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Revisiting Canada's Sub-Central Coverage under the WTO Agreement on Government Procurement

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ABSTRACT: This article explores the recent changes to Canada's sub-central government procurement commitments under the World Trade Organization ('WTO') Agreement on Government Procurement ('GPA'). As a result of bilateral negotiations between Canada and the US, Canada has finally committed all ten of its provinces and two of its three territories to the GPA, thereby opening up public procurement contracts in this multi-billion dollar sector to foreign suppliers of goods and services. Various exceptions to Canada's sub-central commitments are outlined, including notably highway projects and some key sectors in Ontario and Quebec. A recent decision by the Supreme Court of Canada denying foreign firms access to the Canadian International Trade Tribunal challenge procedure for all contracts not covered by the GPA is discussed as are two new inter-provincial trade agreements that *inter alia* aim to liberalize procurement regulations for Canadian firms only. Overall Canada's sub-central commitments should be viewed as a positive step in procurement market liberalization in line with the trend of WTO GPA coverage enlargement.

1. Introduction

Canada's failure to commit its sub-central governments to the World Trade Organization ('WTO') Agreement on Government Procurement ('GPA')¹ was previously discussed in an article by this author wherein it was suggested that the reasons for the Canada's omission could be found in the provinces' desire to prevent American corporations from out-competing local firms for government contracts, as well as an unwillingness to outsource any governmental purchasing to either other

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¹ 1915 UNTS 103, being Annex 4 b of the Marrakesh Agreement Establishing the World Trade Organization, 1867 UNTS 3 Annex 1. The acronym 'AGP' is used by some commentators.

provinces or to the private sector generally.² The lack of sub-central government commitment under the WTO GPA was regretful because it represented a missed opportunity in terms of securing best value outsourcing to international contractors around the world, as well as for Canadian companies that would be consequently excluded from sub-central government procurement contracts in the many GPA Parties that had committed their regional governments, notably Japan, South Korea and Switzerland. This view is obviously premised on the assumption that membership in the GPA actually results in an increase in the awarding of public procurement contracts to foreign firms, a notion which has been challenged by recent empirical work on services procurement in Japan and Switzerland.³ On a more theoretical level, Canada's failure to list its sub-central governments exposed an often overlooked fallacy of public international law – international undertakings are largely meaningless if the constituent entities within federal states are constitutionally empowered to ignore the obligations that their central governments have pledged. Encouragingly, this situation changed in early 2010, with the Canadian government's new GPA commitment to open its sub-central government procurement contracts to international bidding on an equal footing with domestic companies. This article will outline the current regime of Canada's sub-central commitments under the WTO GPA as well as highlight some important legal concerns raised by Canada's new approach to regional procurement from international suppliers. Canada's procurement commitments under the North American Free Trade Agreement ('NAFTA') are beyond the scope of this article, as are Canada's various associated bilateral

² D Collins, "Canada's Sub Central Coverage Under the WTO Agreement on Government Procurement" (2008) 17 Public Procurement Law Review 21-40

³ A Shingal, 'Government Procurement of Services: Whither Market Access?' NCCR Trade Regulation, Swiss National Centre of Competence in Research, Working Paper No. 2010/05/March 2010

commitments. We will begin by briefly discussing the revised WTO GPA and the existing sub-central commitments of the signatory states.

2. The WTO GPA

The WTO implemented an earlier GPA during the Tokyo Round of negotiations to foster international competition in procurement among member governments in a transparent manner free from discrimination. The Tokyo Round GPA, like the existing Uruguay Round GPA that came after it made provision for the inclusion of sub-central entities because of the economic significance of such transactions in the many states where regional governments have a mandate to deliver a large component of governmental functions. On average around the world between 10-15% of a state's GDP is believed to be spent in public procurement.⁴ Moreover, procurement at the regional level, as at the national level, can be implemented to achieve social or economic ends that often conflict with the principles of free trade, requiring more specific regulation to capture legitimate, non discriminatory policy exceptions.

Accession to the plurilateral (optional) Uruguay Round GPA, which came into force on 1 January 1996 is available to all member states of the WTO and currently the GPA has 40 signatories including the 27 states of the enlarged EU.⁵ While this is a relatively small number given the size of the WTO's total membership (approximately one fifth), accession to the GPA is expected to rise in the future.⁶

⁴ S Arrowsmith, *Government Procurement in the WTO* (Kluwer International, 2003) at 3 fn 4.

⁵ The current signatories are Canada, EU (including its 27 Member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom, Bulgaria and Romania), Hong Kong China, Iceland, Israel, Japan, Korea, Liechtenstein, Netherlands with respect to Aruba, Norway, Singapore, Switzerland, US.

