Carleton University

**Understanding Government Procurement Liberalization
in Canada and its Implications for the Federal Procurement Process**

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the Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of
Master of Arts**

Institute of Political Economy

by

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The author is a policy analyst in the Department of Public Works and Government Services and has participated in government procurement trade negotiations over the past year. The views expressed are those of Ms. Alton and do not necessarily reflect the views of the Government of Canada or of the Department.

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Abstract

The idea of opening government markets up to foreign suppliers was rejected by States when first proposed in 1947. Changes to the world economy and macro-economic thinking since that time have made it more politically feasible for governments to liberalize their markets. Since Canada decided to partially open its procurement market, it has stayed the path of incremental liberalization. Liberalization, however, is being conducted in an increasingly complex policy environment as more interests and institutions become involved in the policy process.

This thesis uses an ideas, interests and institutions framework as an analytical aid in understanding the pace and scope of government procurement liberalization. The thesis also explores the impact of such liberalization on the federal procurement process. It finds that liberalization has had both positive and negative impacts on the procurement environment. Recommendations are given in an effort to minimize the negative impacts on the procurement process.

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INTRODUCTION

Governments procure thousands of products each year for use in delivering their programs and services. These 'government markets' represent a sizable portion of the overall market (i.e. public and private), and one which businesses around the world wish to supply.¹

Government procurement, however, is conducted within a framework of domestic laws, regulations, and policies, some of which permit the favouring of local businesses.

Therefore, foreign suppliers who want to compete in government markets other than their own often find themselves at a competitive disadvantage vis-a-vis local suppliers.

In an effort to level the playing field, suppliers lobby their governments to seek the removal of these trade barriers. Governments may then enter into trade agreements to create a single set of rules governing the procurement of all parties to the agreement, so as to provide their suppliers predictable, non-discriminatory access to the government markets of their trade partners.

While trade agreements are primarily commenced to improve market access, the rules they establish, and the implementation of those rules by domestic institutions can have a

¹The WTO estimates that government procurement typically represents 10-15% of Gross Domestic Product. DFAIT, 'Why is government procurement in international trade agreements important?' Free Trade Area of the Americas: Draft Chapter on Government Procurement: Frequently Asked Questions, 06 Dec. 2002, 9 Dec. 2002 <<http://www.dfait-maeci.gc.ca/tna-nac/GP-FAQ-en.asp>>.

facilitating or constraining influence on the procurement process. In other words, the additional layer of rules created to open up government markets may be more restrictive, or more permissive than domestic rules, thereby simplifying or complicating the procurement process.

While the impact on the procurement process may seem inconsequential so long as Canadian suppliers gain access to foreign government markets, it is not. Governments do not procure just for the sake of procuring. Governments procure because they need goods and services to carry out their policy and program objectives. For example, the Canadian Forces need uniforms, guns, vehicles, and many other items to carry out their mission in Afghanistan.

The above items need to be procured in a fair, efficient, timely and cost-effective manner. Fair, because suppliers deserve an equal chance to win business from the government, since the government represents all Canadians; efficient and timely because it does not help soldiers in Afghanistan if their sand colour uniforms arrive after they return back from their mission, and cost-effective because the government is using public money to buy the goods and services.

The purpose of this thesis then is to examine the evolution of the procurement provisions of various trade agreements which Canada has signed with a view to understanding the broad forces which shaped them. It utilizes an "ideas, interests, and institutions"

approach. This approach is not used to explain the content and shape of such agreements in any causal manner. Rather it is used to as a way of classifying and illustrating the role of these variables in an overall sense.

The thesis covers two broad time periods when agreements were negotiated and signed (1947 to 1991 and 1991-2000). These periods were selected for procurement-specific reasons rather than as periods requiring the broader political-economic histories of these times. For these agreements, the thesis uses the ideas-interests-institutions framework as an analytical aid, as indicated above, and as elaborated on later in the thesis.

As a further step or level in the analysis, the thesis also explores some of the impacts of liberalization and other ideas on the actual procurement process. This part of the analysis does not directly continue the ideas-interests-institutions approach per se but rather brings out some key issues regarding the experience with the resultant procurement processes. Since government is procuring with public money, it is in Canadians' interest to ensure that the procurement system is conducted as efficiently and effectively as possible.

The rationale for studying this topic is that government procurement is one of the last remaining areas of trade to be substantially liberalized.² At present, the number of trade

²By substantial, I mean that the majority of the World Trade Organization (WTO) members have yet to 'liberalize' their government procurement markets by signing onto the Agreement on Government Procurement (AGP) and that the countries who have signed on still have numerous exceptions and exemptions to the Agreement.

agreements covering government procurement is steadily increasing as governments face continuing pressure to open up their markets.³ By understanding how liberalization has impacted the federal procurement process, Canada can be in a better position to improve the government procurement chapters in future agreements, so as to maximize the benefits and minimize the drawbacks of liberalization on the procurement process.

This thesis will therefore make a significant contribution to the scant literature on government procurement and trade. Much of the existing literature is written from a strictly economic or legal perspective and appears in general texts on the agreements. In these, government procurement is either skimmed over, or the examination only consists of a listing of the articles appearing in the trade agreements, with very little analysis.⁴

Rarer still is literature on how the trade agreements have impacted the procurement process either in general or from a Canadian perspective.⁵ This thesis makes a

³This can already be seen in the WTO. Government procurement is no longer restricted to the AGP, but there are now ongoing discussions regarding an Agreement on Transparency in Government Procurement. Work is also being done in the General Agreement on Trade in Services to include government procurement.

⁴Murray G. Smith does not mention government procurement at all in his Chapter on '*The Free Trade Agreement In Context: A Canadian Perspective*,' in Jeffrey J. Schott and Murray G. Smith's (eds.) *The Canada-United States Free Trade Agreement: The Global Impact*, (Washington: Institute for International Economics, 1988). Michael J Trebilcock and Rambod Behboodi offer a bit of an analysis, but it amounts to one paragraph out of five pages on the Government Procurement Chapter in the Agreement on Internal Trade in '*The Canadian Agreement on Internal Trade*,' in Michael J Trebilcock and Daniel Schwanen's (eds.) *Getting There: An Assessment of the Agreement on Internal Trade* Policy Study 26, (Toronto: C.D. Howe Institute, 1995). The notable exception is *Law and Policy in Public Purchasing*, edited by Bernard Hoekman and Petros C. Mavroidis, (Ann Arbor: The University of Michigan Press, 1997) and the articles contained therein.

⁵Again the exception being '*Does Size Matter? Canadian Perspectives on the Development of Government Procurement Disciplines in North America*,' by Michael Hart and Pierre Sauvé in *Law and Policy in Public Purchasing*, pp.203-224.

contribution towards filling this research gap in that it is one of the first efforts to examine overall Canadian procurement agreements in an overarching sense. It outlines the historical context of government procurement liberalization in Canada through the use of the ideas, interests, and institutions approach as an initially useful analytical device.

The thesis will focus on the implications of Canada's trade agreements on the procurement process at the federal level. The provinces and territories are responsible for their own procurement and are not subject to existing international trade agreements and the tendering procedures contained therein.

Trade agreements use the terms Central Government, Sub-central government, other entities, entities and enterprises. In Canada these mean the following:

Central Government	=	Federal Government
Sub-central Government	=	Provincial Government
Other Entities	=	Municipal government, publicly funded institutions (Academic institutions, schools, social services, hospitals), and public utilities
Entities	=	Departments and Agencies
Enterprises	=	Crown Corporations

Methods

In the process of researching this thesis, three research methods were used to gain the best possible understanding of government procurement liberalization and its impacts on the procurement process. These included a literature review, a document review/textual analysis, and formal interviews. Multiple research methods were needed, because information on the impacts of government procurement liberalization in particular, was not well documented in secondary resources. Each of the research methods is expanded upon below.

The literature review encompassed works relating to government procurement and the trade agreements, neoliberalism, economic globalization, trade liberalization and the history of trade agreements covering government procurement that Canada is a Party to. These works established the overall theoretical and historical context for the discussion of government procurement and trade.

The document review/textual analysis included documents and web-sites from the World Trade Organization, the Department of Foreign Affairs and International Trade, and the Canadian International Trade Tribunal among others. It also included the legal texts of trade agreements covering government procurement that Canada is a Party to.

The formal interviews were semi-structured and were conducted with:

- (i) Contracting Officers, to gain their perception of how the trade agreements have impacted the federal government procurement process.

- (ii) Canadian negotiators, to explore Canada's negotiating goals for existing government procurement agreements.

Interviews were conducted in Ottawa (National Capital Area) on a not-for-attribution basis. The 10 officials interviewed were or are involved in procurement policy and implementation and in government procurement negotiations (names not to be listed).

Chapter outline

Chapter One provides a brief discussion of frameworks, and explains why an ideas, interests, and institutions framework was chosen for this thesis. It outlines each of the variables in the framework, and analyzes the benefits and limitations of an ideas, interests, and institutions framework.

Chapters Two and Three outline the historical context of government procurement liberalization and use the ideas, interests, and institutions framework as a classification device for understanding such liberalization. The Chapters then explore the subsequent pace and scope of such liberalization in Canada. Chapter Two addresses the road to liberalization from 1947-1991. Chapter Three looks at the successive rounds of liberalization from 1991-2001. It highlights how government procurement liberalization is being conducted in an increasingly complex policy environment as more interests and institutions become involved in the process.

Chapter Four assesses both the positive and negative impacts of government procurement liberalization on the federal procurement process. The ideas, interests and institutions framework is not used as a classification device in this final part of the thesis. Rather the analysis in this chapter tends to flow more from the inherent features of the agreements and the processes that result. Conclusions and Recommendations then follow.

CHAPTER ONE THEORETICAL FRAMEWORK

A framework is a useful tool in conducting research and analyzing material as it puts parameters around the scope of inquiry and identifies which pieces of information are important. A framework is descriptive in nature, specifying who motivates action, or change. It provides a basis of inquiry by establishing classes of variables and the relationship among them.⁶ The variables identified by a framework serve to “structure, constrain, guide, and influence the actions taken by actors.”⁷ A framework simplifies the complexity of public policy analysis and serves as a useful way to organize inquiry.

This thesis adopts an ideas, interests and institutions framework as an analytical aid in classifying and illustrating the role of these variables in an overall sense in understanding the gradual movement towards government procurement liberalization over the past 60 years. The framework is not used to explain the content and shape of such agreements in any causal manner. As a further step or level in the analysis, the thesis also explores some of the impacts of liberalization and other ideas on the actual procurement process. This part of the analysis does not directly continue the ideas, interests and institutions approach.⁸

This particular framework is an inductive framework in that it is based on observations

⁶Edella Schlager, ‘A Comparison of Frameworks, Theories, and Models of Policy Processes,’ in Paul A. Sabatier (ed.), *Theories of the Policy Process*, (Boulder: Westview Press, 1999), p.234.

⁷Hart and Sauvé, p.235.

⁸This thesis uses the terms ‘framework’ and ‘approach’ interchangeably.

about each of the three variables, as opposed to a deductive framework which starts with a set of assumptions and then applies those assumptions to specific variables.⁹ A framework, as opposed to a theory, was chosen for this thesis because it is better suited to classify and analyze the forces shaping government procurement liberalization and its pace and scope in Canada. An ideas, interests and institutions framework also brings out some key issues regarding Canada's experience with the resultant procurement processes.

This thesis is trying to account for the expansion of trade policy into the area of government procurement. An ideas, interests and institutions framework was chosen over international trade theory because the theory did not seem appropriate for this thesis as it was originally written to explain the benefits of trade in goods. Neoliberals have taken their interpretation of international trade theory and applied it to ever increasing areas of domestic policy, including government procurement. Neoliberalism, however, represents more of an approach to policy making as opposed to a theory and while the framework adopted accounts for neoliberal ideas, the thesis does not rely solely on neoliberalism to understand government procurement liberalization and its impacts on procurement.

Another drawback of the neoliberal approach is that while it predicts positive impacts for

⁹See Michael Howlett and M. Ramesh, Studying Public Policy: Policy Cycles and Policy Subsystems, (Toronto: Oxford University Press, 1995), p.18 and Doern, G.Bruce and Richard W. Phidd, Canadian Public Policy (2nd ed.), (Scarborough: Nelson Canada, 1992), p.3.

government procurement (e.g. more competition, lower bid prices, better products), it cannot account for the actual outcomes, particularly when the outcomes are different from the predictions. The neoliberal approach is also unable to shed light on the pace and scope of government procurement liberalization, and why Canada has had the particular experiences it has had, because in emphasizing economics, neoliberalism fails to adequately account for small 'p' politics.

Similarly this thesis is not concerned with procurement policy, so a theoretical discussion based on procurement policy would not be appropriate either. This is because such a discussion would lead to a topic like e-procurement which is outside the scope of this thesis.

Ideas, interests and institutions were chosen as the key variables because they help us to understand government procurement liberalization and because the variables bring out some key issues with respect to the impact of liberalization on the procurement process. More specifically, this thesis looks at the political and economic ideas, interests and institutions, as opposed to sociological or anthropological ones for example. Variables left out include technological factors, and to a lesser extent structure and processes. Government procurement itself can be considered a process, because it is a policy instrument governments use to achieve certain policy objectives. Other processes therefore, such as taxing and spending are not addressed.

While some areas of this thesis look at the variables individually, it is important to recognize that the variables interact dynamically with each other. Even in a discussion on interests, both ideas and institutions are present either implicitly or explicitly. This thesis also recognizes that institutions can create and internalize their own ideas rather than just be “the passive embodiment of ideas” as is generally assumed.¹⁰

The rest of this Chapter expands upon each of the three variables in the framework and explains how they influence the policy process. This is followed by a discussion on the benefits and limitations of the ideas, interests, and institutions framework.

Ideas

Ideas are a key variable in the framework as they provide insight into policy changes and impacts in at least five main ways. First, ideas shape our perception of what constitutes a problem, and therefore what needs to be addressed by policy. In other words, if a policy maker does not think 100 gun deaths a year is a problem, after all, many more people die from the common cold, then he or she will not pursue policies to tighten gun control.

Second, ideas limit the range of conceivable options available to policy makers by directing them in one direction as opposed to another, and by hiding other options from view. For example, if policy makers believe in the idea that citizens have a right to own

¹⁰Peter Trubowitz and Edward Rhodes, ‘*Explaining American Strategic Adjustment*,’ in Peter Trubowitz, Emily O. Goldman and Edward Rhodes (eds.), *The Politics of Strategic Adjustment: Ideas, Institutions and Interests*, (New York: Columbia University Press, 1999), p.18.

guns, then they will not even think of prohibiting the use of guns as a means of lowering the number of gun deaths in a year.

Third, ideas allow policy makers to assign value to one policy option over another, so even when policy makers see that there are four options available to help lower gun deaths, one will seem more attractive than the others. Fourth, ideas determine how policy makers will define and appraise “interests”, how they will evaluate costs and benefits, and ends and means. For example, spending hundreds of millions of dollars on a gun registry may seem reasonable, if the policy maker believes creating the registry will save more lives and that even one life saved is worth more than all the costs combined of developing and implementing the program.

Fifth, and finally, ideas help determine the level of cooperation and acceptance of a policy by various institutions and interests.¹¹ Continuing with the gun registry example, if the gun owners do not believe a registry will lower the rate of gun deaths in Canada, then they will be hesitant to register their guns. If the department responsible for implementing the gun registry also does not believe in the solution, then they will create delays in implementing the program.

Additionally, ideas are important to analyze and account for because policies cannot be

¹¹ All five ways come from Peter Trubowitz and Edward Rhodes, ‘*Explaining American Strategic Adjustment*,’ in Trubowitz, Goldman and Rhodes, (eds.), pp.16-20.

accounted for “simply on the basis of the societal interests that are engaged, or on the basis of institutional constraints on state action.”¹² Again, without ideas, the analyst will have an incomplete picture and understanding of why a policy is the way it is, or why it has had the impact that it has had. In this thesis, the concept of ‘ideas’ is used to encompass various levels of meaning (i.e. ideologies, paradigms and dominant ideas¹³).

Interests

Interests is a broadly encompassing term in that it can include almost anyone. In order to simplify and manage the study of interests, a common set of categories is generally used. In Canada, these usually include the Prime Minister, cabinet, bureaucracy, major interest groups (i.e. business associations and civil society organizations), provinces, the media and to a lesser extent Parliament, political parties and individual voters.¹⁴ This thesis will touch upon all of these categories, with the exception of the mass media.

The role of interests in the policy process is derived from several sources. These include, the Canadian Constitution, Canada’s legal framework, possession of knowledge or information, and of organizational and political resources. The success of interests in

¹²Ibid., p.16.

¹³Doern and Phidd in Canadian Public Policy (2nd ed.), (Scarborough: Nelson Canada, 1992) refer to ideologies as “an umbrella of belief and action that help provide political and social identity to its adherents and that serves to integrate and coordinate their views and actions on a wide range of political issues” (p.35); paradigms as “coherent conceptions of policy thought and action that become entrenched in particular policy fields” (p.xviii), and dominant ideas as something that “often have a separate force of their own in that, rather than being always grouped or combined into a larger ideological view, the ideas may be combined or used to embody a particular preference in a given policy field.” (P.38). This thesis adopts these definitions.

¹⁴See Howlett and Ramesh, p.52 and Doern and Phidd, Chapters 2, 5 and 6.

pursuing their goals can be related to the amount of resources they possess, as well as “the domestic and international institutional context in which they operate.”¹⁵

Interests are examined because they seek to influence policy development and implementation. This is often done “by advocating change or marshalling political action to prevent changes unfavourable to them, [and,] by providing information to and withholding it from government.”¹⁶ Interest groups can also help influence the success or failure of a policy by supporting, legitimating, and communicating government policies, or by demonstrating against a policy. Furthermore, policy options or the viability of specific options derive not only from ideas, but also from political, economic and bureaucratic interests.

When analyzing interests, two important things must be remembered. The first, is to recognize that interests are not monolithic or homogenous. Business interests, for example, can be fragmented among several dimensions (large or small, agriculture, industrial or knowledge based, foreign or domestically owned). The second, is to understand that interests can change over time and to address if, how and why particular interests may have changed.

Institutions

¹⁵Howlett and Ramesh, p.74.

¹⁶Doern and Phidd, p.28

This thesis uses the term 'institutions' broadly to refer to more than just bureaucratic organizations, but to include the trade agreements as well, as they too have an impact on the policy choices available to governments.¹⁷ The term is also meant to include domestic and international institutions, and governmental and non-governmental institutions as they also seek to define policy goals.¹⁸

Institutions represent a key variable in this framework for several reasons. First, institutions are an important determinant of a government's policy capacity.¹⁹ The strength, organization, interaction and nature of institutions can enable or constrain the policy options available to government and the degree of success or failure of the chosen policy solution. The structure of institutions also affects the policy capacity of governments. For example, the division of powers between the provinces and the federal government weakens Canada's policy capacity.²⁰

Second, it is important to recognize that institutions have their own interests and ideas. Not only do they compete with each other to shape and influence the policy process, but they are also competing against the interests mentioned above and against ideas.²¹ How institutions adapt to changing circumstances will also affect the success or failure of

¹⁷Howlett and Ramesh, p.74, Doern and Phidd, p.24.

¹⁸Trubowitz and Rhodes, 'Explaining American Strategic Adjustment,' in Trubowitz, Goldman and Rhodes, (eds.), p.12.

¹⁹Howlett and Ramesh, p.61.

²⁰Doern and Phidd, pp.23-24, 76 and Trubowitz and Rhodes, 'Explaining American Strategic Adjustment,' in Trubowitz, Goldman and Rhodes, (eds.), pp.11-12.

²¹Trubowitz and Rhodes, 'Explaining American Strategic Adjustment,' in Trubowitz, Goldman and Rhodes, (eds.), p.12 and 14.

policies.

Third, institutions affect how successful various interests will be in achieving their goals by shaping “the manner in which they interpret and pursue their interest”²², by influencing the “alliances that will form or emerge triumphant...and the channels that will be available for translating public opinion and particularistic interests into political pressure.”²³

Benefits of the Framework

An ideas, interests, and institutions framework is beneficial in that it allows for a more nuanced understanding of the policy making process, by not limiting the scope of inquiry to only one or two variables. This is important because often the three variables are inseparable, so a complete discussion must consider each of them.

Within an ideas, interests and institutions framework the analyst can give more consideration to factors influencing domestic politics such as political ideologies, structures, and societal interests, as opposed to just focussing on external factors that may limit policy choices.²⁴ This is particularly pertinent in today’s policy environment where the spheres of domestic and international politics and economics are intertwined more

²²Howlett and Ramesh, p.51 and 52.

²³Trubowitz and Rhodes, ‘*Explaining American Strategic Adjustment*,’ in Trubowitz, Goldman and Rhodes, (eds.) p.21.

²⁴Ibid., p.5.

than ever.

Another benefit of an ideas, interests and institutions framework, is that it allows us to classify and illustrate the role of these variables in an effort to understand government procurement liberalization and its resultant impacts on the procurement process. This is related to the greater number of variables taken into account and the holistic view of the variables taken by this thesis.

Limitations of the Framework

Being inductive in nature the framework is limited in that it is difficult to create a “fully integrated or unified set of theoretical propositions that can be applied to any case under consideration.”²⁵ In other words, it is unlikely that a general theory can be developed using an ideas, interests, and institutions framework as a base. Also, because it is a framework as opposed to a theory, cannot offer any predictions about what should happen given these three variables.

