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The Role of Sustainable Public Procurement Policies and Non-Governmental Certification Schemes in the European Union and Canada in the Context of Trade Rules

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Executive Summary

Over the past decade, different levels of government in the EU and Canada have moved towards the adoption of sustainable procurement practices and policies. Civil society groups campaigning for labour rights and environmental sustainability have often been behind the push for the adoption of such policies. Procurement policies incorporate environmental, social, and ethical criteria into government procurement decisions. This shift has facilitated the need to measure and define what constitutes ethical or sustainable practices. As a result, sustainable and ethical products are often certified by “private trade-related sustainability assurance schemes,”¹ for example the Fair Trade Certification for coffee. In other cases different criteria or definitions may be included in such policies, for example ‘local food’ as food that comes from not more than 100 miles away. The purpose of this paper is to analyze the relationship and interaction between the growth of these procurement policies and international trade rules. Procurement policies may contradict the commitments of states to non-discriminatory business practices as dictated by supra-national trade agreements such as the World Trade Organization Agreement (WTO) on Government Procurement (AGP). However, governments that pursue these policies are sometimes permitted to do so because of various exemptions that exist for sustainable development in some trade agreements.

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The European Commission has set out directives to promote sustainable procurement policies for EU member states. The EU has, through a variety of measures, supported the expansion of non-governmental certification schemes, seeing them as compatible with broader macro-economic objectives of increasing trade liberalization. It is clear that there is a delicate balance between the expansion of procurement policies and a commitment to economic openness. For example, EU directives on procurement state that public authorities are not allowed to stipulate one form of non-state certification over another, as this is considered a form of discrimination. Governments have gotten around this by the careful wording of procurement policies, for example listing criteria such as Fair Trade Certified or Certified Organic as ‘technical’ requirements in procurement contracts.

Unlike the EU, where there are both supra-national and national directives concerning sustainable procurement, the Canadian federal government has no specific policies on sustainable procurement. In Canada public institutions at the sub-national level have been the main adopters of sustainable and ethical procurement policies. Some civil society groups have expressed concerns that the growth of policies favouring the procurement of local food and other goods may be considered a trade barrier under the pending Canada-EU trade agreement. The EU and Canada continue to negotiate the Canada-EU Comprehensive Economic and Trade Agreement (CETA) and it remains to be seen if and how the principles of economic openness can be made compatible with sustainable procurement policies. However, governments may negotiate exemptions to these rules on the basis of sustainability.

Introduction

This paper comes out of the 4 March 2011 workshop on Local Food Policy held by the Canada-Europe Transatlantic Dialogue at the British High Commission in Ottawa.² A common topic identified by workshop participants was the role of government procurement policies and non-governmental certification schemes in the development of sustainable local food systems. A key question is the relationship between government procurement and supra-national trade rules. Such policies may not be permitted under the commitments governments have made in particular trade agreements. Many civil society groups that have been advocating for and developing sustainable local food systems have expressed concerns about the commitments governments have made as signatories to international trade agreements. In particular, opponents of the proposed Canada-European Union Comprehensive Economic and Trade Agreement (CETA) in Canada have expressed concerns about the potential impact of the CETA on the ability of local governments to institute local and sustainable procurement policies.³ Considering the language in a leaked early draft agreement, it appears that the CETA could have implications for the ability of governments to pass particular procurement policies.⁴

This paper addresses some of the policy issues related to the growth of sustainable public procurement policies and non-governmental certification schemes in the European Union and Canada. In the EU, such procurement policies are encouraged by the European Commission (EC) as a means to achieve sustainable development objectives and are seen

as congruent with liberal macro-economic policies. Fair Trade Certification and the EC's support for Fair Trade Certification is an example of EU support for initiatives such as local food policies. The case of Fair Trade has implications for the broader political and legal contexts in which non-state forms of governance and government procurement policies favouring such schemes are operating. Canada can learn from the experience of the EU as these issues are newer in the Canadian context and will likely continue to expand in the future.

The question which guides this paper is: To what extent is the growing appetite for sustainable procurement policies in Canada and the EU curtailed by supra-national (and in some cases sub-national) trade obligations?

