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

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I Introduction

In recognition of the fact that governments are often the single largest buyer of goods and services in an economy the World Trade Organization ('WTO') implemented the Government Procurement Agreement ('GPA') to foster international competition in procurement among member governments in a transparent manner free from discrimination. Yet even within one nation, 'government' may consist of a myriad of smaller bodies, each with its own regulatory approach to procurement activities. The GPA made provision for the inclusion of sub-central entities because of the economic significance of such transactions but also because 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. This article will examine an aspect of the WTO GPA that has attracted astonishingly little attention from critics: the anomalous failure of Canada to commit its ten sub-central governments to the agreement. Several reasons for Canada's provincial abstinence from the GPA will be explored as will the procurement regulations that exist in its place at the provincial level. Potential benefits for regional accession to the GPA will be considered and the article will conclude with the recommendation that the provinces enter the regime or

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risk international economic marginalization in the procurement field. A discussion of Canadian provincial procurement under Chapter 10 of NAFTA is beyond the scope of this article, which deals exclusively with the WTO framework.¹ Municipal procurement (purchases by local governments such as cities or townships) will be similarly excluded from specific commentary² as will reference to the revised GPA which was provisionally agreed upon in December 2006 but is still subject to ongoing negotiations³. We will begin by briefly outlining the GPA itself and the extent of Canada's current coverage at the federal level.

II The WTO GPA and Canada's Commitment

Government procurement is largely excluded from the WTO's multilateral agreements and is instead administered primarily under the plurilateral (optional) GPA, an agreement which was signed in Marrakech in April 1994 and went into effect January 1996.⁴ The previous government procurement agreement under the Tokyo Round General Agreement on Tariffs and Trade ('GATT') negotiations was based on an Organization for Economic Cooperation and Development ('OECD') draft document from the 1960s and it was intended that early versions of the GATT would address government procurement but negotiating states objected because it was felt that such activities infringed too closely upon sovereignty to allow regulation at a multilateral level. These concerns were particularly grievous given the increasing role

¹ For procurement under NAFTA see eg A Reich *International Public Procurement Law* (Kluwer Law International, 1999) ch 9; C Muggenberg "The Government Procurement Chapter of NAFTA" 1 US-Mexico L J 295 (1993)

² Canada's position remains that there will be no international commitments with respect to procurement at the municipal level. Canada GPA Annex 2, 1 March 2000

³ For a discussion of the revised GPA see R Anderson, "Renewing the WTO Agreement on Public Procurement: Progress to Date and Ongoing Negotiations" PPLR 2007, 4, 255

⁴ For a detailed discussion of the history of this agreement and a comprehensive outline of its sections see S Arrowsmith, *Government Procurement in the WTO* (Kluwer Law International, 2000).

of the public sector in many national economies in the 1970s.⁵ At present the inclusion of government procurement under the General Agreement on Trade in Services ('GATS') is currently being negotiated by the Multilateral Working Party as required Article XIII 2 of that agreement.

The key provisions of the GPA are Article III which guarantees equal treatment between foreign and domestic suppliers of goods and services, and as among all foreign suppliers (other than normal custom duties) and Article II which establishes fairness in valuation of bids. Articles VII to XVII ensure that tendering and contract selection is conducted in a fair and transparent manner, through provisions covering time limits and delivery (Article XI), documentation (Article XII), and generally on transparency in tender conditions (Article XVII). Disputes under the agreement are subject to binding resolution under the WTO Dispute Settlement Understanding. Through these measures the GPA aims to assist signatory nations to achieve the best value-for-money for their taxpayers and business opportunities for their firms by creating competitive conditions where contracts are awarded to the best tender submitted in a manner that is fair. Additionally, it has been suggested that opening government procurement to international competition through the GPA will fight corruption by "[e]xpos[ing] the policies with which some governments have been covering their wasteful ways and impoverishing their peoples in the process."⁶ While the actual effectiveness of the GPA in achieving market access has been questioned⁷ as has its utility to developing countries through the special

⁵ J Jackson, *World Trading System* 2nd Ed (MIT, 1997) at 225.

⁶ V Mosoti "The WTO Agreement on Government Procurement: A Necessary Evil in the Legal Strategy for Development in the Poor World" (2004) 25 *U of Pennsylvania J of International Economic L* 593 at 598

⁷ S Everett and B Hoekman "Government Procurement: Market Access, Transparency and Multilateral Trade Rules" *Policy Research Working Paper – World Bank Development Research Group* (Geneva 2004). These authors conclude that improved transparency will not necessarily improve market access because of a corresponding fall in demand, at 18.

treatment provisions of Article V⁸ the GATT Secretariat estimated that there would be a ten fold increase in trade in government procurement over coverage under the earlier code, but the extent to which this materializes may depend on the degree of privatization worldwide.⁹

Accession to the GPA is available to all member states of the WTO and currently the GPA has 40 signatories including the 27 states of the enlarged European Union.¹⁰ Article XXIV.2 of the GPA requires that all parties to the agreement must agree upon the accession of a new party. When signing on to the agreement, a government must submit a list of entities (as well as services) to be covered – the extent of this coverage is established on a bilateral basis – parties often negotiate with each other based on their procurement offer and request specific derogations from national treatment concerning areas of particular interest.¹¹ 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. Coverage under 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. The issue of which government entities are covered by the GPA is far from straightforward 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 transition

⁸ P Sutherland “The Doha Development Agenda: Political Challenges to the World Trading System – A Cosmopolitan Perspective” in E Petersmann ed *Reforming the World Trading System* (Oxford University Press 2005) at 40. Cf Mosoti above note 5. The only GPA members that have developing nation status are Israel and Korea.