⁶ R Anderson, "International Public Procurement Developments in 2008" George Washington University Law School Public Law and Legal Theory Working Paper No. 458

This may be in large part due to pressure from existing Parties, especially China, which committed to the GPA as a condition of their accession to the WTO and currently has observer status.⁷ Generally speaking the GPA is designed to open up as much government procurement to international competition by making all regulations with respect to procurement more transparent and non-protectionist in favour of local suppliers. The existing GPA is under a process of revision, and a tentative new text will simplify the tendering process.⁸

GPA Parties are required to accord the products, services and suppliers of any other Party treatment that is “no less favourable” than they accord to their domestic services and suppliers, so-called Most Favoured Party treatment.⁹ Parties may also not discriminate among goods, services and suppliers of other Parties.¹⁰ Furthermore, each Party is required to ensure that its entities do not treat domestic suppliers differently on the basis of a greater or lesser degree of foreign affiliation or ownership as well as to ensure that its entities do not discriminate against domestic suppliers because their good or service is produced in the territory of another Party.¹¹ Unlike other WTO Agreements, there is no general most favoured nation principle within the WTO agreements that allows members that are not signatories to the GPA to benefit from concessions made within it by GPA parties.

<<http://www.ssrn.com/abstract=1356142>> ; C Yukins and S Schooner, “Incrementalism: Eroding the Impediments to a Global Public Procurement Market” 38 *Georgetown Journal of International Law* 529 (2007); and JH Grier, “Recent Developments in International Trade Agreements Covering Government Procurement” 25 *Public Contract Law Journal* 385 (2005-06)

⁷ S Lester and B Mercurio, *World Trade Law: Text, Materials and Commentary* (Hart, 2008) at 667

⁸ For a discussion of the revised text of the GPA and the negotiations that led to it see R Anderson, “Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiations” (2007) 4 *Public Procurement Law Review* 255 who views the new text as a substantial improvement on the old one in terms of simplicity and effectiveness.

⁹ Art III:1a

¹⁰ Art III:1b

¹¹ Art III:2

Contracts for the supply of goods are covered by the GPA unless expressly excluded and exceptions are normally found in the area of defence procurement, as seen, for example, in the EU's Annex I. Services are typically covered only if they are expressly listed in Annex IV of each of the Parties. Annex V covers construction services, for which most Parties have committed coverage, although financial thresholds for construction, expressed as the Special Drawing Right ('SDR')¹² vary considerably from Party to Party but are typically higher than for goods or services, illustrating the need for large civil engineering companies to export high quality design as well as engineering and management services to the global marketplace.¹³ Thresholds for goods and services is 130,000 for all central government parties, although sub-central levels also vary considerably. Under Article 2.2 of the GPA, Parties can specify exclusions from coverage in their Annexes, which as we shall see, Canada's provinces have done extensively.

The GPA adopts the "positive list" approach – parties specify the procurement (by entity and service) that is to be regulated and any procurement that is not explicitly mentioned is excluded. Which government entities are covered by the GPA is not obvious because the status of bodies as independent government entities, commercial state-owned companies and joint venture (public/private) enterprises can be unclear, particularly in relation to non-market and transition economies.¹⁴ GPA coverage is expressly extended to sub-central/regional governments as specified by the Parties under Annex II to the agreement. As GPA negotiations have been

¹² SDRs are the International Monetary Fund's international reserve unit of account and are based upon the currencies of five countries

¹³ R Leal Arcos, *International Trade and Investment: Multilateral Regional and Bilateral Governance* (Edward Elgar, 2010) at 96

¹⁴ For a discussion of these matters, see S Arrowsmith, J Linarelli and D Wallace, *Regulating Public Procurement: National and International Perspectives*, (Kluwer International, 2000) ch.6

conducted on a bilateral basis based on reciprocity, sub-federal purchasing by one state is open only to those states which list their own sub-federal purchases – an approach which has led to many reciprocity-based derogations being included in the Annexes.¹⁵ Article VII of the GPA requires that tendering procedures of each Party shall be applied in an open and non-discriminatory manner. Under Article VIII, any conditions for participation in a tender must be published in a timely manner and conditions shall not be applied a way that discriminates against foreign suppliers. Article XVIII requires that Parties maintain high levels of transparency generally with respect to tendering rules and access to challenge procedures, which are mandated under Article XX: in the event of a complaint by a supplier that a Party has been in breach of its GPA obligations, each Party must provide non-discriminatory, timely, transparent and effective procedures through which a challenge may be brought. Such challenges must be heard by a court or by an impartial independent review body with the powers to take evidence in public and provide reasons for its decision. Article XXIII of the GPA contains exemptions for essential security and national defence matters as well as general exemptions that mirror the language of GATT Article XX including public morals, animal and plant life or health.

Among the most economically important of the sub-central entities covered by the GPA are those of Japan. Japan's regions had in the past engaged in the discriminatory practice of preferring suppliers that maintained local offices but now all of the nation's forty-seven prefectures are covered by the GPA, subject to several exceptions including notably the supply and distribution of electricity.¹⁶ In order to implement the agreement, Japan's central government amended legislation regarding

¹⁵ Arrowsmith, above note 4 at 115. Japan had previously denied sub-central coverage to Canada.

