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978-1-107-00664-5 - The WTO Regime on Government Procurement: Challenge and Reform

Edited by Sue Arrowsmith and Robert D. Anderson

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THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM

Originally an important but relatively obscure plurilateral instrument, the WTO Agreement on Government Procurement (GPA) is now becoming a pillar of the WTO system as a result of important developments since the Uruguay Round. This collection examines the issues and challenges that this raises for the GPA, as well as future prospects for addressing government procurement at a multilateral level.

Coverage includes:

- Issues relating to pending accessions to the GPA, particularly those of developing countries with a large state sector such as China.
- The revised (provisionally agreed) GPA text of 2006, including provisions on electronic procurement and special and differential treatment for developing countries.
- Procurement provisions in regional trade agreements and their significance for the multilateral system.

Attention is also given to emerging issues, especially those concerning environmental, social and SME policy; competition law; and the implications of the recent economic crisis.

SUE ARROWSMITH is Achilles Professor of Public Procurement Law and Policy and Director of the Public Procurement Research Group at the University of Nottingham School of Law.

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Hans-Joachim received his legal education at the universities of Kiel (Dr iur, 1988) and Freiburg im Breisgau, Germany, and Lausanne, Switzerland, and at the Indiana University School of Law (LL M, 1984) and Harvard Law School, US. He worked in Brussels from 1990 to 2000, including from 1991 onwards at Freshfields Bruckhaus Deringer's offices.

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FOREWORD

PASCAL LAMY

Director-General, World Trade Organization

Government procurement is gaining ground as part of world trade, and as part of the work of the World Trade Organization (WTO). During, and in the aftermath of, the world economic crisis, much attention has focused on public infrastructure investment and on government policies that potentially limit the rights of foreign suppliers to bid on related contracts. Such policies were a key focus of my 2009 end-of-year Overview of Developments in the International Trading Environment. In that overview, I noted that ‘buy national’ and other restrictive government procurement 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 could 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 for foreign suppliers. Second, paradoxically, in some cases they may even 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.¹

Fortunately, while restrictive government policies relating to public procurement remain a concern for the global trading system and continuing vigilance is warranted, the world has so far avoided a rush to the wholesale adoption of such measures. This is no doubt due, in substantial measure, to the guarantees of non-discrimination and related commitments embodied in the (plurilateral) WTO Agreement on Government Procurement (GPA) in addition to the assurances incorporated

¹ *Overview of Developments in the International Trading Environment: Annual Report by the Director-General* (WT/TPR/OV/12 of 18 November 2009), paragraph 140.

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in the pledges of the G-20 Leaders and the good sense of governments worldwide that have sought to avoid a repeat of the mutually destructive proliferation of trade barriers that unnecessarily prolonged and deepened the depression of the 1930s.

In the future, public procurement and related international trade disciplines are likely to be even more important for global economic growth and development than they are at present. Past estimates have indicated that overall government procurement spending accounts for as much as 15–20 per cent of GDP, on average, worldwide, though much of this is not yet covered by current international disciplines. Moreover, infrastructure investment and other public procurement in emerging market economies in Africa, Asia and Latin America is likely to be a major driving force of economic growth in the years to come.

This situation calls for a deepening and broadening of international trade disciplines to ensure that, as far as possible, public infrastructure investment and other aspects of government procurement are carried out in a transparent and non-discriminatory manner that maximizes value for money for governments and taxpayers. Equally important, the disciplines themselves need to be continually updated to reflect developments in procurement methodologies and to ensure the maximum degree of flexibility for Parties consistent with an open international trading regime. Most of all, the membership of the GPA needs to be broadened to encompass emerging actors in this field.

As detailed in this informative book, efforts are under way to address each of these challenges. Ongoing negotiations between the Parties aim to extend coverage and eliminate remaining discriminatory measures. Provisional agreement has been reached on a revised and improved GPA text.² With regard to the membership of the Agreement, as detailed in relevant chapters of the book, work on the accessions of several developing countries is intensifying. Crucially, work on the accession of China is proceeding well, with strong, positive engagement by both China itself and the existing Parties. These developments presage a significant expansion of the membership of the Agreement in the years to come.

On a number of occasions in the recent past I have referred to the concept of *governance*. The idea of governance recognizes that the mere opening of markets – however desirable – is not, by itself, enough to ensure good economic performance. Rather, appropriate laws and institutions

2 GPA/W/297 of 11 December 2006, available at <http://docsonline.wto.org/DDFDocuments/t/PLURI/GPA/W297.doc>.

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are also needed, for example to enforce competition, address spillovers such as environmental degradation and ensure the availability of accurate information for consumers.

