

Special Issue: Government Procurement

EDITORIALS

Ali Amerjee, *(Are) Government(s) Pro-‘Cure’(ment)? The WTO and Beyond*

Nicholas C. Niggli, *Helping Nations, Businesses and People to Succeed: How Government Procurement Influences Institution Building, Good Governance, Economic Growth and Sustainable Development*

ARTICLES, NOTES AND COMMENTS

Justice Chang-fa Lo, *Making the Anti-Corruption Provisions in the New Government Procurement Agreement under the WTO Operable*

Robert Anderson & Anna Mueller, *The Revised WTO Agreement on Government Procurement as an Emerging Pillar of the World Trading System: Recent Developments*

Caroline Nicholas, *Negotiations and the Development of International Standards in Public Procurement: Let the Best Team Win?*

Christopher Yukins & Johannes Schnitzer, *GPA Accession: Lessons Learned on the Strengths and Weaknesses of the WTO Government Procurement Agreement*

Sandeep Verma, *Life Cycle Costing in Defence Acquisition: The Challenges of Transforming Complex Aspirations into Factual Ground Realities*

Geo Quinot, *Innovation, State Contracting and Public Procurement Law*

Anna La Chimia, *Cui bono? Scope, rationales and consequences of the exemption for development procurement in the revised text of the GPA*

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Trade, Law *and* Development

Vol. 7, No. 1

2015

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Published by

The Registrar, National Law University, Jodhpur

ISSN : 0976-2329 | eISSN : 0975-3346

Nicholas C. Niggli, *Helping Nations, Businesses and People to Succeed: How Government Procurement Influences Institution Building, Good Governance, Economic Growth and Sustainable Development*
7(1) TRADE L. & DEV. 8 (2015)

HELPING NATIONS, BUSINESSES AND PEOPLE TO SUCCEED:
HOW GOVERNMENT PROCUREMENT INFLUENCES
INSTITUTION BUILDING, GOOD GOVERNANCE, ECONOMIC
GROWTH AND SUSTAINABLE DEVELOPMENT

NICHOLAS C. NIGGLI*

When the United Nations (UN) celebrated their 70th anniversary in September 2015, world leaders formally adopted the 2030 Agenda on Sustainable Development which aims to follow up and complement the Millennium Development Goals in a broad, ambitious and integrated way. The 17 Sustainable Development Goals (“SDGs”) and 169 underlying targets of the 2030 Agenda, extending widely across the economic, social and environmental dimensions, are intended to be bold and transformative guidelines towards a better future for both humanity and our planet.

Has the international community been too inclusive, thereby opting for an excessively long list of targets and stretching its resources over too large a scale, as

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some economists and development experts claim? Have negotiators and leaders essentially failed to prioritize efforts on a limited set of key goals? Will we therefore not be able to generate the best social, economic and environment benefits from our global effort because of a lack of prioritization, which is essential when resources are scarce?

It seems to me that we can approach these questions from a slightly different angle and ask ourselves how we can generate the greatest benefits for people and the planet, while simultaneously saving resources and creating conditions for poverty alleviation and sustainable growth, jobs and wealth creation.

How can we achieve this? By having governments, development agencies and development banks as well as civil society representatives focus their attention on government procurement reform.

I do believe that the nations which develop and commit to open, transparent and procedurally fair government procurement regimes will be able to benefit from the development rewards associated with stronger institutions, better governance, stronger economic growth and more sustainable development. Those jurisdictions which get it right will ultimately take an important step towards achieving SDG 16 - *promoting peace, justice and strong institutions* - and its associated targets, 16.5 - *substantially reduce corruption and bribery in all its forms* - and 16.6 - *develop effective, accountable and transparent institutions at all levels*.

Government procurement is at the interface between key areas of policy, such as governance, trade, development and value for money, as nations undertaking acknowledged reforms in this field will likely also be able to benefit from the leverage effect associated with procurement. It is therefore to be expected that they will be able to maximize the impact of various other SDGs and associated targets as well.

As guest editor of this special edition of the distinguished *Trade, Law and Development Journal*, it is a pleasure and an honour for me to share some of the reasons behind these convictions of mine.

