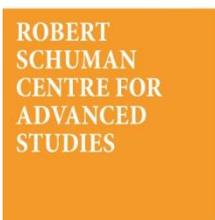




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International Cooperation on Public Procurement
Regulation

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Abstract

Most governments have yet to agree to binding disciplines on government procurement regulation, whether in the WTO or a preferential trade agreement. Empirical research suggests that reciprocally-negotiated market access commitments have not been effective in inducing governments to buy more from foreign suppliers. Foreign sourcing by governments has been rising for most countries, however, independent of whether States have made international commitments to this effect – although there is some evidence that this trend was reversed post-2008 in several countries that had the freedom to do so. The stylized facts suggest a reconsideration of the design of international cooperation on procurement regulation, with less emphasis on specific market access reciprocity and greater focus on good procurement practice and principles, efforts to boost transparency, and pursuit of pro-competitive policies more generally.

Keywords

Government procurement, regulation, trade agreements, WTO.

JEL codes: F13, H57

Introduction*

Discriminatory public procurement practices are high on the agenda of recent trade negotiations and agreements. Although a large portion of government expenditures is devoted to social spending and redistribution (e.g., transfer payments), government entities of all types spend considerable sums on a wide range of products—office supplies, equipment, buildings, roads, and so forth. In the United States (US) and the European Union (EU), government entities spend hundreds of billions of dollars/euros a year on goods, services and works.¹ According to one estimate, some 70 percent of all central government expenditure is associated with a contract of some type. Estimates of the size of contestable public procurement markets across countries are in the range of 5 to 8 percent of GDP.² If many countries pursue discriminatory procurement practices, the end result for the world as a whole is likely to be inferior in welfare terms compared to a situation where governments purchase goods and services from the most efficient suppliers, whatever their origin.

A common goal of most procurement systems is to achieve “value for (taxpayer) money.” The mechanisms to attain that goal often centre on mimicking the working of the market by requiring procuring entities to seek competitive bids for contracts that exceed a given threshold. In practice procurement outcomes may not minimize costs because of other policy objectives and constraints that apply to public procurement activities. One common objective is a desire to allocate taxpayer-provided funds to domestic firms, i.e., to spend tax revenues at home (Branco, 1994) – in the process generating political support for politicians (Vagstad, 1995). Other reasons to spend at home may include safeguarding national supply capacity in important sectors (such as defence equipment) or to achieve social objectives (e.g., to support minorities or disadvantaged communities). Often the pursuit of such objectives results in discrimination against foreign suppliers. Examples include outright prohibitions on foreign sourcing (civil servants must fly national airlines), threshold criteria for foreign sourcing to be permitted (minimum cost or price differentials compared to local suppliers), and offset and domestic content requirements.

A prominent example of a country that has made, and continues to make, active use of government procurement to achieve multiple objectives is the United States. The US has so-called “Buy America” requirements embedded in federal legislation that apply to public procurement contracts and maintains programs that give formal (legal) preferences to small and minority-owned businesses. Many other countries do the same. Chinese public procurement procedures require that purchasing entities give priority to products developed by domestic firms so as to support the development of innovative capabilities of indigenous firms (OECD, 2010).³ Reflecting this reality, international development agencies such as the World Bank have for a long time allowed for domestic preferences in their procurement procedures.

Insofar as procurement policies favour domestic firms and products, they can be equivalent to trade barriers.⁴ The market access dimension of discriminatory procurement practices is generally the main rationale for negotiating disciplines on government procurement in international trade agreements.

* I am grateful to Patrick Messerlin and Robert Wolfe for helpful discussions and comments on an earlier draft.

¹ While public procurement comprises a huge market, it is less than the 10-15 percent of GDP that is often claimed (e.g., by the WTO—see https://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm). This is because much government expenditure comprises items such as the civil service wage bill, social protection, pension payments, interest payments and debt service. See Audet (2002) for a discussion on the size of public procurement markets.

² http://archive.transparency.org/global_priorities/public_contracting.

³ The law requires that more than 30 percent of technology and equipment purchased with public funds be for domestic equipment and grants indigenous innovative products a price preference of 8 percent (OECD, 2010).

⁴ This need not be the case however as in some cases the policy may not have any economic effect—see, e.g., Evenett and Hoekman (2005).

Government procurement was excluded from the original General Agreement on Tariffs and Trade (GATT) in 1947. It was not until the completion of the Tokyo Round of multilateral trade negotiations in 1979 that a multilateral Agreement on Government Procurement (GPA) was negotiated. The GPA has changed in important ways since 1981, most notably in a steady expansion in coverage of national commitments. But, what has not changed is that participation remains voluntary and is limited to mostly OECD member countries – three-quarters of the WTO membership has not joined the GPA. At the time of writing, there are a total of 17 parties to the agreement, representing 45 WTO members. Of these, the EU and its 28 member states account for 29; European countries together account for 70 percent of the membership.⁵ Most of the growth in GPA membership since 1981 has been associated with the gradual expansion of the European Economic Community into the European Union.

In addition to the GPA, preferential trade agreements (PTAs) often include provisions on procurement and in practice PTAs have become the main vehicle to extend procurement rules to non-GPA members. Although liberalization occurs on a preferential basis, this is also true for the GPA as GPA signatories may restrict market opening to other GPA members. There are over 40 PTAs currently in force that include commitments to open access to procurement contracts on a bilateral or regional basis (Ueno, 2013; Rickard and Kono, 2014).

Export politics are a major factor driving negotiation of market access liberalization for procurement. Domestic constituencies (taxpayers, voters) may prefer to see tax revenues spent on local companies, but national firms and their workers may also have an interest in selling to foreign governments. A quid pro quo exchange of access to markets may allow a government to implement pro-competitive, efficiency enhancing procurement reforms – as greater participation by foreign firms should in principle lower prices and increase choice and quality – while at the same time generating more economic activity and profits in the export sector. In this respect the political economy of market access negotiations on procurement are the same as those for negotiations of trade policy more generally. Reciprocity is at the core of efforts to liberalize procurement markets, as the loss of a sheltered home market for domestic firms is offset by an increase in contracts won in trading partners. However, procurement liberalization is more complex than tariff reduction or removal as it involves regulatory regimes—the systems that a government puts in place to allocate contracts and seek to ensure that winning bidders are capable of delivering a product or a project; to reduce the scope for collusion or corruption; and to hold firms and procuring entities accountable for performance. How a government procures goods and services, including the decision to “make or buy” is a regulatory decision in the sense of a conscious act of social (and economic) ordering (Macdonald, 1985).

The regulatory features of procurement regimes are critical in ensuring that public objectives are pursued in an efficient manner. As in any area of regulation, different countries may pursue different approaches and there is no one-size-fits-all optimal procurement mechanism that is appropriate for all situations and all countries. For complex procurement projects involving long-lived infrastructure projects, new technologies or outsourcing of public services, it may not be clear what the best approach is and there is much to be learned from international experience. Thus, in addition to addressing spillovers generated by *de jure* discrimination and differences in procurement regulation that result in *de facto* discrimination against foreign bidders, the inherent complexity of designing procurement systems to achieve public service objectives efficiently create incentives for international cooperation.

This paper briefly discusses prevailing approaches towards international cooperation on government procurement in trade agreements, focusing mostly on the GPA and recent PTAs, and some of the available evidence on the effectiveness of reciprocal negotiations to open procurement markets to greater foreign competition. A key question for future multilateral cooperation in this policy area is whether mega-regional preferential trade agreements will do more than what has proven

⁵ Other European GPA members are Iceland, Montenegro, Norway and Switzerland.

possible under the GPA in the last 30 years, and more generally whether PTAs will be a driver for the gradual multilateralization of disciplines on procurement processes. Evidence and experience to date suggests that from an economic welfare and market contestability perspective what matters more is regulatory cooperation, transparency and learning as opposed to negotiating market access liberalization commitments. The implication is that trade agreements should do more to promote regulatory cooperation in this policy area.

The paper is organized as follows. Section 1 discusses the state of play in the WTO. Section II turns to PTAs and compares what has been (and may be) done in PTAs relative to the GPA. Section III discusses available evidence on the effectiveness of trade agreements in reducing the strong “home bias” that characterizes government purchasing decisions. Section IV argues that international cooperation should centre more on learning from the experience obtained on both sides of the Atlantic and in the rest of the world as to what works and why (and why not) in achieving the various objectives that are pursued through procurement. Section V concludes.