Another limitation is that a cause and effect relationship is difficult to completely and accurately establish, in part, because the variables have dynamic interactions with each other, influencing and being influenced by one another. There is also no natural order among the variables. For example, we cannot say that ideas are developed first and then interests and institutions coalesce around them.

²⁵Howlett and Ramesh, p.28.

The weighting given to each variable is also important; however, the framework does not establish pre-determined weights, but rather leaves this determination up to the analyst, depending on the policy being studied. Even if the same policy is being studied, analysts may arrive at different conclusions just by slightly emphasizing one variable more than another.²⁶ There is also a possibility that reality can be divided artificially in an effort to simplify it. This can happen by examining ideas, interests and institutions separately instead of together.

As a classification system, the framework suffers in that the three bases of classification are not logically clear and self-contained. For example, institutions can develop their own ideas²⁷, and often pursue their own interests, again marking the inseparability of each of the variables.

Summary

This thesis adopted an ideas, interests and institutions framework as an analytical aid in classifying and illustrating the role of these variables in an overall sense in understanding the gradual movement towards government procurement liberalization over the past 60 years. The framework was not used to explain the content and shape of such agreements

²⁶See The Politics of Strategic Adjustment: Ideas, Institutions and Interests by Peter Trubowitz, Emily O. Goldman, and Edward Rhodes, (eds.). Each author arrives at a different explanation of America's 1890's Naval policy depending on which variable they favoured.

²⁷For example, Edward A. Smith, Jr. article '*...From the Sea: The Process of Defining a New Role for Naval Forces in the post-Cold War World*,' in Peter Trubowitz, Emily O. Goldman and Edward Rhodes (eds.), The Politics of Strategic Adjustment: Ideas, Institutions and Interests, (New York: Columbia University Press, 1999) shows how the new ideas that were to shape the Navy came from within the Navy itself. pp. 267-304.

in any causal manner.

Ideas, interests and institutions were chosen as the key variables because they help us to understand government procurement liberalization and because the variables bring out some key issues with respect to the impact of liberalization on the procurement process. The neoliberal approach, while providing some insight, does not adequately account for politics in predicting or explaining the impact of liberalization on procurement. A theoretical discussion about procurement policy was also not appropriate as it would go beyond the scope of this thesis.

Each of the variables in an ideas, interests and institutions framework is important in classifying government procurement liberalization. The dynamic interaction of ideas, interests and institutions represents both a benefit of the framework, as it allows for a more nuanced understanding of government procurement liberalization, and a drawback, as it is difficult to delineate the variables and to establish a cause and effect relationship.

The next Chapter, while more detailed and historical, attempts to convey in an illustrative way, a sense of how ideas, interests and institutions evolved from initially rejecting government procurement liberalization, to accepting and pursuing it in a limited way.

Chapter Two - 1947-1991: From Rejection to Limited Acceptance

This Chapter and the following one provide the historical context surrounding government procurement liberalization from 1947-2001. It addresses and classifies, in an illustrative way, the ideas, interests, and institutions involved in influencing government procurement liberalization in the 1947-1991 period. Ideas, interests and institutions are not, however, used to explain the content and shape of the trade agreements addressed in this period in any causal manner.

This Chapter discusses why government procurement was originally rejected from inclusion in the International Trade Organization and subsequent General Agreement on Tariffs and Trade in 1947, and examines how changes in the economy and macro-economic thinking allowed for its acceptance by 1981. The Chapter then shows how and why Canada and the United States took steps to further liberalize their procurement markets amongst each other.

2.1 1947-1981

In 1947, government procurement was politically sensitive and too entrenched as a policy tool for socioeconomic development to enable meaningful liberalization at the time. Not until over 30 years later would developed countries be prepared to take the first concrete steps towards liberalization. Several changes to the world economy and in macro-economic thinking occurred during this period that made government procurement liberalization more politically palatable. These changes are explored below.

2.1.1 *Rejection at GATT (1947)*

In 1947, 23 countries signed the General Agreement on Tariffs and Trade (GATT). The GATT was originally supposed to operate under the framework of the International Trade Organization (ITO), which, along with the World Bank and the International Monetary Fund (IMF) would form the basis of the post-war economic order. These international institutions were created to ensure that the economic breakdown of the 1930s was not repeated. Although an agreement was reached in Havana, the ITO did not materialize due to the failure of the US Congress to ratify it, leaving GATT to evolve on its own.

During the negotiations to create an ITO, the US delegation submitted a 'Suggested Charter', Articles 8 and 9 of which subjected government procurement to the Most Favoured Nation (MFN) and National Treatment disciplines.²⁸ The Americans, recognizing the scope of government markets and the trade prohibiting effects of domestic procurement policies, argued that to leave government procurement out would result in a "large gap" in the Charter.²⁹

At the time, governments around the world had procurement policies in place that

²⁸MFN means that if one GATT country grants a trade concession to another GATT country, the concession automatically applies to all other GATT countries as well. National Treatment means that one Party's products, services and suppliers must be treated no less favourably than domestic products, services and suppliers or another Party's products, services and suppliers. (MFN definition from Charles Van Marrewijk, *International Trade & The World Economy*, (Oxford: Oxford University Press, 2002), p.223.)

²⁹Annet Blank, and Gabrielle Marceau, 'A History of Multilateral Negotiations on Procurement: From ITO to WTO,' in Bernard M. Hoekman and Petros C. Mavroidis (eds.), *Law and Policy in Public Purchasing* (Ann Arbor: The University of Michigan Press, 1997), p.31.

favoured local suppliers. Governments used procurement as a tool to build up their domestic economies and industries. By awarding contracts to local suppliers, governments could help establish a new industry, enhance domestic capabilities in existing industries or assist economically depressed areas in their countries.

Awarding contracts to local suppliers was also politically desirable as it ensured jobs and taxes stayed in country. As well, procurement was used by politicians to reward friends and supporters of the political party in power, and to ensure continued votes and political donations, hence the concern about the trade-prohibiting effects of such policies. Additionally, governments had unique and sensitive areas of procurement, such as security and defence, that could not be subjected to open competition.

During the very first discussions about including government procurement in the ITO Charter, familiar concerns were expressed about what the scope of such an Article should be. For example, delegates wanted to know at what level of government (central, provincial/state or local) and to what type of contracts (goods, services or public works) the Article would apply to.³⁰

Ultimately, Canada and other Members rejected the inclusion of government procurement in the ITO and the GATT for two primary reasons: First, it would require significant changes to domestic laws, regulations and policies, which at the time required

³⁰Ibid., pp.33-34.

governments to buy from domestic suppliers. Second, any potential agreement would have contained a long list of exceptions to it, to exclude buy-local programs, domestically sensitive areas and other preferential procurement practices, thereby rendering the agreement useless.³¹

In other words, it was not politically feasible at that time for governments to liberalize their procurement markets. While government procurement would not be addressed in the GATT forum for almost another 30 years, it was not completely forgotten, as discussions would be picked up again in the OECD.

2.1.2 Organization for Economic Cooperation and Development (OECD)

Efforts to liberalize government procurement did not take place for almost 15 years, until the debates were taken up within the OECD, of which Canada was a Member. In 1962, the OECD called upon their Members to “review their administrative and technical [procurement] regulations in order to eliminate those provisions which...hamper trade.”³²

In the same year, discriminatory procurement measures implemented by the United States were brought to the attention of the OECD Trade Committee. A study of government procurement procedures and preferences was therefore initiated in 1963, and its results were published in 1966. The study found “that practically all countries maintained

³¹Annet Blank, and Gabrielle Marceau, ‘*The History of the Government Procurement Negotiations Since 1945*,’ *Public Procurement Law Review*, 5, (1996), p.77 and Blank and Marceau, ‘*A History of Multilateral Negotiations on Procurement: From ITO to WTO*,’ p.51.

³²Blank and Marceau, ‘*A History of Multilateral Negotiations on Procurement: From ITO to WTO*,’ p.37.

“preference” policies of some kind, and that procurement practices varied widely.”³³

In conjunction with the above study, the OECD had established a working group on government procurement to draft guidelines on fair and non-discriminatory procurement procedures. These guidelines were published in 1967. The Americans wanted something more binding for governments and in 1969 “tabled a draft Procurement Guidelines [which was originally] to be used for heavy electrical equipment.”³⁴ This second set of guidelines soon formed the basis of negotiations among OECD Members to create more binding procedures which addressed both formal and procedural discrimination in government procurement.

By 1975 the negotiations were stalled over three major issues, namely scope, thresholds, and enforcement of an agreement, and in 1976, the OECD members decided to transmit the work they had completed to date (known as the Draft Instrument on Government Purchasing Policies, Procedures and Practices) to the GATT Sub-Committee on Government Procurement, whose negotiations had begun around this time.

Indeed, the GATT Sub-Committee on Government Procurement had been established in 1976 at the request of developing countries, who thought that government procurement represented potential trade opportunities and “provided scope for special and differential

³³Ibid., p.38.

³⁴Ibid., p.38.

treatment in their favor.”³⁵

The Sub-Committee used the OECD’s Draft Instrument on Government Purchasing Policies, Procedures and Practices as its starting point for negotiations. GATT seemed to be the right forum for negotiations as issues that had remained outstanding in the OECD (scope, thresholds, and enforcement of an agreement) were resolved relatively quickly within the Sub-Committee. Consensus was reached on an agreement in 1979, but the agreement would not formally come into effect for another two years.

The extent of the progress made in the OECD and GATT towards government procurement liberalization would not have been possible, however, without significant changes to the world economy and the ideas through which macro-economic policy was viewed. These changes will be examined below.

2.1.3 Changes in the World Economy

Major changes in the world economy and in the macro-economic paradigm through which the economy was viewed took place in the late-1970s, allowing government procurement liberalization to become more politically feasible.

Three interrelated factors—economic globalization, the resurgence of neoliberal perspectives with its emphasis on laissez faire markets, and the rise of non-tariff barriers

³⁵Blank and Marceau, *A History of Multilateral Negotiations on Procurement: From ITO to WTO*, p.40.

to trade—created the underlying conditions needed for Canada and other governments to support the inclusion of government procurement in the GATT and future trade agreements.

Economic Globalization, Multinational Corporations, and the Internationalization of Domestic Policy

Economic globalization refers to the liberalization and interconnection of production networks, financial markets and goods and services markets, made possible through advances in technology, particularly in the transportation and telecommunications sectors.³⁶

Economic globalization provided the conditions needed for the growth of Multinational Corporations (MNCs), who since the 1970s have re-oriented themselves by investing in “low wage countries” in order to re-export goods back to their home markets, or to third country markets. Prior to that time, ‘multinational’ companies tended to invest in foreign countries primarily through branch plant operations which served the local market.

The above reorientation had two interrelated effects. First, it expanded the meaning of market access which, in turn, shifted the MNCs’ focus from tariff to non-tariff barriers (the second effect).³⁷ Whereas the idea of market access during the first 30 years of

³⁶See David Held, et al., Global Transformations: Politics, Economics and Culture, (Stanford: Stanford University Press, 1999), pp.175-76.

³⁷Non-tariff barriers will be discussed more further on in this sub-section.

GATT was generally understood to mean access to the goods market of other countries, the idea in the past 30 years has come to encompass areas related to productive investment, such as government procurement, services, investment and intellectual property.

The term 'internationally contestable markets' has been coined to reflect this broader idea of market access. It refers to creating market conditions where the competitive process is central and where public or private actions that interfere with this process are limited or circumscribed. In other words, the idea refers to markets in which foreign competitors "compete on terms equal or comparable to those enjoyed by local competitors."³⁸

Whereas MNCs once urged their host countries to provide high tariffs and other measures to protect their "foreign investments" from undue competition, they were now seeking unrestricted access to these foreign markets.

The adoption of this broader idea of market access means that MNCs are now "interested in a much wider range of policy issues than the regulations specifically applying to their products;"³⁹ issues which were traditionally thought to be beyond the scope of trade agreements. For example, because MNCs operate in several foreign markets and are subject to various national policies, it is in their interests to seek convergence of domestic

³⁸Pierre Sauvé and J. Christopher Thomas, 'Towards Internationally Contestable Markets: Trade Policy's Efficiency-Enhancing Response to Globalization?' in Fen Osler Hampson, Michael Hart, and Martin Rudner (eds.), Canada Among Nation 1999: A Big League Player? (Don Mills: Oxford University Press, 1999), p.101.

³⁹Colin Leys, Market-driven Politics: Neoliberal Democracy and the Public Interest, (London: Verso, 2001), p.24.

policies “on the grounds of practicality, economic efficiency and fairness.”⁴⁰

The net effect of convergence has been the ‘internationalization’ of domestic policies or in other words, the adjustment of national policies to meet the requirements of the world economy of international production. Policies now appear to be defined from the perspective of the needs and desires of the MNCs, as opposed to those of the national interest.⁴¹

Non-Tariff Barriers

When trade policy started to be discussed from the perspective of MNCs, a number of ‘domestic’ policies came to be viewed as non-tariff barriers to trade.⁴² Although six rounds of trade negotiations occurred under the GATT by the 1970's, the focus of each round was to eliminate tariff barriers. As tariff barriers were lowered it became evident that there were other things obstructing the free flow of trade.

Indeed, while governments were removing tariff barriers, they were creating in their place several non-tariff barriers as a way to protect, or promote, local interests and non-economic objectives. Non-tariff barriers to trade can, among other things, take the form of subsidies, voluntary export restraints, or ‘preferential’/‘discriminatory’ government

⁴⁰Geza Feketekuty, The New Trade Agenda, Occasional Papers 40, (Washington: Group of Thirty, 1992), p.4.

⁴¹MNCs would argue that policies designed to meet their needs would also maximize national welfare. While it is possible that the interests of MNCs and the national interest may sometimes coincide, this is not always the case.

⁴²One definition of non-tariff barriers is “any government measure that distorts the volume, composition or direction of trade.” Held et al., pp.164-165.

procurement practices.

Non-tariff barriers act as a more informal and indirect barrier to trade, as they are linked to “domestic regulations and laws governing competition in different countries,”⁴³ and are not applied directly at the border, like tariffs are. These ‘internal’ practices often have the optics of giving competitive advantage to domestic firms and of acting as potential barriers to trade to foreign firms.⁴⁴ Firms wishing to supply foreign government markets therefore, pressure their governments to seek the removal of these barriers.

The Rise of Neoliberalism

Along with changes to the world economy came changes in macroeconomic thinking. Macroeconomic policies had been viewed by governments, in Canada and other developed countries, primarily through a Keynesian lens during most of this period. These macro-economic policies, which had been so successful in the 1950s and 1960s, began to fail in the 1970s, as economies around the world succumbed to stagnation, inflation and unemployment. As a result, the stage was set for the return of the neoliberal approach, which had been out of vogue since the end of the 1920s, to real world policy debates. Indeed, the new macroeconomic paradigm would soon be adopted by the United Kingdom, the United States, Canada and others.

The new orthodoxy that emerged claimed that only through unrestricted markets could

⁴³Held et al., p.176.

⁴⁴Ibid., p.176.

economic efficiency and economic growth be achieved. With its emphasis on supply-side economics, open markets and small government, neoliberalism seemed to provide the answer to all the woes of the time. Neoliberals placed a premium on the market and argued that when left to its own devices, the market would allocate resources in the most efficient way, thereby increasing the welfare of society by making sure that everyone got what they wanted or needed.

Neoliberals soon began to apply their interpretation of classical economic theory to ever increasing areas of domestic policy, including government procurement. Neoliberals argued that government procurement should be liberalized on the grounds that open markets will lead to more competition, a greater variety of products from which government departments can choose, lower prices and hence, a better deal for the government and the 'taxpayer'. Neoliberals also argued that further specialization and greater efficiency in the economy could be achieved through increased access to foreign government markets by Canadian suppliers and through the economies of scale that such access creates.

Additionally, neoliberals argued that by subjecting procurement to the 'arms length rules' embedded in modern trade agreements, the scope for corrupt practices would be reduced by increasing transparency and fairness in the procurement process. At the same time, adhesion to these rules would give suppliers more rights and would protect them from costs incurred due to arbitrary political decisions, or policy reversals.

While not everyone bought into these ideas, the Canadian government, to a certain extent, did. The government's belief in neoliberal ideas, the changes in the world economy, and the increasing barriers Canadian suppliers faced in foreign government markets, in conjunction with other factors examined below, allowed it to take its first cautious steps towards liberalizing the federal procurement market.

2.2 *1981-1991*

Small but historic changes were made during this period as the idea of government procurement liberalization slowly became more palatable to Canadian and foreign governments (mostly developed countries). While governments and MNCs remained the primary interests to pursue liberalization, new institutions directly related to government procurement liberalization, (including the trade agreements), were created, which entrenched government procurement liberalization in Canada.

2.2.1 *Interests*

The Canadian and selected foreign governments represented the key interests to pursue liberalization. Since government procurement liberalization was new, and the impact of liberalization unknown, governments initially took a fairly cautious approach towards liberalization. The next section explores, in general, the political and economic reasons Canadian and foreign governments had for pursuing liberalization. It also briefly touches upon the interests of business and civil society, which were initially not well developed.

Canadian Government

The political and economic reasons for the Canadian government to pursue government procurement liberalization, as well as its reasons for limiting the extent of liberalization, are examined in turn below.

The Canadian government came to support the idea of some government procurement liberalization, for six main reasons. First, the government subscribed to the idea that trade increases economic growth and prosperity. In other words, the federal government accepted the arguments of international trade theory, which states that world income will be maximized when countries specialize in areas in which they have a comparative advantage and trade with others for items to which they do not have such a comparative advantage.⁴⁵ Liberalizing procurement, it was thought, would lead to further specialization and efficiency in the global and individual economy's, which in turn, would translate into increased prosperity for citizens.

Second, the Canadian economy has historically been dependent on accessing foreign markets. This is due to the limited size of domestic markets (both the labour market and the goods and service market). Canada, as a result, has maintained a relatively open

⁴⁵The comparative advantage argument goes as follows: Canada and the United States produce two goods—lumber and wheat—Canada can produce each of these more efficiently than the United States. However, as long as Canada's advantage in one commodity is comparatively greater than its advantage in the other (e.g. Canada is 60% more efficient in lumber and only 30% more efficient in wheat) it can still trade with the United States to the benefit of both. This is because if Canada were to move its working force and capital out of wheat production into lumber, and if the United States were to move its labor force and capital from wheat to lumber, the combined production of the two nations would be higher than it was formerly. (Robert Heilbroner, *Teachings from the Worldly Philosophy*, New York: W.W. Norton & Company, 1996, pp.27-28.)

economy and the government applied the same logic to support the liberalization of its markets. In other words, for Canadian suppliers to gain access to foreign government markets, the Canadian government market must be liberalized or opened in return.

Third, government was more prepared to give up some of its ability to use procurement to achieve socioeconomic objectives because some economic studies had shown that directed government procurement was frequently misguided and inefficient, often having the opposite primary effect of the one desired, along with undesirable side effects.⁴⁶

Industries sustained by government procurement, some economists argued, are not as innovative and cost-conscious and become less competitive in the long run. This in turn lessened the value that government received from public money, resulting in a higher tax burden and reduced national welfare.⁴⁷ Economists also argued that the government had other policies at its disposal to achieve strategic or socioeconomic benefits that were more appropriate and would be more successful than using government procurement to attain such goals.⁴⁸

⁴⁶Richard G. Lipsey, Daniel Schwanen, Ronald J. Wonnacott, The NAFTA: What's In, What's Out, What's Next, Policy Study 21, (Toronto: C.D. Howe Institute, 1994), p.91.

⁴⁷*Ibid.*, p.92.

⁴⁸Anne O. Krueger (ed.), The Political Economy of Trade Protection, (Chicago: University of Chicago Press, 1996), p.1, footnote 1. On the other hand, economists have also argued that discriminating against foreign bidders may be welfare improving *if* domestic firms are at a competitive disadvantage in certain areas...and only a limited number of firms bid for a contract....[In that case,] a policy that gives preferences to domestic firms may then induce foreign firms to lower their bids by the extent of the preference margin. If so, procurement favouritism will increase national welfare. (Italics in original) Bernard Hoekman, 'Using International Institutions to Improve Public Procurement,' The World Bank Research Observer, vol.13, no.2, (August 1998), p.253.

Fourth, a successful Canadian economy and successful Canadian businesses often translate into success at the polls for the political party who is perceived to have created the positive business environment and to have implemented policies which stimulated the economy (whether they actually did or not). If liberalizing government procurement helps improve the efficiency and success of the economy, politicians will liberalize procurement in the hopes of being rewarded at election time.

Fifth, the federal government was facing intense political pressure from multinational corporations and export-oriented businesses to pursue government procurement liberalization and it would have been too politically costly for them to ignore this part of the business community indefinitely. On top of the economic benefits these businesses create, they are also large contributors to all political parties in Canada, and particularly to the political party in power.

The individuals that make up internationally competitive businesses are also voters and may vote on the basis of what the government has done to help further the position of their companies (such as negotiate trade agreements that open up market opportunities). As well, it is in the government's self-interest to ensure Canadian businesses are prospering, because that in turn leads to an increase in tax revenue which the government can put towards social programs to ensure the social health of Canada.

Sixth, the Canadian government faces political pressure from foreign governments who

are seeking the removal of discriminatory barriers on their suppliers behalf. Foreign suppliers have the same economic interest in competing for government contracts in other markets as do Canadian suppliers; so foreign governments lobby the Canadian government to engage in trade negotiations on government procurement.

