stakeholders have expressed concern that the benefits of trade liberalization are not shared by all.

In an effort to help ensure that more people see themselves as benefitting more equitably from trade agreements, the Government of Canada is pursuing, as a top priority, a Progressive Trade Agenda that is aimed at trying to address some of these concerns. The Progressive Trade Agenda seeks provisions in trade agreements to address issues such as greater transparency, trade and gender, workers' rights, the environment and small- and medium-sized enterprises. It also

involves maintaining an ongoing dialogue with a broad range of stakeholders, including Indigenous Peoples, youth, and women.

In so doing, trade will continue to generate the economic gains that Canadians have come to expect while at the same time helping to ensure that these benefits are shared more broadly in our societies. By addressing issues that have been of concern to stakeholders, it is expected that support for the trade negotiating agenda will be enhanced.

Of course, there continue to be protectionist pressures around the world and Canada is sometimes affected by actions against our exports. Canada's trade agreements cannot always prevent such actions, but they do provide us with binding dispute settlement procedures to defend our interests. The WTO Trade Policy Review Body also performs an important role in monitoring WTO Members' trade practices, providing useful information and a forum for the discussion of protectionist measures.

The Benefits for Municipalities

Municipalities share in the benefits arising from liberalization and a rules-based system in a very real way. The vast majority of Canadian exporters are small and medium-sized enterprises. They, along with larger Canadian corporations, are based in municipalities across the country. Trade gives these Canadian businesses access to larger markets for their products and services and more varied sources for cost-effective inputs, technology and investment. This, in turn, delivers increased efficiency, productivity and competitiveness, all of which translate into jobs and higher incomes for municipalities' citizens.

As trade agreements support Canadian businesses in obtaining these advantages, they also help support the economic and social foundations of municipalities. However, measures taken by municipalities are not always subject to the requirements of those agreements. As will be seen in the sections that follow, various exemptions, exceptions and reservations in Canada's trade agreements mean that their provisions do not apply to certain measures taken by municipal governments. This includes, for example, measures taken in the exercise of governmental authority, and certain measures relating to social services and minority or aboriginal affairs.

There may nevertheless be instances in which certain provisions of our trade agreements become relevant for municipalities. Greater detail is provided in other sections of the Guide on the specific instances where municipalities may be subject to these requirements. In general, however, as long as certain key concepts and principles that underlie our trade agreements are taken into account, municipal measures are unlikely to be adversely affected or subject to challenge.

Core Obligations and Principles

The basic principles of most trade agreements are straightforward and likely already reflected in how municipalities do business. They essentially call for non-discrimination and disciplines to encourage a certain minimum fairness.

Non-Discrimination

1. **Most Favoured Nation treatment (MFN),** which in 1948 was set out in GATT Article I, is one of the core obligations found in trade and investment agreements. It generally applies to a wide range of measures and activities, including those that affect trade in goods and services as well as investment and intellectual property rights.

Where it is applicable, it essentially means that Canada may not discriminate between or among its trading partners. In the language of the agreements, Canada must grant to the businesses of one foreign country no less favourable treatment that it accords "in like circumstances" to businesses of any other foreign country. In other words, investors and service providers from one of Canada's trading partners must be treated no less favourably than investors or service providers from another. Similarly, Canada must treat products and services of one foreign country as it treats "like" products and services from any other foreign country. The determination of what is a "like product" is addressed on a case-by-case basis. Factors such as the product's end uses, consumer tastes and habits and the product properties, nature, and quality as well as tariff classification have been used to make this determination.

2. **National Treatment (NT),** which in 1948 was set out in GATT Article III, is another core obligation. In the context of trade in goods, this obligation essentially means that Canada must treat imported and locally produced "like" goods equally. Similarly, Canada must treat "like" foreign and local services equally. Regarding foreign businesses operating within Canada, Canada must generally accord these businesses treatment that is no less favourable than it accords, in like circumstances, to domestic businesses.

Fairness

The agreements also contain a variety of principles to encourage a certain minimum fairness.

1. **Transparency** provisions exist in most of our trade agreements, which call upon governments to make information concerning domestic laws, regulations, programs and administrative procedures readily available to domestic and foreign businesses.

2. **Fair and equitable treatment** is also a requirement found in various trade agreements as part of the guarantee to provide a minimum standard of treatment to foreign investors. This principle includes the duty to grant due process to foreign investors, ensuring that the treatment of an investment cannot fall below treatment considered as fair and equitable under generally accepted standards of customary international law. The principle of fair and equitable treatment also applies to government procurement where a contract is captured by Canada's international commitments.

Best Practices for Municipalities

The application of these core obligations and principles is consistent with the way that Canadian municipalities already treat businesses in their communities. In other words, while international trade obligations create additional considerations that municipal governments must take into

account, to the extent that municipalities' regulatory practices are transparent and non-discriminatory, the chance of trade issues arising is greatly minimized.

While other core obligations apply, ensuring that regulations and measures are transparent and non-discriminatory is thus the simplest way to reduce the risk of trade issues arising.

A basic question that a municipality will want to pose to itself is whether any of its measures are discriminatory on the basis of nationality:

Is a municipal measure treating locally produced goods, services or businesses more favourably than their foreign counterparts/equivalents?

Or

Is a municipal measure favouring goods, services or businesses of one trading partner more favourably than those of another trading partner?

Should there be measures that are not in keeping with the core obligations and principles of non-discrimination and fairness outlined in the Core Obligations and Principles section above, then municipalities should examine whether the various exemptions, exceptions and reservations apply. These exemptions, exceptions and reservations apply to many measures taken by municipal governments. This includes, for example, certain types of government procurement, measures taken in the exercise of governmental authority, and certain measures relating to social services and minority or aboriginal affairs.

In addition, when undertaking activities such as zoning, setting standards or providing subsidies, municipalities will also want to ensure that, as appropriate and where applicable, their actions are consistent with obligations regarding issues such as certain specified trade-related performance requirements, compensation requirements for expropriation or the creation of unnecessary or disguised barriers to trade. Where these obligations may be applicable to a municipality's activities, the relevant provisions are reviewed in detail in the respective sections of this guide.

This guide is designed to assist municipal officials in better understanding the core principles of non-discrimination and fairness referred to above and in better navigating the applicability of trade agreements to municipal activity. Specifically, detailed information on the obligations as well as the relevant exemptions, exceptions and reservations is outlined in Part I of this document. Part II of the document provides further detail and a step-by-step guide to determining the applicability of the trade agreements to four areas of municipal activity:

- financial assistance;
- government procurement;
- public-private partnerships; and
- regulation (e.g., zoning and environmental regulation).

This guide does not, however, provide legal advice and the applicability of trade provisions and the related exemptions, exceptions and reservations to municipal measures need to be assessed on a case-by-case basis. Municipalities should seek legal advice, as appropriate.

Municipal measures would also need to be considered in the context of Canada's domestic trade agreements among the provinces, territories and federal government for any obligations that might apply to the activities of regional, local, district or other forms of municipalities government. In this regard, the new *Canadian Free Trade Agreement* (CFTA), which came into force on July 1, 2017 and replaced the *Agreement on Internal Trade* (AIT), should be consulted. Please note however, that according to CFTA Article 1211 (Termination of the Agreement on Internal Trade), Chapter Five (Procurement) of the AIT and the applicable provisions of Chapter Seventeen (Dispute Resolution Procedures) of the AIT will both continue to apply after July 1, 2017 to any procurement commenced before this date. The procurement process commences after an entity has decided on its requirement. A pre-existing dispute shall be resolved and conducted in accordance with the provisions of the AIT as provided in CFTA Article 1014 (Pre-existing Disputes). In these cases, the AIT should continue to be consulted. Also note the application of the CFTA to regional, local, district, or other forms of municipal government measures as outlined in Article 1212 (Transitional Provisions). For information on both the AIT and CFTA please visit https://www.cfta-alec.ca/.

Part I: Key Provisions of the WTO Agreements, NAFTA and CETA in Greater Detail

This section provides detailed information on the key provisions of the trade agreements that are most likely to be relevant to municipalities. The three most relevant agreements are:

- the World Trade Organization (WTO) General Agreement on Trade in Services (GATS)
- the North American Free Trade Agreement (NAFTA)
- the Canada-European Union Comprehensive Economic and Trade Agreement (CETA)

Two other agreements that may be relevant with respect to certain types of regulations are:

- the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)
- the WTO Agreement on Technical Barriers to Trade (TBT)

A more general description of these and other international trade agreements to which Canada is a Party is provided in Annex A, Canada's Free Trade Agreements and Negotiations: an Overview.

The World Trade Organization (WTO) General Agreement on Trade in Services (GATS)

General

The GATS is the first multilateral agreement covering trade in services. It came into force on January 1, 1995 along with the other agreements negotiated during the Uruguay Round. The GATS provides a framework of rules governing services trade, a mechanism for Member countries to make specific commitments to liberalize their services markets, and access to the WTO dispute settlement procedures.

GATS Article I.1 defines the scope and coverage of the GATS which applies to "measures by WTO Members which affect trade in services." The reach of this definition goes beyond central governments to include measures taken by regional and local governments, and includes those of non-governmental bodies exercising powers delegated to them by governments.

All services are covered by the GATS, except those falling under Article 1.3, which specifically excludes services supplied in the exercise of governmental authority from the obligations of the GATS. Services supplied in the exercise of government authority are defined under Article 1.3(c) as "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers." Although many public services fall under the meaning of this Article, and are therefore not subject to the GATS, this does not mean that any service provided by the government is excluded. Rather, a service must meet both criteria: (1) being supplied neither on a commercial basis, (2) nor in competition with one or more service suppliers. The analytical questions provided in Part II are designed to assist municipalities in identifying situations where this might be the case. Importantly, to date, there have been no WTO dispute settlement cases that have dealt with the meaning of GATS Article 1.3(c).

The GATS also contains provisions that provide exceptions which may limit the coverage of measures taken by municipalities. In addition, the scope and coverage of a Member's horizontal and sector-specific commitments are set out in its Schedule of Specific Commitments, which include any relevant conditions and qualifications that may further limit the kinds of municipal activities that could be covered by the GATS.

For covered services, the GATS distinguishes between four modes of supply:

- **Mode 1** - Cross-border supply, in which a service is supplied from one Member country to another (e.g., via telephone, fax, or Internet);
- **Mode 2** - Consumption abroad, in which a service is supplied in the territory of one Member to a service consumer of any other Member (e.g., tourist or foreign exchange student);
- **Mode 3** - Commercial presence, in which a service is supplied by a service provider of one Member through a commercial presence in the territory of any other Member (e.g., foreign-owned retail store); and
- **Mode 4** - Presence of natural persons, in which a service is supplied by a service provider of one Member through the presence of natural persons of that Member in the territory of any other Member (e.g., temporary workers or specialists).

Certain obligations contained in the main text of the GATS apply across the board for all Members. These obligations of general application include most-favoured nation (MFN)

treatment, transparency, and the provision of administrative review and appeal procedures, all of which are described below: General Obligations that May Apply.

Beyond these general obligations, GATS Member countries negotiated specific commitments to provide market access and national treatment in certain sectors of their own choosing. These market access and national treatment undertakings are set out in each Member's Schedule of Specific Commitments, which also may include conditions on and qualifications to those commitments. These specific commitments are described below: Sector Specific Obligations that Might Apply.

Before turning to these negotiated commitments, however, it is useful to review provisions in the GATS that have the effect of limiting its application on some municipal measures or removing them completely from its coverage. This will highlight the kinds of municipal activities that are unlikely to be subject to GATS disciplines and to help identify the particular circumstances in which GATS provisions might apply.

In this context, it is important to keep in mind that the GATS does not prevent governments, whether at the federal, provincial/territorial or municipal level, from regulating. The right to regulate, a basic attribute of sovereignty under international law, is reaffirmed in both the Preamble to the GATS and in the Declaration issued at the November 2001 Ministerial Meeting in Doha, Qatar.

The Preamble explicitly recognizes:

"... the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives ..."

Paragraph 7 of the 2001 Ministerial Declaration reaffirms:

"...the right of Members under the General Agreement on Trade in Services to regulate, and to introduce new regulations on, the supply of services."

This makes it clear that nothing in the GATS prevents governments, whether at the federal, provincial/territorial or municipal level, from regulating in the interests of their citizens. Governments are thus free to pursue their regulatory objectives and have a wide array of choices for implementing such objectives.

At the same time, the GATS does provide a framework of rules to ensure that services regulations are administered in a reasonable, objective and impartial manner. The relevant provisions are described below: General GATS Obligations That Might Apply.

Applicability of the GATS

1. Government Procurement Article XIII.1

Article XIII.1 of the GATS contains another provision that is important for municipalities. It explicitly excludes the procurement of services by governments and their agencies from GATS obligations relating to MFN treatment as well as any specific market access and national treatment undertakings entered into a Member's Schedule of Specific Commitments, provided that those services are "purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale." Therefore, typical procurement activities at the municipal level would not be subject to these GATS obligations. Multilateral discussions on potential rules for government procurement of services mentioned at Article XIII.2 continue but have made very little progress.

2. General Exceptions Article XIV and Security Exceptions XIV (bis)

Article XIV (General Exceptions) and Article XIV bis (Security Exceptions) also could be relevant to municipalities. Measures that fall under Article XIV exceptions include measures: a) necessary to protect public morals or to maintain public order; b) necessary to protect human, animal or plant life or health; or c) necessary to secure compliance with laws or regulations which are not inconsistent with the Agreement (e.g., privacy laws, safety). Measures that are inconsistent with national treatment and MFN requirements under GATS may be covered under Article XIV in certain defined circumstances. However, these measures are "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services."

Article XIV (bis) relates to various actions taken pursuant to essential security interests, which also are excluded from the GATS.

3. Annex on Air Transport Services

Also excluded generally from the GATS, as specified in the GATS Annex on Air Transport Services, are measures affecting air traffic rights and services directly related to the exercise of such rights, with the exception of aircraft repair and maintenance services, the selling and marketing of air transport services and computer reservation systems.

General GATS Obligations that Might Apply

1. MFN Article II

GATS Article II requires Member countries to provide most-favoured-nation (MFN) treatment, meaning that Members must treat services and service suppliers of any other Member country no less favourably than they treat like services and services suppliers of any other country. The practical application of MFN to a specific case requires assessment based on the specific facts of that case. Article II also provides for exemptions from this MFN obligation that Members were allowed to enter into their Annex on Article II Exemptions prior to the GATS entering into force in 1995. These exemptions allow Members to provide preferential treatment to services and service suppliers from some, but not all, Member countries in specified sectors.

Canada’s MFN exemptions relate to the following types of sectors:

- film, video and television programming co-production and distribution;
- fishing related services;
- insurance intermediation agency services;
- financial services, including lending of all types and trading for own account of certain securities by loan and investment companies;
- compulsory arbitration mechanisms of investment disputes as found in our bilateral FTAs
- air and maritime transport;
- aircraft repair and maintenance provided by suppliers outside Canada; and
- services incidental to agriculture.

Canada's MFN exemption in the film, video and television sector, for example, allows us to offer differential treatment in the form of co-production agreements to persons and firms from selected WTO Member countries. Such agreements might include varying tax incentives for foreign productions to film in Canada.

2. Transparency Article III

Article III of the GATS contains provisions on transparency relating primarily to government regulations. They are important given the impact that regulations can have on trade in services.

Article III essentially requires each Member to publish promptly "all relevant measures of general application" (i.e. measures other than those that involve only individual service suppliers) that "pertain to or affect the operation of the Agreement." Relevant measures of general application could include, for example, the need for approval for foreign acquisitions of a local business with assets exceeding a certain threshold and measures related to boards of directors. WTO Members also must notify the Council for Trade in Services of new or changed laws, regulations or administrative guidelines that significantly affect trade in services covered by their specific commitments under the agreement. In Canada, publication and notification of changes in regulations and by-laws are already common practice. Canadian municipalities, however, need to be aware of these transparency requirements with respect to regulation.

3. Monopolies and Exclusive Service Providers Article VIII

Article VIII requires that a monopoly supplier of a service must not be allowed to act inconsistently with a Member's MFN obligations or the specific commitments listed in a Member's Schedule of Commitments. In addition, when a monopoly competes in the supply of a service outside the scope of its monopoly rights in a sector listed in a Member's Schedule of Commitments, the Member must ensure that the monopoly supplier does not abuse its monopoly position. These obligations extend to exclusive service providers where a Member formally or in effect authorizes or establishes a small number of service suppliers and substantially prevents competition among them in its territory.

Sector- Specific GATS Obligations that Might Apply

During the negotiation of the GATS, it was agreed that, beyond the obligations of general application discussed above, such as MFN and transparency, it would be up to each Member country to decide what specific market opening commitments it would make on a sector-by-sector basis. Members therefore set out in their individual Schedule of Specific Commitments the levels of market access and domestic treatment they are prepared to grant to foreign suppliers, in specific sectors. Members also could indicate limitations or qualifications to those commitments. The sectoral commitments, which are contained in each Member's Schedule of Specific Commitments, are governed by the following Articles:

1. Market Access Article XVI

Article XVI relates to market access in specific service sectors. It requires each Member to extend to the services and service suppliers of any other Member treatment no less favourable than that provided for in its Schedule of Specific Commitments. It prohibits Members from imposing certain limitations on market access, such as limitations on the number of service suppliers or employees in the sector, the value of transactions, the legal form of the service supplier or the participation of foreign capital, unless they have been specified in their Schedule.

Canada's Schedule of Specific Commitments includes a number of horizontal (i.e. across *all* service sectors) and sectoral limitations in respect of market access.

2. National Treatment Article XVII

Article XVII requires Members to provide national treatment in service sectors listed in their Schedules, subject, once again, to any limitations specified in those Schedules. National treatment means that each Member must accord to services and service suppliers of any other Member treatment that is no less favourable than that which it accords to its own like services and service suppliers. The key requirement is not to modify, in law or in fact, the conditions of competition in favour of a Member country's own service industry.

As mentioned, Members may specify limitations to national treatment commitments in their Schedule. Canada has done so along the same lines as above with respect to market access. In particular, for Mode 3 (commercial presence), Canada has listed a National Treatment limitation applying to all sectors listed in Canada's Schedule of Specific Commitments that reserves the right to supply or subsidize services within the public sector. Also for Mode 3 (commercial presence) and for Mode 4 (temporary entry), Canada has listed a National Treatment reservation that preserves its freedom to discriminate against foreign service suppliers for the price charged for public education, training, health and child care and the benefits provided under income security or insurance, social security or insurance and social welfare programs.

3. Domestic Regulation Article VI

In sectors where Members have taken specific commitments, GATS Article VI.1 governs regulatory measures other than those that impede market access or discriminate against foreign service providers within the meaning of Articles XVI and XVII. The main provisions of Article VI require Members to:

- administer all measures of general application affecting trade in services in a reasonable, objective, and impartial manner;
- maintain or institute mechanisms for the objective and impartial review of administrative decisions;
- inform an applicant of the status of and decision on its application without undue delay, where an authorization is required for the supply of services;
- ensure that requirements relating to licensing, qualifications and technical standards do not nullify or impair specific commitments undertaken, pending the potential entry into force of more detailed, additional disciplines under Article VI.4 that are still under negotiations; and
- provide adequate procedures to verify the competence of foreign professionals in sectors regarding professional services where commitments have been undertaken.

The majority of these provisions apply only to sectors where specific commitments have been undertaken.

4. Subsidies Article XV

Additional rules governing trade-distorting subsidies in service sectors are being contemplated by WTO Members, as mandated by GATS Article XV. Discussions, however, have not advanced significantly and remain focused on basic questions including what constitutes a trade-distorting subsidy in the services context.

In the meantime, the payment of grants or subsidies affecting trade in services is subject to national treatment in any sector where a Member has made specific commitments. A Member may, however, include either a horizontal or sector specific limitation in its Schedule of Commitments. For example, Canada has listed a National Treatment limitation applying to all sectors covered in Canada's Schedule which reserves Canada's right to supply or subsidize services within the public sector. The payment of grants and subsidies is also subject to MFN, unless an exemption has been claimed under Article II. As mentioned above, Canada maintains a total of 11 MFN exemptions.

Canada's Schedule of Specific Commitments

Canada has undertaken a range of specific commitments under the GATS, as set out in our Schedule of Specific Commitments. Sectors covered include: business services; communications services; construction services; distribution services; environmental services; financial services; tourism and travel related services; and transport services. Negotiations on basic telecommunications services and financial services were concluded in February 1997 and December 1997, respectively, subsequent to the January 1995 entry into force of the GATS.

With respect to financial services (e.g., banking and insurance services), the GATS applies through the general GATS obligations noted above: the GATS Annex on Financial Services which modifies some of the general GATS rules and definitions to take into account the special characteristics of the financial sector, including provision of a prudential carve-out; and through individual Member Schedules which set out specific commitments. In addition, WTO Members

have the option of scheduling their commitments pursuant to the Understanding on Commitments in Financial Services, whereby countries choose to take on generally a higher level of commitments. The "Understanding," which forms a part of the Schedule of Members adopting it, provides a standardized list of liberalization commitments in financial services, including a clause providing for the application of MFN and national treatment for the purchase or acquisition of financial services scheduled by Members. Canada has scheduled its commitments in financial services further to the Understanding.

Subsequent negotiations in the area of telecommunications services also took place following the end of the Uruguay Round. In 1995, the majority of WTO Members had scheduled commitments for value-added telecommunications services only; Members also adopted a GATS Annex on Telecommunications, which seeks to ensure access to and use of public telecommunications networks and services. Post-Uruguay negotiations resulted in the GATS Agreement on Basic Telecommunications, whereby many Members took additional commitments for basic telecommunications services. In addition, some countries also appended a document known as the "Reference Paper" to their Schedules. Recognizing the importance of the impact of a given regulatory framework on market access commitments in the telecommunications sector, the Reference Paper provides a series of pro-competitive regulatory principles, with a view to ensuring that market access commitments for basic telecommunications services are not impaired by regulatory measures.

Canada has not listed commitments in areas such as: health, public education and social services; water collection, purification and distribution services; transmission and distribution of electricity; and wholesale or retail sale of electricity.

The number of sectors covered in Canada's Schedule reflects the fact that Canada is one of the most open services economy in the world. At the same time, however, Canada has reserved its right to maintain certain measures that may not be consistent with the market access and national treatment obligations of the GATS. Canada's Schedule, therefore, specifies certain limitations in some sectors where commitments have been made.

For example, with respect to services supplied through Mode 3 (commercial presence), Canada has listed a National Treatment limitation applying to all sectors covered in Canada's Schedule which reserves Canada's right to supply or subsidize services within the public sector. Also for Mode 3 (commercial presence) and for Mode 4 (temporary entry), Canada has listed a National Treatment reservation reserving the right to discriminate against foreign service suppliers for the price charged for public education, training, health and child care and the benefits provided under income security or insurance, social security or insurance and social welfare programs.

The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)

General

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) is one of the WTO agreements negotiated during the Uruguay Round. It sets out WTO Members' rights and

obligations regarding food safety and animal and plant health regulations. It requires that SPS measures be applied only to the extent necessary to protect human, animal or plant life or health, are based on scientific principles, and are not maintained without sufficient scientific evidence. Members also are obliged to ensure that their measures do not arbitrarily or unjustifiably discriminate between other countries where identical or similar conditions prevail. The Agreement also provides that SPS measures must not be applied in a manner which would constitute a disguised restriction on international trade.

The SPS Agreement recognizes the right of WTO Members to establish their level of tolerance for risk, referred to as their "appropriate level of protection." While Members are encouraged to use international standards, guidelines and recommendations where they exist, they may apply measures that result in a higher level of protection than would be achieved by measures that would be based on such standards, provided that the measures are based on a risk assessment. Canada is responsible under the WTO Agreement for SPS measures taken by any level of government in Canada.

Applicability of the SPS Agreement

1. Article 13 (Implementation)

Article 13 states that WTO Members are responsible for the observance of all obligations contained in the SPS Agreement, including by "other than central government bodies." Article 13 also stipulates that Members "shall not take measures which have the effect of, directly or indirectly, requiring or encouraging … regional or non-governmental entities, or local government bodies, to act in a manner inconsistent with the provisions of the Agreement."

The requirements of the SPS Agreement, therefore, may apply to any sanitary or phytosanitary measures taken by municipal governments.

SPS Obligations that Might Apply

1. Article 1 (General Provisions)

Article 1 establishes that the Agreement applies to all SPS measures that may, directly or indirectly, affect international trade. It then refers to Annex A of the Agreement as containing the definition of such measures.

Annex A states that SPS measures are those applied within the territory of a Member to:

- protect animal or plant life or health from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
- protect human or animal life or health from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
- protect human life or health from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
- prevent or limit other damage from the entry, establishment or spread of pests.

Annex A specifies that SPS measures include all relevant laws, decrees, regulations, requirements and procedures, including, inter alia: end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

2. Article 2 (Basic Rights and Obligations)

Article 2 provides that Members have the right to take SPS measures but also requires that any such measures are applied only to the extent necessary to protect human, animal or plant life or health, are based on scientific principles and are not maintained without sufficient scientific evidence. In addition, Article 2 contains a non-discrimination requirement. Members must ensure that their SPS measures do not arbitrarily or unjustifiably discriminate between countries where "identical or similar conditions prevail, including between their own territory and that of other Members." Measures also must not be applied in a manner that constitutes a disguised restriction to international trade.