⁹ A Lowenfeld, *International Economic Law* (Oxford University Press, 2003) at 86-87.

¹⁰ The signatories are: Canada, European Union (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, United States. Nine additional WTO member states are in the process of acceding to the GPA.

¹¹ Arrowsmith note 3 at 93.

economies.¹² Jackson noted the difficulty involved with states arriving upon an agreed definition of government agency when grappling with the incorporation of government procurement into the GATT in part because ‘nations have a wide variety of ideas as to what is the appropriate sphere of government activity.’¹³ These problems are exacerbated by the fact that some countries economies are exclusively state controlled as well as the trend in some countries toward privatization. Unlike the earlier GATT procurement agreement, the WTO GPA expressly extended its coverage to sub-central/regional governments. The Tokyo Round agreement only required its parties to inform their regional and local governments of the objectives of the Code and ‘to draw their attention to the overall benefits of liberalization of government procurement.’¹⁴ As GPA negotiations have been 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 Under the GPA, each member’s Annex on Central Government Agencies (Annex 1) lists all of the central government bodies to which the GPA applies. Bodies covered here refer to federal level entities and includes individual federal ministries or departments as well as many bodies which are publicly controlled but which may be partially independent of conventional ministerial structure. Each member’s Annex 2 lists the regional governments (such as provinces or states) to which the agreement will apply.

The Canadian federal government acceded to the WTO GPA and the WTO itself through the passage of the World Trade Organization Agreement

¹² For a discussion of these matters see S Arrowsmith, J Linarelli and D Wallace, *Regulating Public Procurement: National and International Perspectives* ch. 6 (Kluwer International: London, 2000)

¹³ Jackson note 4 at 225.

¹⁴ Reich note 1 at 293 referring to Art I.2 of the Tokyo Agreement (1979) ILM 1052

¹⁵ Arrowsmith note 3 at 115. See eg Japan’s denial of sub-central coverage to Canada: Japan GPA Annex 2, 1 March 2000.

Implementation Act¹⁶ which was brought into force on 1 January 1996. The inclusion of Canada into the regime of the GPA represents the opening of a significant market to international firms: the Canadian federal government spent CDN \$8.6 billion on the procurement of goods and services in 2003-04¹⁷ making it one of the largest purchasing entities in the world. A detailed examination of Canada's government procurement regime is beyond the scope of this article and, although there is very little recent academic attention to this topic, it has been discussed by others.¹⁸ Briefly, the federal government entities to which the GPA applies are set out in Annex 1 and cover a wide range of federal agencies from the Supreme Court to the Royal Canadian Mounted Police, and unless there is a specific exclusion,¹⁹ the GPA applies. The GPA permits exceptions under Article XXIII for procurement activities that are necessary to protect public health, safety and national security. In Canada the Procurement Review Committee will assess potential socio-economic benefits of public purchases that are valued in excess of \$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.²⁰ Among its policy-oriented purchasing is a preferential government contracting policy in favour of Canadian Aboriginal businesses which was implemented in 1996.²¹ Monetary thresholds are set every two years and Canada's are currently at 130,000 Special Drawing Rights ('SDR').²² The authority for federal government procurement is exercised by the Treasury Board, which is a

¹⁶ S.C., 1994, c. 47 [assented to 15 December 1994]

¹⁷ Source: MARCAN <http://www.marcan.net/index_en/procure.htm> (last accessed May 2006)

¹⁸ Eg, R Paterson and M Band, *International Trade and Investment Law in Canada* (Thomson: Toronto, 1994) ch "Government Procurement"

¹⁹ For example Canada has excluded shipbuilding and rail transportation equipment: Canada GPA General Notes note 1.

²⁰ Public Works and Government Services Supply Manual, s 5.070.

²¹ Article 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" 7 PPLR CS110 at CS112-113.

²² Canada GPA Annex 1. SDRs are the International Monetary Fund's international reserve unit of account and are based upon the currencies of five countries.

committee of the Privy Council (Cabinet) and is located in the national capital of Ottawa.²³ The Canadian International Trade Tribunal ('CITT'), also located in Ottawa, provides judicial oversight to the implementation of the agreement²⁴ fulfilling the GPA's requirement that domestic bid challenge procedures are maintained within each country by an impartial tribunal.²⁵

At the time when the initial GPA negotiations were concluded, Canada claimed that it would provide a 'final list' of included sub-central entities within a period of 18 months, subject to obtaining commitments from provinces.²⁶ In the twelve years since the federal government registered this statement under its Annex 2, none of Canada's provinces have made such commitments and remain outside the GPA. This has not gone un-noticed by other GPA members, including the Chairman of the Committee on Government Procurement, who expressed concern that Canada has not honoured its commitments with respect to sub-central coverage.²⁷ As we shall see below, Canada later offered an explanation; however it is likely that additional unspecified concerns play a part in ongoing provincial abstention. Before we explore these reasons we will briefly consider the other signatories to the GPA which have listed sub-central governments in order to illustrate the anomalous nature of Canada's empty Annex 2.