The GPA is a paradigm example of a trade opening instrument that recognizes the need for governance mechanisms – in this case, the procedural rules of the Agreement that ensure fair and transparent contracting practices and the domestic review or appeal mechanisms that the Agreement requires Parties to put in place. In addition, 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. Perhaps the treatment of this issue in the revised GPA text will inform broader debates on the role and future of the multilateral trading system.

The foregoing are but some of the aspects of procurement policy and its treatment in the WTO that are addressed in this book. It is clear, from this ambitious survey of developments and emerging challenges, that the WTO Agreement on Government Procurement is in the process of taking on substantially increased importance within the multilateral trading system and as an underpinning of good policy in this sector. Policy issues in this area merit in-depth consideration in the international community not only by responsible government officials but also by businesses, non-governmental organizations and their respective advisers. This book is a serious contribution to such discussion. Academics and students will also welcome it. I congratulate both the editors of this volume and the authors responsible for the individual chapters, and look forward to the enriched debate that the essays in the volume are likely to spawn.

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PERSPECTIVE OF THE CHAIRMAN OF THE
WTO COMMITTEE ON GOVERNMENT
PROCUREMENT, NICHOLAS NIGGLI
(SWITZERLAND)

I believe that, in the coming decade, the WTO Agreement on Government Procurement (GPA) will undergo a transition from being an important but relatively obscure plurilateral treaty to becoming a central pillar of the multilateral trading system. 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 prospect of a gradual broadening, over time, of the extent of Parties' procurements that are actually covered by the Agreement, in addition to an updating of the Agreement itself to enhance its flexibility, user-friendliness and relevance, for example, to developing countries; 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 maximize value for taxpayers.

While the third factor noted above is largely exogenous to the work of the WTO Committee on Government Procurement, the first and second fall directly within its remit, and have been the focus of intensified effort by Parties to the Agreement, in addition to myself as Chairman, and with the support of the Secretariat, in the past few years. On the accession front, already there have been important achievements, and much more is in the offing. As detailed elsewhere in this volume, the accession of Chinese Taipei, as the forty-first WTO Member covered by the Agreement, took effect on 15 July 2009. 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. Work on the accession of Armenia is well advanced, and is expected to be completed before the end of 2010. Work on the accession of Jordan is also intensifying, and it is my fond hope that it, too, will become a member of the GPA family by late 2010/early 2011. Most significantly, work on the accession

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PERSPECTIVE OF THE CHAIRMAN, NICHOLAS NIGGLI

of China is proceeding well, with full engagement by both China itself and the existing Parties, and I have every confidence that this, too, will come to fruition in due course. These accessions represent, in many ways, the future of the GPA.

Apart from the foregoing accessions on which work has already commenced and is, in some cases, well advanced, five other WTO Members (Croatia, the Former Yugoslav Republic of Macedonia, Mongolia, Saudi Arabia and Ukraine) have provisions in their respective WTO Accession Protocols which call for them to seek GPA accession in due course. It is noteworthy, also, that India has recently become an observer in the Committee on Government Procurement – a position which enables it to better assess its potential interests vis-à-vis the Agreement.¹ Indeed, my sense from my extensive personal contacts with diverse WTO delegations is that a good number of Members of diverse sizes and levels of development from all regions of the world are actively looking at the possibility of seeking GPA accession. This is, in part, spurred by the pending accession processes of China and the other acceding Parties I have mentioned. In many cases, it has also been facilitated by Members' participation in bilateral trade agreements containing government procurement chapters that are largely modelled on the GPA.²

Currently, the ongoing negotiations to expand the coverage of the Agreement and renew the Agreement itself are, if anything, an even more pressing item of business for the Committee than the pending accessions, if only because there is now a real prospect of wrapping up the negotiations, and this is essential to unlocking the future. As is explained in detail in relevant chapters of this book, the negotiations have a threefold purpose: (i) to improve and update the Agreement in the light, *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. Work on renewing the text of the Agreement was largely completed in December 2006; however, under the terms of the agreement struck at that time, the revised text cannot come into force until a mutually satisfactory outcome has also been achieved in the

1 In addition to India, twenty-two other WTO Members, including two developed countries (Australia and New Zealand) in addition to countries from all regions of the developing world, are observers to the Agreement.