3. Article 3 (Harmonization)

Article 3 provides that, in the interest of harmonizing SPS measures, Members must base their measures on international standards, guidelines or recommendations where they exist. Measures that conform to such international standards, guidelines or recommendations are deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the Agreement. Members also may apply measures that result in a higher level of protection than would be achieved by measures that would be based on international standards, guidelines or recommendations, provided that the measures are based on a risk assessment. The term "international standards, guidelines and recommendations" is defined in Annex A3 of the SPS Agreement.

4. Article 5 (Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection)

Article 5 provides rules that apply to the assessment of risk by Members. SPS measures must be based on an assessment, as appropriate to the circumstances of the risks to human, animal or plant life or health. Members must take into account the risk assessment techniques that relevant international organizations have developed. In assessing the risks, Members must take into account, inter alia, the relevant scientific evidence and certain economic factors. Members shall avoid arbitrary and unjustifiable distinctions in the levels of protection they consider to be appropriate in different situations. In addition, Members shall ensure that measures are not more trade restrictive than required to achieve the Members' appropriate level of protection. If scientific evidence is insufficient, Members may provisionally adopt measures based on available information but are required to seek the additional information necessary for a more objective assessment of risk and review the provisional measure within a reasonable period of time.

The WTO Agreement on Technical Barriers to Trade (TBT)

General

The TBT Agreement applies to certain types of measures, namely technical regulations, standards and conformity assessment procedures. All products, including industrial and agricultural products, are subject to this Agreement. However, the Agreement does not apply to specifications prepared by governmental bodies for procurement purposes (these are addressed by the Agreement on Government Procurement) nor to sanitary and phytosanitary measures (covered by the SPS Agreement).

Annex 1 of the TBT Agreement defines key terms, such as technical regulations, standards and conformity assessment procedures. A technical regulation describes a product's characteristics or its related processes or production methods. A technical regulation may also include or deal exclusively with packaging, marking or labelling requirements. To be considered a technical regulation, compliance must be mandatory. An example of a technical regulation is a by-law setting limits on vehicle emissions. In the context of the TBT Agreement, a standard is similar to a technical regulation, except that it is voluntary. A "conformity assessment" procedure is used to verify that a product complies with a technical regulation or a standard (e.g. testing, inspection, certification, approval).

The TBT Agreement sets out non-discrimination obligations in respect of technical regulations, standards and conformity assessment procedures. It also requires that such measures be based on international standards where they exist, and that they not be prepared, adopted or applied in a manner that creates unnecessary obstacles to international trade.

Applicability of the TBT Agreement

1. Articles 3 and 7 (Preparation, Adoption and Application of Technical Regulations and Conformity Assessment Procedures by Local Government Bodies)

Articles 3 and 7 require WTO Members to "take such reasonable measures as may be available to them" to ensure compliance by local governments – which include municipalities – with the provisions of the TBT Agreement relating to the preparation, adoption and application of technical regulations and conformity assessment procedures (outlined in articles 2, 5 and 6 described in the following section). Articles 3 and 7 provide that Members are fully responsible for the observance of these provisions of the TBT Agreement by local governments and specify that Members must implement positive measures in support of such observance. Articles 3 and 7 do not require that technical regulations and conformity assessment procedures of municipalities be notified by central governments to other WTO Members.

2. Article 4 (Preparation, Adoption and Application of Standards)

Under Article 4 of the TBT Agreement, Members are required to ensure that their standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards contained in Annex 3 of the Agreement. Its requirements are similar to

the disciplines contained in the TBT Agreement with respect to technical regulations. Members also are required to take such reasonable steps as may be available to ensure that local government standardizing bodies accept and comply with this Code.

Applicable TBT Obligations

Article 2 of the TBT Agreement outlines the obligations that apply to the preparation, adoption and application of technical regulations. Articles 5 and 6 outline the obligations that apply to conformity assessment procedures.

Annex 3 contains the Code of Good Practice for the Preparation, Adoption and Application of Standards. Key obligations include:

1. No unnecessary obstacles to trade: Articles 2 and 5 and Annex 3 of the TBT Agreement all require that standards, technical regulations and conformity assessment procedures not create unnecessary obstacles to international trade. Article 2 requires that technical regulations be no more trade-restrictive than necessary to fulfill a legitimate objective (such as national security, prevention of deceptive practices, protection of human health or safety, or the environment). Article 5 requires that conformity assessment procedures not be stricter than is necessary to ensure that products comply with applicable requirements. Although regulatory authorities have discretion in setting their desired level of protection, they must choose the least trade-restrictive measure that would adequately fulfill the legitimate objective pursued.

2. Non-discrimination: Article 2 and Annex 3 of the TBT Agreement require that technical regulations and standards do not accord less favourable treatment to imported products than to "like" products of 1) local origin (i.e. national treatment) or 2) originating from any other country (i.e., most favoured nation treatment). With respect to conformity assessment procedures, Article 5 provides that suppliers of foreign "like" products should have access to such procedures under no less favourable conditions than those accorded to suppliers of "like" products of national origin or originating in any other country. For instance, conformity assessment procedures should not be conducted in an order that favours suppliers of domestic goods. Also, fees should be equitable for all suppliers.

3. Use of international standards: Article 2 and Annex 3 of the TBT Agreement require that technical regulations and standards be based on relevant international standards. Article 5 requires that conformity assessment procedures be based on relevant guides or recommendations issued by international standardizing bodies. Regulatory authorities and standardizing bodies are allowed to deviate from international standards or such guides or recommendations if such standards or guides or recommendations would be an ineffective or inappropriate means for the fulfilment of the legitimate objective pursued, for instance because of fundamental climatic or geographic factors or technological problems. For example, North American electrical safety standards may deviate from standards developed by the International Electrotechnical Commission (IEC) because the North American electrical infrastructure fundamentally differs from that found in Europe and in Asia.

4. Transparency: Articles 2 and 5 of the TBT Agreement require that WTO Members notify each other when they enact, amend or change technical regulations or conformity assessment procedures. Although the proposed measures of municipalities do not need to be notified to other WTO Members, notices of proposed measures must be published and copies of the proposals must be provided to other Members at their request. Other WTO Members must also be given the opportunity to comment on the proposed measures, and their comments must be discussed upon request and taken into account. Annex 3 requires standardizing bodies to publish work programmes of standards and to give interested parties the opportunity to comment on draft standards.

5. Performance-based requirements: Article 2 and Annex 3 of the TBT Agreement require that standards and technical regulations be performance-based rather than specifying design or descriptive characteristics. For instance, the National Building Code of Canada (NBCC) provides for both performance-based and prescriptive solutions. Alternative designs to the prescriptive solutions can be accepted as long as they meet the performance requirements provided in the NBCC.

6. Acceptance of Equivalence: Article 2 of the TBT Agreement requires giving positive consideration to accepting as equivalent the technical regulations of WTO Members, provided that they adequately fulfill the objectives or requirements of the regulatory authority. This obligation would only take effect if a formal request was made to a Canadian regulatory authority, including an explanation as to why the respective measures should be considered equivalent. Regarding conformity assessment procedures, Article 6 provides that Members shall ensure, whenever possible, that results of such procedures in other Members are accepted, provided they are satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to their own procedures.

The North American Free Trade Agreement (NAFTA)

NAFTA Chapter 7: Agriculture and Sanitary and Phytosanitary Measures

General

Section B of NAFTA Chapter 7 relates to sanitary and phytosanitary measures that may affect trade between the Parties and is similar to the WTO SPS Agreement described above. The measures covered are defined in Article 724 and include a range of measures to protect human, animal and plant life and health.

Section B of Chapter 7 does not explicitly exclude provincial or municipal measures from its coverage, nor is there any language in Section B to suggest that it was intended for such measures to be excluded.

NAFTA Chapter 7 Obligations that Might Apply

1. Basic Rights and Obligations Article 712

Article 712 establishes that each Party has the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health and to establish its appropriate level of protection. Measures must be based on scientific principles and a risk assessment, must not be discriminatory, must be applied only to the extent necessary to achieve its appropriate level of protection and must not constitute disguised restrictions on trade.

2. International Standards and Standardizing Organizations Article 713

Without reducing the level of protection of human, animal, or plant life or health, Article 713 requires Parties to use relevant international standards, guidelines or recommendations as the basis of their measures. A measure that conforms to a relevant international standard, guideline or recommendation is presumed to be consistent with Article 712.

3. Risk Assessment and Appropriate Level of Protection Article 715

Article 715 sets out what a Party must take into account in conducting a risk assessment. The key factors include: relevant risk assessment techniques and methodologies developed by international or North American standardization organizations; relevant scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; the prevalence of diseases or pests; relevant treatments, such as quarantines; and environmental conditions. In establishing its appropriate level of protection regarding the risk, a Member must also take into account relevant economic factors including: loss of production or sales that may result from the pest or disease; costs of control or eradication of the pest or disease; and the relative cost-effectiveness of alternative approaches to limiting risks. In establishing their appropriate level of protection, Parties should minimize negative trade effects and must avoid arbitrary or unjustifiable distinctions in such levels in different circumstances, where such distinctions could result in discrimination or constitute a disguised restriction on trade between the Parties. In sum, NAFTA does not impair governments' ability to adopt measures to protect human, animal or plant life or health, provided that those measures are supported by sufficient scientific evidence, including a risk assessment, are necessary to achieve the level of protection sought, and are not applied in a manner that amounts to arbitrary or unjustifiable discrimination.

NAFTA Chapter 9: Standards-Related Measures

Article 902(1) indicates that NAFTA Article 105 (Extent of Obligations) does not apply to the provisions of Chapter 9. Article 105 requires the Parties to NAFTA to ensure that all necessary measures are taken in order to give effect to the provisions of the Agreement, except as otherwise provided, by state and provincial governments. The obligations set out in Chapter 9 do not apply to standards-related measures of municipalities.

NAFTA Chapter 11: Investment

General

Chapter 11 of NAFTA deals with Parties' commitments with respect to the treatment within their territories of each other's investors and their investments. Investment agreements establish a

framework of rules that assist in providing investors with a more predictable and secure investment climate as well as procedures for the settlement of disputes between investors and NAFTA governments.

NAFTA Chapter 11 is divided into three sections:

- Section A sets out substantive obligations regarding the treatment of investors and their investments;
- Section B sets out the investor/state dispute settlement procedures; and
- Section C contains definitions of key terms.

Section A of Chapter 11 contains a range of obligations applying to measures taken by NAFTA Parties, including laws, regulations, procedures or practices that relate to investors of the other Parties and their investments. These are described further below. Section A also contains, however, various provisions that act to limit the application of those obligations to measures by municipalities. Before turning to the substantive obligations in Chapter 11, therefore, it is important to review some key exceptions relevant to municipal government measures.

Applicability of Investment Provisions

Article 1108, Reservations and Exceptions, limits Chapter 11, Section A obligations in the following important ways:

1. Article 1108(1)

Article 1108(1) provides that any existing non-conforming measure that pre-dates the implementation of NAFTA on January 1, 1994, is reserved from Chapter 11 national treatment (Article 1102) and Most-Favoured-Nation (MFN) treatment (Article 1103) obligations, as well as the obligation to not impose certain performance requirements (Article 1106) or senior management and board of director requirements (Article 1107). Amendments to such measures after NAFTA came into effect are also exempt as long as the amendments do not increase the extent to which a regulation departed from those obligations. Federal measures which fall under the scope of Article 1108(1) are listed in Canada's schedule to Annex I and Annex III. As per Article 1108(1)(a)(iii), local governments were not required to list measures that pre-dated the implementation of NAFTA.

2. Article 1108(3)

Under Article 1108(3), Canada, Mexico and the United States each established reservations for measures, including at the local government level, relating to selected sectors, sub-sectors or activities. These reservations are listed, by country, in NAFTA Annex II. Of particular interest to municipalities are the following reservations taken by Canada:

- Annex II-C-1 (Aboriginal Affairs) - In this section of Annex II, Canada has reserved the right to maintain existing, or to adopt new or more restrictive measures providing preferences to aboriginal peoples that otherwise would not be consistent with the national

treatment requirements of Article 1102, the Most-Favoured-Nation (MFN) requirements of Article 1103, the performance requirements of Article 1106, or the senior management and board of directors requirements of Article 1107.

- Annex II-C-8 (Minority Affairs) - In this section of Annex II, Canada has reserved the right to adopt or maintain measures according preferences to socially or economically disadvantaged minorities that otherwise would be inconsistent with the provisions on national treatment in Article 1102, performance requirements in Article 1106 or the senior management and board of directors requirements of Article 1107.
- Annex II-C-9 (Social Services) - In this section of Annex II, Canada has reserved the right to adopt measures relating to certain social services that otherwise would be inconsistent with the national treatment requirements of Article 1102 or the senior management and board of directors requirements of Article 1107. The social services covered are "public law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health and child care." Importantly the reservation does not require a specified means of delivery (e.g. publicly funded, not-for-profit or on a commercial basis). What the reservation does require is that the service must be established or maintained for a public purpose.

3. Article 1108(7)(a)

This sub-paragraph of Article 1108 provides an exception for government procurement from the national treatment provisions of Article 1102, the MFN provisions of Article 1103 and the senior management and board of director provisions of Article 1107.

4. Article 1108(7)(b)

This Article provides an exception for subsidies or grants, including government-supported loans, guarantees and insurance from the national treatment provisions of Article 1102, the MFN provisions of Article 1103 and the senior management and board of director provisions of Article 1107.

5. Article 1108(8)(b)

Article 1108(8)(b) provides a further exception for government procurement from the provisions relating to performance requirements in Article 1106.

Taken together, these reservations and exceptions could possibly remove a range of government measures, including at the municipal level, from the coverage of key NAFTA Chapter 11 obligations. It should be noted, however, that even where these reservations and exceptions apply, Chapter 11 provisions on minimum standard of treatment in Article 1105 and expropriation in Article 1110 are applicable to all levels of government. These provisions and others that might apply in certain circumstances are set out in the next section.

Chapter 11 Obligations that Might Apply

- National Treatment Article 1102

Article 1102 sets out the national treatment obligation in Chapter 11, unless an exception or reservation applies. The national treatment obligation requires each Party to treat the investors of other Parties and their investments located within their territory no less favourably than they treat, in like circumstances, their own investors and their investments. This provision covers treatment with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments. Please see below for a more detailed overview of Article 1102.

- Most Favoured-Nations (MFN) Article 1103

This is the most-favoured-nation, or MFN, provision in Chapter 11. Unless an exception or reservation applies, Article 1103 requires that Parties treat each other's investors and the investors' investments located within their territory no less favourably than they treat, in like circumstances, any other foreign investors and their investments. This covers treatment with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments. Please see below for a more detailed overview of Article 1103.

- Treatment in Accordance to Customary Law Article 1105

Article 1105 requires each Party to provide to the investments of investors of another Party treatment in accordance with customary international law. This essentially means fair and equitable treatment and due process within the meaning of customary international law. Please see below for a more detailed overview of Article 1105.

- Prohibition of Requirements Article 1106

Where an exception or reservation does not apply, Article 1106 prohibits any Party from imposing certain requirements with respect to the establishment, acquisition, expansion, management, conduct or operation of an investment by an investor of a Party or non-Party in its territory. The prohibited performance requirements include, among other things, export or local content quotas, and technology transfer requirements. Note, however, that Article 1106(4) makes clear that Parties are not prevented from conditioning the receipt of an advantage on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand facilities or carry out research and development in its territory. In addition, Article 1106(6) indicates that Parties are not prevented from adopting or maintaining certain measures, including for environmental purposes, provided they are not applied in an arbitrary or unjustified manner or do not constitute a disguised restriction on trade or investment. Permitted measures include those necessary to protect human, animal and plant life. Please see below for a more detailed overview of Article 1106.

5. Article 1107

Unless an exception or reservation applies, Article 1107(1) prohibits a Party from imposing requirements with respect to the nationality of the senior management of an enterprise that is an

investment of an investor of another Party. Article 1107(2), however, allows a Party to require that a majority of the board of directors, or any committee thereof, be of a particular nationality or resident in their territory provided that the requirement does not materially impair the ability of the investor to exercise control over its investment. Please see below for a more detailed overview of Article 1107.

6. Article 1110

Article 1110 sets out requirements with respect to direct or indirect expropriation. It establishes that "no Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment except: a) for a public purpose; b) on a non-discriminatory basis; c) in accordance with due process of law and Article 1105(1); and d) on payment of compensation." Compensation must be equivalent to fair market value plus interest at a commercially reasonable rate. Please see below for a more detailed overview of Article 1110, including an overview of Chapter 11 Tribunal decisions on expropriation and Canada's position on the application of Article 1110 to non-discriminatory measures that are designed and applied to protect legitimate public welfare objectives.

Finally, please see below for an overview of other Chapter 11 obligations, including those that would not be directly relevant to municipal activities.

Dispute Settlement

As mentioned, Section B of Chapter 11 sets out procedures for the settlement of disputes between a Party to NAFTA and an investor of another Party within its territory. These procedures provide access to arbitration for alleged breaches of the provisions of Section A of Chapter 11 by a Party that have resulted in loss of or damage to an investment. The arbitration is conducted in accordance with either the International Centre for Settlement of Investment Disputes Rules (ICSID), the ICSID Additional Facility Rules or the United Nations Commission on International Trade Law Rules (UNCITRAL). It is important to note that, contrary to some state-to-state dispute settlement mechanisms, a Chapter 11 investor-state Tribunal may only award monetary damages, costs and interest directly related to a breach of an obligation. A Tribunal cannot order a Party to modify or remove its existing legislation and it cannot award punitive damages.

The first step in the Chapter 11 dispute settlement process is the serving of a Notice of Intent to Submit a Claim to Arbitration. The investor must serve a Notice of Intent at least 90 days before the claim is to be submitted. A claim may be made after six months but no more than three years have elapsed from the date on which the investor first knew, or should have known, of the alleged breach and the loss or damage to its investment. Consultations are typically held between the investor and the NAFTA Party in question after the Notice of Intent is filed. Investor-state arbitrations are heard by tribunals of three adjudicators. One arbitrator is named by each party to the dispute and the third by mutual agreement or, failing agreement, by the World Bank International Centre for Settlement of Investment Disputes (ICSID).

The federal government represents Canada in a Chapter 11 case, but local governments would be consulted closely on any claim relevant to their activities.

NAFTA Chapter 12: Cross-Border Trade in Services

General

Chapter 12 establishes rules and obligations aimed at facilitating trade in services among the NAFTA Parties. The Chapter applies to all measures adopted or maintained by a Party relating to cross-border services trade, defined as the provision of a service:

- from the territory of a Party into the territory of another Party;
- in the territory of a Party by a person of that Party to a person of another Party; or,
- by a national of a Party in the territory of another Party.

Chapter 12 does not apply to the provision of a service in the territory of a Party by an investment, which is covered in Chapter 11, or to services that are specifically excluded from Chapter 12, including financial services and air services. In addition, the kinds of obligations applicable to municipal activities may be further limited by several exceptions to Chapter 12, as well as by reservations that Canada has taken against key provisions contained in the chapter. It is useful to review these limitations in the section that follows. Obligations that could apply in certain circumstances are identified further below.

There are no provisions in Chapter 12 that undermine the right of governments to regulate. Article 1201(3)(b), Scope and Coverage, states that:

"Nothing in Chapter 12 shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter."

In addition, the NAFTA Preamble explicitly recognizes the Parties' intent to "preserve their flexibility to safeguard the public welfare." NAFTA, however, does require governments at all levels to act in accordance with certain principles, such as non-discrimination, when implementing regulatory measures affecting cross-border trade in services.

Applicability of Services Provisions

1. Article 1206(1)

Article 1206(1) provides that any existing non-conforming measure that pre-dates the implementation of NAFTA on January 1, 1994, is reserved from Chapter 12 obligations on national treatment (Article 1202), MFN treatment (Article 1203), and local presence (Article 1205). Amendments to such regulations after NAFTA came into effect are also exempt as long as the amendments do not increase the extent to which a regulation departed from those obligations.

2. Article 1201(2)(c) and (d) (Scope and Coverage)

Article 1201(2)(c) states that Chapter 12 does not apply to "procurement by a Party or a state enterprise." Article 1201(2)(d) states that Chapter 12 also does not apply to subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance. It is thus clear that government procurement and subsidies or grants to services or service suppliers are completely outside the scope of Chapter 12.

3. Article 1206 (Reservations)

Chapter 12 is a "top-down" application of key disciplines for cross-border trade in services, which means that the chapter applies to all services except where a sector has been excluded or Parties have taken reservations. In this regard, Article 1206 outlines the manner by which NAFTA Parties may take reservations, which are specified by each Party in its Schedule to NAFTA Annex I and Annex II.

Annex I permits the maintenance of measures that do not conform to the Chapter's provisions on national treatment, MFN treatment and local presence requirements and were listed at the time NAFTA was signed. New measures that would be non-conforming may not be added under Annex I, but measures already listed may be amended so long as they are not made more trade restrictive. Canada has taken a number of Annex I reservations relating to the *Export and Import Permits Act* as well as certain specific sectors including business services, energy, fisheries, and transportation services.

Annex II reservations allow Parties to prescribe new measures or modify existing measures within certain sectors in a way inconsistent with NAFTA obligations (e.g., obligations relating to national treatment, MFN, or performance requirements).The most significant of Canada's Annex II reservations for municipalities are contained in Annex II-C-1 on Aboriginal Affairs, Annex II-C-8 on Minority Affairs and Annex II-C-9 on Social Services:

- Annex II-C-1 (Aboriginal Affairs) - In this section of Annex II, Canada has reserved the right to maintain existing, or to adopt new or more restrictive measures providing preferences to aboriginal peoples that otherwise would not be consistent with the national treatment requirements of Article 1202, the MFN requirements of Article 1203 or the local presence provisions of Article 1204.
- Annex II-C-8 (Minority Affairs) - In this section of Annex II, Canada reserves the right to adopt or maintain measures, according preferences to socially or economically disadvantaged minorities that otherwise would be inconsistent with the national treatment requirements of Article 1202 or the local presence provisions of Article 1204.
- Annex II-C-9 (Social Services) - In this section of Annex II, Canada has reserved the right to adopt measures relating to certain social services that otherwise would be inconsistent with the national treatment requirements of Article 1202, the MFN requirements of Article 1203 or the local presence provisions of Article 1204. The social services covered are "public law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public

education, public training, health and child care." Importantly, the reservation does not require a specified means of delivery (for example publicly funded, not-for-profit or on a commercial basis). What the reservation does require is that the service must be established or maintained for a public purpose.

4. Article 1207 (Quantitative Restrictions)

Chapter 12 contains no strict obligations with respect to non-discriminatory quantitative restrictions (e.g. limitation on number of service providers or operations of any service provider, whether in the form of a quota, monopoly or economic needs test), although Article 1207 requires that such restrictions existing at the federal or provincial levels be notified and scheduled so that service providers can be made aware of them (these restrictions are listed in Annex V). Article 1207, however, does not apply to any quantitative restrictions maintained at the local level (i.e. municipal level).

Chapter 12 Obligations that Might Apply

1. Article 1202 (National Treatment)

Article 1202 is the national treatment provision in Chapter 12. Unless exceptions apply, it requires each Party to accord to service providers of another Party treatment no less favourable than it accords, in like circumstances, to its own service providers.

2. Article 1203 (Most-Favoured-National Treatment)

Article 1203 is the most-favoured-nation (MFN) treatment provision. Unless exceptions apply, it requires a Party to accord to service providers of another Party treatment no less favourable than it accords, in like circumstances, to service providers of any other Party or of a non-Party.

3. Article 1205 (Local Presence)

Subject to exceptions that might apply, Article 1205 states that a NAFTA Party may not require service providers of another Party to establish a local presence or to be residents in its territory as a prerequisite to providing a cross-border service.

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

CETA Chapter 19: Government Procurement

General

As Parties to the WTO Agreement on Government Procurement (GPA), Canada and the European Union (EU) have already committed to procedural rules and have provided each other with market access to certain federal and provincial procurement activities. The Canada-EU Comprehensive Economic and Trade Agreement (CETA) builds upon these commitments by

opening up competition to a wider range of government procurement activities. Importantly, the CETA provides EU and Canadian suppliers with guaranteed and secure access to sub-national procurement opportunities, including at the municipal level.

Under Chapter 19 of the CETA, Canada and the EU have committed to ensuring that the procurement activities – equivalent to or above certain monetary thresholds – of a wide range of contracting entities are conducted in a non-discriminatory, impartial, transparent and accountable manner. The following provides an overview of the provisions contained in the CETA GP Chapter.

Article 19.1 – Definitions

Article 19.1 provides general definitions applicable to the Government Procurement (GP) Chapter. For example, it defines terms such as "limited tendering", "multi-use list" and "technical specification".

Article 19.2 – Scope and Coverage

Article 19.2 prescribes the scope and coverage of application of the GP Chapter, which for Canada is set out in the market access schedules in Annex 19-A. These annexes list the Canadian entities that will be subject to the procedural rules and substantive obligations of the Chapter, including – for the first time – at the municipal level. They also set out the applicable contract-value thresholds (i.e. the value at which point the rules and obligation are triggered) for each type of entity as well as the goods, services and construction services to which the procedural rules and substantive obligations apply.

