# Sustainability in the public procurement chapters of third generation Free Trade Agreements of the European Union

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# Sustainability in the public procurement chapters
# of third generation Free Trade Agreements of the European Union

Martin Trybus*

**Abstract:** The main research question of this Working Paper is whether Free Trade Agreements (FTAs) can be classified as instruments of EU external action to further sustainability though public procurement. This includes the question whether FTAs change the relevant laws of the trading partners of the EU. First, references to sustainability in the procurement chapter of the CETA Agreement with Canada will be detected. CETA is one of the most extensive third generation FTAs also with regards to procurement. Second, these references will be compared with similar references in other FTAs. Third, the implementation of these references in CETA in Canada will be investigated to determine whether relevant changes of Canadian procurement law have occurred directly through CETA. CETA is one of the older third generation FTAs and thus had time for transposition. It will be argued that the extent, originality, and impact of sustainability though public procurement in FTAs is limited.

## I. Introduction

Free Trade Agreements (FTAs) are important external action instruments of the EU. Their main objective is the opening of markets, both to further the economic interests of the EU and her Member States and to project the EU internal market rational externally into the world. This partly ideological economic rationale is largely shared by the trade partners the EU is engaging with.

However, the importance of non-economic social and environmental considerations (sustainability) has increased in the EU Internal Market. This is also projected externally through third generation FTAs. FTAs are thereby becoming a new instrument to promote sustainability, mainly enshrined in their trade and sustainable development chapters. The aim of this Working Paper is to evaluate the role of the EU as a global actor by contributing to the discussion of the use of third generation FTAs to pursue non-economic objectives externally. The Working Paper will, however, look beyond the trade and sustainability chapters and discuss FTAs as external action instruments with regards to one specific area: public procurement. It will therefore look at the procurement chapters of these third generation FTAs.

The 27 Member States of the EU form the largest public procurement market in the world. In 2020, about 250,000 contracting authorities on the national, regional, and local levels awarded contracts for about €2 trillion.[1] This is an average 14% of the national GDP in the Member States, or just over 14% per cent of the Union's GDP (excluding utilities and defence).[2] Therefore, the buying power of the State can make a difference, not only through the actual market share of the State but also by being an example for other economic actors, through Corporate Social Responsibility.[3] However, is it also possible for the EU to go beyond the Internal Market and to 'make the world a better place' through the public procurement chapters of her FTAs with third countries? This is a yet under-appreciated role of EU trade policy.

The main research question of this Working Paper is whether current FTAs can be classified as instruments of EU external action to further sustainability through public procurement. This includes the question whether FTAs change the relevant laws of the trading partners of the EU. First, a short overview of the internal *acquis* of the EU with regards to sustainability and procurement will be provided. Second, references to sustainability in the procurement chapter of the CETA Agreement with Canada will be detected. CETA is one of the most extensive third generation FTAs also with regards to procurement. There are arguments against using CETA as an example – Canada is a small country and there are many specific problems due to federalism and procurement issues. However, CETA is selected as an 'average' FTA between earlier and later FTAs and the size of the Canadian economy compared to larger and smaller economies in other FTAs, somewhere between that of larger Japan and that of smaller Vietnam. Moreover, as explained below, the analysis includes implementation, and it would not have been possible to investigate the implementation of several or all FTAs within the confines of this Working Paper. CETA was also selected because there was a specific approach to implementation by making it directly applicable to the contracting authorities and contracts covered by CETA in Canada. Third, the relevant references in CETA will be compared with

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[1] https://ec.europa.eu/growth/single-market/public-procurement_en [accessed 11 May 2021].

[2] Ibid.

[3] See: M. Trybus, "Beyond competition and value for money: Corporate Social Responsibility in public procurement" (2020) 8 *Kuwait International Law School Journal* 217-246.

similar references in other FTAs. This will not include the special case of the EU-UK FTA since at time of writing UK procurement law was still fully based on the relevant EU Directives and the UK more akin to an EU Member State than an FTA partner. Fourth, the origin or originality of sustainability references in Canadian procurement law beyond CETA will be ascertained, also in view of whether these were new and controversial for Canada. It will be argued that the extent, originality, and impact of sustainability though current public procurement in FTAs is limited.