2 See the pathbreaking analysis in Robert D. Anderson, Anna Caroline Müller, Kodjo Osei-Lah, Josefita Pardo De León and Philippe Pelletier, 'Government Procurement Provisions in Regional Trade Agreements: A Stepping Stone to GPA Accession?' in this volume, chapter 20.

negotiations to extend the Agreement's coverage. Since having the revised text in place is tremendously important to facilitate the pending accessions, currently a major push is on to wrap up the coverage negotiations and thereby permit the revised text to come into force. The Parties can now see the summit (i.e. the conclusion of the negotiations), but have still to climb it. The final metres are always the hardest.

In this context, and as described elsewhere in this volume, I have put forward a 'Roadmap' for conclusion of all aspects of the current GPA negotiations (covering both the text and the coverage aspects) by the middle of 2011. The Roadmap encompasses four main elements, namely: (i) the coverage negotiations; (ii) remaining work to be done on the text of the Agreement, particularly its Final Provisions; (iii) the process for bringing the revised Agreement into force, and in particular the issue of whether it will be treated as a new WTO Agreement or simply as an amendment to the existing one; and (iv) the future work programme of the Committee. The overriding purpose of the Roadmap is to ensure that all the issues before the Committee in the negotiations receive due attention, in parallel fashion, throughout the year, to facilitate bringing them all together and wrapping up the negotiations by the end of the year or very shortly thereafter. The initial reception given to the Roadmap has been overwhelmingly positive: all GPA Parties have pledged their full and unconditional support. They have also expressed the view that, currently, there is a window of opportunity to conclude the negotiations which will not remain open forever. Thus, it is my hope that, when this book appears in print, the negotiations will have been concluded or will be very close indeed to being concluded, and the revised text will be in the process of coming into force.

The challenges and processes outlined above are plumbed in depth in this excellent and timely volume. In addition, the book delves into historical aspects of the treatment of government procurement in the World Trade Organization and into a range of other issues that are not a principal focus of the current negotiations but that will be important in the future. These include issues concerning the interface of government procurement and the GPA with environmental sustainability and social concerns, in addition to more technical matters such as the evolution of the Agreement in relation to newer contracting practices.

As Chairman of the WTO Committee on Government Procurement, I have benefited tremendously from a close partnership with the WTO Secretariat team supporting the Committee, which is very ably led by one of the co-editors of this book, Robert Anderson. I have also enjoyed

meeting and benefited greatly from the advice of leading academics in the field, among whom the other co-editor, Professor Sue Arrowsmith, is particularly eminent. I have formed the conviction that there is a great need to foster public awareness of, and scholarly debate on, the objectives and modalities of the Agreement on Government Procurement and related negotiating issues, challenges and priorities, in addition to the future potential of the Agreement, which I have hinted at above. For these reasons, I am pleased and honoured to have been invited by the editors to contribute this Chairman's Perspective on the Agreement, and to give my full support to the publication of this book. Needless to say, the perspectives developed herein are the sole responsibility of the authors, and are without prejudice to the interests of Parties to the Agreement or to the prerogatives of the Chairman.

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PREFACE

This book grew out of our sense that the World Trade Organization (WTO) regime on government procurement – currently consisting principally of the plurilateral Agreement on Government Procurement (GPA) – is undergoing a far-reaching transition from constituting an important but relatively obscure element of the WTO to becoming a cornerstone of the international trading system. This change is occurring first and foremost as a result of the pending accession to the Agreement of important developing and transition economies such as China, Jordan and Armenia but also as a result of the ongoing effort to modernize the Agreement which is nearing completion and of increased interest in government procurement as a dimension of world trade in light of the recent economic crisis. There is, in our view, a critical need for informed discussion and reflection on these developments in the international community and among international legal scholars, practitioners and students. There is, of course, already a significant body of literature on the GPA as it emerged from the Uruguay Round and on other aspects of the WTO's procurement work, in particular on transparency, and we do not seek to replicate this here. Rather, the aim of the present volume is to explain, and to explore, the most recent developments concerning the WTO regime for government procurement, and to stimulate debate on the challenges that they pose.

Many persons contributed to the production of this book or otherwise provided necessary support. Early versions of some of the papers incorporated in the volume were presented at the conference *Public Procurement – Global Revolution III*, held at the University of Nottingham in June 2006. Subsequent versions and additional papers in the volume were presented at a Symposium held at the WTO in Geneva in February 2010 and at the conference *Public Procurement – Global Revolution IV* in Nottingham in April 2010. We are grateful to all those who made presentations at, or assisted in the organization of, these events.