I. The WTO Agreement on Government Procurement

Art. III:8 GATT excludes procurement from the national treatment obligation. Art. XIII GATS does the same for services. It was only with the 1979 Tokyo Round Government Procurement Agreement that basic GATT obligations such as non-discrimination and transparency were extended to the purchases of goods by selected government entities. This agreement entered into force in 1981.⁶ It bound only those countries willing to sign it—at the time only 12 countries⁷ plus the European Communities (EC), which had 10 members at the time,⁸ for a total of 22 countries plus the EC. All signatories were OECD members. The Tokyo Round code was revised once in 1988 to include rental and leasing contracts, increase the time allowed for submission of bids and require publication of information on winning bids (Stern and Hoekman, 1987). It was subsequently revised in the Uruguay Round of multilateral trade negotiations (1986-93) to expand coverage to include services and additional entities. This second revision of the GPA entered into force in 1996. Negotiations to further revise and expand the GPA commenced in 1997. After more than a decade of talks, the third revision of the GPA was adopted in 2012 and entered into force in April 2014.

Coverage

The GPA applies to ‘any measure regarding covered procurement, whether or not it is conducted exclusively or partially by electronic means’ (Article II:1). The concept of procurement covers all contractual options, including purchase, leasing, rental and hire purchase, with or without the option to buy.⁹ A positive list is used to determine what procurement is covered. The GPA applies *only* to entities and procurement opportunities listed by a signatory in Appendix I of the agreement. There are three ‘entity annexes’ and three ‘product’ annexes. Annex 1 lists covered central government entities; Annex 2 lists sub-central government entities; Annex 3 lists all other entities whose procurement is covered by the GPA;¹⁰ Annexes 4-6 list covered goods, services and construction projects. Annex 3 is a catch-all category that includes entities such as utilities and railways. Entities listed in Annex 3 may

⁶ See Blank and Marceau (1997) for a discussion of the genesis of the GPA.

⁷ Austria, Canada, Finland, Hong Kong, Israel, Japan, Norway, Singapore, Sweden, Switzerland, the United Kingdom and the United States.

⁸ Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, and the United Kingdom.

⁹ The GPA only applies to purchases of goods and services that are not intended for re-sale. If government entities engage in trade (buying and selling), the WTO disciplines on state-trading (Art. XVII GATT) apply.

¹⁰ Only between a quarter and a third of all outlays are undertaken by central governments (OECD, 2015), highlighting the importance of including sub-national authorities in the GPA.

be partially or totally privately owned. What constitutes a ‘government entity’ is nowhere defined in the agreement, reflecting a lack of consensus on what constitutes a public undertaking – more specifically, whether a former state-owned or controlled enterprise that has been privatized or that is subject to competition should be required to follow GPA procurement practices. Instead a pragmatic approach is taken – governments negotiate which entities are listed.¹¹ The entities listed in the first three annexes are subject to the rules and disciplines of the GPA if the value of the procurement exceeds certain specified thresholds, and the goods or services involved are not exempted from the coverage of the Agreement.

The total value of the above threshold procurement by entities covered by the GPA has been estimated at US\$1.6 trillion (European Commission, 2011).¹² This increased by some \$80 billion following expansion in the coverage negotiated the third revision of the GPA and will increase further as more countries join. The coverage of the GPA has expanded very substantially over time – the value of covered procurement reported by GPA members in 1992 was only US\$62 billion (Hoekman, 1998).¹³ The extent to which commitments made by a WTO member in the GPA apply to other GPA members is a function of whether the former considers that reciprocity has been achieved. Parties to the GPA have made reciprocity a core feature of their cooperation. There are many instances where one member does not apply specific commitments to another. For example, the US applies a higher threshold for construction contracts in the case of Korea because Korea maintains a higher threshold than other GPA members. The US does the same with respect to Japan for procurement by NASA and to Canada for procurement by electric utilities such as the Tennessee Valley Authority. The EU excludes the US from coverage of its services procurement commitments for sub-central governments and contracts issued by many of the utilities that the EU has scheduled. Reciprocity is measured in an apparently straightforward way – as the value of average procurement done by procuring entities. However, there are major differences in view regarding the “real” or effective coverage of GPA commitments which impacts on exclusion decisions. These are also influenced by whether a country has specific industry export interests.

The main discipline imposed by the GPA on covered entities is non-discrimination – national treatment and MFN (Art. IV). The obligation extends not only to imports but also to subsidiaries of locally established foreign firms. The GPA thus goes beyond the GATT, which does not extend national treatment to foreign affiliates, and the GATS, which does so only if specific commitments to that effect have been made. Under the GPA, all foreign affiliates established in a signatory are to be treated the same as national firms. Moreover, signatories may not discriminate against foreign suppliers by applying rules of origin that differ from those they apply in general to MFN-based trade.

¹¹ Attempts by a government to remove a privatized entity from the Annex have been a recurring source of disagreement between GPA members. The Japanese government, for example, has unsuccessfully sought to remove railway companies following their privatization for over a decade (see Messerlin, 2014). In the most recent revision of the GPA an arbitration procedure was agreed to address such disagreements and determine if a privatized entity no longer is controlled by the government and should be removed from the GPA.

¹² See also a 2011 WTO brief at https://www.wto.org/english/thewto_e/minist_e/min11_e/brief_gpa_e.htm. According to the reports by GPA parties – see https://www.wto.org/english/tratop_e/gproc_e/gpstat_e.htm – a large share of this reflects procurement by the US states, which adds up to some US\$750 billion. Even if US state-level procurement is excluded, the reports to the WTO for the 2008-10 period indicate that the US is the largest GPA procurement market, representing over US\$500 billion a year in above threshold procurement. This compares to US\$330 billion reported by the EU. In terms of absolute spending by government, including wages, transfers, etc., the EU and the US are similar: US government spending in 2015 was some US\$ 6.5 trillion (<http://www.usgovernmentspending.com/>) or 36 percent of GDP, while EU governments spent €6.7 trillion in 2015 (48 percent of GDP), two-fifths of which was disbursed on social protection (http://europa.eu/rapid/press-release_STAT-15-5318_en.htm). See also OECD (2015).

¹³ This figure is almost certainly below the actual above-threshold procurement in the early 1990s by GPA parties. More recent EU reports to the WTO suggests that in 1996 above threshold procurement in the EU alone was €70.6 billion. See European Union (2013).

Procurement disciplines

The GPA does not explicitly require that procurement be competitive or that certain procurement methods be used. The objective of competitive procurement or ‘value for money’ is not mentioned as an objective in the preamble of the agreement. In this regard the GPA is quite different from the procurement guidelines that international development organizations and national governments apply. Instead, reflecting the market access focus of the WTO more generally, the emphasis is on transparency and on non-discrimination. Regarding the process of procurement, signatories are simply required to “...conduct covered procurement in a transparent and impartial manner that is consistent with this Agreement, using methods such as open tendering, selective tendering and limited tendering; avoids conflicts of interest and prevents corrupt practices” (Art. IV:4). Open tendering is any method that allows any supplier to bid (e.g., international competitive bidding). Selective tendering is a method where only suppliers that satisfy specific criteria for participation may bid (usually prequalified suppliers). Limited tendering is non-competitive and usually involves a procuring entity approaching one or more potential suppliers of its choice.

The rules in the GPA regarding selective tendering are basically aimed at ensuring that foreign suppliers can demonstrate that they qualify and are not discriminated against in this regard (a necessary condition for this is that they can obtain the information needed, which explains why the GPA has numerous provisions that aim to ensure transparency, including publication requirements and minimum time periods for bid preparation). Limited tendering may only be used if no tenders were received or they were not responsive, only one supplier can provide the good or service (e.g., artwork, products protected by intellectual property rights), for additional, follow-on deliveries, in situations of extreme urgency, for commodities (the presumption being that there is a world price for standardized, homogenous goods), for prototypes and winners of design contests (Art. XIII).

There is no explicit hierarchy of the three tendering methods mentioned in Art. IV and governments are free to use others, including negotiation (Art. XII GPA). The preference for competitive procurement methods is implicit in the agreement, reflected in requirements that notices of intended or planned procurement be published (including information on the mode of procurement, its nature and quantity, dates of delivery, economic and technical requirements, and amounts and terms of payment), in the conditions that must be satisfied if governments use limited tendering, and in the disciplines on treatment of tenders and contract awards. Art. XIII on limited tendering makes it clear that competition is preferred by requiring that this method not be used to avoid competition among suppliers, to discriminate, or to protect domestic suppliers. Art. XV requires that entities award contracts to the supplier ‘determined to be fully capable of undertaking the contract’ and who is either the lowest tender (if price is the sole criterion) or the tender that is most advantageous (in terms of the evaluation criteria set out in the notices or tender documentation).

The ‘fuzziness’ regarding requirements for competitive bidding may reflect a desire of signatories to see membership of the GPA expand to include developing countries, but also reflects differences in views among members on what the best approach is for specific types of situations. Until relatively recently, the basic presumption in the procurement literature was that the type of arms-length international competitive bidding procedures that are called for by the GPA and required in the EU (as well as institutions such as the World Bank) would, as a rule of thumb, generate efficient outcomes by awarding contracts to the lowest cost supplier able to meet the technical project requirements (e.g., Bulow and Klemperer, 1996; Bajari and Summers, 2002). However, especially for more complex projects, efficiency may require procuring entities to engage in negotiations and to interact with potential suppliers (see e.g., Estache, Guasch and Trujillo, 2009; Bajari, McMillan and Tadelis, 2009; and Spiller, 2009). This is increasingly the practice in the US and has become one dimension of procurement in which the EU and the US differ, although the EU has also moved towards greater flexibility in procurement policies.