I. GOVERNMENT PROCUREMENT AND INSTITUTION BUILDING: STAGGERING NUMBERS WITH CONSIDERABLE IMPACT

According to the World Bank's ("WB") calculation, gross world product in 2014 was close to \$US 78 trillion in nominal terms, while the World Trade Organization ("WTO") conservatively estimates government procurement to represent between 10 and 15 percent of the world economy. In practical terms, Governments across the globe collectively spent between \$US 7.8 - 11.7 trillion or more in 2014 to

purchase goods, services and construction services with public resources to fulfil their functions.

Behind those staggering yet cold numbers, there are millions if not billions of life-changing situations associated with either efficient or inefficient government procurement regimes.

Whether or not the State is capable of using resources efficiently in order to build quality public hospitals can potentially make an enormous difference to mothers giving birth.

Similarly, whether or not the State is capable of building sufficient numbers of high quality public schools will make a huge difference to the education of most children and their prospects in life.

Additionally, whether or not the State is able to provide entrepreneurs with high quality public infrastructure will undoubtedly reduce or increase the cost of growing their businesses, impacting their competitiveness and capacity to leverage private investment as well as capital productivity.

Furthermore, whether or not the State is capable of guaranteeing a high level of governance and transparent, open and predictable procurement processes will either facilitate investment or render it more difficult, including partnerships between public and private funds to build, renovate or upgrade key infrastructure.

Finally, whether or not public resources are well or less well managed impacts a country's governance profile and capacity to develop sustainably in a significant manner, especially when one takes into account the multiple benefits associated with good governance or all the costs linked to weak governance and related corruption, waste of resources and bribery in all their forms.

To enable or not to enable, that is the fundamental question, to paraphrase William Shakespeare's Hamlet.

Growing evidence does indeed demonstrate the clear link between inclusive institutions and innovation, long-term economic expansion, women's economic empowerment and more widely distributed wealth, amongst other positives. Reinforcing the State's capacity to use public resources effectively as well as efficiently and to deliver for the many rather than the few is therefore essential. So is the effective functioning of government and the facilitation of the working of a market economy which fosters investor confidence and favours the most

innovative, competitive and cost effective players rather than the most well connected.

Given the considerable financial resources involved in government procurement, few State activities create greater temptations or offer more opportunities for collusion and corruption. Significant amounts of public money as well as development aid are wasted instead of being utilized efficiently to improve the provision of vital infrastructure and public services, with disastrous consequences.

Indeed, in 2013 the UN estimated that from the point of view of a public contract's total value, between 10 and 25 per cent on average may vanish as a result of corrupt practices. In some countries these numbers seem unfortunately to be even higher. While these practices are clearly a universal problem, the developing countries tend to suffer particularly: Global Financial Integrity estimates that they lose around \$US 1 trillion each and every year.

Those who tend to pay the heaviest price for the consequences of corruption, collusion and mismanagement of resources at the top are often those at the bottom of society. In other words, it is precisely the people who need well-functioning public infrastructure and services the most that are deprived of the opportunity to grow out of poverty by extractive institutions and poor governance.

Do most people understand the strategic importance of good governance and governments capable of delivering effectively and efficiently for the many rather than the few?

It seems an affirmative response can be given to this question. This is supported by a recent global survey conducted by the UN ("The World We Want"), where people from around the world considered "an honest and responsive government" one of their most important priorities, even ahead of access to clean water and sanitation, affordable and nutritious food, political freedoms as well as freedom from discrimination and persecution, amongst others. Last but not least, it is worth mentioning that it is in countries scoring the lowest on the UN Development Program's Human Development Index that this governance-related priority scored highest.

As highlighted by a growing body of research, the capture of State resources by vested interests is indeed one of the key factors obstructing the transformation of economic growth into development dividends and poverty alleviation. Poor governance also tends to lead to increased inequality, a loss of trust among citizens and investors in the government and de-legitimisation of the State; it can ultimately result in political instability, mass-migration, the rise of extremism and civil war.

Promoting and implementing international instruments which positively impact accountability amongst governments, bidders and contractors through government procurement reform should therefore be very high on the list of strategic focusses of not only States, but also of relevant international organisations, development agencies, development banks, non-governmental organisations and civil society everywhere in the world.