Article 19.3 – Security and General Exceptions

Article 19.3 provides general exceptions to ensure that Parties are not prevented from taking measures to protect *inter alia* national security, public safety, the environment or intellectual property when fulfilling the obligations of the Chapter. These exceptions provide the Parties with the flexibility to derogate from their government procurement obligations in exceptional and specific circumstances, and are consistent with the WTO GPA, to which both Canada and the EU are Parties.

Article 19.4 – General Principles

Article 19.4 sets out a series of obligations that apply to covered procurement, including non-discrimination, transparency and impartiality. These provide assurance that Canadian and EU suppliers will be able to compete on an equal footing in the Canadian and EU government procurement markets. The non-discrimination provision requires Parties and their procuring entities to treat the goods, services, and the suppliers of the other Party offering such goods or services, no less favourably than the treatment it provides its own goods, services and suppliers. It prohibits Parties and procuring entities from treating suppliers less favourably than others based on the degree of foreign affiliation or ownership, as well as from discriminating against suppliers on the basis that the goods or services are those of the other Party. Such obligations give suppliers the confidence that the procurement process will be conducted fairly. In terms of

the conduct of procurements, this Article requires that procuring entities conduct covered procurements in a transparent and impartial manner.

This Article also ensures that when procurements are conducted by electronic means, procuring entities use generally available information technology systems, while ensuring that the integrity of requests for participation and tenders is maintained. It also prevents Parties from applying rules of origin to goods or services that are different from those used in the normal course of trade and from seeking, imposing or enforcing any offset (any condition or undertaking that encourages local development or improves a Party's balance-of-payments accounts, such as the use of domestic content requirements). Finally, it clarifies that the non-discrimination provisions do not apply to measures other than the procurement covered by the Chapter (for example, they do not apply to customs duties or charges of any kind imposed on, or in connection with, importation).

Article 19.5 – Information on the Procurement System

Article 19.5 obliges Parties to publish information on its procurement system (e.g. regulation, policies, standard contract clauses, etc.) such that it is widely disseminated and readily accessible to the public. For procuring entities at the municipal level, the electronic or paper media in which the Party publishes this information – as well as information related to tender notices, multi-use lists, publication of awards and procurement statistics – is set out in Section B of Annex 19-8 (Publication Media).

Article 19.6 – Notices

Article 19.6 requires procuring entities to publish information on specific procurement opportunities (i.e. a notice of intended procurement – or tender notice – for each covered procurement), except in cases where limited tendering (also known as "sole sourcing") is used. These notices of intended procurement shall be accessible by electronic means and free of charge through a single point of access, for which Canada may apply a transitional period of up to five years to implement for all covered entities (the EU already maintains an electronic single point of access for notices of intended procurement). During the transitional period, procuring entities at the municipal level that do not use the single point of access must publish their notices of intended procurement in the electronic or paper media set out in Section B of Annex 19-8 (Publication Media). This Article also describes the type of information that must be included in a notice of intended procurement.

Article 19.7 – Conditions for Participation

Article 19.7 identifies the conditions that procuring entities can and cannot impose for participation in a tender. For example, a procuring entity at the municipal level cannot impose the condition that a supplier must have previously been awarded a contract by a Canadian procuring entity or in Canada. In addition, any conditions that are imposed must be limited to those that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the procurement. In evaluating the financial capacity and the commercial and technical abilities of a supplier, a procuring entity at the

municipal level must take into account the supplier's business activities both inside and outside Canada.

Article 19.8 – Qualification of Suppliers

Article 19.8 allows Parties and procuring entities to maintain a supplier registration system in order to more efficiently complete procurement processes. The Article also prescribes conditions upon which the use of selective tendering is permitted. In addition, the Article enables Parties and procuring entities to maintain a multi-use list of suppliers, subject to certain conditions.

Article 19.9 – Technical Specifications and Tender Documentation

Article 19.9 identifies the information that procuring entities must provide in order to ensure that suppliers are able to prepare and submit tenders. This includes a description of the nature and quantity of goods or services being procured, conditions for the participation of suppliers and the evaluation criteria that will be used to select a supplier. The Article also states that the Parties, including their procuring entities, may prepare, adopt or apply technical specifications. It further provides that the evaluation criteria set out in the notice of intended procurement may include, among others, environmental characteristics. This Article prevents procuring entities from prescribing technical specifications or conformity assessment procedures for goods or services with the purpose of creating unnecessary obstacles to trade.

Article 19.10 – Time-periods

Article 19.10 requires procuring entities to provide suppliers with sufficient time to prepare and submit requests for participation and responsive tenders. Procuring entities have the flexibility to use shorter timelines for tendering in certain instances, such as when electronic procurement tools are used for notices.

Article 19.11 – Negotiation

Article 19.11 provides that procuring entities may conduct negotiations with suppliers as part of the evaluation process, and that any elimination of suppliers participating in negotiations is carried out in accordance with the evaluation criteria set out in the notice of intended procurement or tender documentation.

Article 19.12 – Limited Tendering

Article 19.12 allows procuring entities to use limited tendering (also known as sole-sourcing), whereby the procuring entity does not follow the normal procurement procedures and limits the number of suppliers to one or more suppliers of its choice. This is only allowed under certain circumstances, which include cases where: no suppliers satisfied the conditions for participation; patents, copyrights or other exclusive rights must be protected; or purchases are made under exceptionally advantageous conditions, such as those arising from liquidation, receivership or bankruptcy. Procuring entities must prepare a report in writing on each contract awarded under limited tendering.

Article 19.13 – Electronic Auctions

Article 19.13 sets out the information that procuring entities must provide each participant if a covered procurement is conducted using an electronic auction, such as the automatic evaluation method that will be used in the automatic ranking or re-ranking during the auction.

Article 19.14 – Treatment of Tenders and Awarding of Contracts

Article 19.14 ensures that procuring entities treat all tenders fairly, impartially and guarantee confidentiality. In addition, unless a procuring entity determines that it is not in the public interest, it must award a contract to the supplier that is capable of fulfilling the contract and has submitted the most advantageous tender (or, if price is the sole criterion, the lowest price), based solely on the evaluation criteria specified in the notices and tender documentation. If a municipality receives a tender with a price that is abnormally low, it may verify that the supplier satisfies the conditions for participation and is capable of fulfilling the terms of the contract.

Article 19.15 – Transparency of Procurement Information

Article 19.15 places requirements on procuring entities and Parties in order to ensure the transparency of procurement information. For example, procuring entities must notify participating suppliers of contract award decisions and, upon request, provide an explanation to an unsuccessful supplier of the reasons why it did not select its tender. In addition, Parties must collect and report statistics on contracts covered by the Chapter to the Committee on Government Procurement.

Article 19.16 – Disclosure of Information

Article 19.16 allows a Party to request information from the other Party in order to determine whether a procurement was conducted fairly and impartially, and in accordance with the GP Chapter, while ensuring that any collected information that could prejudice fair competition between suppliers in future tenders is not disclosed to a supplier without the consent of the other Party. This Article further stipulates that Parties are not required to disclose confidential information where, among other instances, such disclosure would be contrary to the public interest or where it would impede law enforcement.

Article 19.17 – Domestic Review Procedures

Article 19.17 requires Parties to provide an administrative or judicial review procedure to allow suppliers to challenge any procurement decisions that they believe run contrary to the obligations of the Chapter. The Article further requires Parties to have measures in place that provide for rapid interim measures to preserve the supplier's opportunity to participate in the procurement, and, in cases where a review body determines that there has been a breach of the Chapter, measures that provide for corrective action or compensation for the loss or damages suffered.

Annex 19-A – Market Access Schedule of Canada

Canada's market access coverage is set out in Annexes 19-1 through 19-7 and sets out the types of procurements that Canada has agreed will be subject to the CETA GP Chapter. The annexes are organized to separately identify the entities at the central government level, sub-central government level, and other entities such as Crown corporations or public utilities. The applicable contract-value thresholds (i.e. contracts that are subject to the GP obligations as their value is equivalent or greater than the prescribed value) are found for each group of entities in the corresponding annexes. Other annexes list the goods, services and construction services to which the rules of Chapter 19 apply, as well as general notes that provide qualifications to the scope of the Chapter.

Annex 19-1 – Central Government Entities

Annex 19-1 identifies the central government entities whose procurement is covered by the Chapter. For Canada, this includes several federal departments and agencies.

Annex 19-2 – Sub-central Government Entities

Annex 19-2 lists the sub-central government entities whose procurement is covered by the Chapter. For Canada, this includes, *inter alia*, provincial and territorial departments and agencies, municipalities and other forms of local government, and academic institutions. This Annex also identifies the thresholds of the contracts to which the obligations of the Chapter apply. Thresholds are expressed either in a country's local currency, or in an International Monetary Fund reserve called "Special Drawing Rights" (SDR). As CETA thresholds are expressed in SDRs, the thresholds are adjusted biannually to account for fluctuations in the exchange rate between the Canadian dollar and the SDR. For sub-central entities, including municipalities, the thresholds are: goods – 200,000 SDR ($340,600); services – 200,000 SDR ($340,600); and construction services – 5,000,000 SDR ($8,500,000).

Annex 19-3 – Other Entities

Annex 19-3 sets out other entities whose procurement is covered by the Chapter. For Canada this includes specified federal and provincial Crown corporations, as well as municipal government enterprises, including some mass transit entities and public utilities in the areas of drinking water, electricity, gas and heat.

Annex 19-4 – Goods

Annex 19-4 notes that the Chapter applies to all goods procured by entities identified in Annexes 19-1 through 19-3, unless otherwise specified. In the case of police forces, only those goods listed under paragraph 2 are covered by the Chapter.

Annex 19-5 – Services

Annex 19-5 lists the services that are covered by the Chapter (based on their Central Product Classification codes). For Canada, this includes *inter alia* engineering services, maintenance and repair services, and consulting services. Only those services listed under paragraph 3 are covered for municipalities.

Annex 19-6 – Construction Services

Annex 19-6 identifies the construction services covered by the Chapter. For Canada, this includes all construction services identified in Division 51 of the UN Central Product Classification, with certain exceptions. Public-private partnerships (P3s) for construction services are covered under this Annex, but not all provisions of the Chapter apply to these types of procurements.

Annex 19-7 – General Notes

Annex 19-7 outlines a series of general notes that provide important qualifications to the scope of the Chapter. For example, it notes that certain goods and services are excluded from coverage under the Chapter, such as procurement in respect of shipbuilding and repair for sub-central entities in certain provinces, and broadcasting and procurement of transportation services that form part of a procurement contract. In addition, it indicates that certain Canadian provinces and territories retain the right to use government procurement to support regional economic development up to ten times per year, so long as the procurement is $1 million or less and will support small firms or employment opportunities in non-urban areas. Certain provincial and territorial measures are also excluded from the scope of the Chapter. The Annex also removes any measure adopted or maintained with respect to Aboriginal peoples, including set asides for aboriginal businesses, from the scope of the Chapter.

Annex 19-8 – Publication Media

Annex 19-8 lists the means of publication used by Canadian entities, including municipalities, to publish notices of intended procurement, permanent lists of qualified suppliers in the context of selective tendering, applicable procurement rules and procedures, as well as the reports required under the Chapter.

Part II: Assessment of Municipal Measures under Canada's Trade Agreements

This Part of the manual is intended to assist municipalities in determining whether certain types of measures commonly taken at the municipal level could be subject to provisions in the international trade agreements to which Canada is a Party. For this purpose, key questions that should be asked to assess the status of municipal measures are provided, along with examples to illustrate how these questions can be applied. These questions and examples focus on the following areas of municipal activity:

The questions and examples focus on the CETA, WTO and NAFTA since these are the agreements most likely to be relevant to municipalities. Note, however, that Canada also has commitments under numerous bilateral Free Trade Agreements and Foreign Investment Protection Agreements. Although the obligations in these agreements are similar to those under the WTO and NAFTA, municipalities may wish to consult their specific provisions.

Importantly, any commentary included in the key questions and examples does not in any way constitute legal advice. The questions and examples are presented for the purpose of illustration only. The status of actual municipal measures must be addressed on a case-by-case basis, taking into account the particular facts and circumstances that apply. Municipalities are advised to obtain legal advice with respect to specific measures.

Assessing Financial Assistance under Canada's Trade Agreements

Municipalities may provide financial assistance to support local manufacturers, service providers, or to attract investment. A common form of financial assistance provided by municipalities is tax breaks. The applicability of particular trade agreements depends on whether that assistance relates to goods, services or investment.

The key questions and examples that follow can be used as a guide to determine the status of financial assistance under the Agreement on Subsidies and Countervailing Measures, the General Agreement on Trade in Services and the North American Free Trade Agreement.

Key Questions for Assessing Financial Assistance

In assessing the vulnerability of a municipal program providing financial assistance to goods producers to possible trade action under the ASCM, granting authorities should consider whether: (i) the program provides a form of financial contribution enumerated in Article 1.1(a)(1) of the ASCM; (ii) that financial contribution confers a benefit to the recipient; (iii) the provision of the subsidy is contingent on export performance or the use of domestic rather than imported goods; (iv) the subsidy can or will be received by only a single company or industry, or a group of companies or industries instead of being available to all companies in the municipality; (v) the subsidized Canadian goods could cause financial harm to foreign producers of similar goods either in the Canadian or foreign markets. The ASCM disciplines subsidies provided to goods producers but not subsidies provided to service suppliers.

A. Agreement on Subsidies and Countervailing (ASCM)

A1. Is the municipality providing a local manufacturer with a form of a financial contribution enumerated in Article 1.1(a)(1) of the ASCM (e.g. direct or potential direct transfer of funds such as a grant, loan, loan guarantee or equity infusion; government revenue foregone or not collected such as a tax reduction or tax credit; provision of a good or service or the purchase of a good; or income or price support)?

- **If yes**, proceed to the next question.
- **If no**, the ASCM does not apply to this municipal measure. Proceed to the GATS section.

A2. Does the financial contribution provide a benefit to the recipient?

- **If yes**, the financial contribution could be considered a subsidy. Proceed to the next question.
- **If no**, the ASCM does not apply to this municipal measure. Proceed to the GATS section.

A3. Can or will only a single company or industry or a group of companies or industries, instead of all companies in the municipality, receive the subsidy? Note that companies or industries are generally grouped together based on similarities in the products that they produce.

- **If yes**, the subsidy could be considered "specific" and thus could be challenged as an "actionable" subsidy. A subsidy is "actionable" if the subsidized Canadian goods negatively affect the sales volume, prices or profits of foreign producers of similar goods, in Canada or foreign markets. Proceed to the next question.
- **If no**, proceed to the next question.

A4. Is the provision of the subsidy to the recipient dependent on that recipient's export performance or its use of domestic over imported inputs in the manufacture of its goods?

- **If yes**, the subsidy could also be challenged under the ASCM as a prohibited export subsidy or a prohibited import substitution subsidy.
- **If no**, proceed to the GATS section.

B. GATS

Municipal measures that provide financial assistance to service providers could be subject to Canada's obligations under the GATS

B1. Where a service is receiving financial assistance, is that service being provided in the "exercise of governmental authority" within the meaning of GATS Article I.3(c)?

- **If yes**, the service and any financial assistance it receives would not be subject to the GATS. Proceed to NAFTA Chapter 11: Investment section.
- **If no**, proceed to the next question.

B2. Are the services to which the financial assistance applies listed in Canada's Schedule of Specific Commitments?

- **If yes**, in addition to MFN and any transparency requirements, national treatment obligations could apply, subject to any reservations in Canada's Schedule of Specific Commitments. The nature and extent of such reservations would require assessment on a case-by-case basis. Proceed to NAFTA Chapter 11: Investment section.
- **If no**, the national treatment requirement in Article XVII would not apply. The MFN obligation in Article II, however, would apply, unless Canada has listed an exemption applicable to the service, also under Article II. The transparency provisions in Article III could be relevant, depending on whether the effect of the financial assistance on trade in services is significant. Proceed to NAFTA Chapter 11: Investment section.

C. NAFTA Chapter 11: Investment

NAFTA Chapter 11 could also apply to subsidies or other financial assistance to support local enterprise or to attract investment, subject to the questions set out below.

C1. Could the financial assistance or the application of the financial assistance relate to a U.S. or Mexican investor?

- **If yes**, proceed to the next question.
- **If no**, Chapter 11 would not apply. Proceed to NAFTA Chapter 12: Services section.

C2. Is the financial assistance a "subsidy or grant" under Article 1108(7)(b)?

- **If yes**, it would not be subject to national treatment under Article 1102 or MFN treatment under Article 1103 due to the exception in Article 1108(7)(b). Proceed to the next question.
- **If no**, proceed to the next question.

C3. Does the measure authorizing the financial assistance pre-date the implementation of NAFTA on January 1, 1994?

- **If yes**, the national treatment obligation in Article 1102, the MFN obligation in Article 1103, performance requirements provisions in Article 1106 and the senior management and boards of directors provisions in Article 1107 would not apply due to the exceptions in Article 1108(1). Amendments to such measures after NAFTA came into effect also would be exempt as long as the amendments did not increase the extent to which a regulation departed from those obligations. Proceed to NAFTA Chapter 12: Services section.
- **If no**, proceed to the next question.

C4. Does the financial assistance apply to any of the social services subject to reservations taken by Canada in NAFTA Annex II-C-9?

- **If yes**, the assistance would not be subject to the provisions relating to national treatment in Article 1102 and senior management and boards of directors in Article 1107. Obligations relating to MFN under Article 1103 and performance requirements under Article 1106, however, could apply. It is important to note Article 1106(4) which sets out the conditions that may be applied to the receipt of advantages. Proceed to the next question.
- **If no**, proceed to the next question.

C5. Does the financial assistance relate to aboriginal affairs subject to reservations taken by Canada in NAFTA Annex II-C-1?

- **If yes**, the assistance would not be subject to the provisions relating to national treatment in Article 1102, MFN treatment in Article 1103, performance requirements in Article 1106, or senior management and boards of directors in Article 1107. Proceed to NAFTA Chapter 12: Services section.
- **If no**, proceed to the next question.

C6. Does the financial assistance relate to minority affairs subject to any of the reservations taken by Canada in NAFTA Annex II-C-8?

- **If yes**, the assistance would not be subject to the provisions relating to national treatment in Article 1102, performance requirements in Article 1106, and senior management and boards of directors in Article 1107. Obligations relating to MFN treatment under Article 1103, however, could apply. Proceed to NAFTA Chapter 12: Services section.
- **If no**, all the above Chapter 11 provisions may be relevant to the introduction, amendment or implementation of the financial assistance and municipalities should seek legal advice. Proceed to NAFTA Chapter 12: Services section.

D. NAFTA Chapter 12: Services

D1. Does the financial assistance relate to "cross border" provision of a service or trade in services by U.S. or Mexican providers as defined in Article 1213(2)?

- **If yes**, proceed to the next question.
- **If no**, Chapter 12 does not apply. No further questions in this section are necessary.

D2. Is the financial assistance a "subsidy or grant" under Article 1201?

- **If yes**, it would not be subject to NAFTA Chapter 12. No further questions in this section are necessary.
- **If no**, proceed to the next question.

D3. Does the measure authorizing the financial assistance pre-date implementation of NAFTA on January 1, 1994?

- **If yes**, the national treatment provisions in Article 1202, the MFN provisions in Article 1203 and the local presence provisions of Article 1205 would not apply due to the exceptions and reservations provided in Article 1206(1). Amendments to such a regulation after NAFTA came into effect would also be exempt so long as the amendments did not increase the extent to which the regulation departed from those obligations. No further questions in this section are necessary.
- **If no**, proceed to the next question.

D4. Does the financial assistance apply to any of the social services subject to the reservations taken by Canada in NAFTA Annex II-C-9?

- **If yes**, the national treatment provisions in Article 1202, the MFN provisions in Article 1203 and the local presence provisions in Article 1205 do not apply. No further questions in this section are necessary.
- **If no**, proceed to the next question.

D5. Does the financial assistance relate to aboriginal affairs subject to the reservations taken by Canada in NAFTA Annex II-C-1?

- **If yes**, the national treatment provisions in Article 1202, the MFN provisions in Article 1203 and the local presence provisions in Article 1205 do not apply. No further questions in this section are necessary.
- **If no**, proceed to the next question.

- **If yes**, the national treatment provisions in Article 1202 and the local presence provisions in Article 1205 do not apply. The MFN provisions in Article 1203, however, would apply. No further questions in this section are necessary.
- **If no**, all the above provisions of NAFTA Chapter 12 could apply. The nature and extent of the obligations would depend on the features and circumstances of the financial assistance. No further questions in this section are necessary.

Examples

Following are examples to illustrate how the above key questions can be applied. It must be noted that the examples do not in any way constitute legal advice or represent legal interpretations by the Government of Canada. Municipal measures would need to be assessed on a case-by-case basis and municipalities should seek legal advice, as appropriate.

Example 1

Grants to Daycare Centres

A municipality provides grants to non-profit daycare centres that compete with private operators.

A. GATS

EX1-1. Are the daycare services being provided "in the exercise of governmental authority" within the meaning of GATS Article I.3(c)?

- **If yes**, the grants are not subject to the GATS. Proceed to question EX1-3.
- **If no**, proceed to the next question.

EX1-2. Are the daycare services being provided listed in Canada's Schedule of Specific Commitments?

- **If no**, there would be no national treatment commitments under Article XVII. This means that grants could be provided to Canadian daycare centres with no obligation to provide them to foreign-owned centres. The MFN obligation in Article II, however, would apply. This means that if a municipality voluntarily decided to offer a grant to one foreign daycare centre, it would need to ensure that it did not disqualify another foreign daycare centre on the basis of nationality. With respect to transparency, the provisions of Article III could apply if the grant was deemed to significantly affect trade in services. If this criterion did not pertain, Article III would not apply (Note: Canada does not have any GATS commitments for child daycare services including daycare services for the handicapped). Proceed to the next question.
- **If yes**, in addition to MFN and any transparency requirements, national treatment obligations could apply, subject to any reservations in Canada's Schedule of Specific Commitments. This means that grants cannot be offered to Canadian daycare centres without offering grants to like foreign daycare centres. The nature and extent of such reservations would require assessment on a case-by-case basis. (Note: Canada does not have any GATS commitments for child daycare services including daycare services for the handicapped). Proceed to the next question.

B. NAFTA Chapter 11: Investment

NAFTA Chapter 11 Article 1108(7)(b) excludes grants, including government-supported loans, guarantees and insurance, from the application of the national treatment provisions of Article 1102, the most-favoured-nation provisions of Article 1103 and the senior management and board of directors provisions of Article 1107. This means that a grant covered by Article 1108(7)(b) can extend preferences to domestic or foreign investors or investments of a non-NAFTA country. The provisions of Article 1106 relating to performance requirements, however, may apply.

Accordingly, the first question would be:

EX1-3. Do the grants fall within the meaning of NAFTA Article 1108(7)?

- **If yes**, the national treatment provisions of Article 1102, MFN provisions of Article 1103 and the senior management and board of directors provisions of Article 1107 do not apply, meaning that assistance can be provided on a preferential basis. Indeed, there is nothing in NAFTA Chapter 11 that prohibits a municipality from offering incentives that

fall within the meaning of NAFTA Article 1108(7), nor does it require a municipality to offer these same incentives to a Mexican or another U.S. company. The performance requirement provisions of Article 1106, however, may apply. Importantly, Article 1106(4) which sets out the conditions that may be applied to the receipt of advantages. Proceed to the next question.

- **If no**, proceed to the next question.

EX1-4. Are the grants being provided in relation to any of the social services subject to reservations taken by Canada in NAFTA Annex II-C-9?

- **If yes**, the measure would not be subject to the provisions relating to national treatment in Article 1102 and senior management and boards of directors in Article 1107. Obligations relating to MFN treatment under Article 1103, minimum standard of treatment under Article 1105, performance requirements under Article 1106 and expropriation under Article 1110, however, could apply. Importantly, Article 1106(4) which sets out the conditions that may be applied to the receipt of advantages. The nature and extent of such obligations would depend on the features and circumstances of a given situation. (Note: Canada's Annex II reservations contain a reservation on social services which reserves Canada's right to adopt measures for certain social services, including health and child care services established or maintained for a public purpose). Proceed to the next question.
- **If no**, proceed to the next question.

EX1-5. Do the grants relate to aboriginal affairs subject to reservations taken by Canada in NAFTA Annex II-C-1?

- **If yes**, the measure would not be subject to the provisions relating to national treatment in Article 1102, MFN in Article 1103, performance requirements in Article 1106, or senior management and boards of directors in Article 1107. Obligations relating to minimum standard of treatment under Article 1105 and expropriation under Article 1110, however, could apply. The nature and extent of such obligations would depend on the features and circumstances of a given situation. Proceed to question EX1-7.
- **If no**, proceed to the next question.

EX1-6. Do the grants relate to minority affairs subject to the reservations taken by Canada in NAFTA Annex II-C-8?

- **If yes**, the measure would not be subject to the provisions relating to national treatment under Article 1102, performance requirements under Article 1106, and senior management and boards of directors under Article 1107. Obligations relating to MFN treatment under Article 1103, minimum standard of treatment under Article 1105 and expropriation under Article 1110, however, could apply. The nature and extent of such obligations would depend on the features and circumstances of a given situation. Proceed to the next question.
- **If no**, the above articles may be relevant to the introduction, amendment or implementation of a grant and municipalities should seek legal advice. Proceed to the next question.