The standard approach in procurement has been to pursue so-called sealed bid auctions or open tendering in the language of the GPA. This contrasts with ‘competitive negotiations’. Recent EU procurement directives make allowance for such negotiations, including ‘competitive negotiated procedures’, where a set of firms is invited to submit tenders and the lowest cost firm is selected, and ‘competitive dialogue’. The latter may be used where an entity knows what outcome it wants to achieve but does not know, and thus cannot specify in a call for tender, the means of satisfying its needs. This may include uncertainty as to the most appropriate legal structure and financing modalities for the project. However, the EU’s procurement guidelines state that this approach is only to be used if a project is particularly complex and should be used exceptionally, whereas in the US it is employed much more regularly (Yukins, 2015).¹⁴ The advantage of competitive dialogue is that it permits companies to engage with procuring entities, allows the latter to consider alternative solutions and technologies and to determine what would be most appropriate in addressing their specific needs.

Such approaches are premised on there being oversight and accountability mechanisms to prevent collusion and corruption and thus are less appropriate in contexts characterized by weak governance. One reason why open tendering may be used by public entities even if it less efficient than other approaches is because it ensures that they can justify the process through which contracts are awarded. Procurement is subject to both political pressures *ex ante* and political scrutiny *ex post* – one motivation for the type of detailed ‘mechanical’ procurement processes such as sealed bid auctions is that officials can protect themselves against *ex ante* pressures and against *ex post* criticism if it turns out that a supplier did not deliver a good product. Empirical analysis suggests that such ‘insurance’ dynamics are observed in available procurement data and that they come at a cost to economic efficiency (Chong, Staropoli and Yvrande-Billon, 2014).¹⁵

Industrial policy

Price-preference policies, local content requirements, offsets and similar discriminatory policies are widely used by governments to achieve equity or industrial policy goals. They are in principle prohibited by the GPA for all covered procurement as a result of the national treatment rule (Art. IV). However, exclusions are possible. Exhibit number one in this regard is the US, which, starting with the 1933 Buy American Act and the 1953 Small Business Act. Domestic content requirements for small businesses are both general and specific, including federal procurement preferences for small businesses owned by women, service-disabled veterans, socially disadvantaged businesspeople, and entrepreneurs in historically underutilized business zones. There is an explicit target that almost a quarter of all federal procurement spending be allocated to small business (Yukins, 2015).

As noted by Weiss and Thurbon (2006), the US pursues both an aggressive policy of opening foreign markets while being very defensive when it comes to maintaining its local preference policies and its ability to use procurement as an industrial policy tool. This creates a problem for countries seeking to improve their access to US procurement opportunities while continuing to be able to use procurement as an instrument to achieve objectives other than ‘value for money’ (Chen, 1995; Kattel and Lember, 2010). Art. V GPA gives developing countries the right to adopt or retain price-preference policies and offset requirements on a transitional basis, and delay the implementation of any and all provisions other than MFN for up to 3 years (5 years for a LDC). Moreover, after accession, the GPA Committee can be asked to extend the transition periods or approve the use of new transitional price preferences or offsets if there are “special circumstances that were unforeseen during the accession process” (Art. V:6). Existing signatories also commit themselves to “give due consideration to any request by a developing country for technical cooperation and capacity building”

¹⁴ In the EU context competitive dialogue has tended to be used for public-private partnership infrastructure projects.

¹⁵ See also Chong et al. (2012).

(Art. V:8). Some scope therefore exists for maintaining a price preference or offset policy – but this is time bound.¹⁶

There is little empirical research on the effectiveness of procurement discrimination in achieving the industrial and other policy objectives.¹⁷ Tax/subsidy instruments are likely to be more efficient in assisting domestic target groups than procurement favouritism, but not necessarily. Governments may confront fiscal constraints that impede the use of such policies. Moreover, an advantage of procurement that favours specific domestic groups is that it can help the most efficient firms in that group (as they must compete for the contracts), whereas a subsidy to a region or a minority group will be less selective. There are arguments for using procurement to achieve industrial policy goals (e.g. Geroski, 1990; Edler and Georghiou, 2007; McMurtgry, 2014). A key feature of procurement is that government is the buyer and thus in principle has greater control over outcomes than when “supply side” industrial policies are used (e.g., subsidies of varying types). From a policy perspective the question is whether discrimination should be an element of “industrial procurement policy.” The *prima facie* case for discrimination is not compelling as much knowledge and know-how resides in foreign firms, suggesting that policy should seek to promote inward FDI, support local suppliers and vertical linkages, incentives to transfer knowledge, etc.

A weakness of the GPA in this regard is the centrality of market access. The procurement process-related rules in the GPA are primarily aimed at supporting the market access goal and not necessarily designed to help governments achieve their procurement policy objectives.¹⁸ The tension arises because not all countries agree on what type of procurement rules are the right ones for any given type of project—instead the aim is to minimize the scope for *de jure* and *de facto* discrimination against foreign bidders. In this respect the GPA differs in several important respects from the new WTO Agreement on Trade Facilitation (TFA). The TFA covers all WTO members, not just a subset, and includes a large number of disciplines that all countries agree make sense for them to implement. All TFA disciplines work towards the realization of one clear goal: to facilitate trade by reducing trade costs. However, it was also recognized that not all rules can be implemented at the same time and that some will require financial and technical assistance to implement. In the GPA context there is no common ‘positive’ goal; instead the goal is ‘negative’ – to abolish discrimination. Arguably the GPA might attract more members if more effort centred on identifying processes and policies that can help governments attain both value for money and industrial policy objectives more efficiently.

¹⁶ In this respect the GPA is inconsistent with the procurement guidelines of major development agencies. Thus, the World Bank permits a margin of preference in contracts awarded under international competitive procurement. For locally manufactured goods, the margin is 15 percent; in the case of works, 7.5 percent (the latter are limited to low-income countries). For goods, the determining criterion is not the nationality of the manufacturer but where the manufacturing takes place. In granting the preference, priority is first given to bids where goods have at least 30 percent local content, using domestic production facilities already in place before the bid was submitted, and then to goods that are produced locally as compared to imported goods. For works, bidders must show that they are locally owned to qualify for the preference. See Alexander and Fletcher (2012). These provisions were maintained in the 2015 revision of the World Bank procurement procedures (World Bank, 2015).

¹⁷ Little is known about the prevalence of price preferences in the allocation of contracts. A study of the use by borrowers from the World Bank of domestic price preferences – permitted under its procurement guidelines – found that during 1998-2009 a total of 153 such contracts were approved, with a value of US\$280 million. This compares to a total of 57,000 contracts issued during this period. In only 12 contracts, worth \$4.3 million, did the preference alter the outcome of the bidding process. See Alexander and Fletcher (2012).

¹⁸ Woolcock (2013) argues that trade agreements have not supported genuine diffusion of liberal procurement regimes because of the central focus on reciprocity (market access) rather than on efficiency considerations and that this has been one reason why developing countries are not incentivized to join the GPA.

Transparency and review

The nature of procurement is such that unless rapid action can be taken, firms may not have an interest in contesting violations of the rules of the game. Accordingly, the GPA supplements the right of signatories to invoke the WTO dispute settlement mechanism – which is much too slow to be relevant for most real world procurement situations – with a requirement that members establish domestic review procedures. These bid-protest or challenge mechanisms should provide for rapid interim measures to correct breaches of the agreement or a failure of a government entity to comply with GPA commitments (Art. XVIII). Measures to preserve commercial opportunities may involve suspension of the procurement process, or compensation for the loss or damages suffered. This may be limited to the costs for preparing the tender or the costs relating to the challenge, or both.

The GPA members make no effort to monitor or report on the use and effectiveness of these mechanisms. The main focus of the GPA is on ensuring that firms have access to information on bid opportunities on a timely basis and are not placed at a disadvantage relative to local firms. Many provisions of the GPA concern transparency broadly defined. Much attention is given to requiring signatories to specify where information on procurement systems and opportunities will be published (including through electronic means). These must be listed in Appendices II through IV to the GPA. There are detailed requirements for publication of notices of intended procurement, the conditions for participation and permitted systems to ascertain that suppliers are qualified, technical specifications and tender documentation, minimum time periods to allow bids to occur, and regular reporting of statistics on procurement activities of covered entities.¹⁹ Arts. IX, XVI and XVII GPA require among other things that GPA members explain why a supplier's application to qualify was rejected, why an existing qualification was terminated, and provide information necessary to determine whether a procurement was conducted in accordance with the GPA, including an explanation why a tender was not selected and the relative advantages of the successful supplier's tender.