Background

As states have taken a more hands-off approach to economic regulation in some areas, new forms of non-state social and economic governance have emerged. Steven Bernstein and Benjamin Cashore conceptualize these private certification schemes as “non-state market driven” forms of governance.⁵ Often, civil society organizations have been at the forefront of campaigns for ethical purchasing policies and as “norm entrepreneurs” in promoting or establishing non-state certification or ethical consumption.⁶ In her 2000 book *No Logo*, Naomi Klein talks about the rise of civil society activists concerned with human and labour rights abuses abroad by corporations and the campaigns for governments and public institutions to adopt ethical procurement policies as a phenomenon of “local foreign policy.”⁷ Other scholars have conceptualized the growth of such forms of regulation as “soft law” vs. the “hard law” of governments.⁸ Some scholars have also critiqued these mechanisms, such as Fair Trade Certification, as an inadequate privatization of governance and regulation, usurping the state’s role in enforcing social, environmental and labour standards.⁹ Such mechanisms may be seen as an alternative to other kinds of state regulation. The EU and other governments around the world have recognized the effectiveness of these new forms of regulation and have legitimized these non-state forms of social and economic governance.

Supra-national trade rules shape the policy environment in which non-state forms of governance operate vis-à-vis government procurement policies. An October 2010 leaked text of the yet-to-be finalized Canada-European Union Comprehensive Economic and Trade Agreement (CETA) refers to the question of sustainable and ethical procurement policies. This text made reference to non-state certification in relation to sustainable development.¹⁰ The Environment Chapter of the leaked draft of the CETA, Article 9 (d) commits both parties to the “Exchange of information and cooperation on the environmental dimension of corporate social responsibility and accountability, including on the implementation and follow-up of internationally agreed guidelines, Fair and Ethical trade, private and public certification and labelling schemes including eco-labelling and green public procurement.”¹¹ While this document is only a draft, which may differ substantially from any agreement that is finally reached, the draft suggests that non-state forms of regulation have been under serious consideration. Should this article remain in the final version of the agreement, it will demonstrate that certain forms of non-

state governance and regulation are seen as compatible with the liberal, non-discriminatory principles that are central to the agreement. However, these non-state forms of governance remain a grey area and it is unclear if they could be considered a form of discrimination if governments were to directly support them or require specific private certification in the language of their procurement policies. This is why it has been stressed by the EU that governments need to be careful not to favour specific private certification schemes in procurement codes and policies. Bidders in the procurement contract process could challenge requirements as a form of discrimination and this is what makes such schemes somewhat of a regulatory grey area.

Public Procurement

Public procurement as a means to achieve policy objectives such as social equity, economic development or environmental sustainability is more deeply embedded in the European political and institutional context than in the North American context, but even on this side of the Atlantic it is not a completely new idea.¹² According to Ian Manners, the discourse on the principle of ‘social solidarity’ in the EU is twofold; the process of European integration, which fosters “...solidarity between the states and peoples of the EU...,” and a discourse of “developing ‘overseas countries’” as a means of fostering solidarity between Europe and the Global South. Fair Trade, for example, is seen to fit in with the developmental foreign policies of the EU.¹³ The Development and Cooperation Committee of the European Parliament made its first explicit reference to the need for “the promotion of fairness and solidarity in North-South trade” in 1988. Another key milestone in the evolution of the EU towards sustainable and ethical procurement was the EC’s 2001 Gothenburg Commitment on sustainability, which committed procurement managers in the public sector to consider ethical and social aspects of procurement. The Gothenburg Commitment has since spurred the development of sustainable procurement policies in Europe.¹⁴

The way that the EU conceptualizes the idea of ‘sustainable procurement’ is broad and covers environmental, economic and social justice metrics in government procurement decisions. However, this broad conceptualization of sustainable procurement was preceded by some distinctions, as many of the civil society campaigns advocating for changes to government procurement focused on a variety of single issues and made their arguments on different terms. For example, the groups advocating the procurement of Fair Trade Certified products and ‘No Sweat’ garments employed a language of ethical procurement because of the focus in this case on issues of economic justice and labour rights. Environmental groups seeking to influence governments to green their operations by conserving energy or procuring green products have used a language of sustainable procurement because of the environmental component to their argument. Campaigns by small farmers’ groups and civil society groups pressuring governments to procure food from local farmers have also used the language of sustainability but have used the term ‘local sustainable’ to argue for the procurement of local food, both from an environmental as well as from a local economic and community development perspective.