## II. The internal *acquis*

Internally to the EU, procurement has been covered by the free movement of goods and services regimes of the TFEU since 1957and subject to Internal Market harmonisation through an increasingly dense set of Directives since the 1970s.[4] There was and to a certain extent still is a widespread protectionism in procurement in Europe, an attitude of lawmakers and contracting officers that contracts should be awarded to domestic suppliers and service providers, an attitude that translated into national procurement law and practice effectively undermining the Common Market for goods and services (including construction). The Cecchini Report leading to the Internal Market reform through the Single European Act in 1986 had identified procurement as a particularly problematic area that needed to be addressed through legislation to complete the Single Market[5] leading to a set of new Directives in the 1990s, then in 2004, and most recently in 2014. The main aim of these Directives is to open public contracts to bidders from other Member States. To that end the principles of non-discrimination (on grounds of nationality) and transparency are enshrined in a set of detailed rules *inter alia* on how to draw up the technical specifications for the goods and services to be procured, on the publication of contract opportunities on an EU-wide portal, on a set of procedures to be followed, and on criteria for the qualification of bidders and criteria for the final award.[6] This is complemented by Directives on bidders seeking remedies against unlawful procurement

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[4] See: Martin Trybus "Public Contracts in European Union Internal Market Law: Foundations and Requirements" in R. Nogouellou and U. Stelkens (eds.), *Comparative Law on Public Contracts Treatise* (Bruylant: Brussels, 2010) 81-121.

[5] *Europe 1992: the overall challenge* [summary of the Cecchini report]. SEC (88) 524 final, 13 April 1988, at 3 and 5.

[6] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.

decisions[7] and specific rules for concessions,[8] utilities,[9] and defence and security.[10] All these Directives have been transposed into the national laws of the 27 Member States and the United Kingdom and to a slightly more limited extend in the European Economic Area and Switzerland. In addition to the Directives and their transposing national laws there are numerous soft law instruments and case law at EU level and national soft and case law based on this EU procurement law. While there have been many shortcomings and it took 30 years to create this body of law, procurement law in the EU is now relatively harmonized, thereby creating a yet imperfect but overall functioning Internal Market in public procurement.

While the Internal Market focus of the Directives remained paramount for a long time, sustainability aims have increasingly been incorporated into these instruments, most extensively in the latest 2014 set of Directives. This involves an adaptation of the rules, for example, by incorporating life cycle costs into the price of a product, writing environmental standards into the technical specifications, disqualification of tenderers who did not pay their social security contributions, special rules of workshops for the disabled, or dividing larger contracts into smaller lots to promote bids from Small and Medium-Sized Enterprises (SMEs). Procurement regulation is used as an instrument to further sustainable, secondary, or horizontal objectives, 'to make Europe a better place'.[11] These adaptations can come at a price, they can

[7] Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ [1992] L-76/14 as amended especially by Directive 2007/66/EC [2007] OJ L335/31; Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ [1989] L 395/33–35 as amended especially by Directive 2007/66/EC [2007] OJ L335/31.

[8] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L94/1.

[9] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L94/243.

[10] Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ [2009] L-216/76.

[11] This article does not discuss whether the promotion of SMEs can be classified as a 'secondary' (term used *inter alia* in by M. Burgi, D. Dragos *et altera* and G. Racca in their chapters in R. Caranta and M. Trybus (eds.), *The Law of Green and Social Procurement*, Djøf: Copenhagen, 2010), 'sustainable' (term used in the chapters of R. Caranta, S. Treumer, L. Vidal, M. Spyra, J. Gonzaléz Garcia and M. Trybus in Caranta and Trybus, ibid.), 'horizontal' (term coined by S. Arrowsmith and P. Kunzlik in "Public procurement and horizontal policies in EC law: general principles" *Social and Environmental Policies in EC Procurement Law*, CUP, 2009), or 'strategic' (term used *inter alia* in W. Kahlenborn *et altera*, *Strategic Use of Public Procurement in Europe*, Final Report to

compromise the national value for money or the Internal Market oriented objectives of non-discrimination and market access. Environmental product characteristics, for example, can make the product more expensive or make domestic bidders more competitive due to their familiarity with relevant national rules, or smaller lots are more difficult to manage for the contacting authority than one large contract. Hence the initial reluctance of the EU legislator to accommodate sustainability objectives in the Directives. The more recent change towards more sustainability occurred not least through the increasing influence of the European Parliament over the law-making process through what is now termed the ordinary legislative procedure leading to numerous amendments of the original drafts initiated by the Commission.[12] Many of the politicians in Strasbourg have environmental, social, or SME agendas. Some Member States pushed for sustainability in procurement in the Council. Sustainability also entered the Directives through the case law of the Court of Justice which was later codified.[13] This case law reflected the relevant practice of contracting authorities in the Member States, many of them using the procurement function as a tool to promote sustainability. Public opinion - organized or not - also aims to shape the legislative process, from lobbying the Commission to effective campaigns for the environment or social rights.