The various transparency provisions are potentially the most important elements of the GPA from an economic welfare perspective. There are significant potential gains from disciplines that promote transparent procurement mechanisms, both in encouraging greater participation (competition) and in reducing the scope for corruption and rent seeking. There is an increasing body of evidence, mostly of a case study nature, that documents the costs of non-transparency. For example, Auriol, Flochel, and Straub (2011) use a database of some 50,000 procurement contracts in Paraguay over a 4-year period in the mid-2000s to both document and estimate the effects of rent-seeking in procurement in Paraguay. They show that corruption in procurement generated a far-reaching system of favouritism that inflated costs and created incentives to engage in directly unproductive rent-seeking activity: firms that obtained government contracts were estimated to have an average 35 percent excess rate of return relative to competing firms that sold to private clients (did not get public contracts). They argue that procurement favouritism and corruption helps explain the bad growth and export performance of the Paraguayan economy.²⁰ Noteworthy is that discrimination against foreign suppliers was not a prominent feature of procurement favouritism in Paraguay as most goods were imported—what was at stake is the allocation of contracts and the rents generated by inflated mark-ups resulting from bid-rigging and sole tendering (about a quarter of all contracts in 2004-05).

Even if procurement is not collusive or corrupt, a lack of transparency will reduce the number of firms able and willing to bid for public contracts, thus reducing competition and increasing costs. An

¹⁹ The GPA does not define specific operational procedures such as whether bids should be assessed on price before determining whether bidders can satisfy technical requirements or whether technical selections should precede an assessment of price. In practice such matters can have an effect on expected procurement costs. See e.g., Blancas et al. (2011).

²⁰ See also Straub (2014). Other contributions to this literature include Di Tella and Schargrotsky (2003), who assess the effects of reducing corruption in procurement in Argentine hospitals and Hyytinen, Lundberg, and Toivanen (2007), who analyse municipal cleaning contracts in Sweden.

important technological development in this regard is the increasing use of e-procurement platforms by government entities. These make it easier for firms to monitor and bid on procurement opportunities. They also facilitate monitoring of procedures used and outcomes of tenders by auditing department and ministries of finance, as well as CSOs and researchers, as long as the data that are generated is compiled and made available.

II. Procurement and Preferential Trade Agreements

As mentioned, membership of the GPA is limited to mostly OECD countries. Almost no developing countries have joined in the last 30 years—Armenia being an exception. This has led GPA members to have pursue procurement liberalization and policy disciplines in PTAs as an alternative route. There are dozens of PTAs that include chapters on government procurement policies (Bourgeois, Dawar and Evenett, 2007; Anderson et al. 2011; Rickard and Kono, 2014).²¹ Some of these are not far-reaching – they either simply reflect the prevailing status quo as regards procurement policy in signatories or limit commitments to best endeavour-type (non-binding, non-enforceable) language. However, many of the more recent vintage PTAs include extensive coverage commitments that are enforceable – including through domestic bid-challenge type mechanisms. The more ambitious PTAs go beyond commitments to remove discrimination in procurement and include language pertaining to the objectives of procurement policy (e.g., attaining best value for money); the use of new technologies, such as electronic procurement, provisions to create or strengthen national institutions that implement national procurement policies and associated reforms; how to address likely changes in the scope of transactions falling under the disciplines of the agreement as a result of privatization of government entities; and call for cooperation on the development of national procurement policies. Noteworthy as well is that some agreements define circumstances under which non-trade objectives of government-procurement policy dominate, or are subservient to, market access (national treatment) disciplines (Bourgeois et al., 2007).

The creation of a Single Government Procurement Market in the New Zealand-Singapore Closer Economic Partnership Agreement is an example of a bilateral agreement with very ambitious objectives. Article 46 of this agreement states that the parties agree to establish a single New Zealand/Singapore government-procurement market through implementation of the APEC Non-Binding Principles on Government Procurement (relating to transparency, value for money, open and effective competition, fair dealing, accountability and due process, and non-discrimination); ensuring that suppliers from both countries can compete on an equal and transparent basis for government contracts; and establishing a mechanism to work towards “achieving the greatest possible consistency in contractual, technical and performance standards and specifications, and simplicity and consistency in the application of procurement policies, practices and procedures.” Article 49 of this agreement specifies that all government entities are to apply the national treatment rule; promote opportunities for their suppliers to compete for government business on the basis of value for money and avoid purchasing practices which discriminate or otherwise have the effect of denying equal access or opportunity to contracts.

This example illustrates that greater ambition can be achieved through PTAs than has been possible through the WTO. Of course, this is nothing new – the EU has long been the foremost example of a subset of WTO members agreeing to far-reaching disciplines on discrimination in procurement. What some of the recent PTAs reveal is that it is possible to go beyond the GPA. Deeper integration in some PTAs may be accompanied by complementary measures, including provision of technical and financial assistance to bolster institutional capacity in partner countries. Some PTAs establish timetables for deliberation and review processes. Rather than regard trade agreements such as the GPA

²¹ Bourgeois, Dawar, and Evenett (2007) discuss government-procurement provisions in 27 regional agreements as of the mid-2000s.

as an opportunity to generate one-off reforms, the review provisions that are found in some of the newer PTAs suggest a more dynamic approach that is based on learning and interaction is both feasible and desirable (Evenett and Hoekman, 2013).

A feature of the procurement-PTA landscape is that it mostly involves GPA members and that non-GPA signatories tend to be geographically concentrated. The non-GPA members that are signatories of PTAs with a GPA member – the EU, the US, Japan, Singapore, Korea – tend to be either very open countries or nations that are already deeply integrated into the global economy (Mexico, Chile) or countries that are located in a specific region and that have concluded PTAs with the US (Central America, Colombia, Panama, Peru). Aside from Mexico, there are no procurement agreements with major emerging economies (e.g., Brazil, China, India, Indonesia, South Africa, or Turkey). The US has concluded PTAs with several Arab countries that cover procurement (Bahrain, Jordan, Morocco and Oman); the CARIFORUM-EU Economic Partnership Agreement (EPA) includes procurement, but other EPAs do not, nor do EU PTAs with non-ACP countries.

The limited coverage of developing countries in recent vintage PTAs is somewhat surprising in that, in principle, a country that has not shown interest in joining the GPA might nonetheless be willing to include procurement in a PTA if this is accompanied by better access to the partner country for exports more generally. A feature of the GPA and negotiations to accede to the GPA is that such issue linkages are not possible—trade-offs and reciprocity is constrained to procurement. The fact that a broader set of concessions in other areas is part and parcel of agreeing to a broader PTA may help to explain why some non-GPA countries in Latin America have agreed to include procurement in recent PTAs. Presumably the same applies to countries such as Malaysia and Vietnam in the case of the TPP.

Over time such a process may result in the countries involved in PTAs deciding to join the GPA. One motivation to do so is to reduce potential trade diversion costs, a dynamic that Anderson et al. (2011) argue should over time result in a steady expansion of GPA signatories. In effect PTAs would then become a path towards increasing GPA membership – helping to overcome a major weakness that is inherent in a ‘sector-specific’ plurilateral agreement that countries are not convinced makes sense to sign onto as such. However, to date this dynamic does not appear to be very strong given that most developing countries do not include procurement in PTAs with the large players. The evidence to date suggests that PTAs are not much more effective in incentivizing developing countries to make international commitments on procurement policy than the GPA.²² The fact that non-GPA countries made less far-reaching commitments in the TPP on procurement than GPA members is also illustrative in this regard (see below).

Some recent PTAs seem to be used as mechanisms for GPA members to accord each other better treatment than what they extend to other GPA members—e.g., the bilateral PTAs between Canada, the EU, Korea and the US. This need not involve a broader PTA. The US and Canada concluded a bilateral deal on procurement in 2010 that ensured Canadian firms would be permitted to bid on contracts that they were excluded from under US law – a matter that became a major concern as a result of the large stimulus packages that were put into place by the US government in response to the 2008 financial crisis and that included ‘buy American’ provisions. The 2010 bilateral agreement involved Canada opening up potential procurement markets worth some C\$25 billion to US firms as a quid pro quo for the US making Canadian firms eligible to bid on stimulus-funded projects.²³ The

²² As discussed previously, procurement negotiations are driven by reciprocity, and market size considerations tend to determine the sectoral and entity coverage of liberalization commitments. As small countries have little leverage in inducing opening by large countries, it may be that the latter are also less inclined to do so. The US, for example, has limited coverage of procurement disciplines in the TPP-context to the central government reflecting such considerations which were stressed by US industries (see, e.g., National Foreign Trade Council and others, 2014).

²³ This issue was particularly important for Canadian companies as a result of the deep integration of the two markets. Many of the supply chains that produced the goods and services that were being procured with stimulus funds embodied Canadian content, making them ineligible for projects that used Federal funds.