¹⁶ Japan Annex 2 note 6, 1 March 2000.

local autonomy and issued formal guidance outlining the procurement objectives. The regions were then free to establish their own procedures and rules to implement the procurement objectives subject to constraints imposed by the central government.¹⁷ Procurement from foreign sources in 2007 accounted for approximately 9 per cent (both goods and services) of all Japanese government procurement. More than fourteen trillion yen were spent in public purchases of goods and services by all level of governments in Japan in 2007.¹⁸ There are no statistics available for Japanese procurement specifically at the sub-central level, but the largest ten procuring bodies were all federal.¹⁹

Korea also lists all sub-central administrative government entities in its GPA Annex II, including six municipalities and nine regions²⁰ as does Switzerland, which lists all twenty-three cantons.²¹ Korean sub-central entities maintain exclusions for procurements from small businesses. Iceland does not list any regional governments but its Annex II states that “contracting local public authorities including all municipalities” are included²² and a similar approach is taken by Liechtenstein which simply lists “public authorities at local level” which may imply that regional governments are not included.²³ Israel’s Annex II specifies municipal entities only.²⁴

¹⁷ See J. H. Grier ‘Japan’s Implementation of the WTO Agreement on Government Procurement’, 17 *U Pa J of Inter Economic Law* 605(1996), 629-31

¹⁸ ‘Japan’s Government Procurement: Policy and Achievements Annual Report – Toward Government Procurement Open to the World’ (2008), ch. 2, <www.kantei.go.jp/foreign/procurement/2003> (last accessed June 2009).

¹⁹ Ibid. For further discussion of public procurement rules in Japan see S Kusunoki “Japan’s Government Procurement Regimes for Public Works: A Comparative Introduction” 32 *Brooklyn Journal of International Law* 523 (2007)

²⁰ Korea GPA Annex II

²¹ Switzerland GPA Annex II,

²² Iceland GPA Annex II.

²³ Liechtenstein GPA Annex II.

²⁴ Specifying Jerusalem, Tel Aviv and Haifa. Israel GPA Annex II.

Norway lists all of its 19 counties (without naming them) and 435 municipalities.²⁵ Annex II does not apply to Singapore, Hong Kong China and the Netherlands with respect to Aruba because those states do not have sub-central agencies.²⁶ The EC's Annex II under the GPA covers all existing regional and local governments without specifying them by name.²⁷ Under its extensive General Notes to the GPA, the EC imposes numerous derogations directed at specific members in relation to particular industries.²⁸ There are no statistics available for the quantity of EC foreign procurement at the sub-central level. The EC's Annex II, like those of most members, commits goods and services above a threshold value of 200,000 SDR.²⁹

The USA originally allowed only limited state-level coverage when the GPA agreement was originally concluded in December 1993 because it was unwilling to provide coverage at the state level without agreement from those entities themselves. According to Reich, the US claimed that domestic political difficulties in binding state governments were responsible for failure to negotiate more comprehensive state coverage.³⁰ The federal government was relegated to suggesting a voluntary compliance plan which would attempt to obtain the broadest possible coverage of sub-central agencies.³¹ Procurement policies at the state level have been used as tools of censure towards foreign states, as seen most notably in the state government of Massachusetts' exclusion of procurement by Burmese firms because of that country's

²⁵ Norway GPA Annex II

²⁶ Singapore GPA Annex II; Hong Kong GPA Annex II; Netherlands GPA Annex II

²⁷ EC GPA Annex II

²⁸ For further discussion of European procurement rules see Y Allain "New European Directives on Public Procurement: Change or Continuity" 35 Public Contract Law Journal 517(2006) and C Bovis, "Public Procurement in the European Union: A Critical Analysis of the New Regime" 33 Legal Issues of Economic Integration 29 (2006)

²⁹ EC GPA Annex II.

³⁰ See Reich, above note X at 294. See also K. Cooper "To Compel or Encourage: Seeking Compliance with International Trade Agreements at the State Level", 2 Minnesota J of Global Trade 143 (1993) at 166.

³¹ Ibid., at 294.

human rights record.³² The US sub-central coverage has expanded significantly after efforts of the federal government to encourage states to enter into the bi-lateral agreement with the EU based on the guiding principle of reciprocity that was required under the GPA Article XXIV.7. The existing sub-central coverage of states within the US is not complete. Thirty seven states are partially covered, including those whose markets had been the most closed, but some states have no government procurement regulation whatsoever, including Ohio and both Carolinas. Threshold values for sub-central procurement are set at 355,000 SDR for supplies and services and 5 million SDR for construction.³³ The US Annex II retains an exemption for distressed areas and minority owned businesses,³⁴ and environmental protection.³⁵ Annex I contains small businesses set-asides which also apply to sub-central procurement. Before we explore Canada's new sub-central commitments under the GPA, it is instructive to first consider the nature of government procurement activities in Canada.

3. Sub-Central Government Procurement in Canada

Canada consists of ten provinces and three territories, four of which have populations above three million: Ontario, Quebec, British Columbia and Alberta.³⁶ Although the federal executive government has the exclusive jurisdiction to negotiate and accede to

³² Massachusetts 'Act Regulating State Contracts with Companies Doing Business in or with Burma' of June 25, 1996 ch.130 s1, 1996 Mass Acts 210.

³³ US GPA Annex II; Canada GPA Annex II.

