The WTO Agreement on Government Procurement: an emerging tool of global integration and good governance

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The World Trade Organization Agreement on Government Procurement (GPA) is working to expand its role as an instrument of global economic integration and good governance. This article reviews key developments in this area, including the main elements of the existing GPA, efforts to expand membership of the Agreement and its ongoing renegotiation. Lastly, it discusses three contextual factors that enhance the role of the Agreement as an instrument of global governance.

Introduction

The World Trade Organization (WTO) Agreement on Government Procurement (GPA) is on the cusp of a significant expansion of its role as an instrument of global economic integration and good governance. This reflects a confluence of factors, including: (i) the growing membership of the Agreement, and the prospect of accession to it by a broad range of developing, transition and other economies in the coming years; (ii) the updating of the Agreement itself to enhance its flexibility, user-friendliness and relevance to developing and transition economies, and to incorporate new provisions on governance; and (iii) the role that public infrastructure investment will undoubtedly continue to play as an underpinning of growth in the aftermath of the economic crisis, and the critical importance of such spending being undertaken on the basis of principles of fair and open competition to maximise value for taxpayers.

This article reviews key developments in this area. The remainder of the article is organised as follows: the second section summarises the main elements of the existing GPA, which will be improved upon but not radically altered in the revised text of the Agreement on which negotiations are nearing conclusion. The third section discusses the ongoing efforts to expand the membership of the Agreement, including through the pending accessions of China, Jordan and Armenia in addition to those of other developing and transition economies. The fourth provides information on the ongoing renegotiation of the Agreement, including with respect to its text and coverage. The fifth section discusses three contextual factors that are further enhancing the role of the Agreement as an instrument of global governance. These are: (i) the importance of public infrastructure investment in the context of the recent economic crisis, and related surveillance activities that have taken place in the WTO Committee on

1. Parts of this article build on analysis and views expressed in various chapters contained in Sue Arrowsmith and Robert D. Anderson (eds), The WTO Regime on Government Procurement: Challenge and Reform (Cambridge University Press, forthcoming). A version of the paper will be presented by the author at the Conference on Public Procurement – Global Revolution V, to be held in Copenhagen on 9-10 September 2010. The views expressed are the personal responsibility of the author and should not be attributed to the WTO or its Secretariat.
Government Procurement, which is responsible for administering the GPA; (ii) an ongoing proliferation of government procurement provisions modelled on the GPA in regional and bilateral trade agreements; and (iii) new thinking on the significance of good governance for development, which would appear to have implications for the GPA.

The final section provides concluding remarks.

Main elements of the WTO Agreement on Government Procurement

The WTO Agreement on Government Procurement (GPA), signed by most of the world’s industrialised countries at the conclusion of the Uruguay Round of multilateral trade negotiations in 1994, provides an international legal framework for the liberalisation and governance of PP markets. The Agreement consists of the following main elements:

- guarantees of national treatment and non-discrimination for the goods, services and suppliers of Parties to the Agreement with respect to procurement of covered goods, services and construction services as set out in each Party’s schedules (Appendix I) and subject to various exceptions and exclusions that are noted therein
- minimum standards regarding national procurement processes, which are intended to ensure that the Parties’ procurements are carried out in a transparent and competitive manner that does not discriminate against the suppliers of other Parties. Aspects of the procurement process that are addressed include: (i) the use of technical specifications; (ii) allowable tendering procedures; (iii) qualification of suppliers; (iv) invitations to participate in intended procurements; (v) selection procedures; (vi) time limits for tendering and delivery; (vii) tender documentation; (viii) submission, receipt and opening of tenders, and the awarding of contracts; (ix) negotiations by entities with suppliers; and (x) the use of limited tendering
- additional requirements regarding transparency of procurement-related information (for example, relevant statutes and regulations)
- procedures dealing with modifications and rectifications of Parties’ coverage commitments
- requirements regarding the availability and nature of bid challenge (that is, domestic review) procedures which must be put in place by all Parties to the Agreement
- the application of the WTO Dispute Settlement Understanding in this area
- a “built-in agenda” for improvement of the Agreement, extension of coverage and elimination of remaining discriminatory measures applied by Parties.