The federal government, however, also has several reasons for wanting to limit the scope of liberalization. First, the government has an interest in retaining the ability to use procurement to reward friends and supporters. Awarding contracts to political supporters is more difficult to do in a transparent environment that trade agreements seek to create.

Second, the federal government has an interest in liberalizing its markets at a similar pace to that of its trading partners. The market access element of trade agreements are usually based on the concept of a 'balance-of-concessions', so if a country is not prepared to open their government procurement markets, or an aspect of those markets, to Canadian suppliers, then Canada will not open its government procurement markets to those foreign suppliers.

Third, the government also has to consider various interests (business, civil society, Canadians) who are seeking to limit the extent of liberalization as they too have political power that politicians cannot necessarily ignore. For example, Canadians have domestic sensitivities around particular areas such as culture and health. They are afraid that if these particular areas are liberalized, Canadian culture will disappear into the

overwhelming American culture, or that Canada will not be able to protect its decision to maintain a public health care system. These sensitivities are not specific to government procurement but apply to market access in general.

Fourth, the structure of government in Canada (i.e. division of powers between federal and provincial governments) acts as a limiting factor on government procurement liberalization. Historically, each jurisdiction has had control over their own procurement,⁴⁹ meaning the federal government could not unilaterally liberalize areas of provincial responsibility, or at least it would be politically difficult to do so.

During this decade, however, Canadian and foreign governments had little interest in liberalizing the procurement markets of other levels of government. Since experience with government procurement liberalization was limited, and the impacts of liberalization were largely unknown, the scope of the trade agreements was restricted to the central or federal levels of government at this early point. Provinces themselves had little interest in government procurement liberalization as they too had preferential procurement policies in place to build up provincial economies.

Fifth, the government wants to retain some ability to use procurement as a socioeconomic tool. Often, government procurement programs or policies are in place to assist in achieving socioeconomic goals such as promoting small and minority businesses,

⁴⁹G. Bruce Doern, and Mark MacDonald, Free-Trade Federalism: Negotiating the Canadian Agreement on Internal Trade, (Toronto: University of Toronto Press, 1999), p.88.

encouraging industrial development and technology transfer, developing infant industries, among other things. Including government procurement in the trade agreements would limit the ability of government to use its procurement in such strategic ways because it would be considered discriminatory and therefore, incompatible with the principles of the trade agreements.

Federal Political Parties

With respect to the positions of various political parties at the federal level, the Liberal and Conservative governments understood both the economic and political rationales for liberalizing government procurement and both parties have initiated trade talks that included government procurement while in power. For example, Trudeau's Liberals were in power during the negotiation and implementation of the GATT Procurement Code, whereas, it was Mulroney's Conservatives who led the negotiations of a Canada-United States Free Trade Agreement, which included a chapter on government procurement. The New Democratic Party was opposed to trade agreements in general, fearing the loss of national sovereignty, however, they had little power to influence the policy process.

Cabinet and Parliament

In terms of the actual role Cabinet and Parliament play in the government procurement liberalization process, the federal Cabinet initiates negotiations by establishing the mandate within which negotiators must work. The mandate lays out the broad scope of negotiations and it is within this mandate that the federal government determines

generally what is politically feasible to liberalize and what is not. Individual ministers may have a hand in concluding trade negotiations where negotiators are unable to do so. Parliament as a whole gives effect to the trade agreements by passing them into law.

Foreign Governments

Foreign governments have an interest in expanding the scope of Canadian government procurement liberalization so that their suppliers can compete for an increasing amount of Canadian government procurement and so that their economies can capture the benefits to be gained by liberalization. Foreign governments attempt to influence the Canadian government through discussions between political leaders, ambassadors, and/or negotiators at various international fora.

While some governments are keen to pursue government procurement liberalization, there are many other governments who have little interest in pursuing liberalization for reasons (legitimate or otherwise) detailed below. This in turn, serves to limit the extent of government procurement liberalization in Canada.

First, governments may, as a matter of domestic policy, maintain open government procurement markets, and therefore see no need to sign a formal trade agreement that seeks to achieve a similar goal.⁵⁰ If the theoretical benefits of liberalization materialize

⁵⁰If a country has an open door policy, then signing a trade agreement may, in fact, be trade restricting, as the benefits of the trade agreement accrue only to the signatories. Therefore, a non-signatory, who used to have access to this country's market, may find that it no longer has access resulting in less liberalization.

in the real world, then governments may, on their own accord, open up their markets in order to realize such benefits.

Second, foreign governments may, like the Canadian government, want to retain the ability to use procurement as a domestic socioeconomic policy instrument by, for example, retaining the ability to use offsets⁵¹ in procurement. As in Canada, each country is also bound to have its areas of domestic sensitivities, or areas, which due to vested interests, are politically difficult to liberalize.

Third, foreign governments may be corrupt (although this can also be true of Canada), and may use procurement to benefit friends, family and supporters. In such cases, liberalization, particularly through trade agreements, is not desirable due to the transparency, non-discrimination, and accountability obligations that form the basis of such agreements.

Fourth, governments, particularly those of smaller economies, may find trade agreements too prescriptive and difficult to understand, and too costly to implement. Finally, governments may not see a benefit for their domestic suppliers in signing an agreement, because, for example, their suppliers may not be able to compete above the high thresholds set in some trade agreements. Such was the case with the original GATT

⁵¹Offsets are conditions in a procurement that seek to encourage local development or improve a governments balance-of-payments accounts, through means such as requiring the use of domestic content, domestic suppliers, the licensing of technology, investment, counter-trade and similar actions.

Code, where developing countries declined to sign the agreement, even though they participated in its negotiation, due to high thresholds.

While the above list is not exhaustive, it does provide some insight into and understanding of, the apprehensions governments around the world have in liberalizing their procurement markets.

Canadian Businesses and Civil Society

During this decade the main priority of internationally competitive Canadian businesses was to gain more predictable and secure access to the American market. This was particularly true after the GATT Code came into effect, and Canadian businesses realized the Code had not really succeeded in providing significant access to the American market.

Trade agreements were the preferred method of liberalization by internationally competitive businesses because they institutionalize a particular policy direction, and bind current and future governments to that policy. In other words, trade agreements limit the policy options available to governments.

The extent of outright opposition by parts of the Canadian business community during this decade is not known, as the degree of liberalization during this period was limited. It is probably safe to speculate that there would have been opposition to government

procurement liberalization from domestically oriented, or non-competitive business sectors.

Civil society was not particularly active in the area of government procurement in this decade either because the trade liberalization process itself was a fairly closed process. Trade negotiations were perceived as a technical issue, dealt with by professionals, and conducted above politics. This started to change with the Canada-US Free Trade Agreement, when many civil society organizations became active in expressing their disagreement with the pending Free Trade Agreement, primarily on the basis that it posed a threat to national sovereignty.

2.2.2 Institutions

The institutions created in this decade as a result of government procurement liberalization include the GATT Code, the Canada-United States Free Trade Agreement and the Procurement Review Board. Together, these institutions served to internalize and entrench government procurement liberalization in Canada.

Tokyo Round Agreement on Government Procurement

The Tokyo Round Agreement on Government Procurement (known as the GATT Procurement Code) represented the first trade agreement on government procurement in the world, as well as the first agreement, among many, that Canada would be a signatory to. It came into effect in 1981 and had 21 signatories. The agreement's two overarching

goals were to remove discrimination from the procurement system (although the Code still allowed the use of offsets and contained general exceptions), and to improve transparency of procurement procedures.

The GATT Procurement Code covered goods purchased by listed entities of the Central Governments for contracts above 150 000 Special Drawing Rights (SDRs) or C\$238,000.⁵² The agreement also established the basic outline of future government procurement agreements - scope and coverage; national treatment and non-discrimination; tendering procedures; submission, receipt and opening of tenders and awarding of contracts; transparency; dispute settlement and exceptions to the agreement.

As mentioned, much of groundwork for the GATT Procurement Code had already been laid among members of the OECD and was then transferred to the GATT Sub-Committee on Government Procurement. This draft instrument provided a starting point and framed the discussion for the GATT negotiations.⁵³

While there had been some debate as to where the government procurement issue should be resolved (e.g. the OECD or the GATT), “the United States and Canada, both motivated by perceived export interests, supported the move to the Tokyo Round [from the OECD] on the ground that the larger negotiating forum would provide greater

⁵²The threshold was lowered to 130 000 SDRs or C\$213,000 in the 1988 Amendment to the Agreement.

⁵³Leslie Alan Glick, Multilateral Trade Negotiations: World Trade After the Tokyo Round, (New Jersey: Rowman & Allanheld, 1984), p.18.

opportunities for tradeoffs and eventual settlement.”⁵⁴

Some of the issues under discussion were: thresholds—which would determine when the agreement would apply; non-discrimination; transparency; and dispute settlement.

Transparency and non-discrimination went hand in hand, because once practices and policies became open to public disclosure and scrutiny, it was hard to retain discriminatory measures.⁵⁵ Two specific goals of the Canadian negotiators—low thresholds and allowance for the use of offsets—are documented in secondary resources, though it is highly probable that negotiators had additional goals.⁵⁶

From the text of the agreement, it appears that Canadian negotiators were successful in achieving their specific objectives. They backed the developing countries position in seeking to retain the use of offsets in contracts, which was originally to be prohibited by the agreement. Canada used many offsets in foreign investment to support local development and wanted to retain the ability to use them even in procurement covered by the trade agreement.⁵⁷

Canadian negotiators also sought to enshrine a relatively low threshold in the agreement so that Canadian suppliers could gain greater access to foreign markets. This was

⁵⁴Gilbert R. Winham, *International Trade and the Tokyo Round Negotiation*, (Princeton: Princeton University Press, 1986), p.189.

⁵⁵Glick, pp.29, 65.

⁵⁶Since the actual negotiations of the GATT Code occurred over 30 years ago, it is difficult to gain access to primary resources, such as the actual negotiators, to piece together what all the Canadian goals were.

⁵⁷Winham, p.230.

consistent with the American position and together with the Japanese, the Canadians and Americans were able to convince the European Community to accept the lower threshold of 150,000 SDRs.⁵⁸ In this instance, Canada was able to achieve its goal because a number of major players were also seeking the same goal.

The GATT Code was amended in 1988 to strengthen obligations relating to transparency, non-discrimination and compliance. As well, the threshold was lowered from 150 000 SDRs to 130 000 SDRs or C\$213,000 and coverage was extended to include leasing contracts.⁵⁹ Almost immediately, parties entered into negotiations again to expand coverage of the agreement and make further changes to the text. The US, however, soon became frustrated with the pace of negotiations and sought a more extensive agreement in the context of the Canada-United States Free Trade Agreement, discussed below.

Canada-United States Free Trade Agreement - Chapter 13

The Canada-United States Free Trade Agreement (FTA) came into effect in 1989. It was initiated in Canada, by Brian Mulroney's Conservatives, and had the support of seven provinces.⁶⁰ Mulroney established a separate Trade Negotiator's Office to conduct the Canada-US negotiations, whereas prior to this trade policy had first resided in the Department of Industry, Trade and Commerce and then, from 1982, in the Department of

⁵⁸Winham, p.232.

⁵⁹Blank and Marceau, 'A History of Multilateral Negotiations on Procurement: From ITO to WTO,' pp.44-45.

⁶⁰Doern and Phidd, p.23. Brian Mulroney was well known for his pro-Americanism and his policies reflect his desire to move Canada closer to the United States.

External Affairs.⁶¹

Chapter 13 of the FTA dealt with government procurement. In the end, the Chapter represented only a slight improvement over the GATT Procurement Code. In fact, the Chapter essentially incorporated the GATT Procurement Code, with a few modifications and supplementary obligations.

Coverage in terms of entities and goods was the same as in the GATT Procurement Code, only the threshold was lowered to US\$25,000 or C\$33,000. Besides a dramatically lower threshold, the other major improvement over the Code was the introduction of a bid challenge mechanism for aggrieved suppliers. In Canada, the bid-challenge obligation was met through the creation of the Procurement Review Board.

The Canadian negotiating objectives, as documented in secondary sources, were to limit the effect of the U.S. *Buy American Act* and the small business set-aside program on Canadian suppliers, and to secure guaranteed market access to the American government market in an open and competitive environment.

Canadian negotiators sought to achieve the above objectives through negotiating a comprehensive government procurement chapter, which would provide for a completely

⁶¹Ibid., p.24.

open procurement market.⁶² Indeed, “Canada took the view that within an FTA it should be possible to go much further and place government procurement between the partners on a fully competitive basis as far as North American suppliers were concerned.”⁶³

Canadian negotiators were somewhat successful in achieving the first objective in that for procurement covered by the trade agreement, Canadian goods were to be treated no differently than American goods under the Buy American policy.⁶⁴ The Canadian negotiators were only successful in opening up the American government market to the extent of the lower thresholds. No new entities, levels of government or other categories of purchases (e.g. services, construction) were introduced in the FTA.

Canadian objectives with respect to a completely open and transparent procurement environment also met with dismal results, although some ground was gained in increasing “transparency in all phases of the bidding system”, and in providing “effective provisions to allow bidders alleging a breach of the agreement to challenge contract awards and obtain redress.”⁶⁵

The primary reason Canadian negotiators achieved limited success in this area was because their objectives were politically unacceptable in the United States. Domestic

⁶² See Hart and Sauve, p.210 for more detail about what a comprehensive procurement agreement would entail.

⁶³ Ibid., pp.207-208.

⁶⁴ Canada, The Canada-U.S. Free Trade Agreement and Government Procurement: An Assessment, (Ottawa: Department of Supply Services, 1989), p.7.

⁶⁵ Hart and Sauve, p.210.

politics there “precluded acceptance of the logic of a comprehensive approach.”⁶⁶ One might also question whether or not it would have been politically acceptable in Canada, considering the provinces would have had to have been in agreement as well.

Hart, in his Paper ‘*The Future on the Table: The Continuing Negotiating Agenda under the Canada-United States Free Trade Agreement*’ details four additional reasons why government procurement has been so difficult to liberalize, particularly between Canada and the United States. Briefly, they are: 1) the forms of discrimination differ, making it hard to negotiate reductions in different types of barriers; 2) the large disparity between economies is more acute in the government procurement market because it is perceived to be a finite market; 3) the US is less import dependent, eroding the perceived benefit of a government procurement agreement to them; and, 4) cooperation is needed from the provinces and states, which, as mentioned, would be particularly challenging for Canada.⁶⁷

Procurement Review Board

The Procurement Review Board (PRB) was created to fulfill Canada’s obligation in respect of Article 1305(3) of the FTA. The PRB was responsible for receiving, investigating and making determinations on complaints by suppliers with respect to trade-

⁶⁶Ibid., p.210.

⁶⁷Michael Hart, ‘*The Future on the Table: The Continuing Negotiating Agenda under the Canada-United States Free Trade Agreement*,’ Occasional Papers in International Trade Law and Policy no.11, (Ottawa: Centre for Trade Policy and Law, The Norman Paterson School of International Affairs, Carleton University, Faculty of Law, University of Ottawa, 1992), pp.18-19.

covered procurement. In making a determination, the PRB could recommend that bids be re-evaluated, that the procurement be re-tendered or that the contract be terminated. It could also issue recommendations to contracting authorities regarding changes to procurement procedures.⁶⁸

The PRBs scope was relatively limited because the trade agreement itself was limited to contracts for goods. In its six years of operation it investigated 146 complaints.⁶⁹ In some cases, where the complaint was valid, the Board awarded the complainant costs for the complaint and/or bid preparation.⁷⁰

The PRB had quite an impact on government departments, particularly the Department of Supply Services, which was responsible for procuring goods on behalf of government departments. Procurement officers were now more accountable for how they carried out procurement, and had to ensure that the procurement process complied with the obligations in the trade agreements. The officers and department had to get used to a new way of procuring (i.e. procuring in accordance with the FTA) and to an external authority reviewing their work and pointing out deficiencies in it.

Summary

⁶⁸See Annex 1305.3 of the Canada-United States Free Trade Agreement. 23 Nov. 2003 <<http://www.dfait-maeci.gc.ca/tna-nac/documents/cusfta-e.pdf>>.

⁶⁹Canadian International Trade Tribunal (CITT). Procurement: Determinations: List of Determinations (Ottawa: CITT, 1989-1994), 21 Nov. 2003 <http://www.citt.gc.ca/procure/determin/prin94_e.asp#94>.

⁷⁰Gerald A. Berger, SWEEPRITE MFG. INC. Board File Nos: G92PRF66K-021-0005 and G92PRF66K-021-0006, (Ottawa: Procurement Review Board, 1992), 23 Nov. 2003 <http://www.citt.gc.ca/procure/determin/pr92005_e.asp#18>.

This Chapter addressed and classified, in an illustrative way, the ideas, interests, and institutions involved in influencing government procurement liberalization in the 1947-1991 period. Ideas, interests and institutions were not, however, used to explain the content and shape of the trade agreements addressed in this period in any causal manner.

The Chapter discussed why government procurement was originally rejected from inclusion in the International Trade Organization and subsequent General Agreement on Tariffs and Trade in 1947, and examined how changes in the economy and in macro-economic thinking allowed for its acceptance by 1981. It then showed how and why Canada and the United States took steps to further liberalize their procurement markets amongst each other. The following Chapter continues the story by illustrating the role of ideas, interests and institutions throughout the 1991-2001 period.

Chapter Three - 1991-2001: Successive Rounds of Liberalization

The idea of government procurement liberalization came into its own during this decade as Canada joined four new trade agreements that included government procurement. This decade was also witness to an increase in the number of interests and institutions involved in the government procurement liberalization process, reflecting the changing environment in which liberalization was taking place.⁷¹

3.1 *Interests*

Between 1991-2001, the trade policy process in general became more politicized. Whereas in the past little attention had been paid by civil society to the trade negotiation process, by the end of the decade the exact opposite was true. While the focus was not so much on government procurement per se, it became caught up in overall opposition to trade agreements. Canadian businesses also became more vocal during this time in articulating their support for government procurement liberalization. Other new players to the process included Canadian provinces and territories.

3.1.1 *Federal Government*

The federal government continued to have an interest in pursuing incremental government procurement liberalization, for the same reasons highlighted in the previous Chapter. The federal government became more bold in the extent of liberalization it was willing to undertake during this period, pursuing liberalization both internally,

⁷¹This section addresses completed trade agreements only.

continentally and plurilaterally. Their specific interests in each of the agreements will be expanded upon in the section on the trade agreements.

With respect to liberalizing internal barriers, the federal government was politically motivated by the desire for a unified market.⁷² It also made economic sense to push for internal open government markets because the same benefits would accrue internally as they had externally — business capabilities would build up, they would become more interested in foreign markets, and would become more competitive in those markets.⁷³

With respect to political parties the Liberals, Conservatives and Reform/Canadian Alliance Parties were supportive of the trade liberalization agenda while the New Democratic Party and Bloc Québécois were less supportive due to their concern with labour, environment, democratic and poverty issues and their links to trade.⁷⁴ The Parties had similar positions in relation to government procurement.

3.1.2 Provinces and Territories

Provincial and territorial governments (hereinafter references to provinces or provincial interests will include the territories) have been more resistant than the federal government

⁷²Personal Interview, Ottawa, November 8, 2002.

⁷³Personal Interview, Ottawa, October 30, 2002.

⁷⁴See for example, the dissenting opinions of the Bloc Québécois and the New Democratic Party to the Canada, Parliament, House of Commons, Standing Committee on Foreign Affairs and International Trade Report, Partners in North America: Advancing Canada's Relations with the United States and Mexico, (Ottawa: House of Commons, December, 2002), 16 Oct. 2003 <<http://www.parl.gc.ca/InfoComDoc/37/2/FAIT/Studies/Reports/faitrp03-e.htm>>. The Green Party of Canada, Canadian Action Party and the Communist Party of Canada are also opposed to free trade. These parties are more supportive of "fair trade" practices.

to procurement liberalization, particularly at the international level because the provincial community views “procurement much more as policy instruments for regional and economic development than as trade policy.”⁷⁵

Provincial governments also have practical reasons for resisting liberalization: they do not want to change how they conduct procurement, and international trade agreements often contain overly prescriptive rules that can be difficult and costly to implement. The provinces have been witness to the difficulties the federal government has experienced in liberalizing its procurement market, and have little desire to go through the same thing.⁷⁶

Shifting to a trade policy paradigm in procurement at the provincial level also requires a change in mind-set/culture at the political level and within the bureaucracy. Trade represents a whole new area of specialization that provincial governments would have to develop, although they have already begun to develop such an expertise through negotiating the internal trade agreement and through continuing consultations with the federal government on international trade agreements.

Another reason provinces have been resistant to liberalizing their procurement markets internationally is because they want stronger guarantees from the US that Canadian suppliers will not be discriminated against. The provinces are unwilling to change their

⁷⁵Doern and MacDonald, p.92.

⁷⁶For example, the federal government has had to re-evaluate all of its procurement policies for consistency with the trade agreements.

procurement system for other countries, since over 80% of Canadian exports are destined for the US market. Therefore, any access gained to other markets is not seen as significant enough to warrant changes to the provincial procurement system.

Even if the provinces agreed to be covered by international trade agreements, the extent of liberalization would probably be limited as Provinces are responsible for several politically sensitive areas. These include the education and health sectors, provincial Crown Corporations, particularly the utilities, and the municipal level of government and other public institutions such as hospitals and universities, which are similarly resistant to international liberalization.