While in the EU, the discourse of sustainable public procurement has come to encompass a range of issues, in North America, there is still more of a separation between, ethical, sustainable and local sustainable procurement. The origins of engagement by civil society groups with government procurement in North America began with the civil society campaigns of the 1990s and what Klein refers to as “local foreign policy”. The growth of NGO campaigns against the sweatshop working conditions in garment factories throughout the Global South led to the development of the “Sweat Free” procurement policies at universities and public institutions throughout Canada and the United States, usually referred to as ethical procurement policies.¹⁵ In recent years, environmental groups have begun to employ the language of sustainability to pressure governments to procure green goods as well as local food. Campaigns for Fair Trade Certified have sometimes employed both the language of ethical and sustainable procurement in making their cases. In North America, all of these efforts to influence government procurement have thus far evolved mainly at the level of sub-national public institutions, as opposed to the EU, where it evolved from a broader promotion of sustainable and ethical purchasing at the EU level.

The predominant view of public procurement by governments in both North America and the EU is that institutions should seek the best ‘value for money’ and focus on transparent and fair processes in the tendering of contracts. In the context of local food policies, Morgan and Sonnino describe public procurement policies as representing significant “untapped potential” in economic terms for the local food movement. However, they go on to state that the procurement logic for foodstuffs is currently governed by a narrow logic of value for money and food safety.¹⁶ Still, in the EU there has been considerable growth in ethical and sustainable procurement policies, including local sustainable food. The 2011 EC report, *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement Practices*, conceptualizes sustainable public procurement as an extremely broad concept. As the report states, “By purchasing wisely, public authorities can promote employment opportunities, decent work, social inclusion, accessibility, design for all, ethical trade, and seek to achieve wider compliance with social standards.”¹⁷ What remains to be seen is if EU public institutions can ultimately combine the best value for money with a push towards more stringent regulatory standards, which may be more expensive in some cases.

While the EC has issued proclamations and directives on the importance of ethical and sustainable procurement, measures such as procurement policies have been taken mainly at the sub-national level in the EU through local governments and public institutions. However, there are also cases of national procurement policies such as the policy developed by the UK’s Department of Environment, Food and Rural Affairs, which developed a comprehensive national sustainable procurement strategy in 2009.¹⁸ Much like the vision advanced by the EC’s “*Buying Social*” Report, the UK strategy is an extremely broad conceptualization of ethical purchasing that includes both environmental and social equity concerns and language about ensuring procurement decisions provide best value for taxpayer dollars. Civil society groups in the EU have called this focus on value for money contrary to the EU’s progression towards sustainable procurement practices.

The various schemes, agreements and rules that address procurement do so with the spirit of ensuring an open and transparent tendering process in order to ensure the best value for taxpayer dollars. It is important to understand how sustainable procurement differs from the argument for the local or national procurement of goods and services, such as the 2009 row over the ‘Buy America’ procurement provisions in the United States. Government procurement contracts have sometimes functioned as a means of “picking winners” by rewarding local or national companies as was highlighted by the debate around the ‘Buy America’ provisions. However, it is important to separate the argument for environmental sustainability that can be made for ‘buy local’ provisions for food from those favouring local businesses more broadly. Though there are some grey areas here, an argument may be made for the former on the basis of sustainability and reduction in the carbon footprint while the latter would be considered discriminatory. Governments can avoid the issue of being charged with discrimination if they specify the sustainable and ethical procurement requirements, for example “organic food” or “local sustainable” food from within a 100-mile radius, in the technical requirements of the contract they tender.