As already noted, the text of the Agreement is the subject of ongoing negotiations. As will be explained in the renegotiation section, the revised text will improve upon the existing one in a number of ways. Nonetheless, the text will continue to be built around the main elements of the Agreement which are noted above.

Work under way to broaden the membership of the Agreement

The GPA is a plurilateral agreement, meaning that not all Members of the WTO are bound by it. Currently, 41 WTO members are covered by the Agreement. These are: Canada; China; the European Union, including its 27 member States; Hong Kong, Iceland; Israel; Japan; Korea; Liechtenstein; the Kingdom of the Netherlands with respect to Aruba; Norway; Singapore; Switzerland; Taipei China and the United States. The accession of Taipei China took effect only on 15 July 2009, bringing under the disciplines of the Agreement additional procurement opportunities that have been valued at in excess of US$ 20 billion annually.3

Apart from the above, by the end of 2009, nine other WTO members (Albania, Armenia, China, Georgia, Jordan, the Kyrgyz Republic, Moldova, Oman and Panama) had applied for accession to the Agreement and submitted relevant documentation. In addition, a further five members (Croatia, the Former Yugoslav Republic of Macedonia [FYROM], Mongolia, Saudi Arabia and Ukraine) have provisions in their respective WTO Accession Protocols which call for them eventually to seek GPA


accession. Overall, there is a clear trend for new countries that join the WTO to be asked to make, as one of their WTO accession commitments, a promise to also seek GPA accession.

The countries mentioned above are, in general, at different stages of the accession queue. Among those that are currently negotiating their accessions, four have been the subject of focused discussions and active negotiations in the Committee on Government Procurement during the past two years: Armenia, Moldova, China and Jordan.

Armenia

Work on the accession of Armenia is well advanced, and is expected to be completed in the second half of 2010. Armenia’s application for accession and initial offer were formally circulated only on 4 September 2009. These documents were supplemented by an “Analysis of the Armenian Public Procurement Law and Implementing Decree vis-à-vis the EC Public Procurement Directives and the Agreement on Government Procurement (WTO)” and an overview of “Public Procurement in Armenia” that were prepared by SIGMA, a governance institute associated with the OECD and supported by the European Union. As was made clear by this documentation, Armenia’s GPA accession is a natural and logical element of an overall effort to reform and modernise the country’s procurement legislation and practices while fostering its integration with other jurisdictions in the region. Most recently, in April 2010, Armenia submitted a Draft Final Offer and its Replies to the Checklist of Issues to the Committee on Government Procurement. This additional documentation has given renewed impetus to Armenia’s accession.

Moldova

Moldova’s application for accession and its initial coverage offer were tabled for consideration by the Committee in December 2008. At the time, the high quality of Moldova’s offer and documentation were noted by several Parties. Since then, substantive negotiations on the offer have been deferred in light of an ongoing governmental reorganisation in Moldova. There are, nonetheless, hopes that discussions will resume in the coming months.

China

China’s application for GPA accession, together with its initial coverage offer, was submitted to the WTO Secretariat at the end of 2007 and was circulated to GPA Parties early in 2008. Clearly, the accession of China raises complex issues for Parties’ negotiators and involves significant stakes for the WTO system. Work on the accession of China is, nonetheless, proceeding actively, with China showing significant commitment and the existing Parties to the Agreement also being fully and actively engaged. China’s offer has been discussed in several informal sessions of the Committee and many bilateral meetings. China has also submitted its replies to the “Checklist of Issues for Provision of Information Relating to Accession to the Agreement on Government Procurement” – an important step in the assessment of an accession candidate’s procurement legislation and practices. Most recently, China submitted to the Committee on Government Procurement an “enriched” coverage offer incorporating a substantial reduction in its proposed thresholds under the Agreement, expanded coverage of central government entities and other improvements. Parties have expressed their strong appreciation for this development, while also continuing to make clear that further improvements are expected and that, in order for China’s accession to be concluded, it will have to provide an eventual level of coverage that is comparable with that of other Parties to the Agreement.

