

International Trade and Investment Law Practicum

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# TRADE & GENDER IN PUBLIC PROCUREMENT

April 26, 2018

Kingston, ON, Canada

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## **Executive Summary**

Preferential public procurement provides states with a powerful means of reducing gender inequality and promoting women's empowerment. Well-designed policies that efficiently redirect a greater proportion of public spending towards small and medium-sized women-owned enterprises (SMEs) will not only help these businesses develop capacity and expertise but will also pay broader societal dividends. For not only are women's rights and the interwoven need for economic gender equality a question of human rights, but mounting evidence also suggests that levelling the economic playing field for women is a prerequisite for sustainable development. Creating opportunities for women-owned SMEs through public procurement is a potent means of achieving this objective, particularly because of the significant room for growth that remains: while public procurement accounts for approximately 20% of global GDP, it is estimated that only 1% of this market is supplied by women-owned businesses. Investing in women-owned SMEs further makes sense because SMEs generally make up nearly 80% of jobs worldwide, and yet the third of all SMEs owned by women cannot realize their full potential because of gender-specific constraints and barriers.

Of course, public procurement already presents a challenge for policymakers because of the number of objectives in play, including efficiency, transparency, and integrity. By adding a set of preferences for some businesses to this list of considerations, preferential public procurement only increases the complexity of the task. While the scope of this challenge is considerable, a review of existing preferential public procurement schemes proves that there

are practical and cost-effective solutions available to governments across the spectrum of economic development.

This report aims to provide a roadmap to preferential public procurement tailored to the context of women-owned businesses. Specifically, we offer guidance to policymakers working with governments and international organizations on the design, implementation, and support of these programs by distilling best practices from existing approaches into a set of recommendations. In brief, we show that successful programs combine a range of primary and secondary measures, namely:

- **Primary measures** form the core of preferential public procurement schemes, as they provide tangible benefits to eligible women-owned businesses. While certification acts to minimize abuse of these programs, set-asides and bid-adjustments are forms of affirmative action through which eligible businesses are awarded contracts without having to compete on the open market. Ideally, these policies provide sufficient growth opportunities for businesses so that eventually they are able to compete beyond the scope of these programs.
  - **Certification** forms the backbone of any preferential procurement regime.
    - It allows procuring authorities to verify bidder eligibility, which helps ensure program integrity.
    - It streamlines the bid process for eligible businesses.
    - Procuring authorities can perform certification in-house, or can out-source to third party certification organizations.

- **Set-asides** reserve suitable contracts for exclusive competition amongst women-owned businesses.
  - Their key advantage is that they guarantee that select contracts are awarded to women-owned businesses.
  - The selection process may be complicated because it requires a range of data (e.g., the number and profiles of eligible businesses, the communities within which those businesses operate, their representation in the applicable economic sector, and cost implications).
- **Bid-adjustments** promote the competitiveness of women-owned businesses by applying a discount to some or all of the price components of eligible bids.
  - The challenge in this approach is configuring the extent of the price discount.
  - Procuring authorities must balance between access for women-owned businesses while capping the potential cost-consequences of applying the discount.
- **Secondary measures** educate and train eligible business personnel and provide general support structures.
  - **Public outreach and training initiatives** provide education for women-owned businesses on the programs offered and on the steps required to participate in public procurement.
    - Among other things, this should include training on the particular procedures in a procurement process, the

criteria used to evaluate bids, and the preparation of bid documents.

- **Materials must be presented clearly and accessibly.** Information on websites and elsewhere must be presented in a user-friendly manner, and reference documents should provide step-by-step explanations of the procedures involved.
- **Investigative/adjudicative tribunals** provide a venue for suppliers to contest the award of particular contracts.
  - This furthers the integrity of a regime and provides policymakers with a source of feedback.
- **Periodic review of applicable legislation/regulations** ensures continuous improvement.
  - Ideally, these reviews include consultations with all stakeholders and engage independent experts to assist with fact-finding, analysis, and recommendations.

In addition, there are three interrelated issues in preferential public procurement that would be best resolved through international coordination.

1. Governments should work towards a universal definition of “women-owned business”. Variations in the definitions and standards used for women-owned business limit the reach of preferential public procurement schemes and create artificial obstacles for women entrepreneurs seeking opportunities across borders. We discuss a number of considerations on which to base a universal definition and provide a template for what this definition might look like.



2. A universal definition, in turn, would create the foundation for a universal certification program. This would further enhance the reach of these schemes by reducing barriers and promoting integrity.
3. Finally, successful preferential public procurement regimes require accurate data on a range of points, most importantly, on the number and profiles of eligible women-owned businesses. A centralized database of women-owned businesses would facilitate preferential procurement processes that do not discriminate based on nationality and would also allow for a more nuanced understanding of these businesses and the challenges they face. Governments should therefore be encouraged to share domestic information and aggregate it in a transparent global registry. Ideally, this global registry would be administered alongside a universal certification mechanism.

# 1. INTRODUCTION

Public procurement—the process through which governments purchase goods, services, and works from the private sector—is a key driver of the global economy. The World Trade Organization (“WTO”) estimates that, on average, public procurement accounts for approximately 10% to 15% of states’ economies,<sup>1</sup> and data compiled by the World Bank confirm that it plays a vital role for countries at both high and low-income levels and across the political spectrum.<sup>2</sup> Further, citizens in most states have direct experience with their government’s public procurement processes on a daily basis, as they may regulate everything from awarding construction projects for schools and hospitals to the provision of public utilities such as water and electricity. Given the magnitude of global government spending and the citizens’ interests at stake, it is critical that states adopt procurement schemes that are efficient, fair, and maximize the public interest. Governments that fail to do so not only risk undermining public trust and governmental legitimacy, but also forego the opportunity to strengthen their competitive markets by developing business expertise and capacity.

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<sup>1</sup> World Trade Organization, “WTO and Government Procurement”. Online: <[www.wto.org/english/tratop\\_e/gproc\\_e/gproc\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm)>.

<sup>2</sup> Asif Islam & Federica Saliola, “Is public procurement a rich country’s policy?” (World Bank, December 2016). Online: <[blogs.worldbank.org/governance/public-procurement-rich-country-s-policy](http://blogs.worldbank.org/governance/public-procurement-rich-country-s-policy)>. The authors note that while consistent and reliable data are available for high-income countries, there tends to be a scarcity of publicly available data for lower-income countries. Saliola and Islam calculate that on average, public procurement in low-income countries tends to account for a higher percentage of GDP (14.5%) than for upper-middle income countries (13.6%) and higher-income countries (12% in the OECD). Note that the averages are skewed by significant outliers in each group, such as Eritrea (where public procurement accounts for 33% of GDP), the Netherlands (20.2%), and China (2.8%). The report raises the question of how public procurement is measured across states with different political arrangements.

In designing public procurement processes, policymakers must strike a balance between a dizzying number of strategic objectives. For starters, procuring authorities must continuously optimize their processes and adopt new technologies (such as e-procurement systems) in order to maximize the return on investment of taxpayer resources. The scope of public procurement in both developed and developing states means that even marginal improvements result in significant savings. For example, the OECD's 2015 Recommendation of the Council on Public Procurement found that a 1% cost reduction through the adoption of more efficient systems represents savings worth EUR 43 billion per year in OECD countries.<sup>3</sup> At the same time, public procurement authorities must ensure that their laws and policies are transparent, establish a level playing field between suppliers, and are in compliance with any international commitments in bilateral, multilateral, and plurilateral agreements (such as the *WTO Agreement on Government Procurement* ("GPA")).

Finally, policymakers are increasingly expected to approach the development of their public procurement regimes in holistic terms. As part of the push for "smart spending", many governments now look beyond a simple calculation of the financial bottom line, and instead, aim to incorporate environmental and developmental considerations in their assessments. Of course, states have long used public procurement as a tool to achieve various social and political objectives. Starting in the 19th century, states such as England and the United States used public procurement as a means to advance

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<sup>3</sup> OECD Directorate for Public Governance and Territorial Development, "2015 Recommendation of the Council on Public Procurement" (March 2, 2015). Online: <[www.oecd.org/gov/public-procurement/recommendation/](http://www.oecd.org/gov/public-procurement/recommendation/)>.

labour and employment standards; in 1840, US President Martin Van Buren set a 10-hour work day limit for employees of certain government contractors, and beginning in 1931, US government contractors were required to pay their employees at minimum the local prevailing wage on certain construction projects.<sup>4</sup> Eventually, these schemes were extended for the benefit of disadvantaged workers, such as the disabled—in the post-World War I period, the British government sought to protect disabled veterans through preferential public procurement schemes. Over time, the number of interest groups targeted through preferential public procurement has only increased: the unemployed, the disabled, indigenous groups, and ethnic, religious, and racial minorities have all, at one time or another and across both developed and developing states benefited from preferential public procurement. Since the early 1990s, many governments have also begun to implement legislation facilitating environmentally friendly and sustainable public spending.<sup>5</sup>

In recent years, many governments have become interested in deploying this tool in order to promote gender equality and inclusivity. Particularly the latter half of the 20th century saw ever-growing awareness that gender equality is both a question of human rights and a precondition for states that wish to achieve their full economic potential. This is powerfully illustrated by the 1995 Beijing Declaration of the Fourth World Conference, in which the representatives of 189 governments recognized that “women’s rights are human rights” and that “women’s empowerment and their full participation on

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<sup>4</sup> Christopher McCrudden, “Using public procurement to achieve social outcomes” (Natural Resources Forum 28, 2004) at 257. Online: <[www.socialtraders.com.au/wp-content/uploads/2016/04/000415\\_cebe.pdf](http://www.socialtraders.com.au/wp-content/uploads/2016/04/000415_cebe.pdf)>.

<sup>5</sup> *Ibid.*

the basis of equality in all spheres of society, including participation in the decision-making process and access to power, are fundamental for the achievement of equality, development, and peace.” To achieve these objectives, the Beijing Declaration called on governments to “design, implement and monitor, with the full participation of women, effective, efficient and mutually reinforcing gender-sensitive policies and programmes, including development policies and programmes, at all levels that will foster the empowerment and advancement of women.”<sup>6</sup>

The achievement of gender equality and empowerment of women, as articulated in the UN Sustainable Development Goal 5,<sup>7</sup> is predicated on empowering women in every sphere of social, political, and economic life. This requires international organizations and national governments to take a comprehensive view when they develop standards and rules and design and implement policy. One area of vital importance to achieving greater gender equality concerns closing the economic gap between women and men. Here, governments have an added impetus for reform in light of ever-increasing evidence that the economic empowerment of women facilitates sustainable economic development and yields greater productivity and economic growth.<sup>8</sup> As summarized by Roberto Azevêdo, Director-General of the WTO: “[A]ll the

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<sup>6</sup> United Nations, “Beijing Declaration and Platform of Action,” adopted at the Fourth World Conference on Women” (October 27, 1995). Online: <[www.un.org/womenwatch/daw/beijing/platform/declar.htm](http://www.un.org/womenwatch/daw/beijing/platform/declar.htm)>.

<sup>7</sup> United Nations General Assembly, “Transforming Our World: the 2030 Agenda for Sustainable Development” (October 21, 2015). Online: <<https://sustainabledevelopment.un.org/sdg5>>. Substantial Development Goal 5 (“SDG5) builds on Millennium Development Goal 3 (“MDG3”) in the 2000 Millennium Declaration but establishes a significantly broader set of targets. MDG3 set a single target: the elimination of gender disparity in primary and secondary education by 2015. In comparison, SDG5 adopts a more comprehensive range of targets involving social, political, and economic objectives.

<sup>8</sup> World Economic Forum, “The Global Gender Gap Report 2017” (November 2, 2017). Online: <[www3.weforum.org/docs/WEF\\_GGGR\\_2017.pdf](http://www3.weforum.org/docs/WEF_GGGR_2017.pdf)>.

evidence suggests that giving an equal economic chance to women is not only economically important; it results in beneficial outcomes for society as a whole. Investing in women—and empowering women to invest in themselves—is a risk-free venture.”<sup>9</sup>

But while the need for reform has been clear for some time, economic gender inequality remains substantial. As a result, most countries fail to achieve their potential. It is estimated that economic and social discrimination against women is costing Africa approximately 6% of the continent’s GDP.<sup>10</sup> Similarly, research suggests that gender inequality causes an average income loss of 15% in OECD economies.<sup>11</sup> The complex nature of the problem necessitates a multi-pronged response, as there is no one-size fits all solution. Arancha González, Executive Director at the International Trade Centre, believes “women entrepreneurs face disproportionately complex, and interconnected barriers to accessing equal economic opportunities”, meaning “no one entity...can do it alone. There needs to be a comprehensive effort from all parties to make a change.”<sup>12</sup>

The United Nations Conference on Trade and Development (“UNCTAD”) has recognized that “[t]aking into account gender perspectives in macro-economic policy, including trade policy, is essential to pursuing inclusive and sustainable development” and that the “nexus between trade policy, gender

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<sup>9</sup> World Trade Organization, “Gender Aware Trade Policy: a Springboard for Women’s Economic Empowerment” (June 2017) at 2. Online: <[www.wto.org/english/news\\_e/news17\\_e/dgra\\_21jun17\\_e.pdf](http://www.wto.org/english/news_e/news17_e/dgra_21jun17_e.pdf)>.

<sup>10</sup> *Ibid* at 3.

<sup>11</sup> World Bank Group, “Women, Business, and the Law 2018” (March 29, 2018) at 7. Online: <<https://openknowledge.worldbank.org/bitstream/handle/10986/29498/9781464812521.pdf>>.

<sup>12</sup> Arancha González, “Public Procurement, a Tool to Boost Women’s Economic Empowerment” (International Trade Centre, speech delivered November 10, 2017). Online: <[www.intracen.org/news/Public-Procurement-a-Tool-to-Boost-Womens-Economic-Empowerment/](http://www.intracen.org/news/Public-Procurement-a-Tool-to-Boost-Womens-Economic-Empowerment/)>.

equality, and development” has become increasingly clear. Increasing incorporation of gender-related considerations in trade instruments and the emergence of trade agreements with dedicated trade and gender chapters attests to the growing awareness of the importance of trade and investment to promoting economic gender parity.<sup>13</sup> While there are currently only two free trade agreements with dedicated trade and gender chapters—namely the *Chile-Uruguay Free Trade Agreement* (the first agreement incorporating such a chapter) and the amended *Canada-Chile Free Trade Agreement* (“CCFTA”)—there are a number of trade instruments that incorporate gender perspectives and considerations.<sup>14</sup> However, UNCTAD anticipates that an increasing number of instruments will address gender-related issues, in part because of growing “awareness about the gender dimension of trade policy, including as a result of research work conducted by international organizations and academia.”<sup>15</sup> Recent examples of this trend include the European Parliament’s adoption of a resolution by which the EU’s trade policy must better account for and integrate gender related perspectives and concerns, the EU’s announcement that the modernised Chile-EU FTA will also include a specific trade and gender chapter, as well as a Canada-Mercosur joint statement promising the inclusion of trade and gender issues in their negotiations. This is further confirmed by the 2017 WTO Buenos Aires Joint Declaration on Women’s Economic Empowerment, in which 118 WTO Members and observers recognized that “inclusive trade policies can contribute to advancing

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<sup>13</sup> United Nations Conference on Trade and Development, “The New Way of Addressing Gender Equality Issues in Trade Agreements: is it a true revolution?” (October 2017). Online: <[http://unctad.org/en/PublicationsLibrary/presspb2017d2\\_en.pdf](http://unctad.org/en/PublicationsLibrary/presspb2017d2_en.pdf)>.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid* at 3.

gender equality and women’s economic empowerment”, and that “improving women’s access to opportunities and removing barriers to their participation in national and international economies contributes to sustainable economic development.”<sup>16</sup>

Reforming international trade and investment with a focus on gender equality may take a number of different forms. One option involves facilitating the greater use of preferential public procurement for the benefit of women-owned businesses, which, as noted above, is an area of increasing interest to many governments. This is demonstrated by the Buenos Aires Joint Declaration, in which participating WTO Members and observers vouched to inquire into the “enhancement of women entrepreneurs’ participation in public procurement markets.” Another example is found in the Canadian Federal Government’s 2018 Budget, where the Government undertook to increase the participation of women-owned small and medium-sized enterprises (“SMEs”) in federal procurement by 50 per cent (to at least 15 per cent) in order to reflect the current proportion of SMEs majority led by women entrepreneurs in the broader population.<sup>17</sup> In doing so, Canada joins a number of countries committed to using public procurement as a tool to foster gender equality, including Australia, Chile, Kenya, South Africa, and the United States. We examine some of these efforts below.

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<sup>16</sup> WTO Ministerial Conference in Buenos Aires December 2017, “Joint Declaration on Trade and Women’s Economic Empowerment”. Online: <[www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/genderdeclarationmc11\\_e.pdf](http://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf)> [Buenos Aires Joint Declaration].

<sup>17</sup> Government of Canada, “Budget Plan 2018: Equality + Growth = A Strong Middle Class”, Tabled in the House of Commons by the Honourable William Francis Morneau, Minister of Finance (27 February 2018) at 110. Online: <[www.budget.gc.ca/2018/docs/plan/toc-tdm-en.html](http://www.budget.gc.ca/2018/docs/plan/toc-tdm-en.html)> [Budget Plan 2018].



The opportunity for development in this area is significant: public procurement is estimated to make up 20% of global GDP, and yet only 1% of the market is supplied by women-owned businesses.<sup>18</sup> As noted in a report by Chatham House, women-owned SMEs grapple with challenges common to SMEs in general, including: limited information about upcoming tenders, overly complex tender procedures, time constraints, a lack of feedback indicating why a bid was unsuccessful, and a difficulty meeting high contract volumes.<sup>19</sup> However, the report suggests that these problems may be exacerbated by the fact that women tend to carry a disproportionate share of family and care responsibilities; that women-owned businesses are over-represented in less profitable sectors (such as retail and personal services) and under-represented in more profitable sectors (including manufacturing, extraction, and business services); and that women-owned businesses are more likely to pursue social as well as economic ends and typically generate lower levels of profit.<sup>20</sup>

But as policymakers already grapple with numerous policy objectives in designing their public procurement schemes, incorporating yet another objective poses a substantial challenge. The following paper offers policymakers guidance in approaching these issues. The recommendations herein apply broadly and will hopefully prove useful to policymakers at different levels of government and across different developmental and political contexts.

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<sup>18</sup> Chatham House Global Economy and Finance Department, “Gender-smart Procurement: Policies for Driving Change” (edited by Susan Rimmer, December 2017) at 2. Online: <[www.chathamhouse.org/sites/files/chathamhouse/publications/research/Gender-smart%20Procurement%20-%2020.12.2017.pdf](http://www.chathamhouse.org/sites/files/chathamhouse/publications/research/Gender-smart%20Procurement%20-%2020.12.2017.pdf)> [Chatham House Report].

<sup>19</sup> *Ibid* at 3.

<sup>20</sup> *Ibid* at 14, 17.

In the next section, we outline and evaluate the public procurement landscape in Canada. Here, we provide a brief overview of Canada's public procurement regime and discuss how Canada's international commitments set limits for policymakers who wish to develop preferential public procurement schemes. The section concludes with an assessment of two preferential public procurements schemes previously implemented by Canadian governments at sub-national levels: the Territory of Nunavut's Nunavummi Nangminiqagtunik Ikajuuti Policy and the City of Toronto's Social Procurement Program, as these programs effectively showcase best practices. In the third section of this paper, we identify international best practices via a discussion of case studies in Australia, Chile, Kenya, South Africa, and the United States. In the fourth and final section, we issue recommendations as to which schemes should be considered by policymakers and governments that wish to achieve greater economic gender equality. In addition, we provide suggestions for institutions that wish to support governments in their public procurement reform efforts.