Provinces, however, have agreed to some amount of internal liberalization through the Agreement on Internal Trade for three main reasons: first, “several of the jurisdictions had recent experience with tearing down procurement barriers at the bilateral or regional provincial levels;”⁷⁷ second, various studies were starting to show the significant economic costs of internal trade barriers;⁷⁸ and third, businesses were increasing the pressure on provincial governments to remove internal barriers, particularly because they had already been removed to a certain extent at the international level.

3.1.3 *Canadian Businesses*

A large majority of Canadian businesses are in favour of government procurement

⁷⁷Doern and MacDonald, p.89.

⁷⁸Ibid., p.88.

liberalization. As the engine of the economy, Canadian businesses hold a lot of political power, and use various means of exercising that power to achieve desired ends. For example, the Presidents of the Canadian Council of Chief Executives (formerly Business Council on National Issues), the Canadian Chamber of Commerce and the Canadian Manufacturers and Exporters wrote an open letter to Prime Minister Jean Chrétien, outlining their support in moving the WTO Doha Agenda forward, including work on transparency in government procurement.⁷⁹

Canadian businesses have an interest in promoting government procurement liberalization because through trade agreements their access to foreign markets expands, providing many more potential buyers to which they can sell their product. This offers the potential for increased profits and reduced costs through economies of scale. With respect to seeking transparency provisions in government procurement agreements, the Canadian Council of Chief Executives advanced the following arguments to support their position:

An agreement in this area [transparency in government procurement] within the WTO would be an important step in reducing the major costs incurred through corrupt practices that thrive in a non-transparent environment. The Council strongly supports all efforts to reduce the scope for corruption and bribery in international transactions, and suggests that an agreement on greater transparency would contribute to the development of better corporate and public governance worldwide. We urge the Government to look for other opportunities to address these objectives in

⁷⁹Perrin Beatty, Thomas d'Aquino and Nancy Hughes Anthony, 'Letter to Prime Minister Chrétien on the World Trade Organization Doha Development Agenda and the Fifth Ministerial Meeting in Mexico,' (September 8, 2003). 9 Oct. 2003 <<http://www.ceocouncil.ca/English/Media/memos/sept8-03.pdf>>.

the WTO negotiations.⁸⁰

Government procurement liberalization is also favoured by Canada's small business community because they too support the removal of market barriers, and small-business set-asides are seen as another barrier. Canadian small businesses do not believe that such programs have worked in the US, and are therefore not likely to be successful in Canada.⁸¹

Again, as mentioned in the last Chapter, internationally competitive businesses prefer trade agreements as the means to attain liberalization as they entrench policies favourable to these businesses in international treaties. Domestic laws, regulations and policies must be changed to conform with the requirements of international treaties. This serves to bind future governments to a particular policy direction. (This is less true of internal trade agreements, which do not carry the same legal weight as international treaties between states).

Not all Canadian businesses, however, are supportive of government procurement liberalization and they too will use their political power, but in this case, to prevent liberalization. Generally, businesses are against liberalization either because they benefit

⁸⁰ Canadian Council of Chief Executives, PROSPERITY, FREEDOM AND SECURITY: RENEWING CANADA'S COMMITMENT TO MULTILATERAL TRADE LIBERALIZATION, A Statement of the Canadian Council of Chief Executives on the World Trade Organization and the Doha Development Round, (May, 2003), 9 Oct. 2003 <<http://www.ceocouncil.ca/English/Publications/reports/may-03.htm>>.

⁸¹ Brien Gray, and Pat Thompson, Federal government procurement & small business: Opportunity or Opportunity lost? CFIB's Presentation to the Standing Committee on Government Operations with Respect to Small Business Access to Government Contracts. (Ottawa). 3 Nov. 2003 <<http://www.cfib.ca/research/reports/procure2.asp>>.

from preferential procurement practices (e.g. Aerospace Industries),⁸² they lack international competitiveness (e.g. shipbuilding),⁸³ they desire to serve only a local market or they benefit from a less competitive and transparent procurement environment that is more likely to exist when governments are not bound by trade agreements (e.g. Sponsorship firms).

3.1.4 Civil Society

Government procurement represents a small policy area and indeed there are few academics or civil society organizations within Canada and worldwide who research or address government procurement specifically.⁸⁴ This is primarily because government procurement is seen as a technical/administrative issue which, while not insignificant, is not overly significant in terms of the broader trade agenda.

⁸²While the Aerospace Industries fully supports using government procurement as a lever of innovation in the private sector through Canada's Industrial and Regional Benefits Policy, they are also a strong supporter of trade liberalization. Due to the importance of export sales to Canada's aerospace industry, the industry association argues that Canada must be an unyielding advocate of free and fair trade, and must aggressively pursue trade liberalization agreements, both multilaterally and bilaterally in key markets for Canada. Aerospace Industries Associations of Canada, *Achieving Aerospace Excellence Taking it to the Next Level*, Response to *Achieving Excellence – Investing in People, Knowledge and Opportunity*, (September 2002). 4 Nov. 2003 <http://www.aiac.ca/files/103103113146_AIAC%20Innovation%20Report.pdf>.

⁸³The Canadian Shipbuilding Industry argues they are fully competitive (in areas they control). They, however, support the Canadian Shipbuilding Policy which states that any additions or replacements to the Canadian fleet will be sourced in Canada as they see the policy as a counterweight to foreign subsidies and unfair trade practices. Canadian Shipbuilding Industry, *Breaking Through*, (Ottawa: Industry Canada, 2001). 4 Nov. 2003 <http://strategis.ic.gc.ca/sc_indps/shipbuilding/graphics/MINIBreakinge.pdf>.

⁸⁴Of the 5 Market Access Negotiating Groups in the FTAA, Government Procurement has received the least amount of Civil Society Contributions. Hardly any of the contributions received come from Canadians or Canadian organizations. Some contributions are supportive of negotiations in government procurement (mostly business associations), while others seek to retain the ability to use procurement in support of labour, environment and social objectives, but are not completely against liberalization. See the Free Trade Area of the Americas (FTAA) website *Government Procurement: Contributions from Civil Society*, 13 Oct. 2003 <http://www.alca-ftaa.org/spcomm/SOC/CIV_GP_e.asp>.

Civil society opposition to government procurement liberalization is usually not in response to government procurement specifically, but again, forms part of their opposition to the trade agenda in general. For example, over 80 Canadian civil society groups signed a statement opposing the launch of a new round of WTO negotiations. Specifically, they opposed “further liberalization negotiations, especially those which will bring new areas under the WTO regime, such as investment, competition policy and government procurement,”⁸⁵ and called for a moratorium on new issues. Government procurement, however, is already included in the WTO regime (see the WTO-Agreement on Government Procurement), although it does not form part of the single undertaking.

Individual Canadians have both reasons to support and oppose government procurement liberalization. On the one hand, liberalization is seen as a potential threat to national sovereignty, public control, and values like equality which may be at odds with efficiency.⁸⁶ For example, Canadians fear that if health or education is liberalized, then the ability for society to choose a public health and education system would be lost.⁸⁷ Again, these represent concerns with the broader trade agenda, and while not specific to

⁸⁵Public Citizen, ‘Statement from Members of International Civil Society Opposing a Millennium Round or a New Round of Comprehensive Trade Negotiations,’ November 27, 1999. 3 Nov. 2003

<http://www.citizen.org/trade/wto/Qatar/seattle_mini/articles.cfm?ID=5576>. These civil society organizations were primarily concerned with broader issues relating to the environment, democracy, and the protection of public health, education and social services.

⁸⁶Jill Mahoney, ‘Census at risk if U.S. firm in on it, critics say,’ *Globe and Mail*, October 14, 2003, A4, 12 Nov. 2003

<<http://www.globeandmail.com/servlet/ArticleNews/TPStory/LAC/20031014/UCENSN/TPNational/TopStories>>.

⁸⁷See for example, Maude Barlow and Tony Clarke’s *Making the Links: A Citizen’s Guide to the WTO and the FTAA*, (Ottawa: Council of Canadians), 8 Nov. 2003
<http://www.canadians.org/documents/making_links_web.pdf>.

government procurement, have the same effect of limiting government procurement liberalization nonetheless.⁸⁸

Canadians may also subscribe to the view that Canadian taxes should go to support Canadian businesses, regions, and goals. Domestic suppliers are viewed as contributing more to the economic and social growth and development of Canada, particularly because locally owned suppliers are perceived as keeping profits, for the most part, in the country whereas foreign suppliers are seen as repatriating their profits.⁸⁹ Politicians could find themselves in a difficult position politically if it is perceived that too many government contracts are being awarded to foreign companies.

On the other hand, Canadians may want to see government procurement liberalization proceed if they believe that trade liberalization is the best way to get the most out of a taxpayer dollar (i.e. the government will be able to buy more with less); if they believe that their wealth will increase as a result of liberalization; or if they believe that more checks and balances that liberalization provides (i.e. greater transparency, more accountability) are needed in the procurement system.

3.1.5 Foreign Governments

As mentioned in the previous Chapter, foreign governments have several reasons for

⁸⁸Canada, for these reasons, has excluded health, education and culture from trade agreement coverage in government procurement chapters/agreements.

⁸⁹Hoekman, p.253.

wanting to either support or limit government procurement liberalization. During this decade, Canadian suppliers gained access to a handful of new government markets: Mexico under NAFTA, and Spain, Greece, Portugal, Liechtenstein, the Netherlands with respect to Aruba, Iceland, Israel, and the Republic of Korea under the WTO-AGP. Canadian suppliers also received additional access to the purchases of telecommunications equipment by the Korean government. In return, Canada opened up its federal market to suppliers from the above countries.

3.2 *Institutions*

Most of the institutions created in the previous period were succeeded by new institutions during this period. This was the case with the GATT, the GATT Procurement Code, the FTA, and the PRB, succeeded by the World Trade Organization (WTO), the WTO-Agreement on Government Procurement (WTO-AGP), the North American Free Trade Agreement (NAFTA) and the Canadian International Trade Tribunal (CITT) respectively.

The OECD remained actively involved in promoting government procurement liberalization along with three new institutions created in this decade: the Agreement on Internal Trade (AIT), the Canada-Korea Telecommunications Equipment Procurement Agreement (CKTEA) and the Asia-Pacific Economic Community (APEC) Government Procurement Experts Group. An increasing number of federal departments also became involved in the government procurement liberalization process and their role will be

explored as well.

A striking feature of the analysis below is the extent to which government procurement liberalization has been accepted, internalized and promoted by the institutions examined. There seems to be little institutional opposition to government procurement liberalization.

3.2.1 Trade Agreements

Government procurement was incrementally liberalized and entrenched in this period with the creation of four new trade agreements. As mentioned, two of these replaced agreements reached in the previous decade. A synopsis of each of the agreements, along with a discussion of the Canadian interests follows.

North American Free Trade Agreement (NAFTA), Chapter 10

NAFTA is a free trade agreement between Canada, the United States and Mexico and came into effect in 1994. The government procurement chapter substantially builds upon the Canada-US FTA by expanding coverage to services, construction, and other levels of government or types of entities. The aim of the government procurement provisions under NAFTA “is to make public sector procurement by the three participating governments more accessible to businesses located in all NAFTA countries.”⁹⁰

Thresholds under NAFTA remain much lower than those of the GATT Code (Canada and

⁹⁰Lipsey, et al., p84.

the US retain the goods threshold of US\$25,000, whereas the current goods threshold for Mexico is C\$89,000⁹¹). Thresholds were also established for services and construction. Similarly, government entities have their own, higher thresholds for goods, services and construction.⁹²

NAFTA contains more prescriptive rules than the FTA and the GATT Code. NAFTA improves upon the FTA by expanding procurement opportunities for small businesses (Article 1021) and by giving governments more flexibility to use limited tendering “to avoid cumbersome tendering procedures, when these can be shown to impede the efficiency of government.”⁹³

Unlike the GATT Procurement Code and the FTA, the government procurement chapter in NAFTA is the first to prohibit the use of all offsets in contracting covered by the agreement. It is also under NAFTA that the Canadian International Trade Tribunal (CITT) became designated as Canada’s bid challenge authority, taking over from its predecessor - the Procurement Review Board.

The Canadian government welcomed the inclusion of government procurement in NAFTA as it represented another chance to seek a comprehensive agreement on

⁹¹Thresholds for NAFTA, the WTO-AGP and CKTEA are adjusted every two years to account for inflation. These thresholds apply until December 31, 2005.

⁹²The current threshold levels in Canadian dollars are: \$89,000 for services procured by government entities and \$445,000 goods and services procured by government enterprises, \$11.5 million for Construction services procured by government entities and \$14.2 million for construction services procured by government enterprises.

⁹³Lipsey, et al., p.89.

government procurement with the US. Canadian negotiators were disappointed in the results of the FTA (with respect to government procurement), and sought to further circumscribe America's use of small business set-asides. At minimum, they wanted to ensure that Canadian suppliers had the same access to the American government market as American suppliers had to the Canadian government market and that no third Party (i.e. Mexico) had greater access to the American government market than Canada.⁹⁴

On the procedural side, Canada sought written rules on government procurement that were supportive of the principles of transparency and predictability. Specifically, the Canadian negotiators wanted a better understanding of the American government procurement process.⁹⁵ They also sought a text that would modernize the procurement system and that would minimize bidding times.⁹⁶

Canadian negotiators did not fully succeed in their objectives. Greater inroads, however, were made under NAFTA, than under the FTA. NAFTA Chapter 10 saw coverage expand to include services, construction, and some Crown Corporations and other levels of government. This was a key achievement as it paved the way for a similar expansion at the multilateral level. The gains made are offset by the fact that Canadian suppliers are still constrained by US State and Local 'Buy American' provisions and that what seems like greater coverage still only amounts to about 10% of public sector procurement in

⁹⁴Personal Interview, Ottawa, November 1, 2002.

⁹⁵Personal Interview, Ottawa, November 5, 2002.

⁹⁶Ibid.

North America.⁹⁷

On the procedural side, the Canadian negotiators were somewhat more successful. The procurement chapter is rules based and prescribes a procurement system that is transparent and predictable. But in terms of modernizing the procurement process the Canadian negotiators were less successful due to a technological lag in the American and Mexican procurement systems.

In 1990, the Canadian federal government began using an electronic bulletin board to advertise upcoming purchases. However, the Internet and e-mail were just starting to emerge so the bidding periods in the agreement reflect the time it takes to carry out procurement using non-electronic means. In this instance, the lowest common denominator or least technologically advanced dictated the procedures.⁹⁸ Article 1024(5), however, provides for Parties to undertake further negotiations on the subject of electronic transmission and Canada was able to designate its electronic tendering service (known at the time as Open Bidding System) as one of the two official publications of Notices of Procurement.⁹⁹

The reasons why Canadian negotiators could not secure as broad an agreement as hoped

⁹⁷Lipsey et al, pp.90-91.

⁹⁸Ibid.

⁹⁹NAFTA, Annex 1010.1. Open Bidding Service was run by ISM Publishing - a private company in contract with the government. In 1997, Cebra Inc. (subsumed by the Bank of Montreal) won the contract and ran the Government Electronic Tendering Service (GETS) under the name MERX. The contract has since been assigned to Mediagrif Interactive Technologies Inc.

for, are the same as those that prevented a broad agreement under the FTA: 1) Such an agreement is politically impossible in the US as the small business set-aside is too entrenched in America and has strong political support. The same could be said of Canada given the number of exceptions Canada has, some for strictly domestic political reasons (e.g. culture, education, social services); 2) The market asymmetries that exist between the three nations; 3) The different types of barriers used; and 4) Differing divisions of government.

The division of powers in Canada makes it hard for the federal government to negotiate international agreements that cover areas of provincial concern without their consent and participation.¹⁰⁰ A comprehensive procurement chapter was therefore not politically feasible because most purchasing is done at the provincial and municipal level, particularly in the services area.¹⁰¹

The provinces have indicated to federal officials that they will not consent to coverage until they receive improved access to the American market. Again, substantial changes to the provincial procurement system would be required, should they join an international trade agreement, and such changes could not be justified for anything less than improved access to the American market.¹⁰²

¹⁰⁰Hart and Sauve, pp.211-212.

¹⁰¹Personal Interview, Ottawa, November 5, 2002.

¹⁰²Personal Interview, Ottawa, October 30, 2001.

Agreement on Internal Trade (AIT), Chapter 5

The AIT is a rules-based agreement between the federal, provincial and territorial governments of Canada, except for Nunavut. The purpose of the Chapter as stated in Article 501 is to create a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency.

The AIT covers all types of public sector entities, including, for the first time, municipalities, municipal organizations, school boards and publicly funded academic institutions, social services and health entities (the MASH sector) of all provinces and territories except the Yukon and Nunavut. The agreement applies to covered goods contracts over \$25,000 and covered services and construction contracts over \$100,000. As with the international agreements, the Canadian International Trade Tribunal (CITT) is the bid challenge authority for the federal government but not for the provinces, who instead have a government-to-government bid challenge mechanism.

Government procurement was initially identified as a 'sectoral challenge' in 1987 by the Committee of Ministers of Internal Trade. Between then and the start of sectoral negotiations in 1993, a number of procurement agreements had been signed between provinces and between the provinces and the federal government.¹⁰³ The goal of the

¹⁰³For example, the Intergovernmental Agreement on Government Procurement was signed in 1992, and was the draft outline for what would become the Procurement Chapter in the AIT. Both the Eastern and Western Provinces had procurement deals amongst themselves, and Québec had signed a Procurement Agreement with New Brunswick and Ontario. (Doern and MacDonald, p.88-89).

negotiations was to “establish an open and efficient system that provided fair and equitable access to public-sector procurement, regardless of jurisdictional location in Canada.”¹⁰⁴

The inclusion of a procurement chapter in the AIT had broad support because provinces had already begun the process of removing procurement barriers between themselves, and the federal government had similar experiences at the “international level with the GATT, FTA and NAFTA.”¹⁰⁵

The principles of reciprocal non-discrimination and transparency achieved in the federal procurement system under the international trade agreements were extended to the MASH sector. These principles were also in keeping with the principles of other sectoral negotiations as well as the AIT as a whole.¹⁰⁶

The federal government sought an agreement that was similar to the international agreements, but more flexible (i.e. less prescriptive). This was because the provinces did not like the overly prescriptive and legalistic language of the international agreements, and the federal government thought they would fare better in front of the CITT with less prescriptive language.

¹⁰⁴Ibid., p.89.

¹⁰⁵Ibid., p.89.

¹⁰⁶Ibid., p.89.

The overarching goals of the federal negotiators were to: 1) seek the broadest possible coverage; 2) eliminate regional and local procurement preferences — the AIT could retain preferences for “Canadian” suppliers but not for regional or municipal suppliers; and 3) ensure a transparent, open, competitive procurement system on the procedural side.

As mentioned, the federal government recognized the economic benefits to be gained from reforming procurement in Canada. Preferential procurement practices were viewed as an inefficiency to Canadian society and a waste of the taxpayer’s money. Although economics represented the driving force behind the procurement chapter and the AIT in general, there was also a political objective: the desire to have a unified marketplace.¹⁰⁷

The federal government was in an ideal negotiating position, because it did not have to alter its procedures or practices in order to open up the internal government market, as its procurement system had already been ‘reformed’ under the international agreements. The same could be said about market access: the federal goal was to seek broad coverage, because the majority of federal government entities were covered by the international agreements.

The provinces sought, and received access to a few areas that had been excluded from international coverage - mainly non-covered Department of Defence (DND) Procurement,

¹⁰⁷ Personal Interview, Ottawa, November 8, 2002.

Architectural and Engineering Services, and procurement by the Canadian International Development Agency (CIDA). The federal negotiators could offer this coverage internally because the circumstances were different. For example, some DND purchases were not covered internationally due to national security reasons, and CIDA was not covered because it had a policy of tied aid at the time.¹⁰⁸

The federal government negotiators were fairly successful in achieving the above goals. The agreement was written in more colloquial language, and was not as prescriptive as the international agreements.¹⁰⁹ For example, all of the tendering procedures of the AIT are contained in twelve paragraphs of one article (506), as opposed to the 39 paragraphs of nine articles in NAFTA.¹¹⁰

The agreement contained broad coverage of federal and provincial entities. When the agreement was initially signed it did not cover the MASH sector. Within a few years, however, it came to be covered by the agreement. Meanwhile, the federal negotiators were not successful in having the Provincial Crown Corporations covered due to strong provincial opposition.

The federal government also had success in establishing a solid framework with respect

¹⁰⁸ Personal Interview, Ottawa, October 30, 2002. CIDA has since changed its tied aid policy.

¹⁰⁹ Again, this was also a goal of the provincial governments.

¹¹⁰ This does not include the Articles on Prohibition of Offsets and Technical Specifications, which appear in Section A on Scope and Coverage and National Treatment.

to procurement obligations and procedures.¹¹¹ The threshold for goods was set at the federal goal of \$25,000, but the threshold for services was not set as low as the federal government had hoped it would be. The negotiators were very successful in achieving an exception for the Industrial and Regional Benefits (IRB) program. Whereas the Internal Trade Secretariat did not want the IRB exception to kick in until \$20 million, the federal negotiators succeeded in having this limit lowered to \$2 million.¹¹² On the other hand, federal negotiators failed to achieve their goal of establishing one common bid challenge mechanism. As a result two separate Bid Protest Procedures were established in the Chapter - one for the provinces (Article 513), and one for the federal government (Article 514).