Other accessions

Work on the accessions of other GPA candidates and WTO members with accession commitments is at a less advanced stage. However, with the leadership of its Chairman (Mr Nicholas Niggli of Switzerland) the WTO Committee on Government Procurement has signalled a clear intention to keep all of the pending accessions and accession commitments under active review.
A question that remains to be answered is whether, when the accessions of China and other current accession candidates are close to being concluded, other major developing/transition WTO Members might consider joining the Agreement.\(^7\) While this would clearly be contrary to currently held positions (at least in some cases), such Members might also see potential commercial opportunities in their participation in the Agreement and therefore might not want to be foreclosed from markets to which China has access (via the GPA).

In addition to its obvious significance in broadening the membership of the GPA over time, the accession of developing and transition economies such as China and (as called for in their WTO accession commitments) Saudi Arabia and Ukraine can be expected to involve important conceptual and practical challenges for the Parties. For example, a key issue in the accession negotiations of China and very likely also those of Saudi Arabia, Ukraine and others will concern the treatment of state-owned enterprises. These challenges are an important focus of the forthcoming volume edited by Arrowsmith and Anderson.

The ongoing renegotiation of the Agreement

Both the text and coverage of the GPA are the subject of ongoing negotiations in the WTO. The basis for these negotiations is provided in Article XXIV:7(b) and (c) of the Agreement. The purpose of these negotiations is threefold: (i) to improve and update the Agreement in the light, \textit{inter alia}, of developments in information technology and procurement methods; (ii) to extend the coverage of the Agreement; and (iii) to eliminate remaining discriminatory measures.\(^8\)

Further to the above, Article XXIV:7(c) of the GPA directs Parties to avoid introducing or prolonging discriminatory measures and practices which distort open procurement and further stipulates that the negotiations under subparagraph (b) shall seek to eliminate remaining discriminatory measures and practices. The negotiations are also intended to facilitate accession to the Agreement by additional Parties, notably developing countries. The negotiations under the GPA are not part of the Doha Round of negotiations in the WTO which are multilateral rather than plurilateral in nature and relate to a range of other topics including agriculture, non-agricultural market access (NAMA), services trade and intellectual property issues.\(^9\)

The negotiations called for in Article XXIV:7 have been under way for several years. They have been conducted in a series of informal plurilateral meetings of the Parties’ negotiators in Geneva, supplemented by bilateral meetings between Parties. An important milestone was reached in December 2006, when agreement was reached by the negotiators in Geneva on the text of a revised Agreement on Government Procurement (the revised draft text is available here: www.wto.org/english/tratop_e/gproc_e/gproc_e.htm). At the time that the agreement on the text was reached, it was made provisional in the following two senses: first, it was subject to a final legal check (rectification process) which has now been completed; and second, the agreement on the text was made subject to a mutually satisfactory outcome to the parallel negotiations to extend the coverage of the Agreement.\(^10\)

In general, the revised GPA text is based on the same principles and contains the same main elements as the existing Agreement. Nonetheless, it improves on the existing text of the Agreement in various significant ways.\(^11\)

- It incorporates a complete revision of the wording of the provisions of the Agreement with a view to making them more streamlined, easier to understand and user-friendly.
- The text has been updated to take into account developments in current government procurement practice, notably the use of electronic tools. The revised text also sets out related requirements regarding the general availability and interoperability of the information technology systems and software used; the availability of mechanisms to ensure the

\(^7\). In an important development, India became an observer to the Committee on Government Procurement in February 2010. Press reports have indicated that India is looking seriously at the pros and cons of GPA accession. See “Foreign firms could get access to govt contracts,” Financial Express (India), 3 November 2009.

\(^8\). See, in particular, the chapters in the book authored by Ping Wang.


Additional flexibility for Parties’ procurement authorities has been included, for example in the form of shorter notice periods when electronic tools are used. Shorter time-periods have also been allowed for procuring goods and services of types that are available on the commercial marketplace.

There is more explicit recognition of the GPA’s significance for governance and development, and of its shared purpose with other international instruments and initiatives in this regard.

In a key additional change, the transitional measures (“special and differential treatment”) that are available to developing countries that accede to the Agreement have been more clearly spelled out. The transitional measures that will potentially be available, subject to negotiations, include: (i) price preferences; (ii) offsets; (iii) phased-in addition of specific entities and sectors; and (iv) thresholds that are initially set higher than their permanent level (see the provisionally agreed revised GPA, Article IV). Provision has also been made for delaying the application of any specific obligation contained in the Agreement, other than the requirement to provide equivalent treatment to the goods, services and suppliers of all other Parties to the Agreement, for a period of five years following accession to the Agreement for Least Developed Countries (LDCs) or up to three years for other developing countries. These periods can be extended by decision of the Committee on Government Procurement, on request by the country concerned. There is a clear hope, on the part of the Parties, that the availability of these measures and possibilities will both encourage developing countries to consider joining the Agreement and facilitate their respective accession processes.