³⁴ Racially linked procurement initiatives are common in many jurisdictions. See C Noon, "The Use of Racial Preferences in Public Procurement for Social Stability" 38 Public Contracts Law Journal 611 (2008-09)

³⁵ Environmentally-oriented public procurement laws are common and have received support from commentators: see further H Van Asselt, N Van der Grijp, F Oosterhuis, 'Greener Public Purchasing: Opportunities for Climate-Friendly Government Procurement Under WTO and EU Rules' Climate Policy vol 6:2 217 (2006)

³⁶ January 2010 figures, source: Statistics Canada www.statcan.gc.ca (last accessed June 2010)

treaties under section 91 of the Constitution Act, 1867, the ability to implement international agreements into domestic law can (and frequently does) fall within the jurisdiction of the provinces as listed in section 92 of the Constitution Act. A treaty that requires the expenditure of public monies or purports to change existing law (such as an agreement modifying government procurement policy) is not directly applicable under Canadian law unless there is an act specifically incorporating it into domestic law.³⁷ Consequently an Act passed by the federal parliament would be inapplicable in relation to provincial procurement decisions because provincial jurisdiction encompasses “local works and undertakings”, “property ...within the province” and “all matters of a merely local or private nature.”³⁸ Procurement activities, either relating to goods, services or construction, clearly fall under one or more of these fairly broad provincial powers. Additional WTO commitments might well encroach upon matters that fall within the provincial domain and this would require cooperation with the nation’s sub-central governments.³⁹ It should also be recognized that as treaty making is an exclusively federal power, international law does not recognize any international arrangements between provinces and foreign states. Therefore sub-central commitment to the WTO GPA is extended to the WTO by Canada on behalf of its provinces, not through the provinces directly, which are themselves not WTO members.

Individual procurement expenditures of the Canadian provinces are considerably less than that of the federal government, but when taken in aggregate more than twice as much government procurement in Canada is done at the sub-

³⁷ *Francis v. The Queen* [1956] SCR 618 at 625

³⁸ Constitution Act, 1867, s. 92

³⁹ D Steger, ‘Canadian Implementation of the WTO Agreement’ in J Jackson and A Sykes eds, *Implementing the Uruguay Round* (Clarendon Press, 1997)

central level compared to the federal level, reflecting the largely de-centralized nature of governmental administration in Canada. More than 17 billion Canadian dollars was spent by the provincial governments in procurement compared to \$7.86 billion for the federal government in 2007-08, the most recent year for which data is available.⁴⁰ Together these figures account for only about 2% of Canada's GDP, which it should be said is far lower than the world average for expenditures on public procurement, as noted above.⁴¹ The province with the largest procurement figure is Alberta, which spent \$4.3 billion in 2007-08, mostly linked to oil related projects and infrastructure. The next largest spenders of that year were the governments of Quebec (\$3.6 billion); Ontario, by far Canada's largest province by population (\$3.18 billion) and British Columbia (\$2.2 billion).⁴² Although Canadian provincial governments clearly represent sizable markets for international firms, no publicly accessible records of the location of the supplying firms is kept by any province and the extent of provincial procurement from international suppliers is unknown. Under the auspices of the Internal Trade Secretariat, the federal and provincial governments of Canada maintain the website MARCAN which consolidates data regarding public sector

⁴⁰ Source: <<http://www.marcan.net>> Note that provincial statistics include procurement by municipal governments. (last accessed June 2010). All dollar figures are heretofore in Canadian dollars. R Taylor and L Bolton have quoted a figure of \$100 billion per year in goods, services and construction: 'Overview of Canadian Procurement Law' 42 Procurement Lawyer 14 at 14 (Fall 2006).

⁴¹ The figure of 2% is unofficial and based on total federal and provincial procurement of \$25 billion per annum and a GDP of approximately \$1.3 trillion. In comparison, the European Union's public procurement expenditures were stated to be 16% of their GDP in 2002: 'A Report on the Functioning of Public Procurement Markets in the EU: Benefits from the Application of EU Directives and Challenges for the Future. (2 March 2004) at 2 <http://ec.europa.eu/internal_market/publicprocurement/docs/public-proc-market-final-report_en.pdf> (June 2010). This large disparity raises questions about the way in which procurement / GDP ratios are calculated. Note the much larger figure of \$100 billion for procurement expenditures in Canada quoted by Taylor and Bolton, *ibid.*, which would yield an 8% of GDP figure, still much lower than the world average.

⁴² *Ibid.* Note again that these figures include municipal government spending. It will be interesting to see how the 2010 Winter Olympics in British Columbia and the 2010 G-20 Conference in Toronto, Ontario (which reportedly cost \$1B) will be reflected in forthcoming federal and provincial procurement figures.

tenders and also provides an overview of rules for public sector procurement, as well as information on complaints procedures for bidders, largely satisfying the GPA's transparency requirements.⁴³ An equally useful private sector database can be found on the MERX website which lists all federal and provincial procurement opportunities, as well as other private sector tenders.⁴⁴ Accessing data on public sector opportunities on both websites is free and should conform to GPA requirements on transparency. The websites are both comprehensive and user friendly, however if a foreign supplier did not know of their existence it is not clear that this information would be easy to obtain through Canada's federal government or various provincial government website portals.