## III. The external *acquis*: the example of CETA

Chapter 19 of the CETA 2016 is the government procurement chapter of the Agreement. There are four provisions that can be classified as rules that can promote sustainability in procurement. Firstly, Article 19.9(6) CETA provides:

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the European Commission, MARKT/2010/02/C 2011) objective, as a 'community benefit' (term used in a session of the *2015 Procurement Week* organised by the University of Bangor and the Welsh Government in Cardiff), akin to social or environmental (see Caranta and Trybus, ibid.) considerations in public procurement. However, this discussion is provided in M. Trybus and M. Andrecka, "Favouring Small and Medium Sized Enterprises with Directive 2014/24/EU?" (2017) 12 EPPPL 217-232.

[12] See on the law making process of the 2014 Directives: For an overview of the reform: R. Caranta, "The changes to the public contract directives and the story they tell about how EU law works" (2015) 52 CML Rev. 391–459; Issues 3 and 4 of the (2014) 23 PPL Rev.; and G. Skovgaard Ølykke and A. Sánchez Graells (eds.), *Reformation or Deformation of the EU Public Procurement Rules in 2014* (Edward Elgar: Cheltenham, 2017).

[13] Leading examples for such cases are Case C-513/99, *Concordia Bus Finland* v. *Helsinki Kaupunki* [2002] ECR I-7213 or Case C-448/01, *EVN Wienstrom AG* v. *Austria* [2003] ECR I-14521 on environmental criteria.

> "For greater certainty, a Party, including its procuring entities, may prepare, adopt or apply
>
> technical specifications to promote the conservation of natural resources or protect the environment, provided that it does so in accordance with this Article."

This provision relates to the very beginning of a procurement procedure, when the good or service to be procured is defined. Environmental considerations such as fuel consumption or the use of recycled material are written into the specifications, all bidders know from the very beginning what the requirements are (transparency), they are the same for all (non-discrimination), and the remainder of the procedure is not affected by sustainability, allowing a focus on the economically most advantageous tender (competition). This is arguably the best way to promote environmental considerations without conflict with the other objectives of procurement regulation, including the facilitation of trade. However, there are limits to this approach. Firstly, it is only suitable for open and restricted procedures when specifications can be drawn up at the very beginning. For negotiated procedures, where specifications cannot be drawn up because the input of the private sector is required even on the question on exactly what good or service to procure,[14] this approach cannot be used and that excludes many of the more complex and valuable contracts that are most interesting for Transatlantic trade between the EU and Canada. However, environmental considerations could be included in the negotiation criteria of contracting authorities for negotiated procedures, but this is not addressed in CETA. Secondly, Article 19.9(6) CETA does not include objectives other than environmental ones, especially no social considerations. Thirdly, as the use of the word "may" clarifies, there is no obligation to take environmental considerations into account when drafting specifications. This means that a fictional situation in which Canadian contracting authorities never take environmental considerations into account and their European colleagues do that all the time, or vice-versa, would be perfectly compliant with the letter of Article 19.9(6) CETA. It is therefore argued that the provision does not intend to put any obligation on the trade partners, - Canada or the EU. However, what the provision does is to clarify that taking

[14] Take the example of the requirement being a connection between the mainland and an island near the coast. When, the contracting authority is certain that it wants a bridge financed exclusively by the taxpayer, then it can finalise specifications for a bridge and use the open or restricted procedure (not allowing for negotiations with the private sector) to procure such a construction contract. If that is not clear – if it could be a bridge or a tunnel or a ferry service, financed exclusively by the taxpayer, or by the private sector, or through a mixture of both – then technical specifications cannot be finalised at the beginning of the procedure and negotiations are essential to allow for the input of the private sector.

environmental considerations into account when drafting specifications is legal under CETA. This could have two effects in practice: preventing problems of Transatlantic bids when environmental considerations are part of the technical specifications on the one hand and encouraging to finalise such specifications as they are clearly legal thereby reducing the risk of legal disputes when this is done.

Secondly, Article 19.9(9) CETA provides:

> "The evaluation criteria set out in the notice of intended procurement or tender documentation
>
> may include, among others, price and other cost factors, quality, technical merit, environmental characteristics and terms of delivery."