Has the evidence led to practical progress across the globe? The recipe for developing inclusive institutions and good governance being a very complex and multifaceted one, it is probably inevitable that the picture seems to be strongly contrasted, especially while focussing so specifically on government procurement reform.

A *tour d'horizon* of government practices across the world leads government procurement experts to think that during the past two decades some governments have largely failed to tackle the problem of poorly performing public procurement processes in a substantive way, essentially jeopardizing their capacity to strengthen their institutions in the process and missing out on achieving the best value for money and best quality of goods and services available internationally, through well-functioning, open, transparent and competitive procurement processes.

However more encouragingly, another fast growing group of States has taken positive steps towards reforming government procurement practices, electing to conduct reforms autonomously or to commit to agreed disciplines, and to reform and open their government procurement markets in the framework of bilateral free trade agreements (“FTA”) or regional free trade agreements (“RTA”).

Last but not least, some twenty years ago, a relatively small group of mostly developed States agreed to commit to open, transparent and procedurally fair government procurement rules by negotiating and joining the WTO Government Procurement Agreement (“GPA”), which updated and improved previous, narrower-scoped versions of the Agreement.

Since then, this group of WTO Members has grown rapidly and has successfully renegotiated the Agreement which binds them, essentially setting the stage for a very significant change in the global procurement landscape, but also offering new hope, opportunities and perspectives to citizens, entrepreneurs and investors across the globe.

While benefits of the GPA are often seen in terms of providing market access rights for national suppliers in the other GPA parties’ markets, the Agreement can

also be seen as a powerful tool for improving governance and promoting development. These are the two drivers I mainly choose to emphasize below.

II. THE REVISED WTO GPA: EFFICIENCY, DEVELOPMENT AND GOVERNANCE BENEFITS AVAILABLE FOR ALL

During the first sixteen years of the WTO's history, the GPA was informally called the "rich man's club" on more than one occasion. This nickname's origins are multiple: on the one hand, the Agreement is one of only two WTO treaties which are plurilateral instead of multilateral in their scope and on the other hand, it brought together mostly WTO Members enjoying advanced development status.

Originally developed at the Organisation for Economic Co-operation and Development (OECD) in the 1960s and taken over by the General Agreement on Tariffs and Trade ("GATT") during the Tokyo Round in the 1970s, the GPA was then renegotiated in parallel with the Uruguay Round in the 1980s and 1990s. During this process, the Agreement was extended in its scope and coverage but failed to acquire a clear development dimension. Its special and differential treatment provisions, to recognize the needs of WTO Members enjoying less advanced economic development, were indeed not developed well enough and therefore not entirely realistic.

The willingness of the GPA Parties to expand the coverage of the Agreement amongst themselves and to modernize the rulebook once again, to take into account developments in information technology and procurement methods, were certainly important drivers during the most recent renegotiation process, which formally started in 1997 and got under way substantially in the early 2000s.

Even more importantly, GPA Parties were united by the strong desire to reach out to the rest of the WTO Members, in order to gradually move the plurilateral Agreement towards multilateralism.

To attract newcomers, an international legally binding instrument usually needs to possess both a desirable content and the adequate architecture. By successfully overcoming their divergences in December 2011 after more than a decade of arduous and complex negotiations, Ministers representing the 42 GPA WTO Members signalled to the rest of the world that the revised GPA now met those two criteria.

Current membership of the Agreement does indeed provide for predictable, transparent and non-discriminatory access to procurement markets, currently estimated at \$US 1.7 trillion annually within the jurisdictions of its now 45 GPA WTO Members, and the proper framework now in place is up to date, reflects

twenty first century procurement practices and is more reader and user friendly than the 1995 GPA.

Critically, the Agreement now has the transformative power to help and serve those who need it the most and who are at the heart of the SDG's focus: the people furthest behind.

In other words, the GPA, as well as being a grouping of advanced economies, is now also sufficiently flexible and development-friendly to appeal to a much larger audience of States, thanks in particular to its Article V which deals exclusively and specifically with developing countries' recognized need for special and differential treatment, given their particular development requirements. This capacity to act as a "passport to prosperity" is essential, first and foremost because less developed economies tend to need institutional and governance-strengthening reforms the most.