Coverage

As indicated, work is also under way on renegotiation of the coverage of the Agreement on Government Procurement. The concept of coverage refers to the sets of entities that are bound by the Agreement, the thresholds that will apply, relevant exception and exclusions, and other elements that define whether particular procurements will be subject to the disciplines of the Agreement. Under the agreement reached by the negotiators in 2006, the revised GPA text cannot come into force until a conclusion has been reached in the coverage negotiations.

Until recently there were few signs of significant movement towards an overall conclusion of the coverage negotiations. Indeed, public reports indicated that there was a gap in aspirations between major parties in the negotiations and little progress toward overall convergence through mid-2009. However, beginning in late 2009 and coming through more forcefully in the first half of 2010, there have been signs of renewed energy and possibilities for a successful conclusion of the negotiations. The Chairman of the Committee on Government Procurement, Mr Niggli, has put forward a “roadmap” for conclusion of the negotiations by the end of the year, encompassing not only the coverage negotiations themselves but also the finalisation of the revised GPA text; the process for bringing it into effect; and the future work programme of the Committee.

GPA Parties have expressed strong support for the Chairman’s roadmap. In addition, hope has been expressed that revised offers in the negotiations from Canada and the United States that have been circulated under a bilateral agreement between the two countries could provide a springboard for broader forward movement. Hence, as this article is finalised (August 2010), there are renewed prospects for a successful conclusion to the negotiations. This would, in turn, permit the coming into force of the revised GPA text. It could also facilitate future accessions to the Agreement.


12. For an insightful analysis, see Anna Caroline Müller, “Transitional Measures for Developing Countries Acceding to the GPA under the Existing and Revised Texts of the GPA,” in Arrowsmith and Anderson (eds), The WTO Regime on Government Procurement: Challenge and Reform, above note 1.


extent that these are made easier by the additional flexibilities and more specific and concrete provisions on special and differential treatment that the new text embodies.\textsuperscript{17}

**Recent contextual developments that have enhanced the role and significance of the GPA**

(a) The recent economic crisis and trends in world infrastructure spending

The economic downturn of 2008-09 triggered increased emphasis on public infrastructure spending as an element of economic stimulus packages around the globe.\textsuperscript{18} The size of fiscal stimulus packages in OECD countries to date has been estimated at around 3.5 per cent of collective GDP in these countries. Of course, only a portion of this is accounted for by infrastructure spending. Regarding the latter, it has been estimated that, in 2009, governments around the world have spent around 2.9 per cent of world GDP on infrastructure, up from 2.2 per cent in 2008.\textsuperscript{19} A related point worth noting is that, over the next two decades, US infrastructure spending is expected by some observers to decline to less than 10 per cent of the world market, while China’s share may grow to exceed 28 per cent and that of the European Union may account for more than 20 per cent.\textsuperscript{20} These trends would appear to highlight both the increased emphasis on infrastructure spending in the context of the economic crisis and the growing importance for the world economy of such spending in emerging markets, notably China but also India and others.

Together with the current emphasis on infrastructure spending as an element of economic stimulus, there has been something of a worldwide trend towards the introduction of “buy-national” policies and requirements relating to PP. The web site of the Global Trade Alert (GTA), an independent organisation that monitors trade policy developments internationally, refers to more than 30 actual or proposed measures, in countries including Australia, Botswana, Brazil, Canada, China, France, India, Kazakhstan, Korea, Spain, Ukraine and the United States.\textsuperscript{21}