This is a more far-reaching rule since it allows to take environmental considerations into account at a very late stage of the procurement procedure when all qualified and selected bids are compared, and the contract is awarded to the economically most advantageous tender. "[P]rice and other cost factors, quality, technical merit, […] and terms of delivery" are all obvious considerations when considering 'value for money', none of them to be considered sustainability criteria. While "environmental characteristics" can be construed as economically relevant, it is argued that they clearly are sustainability criteria. Since taking sustainability into account at the late award stage is more controversial due to potential effects on transparency and competition, this rule is not included in all FTAs, as explained under the next heading below. Again, neither does the rule include considerations other than environmental ones nor does it impose an obligation ("may") on contracting authorities in Canada or the EU.

Thirdly, 19.7(4) CETA provides:

> "If there is supporting evidence, a Party, including its procuring entities, may exclude a
>
> supplier on grounds such as: […]
>
> (f) failure to pay taxes."

This provision relates to a relative early stage of any procurement procedure when the qualification of bidders rather than their bid is evaluated. The failure to pay taxes is a relatively common exclusion ground and is arguably covered by a wide notion of sustainability. However, as part of the methodology the application of a narrow understanding of sustainability (limited to social and environmental objectives) is applied in the context of this Working Paper to discuss the importance and effect of sustainability in the procurement chapters of FTAs. Not paying taxes may impact on bids and make the bidder vulnerable for prosecution and insolvency and therefore has a stronger link to competition and efficiency than to sustainability.

Finally, Article 19.2(6) CETA provides:

> "In estimating the value of a procurement for the purpose of ascertaining whether it is a covered procurement, a procuring entity shall:
>
> (a) neither divide a procurement into separate procurements nor select or use a particular valuation method for estimating the value of a procurement with the intention of totally or partially excluding it from the application of this Chapter […]"

This rule is indirectly allowing the division of larger contracts into lots, which is an important technique to facilitate the participation of SMEs in procurement procedures.[15] However, it will be excluded from further analysis in this Working Paper.[16] Firstly, the rule is mainly concerned with division as a 'trick' to avoid the application of the Chapter which only applies above certain threshold values. Secondly, this conveys a negative rather than an encouraging attitude of the Parties. Thirdly, no further detail on the various aspects on division into lots is provided. Therefore, this is only very indirectly a sustainability provision and will be excluded from the further analysis.

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[15] See: M. Trybus, "The division of public contracts into lots under EU Directive 2014/24/EU: minimum harmonisation and impact on SMEs in public procurement? (2018) 43 *European Law Review* 311-340; M. Trybus and M. Andrecka, "Favouring Small and Medium Sized Enterprises with Directive 2014/24/EU" (2017) 12 *European Procurement and Public Private Partnerships Law Review* 224-238.

[16] A similar rule can be found in Article 12 of the Act on Contracting by Public Bodies of Quebéc.

## IV. The external *acquis*: other third generation FTAs

A look at the relevant provisions of third generation FTAs of the EU since 2010 reveals an evolution from not even mentioning sustainability objectives in earlier FTAs to addressing them extensively in more recent agreements.

Article 9.1 of the EU-South Korea FTA 2010 incorporates the revised text of the Government Procurement Agreement (GPA) of the WTO into the FTA but makes not further mention of sustainability. While sustainability is also promoted through the GPA, [17] this is a separate issue beyond the analysis of EU FTAs in this Working Paper.

The EU-Colombia/Peru/Ecuador FTA 2012 contains in Article 173(6) the no-division rule, in Article 178(4) disqualification for failure to pay taxes, and in Article 181(6) the technical specifications rule but no rule on award criteria. This is followed by CETA 2016 as described under the previous heading above.

Article 10.1 of the EU-Japan FTA 2017 incorporates the GPA but makes no further mention of sustainability. This approach is closer to the South Korea FTA since both are members of the GPA, while Colombia, Peru, and Ecuador are not.

Chapter 20 of the EU-Mexico Agreement in Principle 2018 contains in Article 7(4)(f) the failure to pay taxes rule and in Article 9(7) the specifications rule, but Article 14 does not include environmental award criteria.

Similarly, Chapter 9 of the EU-Vietnam FTA 2018 includes the no-division rule in Article 9.2(7)(a), the taxes rule in Article 9.7(4)(f) and the specifications rule in Article 9.9(6) but no award criteria rule.