Since the provinces were not covered by the international trade agreements, their experience and view of the bid-challenge mechanism was very much different from that of the federal government. The provinces did not like the quasi-judicial nature of the federal challenge mechanism, but instead, preferred disputes to be resolved through 'government-to-government' mechanisms.¹¹³ The federal negotiators had to compromise to ensure the conclusion of the Chapter within the tight time frames (i.e. before the Québec election).¹¹⁴

¹¹¹ Personal Interview, Ottawa, November 8, 2002.

¹¹² Doern and MacDonald, pp. 91-92. It seems contradictory that the federal government wanted to eliminate regional preferences at the provincial level but retain them at the federal level. However, the IRB Policy was "political dynamite" in that the federal regional agency's (Atlantic Canada Opportunities Agency and Western Economic Diversification) and the regions that benefited did not want to circumscribe or eliminate the use of this policy. Personal Interview, Ottawa, November 8, 2002.

¹¹³ Doern and MacDonald, p.92.

¹¹⁴ The MASH sector was also left out of the original agreement due to the complexity of the issue and the tight time frames. Ibid., p.91.

The presence of differing dispute mechanisms is a major drawback of the Chapter, for two main reasons: 1) the provincial mechanism has proved to be far less effective and transparent¹¹⁵ and, 2) federal negotiators will now have a harder time bringing the provinces under the international agreements, especially since the provinces have seen first hand how proactive the CITT has been in investigating supplier complaints at the federal level and how narrow their interpretations have been.

Doern and MacDonald have attributed the differing positions of the federal and provincial governments to the fact that the federal government, in keeping with the international agreements, viewed government procurement through a 'trade policy' lens, whereas the provincial governments, who did not have these international experiences, viewed procurement as "policy instruments for regional and economic development."¹¹⁶

Despite some shortcomings, overall the procurement chapter was deemed to be a success.¹¹⁷ Several key factors were involved in guaranteeing its success. First, there had been substantial pressure from both the politicians and the business community to conclude an agreement, as the procurement chapter was the key chapter in the AIT. Indeed if the federal negotiators had failed to conclude the procurement chapter, then the AIT itself would have failed.

¹¹⁵Unlike the CITT, there is no transparent way of finding out how many complaints were brought against a provincial government, the nature of any complaints brought forward, and how they were resolved.

¹¹⁶Doern and MacDonald, pp.92-93.

¹¹⁷Ibid.

Second, a lot of energy was put into the agreement by the Minister of Industry at the time (John Manley) in an attempt to secure the political backing of his cabinet colleagues.¹¹⁸ Finally, the quality of the chief federal negotiator for government procurement has also been cited as a contributing factor to a successful chapter.¹¹⁹

World Trade Organization Agreement on Government Procurement (WTO-AGP)

The World Trade Organization Agreement on Government Procurement (WTO-AGP) is a plurilateral agreement with 27 members.¹²⁰ The WTO-AGP was negotiated concurrently with the Uruguay Round but did not form part of the single undertaking. It came into effect in 1996 and succeeds the GATT Procurement Code.

The threshold for goods and services purchased by central governments is generally Special Drawing Rights (SDR) 130,000 or C\$261,300; and for construction SDR 5 million or C\$10,000,000; for local governments the threshold is SDR 200,000 (not applicable to Canada); and for other entities usually SDR 400,000 (also not applicable to Canada). Like all the other government procurement agreements/chapters, coverage is limited to the listed entities, and several exclusions/exceptions exist.

Like NAFTA, offsets are not allowed in the AGP with the exception of some flexibility

¹¹⁸Personal Interview, Ottawa, November 8, 2002. The Department of Industry was the lead Department in the AIT.

¹¹⁹Personal Interview, Ottawa, October 30, 2002.

¹²⁰Canada, EU (Austria, Belgium, Denmark, Germany, Spain, France, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Finland, Sweden, United Kingdom), Hong Kong China, Iceland, Israel, Japan, The Republic of Korea, Liechtenstein, Netherlands with respect to Aruba, Norway, Singapore, Switzerland, and the United States.

granted to developing countries under Article V. The agreement expands the number of limited tendering reasons permitted, and as with the other agreements, the CITT is the Canadian bid challenge authority.

Unlike other WTO agreements, coverage in the AGP is not based on the most-favoured nation principle, but rather is negotiated on a reciprocal basis. This means that each signatory could make different offers to other signatories as opposed to making one offer to all signatories. "The result is that the GPA has the appearance of a series of bilateral agreements based around a common structure of principles and award procedures, rather than a multilateral arrangement."¹²¹

All 27 members of the AGP, except Canada, have made commitments to open certain procurement by federal government departments, sub-central governments (i.e. provincial, state, municipal, etc.) and crown corporations. In consideration of the United States' reluctance to eliminate or circumscribe its exception for Small Business set-asides and expand coverage, Canada decided to limit its coverage under this agreement to federal departments and agencies. Canadian provincial, municipal, or regional governments are therefore not included in the agreement.¹²²

During negotiations, Canada indicated it was prepared to table an offer that would extend

¹²¹Arrowsmith, 'Towards a Multilateral Agreement on Transparency in Government Procurement,' *International and Comparative Law Quarterly* 47 (1998), p.796.

¹²²DFAIT, 2001 - WTO Consultations, Doha (Qatar) Ministerial Meeting, Government Procurement: Information Paper, 28 Sep. 2001. 3 Oct. 2002 <<http://www.dfait-maeci.gc.ca/tna-nac/gp-info-e.asp>>.

coverage of the agreement to certain Canadian sub-central entities if, and only if, two specific areas of concern to Canada were addressed. First, Canada requested that the agreement be expanded to include sectors, such as steel and transportation, that were particularly important to Canadian suppliers. Second, Canada sought agreement from the other parties to curb (though not entirely prohibit) the use of small business and other “set-aside” programs.¹²³

Canadian negotiators were unsuccessful in having their concerns addressed due to the entrenched positions of the Canadian provinces and the American Small Business Administration. The fact that Canadian provinces could have had access to central and sub-central government markets in 25 other countries and even in the US to procurement not eligible to be set aside for small business, was not enough to sway the provinces from their position. The US negotiators have also been unable to make inroads in curbing the use of their small business set-aside.¹²⁴

Canada originally intended to cover Crown Corporations as evidenced by the list of 9 federal Crown Corporations in the agreement, but at the last minute, the European Community excluded Canada from access to its enterprises because Canada would not offer sub-central coverage. As a retaliatory measure, Canada excluded coverage of its Crown enterprises.¹²⁵

¹²³Christopher C. Nicholls, ‘*Government Procurement after the Uruguay Round*,’ C.D. Howe Institute Commentary No.74, December 1995, (Toronto: C.D. Howe Institute), p.3.

¹²⁴Hart and Sauve, p.216.

¹²⁵Personal Interview, Ottawa, November 1, 2002.

Canada, however, did not have a lot of Crown Corporations to offer in the first place. Two of the biggest Crown Corporations - Canadian National and Petro-Canada were in the process of being privatized; the Canadian negotiators were not allowed to put the Canadian Wheat Board, another significant purchaser, on the table; and the Americans did not want the St. Lawrence Seaway Authority to be covered, because they had preferential access to its procurement under NAFTA. Few Crown Corporations of value were therefore left to offer.¹²⁶

Canada-Korea Telecommunications Equipment Procurement Agreement (CKTEA)

Canada and Korea signed a Telecommunications Equipment Procurement Agreement in 1999, which came into effect in September, 2001. The agreement incorporates several articles of the WTO-AGP, including the threshold (currently set at C\$261,300). The agreement applies to goods related to telecommunications and services with respect to a covered goods contract by most federal government departments and agencies. Korean Telecom is the only entity covered by Korea, as it procures the majority of telecommunications equipment in Korea. A limited number of exceptions are specified in the agreement.

The agreement commits both parties to secure reciprocal, transparent and nondiscriminatory access for each other's suppliers and service providers.¹²⁷ Canadian suppliers, therefore, gain access to Korea's telecommunications market and in return,

¹²⁶Personal Interview, Ottawa, November 5, 2002.

¹²⁷Public Works and Government Services Canada, *Trade Deck*, (Ottawa: PWGSC, 2000), p.10.

Korean suppliers gain access to Canada's telecommunications equipment market.

Canada sought such an agreement, in part because Korea had concluded similar agreements with the European Union and the United States, and in part because Canada's telecommunications suppliers (e.g. Nortel) were seeking secure access to foreign markets. At the time of negotiations, the Koreans advised the Canadian delegation that it was planning to privatize Korean Telecom, the only entity covered by Korea. The Canadian delegation assumed this would not be finalized for many years, and so went forward with the negotiations. However, in September, 2002, Korea gave official notice that Korean Telecom had been privatized, and 100% of the shares had been sold, effectively making the agreement null and void.

3.2.2 Federal Departments

Federal departments have their own political power and represent a factor in determining the scope of trade agreements, the success of the negotiations and of implementation. The mandate that Cabinet approves to launch negotiations reflects various departmental positions.

The most influential departments with respect to government procurement liberalization include the Department of Foreign Affairs and International Trade (DFAIT), Industry Canada (IC), the Treasury Board Secretariat (TBS) and Public Works and Government

Services Canada (PWGSC), each of which will be addressed below.¹²⁸ Environment Canada, Transport Canada and the Department of Finance also have a cursory interest in government procurement liberalization.

Department of Foreign Affairs and International Trade (DFAIT)

DFAIT is responsible for negotiating international trade agreements within the mandate agreed to by Cabinet. DFAIT often has its own views about whether government procurement should be included in a specific trade agreement, but is responsible for negotiating all trade agreements initiated by the Prime Minister and Cabinet to the best of its ability.

While the Cabinet mandate sets out the parameters of the Canadian position, DFAIT must gain consensus from key departments on the specific proposals relating to the text of the agreement and market access. This is done through a series of interdepartmental meetings led by the department. Once a position is agreed, the department is then responsible for developing an appropriate negotiating strategy for attaining Canadian objectives. DFAIT is also responsible for consulting with the provinces, civil society organizations and Canadians in general, with respect to international trade agreements and is the designated contact for all correspondence with our international trade partners.

¹²⁸ On December 12, 2003, Paul Martin became the Prime Minister of Canada. Shortly after, he announced a reorganization of government departments. International Trade is now its own department, and the trade policy functions formerly carried out by Industry Canada have moved to the new Department of International Trade. This analysis is based on the government structure prior to the December reorganization.

With respect to government procurement, DFAIT, for the most part, is a transmitter of neoliberal ideas. For example, on the departmental web-site, DFAIT has posted frequently asked questions about the draft chapter on government procurement in the Free Trade Area of the Americas negotiations. In response to the question “Why is government procurement in international trade agreements important?”, DFAIT wrote:

...Opening government procurement markets in international trade agreements will result in countries having a greater choice of suppliers and products when they buy goods and services. Greater competition will result in better value for taxpayers.

Opening government procurement markets in international trade agreements reduces barriers that are complex and time-consuming for suppliers. Firms are able to operate in a more transparent and predictable environment. Suppliers have access to government markets that otherwise may not be open to them.¹²⁹

The department, however, recognizes that there are administrative and political limits to liberalization. For example, DFAIT will not agree to a trade agreement unless it has a sufficiently high threshold level because the department recognizes that it would not be administratively efficient to run a competition that is open to the whole world below such a threshold. DFAIT will also refuse to cover particular areas of procurement because of their domestic sensitivity.

As the lead negotiator, DFAIT has an interest in gaining the best possible agreement for Canada. DFAIT negotiators may decide to keep coverage off the table if they do not

¹²⁹DFAIT, ‘Why is government procurement in international trade agreements important?’ Free Trade Area of the Americas: Draft Chapter on Government Procurement - Frequently Asked Questions, 1 Nov. 2002. 9 Dec. 2002 <<http://www.dfait-maeci.gc.ca/tna-nac/GP-FAQ-en.asp>>.

think the other Party has put forward an equivalent offer,¹³⁰ or alternatively, they may liberalize a specific Canadian area in an effort to gain access to a foreign area of interest to Canadian suppliers, provided it is within the broad mandate agreed to by Cabinet. DFAIT can also have a hand in limiting liberalization by choosing not to put forward coverage if a satisfactory agreement can be attained without such coverage. This gives them more negotiating room in the future.¹³¹

Industry Canada (IC)

IC represents the interests of Canadian businesses. Hence, since the majority of Canadian businesses are in favour of government procurement liberalization, so too is Industry Canada. IC does not argue for complete liberalization however, because the department must protect weak or politically sensitive areas of Canadian industry from being threatened by liberalization of government procurement (e.g. shipbuilding).

IC represents the views of business at the interdepartmental working level by making known what market access commitments Canada should be seeking from our trade partners and what market access commitments Canada can and cannot offer to its trading partners. IC also lobbies for strict procedural rules so as to minimize the chance of discrimination to Canadian suppliers by foreign procurement officers. As well, the department seeks transparency commitments in order to make the procurement environment more predictable for business.

¹³⁰Personal Interview, Ottawa, November 1, 2002.

¹³¹Personal interview, Ottawa, November 1, 2002.

Treasury Board Secretariat (TBS)

TBS is responsible for government contracting policy and is therefore not all that keen on government procurement liberalization. Its goal is to make procurement as administratively easy as possible. It therefore seeks agreements that are as similar as possible (i.e. common rules, common thresholds).

While there is merit in seeking consistency between agreements, demand for strict replication of agreements is often untenable and serves to place Canada in a difficult negotiating position with its trading partners. For example, if all countries sought the same threshold as in their existing agreements, and if those thresholds were all different, then negotiations would be doomed from the start. Such a position is also difficult to argue as it is unlikely Canada's trading partners would be swayed by an argument that "we want these thresholds because it will make life easier for our bureaucrats," although it is not likely to be phrased in this manner.

TBS is also responsible for Crown Corporations in government procurement negotiations. To date, Canada has only agreed to liberalize Crown Corporations under NAFTA and the AIT, and has been reluctant to offer Crowns in other trade fora. This is in part because Crown Corporations operate in the competitive marketplace and therefore do not want to be bound by rules that their private-sector competitors are not bound by.

Public Works and Government Services Canada (PWGSC)

As the common purchaser for the federal government, PWGSC represents procurement interests at the interdepartmental table. This department is the most affected by trade rules as it has primary responsibility for implementing the trade agreements. Like TBS, PWGSC is also not particularly keen on government procurement liberalization as it represents another layer of rules that must be followed when procuring a good or service. Trade agreements also represent a constraining influence on departmental programs and policies.

The department has a strong interest in seeking clear and understandable obligations, and therefore pays close attention to the actual wording of the text. PWGSC wants to ensure that the obligations that are negotiated can be implemented and that there are no legal, technical or administrative reasons why an obligation cannot be met. The text is also important to PWGSC because it is what the Canadian International Trade Tribunal interprets in making its determinations. Supplier complaints are most often against procurement let by PWGSC since it is the federal governments main purchaser.

The department is also protective of its current procurement methods (i.e. trade rules must accommodate, to the extent possible, the departments procuring practices, such as standing offers), and seeks administrative flexibility in the agreements so as to be able to adopt new advances in procuring (i.e. e-purchasing).

3.2.3 Other Institutions

As in the previous periods, the OECD continues to have an influence in promoting and supporting the idea of government procurement liberalization. Other institutions involved in promoting government procurement liberalization during this decade include the World Trade Organization, the Asia-Pacific Economic Cooperation and the Canadian International Trade Tribunal, as briefly discussed below.

Organization for Economic Cooperation and Development (OECD)

The OECD is a pro-free trade institution. Its web-site states that “OECD's vocation has been to build strong economies in its member countries, improve efficiency, hone market systems, expand free trade and contribute to development in industrialised as well as developing countries.”¹³² The OECD Trade Directorate, in turn, works to support “a strong, open and rules-based multilateral trading system.”¹³³ It does this in part by publishing studies in support of trade liberalization and in part by supporting the work of members in the WTO.

With respect to government procurement, the OECD has published an e-publication entitled ‘*The Size of Government Procurement Markets*’¹³⁴ and has written a report entitled ‘*Transparency in Government Procurement: The Benefits of Efficient*

¹³² OECD, Overview of the OECD: What is it? History? Who does what? Structure of the Organization, (Paris: OECD). 21 Sep. 2003
<http://www.oecd.org/document/18/0,2340,en_2649_201185_2068050_1_1_1_1,00.html>.

¹³³ Ibid.

¹³⁴ OECD, The Size of Government Procurement Markets, OECD Journal on Budgeting Vol 1, No.4, (2000), 15 Oct. 2003 <<http://www1.oecd.org/publications/e-book/2202011E.PDF>>.

*Governance and Orientations for Achieving It.*¹³⁵ These studies create momentum for liberalization in government procurement. In *'The Size of Government Procurement Markets'* the OECD advances the neoliberal arguments that

improved import competition conditions in government procurement play a crucial role in keeping downward cost pressures on goods and services purchases, giving taxpayers value for money, improving the quality of government services, and permitting improved allocation of resources.¹³⁶

World Trade Organization (WTO)

The WTO was created in 1995. It is a forum for negotiations but is also an institution itself. "Its main function is to ensure that trade flows as smoothly, predictably and freely as possible,"¹³⁷ meaning the WTO has a significant stake in promoting liberalization in government procurement. The WTO Secretariat thus supports government procurement liberalization but can only pursue it to the extent that its members are willing to do so. The Organization believes that greater trade liberalization (in all areas) results in increased economic prosperity. As the dispute settlement mechanism for all its agreements, including the AGP, the WTO serves to further institutionalize procurement liberalization.

Asia-Pacific Economic Cooperation (APEC)

Although APEC was established in 1989, it was not until 1994 that APEC economic

¹³⁵OECD, Working Party of the Trade Committee, *Transparency in Government Procurement: The Benefits of Efficient Governance and Orientations for Achieving It*, (Paris: OECD, May 5, 2003), 14 Oct. 2003 <[http://www.oilis.oecd.org/olis/2002doc.nsf/43bb6130e5e86e5fc12569fa005d004c/41c89c89cb9e147cc1256d1d00462725/\\$FILE/JT00143801.PDF](http://www.oilis.oecd.org/olis/2002doc.nsf/43bb6130e5e86e5fc12569fa005d004c/41c89c89cb9e147cc1256d1d00462725/$FILE/JT00143801.PDF)>.

¹³⁶OECD, *The Size of Government Procurement Markets*, Abstract, 21 Sep. 2003 <http://www.oecd.org/LongAbstract/0,2546,en_2649_34153_2082762_119699_1_1_37431,00.html>.

¹³⁷World Trade Organization, *The WTO... In brief*, (Geneva: World Trade Organization), 21 Sep. 2003 <http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm>.

leaders agreed to work towards "free and open trade and investment in the Asia-Pacific by 2010 for developed member economies and 2020 for developing ones."¹³⁸ It would take another year before the Government Procurement Experts Group (GPEG) was created to work towards the above goal in the area of government procurement.

In 1999, the group established a series of six non-binding principles with respect to government procurement that Members report against. These principles include transparency, value for money, open and effective competition, fair dealing, accountability and due process, and non-discrimination. The purpose of these activities is to share information "on existing procurement regimes, with a view to enhancing transparency and ultimately leading to liberalization of procurement markets."¹³⁹ APEC therefore, represents another forum for promoting government procurement liberalization.

Canadian International Trade Tribunal (CITT)

The CITT is a quasi-judicial body that investigates complaints by suppliers relating to government breaches of procurement obligations found in NAFTA, the AIT, the WTO-AGP, and CKTEA.¹⁴⁰ Its mandate as a trade remedy body makes it a very pro-liberalization institution; the CITT interprets rules in a way that favours increased

¹³⁸ APEC, Government Procurement in APEC, (Singapore: Asia Pacific Economic Cooperation), 16 Oct. 2002 <<http://www.apecsec.org.sg/loadall.htm?http://www.apecsec.org.sg/govtproc/gphome.html>>.

¹³⁹ Simeon A. Sahaydachny and Don Wallace Jr., 'Opening Government Procurement Markets,' in Miguel Rodriguez Mendoza, Parick Low, Barbara Kotschwar (eds.), Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations, (Washington: Brookings Institute Press (OAS), 1999), p.470.

¹⁴⁰ Canadian International Trade Tribunal (CITT), Procurement Review Process: A Descriptive Guide, (Ottawa: CITT, October, 2003). 15 Oct. 2003 <http://www.citt.gc.ca/publicat/guide2003_e.asp>.

liberalization. This could potentially result in the scope of liberalization being broadened beyond what negotiators intended.

Institutional culture in the CITT has also played an important role in internalizing government procurement liberalization. The CITT has significant powers and views itself as the defender of competition against bureaucrats who are trying to skirt the rules. It also has an interest in protecting its power base, and not seeing its mandate watered down.

Summary

The idea of government procurement liberalization really came into its own during this decade as Canada joined four new trade agreements that included government procurement. The 1990s also witnessed an increase in the number of interests participating in the liberalization process and in the number of institutions internalizing and entrenching government procurement liberalization.

While civil society has become more vocal in opposing new areas of negotiations in trade agreements, what is striking is the lack of institutional opposition to government procurement liberalization. It seems that government procurement liberalization is now a given in trade agreements to which Canada is a Party. The next chapter does not directly continue the ideas, interests and institutions framework per se, but rather brings out some key issues regarding the experience with the resultant procurement process.