III Sub Central Entities and the WTO GPA

²³ For a discussion of the methodology of federal government procurement in Canada see Van Dyk above note 20.

²⁴ Canadian International Trade Tribunal Act R.S. 1985 c.47 s.30.1 definition of 'government institution'. The CITT is also the designated bid challenge authority for NAFTA and the Agreement on Internal Trade with respect to procurement by the federal government.

²⁵ GPA Article XX.

²⁶ Canada GPA Annex 2, 1 March 2000.

²⁷ WTO Document GPA M/5/ 11 April 1997

Among the most 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.²⁸ In order to implement the agreement, Japan's central government amended legislation regarding 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.²⁹ Although there are no statistics available for Japanese procurement specifically at the sub-central level, procurement from foreign sources in 2002 accounted for almost 14 per cent (both goods and services) of all Japanese government procurement. Almost ten trillion yen were spent in public purchases of goods and services by all level of governments in Japan in 2002.³⁰

Korea also lists all sub-central administrative government entities in its GPA Annex 2, including six municipalities and nine regions³¹ as does Switzerland, which lists all twenty-three cantons.³² Korean sub-central entities maintain exclusions for procurements from small businesses, which as we shall see below, is a point of contention for Canada.³³ Iceland does not list any regional governments but its Annex 2 states that 'all contracting local public authorities including municipalities' are

²⁸ Japan Annex 2 note 6, 1 March 2000

²⁹ See JH Grier "Japan's Implementation of the WTO Agreement on Government Procurement" 17 U Pa J of Inter Economic Law (1996) 605 at 629-631.

³⁰ "Japan's Government Procurement: Policy and Achievements Annual Report – Toward Government Procurement Open to the World" ch 2 (2003) <<http://www.kantei.go.jp/foreign/procurement/2003>> (last accessed May 2006)

³¹ Korea GPA Annex 2, 1 March 2000

³² Switzerland GPA Annex 2, 7 February 2003.

³³ Korea GPA Annex 2 note 3

included³⁴ and a similar approach is taken by Liechtenstein which simply lists ‘public authorities at local level.’³⁵ Israel’s Annex 2 specifies municipal entities only.³⁶ Norway lists all of its 19 counties (without naming them) and 435 municipalities.³⁷ Annex 2 does not apply to Singapore, Hong Kong China and the Netherlands with respect to Aruba because those states do not have sub-central agencies.³⁸ The European Community’s (‘EC’) Annex 2 under the GPA covers all existing regional and local governments without specifying them by name.³⁹ Under its extensive General Notes to the GPA, the EC imposes numerous derogations directed at specific members in relation to particular industries. For example, the EC extends no sub-central coverage to Canada whatsoever and none to the US with respect to the procurement of goods.⁴⁰ There are no statistics available for the quantity of EC foreign procurement at the sub-central level. The EC’s Annex 2, like those of most members, commits goods and services above a threshold value of 200,000 SDR.⁴¹

The United States 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 United States claimed that domestic political difficulties in binding state governments were responsible for failure to negotiate more comprehensive state coverage. While the US federal government has the authority to compel state governments to accede to international trade agreements Washington it not always willing to do so: ‘...politicians are reluctant to use their

³⁴ Iceland GPA Annex 2, 28 April 2001

³⁵ Liechtenstein Annex 2, 1 March 2000

³⁶ Specifying Jerusalem, Tel Aviv and Haifa. Israel GPA Annex 2, 13 February 2006

³⁷ Norway GPA Annex 2, 1 March 2000

³⁸ Singapore GPA Annex 2, 1 March 2000; Hong Kong GPA Annex 2, 9 March 2005; Netherlands GPA Annex 2, 1 March 2000

³⁹ EC GPA Annex 2, 1 March 2000

⁴⁰ EC GPA General Notes, note 1.

⁴¹ EC GPA Annex 2.

powers in particular in the area of procurement. They feel that it may be perceived as a federal intrusion not only on state jurisdiction but also on how the states spend their own revenues.⁴² The federal government was relegated to suggesting a voluntary compliance plan which would attempt to obtain the broadest possible coverage of sub-central agencies.⁴³ Thus voluntary accession to government procurement agreements was viewed as a ‘convenient solution which shifts the political decision-making to the state level.’⁴⁴ Procurement policies at the state level have been used as tools of censure towards foreign states, as seen most notably in Massachusetts’ exclusion of procurement by Burmese firms because of that country’s human rights record.⁴⁵ The United States sub-central coverage has expanded significantly after efforts of the federal government to encourage states to enter into the bi-lateral agreement with the European Union based on the guiding principle of reciprocity that was required under the GPA Article XXIV.7. As it stands, the existing sub-central coverage of states within the United States 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. Threshold values for sub-central procurement are set at 355,000 SDR for supplies and services, which tied with Canada’s vacuous Annex 2, are higher than those of any other member.⁴⁶ Approximately \$US 94 billion is spent in procurement of goods and \$US 40 billion in services at the state (and local) level per year. Most US states retain ‘Buy American’ provisions in their procurement regulations, as required under the federal Buy

⁴² Reich note 1 at 294. See also K Cooper “To Compel or Encourage: Seeking Compliance With International Trade Agreements at the State Level” (1993) 2 *Minnesota J of Global Trade* 143 at 166

⁴³ Reich *ibid* at 294.