Canada EU Comprehensive Economic and Trade Agreement (CETA) is noteworthy in for the first time permitting EU firms to participate in Canadian procurement opportunities at the sub-federal level (Provinces and Territories, as well as contracts issued by provincial Crown Corporations, utilities, mass transit, municipalities, school boards, and publicly-funded academic, health and social service entities (including corporations or entities owned or controlled by one of the preceding). CETA commitments on opening procurement were unprecedented and exceed those made in other Canadian PTAs.²⁴

Canada had long resisted opening access to sub-federal level procurement. Its commitments under the GPA are limited to federal level procurement. As a result the EU, which has made commitments on sub-central procurement in the GPA, excluded Canada from eligibility to bid on such contracts in the EU. The overall package negotiated in CETA allowed the Canadian government to move forward where this was not possible in the GPA context. This was made possible because of a general understanding that opening of provincial procurement was a key objective for EU participation in the negotiations,²⁵ in part reflecting the 2010 bilateral agreement between Canada and the US. Absent international trade agreements such as the GPA, CETA, NAFTA and the 2010 bilateral with the US, foreign participation in procurement is limited through a Canadian Content Policy that is motivated by industrial policy objectives. The Canadian Content Policy applies to procurements carried out by Public Works and Government Services Canada that exceed C\$25,000.²⁶

In the case of the Trans-Pacific Partnership (TPP), most parties already had agreements with each other. Only three TPP countries are not GPA members or did not have an existing agreement with the US: Brunei, Malaysia, and Vietnam. US procurement commitments in PTAs have tended to be GPA-minus, in that partner countries are offered less than what the US has committed to under the latest iteration of the GPA.²⁷ The US has found it increasingly difficult to induce its States to participate in the procurement chapters of recent PTAs—only 8 States plus Puerto Rico participated in the PTAs with Panama, Peru and Colombia – and the US opposed including sub-central procurement in the TPP (Grier, 2014).²⁸ The TPP continues the pattern of being a PTA that is GPA-minus in terms of coverage of products and entities, with a set of process-related rules that are close aligned with the GPA. Only five TPP signatories included sub-central procurement, but only to countries that do so as well. Non-GPA members Malaysia, Mexico and Vietnam negotiated exceptions to key provisions disciplining the use of offsets and price preferences, and further limited the reach of procurement rules through high thresholds that apply for long transitional periods.

Turning to the TTIP, while it is unclear what will emerge, both the EU and the US are GPA members and both have made substantial commitments to open access to their procurement markets. However, the EU does not give the US access to procurement of services by sub-central entities, or to most procurement by utilities that it has scheduled (with the exception of electricity utilities), reflecting its view that the US needs to provide better access to ensure reciprocity.²⁹ This view reflects

²⁴ They may even imply that EU firms will have better access to Canadian procurement opportunities than do Canadian firms, given that there are various barriers to cross-border procurement within Canada. As a result, CETA may be a trigger for revising the existing Agreement on Internal Trade that aims to reduce such internal barriers.

²⁵ See e.g. <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5431905&File=87> and McMurdy (2014).

²⁶ Swick (2014). Canadian content is determined by NAFTA rules of origin criteria, with “NAFTA” replaced by “Canada”. See <https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/annex/3/6>.

²⁷ Thus, the US has scheduled 89 central government entities in the revised GPA, as compared to 53 in its early vintage PTAs (e.g., NAFTA and its PTA with Israel) and 78 or 79 in the CAFTA and the PTAs with Chile, Colombia, Korea, Morocco, Panama, Peru (Anderson et al. 2011). See also Hufbauer and Moran (2015).

²⁸ See Kim (2009) for an analysis of the determinants of US State-level participation in trade agreements.

²⁹ European Commission (2013). This perception also was an important factor underlying the proposal by the European Commission to permit EU procuring entities to discriminate against bidders from countries that are deemed not offer reciprocity to EU firms for contracts exceeding €5 million. See European Commission (2012).

Buy America provisions and the set asides for SMEs, and the fact that the US has only scheduled some of the procurement by 37 of its 50 states, as well as only a very small number of municipalities (Woolcock and Grier, 2015). The discrepancy between EU and US commitments in the GPA reflects the very different institutional contexts. The Federal government in the US has little say about what the States can do in the area of procurement, and the Congress has mandated the Buy American and other domestic content requirements. The EU is in a very different situation in that procurement liberalization is a core part of the objective of creating a single European market for goods and services, with EU legislation requiring that EU member states do not favour domestic firms when allocating public contracts.

A necessary condition for achieving significant further opening of the US procurement market will be an internal agreement among the US States, the federal government and the US Congress that there is enough on the table and that it is in the public interest to refrain from procurement discrimination – as was done in the bilateral with Canada in the CETA context. As discussed below, it is unlikely that any such agreement will be forthcoming on the basis of a narrow market access calculus and the associated political economy dynamics. There may be better prospects for changing procurement policies gradually over time to reduce the reliance on favouritism and discrimination by pursuing greater joint activities that are centred on regular exchange of information, mutual learning based on experience with alternative approaches towards award of contracts and the identification of specific practices that are more effective in attaining underlying policy goals. One reason for this view is that it is unclear whether in fact market access driven exchanges of commitments and the insistence on bilateral reciprocity have in practice done much to reduce “home bias” in procurement—or can do so.

III. Do Trade Agreements ‘Work’?

To assess the impact of procurement disciplines in trade agreements, whether the GPA or PTAs, one needs data on procurement awards over time that distinguish between winning bids on the basis of the nationality of ownership of firms. Such data are not reported by most countries. Exceptions among GPA members include the EU, Japan, Korea and Switzerland. In the absence of detailed statistics on actual awards by entity and type of procurement (goods, services, works), the only source of data that can provide an aggregate indication of government sourcing patterns are the national accounts and associated input-output tables. These data can be used to determine what share of government purchases are sourced from foreign-based suppliers. A measure of home bias can then be derived by comparing the behaviour of governments with that of the private sector. The ratio between the public sector’s share of imports in total public purchases and that observed for the private sector has been used in the procurement literature since the 1970s for this purpose (see e.g., Francois, Nelson and Palmeter, 1997; Trionfetti, 2000).

The EU maintains a comprehensive database – the Tenders Electronic Daily (TED) – that includes data on all types of announcements of procurement opportunities in the EU. This database also is used to register the outcome of calls for tender. TED includes information such as year and date of award, the type of award procedure used, type of product or service procured, the awarding authority and the geographical location where the contract is performed. There is also information on the nationality of the contract winner. Combining this information permits an assessment of cross-border procurement in the EU as a whole and by EU Member State. PWC and Ecorys (2010) find that on average about 3 percent of the value of all procurement contracts in the EU are allocated to foreign companies, including other EU countries. GHK (2010) conclude that cross-border procurement accounts for 1.5 percent of all contracts awarded in the EU, and 3.7 percent of the total value of above-threshold contracts. As is to be expected, smaller countries engage in more cross-border procurement, while local and regional authorities engage less frequently in cross-border transactions than central government entities and public utilities. The latter have the highest share of foreign sourcing of covered entities. SMEs accounted for 60 percent of all above threshold contracts awarded and around one-third of the value of all contracts during 2006-08 (GHK, 2010).

The picture changes if account is taken of subcontracting and bids that are won by subsidiaries of foreign companies. TED does not identify whether a winning bidder is an affiliate of a foreign firm, but this can be assessed by using other databases on business ownership and cross-holdings. An effort to do so by Ramboll and HTW Chur (2011) concludes that ‘indirect’ cross-border procurement – i.e., awards allocated to affiliates of multinational enterprises – is substantially greater than direct cross-border procurement. This study concludes that direct cross-border procurement as measured by number of contracts and total value was 1.6 and 3.5 percent, respectively in 2009, as compared to 11.4 and 13.4 percent, respectively, for indirect cross-border procurement through foreign subsidiaries. These findings confirm the theoretical prediction that FDI is both a means of responding to (circumventing) discriminatory procurement policies³⁰ as well as often being a more efficient channel through which to supply foreign governments (e.g., for services and construction projects) (e.g., Evenett and Hoekman, 2005).³¹

Detailed data of the type compiled and reported by the EU are not collected by most countries.³² As a result, assessments of the share of total government purchases that are allocated to foreign suppliers need to rely on more aggregate sources of information. Messerlin and Miroudot (2012) and Messerlin (2015) use the World Input-Output Database (WIOD) to calculate the public sector import penetration ratio for countries. These data indicate that for the EU27 this ratio averaged 4.5 percent for the 2007-09 period, somewhat higher but quite consistent with what is observed in the TED database. This suggests that WIOD can be used to compare procurement sourcing across countries.