Fair Trade

Fair Trade Certification is one of the oldest and most prominent non-governmental certification schemes to have emerged over the past two decades. In Europe, Fair Trade Certification emerged in the Netherlands in the 1980s under the name Max Havelaar. Fair Trade began as a scheme to import coffee from small-farmer cooperatives and markets and sell it in Europe as fair trade or solidarity coffee. From its origins, Fair Trade Certification emerged as a global network known as Fairtrade Labelling Organizations (FLO), which serves to certify commodities in accordance with social and environmental standards. FLO certification is conducted by subsidiary Labelling Initiatives (LIs) that certify products and facilitate the export and import process of the certified commodities. Fair Trade usually means that producers are organized into cooperatives. Both the cooperatives and importing businesses pay certification and licensing fees. FLO’s headquarters are in Germany and currently national and affiliated labelling initiatives are present in 24 countries.¹⁹ In the EU and Canada, a number of local governments and public institutions have adopted Fair Trade Certified products in their procurement policies.²⁰ There is an ongoing debate about how Fair Trade relates to free trade and the kind of trade liberalization promoted by the WTO.²¹

Over the last 20 years, the interaction between public policy and Fair Trade Certification within the EU has evolved. Declarations made by the EC in support of the promotion of Fair Trade products by the EC and member states have led to ongoing dialogue with the civil society groups promoting Fair Trade and the certification bodies. The 2009 EC Communication on Fair Trade and the EU conceptualizes Fair Trade as a market-driven, private sector phenomenon and warns that “...too heavy regulatory embrace could prove damaging rather than beneficial.”²² As a result of the report adopted by the European Parliament in 2006, *Fair Trade and Development*, the EU has thrown official political and financial support behind Fair Trade. As the EC communication states, “Between 2007 and 2008, € 19.466 million were allocated for various NGO implemented and co-

financed actions. The majority of these actions were in the field of awareness raising within the EU.” The EU has also financed, “...multi-annual Country Strategy Papers and Indicative Programmes, covering agricultural and rural sectors, including activities... [that] contribute to facilitating Fair Trade.”²³ In essence, these funds assist producer cooperatives in EU foreign aid recipient countries to develop the capacity to access the Fair Trade market through certification. The EC’s outlook and policies demonstrate the compatibility of Fair Trade with the broader liberal economic policies of the EU, which for the EC is conceptualized as policies that are private and consumer or market-driven.

Trade Rules and Local Food Policy

The growth of public interest in supporting sustainable local food systems is palpable in Canada and even more so in the EU. In both contexts, various levels of government have set out to foster the growth of local networks for the sustainable production and distribution of food by implementing local food procurement policies amongst other measures. Local food procurement policies raise the same set of concerns as those around Fair Trade Purchasing Policies, in that they could potentially be deemed a form of discrimination by trade agreements. Kevin Morgan and Roberta Sonnino argue that supra-national trade rules are a factor that must be considered in the development of government policy directives favouring the procurement of local food. As Morgan and Sonnino state, the WTO’s Agreement on Government Procurement (AGP) is in place to ensure that “...neither the location of production, nor the nationality of the supplier are deemed to be relevant factors in public procurement decision-making.”²⁴ Canada and EU member states are both signatories to the World Trade Organization (WTO) Plurilateral Agreement on Government Procurement (AGP), which regulates government procurement of goods and services.²⁵ There have been few challenges to the enforcement of this agreement and subsequently few precedents to consider.²⁶ In light of the commitments of governments to the AGP and other trade agreements, the growth of local food procurement policies may mean that governments will attempt to find loopholes in the various rules concerning non-discrimination. They will likely claim these exemptions for local food policies on the basis of supporting local economic development or environmental sustainability.

Within Canada, local food policies have grown in recent years. In 2009, the Canadian Cooperative Association counted 24 local food procurement policies passed by public institutions and local governments across the country.²⁷ Canadian civil society groups have expressed concerns that international and inter-provincial trade agreements may act as barriers to the expansion of sustainable public procurement objectives. These agreements include the WTO Government Procurement Agreement, the Canada-US Agreement on Government Procurement, the North American Free Trade Agreement (NAFTA) and domestic inter-provincial agreements such as the Agreement on Internal Trade (AIT) and the Trade, Investment and Labour Mobility Agreement (TILMA). These agreements vary in the degree and scope with which they regulate government procurement. The 2008 report, *Bringing Local Food Home: Legal, Regulatory and Institutional Barriers to Local Food*, by the Canadian Institute for Environmental Law and Policy, provides a thorough overview of these various rules within which local food

procurement is operating in Canada. The report explains that as a signatory to the WTO GPA, all Canadian federal government procurement of goods and services valued at more than \$217,400 is subject to scrutiny under the agreement. However, the GPA does not cover the purchasing decisions of private sector or sub-national public institutions such as provincial or municipal governments.