The potential adverse effects of buy national measures in relation to PP policies for the international trading system were profiled in the December 2009 report by the WTO’s Director-General to the Trade Policy Review Body (the WTO body that monitors general developments in trade policy at the multilateral level). As the report pointed out, such measures raise concerns for trade and the international trading system in three main ways. First, they can exclude foreign suppliers from markets in which they might otherwise hope to compete, either by reserving the market completely for domestic suppliers or by introducing administrative complexities that make procurement procedures less easily accessible to foreign suppliers. Second, paradoxically, in some cases buy national requirements may also raise the costs or impede the operations of domestic companies in the countries implementing the relevant measures, if such companies experience difficulties in sourcing domestically and cannot easily obtain waivers for purchases abroad. Third, as in other economic sectors, the implementation of discriminatory government procurement measures in one country may engender pressures for the adoption of similar measures by other countries.\textsuperscript{22}

In this context, in 2009 increased attention was given in the WTO Committee on Government Procurement, which administers the GPA, to the monitoring of PP policy developments related to the economic crisis and related stimulus measures.\textsuperscript{23} A key focus was on the US stimulus legislation, the American Recovery and Reinvestment Act of 2009 (Pub. Law 111-5). This legislation introduced two new “Buy American” requirements, one relating to the procurement of iron, steel and manufactured goods for construction and related projects concerning public buildings and works (section 1605 of the legislation) and the other involving the procurement of specified items of clothing or equipment for the Department of Homeland Security (section 604). In both cases, the stimulus legislation addressed the potential for conflict with US international trade commitments by including a further provision stipulating that “This section shall be applied

\textsuperscript{17} See Anderson and Osei-Lah, “Forging a More Global Procurement Market: Issues Concerning Accessions to the Agreement on Government Procurement,” above note 1.

\textsuperscript{18} World Trade Organization, Overview of Developments in the International Trading Environment, 18 November 2009, p. 39.


\textsuperscript{21} See www.globaltradealert.org/measure?id=44&id1=1&id2=2205. To be sure, it is important not to draw strong conclusions without more detailed study of these measures given the inclusion of proposed, in addition to actual, measures in the GTA data set.

\textsuperscript{22} World Trade Organization, Overview of Developments in the International Trading Environment, 18 November 2009, p. 42.

\textsuperscript{23} Report (2009) of the WTO Committee on Government Procurement to the General Council (GPA/103, 12 November 2009), paragraph 7.

\textsuperscript{24} See GPA/98 of 24 April 2009.

\textsuperscript{25} Report (2009) of the WTO Committee on Government Procurement to the General Council (GPA/103, 12 November 2009), paragraph 7.
in a manner consistent with United States obligations under international agreements” (see section 604(k) and section 1605(d) of the legislation, respectively).

Subsequently, related interim implementing measures were issued. A timely notification on this topic was provided by the United States to the WTO Committee on Government Procurement, and was the subject of significant discussion in the Committee during the year.

Overall, the framing of these measures and the discussions that took place in the WTO Committee would seem to have illustrated both the value of international instruments and bodies such as the WTO Agreement on Government Procurement and the Committee and the important efforts that have been made by Parties to the Agreement to ensure that the rules are honoured.

Of course, governments that are not Parties to the WTO Agreement on Government Procurement, including many of those mentioned above that appear to be implementing or at least considering protectionist measures in this area, are not constrained by it. This highlights the importance of the efforts that are currently under way to expand the membership of the Agreement.

Another point to note concerning infrastructure spending in a time of crisis relates to the stress that can be placed on national procurement systems when such spending is quickly ramped up. Indeed, various reports have cited an increased risk of corruption or other abuses in procurement systems around the globe. The risks for good procurement practices may be even greater where the responsible authorities are required to implement buy national requirements. In this context, Schooner and Yukins have argued that, particularly in times of crisis, countries are wise to focus their procurement systems on human capital upgrading, value for money and the integrity of purchasing mechanisms, and not on trade protectionism. This consideration further highlights the usefulness of an agreed body of rules reflecting best practices and binding commitments to non-discrimination in PP in a time of economic crisis.

(b) The proliferation of regional trade agreements embodying government procurement provisions

The majority of regional trade agreements (RTAs) that have been notified to the WTO in recent years contain provisions on government procurement, whether of a detailed or a limited nature. These include arrangements involving one or more Parties to the GPA and a number of non-Parties. Moreover, in a growing number of cases, these agreements contain detailed provisions on government procurement that are modelled closely on the GPA. This shows clearly that the acceptability in principle of such disciplines extends beyond the current membership of the GPA, and implies that, in some cases, parties to these arrangements that are currently outside the GPA are in a position to join the Agreement with relative ease.