C. NAFTA Chapter 12: Services

NAFTA Chapter 12 Article 1201(2)(d) provides an exclusion from the Chapter for subsidies or grants provided by a Party or state enterprise, including government-supported loans, guarantees and insurance.

EX1-7M. Do the grants fall within the meaning of a "subsidy or grant" under NAFTA Article 1201?

- **If yes**, they are not subject to Chapter 12. No further questions in this section are necessary.
- **If no**, proceed to the next question.

EX1-8. Does the measure authorizing the provision of the grants pre-date implementation of NAFTA on January 1, 1994?

- **If yes**, the national treatment requirement in Article 1202, MFN requirement in Article 1203 and local presence requirement in Article 1205 would not apply due to the exceptions and reservations provided in Article 1206(1). Amendments to such a measure after NAFTA came into effect would also be exempt so long as the amendments did not increase the extent to which the measure departed from those obligations. No further questions in this section are necessary.
- **If no**, proceed to the next question.

EX1-9. Are the grants being provided to social services subject to the reservations taken by Canada in NAFTA Annex II-C-9?

- **If yes**, the national treatment provisions in Article 1202, the MFN provisions in Article 1203 and the local presence provisions of Article 1205 do not apply. This means that grants can be extended to Canadian daycare centres and centres from non-NAFTA countries with no obligation to provide them to U.S. or Mexican-owned centres (Note: Canada's Annex II reservations contains a reservation on social services which reserves Canada's right to adopt measures for certain social services, including health and child care services established or maintained for a public purpose). No further questions in this section are necessary.
- **If no**, proceed to the next question.

EX1-10. Do the grants relate to aboriginal affairs subject to the reservations taken by Canada in Annex II-C-I?

- **If yes**, the national treatment provisions of Article 1202, the MFN provisions of Article 1203 and the local presence provisions of Article 1205 do not apply. This means that grants can be extended to Canadian daycare centres and centres from non-NAFTA countries with no obligation to provide them to U.S. or Mexican-owned centres. No further questions in this section are necessary.
- **If no**, proceed to the next question.

EX1-11. Do the grants relate to minority affairs subject to the reservations taken by Canada in NAFTA Annex II-C-8?

- **If yes**, the national treatment provisions in Article 1202 and the local presence provisions in Article 1205 do not apply. The MFN provisions in Article 1203, however, would apply. This means that grants can be extended to Canadian daycare centres with no obligation to provide them to American or Mexican-owned owned centres. No further questions in this section are necessary.

- **If no**, all the above provisions of NAFTA Chapter 12 could apply. The nature and extent of the obligations would depend on the features and circumstances of the grants. No further questions in this section are necessary.

Assessing Financial Assistance under Canada's Trade Agreements

Example 2

Following is an example to illustrate how the key questions can be applied. It must be noted that the example does not in any way constitute legal advice or represent legal interpretations by the Government of Canada. Municipal measures would need to be assessed on a case-by-case basis and municipalities should seek legal advice, as appropriate.

Incentives to Attract an Auto Parts Manufacturer

A City competed with three other municipalities to attract a large U.S. auto parts manufacturer. The City was successful as a result of providing land for free, eliminating property taxes for five years and providing a loan guarantee for building construction costs.

A. ASCM

EX2-1. Is the municipality providing a local manufacturer with a form of a financial contribution enumerated in Article 1.1(a)(1) of the ASCM (e.g., direct or potential direct transfer of funds such as a grant, loan, loan guarantee or equity infusion; government revenue foregone or not collected such as a tax reduction or tax credit; provision of a good or service or the purchase of a good; or income or price support)?

- The provision of land, the elimination of property taxes and loan guarantees are types of financial contributions covered by Article 1.1(a)(1) of the ASCM. Proceed to the next question.

EX2-2. Does the financial contribution provide a benefit to the recipient (e.g., the financial contribution is offered on terms or conditions that are below what the recipient would have been able to get on the market)?

- The example indicates that the City provided the auto parts manufacturer with land for free. Given that land is not normally acquired for free on the market, this financial contribution is likely to confer a benefit and thus be considered a subsidy. A property tax reduction would normally provide a benefit. An analysis of whether the loan guarantee was provided on market terms must also be undertaken. If provided on market terms, it is unlikely to confer a benefit. Proceed to the next question.

EX2-3. Can or will only a single company or industry, or a group of companies or industries receive the subsidy? Note that companies or industries are generally grouped together based on similarities in the products that they produce.

- The example does not indicate whether the auto parts manufacturer is the only recipient of the subsidy.
- **If yes**, the subsidy is likely to be "specific" and thus could be challenged as an "actionable" subsidy. In this example, the subsidy would be "actionable" if the subsidized Canadian auto parts negatively affected the sales volume, prices or profits of foreign producers of similar auto parts in Canada or foreign markets.
- **If no**, proceed to the next question.

EX2-4. Is the provision of the subsidy to a recipient dependent on that recipient's export performance or its use of domestic over imported inputs in the manufacture of its goods?

- The example does not indicate whether the provision of the subsidy is dependent on the auto parts manufacturer's export performance or on its use of domestic over imported inputs in the manufacture of its goods.
- If yes, the subsidy could also be challenged under the ASCM as a prohibited export subsidy or a prohibited import substitution subsidy.
- If no, as indicated above, the subsidy could still be challenged as an actionable subsidy if the subsidy or the subsidized goods had certain negative effects on producers of similar goods.

B. NAFTA Chapter 11: Investment

EX2-5. Do the incentives fall within the meaning of NAFTA Article 1108(7)?

- **If yes**, the MFN provisions of Article 1103 do not apply, meaning that assistance can be provided on a preferential basis. Indeed, there is nothing in NAFTA Chapter 11 that prohibits a municipality from offering incentives as in this example or requires a municipality to offer the same incentives to a Mexican or another U.S. company. Certain performance requirement provisions of Article 1106 may apply, however, it is important to note Article 1106(4) which sets out the conditions that may be applied to the receipt of advantages.
- **If no**, the MFN provisions of Article 1103 and the performance provisions of Article 1106 may apply and municipalities should seek legal advice. It is important to note Article 1106(4), however, which sets out the conditions that may be applied to the receipt of advantages. Canada's Annex II reservations would not appear to be applicable to this scenario.

Assessment of Government Procurement under Canada's Trade Agreements

A typical government procurement is generally understood as one that is both for government purposes and not for commercial sale. It is therefore reasonable to expect that typical procurement conducted by a procuring entity at the municipal level would fall within the meaning of "government procurement".

While Canada is a Party to several international trade agreements that contain specific commitments relating to government procurement, the only one that contains international commitments at the municipal level is the Canada-EU CETA. The CETA GP Chapter commits Canada and the EU to provide non-discriminatory market access to procurement of identified goods and services above specified thresholds by identified entities. For covered procurements, procuring entities from Canada and the EU must treat goods, services and suppliers of the other Party in the same manner as domestic goods, services and suppliers.

A: Key Questions for Assessing Whether a Procurement is Covered under the CETA GP Chapter

A1. Is the procurement for governmental purposes (e.g. delivery of a public program or service) and not for commercial sale or resale of a good, a service or a construction service, and is it included in the scope of the CETA Government Procurement Chapter, by virtue of Article 19.2 (Scope and coverage)?

- **If the answer is yes**, proceed to the next question.
- **If the answer is no**, the CETA GP Chapter does not apply to this purchase and no further action is required.

A2. Is the procuring entity listed in Annexes 19-2 or 19-3 of Canada's market access schedule?

Almost all Canadian municipalities (and other forms of local government) are listed in Annex 19-2, under their respective province or territory. Government-owned enterprises, including in the public utilities sector, are listed under each province and territory in Annex 19-3, Section A.

- **If the procuring entity is listed in Annexes 19-2 or 19-3**, proceed to the next question.
- **If the procuring entity is not listed in one of these two annexes**, the CETA GP Chapter does not apply to this purchase and no further action is required.

A3. Is the good, service or construction service being procured covered in Annexes 19-4, 19-5 or 19-6 of Canada's market access schedule?

Annex 19-4 of Canada's market access schedule stipulates that all goods are covered, unless otherwise specified. With respect to police forces, only those goods listed under paragraph 2 of Annex 19-4 are covered by the Chapter.

Annex 19-5 of Canada's market access schedule lists the services that are covered by the Chapter (based on their Central Product Classification codes). Only those services listed under paragraph 3 of Annex 19-5 are covered by the Chapter.

Annex 19-6 of Canada's market access schedule stipulates that all construction services are covered, unless otherwise specified.

- **If the good, service or construction service being procured is covered under Annexes 19-4, 19-5 or 19-6** of Canada's market access schedule, proceed to the next question.
- **If the good, service or construction service is not covered**, the CETA GP Chapter does not apply to this purchase.

A4. Is the purchase at or above the applicable thresholds as specified in Annexes 19-2 and 19-3 of Canada's market access schedule?

Procuring entities must estimate the value of the goods, services or construction services that they are seeking to procure, following the rules laid out in paragraphs 6 through 8 of Article 19.2 (Valuation). The GP Chapter applies only to procurement for which the estimated value is at or above these monetary thresholds.

The current CETA thresholds will remain valid until December 31, 2017. The thresholds for sub-central government entities and government enterprises (Crown corporations) are as follows:

- **Sub-central Government Entities**
  - Goods
    - 200,000 SDR
    - CAD 340,600
  - Services
    - 200,000 SDR
    - CAD 340,600
  - Construction Services
    - 5,000,000 SDR
    - CAD 8.5M
- **Government Enterprises**
  - Goods
    - Section A:
      - 355,000 SDR
      - CAD 604,700
    - Section B:
      - 400,000 SDR
      - CAD 681,300
  - Services
    - Section A:
      - 200,000 SDR
      - CAD 604,700
    - Section B:
      - 400,000 SDR
      - CAD 681,300
  - Construction Services
    - 5,000,000 SDR
    - CAD 8.5M

- **If the estimated value of the procurement is at or above the monetary thresholds**, proceed to the next question.
- **If the estimated value of the procurement is below threshold**, the CETA GP Chapter does not apply to this purchase.

A5. Is the procurement subject to any exceptions or exclusions as specified in

Canada's notes to Annexes 19-1 to 19-6; or

Annex 19-7 (General Note); or

Article 19.3 (Security and General Exceptions)?

Article 19.3 provides general exceptions to ensure that Parties are not prevented from taking measures to protect *inter alia* national security, public safety, the environment or intellectual property when fulfilling the obligations of the GP Chapter. These exceptions provide the Parties with the flexibility to derogate from their government procurement obligations in specific circumstances.

- **If the procurement is subject to an exception or an exclusion**, the CETA GP chapter does not apply.
- **If there is no exception or exclusion**, the procurement is covered and subject to the provisions of the GP Chapter, including the requirement to not exclude goods, services and suppliers of the EU.

B: Key Q&As regarding the CETA Government Procurement (GP) Chapter

B1. How will Canadian companies know what GP opportunities in the EU are available to them?

- The EU publishes information concerning government procurement opportunities in the 'Supplement to the Official Journal of the European Union'. The Supplement has an online version called Tenders Electronic Daily (TED).
- TED publishes contract notices about procurement opportunities across the EU and the European Economic Area above fixed thresholds. These notices specify if the contracts are open to Canadian bidders.

B2. Will CETA cover categories of provincial, municipal and sub-municipal procurement that are not covered by the Canadian Free Trade Agreement (CFTA)?

- CETA and the CFTA are different agreements. CETA is a single undertaking between Canada and the EU which, on government procurement, expands on the market access both parties have in the WTO GPA. The CFTA is a domestic trade agreement, which is focussed on inter-provincial trade.
- In some cases, CETA will cover entities that are not covered by the CFTA.

B3. Does CETA restrict the power of municipalities to protect local interests when awarding procurement contracts?

- The CETA GP rules only apply to procurement that is explicitly covered in the agreement. The CETA rules do not apply to procurement that is not covered, such as where the value of the procurement is below a certain monetary threshold.
- CETA also does not apply to government procurement of services not specifically listed in the agreement, such as legal and accounting services, financial services, research and development, public administration, education or health care.
- Moreover, CETA does not apply to government procurement that is subject to a general exclusion, which includes procurement related to agricultural support programs, food aid programs and cultural industries as well as certain types of procurement by public utilities.
- This leaves municipalities considerable scope to use the awarding of procurement contracts to protect local interests.
- That said, much of the procurement that is covered under CETA is already subject to obligations under the CFTA. Under the CFTA, municipalities are limited in the extent to which they can favour local interests and must treat suppliers from other parts of Canada no differently than local suppliers.

B4. Will municipalities be able to maintain their Buy Local Food Programs?

- The CETA GP Chapter excludes procurement "in respect of agricultural goods made in furtherance of agricultural support programs or human feeding programs". Examples of procurements which could fall under this exclusion include institutional food purchasing programs to help local producers, nutrition programs in schools, and food assistance programs for seniors and other vulnerable populations.
- Such an exemption is consistent with Canada's practice in all of its free trade agreements. It is also consistent with the practice of Canada's major trading partners like the U.S. and the EU.

B5. Will municipalities have to change their tendering processes now that they are covered by CETA?

- Much of the procurement that is covered under CETA is already subject to obligations under the CFTA that govern the tendering process.
- While the rules under the CFTA and CETA vary, both agreements seek to embody the same principles of good procurement practice – competition, transparency, integrity and fairness in the procurement process.
- Governments across the country seek to ensure that their procurement systems deliver value for money for local taxpayers through these principles of good procurement practice. The obligations in CETA complement this broader public policy objective.
- To the extent that municipalities have tendering procedures that are inconsistent with CETA rules, these procedures will have to be modified for procurement that is covered by the agreement.

B6. What are the key differences between the CFTA and CETA for municipalities?

- One of the key differences between the CFTA and CETA for municipalities is the requirement for an impartial domestic review procedure – e.g. a bid challenge mechanism. Bid challenge mechanisms are an important part of accountability and transparency. Provincial and Territorial governments have had domestic review procedures in place for procurement covered under the WTO GPA for several years.
- Each province and territory will be responsible for developing a domestic review procedure, consistent with CETA, for municipalities within their jurisdiction. Domestic review procedures must include recourse to an impartial administrative or judicial authority (including the court system) and must provide for corrective action or compensation, "which may be limited to either the costs of the preparation of the tender or the costs relating to the challenge or both."
- Under existing domestic review procedures in Canada, the procuring authority is directly involved in the dispute process.

B7. Does CETA allow Buying Groups (bulk purchasing)?

- Yes. Nothing in CETA prevents municipalities from using buying groups or undertaking bulk purchases by several municipalities.
- The CETA procurement commitments will apply to buying groups if the buying group procures goods and services that would otherwise be covered by CETA if purchased directly by a municipality. The buying group is an agent for the municipalities. A covered

entity cannot avoid its procurement obligations by giving responsibility for covered procurement to a private sector party.

B8. How will municipalities be affected by the establishment of a Single Point of Access?

- Under Article 19.6, Canada agreed to establish a single electronic point of access (SPA) for procurement tenders. The SPA, which will be similar in function to a single electronic point of access already maintained by the EU, will allow suppliers to quickly retrieve information about all opportunities in Canada covered under CETA.
- While Canada has five years from the entry into force of CETA to implement the SPA, municipalities must comply with the remaining commitments related to the publication of notices – including those under Article 19.5 – immediately upon provisional application of the CETA.

Assessment of P3s under Canada's Trade Agreements

A. CETA Chapter 19: Government Procurement

Municipal governments are increasingly engaging in partnerships with the private sector to undertake major public infrastructure projects. While there is no common definition of P3, PPP Canada defines a P3 as "a long-term performance-based approach to procuring public infrastructure where the private sector assumes a major share of the risks in terms of financing and construction and ensuring effective performance of the infrastructure, from design and planning, to long-term maintenance".

As stipulated in paragraph 2 in Annex 19-6 of Canada's market access schedule, the CETA GP Chapter covers construction services contracts "awarded by entities in Annexes 19-1 and 19-2, and Section A of Annex 19-3, which involve, as complete or partial consideration, any grant to the supplier of the construction service, for a specified period of time, of temporary ownership or a right to control and operate the civil or building work resulting from such contract, and demand payment for the use of such work for the duration of the contracts". These contracts are subject to the procedural rules listed in paragraph 2, including non-discrimination, transparency and impartiality. In addition, paragraph 3 of the same Annex specifies which construction P3s are not covered under the CETA GP Chapter. More specifically, all construction P3s are covered except for the activities listed in Section B of Annex 19-3 (i.e., public utilities).

C: Key Qs&As regarding P3s in the CETA GP Chapter

C1. Are P3s covered in the CETA GP Chapter?

- Limited procedural rules to ensure non-discrimination, transparency and impartiality apply to P3s. All construction P3s are covered except for public utilities. Accordingly, the CETA GP Chapter does not apply to P3s for the construction of:
- Airports (e.g. terminal facilities to air carriers);
- Public transit (e.g. public transportation by bus, rail, or tramway)
- Water and wastewater (e.g. production, transport or distribution of drinking water);
- Electricity (e.g. production, transport or distribution of electricity); or

- Gas (e.g. production, transport or distribution of gas).
- Nothing in CETA forces municipalities to adopt a particular model for the delivery of public infrastructure. CETA does not prohibit or limit the use of P3s.

C2. Which procedural rules apply to P3s?

- As stipulated in paragraph 2 of Annex 19-6 of Canada's market access schedule, the following provisions apply to P3s:
    - Article 19.1 (Definitions);
    - Article 19.2 (Scope and Coverage);
    - Article 19.4 (General principles);
    - Article 19.5 (Information on the procurement system);
    - Article 19.6 (Notices) [except for subparagraphs 3(e) and (l)];
    - Article 19.15 (Transparency of procurement information)(except for paragraphs 3 and 4); and
    - Article 19.17 (Domestic review procedures).

GATS

B1. Are any services in the P3 being supplied "in the exercise of governmental authority" within the meaning of GATS Article 1.3(c)?

- **If yes**, those service aspects of the P3 would not be subject to the GATS. Proceed to Section C.
- **If no**, proceed to the next question.

B2. Is the P3 "government procurement" within the meaning of the exemption in GATS Article XIII?

- **If yes**, market access (Article XVI), MFN (Article II) or national treatment (Article XVII) obligations under the GATS do not apply to the service aspects of the P3. Proceed to question B5.
- **If no**, proceed to the next question.

B3. Are services in the P3 listed in Canada's Schedule of Specific Commitments?

- **If no**, there would be no market access commitments under GATS Article XIII or national treatment commitments under Article XVII. The MFN obligation in Article II, however, would apply if the municipality engaged in a partnership with a foreign service provider, unless Canada has listed an exemption applicable to that service, also under Article II. Depending on whether the impact of the P3 on trade in services is significant, the transparency provisions in Article III also could apply. Proceed to the next question.
- **If yes**, in addition to MFN and any transparency requirements, market access and national treatment obligations could apply, subject to any reservations in Canada's Schedule of Specific Commitments. The nature and extent of such reservations would require assessment on a case-by-case basis. Proceed to the next question.

B4. Are any financial incentives or land grants being offered?

- **If yes**, and services in the P3 are not exempt by Article I.3(c) or Article XIII, the MFN requirement in Article II could apply. A financial incentive is a measure under the GATS and is subject to MFN. Proceed to the next question.
- **If no**, proceed to the next question.

B5. Does the P3 result in the creation of a monopoly or exclusive service provider?

- **If yes**, the provisions relating to the conduct of monopolies in Article VIII would apply for any services in the P3 listed in Canada's Schedule of Specific Commitments. Proceed to Section C.
- **If no**, no further action is required.

C. NAFTA Chapter 11: Investment

C1. Could the P3 or the application of the P3 agreement relate to a U.S. or Mexican investor or investment?

- **If no**, Chapter 11 would not apply. Proceed to Section D.
- **If yes**, proceed to the next question.

C2. Is the P3 a "government procurement" under Article 1108(7) and (8)?

- **If yes**, the national treatment requirements of Article 1102, the MFN requirements of Article 1103, some performance requirements provisions of Article 1106 and the senior management and boards of directors provisions of Article 1107 would not apply. The minimum standard of treatment provisions in Article 1105, and the expropriation provisions in Article 1110, however, may apply. Proceed to question C8.
- **If no**, proceed to the next question.

C3. Does the P3 or measure authorizing the P3 pre-date the implementation of NAFTA on January 1, 1994?

- **If yes**, the national treatment obligation in Article 1102, the MFN obligation in Article 1103, performance requirements provisions in Article 1106 and the senior management and boards of directors provisions in Article 1107 would not apply due to the exceptions in Article 1108(1). This also would be true for any amendments to relevant measures made after the implementation of NAFTA as long as such amendments did not make the measure more inconsistent with these provisions. Proceed to question C8.
- **If no**, proceed to the next question.

C4. Are services being provided under the P3 social services subject to the reservations taken by Canada in NAFTA Annex II-C-9?

- **If yes**, the national treatment provisions in Article 1102 and the senior management and boards of directors provisions in Article 1107 would not apply. The MFN provisions in Article 1103, the minimum standard of treatment provisions in Article 1105and the performance requirements provisions of Article 1106, however, would apply. Proceed to the next question.
- **If no**, proceed to the next question.

C5. Does the P3 relate to aboriginal affairs subject to the reservations taken by Canada in NAFTA Annex II-C-I?

- **If yes**, the national treatment requirements in Article 1102, the MFN requirements in Article 1103, the performance requirements provisions in Article 1106 and the senior management and boards of directors provisions in Article 1107 would not apply. The minimum standard of treatment provisions in Article 1105, however, would apply. Proceed to question C8.
- **If no**, proceed to the next question.

C6. Does the P3 relate to minority affairs subject to the reservations taken by Canada in NAFTA Annex II-C-8?

- **If yes**, the national treatment provisions in Article 1102, the performance requirements provisions in Article 1106 and the senior management and boards of directors provisions in Article 1107 would not apply. The MFN requirements in Article 1103and the minimum standard of treatment provisions in Article 1105, however, would apply. Proceed to the next question.
- **If no**, all the above provisions in Chapter 11 could apply. Proceed to the next question.

C7. Does the P3 contract selection process provide less favourable treatment to U.S. or Mexican investors or their investments compared to the treatment of Canadian or other foreign investors or their investments in like circumstances?

- **If no**, the contract selection process will be consistent with the national treatment provisions in Article 1102 and the MFN provisions in Article 1103. Proceed to the next question.
- **If yes**, the P3 contract selection process could be inconsistent with the treatment provisions of Article 1102 or the MFN requirements of Article 1103 and municipalities should seek legal advice. Proceed to the next question.

C8. Does the treatment accorded to an investor or its investment throughout the P3 contractual relationship and its termination, meet the minimum standard of treatment requirements in NAFTA Article 1105?

- **If yes**, the P3 is consistent with Article 1105. Proceed to the next question.
- **If no**, the treatment of the investment under the P3 could be inconsistent with the provisions of Article 1105 and municipalities should seek legal advice. Proceed to the next question.

C9. Does any action taken by the municipality throughout the P3 contractual relationship and its termination result in an "expropriation" within the meaning of NAFTA Article 1110?

- **If no**, Article 1110 would not apply. Proceed to Section D.
- **If yes**, proceed to the next question.

C10. Was the expropriation in accordance with the provisions of Article 1110?

- **If yes**, the expropriation would be consistent with Chapter 11 requirements. Proceed to Section D.
- **If no**, the treatment could be inconsistent with the provisions of Article 1110 and municipalities should seek legal advice. Proceed to Section D.

D. NAFTA Chapter 12: Services

D1. Does the P3 relate to "cross-border" trade in services by U.S. or Mexican service providers as defined in Article 1213(2)) (e.g., the service supplier is providing a portion of its services on a cross-border basis)?

- **If no**, Chapter 12 does not apply.
- **If yes**, proceed to the next question.

D2. Is the P3 undertaking "government procurement" within the meaning of NAFTA Article 1201(2)(c)?

- **If yes**, NAFTA Chapter 12 does not apply.
- **If no**, proceed to the next question.

D3. Does the P3, or do the relevant measures relating to the P3, pre-date implementation of NAFTA on January 1, 1994?

- **If yes**, the national treatment requirement in Article 1202, the MFN requirement in Article 1203 and the local presence requirement in Article 1205 would not apply due to the exceptions and reservations provided in Article 1206(1). This would also be true for any amendments to relevant measures made after implementation of NAFTA so long as the amendments did not increase the extent to which the measure departed from those obligations.
- **If no**, proceed to the next question.

D4. Are services being provided under the P3 social services subject to the reservations taken by Canada in NAFTA Annex II-C-9?

- **If yes**, the national treatment provisions in Article 1202, the MFN provisions in Article 1203 and the local presence provisions of Article 1205 would not apply.
- **If no**, proceed to the next question.

D5. Does the P3 relate to aboriginal affairs subject to the reservations taken by Canada in NAFTA Annex II-C-I?

- **If yes**, the national treatment provisions in Article 1202, the MFN provisions in Article 1203 and the local presence provisions in Article 1205 would not apply.
- **If no**, proceed to the next question.

D6. Does the P3 relate to minority affairs subject to the reservations taken by Canada in NAFTA Annex II-C-8?