⁴⁴ Reich *ibid* 264.

⁴⁵ Massachusetts “Act Regulating State Contracts with Companies Doing Business in or with Burma” of June 25, 1996 ch 130 s1, 1996 Mass Acts 210.

⁴⁶ US GPA Annex 2, 16 October 2002; Canada GPA Annex 2.

American Act⁴⁷ but these only apply to procurements that fall outside the scope of the GPA.⁴⁸ The United States Annex 2 retains an exemption for distressed areas and minority owned businesses and Annex 1 contains small businesses set-asides which also apply to sub-central procurement. This latter exemption has been instrumental in Canada's sub-central omissions.

IV 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.⁴⁹ It is within the provinces' constitutional purview to accept or reject all international agreements entered into by the central government and as such the Canadian federal government cannot compel its provincial counterparts to accede to any of Canada's WTO obligations. Although the federal executive government has the exclusive jurisdiction to negotiate and accede to 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.⁵⁰ 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',

⁴⁷ 41 U.S.C. 10a-10d

⁴⁸ WTO Trade Policy Review – United States WT/TPR/S/56 at [288] 1 June 1999

⁴⁹ 2005 figures, source: Statistics Canada <www.statcan.ca> (last accessed May 2006)

⁵⁰ *Francis v The Queen* [1956] SCR 618 at 625.

‘property ...within the province’ and ‘all matters of a merely local or private nature.’⁵¹ Procurement activities, either relating to goods or services, clearly fall under one or more of these fairly broad provincial powers. Steger observed shortly after Canada implemented the WTO treaty into domestic law that 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 governments⁵², a situation that was probably responsible for Canada’s recent abandonment of the Kyoto Protocol on climate change. 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. Thus any sub-central commitment to the WTO GPA would be extended to the WTO by Canada on behalf of its provinces, not through the provinces directly – which are themselves not WTO members.

Statistics for provincial government procurement expenditures are incomplete in part because the largest province (by population), Ontario, has failed to report its total procurement expenditures since 1996. Individual expenditures of the reporting provinces are considerably less than that of the federal government, but when taken in aggregate, even lacking Ontario’s contribution, almost half of all government procurement in Canada is done at the sub-central level: \$CDN 6 billion in 2003-04.⁵³ That same year provincial procurement expenditures for the three other largest provinces were: Quebec \$1.9 billion; British Columbia \$1.1 billion; and Alberta \$2.2 billion.⁵⁴ Although Canadian provincial governments clearly represent sizable

⁵¹ Constitution Act, 1867, s. 92

⁵² D Steger “Canadian Implementation of the WTO Agreement” in *Implementing the Uruguay Round* J Jackson and A Sykes eds. (Clarendon Press, Oxford: 1997).

⁵³ Source: MARCAN < http://www.marcan.net/index_en/procure.htm > (last accessed May 2006). This figure may be misleading because provincial statistics include procurement by municipal governments.

⁵⁴ Ibid. Note again that these figures include municipal government spending.

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. As stated at the beginning of this article, not only have there been no GPA commitments from Canadian provinces, leaving Canada's existing Annex 2 to the agreement unchanged since it was submitted over 10 years ago, there is no indication that any negotiations have ever taken place between the Canadian federal government and the individual provinces concerning sub-central commitment to the WTO GPA. If discussions have taken place it has been done informally and without publicly accessible record.

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.⁵⁵ The AIT agreement covers trade in goods and services between the Canadian provinces, the purpose of which is to achieve efficiency and a strong economy.⁵⁶ The agreement was ratified by all 10 provinces, the federal government, and the two territories⁵⁷ in 1995 and encompasses procurements in excess of \$25,000 for goods and \$100,000 for services.⁵⁸ Of the provinces which conduct significant procurement activities, only Quebec has formally enacted the AIT into its provincial legislation,⁵⁹ although all parties are expected to maintain procurement practices that conform to its requirements and decisions of any provincial government are subject to challenge by the CITT under the agreement's dispute settlement system.⁶⁰ The AIT's principles of fairness and transparency in the tendering process and in bid valuation, which recall

⁵⁵ Art 504(2)

⁵⁶ Art 501

⁵⁷ The third territory, Nunavut, did not exist when the agreement was signed.

⁵⁸ Art 502

⁵⁹ An Act Respecting the Implementation of the Agreement on Internal Trade RSQ c. M-35.1.1

⁶⁰ See further L DiMarzo "Dispute Resolution Provisions of the Agreement on Internal Trade" 34 Alberta L R 240 (1995).

those of the GPA, are outlined in Articles 505 and 506. Like the GPA, there are narrow exclusions for unforeseeable urgency and national security.⁶¹ 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. The government of Ontario repealed its Canadian content policy for all procurements in 2001 but still maintains a 10 per cent price preference for Canadian structural steel products on construction contracts above CDN \$100,000,⁶² a policy that was likely intended to assist the mining and smelting industry in the province – Canada’s leading producer of steel. Other than this preference in Ontario which may be levied even against a supplier from another province, the occurrence of procurement discrimination against foreign firms by individual provinces is unknown, although the EC noted in 1999 that British Columbia and Quebec accorded national price preferencing of up to 10 per cent.⁶³ Under current law, discriminatory pricing against a non-Canadian firm would not be illegal as the AIT deals only with suppliers located within Canada.⁶⁴ Accordingly the lack of transparency with respect to the provinces’ treatment of foreign bids leaves international suppliers in the difficult position of not knowing whether it is worth their effort to prepare a bid if domestic firms may garner favourable consideration. The AIT dispute resolution service is also only available to Canadian firms and thus there