## 2. PREFERENTIAL PUBLIC PROCUREMENT IN CANADA

We begin our examination of procurement practices with a case study on Canada, in part due to the location of its authors, but also in light of Canada's current policies focusing on promoting women in international trade. One example of this policy in action is the recent Amending Agreement to the *Canada-Chile Free Trade Agreement* ("CCFTA")—Amending Agreement in Respect of Investment and Trade and Gender (signed June 5, 2017). This Agreement added a new Part Four to the CCFTA, in which it dedicated an entire chapter to "Trade and Gender" (Chapter N *bis*). The Chapter acknowledges the importance of incorporating a gendered perspective to trade-related issues, in order to ensure that everyone can participate.<sup>21</sup> This step of including a gender chapter in an FTA is historic as not only a first for Canada, but for any G7/G20 country.

### 2.1. Overview of the Domestic Landscape

Understanding the domestic public procurement landscape is relevant for procurement and gender because ultimately, this is where legislative and policy changes for the advancement of women entrepreneurs will be made. The procurement regulatory framework in Canada is complicated by the country's federal structure, meaning that various statutes and policies exist at the federal,

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<sup>21</sup> François-Philippe Champagne, Minister of International Trade: "All Canadians and Chileans will undoubtedly welcome the modernization of this agreement, particularly the dedicated chapter on trade and gender, which reinforces the Government of Canada's commitment to advancing gender equality and to creating real opportunity for the middle class, especially women and the girls who will be the next generation of entrepreneurs, board members and CEOs." See online: <[www.canada.ca/en/global-affairs/news/2017/06/canada\\_breaks\\_newgroundasitsignsmodernizedfreetradeagreementwith.html](http://www.canada.ca/en/global-affairs/news/2017/06/canada_breaks_newgroundasitsignsmodernizedfreetradeagreementwith.html)>.

provincial, and municipal levels.<sup>22</sup> As a result, public procurement in Canada operates in a decentralized manner, with individual entities having delegated authority to award contracts. Of all regimes in Canada, the federal one is the most comprehensive. The leading documents that apply to federal contracts for goods and services include the: *Financial Administration Act*,<sup>23</sup> *Government Contracting Regulations*,<sup>24</sup> *Treasury Board Contracting Manual*,<sup>25</sup> *Public Works and Government Services Canada Act*,<sup>26</sup> and *Standard Acquisition Clauses and Conditions Manual*.<sup>27</sup> In these documents, you can find the authority of the Minister to acquire goods, the legal framework for the collection and expenditure of public funds, and rules respecting transparency and accountability. Most goods and services are purchased by Public Services and Procurement Canada (“PSPC”)<sup>28</sup> using contracts, standing offers, and supply arrangements.<sup>29</sup>

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<sup>22</sup> Canadian federalism is comprised of eleven jurisdictions of governmental authority. There is one nation-wide federal Crown, which delegates powers to the three territorial governments, and ten provincial Crowns, which delegate powers to local municipal governments. Legislative powers are divided between the federal and provincial Crowns through sections 91 and 92 of the *Constitution Act, 1867*, although procurement falls into categories regulated by both levels, each with their own sets of procedure. See Garth Stevenson, “Federalism” (Canadian Encyclopedia, December 16, 2013). Online: <[www.thecanadianencyclopedia.ca/en/article/federalism/](http://www.thecanadianencyclopedia.ca/en/article/federalism/)>.

<sup>23</sup> *Financial Administration Act*, RSC 1985, c F-11.

<sup>24</sup> *Government Contracts Regulations*, SOR/87-402.

<sup>25</sup> Government of Canada, Public Services and Procurement Canada, “Treasury Board Contracting Manual”. Online: <[www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494](http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494)>.

<sup>26</sup> *Department of Public Works and Government Services Act*, SC 1996, c 16.

<sup>27</sup> Government of Canada, Public Services and Procurement Canada, “Standard Acquisition Clauses and Conditions (SACC) Manual”. Online: <[buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual](http://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual)>.

<sup>28</sup> This is a department of the federal government that procures goods and services for all federal government departments and agencies. It was formerly called Public Works and Government Services Canada (“PWGSC”).

<sup>29</sup> Gerry Stobo & Derek Leschinsky, “Pocketbook on the Canadian Public Procurement Regime” (BLG, February 1, 2011) at 7. Online: <[http://blg.com/en/News-And-Publications/publication\\_1799](http://blg.com/en/News-And-Publications/publication_1799)> [Stobo & Leschinsky].

The regime is further detailed in the *PSPC Supply Manual 2017*.<sup>30</sup> This Manual sets forth policies and procedures to be followed and includes references to statutes and regulations relevant to the procurement of goods, services, and construction in Canada. It also underscores that there is “one over-arching principle for all [PSPC] procurement activities: [i]ntegrity”<sup>31</sup>, and that the procurement processes will be “open, fair and honest”.<sup>32</sup> Moreover, all individuals involved in the procurement process are required to abide by five guiding principles: client service, national objectives, competition, equal treatment, and accountability.<sup>33</sup>

The *Supply Manual* also discusses two procurement policies for the advancement of domestic socio-economic objectives. These are the *Canadian Content Policy*, which is designed to “encourage industrial development in Canada by limiting, in specific circumstances, competition for government procurement opportunities to suppliers of domestic goods and services”<sup>34</sup> and the *Procurement Review Committee* (“PRC”), which is tasked with identifying procurements that have the “potential to achieve socioeconomic benefits”.<sup>35</sup> National socioeconomic objectives include, but are not limited to, aboriginal economic development, the environment, and defence procurement strategy.<sup>36</sup>

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<sup>30</sup> Government of Canada, Public Services and Procurement Canada, “PSPC Supply Manual” (effective November 28, 2017). Online: <[buyandsell.gc.ca/policy-and-guidelines/Supply-Manual](http://buyandsell.gc.ca/policy-and-guidelines/Supply-Manual)> [PSPC Supply Manual].

<sup>31</sup> *Ibid*, 1.10 PWGSC Procurement Process.

<sup>32</sup> *Ibid*, 1.10.1 Integrity.

<sup>33</sup> *Ibid*, 1.10.5 Guiding Principles.

<sup>34</sup> *Ibid*, 3.130(a). The *Canadian Content Policy* applies to procurements with an estimated value of \$25,000 or more, with certain exceptions. The bidder must certify that the good or service meets the definition of Canadian content by submitting a certification. For examples to assist in determining whether a good is Canadian or whether a mix of goods and services meets the stipulated rule of origin, see *ibid*, Annex 3.6: Canadian Content Policy.

<sup>35</sup> *Ibid*, 3.70. Any contract over \$2,000,000 must be reviewed by the PRC for potential socio-economic benefits. For an exhibit of the Detail Document to be forwarded to the PRC, see *ibid*, Annex 3.5: Procurement Review Committee Requirements and Approval Process.

<sup>36</sup> *Ibid*.

Each province and territory has its own separate legislation (e.g. the *Ministry of Government Services Act 2010* in Ontario).<sup>37</sup> The federal regime only applies to the provinces and territories in so far as the entity doing the procurement in the province or territory is a federal government entity. Municipal contracts are generally governed by common law and codified in municipal statutes, bylaws, and purchasing procedures (e.g. the *City of Ottawa Purchasing Bylaw*).<sup>38</sup> Together, the federal, provincial, territorial, and municipal governmental authorities purchase over CAD 100 billion in goods and services each year, for materials ranging from vaccines to bullets.<sup>39</sup>

In addition to legislation and various policies, public procuring entities, be they federal, provincial, territorial, or municipal, are further subject to obligations at common law—namely the tendering process governed by the Contract A/Contract B analysis established in the leading Supreme Court of Canada decision, *The Queen (Ontario) v Ron Engineering*.<sup>40</sup> The common law adds to Canada’s procurement regime by laying out the foundational principles upon which it rests. One such principle is that all bidders must be treated equally and fairly.<sup>41</sup> Another is that purchasers must be “fair and consistent” when evaluating bids.<sup>42</sup>

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<sup>37</sup> Stobo & Leschinsky, *supra* note 29 at 16. The PRC makes recommendations to the operating and contracting departments regarding appropriate procurement strategies and other initiatives that would support government objectives in individual acquisitions.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid* at 5.

<sup>40</sup> Contract “A” is the contract formed when a bidder submits their bid in response to an invitation to tender. Contract “B” is the contract formed between the winning bidder and the procuring authority. See: *The Queen (Ontario) v Ron Engineering*, [1981] 1 SCR 111, [1981] SCJ No 13.

<sup>41</sup> *Martel Building Ltd v Canada*, 2000 SCC 60 at para 108, [2000] 2 SCR 860.

<sup>42</sup> *Ibid* at paras 84, 88. The Court held that a privilege clause (in this case reserving the right not to accept the lowest bid) does not free a purchaser from their common law duty to treat all bidders fairly.

## 2.2. Overview of Canada’s International Treaty Obligations and their Impact on Procurement Schemes

In addition to the various domestic mechanisms at play, Canada is party to numerous bilateral and multilateral international agreements that establish, among other things, rules for the procurement of certain goods and services by national and subnational governments. Some important international agreements, for Canada’s procurement purposes, are: the *North American Free Trade Agreement* (“NAFTA”),<sup>43</sup> the *WTO Agreement on Government Procurement* (“GPA”) (including the original agreement—the GPA 1994<sup>44</sup>—and the revised agreement, which entered into force in 2014<sup>45</sup>), the *Canada-European Union Comprehensive Economic and Trade Agreement* (“CETA”)<sup>46</sup>, the *Canada-Chile Free Trade Agreement* (“CCFTA”),<sup>47</sup> and the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (“CPTPP”).<sup>48</sup>

Although gender is not addressed specifically in the procurement provisions of these agreements, they are nevertheless relevant because they refer to obligations of non-discrimination, monetary thresholds, and exemptions

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<sup>43</sup> *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289 (entered into force 1 January 1994). Online: <[www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement](http://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement)> [NAFTA].

<sup>44</sup> *Agreement on Government Procurement (1994)*, 15 April 1994 (entered into force 1 January 1996). Online: <[www.wto.org/english/docs\\_e/legal\\_e/gpr-94\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm)> [GPA 1994].

<sup>45</sup> *Revised Agreement on Government Procurement*, March 2012 (entered into force 6 April 2014). Online: <[www.wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm)> [GPA].

<sup>46</sup> *Canada-European Union Comprehensive Economic and Trade Agreement*, 30 October 2016 (entered into force 21 September 2017). Online: <[www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng](http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng)> [CETA].

<sup>47</sup> *Canada-Chile Free Trade Agreement*, 5 December 1996 (entered into force 5 July 1997). Online: <[international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/background-contexte.aspx?lang=eng](http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/background-contexte.aspx?lang=eng)> [CCFTA].

<sup>48</sup> *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 23 January 2018 (not yet in force). Online: <[wtocenter.vn/tpp/full-text-comprehensive-and-progressive-agreement-trans-pacific-partnership-cptpp](http://wtocenter.vn/tpp/full-text-comprehensive-and-progressive-agreement-trans-pacific-partnership-cptpp)> [CPTPP].

regarding set asides that could perhaps inform domestic procurement practices to promote women entrepreneurs.

### 2.2.1. North American Free Trade Agreement (NAFTA)

The NAFTA came into force in 1994 and establishes Canada's international commitment to reduce trade barriers amongst itself, the United States, and Mexico. This objective is to be achieved through the application of principles and rules, including "national treatment, most-favoured-nation treatment, and transparency" in the trilateral trading relationship.<sup>49</sup> In order to determine whether the NAFTA is applicable in the procurement context, Chapter Ten (Government Procurement) must be consulted. It applies to NAFTA-based suppliers of goods and services,<sup>50</sup> and imposes obligations on the NAFTA parties not to discriminate against goods, goods suppliers, and services suppliers of another Party, as well as not to discriminate against locally established suppliers on the basis of foreign affiliation or ownership, with respect to measures covered by the procurement chapter.<sup>51</sup>

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<sup>49</sup> *NAFTA*, *supra* note 43, art 102.

<sup>50</sup> *Ibid*, art 1005; NAFTA-based supplier means that the enterprise is "owned or controlled by persons" of a party and has "substantial business activities in the territory" of a party.

<sup>51</sup> *Ibid*, art 1003: "National Treatment and Non-Discrimination" reads as follows:

1. With respect to measures covered by this Chapter, each Party shall accord to goods of another Party, to the suppliers of such goods and to service suppliers of another Party, treatment no less favorable than the most favorable treatment that the Party accords to:
  - (a) its own goods and suppliers; and
  - (b) goods and suppliers of another Party.
2. With respect to measures covered by this Chapter, no Party may:
  - (a) treat a locally established supplier less favorably than another locally established supplier on the basis of degree of foreign affiliation or ownership; or
  - (b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for the particular procurement are goods or services of another Party.
3. Paragraph 1 does not apply to measures respecting customs duties or other charges of any kind imposed on or in connection with importation, the method of levying such duties or charges or other import regulations, including restrictions and formalities.



The NAFTA applies to public procurements with values equal to or greater than certain monetary thresholds, ranging from modest amounts (such as CAD 28,900 for goods) to more significant ones (such as CAD 11.6 million for construction services).<sup>52</sup> The entities covered are set forth in annexes, which do not include Canada's provincial governments.

Article 1006 specifically prohibits offsets, which are defined as “conditions imposed or considered by an entity prior to or in the course of its procurement process that encourage local development or improve its Party’s balance of payments accounts, by means of requirements of local content, licensing of technology, investment, counter-trade or similar requirements”.<sup>53</sup> However, exceptions to this prohibition are outlined in Article 1018<sup>54</sup> and can be classified broadly as those for national security purposes and interests which a country deems “necessary to protect”, such as public safety, human health, and intellectual property.

Of particular relevance to this Report is a carve out related to set-asides, since these are a core component of many preferential public procurement schemes. Each NAFTA Party has a Schedule under Annex 1001.2b entitled

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<sup>52</sup> *Ibid*, art 1001(1)(c)(i); For services, the threshold is CAD 89,600. Values are different for the US and Mexico.

<sup>53</sup> *Ibid*, art 1006.

<sup>54</sup> *Ibid*, art 1018. “Exceptions” reads as follows:

1. Nothing in this Chapter shall be construed to prevent a Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes.
2. Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on trade between the Parties, nothing in this Chapter shall be construed to prevent any Party from adopting or maintaining measures: (a) necessary to protect public morals, order or safety; (b) necessary to protect human, animal or plant life or health; (c) necessary to protect intellectual property; or (d) relating to goods or services of handicapped persons, of philanthropic institutions or of prison labor.

“General Notes”, and Canada’s specifies that: “[T]he Chapter also does not apply to procurements in respect of . . . (d) set-asides for small and minority businesses.”<sup>55</sup> The Schedule of the United States includes the same carve out.<sup>56</sup> Neither provides a definition of what constitutes a “small” or “minority” business.<sup>57</sup> In our view, however, this carve out could be interpreted to permit procurement processes aimed at benefitting women-owned businesses.

Finally, the NAFTA includes a section on bid challenges. Each party is obligated to adopt and maintain bid challenge procedures, in accordance with several enumerations listed under Article 1017, in order to “promote fair, open and impartial procurement procedures”.

## 2.2.2. WTO Agreement on Government Procurement (GPA)

The GPA is a plurilateral agreement under Annex IV of the WTO Agreement, meaning that not all WTO Members are party to the Agreement. Presently, the original GPA, which was concluded in 1994 and came into force in 1996 and the revised GPA, which came into force in 2014, co-exist, and will continue to do so until all parties to the GPA 1994 are bound by the revised GPA.<sup>58</sup> While the revised GPA has come into effect for most parties,<sup>59</sup> including

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<sup>55</sup> *Ibid*, annex 1001.2b: “General Notes”, “Schedule of Canada”, s. 1(d).

<sup>56</sup> *Ibid*, “Schedule of the United States”.

<sup>57</sup> However, Canada has used this carve out in connection with promoting Aboriginal business development. See Canadian Manufacturers & Exporters, “Strategic Government Procurement: Driving business investment and innovation through strategic government procurement” (September 2012) at 5. Online: <[www.cme-mec.ca/download.php?file=h8tlkaeo.pdf](http://www.cme-mec.ca/download.php?file=h8tlkaeo.pdf)>.

<sup>58</sup> World Trade Organization, “[GPA] Basic Principles and Elements”. Online: <[www.wto.org/english/tratop\\_e/gproc\\_e/gpa\\_1994\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gpa_1994_e.htm)>.

<sup>59</sup> The revised GPA has 18 parties: Armenia, Canada, the European Union (the European Union, and its 28 member states, are covered by the Agreement as one party), Hong Kong China, Iceland, Israel, Japan, the Republic of Korea, Liechtenstein, the Republic of Moldova, Montenegro, the Netherlands (in respect to Aruba), New Zealand, Norway, Singapore, Chinese Taipei, Ukraine, and the United States. See World Trade Organization, “[GPA] Parties, observers, and accession”. Online <[www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm)>.

Canada, the GPA 1994 (and Appendix I) continues to apply for Switzerland, the one remaining party of the 1994 agreement that is in the process of acceding to the revised GPA.<sup>60</sup> At the moment, ten more WTO Members are in the process of acceding to the revised GPA.<sup>61</sup>

The GPA 1994 is composed of two parts: the text of the Agreement and the parties' schedules of commitments. The text establishes an international commitment by the parties to open up procurement as much as possible to international competition.<sup>62</sup> Generally speaking, this commitment, alongside the principles of non-discrimination, transparency, and procedural fairness, are also found in the revised GPA, and the majority of the elements remain the same.<sup>63</sup> However, there are a few differences in the revised GPA, including streamlined provisions, a modernized explanation of public procurement practices, accommodation of developments in current government practice such as the use of electronic tools, clarification of the "special and differentiated treatment" provisions for developing countries, and a new requirement to avoid conflicts of interest and prevent corrupt practices.<sup>64</sup>

The revised GPA includes a prohibition on offsets<sup>65</sup> under Article IV.6 however, it says nothing in the main text about set asides or minority

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<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.* These ten members are: Albania, Australia, China, Georgia, Jordan, Kyrgyz Republic, Oman, the Russian Federation, Tajikistan, and the former Yugoslav Republic of Macedonia. Five other WTO members have made commitments to initiate accession to the GPA: Afghanistan, Kazakhstan, Mongolia, Saudi Arabia, and Seychelles.

<sup>62</sup> *GPA 1994, supra* note 44.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *GPA, supra* note 45. Art I(l) defines 'offset' as "any condition or undertaking that encourages local development or improves a Party's balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter- trade and similar action or requirement."

businesses.<sup>66</sup> It also calls upon the Government Procurement Committee to adopt a work programme for “(i) the treatment of small and medium-sized enterprises” under Article XXII.8(a). A work program was adopted by the Committee in 2012 providing for, among other things, the conduct of a survey of parties’ practices with respect to policies used to promote or facilitate participation by SMEs in public procurement. It was to inquire specifically about parties’ procurement measures and policies including their economic, social and other goals. The results of the survey are to be compiled by the Secretariat.<sup>67</sup>

The principles and rules of the revised GPA do not apply to all public procurement by the GPA parties. Rather, each GPA Party submits a coverage schedule where it specifies commitments with respect to the following: entities covered, the goods, services and construction services covered, the threshold values above which procurement activities are covered, and exceptions to the coverage. Coverage with respect to Canada is broader under the revised GPA, in comparison to the NAFTA, because it also binds provincial and territorial governmental entities as well as some Crown corporations.

Canada’s coverage schedule contains seven Annexes.<sup>68</sup> Canada qualifies the commitments made in its Annexes under the “General Notes” section found in Annex 7, which includes a statement that the “Agreement does

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<sup>66</sup> *Ibid*, art IV.6.

<sup>67</sup> See Annex C to Appendix 2 of the Decision on the Outcomes of the Negotiations Under Article XXIV:7 of the Agreement on Government Procurement, adopted on 30 March 2012.

<sup>68</sup> Annex 1 = Central Government Entities; Annex 2 = Sub-Central Government Entities; Annex 3 = Other Entities; Annex 4 = Goods; Annex 5 = Services; Annex 6 = Construction Services; Annex 7 = General Notes. See online: <[www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_app\\_agree\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm)>.

not apply to set asides for small and minority owned businesses.”<sup>69</sup> These terms are not defined but could, in our view, apply to women-owned businesses.