However, Chapter 9 of the EU-Singapore FTA 2018 contains in Article 9.2(6) the division rule, in Article 9.7(4)(f) the taxes rule, in Article 9.9(6) the specifications rule, and in Article 9.9 (11) also the rule on award criteria.

Finally, the EU-Mercosur FTA 2019 contains the division rule in Article 4(2)(a), the taxes rule in Article 14(4)(f), and the specifications rule in Article 16(6), but no award criteria rule.

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[17] The GPA contains the technical specifications rule in Article X(6), the payment of taxes rule in Article VIII(4)(f), and the no-division rule in Article II(6)(a) but no award criteria rule in Article VIII.

The specifications- and award criteria rules in all these FTAs are all limited to environmental considerations and do not impose obligations on the trade partners ("may").

However, Article X.2(7) of both the 2018 draft FTAs with Australia and with New Zealand provide:

> "Environmental, social and labour considerations
>
> 7.A Party may:
>
> (a) allow procuring entities to take into account environmental *and social* considerations *throughout the procurement procedure*, provided they are non-discriminatory and they are linked to the subject-matter of the contract; and
>
> (b) take appropriate measures to *ensure compliance* with its obligations in the fields of environmental, social and labour law, including the obligations under Chapter X (*Trade and Sustainable Development*) [emphasis added]."

This provision and consequently the eventual FTAs are dramatically different to all previous FTAs discussed in this chapter, including CETA, in four fundamental ways. Firstly, for the first time they do not only refer to environmental considerations but also expressly include social considerations under letter (a), a concept further explained under letter (b) as "obligations in the field of […] social and labour law". Thus, these draft FTA go beyond the environmental and perhaps SME limits seen in FTAs so far. Secondly, they allow contracting entities to take sustainability considerations into account "throughout the procurement procedure" thus going beyond the limits of the tax, specifications, division, and award criteria limits seen until now. Thirdly, letter (b) expressly links the procurement chapter to the trade and sustainable development chapter thereby giving importance to both that latter chapter and public procurement as an instrument to promote sustainability, making the FTA not only an instrument to further trade but also sustainable development. Fourthly and finally, while leaving the use of sustainability criteria at the discretion of the trade partners or their contracting entities ("allow", CETA: "may"), letter (b) provides for the enforcement of sustainability through contracting entities thereby giving any rules promoting sustainability in procurement 'teeth' beyond mere declarations of intent. Nevertheless, the use of the words "may" and "allow" indicates a 'trade before sustainability' approach that ultimately limits these FTAs as instruments to promote sustainability and thus that of the EU as a global actor for

more than just trade. In fact, these references to sustainability might be motivated by a concern for sustainability not to hinder trade more than anything else.

Thus, it can be said that there is evidence for a growing importance of sustainability in the public procurement chapters of future FTAs, while the *status quo*, best represented by CETA, is very limited with respect to sustainability.

## V. Impact: the 'implementation' of the EU's external *acquis* in Canada

The EU can only project its sustainability agenda through the procurement chapter of CETA if the latter is transposed into the relevant Canadian legal framework and thus becomes the basis of Canadian procurement practice. Canadian public procurement law can be divided into four levels. Firstly, there is common (case) law of the relevant Canadian courts on many crucial aspects of public procurement.[18] Secondly, there are the trade agreements, including the Canadian Free Trade Agreement (CFTA) between the Provinces and Territories of Canada and CETA, that are applied directly and cumulatively if a contracting authority and contract in question is covered by these Agreements.[19] Thirdly, there are the statues and regulations of the Provinces and Territories of Canada.[20] Fourthly, there are policies and directives.[21]

Both with respect to the Canadian Federal level and that of the Provinces and Territories, CETA is applied directly by the covered contracting authorities to the contracts covered by the agreement. This is more like a direct application than a transposition into national legal instruments but has a similar effect. Thus, while Articles 19.9(6) and 19.9(9) CETA are applied directly, whether technical specifications and award criteria in contracts covered by CETA are taking sustainability into account more than contracts not covered by CETA cannot comprehensively be determined in this Working Paper. However, this is doubtful as the relevant CETA rules on technical specifications and award criteria are not mandatory ("may"). Nevertheless, for the covered contracts Canadian contracting authorities can take

[18] For example on strict compliance requirements in *Bradscot (MCL) Ltd. Hamilton Wentworth Catholic District School Board [1999]* 42 O.R. (3d) 723 (Ont.C.A.) *Steelmac Ltd.* v. *Nova Scotia (Attorney General)* [2007] NSJ. No. 216.