Table 1 reports WIOD data for a selection of countries for three time periods, 1995-97, 2007-09 and 2010-11. A number of observations can be made. First, import penetration ratios for the US are very similar to those of the EU. Both of these behemoths import less than the world as a whole. This is to be expected given that large economies will be better able to source domestically from efficient firms. Second, the sample of non-GPA members source more from abroad than the GPA members during the first 2 periods—4.9 vs. 3.9 in the mid-1990s and 6.6 vs. 5.7 percent on average during 2007-09. The same is true if the GPA members are compared to the world average. Third, there are large differences across countries, with Brazil only sourcing 3.5 percent from abroad, as compared to Korea at 13.2 percent in 2010-11. Fourth, GPA members see a more rapid increase in foreign sourcing during the 1995-2011 period: over time there is convergence towards the average level of ‘openness’ of the non-GPA members in the sample and the global average.

Fifth, and particularly striking, in the post-2008 financial crisis period, the data indicate that for both GPA and non-GPA members import penetration dropped substantially between 2008 and 2009, suggesting a major shift towards domestic sourcing, which may reflect efforts by governments to support domestic economic activity. Import penetration falls *more* for GPA members, suggesting that in times of crisis governments tend to respond in a similar fashion, whether or not constrained by GPA disciplines. Noteworthy, however, is that the decline was much less for intra-EU procurement, which fell by only 6%, compared to the -18% for GPA members in the sample, and the -13.7% for extra-EU sourcing. Moreover, the sourcing ration bounced back for the GPA members whereas for a number of the non-GPA countries import penetration did not recover. This ratio fell by over 13 percent post 2008 for the non-GPA members – with the greatest declines in Turkey (a drop of over 50%) and China (-

³⁰ Note that although supplying foreign government through affiliates or subsidiaries allows foreign companies to benefit from procurement opportunities, much of the economic activity associated with the contract may occur in the procuring country so that allocating a contract to a foreign investor may be consistent with the pursuit of industrial policy objectives.

³¹ See European Commission (2011) for an overall evaluation of EU procurement trends.

³² Exceptions include the US and Turkey. Fronk (2014) analyses available US data. Onur, Özcan and Tas (2012) analyse 90,000 government procurement tenders held in Turkey during the 2004–06 period. They find that the number of bidders significantly and negatively impacts on the procurement price – i.e., greater competition associated with open tendering procedures reduces average prices. Moreover, tenders that are open to foreign participation (i.e., tenders involving international competitive bidding) further reduce prices paid.

28%) – while it increased by 10 percent on average for the GPA members covered. Thus, the data are indicative of the GPA potentially playing a role in preventing backsliding and a shift in the allocation of fiscal expenditures towards domestic industries—behaviour that governments naturally have stronger incentives to engage in during recessions and times of crisis.

Table 1: Government purchasing import penetration ratios, selected countries

	1995-97 simple average	2007-09 simple average	2010-11 simple average	% change 1995-2009 (simple average)	% change, 2008-1009	% change 2007/09— 2010/11 (simple average)
Non-GPA-members:						
Australia	5.2	5.7	5.6	9.6	-10.0	-1.8
Brazil	2.1	3.0	3.5	42.9	-12.1	16.7
China	3.4	6.4	4.6	88.2	-5.8	-28.1
India	4.2	6.1	6.5	45.2	1.6	6.6
Indonesia	7.9	7.9	7.4	0.0	-31.5	-6.3
Mexico	5.0	6.1	7	22.0	-12.3	14.8
Turkey	6.4	11.1	5.4	73.4	-9.8	-51.4
Average	4.9	6.6	5.7	34.7	-13.4	-13.6
GPA members:						
Canada	4.4	4.7	4.3	6.8	0.0	-8.5
Extra-EU27	2.7	4.8	5.2	77.8	-13.7	8.3
Japan	2.1	4.3	4.4	104.8	-34.6	2.3
Korea	7.8	11.8	13.2	51.3	-17.1	11.9
US	2.8	4.3	4.6	53.6	-24.5	7.0
Average	3.9	5.7	6.3	46.2	-18.0	10.5
World	4.4	6.9	6.6	56.8	-16.7	-5.1
Memo: Intra-EU27	3.3	4.5	4.6	36	-6.3	2

Source: Calculated from data reported in Messerlin (2015), based on WIOD data.

While the sustained growth in foreign sourcing for GPA members is suggestive, these data tell us nothing about the effect of the GPA or PTAs as they do not distinguish between different bilateral flows.³³ Clearly country-specific effects influence the simple averages reported in Table 1 – e.g., the very large drop in foreign sourcing by China and Tukey post 2009 – see Messerlin (2015) – but the fact that intra-EU public procurement penetration is below extra-EU ratios, below the world average and shows a relatively low rate of growth suggests that non-discrimination disciplines for procurement may not have had much impact in changing behaviour towards greater openness. The divergence in import penetration growth post-2008 suggests that EU and GPA rules may have played a role as a lock-in device. To determine whether this is the case requires more specific empirical analysis.

Signatories to the GPA are required to report data annually on procurement that is covered by their commitments (Art. XVI:4 GPA). Statistics to be provided include data on the number and total value of contracts awarded, broken down by entity and categories of products and services. The revised GPA that entered into force in 2014 differs from the 1994 GPA in an important respect. The 1994 GPA had a provision stating that “To the extent that such information is available, each Party shall provide statistics on the country of origin of products and services purchased by its entities. With a

³³ To evaluate the effects of trade agreement disciplines on procurement behaviour it is necessary to control for general determinants of government purchasing decisions to assess if there is a distinct additional impact that can be attributed to an agreement. This requires, at a minimum, information on the share of all procurement that is awarded to foreign firms. To assess the effects of PTAs it is necessary in addition to be able to distinguish between foreign firms from PTA partners and other foreign firms.

view to ensuring that such statistics are comparable, the Committee shall provide guidance on methods to be used.” (Art. XIX:5(d)). The revised GPA no longer includes this language. Signatories are not even encouraged to provide data on country of origin of winning bidders and, indeed, are not even encouraged, let alone required, to report whether a contract went to a foreign supplier. This makes it impossible to assess the effective level of foreign market access in the central government procurement markets of GPA signatories even if they were to comply with reporting requirements. Whether these data are collected is left to national data reporting requirements and the design of national databases. The revised GPA also differs from its 1994 predecessor in that members may (and are encouraged) to post data on procurement contract awards on a national website as opposed to sending specific reports to the WTO Secretariat on an annual basis. In addition to the weaker reporting requirements this implies that the role of the Secretariat as an “agent of transparency” is limited at best, as the Secretariat does not monitor implementation of the GPA or analyse the extant data.

Choi (2003), Evenett and Shingal (2006) and Shingal (2011, 2015) have used data reported by the few countries that provide statistics on the national breakdown of winning tenders on contracts that are covered by the GPA, focusing on Korea, Japan, and Switzerland, respectively. Choi (2003) finds that in the period following GPA accession there was no impact on the share of foreign supplied goods – indeed, this share fell between 1993-95 and 1996-98. Evenett and Shingal (2006) conclude that in 1999 in Japan more contracts fell below the GPA thresholds than in earlier years, and that of the contracts that exceeded the threshold – and thus were covered by the GPA – a smaller share was awarded to foreign suppliers in 1998-99 than in 1990-91. Shingal (2015) undertakes an econometric analysis of the determinants of procurement sourcing over time in Japan and Switzerland, controlling for variables and factors that theoretical considerations suggest could impact on sourcing from foreign firms. These include the state of the business cycle, overall trade policy trends and trade costs, and political economy variables. He finds that GPA membership has no independent effect on sourcing behaviour. The same conclusion emerges from an analysis of the extension of the GPA in 1996 to include services procurement. Using data reported by Japan and Switzerland, Shingal (2011) concludes that the share of services contracts awarded to foreigners declined over time for both countries. The import penetration ratio for public purchases of services fell relative to that of the private sector for similar categories of services.