⁶¹ For further discussion of the AIT see A Van Dyk “The Canadian Agreement on Internal Trade” 7 PPLR CS176 (1998)

⁶² This is called the Canadian Steel Preference Policy and allows a 10 per cent deduction of the value of bids that use Canadian structural steel products. “Tips on How to Do Business with the Ontario Government” Ontario Ministry of Government Services (7 Feb 2006)

<<http://www.ppitpb.gov.on.ca/mbs/psb/psb.nsf/english/tips.html#intro>> (last accessed May 2006)

⁶³ “Review of National Implementing Legislation – Canada, World Trade Organization” GPA/51 18 June 2001. Comment by the EC.

⁶⁴ The various provincial governments’ contract submission guidelines are available on-line through the respective provincial government websites but do not generally divulge any Canadian price preferencing in terms of selection criteria. Provincial procurement representatives do not respond to direct queries from the public regarding Canadian price preferences.

is no means of domestic redress for any discrimination by a provincial government against an international supplier.⁶⁵ A key point here is that the provinces are already required to engage in non-discriminatory, transparent procurement practices with respect to Canadian firms under the AIT such that the principles of the GPA could scarcely be viewed as revolutionary from a legal standpoint – but for the prohibition that it would impose against discrimination towards foreign firms, which may or may not currently engage in supply contracts with Canadian provincial governments. At first glance, then, provincial abstention from the GPA may seem perplexing. We will now attempt to discern several possible explanations for the provinces’ failure to join the GPA.

V Explanations for Canada’s Sub-Central Abstention from the WTO GPA

In October 1995 the WTO’s Committee for Government Procurement questioned Canada as to its failure to commit sub-central entities and the Canadian delegation responded:

Canada is prepared to table an offer at the sub-central level if, and only if, members are prepared: (1) to include sectors of priority to Canadian suppliers, for example, in the steel and transportation areas; and (2) to agree to circumscribe the use of small business and other set asides in a manner that, while not precluding their use, would provide an acceptable security of access to suppliers from all members of this committee.⁶⁶

⁶⁵ An aggrieved supplier could also launch a private action against the relevant government agency, possibly for breach of warranty or implied term that the contract would be awarded to the lowest bidder. For example of such a claim see the House of Lords decision *Harvela Investments Ltd. v Royal Trust Company of Canada (CI) Ltd* [1986] AC 207. See also S Arrowsmith “Protecting the Interests of Bidders for Public Contracts: The Role of the Common Law” [1994] CLJ 104.

⁶⁶ Review of National Implementing Legislation – Canada, above note 62.

Thus Canada initially used its Annex 2 omissions as a bargaining chip to encourage the commitment of sectors from other members in which Canada holds a comparative advantage, namely steel and automobiles. This strategy seems to have been aimed primarily at the United States where several sub-central entities, including populous New York, Michigan and Illinois, exclude procurement of structural grade steel and motor vehicles from GPA coverage.⁶⁷ However, while such derogations clearly restrict market opportunities for important Canadian industries, there is no reason that Canada could not establish corresponding Annex 2 exclusions for goods in which the US enjoys a comparative advantage over Canada such as textiles or computer technology. Assistance to regional suppliers of these goods might help compensate for lost opportunities in the US for Canadian steel and automotive firms while opening up markets for all other goods and services in other sub-central member entities. The flexible nature of the GPA Article V allows members to establish their own list of derogations for certain industries – or for social purposes where economic gain may be of secondary importance, such as the aforementioned preferences for aboriginal businesses. States are free to impose derogations may be imposed with respect to certain members and not others, as the EC has done.⁶⁸ Signatory status under the GPA does not restrict sub-central governments from such promotion of domestic suppliers, provided that it is done in an open manner.⁶⁹ Indeed, Canada expressly allowed for such policy-oriented procurement at the provincial level in the text of its Annex 2.⁷⁰ It

⁶⁷ US GPA Annex 2

⁶⁸ EC GPA General Notes.

⁶⁹ Mosoti note 5 at 602. M Dischendorfer observes that the availability of derogations is not unfettered because of the reciprocity requirement it may be difficult for potential members without significant economic might to achieve concessions to such derogations: “The Existence and Development of Multilateral Rules on Government Procurement Under the Framework of the WTO” 9 PPLR 1 at 27 (2000), see also Arrowsmith note 3 at 442. This may be particularly problematic for some of Canada’s economically weaker provinces.