Sub-central government procurement in Canada is currently regulated by Chapter Five of the Agreement on Internal Trade ('AIT') which establishes principles of non-discrimination and transparency similar to those of the WTO GPA.⁴⁵ The AIT is a Canadian inter-governmental agreement, not a piece of legislation, and covers trade in goods and services between the Canadian provinces, the purpose of which is to achieve efficiency and a strong economy.⁴⁶ The agreement was ratified by all 10 provinces, the federal government, and the two existing territories in 1995 and encompasses procurements in excess of \$25,000 for goods and \$100,000 for services.⁴⁷ Of the provinces which conduct significant procurement activities, only Quebec has formally enacted the AIT into its provincial legislation,⁴⁸ although all parties are expected to maintain procurement practices that conform to its

⁴³ <<http://www.marcan.net>> (last accessed June 2010)

⁴⁴ <<http://www.merx.com>> (last accessed June 2010)

⁴⁵ AIT Art. 504(2)

⁴⁶ Art. 501

⁴⁷ Art. 502

⁴⁸ An Act Respecting the Implementation of the Agreement on Internal Trade RSQ c. M-35.1.1.

requirements. Decisions of any provincial government are subject to challenge by the Canadian International Trade Tribunal ('CITT') under the agreement's dispute settlement system.⁴⁹ The AIT's principles of fairness and transparency in the tendering process and in bid valuation, which recall those of the GPA, are outlined in Articles 505 and 506. As under Article XXIII of the GPA, there are narrow exclusions for unforeseeable urgency and national security.⁵⁰ While the agreement ensures non-discrimination among Canadian provinces, Article 504(5) of the AIT permits a party to accord a price preference of no more than 10 per cent for Canadian content of purchased goods, provided that potential suppliers are informed of this policy in tender documents, and as long as this does not violate international agreements. As the Art XVI of the GPA specifically prohibits domestic content requirements, any sub central or central procurement subject to GPA coverage could not be conditional on this 10 per cent Canadian content allowance.⁵¹ It should be noted that the Canadian AIT has been criticized for its failure to reduce barriers in agriculture or energy as well as its inability to force governments to comply with the rulings of the CITT.⁵²

4. Canada's Sub-Central Government Procurement Commitments under the GPA

⁴⁹ See further L DiMarzo, 'Dispute Resolution Provisions of the Agreement on Internal Trade' 34 Alberta Law Review 240 (1995). The CITT is also the designated bid challenge authority for NAFTA with respect to procurement by the federal government.

⁵⁰ For further discussion of the AIT, see Taylor and Bolton above note X

⁵¹ For an overview of the process of bidding for tenders and bid challenge procedures in Canada see Taylor and Bolton, above note 40.

⁵² 'The Ontario-Quebec Trade and Cooperation Agreement' Montreal Economic Institute, October 2009 <http://www.iedm.org/uploaded/pdf/sept09_en.pdf> (last accessed June 2010)

The Canadian federal government acceded to the WTO GPA and the WTO itself through the passage of the World Trade Organization Agreement Implementation Act⁵³ which was brought into force on 1 January 1996. As noted above, Canada had not committed any of its 13 sub-central provincial governments (10 provinces and 3 territories) under the GPA for the fourteen year existence of the agreement. However, in February 2010 the Canadian government agreed to open provincial, territorial and some municipal government procurement contracts to American firms in exchange for America's relinquishing of the "Buy American" requirement of its domestic financial aid legislation, allowing Canadian firms to compete for the funds remaining in the stimulus package. The US Recovery and Reinvestment Act⁵⁴ which extended US \$275 billion to American firms caused much consternation in Canada and was viewed as a potential violation of NAFTA as well as WTO rules which mandate equal treatment of foreign and domestic firms. Whether or not these domestic economic measures represented violations of international trade commitments⁵⁵ (they have not been challenged as such), Canadian companies had clearly been excluded from highly lucrative contracts from their largest trading partner.

The above negotiations with the United States resulted in the Canada-U.S. Agreement on Government Procurement⁵⁶ which provides reciprocal commitments with respect to provincial, territorial and state procurement. As a result, Canada's

⁵³ S. C. 1994, c. 47 [assented to 15 December 1994]

⁵⁴ Public Law 111-5, 2009

⁵⁵ The extent to which the various "bailout" or "stimulus" packages created by governments around the world would have been or remain violations of international trade liberalization commitments is a source of much controversy, although it is commonly held that such measures would fall within "emergency" type exceptions, such as GATT Art XIX safeguards. It is also unlikely that any WTO Member would seek redress for such packages because of them being common to all Members: J. Sen 'Will Government Bailouts Lead to Trade Wars?' Global Subsidies Initiative <<http://www.globalsubsidies.org/en/subsidy-watch/analysis/will-government-bailouts-lead-trade-wars>>

⁵⁶ Signed on 11 and 12 February 2010: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/agreement_accord.aspx?lang=eng> (accessed June 2010)

GPA Annex II now contains extensive international commitments for all ten provinces: Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan and two of the three territories (the Northwest Territories and the Yukon).⁵⁷ As predicted, some of Canada's sub-central governments, especially the largest three provinces, have maintained a number of exceptions to their procurement commitments, notably in relation to road projects. The sub-central governments of Canada each commit 335,000 SDR to procurement in both goods and services, as well as 5 million SDR to construction, this latter figure representing the high demand for infrastructure related suppliers in Canada's vast dispersed primary and secondary industries. These service and goods commitment levels are more than twice that of the federal government and considerably more than the sub-central commitments of Japan's⁵⁸, Switzerland's⁵⁹ and the European Union's⁶⁰ regions and although they are identical to those of the US states and the US GPA Annex II.