There is even less empirical research on PTAs than there is on the GPA. In part this reflects the absence of bilateral procurement sourcing statistics. Rickard and Kono (2013) assess the effects of 43 PTAs that include procurement, focusing on overall import penetration. They conclude the PTAs have no impact on the procurement elasticity of trade (the ratio of imports to government demand). Thus, PTAs are no different from the GPA in impacting on procurement behaviour. Fronk (2014), focusing only on PTAs that have been negotiated by the US (including the GPA) and on the effects of these agreements on the behaviour of US procuring entities, comes to a different conclusion. Using a gravity regression framework, Fronk finds a statistically significant positive effect of procurement trade agreements, generating an increase of 150 percent in the number of contracts annually won by foreign bidders. However, this is only equivalent to an additional 135 contracts – reflecting the fact that the mass of contracts (some 98 percent) is awarded to US firms. Thus, there is an effect, but because the baseline level of foreign awards is small, the magnitude of the impact is also relatively small. Because US data on nationality of winning bidders only starts in the mid-1990s, this analysis cannot consider the fact that the countries that mostly win procurement bids in the US (Canada, EU, Japan) are original members of the GPA (1981) and that much of the procurement that is analysed was already subject to disciplines for a long period of time. It is therefore not necessarily the case that the positive sourcing effect attributed to the agreements is in fact due to them as opposed to other factors.³⁴

³⁴ One potential reason for Fronk’s finding is that US PTAs may constrain the use of trade policy more than other agreements do. Cole and Davies (2014) note that governments have different instruments through which to favour domestic firms, including standard trade policies. They find that optimal tariffs can be more protectionist and welfare-reducing than an optimal procurement price preference, suggesting that restricting the latter when countries retain the

The upshot of available research is that, at least during the 1990s, the GPA seems to have done little to increase market access for foreign suppliers. Moreover, there is also little evidence that PTAs have had an impact on changing procurement sourcing. While the WIOD data discussed previously suggests a trend of greater foreign sourcing in the 2000s, this is observed for both GPA and non-GPA members. The extant analyses suggest that the increase in foreign sourcing observed in the WIOD data up until the 2008-09 crisis is driven by factors other than the market access features of trade agreements. There are many possibilities. One could be technology – a decline in information and search costs through the use of e-procurement and internet platforms. Another is a more general shift in policy towards greater openness to trade and to FDI that is independent of procurement policy. An increase in the global stock of FDI and two-way flows of FDI may result in foreign affiliates winning more bids and relying more on imports than do domestic firms. Yet another possible driver is change in procurement regimes and processes, such as the shift towards greater use of competitive negotiation and dialogue discussed above. These may be associated with more intensive scrutiny of government behaviour and performance, tighter budget constraints, and greater use of outsourcing and public-private partnerships. A common feature of these possible drivers is that they centre on changes in incentives as opposed to top down international market access liberalization commitments.

There is little research on this question. An exception is Kutlina-Dimitrova and Lakatos (2014), who use statistics for the 2008-12 period reported in the TED database to investigate the determinants of foreign sourcing by EU public entities. They find that the probability of a contract being won by a foreign-based supplier depends positively on the value of the contract awarded and negatively on the number of bids. They also find that GDP per capita (wealth) and a country's overall openness as captured by the trade-to-GDP ratio are positively associated with the probability of cross-border procurement. In addition, they show that measures of the quality of the 'behind-the-border' investment climate such as the prevalence of entry-restricting product market regulation, barriers to FDI and the share of public enterprises in the economy all have a statistically significant negative impact on the probability of cross-border procurement. These findings, in conjunction with the empirical analyses that find no effect of trade agreements after controlling for other determinants of government behaviour, suggest there may be only a limited payoff from the type of reciprocal procurement market access focus that is central to the GPA and PTAs. Other policies – more general opening towards trade and FDI, pro-competitive regulation of product markets and the business environment may have a greater impact.

Where agreements may have a stronger impact is as mechanisms to prevent 'backsliding'. This is suggested by the trends observed in the WIOD data. Rigorous econometric analysis is required to determine to what extent policy commitments do in fact explain the differences in import penetration trends that are reported in Table 1.

IV. Procurement Market Access Negotiations vs. Regulatory Cooperation

What does the foregoing suggest regarding the design of international cooperation on procurement? The premise of what follows is threefold: (i) a narrow market access reciprocity focus that is limited to procurement is unlikely to have much of an effect; (ii) the revealed preference of governments to use different types of procurement contracts for industrial policy objectives and to allocate most contracts locally needs to be taken seriously; and (iii) rules of the game, including lock-in provisions (policy bindings) and associated intuitional and good governance dimensions of procurement processes matter.

One reason why market access reciprocity arguably has limited returns is that many contracts that are issued by procuring entities concern products that are difficult to supply on a cross-border basis.

(Contd.) _____

freedom to use tariffs – most developing countries – may reduce welfare. The implication is that the focus of policy should be on more generally constraining the ability of governments to use trade policy.

Construction and services of many kinds will generally have to be supplied locally and there may be good reasons for procuring locally even if a good is tradable. If the products procured are intangible (services) or there are problems in monitoring and enforcing contract compliance, discrimination can increase the likelihood of performance by suppliers. The best (economic) case for discrimination revolves around situations where there is asymmetric information, e.g., difficulties in monitoring the performance of a contractor if buyer and provider are located far from each other, or there is a need to offer a firm quasi-rents in order to increase the probability of contract compliance through the threat of losing repeat business (Evenett and Hoekman, 2013). Moreover, geographic proximity may be a precondition for effectively contesting procurement markets—making some products, in particular services, in essence non-tradable. Problems of asymmetric information and contract compliance may imply that entities can economize on monitoring costs by choosing suppliers that are located within their jurisdictions. In turn, this will make it more difficult for foreign firms to successfully bid for contracts, even if the goods or services involved are tradable and in the absence of formal discrimination. Such rationales have been explored extensively by Laffont and Tirole (1993); many of the underlying technical arguments are summarized and synthesized in Breton and Salmon (1995). The policy issue that arises in such situations is whether there are barriers against establishment (FDI) by foreign suppliers, as this is a precondition for them to bid for/supply contracts (Evenett and Hoekman, 2005).

Turning to industrial policy, there are good arguments for why targeted procurement through which the government creates demand for new or innovative technologies may be superior to policies that target the supply side such as R&D subsidies. Geroski (1990) notes that this can both stimulate innovation and allow firms to learn by doing. Insofar as governments care about the nationality or ownership of the firms that acquire and control such technologies, discrimination will be a feature of the associated procurement process. However, it is not obvious that this will be optimal in terms of increasing the likelihood that the new desired technologies or products are in fact generated. If control is an objective then contracts can be structured so as to ensure that the government will be able to determine how the results of what is being financed can be used/made available. If one of the objectives is to utilize and develop local capacity and expertise, then this can be specified as well, implying that firms bidding for the contract need to have a local presence. Discrimination against foreign firms in such “public procurement for innovation” is therefore neither needed nor likely to be desirable in attaining the innovation objective.³⁵

The pursuit of non-economic objectives by governments can have very different implications for economic efficiency. In principle, policy should target directly the source of problem at hand: lack of economic opportunities for minority groups; regional economic wealth differentials; market failures, and so forth. For example, take the case where a government awards a tender to an SME instead of a large company that submitted a lower cost bid because of an SME preference policy. It may be more effective and efficient if instead the government were to address the factors that impede the ability of SMEs to compete with larger firms. This can of course be due to different factors, ranging from financial market imperfections to excessively burdensome administrative requirements that are too costly for SMEs to meet. Dealing with these constraints directly as opposed to using a SME preference policy will be more efficient (Evenett and Hoekman, 2013).

These considerations have direct relevance for the design of government procurement policies and international cooperation. Governments may be more inclined to pursue a non-discriminatory procurement policy if they understand that other policies are available that are more effective in attaining specific ‘non-procurement’ goals – and that using these will also generate more efficient procurement outcomes. An implication is that the main payoff in terms of creating greater competition may be through other policy reforms. Such other policies include procurement rules, as distinct from removing market access restrictions (‘buy national’ rules). As is the case with regulation more

³⁵ For discussions of the use of procurement to achieve innovation objectives, see Edler and Georghiou (2007).

generally, procurement policy does not lend itself easily to negotiation – e.g., seeking to agree that all contracts of type *X* must be procured through process type *Y*. This explains the emphasis in the GPA on transparency and on principles that signatories agree to abide by when engaging in procurement. However, the GPA disciplines are motivated by the market access objective. The goal is not to support learning by regulators, procuring entities and the public at large (voters) regarding policies and approaches that are effective, efficient in attaining different types of objectives, and generate fewer negative spillovers for trading partners.

International cooperation and fora that support diffusion of knowledge and learning about the effects of alternative procurement approaches has tended to be piecemeal and ad hoc. Woolcock (2013) notes that the Tokyo Round GPA originated in Paris, and was based on a set of principles developed by an OECD working group over the course of a decade of talks (see, e.g., Winham, 1986; Blank and Marceau, 1997)³⁶ and that other innovations in rule-making on procurement such as incorporating a bid-challenge provision derived from the Canada-US FTA. Initiatives by the EC were at the source of other changes to the GPA, e.g., the inclusion of utilities and local government procurement in the GPA, reflecting EU disciplines that were adopted as part of the effort to establish a single European market. However, all such examples of diffusion were very much centered on market access. Starting in the mid-1990s, efforts were made to agree to more general good practices, specifically deliberations on potential disciplines on transparency that were launched at the WTO's ministerial in Singapore in 1996. These provided a forum for interaction with other entities such as the multilateral development banks, CSOs such as Transparency International, and the UN. These discussions were not successful in generating agreement to initiate negotiations on specific rules, in large part because developing countries were not convinced that discussions on transparency would not morph into market access talks. Given that greater transparency is likely to be welfare-improving for a variety of reasons, including by facilitating participation of domestic firms in procurement and reducing scope for corruption and collusion, this was an unfortunate development. It illustrates the challenge confronting efforts to move institutions like the WTO that are designed to promote market access liberalization to become foci for deliberations on good practices and venues for sharing information and learning from experience.