⁷⁰ ‘Nothing in this offer shall be construed to prevent any provincial entity from applying restrictions that promote the general environmental quality in that province, as long as such restrictions are not

should be noted that none of the other large GPA members maintains sub-central restrictions on automobiles or steel and while the Japanese government procures most of its steel domestically, it, like sub central governments in the US and the EC, procures significant quantities of forest products, minerals and machinery from foreign sources⁷¹, and that goods of this kind account for a large portion of Canada's exports⁷² China's sub-central governments may ultimately choose to open the market for steel and transportation products upon eventual accession to the GPA, which could further represent an enormous market to Canadian steel and automotive suppliers. The discriminatory nature of the US small business set asides⁷³ (which are also exercised by Korea)⁷⁴ are a legitimate problem for smaller Canadian suppliers and are rightly a cause of concern to trade negotiators, but Canadian provinces could counter the negative effects of this exemption through their own exclusions for small businesses, which were listed after Canada's above comments to the Government Procurement Committee were issued.⁷⁵ Small business restrictions in Canada should assist in the protection of the most vulnerable firms against cheaper foreign suppliers. Although these reciprocal measures may not offer perfect solutions, and could amount to substantial derogations from the GPA's aims⁷⁶, they would afford Canadian firms with some measure of compensation for lost contracts abroad. Canada exports far

disguised barriers to international trade.' Canada GPA Annex 2 note 2. Steel, automotive products and coal are also excluded for all provinces, Annex 2 note 1.

⁷¹ WTO Trading Partner Report: Japan – Policy and Developments Affecting Trade and Investment, WT/TPR/S/32 5 January 1998. US Annex 2, EC Annex 2,

⁷² Source: Statistics Canada, <www.statscan.ca> (last accessed May 2006)

⁷³ As provided for in US GPA Annex 1 General Notes. For a discussion of US procurement policies that favour small businesses see S Schooner "Mixed Messages: Heightened Complexity In Social Policy Favouring Small Business Interests" 8 PPLR CS78 (1999)

⁷⁴ Korea GPA Annex 2 note 3.

⁷⁵ Canada GPA General Notes, note 1d, 1 March 2000.

⁷⁶ McCrudden believes that an enlarged role of regional governments in international trade and their respective derogations may actually lead to the realization of 'local protectionist impulses' such as job protection and other social policy goals: C McCrudden "International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of Selective Purchasing Laws under the WTO Government Procurement Agreement" (1994) 2 J of International Economic L 1

more of its goods to the US than any other nation⁷⁷ and US sector restrictions will remain a burden to certain Canadian firms, but they should not prevent all Canadian firms from enjoying access to a wide range of other sub-central markets for goods and services worldwide. Clearly Canada's strategy of withholding provincial GPA commitment to compel the removal of certain restrictions by other members has not worked. Some open competition in sub-central government procurement is preferable to none and Canada's obstinacy in this matter is quite simply a case of cutting off its nose to spite its face.

In addition to Canada's stated reasons for lack of sub-central coverage at the GPA, there are several less obvious factors which may be in operation, which probably stem from the provinces themselves rather than from a national economic strategy. First, one possible disadvantage of accession to the GPA is the cost associated with membership. Several commentators have observed that practical difficulties involved with the bi-lateral negotiation procedure could operate as a barrier to joining, particularly given the complexity of some of the GPA rules⁷⁸ and the paucity of technical expertise in government procurement.⁷⁹ While this may be true of sub-central governments within developing states, it is not a concern that is applicable to even the smallest Canadian provinces which possess the infrastructure necessary to conduct complex negotiations – particularly since assistance from the federal government as the negotiating WTO member involved could be available. Moreover, as we have seen, the provinces' procurement regulations under the AIT are not unlike those required by the GPA such that additional administration might be minimal. The burden of establishing the required review mechanism for procurement

⁷⁷ Source: Statistics Canada <www.statscan.ca> (last accessed May 2006)

⁷⁸ Arrowsmith GPA note 3 at 440-441 and M Dischendorfer note 68 at 27-28, who notes that negotiation and implementation costs were the reason that Australia and New Zealand did not join the GPA.

⁷⁹ Arrowsmith note 3 at 443.

disputes has been cited as one of the chief barriers to GPA membership⁸⁰. However, this function could be performed with respect to sub-central entities in Canada simply by modifying the jurisdiction of the CITT to cover provincial procurement decisions.

There may be strategic disadvantages in accession to the GPA for Canadian provinces. Cooper has noted that sub-central governments in the United States have little incentive to commit to the agreement individually because benefits derived from the GPA are likely to accrue on a nationwide basis rather than directly to a participating state. According to Cooper's theory, if American State X signs on it is unlikely that Nation Y will enter into increased procurement contracts with State X firms because it is administratively impractical for Nation Y procurement authorities to try to distinguish between particular firms from different American states. Such authorities would need to demand labels of origin for products and there would be confusion regarding firms that are based on more than one state. Rather Nation Y's government would probably open up a particular sub-central procurement market in Nation Y (such as Province Y1) to all American firms. Thus the reciprocal benefits for State X for opening its procurement market to Nation Y would be minimal.⁸¹ This is why, as Reich points out, mandatory coverage of all sub-central entities would realize the full reciprocal benefits of all states as a whole.⁸² However, as we have seen, forced coverage of sub-central governments is constitutionally impossible in Canada, irrespective of the wishes of other GPA members, such that Canada and its federal markets might find itself completely excluded from the agreement. The flaw in Cooper's reasoning is that foreign sub-central governments may find it easier to discern location of suppliers than he realizes, not necessarily through labels on packages as they might in smaller contracts for goods, but via corporate information –

⁸⁰ Dischendorfer note 68 at 28.

⁸¹ Cooper note 41 at 166 quoted from Reich note 1 at 264.

⁸² Reich note 1 at 264

which is readily available for examination by tendering governments in the case of large bids. Firms from Canada will either be incorporated in a particular province, or if incorporated federally, all firms must register the province in which the head office is situated.⁸³ Fearing association with a province that has not signed the GPA, Canadian firms will be motivated to relocate to a province that has committed to the WTO regime, a clear benefit to a listing province.