It is precisely this ability to help the emerging, developing and least-developed countries, their small, medium and large-sized companies and their citizens which makes me believe that the revised GPA, which is already the world's largest legally binding agreement covering public procurement, has the capacity to further grow significantly in stature and to become one of the key global standards for sound public sector governance in the foreseeable future.

Due to the strategic and systemic importance of government procurement, the GPA should also help its parties to reap benefits way beyond procurement, saving public resources and creating conditions for poverty alleviation, investor confidence, women's economic empowerment, sustainable growth, jobs and wealth creation.

A mere 18 months after the entry into force of the revised GPA, interest in the Agreement among non-GPA WTO Members has already grown considerably. On top of the 45 GPA WTO Members, 30 non-GPA WTO Members currently participate in the GPA Committee debates as observers and 10 of them, including China, are already in the process of negotiating their accession to the Agreement.

While the momentum resulting from the still relatively recent conclusion of the renegotiation process is strong and positive, I believe that some exogenous factors will most likely precipitate the enlargement of the GPA in the coming years, reinforcing the Agreement's importance and capacity to deliver for the States, the private sector and citizens.

The ability to help close the infrastructure gap and to deal with some of the financial crisis aftershocks as well as reforms undertaken autonomously or within bilateral or regional trade pacts should indeed contribute to further increase the GPA's appeal substantially.

III. CLOSING THE INFRASTRUCTURE GAP: THE POST-FINANCIAL CRISIS IMPERATIVE OF PUBLIC AND PRIVATE CAPITAL WORKING TOGETHER

Infrastructure does form the backbone of any economy, supporting essential activities that underpin economic and social productivity. While the benefits of functioning, efficient infrastructure are evident in terms of development, poverty alleviation, women's economic empowerment and investment attraction, the political, fiscal, economic, social and human costs associated with dysfunctional infrastructure are abysmal.

While our increasingly interconnected world has entered the digital age and the opportunities as well as challenges of the fourth industrial revolution are being debated, there are still mighty obstacles preventing our world from being a level playing field where all entrepreneurs and citizens have an equal opportunity.

Indeed, according to the latest WB figures, some 1.3 billion people still do not have access to electricity, 770 million lack access to clean water, 2.5 billion do not have adequate sanitation and 1 billion live more than two kilometres away from an all-weather road. The solution to this dreadful situation is both a daunting challenge and extraordinary opportunity.

While the OECD estimates that the infrastructure spending requirement across the world amounts to \$US 50 trillion in the next fifteen years, the WB reports that the unmet demand for infrastructure investment in emerging and developing countries amounts to at least \$US 1 trillion each and every year.

The future economic infrastructure investments required to cope with economic and demographic growth alone are estimated at 6-8% of the gross domestic product ("GDP") in developing countries, which is twice as much as their present spending. If one adds the much-needed social and climate-change related infrastructure to the bill, the picture gets even bleaker.

Behind this massive gap, one can distinguish two important interlinked realities.

On one hand, as a result of massive State interventions to sustain their economies during and after the recent global financial crisis and the resulting increase in public debt levels, the vast majority of jurisdictions no longer possess the necessary

resources to finance their infrastructure needs alone, even with the help of international donors, development agencies and development banks as well as infrastructure investment banks.

On the other hand, faced with a post-financial crisis situation of low government bond yields, institutional investors do need to find alternative income streams to help match liabilities and to diversify the risk profiles of their investment portfolios. Pension funds being long-term investors by definition, investing in infrastructure, either through direct government contracts, public-private partnerships or investment vehicles such as infrastructure debt or funds, should in principle represent sterling opportunities, given the expected stable income streams and limited correlation to other asset classes.

It should, in other words, be a priority for public and private capital to work together constructively and innovatively in the twenty first century.

Unfortunately, practice hardly seems to match theory. Private investors and in particular large institutional players, representing a colossal source of capital to invest, might in principle consider it desirable to partner with governments. They are, however, often finding it very difficult to identify infrastructure investments that they are comfortable backing.