Chapter Four - Positive and Negative Impacts of Liberalization on the Federal Government Procurement Process

The last two Chapters showed how the idea of government procurement was initially rejected by the Canadian government and governments around the world, but that as ideas, interests, and institutions evolved, liberalization became more acceptable, to the point where Canada has signed multiple trade agreements liberalizing its federal market.

This thesis is concerned with the impact such liberalization has had on the procurement process, because as mentioned in the introduction, the purpose of procurement is to buy a needed good or service in a fair, timely, efficient and cost-effective way. If the procurement process becomes bogged down in cumbersome trade rules, then it cannot meet these objectives. A balance must be struck between the needs of departments and agencies to procure products to meet their program objectives, and the needs of Canadian suppliers to have predictable access to government markets around the world.

This chapter therefore, takes the first steps towards analyzing, in general, the impact of government procurement liberalization on the procurement process. It does not directly continue the ideas, interests and institutions approach, but instead addresses key issues (both positive and negative) regarding Canada's experience with the resultant procurement process.

4.1 *Positive Impacts*

Government procurement liberalization has contributed to improving the procurement process in three main areas: non-discrimination, transparency, and openness / competitiveness. While these are not the only positive impacts, they are the ones most cited by procurement officers interviewed, and so, in the interest of keeping the scope of this thesis manageable, the discussion is limited to these three variables.¹⁴¹ Each is addressed in turn below.

4.1.1 Non-Discrimination

The procurement process has become less discriminatory by virtue of the fact that there are now explicit trade rules that prohibit discrimination against foreign suppliers.¹⁴² As mentioned, Canadian suppliers, Industry Canada and the Department of Foreign Affairs and International Trade (and their predecessors) sought rules-based trade agreements so as to provide more predictability in the procurement process and to level the playing field with local suppliers in other countries. Rules on non-discrimination were one way of achieving market access and predictability of that access.

Canadian businesses, by having strong assurances that they will be treated no less favourably than other suppliers, particularly domestic suppliers, have more confidence in their ability to bid on and win foreign government contracts. Businesses (Canadian or otherwise) do not want to spend the time, money and effort involved in preparing and

¹⁴¹ Other positive impacts include increased predictability and accountability of the procurement process.

¹⁴² Or in the case of the AIT, the federal government is prohibited from discriminating between the goods, services or suppliers of a particular province or region. All references to foreign goods, services and suppliers shall be interpreted to mean provincial goods, services and suppliers in the context of the AIT.

submitting a bid, if their chances of winning are going to be based on arbitrary factors. In other words, if the bids will not be evaluated according to objective factors such as best price/product/value.

Non-discrimination rules have therefore, become institutionalized in the various trade agreements. These rules carry the force of law, whereas prior to the international trade agreements, procurement rules at the federal level in Canada were articulated through policies and regulations (as is still the case for non-trade covered procurement). As a treaty between governments, international trade rules are much more binding and difficult to change than a domestic policy or regulation.

The newest trade agreements (NAFTA, AIT, WTO-AGP, CKTEA) further entrench procurement rules by establishing a bid challenge mechanism, which in Canada is carried out through the CITT, and a state-to-state dispute settlement mechanism (in the case of the international agreements). This means that procurement officers can no longer intentionally or unintentionally discriminate against foreign suppliers without consequence.

Not only is the non-discrimination principle expressly set out in a specific article early on in each trade agreement, it is reiterated throughout the chapters/agreement in order to further discourage discriminatory behaviour and to emphasize the importance countries

attach to this principle. For example, in NAFTA,¹⁴³ Article 1003 is the National Treatment and Non-discrimination article, but the nondiscrimination principle is also found in Articles 1006 - Offsets, 1007 - Technical Specifications, 1008 - Tendering Procedures, 1009 - Qualification of Suppliers, 1011 - Selective Tendering, 1012(1)(a) - Time-Limits, and 1017 - Bid Challenge. The same can be said about the WTO-AGP, CKTEA and to a lesser extent, the AIT.

Evidence that the federal procurement process has become less discriminatory can be seen in several areas. For example, the federal government no longer applies its domestic socioeconomic policies to international trade covered procurement, the most 'discriminatory' policy from a foreign standpoint being the Canadian Content policy. This policy gives preference to Canadian goods and services.

In instances where Canada wanted to retain an ability to apply its socioeconomic procurement policies, it negotiated specific exemptions from the agreements (e.g. set-asides for small and minority businesses).¹⁴⁴ In general, the procurement process has become less discriminatory in that Canada no longer applies offsets (e.g. a requirement to use local labour) in procurement covered by the trade agreements.

Further evidence that the federal procurement process has become less discriminatory can

¹⁴³NAFTA is cited throughout this Chapter, but similar Articles are found in the WTO-AGP, CKTEA, and for the most part, the AIT.

¹⁴⁴This set-aside allows Canada to implement its Set-Aside Program for Aboriginal Businesses and to meet its procurement obligations under the numerous Comprehensive Land Claim Agreements.

be found by turning to the mechanisms that were meant to enforce the principle of non-discrimination: the main one being the CITT. Each year, of over 15,000 trade-covered procurement, less than one percent have been challenged at the CITT. Of those, less than 40% are investigated (in other words, 60% of complaints were dismissed without having been investigated due to technicalities or lack of evidence showing a breach of the trade agreements). Of those investigated, less than fifty percent were determined to be valid (except in 1999-2000 and 2001-2002 when more than 50% of investigated complaints were determined valid).¹⁴⁵ This seems to suggest that the federal government procurement process is relatively non-discriminatory.

Not only has the procurement process become more non-discriminatory vis-a-vis foreign suppliers, it has also become more non-discriminatory amongst Canadian suppliers.

Although the international trade agreements were meant to eliminate government discrimination against foreign suppliers “by far the largest number of bid challenges brought before the Tribunal are from Canadian firms.”¹⁴⁶

According to the CITT, as of November 2002, only eight complaints have been received from non-Canadian based suppliers and in 1995-1996, all the complaints were from Canadian-based suppliers.¹⁴⁷ A probable explanation for this is that the federal

¹⁴⁵See the Canadian International Trade Tribunal (CITT) Annual Reports that contain a table on the disposition of procurement complaints. (Ottawa: CITT, 1994/95 to 2001/02), 23 Oct. 2003 <http://www.citt.gc.ca/publicat/index_e.asp>.

¹⁴⁶Public Works and Government Services Canada (PWGSC), Public Procurement: A Matter of Trust, not Blind Trust, (Ottawa: PWGSC, 1997), p.4.

¹⁴⁷Randy W. Heggart, ‘*Information on Procurement Complaint History*,’ e-mail to the author, (December 11, 2002) and CITT, Annual Reports.

government, when procuring, does not make a distinction of ownership; therefore if a company has a Canadian address it is considered a Canadian supplier and treated as such, even though in reality it is just a Canadian subsidiary of a foreign-owned company.

4.1.2 Increased Transparency

Like non-discrimination, transparency is another theme that runs throughout the trade agreements, and is promoted in all aspects of the procurement process. Transparency is very important to suppliers because they need to know what it is they are being asked to bid on, and how their bids will be evaluated, before they can decide whether or not to put the time, money and effort into preparing and submitting a bid. Transparency also contributes towards creating a predictable and accountable environment for suppliers, as corrupt government practices are less likely to occur in a transparent procurement environment.

Transparency means making the procurement rules, procedures and outcomes known. Transparency is primarily provided through three mechanisms in the trade agreements: publication of information, provision of information and reports.

Under publication of information, parties are required to publish various notices about each covered procurement¹⁴⁸ and about the procurement environment in general (e.g.

¹⁴⁸Examples include Notice of Proposed Procurement (NAFTA 1010 (1)(2)), Notice of Planned Procurement (NAFTA 1010 (3)), Notice of a Qualification List (NAFTA 1010(5) and (6)), and Contract Award Notice (NAFTA 1015(7)).

procurement laws, regulations, precedential judicial decisions, administrative rulings of general application and any procedure, including standard contract clauses).¹⁴⁹ Under provision of information, parties are required to share information with other parties, on request¹⁵⁰ and to share information with suppliers, on request.¹⁵¹

Again, the procurement process has become more transparent by virtue of these rules and while it is true that rules are not always followed, there is evidence that with respect to transparency, the rules are being followed. One area in particular in which the trade agreements have been successful in making things more transparent, is in the advertisement of government requirements.

Prior to the trade agreements, procurement officers used source lists and sent out invitations to tender to a specific number of suppliers on a list, depending on the requirement. In other words, suppliers (domestic or foreign) had no way of knowing what the government was planning to buy in any particular year, and when they were planning on buying it, until and unless they received an invitation to tender.¹⁵²

This changed with the obligation set out, first in the GATT Procurement Code, and then in subsequent trade agreements, for entities to publish a notice of proposed procurement for each covered procurement. The notices had to be published in a designated

¹⁴⁹See NAFTA 1017(n) and (o) and 1019(1) and (4).

¹⁵⁰NAFTA 1019(2)-(4).

¹⁵¹NAFTA 1013(2) and 1015(6), 1009(2)(j), 1011(4), 1020(2).

¹⁵²Personal Interview, Ottawa, November 18, 2002.

publication, thereby facilitating access to government contracts. For Canada, the current designated publication is the Government Electronic Tendering Service (GETS), which is run under the name MERX.¹⁵³ Any supplier, anywhere in the world who has access to the Internet can go on MERX and view over 2000 public sector opportunity notices on any given day.

Federal laws, regulations, policies and procedures that govern the procurement process are also more transparent and, with the advent of the Internet, are readily accessible to all suppliers, and trading partners. For example, TBS Contracting Policies and Notices, and PWGSC's Supply Manual and Standard Acquisition Clauses and Conditions (SACC) Manual can all be found on the Internet.¹⁵⁴ This gives both foreign and domestic suppliers a better understanding of how federal government procurement is conducted.¹⁵⁵ The procedures and determinations of Canada's bid challenge mechanism - the Canadian International Trade Tribunal - are also readily available on the Internet, to all suppliers and interested parties, rather than just to the supplier who submitted the complaint.¹⁵⁶

In addition to the publication and provision of information requirements, trade agreements promote transparency through reporting obligations. For example, entities

¹⁵³Federal government notices can be viewed on MERX - <www.merx.com>

¹⁵⁴Treasury Board of Canada Secretariat, Contracting Policy and Publications, 25 Oct. 2003 <http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/Contracting/siglist_e.asp>, PWGSC, Supply Manual, (Ottawa: PWGSC), 25 Oct. 2003 <<http://www.pwgsc.gc.ca/sos/corporate/sm/index-e.html>>, PWGSC, SACC Manual, (Ottawa, PWGSC), 25 Oct. 2003 <<http://sacc.pwgsc.gc.ca/sacc/query-e.jsp>>.

¹⁵⁵Personal Interview, Ottawa, November 18, 2002.

¹⁵⁶CITT, Publications, 23 Oct. 2003 <http://www.citt.gc.ca/publicat/index_e.asp>.

have to prepare a written report on each contract awarded under limited tendering¹⁵⁷ and submit statistical reports on covered procurement, which again, provide for both accountability and transparency.¹⁵⁸

While Canada is doing a good job meeting its publication and provision of information requirements, it is falling behind in meeting its reporting requirements, particularly with respect to statistics on procurement covered by the WTO-AGP and NAFTA. The last statistical report on procurement covered by the WTO-AGP Canada submitted was for the year 1996.¹⁵⁹ This, in part, is because other WTO-AGP members have also failed to submit their statistical reports.

Canada, however, is still providing a high level of transparency even though it is not meeting some of the formal transparency obligations. For example, information and statistics on what the federal government bought, by department, can be found on the Treasury Board Secretariat web-site up until the year 2001. The Contracts Canada web-site also carries data on historical contracts from the previous three years, although the information is not tabulated in a statistical form.¹⁶⁰

¹⁵⁷ NAFTA, Article 1016(3).

¹⁵⁸ NAFTA, Article 1019(7).

¹⁵⁹ Canada submitted its Article XIX.5 Statistics for 1996 on October 16, 1998. World Trade Organization, Documents Online, Symbol: GPA/1/Add.1, 30 Nov. 2002 <<http://docsonline.wto.org>>.

¹⁶⁰ Treasury Board of Canada Secretariat, Publications: Contracting Data, 25 Oct. 2003

<http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/con_data/siglist_e.asp>, Contracts Canada, Contract History (Database), 16 Nov. 2002 <<http://csi.contractsCanada.gc.ca/csi/prod/en/applctrl.cfm?cmd=start>>. Contracts Canada only carries data on contracts let by the Department of Public Works and Government Services.

Improvements in transparency have benefited both suppliers and the government.

Suppliers have more information available to familiarize themselves with the government procurement environment and to determine whether or not to attempt to penetrate a particular market. Suppliers have access to the government's Standard Acquisition Clauses and Conditions, and have the right to a debrief if their bid is unsuccessful. They can also view contract award notices to get a better sense of the competition. These are rights suppliers did not have prior to the trade agreements.

Transparency lowers the number of non-compliant bids that are received, as suppliers gain a better understanding of government expectations, policies and procedures. It also improves the level of competition amongst suppliers.

The level of transparency that is required by the trade agreements has motivated governments to improve transparency of the procurement environment in general. For example, it is now the federal government's policy to advertise notices for all procurement above \$25,000 on GETS, whether or not the procurement is covered by a trade agreement (except in limited circumstances, such as for national security).¹⁶¹ As well, Public Works and Government Services Canada, along with other federal departments, have created Contracts Canada as a means of improving supplier awareness of, and access to, federal government purchasing information.¹⁶²

¹⁶¹Treasury Board of Canada Secretariat, Contracting Policy, 10.7.8, 30 Nov. 2002
<http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/Contracting/contractingpol_2_e.html#pro>.

¹⁶²Contracts Canada, Welcome, 20 June 2003, 24 Oct. 2003
<<http://www.contractscanada.gc.ca/en/index.html>>.

Increased transparency of the procurement process, however, cannot be understood by looking at the ideas, interests, and institutions involved in the government procurement liberalization process alone. Canada was already moving towards a more transparent process as a result of suppliers complaining that they were not being invited to bid on federal opportunities.¹⁶³ They wanted access to their own government market, let alone foreign government markets.

Advances in technology also represent a large contributing factor to increased transparency. The Internet is much more accessible to foreign suppliers, and costs a lot less (for the government and the supplier), than traditional paper based publications. Canada was quick to take advantage of new technologies, as evidenced by the fact that the federal government was already advertising its opportunities on electronic bulletin boards in 1990.¹⁶⁴

4.1.3 A More Open and Competitive Procurement Process

Trade rules exist to enhance competition, and in a procurement context, the way to guarantee the highest level of competition is to have as few restrictions as possible on who can bid. Or in other words, it is to have open competition. International trade agreements, therefore, seek to establish open competition as the norm. As a rule, this is expected to yield significant benefits, even though some fear that it could also be administratively costly in some cases.

¹⁶³Personal Interview, Ottawa, November 27, 2002.

¹⁶⁴Ibid.

While provisions for selective tendering do exist in the international agreements, they generally try to maximize domestic and foreign competition.¹⁶⁵ The trade agreements also set-out circumstances which allow for less than full competition (i.e. limited tendering), but these are considered derogations from the norm of open tendering, and are carefully circumscribed.¹⁶⁶

Prior to the trade agreements, federal procurement officers had to invite a minimum of three suppliers to bid on any contract in order for the procurement to be deemed competitive. Depending on the industry, it was likely that all three suppliers were Canadian. The emphasis on open tendering in the trade agreements eliminated the discretion given to procurement officers to decide which, and how many, suppliers were to be invited to tender.¹⁶⁷

Under open competition under the international agreements, anyone who is interested in bidding, whether they are a domestic or foreign supplier, can ask for the tender documents and submit a bid. As a result, not only has the government market become more internationally competitive, but the level of competition amongst Canadian suppliers has also increased.

Procurement officers interviewed also have the impression that the procurement process

¹⁶⁵See NAFTA, Article 1011.

¹⁶⁶See NAFTA, Article 1016.

¹⁶⁷Personal Interview, Ottawa, November 18, 2002.

has become more open and competitive and that there is now less directed, or sole source, purchasing. They attribute this to the reduced ability to use socioeconomic procurement policies in procurement covered by the trade agreements.¹⁶⁸ As well, procurement officers specifically cite the narrow interpretations and inconsistent rulings of the CITT as limiting the ability of the federal government to tender procurement non-competitively, even in circumstances provided for in the trade agreements.¹⁶⁹

Openness is also evidenced by the fact that the federal government now rarely uses source lists or selective tendering as a method of procurement. Indeed, a search of over 2000 public sector procurement notices on MERX on October 22, 2003, found no instances of procurement classified as selective tendering, automated vendor rotation or rotational tendering.¹⁷⁰

Further evidence of openness is found in the number of procurement contracts let under open tendering conditions. The following tables show the number of procurements let by PWGSC above \$25,000 under competitive conditions and non-competitive conditions, both by number of contracts and by dollar value for the last three fiscal years.¹⁷¹

¹⁶⁸Personal Interviews, Ottawa, November 18, 2002 and November 27, 2002.

¹⁶⁹For example, in Patricia M. Close, P&L Communications Inc., PR-2000-059, (Ottawa: CITT, 2000) the Tribunal essentially said that limited tendering cannot be used if two potential suppliers exist, but in Ellen Fry, Papp Plastics & Distributing Ltd., PR-2001-066, (Ottawa: CITT, 2001) the Tribunal said that the existence of exclusive rights does not automatically mean that PWGSC is entitled to sole source.

¹⁷⁰MERX, Canadian Opportunities, 22 Oct. 2003 <www.merx.com>.

¹⁷¹Contracts Canada, Contract History: Expert Search, 23 Oct. 2003

<[HTTP://CSI.CONTRACTSCANADA.GC.CA/CSI/PROD/en/applctrl.cfm?cmd=expdsrch&init=1&f=expertSearch](http://CSI.CONTRACTSCANADA.GC.CA/CSI/PROD/en/applctrl.cfm?cmd=expdsrch&init=1&f=expertSearch)>. Competitive numbers include unchallenged Advanced Contract Award Notices (ACANs). An ACAN is issued when the government wants to let the supplier community know that it plans to direct a contract to a pre-identified supplier. Potential suppliers then have 15 days to submit a statement of

Table 1

Fiscal Year	Competitive		Non-Competitive	
	Number of contracts	Value of Contracts	Number of contracts	Value of Contracts
2002/2003	15998	\$8,470,112,429	3269	\$1,786,152,195
2001/2002	15890	\$6,932,367,118	3587	\$2,449,353,619
2000/2001	9044	\$4,462,197,515	1801	\$1,334,079,993

Table 2

Fiscal Year	Percentage Competitive		Percentage Non-Competitive	
	Number of contracts	Value of Contracts	Number of contracts	Value of Contracts
2002/2003	80%	79%	20%	21%
2001/2002	77%	65%	23%	35%
2000/2001	80%	70%	20%	30%

While the data is conclusive in showing that a majority of procurement is being let under competitive conditions rather than under non-competitive conditions, little else can be determined from this information. For example, due to a lack of data, it is difficult to establish a long-term trend towards increasing competition, and it is even more difficult to completely attribute any increase in competition to trade liberalization. Increased

capabilities. If the supplier is deemed capable of performing the work then the requirement is competed under open conditions. If no challenge is received, the contract is considered competitive. Source: Treasury Board of Canada Secretariat, *Contracting Policy Notice 2000-4*, 1 Dec. 2000, 30 Nov. 2002 <http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/ContPolNotices/cpn_20-4_e.html>. This, however, is not competitiveness; it is only transparency. If the entity is using a valid limited tendering reason (e.g. exclusive rights, prototype) it does not make sense that another supplier exists who is capable of 'competing' for the work, regardless of whether a notice was published. It also does not make sense for the government to run a pseudo-competition when there are legitimate reasons for not competing (e.g. extreme urgency, purchases made under exceptionally advantageous conditions).

openness can also be a result of advancements in technology, or to the establishment of Access to Information laws.¹⁷²

Furthermore, the data cannot tell us if this is a desirable level of openness and competition. The goal of procurement is not to attain 100% competitive contracts because there are valid circumstances when it is better value for the Crown to procure on a sole source or less than fully internationally competitive basis.¹⁷³ It then begs the question of what the goal should be - e.g. is 60% by number and value of contracts the right amount of competitive contracting?

Generally, the proportion of competitive contracts should increase as the trade agreements come into effect. However, specific circumstances could lead to a temporary increase in the proportion of non-competitive procurement contracts. This could be indicative of certain major world events or of one-time purchases by the government (usually these are related to national security and defence). For example, given the events of September 11, 2001, it is likely that more non-competitive contracts relating to national security were issued in the year following.

4.2 Negative Impacts

Government procurement liberalization has had negative impacts on the procurement

¹⁷²Personal Interview, Ottawa, November 27, 2002.

¹⁷³See Sue Arrowsmith, *Government Procurement and Judicial Review*, (Toronto: The Carswell Co. Ltd.), 1988, pp.62-66. Examples where competition may not result in best value include where the dollar requirement is low, in cases of emergency or urgency, where there is only one source of supply, etc.

process in three main areas (again, this is not an exhaustive list): efficiency (of the procurement process, not of the economy), complexity, and rigidity, inflexibility and risk adversity. Each is elaborated upon below.

4.2.1 Increased Inefficiency

Government procurement liberalization has made the procurement process more inefficient in three main ways. First, the trade agreements have lengthened the procurement process, particularly the bidding periods, delaying the time it takes for a department to receive the needed good or service.