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

The CETA includes similar commitments to those found in the revised GPA in its Chapter 19, which sets out the procedural rules and market access commitments agreed to by Canada and the European Union with regards to public procurement.<sup>70</sup> The CETA features obligations such as “non-discrimination” (Article 19.4), a prohibition on offsets (Article 19.4.6), as well as the same exceptions found in the NAFTA for national security and “necessary to protect” purposes (Article 19.3).<sup>71</sup>

Unlike the NAFTA and Canada’s GPA schedule, however, the CETA does not include a carve out in Canada’s Market Access Schedule for “small and minority businesses”. It does, however, permit set asides for Aboriginal businesses,<sup>72</sup> and specifically references the Northwest Territories Business Incentive Policy (NTBIP) and the Nunavummi Nangminiqagtunik Ikajuuti (NNI) Policy.<sup>73</sup> This qualification does not appear in the EU’s Schedule. There is no pertinent explicit reference to gender, women, minorities, SMEs, or a general

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<sup>69</sup> GPA, *supra* note 45, annex 7.

<sup>70</sup> CETA, *supra* note 46, ch 19.

<sup>71</sup> *Ibid*, arts 19.3–19.4.

<sup>72</sup> *Ibid*, annex 19-7; General Notes provides in part as follows: “(2) This Chapter does not apply to: (a) any measure adopted or maintained with respect to Aboriginal peoples, nor to set asides for aboriginal businesses; existing aboriginal or treaty rights of any of the Aboriginal peoples of Canada protected by section 35 of the *Constitution Act, 1982* are not affected by this Chapter.”

<sup>73</sup> *Ibid*, annex 19-7; General Notes, subsection (1)(k)–(l).

commitment to equality of treatment in either the Market Access Schedules of Canada and the EU or in Chapter 19.

#### 2.2.4. Canada-Chile Free Trade Agreement (CCFTA)

The CCFTA has governed trade between Canada and Chile since 1997, with amendments effected along the way. The Agreement was amended in 2006 to include provisions respecting public procurement. While the obligations established in Chapter K *bis* are similar to those of the trade agreements discussed above, the agreement goes one step further by establishing a Committee on Procurement with a “view to maximizing access to government procurement”.<sup>74</sup>

In addition to establishing this Committee, the CCFTA features “non-discrimination” obligations (Article Kbis-02), a prohibition on offsets (Article Kbis-02.4), and exceptions for national security and “necessary to protect” purposes (Article Kbis-16). Similarly to other agreements, Canada’s Schedule states that “[t]his Chapter does not apply to procurements in respect of . . . set-asides for small and minority businesses.”

CCFTA was amended in 2017 to include Chapter N *bis*—a new Part Four dedicated to “Trade and Gender”.<sup>75</sup> Overall, this Chapter is an important reflection of current thinking in Canada with regards to trade and gender. It acknowledges that “international trade and investment are engines of economic

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<sup>74</sup> CCFTA, *supra* note 47, art K *bis*-18. The provision in full reads: “The Parties hereby establish a Committee on Procurement to address matters such as increasing the understanding of their respective government procurement systems, with a view to maximizing access to government procurement.”

<sup>75</sup> *Amending Agreement in Respect of Investment and Trade and Gender*, CAFTA, 5 June 2017 (not yet in force). Online: <[international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/background-contexte.aspx?lang=eng](http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/background-contexte.aspx?lang=eng)>. For Appendix II, see online: <[international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/2017\\_Amend\\_Modif-App2-Chap-N.aspx?lang=eng](http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/2017_Amend_Modif-App2-Chap-N.aspx?lang=eng)>.

growth, and that improving women’s access to opportunities and removing barriers in their countries enhances their participation in national and international economies, and contributes to sustainable economic development”.<sup>76</sup> It further iterates that both countries “shall carry out cooperation activities designed to improve the capacity and conditions for women, including workers, businesswomen and entrepreneurs, to access and fully benefit from the opportunities created by this Agreement”.<sup>77</sup> Despite these statements and undertakings, there is no specific mention of procurement as a tool to achieve the goals of the Chapter.

#### 2.2.5. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

The CPTPP is Canada’s newest free trade agreement, signed alongside Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.<sup>78</sup> The Agreement reaffirms the importance of “promoting corporate social responsibility, cultural identity and diversity, environmental protection and conservation, *gender equality*, indigenous rights, labour rights, inclusive trade, sustainable development and traditional knowledge, as well as the importance of preserving their right to regulate in the public interest” in its Preamble.<sup>79</sup> It also dedicates Chapter 15 to Government Procurement, which features the obligation of “non-discrimination” (Article 15.4), a prohibition on offsets (Article 15.6), and exceptions for “necessary to protect” purposes (Article 15.3).<sup>80</sup>

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<sup>76</sup> *Ibid*, art N bis-01: General Provisions, s 4.

<sup>77</sup> *Ibid*, art N bis-03: Cooperation Activities, s 2.

<sup>78</sup> *CPTPP*, *supra* note 48.

<sup>79</sup> *Ibid*, Preamble [emphasis added].

<sup>80</sup> *Ibid*, arts 15.3, 15.4, 15.6.

There are several unique features in the CPTPP's procurement chapter. First, Article 15.21 is designed to facilitate participation by SMEs in covered procurement. Each Party shall:

- a) provide comprehensive procurement-related information that includes a definition of SMEs in a single electronic portal;
- b) endeavour to make all tender documentation available free of charge;
- c) conduct procurement by electronic means or through other new information and communication technologies; and
- d) consider the size, design and structure of the procurement, including the use of subcontracting by SMEs.<sup>81</sup>

These matters are to be further discussed at meetings of the Committee on Government Procurement. Second, Annex 15-A "Schedule of Canada" binds central and sub-central government entities, excludes the NTBIP and NNI policies (as was done in the CETA schedule), and provides carve outs for "any form of preference, including set asides, to benefit micro, small and medium enterprises", set asides for aboriginal businesses, and measures "adopted or maintained with respect to Aboriginal peoples".<sup>82</sup>

The CPTPP also makes direct reference to the capacity of women to access and benefit from CPTPP opportunities in a broader chapter on "Development" (Chapter 23). Under Article 23.4(2), various activities are listed for CPTPP governments to consider undertaking, including: "(a) programmes aimed at helping women build their skills and capacity, and enhance their access to markets, technology and financing; (b) developing women's leadership networks; and (c) identifying best practices related to workplace flexibility."<sup>83</sup> There is also a chapter dedicated to SMEs, which addresses

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<sup>81</sup> *Ibid*, art 15.21.

<sup>82</sup> *Ibid*, annex 15-A "Schedule of Canada", Section G: General Notes.

<sup>83</sup> *Ibid*, art 23.4(2).



information barriers faced by SMEs (which includes many women-owned businesses) in trying to access international markets.<sup>84</sup> Stephanie Honey from the *Centre for International Governance Innovation* suggests that CPTPP countries could look to the intergovernmental SME committee for engagement on gender issues.<sup>85</sup>

New Zealand, Canada, and Chile signed a *Joint Declaration on Fostering Progressive and Inclusive Trade* in March 2018, which includes an agreement to examine the effectiveness of the CPTPP with respect to gender within three years of its entry into force.<sup>86</sup>

### 2.3. General Observations About Canada's Domestic and International Procurement Landscape

The procurement-related provisions in all of the above trade agreements are similarly structured, in that they have minimum monetary thresholds that must be surpassed before the agreement applies, an emphasis on the principle of non-discrimination, and almost identical exceptions available with respect to national security and the protection of public order, human health, and

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<sup>84</sup> *Ibid*, ch 24; Among other things, Article 24.1 stipulates that the parties must establish and maintain public websites containing information useful for SMEs interested in benefitting from the opportunities provided by the Agreement. Moreover, Article 24.2 establishes a 'Committee on SMEs' with a mandate including the discussion of best practices in supporting SME exporters and the development of seminars and workshops for SMEs hoping to benefit from the Agreement.

<sup>85</sup> See Stephanie Honey, "Will CPTPP Offer Tangible Improvements for Women?" (Centre for International Governance Innovation, April 6, 2018). Online: <[www.cigionline.org/articles/will-cptpp-offer-tangible-improvements-women](http://www.cigionline.org/articles/will-cptpp-offer-tangible-improvements-women)>; The Centre for International Governance Innovation is an independent, non-partisan think tank working on global governance issues. The Organization is supported by the Governments of Canada and Ontario. Stephanie Honey is a trade policy consultant and associate director of the New Zealand International Business Forum.

<sup>86</sup> Governments of Canada, Chile, and New Zealand, "Joint Declaration on Fostering Progressive and Inclusive Trade" (March 8, 2018). Online: <[international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/declaration\\_fpit-pcpi.aspx?lang=eng&\\_ga=2.178902692.1871708702.1522023110-1459645498.1522023110](http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/declaration_fpit-pcpi.aspx?lang=eng&_ga=2.178902692.1871708702.1522023110-1459645498.1522023110)>.

intellectual property. When a proposed contract is covered by more than one agreement, it must comply with all of the agreements.<sup>87</sup>

There is no explicit limit on Canada's ability to create preferential public procurement schemes. Nevertheless, if lawmakers and/or policymakers wish to achieve more inclusiveness in public procurement activities, including enhancing opportunities for women-owned businesses, they must ensure that laws and/or policies do not flout Canada's international obligations with respect to non-discrimination. One mechanism for advancing social procurement used by Canada in its trade agreements is the inclusion of carve outs or exceptions, such as for aboriginal businesses in the CETA, for "small and minority businesses" in the NAFTA, the GPA, and the CCFTA, and for "set asides, to benefit micro, small and medium enterprises" in the CPTPP.

Women-owned businesses are likely to qualify under the "small and minority business" exception. However, we note that the exception has never been used historically in Canada to further women's involvement in procurement. This is likely because the exception has not generally been regarded as a tool to promote women-owned businesses, with the result that there has been no call to use the exception for this purpose. Going forward, this may change. However, it may be more effective in enhancing women's economic empowerment to include in future agreements explicit carve outs for women-owned and women-run businesses.

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<sup>87</sup> PSPC Supply Manual, *supra* note 30 at 1.25.1 International and National Trade Agreements, (d) Coverage Under Multiple Agreements.

## 2.4. Case Study 1: Canada

In designing new preferential public procurement schemes, including those promoting women-owned and women-run enterprises, Canadian policy-makers are likely to begin by looking towards domestic examples of these programs. While Canadian preferential public procurement schemes on the federal<sup>88</sup> and territorial levels have particularly focused on promoting Aboriginal business capacity, there is emerging interest on the municipal level to use these programs for a broader set of beneficiaries. Here, we canvass two Canadian initiatives: the Territory of Nunavut's<sup>89</sup> Nunavummi Nangminiaqtunik Ikajuuti Policy, and the City of Toronto's Social Procurement Program.

### 2.4.1. The Nunavummi Nangminiaqtunik Ikajuuti Policy

One of the most significant Canadian preferential procurement policies to date is the Government of Nunavut's Nunavummi Nangminiaqtunik Ikajuuty ("NNI") policy. The NNI evolved out of the Government of Canada's and the Territorial Government of Nunavut's mandate established in Article 24 of the *Nunavut Land Claims Agreement*, which requires the Government of Canada and the Territorial Government of Nunavut to "provide reasonable support and assistance to Inuit firms...to compete for government contracts".<sup>90</sup> The NNI was

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<sup>88</sup> On the federal level, the most significant program is the Procurement Strategy for Aboriginal Business ("PSAB"). Since the program's establishment in 1996, more than 100,000 contracts have been awarded to Aboriginal suppliers with a total value of \$3.3 billion. PSAB also helps fulfil the Government of Canada's priority to strengthen Aboriginal entrepreneurship as outlined in the Federal Framework for Aboriginal Economic Development, announced in 2009.

<sup>89</sup> Nunavut is the largest, northernmost, and newest territory of Canada. It officially separated from the Northwest Territories in 1999 through the Nunavut Act and the Nunavut Land Claims Agreement Act. It has a population of approximately 38,000, of which 84% are Inuit and with a median age of 25. Nunavut is governed by a 19-member legislative assembly that operates consensus style without political parties, and as a territory it receives a substantial amount of its financial resources from the federal government.

<sup>90</sup> *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada*, 1993. Online: <[nlca.tunnngavik.com/?page\\_id=2366](http://nlca.tunnngavik.com/?page_id=2366)>.

first approved by the Government of Nunavut in March 2000, and has been reformed numerous times in the years since. Between 2012 and 2013, the Government of Nunavut thoroughly reviewed the program with the help of key stakeholders and experts. The result of this review is the most recent iteration of the program, the *NNI Policy and Implementation Act 2017*.<sup>91</sup> As set out in Article 16 of the NNI Act, the Act aims to advance the economic participation of Inuit firms in the territory by improving their capacity to compete for public procurement contracts. Further, the NNI Act is intended to promote the employment of Inuit and facilitates increased Inuit job training and skill development. The revised NNI Act uses several mechanisms to achieve these objectives, the most important of which are set out below.

*(i) Key Features of the NNI Policy*

First, the NNI Act establishes a bid adjustment scheme, per which bids or proposals submitted by Inuit firms benefit from adjustments to their bid's or proposal's price components. By effectively lowering the costs of the price components, the adjustment mechanism makes an Inuit firm's bid or proposal more competitive. The extent of the adjustment depends on the degree of ownership of the Inuit firm—the greater the percentage of Inuit ownership, the greater the support offered through the NNI Act. Specifically, a business

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<sup>91</sup> *Nunavummi Nangminiqagtunik Ikajuuti Implementation Act*. Online: <[nni.gov.nu.ca/sites/nni.gov.nu.ca/files/NNI-Regs-amendment\\_2.pdf](http://nni.gov.nu.ca/sites/nni.gov.nu.ca/files/NNI-Regs-amendment_2.pdf)> [*NNI Act*].

registered as an “Inuit Firm”<sup>92</sup> in the Inuit Firm Registry<sup>93</sup> (which is established under the Act) receives a 5% adjustment to the bid’s or proposal’s price components for the cost of the goods, services, and works supplied (but not including the cost of labour).<sup>94</sup> An Inuit Firm with 76% or more Inuit ownership receives an additional 5% adjustment, and if the business is 100% Inuit owned, it receives another 5% adjustment. Procuring authorities can verify a firm’s degree of Inuit ownership via the Inuit Firm Registry, which assigns Inuit firms to one of the three categories of ownership (51 to 75% Inuit ownership, 76 to 99% Inuit ownership, or 100% Inuit owned). A separate scheme is created for the promotion of Inuit labour. The NNI Act requires procuring authorities to establish, wherever possible, a minimum level of Inuit labour (determined via consideration of factors including the nature of the skills required and the Inuit labour pool available to perform the required work). Where a project identifies labour as a component, it is expected that Inuit labour be assigned a minimum weight of 20% in the evaluation criteria. Further, where a procurement process identifies Inuit labour as a price component, that component shall be adjusted by 15%.

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<sup>92</sup> *Ibid.* The NNI Act defines “Inuit Firm” as an entity which:

- (a) complies with the legal requirements to carry on business in the Nunavut Settlement Area,
- (b) is: (i) a limited company with at least 51% of the company's voting shares beneficially owned by Inuit; ii) a cooperative controlled by Inuit; or (iii) an Inuk sole proprietorship or partnership; and
- (c) is able to present evidence of inclusion on Nunavut Tunngavik Incorporated's Inuit Firms Registry as compiled in accordance with Article 24 of the Agreement.

<sup>93</sup> The Inuit Firm Registry is maintained by the Policy & Planning Department of Nunavut Tunngavik Inc., and is available online at: <[inuitfirm.tunngavik.com/about/](http://inuitfirm.tunngavik.com/about/)>. The NNI Act requires firms to present evidence of the degree of ownership.

<sup>94</sup> For example, if a business issues a bid or proposal with a total cost of CAD 10,000 for goods, services, and works (but excluding labour) supplied, and if that business fulfils the criteria and is registered as an Inuit firm, then it will benefit from the 5% bid adjustment mechanism. When the procuring authority reviews the bid, the cost of the goods, services, and works is thus adjusted to CAD 9,500, making the bid or proposal more competitive.

Second, the NNI Act establishes a set-aside scheme, where the procuring authority reserves certain procurement processes for the exclusive benefit of Inuit firms. In particular, and subject to various regulations, a procuring authority can restrict the procurement process where (a) the value of the contract does not exceed CAD 100,000 for architectural/engineering/construction works and CAD 25,000 for all other contracts; and (b) where the procuring authority determines that there is sufficient competition amongst Inuit firms located in Nunavut (defined as three or more potentially capable and available Inuit firms). In evaluating the suitability of the set-aside scheme for a given project, the procuring authority must weigh a number of factors, including:

- a) the number of potential Inuit firms;
- b) the extent to which a restricted procurement process will contribute to Inuit community and regional economic development in the community or region where the contract will be performed;
- c) the need to build Inuit firm capacity in the community or region where the contract will be performed; and
- d) the potential cost implications of a restricted procurement process.<sup>95</sup>

In select circumstances, procuring authorities are authorized to award a contract to an Inuit firm without conducting a competitive procurement process. Specifically, a procuring authority may forego a competitive procurement process in favour of a sole-source contract award if the following factors indicate this is appropriate:

- a) the need to build capacity for Inuit firms in the region where the contract will be performed;
- b) the extent to which a sole-source contract will contribute to community and regional economic development;
- c) the nature and value of the goods or services or construction; and
- d) the potential cost implications associated with awarding a contract without administering a competitive procurement process.

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<sup>95</sup> *NNI Act*, *supra* note 91, art 20.2.

Third, the NNI Act mandates that for contracts with a duration of twelve months or longer and where the labour component has an expected value of greater than CAD 1,000,000, the contract must require that a certain number of on-the-job training opportunities are made available to Inuit candidates. In the case of construction projects, these candidates are to be hired in consultation with the relevant apprenticeship or training groups. For contracts that do not fall within that scope, procuring authorities can mandate minimum commitments to training and skills development.

Fourth, the NNI Act makes available the bid adjustment and set-aside schemes for businesses owned by Nunavut residents generally, although the benefit is reduced when compared to that enjoyed by Inuit firms. Nunavut-owned businesses (defined as 100% owned by Nunavut residents) receive a 5% adjustment to all price components (excepting labour), and can receive an additional 5% adjustment (excepting labour) if they are a local supplier (meaning the business is local to the community where the work or services is to be performed). Where there is a price component for labour, this can also be adjusted for 5% where the business is Nunavut-owned and an additional 5% if the supplier is local. Note that Inuit firms that are also owned by Nunavut residents can benefit under both these programs. The maximum bid adjustment available to Inuit firms is thus 25%.

Finally, the 2012–2013 comprehensive review of the NNI policy recognized that abuse of the program had become an issue, as a number of unscrupulous businesses that were neither Inuit-owned nor based in Nunavut

were awarded contracts on the basis of false or misleading information.<sup>96</sup> In response, the revised NNI Act implemented stronger monitoring and enforcement provisions. Most importantly, the revised NNI Act introduced a new penalty formula for contractors who fail to satisfy the required Inuit labour levels. Now, contractors held in violation of the requirements can be barred from receiving future bid adjustments under the NNI policy. Also, procuring authorities can terminate a contract where the contractor:

- a) fails to meet the committed levels of supplies, works or services for which the contractor receives Inuit firm, Nunavut Business, and/or local adjustments;
- b) fails to meet the minimum Inuit labour level during the course of the contract;
- c) fails to meet the mandatory training and skills development requirements of the contract; or
- d) is found to have provided specific inaccurate information in respect of its contractual obligations arising pursuant to the NNI.

In order to foster greater transparency and integrity of the project, the revised NNI Act also established an independent tribunal to deal with complaints concerning the application of the NNI policy in the award of contracts. Where a tribunal determines that an unsuccessful bidder has established a breach of the NNI policy, it may recommend one or more of several courses of action, namely:

- a) that the procuring authority review and amend the specific procurement process in order to bring that process into compliance with the NNI policy;
- b) that the procuring authority re-evaluate the specific proposal;
- c) that the procuring authority cancel the procurement process or contract award and issue a new solicitation;
- d) that the procuring authority award the complainant its bid preparation costs.