Chapter 10 of the NAFTA also regulates government procurement in the member states. It applies to federal government departments and corporations for the procurement of goods valued at more than \$28,200 between Canada and the US, and more than \$76,500 between Canada and Mexico. If these rules are not adhered to, it could lead to a challenge through a trade tribunal and potential penalties. In addition, Chapter 10 has non-binding provisions for government procurement at the municipal and provincial levels, though since these are non-binding these rules do not directly affect the ability of municipal and provincial governments to pass local procurement policies.²⁸ In contrast, the 2009 Canada-US Agreement on Government Procurement negotiated between Canada and the United States deemed "...all...provincial ministries...[to be] subject to the WTO GPA".²⁹ The ramifications of these various international commitments for local food procurement policies would likely be to curtail the ability of federal government departments, crown corporations and provincial ministries to pass local procurement policies above the specified monetary thresholds. However, these agreements do not directly impact what are referred to as the MASH entities, which includes "...municipalities, municipal organizations, school boards, and publicly funded academic, health and social services entities".³⁰ This is where the expansion of local food procurement policies has mainly occurred in Canada and where there is the greatest potential for further expansion in the future.

Within Canada, the Agreement on Internal Trade (AIT), adopted in 1995, regulates trade barriers within Canada, between provinces and "...applies beyond provincial government ministries and entities."³¹ The 2010 paper, *International Trade Law and Local Food Policy in Canada* by the Montreal-based NGO Equiterre states that the AIT, "...generally applies where the procurement value is \$25,000 or more for goods, and \$100,000 or more for services." However, the AIT also includes an "...exception for procurement for regional and economic development purposes", of which Equiterre estimates that the exceptions, "...would seem broad enough to allow for institutional procurement policies that establish preference or specific targets for the purchase of local food."³² The TILMA (Trade, Investment and Labour Mobility Agreement) is another internal agreement on inter-provincial trade and investment between British Columbia and Alberta, also recently extended to include Saskatchewan. It opens up the MASH sector to inter-provincial competition and could in theory pose a barrier to the adoption of procurement policies by public sector institutions, the MASH entities, in these provinces.³³ It is important to note that in the case of the AIT there are loopholes that would allow for the expansion of local food procurement on the basis of regional economic development purposes through public sector institutions. The various thresholds for procurement could limit the potential for contracts for local food above the thresholds, but would leave open the possibility of procurement under the given thresholds.

The European Union, like Canada, is a signatory of the WTO AGP and there are also various bilateral trade agreements that were not addressed in the research for this paper that may affect the governance of public procurement in the EU. In addition to these international commitments, the European Union also has its own rules regulating public procurement in the EU Single Market.³⁴ However, as Morgan and Sonnino state, the Common Agricultural Policy (CAP) allows flexibility as to how states employ agricultural subsidies and supports, while at the same time this is balanced out against a concern for non-discrimination due to the various commitments made through the WTO. Institutional support in the EU for local food systems is at a much more advanced stage than in Canada. Procurement policies exist at both the national and the sub-national level in public institutions and local governments and there are many other policies favouring sustainable local food production. Thus, many EU member states have made policies that are supportive of the expansion of local sustainable food systems and the EC has a vision of an EU-wide strategy.³⁵ In 2011, a report by the Committee of the Regions of the European Commission states, "...the European Commission could suggest that Member States should consider targets for developing local food systems in their Rural Development Strategy, to be executed by LRAs [local and regional authorities] with support from the EU and national authorities."³⁶ The same report calls for the development of standard definitions by which to define 'Local Food Products' and 'Local Food Systems'. It also addresses how governments could get around existing regulations in the EU that stand in the way of local food policies. With respect to the issue of whether or not the regulations governing public procurement restrict the development of local food systems, Article 55 of the committee's report points to the "...specific conditions and criteria to be incorporated in the call for tenders concerning public supply contracts, which may include particular aspects and features such as freshness or production circumstances". While Article 56 calls on the EU to explore whether pre-existing legislation could "...be amended such that 'locally produced' can be a standard selection criterion in tenders for the supply of food to, for instance, schools, nursing homes and public facilities;"³⁷ the recommendations in this report demonstrate how the momentum behind local food procurement policies comes up against the principle of non-discrimination. This is likely why this report recommends exemptions based on the criteria of local sustainable food systems. The report also demonstrates that much as in Canada, in the EU it appears that the greatest potential for the expansion of local food policy is at the sub-national level in the MASH institutions. It also demonstrates that governments may be moving towards finding ways to get around existing rules in order to exempt local food from rules on non-discrimination.