- **If yes**, the national treatment requirement in Article 1202 and the local presence provisions in Article 1205 would not apply. The MFN requirement in Article 1203, however, would apply.
- **If no**, proceed to the next question.

D7. Has Canada listed any other reservations pertaining to service aspects of the P3 in NAFTA Annex I or Annex II?

- **If yes**, the national treatment requirement in Article 1202, the MFN requirement in Article 1203, and the local presence requirements in Article 1205 might be limited or not applicable. The nature and scope of reservations would need to be assessed.
- **If no**, all the above provisions in Chapter 12 could apply.

Examples

Following are examples to illustrate how the above key questions can be applied. It must be noted that the examples do not in any way constitute legal advice or represent legal interpretations by the Government of Canada. Municipal measures would need to be assessed on a case-by-case basis and municipalities should seek legal advice, as appropriate.

Example 1

Public-Private Partnerships: Natural Gas Franchise

A municipality enters into a franchise agreement with a U.S. natural gas supplier. The agreement grants the supplier a 21-year exclusive right to provide natural gas services within municipal boundaries. During this period, therefore, no other supplier, including the municipality itself, may enter the market. The agreement requires the U.S. supplier to use Canadian natural gas.

Example 2

Public-Private Partnerships: Water Treatment Facility

A district proposes to enter into a 40-year partnership with a European water service supplier. The European partner is to design, build, maintain and operate a water treatment facility and provide water services which were previously provided by the municipality to district residents, two private bottlers and a U.S. community. The district is to pay all costs, provide land for free and regulate the service only in the contract with the European partner. The facility is transferred to the district at the end of the 40-year contract term.

Assessment of Public-Private Partnerships under Canada's Trade Agreements

Following is an example to illustrate how the key questions can be applied. It must be noted that the example does not in any way constitute legal advice or represent legal interpretations by the Government of Canada. Municipal measures would need to be assessed on a case-by-case basis and municipalities should seek legal advice, as appropriate.

Example 1 - Natural Gas Franchise

A municipality enters into a franchise agreement with a U.S. natural gas supplier. The agreement grants the supplier a 21-year exclusive right to provide natural gas services within municipal boundaries. During this period, therefore, no other supplier, including the municipality itself, may enter the market. The agreement requires the U.S. supplier to use Canadian natural gas.

A. GATS

EX1-1. Is the natural gas service being provided "in the exercise of governmental authority" within the meaning of GATS Article 1.3(c)?

- **If yes**, the P3 would be exempt from the GATS. Proceed to question EX1-5.
- **If no**, proceed to the next question.

EX1-2. Is the franchise agreement "government procurement" within the meaning of Article XIII?

- **If yes**, there are no market access (Article XVI), MFN (Article II) or national treatment (Article XVII) obligations under the GATS for the agreement. Proceed to question EX1-5.
- **If no**, proceed to the next question.

EX1-3. Is the natural gas distribution service included in Canada's Schedule of Specific Commitments?

- **If no**, there are no market access commitments under Article XVI or national treatment commitments under Article XVII. The MFN obligation in Article II, however, would apply, unless Canada has listed an exemption applicable to the service, also under Article II. Where the effect of the P3 on trade in services is significant, the transparency provisions of Article III also could apply. Proceed to the next question.
- **If yes**, in addition to MFN and any transparency requirements, market access and national treatment obligations could apply, subject to any reservations in Canada's Schedule of Specific Commitments. The nature and extent of such obligations would require assessment on a case-by-case basis. Proceed to the next question.

EX1-4. Does the P3 result in the creation of a "monopoly supplier of a service" as defined under Article XXVIII or an "exclusive service provider" under Article VIII(5)?

- **If no**, there would be no additional obligations with respect to monopolies and exclusive service providers. Proceed to the next question.
- **If yes**, obligations for monopolies and exclusive service providers as found under Article VIII could apply. Proceed to the next question.

B. NAFTA Chapter 11: Investment

EX1-5. Is the franchise agreement "government procurement" within the meaning of Article 1108(7) and (8)?

- **If yes**, the MFN provisions of Article 1103, and some performance requirements provisions of Article 1106 do not apply. This means that preferences can be extended to a foreign investor or investment. Proceed to the next question.
- **If no**, proceed to the next question.

EX1-6. Does the P3 relate to aboriginal affairs subject to the reservations taken by Canada in NAFTA Annex II-C-I?

- **If yes**, the national treatment requirements in Article 1102, the MFN requirements in Article 1103, the performance requirements provisions in Article 1106 and the senior management and board of directors provisions in Article 1107 would not apply. Proceed to Section C.
- **If no**, proceed to the next question.

EX1-7. Does the P3 relate to minority affairs subject to the reservations taken by Canada in NAFTA Annex II-C-8?

- **If yes**, the national treatment requirements in Article 1102, the performance requirements provisions in Article 1106 and the senior management and board of directors provisions in Article 1107 would not apply. Proceed to Section C.
- **If no**, Chapter 11 obligations could apply and municipalities should seek legal advice. Proceed to Section C.

C. NAFTA Chapter 12: Services

EX1-8. Does the franchise agreement relate to cross-border trade in services by U.S. or Mexican service providers (e.g. cross-border supply of billing services)?

- **If no**, NAFTA Chapter 12 does not apply. No further questions in this section are necessary.
- **If yes**, proceed to the next question.

EX1-9. Is the franchise agreement "government procurement" within the meaning of NAFTA Article 1201(c)?

- **If yes**, Chapter 12 does not apply. No further questions in this section are necessary.
- **If** no, proceed to the next question.

EX1-10. Do measures relating to the P3 pre-date implementation of NAFTA on January 1, 1994?

- **If yes**, the national treatment requirement in Article 1202, MFN requirement in Article 1203 and local presence requirement in Article 1205 would not apply due to the exceptions and reservations provided in Article 1206(1). This would also be true for any amendments to relevant measures made after implementation of NAFTA so long as the amendments did not increase the extent to which the measure departed from those obligations. No further questions in this section are necessary.
- **If** no, proceed to the next question.

EX1-11. Does the P3 relate to aboriginal affairs subject to the reservations taken by Canada in NAFTA Annex II-C-I?

- **If yes**, the MFN provisions in Article 1203, national treatment provisions in Article 1202, and the local presence provisions in Article 1205 would not apply. No further questions in this section are necessary.
- **If no**, no further questions in this section are necessary.

Assessing Public-Private Partnerships under Canada's Trade Agreements

Following is an example to illustrate how the key questions can be applied. It must be noted that the example does not in any way constitute legal advice or represent legal interpretations by the Government of Canada. Municipal measures would need to be assessed on a case-by-case basis and municipalities should seek legal advice, as appropriate.

Example 2

Water Treatment Facility

A district proposes to enter into a 40-year partnership with a European water service supplier. The European partner is to design, build, maintain and operate a water treatment facility and provide water services which were previously provided by the municipality to district residents, two private bottlers and a U.S. community. The district is to pay all costs, provide land for free and regulate the service only in the contract with the European partner. The facility is transferred to the district at the end of the 40-year contract term.

A. CETA

EX2-1. Are the water treatment and distribution services being provided "in the exercise of governmental authority" within the meaning of CETA GP Chapter (as reflected in section B of EU Annex 19-6, para. 2 of Canada's Annex 19-6)?

- **If yes**, the P3 would be exempt from the CETA. Proceed to section B
- **If no**, proceed to the next question.

EX2-2. Are the water treatment and distribution services "government procurement" within the meaning of CETA GP Chapter (as reflected in section B of EU Annex 19-6, para. 2 of Canada's Annex 19-6)?

- **If yes**, the P3 is not subject to CETA provisions. Proceed to section B
- **If no**, proceed to the next question.

EX2-3. Are water treatment facilities or water distribution services included in Canada's Schedule of Specific Commitments?

- **If no**, there would be no market access commitments. The MFN obligation in Article II, however, would apply. Depending on whether the effect of the P3 on trade in services is significant, the transparency provisions in Article III also could be relevant. (Note: Canada does not have any CETA commitments for water collection, purification and distribution services.) Proceed to the next question.
- **If yes**, in addition to MFN and any transparency requirements, market access and national treatment obligations could apply, subject to any reservations in Canada's Schedule of Specific Commitments. The nature and extent of such obligations would require assessment on a case-by-case basis.

EX2-4. Does CETA result in the creation of an "exclusive service provider" under Article 19-12?

- **If no**, there would be no additional obligations with respect to monopolies and exclusive service providers. Proceed to the next question.
- **If yes**, it could lead to no market access or it could require assessment on a case-by-case basis. Proceed to the next question.

B. GATS

EX2-5. Are the water treatment and distribution services being provided "in the exercise of governmental authority" within the meaning of GATS Article 1.3(c)?

- **If yes**, the P3 would be exempt from the GATS. Proceed to question EX2-9.
- **If no**, proceed to the next question.

EX2-6. Are the water treatment and distribution services "government procurement" within the meaning of GATS Article XIII?

- **If yes**, the P3 is not subject to GATS provisions for MFN in Article II Market Access in Article XVI and National Treatment in Article XVII (Article XIII Exemption). Proceed to question EX2-9.
- **If no**, proceed to the next question.

EX2-7. Are water treatment facilities or water distribution services included in Canada's Schedule of Specific Commitments?

- **If no**, there would be no market access commitments under Article XVI or national treatment commitments under Article XVII. The MFN obligation in Article II, however, would apply. Depending on whether the effect of the P3 on trade in services is significant, the transparency provisions in Article III also could be relevant. (Note: Canada does not have any GATS commitments for water collection, purification and distribution services.) Proceed to the next question.
- **If yes**, in addition to MFN and any transparency requirements, market access and national treatment obligations could apply, subject to any reservations in Canada's Schedule of Specific Commitments. The nature and extent of such obligations would require assessment on a case-by-case basis. (Note: Canada does not currently have any GATS commitments for water collection, purification and distribution services.) Proceed to the next question.

EX2-8. Does the agreement result in the creation of a "monopoly supplier of a service" as defined under Article XXVII or an "exclusive service provider" under Article VIII(5)?

- **If no**, there would be no additional obligations with respect to monopolies and exclusive service providers. Proceed to the next question.
- **If yes**, obligations for monopolies and exclusive service providers as found under Article VIII could apply. Proceed to the next question.

C. NAFTA Chapter 11: Investment

EX2-9. Is the agreement "government procurement" within the meaning of Article 1108(7) and (8)?

- **If yes**, the MFN provisions of Article 1103 do not apply, meaning that the municipality would be at liberty to extend preferences to non-NAFTA foreign investors or investments without assuming any potential obligations with respect to NAFTA investors or investments. Proceed to question EX2-11.
- **If no**, the MFN provisions of Chapter 11 could apply. Proceed to the next question.

EX2-10. Did the P3 contract selection process provide less favourable treatment to U.S. or Mexican investors or their investments compared to the treatment of Canadian or other foreign investors or their investments in like circumstances?

- **If no**, the contract selection process was consistent with the MFN provisions in Article 1103. Proceed to the next question.
- **If yes**, the selection process may not be consistent with the MFN provision in Article 1103. The MFN obligation, however, does not require a municipality to enter into a similar agreement with a U.S. or Mexican company simply on the basis that it entered into one with another foreign company. Proceed to Section D.

D. NAFTA Chapter 12: Services

EX2-11. Does any aspect of the P3 relate to cross-border trade in services by U.S. or Mexican service providers as defined in Article 1213(2) (e.g. cross-border supply of billing services, cross-border supply of facility control or monitoring services)?

- **If no**, NAFTA Chapter 12 does not apply. No further questions.
- **If yes**, the next question would be:

EX2-12. Are the water treatment facility and distribution service "government procurement" within the meaning of Article 1201(2)(c)?

- **If yes**, the P3 is exempt from NAFTA Chapter 12. No further questions in this section are necessary.
- **If no**, no further questions in this section are necessary.

Assessing Regulation under Canada's Trade Agreements

Regulation

All Canada's trade agreements protect the right of governments to regulate, whether at the federal, provincial/territorial or municipal level. At the same time, trade agreements do establish certain disciplines regarding the manner in which regulatory measures are designed and applied, which could be relevant to municipalities. The GATS, the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement), the WTO Agreement on Technical Barriers to Trade (the TBT Agreement) and NAFTA contain provisions aimed at ensuring that regulations affecting trade in goods or services are non-discriminatory and fair. NAFTA Chapter 11 on investment also has provisions relating to the manner in which regulatory measures are applied vis-à-vis foreign investors and their investments. Even these requirements, however, do not always apply to municipalities as a result of various exceptions contained in the GATS, NAFTA and other international agreements.

The following key questions and examples can be used as a guide for identifying what, if any, provisions might apply.

Key Questions for Assessing Regulations

A. The SPS and TBT Agreements

A1. Does the proposed measure apply to a product or a service?

- If the measure applies to a service, the SPS and TBT Agreement would not apply. Proceed to Section D (GATS).
- If the measure applies to a good, it may be subject to the SPS or TBT Agreement. Proceed to the next question.

B. The SPS Agreement

B1. Is the measure applied for any of the objectives listed in Annex A I(a)-I(d)?

- **If no**, the SPS Agreement would not apply. Proceed to Section C (TBT).
- **If yes**, the SPS Agreement may apply to the measure, but the TBT Agreement would not apply. Proceed to the next question.

B2. Could the measure affect international trade?

- **If yes,** the measure is subject to the SPS Agreement. Proceed to the next question.
- **If no**, the SPS Agreement would not apply.

B3. Does the measure conform to international standards, guidelines or recommendations (as defined in Annex A3)?

- **If yes**, the measure is presumed to be consistent with the relevant provisions of the SPS Agreement.
- **If no**, the measure does not benefit from the presumption of consistency with the relevant provisions of the SPS Agreement. Proceed to the next question.

B4. Does the measure meet the key requirements of Article 2 of the SPS Agreement, i.e. is it based on scientific principles, is it non-discriminatory and is it no more trade-restrictive than necessary to achieve the objective?

- **If yes**, the measure may be consistent with Article 2. Proceed to the next question.
- **If no**, the measure could be inconsistent with the SPS Agreement. Proceed to the next question.

B5. Is the measure based on a risk assessment and appropriate level of protection in keeping with the provisions of Article 5 of the SPS Agreement, i.e. a risk assessment that takes account of scientific evidence and other factors listed in Article 5 and a choice of level of protection that does not result in discrimination?

- **If yes**, the measure may be consistent with Article 5.
- **If no**, the measure could be inconsistent with the SPS Agreement.

C. The TBT Agreement

C1. Is the proposed measure a technical regulation, standard or a conformity assessment procedure as defined in Annex 1 of the TBT Agreement?

- **If no**, the measure would not be subject to the TBT Agreement.
- **If yes**, the measure may be subject to the Agreement. Proceed to the next question.

C2. Is the proposed measure a purchasing specification prepared by a government body for production or consumption requirements of such a government body?

- **If no**, the measure would be subject to the TBT Agreement. Proceed to the next question.
- **If yes**, the measure would not be subject to the TBT Agreement. Please refer to the section on Government Procurement.

C3. If the measure is a technical regulation, does it meet the key requirements of Article 2 of the TBT Agreement, e.g. is it based on relevant international standards, is it non-discriminatory and is it no more trade-restrictive than necessary to fulfill a legitimate objective?

- **If yes**, the measure may be consistent with Article 2. Proceed to the next question.
- **If no**, the measure could be inconsistent with the TBT Agreement. Proceed to the next question.

C4. If the measure is a conformity assessment procedure, does it meet the key requirements of Article 5 of the TBT Agreement, e.g. is it non-discriminatory, not stricter than necessary and based on relevant guides or recommendations issued by international standardizing bodies?

- **If yes**, the measure may be consistent with Article 5.
- **If no**, the measure could be inconsistent with the TBT Agreement.

D. GATS

D1. Is the service to which the regulatory measure applies provided "in the exercise of governmental authority" within the meaning of GATS Article I.3(c)?

- **If yes**, the service and the regulatory measure would not be subject to the GATS. Proceed to section E.
- **If no**, proceed to the next question.

D2. Is the service to which the regulatory measure applies listed in Canada's Schedule of Specific Commitments?

- **If no**, there would be no market access commitments under GATS Article XVI or national treatment commitments under Article XVII. The most-favoured-nation (MFN) obligation in Article II, however, would apply, unless Canada has listed an exemption under Article II applicable to the service. Depending on the significance of the effect of the measure on trade in services, the transparency provisions of Article III could apply. Proceed to section E.
- In addition, certain obligations contained in the domestic regulation article would not be applicable as well (Specifically, Article VI.1, .3, .5, and .6).
- **If yes**, in addition to MFN and any transparency requirements, market access and national treatment obligations could apply, subject to any reservations in Canada's Schedule of Specific Commitments. The nature and extent of such reservations would require assessment on a case-by-case basis. Proceed to section E.
- Moreover, obligations under GATS Article VI, which governs regulatory measures other than those that impede market access or that discriminate against foreign service providers within the meaning of Articles XVI and XVII, would apply as well. The key, relevant obligations under Article VI require Members to:
    - administer all measures of general application affecting trade in services in a reasonable, objective, and impartial manner;
    - maintain or institute mechanisms for the objective and impartial review of administrative decisions;
    - inform an applicant of the status of and decision on its application without undue delay, where an authorization is required for the supply of services. Proceed to section E.

E. NAFTA Chapter 7: Agriculture and Sanitary and Phytosanitary Measures

E1. Does the regulatory measure meet the definition of a sanitary or phytosanitary measure under Article 724?

- **If yes**, NAFTA Chapter 7 may apply to the proposed regulation. Proceed to the next question.
- **If no**, Chapter 7 does not apply. Proceed to Section F.

E2. Could the measure affect trade between the NAFTA Parties?

- **If yes,** the proposed regulation is subject to NAFTA Chapter 7. Proceed to the next question.
- **If no**, Chapter 7 does not apply.

E3. Does the measure conform to a relevant international standard, guideline or recommendation (as defined under Article 724)?

- **If yes**, the measure will be presumed to be consistent with Article 712.

- **If no**, the measure does not benefit from the presumption of consistency with Article 712. Proceed to the next question.

E4. Does the regulatory measure meet the key requirements of Article 712 of NAFTA Chapter 7, i.e. is the measure based on scientific principles and a risk assessment, is it non-discriminatory and not a disguised restriction on trade?

- **If yes**, the measure may be consistent with Article 712. Proceed to the next question.
- **If no**, the measure may be inconsistent with NAFTA Chapter 7. Proceed to the next question.

E5. Does the measure meet the key requirements of Article 715 of Chapter 7, i.e. is it based on a risk assessment that takes account of the factors in Article 715?

- **If yes**, the measure may be consistent with Article 715.
- **If no**, the measure may be inconsistent with NAFTA Chapter 7.

F. NAFTA Chapter 9: Standards-Related Measures

Chapter 9 of NAFTA contains obligations for the federal government, thus the obligations set out in that Chapter do not apply to standards-related measures of municipalities. Proceed to Section G.

G. NAFTA Chapter 11: Investment

G1. Could the regulatory measure or the application of the regulatory measure relate to investments of a U.S. or Mexican investor within the meaning of Article 1101?

- **If no**, Chapter 11 does not apply. Proceed to Section H.
- **If yes**, proceed to the next question.

G2. Does the regulatory measure predate the implementation of NAFTA on January 1, 1994?

- **If yes**, the national treatment requirement in Article 1102 and the MFN requirement in Article 1103 would not apply due to the exceptions and reservations provided in Article 1108(1). Amendments to such a regulation after NAFTA came into effect would also be exempt as long as the amendments did not increase the extent to which the regulation departed from those obligations. Proceed to the next question.
- **If no**, proceed to the next question.

G3. Does the regulatory measure apply to any of the social services subject to reservations taken by Canada in NAFTA Annex II-C-9?

- **If yes**, the measure would not be subject to the provisions relating to national treatment in Article 1102 and senior management and boards of directors in Article 1107. Obligations relating to MFN treatment under Article 1103, minimum standard of treatment under Article 1105, performance requirements under Article 1106 and expropriation under Article 1110, however, could apply. The nature and extent of such obligations would depend on the features and circumstances of a given regulation. Proceed to the next question.
- **If no**, proceed to the next question.

G4. Does the regulatory measure relate to Aboriginal affairs subject to reservations taken by Canada in NAFTA Annex II-C-1?

- **If yes**, the measure would not be subject to the provisions relating to national treatment in Article 1102, MFN in Article 1103, performance requirements in Article 1106, or senior management and boards of directors in Article 1107. Obligations relating to minimum standard of treatment under Article 1105 and expropriation under Article 1110, however, could apply. The nature and extent of such obligations would depend on the features and circumstances of a given regulation. Proceed to question G7.
- **If no**, proceed to the next question.

G5. Does the regulatory measure relate to minority affairs subject to the reservations taken by Canada in NAFTA Annex II-C-8?

- **If yes**, the measure would not be subject to the provisions relating to national treatment under Article 1102, performance requirements under Article 1106, and senior management and boards of directors under Article 1107. Obligations relating to MFN treatment under Article 1103, minimum standard of treatment under Article 1105 and expropriation under Article 1110, however, could apply. The nature and extent of such obligations would depend on the features and circumstances of a given regulation. Proceed to question G7.
- **If no**, all the above Chapter 11 provisions may be relevant to the introduction, amendment or implementation of a regulation. Proceed to the next question.

G6. Does the regulatory measure treat U.S. or Mexican investors or their investments less favourably than Canadian investors or investments, or investors and their investments from another country in like circumstances?

- **If no**, the measure is consistent with the national treatment requirement in Article 1102 and the MFN requirement in Article 1103. Proceed to the next question.
- **If yes**, the regulatory measure could be inconsistent with the provisions of Article 1102 and Article 1103 and municipalities should seek legal advice. Proceed to the next question.

G7. Does the regulatory measure result in a direct or indirect expropriation of a U.S. or Mexican investment within the meaning of Article 1110?

- **If no**, the measure is consistent with the provisions of Article 1110. Proceed to Section H
- **If yes**, proceed to the next question.

G8. Was the expropriation in accordance with the requirements of Article 1110?

- **If yes**, the expropriation would be consistent with Article 1110. Proceed to Section H.
- **If no**, the expropriation could be inconsistent with the provisions of Article 1110 and municipalities should seek legal advice. Proceed to Section H.

H. NAFTA Chapter 12: Services

H1. Does the regulatory measure relate to cross-border trade in services by U.S. or Mexican service providers within the meaning of Article 1201?

- **If no**, Chapter 12 does not apply. No further questions in this section are necessary.
- **If yes**, proceed to the next question.

H2. Does the regulatory measure predate implementation of NAFTA on January 1, 1994?

- **If yes**, the national treatment requirement in Article 1202, MFN requirement in Article 1203 and local presence requirement in Article 1205 would not apply due to the exceptions and reservations provided in Article 1206(1). Amendments to such a regulation after NAFTA came into effect would also be exempt so long as the amendments did not increase the extent to which the regulation departed from those obligations. No further questions in this section are necessary.
- **If no**, proceed to the next question.

H3. Does the measure apply to any of the social services subject to reservations taken by Canada in NAFTA Annex II-C-9?

- **If yes**, the measure would not be subject to the provisions regarding national treatment in Article 1202, MFN treatment in Article 1203 or local presence requirements in Article 1205. No further questions in this section are necessary.
- **If no**, proceed to the next question.

H4. Does the regulatory measure or the service to which the regulatory measure applies relate to Aboriginal affairs subject to reservations taken by Canada in NAFTA Annex II-C-1?

- **If yes**, the measure would not be subject to the provisions relating to national treatment in Article 1202, MFN treatment in Article 1203 and local presence in Article 1205. No further questions in this section are necessary.
- **If no**, proceed to the next question.

H5. Does the regulatory measure or the service to which the regulatory measure applies relate to minority affairs as covered in NAFTA Annex II-C-8?

- **If yes**, the measure would not be subject to the provisions relating to national treatment in Article 1202 and local presence in Article 1205. Obligations relating to MFN treatment under Article 1203, however, would apply. Proceed to the next question.
- **If no**, proceed to the next question.

H6. Has Canada listed any reservations pertaining to the measure in NAFTA Annex I?

- **If yes**, the provisions regarding national treatment in Article 1202, MFN in Article 1203, and local presence in Article 1205 might be limited or not applicable. The nature and scope of the reservations would need to be assessed. No further questions in this section are necessary.
- **If no**, Chapter 12 provisions for national treatment in Article 1202, MFN in Article 1203 and local presence in Article 1205 could apply. No further questions in this section are necessary.

Examples

The following are examples to illustrate how the above key questions can be applied. It must be noted that the examples do not in any way constitute legal advice or represent legal interpretations by the Government of Canada. Municipal measures would need to be assessed on a case-by-case basis, and municipalities should seek legal advice, as appropriate.

Example 1 - Environmental Protection By-law

A district has proposed a by-law to ban diesel motors, certain gasoline additives or pesticides.

Example 2 - Downzoning

A municipality proposes to "downzone" land optioned by a U.S. box store in order to prohibit "big box stores," except on land owned by the municipality.

Assessing Regulation under Canada's Trade Agreements

The following is an example to illustrate how the key questions can be applied. It must be noted that the example does not in any way constitute legal advice or represent legal interpretations by the Government of Canada. Municipal measures would need to be assessed on a case-by-case basis, and municipalities should seek legal advice, as appropriate.