Prior to the trade agreements, the rule of thumb was to provide suppliers a 10-15 day bid period.¹⁷⁴ The international trade agreements, however, have institutionalized a lengthier procurement process by establishing a minimum 40 day bid period as the norm. This can be reduced to 24 or 10 days in a few specific circumstances, (e.g. urgency).¹⁷⁵ The AIT has had less of an effect in this regard, as there are no prescribed time limits, but the general practice is to observe a 15-day minimum bid period.

The GATT Procurement Code had initially set a 30-day minimum, but this was increased to 40 days in NAFTA and the WTO-AGP. Presumably, this was because suppliers felt that 30 days was not enough to prepare and submit a responsive bid on a foreign opportunity. While this may have been a valid concern at the time, it seems less

¹⁷⁴Personal Interviews, Ottawa, November 15, 2002 and November 18, 2002.

¹⁷⁵See NAFTA, Article 1012 and WTO-AGP, Article XI(3)(c).

legitimate with the advent of the Internet and other technological advances in telecommunications and transportation which allow foreign suppliers to view procurement notices, to order tender documents, and to submit bids in about the same amount of time as domestic suppliers. Unfortunately, the trade agreements have yet to be amended to reflect these advances.¹⁷⁶

Related to this is the delay in the procurement process if a complaint is accepted for investigation by the CITT. The CITT can issue a stop award order until its investigation is complete, which can take anywhere from 45 days (for an expedited case) to 135 days.¹⁷⁷ The Tribunal can also order the procuring entity to re-tender the solicitation, to re-evaluate the bids, or to award the contract to a different supplier, thereby further lengthening the procurement process and preventing the government department from receiving the needed goods or services in a timely manner.

Second, inefficiencies in the procurement process are created due to the greater number of rules, decision-making points, players, analysis and consideration given to a trade covered procurement, as expanded upon below. These have all become necessary if a procuring entity is to successfully meet its trade agreement obligations and to avoid the risk of a

¹⁷⁶Trade Agreements tend to be fairly static documents that are difficult to amend, because each country will want to amend different parts of the Agreement, leading to the renegotiation of the whole text which is a lengthy process. Therefore, Members are reluctant to amend the Agreement resulting in a text with soon outdated language and ideas. For example, NAFTA and the WTO-AGP refer to bids being submitted by telex or telegram.

¹⁷⁷The Tribunal usually renders a decision within 90 days. CITT, Information on Procurement Review (Ottawa: CITT, 2001), 30 Nov. 2002 <<http://www.citt.gc.ca/publicat/procu-e/procu-e.htm>>.

formal complaint to the CITT.¹⁷⁸

Decision-making points have increased, lengthening the procurement process, as procurement officers have to go through several steps to determine 1) if any of the four trade agreements apply, 2) what obligations actually apply to the specific procurement, 3) how the agreements interact with each other, if more than one applies, and 4) how they interact with other procurement policies.

Greater attention and consideration must now be given to tender documents as the instructions and information provided to bidders are required to be more specific and clear than before the trade agreements came into effect, specifically in relation to technical specifications and evaluation criteria. This takes more time, as procurement officers become exceedingly cautious when writing their specifications so as not to favour a particular company or brand name, and in ensuring that evaluation is carried out in strict accordance with what was set out in the tender documents.¹⁷⁹ On the other hand, it could be argued that these delays are justified because they enhance the checks and balances in the procurement process, and that these are desirable when dealing with public money.¹⁸⁰

Further inefficiencies can be attributed to the CITT. The creation of a bid challenge mechanism has created a need for dedicated lawyers and policy analysts to address CITT

¹⁷⁸Public Works and Government Services, Contracting Deck: An Overview of the Contracting Activities of Public Works and Government Services Canada, (Ottawa: PWGSC, 2000), p.23.

¹⁷⁹Personal Interview, Ottawa, November 15, 2002.

¹⁸⁰Personal Interview, Ottawa, November 18, 2002.

complaints. Lawyers represent the Crown's interests to the CITT and policy analysts coordinate the government response to CITT complaints, write 'lessons learned' and make the necessary policy changes arising from a CITT decision. The contracting officers whose procurement is subject to complaint also have to spend considerable time responding to the complaint, taking them away from working on other procurement.

Third, inefficiencies arise because government cannot take advantage of practices generally available in the private sector. For example, it is harder for the government to avoid dealing with suppliers who have a poor performance record, because the trade agreements do not explicitly recognize this as grounds for rejecting a supplier. Thus, NAFTA 1009(4) states that "nothing in paragraphs 2 and 3 shall prevent an entity from excluding a supplier on grounds such as bankruptcy or false declarations." Since this does not include prior poor performance as an explicit reason for exclusion, it has the legal effect of limiting procurement behaviour, even though one could argue that the above list is only illustrative.

As well, under the trade agreements, government can no longer negotiate directly with a manufacturer for a particular product, but must buy from resellers who are likely to sell the product at marked-up prices. This is because there are no limited tendering reasons in the trade agreements to allow government to buy directly from the manufacturer even when the technical specifications effectively identify a particular product. In this case, the presence of numerous resellers makes it seem as though there is competition in the

market, when really there is not - since they are all selling the same product.¹⁸¹

As mentioned before, the federal government has also been unable to take advantage of the potential efficiencies of limited tendering (in the appropriate circumstances) due to the narrow interpretations of the CITT. Canada's difficulties with this Tribunal are addressed further on in this Chapter.

Similarly, the trade rules on negotiations effectively make it impossible to use negotiations as an efficient aspect of procuring. Since mandatory and point-rated evaluation criteria have to be established at the front-end of the procurement process, there is little left to negotiate, except the finer details. If the mandatory criteria change substantially, then the requirement has to be re-tendered, as there may have been suppliers who did not bid on the basis of the original criteria, but who would have bid on the basis of the modified criteria.¹⁸²

The rigid tendering procedures that tend to be established by such trade agreements also do not allow for the development of networks of reliable suppliers, which could reduce transaction costs and enhance the likelihood that suppliers could come up with innovative products tailored to the purchaser's needs, as often happens in the private sector.¹⁸³

¹⁸¹Personal Interview, Ottawa, November 27, 2002 and November 3, 2003.

¹⁸²Ibid. The negotiations article in NAFTA is based on the American system of best and final offer. Canada made a decision not to use this system as a basis of negotiations. Generally, Canada only negotiates with the winning supplier, and in the past procurement officers would likely have negotiated some of the mandatory criteria.

¹⁸³Lipsey, et al., p.92.

4.2.2 *Added Complexity*

Government procurement liberalization has added complexity to the procurement process in several ways. The first is in determining if a procurement is covered by the trade agreements. Canada is now a signatory to three major agreements covering government procurement and each agreement has different thresholds, different ways of stating what is covered (i.e. positive list or negative list) and a different coverage of services, Crown Corporations and sub-central entities.

A procurement officer has to go through five steps in determining coverage. They must verify if the procurement is: 1) above trade agreement thresholds; 2) a procurement according to the definition in the trade agreements; 3) for a covered entity; 4) for a covered good, service or construction service; and 5) covered by an exclusion, exception or exemption from the agreements.

The first step has to be carried out in accordance with the article on valuation in the trade agreements. If after the first step, the procurement appears to be covered by NAFTA, WTO-AGP and AIT, the procurement officer then has to consult three different agreements to determine if it falls under the coverage of one or more agreement.

While it is easy to list the five steps, in practice determining coverage is often difficult.

For example, there are over ten different thresholds.¹⁸⁴ Crown Corporations, such as the Mint and Canada Post, are covered under NAFTA, but not under the AIT. Conversely, the Queen's Quay West Land Corporation is covered under AIT but not NAFTA, whereas there are no Crown Corporations covered by the WTO-AGP. Moreover, NAFTA and the WTO-AGP exclude all procurement in respect of research and development or shipbuilding and repair, whereas the AIT does not.¹⁸⁵

The second complexity relates to understanding which rules have to be followed and how to apply those rules. Which the trade agreements have added many more rules, the text on these can often be difficult to read and is always subject to interpretation to a degree.¹⁸⁶

Further complexity ensues when the text of the applicable trade agreement uses different terms than those used in the domestic procurement process; or where it uses similar terms, but with different meanings. For example, open, selective and limited tendering are terms used only in the trade agreements. In Canada, the synonymous terms are competitive, two-stage procurement and non-competitive or sole-source procurement.

The trade agreements also use the term invitation to tender as a synonym for Notice of

¹⁸⁴For goods alone the threshold for AIT is \$25,000; for NAFTA it is \$37,500 between Canada and the U.S., \$89,000 between Canada and Mexico, and \$445,000 for Crown Corporations; and for the WTO-AGP it is \$261,300.

¹⁸⁵Public Works and Government Services Canada, Contracting Deck: An Overview of the Contracting Activities of Public Works and Government Services Canada, pp. 22-23.

¹⁸⁶For example, NAFTA 1012(2)(c) states that Subject to paragraph 3, an entity shall provide that: (c) in selective tendering procedures involving the use of a permanent list of qualified suppliers, the period for receipt of tenders is not less than 40 days from the date of the initial issuance of invitations to tender, but where the date of initial issuance of invitations to tender does not coincide with the date of publication of a notice in accordance with Article 1010 there shall not be less than 40 days between those two dates. What does this mean?

Proposed Procurement and Notice of Planned Procurement. While all three terms are used in Canada, the term 'invitation to tender' has a different meaning.¹⁸⁷

Third, as mentioned, government procurement liberalization has introduced more players into the procurement process. Legal, in particular, has a greater role than it ever did, in part because suppliers have become more litigious under the trade agreements. Policy is also more involved in helping procurement officers meet the obligations of the trade agreements, and often, different people have different interpretations about the obligations (even lawyers themselves cannot always agree.)¹⁸⁸

Fourth, the trade agreements have made it more difficult for the government to use procurement to meet its other political obligations and there is no clear mechanism to determine how conflicting political commitments are to be met.¹⁸⁹ For example, Canada is required to give preferential treatment to Aboriginals in some aspects of the procurement process under the Comprehensive Land Claim Agreements (CLCA), signed with various aboriginal groups. If a procurement is covered by a trade agreement and a CLCA, it is possible that the two sets of obligations will conflict and it is unclear which one takes precedence.¹⁹⁰

¹⁸⁷In Canada, an Invitation to Tender is a method of solicitation, like a Request for Proposal. A Notice of Proposed Procurement is published in both circumstances.

¹⁸⁸Personal Interview, Ottawa, November 18, 2002.

¹⁸⁹Personal Interview, Ottawa, November 12, 2002.

¹⁹⁰Although Canada has a set-aside for minority businesses under the trade agreements, some actions required under the CLCAs would not qualify as a set-aside. For example, in Selkirk First Nation Final Agreement, Section 13.12.1.1, the government is required to give preferential notice to the Aboriginal group, however, this is in direct conflict with the non-discrimination principal of the trade agreements. (E.g. WTO-AGP Article III, NAFTA Article 1003) What should be done in this circumstance? Department of

Fifth, as explained in the previous Chapter, the trade agreements have made the procurement process more complex due to the cumulative effect of an increased number of rules, steps, and players involved, and the increased level of sophistication required by the procurement officer. Several complexities in particular arose during the implementation of the trade agreements as policy analysts tried to figure out what it was procurement organizations were expected to do, and how to translate the obligations of the trade agreements into concrete guidance for procurement officers.¹⁹¹

In implementing the trade agreements, the government has had to re-assess its other procurement policies to determine if they could or could not be applied to a trade-covered procurement. In some cases they could, such as the Set-Aside Program for Aboriginal Businesses, and in some cases they could not, such as the Canadian Content policy (it applies only when the procurement is not covered by an international trade agreement).¹⁹²

Policy analysts also had to determine services coverage under the WTO-AGP. Whereas services coverage is listed in the WTO-AGP according to the Central Products Classification (CPC) Canada states in its Annex 4 that it will “be utilizing the Common Classification System (CCS) for purposes of implementing this Agreement.”¹⁹³ The two Classifications are not directly translatable though, as the CCS is a specific procurement

Indian Affairs and Northern Development, Selkirk First Nation Final Agreement, (Ottawa: Minister of Indian Affairs and Northern Development, 1998), 13 Nov. 2003
<http://www.ainc-inac.gc.ca/pr/agr/selkirk/sfa1_e.pdf>.

¹⁹¹Personal Interview, Ottawa, October 30, 2002.

¹⁹²See PWGSC, Supply Manual 5.071 and 9L.050. 30 Nov. 2002
<<http://www.pwgsc.gc.ca/sos/corporate/sm/chapter-full-e.html>>.

¹⁹³WTO-AGP, Canada’s Appendix 1, Annex 4.

classification code, whereas the CPC is not. “When the Department of Public Works and Government Services tried to convert the CPC to the CCS in order to say what was covered it turned out that it was not exactly what the negotiators had thought they covered.”¹⁹⁴ Therefore it has been, and continues to be, hard to determine what Canada’s services coverage actually is.

Sixth, it is harder for the procurement officers to know who their suppliers are and to know the industry when the procurement is open for anyone to bid. These complexities have posed a particular challenge to the Department of Public Works and Government Services in providing their services to client departments.¹⁹⁵

4.3.3 Rigidity, inflexibility and risk adversity

While trade agreement rules are meant to provide predictability and certainty for the supplier, the flip side in terms of the procurement process is often rigidity and inflexibility. Trade rules are usually in place for at least 10 years before any changes are made, in part because consensus is needed to make changes. Consensus is hard to obtain among the three NAFTA countries, let alone among the over 20 countries of the WTO-AGP, as each country is likely to have a different view about what needs to be changed.

In the meantime, wide-ranging advances in technology are being made which affect the way procurement is carried out. The Internet, for example, allows governments to carry

¹⁹⁴Personal Interview, Ottawa, October 30, 2002.

¹⁹⁵Personal Interview, Ottawa, November 12, 2002.

out procurement on-line (e-purchasing), representing huge savings in time and money. The trade agreements, however, are inhibiting the ability of governments to fully take advantage of these new technologies, because of their out-of-date rules (e.g. 40 day bid period).¹⁹⁶

Modifications to trade rules are also difficult to make because the negotiation of new rules can be time consuming and the implementation can be costly. For example, governments may have just finished making all the regulatory, policy and system changes necessary to meet the obligations of the current trade rules, and procurement officers may finally be familiar with and comfortable in applying the rules, and hence are resistant to change. Trade rules are also hard to modify because governments often fear change and the uncertainty it may bring. Even if the current rules are flawed, at least they are familiar.

Trade rules often create rigidities due to their overly prescriptive nature. Unnecessary adjectives are added in the hope that they will further prevent discrimination or unfair treatment of foreign suppliers. For example, NAFTA, Article 1016(2)(c) reads “in so far as is *strictly* necessary where, for reasons of *extreme* urgency brought about by events *unforeseeable* by the entity, the goods or services could not be obtained in time by means of open or selective tendering procedures.” (Italics mine)

¹⁹⁶Personal Interview, Ottawa, November 27, 2002.

The above adjectives make it very difficult for government to actually take advantage of this provision. How do you determine whether something is strictly necessary, as opposed to just necessary, and why is urgency in and of itself not good enough to justify the use of limited tendering; what is it that makes the urgency extreme? The question can also be raised as to whether anything is ever truly unforeseeable. A balance is needed to maintain a level of non-discrimination and fairness towards suppliers, while at the same time allowing the procuring entity to carry out its procurement in an efficient manner.

By far though, the largest contributor to creating a rigid, inflexible, stressful and risk-adverse procurement environment is the Canadian International Trade Tribunal (CITT). The determinations of the Tribunal more often than not add further complexities and rigidities to the procurement process. Each decision against the federal government leads to an extensive review and modification if necessary, of the procurement process by the department involved.¹⁹⁷ In response, procurement officers become ever more risk averse in an effort to avoid a complaint to the CITT.¹⁹⁸

Some of the CITT's negative impacts on the federal procurement process stem from the extended mandate given to the Tribunal, beyond what was actually called for in the trade agreements. Thus, two additional remedies provided for by the *CITT Act* are, namely that the designated contract can be awarded to the complainant and that the complainant can

¹⁹⁷ Public Works and Government Services Canada, Contracting Deck: An Overview of the Contracting Activities of Public Works and Government Services Canada, p.75.

¹⁹⁸ Personal Interview, Ottawa, November 26, 2002.

be compensated by an amount specified by the Tribunal.¹⁹⁹ None of the trade agreements provide for the former remedy, and only the AIT provides for the latter.

Moreover, on occasion the CITT appears to step beyond its mandate when it makes determinations on complaints filed by a company who could not be considered a potential supplier. For example, in PR-2000-077, the CITT found that “Volvo did not demonstrate that it could have submitted a proposal compliant with the specifications set out in the solicitation,”²⁰⁰ but initiated an inquiry nonetheless, and awarded Volvo its costs for filing the complaint!

Canada, because of the way in which it has implemented the agreements—through legislation as opposed to implementing regulations²⁰¹—faces the problem that the Tribunal tends to interpret the trade agreements in the narrowest possible manner, and sometimes in ways that the drafters of the agreements never intended. This makes it still more difficult to carry out effective procurement at the federal level.²⁰²

Trade agreements are often written in high-level, general language that provides broad policy direction but is not meant to provide the specifics. In Canada, however, the CITT, in directly interpreting the language of the agreements, is developing specific policy

¹⁹⁹*CITT Act*, s-s. 30.15(2)(d) and (e).

²⁰⁰Pierre Gosselin, *Volvo Motor Graders Limited*, PR-2000-077, (Ottawa: CITT, 2000).

²⁰¹More specifically, Canada incorporates each trade agreement by reference, making the text of the agreement law, whereas with implementing regulations, the government can interpret the text of the agreement, and that interpretation forms the basis of the regulations. In that way, if negotiators meant for an obligation to be interpreted broadly, it will be.

²⁰²Personal Interview, Ottawa, October 30, 2002.

positions. These positions may be contrary to or different from, the federal government's position, making the wording of the text more relevant for Canada than for other countries.

PR 2001-026 provides a perfect example of CITT's narrow interpretation. In it the CITT examined the scope of Canada's shipbuilding exception under NAFTA and the WTO-AGP. Since the trade agreements do not define what a ship is, the CITT took it upon itself to do so. Contrary to the broad definition that Canada uses as the basis of its shipbuilding policy, and to the understanding negotiators had in negotiating a shipbuilding exception, the CITT used a narrow definition in determining what should constitute a ship for the purposes of the shipbuilding exception. The Tribunal arrived at this decision on the basis that

the purpose of the procurement provisions of NAFTA and the AGP is to promote trade liberalization by ensuring that tendering procedures are applied in a non-discriminatory and transparent manner. In order to address this purpose as broadly as possible, the Tribunal considers that the categories of procurement excluded from coverage by NAFTA and the AGP should normally be construed narrowly.²⁰³

The Tribunal, however, failed to consider that the government has to satisfy other values that are often different from, and in tension with, those of non-discrimination and transparency, and that there are times when it is appropriate to interpret trade rules in a broad manner.

²⁰³Ellen Fry, *McNally Construction Inc.*, PR 2001-026, (Ottawa: CITT, 2001), 16 Nov. 2002 <<http://www.citt.gc.ca/procure/Determin/pr2b026e/pr2b026e.htm>>.

As a supporter of trade liberalization, Canada would not have negotiated a shipbuilding exception (or any other exception) unless there were specific political reasons for doing so (in this case, to retain jobs in the Atlantic provinces, and to retain a Canadian capability in the shipping industry).

The Tribunal also went beyond “the general rule for interpreting domestic legislation [which] is that words are to be given their ordinary meaning as understood in context.”²⁰⁴ In this case, the Tribunal should have adopted the definition Canada uses as the basis of its shipbuilding policy.²⁰⁵ As a result of this determination, the federal government and PWGSC will have to revise its shipbuilding policies and foreign suppliers will now be allowed to bid on contracts for “boats”. Ironically, this is likely not what the supplier intended when it filed its complaint, since it too will now have to compete with foreign suppliers.

In another decision, PR 95-039, PWGSC argued that the Tribunal did not have the jurisdiction to look into the complaint because the contract was set-aside from NAFTA under the small and minority business set-aside. The contract related to a Comprehensive Land Claim Area. In this case, the Tribunal ruled against the federal government even though it recognized that the procurement would take place partly in designated land

²⁰⁴David M. Attwater, *Procurement Review: A Practitioner's Guide*, 2002 - Release 3, (Toronto: Thomson-Carswell, 2002), p.1-13.

²⁰⁵The federal government uses the North American Industry Classification 1997 33661 Ship and Boat Building as the basis of its policy. Statistics Canada, ‘*Classification 33661: Ship and Boat Building*,’ *North American Industry Classification System (NAICS) 1997*, 1 April 2003 <<http://stds.statcan.ca/english/naics/1997/naics97-class-search.asp?criteria=3366>>.

claim areas, and even though land claim agreements have procurement obligations that require the federal government to give the claimant group preferential treatment, and even though Canada had negotiated an exception in the international trade agreements to protect this obligation.

In its statement of reasons, the Tribunal ruled that in order for a procurement to be set-aside from the obligations of the trade agreements, it must be “subject to objective requirements.”²⁰⁶ Again, as a result of the determination, PWGSC had to develop a new policy on how procurement subject to both the trade agreements and one or more CLCA should be addressed.