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<sup>96</sup> Borden Ladner Gervais, "External Report to the NNI Policy Review Committee" (February 2013) at 91-93. Online: < <https://www.tunngavik.com/files/2013/09/BLG-Review1.pdf>>.



(ii) *Evaluating the NNI Policy*

Given the recent nature of the reforms of the NNI policy, it is difficult to measure the impact of these preferential procurement policies as they currently stand. We can nonetheless attempt to draw some preliminary conclusions. Overall, there is little doubt that the revised NNI Act has improved on the NNI policy in several ways. The scheme is now more transparent, offers greater value, guidance, and support to intended beneficiaries, and has limited the potential for abuse. Gerry Stobo, one of the lead authors of the 2012–2013 comprehensive review of the NNI policy, is optimistic that the NNI policy held significant promise for Inuit firms even prior to the most recent amendments. The authors of the study estimate that the NNI policy has led to a substantial increase in: (a) the number of government contracts awarded to Inuit firms; (b) the number of Inuit firms submitting bids (indicating more active participation in the Nunavut economy); and (c) the overall capacity of Inuit firms. Further, these achievements were made at relatively minor expense, as the data indicates that the NNI Policy accounted for less than 1% of total procurement expenditure in a fiscal year. The authors indicate that the set-aside scheme in particular provides Inuit firms with more opportunities to develop their business capacities. By providing Inuit firms with access to opportunities that would otherwise go to larger and more established industry players, over time they will develop the expertise necessary to compete on the open market.<sup>97</sup>

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<sup>97</sup> *Ibid* at 75, 96-98.

Similarly, Harry Flaherty, President of the Qikiqtaaluk Corporation,<sup>98</sup> thinks the revised NNI Act addresses many of the issues plaguing the previous iteration of the policy.<sup>99</sup> In his view, clearer guidelines make it easier for Inuit-owned businesses to register as Inuit firms, and stricter registration standards mean that companies who previously exploited loopholes can no longer benefit from the NNI policy. Moreover, Inuit-owned businesses that partnered with businesses from other provinces are no longer favoured under the scheme, which further helps to reduce gaming of the system. But in his mind, some concerns remain. First and foremost, there is a need to adopt stronger auditing procedures. Mr. Flaherty has called for the next revision of the NNI Act to include an audit at the end of each contract to fully assess whether contractors have met their commitments. While budget constraints presumably render full-blown audits after each procurement process uneconomical, the use of randomized audits might strike a balance between the need for efficiency and maintaining the integrity of the program. Another concern relates to the various caps for bid-adjustments. Currently, the maximum bid adjustment for contracts for mixed goods and services is set at CAD 125,000. This is arguably too low given the high costs of doing business in Nunavut and means that for these contracts the competitive benefit to Inuit firms is limited. While there are no current publicly available data on this point, it appears likely that the bid adjustment caps should be significantly increased to ensure the viability of the program.

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<sup>98</sup> Qikiqtaaluk Corporation is an Inuit birthright development corporation created to provide economic, employment, and career development opportunities for Inuit. It is 100% owned by the Qikiqtani Inuit Association and represents 13 communities with over 14,000 Inuit.

<sup>99</sup> Harry Flaherty, "How the NNI Policy Affects Business Within the Territory" (September 20, 2017). Online: <nunavuttradeshaw.ca/wp-content/uploads/2017/09/Flaherty-QC-NNI.pdf>.

As suggested above, a key strength of the NNI Act is its ability to respond to these and other concerns. Not only can the Commissioner in Executive Council (akin to a Lieutenant-Governor in the Canadian provinces) initiate consultation procedures to make changes to the policy when necessary, but the NNI Act also establishes an NNI Review Committee, which must conduct a comprehensive review of the policy every five years.<sup>100</sup> These comprehensive reviews must take into account the input of particular stakeholders and the general public. This facilitates continuous improvement of the policy and ensures that criticisms are acknowledged and addressed over time.

#### 2.4.2. The City of Toronto's Social Procurement Program

Another example of Canadian preferential public procurement policy is the City of Toronto's Social Procurement Program ("SPP").<sup>101</sup> As noted by the City's Executive Director for Social Development, Toronto has long used public procurement as a tool to achieve progressive social outcomes (such as increased environmental sustainability and non-discrimination). The 2016 Social Procurement Program builds on this history by focusing on promoting diverse suppliers. In comparison to the NNI policy, the SPP targets a substantially broader set of beneficiaries. It is ultimately intended as a poverty reduction policy; its intended beneficiaries, namely Aboriginal people, visible minorities, persons with disabilities, new immigrants, women, and LGBTQ people, were found to have substantially higher rates of poverty than the general population in the City of Toronto. The idea of using public procurement

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<sup>100</sup> *NNI Act*, *supra* note 91, art 12.7.

<sup>101</sup> The City of Toronto is the capital of the Canadian province of Ontario. With a population of approximately 2.8 million, it is Canada's largest city and the fourth-largest city in North America. It is estimated that over 50% of Toronto residents belong to a visible minority group, and that almost half of the city's population is foreign-born.

in this way emerged from the Toronto Poverty Reduction Strategy recommendations, and from studies showing that even minor re-routing of the City's CAD 1.8 billion public procurement for the benefit of these groups would result in meaningful change. The SPP hopes to achieve inclusive economic growth by increasing the diversity of public procurement suppliers and by increasing the number of training opportunities for economically disadvantaged groups. The SPP was developed over an 18-month period and in consultation with a range of stakeholders and is based on the results of a number of pilot projects.<sup>102</sup> Completion of these pilot projects generated four key principles on which the SPP is based, namely:

- a) a need for clear internal guidelines and an enabling policy environment for City project managers;
- b) a need for tools, guides, and support systems for diverse suppliers, which would empower them to make use of these programs;
- c) a need for dedicated internal staff training and support; and
- d) a need for supplier and community capacity building and outreach.

*(i) Key Features of the SPP*

Under the SPP, suppliers must first seek “diverse supplier” certification through non-profit supplier certification organizations. Procuring authorities include these diverse suppliers in their processes in two ways.<sup>103</sup> First, for contracts valued between CAD 3,000 and CAD 50,000, the procuring authority must seek at least one or more bids from a diverse supplier. Second, for contracts valued at over CAD 50,000 and for which there is a competitive procurement process, the procuring authority is to encourage the supplier to develop their own internal supplier diversity programs (i.e. to ensure that the

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<sup>102</sup> City of Toronto Executive Directors, Social Development, Finance and Administration, “City of Toronto Social Procurement Program Staff Report” (April 4, 2016). Online: <[www.toronto.ca/legdocs/mmis/2016/ex/bgrd/backgroundfile-91818.pdf](http://www.toronto.ca/legdocs/mmis/2016/ex/bgrd/backgroundfile-91818.pdf)> [City of Toronto].

<sup>103</sup> *Ibid* at 10.

supplier itself has inclusive supply chain practices when procuring goods and services). Suppliers that propose to adopt such internal policies may be awarded additional points in the procurement process. To supplement these approaches, the City of Toronto educates potential diversity suppliers through various outreach programs.<sup>104</sup> For workforce development (such as on the job training), City procurement staff are to identify opportunities in annual plans, and are to focus on procurement contracts valued at over CAD 5,000,000. For those contracts, procurement staff must consider a range of factors to determine the appropriate number and quality of opportunities suppliers must commit to in their proposals.<sup>105</sup>

*(ii) Evaluating the SPP*

As with the NNI policy, the limited availability of public data makes it difficult to assess the impact of the SPP.<sup>106</sup> But unlike the NNI, there are

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<sup>104</sup> Outreach programs include: sharing information with potential suppliers early in the project cycle, reaching out to diverse suppliers and encouraging them to become certified, providing targeted business development support to diverse suppliers, and engaging with community networks to provide entrepreneurship training to create community-based enterprises.

<sup>105</sup> These factors include project suitability (the degree to which potential employees would meaningfully benefit from the experience in terms of job and skill development), reach (the extent to which targeted groups will be able to meet the minimum qualifications to access the employment opportunities), volume (the number of opportunities), and feasibility (the likelihood that project targets can be achieved in the required timeframe).

<sup>106</sup> City of Toronto, Policy Development Officer, “2018 Operating Budget Briefing Note” (January 18, 2018). Online: <[www.toronto.ca/legdocs/mmis/2018/bu/bgrd/backgroundfile-111668.pdf](http://www.toronto.ca/legdocs/mmis/2018/bu/bgrd/backgroundfile-111668.pdf)>; According to a 2018 City of Toronto operating budget briefing note (released in January 2018), the SPP has produced results in two streams:

(1) “Supply Chain Diversity: In the first year, 42 small-scale contracts were awarded to diverse suppliers including businesses owned by Aboriginal people, racialized people and/or women. The total value of these contracts was more than \$550,000”; and

(2) “Workforce Development: 17 capital procurement projects were selected to create job opportunities for equity-seeking groups. Eighty-five percent (85%) of large-scale projects included workforce development opportunities, which far exceeded the Program’s 33% target.”

The City of Toronto also provides three examples of successful SPP projects, namely the revitalization of a city park (which employed 570 local residents); the construction of a youth centre (in which 10 youth were hired as apprentices); and the “Waterfront Toronto Employment Initiative”, which connected residents to employment and training opportunities. See City of Toronto, “Social Procurement Program: Examples of Successful Social

reasons to approach the SPP with a greater degree of skepticism, particularly in how it aims to promote supplier diversity. There is no doubt that an effective preferential public procurement scheme incorporates both “soft” (such as public outreach programs, supplier education resources, and internal staff training) and “hard” measures (such as set-aside schemes). One issue with the SPP is that it appears to over-emphasize the former over the latter. One of the key measures it adopts, namely the requirement on the part of a procuring authority to seek at least one bid from a diverse supplier, can easily be satisfied by procuring staff but will not necessarily change the final outcome of a bid-process. Similarly, the requirement for procuring authorities to encourage bidders in contracts valued at more than CAD 100,000 to adopt diversity programs may not result in tangible change.<sup>107</sup>

## 2.5. Looking Forward

In the recent 2018 Budget Plan, the federal government recognized the need to expand access to entrepreneurship in Canada, particularly when it comes to women-owned businesses.<sup>108</sup> Only 16% of businesses in Canada are majority-owned by women, and these businesses tend to be smaller than those owned by men.<sup>109</sup> The Budget Plan observed that: “Of those SMEs who participate in federal procurement, 10 per cent are women-owned. The Government intends to introduce measures to increase this participation rate

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Procurement Projects in Toronto”. Online: <[www.toronto.ca/business-economy/doing-business-with-the-city/social-procurement-program/](http://www.toronto.ca/business-economy/doing-business-with-the-city/social-procurement-program/)>.

<sup>107</sup> The SPP aimed to meet the following targets by 2018: (1) 33% of competitive procurement over CAD 5,000,000 would include workforce development and/or supply chain diversity requirements; and (2) 25% of direct suppliers with the City would have a supply chain diversity requirement. At this stage, it remains unclear whether these targets have been met.

<sup>108</sup> Budget Plan 2018, *supra* note 17.

<sup>109</sup> *Ibid.*

by 50 per cent (to at least 15 per cent), in order to reflect the current proportion of SMEs majority led by women entrepreneurs in the broader population.”<sup>110</sup>

There is, however, no specified timeline for the introduction of these measures.<sup>111</sup>

That said, in the coming months, PSPC plans to implement a Social Procurement Pilot project in order to increase the diversity of bidders on government contracts. In particular, PSPC is expected to develop initiatives for “businesses owned or led by Canadians from under-represented groups, such as women, Indigenous Peoples, persons with disabilities, and visible minorities”.<sup>112</sup> PSPC is considering various models in order to attract “diverse suppliers”, including self-certification and a second mechanism that involves the use of third-party organizations to verify that the “supplier” qualifies as a “diverse supplier”.<sup>113</sup>

Steps in this direction have already been taken. PSPC issued a Request for Information (“RFI”) to suppliers seeking input on recommended approaches for incorporating social procurement into the current Temporary Help Services (“THS”) requirements.<sup>114</sup> The THS is an online procurement tool designed to

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<sup>110</sup> *Ibid* at 111.

<sup>111</sup> *An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, House of Commons, First Session, Forty-second Parliament (Bill C-74) [first Reading in the House of Commons on March 27, 2018].

<sup>112</sup> Government of Canada, Public Services and Procurement Canada, “Request for Information: Temporary Help Services for the National Capital Region”. Online: <[buyandsell.gc.ca/cds/public/2017/12/21/e6d1bd4cd7a6e71a798c2df4d0d9ff34/ABES.PROD.PW\\_\\_ZN.B002.E32089.EBSU000.PDF](http://buyandsell.gc.ca/cds/public/2017/12/21/e6d1bd4cd7a6e71a798c2df4d0d9ff34/ABES.PROD.PW__ZN.B002.E32089.EBSU000.PDF)>.

<sup>113</sup> *Ibid*; A diverse supplier is currently defined as “a business owned or led by Canadians from underrepresented groups, such as women, Indigenous Peoples, persons with disabilities and visible minorities”. The business must be owned, operated, and controlled by 51% of a given group in order to qualify.

<sup>114</sup> *Ibid*; “PSPC intends to implement a social procurement approach to leverage the government’s buying power through procurement to support socio-economic objectives and to generate positive societal impacts. Specifically, PSPC is undertaking:

- A simpler and more efficient process for all THS stakeholders, including an ‘express’ process for simple requirements;

supply federal government departments in Ottawa with temporary help services up to CAD 400,000.<sup>115</sup>

PSPC also plans to continue its work under the Innovative Solutions Canada initiative, which aims to make procurement less of an “administrative burden” more generally.<sup>116</sup> The next step, according to the 2018 Budget Plan, is to establish a new electronic procurement platform, which is expected to increase the participation rate for women-owned SMEs through ease of access.<sup>117</sup> The Budget proposes to provide CAD 196.8 million over the next five years towards this initiative.<sup>118</sup>

PSPC is not the only department working to advance social procurement. There is also the Treasury Board and Global Affairs Canada (“GAC”), but each department seems to operate in a silo. This suggests a need for a government-wide agreement on which department is responsible for promoting women-owned businesses through public procurement policies—GAC under the progressive trade agenda, Treasury Board as the advisor on how government spends money, and PSPC as the government contractor.

Having examined the procurement landscape in Canada, we turn in the next section of this Report to an examination of social procurement models that are currently working in other countries.

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- Social Procurement measures to increase the number and diversity of bidders on government contracts; and
  - Enhanced vendor performance measures that encourage good behaviour from suppliers.”

<sup>115</sup> “Temporary Help Services for the National Capital Region”, *Public Services and Procurement Canada* (10 April 2018). Online: <[www.tpsgc-pwgsc.gc.ca/app-acq/sat-ths/index-eng.html](http://www.tpsgc-pwgsc.gc.ca/app-acq/sat-ths/index-eng.html)>.

<sup>116</sup> Budget Plan 2018, *supra* note 17 at 119.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*



### **3. INTERNATIONAL BEST PRACTICES**

This section features a discussion of preferential public procurement schemes adopted to promote the economic inclusivity of target groups. Case studies on the following countries are included: Australia, Chile, Kenya, South Africa, and the United States.

#### **3.1. Case Study 2: Australia**

We have chosen to examine Australia's preferential procurement policies for this report because the Australian government's procurement framework includes two procurement connected policies that specifically target social inclusion – the Workplace Gender Equality Procurement Principles and the Indigenous Procurement Policy. These policies target social inclusion in different ways. The Indigenous Procurement Policy is a robust program that provides specific opportunities for indigenous owned businesses, while the Workplace Gender Equality Procurement Principles stipulate requirements for all employers with more than 100 employees. The latter do not provide targeted opportunities for women-owned businesses.

Public procurement by the Australian government is governed by the Commonwealth Procurement Rules (CPRs).<sup>119</sup> They were updated at the beginning of 2018 to incorporate obligations arising from Australia's

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<sup>119</sup> The six Australian state governments have their own procurement frameworks. This section refers to government procurement on the national level only.

international trade obligations<sup>120</sup> arising from multiple FTAs.<sup>121</sup> Australia is not currently a party to the GPA but is in the process of accession.<sup>122</sup>

The core rule of the CPRs is “achieving value for money”, which “requires the consideration of the financial and non-financial costs and benefits associated with procurement”.<sup>123</sup> The CPRs require government officials from non-corporate Commonwealth entities and prescribed corporate Commonwealth entities listed in section 30 of the *Public Governance, Performance and Accountability Rule 2014* (the “relevant entities”)<sup>124</sup> to comply with all rules listed in Division 1 of the CPRs and with the additional rules listed in Division 2 when the procurement is at or above the relevant procurement threshold.<sup>125</sup> The Division 1 rules include the value for money requirement as well as rules regarding competition, SMEs, ethical behaviour, accountability and transparency, and procurement methods. Division 2 provides additional rules regarding limits on limited tenders, time limits, documentation, specifications, and conditions for participation.<sup>126</sup> Procuring entities must also ensure that they are complying with other procurement-connected policies, including the preferential policies discussed below.<sup>127</sup>

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<sup>120</sup> Government of Australia, Department of Finance, “Commonwealth Procurement Rules”. Online: <<https://www.finance.gov.au/procurement/procurement-policy-and-guidance/commonwealth-procurement-rules/>>..

<sup>121</sup> Australia currently has bilateral FTAs with Chile, China, Japan, the Republic of Korea, Malaysia, New Zealand, Singapore, Thailand, and the United States and is also party to the ASEAN-Australia-New Zealand FTA, the Pacific Agreement on Closer Economic Relations, and the concluded but not yet in force CPTPP. See online: <<http://dfat.gov.au/trade/agreements/pages/trade-agreements.aspx>>.

<sup>122</sup> *Supra* note 61.

<sup>123</sup> Government of Australia, Department of Finance, *Commonwealth Procurement Rules 2017* at 9, 11. Online: <[www.finance.gov.au/sites/default/files/commonwealth-procurement-rules-1-jan-18.pdf](http://www.finance.gov.au/sites/default/files/commonwealth-procurement-rules-1-jan-18.pdf)> [*Commonwealth Procurement Rules*].

<sup>124</sup> *Ibid* at 6.

<sup>125</sup> *Ibid* at 9, 11-12.

<sup>126</sup> *Ibid* at 22-26.

<sup>127</sup> *Ibid*.

All Australian Government Approaches to Market (ATMs) with a value over AUD\$80,000 are listed on AusTender, a centralised website, unless the procuring entity is using an exemption to conduct a limited tender.<sup>128</sup> AusTender is free to join and use and business owners can sign up for a subscription service to receive email updates about new ATMs in their area of business interest.<sup>129</sup>

In addition to the specific preferential procurement policies discussed below, the CPRs state that Australia is “committed to non-corporate Commonwealth entities sourcing at least 10 per cent of procurement by value from SMEs”.<sup>130</sup> The CPRs also require officials to apply procurement processes that do not discriminate against SMEs.<sup>131</sup>

### 3.1.1. Workplace Gender Equality Procurement Principles

#### (i) *Key Features of the Principles*

The Workplace Gender Equality Procurement Principles (“the Principles”) is the procurement connected policy associated with the *Workplace Gender Equality Act 2012* (WGE Act). The Principles provide that in order for companies with more than 100 employees (“relevant employers”) to be considered for government contracts above the thresholds listed in paragraph 9.7 of the CPRs<sup>132</sup>, they must be in compliance with the WGE Act. The WGE

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<sup>128</sup> Government of Australia, Department of Finance, “Notification of Approaches to Market”. Online: <[www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/reporting-requirements/notification-approach/principles.html](http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/reporting-requirements/notification-approach/principles.html)>.

<sup>129</sup> Government of Australia, Department of Finance, “Identifying Opportunities”. Online: <<https://sellingtogov.finance.gov.au/faqs/identifying-opportunities>>.

<sup>130</sup> *Commonwealth Procurement Rules*, *supra* note 123 at 14.

<sup>131</sup> *Ibid.*

<sup>132</sup> These thresholds are: AUD\$80,000 for non-corporate Commonwealth entities, AUD\$400,000 for prescribed corporate Commonwealth entities, and AUD\$7.5 million for procurement of construction services by relevant entities.