Is the situation desperate? Not entirely. Sophisticated institutional investors have indeed started to allocate more capital to infrastructure over the past five years. This increased allocation has however barely ventured into the regions of the world where the infrastructure demand is the most extreme, despite higher promised returns.

What are the reasons behind this overly cautious approach? While complexity and regulator restrictiveness are often raised informally, in discussions amongst institutional investors, political risks, lack of transparency and weak governance structures are often identified as the main culprit.

Jurisdictions which reform their government procurement processes and make the choice to commit themselves to recognized international regulations such as the GPA should be able to benefit from such a move by sending a very powerful signal to investors, whether foreign or national. The risks involved in committing financial resources to investments where life cycles are longer than most political cycles are particularly feared by private investors. To assuage these fears, an adherence to rules backed by a multilateral trading system does certainly help since it indicates that a jurisdiction is ready to guarantee a sustained, high level of governance.

While accession to the GPA is certainly not the end of the road - rigorous implementation of the rules being as crucial as signing on the dotted line - the backing of the WTO's Dispute Settlement Understanding and the obligation to provide a timely, effective and transparent review by an impartial and independent judicial authority, as foreseen by Articles XX and XVIII of the GPA, should evidently increase investor confidence by providing solid guarantees of more stable, predictable and transparent sets of rules and conditions over the long term.

This should in turn help to end the private capital stand-off and boost partnerships between public and private funds to build, renovate or upgrade key infrastructure, ultimately facilitating the working of the market, empowering both more innovative, competitive and cost-effective businesses as well as citizens at the receiving end, while also helping institutional investors deliver on their pension promises and businesses grow in capital and capacity-heavy jurisdictions.

As the number of GPA Parties grow, the Agreement's good governance "stamp" is increasingly likely to be recognized, not only by institutional investors and the finance industry, but also by relevant international organizations, development agencies, development banks, non-governmental organizations and civil society, essentially pushing those jurisdictions which have not yet adopted regulations that meet internationally recognized standards and/or joined the GPA to do so. Failing which, they risk being left behind or facing significantly greater difficulties and higher costs when it comes to the indispensable financing of the infrastructure gap.

IV. THE WAY FORWARD: LEVERAGING GOVERNMENT PROCUREMENT TO CREATE A MORE PROSPEROUS AND SUSTAINABLE WORLD

Government procurement was originally carved out of the main multilateral rules of the GATT and then the WTO system, despite strong evidence that procurement trade across borders accounts for a significant and growing part of international goods, services and construction services trade. For a long time, it was indeed perceived to be an area that was too politically sensitive to fully address within the multilateral trading system.

Addressing the links between trade, foreign direct investment, transparency and good governance at the WTO was yielding infrequent results just over a decade ago, but now such associations are much more widely accepted, highlighting the rapidly-shifting perceptions of the strategic importance of government procurement as a key policy-making instrument not just to promote trade and support economic development, but also to tackle corrupt practices.

Indeed, the revised GPA itself contains an explicit request for participating WTO Members to conduct procurement in ways that prevent corruption and avoid conflicts of interest. The significance of this is reinforced by the language in the Preamble of the Agreement, which effectively links the revised GPA to the UN Convention against Corruption. This explicit reference clearly underscores the significance of the GPA with reference to related UN work pursuant to the SDGs.

In 2010, a year before the GPA renegotiation was concluded at the ministerial level, I ventured to predict, in the context of a leading academic publication and in my capacity of Chairman overseeing this process, that in the coming decade the Agreement would undergo a transition from being an important but relatively obscure plurilateral treaty to becoming a central pillar of the multilateral trading system.

While at the time this appeared to be an extremely bold statement to say the least, it seems to me that only six years later, considerable progress has already been made towards reaching that goal. This illustrates the strong momentum behind the GPA and proves the attractiveness of both the architecture and content of the revised Agreement to contribute to address some of the more daunting challenges of our time.

How does this change of paradigm materialize?

First, the revised Agreement is now firmly in place since almost all Parties involved in the renegotiation process have completed their domestic ratification processes. Second, several WTO Members from vastly different geographical horizons and diverse levels of development have already joined the GPA since the completion of the plurilateral negotiations in December 2011. Third, an even larger number of WTO Members are presently actively engaged in GPA Accession negotiations or simply becoming observers to the Agreement.