The province of Alberta commits all ministries and agencies but specifically exempts some agencies responsible for political administration, such as the provincial Legislative Assembly as well as the Information and Privacy Commissioner and the Office of the Ombudsman. Similarly, British Columbia commits all of its agencies and departments except its Legislative Assembly.⁶¹ The provinces of Manitoba,

⁵⁷ GPA Annex II, (19 March 2010). The third territory Nunavut, with a population of only 32,000 and with no available procurement statistics, was not included.

⁵⁸ Japan's sub-central goods thresholds are 200,000 SDR and only 15,000 for construction. No specified limit is provided for the listed services, GPA Annex II

⁵⁹ Switzerland's sub-central goods and services thresholds are 200,000 SDR with construction at 5 million SDR, GPA Annex II

⁶⁰ The European Unions goods and services commitments are at 200,000 SDR with construction at 5 million SDR , GPA Annex II

⁶¹ Procurement procedures in relation to electoral services is a highly sensitive issue without the participation of foreign firms as it requires the utmost transparency and accountability: see further J

Newfoundland and Labrador and the Yukon Territory make sweeping commitments for all of their respective departments and agencies. New Brunswick appears to have covered virtually all of its agencies and departments, although it has chosen to do so by an exhaustive positive-list approach with no expressly mentioned exemptions. Nova Scotia opens all of its agencies and departments except Emergency Health Services. The smallest province by population and area, Prince Edward Island lists all agencies and departments, but specifically exempts construction materials for use in highway construction and maintenance. The Northwest Territories, the largest region in size but with a minimal population lists all departments and agencies but excludes contracts subject to a federal government designed incentive policy to attract settlers to the remote north.

Ontario and Quebec, the two largest provinces, list some exceptions that could denote significant lost opportunities for international suppliers. Otherwise committing all departments and agencies, Ontario specifically excludes urban rail and urban transportation equipment, systems, components and materials, as well as all project-related materials of iron or steel, as well as highway construction. There are two probable reasons for these derogations – these activities are largely supplied by local firms that would risk losing essential public contracts were they to face international competition and they are in line with exceptions retained by most US states. Quebec’s exemptions are of a different character, but equally telling. That province commits all agencies and departments, but its exemptions include procurement of cultural or artistic goods and services, seedling (tree) production, and production of construction-grade steel. Derogations for trees and steel reflect key

Nou, ‘Privatizing Democracy: Promoting Election Integrity Through Procurement Contracts’ 118: 4 Yale Law Journal 744 (2009)

industries vital to Quebec's domestic economy, and the cultural exception expresses the clear, and often politically controversial, desire for the province to conserve its French heritage in a predominately English speaking country (and world).⁶² Among the most significant limitations to Canada's sub-central commitments under the GPA can be found among the general derogations that apply to all provinces. First, Canada's Annex II does not apply to highway projects, a reservation likely enacted in response to various American states' refusal to commit in this area. Second, the provinces do not commit to procurement relating to projects designed to help economically distressed areas, Aboriginal peoples⁶³ or to improve the environment⁶⁴. Taken together these exemptions could represent major impediments to foreign suppliers seeking sub-central public contracts in Canada.

Two recent regional trade agreements have been concluded in Canada that could have a further effect on international public procurement bids at the sub-central level. First, in early 2010, the Trade Investment and Labour Mobility Agreement ('TILMA') went into effect among its three signatory members, the provincial governments of Alberta, British Columbia and Saskatchewan (the three western provinces).⁶⁵ TILMA substantially integrates the economies of the three provinces, eliminating or reducing any barriers to trade, investment and labour. Article 14 of the agreement provides that the three Parties will allow open and non-discriminatory access to virtually all sub-central government contracts above a minimum threshold of

⁶² Cultural exemptions claimed by Canada and, interestingly, France, were among the reasons that the negotiations OECD's Draft Multilateral Agreement on Investment failed: M Sornarajah, *The International Law on Foreign Investment* (3ed, Cambridge, 2010) at 273. One suspects that Canada's objections therein were almost entirely due to Quebec's concerns for safeguarding its French culture against American influences in film and television.

⁶³ On racially linked procurement initiatives, such as those seen in the US and South Africa see Noon, above note 34

⁶⁴ On environmental exceptions see Asselt, Van der Grijp and Oosterhuis above note 35

⁶⁵ http://www.tilma.ca/pdf/TILMA_Agreement_April2009.pdf (accessed June 2010)

\$10,000 for goods, \$75,000 for services and \$100,000 for construction. Unfortunately TILMA may undermine these provinces' WTO GPA commitments because it is expressly intended for the benefit of the three provinces and their "persons"⁶⁶ likely meaning companies with an office located in Alberta, British Columbia or Saskatchewan or corporations incorporated therein. Foreign suppliers are therefore not entitled to benefit from the agreement's open procurement guarantees. Secondly, the Ontario-Quebec Trade and Cooperation Agreement ('OQTCA')⁶⁷ took effect on 1 October 2009 intending to facilitate trade and labour mobility between the provinces through a reduction in regulatory obstacles, for example by providing for electronic tendering procedures in procurement. Article 9 of the agreement, which deals with procurement, states that the objectives of the OQTCA are to "ensure equal access to procurement to all Quebec and Ontario suppliers" in order to reduce costs with a view to strengthening the economy. Article 9.1 goes on to say that the agreement should not be interpreted as providing any rights or conferring any benefits to suppliers, enterprises, persons or products that are not "of a Party", again likely meaning with a head office in Ontario or Quebec. Clearly, then, any reductions in regulatory barriers achieved by the OQTCA in the sphere of public procurement will not be enjoyed by foreign suppliers, which raises the concern that this agreement may transgress Ontario and Quebec's new WTO GPA obligations with respect to non-discrimination.