Act provides a framework for employers to improve gender equality within their businesses. It requires employers to submit a report containing details relating to six gender equality indicators:

- a) Gender composition of the workforce;
- b) Gender composition of governing bodies of relevant employers;
- c) Equal remuneration between women and men;
- d) Availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities;
- e) Consultation with employees on issues concerning gender equality in the workplace; and
- f) Any other matters specified in an instrument.<sup>133</sup>

There are also minimum standards that relevant employers must meet in order to comply with the WGE Act. Currently, the minimum standard is that a relevant employer must have a policy or strategy in place to support one or more of the gender equality indicators identified in the *Workplace Gender Equality (Minimum Standards) Instrument 2014* (“the Instrument”).<sup>134</sup> The gender equality indicators identified in the Instrument are:

- a) Gender composition of the workforce
- b) Equal remuneration between women and men
- c) Availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities
- d) Sex-based harassment and discrimination.<sup>135</sup>

Relevant employers must provide a letter of compliance that certifies that they are compliant with the WGE Act with their submission in response to an ATM or before they enter into a contract with an Australian Government

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<sup>133</sup> *Workplace Gender Equality Act 2012* (Cth), s 3.

<sup>134</sup> *Workplace Gender Equality (Minimum Standards) Instrument 2014* (Cth).

<sup>135</sup> *Ibid.*

agency.<sup>136</sup> Letters of compliance are issued by the Workplace Gender Equality Agency (WGEA) when a relevant employer registers with it and are renewed annually once the employer submits its compliance report.<sup>137</sup>

There are a variety of prescribed ways that a relevant employer can become non-compliant with the WGE Act, including failing to submit the Report or failing to improve against a minimum standard set by the Minister of Employment (the Minister) in the Instrument.<sup>138</sup> However, the majority of the prescribed ways to become non-compliant are linked to administrative matters regarding the Report, such as failing to have the Report signed by the CEO.<sup>139</sup> Only one of the prescribed ways of becoming non-compliant - failing to improve against the set minimum standard – is related to the gender equality indicators themselves.

## *(ii) Evaluating the Principles*

The Principles are not a preferential procurement policy. Instead they are a framework that affects all Australian public procurement. Unlike preferential procurement policies that target specific disadvantaged groups and provide specific opportunities, such as set-asides, for businesses owned by members of those groups, the Principles do not require businesses to be majority owned by women. Nor do they provide for specific opportunities for women-owned businesses.

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<sup>136</sup> Government of Australia, Department of Families, Housing, Community Services and Indigenous Affairs, “Workplace Gender Equality: Procurement Principles and User Guide” at 4. Online:

<[www.dss.gov.au/sites/default/files/documents/08\\_2013/workplace\\_gender\\_equality\\_procurement\\_principles\\_user\\_guide5\\_0.pdf](http://www.dss.gov.au/sites/default/files/documents/08_2013/workplace_gender_equality_procurement_principles_user_guide5_0.pdf)>.

<sup>137</sup> *Ibid* at 8.

<sup>138</sup> *Ibid* at 13-14.

<sup>139</sup> *Ibid*.

Additionally, while the gender equality indicators in the WGE Act are laudable, they are not ambitiously advanced by the minimum standard set in the Instrument and as such the Principles are not designed specifically with the goal of advancing women's participation in procurement. The Principles do not provide any incentive for employers to increase the number of women who work for them or to advance equal pay. Moreover, the fact that it is easier for an employer to become non-compliant with the WGE Act by failing to adhere to administrative processes than it is for an employer to become non-compliant for not satisfying a gender equality indicator in the Instrument is problematic. The Instrument only includes four<sup>140</sup> of the six indicators found in the WGE Act and therefore it does not fully pursue the Act's goals. Further, the minimum standard set out in the Instrument is that an employer has a policy in place to address one of these four indicators. Therefore, something as routine as a policy against sexual harassment would suffice to ensure that an employer is compliant with the WGE Act.

The WGE Act and the Principles demonstrate that Australia is interested in promoting gender equality through its procurement policies. However, in our view, by virtue of the design of the Principles, they are unlikely to make a significant impact in this area. In order to make an effective contribution to gender equality through procurement, we believe that the Australian government needs to develop a more comprehensive preferential procurement policy that specifically targets and increases the opportunities for women-owned businesses.

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<sup>140</sup> The sex-based harassment indicator in the Instrument would fall under the "Any other matters specified in an instrument" indicator from the WGE Act.

### 3.1.2. Australia's Indigenous Procurement Policy and Exemption 17

#### (i) *Key Features of the IPP*

Australia has a comprehensive preferential procurement policy for indigenous businesses. The IPP was launched on July 1, 2015 and has three main parts:

- a) A target number of contracts that must be awarded to Indigenous businesses;
- b) A mandatory set-aside for remote contracts<sup>141</sup> and contracts valued between AUD\$80,000 - \$200,000; and
- c) Minimum Indigenous participation requirements<sup>142</sup> in contracts valued at or above AUD\$7.5m in certain industries.<sup>143</sup>

An Indigenous enterprise is defined by the Australian government as a business that is 50% or more owned by Indigenous Australians.<sup>144</sup> Supply Nation, a non-government Australian Indigenous supplier diversity council, maintains a list of Indigenous enterprises that meet this definition.<sup>145</sup> Businesses can register with Supply Nation as Indigenous businesses if they are "at least 50% Indigenous owned, based in Australia [and are a] provider of goods or services."<sup>146</sup>

Supply Nation also certifies businesses as Supply Nation Certified Suppliers if they are:

- a) At least 51% owned by Indigenous Australian(s);

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<sup>141</sup> A remote contract is a contract where the majority (by value) of the goods or services will be delivered in a Remote Area, which are identified on the map listed on the Indigenous Procurement Website: <[www.pmc.gov.au/resource-centre/indigenous-affairs/ripp-map-data](http://www.pmc.gov.au/resource-centre/indigenous-affairs/ripp-map-data)>.

<sup>142</sup> Mandatory minimum requirements ("MMRs") are minimum levels of Indigenous employment and supplier use that must be met over the life of the contract. The MMR contract-based target is 4% and the MMR organisation-based target is 3%. See online: <[www.pmc.gov.au/sites/default/files/publications/ipp-mmr.pdf](http://www.pmc.gov.au/sites/default/files/publications/ipp-mmr.pdf)>.

<sup>143</sup> Government of Australia Department of the Prime Minister and Cabinet, "Indigenous Procurement Policy". Online: <[www.pmc.gov.au/indigenous-affairs/economic-development/indigenous-procurement-policy-ipp](http://www.pmc.gov.au/indigenous-affairs/economic-development/indigenous-procurement-policy-ipp)> [Government of Australia IPP].

<sup>144</sup> *Commonwealth Indigenous Procurement Policy 2015* (Cth) at 11.

<sup>145</sup> *Ibid* at 8.

<sup>146</sup> Supply Nation, "Registration and Certification". Online: <[www.supplynation.org.au/indigenous\\_businesses/registration\\_and\\_certification](http://www.supplynation.org.au/indigenous_businesses/registration_and_certification)> [Supply Nation].

- b) Led and/ or managed by a Principal Executive Officer who is an Indigenous Australian;
- c) Controlled by an Indigenous Australian with whom rests the key business decisions regarding the company's finances, operations, personnel and strategy;
- d) For profit – the company is not a registered charity and the company generates the majority of its revenue by providing goods or services;
- e) Trading as a business with a minimum annual revenue of AUD\$50,000 or have a demonstrated recent history of trade (ideally, at least 6 months' trade history); and
- f) Located in Australia.<sup>147</sup>

Supply Nation maintains a list of registered and certified suppliers on its website and the list is the first reference point for government buyers.<sup>148</sup> Certification by Supply Nation allows access to Supply Nation's Certified Supplier logo and support and assistance to connect with government and corporate entities.<sup>149</sup>

The original target of the IPP was to award 3% of government contracts to Indigenous enterprises beginning in 2019-2020. However, after a successful first year of the policy, that goal was brought forward to 2016-2017.<sup>150</sup>

The CPRs also contain an Indigenous business exemption (Exemption 17). The Exemption allows any relevant entity to approach an indigenous business directly via limited tender for a quote for the provision of goods and services regardless of the additional rules in Division 2 of the CPRs, which apply to procurements above a prescribed threshold.<sup>151</sup> To utilise Exemption 17, the government official in charge of the procurement must be satisfied that the business is 50% or more indigenous owned and meets the definition of an

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<sup>147</sup> *Ibid.*

<sup>148</sup> Supply Nation, "Indigenous Business Direct". Online: <[www.supplynation.org.au/indigenous\\_businesses/indigenous\\_business\\_direct/](http://www.supplynation.org.au/indigenous_businesses/indigenous_business_direct/)>.

<sup>149</sup> Supply Nation, *supra* note 146.

<sup>150</sup> Government of Australia IPP, *supra* note 143.

<sup>151</sup> Government of Australia Department of the Prime Minister and Cabinet, "Factsheet: Using the Commonwealth Procurement Rules Indigenous Exemption (No.17) at 4. Online: <[www.pmc.gov.au/sites/default/files/publications/commwth\\_indig\\_exemption\\_11Sept%202015.pdf](http://www.pmc.gov.au/sites/default/files/publications/commwth_indig_exemption_11Sept%202015.pdf)>.



SME, namely, an Australian firm with fewer than 200 full-time equivalent employees.<sup>152</sup>

### *(ii) Evaluating the IPP*

The Indigenous Procurement Policy (IPP) is a sterling example of a preferential procurement policy that has been successful in increasing the participation of a minority group in public procurement. The IPP could serve as a model for countries looking to create a preferential procurement policy to target women-owned businesses.

The early success of the IPP demonstrates that preferential procurement policies can be used to effectively increase the participation of minorities in public procurement. The three parts of the IPP work together to ensure that indigenous businesses in Australia have access to government contracts. The Supply Nation certification criteria are supported by an audit and verification program that ensures the continuing eligibility of businesses and also investigates suspicions of false information.<sup>153</sup> By relying on Supply Nation to maintain a list of registered and certified indigenous businesses, the Australian government can be confident that it is awarding contracts to eligible businesses.

### 3.1.3. Indigenous Business Australia and Procurement Workshops

#### *(i) Key Features of the Workshops*

Indigenous Business Australia is a statutory authority created in 1990 to assist and enhance self-management and economic self-sufficiency of Indigenous Australians.<sup>154</sup> It does so by providing resources and workshops for

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<sup>152</sup> *Ibid* at 1.

<sup>153</sup> Supply Nation, *supra* note 146.

<sup>154</sup> Indigenous Business Australia, "About Us". Online: <[www.iba.gov.au/about-us/our-history/](http://www.iba.gov.au/about-us/our-history/)>

Indigenous Australians on topics such as starting a business, business law, and procurement.

The procurement workshops focus on the IPP and aim to help participants:

- a) gain a better understanding of the IPP's targets, contracts and minimum requirements
- b) learn how to best position their business to respond to contract opportunities
- c) assess their business potential in terms of its capability, competitiveness and supply readiness
- d) design or refine their business capability statements and pitches.<sup>155</sup>

### *(ii) Evaluating the Workshops*

These workshops can help Indigenous Australians position themselves to take advantage of IPP contracts, thereby increasing their ability to win those contracts. If more indigenous businesses are positioned to fulfil IPP contracts, the IPP will be more successful in achieving its goals. Programs such as those offered by Indigenous Business Australia can be adapted and adopted by other countries to increase the ability of minority groups, such as women, to take advantage of preferential procurement policies targeted to them.

## 3.2. Case Study 3: Chile

In 2010, Chile became a member of the OECD. It has negotiated 15 FTAs to date.<sup>156</sup> As noted above, one of these FTAs is the CCFTA, which includes an entire chapter dedicated to “Trade and Gender”. Chile has yet to

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<sup>155</sup> Indigenous Business Australia, “Procurement Workshops”. Online:

<[www.iba.gov.au/business/procurement-workshops/](http://www.iba.gov.au/business/procurement-workshops/)> [IBA Procurement Workshops].

<sup>156</sup> FTAs have been negotiated with the United States, Canada, Mexico, Central America (which includes Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua), Korea, EFTA (which includes Iceland, Liechtenstein, Norway, and Switzerland), China, Panama, Peru, Australia, Colombia, Turkey, Malaysia, Vietnam, Hong Kong, and Thailand. See US Department of Commerce’s International Trade Administration, “Chile – Trade Agreement” (August 15, 2017). Online: <[www.export.gov/article?id=Chile-Trade-Agreements](http://www.export.gov/article?id=Chile-Trade-Agreements)>.

become party to the GPA and, although not yet negotiating accession, Chile has been an observer in the GPA Committee since 1997. We chose to examine Chile because it is regarded by many as having one of the world's most open, and SMEs-inclusive, public procurement systems. This is in part due to its use of public procurement as a tool to enhance women's economic empowerment.

ChileCompra, a public agency supervised by Chile's Ministry of Finance, was established in 2013 to standardize public procurement.<sup>157</sup> The agency manages Mercado Público, an e-marketplace which accounts for approximately 4% of Chile's GDP, and on which 90% of the suppliers that sell their products and services are micro or small enterprises.<sup>158</sup> The combined participation of micro, small, and medium-sized enterprises on the platform represents approximately 60% of the total number of transactions on the marketplace.<sup>159</sup> Mercado Público reduces barriers for SMEs by providing universal access to the public procurement tenders and by allowing all national and foreign suppliers to participate in the online market.<sup>160</sup>

### 3.2.1. ChileCompra Action Plan 2015

#### (i) *Key Features of the Action Plan 2015*

In 2015, ChileCompra implemented an action plan aimed at increasing participation by women-owned businesses in public procurement.<sup>161</sup> This

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<sup>157</sup> See OECD, "Making Decentralisation Work in Chile: Towards Stronger Municipalities" (OECD Multi-level Governance Studies, 2017) at 202. Online: <[www.oecd.org/publications/making-decentralisation-work-in-chile-9789264279049-en.htm](http://www.oecd.org/publications/making-decentralisation-work-in-chile-9789264279049-en.htm)>.

<sup>158</sup> See Trinidad Inostroza, "Including SMEs and women in public procurement in Chile" (International Trade Centre, October 3, 2016). Online: <[www.intracen.org/article/Including-SMEs-and-women-in-public-procurement-in-Chile/](http://www.intracen.org/article/Including-SMEs-and-women-in-public-procurement-in-Chile/)>.

<sup>159</sup> *Ibid.*

<sup>160</sup> Chatham House Report, *supra* note 18 at 33.

<sup>161</sup> See Luis Eugenio García-Huidobro & Jose Luis Lara, "Chilean Chapter" in *The International Comparative Legal Guide to Public Procurement*, 15th ed (London: Global Legal Group Ltd, 2015) at 66.

resulted in modifications to the *Public Procurement Law* (No. 19.886), which regulates supply and service contracts for public entities together with the *Supreme Decree* (No. 250) of 2004.<sup>162</sup>

One of the main modifications was effected in 2016, when a guideline was published calling for the inclusion of gender criteria in all public purchases.<sup>163</sup> The 2016 guideline meant that any government agency using Mercado Público was now able to include gender-specific evaluation criteria in its purchasing processes. Other results of the 2015 Action Plan include the creation of specialized training programmes in order to help women learn how to submit bids for public procurement, the establishment of a six-month mentorship programme for women suppliers, and the production of a television programme, “Soñadoras, el valor de las oportunidades”, to share the stories of sixteen successful women suppliers.<sup>164</sup>

### 3.2.2. Sello Empresa Mujer (Women Supplier Certification)

#### (ii) *Key Features of the Sello Empresa Mujer*

Sello Empresa Mujer, a certification program for women-led enterprises or for enterprises with more than 50% female workers, was launched in 2015.<sup>165</sup> This certification can be requested in public procurements and will serve as a social-impact criterion in the evaluation of a tender document. To date, more than 345 companies and 20,000 individuals have received the Sello Empresa Mujer certification.<sup>166</sup> In addition to valuable certification that could lead to a higher bid score, the creation of Asociación de Mujeres Empresarias

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<sup>162</sup> *Ibid.*

<sup>163</sup> Chatham House Report, *supra* note 18 at 34.

<sup>164</sup> *Ibid* at 35.

<sup>165</sup> *Ibid* at 34.

<sup>166</sup> *Ibid* at 35.

Proveedores del Estado (“AMEPE”) followed suit.<sup>167</sup> AMEPE is an association of “women providers of the state” that promotes the involvement of women in public procurement through initiatives such as educational programs on issues affecting the participation of women-owned businesses in public procurement and acting as a networking centre for women entrepreneurs.<sup>168</sup>

### *(iii) Evaluating Chile’s Regime*

Chile’s reputation as one of the world’s most open public procurement regimes is well deserved. The country has an ideal combination of action plans with a variety of secondary measures and programs to support the recent reforms and to encourage participation on the ground. The certification system also allows procuring authorities to easily determine whether a business is eligible for a higher bid score. Although certification can be undermined if the requirements are not sufficiently rigorous, it seems to be working well in Chile to date. As of 2016, the share of women participating in the public procurement system reached 36.5%, which roughly corresponds to 21,345 women-state suppliers.<sup>169</sup>

### 3.3. Case Study 4: Kenya

Kenya has signed free trade agreements with several countries,<sup>170</sup> including the recent African Continental Free Trade Area (“AfCFTA”) in March

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<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid* at 32.

<sup>170</sup> These include: Argentina, Bangladesh, Nigeria, Bulgaria, China, Comoros, Congo (DRC), Djibouti, Egypt, Hungary, India, Iraq, Lesotho, Liberia, Netherlands, Pakistan, Poland, Romania, Russia, Rwanda, Somalia, South Korea, Swaziland, Tanzania, Thailand, Zambia, and Zimbabwe. See US Department of Commerce’s International Trade Administration, “Kenya – Trade Agreements” (November 27, 2017). Online: <[www.export.gov/article?id=Kenya-trade-agreements](http://www.export.gov/article?id=Kenya-trade-agreements)>.

2018.<sup>171</sup> This is the largest trade agreement since the formation of the World Trade Organization, and the negotiations specifically included discussions on how AfCFTA would benefit SMEs and Africa’s women through tariff reductions.<sup>172</sup> Kenya provides a unique case study for this Report as a developing country that is not an OECD Member and has yet to become party to the GPA. The country has enacted regulations and programs geared towards enhancing women’s “active participation” in public procurement.

*(i) Key Features of Kenya’s Regime*

The requirement that procurement of public goods and services be conducted through a “system that is fair, equitable, transparent, competitive and cost-effective” is entrenched under Article 227(1) of the *Constitution of Kenya, 2013*.<sup>173</sup> Article 227(2)(b) further recognizes that policies relating to procurement may provide for “the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination”.<sup>174</sup>

The *Public Procurement and Disposal Act, 2005* (“PPDA”)<sup>175</sup> was drafted using the 1994 United Nations Commission on International Trade Law’s Model Law on Procurement of Goods, Construction and Services (“Model

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<sup>171</sup> Loes Witschge, “African Continental Free Trade Area: What you need to know” (Al Jazeera News, March 20, 2018). Online: <[www.aljazeera.com/news/2018/03/african-continental-free-trade-area-afcfta-180317191954318.html](http://www.aljazeera.com/news/2018/03/african-continental-free-trade-area-afcfta-180317191954318.html)>.

<sup>172</sup> See African Trade Policy Centre, “African Continental Free Trade Area: Questions & Answers”. Online: <[au.int/sites/default/files/documents/33984-doc-qa\\_cfta\\_en\\_rev15march.pdf](http://au.int/sites/default/files/documents/33984-doc-qa_cfta_en_rev15march.pdf)>.

<sup>173</sup> *Constitution of Kenya, 2013*, art 227(1). Online: <[www.kenyalaw.org/lex/actview.xql?actid=Const2010#KE/CON/Const2010/chap\\_12](http://www.kenyalaw.org/lex/actview.xql?actid=Const2010#KE/CON/Const2010/chap_12)>.

<sup>174</sup> *Ibid*, art 227(2)(b).

<sup>175</sup> *Public Procurement and Disposal Act, No 3 of 2005, Republic of Kenya* (26 October 2005). Online: <[www.ppoa.go.ke/images/downloads/the-act/public\\_procurement\\_and\\_disposal\\_act\\_2005.pdf](http://www.ppoa.go.ke/images/downloads/the-act/public_procurement_and_disposal_act_2005.pdf)> [PPDA].