Fourth, evidence suggests that a large number, more than 30, of WTO Members are still not Parties to the GPA, but are nevertheless engaged in FTA and RTA negotiations and have included a government procurement chapter in those bilateral and plurilateral preferential trade deals. Since those chapters are often modelled on GPA standards, either the 1994 or the 2012 Agreement, procurement legislation and practices in these jurisdictions are consequently broadly in line with the norms developed at the WTO, in this way it should *in fine* facilitate their Accession to the GPA, whenever they feel ready to take this step.

Fifth, work has been initiated in the WTO Committee on Government Procurement on a series of work programmes to enhance transparency and

contribute, if appropriate, to the future evolution of the Agreement. The work programmes were an important specific outcome of the recent renegotiation of the Agreement, and deal with topical issues such as access to procurement activities by small and medium-sized enterprises; the promotion of sustainability in procurement activities; exclusions and restrictions to the Agreement's coverage; and improvement of the statistics that are available regarding the operation of the Agreement. These programmes will, no doubt, help to ensure the continuing relevance and adaptability of the Agreement.

Last but not least, during the past 2-3 years, very significant progress has been made toward strengthened cooperation and the achievement of tangible synergies in the work of the WTO and other international organizations active in the procurement field.

Thus, a new informal cooperation arrangement between the WTO Secretariat and the European Bank for Reconstruction and Development (“EBRD”) is providing very significant support to GPA accessions in the countries where the EBRD operates. Furthermore, building on informal discussions with the WTO Secretariat, the WB’s new procurement framework, which was approved by the WB’s Executive Board in 2015, refers specifically to GPA accession as a path by which the WB’s client countries can put into place legislation that the WB may deem to be acceptable for its own purposes, subject to appropriate safeguards. This is a very significant step toward ensuring greater coherence in the work of international organizations in this area.

In a post-financial crisis world characterized by slow growth, high indebtedness, high levels of inequality, increased geostrategic tensions and deepening global uncertainties, addressing the low levels of public sector investment largely resulting from fiscal constraints and governance deficiencies is essential. Creating conditions for public and private investors to increasingly think in the long-term and to team up more effectively to meet emerging, developing, least-developed and developed economies’ enormous financing need for infrastructure creation and renovation is equally crucial in this context.

For more than four decades, the international development community has largely focused its attention on the importance of the private sector, human capital and governance as well as institutional reform in its development recipes. Consideration of public sector investment, physical capital and emphasis on infrastructure have however been making a spectacular comeback recently amongst development experts.

Government procurement, which is situated precisely at the intersection between the public and private sphere while also strongly depending on and impacting

governance, institutions and the provision of strategically important infrastructure, could well be one of the key chain links between those two methodologically different but complementary approaches of development.

If conducted in a transparent, non-discriminatory and procedurally fair way, government procurement can indeed deliver for the many rather than the few and thus offer a remarkable win-win-win combination by helping nations, businesses and people to succeed.

With the GPA, the WTO has a superb toolbox at its disposal to generate trade, economic growth and sustainable development while also promoting good governance and contributing to institution building.

Let's leverage it.

Last but not least, I would like to thank wholeheartedly all the eminent authors who have contributed to this special volume of the present *Trade, Law and Development Journal*. Ever since I served as Chairman of the WTO GPA, I have formed the strong conviction that there is a great need to foster public awareness of government procurement and scholarly as well as political and economic debate on its importance.

I am also of the view that much more research needs to be conducted, to properly quantify the powerful links and positive correlations between transparent, open and non-discriminatory government procurement regimes and institution strengthening, growth and sustainable development creation, as well as good governance promotion and women's economic empowerment, ultimately helping policy makers' decision processes.

The authors' excellent contributions clearly enrich that debate, highlighting not only potentialities but also challenges still to be overcome to progress further and faster.

My final words are for the Editors of the *Trade, Law and Development Journal*. I feel both privileged and deeply honoured to be able to modestly contribute to their eminent publication.

London, 12 February, 2016,

Nicholas C. Niggli