A compelling explanation for the provinces' failure to sign on to the GPA may be the strong sense of regionalism that pervades Canada. WTO analysts are familiar with the threat that multilateral trade poses to national sovereignty⁸⁴ but sovereignty also plays a role at the sub-national level. Many provinces resent regulatory intrusion by the federal government and consequently, like many sub-central entities throughout the world, the provinces wish to retain the ability to exercise discriminatory purchasing as a way of asserting autonomy in the face of an international agreement negotiated by the federal government, which may be viewed as oppressive regulation at the central level. There is a significant history of regional tension within Canada, most notably concerning the largely francophone province of Quebec. More recently regionalism has evolved into 'western alienation' of the provinces west of Ontario which claim that they are largely excluded from decision-making at the federal level.⁸⁵ The idea that these provinces had been coerced into an international obligation by Ottawa primarily for the benefit of firms elsewhere in Canada might not sit well with the constituents of the elected politicians who would be negotiating GPA coverage. However, the provinces' desire to fulfil their own economic and social policies by favouring local suppliers of goods and services has

⁸³ Canadian Business Corporations Act R.S. 1985, c. C-44. s.6(1)b

⁸⁴ See eg, Jackson note 4 at 225

⁸⁵ See eg L Young, *Regionalism and Party Politics in Canada* (Toronto: Oxford University Press, Canada, 2002)

already been restricted by the Agreement on Internal Trade, which ensures that there will be no discriminatory trade between provinces. This suggests that the support of regional firms at the expense of other Canadian firms is not the primary motivation for abstaining from the GPA and regionalism at least in the economic sense is not a priority for the provinces. Moreover, anything that fosters provincial government engagement in activity at an international level should be welcomed as a kind of regional empowerment.

Finally, it is possible that the failure of Canada's provinces to join the GPA may be rooted in a more fundamental aversion to 'outsourcing' by governments, irrespective of the location of the supplying firm. A study recently conducted in Europe revealed entrenched opposition within government departments to the use of private sector firms to deliver public services in effort to achieve value-for-money.⁸⁶ According to the study, the emphasis on government procurement is a key component of this surge of privatization seen notably in Japan and France, which is aimed at countering the 'bureaucratic inertia' that characterized public administration for decades. Managers within the public service are the most intransigent, and undoubtedly motivated by the concern for job security; they contend that commercial oriented management of traditionally 'public' services has led to a diminished quality such that the public good has suffered.⁸⁷ While a discussion of the merits of privatization is beyond the scope of this article, it is evident that governments' attempts to streamline services via outsourcing to firms remains controversial and with the possible exceptions of Alberta⁸⁸ and at one point Ontario⁸⁹, Canadian

⁸⁶ A Kakabadse and N Kakabadse, *Smart Sourcing – International Best Practice* (Palgrave, New York, NY, 2002) at 128-130. This study related to government outsourcing of services and not goods.

⁸⁷ Kakabadse and Kakabadse *ibid* at 130.

⁸⁸ Notably regarding its approach towards health care, see eg "Alberta's Oil-Fired Conservative Revolution" *The Economist*, 8 Sep 2005.

⁸⁹ See eg "Ontario Politics Swings To the Left" *The Economist*, 28 Nov 2002.

provinces have, at least in the past, been resistant to the trend of privatization that has taken in hold in jurisdictions such as the United Kingdom and the United States. Thus in expressing disinterest in transparent, non-discriminatory procurement at the international level, Canadian provinces are not so much protecting regional firms as they are protecting regional governments, primarily in relation to the provision of services. Provincial governments are in effect taking care of themselves by keeping cheaper, private suppliers from around the world off the bargaining table. Regional governments justify their opposition to outsourcing by pointing to high price Canadian bids that are not forced to compete internationally. This represents hostility to the private sector generally – not to foreign firms.

VI Benefits from Canadian Sub-Central Commitment to the WTO GPA

There are several reasons why the provinces should accede to the GPA, some of which have been noted already. The first clear benefit is improved access for Canadian firms to foreign sub-central markets. Whilst this may admittedly be limited with respect to key industries such as steel and transportation because of other members' derogations, Canada's exports of lumber, oil and natural gas could have significant sub-central demand abroad. Canadian firms are already at a disadvantage currently because of the high value of the Canadian dollar which renders any goods it exports expensive to foreign consumers and enhanced market access is vital to their survival both domestically and globally. Arrowsmith observes that GPA gaps in coverage at the sub-central level have resulted in derogations from the MFN principle by those countries with more comprehensive coverage. For example, Canada's failure to commit sub-central entities resulted in Japan and the European Community denying GPA benefits to suppliers from Canada in relation to all of their (Japan and

the EC's) Annex 2 entities.⁹⁰ Potentially lucrative sub-central markets in other nations will thus remain unavailable to Canadian firms should the provinces remain excluded from the GPA. Regional procurement activities are economically significant, especially in highly decentralized countries such as Japan. When the GPA was signed by Japan in the mid 1990s, 80 per cent of public works in that country were undertaken at the regional level of government.⁹¹ This should be of particular interest to firms operating in Canada's west.