Law”).<sup>176</sup> (The Model Law was updated, and subsequently adopted, in 2011.)<sup>177</sup> It is designed to reflect international best practice in terms of public procurement law, to be appropriate for use by all states in updating their legislation to reflect modern developments, and to promote the goals of objectivity, fairness, participation, competition, and integrity in the process.<sup>178</sup>

The PPDA was enacted to enhance efficiency, integrity, fairness, accountability, and to promote local industries.<sup>179</sup> It creates preferences for “disadvantaged groups, including women, youth and persons with disabilities”.<sup>180</sup> The Government specifically enacted the *Public Procurement and Disposal (Preference and Reservations) Regulations* (“PPDR”) in order to regulate the inclusion of said disadvantaged groups in procurement contracts.<sup>181</sup> In 2013, Regulation 31 was amended to reserve 30% of public procurement for businesses owned by women, youth, and people with disabilities.<sup>182</sup> Qualifications are provided in Regulation 32, which reads:

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<sup>176</sup> The UNCITRAL Model Law has been used by 25 countries in reforming their domestic procurement frameworks. These countries are: Afghanistan, Armenia, Azerbaijan, Belarus, Egypt, Ghana, India, Jamaica, Kazakhstan, Kenya, Kyrgyzstan, Mexico, Mongolia, Myanmar, Russian Federation, Rwanda, Tajikistan, Thailand, Trinidad and Tobago, Tunisia, Uganda, Ukraine, United Republic of Tanzania, Uzbekistan, and Zambia. See United Nations Commission on International Trade Law, “Status: UNCITRAL Model Law on Public Procurement (2011)”. Online: <[www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/2011Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model_status.html)>.

<sup>177</sup> United Nations Commission on International Trade Law, “Model Law on Public Procurement” (New York: United Nations, 2014). Online: <[www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf](http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf)>.

<sup>178</sup> *Ibid.*

<sup>179</sup> *PPDA*, *supra* note 175, art 2.

<sup>180</sup> Shikha Vyas-Doorgapersad & Abel Kinoti, “Gender-based Public Procurement Practices in Kenya and South Africa” (2015) 8:3 *African Journal of Public Affairs* 96 at 101 [Vyas-Doorgapersad & Kinoti]; See also the *PPDA*, *supra* note 175, s 39(4): “The preferences and reservations shall apply to—(a) Candidates such as disadvantaged groups, micro, small and medium-sized enterprises.”

<sup>181</sup> *Public Procurement and Disposal (Preference and Reservations) Regulations* (18 June 2013). Online:

<[ppoa.go.ke/images/downloads/regulations/Legal%20Notice%20No%20114%20-%2018th%20June%202013%20-%20Procurement.pdf](http://ppoa.go.ke/images/downloads/regulations/Legal%20Notice%20No%20114%20-%2018th%20June%202013%20-%20Procurement.pdf)> [*PPDR*].

<sup>182</sup> *Ibid.*, Regulation 31.

[A]n enterprise owned by youth, women or persons with disabilities shall be a legal entity that—(a) is registered with the relevant government body; and (b) has at least seventy percent membership of youth, women or persons with disabilities and the leadership shall be one hundred percent youth, women and persons with disability, respectively.<sup>183</sup>

Another component of the Kenyan procurement regime is the Access to Government Procurement Opportunities (“AGPO”) programme. The AGPO was formed under the National Treasury Public Procurement Directorate in 2013 in order to oversee implementation of the amended PPDR regulations. The main purpose of the AGPO is “to ensure that women and discriminated groups actively participate in public procurement”.<sup>184</sup> In order to obtain access to the government portal, an enterprise merely has to register online and verify that it meets the qualifications specified in Regulation 32 of the PPDR above.<sup>185</sup>

### *(ii) Evaluating the Kenyan Regime*

In their 2015 article entitled “Gender-based Public Procurement Practices in Kenya and South Africa”, Professor Shikha Vyas-Doorgapersad from the University of Johannesburg and Professor Abel Kinoti from Riara University reference the following benefits of registering for the AGPO: an opportunity to participate in the 30% of government tenders set aside for preferential procurement, qualification for financing from the Women Enterprise Development Fund (a government agency designed to provide accessible and affordable support to women in starting or expanding business), exclusion from

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<sup>183</sup> *Ibid*, Regulation 32.

<sup>184</sup> Vyas-Doorgapersad & Kinoti, *supra* note 180 at 102; See also Access to Government Procurement Opportunities, “About AGPO”. Online: <[agpo.go.ke/pages/about-agpo](http://agpo.go.ke/pages/about-agpo)>.

<sup>185</sup> For the online registration form, see Access to Government Procurement Opportunities, “Register”. Online: <[agpo.go.ke/register](http://agpo.go.ke/register)>.



bid bonds (a guarantee that the bidder will be able to fulfil the contract terms at the agreed price), and invoice discounting with financial institutions.<sup>186</sup>

By reserving 30% of public procurement contracts for businesses owned by certain economically disadvantaged groups, including women-owned businesses, the quota system ensures that a substantial portion of public contracts are awarded to the program's beneficiaries. It seems to be having the desired effect. By May 2015, two years after the program's implementation, over 6500 businesses owned by women or disadvantaged groups benefited from KES 9.3 billion worth of government contracts.<sup>187</sup>

### 3.4. Case Study 5: South Africa

South Africa has concluded four FTAs and is part of the Southern African Customs Union ("SACU") with Botswana, Lesotho, Namibia, and Swaziland.<sup>188</sup> South Africa is neither an OECD member nor party to the GPA. It is one of the eleven African countries that did not sign the recent African Continental Free Trade Area.<sup>189</sup> We chose to include South Africa in this paper because it is one of Africa's largest economies and has legislation specifically enacted for preferential procurement policies.

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<sup>186</sup> Vyas- Doorgapersad & Kinoti, *supra* note 180 at 102–03.

<sup>187</sup> *Ibid* at 103.

<sup>188</sup> These are the *Southern African Development Community FTA* ("SADC") between 12 member states; the *Trade, Development and Cooperation Agreement between South Africa and the EU*; the *EFTA-SACU Free Trade Agreement* between SACU and the European Free Trade Association of Iceland, Lichtenstein, Norway, and Switzerland; and the *Economic Partnership Agreement* between the SADC EPA Group (South Africa, Botswana, Namibia, Swaziland, Lesotho, and Mozambique) and the EU. See "Trade Agreements", Department of Trade and Industry, *Republic of South Africa*. Online: <[www.thedti.gov.za/trade\\_investment/ited\\_trade\\_agreement.jsp](http://www.thedti.gov.za/trade_investment/ited_trade_agreement.jsp)>.

<sup>189</sup> South Africa has delayed signing the agreement because of domestic constitutional requirements by which the government must engage in a consultation process before the signing of international treaties. See International Centre for Trade and Sustainable Development, "African Leaders Launch Continental Free Trade Area" (March 22, 2018). Online: <[www.ictsd.org/bridges-news/bridges/news/african-leaders-launch-continental-free-trade-area](http://www.ictsd.org/bridges-news/bridges/news/african-leaders-launch-continental-free-trade-area)>.

The *Constitution of the Republic of South Africa, 1996* stipulates in section 217(1) that “[C]ontracting by organs of state for goods or services must occur in accordance with a system that is fair, equitable, transparent, competitive and cost-effective”.<sup>190</sup> Section 217(2) clarifies that subsection (1) does not prevent government institutions from implementing procurement policies that provide for: “(a) categories of preference in the allocation of contracts [or] (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination”.<sup>191</sup>

### 3.4.1. Preferential Procurement Policy Framework Act

#### (i) *Key Features of the PPPFA*

The *Preferential Procurement Policy Framework Act No 5 of 2000* (“PPPFA”) was crafted in response to section 217(3) of the *Constitution*, which called for the implementation of national legislation regarding preferential procurement policy.<sup>192</sup> The PPPFA governs a points-based system of awarding contracts in South Africa and is monitored by the Department of Public Works.<sup>193</sup> Under this system, the maximum number of points a tender for a contract can be awarded is 100. Of the 100 points, 80 points (or 90 points for larger procurements) are awarded based on price while the remaining 20 points (or 10 points for larger procurements) are awarded based on the business’s

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<sup>190</sup> *Constitution of the Republic of South Africa, 1996*, s 217(1). Online: <[www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf](http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf)>.

<sup>191</sup> *Ibid*, s 217(2).

<sup>192</sup> *Preferential Procurement Policy Framework Act No 5 of 2000*, Republic of South Africa, Government Gazette Vol 416:2085 (3 February 2000). Online: <[www.westerncape.gov.za/text/2010/7/preferential\\_procurement\\_policy\\_framework\\_act\\_5\\_of\\_2000.pdf](http://www.westerncape.gov.za/text/2010/7/preferential_procurement_policy_framework_act_5_of_2000.pdf)>. [PPPFA].

<sup>193</sup> Vyas- Doorgapersad & Kinoti, *supra* note 180 at 103.

certified Broad-Based Black Economic Empowerment (“B-BBEE”) status level.<sup>194</sup>

This status level is assessed through compliance with the B-BBEE *Codes of Good Practice*, which uses a scorecard featuring seven elements, including ownership, employment equity, and preferential procurement.<sup>195</sup> Preference points may be awarded to advance “special goals”, which include “contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability”.<sup>196</sup>

### 3.4.2. Revised Preferential Procurement Regulations, 2017

The revised *Preferential Procurement Regulations 2017* came into effect last year, and brought the following significant changes to the preferential points-based procurement model in South Africa:<sup>197</sup>

- a) **a threshold increase:** The threshold for what constitutes a “larger procurement” has increased to ZAR 50 million from the previous ZAR 1 million.
- b) **the use of set asides:** A procuring authority may advertise a tender limiting bids to businesses that meet certain pre-qualification criteria. The criteria must be:

[A]imed at the promotion of tenderers with specified broad-based black economic empowerment contributor status levels, exempt micro-enterprises (“EMEs”) or qualifying small enterprises (“QSEs”), and/or tenderers that commit to sub-contracting at least 30% of the rand value of the contract to EMEs or QSEs with at least 51% ownership by black people, including those with disabilities and those

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<sup>194</sup> *Ibid.*

<sup>195</sup> These elements include: ownership, management control, employment equity, skills development, preferential procurement, enterprise and supplier development, and socioeconomic development. See “Empowering Women Through Public Procurement”, *International Trade Centre* (2014). Online: <[www.intracen.org/uploadedFiles/intracenorg/Content/Publications/Women%20procurement%20guide-final-web.pdf](http://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/Women%20procurement%20guide-final-web.pdf)>.

<sup>196</sup> *PPPFA*, *supra* note 192, s 2(1)(d).

<sup>197</sup> See Pippa Reyburn, “Revised Preferential Procurement Regulations, 2017”, *ENSAfrica* (5 April 2017). Online: <[www.ensafrica.com/news/Revised-Preferential-Procurement-Regulations-2017?Id=2575&STitle=corporate%20commercial%20ENSight](http://www.ensafrica.com/news/Revised-Preferential-Procurement-Regulations-2017?Id=2575&STitle=corporate%20commercial%20ENSight)>.

living in rural or underdeveloped areas or townships, black youth, black women, black military veterans, [and] co-operatives owned by black people.

- c) **a subcontracting requirement:** Procuring authorities must include a 30% subcontracting requirement in tender advertisements (where feasible) for contracts over ZAR 30 million. The tenderer must commit to subcontracting at least 30% of the rand value of the contract to EMEs or QSEs, with at least 51% ownership by black people, including women. This will assist with South Africa's goal to integrate smaller enterprises into larger government procurement contracts.

## (ii) *Evaluating the South African Regime*

It is too early to assess how the new policies will play out and whether the revised Regulations will be challenged for not being “cost-effective” in accordance with the PPPFA.<sup>198</sup> In the meantime, South Africa has demonstrated a constitutional commitment to preferential public procurement and has experimented with both points-based systems and set-aside schemes. Its new subcontracting requirement provides a unique means of assisting smaller enterprises to integrate into the supply chains of larger procurement contracts.

## 3.5. Case Study 6: The United States of America

We chose to analyze the United States for this report because of its well established preferential procurement programs. The United States has multiple FTAs with public procurement obligations regarding national treatment and non-discrimination<sup>199</sup>. The United States is also a party to the revised WTO

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<sup>198</sup> See Terrance Booyesen, “New preferential procurement regulations – radical shift in enforcing BBBEE?”, *BusinessBrief* (16 May 2017). Online: <[www.bbrief.co.za/2017/05/16/new-preferential-procurement-regulations-radical-shift-in-enforcing-bbbee/](http://www.bbrief.co.za/2017/05/16/new-preferential-procurement-regulations-radical-shift-in-enforcing-bbbee/)>.

<sup>199</sup> Government procurement obligations are included in the following agreements: CAFTA-DR, NAFTA, GPA, US-Australia FTA, US-Bahrain FTA, US-Chile FTA, US-Colombia FTA, US-Israel FTA, US-Korea FTA, US-Morocco FTA, US-Oman FTA, US-Panama FTA, US-Peru FTA, and US-Singapore FTA.

GPA. The United States excludes set asides for small- or minority-owned businesses from the disciplines of all of these agreements.<sup>200</sup>

The US Federal Government spends more than US\$500 billion every year on goods and services.<sup>201</sup> The US General Services Administration provides centralized procurement for federal agencies and departments.<sup>202</sup> All federal public procurement opportunities are posted on FedBizOpps, a website where registered vendors can search for opportunities. Businesses register for free with the System for Award Management (SAM) and then can access procurement opportunities on FedBizOpps.<sup>203</sup>

### 3.5.1. The Women-Owned Small Business Program

#### (i) *Key Features of the WOSB Program*

The United States operates preferential procurement programs through the Small Business Administration (SBA).<sup>204</sup> One of the programs, the Women-Owned Small Business Federal Contracting program, is specifically aimed at “providing a level playing field for Women-Owned Small Businesses (WOSBs)

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<sup>200</sup> The exemption is located in each agreement in the following location: CAFTA-DR Annex 9.1.2(b)(i)-30; NAFTA Annex 1001.2b; GPA Annex 7 United States General Note 1; US-Australia FTA Annex 15-A, Section 7; US-Bahrain FTA Annex 9-E; US-Chile FTA Annex 9.1, Section H; US-Colombia FTA Annex 9.1, Section H; US-Israel FTA Article 15 (this agreement does not contain the same language as the others, instead it limits application to procurements “which would be subject to the Agreement on Government Procurement”, which excludes small and minority-owned businesses); US-Korea FTA Annex 17A, Section E; US-Morocco FTA Annex 9-F; US-Oman FTA Annex 9, Section F; US-Panama FTA Annex 9.1, Section H; US-Peru FTA Annex 9.1, Section G; US-Singapore FTA Article 13.1(1) (this article states that the United States’ General Notes 1-4 in Annex 7 of the WTO GPA are incorporated *mutatis mutandis*).

<sup>201</sup> The Canadian Trade Commissioner Service, “Procurement Basics”. Online: <[http://tradecommissioner.gc.ca/sell2usgov-vendreaugouvusa/procurement-marches/procurement\\_basics-guide\\_affaires.aspx?lang=eng](http://tradecommissioner.gc.ca/sell2usgov-vendreaugouvusa/procurement-marches/procurement_basics-guide_affaires.aspx?lang=eng)>.

<sup>202</sup> *Ibid.*

<sup>203</sup> *Ibid.*

<sup>204</sup> US Small Business Administration, “Contracting assistance programs”. Online: <<https://www.sba.gov/federal-contracting/contracting-assistance-programs>> [SBA Contracting Assistance].

to compete for Federal contracts”.<sup>205</sup> It does so by providing set-aside contracts for industries in which WOSBs are underrepresented. The United State’s current procurement goal is to award 23% of all federal government contracting dollars to small businesses, with a targeted sub-goal of 5% for WOSBs.<sup>206</sup>

To qualify as a WOSB, a business must meet two requirements – it must (1) “meet the small business size standard for primary [North American Industry Classification System] NAICS code and contract” and (2) “be at least 51% unconditionally and directly owned and controlled by women who are U.S. citizens”.<sup>207</sup>

Regarding the first requirement, whether a business qualifies as a small business depends on the industry it is involved in or the type of economic activity in which it engages.<sup>208</sup> The SBA establishes size standards based on the North American Industry Classification System (NAICS), which assigns codes to areas of economic activity.<sup>209</sup> When the federal government goes to procure goods or services, the relevant NAICS code for that product or service is identified. The SBA publishes a full table of size standards by NAICS code every year in the Federal Register.<sup>210</sup>

Regarding the second requirement, for a business to be unconditionally owned by a woman, “the ownership must not be subject to any conditions, executory agreements, voting trusts, or other arrangements that cause or

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<sup>205</sup> US Small Business Administration, “Women-Owned Small Business Federal Contracting program”. Online: <<https://www.sba.gov/federal-contracting/contracting-assistance-programs/women-owned-small-business-federal-contracting-program>> [SBA Women-Owned Small Business Program].

<sup>206</sup> SBA Contracting Assistance, *supra* note 204.

<sup>207</sup> *Women-Owned Small Business Federal Contract Program*, 13 CFR, s127.200, (2013).

<sup>208</sup> *Small Business Size Regulations*, 13 CFR, s 121.101, (2009).

<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid.*; Also see §121.201 for a table of size standards matched to NAICS codes.

potentially cause ownership benefits to go to another.”<sup>211</sup> In order for a business to be directly owned by a woman, “the qualifying women must own 51 percent of the concern directly.”<sup>212</sup> Lastly, for a business to be controlled by women, “the management and daily business operations of the concern must be controlled by one or more women.”<sup>213</sup> A woman must hold the highest officer position full-time and have ultimate managerial and supervisory control over the business.<sup>214</sup>

There is also a sub-program within the WOSB program for economically-disadvantaged women-owned small businesses (EDWOSB). To qualify as an EDWOSB a business must meet all the requirements for a WOSB and:

- a) Be owned and controlled by one or more women, each with a personal net worth less than \$750,000;
- b) Be owned and controlled by one or more women, each whose average adjusted gross income for three years is \$350,000 or less; and
- c) Have \$6 million or less in business assets.<sup>215</sup>

In order for a WOSB or a EDWOSB to compete for a WOSB set-aside it must satisfy three requirements<sup>216</sup>:

1. Registration on SAM
2. Have a current representation posted on SAM that it qualifies as an EDWOSB or WOSB. The representation must state that:
  - a. The concern is an EDWOSB or WOSB or is certified as an EDWOSB or WOSB by a certifying entity approved by SBA, and there have been no changes in its circumstances affecting its eligibility since certification;
  - b. The concern meets *each* of the applicable individual eligibility requirements..., including that:
    - i. It is a small business concern under the size standard assigned to the particular procurement;
    - ii. It is at least 51 percent owned and controlled by one or more women who are United States citizens, or it is at least

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<sup>211</sup> *Women-Owned Small Business Federal Contract Program, supra note 207, s 127.201.*

<sup>212</sup> *Ibid.*

<sup>213</sup> *Ibid, s 127.202.*

<sup>214</sup> *Ibid.*

<sup>215</sup> *SBA Women-Owned Small Business Program, supra note 205.*

<sup>216</sup> *Women-Owned Small Business Federal Contract Program, supra note 207, s 127.300.*

- 51 percent owned and controlled by one or more women who are United States citizens and are economically disadvantaged; and
- iii. Neither SBA, in connection with an examination or protest, nor an SBA-approved certifier has issued a decision currently in effect finding that it does not qualify as an EDWOSB or WOSB.<sup>217</sup>
3. Have provided the following required documents to the WOSB Program Repository:
    - a. Birth certificates, Naturalization papers, or unexpired passports for owners who are women;
    - b. Copy of the joint venture agreement, if applicable;
    - c. For limited liability companies:
      - i. Articles of organization (also referred to as certificate of organization or articles of formation) and any amendments; and
      - ii. Operating agreement, and any amendments;
    - d. For corporations:
      - i. Articles of incorporation and any amendments;
      - ii. By-laws and any amendments;
      - iii. All issued stock certificates, including the front and back copies, signed in accord with the by-laws;
      - iv. Stock ledger; and
      - v. Voting agreements, if any;
    - e. For partnerships, the partnership agreement and any amendments;
    - f. For sole proprietorships (and corporations, limited liability companies and partnerships if applicable), the assumed/fictitious name certificate(s);
    - g. A signed copy of the Women-Owned Small Business Program Certification<sup>218</sup>

A WOSB can either self-certify or get third-party certification from an SBA-approved organization.<sup>219</sup> Both require use of the certify.SBA.gov website and updating of the WOSB's business profile on SAM.<sup>220</sup> Self-certification requires answering questions and uploading documents on certify.SBA.gov.

