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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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PART I

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1

The WTO regime on government procurement: past, present and future

ROBERT D. ANDERSON AND SUE ARROWSMITH

1. Introduction to the chapter

Government procurement – the purchase of goods, construction services and other services required by government bodies – accounts for a substantial proportion of GDP,¹ and it is well recognized that discrimination in this area (intentional or otherwise), as well as other practices, creates significant barriers to trade.² Thus government procurement is of great potential interest for international trade regimes, including the WTO. However, dealing with government procurement was not generally a priority in the early phase of the multilateral trading system, nor in early regional and bilateral free trade agreements. Rather, the initial efforts of those responsible for negotiating these arrangements tended to focus on more conventional trade barriers, such as tariffs and quotas, both because these were perceived as more important (and their removal a necessary initial step for access to government markets in any case) and because of the particular sensitivity of government procurement.³ As other trade

1 For an analysis see D. Audet, 'Government Procurement: A Synthesis Report', *OECD Journal on Budgeting*, 2 (2002), 149.

2 Although not all discriminatory practices affect trade. On the economic issues see E. Trionfetti, 'The Economics of Opening Up Public Procurement', chapter 12 in S. Arrowsmith and M. Trybus (eds.), *Public Procurement: The Continuing Revolution* (The Hague: Kluwer Law International, 2002) and on markets in which foreign participation occurs through a local presence S. Evenett and B. Hoekman, 'Government Procurement of Services and Multilateral Disciplines', chapter 6 in P. Sauvé and R. Stern (eds.), *GATS 2000: New Directions in Services Trade Liberalization* (Washington: Brookings Institution Press, 2000), p. 143.

3 Factors here include the potential for using government procurement to promote personal and political interests and the value of procurement from a political perspective for supporting social and development policies (for example, because of hidden costs). As other trade barriers diminish, addressing government procurement can also become more

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barriers have diminished, however, the WTO, in common with many other regimes, has increasingly turned its attention to opening up public markets: this is evidenced clearly by chapter 20 of this volume which examines procurement provisions in regional trade agreements notified to the WTO since 2000. Most recently, the importance of government procurement has been enhanced by the increased importance of public infrastructure investment and other procurement activities as an aspect of world economic activity in the context of the recent economic crisis and as a consequence of continuing high growth and, consequently, infrastructure demand in emerging economies such as China and India. Also relevant is an increasing recognition, both in scholarly writing and in public policy formulation, of the role of governance mechanisms – i.e. the rules and institutions that establish the framework for the operation of markets – as an underpinning of long-run economic growth and prosperity.⁴ Studies by economists such as Robert Wade have long identified corruption and clientism in public procurement policies as barriers to efficient and sustainable development.⁵

There have already been efforts to deal with government procurement within the WTO at a multilateral level and some of these efforts are continuing, as elaborated below. However, in contrast with many other areas of WTO work, there has been relatively little progress in addressing the issue at the multilateral level. As explained further below, government procurement remains substantially outside the scope of the main disciplines of the multilateral trade agreements (e.g. those of the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS)) and efforts so far to extend existing agreements or develop a new one are stalled or moving slowly.

In stark contrast is the position of the Agreement on Government Procurement (GPA), which is a plurilateral Agreement of the WTO regulating the government markets of those WTO Members that have chosen to become Parties to it.⁶ The current GPA came into force in the

problematic politically as it remains one of the few tools left to government to protect national industry.

4 See for background, Anderson and Osei-Lah, chapter 2 of this volume, section 4.2.2.

5 See e.g. R. Wade, 'The System of Administrative and Political Corruption: Canal Irrigation in South India', *Journal of Development Studies*, 18 (1982), 287, and more generally, R. Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton University Press, 2003).

6 In the WTO, a plurilateral agreement is an agreement whose members comprise less than the full membership of the Organization. Currently, the GPA covers forty-one WTO Members (see, for details, section 6.2 below).

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mid-1990s with its roots in the modest Tokyo Round Code on Procurement just over thirty years ago, as we explain in section 3 below. Since its first incarnation in the Tokyo Round, the Agreement has continually expanded in its scope and developed in its content in a significant way. It now seems poised on the threshold of a further deepening of disciplines, as well as of an expansion of membership that will extend its scope beyond the traditional developed country Parties.