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

At the time of writing the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) is still under negotiation. However, opponents and critics of the CETA claim that the wording of the leaked text of the CETA, if included in the final agreement, could impact procurement policies. According to the Canadian Centre for Policy Alternatives (CCPA) report on the CETA, the CETA is much more demanding than existing agreements Canada has signed up to such as the NAFTA or GPA in terms of concessions on government procurement. In its current draft form, it would apply to

municipal governments and public sector institutions, arguably where the greatest possibility for expansion exists for local food policies. Equiterre identifies the "...so-called 'MASH' sector..." as "...a far greater vehicle for LFS [local food system] promotion than the catering needs of federal and provincial ministries."³⁸ According to the analysis of the report by the CCPA, the CETA would prevent municipal governments from implementing procurement policies concerned with favouring local sustainable food. The analysis names Toronto's new local food procurement policy as an example of a policy, which could be considered a form of discrimination under the draft agreement of the CETA.³⁹ A legal opinion by Steven Shryban of the firm Sack Goldblatt Mitchell LLP on the CETA states that the City of Toronto's Local Food Procurement Policy would contravene the proposed CETA rules on discrimination, at least in the context of potential EU competition from EU firms. However, while critics have expressed these concerns, it remains unclear if exemptions will be negotiated into the agreement to allow for such policies on the basis that they promote sustainability. In terms of procurement, the prime concern of the CETA is likely to be in ensuring non-discrimination for EU firms for multi-million dollar contracts such as those for transport or services. It would also be difficult for the EU to argue against local sustainable and ethical procurement policies in the Canadian context because it appears that the EC is highlighting the importance of local food systems and is encouraging public procurement as a means by which local food can be promoted. This will be explored further in the following section.⁴⁰ As it stands, the wording in the leaked draft of the CETA suggests that sustainable procurement policies could be considered a form of protectionism but it remains to be seen if exemptions will be written into the CETA to allow for measures such as local food procurement as 'sustainable development' exemptions as has been done in other agreements.

Legal Issues

EU member states remain cautious in ensuring that procurement contracts are written so as to protect them from being challenged for being a form of discrimination or protectionism. These concerns are the same for state policies that relate to support for a particular non-state certification system. As the 2009 EC report on Fair Trade Certification and public policy states, "Private initiatives that operate through essentially voluntary participation are consistent with a non-discriminatory multilateral trading system. Any government intervention or regulatory mechanisms relating to such labelling schemes, while not problematic per se need to take account of WTO obligations, in particular to ensure their transparent and non-discriminatory functioning."⁴¹ To address concerns surrounding commitments to non-discrimination, the EC has developed extensive recommendation guidelines for governments to follow when they are tendering contracts for products covered under procurement policies. As the 2011 EC *Buying Social* report states, "A contracting authority that wants to purchase ethical trade goods can do so by defining the relevant sustainability criteria in its technical specifications for the goods... The requirements must, however, relate to the characteristics or performance of the products (e.g. recycled material) or the production process of the products (e.g. organically grown)...[A] contracting authority ...should not...designate a specific ethical trade label or certification. Instead, they should look at each of the sub-criteria underlying

the ethical trade label or certification and must use only those that are linked to the subject matter of their purchase.”⁴² This cautionary approach to procurement demonstrates the complex relationship between the use of private forms of certification while maintaining non-discrimination in business practices.