⁶⁶ Art 2.3

⁶⁷ http://www.ontariocanada.com/ontcan/1medt/downloads/Ontario-QuebecTradeCooperationAgreement_sept09_en.pdf (accessed June 2010)

5. Overview of Canadian Federal Level Procurement and Tender Challenge Issues

Canada's ongoing federal government commitments to the WTO GPA represent a significant market to international firms: the Canadian federal government spent CDN \$7.86 billion on the procurement of goods and services in 2007-08.⁶⁸ This figure should be even more attractive to foreign suppliers as Canada remains one of the few developed countries that has not enacted severe austerity measures to curb public sector expenditure. In addition to the new provincial commitments, the federal government entities to which the GPA applies, set out in Annex I, cover a wide range of federal agencies from the Supreme Court to the Royal Canadian Mounted Police. For federal level procurement the Procurement Review Committee will assess potential socio-economic benefits of public purchases that are valued in excess of CDN \$2 million and will submit recommendations to the Treasury Board which may permit the award of a tender to a contractor that does not offer the lowest price.⁶⁹ Among its policy-oriented purchasing is a preferential government contracting policy in favour of Canadian Aboriginal businesses which was implemented in 1996.⁷⁰ Monetary thresholds are set every two years and Canada's are currently at 130,000 SDRs for goods and services and 5 million for construction, this latter unusually high figure denoting the large need for building projects in Canada's industry led economy.⁷¹ The authority for federal government procurement is exercised by the Treasury Board, which is a committee of the Privy Council (Cabinet) and is located in

⁶⁸ Source: MARCAN <http://www.marcan.net/index_en/procure.htm> (last accessed June 2010).

⁶⁹ Public Works and Government Services Supply Manual, s 5.070.

⁷⁰ Art. 24 of the Nunavut Agreement. Aboriginal preferences also involve Comprehensive Land Claims in the far north and assistance with small businesses, see A Van Dyk, 'Recent Changes in the Canadian Government's Contracting Policy', (2007) 7 Public Procurement Law Review 110 at 112-13.

⁷¹ Canada GPA Annex I

the national capital of Ottawa.⁷² The CITT provides judicial oversight to the implementation of the agreement⁷³ fulfilling the GPA's above noted Article XX requirement that domestic bid challenge procedures are maintained within each country by an impartial tribunal. Matters falling under the scope of Canada's sub-central or federal GPA obligations are "designated contracts"⁷⁴ and as such complaints regarding associated procurement decisions may be brought by foreign companies to the CITT. However, the Supreme Court of Canada ('SCC')'s recent decision in *AGC v Northrop Grumman*⁷⁵ has now established that recourse to the CITT tribunal is only available for foreign suppliers with respect to procurement that is explicitly covered by Canada's GPA (and other equivalent) commitments. The SCC ruled in *Northrop* that unless enacted into domestic law, international trade agreements are merely political statements rather than an enforceable legal regime.

Some further discussion of the *Northrop* decision is warranted. US company Northrop Grumman's complaint originated from a government procurement contract with Canada's federal Public Works and Government Services Canada ('PWGSC') for the purchase of infrared sensor pods (not covered by Canada's existing federal GPA commitment) in which the PWGSC allegedly evaluated the bids in a manner inconsistent with the published criteria. PWGSC argued at the CITT that Northrop did not have standing to bring a complaint as it was not a Canadian company. The CITT had ruled that a foreign company could bring a complaint, and PWGSC applied for judicial review of the decision by the Federal Court of Appeal, which overturned the

⁷² For a discussion of the methodology of federal government procurement in Canada, see Taylor and Bolton above note 40

⁷³ Canadian International Trade Tribunal Act R.S. 1985 c.47 s.30.1 definition of "government institution"

⁷⁴ Canadian International Trade Tribunal Procurement Inquiry Regulations, SOR/93-602 s.3(1)

⁷⁵ [2009] 3 S.C.R. 309 (5 Nov 2009)

decision of the CITT. This decision was appealed by Northrop to the SCC, which unanimously dismissed the appeal, ruling that Northrop, as a non-Canadian supplier, did not have standing to bring a complaint under the AIT before the CITT. As a matter of administrative law, access to the CITT as a statutory tribunal must be found in the statutory instrument. The relevant statutory provision, Article 30.11(1) of the Canadian International Trade Tribunal Act⁷⁶, allows potential suppliers to complain to the CITT in relation to designated contracts. “Designated contract” as defined in the regulations, refers to a contract described under the WTO GPA, NAFTA and the AIT as well as the Canada-Chile Free Trade Agreement. Northrop argued that it had standing under these agreements and that there was no requirement to be a Canadian supplier for the complaint provisions to take effect. The SCC disagreed, concluding that only suppliers with an office in Canada qualify as Canadian suppliers and therefore have standing to bring a complaint under the CITT. In reaching this decision the court pointed to Article 501 of AIT which states that the purpose of the agreement is to “establish a framework that will ensure equal access to procurement for all Canadian suppliers.” Given this objective, the AIT should be viewed as basically a “domestic free-trade agreement” negotiated between federal, provincial and territorial governments within Canada. Presumably this logic would also apply to the above noted TILMA and OQTCA.