The present volume focuses on the challenges that exist in seeking to develop effective disciplines on procurement within the WTO and on current and potential efforts to address these challenges. In this chapter, we will outline the past development and current state of play of the WTO regime on government procurement, setting the scene for the remaining essays in this volume, and highlighting some of the key issues emerging from the essays and from our own study of these subjects. As one of the current authors has previously stated, ‘The increasing interest in GPA membership, combined with the difficulties of progressing the multilateral initiatives, suggests that the GPA will remain the most important instrument for developing meaningful participation in WTO procurement disciplines.’⁷ Given that this is likely to remain the case, at least in the medium term, inevitably most of the focus of the volume and also of this introductory chapter is on the GPA. However, multilateral agreements and initiatives remain relevant both because they have some current, if limited, application to procurement and because the potential for a multilateral agreement cannot necessarily be ruled out in the longer term. In section 2 we thus outline briefly the current position of government procurement under the WTO’s multilateral rules and the initiatives that have taken place to extend the multilateral rules in this area. The remaining sections of this chapter are then devoted to a consideration of the GPA.

2. Government procurement and the multilateral rules of the WTO

2.1. *Application of the multilateral agreements to government procurement*⁸

So far as concerns the multilateral rules of the WTO, as we have noted above these have little significance for government procurement

7 S. Arrowsmith, ‘Reviewing the GPA: The Role and Development of the Plurilateral Agreement after Doha’, *Journal of International Economic Law*, 5 (2002), 761.

8 See further S. Arrowsmith, *Government Procurement in the WTO* (The Hague: Kluwer Law International, 2003), chapter 3; M. Dischendorfer, ‘The Existence and Development of Multilateral Rules on Government Procurement under the Framework of the WTO’, *Public Procurement Law Review*, 9 (2000), 1.

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at present. In particular, whilst GATT and GATS both contain general obligations on national treatment and most favoured nation (MFN), government procurement is excluded from these obligations.

First, the key national treatment obligation in GATT Article III does not apply to procurement. This requires, generally, that internal measures should not be applied so as to afford protection to domestic production (Article III.1). This general obligation is then elaborated in later provisions of Article III, one of which is Article III.4. This provides that in measures relating to 'internal sale, offering for sale, purchase, transportation, distribution or use', the products of any WTO Member imported into any other Member State shall be accorded treatment no less favourable than that accorded to like products of national origin. Without a specific exclusion this would include measures relating to government procurement – and a similar national treatment provision in the original draft of these rules expressly stated that the measures covered did include laws and regulations governing procurement of supplies by government agencies.⁹ However, ultimately national treatment was expressly excluded by Article III.8 of the GATT: this states that Article III is not to apply to 'laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial resale'. The position with respect to the MFN obligation of GATT, as stated in GATT Article I, has been slightly more contentious, but the view of many scholars is that this, also, does not apply to government procurement.¹⁰

The GATS likewise exempts procurement from its most significant obligations, doing so very clearly in respect of both MFN and national treatment. Thus Article XIII.1 provides that both Articles II (MFN) and XVII (national treatment), as well as Article XVI on market access, shall not apply to 'laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial resale'.

Thus in general under both GATT and GATS governments remain free to discriminate in favour of national industry and to choose their own procurement procedures and policies, no matter what obstacles these

9 Except for military purchases. See generally Arrowsmith, note 8 above, pp. 32–4.

10 See Arrowsmith, note 8 above, at pp. 61–3, and works cited there; Dischendorfer, note 8 above, pp. 15–17. Cf. A. Reich, 'The New GATT Agreement on Government Procurement: The Pitfalls of Plurilateralism and Strict Reciprocity', *Journal of World Trade*, 31 (1997), 125 at 144.

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might create for suppliers from other WTO Members in participating in government contracts.

In light, in particular, of the current importance of the development agenda in the WTO,¹¹ it is also pertinent to mention that the WTO's multilateral rules impose few controls over the practice of tying aid, whereby donors to developing countries require the recipients to spend aid given on goods and services from the donor country. Whilst, in the view of La Chimia as set out in chapter 13 of this volume, this practice may be viewed as potentially distorting trade contrary to the basic principles of WTO rules as well as reducing the effectiveness of the aid given, both the initial tying of aid and the procurement of aid-funded goods under discriminatory rules are largely outside the scope of WTO rules because of a combination of the wording of the MFN and non-discrimination rules and the government procurements exclusions referred to above.¹²

The multilateral agreements *are*, however, relevant to government procurement in at least two respects.¹³ First, these agreements at least oblige governments to publish their general measures on government procurement, such as laws and regulations, under general provisions on publication of government measures found in GATT Article X and GATS Article III.¹⁴ Second, the rules may have some potential role in controlling the procurement of state trading companies, which traditionally have been considered to present a problem of discrimination in procurement similar to that presented by public bodies in general. This is a complex issue that is considered further by Wang in chapter 8 of the present volume.

2.2. Multilateral initiatives to expand WTO disciplines in government procurement

The fact that government procurement remains largely uncontrolled at present under the WTO's key multilateral agreements, combined with the increasing attention to this subject as described in section 1 above, means that it is not surprising that subsequent to the Uruguay Round there have

11 See further chapter 11 of this volume.

12 Chapter 13 of this volume, section 2.3; A. La Chimia and S. Arrowsmith, 'Addressing Tied-Aid: Towards a More Development Oriented WTO?', *Journal of International Economic Law*, 12 (2009), 707.