There are few legal precedents to thoroughly analyze the legal ramifications of Fair Trade and other forms of non-state governance in relation to non-discriminatory government procurement. Ian Manners is researching the legal implications of Fair Trade Certification and public procurement. Manners states that “...the ECJ [European Court of Justice] has yet to interpret fair trade considerations in public procurement;” however, Manners also refers to the case in the Netherlands *Douwe Egberts vs. The Province of Groningen* (2007), which was “...the first case in which a Fair Trade public procurement call to tender was legally challenged...” in the EU. The company brought a challenge charging discrimination based on the requirement for Fair Trade certification by the province in a public tender. The Province of Groningen won the case against the company because the, “...local courts were able to use EU Communications and Resolutions to interpret whether local provinces could call for Fair Trade tenders, discriminating against other sustainability schemes.”⁴³ It is unclear whether this case would have set a different precedent in another legal jurisdiction as a form of discrimination. This remains a new area where legal precedents remain to be set.

Another area that relates to the development of sustainable local food systems is the question of trade rules in relation to agriculture policy. Professor Rod McRae of York University suggests that the WTO Agreement on Agriculture (AoA), of which Canada and the EU are both signatories, does not affect many of the policy measures governments have undertaken or could undertake in collaboration with civil society or para-public organizations to develop sustainable local food systems.⁴⁴ For example, most of the policy measures that have been employed or which could be employed to support local food systems are food policy and are outside of what is conceived of as agricultural policy that is governed by the WTO AoA. For example, the Ontario or federal government could provide financial support to an organization such as Local Food Plus (LFP) in Ontario to support local sustainable food systems.⁴⁵ This Toronto-based private certification body certifies sustainable produce within Ontario and connects these producers with institutional purchasers such as universities and hospitals. While procurement policies at these levels may be an aspect of the move towards the adoption of LFP certified products, the relationship involves changes in the purchasing decisions of private entities, decisions that are also not subject to WTO or other international trade agreements. Another example in Ontario would be the support by various levels of government for the promotion of locally grown food through marketing campaigns and farmers’ markets. In both the EU and Canada, it is likely that government subsidies or policy measures used to promote sustainable local food systems would be in line with WTO rules, speaking to the difference of what is considered ‘food policy’ vs. ‘agriculture policy’.

Conclusion

In the EU, governments are progressively moving more towards the adoption of various benchmarks for public procurement decisions. Canada is likely to follow a similar trajectory if the growth of interest in sustainable procurement policies continues to develop. However, there may still be contradictions between the objectives of higher standards and the rules governing public procurement, such as non-discrimination and an obligation to secure the best value for taxpayers' money. In response to the ongoing work of the EC and the release of its Buying Social Guide, civil society organizations promoting Fair Trade, labour unions and other groups released a report critiquing the contradictions in current EU sustainable procurement policy. The report draws out the tension in much of the language of the EC, and the UK government in its sustainable procurement strategy between high standards and the best value for taxpayer dollars. As the report states, "...value for money/best value in public contracting does not mean lowest price, but that wider social, ethical and environmental benefits must be given clear weight in the decision."⁴⁶ What remains to be seen is if higher labour and environmental standards can be achieved through these private certification systems within a non-discriminatory and liberal economic environment.

How the final text of the CETA deals with the question of public procurement will be a test of how governments attempt to balance these different objectives. However, at present it appears that governments do have policy space to implement sustainable procurement directives such as the promotion of Fair Trade or sustainable local food systems in spite of existing commitments to trade rules. As Equiterre argues in the Canadian context "...many of the policies suggested as a means to promote LFS already exist in one or more Canadian jurisdictions, albeit in a geographically or financially modest form: funding for transition to organic or other sustainability investments, 'eat local' marketing campaigns, rural infrastructure projects, roundtables, research and development, etc."⁴⁷ Such policies mirror developments in the EU, where the 2011 EC report on local sustainable food systems calls for, "...intervening in the supply chain, using tools such as certification, marketing, promotion, public-private partnerships and public procurement" to promote local food systems (2011). As local food and non-governmental certification schemes progressively move into mainstream political and policy discourse, governments will likely continue to find and negotiate exemptions for criteria such as local food when they come into conflict with rules on discrimination.

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