There are four SBA-approved non-government organizations which can provide third-party certification: the El Paso Hispanic Chamber of Commerce,

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<sup>217</sup> *Ibid.*

<sup>218</sup> *Ibid.*

<sup>219</sup> SBA Women-Owned Small Business Program, *supra* note 205.

<sup>220</sup> *Ibid.*



the National Women Business Owners Corporation, the US Women’s Chamber of Commerce, and the Women’s Business Enterprise National Council. Proof of third-party certification must be submitted through [certify.SBA.gov](https://certify.sba.gov).<sup>221</sup>

The SBA maintains a list of NAICS codes that qualify for the WOSB Federal Contracting program.<sup>222</sup> When the federal government goes to purchase products that fall within one of those NAICS codes and below the threshold for the specific code<sup>223</sup>, the contract is set aside exclusively for WOSBs.<sup>224</sup> The set aside can either be competitive, when two or more small businesses can perform the work or provide the products required, or sole-source, when only one small business can perform the work or provide the products.<sup>225</sup>

### *(ii) Evaluating the WOSB Program*

Although the US system appears to be very robust and therefore likely to foster women’s participation in public procurement in the US, problems with the WOSB program were identified by the US Government Accountability Office (GAO) in a report in 2014.<sup>226</sup> The GAO found that the SBA was not conducting sufficient oversight and monitoring of third-party certifiers. Further, it found that 40% of businesses that had received contracts under the WOSB program were

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<sup>221</sup> *Ibid.*

<sup>222</sup> US Small Business Administration, “Qualifying NAICS for the Women-Owned Small Business Federal Contracting program”. Online: <<https://www.sba.gov/document/support--qualifying-naics-women-owned-small-business-federal-contracting-program>>.

<sup>223</sup> *Ibid.*

<sup>224</sup> US Small Business Administration, “Types of contracts”. Online: <<https://www.sba.gov/federal-contracting/contracting-guide/types-contracts>>.

<sup>225</sup> *Ibid.*

<sup>226</sup> United States Government Accountability Office, “Women-Owned Small Business Program Certifier Oversight and Additional Eligibility Controls Are Needed” (October 2014). Online: <<https://www.gao.gov/assets/670/666431.pdf>>.

ineligible. The GAO made two recommendations for the SBA to rectify these problems:

- a) SBA should establish and implement comprehensive procedures to monitor and assess performance of certifiers in accord with the requirements of the third-party certifier agreement and program regulations; and
- b) SBA should enhance examination of businesses that register to participate in the WOSB program, including actions such as developing and implementing procedures to conduct annual eligibility examinations, analyzing examination results and individual businesses found to be ineligible to better understand the cause of the high rate of ineligibility in annual reviews, and implementing ongoing reviews of a sample of all businesses that have represented their eligibility to participate in the program.<sup>227</sup>

The SBA responded by introducing compliance reviews of third-party certifiers. In addition, self-certification of WOSB status was eliminated by the National Defense Authorization Act for the Fiscal Year 2015. However, the SBA has not eliminated self-certification as an option for the WOSB program.<sup>228</sup> Therefore, problems still remain with certification under the WOSB program and the SBA has not yet taken adequate steps to address them.

Overall, the WOSB program appears to be an effective way to encourage the participation of women in public procurement. Nevertheless, the United States could benefit from a more streamlined and enforceable certification system that would reduce the issues with non-eligible businesses receiving contracts. Moreover, finding information on eligibility for the program is also quite difficult. While conducting research on the WOSB program, it was necessary to read the actual legislation to fully understand how the program works and much of the information appears to be on the SAM and certify. SBA

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<sup>227</sup> United States Government Accountability Office, "Small Business Administration Government Contracting and Business Development Processes and Rule-Making Activities" (June 2017) at 21-22. Online: <<https://www.gao.gov/assets/690/685569.pdf>>.

<sup>228</sup> *Ibid*; Self-certification is still listed as an option on the SBA website for the WOSB program.

websites, which require registration to access. In our opinion, more transparency and ease of access would help not only WOSBs but also other jurisdictions that want to use the WOSB program as a model for developing their own preferential procurement programs for women.

## **4. RECOMMENDATIONS**

The foregoing discussion and analyses demonstrate that governments, policymakers, and international institutions interested in constructing preferential public procurement schemes for the advancement of economic gender equality and inclusivity have a range of options at their disposal. Of course, policymakers operate within unique political, legal, and regulatory environments, meaning a preferential public procurement framework that may be optimal in one instance may be less effective in another. It is nonetheless possible to make general recommendations as to which mechanisms ought to be considered in the policymaking process.

The case studies we included in this paper demonstrate that preferential public procurement frameworks tend to use a number of different mechanisms, which can be classified as “primary” or “secondary” measures. Primary measures refer to those that provide beneficiaries with specific and concrete preferential treatment and include set-aside schemes and bid-adjustment mechanisms. Primary measures also include certification measures, since these act to safeguard these programs. Secondary measures lend support to primary measures and help maximize their reach and include initiatives such as supplier outreach and training programs, staff training for procurement authorities, and education and skills development workshops for suppliers.

Successful preferential public procurement policies adopt a variety of primary and secondary measures and they safeguard their programs through robust certification schemes. In the following section, we provide an assessment of the various primary and secondary measures available and

identify which are most effective in the context of promoting greater gender equality.

## 4.1. Primary Measures

Primary measures are the key measures that constitute a preferential procurement program. Through our case studies, we have identified three primary measures – certification, set-aside schemes, and bid-adjustment schemes. This section will give an overview of each primary measure, with reference to the case studies, and make recommendations for the implementation of each measure. For an overview chart illustrating primary measures and their benefits and limitations, see Appendix A.

### 4.1.1. Certification

Certification is essential to any preferential procurement program. It enables government officials to easily determine whether a bidder is eligible for the preferential program. It also makes it easier for eligible businesses to bid on preferential contracts, as they do not have to undergo a process to prove their eligibility for every bidding process; they simply present their certification.

However, certification can be undermined if the requirements are too easy to circumvent. A certification system must have rigorous enough requirements to prevent ineligible businesses from exploiting loopholes and improperly gaining access to preferential programs. As discussed above, Nunavut's NNI program suffered from such loopholes until it was revised to include tiered ownership levels and stronger monitoring and enforcement mechanisms. Similarly, ineligible businesses have been able to take advantage of the United States' WOSB Federal Contracting Program because of the self-certification nature of the program. The GAO recommendations for fixing this

problem, such as compliance reviews of third-party certifiers, have been partially implemented, but self-certification remains a problem that must be eliminated.

States have three options in structuring their certification bodies: in-house, third-party, or a hybrid model. The advantage of the in-house approach is that procuring authorities retain full control of the administration of the certification mechanism, which may facilitate faster integration between certification and other components of the public procurement process (e.g., certification and bidding on contracts can be incorporated into one e-procurement platform). However, third-party certification (used in the WOSB Program and Australia's IPP) may offer a more efficient solution, since these organizations often have pre-existing capacity and expertise in dealing with certification regimes generally, and with women's economic empowerment specifically. The drawback in using third-party certification organizations is that supervision may be more complicated, a concern enhanced where multiple third-party organizations are used. Therefore, procuring authorities should aim to outsource certification to a single third-party certifier. A hybrid body, such as an organization created by a government for the express purpose of carrying out certification, may also allow for sufficient expertise and capacity, but raises issues related to independence and oversight. We recommend that certification be delegated to a single third party. A useful model is Australia's arrangement with Supply Nation, which has been successful in maintaining a list of eligible indigenous businesses and contributing to the success of the IPP.

A robust certification system needs two things: effective oversight and enforcement. If a State wishes to use a third-party (or a hybrid) certification

body, it should implement procedures to monitor and assess them to ensure that they certify only eligible businesses. In addition to ensuring oversight of certifiers, there should be penalties for businesses that improperly hold themselves out as eligible, such as provisions providing for immediate termination of a contract if the business is found to be ineligible and/or a freeze on that business' ability to bid for government contracts in the future until it becomes eligible.

It will be important for States to take into account their own unique situations, including their particular economies, social policy goals, and procurement practices in order to tailor certification procedures with a view to being effective in their domestic markets. The approach used in the NNI Policy and the United States' GAO recommendations with respect to monitoring the performance of certifiers and implementing stronger enforcement mechanisms can be useful starting points from which States can adapt procedures to suit their country's needs.

#### 4.1.2. Set-Aside Schemes

Set-aside schemes feature prominently in a number of the preferential public procurement regimes discussed above and constitute one of the most effective tools available to policy-makers developing preferential public procurement programs. These schemes operate to reserve particular contracts for exclusive competition amongst relevant target beneficiaries (such as select women-owned businesses) that would not be able to effectively compete for

the contract(s) on the open-market.<sup>229</sup> Their key advantage is certainty, in that they ensure that suitable contracts are ultimately awarded to target beneficiaries and thus guarantee real outcomes of the policy.

Set-asides, which are essentially a form of affirmative action, allow target businesses and their employees to develop capacity. Ideally, and over enough time, set-asides act as a springboard for target businesses, eventually allowing them to grow to a point where they can compete on the open-market. Set-aside schemes can thus be thought of as business incubators, through which otherwise non-competitive businesses are given the opportunity to develop their business acumen as well as their ability to compete on the competitive market.

Three examples of set-asides are provided by the preferential procurement schemes of the Territory of Nunavut, Kenya, and the United States. While these regimes have a similar effect, they are structured differently. In Kenya, the PPDA reserves 30% of public procurement contracts for businesses owned by certain economically disadvantaged groups, including women-owned businesses. In contrast, the NNI policy does not mandate awarding a minimum number of contracts to Inuit-owned firms, and instead, asks procuring authorities to set aside particular types of contracts whenever appropriate. The approach to set-aside schemes taken in the Kenyan PPDA establishes the equivalent of a mandatory quota system, whereas the NNI policy is more flexible, as it does not require procuring authorities to reserve a minimum number of contracts for intended beneficiaries and provides that the

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<sup>229</sup> Carol Cravero, "Socially Responsible Public Procurement and Set-Asides: a Comparative Analysis of the US, Canada, and the EU" (November 2017), Arctic Review on Law and Politics. Online: <<https://arcticreview.no/index.php/arctic/article/view/739/2105>>.



analysis for setting aside these contracts is contextual. Each approach has its advantages: the quota system ensures that a substantial portion of public contracts are awarded to the program's beneficiaries; the NNI's contextual approach allows for a more nuanced balancing of the competing objectives involved.

Ideally, a preferential public procurement set-aside scheme combines these two methods. This is the approach taken in the United States' WOSB program. Adopting a policy that sets a target for procuring authorities in terms of the percentage of contracts that should be reserved for exclusive competition among women-owned businesses ensures that these programs achieve their goals. By adding specific guidance as to which factors need to be considered in identifying suitable contracts, flexibility is maintained.

Identifying suitable tenders is perhaps the most significant challenge in using set-aside schemes for the benefit of women-owned businesses. There are two aspects to this issue. First, there are relatively few shared characteristics between women-owned businesses relevant to identifying particular tenders. Unlike programs that target a comparatively small set of beneficiaries (such as Inuit-owned firms), women-owned businesses share little to no common denominators in terms of competitive environment, geography, and business capacity. In other words, while procurement authorities are likely able to make relatively accurate generalizations for groups such as Inuit-owned firms (particularly since the total population of Nunavut is less than 40,000), this is more difficult when dealing with a much larger group such as women-owned businesses.

Of course, as briefly mentioned in the introduction, there are particular sectors in which women-owned businesses are more prevalent (such as retail and personal services) than others (manufacturing and business services). For example, in the United States half of all women-owned businesses can be found in three industries, including health care and social assistance (which accounts for 15% of all women-owned businesses) and professional/scientific/and technical services, such as lawyers, accountants, architects, and public relations firms (which account for 12% of all women-owned firms). Nonetheless, the significant variability amongst women-owned businesses will raise costs for determining whether a tender is suitable to be set aside, because procurement authorities will need to engage in a more specific analysis wherever they are not able to use certain basic assumptions in regard to a program's beneficiaries.

Second, determining the suitability of a given tender for use in a set-side scheme requires accurate and frequently updated data. In performing the analysis required for identifying contracts suitable to be set-aside, procuring authorities require data regarding the number of potential diverse bidders, the need to develop capacity in the sector, the extent to which the broader community or region would benefit, the competitiveness of diverse bidders, and the costs associated with setting aside the contract. Access to information and the ability to effectively utilize it are general challenges for procuring authorities but are likely to be particularly pronounced for authorities working with fewer financial resources.

Together, these considerations may increase the costs and lower the political viability of using set-aside schemes for women-owned businesses.

Fortunately, their impact can be limited. First, tools such as e-procurement may not only increase the overall efficiency of procurement regimes, but can also facilitate better data collection, sharing, and analysis. E-procurement tools can allow for central storage and real-time analysis of data and can be configured to make certain information available to the general public (which helps make these programs more transparent).<sup>230</sup> This can expedite suitability assessments and bring down-costs. Second, resort to schemes such as the United States' WOSB program—in which set-aside tenders are made available in those industries in which WOSBs are underrepresented—can help streamline the analysis that procuring authorities must perform. While a case-by-case analysis (required under the NNI Policy, for example) allows for greater flexibility, it may also render the use of set-aside schemes too expensive for procuring authorities working under greater financial constraints.

#### 4.1.3. Bid-Adjustment Schemes

Our previous review of public procurement in Canada and South Africa demonstrates that bid-adjustment (or points-based) schemes are another effective measure used by governments to promote the advancement of a target group. To recap, both the NNI Act in Canada (Nunavut) and the PPPFA in South Africa incorporate adjustments into the tendering-selection process. The NNI Act does so by adjusting a bid's price components based on the degree of Inuit ownership. The adjustment can range from 5% to 15% depending on different factors. The PPPFA, in contrast, sets aside 20 of the 100 points a tender can be awarded based on a B-BBEE's status level.

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<sup>230</sup> For an example of a public e-procurement tool, see <https://buyandsell.gc.ca/>.

The benefit of a bid-adjustment scheme is that it gives governments an opportunity to advance public policy goals, including social inclusion for particular groups. By providing extra points to bids based on certain criteria, procurement can help support the economic development of disadvantaged groups that may not be competitive otherwise. This opens the market to potentially greater competition and participation by groups that may not have opted to submit a bid without the benefit of special treatment. Like many affirmative action programs, bid-adjustments essentially level the playing field for disadvantaged groups, and points can be easily quantifiable. Point schemes are straightforward and relatively easy to administer.

The main challenge with this model is ensuring that the intended benefit is achieved. Determining the level of adjustment needed (such as 5%, 10%, 20%, or some other level) in order to make the relevant supplier competitive can be challenging. There is also the question of balancing the objectives of social procurement with the needs of efficiency and “best-value”. Too significant an adjustment will drive up costs, while too low an adjustment will render the scheme ineffective.<sup>231</sup>

The B-BBEE regime, for example, has been criticized by Professor Intaher M. Ambe & Professor Johanna A. Badenhorst-Weiss of the University of South Africa (Unisa) for “imposing significant costs on the economy without supporting employment creation or growth”.<sup>232</sup> Other potential shortcomings of

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<sup>231</sup> See generally “The Cost of Different Goals of Public Procurement”, *Konkurrensverket Swedish Competition Authority* (Sweden: Editra Västra Aros AB, 2012). Online: <[www.konkurrensverket.se/globalassets/english/publications-and-decisions/the-cost-of-different-goals-of-public-procurement.pdf](http://www.konkurrensverket.se/globalassets/english/publications-and-decisions/the-cost-of-different-goals-of-public-procurement.pdf)>.

<sup>232</sup> Intaher M Ambe & Johanna A Badenhorst-Weiss, “Procurement Challenges in the South African Public Sector” (2012) *Journal of Transport and Supply Chain Management* 242 at 253 [Ambe & Badenhorst-Weiss].

point allocation include an inability to incentivize employment creation and a disproportionate emphasis on ownership (which has led to the unintended consequences of fronting<sup>233</sup>), as well as misplaced focus on transactions that benefit only a small number of individuals.<sup>234</sup>

In sum, effective monitoring and a transparent means for evaluating how many points to allocate in each case are necessary to avoid abuse of preference criteria as well as scepticism from competitors that are not awarded particular contracts. Therefore, for bid-adjustment schemes to succeed as preferential public procurement tools, the social policy goals behind bid adjustment schemes should be quantifiable and the preferential treatment accorded must be monitored to ensure compliance with those goals. Ensuring that a certain percentage of public procurement contracts are awarded to women-owned businesses would assist in this regard.

#### 4.2. Secondary Measures

In addition to developing or enhancing preferential programs that directly target women-owned businesses for government contracts, States should provide programs to encourage development of women-owned businesses as well as implement other mechanisms to ensure the success of their preferential procurement programs. For an overview chart illustrating secondary measures and their design options and benefits, see Appendix B.

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<sup>233</sup> “Fronting” refers generally to the practice where non-eligible businesses mask their true ownership in order to benefit from the preferential procurement regime. Fronting can take a variety of forms depending on the specific eligibility requirements set out in the applicable legislation. For example, a non-eligible business can misrepresent its ownership by appointing members of the target group to its board as a formality or can recruit members of the target group to establish shell companies that then enter into partnerships with the business.

<sup>234</sup> Ambe & Badenhorst-Weiss, *supra* note 232.

#### 4.2.1. Education and Training

A robust preferential procurement policy is of no utility if eligible businesses do not know about it or are otherwise unable to participate in the programs created by it. In order to effectively engage women-owned businesses in public procurement, a holistic framework is needed to ensure full participation and engagement.

Programs such as Australia's Procurement Workshops for Indigenous suppliers help businesses learn about the procurement process and how to best position themselves to participate and win contracts.<sup>235</sup> These programs can cover a wide variety of topics, from basic business sense to more specific procurement or export workshops. In 2016-2017, Indigenous Business Australia assisted over 90 indigenous businesses to enhance their business profiles so that they could better participate in public procurement.<sup>236</sup> Generally speaking, workshops (which can be hosted either directly by procuring authorities or by NGOs) should assist eligible businesses with understanding elements of public procurement including the bid process itself, the criteria used for evaluating bids, and what is required in the preparation of bid documents.

Similarly, Toronto's Social Procurement Program includes a "supplier community capacity building and community outreach" component.<sup>237</sup> This component includes policies to reach out to diverse suppliers and encourage them to become certified, providing business development support for diverse suppliers, and identifying opportunities for training and employment on City

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<sup>235</sup> IBA Procurement Workshops, *supra* note 155.

<sup>236</sup> Indigenous Business Australia, "Business ownership: Achievements". Online: <<http://iba.gov.au/reports/AR1617/part-3-business-ownership/achievements/index.html>>.

<sup>237</sup> City of Toronto, *supra* note 102 at 12.

projects.<sup>238</sup> The goal of this component is to ensure that “diverse suppliers and people experiencing economic disadvantage can take better advantage of the opportunities that will be created through supply chain diversity and workforce development initiatives.”<sup>239</sup>

Canada provides products and services through Business Women in International Trade (BWIT),<sup>240</sup> which assist women-owned small businesses with exporting and internationalizing their businesses.<sup>241</sup> BWIT organizes women-focused trade missions where business owners can meet representatives of corporations that want to buy from women-owned businesses and provides a list of funding opportunities for export financing.<sup>242</sup> While not procurement focused, programs like these can help women-owned businesses increase their capacity to better compete for government contracts.