13 The WTO Agreement on Subsidies and Countervailing Measures is also potentially relevant in affecting the use of government procurement to subsidize national industry (for example, through contracts under which an excessive price is paid): see Arrowsmith, note 8 above, pp. 85–7.

14 See further Arrowsmith, note 8 above, pp. 75–6 and 84.

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been two significant initiatives to address this subject at the multilateral level in the WTO. So far, however, these have made little progress.

The broader of these initiatives, although not the first in time, is an initiative to develop an agreement on transparency in government procurement, which was launched at the Singapore Ministerial Conference in 1996.¹⁵ This Conference set up a Working Group on Transparency in Government Procurement (Transparency Working Group) 'to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement'.¹⁶ The Conference did not confer any actual negotiating mandate but it was later agreed at the Fourth Ministerial at Doha in 2001, which launched the current Doha Round of WTO trade negotiations, that negotiations on procurement would begin after the Fifth Ministerial 'on the basis of a decision to be taken, by explicit consensus, at that session on the modalities of negotiations'.¹⁷ However, that Fifth Ministerial meeting at Cancún ended without any decision formally to start negotiations on government procurement: whilst a number of WTO Members, especially the European Union (EU), considered negotiations on this to be important to the WTO package as a whole, several other WTO Members were strongly opposed to starting any such negotiations – and, indeed, disagreement on this issue (and on the fate of the other 'Singapore' issues)¹⁸ is generally believed to have been one factor

15 See further S. Arrowsmith, 'Towards a Multilateral Agreement on Transparency in Government Procurement', *International and Comparative Law Quarterly*, 47 (1998), 793; Arrowsmith, 'Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the World Trade Organization', *Journal of World Trade*, 37 (2003), 283; Dischendorfer, note 8 above; K. Abbott, 'Rule-making in the WTO: Lessons from the Case of Bribery and Corruption', *Journal of International Economic Law*, 4 (2001), 275; V. Rege, 'Transparency in Government Procurement – Issues of Concern and Interest to Developing Countries', *Journal of World Trade*, 35 (2001), 489; J. Linarelli, 'The WTO Transparency Agenda: Law, Economics and International Relations Theory', chapter 13 in Arrowsmith and Trybus, note 2 above; H.-J. Priess and C. Pitschas, 'The WTO General Council Decision of August 1, 2004: A Note on the Decision Not to Launch Negotiations on Transparency in Government Procurement during the Doha Round', *Public Procurement Law Review*, 14 (2005), NA1; V. Mosoti, 'The WTO Agreement on Government Procurement: A Necessary Evil in the Legal Strategy for Development in the Poor World?', *University of Pennsylvania Journal of International Economic Law*, 25 (2004), 593.

16 WTO, Ministerial Declaration, Ministerial Conference First Session, 13 December 1996 (WT/MIN(96)/DEC) ('Singapore Declaration').

17 WTO, Ministerial Declaration, Ministerial Conference Fourth Session, 14 November 2001 (WT/MIN(01)/DEC/W/1) ('Doha Declaration'), paragraph 26.

18 The four original 'Singapore issues' (so designated since work on them was launched at the First WTO Ministerial Conference, in Singapore) were: (i) the relationship

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underlying the overall failure of the Fifth Ministerial Conference. Following that Conference, the general negotiations were put back on track with the adoption of a General Council decision of 1 August 2004 which established a framework for continuing negotiations. However, as part of this agreement it was decided to drop, for the time being, any continuing work in a multilateral format towards negotiations on transparency in government procurement (and on the separate 'Singapore' issues of trade and investment, and competition policy). The terms of the General Council's decision state that no further work towards negotiations on this matter will take place in the WTO 'during the Doha Round' – thereby leaving the door open to a resumption of work subsequent to the conclusion of the Round.¹⁹

The prospect of concluding any significant agreement on transparency in government procurement on a multilateral basis is thus clearly ruled out, at least in the short term. However, it is possible that some countries will try to move forward on this issue again once the Doha Round negotiations have been completed. A key issue to be addressed if progress is to be made with this particular initiative is the precise role and purpose of an agreement on transparency.²⁰ The concept of transparency refers generally to openness, and there is a general consensus on the type of procurement rules that can be regarded as implementing transparency in procurement, as discussed further in section 4 below. However, transparency is generally understood as a means to an end rather than an end in itself, and is supportive of multiple objectives in public procurement. In the context of the GPA, as we will see below, transparent procedures were originally included in the Agreement mainly to support the GPA's non-discrimination rules; but transparency rules can also play an important role in supporting, in particular, the objectives of value for money and integrity in public procurement.²¹ In the period leading up to the Cancún Conference, a major effort was made to make clear that an agreement on transparency in government procurement would not entail rules

between trade and investment; (ii) the interaction between trade and competition policy; (iii) transparency in government procurement; and (iv) 'trade facilitation', or possible ways of simplifying trade procedures.