The second obvious advantage to GPA coverage for Canadian provincial governments is that accepting tenders by foreign firms without price discrimination will lead to improved competition which will in turn foster more value-oriented procurement practices in the face of internal inefficiencies such as political pressures. Canadian firms will be forced to compete with international suppliers for government contracts and this will result in better, cheaper contracts and therefore more satisfied taxpayers. This should be especially relevant to Canada where government corruption in connection with the Federal government's recent advertising sponsorship activities in Quebec is still in the minds of many Canadians.⁹² The downside to obtaining value-for-money is that what the economy saves in reduced government expenditure, the economy may lose as money flows out of the provinces and into the hands of foreign firms. However, provincial firms may still end up winning the contracts, having been forced into offering lower cost services by the threat of foreign competition.

Another related reason that the provinces should embrace the GPA is the market opportunities that this would present to foreign firms that have significant Canadian ownership. Transnational corporations with Canadian foreign direct investment would be able to tender for contracts to Canadian provincial governments

⁹⁰ Arrowsmith note 3 at 116. See also WTO Trade Policy Review WT/TPR/S/53at [133]

⁹¹ Grier note 28 at 639

⁹² See eg "Canada's Sleazy Inquiry" The Economist 3 Nov 2005.

earning revenue that would ultimately fall into the hands of Canadian shareholders. Thus Canadian investors would be able to conduct business with their own regional governments through a foreign firm. Of course, such gains could be achieved outside the GPA framework by sub-central procuring bodies granting favourable treatment to foreign firms with a certain percentage of Canadian ownership. One additional substantive benefit from GPA membership noted by Dischendorfer is that it would 'enable a government to influence the development of international arrangements on government procurement,'⁹³ although admittedly this is less meaningful for sub-central entities because the internationally negotiating body would remain their federal counterpart.

Lastly, given that Canada's primary trade relationship is a bi-lateral one with the United States and Canada's international trade in procurement may not yet be extensive, the provinces should still be accede to the GPA because it represents a gesture of international good faith to the WTO trading forum. Arrowsmith urges that 'expanding participation in government procurement disciplines is important for achieving the long-term goals of the WTO, especially as the WTO embraces more countries with an extensive state sector.'⁹⁴ Although the GPA is an optional agreement it represents a key component of the WTO's overall purpose of promoting international free trade, much of which is conducted by public bodies. Furthermore, the extent of an applicant's coverage is currently specified as a criterion for GPA membership.⁹⁵ As commitments on government procurement on both federal and sub-central levels were included as part of China's WTO membership negotiations, similar government procurement coverage may be expected for future applicants to

⁹³ Dischendorfer note 68 at 25

⁹⁴ Arrowsmith note 3 at 438.

⁹⁵ Uruguay Round Decision on the Accession to the Agreement on Government Procurement s.1(d)i

the WTO itself.⁹⁶ Canada may consequently face diplomatic pressure from within the WTO in the future if it does not commit its provinces and this could be harmful to the nation's trading interests as well as damaging to Canada's image in international affairs.

VII Conclusion

That Canada failed to list its provincial governments in its commitment to the WTO GPA is in one sense surprising given Canada's reputation as a globally-conscious state. Yet the omission of the provinces is less remarkable when one considers the strong regional mentality present within the country – provinces wish to assert their own economic and social policies through a tool such as government procurement that favours local suppliers rather than bend to a policy of free trade dictated by the capital. This cannot be challenged domestically as the provinces are within their constitutional authority to decide to which international obligations they commit themselves. Equally disturbing is that while the provinces have agreed not to favour local suppliers over those from other Canadian provinces through provisions of the AIT that echo the principles of the GPA, it remains unclear if foreign firms suffer any general price discrimination either mandatory or discretionary.

This article has attempted to illustrate that Canada's failure to commit its provinces to the GPA represents both a significant shortcoming in the interests of global government commerce and an impediment to regional economic prosperity. It has been argued that accession to the GPA is vital to Canadian provinces because of the crucial benefit of enhanced internal competition and foreign market access,

⁹⁶ Arrowsmith note 3 at 439. China may not commit all of its sub-central entities (27 provinces) because of reciprocity – specifically the incomplete listing of all US states: T Xinchao “Chinese Procurement Law: Current Legal Framework and a Transition to the WTO GPA” 17 Temple International and Comparative L J 139 (2003) at 167

despite Canada's complaint that its some of its key industries were largely excluded from other members' coverage. Without universal sub-central membership in the GPA, valuable regional procurement contracts around the world will remain closed to Canadian firms, regardless of the listing of Canada's central government. Sub-central projects of other nations, such as those of Japan and eventually China may become as lucrative as those of their central governments and the importance of access to these markets for Canadian companies cannot be overstated. We must also keep in mind that as the global market for government purchasing expands, WTO GPA members will inevitably become aware that Canada is not one entity but a mosaic of (largely) economically independent regions. As such, foreign regional governments may discern more readily between tendering firms from a particular province via jurisdiction of incorporation and any province which has joined the GPA will enjoy a corresponding advantage as against its Canadian neighbours. It is ironic that in the current climate of economic globalization, the growing importance of Alberta's oilfields and the ascendancy of Toronto as the second largest financial centre of the Americas may draw the world's gaze to Canada's regions. Each province must capitalize on this trend by committing to the WTO GPA or else the provinces will suffer the unfortunate consequences of global isolationism in the field of government commerce.