As Northrop lacked a place of business in Canada (the territorial scope of the AIT) it was not entitled to have standing under the agreement, although a Northrop subsidiary may have had standing to bring the complaint. Standing before the CITT could otherwise only be achieved through negotiation with the home state of the

⁷⁶ R.S.C. 1985, c. 47

supplier, which is demonstrated through Canada's specific GPA commitments. The SCC interestingly commented that if Northrop's argument had been accepted and foreign companies could have standing to bring complaints under the AIT to the CITT, then this would deprive Canada of an important concession that it could make in trade negotiations, for example under NAFTA or the WTO GPA. Furthermore, the court stated that Article 504(6) which establishes the ability of a party to the AIT (a Canadian province or territory or the federal government) to limit its tendering to Canadian suppliers on condition that all qualified suppliers be informed of the decision, is merely a statement that the AIT will not supersede Canada's international agreements, it does not create enforceable obligations to foreign suppliers. Therefore, foreign companies supplying a good or service to a the Canadian federal government or any provincial government that is not explicitly covered by Canada's GPA commitment (or a similar commitment under NAFTA) must have a place of business in Canada in order to use the CITT's complaint procedures. Similar nationality requirements are evidently also required to take advantage of TILMA and the OQTCA regional trade agreements. Otherwise, foreign suppliers must bring complaints via judicial review through the Federal Court of Canada for federal procurement contracts or the superior courts of any of the provinces for provincial tendering challenges.⁷⁷ While the SCC did not say so explicitly, the requirement of a place of business in Canada to access Canada's trade tribunal and to take advantage of its regional agreements in western and central Canada may act as an incentive for companies to establish a commercial presence in the country, which may in turn

⁷⁷ Taylor and Bolton above note 40 at 17

increase foreign direct investment flows into Canada, providing tax revenue as well as potential employment and training opportunities for Canadians.

6. Conclusion

Canada's sub-central commitments under the WTO GPA should be viewed in a positive light as the change in policy should open Canadian provincial markets to international suppliers and in so doing offer the best value-for-money goods and services. Moreover, the provinces' commitments should offer new opportunities for Canadian firms seeking to supply sub-central government contracts abroad. Still, the practical impact of the new commitments for Canadian firms may be limited in that several US states remain outside the US' Annex II GPA coverage, including the traditionally important markets of Ohio and both Carolinas. Other US states retain carve-outs for such sectors as roads and public transit, which may explain the Canadian provinces' unwillingness to commit to these areas. As some measures of the new Canada-US Government Procurement Agreement are temporary⁷⁸, it is conceivable that the Canada's sub central GPA coverage could be further restricted in the event that a second US financial stimulus package were to re-establish American-only purchasing requirements or add additional sectors to the existing exemptions.⁷⁹ The effect of the preference for local firms seen in the new TILMA and OQTCA agreements on Canada's WTO GPA obligations also remains to be seen.

⁷⁸ E.g. under Art 7 the US commitment to allow Canadian firms access to the American recovery funding expires on 30 September 2011

⁷⁹ Canada and United States Reach Agreement on Buy American', *Foreign Affairs and International Trade Canada bulletin no. 56* (5 Feb 2010)

Until further developments crystallize, Canada's much anticipated reversal of its sub-central omissions to the GPA must be viewed as a positive move on the part of Canadian provinces to integrate their economies with those of the other sub-central GPA signatories and should offer lower cost methods of improving the aging infrastructures and underperforming services in many regions of Canada. Canada's new commitment to openness in sub-central procurement may ultimately facilitate the creation of a highly anticipated bilateral trade agreement between Canada and the EU, which had previously viewed Canada's refusal to commit its sub-federal units to government procurement liberalization with scorn.⁸⁰ What this change in Canada's attitude reveals about this author's earlier conjecture regarding the reasons for the provinces' previous non-commitment, including regionalism and a small-government approach⁸¹ is unclear as it is suggested that both these factors remain, although the extent to which this is so is left for others to consider. More evident, however, is Canada's intimate and enduring economic relationship with its southern neighbour, the integrity of which was the catalyst for Canada's eventual sub-central GPA acquiescence. Thus, in addition to recent worldwide praise for its regulatory sensibility in the banking sector in the aftermath of the recent financial crisis⁸² and as a model for deficit reduction⁸³ Canada can now be admired for its commitment to international trade liberalization in the important sector of sub-central public procurement, be as it may somewhat incomplete and overdue.

⁸⁰ See P. Viera, 'Protectionism Kept At Bay', *The Financial Post* (Canada), 6 Feb 2010

⁸¹ Collins, above note 2.

⁸² See e.g. C Mason, 'MBAs Bank on Canada' *Financial Times* (UK) 6 July 2009; C Mason, 'Canada's Banks Poised for Global Growth' *Financial Times* (UK) 8 December 2009

⁸³ See e.g. B Simon, 'Lessons From Canada on How to Manage Deficit Reduction' *Financial Times* (UK) 8 June 2010