19 See *Decision Adopted by the General Council on 1 August 2004*, available at www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm.

20 See further Arrowsmith (2003), note 15 above.

21 See S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (The Hague: Kluwer Law International, 2000), chapter 2; P. Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford University Press, 2004), *passim*.

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on non-discrimination or market access; nonetheless, some WTO Members continued to have apprehensions that a transparency agreement was envisaged as a first step towards non-discrimination rules, an objective that they opposed. Rules on transparency were also defended as supportive of the 'good governance' objectives of public procurement referred to above. However, not all WTO Members were supportive of this approach either – some, indeed, considered it to be a departure from the WTO's traditional market-opening agenda.²² This lack of clarity has impeded both the commitment to negotiations on transparency and concrete progress in deciding what precise obligations might be included in any transparency agreement.²³

The second initiative on government procurement that has been undertaken at the multilateral level subsequent to the Uruguay Round is that which is called for under GATS Article XIII.2. Recognizing that the exclusion of government procurement was a major gap in the multilateral system but also that this gap could not realistically be filled in the Uruguay Round itself, this provision required negotiations on government procurement of services to commence by 1997. These, along with negotiations on subsidies and safeguards, were to be conducted in the Working Party on GATS Rules.²⁴ It might be felt that there is an anomaly in pursuing negotiations on procurement of services and not procurement of goods, especially given that it tends to be easier to open up markets in the latter before dealing with the former; but this resulted simply from the historical fact that there was an opportunity to insert such a provision for services during the Uruguay Round. Pursuant to this mandate, the European Union has put forward detailed proposals for negotiations that parallel the main elements of the GPA at least in some respects (while obviously focusing on the procurement of services as compared to goods);²⁵ however, other WTO Members have shown a reluctance to engage in negotiations on this topic. Recently, the discussions in the

22 It is noteworthy, in this regard, that the revised text of the GPA on which provisional agreement was reached in December 2006 explicitly embraces good governance in addition to traditional market-opening objectives, as well as including a new substantive obligation on the avoidance of corrupt practices. See further section 5.2 below.

23 Arrowsmith (2003), note 15 above.

24 The government procurement mandate was first taken up at the meeting of 8 December 1995: see Working Party on GATS Rules, *Report of the Meeting of 8 December 1995* (S/WPGR/M/3).

25 See, in particular, *Communication from the European Communities* (document S/WPGR/W/54 of 20 June 2006).

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Excerpt

[More information](#)

Working Group have focused on a range of topics, including the approach to be taken up in informal technical discussions on the subject.²⁶

2.3. *The future for multilateral rules and government procurement*

Since current initiatives for a multilateral agreement on transparency have stalled and progress on the GATS mandate for negotiations has been limited, whilst the GPA is rapidly gaining momentum, it is clear that the focus of government procurement work in the GPA for the short to medium term will be on the plurilateral approach. Given the past opposition of some WTO Members to multilateral initiatives on procurement, as well as the lack of interest on the part of others, it may be that even in the longer term the GPA, possibly with a much-expanded membership, will remain the main forum for regulating procurement within the WTO. On the other hand, the potential benefits of a multilateral approach to these issues should not be forgotten, in particular in bringing within a regulatory framework states that have been unable to introduce desired reforms in this area because of vested interests or other political difficulties. In some cases, these may be the very states that would benefit most from regulation in this field.

Two key points seem worth bearing in mind in the future pursuit of any multilateral agenda on this topic. One is the need for a clear vision from the outset of detailed negotiations of the precise objectives that regulation will serve: the absence of such a vision appears to have been an obstacle to progress in the work on transparency. A second point is that possible multilateral rules need not seek to replicate the role of the GPA: it could be more useful to focus on developing a different and more limited agreement that would primarily serve those states that are unwilling or unable to accede to the GPA in the near future. In this regard, the potential benefits of ‘soft law’ approaches to the subject – for example, constructing an agreement that might not be enforceable through the WTO’s dispute settlement mechanism or through the kind of supplier remedies system found in the current GPA²⁷ – are reviewed by Jiang in chapter 23 of the present volume.

For the present, however, the focus of the work in the WTO and of the resources of the WTO and its Members is very likely to remain with

²⁶ See *Annual Report of the Working Party on GATS Rules to the Council for Trade in Services* (S/WPGR/19 of 2 October 2009).

²⁷ On this system see further section 4.2 below.