The CITT’s interpretations with respect to overlapping coverage have also added confusion to the procurement process by stating in some determinations “that the trade agreements, while referring to the same subject matter, i.e. procurement, are legally separate one from the other,”²⁰⁷ while in other determinations, recognizing the exact opposite principle by incorporating specific obligations from NAFTA into the AIT.²⁰⁸

As Attwater has noted in Procurement Review: A Practitioner’s Guide “this uncertainty

²⁰⁶ Anthony T. Eyton, Conair Aviation, A Division of Conair Aviation Ltd., PR 95-039, (Ottawa: CITT, 1995), 16 Nov. 2002 <<http://www.citt.gc.ca/procure/Determin/pr95039e/pr95039e.htm>>.

²⁰⁷ See for example Patricia M. Close, Brent Moore and Associates, PR-99-040, (Ottawa: CITT, 1999), and Pierre Gosselin, P&L Communications Inc., PR-2000-073, (Ottawa: CITT, 2000).

²⁰⁸ See Ellen Fry, Hewlett-Packard (Canada) Ltd., PR-2001-30, (Ottawa: CITT, 2001) in which the “Tribunal notes that, although no similar provision exists in the AIT, the maintenance of complete documentation is essential under the AIT to promote fair and open procedures.” However, had the Parties wanted this, they would have written it specifically into the Agreement, as the Tribunal noted in P&L Communications Inc., PR-2000-073.

seriously undermines the existence of objective, transparent and predictable procurement rules of universal application.”²⁰⁹ Indeed, it is only through the consistent interpretation of the trade agreements that “much of the uncertainty and risk created by not knowing which procurement rules apply to a procurement would be eliminated.”²¹⁰

Summary

This chapter took the first steps towards analyzing, in general, the impact of government procurement liberalization on the procurement process. It did not directly continue the ideas, interests and institutions approach, but instead addressed key issues (both positive and negative) regarding Canada’s experience with the resultant procurement process. The Chapter showed how the rules-based trade agreements, supported by a particular bid challenge mechanism, sought by suppliers and negotiated by governments, has contributed to making the procurement process on the one hand more non-discriminatory, transparent, open and competitive; but on the other hand more administratively inefficient, complex, rigid, inflexible and risk adverse.

The negative impacts to the procurement process were augmented by the fact that Canada chose to implement its trade agreements through law, as opposed to implementing regulations, thereby allowing the CITT to interpret the actual text of the agreements; and by the fact that CITT’s mandate, culture, and interpretations have led it to make policy decisions that are not necessarily consistent with the policy direction the

²⁰⁹Attwater, p.1-9.

²¹⁰Ibid., 1-11.

government wants to take.

As highlighted in the Chapter, however, variables other than ideas, interests and institutions must be taken into account when trying to understand changes to the procurement process. Improvements in technology, domestic supplier complaints respecting the lack of access to and transparency of their own government market; and a genuine desire to improve the procurement process independent of liberalization, have also contributed to improving the efficiency and effectiveness of the procurement process.

5. Conclusions and Recommendations

The purpose of this thesis was to examine the evolution of the procurement provisions of various trade agreements which Canada has signed with a view to understanding the broad forces which shaped them. It utilized an "ideas, interests, and institutions" approach. This approach was not used to explain the content and shape of such agreements in any causal manner. Rather it was used to as a way of classifying and illustrating the role of these variables in an overall sense.

The thesis covered two broad time periods when agreements were negotiated and signed (1947 to 1991 and 1991-2000). These periods were selected for procurement-specific reasons rather than as periods requiring the broader political-economic histories of these times. For these agreements, the thesis used the ideas-interests-institutions framework as an analytical aid. As a further step or level of analysis, the thesis also explored some of the impacts of liberalization and other ideas on the actual procurement process. This part of the analysis did not directly continue the ideas, interests, and institutions approach per se but rather brought out some key issues regarding the experience with the resultant procurement processes.

Government procurement is of interest as it represents one of the last remaining areas of trade that has not been substantially liberalized. At present, the number of trade agreements covering government procurement is steadily increasing as governments face continuing pressure to open up their markets.

While providing Canadian suppliers with access to foreign markets is important, so too is procuring the goods and services needed by federal departments in a fair, timely, efficient and cost-effective manner. By understanding how the trade agreements have affected the federal procurement process, Canada can be in a better position to negotiate better government procurement chapters in future agreements, so as to minimize the negative impacts of liberalization on the procurement process.

This thesis therefore makes a significant contribution to the scant literature on government procurement and trade. As mentioned in the introduction, much of the existing literature is written from a strictly economic or legal perspective and appears in general texts on the agreements. In these, government procurement is either skimmed over, or the examination only consists of a listing of the articles appearing in the trade agreements, with very little analysis. This thesis made a contribution towards filling this research gap in that it is one of the first efforts to examine overall Canadian procurement agreements in an overarching sense.

As mentioned, this thesis adopted an ideas, interests and institutions framework as an analytical aid in classifying and illustrating the role of these variables in an overall sense in understanding the gradual movement towards government procurement liberalization over the past 60 years. Chapter One introduced the framework and its variables, and highlighted some of its benefits and limitations. The framework was useful in providing

a general understanding of why Canada and other governments initially rejected the idea of government procurement liberalization and why, over 30 years later, the idea has been so widely accepted and implemented, and continues to be pursued, albeit in an incremental way.

The framework was also useful in bringing out some key issues related to changes to the procurement process as a result of Canada's decision to liberalize its government procurement market. The positive and negative impacts on the procurement process, however, cannot be accounted for by ideas, interests and institutions variables alone. Hence, it was shown that technology, among other things, can also help to account for the generally improved transparency of the procurement process.

The framework was first applied in chapters two and three where it was used to illustrate the historical context within which the progressive liberalization of government procurement has occurred. Here it was shown that whereas in 1947 an overwhelming majority of governments were not prepared to liberalize their markets, by 1981 this had changed sufficiently for the first concrete steps towards liberalization to be taken. While progress was slow during this period, once many governments had made the decision to go down the liberalization road, the pace soon accelerated.

For example, in 1981 Canada was only a signatory to one agreement that addressed government procurement, whereas by 2001 it had joined 5 such agreements (although the

FTA was subsequently largely subsumed by NAFTA). Not only did the number of agreements increase, but the scope of government procurement liberalization broadened, with coverage expanding from goods to services and construction, and from central entities, to sub-central and other entities to varying degrees.

Once the historical context had been set out, the thesis explored the resultant impact of government procurement liberalization on the procurement process. It showed how rules based trade agreements, supported by a bid challenge mechanism that suppliers sought and governments negotiated, had contributed to making the procurement process on the one hand more non-discriminatory, transparent, open and competitive; but on the other hand more inefficient, complex, rigid, inflexible and risk adverse.

The negative impacts on the procurement process were augmented by the fact that Canada chose to implement its trade agreements through legislation, as opposed to implementing regulations, thereby allowing the CITT to interpret the actual text of the agreements; and by the fact that CITT's mandate, culture, and practice have led it to make policy decisions that are not necessarily consistent with the policy direction the government wanted to take.

The next section provides recommendations for ways to lessen the negative impacts of government procurement liberalization in the future. This is timely considering that Canada is currently involved in a number of trade negotiations that include government

procurement (e.g. Free Trade Area of the Americas, Canada-Singapore, Canada-Central American 4, review of the WTO-AGP).

5.1 Recommendations

Since this thesis is concerned with the impact of trade liberalization on the federal procurement process, these recommendations are written with the efficiency and effectiveness of procurement in mind. In an effort to lessen the impact of government procurement liberalization on the procurement process, I make the following three recommendations:

1. All future trade agreements which include provisions on government procurement should be based on a modern text with appropriate rules and thresholds.

While the need for rules based trade agreements seems self-evident, not all countries would agree, as many prefer a principles-based, best efforts type of procurement agreements. A rules-based trade agreement represents a double-edged sword for federal procuring entities. On the one hand, the rules are often rigid, inflexible and are easily outdated. On the other hand, when Canada negotiated agreements with fewer, less specific rules, as in the case of the AIT, it found this to be more problematic as this left the CITT even greater scope to make up rules where none exist.²¹¹ Therefore, relatively specific rules are desirable, although negotiators should strive towards a middle ground, by agreeing to clearly articulated, but simplified rules.

²¹¹See, for example, the discussion on the complaint by Hewlett-Packard (Canada) Ltd. in Attwater, p.1-15.

The need for a modern text with clear and understandable rules cannot be reiterated enough, because from a domestic implementation perspective it is difficult to meet the obligations of an agreement if one is not sure what those obligations are.²¹² This poses a particular challenge, because trade agreements are often written in general terms, which are then interpreted differently by Members.

One way to contribute towards developing a modern text is to avoid using language that is outdated (e.g. telex) and to define terms that may not be understood by all members or by the procuring community (e.g. recurring contract). A second way is to find a balance between having rules that are overly prescriptive, which tends to create confusion, and having rules that are overly broad and general, which does not provide the direction needed.

Tied into the above is the need for a text that can be implemented. In other words, if the negotiators get too focussed on trying to provide non-discriminatory access for each other's suppliers, they may write rules that can simply not be carried out due to the nature of the rules and the logistics of the procurement process.²¹³

A third way to develop a modern text, is to take full account of current and future use of

²¹²See for example Article XI(10)(2)(c).

²¹³For example, in trying to circumscribe the use of limited tendering related to urgency, several adjectives were added into the text so as to make this circumstance virtually impossible to use in practice, although there may be a legitimate requirement for its use. See, for example, the WTO-AGP Article XV(1)(c) reads "in so far as is *strictly* necessary when, for reasons of *extreme* urgency brought about by events *unforeseeable* by the entity, the products or services could not be obtained in time by means of open or selective tendering procedures." (Italics added in)

electronic technology in procurement (e-procurement) and in meeting the obligations of the trade agreements. This would mean, among other things, allowing for shorter bid periods once electronic technology is used throughout the procurement process, meaning that the notice of intended procurement is posted electronically, the tender documents are provided electronically and the bids are received electronically. In this case, and if the procurement is also for a good or service that is readily available in the private marketplace, it would be reasonable to allow for shorter bidding periods.

In the above scenario, all suppliers, foreign or domestic would have access to the notice and tender documents at the exact same time, and there would be no time lag in delivering and receiving tender documents from foreign points, because it would be done instantaneously over the Internet.

Presumably, the only time-consuming aspect of the procurement process that would be specific to a foreign supplier, might be the translation of tender documents. The extra time that may be required for translation, however, represents the cost of doing business in foreign markets, and is something even Canadian suppliers face in the domestic market, for example if a French-language company wanted to bid on an English-language procurement, or vice versa.

Some of Canada's potential trade partners have mentioned their desire to have a government procurement agreement with no thresholds, as their suppliers can often not

compete for contracts at or above the relevant thresholds. Thresholds, however, are desirable from a procurement perspective because it is not administratively efficient to run a competition below a certain threshold (i.e. the benefits of open competition are outweighed by the costs of running the competition). Canada's current policy at the federal level is to compete requirements above \$25,000,²¹⁴ so few changes would be required to the federal procurement process as long as the new agreements have a threshold of \$25,000 or above.

Finally, in terms of the coverage specified in the text of the agreements and/or their annexes or appendices, there is a greater need for Canadian negotiators to ensure that the exceptions are more clearly articulated, so that they cannot later be so easily circumscribed by the CITT. This is particularly the case with shipbuilding and small and minority set-asides.

Chapter Four highlighted the difficulty that procurement officers have in determining services coverage under the WTO-AGP, because it is identified by one classification code (CPC) but is implemented according to another classification code (CCS). Therefore, it is recommended that during the renegotiation of the AGP, Canadian negotiators change Canada's services annex so that it is defined in terms of the Common Classification System in order to clarify precisely what is and is not covered.

²¹⁴Treasury Board of Canada Secretariat, Contracting Policy, Appendix B, Regulations respecting Government Contracts, 5(b)(i), 10 Apr. 2003
<http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/Contracting/contractingpol_b_e.asp>.

2. All future trade agreements should be implemented through implementing regulations.

New trade agreements, particularly the Free Trade Area of the Americas (FTAA), represent an opportune time for Canada to change the way it implements such agreements, moving away from the practice of incorporating the agreements into law and towards the use of implementing regulations.

As discussed in Chapter Four, implementing regulations allow governments to interpret their trade obligations on a continuing basis, so that when the CITT investigates a complaint, it must look to the implementing regulations for guidance, as opposed to the actual wording of the trade agreements. CITT will likely be the designated bid challenge mechanism for future trade agreements, and the use of implementing regulations would go some way to ensuring that the CITT did not make policy decisions that are contrary to the policy direction that the government has established.

3. Changes should be made to the CITT.

Along with the first two recommendations, it would also be desirable for the government to change the *CITT Act* and related regulations to ensure that subsequent practice will better reflect the intended scope of the trade agreements and ensure that the CITT interprets these more in accordance with the General and Supplementary rules of interpretation in the Vienna Convention on the Law of Treaties.²¹⁵ In addition, a clear and modernized text would help lessen the CITT's current problematic impact on the

²¹⁵United Nations, International Law Commission, Vienna Convention on the Law of Treaties, Articles 31 and 32. 9 (Vienna: United Nations, 1969), Apr. 2003 <<http://www.un.org/law/ilc/texts/treatfra.htm>>.

procurement process. Even so, changes to the CITT should be a priority for the federal government and these should be undertaken before any new agreement is reached— at a minimum, before the FTAA is potentially concluded in 2005.

Even with the above recommendations, it is unlikely that implementation of future government procurement trade obligations will go smoothly. Implementing challenges such as the cumulative impact of trade agreements and the complexity they create will remain. By learning from the challenges raised by past agreements, however, the negative impacts of future agreements can be lessened.

APPENDIX 1 - List of Acronyms

ACAN - Advanced Contract Award Notice

AIT - Agreement on Internal Trade

APEC - Asia-Pacific Economic Cooperation

CCS - Common Classification Service

CIDA - Canadian International Development Agency

CITT - Canadian International Trade Tribunal

CKTEA - Canada-Korea Telecommunications Equipment Procurement Agreement

CLCA - Comprehensive Land Claims Agreement

CPC - Central Product Classification

DND - Department of National Defence

EU - European Union

FAQs - Frequently Asked Questions

FTA - Free Trade Agreement (Canada - US)

FTAA - Free Trade Area of the Americas

GATT - General Agreement on Tariffs and Trade

GETS - Government Electronic Tendering Service

MASH - Municipalities, municipal organization, school boards and publicly funded Academic institutions, Social services and Health entities

MFN - Most Favoured Nation

NAFTA - North American Free Trade Agreement

OECD - Organization for Economic Cooperation and Development

PWGSC - Public Works and Government Services Canada

SDRs - Special Drawing Rights

TBS - Treasury Board Secretariat

US - United States

WTO - World Trade Organization

WTO-AGP - World Trade Organization Agreement on Government Procurement

APPENDIX 2 - Participant Cover Letter

_____, 2002
(Date)

Name
Title
Building
Street Address
City, Province
Postal Code

Dear _____:

You are being invited to participate in research for my M.A in Political Economy. My research is exploring how the inclusion of government procurement into trade agreements has affected the procurement process. You are being asked to participate either due to your extensive time with the Department of Public Works and Government Services and the knowledge you have about the procurement process and how it may or may not have changed as a result of the trade agreements; or because of your knowledge about the Canadian negotiating goals for government procurement in various trade agreements.

I would like to advise you that I am also a permanent employee with the Department of Public Works and Government Services, but I am not doing this research on behalf of the Department. Please also be made aware that this is a public interview, and anonymity will not be granted.

Should you agree to be interviewed by me please read and sign the attached Informed Consent Form and bring in with you to our interview.

If you have further questions or concerns, I can be contacted at 613-567-3800 or sabrina_alton@hotmail.com or you can contact my Thesis Supervisor, Bruce Doern at bruce_doern@carleton.ca

Sincerely,

Sabrina Alton

Appendix 3 - Informed Consent Form

I, _____, am being invited by Sabrina Alton to participate in her research project undertaken as part of a graduate course requirement for a Master's in Political Economy.

I understand that the aim of the project is to gain insight into federal government procurement in Canada, why it became covered by trade agreements, how a government procurement chapter/agreement was negotiated and what effect such inclusion has had on the procurement process.

I understand that if I am/was a contracting officer my participation will be limited to answering a series of semi-structured questions relating to my perception of how the trade agreements have impacted the procurement process in Canada. If I am/was a trade negotiator my participation will include answering semi-structured questions relating to the Canadian negotiating goals in a government procurement Agreement/chapter. The researcher has informed me that one formal interview will be necessary, and clarification or confirmation of my answers may be sought at a later date. I am aware that each interview is expected to be kept to approximately one hour and will take place at a location and time of my choice. I have also been advised that I will not be granted anonymity, and that my answers may be attributed to me in the researcher's thesis, unless otherwise specified.

I have been made aware that the researcher, in addition to being a graduate student at Carleton University, is also a permanent employee of the Department of Public Works and Government Services Canada. I confirm, however, that she does not work in a position of authority over me, and that I have in no way been coerced or pressured to participate in her research.

I understand that my participation is entirely voluntary and that I have the right to withdraw at any time or to refuse to answer some or all of the questions posed to me. Should I exercise my right to withdraw I will or will not give the researcher permission to use the data I have provided to that point.

I understand that a debriefing will not be necessary and that the only access I will have to the results of this research will be limited to the researcher advising me of when she has completed her research and where a copy of her final M.A. thesis can be obtained.

If I have further information about participation in this study, I have been advised that I can contact the following persons:

Sabrina Alton, primary researcher, candidate for an M.A. in Political Economy at

Carleton University, Telephone: 613-567-3800 E-mail: sabrina_alton@hotmail.com

Bruce Doern, Supervisor, Professor of Public Policy and Administration, Carleton University

Telephone: 613-520-2600 ext.1781 E-mail: bruce_doern@carleton.ca

If I have any complaints about how this research has been carried out, I can contact Professor Klaus Pohle, Chair of the Ethics Committee, Carleton University.

Telephone: 613-520-7434 E-mail: klaus_pohle@carleton.ca

Signature of Participant Date

Signature of Researcher Date

APPENDIX 4 - Government Procurement Liberalization Time Line

- 1981 Agreement on Government Procurement (GATT) takes effect.
- 1988 Agreement on Government Procurement is amended. Thresholds are lowered and changes to the text are made.
- 1989 Canada-U.S. Free Trade Agreement takes effect.
- 1994 The North American Free Trade Agreement takes effect.
- 1995 The Agreement on Internal Trade (AIT) takes effect.
- 1995 The Government Procurement Experts Group was established in APEC. Their goal is to work towards liberalizing government markets in the Asian-Pacific states.
- 1996 A new Agreement on Government Procurement (WTO-AGP) takes effect.
- 1996 A mandate to develop a multilateral agreement on Transparency in Government Procurement is established at the WTO.
- 1997 Negotiations on extending the General Agreement on Trade in Services to include Government Procurement begin.
- 1998 Negotiations of the proposed Free Trade Area of the Americas (FTAA) are launched. This includes a negotiating group on Government Procurement.
- 1999 The Government Procurement Chapter of the AIT is extended to include Municipalities, Municipal Organizations, School Boards and Publicly Funded Academic Institutions, Social Services and Health (MASH) entities.
- 1999 A Review of the WTO-AGP begins.
- 2001 The Canada-Korea Telecommunications Equipment Procurement Agreement (CKTEA) takes effect.
- 2001 Free Trade negotiations between Canada and the Central American 4 are launched.
- 2001 Free Trade negotiations between Canada and Singapore are launched.

APPENDIX 5 - Canadian International Trade Tribunal Statistics

	1994-1995	1995-1996	1996-1997	1997-1998	1998-1999	1999-2000	2000-2001	2001-2002
CASES RESOLVED BY PARTIES								
Resolved	1	3	0	1	0	0	0	See Below
Withdrawn	2	3	6	9	6	4	5	11*
Abandoned	1	4	1	2	4	0	1	0
Sub-total	4	10	7	12	10	4	6	11
INQUIRIES NOT INITIATED								
Lack of Jurisdiction	9	8	7	8	6	6	6	8
Late Filing	2	4	5	4	7	9	8	12
No Valid Basis	3	6	9	12	4	13	17	19*
Sub-total	14	18	21	24	17	28	31	39
CASES DETERMIN ED ON MERIT								
Not-Valid	4	3	7	9	14	13	15	9
Valid	1	3	5	7	10	14	13	23
Sub-total	5	6	12	16	24	27	28	32

In Progress	2	8	9	11	15	9	22	17
TOTAL	25	42	49	63	66	68	87	99

* This includes 3 that were dismissed.

Source: CITT Annual Reports from 1994/95 to 2001/02, 16 Nov. 2002

http://www.citt.gc.ca/publicat/index_e.htm.

APPENDIX 6 - Links*

CITT Procurement Page - http://www.citt.gc.ca/procure/index_e.asp

Contracts Canada - www.contractscanada.gc.ca

Internal Trade Secretariat (AIT) - <http://www.intrasec.mb.ca/eng/ait.htm>

Government Electronic Tendering Service (MERX) - www.merx.com

NAFTA Chapter 10 -

http://www.nafta-sec-alena.org/DefaultSite/legal/index_e.aspx?CategoryID=42

PWGSC's Supply Manual - <http://www.pwgsc.gc.ca/sos/corporate/sm/index-e.html>

Treasury Board Contracting Policies and Publications -

http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/contracting/siglist_e.asp

WTO-AGP - http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (With links to Transparency in Government Procurement and the General Agreement on Trade in Services).

*All links are current as of December 9th, 2003.

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