(c) New thinking on good governance as a tool of economic development: another factor enhancing the role of the GPA

Still another consideration that may increase the importance of the GPA over time is the heightened appreciation, particularly in current thinking and research on economic development, of the need for adequate governance mechanisms (that is, appropriate laws and institutions) as a counterpart to market opening and liberalisation. In the words of Pascal Lamy, Director-General of the WTO:

“The mere removal of obstacles to trade may not, by itself, ensure optimal performance if rules are not in place to ensure fair procedures, appropriate transparency of markets, and responsible competitive behaviour that is environmentally sustainable. It is time to recognise that such rules are an essential counterpart to market opening.”

To be sure, there is no universal recipe for economic growth. It would be misleading to portray any single policy instrument or tool...
in this way. Cutting-edge thinking on growth does, however, highlight the importance of robust governance systems to ensure the stable and effective functioning of markets, and thereby to promote sustainable growth over the long-term. The implementation of citizen-oriented governance mechanisms is also a central aspect of the broader concept of “development” (encompassing life-enhancing social and institutional change) as distinct from growth per se.

Arguably, the GPA is a good example of an international framework to enhance governance of the type that can help countries to implement and lock-in citizen-empowering institutional reforms. Rather than simply seeking to open markets, it recognises explicitly the need for rules, procedures and institutions to ensure that markets perform well in this sector. These rules and institutions are intended to ensure transparency, fairness and non-discrimination in procurement processes, and can thereby help to ensure maximum value for money for taxpayers in addition to freer trade.

In the foregoing context, Mr Lamy comments further as follows:

“The GPA is a paradigm example of a trade opening instrument that also recognises the need for governance mechanisms – in this case, the procedural rules that Parties to the Agreement must follow to ensure fair and transparent contracting practices and the domestic review or bid challenge mechanisms that the Agreement requires all Parties to put in place.”

Further, the revised GPA text contains a new and explicit requirement that procurement be carried out in a manner that avoids conflicts of interest and prevents corrupt practices. This is a significant innovation in WTO rules. The treatment of this issue in the revised GPA text may well inform broader debates on the role and future of the multilateral trading system.

**Conclusion**

This article has summarised the current state of work in the WTO regarding the plurilateral GPA. Reference has been made, in this regard, to: (i) the prospects for a significant broadening of the membership of the Agreement over time, through the accession to it by a range of developing, transition and other economies; (ii) the development of the provisionally agreed revised GPA text, to enhance the flexibility, user-friendliness and relevance of the Agreement to developing and transition economies; and (iii) related efforts to broaden the extent of existing Parties’ commitments that are subject to the disciplines of the Agreement.

Reference has also been made to various contextual factors that are further enhancing the role of the Agreement as an instrument of global governance. The article has argued, in this regard, that the recent economic crisis – and particularly the emphasis that many governments have placed on public infrastructure spending as an aspect of their strategies for recovery from the crisis – have increased the importance and profile of the GPA as an instrument of international economic policy. Another factor that is likely to enhance the importance of the agreement over time is the heightened appreciation of the need for adequate governance mechanisms in relation to development and the management of globalisation that is increasingly evident in related thinking and research. These and other trends discussed in this article will further extend the reach of the Agreement on Government Procurement and enhance its significance as an instrument of global governance over time.


32. “... the key to longer-term prosperity, once growth is launched, is to develop institutions that maintain productive dynamism and generate resilience to external shocks.” Rodrik, id. p. 43.

33. “Good governance, by which I mean transparency, accountability, rule of law, and bureaucratic competence and effectiveness, is clearly desirable as an objective in itself. We might even say that good governance is what development is all about.” Dani Rodrick, “Thinking about government and getting a headache,” 26 March 2008, http://rodrik.typepad.com/dani_rodricks_weblog/2008/03/thinking-about.html. Rodrick goes on to state that “Where economists have a comparative advantage is in designing institutional arrangements for specific policy reforms targeted at binding growth constraints – whether in trade, monetary policy, or education. This agenda differs quite a bit from the broad-brush governance agenda on which discussion tends to focus.”

34. Pascal Lamy, above note 29.

35. See provisionally agreed revised GPA text (GPA/W/297), Article V:4(b) and (c).

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