Example 1 - Environmental Protection Bylaw

A district has proposed a by-law to ban diesel motors, certain gasoline additives or pesticides.

In the case of this scenario, neither an analysis of the GATS nor NAFTA Chapter 12 is required. In addition to the questions asked under "Key Questions for Assessing Regulations," additional specific questions should be asked in this scenario and are listed below.

A. The SPS Agreement

EX1-1. Is the ban applied for any of the objectives listed in Annex A 1(a)-(d) of the SPS Agreement?

- **If yes**, the SPS Agreement could apply. Proceed to the next question.
- **If no**, the SPS Agreement would not apply.

EX1-2. Could the bylaw proposing a ban have an effect on imported product(s) supplied in the district?

- **If yes**, the SPS Agreement would apply. Proceed to the next question**.**
- **If no**, the SPS Agreement would not apply.

EX1-3. Does the ban meet the key requirements of Article 2 of the SPS Agreement, i.e. is it based on scientific principles, is it non-discriminatory and is it no more trade-restrictive than necessary to achieve the objective?

- **If yes**, the ban may be consistent with Article 2. Proceed to the next question.
- **If no**, the ban could be inconsistent with the SPS Agreement. Proceed to the next question.

EX1-4. Is the ban based on a risk assessment and appropriate level of protection in keeping with the provisions of Article 5 of the SPS Agreement, i.e. a risk assessment that takes account of scientific evidence and other factors listed in Article 5 and a choice of a level of protection that does not result in discrimination?

- **If yes**, the ban may be consistent with Article 5. Proceed to the next question.
- **If no**, the measure could be inconsistent with the SPS Agreement. Proceed to the next question.

B. The TBT Agreement

EX1-5. Is the proposed ban or are parts of the proposed ban a technical regulation, standard or conformity assessment procedure as defined in Annex 1 of the TBT Agreement?

- **If no**, the measure would not be subject to the TBT Agreement. Proceed to question EX1-8.
- **If yes**, and to the extent that the measure is not (i) an SPS measure and (ii) **a purchasing specification prepared by a government body for production or consumption requirements of such a government body,** the TBT Agreement would apply to the measure. Proceed to the next question.

EX1-6. To the extent that the ban is a technical regulation, does the ban or do parts of the ban meet the key requirements of Article 2 of the TBT Agreement, i.e. is it based on relevant international standards, is it non-discriminatory and is it no more trade-restrictive than necessary to fulfill a legitimate objective?

- **If yes**, the ban would be consistent with Article 2. Proceed to the next question.
- **If no**, the ban could be inconsistent with the TBT Agreement. Proceed to the next question.

C. NAFTA Chapter 7: Agriculture and Sanitary and Phytosanitary Measures

EX1-8. Does the ban or any part of the ban meet the definition of a sanitary or phytosanitary measure under Article 724?

- **If yes**, the ban would be subject to NAFTA Chapter 7. Proceed to the next question.
- **If no**, Chapter 7 does not apply. Proceed to Question EX1-12.

EX1-9 Does the measure conform to a relevant international standard, guideline or recommendation (as defined under Article 724)?

- **If yes**, the measure will be presumed to be consistent with Article 712.
- **If no**, the measure does not benefit from the presumption of consistency with Article 712. Proceed to the next question.

EX1-10. Does the ban meet the key requirements of Article 712 of Chapter 7, i.e. is it based on scientific principles and a risk assessment, is it non-discriminatory and not a disguised restriction on trade?

- **If yes**, the ban may be consistent with Article 712. Proceed to the next question.
- **If no**, the measure may be inconsistent with NAFTA Chapter 7. Proceed to the next question.

EX1-11. Does the ban meet the key requirements of Article 715 of Chapter 7, i.e. is it based on a risk assessment that takes account of the factors in Article 715?

- **If yes**, the ban may be consistent with Article 715. Proceed to question EX1-12.
- **If no**, the ban may be inconsistent with NAFTA Chapter 7 and municipalities should seek legal advice. Proceed to question EX1-12.

D. NAFTA Chapter 11: Investment

EX1-12. Could the bylaw or the application of the bylaw relate to a U.S. or Mexican investor or investment within the meaning of Article 1101?

- **If no**, Chapter 11 does not apply. No further questions in this section are required.
- **If yes**, proceed to the next question.

EX1-13. Does the bylaw treat U.S. or Mexican investors or their investments less favourably than Canadian investors or investments, or investors and their investments from another country in like circumstances?

- **If no**, the bylaw is consistent with the national treatment requirement in Article 1102 and the MFN requirement in Article 1103. Proceed to the next question.
- **If yes**, the action could be inconsistent with the provisions of Article 1102 and Article 1103 and municipalities should seek legal advice. Proceed to the next question.

EX1-14. Does the bylaw result in a direct or indirect expropriation of a U.S. or Mexican investment within the meaning of Article 1110?

- **If no**, the provisions of Article 1110 do not apply. No further questions in this section are necessary.
- **If yes**, proceed to the next question.

EX1-15. Was the expropriation in accordance with the requirements of Article 1110?

- **If yes**, the expropriation would be consistent with Article 1110. No further questions in this section are necessary.
- **If no**, the U.S. or Mexican investor could be eligible to seek compensation under the investor-state dispute settlement procedures of Chapter 11, Section B. No further questions in this section are necessary.

Assessing Regulation under Canada's Trade Agreements

The following is an example to illustrate how the key questions can be applied. It must be noted that the example does not in any way constitute legal advice or represent legal interpretations by the Government of Canada. Municipal measures would need to be assessed on a case-by-case basis and municipalities should seek legal advice, as appropriate.

Example 2 - Downzoning

A municipality proposes to "downzone" land optioned by a U.S. box store in order to prohibit "big box stores," except on land owned by the municipality.

In the case of this scenario, an analysis of the GATS and the TBT and SPS Agreements is not required.

A. NAFTA Chapter 11: Investment

EX2-1. Does the downzoning measure, the application of the downzoning measure or the restriction to municipally owned land discriminate against the U.S. or Mexican investor or its investments, compared to Canadian or other foreign investors or investments in like circumstances?

- **If no**, the measure would be consistent with the national treatment obligation in Article 1102 and the MFN obligation in Article 1103. Proceed to the next question.
- **If yes**, the zoning action could be inconsistent with the provisions of Article 1102 and Article 1103 and municipalities should seek legal advice. Proceed to the next question.

EX2-2. Does the downzoning result in a direct or indirect expropriation of a U.S. investment within the meaning of Article 1110?

- **If no**, Article 1110 does not apply. No further questions in this section are necessary.
- **If yes**, proceed to the next question.

EX2-3. Is the expropriation in accordance with the requirements of Article 1110?

- **If yes**, the expropriation would be consistent with Article 1110. No further questions in this section are necessary.
- **If no**, the U.S. or Mexican investor could be eligible to seek compensation under the investor-state dispute settlement procedures of Chapter 11, Section B. No further questions in this section are necessary.

Annex A
Canada's Free Trade Agreements and Negotiations: An Overview

This Annex provides an introduction to Canada's Free Trade Agreements and other trade and investment-related initiatives and negotiations. In particular, the Annex provides an overview of:

- The World Trade Organization (WTO)
- Key WTO Agreements
  - The General Agreement on Trade in Services (GATS)
  - The Agreement on Technical Barriers to Trade (TBT)
  - The Agreement on Sanitary and Phytosanitary Measures (SPS)
  - The Agreement on Government Procurement (GPA)
  - The Agreement on Subsidies and Countervailing Measures (ASCM)
  - The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)
- Ongoing Negotiations in the WTO: The Doha Development Agenda
- The North American Free Trade Agreement (NAFTA)
  - Chapter 7: Agriculture and Sanitary and Phytosanitary Measures
  - Chapter 9: Standards-Related Measures
  - Chapter 10: Government Procurement
  - Chapter 11: Investment
  - Chapter 12: Cross-Border Trade in Services
  - Chapter 15: Competition Policy, Monopolies and State Enterprises
- Bilateral/Regional Free Trade Agreements
- Foreign Investment Promotion and Protection Agreements (FIPAs)
- Negotiating Canada's Trade Agreements: Process and Consultations

Note: This document is provided for information purposes only and does not in any way constitute legal advice or represent legal interpretations by the Government of Canada. Municipal measures would need to be assessed on a case-by-case basis. Municipalities should seek legal advice, as appropriate.

The World Trade Organization (WTO)

The World Trade Organization (WTO) (previously known as the General Agreement on Tariffs and Trade or GATT) establishes a common institutional framework for the conduct of trade relations among its Members related to various multilateral and plurilateral agreements and associated legal instruments that were negotiated during the Uruguay Round. It also serves to protect trade-related intellectual property rights, acts as an arbitrator in settling trade disputes and undertakes regular reviews of its Members' national trade policies. WTO agreements of special interest to municipalities include: the GATS, the Agreement on Technical Barriers to Trade (TBT), the Agreement on Sanitary and Phytosanitary Measures (SPS), the Agreement on Government Procurement (GPA), the Agreement on Subsidies and Countervailing Measures (ASCM) and the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). A brief overview of all these agreements is provided below. More detailed explanations of their key provisions can be found in Part I, Key Provisions of WTO Agreements, NAFTA, and CETA in Greater Detail. More information can also be found on the Global Affairs Canada website.

Key WTO Agreements

A. The General Agreement on Trade in Services

The GATS is the first multilateral agreement covering trade in services. It came into force on January 1, 1995, along with the other agreements negotiated during the Uruguay Round. The GATS establishes a framework of rules governing services trade, a mechanism for Member countries to make specific commitments to liberalize access to their services markets and access to the WTO dispute-settlement system.

The GATS applies to all measures taken by WTO Members that affect trade in services, except those falling under Article I.3 which specifically excludes "services provided in the exercise of governmental authority" from the obligations of the agreement. "Services provided in the exercise of governmental authority" are defined as "services provided neither on a commercial basis nor in competition with one or more service suppliers."

Measures taken by regional and local governments as well as by non-governmental bodies exercising powers delegated to them by governments are covered by the GATS. The GATS also contains several provisions, however, that limit the coverage of measures taken by governments. In addition, the scope and coverage of a Members' horizontal and sectoral specific commitments set out in its Schedule of Specific Commitments, including any relevant conditions and qualifications, may further limit the kinds of activities that could be covered by the GATS (see Key Provisions of WTO Agreements, NAFTA, and CETA in Greater Detail).

For covered services, the GATS distinguishes between four modes of supply:

- "cross-border supply," (Mode 1) e.g. services supplied from one Member country to another;
- "consumption abroad," (Mode 2) e.g. consumers or businesses using a service in another Member country;
- "commercial presence," (Mode 3) e.g. a foreign company establishing a subsidiary or branch operation to supply services in another Member country; and

- "presence of natural persons," (Mode 4) e.g. individuals travelling to another Member country to supply services.

Certain obligations contained in the main text of the GATS apply across the board for all WTO Members. These obligations of general application include most-favoured-nation (MFN) treatment, which essentially means that any benefit extended to one foreign service provider of a WTO Member must be extended equally to all foreign service providers from other Members, and transparency, which requires that information on measures affecting trade in services be made available. Another generally applicable obligation includes the establishment of administrative review and appeal procedures.

Beyond such general obligations, GATS Member countries negotiated specific commitments to provide market access and national treatment. These market access and national treatment commitments are taken in sectors of their own choosing as set out in each Member's Schedule of Specific Commitments, which also may include conditions on and qualifications to those commitments.

Finally, the GATS contains a built-in agenda for further negotiations to extend the commitments made during the Uruguay Round with a view to progressively liberalizing markets for services.

B. The Agreement on Sanitary and Phytosanitary Measures (SPS)

The SPS Agreement and the Technical Barriers to Trade Agreement (TBT) are broadly similar in purpose and design. They are also mutually exclusive. The TBT Agreement states clearly that it does not apply to SPS measures, while the SPS Agreement indicates that it applies solely to SPS measures and defines what those are.

Generally, SPS measures are measures applied to address risks to:

- animal or plant life or health arising from pests, diseases, or disease-carrying or -causing organisms;
- human or animal life or health arising from additives, toxins, contaminants or disease-causing organisms in food and feed; or
- human life or health arising from diseases carried by animals, plants or products derived from animals or plants, or from pests.

The SPS and TBT Agreements have several common elements, including the requirement for least trade-restrictiveness, transparency, and due process in the application of control, inspection and approval procedures. Also, both Agreements favour the use of international standards but recognize the legitimacy of departing from such standards where the WTO Member in question seeks to achieve a level of protection that is higher than would be achieved by the application of the international standard (SPS Agreement) or where the international standard would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued (TBT Agreement). SPS measures that are not based on an international standard must be based on a risk assessment, unless insufficient scientific evidence exists to complete such an assessment. In the latter case, the Member may adopt a provisional measure but must also take steps to acquire the information necessary to complete the risk assessment.

C. The Agreement on Technical Barriers to Trade (TBT)

The TBT Agreement applies to certain types of measures—namely, technical regulations, standards and conformity assessment procedures. All products, including industrial and agricultural products, are subject to this Agreement. However, the Agreement does not apply to specifications prepared by governmental bodies for procurement purposes (these are addressed by the Agreement on Government Procurement) nor to sanitary and phytosanitary measures (covered by the SPS Agreement).

Generally, technical regulations and standards set out product specifications or characteristics. An example of a technical regulation is a by-law setting limits on vehicle emissions. Technical regulations are mandatory and enforced by government authorities, while standards are voluntary. Conformity assessment procedures are mechanisms, such as testing and certification, for verifying that a given product complies with a technical regulation or standard.

The TBT Agreement sets out the rights and obligations of WTO Members in respect of these measures. Among other things, it requires that local products are not treated more favourably as compared to similar imported products and that access to conformity assessment procedures must be granted equally to foreign suppliers and domestic suppliers. Also, Technical regulations and conformity assessment procedures must not be more trade-restrictive or stricter than necessary to achieve their goals. Regulatory authorities must use existing relevant international standards as a basis for their measures, unless these standards would be an ineffective means for the fulfillment of the legitimate objectives pursued. Notices of proposed measures must be published, and WTO Members must be given the opportunity to comment on them. The TBT Agreement imposes an obligation on the federal government to take reasonable measures to ensure that local governments, including municipalities, meet these obligations.

The TBT Agreement also contains a *Code of Good Practice for the Preparation, Adoption and Application of Standards*. As its title indicates, the Code applies to the setting, implementation and enforcement of standards. Its requirements are broadly similar to the disciplines applied to technical regulations. Standardizing bodies, including local government bodies that develop standards, should accept and comply with the Code.

D. The Agreement on Government Procurement (GPA)

The basic rule in the WTO is that all Members must subscribe to all WTO agreements. This ensures that Members do not pick and choose between agreements so as to maximize the benefits available and minimize the concessions required in return. There are four exceptions to this rule involving more specialized plurilateral agreements with limited membership: the International Dairy Agreement (terminated in 1997), the International Bovine Meat Agreement (terminated in 1997), the Agreement on Trade in Civil Aircraft (currently in force), and the Agreement on Government Procurement, or GPA (currently in force).

The GPA originally entered into force on January 1, 1996. A revised version of the GPA subsequently entered into force on April 6, 2014. There are currently 19 Parties[Footnote 1] to the GPA, comprising 47 WTO members, including Canada. The Agreement contains general rules and obligations, mostly relating to procedures for tendering and appealing procurement decisions

(the rules are very similar to the CETA Chapter on Government Procurement), as well as the market access annexes in which Members list the government entities whose purchasing is subject to the Agreement. The GPA covers both goods and services and applies to contracts worth more than defined threshold values.

Canada's GPA commitments were made only at the federal government level until the *Agreement between the Government of Canada and the Government of the United States of America on Government Procurement* (CUSPA) entered into force on February 16, 2010. Canada now provides access to its provincial and territorial procurement to all GPA Parties through its commitments under the revised GPA.

E. The Agreement on Subsidies and Countervailing Measures

The Agreement on Subsidies and Countervailing Measures (ASCM) disciplines the use of subsidies by WTO Members and regulates the actions countries are permitted to take to counter the effect of subsidies. The definition of "subsidy" in the ASCM consists of two discrete elements: (1) a financial contribution by a government or any public body; and (2) a benefit thereby conferred. The types of government actions encompassed by the "financial contribution" element include direct transfer of funds or potential direct transfer of funds or liabilities (e.g. loan guarantees), government revenue otherwise foregone or not collected (e.g. tax credits), and the provision of goods or services or the purchase of goods by a government.

To fall under the disciplines of the ASCM, a subsidy has to be either actionable or prohibited. A subsidy is actionable if it is "specific" (i.e. it can or will be used by only a single company or industry or a limited number of companies or industries) and if the subsidized Canadian goods negatively affect the sales volume, prices or profits of foreign producers of similar goods, in Canada or foreign markets.

A subsidy is prohibited if the provision of the subsidy to the recipient is dependent on that recipient's export performance (in law or in fact) or its use of domestic over imported inputs in the manufacture of its goods. A "prohibited subsidy" is deemed to be specific. These subsidies are prohibited since they are considered to have the most trade-distorting effects.

Countries may take action against actionable or prohibited subsidies through WTO dispute settlement. Where there are allegations that a domestic industry has been injured by subsidized goods, countervailing duty investigations may also be conducted at the national level. The ASCM sets out the procedures to be followed in such investigations and provides for the application of countervailing duties, on imports from the subsidizing country.

If a WTO Member believes that countervailing duties have been applied to its exports improperly, it can challenge those duties through the WTO dispute settlement system. Further, if a Canadian participant in a U.S. investigation believes that U.S. countervailing duties have been applied inconsistently with U.S. domestic law (or vice versa), it can request a review by a NAFTA Chapter 19 binational panel.

F. The Understanding on Rules and Procedures Governing the Settlement of Disputes

A key feature of the WTO that sets it apart from most other international organizations is its binding dispute settlement procedures. These procedures are contained in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

Key elements of the DSU include the automatic establishment of dispute settlement panels to review complaints by WTO Members, specific timelines throughout the process to ensure that disputes are adjudicated in a timely fashion, the right to appeal panel decisions to a permanent Appellate Body on issues of law, and the automatic adoption of panel and Appellate Body reports.

The WTO membership must adopt panel and Appellate Body reports, unless there is a consensus not to adopt them. Adopted panel and Appellate Body reports are binding on the complaining and responding WTO Members in a dispute. If a Member has been found to be in violation of its obligations, it must comply with the ruling within a "reasonable period of time." If the Member fails to do so, it may offer compensation to the complaining Member. If there is no agreement on compensation, the complaining Member may seek authorization to suspend the application to the responding Member of concessions or other obligations.

The North American Free Trade Agreement (NAFTA)

In January 1994, the North American Free Trade Agreement (NAFTA) came into effect for Canada, the United States and Mexico, thus building on the success of its predecessor, the Canada-U.S. Free Trade Agreement, which came into effect in 1989. NAFTA expands the coverage of the FTA to include extensive provisions relating to trade in services, intellectual property rights and investment. It is also accompanied by side agreements relating to labour and the environment.

Since the agreement entered into force, merchandise trade amongst the three partners has reached over U.S. $1 trillion, roughly 3.6 times more than the pre-NAFTA level in U.S. dollar terms. Foreign direct investment by the three NAFTA Parties in each other's markets (using inward investment in Canada and the U.S. and Canadian and U.S. outward investment in Mexico) amounted to US$781.6 billion in 2016, a six-fold increase since pre-NAFTA level.

The NAFTA Chapters most likely to be of interest to municipalities are Chapter Seven (Agriculture and Sanitary and Phytosanitary Measures), Chapter Nine (Standard-Related Measures), Chapter Ten (Government Procurement), Chapter Eleven (Investment), Chapter Twelve (Services), and Chapter Fifteen (Competition Policy, Monopolies and State Enterprises). A brief overview of these Chapters is provided below. More detailed explanations of key provisions in these Chapters are contained in Part I, Key Provisions of WTO Agreements, NAFTA, and CETA in Greater Detail. The full text of the Agreement and additional background information can be found under the title North American Free Trade Agreement (NAFTA) on the Global Affairs Canada website.

A. Chapter Seven: Agriculture and Sanitary and Phytosanitary (SPS) Measures

Chapter Seven, Section B, is similar in nature to the WTO SPS Agreement, although there are some differences. The same basic principles apply, i.e. the right to take sanitary and

phytosanitary measures; the right to establish appropriate levels of protection; measures must be based on scientific principles (based on a risk assessment as appropriate); not be discriminatory; must not be unnecessary obstacles or disguised restrictions on trade; and transparency (notification and opportunity to comment prior to implementation). The obligations set out in Section B of Chapter Seven apply to SPS measures of municipalities.

B. Chapter Nine: Standards-Related Measures

Chapter Nine is similar in nature to the WTO Technical Barriers to Trade (TBT) Agreement, although there are some differences. This Chapter applies to standards-related measures (technical regulations, standards and conformity assessment procedures other than those covered by Section B of Chapter Seven [Sanitary and Phytosanitary Measures]) that may directly or indirectly affect trade in goods and services between the NAFTA Parties. Technical specifications for government procurement purposes are not covered by this Chapter, as is also the case under the TBT Agreement. The obligations set out in Chapter Nine do not apply to standards-related measures of municipalities.

C. Chapter Ten: Government Procurement

Creating opportunities for Canadian suppliers in foreign government procurement markets has long been an important goal in Canadian trade policy, particularly with respect to the United States. Expanding and securing access to these markets, therefore, was a key Canadian objective in the NAFTA negotiations.

Chapter Ten covers procurement by federal entities and government enterprises listed by each Party in NAFTA Annexes 1001.1a-1 and 1001.1a-2, respectively, which includes nearly all such entities or enterprises in the three countries. No provincial or municipal government organizations are listed, and no procurement by provincial or municipal government is included.

All goods and services procured by the listed federal entities and enterprises are covered, unless specifically exempted in Annexes 1001.1b-1 and 1001.1b-2, respectively. Services exempted by Canada include research and development, health and social services, financial and related services and utilities services. For covered goods and services, minimum value thresholds are set out, establishing which contracts must be open to suppliers from all three countries. For example, the basic threshold for goods procurement for Canadian and U.S. entities is CAD $28,900.00 (in effect from January 1, 2016, to December 31, 2017).

The remainder of Chapter Ten deals primarily with tendering and bid challenge procedures. The bid challenge system, first introduced in the Canada-U.S. FTA, allows potential suppliers to seek a review of any aspect of the procurement process by an independent reviewing authority. There are also provisions relating to general exceptions, exchange of information and technical cooperation, future negotiations and general definitions.

D. Chapter Eleven: Investment

Chapter Eleven establishes a framework of rules that assist in providing investors with a more predictable and secure investment climate as well as procedures for the settlement of disputes between investors and NAFTA governments.

The Chapter is divided into three sections:

- Section A sets out substantive obligations regarding investment;
- Section B sets out procedures for dispute settlement; and
- Section C contains definitions of key terms.

Section A

Subject to exceptions and reservations, the obligations contained in Section A begin with a requirement to provide non-discriminatory treatment. The key provisions in this regard are national treatment, which means that each Party must treat the investments and investors of the other Parties no less favourably than it treats, in like circumstances, its own investors and investments, and most-favoured-nation (MFN) treatment, which means that each Party must treat the investments and investors of the other Parties no less favourably than it treats, in like circumstances, the investments and investors of non-NAFTA countries. Section A also establishes a requirement for a minimum standard of treatment of investments of NAFTA investors based on long-standing principles of customary international law. In addition, it prohibits the imposition of certain performance requirements (e.g. domestic content quotas) and nationality requirements for senior management and Boards of Directors employed by investors of another Party.

There are several important exceptions and reservations to these provisions relevant to municipalities. For example, Chapter Eleven obligations relating to national treatment and performance requirements do not apply to government procurement. Canada also claimed various exemptions and reservations in sensitive areas such as transportation, telecommunications, social services, cultural industries, and minority and Aboriginal affairs. NAFTA also affirms the rights of Parties to adopt and enforce environmental measures consistent with the provisions of Chapter Eleven. Finally, existing non-conforming measures of local governments in effect on January 1, 1994, are not subject to NAFTA obligations relating to national treatment, MFN, performance requirements and senior management and boards of directors.

Section A also addresses expropriation. It establishes that a NAFTA Party cannot directly or indirectly nationalize or expropriate an investment of an investor of another Party except: i) for a public purpose; ii) on a non-discriminatory basis; iii) in accordance with due process of law; and iv) on payment of compensation equivalent to fair market value.

Part I, Key Provisions of WTO Agreements and NAFTA in Greater Detail provides further information on the above Chapter Eleven provisions. As a further aid, Annex B outlines clarifications of certain provisions in statements by the Canadian government and the NAFTA Commission and provides summaries of key Tribunal decisions or positions on specific provisions.

Section B

Section B of Chapter Eleven sets out procedures for the settlement of disputes between a Party to NAFTA and an investor of another Party within its territory. These procedures provide access to arbitration for alleged breaches of the provisions of Section A of Chapter Eleven by a Party that have resulted in loss of or damage to an investment. The arbitration is conducted in accordance with either the International Centre for Settlement of Investment Disputes Rules (ICSID), the ICSID Additional Facility Rules or the United Nations Commission on International Trade Law Rules (UNCITRAL). Importantly, and contrary to some state-to-state dispute settlement mechanisms, a Chapter Eleven investor-state tribunal may only award monetary damages, costs and interest directly related to a breach of an obligation. A tribunal cannot order a Party to modify or remove its existing legislation, and it cannot award punitive damages.