[19] Article 509 (5) CFTA contains the specifications rule for environmental considerations but there is no award criteria rule. Thus, a contract covered by both CFTA and CETA would have to apply both the specifications and the award criteria rule.

[20] Such as the Broader Public Sector Accountability Act of Ontario, the Public Procurement Act of Newfoundland, the Procurement Act of New Brunswick, or the Contracts and Procurement Regulation of Yukon.

[21] Such as the Federal Contracts Programme (formerly Employment Equity) or the Aboriginal Procurement Policy.

environmental considerations into account when drafting specifications and award criteria. Thus, it is argued here that there has been an impact of CETA on the relevant legal framework in Canada.

On the federal level Canada introduced a *Policy on Green Procurement* in 2006[22] (on the fourth level described two paragraphs above) with the objective:

> "[…] to advance the protection of the environment and to support sustainable development by integrating environmental performance considerations into the procurement decision-making process."[23]

This is further set out in 2.2. Annex: Green Procurement: Environmental Factors and Evaluation Indicators,[24] and section 1.60.1. Green Procurement Policy.[25] The detail in these sections exceeds that of CETA on award criteria considerably. Section 2.20 - Green Procurement and Defining the Requirement[26] sets out the use of environmental criteria when defining technical specifications in considerably more detail that those of CETA. However, the policy only applies to contracting authorities at the Federal level.[27] Sustainability rules and policies do exist at the level of the Provinces and Territories, for example the Quebéc Act on Contracting by Public Bodies contains the no-division rule in Article 12 and the tax rule in Article 21.1.1. However, no direct impact of CETA on the legal framework of the federal or sub-federal level beyond the contracts covered by the Agreement occurred since CETA covered procurement is a self-contained regime in Canada.

An indirect impact on Canadian procurement law other than that covered by CETA is possible: the case law may take ideas from CETA also with respect to procurement not covered by it. Moreover, new Federal laws and policies as well as those of the Provinces and Territories might

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[22] https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32573.

[23] Ibid.

[24] *Supra* note 22.

[25] https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/1/60/1.

[26] https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/2/20.

[27] Ibid., at 3. Application referring to Section 2 Financial Administration Act R.S.C., 1985, c. F-11.

be inspired by CETA. However, this will take time. Moreover, the relevant rules in CETA are limited and Canada already had rules and policies that go beyond them. This is also promoting sustainability in procurement in the spirit of CETA but is not caused by it.

## VI. Conclusions

The FTAs of the EU currently in force cannot be classified as instruments of EU external action to further sustainability though public procurement. Firstly, the references to sustainability are very limited, only addressing environmental objectives and only with regards to the drafting of technical specifications and only in CETA with regards to award criteria. Secondly, the rules that do exist do not require but only allow the use of environmental criteria, are soft law rules within a hard law instrument. Thirdly, because the rules are not mandatory and because the parties already have procurement systems in place that promote particularly environmental standards but also other sustainability objectives to a degree by far exceeding the requirements set out in the procurement chapters of the FTA, there is no impact of the FTAs on the procurement laws and policies of the parties. Neither the EU nor Canada, for example, had to change their procurement system with regards to sustainability in consequence of adapting to CETA. If the EU wants to make the world a better place through procurement it is not currently doing this through its FTAs. With regards to procurement, the current FTAs are almost exclusively focused on the trade and regulation objectives: opening markets and regulating the procurement process for that purpose.

However, the 2018 drafts of the FTAs with Australia and New Zealand might represent the first steps towards a more extensive use of FTAs as instruments to further sustainability in procurement. They go beyond environmental objectives and include social considerations also. They go beyond the drafting of technical specifications and allow taking sustainability into account throughout the procurement process. They link their procurement chapters to their trade and sustainable development chapters. They allow for the enforcement of sustainability though contracting entities. While this is certainly very promising, caution is advised. These FTAs are not in force yet. Australia and New Zealand have very developed public procurement systems and that includes sustainable procurement, at least in line with EU standards if not going beyond that. Therefore, only very limited impact can be expected on the Australian and New Zealand procurement systems, even after these FTAs entered into force. The EU will not be exporting its internal sustainable procurement *acquis*. Nevertheless, a blueprint for a more

extensive use of FTAs to further sustainability through procurement now exists and might herald a new era in international trade law with regards to procurement.