Canada and the United States created the Canada-United States Council for Advancement of Women Entrepreneurs and Business Leaders (“the Council”) in February 2017 with the goal of increasing women’s participation in business.<sup>243</sup> The Council’s mandate is to “make recommendations that can: reduce barriers that limit women’s participation in business, support and develop women’s professional advancement, and assist women in starting and

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<sup>238</sup> *Ibid.*

<sup>239</sup> *Ibid.*

<sup>240</sup> BWIT is part of the Canadian Trade Commissioner Service, which provides information to Canadian businesses to help them succeed abroad and to foreign businesses that wish to invest in Canada. See online: <http://tradecommissioner.gc.ca/about-tcs-propos-sdc.aspx>.

<sup>241</sup> The Canadian Trade Commissioner Service, “About us”. Online: <http://tradecommissioner.gc.ca/businesswomen-femmesdaffaires/aboutus-approposdenous.aspx?lang=eng>.

<sup>242</sup> The Canadian Trade Commissioner Service, “Funding Opportunities”. Online: <http://tradecommissioner.gc.ca/businesswomen-femmesdaffaires/funding-financement.aspx?lang=eng>.

<sup>243</sup> Canada-United States Council for Advancement of Women Entrepreneurs & Business Leaders, “Advancing Women in Business”. Online: <https://advancingwomeninbusiness.com/>.

scaling their businesses.”<sup>244</sup> In their first report in January 2018, the Council specifically identified public-sector procurement as a method of supporting women-owned businesses. The recommendations include “improve the existing US Women Owned Small Business (WOSB) program, while initiating a similar type of program in Canada.”<sup>245</sup> It was also recommended that the programs be linked so that women in both countries can participate in both programs.<sup>246</sup> The work of the Council is ongoing and it remains to be seen what impact their recommendations will have on public procurement. In our view, the recommendations are promising. If Canada develops a program similar to the WOSB program and links it to the WOSB program, other states might use the joint program as a model for how to administer preferential procurement programs in a non-discriminatory way.

#### 4.2.2. Accessibility

As discussed above, details on how to participate in the United States’ WOSB program are located in legislation and on websites that require registration to access, which could make it difficult for eligible businesses to know that they are eligible. In order to promote access to preferential public procurement programs, authorities should establish user-friendly e-procurement platforms, which can help standardize the materials and processes required across different types of public procurement contracts.

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<sup>244</sup> Canada-United States Council for Advancement of Women Entrepreneurs & Business Leaders, “Council Goals”. Online <<https://advancingwomeninbusiness.com/our-goals/>>.

<sup>245</sup> Canada-United States Council for Advancement of Women Entrepreneurs & Business Leaders, “Growing Women-Owned Businesses”. Online: <<https://advancingwomeninbusiness.com/pillar-one/>>.

<sup>246</sup> Canada-United States Council for Advancement of Women Entrepreneurs & Business Leaders, “*Supporting and Growing Women-Owned Businesses: Report of the Canada-United States Council for Advancement of Women Entrepreneurs and Business Leaders*” (January 2018) at 17. Online: <<https://advancingwomeninbusiness.com/wp-content/uploads/2018/01/Supporting-Growing-Women-Owned-BusinessesFINAL.pdf>>.



These platforms should be supported by documentation and reference materials (such as step-by-step explanations of the bid process and the required forms) that are drafted using clear and jargon-free language. Ideally, these platforms should be directly integrated with certification systems in order to reduce the administrative burden for suppliers and procuring authorities.

#### 4.2.3. Independent Review Mechanisms

In order to support the integrity of preferential procurement programs, States can create independent tribunals to investigate allegations of improper contract awards. The NNI Act created an independent NNI Tribunal to “hear complaints regarding the application of the NNI in the award of any contracts covered by the NNI”.<sup>247</sup> Tribunals such as this one allow suppliers to contest the award of a contract if they believe that it was not awarded in compliance with the relevant policy. Having an independent review mechanism furthers the integrity of a preferential procurement policy because it allows potential breaches to be identified and dealt with in an efficient manner. It also provides policymakers with a source of feedback: if many contracts are being contested, policymakers may wish to revisit how contracts are awarded or review the policy itself.

In order to ensure continuous improvement and relevance of a preferential procurement policy, the substance and application of the policy should be periodically reviewed. Ideally, these reviews should include consultations with all stakeholders and engagement of independent experts to assist with fact-finding, analysis, and recommendations. The NNI Act

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<sup>247</sup> *NNI Act*, *supra* note 91, art 9.1.

implements periodic review to “ensure that progress towards [the Act’s] objectives is being made in a demonstrable and balanced manner.”<sup>248</sup> By reviewing a preferential procurement policy on a regular basis, policymakers can be sure that the policy is achieving its goals and can make adjustments as needed to address any problems that are identified.

In sum, States can rely on these types of secondary measures or develop similar programs, either directly or by partnering with a non-government organization, with a view to benefiting women-owned businesses in their countries so that the latter can fully participate in preferential procurement programs.

#### 4.3. Towards a Universal Definition for “Women-Owned Business”

As we explained in the introductory section to this paper, women around the world face significant hurdles in participating in the global economy.<sup>249</sup> 118 WTO Members and observers recognized the importance of using trade policies to advance gender equality and women’s economic empowerment in the 2017 Buenos Aires Joint Declaration on Women’s Economic Empowerment.<sup>250</sup> Public procurement markets were specifically identified in the Buenos Aires Joint Declaration as an area of interest. Public procurement opportunities have the potential to benefit women-owned businesses globally and contribute to achieving UN Sustainable Development Goal 5 (SDG 5),

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<sup>248</sup> *NNI Act*, *supra* note 91, art 11.1.

<sup>249</sup> It must be acknowledged, however, that some jurisdictions make it more difficult for women to do so than others through laws preventing access to financing and other prohibitions.

<sup>250</sup> Buenos Aires Joint Declaration, *supra* note 16.

which aims to empower women in every sphere of social, political, and economic life.

#### 4.3.1. Cross-Border Public Procurement

This paper has examined domestic preferential procurement policies in various States and identified how these policies have been used with varying degrees of success to assist minority groups to participate in the domestic economy. However, it is also important to encourage women-owned businesses to participate in global markets and to become integrated into global supply chains. The objectives of the Buenos Aires Joint Declaration and SDG 5 are global, and it is through participation in global markets that economic empowerment of women will be achieved. Public procurement markets, as identified earlier in this paper, account for a significant percentage of both developed and developing States' economies. Therefore, integrating women-owned businesses into public procurement is one avenue for achieving integration in the world economy.

However, cross-border participation in public procurement is hampered in some instances by preferential policies that, while designed to assist women-owned businesses, are restricted to nationals. A significant example of this is the United States, which restricts all of its preferential procurement policies, including the WOSB program, to nationals. This means that 23% of the USD\$500 billion American public procurement market is inaccessible to foreign suppliers and women-owned businesses from other countries have no way to benefit from the WOSB program even if they meet all of the other requirements. We believe that efforts must be directed to eliminating discrimination in

preferential procurement policies based solely on nationality in the context of women-owned businesses.

#### 4.3.2. Certification of Foreign Women-Owned Businesses

We have noted above that certification is an important element of a well-functioning preferential procurement system. This is just as, if not more, critical in the context of cross-border bidders because foreign women-owned businesses are likely to be unknown to domestic procurement authorities. A robust certification procedure will therefore be required so that procurement authorities can be confident that a foreign woman-owned business meets the standard for the relevant program, thereby limiting the risk of abuse of the preferential program.

Designing a robust certification scheme for cross-border transactions would be enhanced through the development of a universally-accepted definition of “woman-owned business”. With such a definition in place and adopted by States for use in certification processes, domestic procurement authorities could more readily accept foreign certification presented by women-owned businesses seeking to participate in preferential procurement programs. Procurement authorities could be confident that the foreign business meets the same criteria as domestic women-owned businesses are required to meet to participate in the program.

#### 4.3.3. Global Registry of Women-Owned Businesses

Moreover, having a universal definition of women-owned business would also make it possible to develop a global registry of women-owned businesses, which could serve as a point of reference for domestic procurement authorities to identify potential suppliers for government contracts. National certification

bodies could provide data on certified women-owned businesses and their areas of economic activity to the global registry, which could then be accessed by procuring authorities and potentially even private actors who wish to integrate women-owned businesses into their supply chains.

#### 4.3.4. Proposed Universal Definition of Women-Owned Business

In this paper we have examined three countries which currently have women-specific preferential procurement policies – Chile, Kenya, and the United States. Each country has its own definition of a women-owned business which it uses to certify businesses for its preferential procurement program. These definitions are set forth in the table below.

Sample Definitions of “Women-Owned Business”	
<b>Chile</b>	Legal entities must comply with two conditions: a) more than 50% of the company’s property must belong to one or more women; b) the legal representative or general manager of the company must be a woman. <sup>251</sup>
<b>Kenya</b>	[A]n enterprise owned by youth, women or persons with disabilities shall be a legal entity that—(a) is registered with the relevant government body; and (b) has at least seventy percent membership of youth, women or persons with disabilities and the leadership shall be one hundred percent youth, women and persons with disability, respectively. <sup>252</sup>
<b>United States</b>	To be eligible for the women’s contracting program, [a] business must: a) Be a small business b) Be at least 51% owned and controlled by women who are U.S. citizens c) Have women manage day-to-day operations and also make long-term decisions. <sup>253</sup>

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<sup>251</sup> ChileCompra, “Sello Empresa Mujer”, Online: <<http://www.chileproveedores.cl/SelloEmpresaMujer.aspx>>.

<sup>252</sup> PPDR, *supra* note 181, Regulation 32.

<sup>253</sup> SBA Women-Owned Small Business Program, *supra* note 205.

Each of these definitions has strengths and weaknesses. Chile's definition is simple. It is easy to understand and does not exclude foreign-owned businesses from qualifying for the Sello Empesa Mujer designation. However, it may be too simple and may operate such that opportunities go to businesses that fit this definition, yet do not necessarily benefit women.

Kenya's definition is rigorous, and the 100% female leadership requirement ensures that a business is truly run by women. However, the 70% membership requirement is unclear, and it may not be feasible for a business to have 70% female employees (if that is what it means in the context of a business). Kenya's definition also does not have an ownership component, which means that it does not ensure that financial benefits flow to women.

The definition used by the United States is based on ownership, control, and operation and these requirements make it certain that the business is wholly run by women. However, this definition does limit eligibility to American citizens and the stipulation of small business is complicated by different standards for different industries.<sup>254</sup>

Having considered the strengths and weaknesses of these definitions we are in a good position to consider what should be considered for a universal definition of a "women-owned business".

We propose the following definition:

A "women-owned business" is a business which is:

- a) At least 51% owned by one or more women;
- b) Controlled by a majority of women;
- c) Operated on a day-to-day basis by one or more women.

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<sup>254</sup> See page 66 for a full explanation of size standards.

This definition is based upon three pillars – ownership, control, and operation – similar to the definition used by the United States. We further propose that each pillar be understood as follows:

- a) “Owned” means that at least 51% of the business is directly owned (including, but not limited to, shares and property) by one or more women and 51% of the benefits of ownership (including, but not limited to, voting rights and profit) accrue to one or more women.
- b) “Controlled” means that all ultimate business decisions (such as developing a new product line or making fundamental changes to the business) are made by one or more women. The highest officer position in the business must be held by a woman and, if a business has a board of directors, the Board must be composed of at least 51% women.
- c) “Operated” means that day-to-day business decisions (such as hiring and scheduling employees) must be made by one or more women and the general manager must be a woman.

We believe that adopting this definition would assist States in fulfilling the goal of securing broader preferential procurement opportunities for women-owned businesses more fully than the options that are currently available. The definition is crafted to ensure that a business is genuinely a “women-owned business” and is rigorous enough to prevent loopholes that could lead to abuse of the designation. It is also simple enough for women-owned businesses (and procurement authorities) to understand and prove compliance with the requirements. Finally, it is not impractical in that it does not impose

requirements that are very difficult to meet, such as a very high percentage of female employees.

We propose that States use this definition to begin to develop a universal definition of a “women-owned business”. Of course, regard will have to be paid to different business law regimes and contexts in further developing the understandings of the three pillars. Further thinking will need to be done to ensure that States succeed in developing a workable, universally-accepted definition that achieves the aims we have outlined above.

In our view, the effort will be well worth the result. For if a universal definition were adopted, States could use it to develop trade policies, including procurement policies, to satisfy the commitments that they have made to achieving gender equality and the economic empowerment of women.

#### 4.4. Next Steps: Realizing the Potential of Preferential Public Procurement

This final section sets forth policy suggestions in the international trade sphere for policymakers to consider should they wish to assist women entrepreneurs to participate in the global economy.

- ✓ Link procurement opportunities into existing global databases, such as the ITC Procurement Map: [procurementmap.intracen.org/](http://procurementmap.intracen.org/). States can do this by encouraging global databases to post information on procurement opportunities included on their national e-procurement websites. The ITC Procurement map provides information about more than 150,000 public tenders. All an entrepreneur has to do is select a country and a sector before entering the Map, which will then reveal all the available public tenders and what legislation, or policies exist for



women-owned businesses within that country's public procurement system. Making this connection between national and global databases will assist women-owned businesses in entering the international trade community without the need for legal reform or the creation of training programs.

- ✓ Work towards a universal definition of “women-owned business”. States should endeavour to develop a universal definition of a “women-owned business” through multilateral and bilateral consultations and negotiations. Parties to the GPA could do this through the Committee on Government Procurement. States could also use opportunities such as the seminars called for by the Buenos Aires Joint Declaration to begin discussions on creating the universal definition. States engaged in negotiating FTAs could include a definition of “women-owned business” in the FTA text. International Gender Champions<sup>255</sup> could press for agreement on a definition. The development of a universal definition will assist with the ultimate goal of one day negotiating universal certification for women-owned businesses. The benefits of universal certification include further reducing barriers to trade for women, avoiding the need to shoehorn women-owned businesses into existing carve outs in international trade agreements, and having an objective third party to award contracts in a more transparent, accountable, and quantifiable manner.

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<sup>255</sup> International Gender Champions is a leadership network that brings together female and male decision-makers determined to break down gender barriers and make gender equality a working reality in their spheres of influence.

- ✓ House data, such as percentages of female ownership, control, and operation, as well as contact information gathered from women-owned businesses domestically (i.e. through national certification processes) in a centralized global registry. A global registry would enable procurement authorities to become aware of qualified women-owned businesses and could encourage countries to conduct public procurement in a non-discriminatory fashion by opening the bidding process to non-domestic women-owned suppliers.
- ✓ Accede to the GPA in order to encourage fair, open, and transparent public procurement. Certain procurements can be excluded from coverage by way of annexes, as Canada has done with set-asides for “small and minority businesses”. (See Table 2 below.)
- ✓ Explicitly provide for preferential treatment for women-owned businesses in future FTAs. While a proposed preferential policy can likely be shoehorned into an existing exemption such as “minority business”, these exclusions have yet to be used (at least in Canada) with a view to promoting women-owned businesses. A carve out designed specifically for women-owned businesses would provide greater clarity for preferential policies moving forward and would serve to give notice to potential users about eligibility.

## **APPENDICES**

The following appendices set forth an overview of the primary and secondary measures discussed above, as well as information on relevant carve outs found in the annexes of GPA members. This information is presented in appendix form to permit easy reference.

## Appendix A: Overview of Primary Measures

	<b>Certification</b>	<b>Set-Asides</b>	<b>Bid-Adjustments</b>
<b>Definition</b>	Allows for status verification of women-owned businesses	Reserves select procurement processes for exclusive competition amongst women-owned businesses	Adjusts price components of eligible bids, making them more competitive
<b>Challenge</b>	Effective oversight and enforcement	Identifying suitable contracts	Calibrating the benefit to balance access vs. costs.
<b>Design Options</b>	<p>In-house certification programs</p> <p>Outsource to third-party certification organizations</p> <p>Hybrid approach</p>	<p>May require a mandatory minimum number of contracts to be set aside in a given time period</p> <p>Allocate contracts based on under-representation of women-owned businesses in industries</p>	Can adjust benefit based on degree of ownership/control
<b>Benefits</b>	<p>Streamlines the bidding process for suppliers</p> <p>Facilitates faster information exchange between procuring authorities and suppliers</p> <p>Combats illegitimate program access (e.g. fronting, tokenism).</p>	<p>Guarantee that suitable contracts are awarded to women-owned businesses</p> <p>Can act as a springboard for businesses to develop capacity and acquire procurement experience</p>	<p>Flexibility: better able to respond to the specific level of women-ownership of a business</p> <p>Easier to control costs because the potential price difference can be capped</p> <p>Relatively easier to administer</p>
<b>Limitations</b>	Variations in certification standards and definitions of 'women-owned business' restrict the reach of these programs and lead to administrative burden	<p>Significant ongoing administration requirements</p> <p>Requirement for up to date data</p> <p>Cost implications</p>	Too great a benefit will skew the playing field too dramatically and drive up costs; an insufficient benefit will not provide the required access to women-owned businesses

## Appendix B: Overview of Secondary Measures

	<b>Education &amp; Training</b>	<b>Accessibility</b>	<b>Tribunals</b>	<b>Periodic Review</b>
<b>Definition</b>	Educate and train businesses and the general public on the purpose of the policy and the opportunities it creates	E-procurement platforms, legislation, and reference materials should be easily accessible and user friendly	Investigative and/or adjudicative tribunals allow eligible businesses to contest the award of contracts	Review legislation/regulations on a regular basis to ensure program objectives and its potential are fulfilled
<b>Design Options</b>	<p>Educate general public on program benefits</p> <p>Host workshops for eligible businesses and their procuring staff (e.g., on the bid process, bid evaluation criteria, and the preparation of bid documents)</p> <p>Can be performed by procuring authorities or by NGOs</p>	<p>Create and maintain e-procurement systems, with step-by-step explanations of the bid process</p> <p>Link certification/registration systems with e-procurement platforms</p> <p>Draft reference materials in clear and plain language (avoid jargon)</p> <p>Standardize procurement processes and materials across different types of contracts</p>	<p>Can review whether procuring authorities fulfilled their mandate, either by engaging in direct investigations or by playing an adjudicatory function</p> <p>Must be independent and transparent (but protect confidential business information)</p> <p>Tribunal members should be procurement experts, and include legal and economics expertise</p>	<p>Consult with stakeholders re. benefits/limitations created by the program</p> <p>Incorporate best practices (domestically and internationally)</p> <p>Appoint external counsel/economists/public policy makers for comprehensive program reviews</p>
<b>Benefits</b>	<p>Helps maximize program efficacy</p> <p>Facilitates networking between women entrepreneurs and procurement experts, through which issues can be identified and remedied faster</p>	<p>Advances program reach and inclusiveness</p>	<p>Ensures program integrity and transparency, and promotes public accountability</p>	<p>Facilitates continuous program improvement</p>

## Appendix C: Current Carve Outs Under the GPA

This table provides a high-level overview of relevant carve outs found in the “General Notes” sections of each Party’s Annex to the GPA.<sup>256</sup>

<b>GPA Party</b>	<b>Examined in Report?</b>	<b>Carve Out Covering Women-Owned Businesses?</b>
Armenia	---	NO
Canada	YES	“set-asides for small and minority businesses”
European Union (with regard to its 28 members states)	---	NO
Hong Kong, China	---	NO
Iceland	---	NO
Israel	---	NO
Japan	---	NO
Republic of Korea	---	NO
Liechtenstein	---	NO
Republic of Moldova	---	NO
Montenegro	---	NO
Netherlands (with respect to Aruba)	---	NO
New Zealand	---	NO
Norway	---	NO
Singapore	---	NO
Switzerland	---	NO
Chinese Taipei	---	“When a specific procurement may impair important national policy objectives...may consider it necessary in particular procurement cases to deviate from the principle of national treatment of the Agreement”
Ukraine	---	NO
United States	YES	“set-asides on behalf of small and minority businesses”

<sup>256</sup> See the full Appendices and Annexes to the GPA online at: [www.wto.org/english/tratop\\_e/gproc\\_e/appendices\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm).

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