The first step in the Chapter Eleven dispute settlement process is the serving of a Notice of Intent to Submit a Claim to Arbitration. The investor must serve a Notice of Intent at least 90 days before the claim is to be submitted. A claim may be made after six months but no more than three years have elapsed from the date on which the investor first knew, or should have known, of the alleged breach and the loss of or damage to its investment. Consultations are typically held between the investor and the NAFTA Party in question after the Notice of Intent is filed. Investor-state arbitrations are heard by tribunals of three adjudicators. One arbitrator is named by each party to the dispute and the third by mutual agreement or, failing agreement, by the World Bank International Centre for Settlement of Investment Disputes (ICSID).

The NAFTA Commission, composed of the three NAFTA Cabinet members responsible for international trade, issued a Note of Interpretation on July 31, 2001, which confirmed that in the course of dispute settlement, Parties may share all relevant documents with officials of their sub-national governments and, subject to the protection of confidential information, these documents are to be made publicly available. All NAFTA Parties have also issued Joint Statements that, subject to the protection of confidential information, all hearings should be open to the public, and the three NAFTA Parties have released a trilateral statement supporting written submissions of interested third parties (i.e. amicus) in the Chapter Eleven dispute settlement proceedings. Canada's model for Foreign Investment Protection Agreements reflects these clarifications and incorporates the results of our growing experience with the implementation and operation of the investment chapter of NAFTA.

The federal government is the respondent in a Chapter Eleven case, but sub-national governments would be consulted closely on any claim relevant to their measures, responsibilities or activities.

E. Chapter Twelve: Cross-Border Trade in Services

Chapter Twelve establishes rules and obligations aimed at facilitating the cross-border provision of services among the NAFTA Parties. Cross-border services trade is defined as the provision of a service:

- from the territory of a Party into the territory of another Party;
- in the territory of a Party by a person of that Party to a person of another Party; or

- by a national of a Party in the territory of another Party.

Chapter Twelve does not apply to the provision of a service in the territory of a Party by an investment, which is covered in Chapter Eleven, and to financial services, which are covered under Chapter Fourteen. The Chapter also excludes air services, procurement of services and domestic subsidies and grants provided to services and service providers. In addition, NAFTA Parties were permitted to maintain domestic regulatory measures that did not conform to the obligations of Chapter Twelve. These include most-favoured-nation (MFN), national treatment and local presence. The reservations taken by the NAFTA Parties can be limited to a specific sector or can be of horizontal application. The reservations that each Party has maintained are detailed in the annexes to the agreement. Canada, for example, has taken reservations with respect to certain social services (i.e. health and public education) and for minority and Aboriginal affairs. All Parties have provided a listing of non-conforming measures at the federal level. Existing sub-national non-conforming measures (at the state, provincial/territorial and local levels of government) were all grandfathered at the entry into force of the agreement and remain as reservations unless they are liberalized in the future.

Unless a reservation applies, Chapter Twelve requires Parties to provide 1) national treatment, which means that each Party must treat service providers from the other Parties no less favourably than it treats, in like circumstances, its own service providers; and 2) most-favoured-nation treatment, which means that each Party must treat service providers from other Parties no less favourably than it treats, in like circumstances, service providers from non-NAFTA countries. Once again, subject to any reservations that might apply, Chapter Twelve also prohibits Parties from requiring service providers to establish a local presence as a prerequisite to supplying a cross-border service. The Chapter does not impose any obligations with respect to non-discriminatory quantitative regulatory measures such as limitations on the hiring of the total number of service providers in a given sector or any limitations in numerical forms, which may limit participation in a service activity. The Chapter does require, however, that quantitative restrictions existing at the federal or provincial level be notified and scheduled in the appropriate annex so that service providers can be made aware of them. This does not apply to any restrictions that are applied at the local/municipal level.

The reservations listed under Annex I of Chapter Twelve are subject to a ratchet mechanism that guarantees the integration of future autonomous liberalization without the need to revisit or amend the text of agreement. Decisions to liberalize are entirely up to a Party; however, once a Party eliminates or reduces the level of non-conformity of a regulatory measure, the new level of treatment becomes the guaranteed minimum. The ratchet mechanism, however, does not apply to reservations taken under Annex II.

Annex II reservations set out the sectors or activities where both future and existing non-conforming measures may be adopted or maintained in the face of these same obligations. The possibility of adopting future non-conforming measures guarantees “policy flexibility” in certain key areas.

Other key provisions of Chapter Twelve deal with the liberalization of remaining residency and citizenship requirements for service providers, as well as providing guidelines and work plans in respect to licensing and certification requirements for professionals.

F. Chapter Fifteen: Competition Policy, Monopolies and State Enterprises

NAFTA Chapter Fifteen provides the NAFTA Parties' commitments with respect to the governance of monopolies and state enterprises. With respect to monopolies, the obligations apply to a privately owned monopoly only if a government has designated it as the sole provider or purchaser of a good or service. Where the government itself is the designated monopoly, Chapter Fifteen's obligations apply where that monopoly is owned or controlled through ownership interests, by the federal government or another such monopoly (i.e. the obligations do not apply to provincial or municipal governments). The Chapter's obligations do not apply to a government's procurement of a good or service provided such procurement is not made with a view to commercial resale or with a view to use in the production for commercial sale.

The state enterprises obligations apply to a federal Crown corporation, a Crown corporation within the meaning of any comparable provincial law or an equivalent entity that is incorporated under other applicable provincial law.

Bilateral/Regional Free Trade Agreements

In addition to the WTO and NAFTA, Canada has FTAs in force with Israel (1997), Chile (1997), Costa Rica (2002), the European Free Trade Association (2009), Peru (2009), Colombia (2011), Jordan (2012), Panama (2013), Honduras (2014) and Korea (2015). These agreements supplement WTO agreements, which also apply to Canada's trade relations with these countries and go further in some areas than was possible on a multilateral basis. For more information on Canada's bilateral/regional free trade agreements and ongoing negotiations, please visit the Trade Negotiations and Agreements website.

Foreign Investment Promotion and Protection Agreements (FIPAs)

Since 1991, Canada has entered into 24 bilateral Foreign Investment Promotion and Protection Agreements (FIPAs) and is in the process of concluding and negotiating more. These FIPAs are similar to Chapter Eleven of NAFTA, containing disciplines that help to open investment markets and make them more secure. The FIPAs focus on emerging economies and economies in transition, which are increasingly important destinations for Canadian investors. Developing countries need the capital that investment brings, and they also want to ensure predictable investment flows. For investors, FIPAs thus provide a necessary signal of stability.

As in NAFTA, the FIPA obligations require three standards of treatment for investments and investors: minimum standard of treatment, national treatment and most-favoured-nation (MFN) treatment. The minimum standard of treatment ensures investors receive fair and equitable treatment and full protection and security, in accordance with the principles of customary international law. National treatment requires a Party to a FIPA to treat an investor and an investment from the other Party no less favourably than it treats, in like circumstances, its own investors. MFN treatment means that a Party must give the investors and investments of the other

Party treatment no less favourable than the treatment given, in like circumstances, to investors of any third country. Other obligations include rules governing expropriation and capital transfers.

The dispute settlement provisions in FIPAs are similar to those contained in NAFTA Chapter Eleven, including with respect to procedures for investor-state disputes. The FIPAs also contain a range of exceptions, including a national treatment exception for non-conforming measures; and a national treatment and MFN exception for government procurement, subsidies, and certain development assistance and special programmes.

In 2004, Canada updated its FIPA model to reflect and incorporate the results of its growing experience with the implementation and operation of the investment chapter of NAFTA. This new model is not a departure or change from Canada's international investment policy approach; it simply clarifies and formalizes Canada's existing position on some key substantive and procedural provisions. Of particular interest will be the jurisdictional clarifications for the national treatment and MFN Articles, which ensure that only investments of investors within the relevant territorial limits (federal, provincial or municipal) could be compared for the purposes of determining whether there has been discrimination.

An Annex on expropriation has been introduced to clarify Canada's position that an indirect expropriation could occur only if a measure resulted in substantial deprivation of the use and enjoyment of an investment. Moreover, except in rare circumstances, non-discriminatory measures designed and applied to protect legitimate public welfare purposes, such as health, safety and the environment, would not be considered indirect expropriation and, therefore, would not be subject to compensation.

The new model also formalizes Canada's policy to maximize openness and transparency in the dispute settlement process through a provision which provides, subject to the protection of confidential information, public access to hearings and public availability to all documents submitted to, or issued by, a Tribunal and a provision that provides for submissions by a non-disputing party (i.e. amicus). In addition, the new model introduces criteria to be used in the selection of Tribunal members and provides signatory Parties with the authority to interpret or clarify the Agreement as appropriate, without the requirement of recourse to formal amendment procedures.

For information on each of the FIPAs in force and under negotiation, please visit the Trade Negotiations and Agreements website.

Negotiating Canada's Trade Agreements: Process and Consultations

Negotiating Process

Canada enters into trade agreement negotiations for a wide range of reasons, such as to open foreign markets to Canadian goods, services and investment; to ensure that access to those markets is predictable and secure; to strengthen economic and political ties with other countries; to expand the scope of existing agreements in order to further liberalize trade and investment opportunities; and to strengthen economic and political ties with other countries. Negotiations can be conducted on a number of fronts at the same time, including bilateral and multilateral

agreements. Although the specific focus and objectives in any given negotiation may vary, there is always one overriding purpose: to pursue the Canadian interest. The expansion of trade is vital to Canada's economic growth and prosperity.

The negotiating process begins with the identification of Canadian interests and the definition of the more specific objectives that will allow these objectives to be pursued. These more specific objectives may be established by subject area or sector by sector, and they form the basis for the Canadian negotiating mandate, which must be approved by Cabinet. For a detailed description of the general steps to negotiate, implement and manage trade agreements, see Annex E.

During the course of negotiations, Canadian positions, like those of all participants, evolve in response to the positions and proposals of others. In particular, all participants need to decide if and to what extent they are prepared to respond to the demands being made by others and what they will seek in return. Various negotiating mechanisms may be used in different negotiations or even in different phases of any one negotiation. Regardless of the mechanism, the negotiating process is always aimed at finding a balance between the benefits participants are seeking and the concessions they are willing to make in return in order to reach an agreement of mutual benefit.

Consultation Process

It is critical for stakeholders, including Canadian municipalities, to ensure that their particular views are conveyed to the Government of Canada. This is important throughout all phases ofthe negotiating process, i.e. providing information and advice in the early stages when Canada's negotiating objectives and mandate are being developed; providing further information and advice as negotiations unfold and the Canadian position evolves; and conveying final positions as the negotiations move into the concluding phase.

In order to make their views known, stakeholders need to be informed about the negotiating process from its earliest stages. As well, stakeholders need to be aware of when and how they can make their views known.

There are well-established channels of communication and consultation that respond to each of these requirements. The Government has established various permanent and ad hoc mechanisms, including citizen-outreach processes, to ensure that the views, priorities and interests of citizens, other levels of government, industry, non-governmental organizations and public interest groups are taken into account.

Global Affairs Canada manages a wide range of consultation mechanisms to engage the business community, public interest and citizen-based organizations, academic institutions, and Canadians in general. In addition, the Department benefits from a number of tools, including the Consultations page on the Trade Negotiations and Agreements, the *Canada Gazette*, and participation in numerous industry and public events. The Department is committed to ensuring that all consultations are listed on our website, with an opportunity for Canadians to express their views. Additionally, the Department maintains dedicated email boxes for some consultations. Stakeholder input is always welcomed by the Department.

The Government engaged and updated municipalities on various trade negotiations via its partnership with the Federation of Canadian Municipalities (FCM). The Joint Working Group on International Trade, established in 2001 between the FCM and then Global Affairs Canada, provides a direct channel of communication on trade issues implicating municipalities. It serves as an effective two-way consultation mechanism fostering mutual understanding on issues of common interest.

The Joint Working Group provides an opportunity to inform municipalities about Canada's ongoing international trade negotiations and ensures that their views on trade matters are taken into account in developing trade policy positions.

Canada also has a long-standing practice for federal-provincial-territorial consultations on international trade policy and negotiations. Government officials gather on a quarterly basis, or more frequently as required, at meetings of the Federal/Provincial/Territorial Committee on Trade (known as C-Trade) to review the trade agenda overall and to consult on the formulation of Canada's position and strategies in trade negotiations. This open and collaborative approach promotes information sharing and open dialogue to ensure that Canadian positions are informed by provincial and territorial views in areas such as trade in goods, services, investment, government procurement and intellectual property. Global Affairs Canada closely consults provincial and territorial governments on negotiations in areas falling under their jurisdiction. Additionally, federal-provincial-territorial ministers, deputy ministers and senior officials also meet regularly to discuss Canada's pro-trade plan, priorities and strategies.

The Government also consults parliamentarians when developing Canada's trade and negotiating agenda. By encouraging public awareness and understanding of international trade, as well as citizen participation in public consultations, parliamentarians are critical to the development of trade policies that reflect the interests of all Canadians. The work of parliamentary committees serves as the key instrument for parliamentarians to contribute to the development and refinement of Canada's trade strategy.

Consultation at all these levels is essential to preparations for and Canada's participation in trade negotiations. There will be stages in any negotiation when it will not be possible to provide detailed reports, particularly if other countries have not made their positions or proposals public. Within these constraints, however, the Government remains committed to an open and collaborative approach to international trade negotiations. Notwithstanding these constraints, Canada has been a leading advocate for openness and transparency in trade negotiations as well as in trade disputes. The Government actively makes information on the progress of negotiations available.

Annex B
Overview of NAFTA Chapter 11 Substantive Provisions

- Article 1101 – Scope and Coverage
- Article 1102 – National Treatment
- Article 1103 – Most-Favoured-Nation Treatment

- Article 1104 – Standard of Treatment
- Article 1105 – Minimum Standard Treatment
- Article 1106 – Performance Requirements
- Article 1107 – Senior Management and Board of Directors
- Article 1108 – Reservations and Exceptions
- Article 1109 – Transfers
- Article 1110 – Expropriation and Compensation
- Article 1111 – Special Formalities and Information Requirements
- Article 1112 – Relation to Other Chapters
- Article 1113 – Denial of Benefits
- Article 1114 – Environmental Measures
- NAFTA Chapter 11's coverage of Chapter 15 (Competition Policy, Monopolies and State Enterprises)

Article 1101 – Scope and Coverage

Article 1101 states that Section A covers measures by a Party (i.e. any level of government in Canada) that relate to:

- investors of another Party (i.e. a Mexican or U.S. enterprise or individual Mexican or U.S. investor);
- investments of investors of another Party (e.g. the subsidiary enterprise or certain assets located in Canada); and
- for the purposes of the provisions on performance requirements and environmental measures, all investments in the territory of the Party (i.e. NAFTA and non-NAFTA investments located in Canada).

The section does not apply to any measure to the extent that it is covered by Chapter Fourteen relating to financial services. Article 1101 also affirms the right of a Party to perform functions such as law enforcement and to provide services such as social welfare and health and child care.

NAFTA Text

An "investor of another Party" can be a NAFTA government, a state enterprise, an individual (either a citizen or permanent resident of a NAFTA Party), a corporation or other juridical entity organized under the laws of a NAFTA Party.

In Article 1139, there is a detailed list of what constitutes an "investment" of an investor, which includes an enterprise (such as a corporation, trust, partnership, sole proprietorship, joint venture or other association); equity securities; certain debt securities; and real estate and tangible and intangible property used for business purposes.

An investor of a Party is an investor who seeks to make, is making or has made an investment. For example, an investor can be a Mexican or U.S. company that has a subsidiary in a Canadian municipality or that is making expenditures towards establishing such an enterprise. An investment may also be direct, when a Mexican or U.S. investor owns an enterprise (the

investment) in a Canadian municipality, or indirect, when this Canadian-based enterprise makes a further investment in Canada, such as the purchase of business property or the establishment of a subsidiary.

Certain economic activities, however, are not deemed investments and therefore do not receive any benefits or protection under NAFTA Chapter 11. In particular, any claim for money by an enterprise located in the territory of another NAFTA party, resulting solely from commercial contracts for the sale of goods or services, is not an investment.

Article 1102 – National Treatment

Article 1102 sets out the basic obligations of national treatment for investors and their investments with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of an investment. The national treatment provision requires Canada to treat U.S. and Mexican investors and their investments no less favourably than it treats Canadian investors and their investments in like circumstances. It prohibits treatment which discriminates on the basis of the nationality of the investment or the investor.

The phrase "in like circumstances" establishes the basis for comparison between domestic and NAFTA investors and investments. In determining the existence of "like circumstances," it is not merely a matter of determining whether investors operate in the same business sector, since Article 1102 expressly addresses the question of whether treatment was accorded "in like circumstances." While a determination that investors or investments compete for the same business, or are otherwise similar, may be one of several relevant factors in determining whether the treatment accorded by a NAFTA Party was "in like circumstances," the Article itself makes it clear that it is not the sole or determining factor.

National treatment by state, provincial and local governments is defined in NAFTA and in Canada's Statement of Implementation as treatment no less favourable provided by that government to any investor or investment. For example, the measures or treatment provided by one municipal government are not to be compared to the measures or treatment provided by another municipal government. It is also important to clarify that Chapter 11's national treatment provision does not require a Party to enter into a relationship with a U.S. or Mexican company simply on the basis that it entered into one with a Canadian company. National treatment simply addresses whether a company was treated in a less favourable manner based on its nationality.

Chapter 11's Article 1108 and NAFTA's Annex II on "Reservations for Future Measures" contain a number of exceptions for the application of Article 1102, such as the provision of subsidies or grants, government procurement activities and measures related to Aboriginal affairs, minority affairs or social services such as health, child care and social welfare.

Tribunal decisions and positions put forward by NAFTA Parties on national treatment can be found on the Chapter 11 section of Canada's Trade Negotiations and Agreements website.

NAFTA Text

Article 1103 – Most-Favoured-Nation Treatment

Article 1103 requires that a Party not treat an investor or investment from a NAFTA country less favourably than it treats, in like circumstances, an investor or investment from a non-NAFTA country (i.e. Canada must treat U.S. and Mexican investors and investments as favourably as it treats, in like circumstances, European or Japanese investors and investments). Article 1103 does not require a Party to enter into a relationship with a U.S. or Mexican company simply on the basis that it entered into one with a company of a non-NAFTA Party. What the Article does require is that a U.S. or Mexican company not be treated less favourably based on its nationality.

As with the national treatment article (1102), treatment accorded "in like circumstances" establishes the basis for comparison between investors and investments. In determining the existence of "like circumstances," it is not merely a matter of determining whether investors operate in the same business sector, since Article 1103 expressly addresses the question of whether treatment was accorded "in like circumstances." While a determination that investors or investments compete for the same business, or are otherwise similar, may be one of several relevant factors in determining whether the treatment accorded by a NAFTA Party was "in like circumstances," the article itself makes it clear that it is not the sole or determining factor.

Chapter 11's Article 1108 and NAFTA's Annex II on "Reservations for Future Measures" contain a number of exceptions for the application of Article 1103, such as the provision of subsidies or grants, government procurement activities and measures related to Aboriginal affairs.

NAFTA Text

Article 1104 – Standard of Treatment

Article 1104 requires that each Party accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103 (national treatment and most-favoured-nation treatment).

NAFTA Text

Article 1105 – Minimum Standard of Treatment

Article 1105, which provides for treatment in accordance with international law, is intended to assure a minimum standard of treatment of investments of NAFTA investors. National and most-favoured-nation treatments provide a relative standard of treatment, while this article provides for a minimum absolute standard of treatment, based on long-standing principles of customary international law.

This article requires the provision of fair and equitable treatment within the meaning of customary international law and provides a "floor" below which the treatment of an investor or its investment cannot fall.

Article 1105 was clarified in the Notes of Interpretation of Certain Chapter 11 Provisions released on July 31, 2001, by the NAFTA Free Trade Commission. These Notes clarified that Article 1105 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be accorded to foreign investors under NAFTA. They also clarified that a determination that there has been a breach of another provision of NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105.

NAFTA Text

Article 1106 – Performance Requirements

Unless subject to a NAFTA exception, Article 1106 prohibits the imposition and enforcement of a number of specified requirements, in connection with the "establishment, acquisition, expansion, management, conduct or operation" of investments, such as requiring a certain level of domestic content in its production or certain export requirements. It also prohibits prescribed requirements, such as a requirement to accord preferences for domestic sourcing of goods or restricting domestic sales by tying such sales to export performance, as conditions attached to the receipt or continued receipt of advantages (i.e. subsidies or incentives). It is important to note that these prohibitions do not apply to subsidies that are conditioned on requirements to locate production, provide a service, train or employ workers, construct or expand facilities, or perform research and development. Nor does Article 1106 restrict the use of certain measures (such as environmental measures) which require domestic content or a preference for domestic goods or services, provided that such measures are not arbitrary and do not constitute a disguised restriction on international trade or investment. Permitted measures include those necessary to protect human, animal or plant life or health.

Chapter 11's Article 1108 and NAFTA's Annex II on "Reservations for Future Measures" contain a number of exceptions for the application of Article 1106, such as government procurement activities and measures related to Aboriginal affairs or minority affairs.

NAFTA Text

Article 1107 – Senior Management and Board of Directors

Parties are prohibited from imposing a nationality requirement on senior personnel employed by investments of NAFTA investors under Article 1107. This provision permits NAFTA investors to employ personnel of their choosing, subject to the immigration laws of the host country.

The article also affirms that Parties may impose a requirement that a majority of the board of directors of a company be nationals or residents provided, however, that this requirement would not materially impair the ability of the investor to exercise control over its investment.

Chapter 11's Article 1108 and NAFTA's Annex II on "Reservations for Future Measures" contain a number of exceptions for the application of Article 1107, such as the provision of

subsidies or grants, government procurement activities and measures related to Aboriginal affairs, minority affairs or social services such as health, child care and social welfare.

NAFTA Text

Article 1108 – Reservations and Exceptions

Article 1108 specifies exceptions to Articles 1102 (National Treatment), 1103 (Most-Favoured-Nation Treatment), 1106 (Performance Requirements) and 1107 (Senior Management and Boards of Directors). For instance, Article 1108 specifies that these articles do not apply to local governments or to government procurement. Nor do Articles 1102, 1103 and 1107 apply to subsidies or grants. NAFTA does not explicitly define the term "subsidy." The WTO Agreement on Subsidies and Countervailing Measures Article 1.1 and GATT Article III:8(b), however, essentially describe a subsidy as a specific contribution by government that provides a benefit to the recipient.

Article 1108 also explains Annexes I to IV to Chapter 11. Annex I provides an exception for all existing non-conforming measures, including those at the sub-national level, that do not meet the obligations of Articles 1102 (National Treatment), 1103 (Most-Favoured-Nation Treatment), 1106 (Performance Requirements) and 1107 (Senior Management and Boards of Directors) (as these provisions do not apply to local governments, municipal measures are not listed in Annex I). Amendments to such regulations after NAFTA came into effect would also be exempt as long as the amendments did not increase the extent to which a regulation departed from those obligations.

Annex II provides exceptions from these same articles when the government is establishing a new measure related to a reserved area such as Aboriginal affairs, minority affairs and social services such as health, social welfare, public education and child care.

NAFTA Text

Article 1109 – Transfers

Under Article 1109, each Party is required to permit the transfer of funds related to investments (such as profits, loan payments and liquidations), to be made freely and without delay. The Article also prohibits forced repatriation of funds (i.e. by the home government). Certain exceptions are permitted to enforce laws of general application related to, for example, bankruptcy and trading in securities. (A limited exception for balance-of-payments difficulties is set out in Article 2104).

NAFTA Text

Article 1110 – Expropriation and Compensation

Article 1110 provides that no Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to

nationalization or expropriation of such an investment except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1) (Minimum Standard of Treatment); and (d) on payment of compensation.

- For a public purpose: Customary international law recognizes that a government has the right to take property for a public purpose. While the final determination of whether an expropriation was for a public purpose or not is very fact-specific, some fairly standard examples would be the expropriation of land to widen a road or the expropriation of mineral rights to create parkland. It would be more difficult to justify, on the other hand, the public purpose basis of an expropriation which was undertaken purely to enrich private interests.
- On a non-discriminatory basis: Expropriation must not single out investments in like circumstances on the basis of nationality of the investor or some other arbitrary criterion.
- In accordance with due process of law and Article 1105(1): Essentially protects investors from denial of judicial due process that falls under the standards of customary international law. The expropriation must also be in accordance with principles of Article 1105(1), which require the provision of fair and equitable treatment within the meaning of customary international law.
- On payment of compensation: Compensation must be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place. Valuation criteria include going concern value; asset value, including declared tax value of tangible property; and other criteria, as appropriate, to determine fair market value.

While protection against direct or indirect expropriation without compensation at fair market value is a common feature of investment agreements and concepts well known in international law, there is limited Canadian domestic jurisprudence on expropriation which does not involve a taking of real property. In this regard, it is important to be familiar with the concept of expropriation under international law.

In defining the term "expropriation," NAFTA Chapter 11 Tribunals have held that expropriation requires a substantial deprivation of an investor's property by the state. They have also held that the phrase "measure tantamount to nationalization or expropriation" does not broaden the ordinary concept of expropriation under international law to require compensation for measures affecting property interests without regard to the magnitude or severity of that effect.

NAFTA Chapter 11 Tribunal Decisions on Expropriation

NAFTA Article 1136 stipulates that awards made by a NAFTA Tribunal shall have no binding force except between the disputing parties and in respect of the particular case. In other words, the common-law doctrine of precedent does not apply to the decisions of NAFTA tribunals. However, these decisions are still useful, to illustrate how the obligation has been interpreted in specific fact situations. Accordingly, the following is a summary of NAFTA Chapter 11 decisions that address the issue of expropriation:

In ARCHIVED - Pope & Talbot v. The Government of Canada, the tribunal held that expropriation requires a "substantial deprivation" of the property. In other words, the

interference must be sufficiently restrictive to support a conclusion that the property has been "taken" from the owner so that the owner has become unable to use, enjoy or dispose of it.

In ARCHIVED - S.D. Myers v. The Government of Canada, the tribunal found that an expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights.

The Metalclad v. United Mexican States decision on expropriation is of particular interest to municipalities. The claim brought by Metalclad Inc., a publicly held U.S. company, alleged that Mexico's failure to grant it a municipal licence to operate its hazardous waste treatment facility and landfill site and the decree declaring the area where the facility and site were located an ecological zone, amounted to an expropriation without compensation, contrary to NAFTA Article 1110.

The Metalclad tribunal found that the creation of an ecological zone, after Metalclad had been led to believe that it had all necessary authorizations and had invested a substantial amount in its operation (the plant was ready to open), was tantamount to expropriation. While the tribunal held that it need not consider the motivation or intent of the adoption of the measure, it made its finding on the basis that the measure was sufficiently restrictive that the owner would not be able to use, enjoy or dispose of the property.

Waste Management v. the United Mexican States involved a municipal measure regarding a concession agreement between a U.S. company and the City of Acapulco for the provision of waste management services. Of particular interest to municipalities is the Tribunal's statements that Chapter 11 is not the forum for the resolution of contractual disputes, nor is it meant to eliminate normal commercial risks. Further, the simple loss of benefits or expectations alone does not constitute an expropriation. This is consistent with a much earlier Chapter 11 ruling, Azinian v. the United Mexican States.

Canada updated its FIPA model to reflect, and incorporate the results of, its growing experience with the implementation and operation of the investment chapter of NAFTA. This new model is not a departure or change from Canada's international investment policy approach; it simply clarifies and formalizes Canada's existing position on some key substantive and procedural provisions. In this regard, Canada has added an annex on expropriation which clarifies that an indirect expropriation can occur only if a measure results in a substantial deprivation of the use and enjoyment of an investment. Moreover, except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, the non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives—such as health, safety and the environment—do not constitute indirect expropriation.

NAFTA Text

Article 1111 – Special Formalities and Information Requirements

Article 1111 permits special formalities such as incorporation requirements, provided that these do not materially impair the protections under the Chapter. In addition, a Party may require investors of the other Parties to provide routine information about their investments to be used for statistical purposes.

NAFTA Text

Article 1112 – Relation to Other Chapters

In the case of any inconsistency between the Investment Chapter and other chapters in NAFTA, Article 1112 provides that the latter shall prevail to the extent of the inconsistency.

NAFTA Text

Article 1113 – Denial of Benefits

Under Article 1113, a Party may deny the benefits of Chapter 11, where investors of a non-Party control the investment and the denying Party does not maintain diplomatic relations with the non-Party, or the denying Party has prohibited transactions with enterprises of the non-Party which could be circumvented if NAFTA applied. A Party may also deny benefits in the case of "sham" investments (i.e. where there are no substantial business activities in a NAFTA country).

NAFTA Text

Article 1114 – Environmental Measures

The first paragraph of Article 1114 affirms each Party's right to adopt and enforce environmental measures that are consistent with the chapter (e.g. environmental measures must be applied on a non-discriminatory basis). The second paragraph requires that the Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures, and that Parties should not waive or derogate from such environmental measures to attract investment. If one Party considers that another has done so, it may request consultations.

NAFTA Text

NAFTA Chapter 15 Obligations (Competition Policy, Monopolies and State Enterprises) and Chapter 11

Article 1116 (Claim by an Investor of a Party on Its Own Behalf) and Article 1117 (Claim by an Investor of a Party on Behalf of an Enterprise) provide for the investor-state dispute settlement mechanism set out in Chapter 11 (Investment) to be invoked by an investor if a claim can be made that another Party has breached the obligations of Article 1502(3)(a) or Article 1503(2). All other Chapter 15 provisions are only subject to state-to-state consultation or dispute settlement as set out in Chapter 20 of NAFTA (Institutional Arrangements and Dispute Settlement Procedures).

Article 1502(3)(a): Monopolies

Article 1502(3)(a) applies to privately owned and government monopolies. However, as NAFTA defines a government monopoly as "a monopoly that is owned, or controlled through ownership interests, by the federal government of a Party or by another such monopoly," Article 1502(3)(a) **does not apply to monopolies owned or controlled by municipal or provincial governments**.

Article 1503(2): State Enterprises

Article 1503(2) requires Parties to ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapter Eleven (Investment), wherever such an enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it. While there is no definition of governmental authority, the text provides an illustrative list of this authority to include the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.

A state enterprise as defined for 1503(2) is "an enterprise owned, or controlled through ownership interests, by a Party."

Annex C
Glossary of Terms

ASCM: The Agreement on Subsidies and Countervailing Measures. The WTO agreement establishing rules governing the use of subsidies and countervailing measures, i.e. duties to offset material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry they may cause.

Built-in Agenda: Refers to a set of activities to be undertaken in the WTO at different times in the future, including reviews and further negotiations, which are already inscribed in the various agreements annexed to the WTO Agreement, plus a series of activities that originate in ministerial decisions or declarations adopted along with the Final Act of the Uruguay Round at the Marrakesh Ministerial Meeting in April 1994.

CETA: Canada-European Union (EU) Comprehensive Economic and Trade Agreement (CETA).

Commercial goods or services: means goods or services of a type generally sold or offered for sale in the commercial marketplace to, and customarily purchased by, non-governmental buyers for non-governmental purposes.

Construction service: means a service that has as its objective the realisation by whatever means of civil or building works, based on Division 51 of the United Nations Provisional Central Product Classification (CPC).

Electronic auction: means an iterative process that involves the use of electronic means for the presentation by suppliers of either new prices, or new values for quantifiable non-price elements of the tender related to the evaluation criteria, or both, resulting in a ranking or re-ranking of tenders.

In writing or written: means any worded or numbered expression that can be read, reproduced and later communicated. It may include electronically transmitted and stored information.

Limited tendering: means a procurement method whereby the procuring entity contacts a supplier or suppliers of its choice.

Measure means: any law, regulation, procedure, administrative guidance or practice, or any action of a procuring entity relating to a covered procurement.

Multi-use list: means a list of suppliers that a procuring entity has determined satisfy the conditions for participation in that list, and that the procuring entity intends to use more than once.

Notice of intended procurement: means a notice published by a procuring entity inviting interested suppliers to submit a request for participation, a tender, or both.

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.

Open tendering: means a procurement method whereby all interested suppliers may submit a tender.

Person: means "person" as defined in Article 1.1 (Definitions of general application).

Procuring entity: means an entity covered under Annexes 19-1, 19-2 or 19-3 of a Party's Market Access Schedule for CETA GP Chapter.

Qualified supplier: means a supplier that a procuring entity recognises as having satisfied the conditions for participation.

Selective tendering: means a procurement method whereby only qualified suppliers are invited by the procuring entity to submit a tender.

Services: includes construction services, unless otherwise specified.

Standard: means a document approved by a recognised body that provides for common and repeated use, rules, guidelines or characteristics for goods or services, or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a good, service, process or production method.

Supplier: means a person or group of persons that provides or could provide goods or services; and

Technical specification: means a tendering requirement that:

1. lays down the characteristics of a good or a service to be procured, including quality, performance, safety and dimensions, or the processes and methods for their production or provision; or
2. addresses terminology, symbols, packaging, marking or labelling requirements, as they apply to a good or a service.

Conformity Assessment Procedures: A procedure used to verify that a product meets relevant requirements set out in technical regulations or standards.

Countervailing Duties (CVD): Additional duties imposed by the importing country to offset Government subsidies in the exporting country, when the subsidized imports cause material injury to domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry in the importing country.

Dispute Settlement: Provisions in a trade agreement that provide the means for settling disagreements arising from the application of provisions of the agreement.

Doha Round: The name of the round of WTO trade negotiations launched in 2001. Ministers from WTO member countries met in Doha, Qatar, in November 2001 to launch the negotiations in which the needs and concerns of developing countries would be a priority.

DSU: The Understanding on Rules and Procedures Governing the Settlement of Disputes: the agreement establishing the WTO dispute settlement system.

Expropriation: The direct or indirect taking of private property interests by a foreign Government without compensation at fair market value.

FIPA: Foreign Investment Promotion and Protection Agreement. Canada has entered into 24 such bilateral agreements to open foreign investment markets and protect the interests of Canadian investors in those markets.

Foreign Direct Investment (FDI): The funds committed to a foreign enterprise. The investor may gain partial or total control of the enterprise.

FTA: Free Trade Agreement: an arrangement that establishes enhanced market access and flow of goods and services between trading partners. Unlike a common market, FTAs do not address labour mobility across borders, uniform standards, or other common policies such as taxes.

GATS: General Agreement on Trade in Services, which entered into force in January 1995. It is the first multilateral agreement covering international trade in services.

GATT: General Agreement on Tariffs and Trade. The original Agreement came into force in January 1948 and is now part of the GATT 1994.

GDP: Gross Domestic Product: the total value of goods and services produced by a country.

GPA: The Agreement on Government Procurement: the WTO agreement establishing rules for government procurement. The GPA is a plurilateral agreement, i.e. not all WTO member countries are signatories.

ICSID: The International Centre for Settlement of Investment Disputes is an institution linked to the World Bank that provides facilities for the arbitration of investment disputes between member countries and investors of other member countries. It is one of the arbitration facilities that can be used in investor-state dispute settlement cases under NAFTA Chapter 11.

Intellectual Property (IP): A collective term used to refer to inventions, designs and creative works protected by rights such as patents, trademarks, industrial designs, geographical indications and copyrights.

ITA: Information Technology Agreement. A WTO-based agreement endorsed by several Members that calls for the gradual elimination of most-favoured-nation tariffs on many information technology and telecommunication products.

ITO: The International Trade Organization. Following the Second World War, negotiations began toward an ITO to function alongside the World Bank and the International Monetary Fund. The ITO was never ratified.

Liberalization: Reductions in tariff and other measures that restrict trade, unilaterally, bilaterally or multilaterally.

MFN (Most-favoured-nation Treatment): The principle of not discriminating between or among one's trading partners.

NAFTA: North American Free Trade Agreement, involving Canada, the United States and Mexico. NAFTA entered into force on January 1, 1994.

National Treatment: The principle of giving others no less favourable treatment than that afforded to one's own nationals.

Non-Tariff Barriers (Measures) – (NTB): Government measures or policies other than tariffs which restrict or distort international trade. Examples include import quotas, discriminatory government procurement practices, and measures to protect intellectual property. Such measures have become relatively more conspicuous impediments to trade, as tariffs have been reduced during the period since World War II.

Performance Requirements: Government-mandated trade-related activities that investors must undertake, such as export- or domestic-content-related requirements, usually as a condition of establishment or operation in a country.

Sanitary or Phytosanitary Measure: A measure applied to protect animal or plant life or health within a territory from risks such as pests, diseases, contaminants and toxins.

SPS Agreement: The Agreement on the Application of Sanitary and Phytosanitary Measures: a WTO agreement setting out Members' rights and obligations with respect to SPS measures.

Standard: A standard is a document approved by the recognized body that provides rules, guidelines or characteristics for products or related processes and production methods. A standard is voluntary. It may also deal exclusively with, inter alia, terminology or labelling requirements as they apply to a product, process or production method.

Subsidy: Defined by the WTO Agreement on Subsidies and Countervailing Measures as a financial contribution by a government or any public body, or any form of income or price support, that confers a benefit (i.e. advantage) and that is specific to an enterprise or industry or to a group of enterprises or industries that are found within the jurisdiction of the granting authority. Two types of subsidies are explicitly prohibited under the WTO Agreement: those that are contingent on exporting, and those that are contingent on the use of domestic over imported goods. Other types of subsidies are permitted but still may be the subject of trade action if they are found to cause adverse effects to trading partners. (i.e. material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation to the establishment of such an industry; nullification or impairment of benefits accruing to other Members under GATT 1994 or serious prejudice to the interests of another Member) . Examples of subsidies include direct case grants, low-interest loans, loan guarantees, support for research and development, and tax breaks.

Tariff: Customs duties on merchandise imports. Levied either on an ad valorem basis (percentage of value) or on a specific basis (e.g. $5 per 100 kg). Tariffs give price advantage to similar locally produced goods and raise revenues for the Government.

TBT Agreement: The Agreement on Technical Barriers to Trade: a WTO agreement setting Member's rights and obligations with respect to technical regulations, standards and conformity assessment procedures.

Technical Regulation: A technical regulation is a document that sets out a product's characteristics or its related processes and production methods. It is mandatory and enforced by the government. It may also deal exclusively with terminology or labelling requirements as they apply to a product, process or production method.

Trade Facilitation: A term used to refer to a streamlining of trade and customs procedures. Negotiations towards new rules in this regard are underway in the WTO.

Transparency: Visibility and clarity of laws and regulations.

TRIPS: The Agreement on Trade-Related Aspects of Intellectual Property Rights. Negotiated in the Uruguay Round, TRIPS is the WTO agreement addressing intellectual property rights.

UNCITRAL: The United Nations Commission on International Trade Law is a legal body in the UN system. It is one of the arbitration facilities that can be used in investor-state dispute settlement cases under NAFTA Chapter 11.

Uruguay Round: Multilateral trade negotiations launched in the context of the GATT at Punta del Este, Uruguay, in September 1986, and concluded in Geneva in December 1993. Resulting agreements signed by ministers in Marrakesh, Morocco, in April 1994.

WTO: World Trade Organization. The WTO was established on January 1, 1995, to replace the Secretariat of the General Agreement on Tariffs and Trade. It forms the cornerstone of the world trading system.

Annex D
List of Useful Contacts

For all questions related to international trade, including the impacts of Canada's international trade agreements on areas of municipal jurisdiction, municipal leaders should contact their respective provincial or territorial departments responsible for international trade, listed below. Please note that this list was compiled based on information received in summer 2017, Global Affairs Canada cannot guarantee its accuracy in the future.

Provincial/Territorial Departments Responsible for International Trade Policy

Alberta

Ministry of Economic Development and Trade
International Trade Policy, Trade and Investment Attraction Division
Government of Alberta
Edmonton, AB
Telephone: (780) 644-8554
Fax: (780) 644-8572
E-mail: EDT.MinisterOffice@gov.ab.ca
Website: Alberta Ministry of Economic Development and Trade

British Columbia

Trade Policy and Negotiations, International Strategy and Competitiveness Division
Ministry of Jobs, Trade and Technology
Government of British Columbia
Telephone: 778-698-8752
Fax: 250-952-0716

Website: http://www2.gov.bc.ca/gov/content/employment-business/international-investment-and-trade/trade-agreement-policy

Manitoba

Manitoba Growth, Enterprise and Trade
Policy, Planning and Coordination, Administration and Finance Division
Government of Manitoba
Winnipeg, MB
Telephone: 204-945-1995
Fax: 204-945-2964
E-mail: mgi@gov.mb.ca
Website: Manitoba Department of Entrepreneurship, Training and Trade

New Brunswick

Executive Council Office
Trade Policy Division
Government of New Brunswick
Fredericton, NB
Telephone: (506) 444-4417
Fax: (506) 453-2266
Email: Executivecounciloffice@gnb.ca
Website: New Brunswick Executive Council Office

Newfoundland and Labrador

Department of Business, Tourism, Culture and Rural Development
Trade Policy, International Business Development Division
Government of Newfoundland and Labrador
St. John's, NL
Telephone: (709) 729-7000
Fax: (709) 729-0654
E-mail: BTCRD@gov.nl.ca
Website: Newfoundland and Labrador Department of Business. Tourism, Culture and Rural Development

Northwest Territories

Department of Industry, Tourism and Investment
Investment and Economic Analysis Division
Government of Northwest Territories
Yellowknife, NT
Telephone: (867) 920-8696
Fax:

E-mail: info@ITI.ca
Website: Northwest Territories Department of Industry, Tourism and Investment

Nova Scotia

Department of Intergovernmental Affairs, Trade Policy Division
Government of Nova Scotia
Halifax, NS
Telephone: (902) 424-5153
Fax: 902-424-0728
E-mail: trade@novascotia.ca
Website: novascotia.ca/iga

Nunavut

Department of Executive and Intergovernmental Affairs
Intergovernmental Affairs Division
Government of Nunavut
Iqaluit, NU
Telephone: (867) 975-6000 or 1-877-212-6638 (toll-free)
Fax: (867) 975-6099
E-mail: info@gov.nu.ca
Website: Nunavut Department of Executive and Intergovernmental Affairs

Ontario

Ministry of International Trade
Trade Strategy, Analytics, and Partnerships Branch, International Trade Policy and Representation Division
Government of Ontario
Toronto, ON
Telephone: (416) 326-8475 or (866)-853-2137 (toll-free)
Fax: (416) 327-1061
E-mail: info@edt.gov.on.ca
Website: Ontario Ministry of International Trade

Prince Edward Island

Economic Development and Tourism
Economic Research and Trade Negotiations
Government of Prince Edward Island
Charlottetown, PE
Telephone: (902) 368-5540
Fax: (902) 894-0342
Email: tpswitch@gov.pe.ca
Website: Prince Edward Island Department of Economic Development and Tourism

Québec

Ministère de l'Économie, de la Science et de l'Innovation
Direction de la politique commerciale
Gouvernement du Québec
Québec, QC
Téléphone : (418) 691-5950 or (866) 680-1884 (sans frais)
Télécopieur : (418) 644-0118
Courriel :
Site Web : Ministère de l'Économie, de la Science et de l'Innovation du Québec

Saskatchewan

Executive Council and Office of the Premier
Trade Policy, Intergovernmental Affairs
Government of Saskatchewan
Regina, SK
Telephone: (306) 787-7448
Fax: (306) 787-7317
Email: inquiry@ec.gov.sk.ca
Website: Executive Council and Office of the Premier

Yukon

Department of Economic Development
Policy and Planning, Corporate Planning and Economic Policy Division
Government of Yukon
Whitehorse, YK
Telephone: (867) 393-7191
Fax: (867) 393-6412
E-mail: ecdev@gov.yk.ca
Website: Yukon Department of Economic Development

Annex E
General Steps in Preparing for Negotiating, Implementing and Managing Free Trade Agreements

Exploration and Consultation

Once the parties agree to explore the possibility of a free trade agreement, a process to gather information and consult stakeholders is launched. Domestically, it involves activities such as:

- Publication of notices in the *Canada Gazette* and other printed media (*CanadExport*, for example)
- Issuance of a Press Release

- Posting of a call for comments on the Departmental website

All input received is used to help produce a preliminary assessment. This is essentially a summary of the trade and investment relationship, and the identification of interests and concerns in key fields.

A series of preliminary talks are held among the parties to better define the potential scope of a potential agreement; to exchange information ranging on many subjects from tariffs to laws and regulations; to discuss principles and key provisions of a potential agreements, area by area; and to discuss and determine the level of commonality between the parties in terms of their positions vis-à-vis the above-mentioned principles and provisions. Such discussions are important for Canada, inter alia, establish expectations and gauge prospects for success in eventual negotiations. These meetings can also be helpful in establishing guidelines for the negotiations (e.g. language to be used, hosting of negotiating rounds, etc.). Alternatively, such guidelines may be established following the formal launch of negotiations.

All major trade policy initiatives are subject to the Government's Framework for Conducting Environmental Assessments of Trade Negotiations. The goal of this framework is to identify and evaluate the environmental impacts and benefits of Canada's trade initiatives.

Negotiations

If following the exploratory phase it is concluded that the initiative should be pursued, decisions regarding a formal launch of negotiations and a negotiating mandate are sought.

Negotiating groups are established for each of the issue areas of the negotiation. Negotiations are usually conducted in rounds hosted alternately by each party. A negotiating round usually lasts between three and five days. Records of the discussions are prepared, and a complete, consolidated text is assembled after each round to confirm what was agreed to in the round.

At the conclusion of formal negotiations, the draft text is typically initialed by chief negotiators. This is followed by a legal review of the negotiated text, as agreed to by chief negotiators. In this stage, the parties' treaty experts work together to review the text to verify that the language reflects the intention of the negotiators and respects the countries' obligations under other agreements. Translation of the text, as required, is also part of this stage.

Once the Agreement is final and translated, as required, authorization is obtained to sign the agreement.

Implementation

The process for adoption into Canadian law and ratification may begin immediately after the agreement has been signed, and consists of the following main steps:

- **Tabling Treaties in Parliament.** The Government's Policy on the Tabling of Treaties in Parliament requires that the Minister of Foreign Affairs table all instruments governed by

public international law between Canada and other states or international organizations, in the House of Commons following their signature or adoption. This occurs prior to Canada formally giving its consent to be bound by the instrument though ratification. These instruments, including trade agreements, are tabled in Parliament for 21 sitting days to allow Members of Parliament an opportunity to review and comment on them.

- **Development of Implementing Legislation and Regulations.** In order to develop the implementing legislation, it is necessary to identify every piece of legislation that needs to be amended in order to implement the FTA. The compilation of all these amendments is what will eventually constitute the FTA implementing act. The legal team also needs to draft or amend regulations as necessary to implement the agreement.
- **Administrative Actions.** Certain commitments in FTAs are achieved through administrative actions (i.e. no formal legislation or regulation is necessary). Examples of these actions are the establishment of the National Section of the Secretariat and the appointment of Free Trade Coordinators. Usually, the parties exchange letters through diplomatic channels, informing each other of the designation and/or appointment.
- **Implementing Actions.** Parliament is responsible for adopting the FTA implementing act. The process starts with a First Reading when the bill is introduced to the House, no debate takes place at this stage. The Second Reading is the first debatable stage of the legislative process; if the bill passes Second Reading, its scope and basic principles are fixed, and it is referred to the Committee for detailed examination. At this stage, witnesses are often invited to offer insight and opinions. The Committee also conducts a clause-by-clause examination of the bill. The Third Reading is the final consideration of the bill by the House before sending it to the Senate for a similar process of consideration. Once the bill is adopted in identical form by both Houses, it can receive Royal Assent. A similar process is followed in the provincial and territorial legislatures in cases where provincial and territorial laws or regulations need to be amended in order for Canada to meet its obligations under the FTA.
- **Royal Assent**. Royal Assent is the procedure by which the Governor General gives consent to the enactment of the bill. With this procedure, the bill becomes an Act of the Parliament.
- **Order in Council.** Once all necessary implementation measures are in place, including through the passage of any required implementing legislation, the Minister of Foreign Affairs requests an Order in Council allowing him to ratify the Agreement.
- **Entry into Force**. Canada can then formally ratify the Agreement. This is usually done by sending diplomatic notes to the other Parties to the Agreement, notifying them that Canada has completed its internal measures necessary for the Agreement to enter into force. Once all the Parties to the Agreement have ratified, it will enter into force according to its terms. For example, some of Canada's recent FTAs provide that they come into force 60 days after both countries have ratified the agreement.

Management

The following graph illustrates the institutional/administrative framework that most of Canada’s FTAs establish:

Text alternative

The Free Trade Commission, which is formed by Cabinet-level representatives or their designee from each partner, is the central "institution" of Canada's FTAs. The Commission oversees the implementation of the agreement and its further elaboration. It also resolves disputes and supervises the work of committees and working groups. Day-to-day management of the FTA work program and of the implementation of the Agreement more broadly, is carried out by the Free Trade Coordinators. Free Trade Coordinators are the senior trade department officials designated by each country.

Disclaimer: This document is provided for information purposes only and does not in any way constitute legal advice or represent legal interpretations by the Government of Canada. Municipal measures would need to be assessed on a case-by-case basis. Municipalities should seek legal advice, as appropriate.

Municipal measures would also need to be considered in the context of interprovincial trade initiatives including, but not limited to: the Canadian Free Trade Agreement (CFTA); the Trade, Investment, and Labour Mobility Agreement between British Columbia and Alberta; the New West Partnership Trade Agreement between British Columbia, Alberta, and Saskatchewan; the Partnership Agreement on Regulation and the Economy between New Brunswick and Nova Scotia; and the Trade and Cooperation Agreement between Quebec and Ontario, as well as any other obligations that might apply to the activities of municipalities.

Footnotes

Footnote 1

> The Agreement on Government Procurement (GPA) consists of 19 parties covering 47 WTO members (counting the European Union and its 28 member states, all of which are covered by the Agreement, as one party). These include Armenia, Canada, European Union, Hong Kong (China), Iceland, Israel, Japan, Korea, Liechtenstein, Moldova,

Montenegro, Netherlands, New Zealand, Norway, Singapore, Switzerland, Chinese Taipei, Ukraine and the United States.

Return to footnote 1 referrer

Date Modified:
2017-08-31