The last revision of the GPA included agreement to launch work programmes and engage in deliberation on several subjects:³⁷ (i) best practice with respect to measures and policies to support the participation of SMEs in government procurement; (ii) promoting the use of sustainable procurement practices; (iii) safety standards in international procurement; (iv) restrictions and exclusions in parties' coverage commitments under the Agreement; and (v) improving procedures to collect and report statistical data relating to the GPA. In addition to these areas GPA members also agreed to conduct work in the future on public-private partnerships and their relationship to procurement covered by the GPA, and the advantages and disadvantages of developing common nomenclature for goods and services and standardized notices.

A number of these work programme areas are focused on procurement practice as opposed to primarily revolving around market access. Their adoption suggests recognition by GPA members that there is value to learning from each other and to identify good practices. Greater use of the

³⁶ As described in Winham (1986), formal international discussions on government procurement in the OECD started in 1962, when Belgium and the United Kingdom brought a formal complaint to the OECD against the U.S. Buy American Act. A working party of the OECD Trade Committee was constituted to hear the complaint, but its report was subsequently deflected by U.S. pressure into a general review of government procurement in member countries. This led to an OECD secretariat summary of government procurement practices and a short draft text in 1967 on guidelines for government procurement. From then until the matter was transferred to the Tokyo Round in 1976, the issue of government procurement was under discussion in the OECD, but the major trading powers were unable to agree on rules of the game a stand-alone basis. Adding the subject to the Tokyo Round agenda permitted the issue linkage that made a deal possible.

³⁷ See https://www.wto.org/english/tratop_e/gproc_e/gpa_wk_prog_e.htm

institutional mechanisms that are part of trade agreements to perform a knowledge platform function (Hoekman and Mattoo, 2013; Hoekman, 2015) could increase the value of membership. To be most useful such deliberation should involve non-parties to the GPA and not be limited to GPA members.

The need/potential payoff of greater effort to identify good practices is substantial. Yukins (2015), for example, has emphasized how little the US does to learn from experience elsewhere. He mentions Section 508 of the US Rehabilitation Act, which requires that all information technology bought by the government be accessible to persons with disabilities and that the EU has been implementing requirements in this area well. No effort was made to coordinate US and EU standards for accessibility; indeed, US regulators explicitly rejected using international technical norms when the Section 508 standards were originally published. More generally, Yukins argues that change in US federal procurement rarely includes consideration of international norms or best practices. Members of Congress, their staff and regulators (e.g., the Federal Acquisitions Regulatory Council) have no ready means or mandate to exchange information with foreign stakeholders or regulators, or to consider international best practices.³⁸

The World Bank has at times been a focal point for international dialogue, but as a lending institution has tended to be more concerned with ensuring that value for money is achieved for its own projects as opposed to a focus on learning from procurement practices around the world and innovations in these practices. Specialized international fora that have focused on procurement policies and practices such as UNCITRAL have tended to emphasize legal aspects as opposed to procurement practice, seeking to design legislation rather than exchanges and learning from experience.³⁹ The type of deliberation that could make a concrete difference in improving procurement practices is illustrated by the Public Procurement Knowledge Exchange Forum, an initiative that was started in early 2000s and that is co-sponsored by multilateral development banks supporting countries in Europe and Central Asia,⁴⁰ and the consultative process that was undertaken by the World Bank during 2013-14 and that led to the adoption of a new World Bank Procurement Framework. This new framework moves the World Bank away from a rigid one-size-fits-all approach. Instead, it aims at supporting the delivery of better procurement outcomes by increasing the number of approaches and methods that can be used, reflecting the experience and innovations, both technical (e-procurement) and regulatory (mechanism design). A central feature of post-2015 World Bank procurement practice is a Project Procurement Strategy for Development (PPSD). This is an instrument to determine the appropriate procurement process for each project that will be (co-) financed by the Bank, allowing for a significant degree of flexibility – including competitive dialogue, e-procurement, etc. Moreover, there will be a much stronger emphasis on complementary capacity-building and implementation-related assistance than there has been in the past, including for CSOs and private sector.

The new World Bank Procurement Framework promotes incremental steps towards greater cooperation with other agencies as well. So-called alternative procurement arrangements by borrowers may be used, for example delegating procurement for investment projects to other development banks, bilateral donor agencies or UN organizations when it makes sense to do so. Noteworthy is inclusion of language allowing for implementation of procurement under the systems of signatories to the GPA. Given that the GPA disciplines are only a framework, such delegation to the national systems of a

³⁸ Yukins (2015) also points out that while regulators are required to consider the market impact that significant rules may have; in practice, the required review is often ignored in rulemaking regarding procurement. See also Yukins and Cora (2013).

³⁹ The work of the OECD on procurement has tended to focus on fighting corruption and improving the integrity of procurement practices.

⁴⁰ The aim of the forum is to promote and foster regional cooperation in public procurement, good governance, and anticorruption in the Western Balkans, Central Asia and neighbouring countries. Each year, the Knowledge Exchange Platform participants discuss issues relating to improving public procurement, and report on recent achievements and future plans in each of their countries. See: <http://www.worldbank.org/en/events/2015/06/09/11th-public-procurement-knowledge-exchange-forum#4>

GPA member is conditional on an assessment by the Bank of the implementation capacity of the procuring entities concerned. As there are virtually no World Bank borrowing countries that are parties to the GPA, this provision will not have much of an impact in the short run, but it is a significant step towards greater coherence, and may constitute a small additional incentive for developing countries to join the GPA. Much more significant from an operational perspective is the acceptance of procurement regimes of other development banks and agencies, and the emphasis on bolstering implementation capacity. However, while the new World Bank procurement framework now embodies a presumption that the systems of GPA members satisfy its good procurement practice criteria, conditional upon certification by the Bank to that effect, we have yet to see flexibility in the other direction – i.e., a willingness of GPA members to embrace what major players in procurement such as the World Bank consider reasonable practice, including the open-ended acceptance of domestic local content and price preferences.

Gelderman, Ghijsen and Schoonen (2010) argue that greater interaction and engagement between stakeholders is needed for improved compliance with procurement rules. Such interaction is important in developing a common view on what constitutes good procurement practice and should include consideration and discussion of evolving best practices of purchasing in the private sector. There are elements and examples of collaborative interactions among procurement practitioners, including communities of practice such as the one that has been supported by multilateral development banks in Europe and Central Asia. The OECD and APEC have provided opportunities for practitioners to interact, as does the GPA Committee, but there is much more that could be done in this regard, both in and outside the WTO. This could include a regular global procurement forum, regional knowledge platforms along the lines of that already existing for the Balkans and Central Asia, and greater interaction with the private sector. The work programmes that were agreed by the GPA Committee could become building blocks for non-market access centric deliberations and be opened to participation by any interested WTO Member. Similarly, there is much more that could be done by PTA members to increase dialogue and interaction on procurement practices, and to engage the WTO membership more generally on lessons of experience in cooperating on procurement matters.

V. Concluding Remarks

Many countries have yet to commit to procurement disciplines in a trade agreement, whether in a PTA or through membership of the GPA. After more than 30 years, the GPA only applies to one-quarter of the WTO membership. A number of countries that are not GPA members have expanded foreign access to their procurement markets through PTAs, but the extent to which these arrangements will make a difference in country coverage is limited – most of the nations involved in the mega-regionals are members of the GPA or have already made procurement commitments in bilateral PTAs.

Trade agreements are instruments to negotiate market access opening on a reciprocal basis. The objectives of international cooperation on procurement have centred on reducing discrimination against foreign companies as well as identification of better policy (the efficiency and effectiveness of different instruments and practices in achieving specific objectives; approaches that reduce negative international spillovers). The extant research suggests that the market access focus of trade agreements may not achieve much in reducing home bias and *de facto* discrimination. The available statistics suggest there is not much difference between the sourcing behaviour of GPA and PTA members and countries that have not made commitments on procurement in a trade agreement. The data indicate that in recent years foreign sourcing has increased on average in many countries – for the world as a whole by some 50 percent since the mid-1990s. This suggests that other factors are more important than trade agreements in reducing home bias. These factors may encompass technology, more general improvements in economic governance, greater openness to trade and investment, and learning and innovations in the design of procurement processes and the supply of public goods and services. An implication is that there may be a higher payoff in focusing international cooperation on procurement regulation on identifying good practices and improving economic policies more generally as opposed

to what has been the dominant focus of trade agreements: market access. That said, the difference in trends in foreign sourcing that are reported by the WIOD database suggests that procurement agreements may play a role as a lock-in mechanism that constrains a shift away from efficient public purchasing in times of economic pressure. This is clearly a subject that deserves further in-depth empirical research.

The focus of trade negotiations on attaining narrowly defined reciprocity in incremental procurement market opening commitments may also detract from using trade agreements as a platform for improving procurement practices. It is the latter that matters for citizens, officials, and economic actors, as the practices through which government entities procure products and works help determine the efficiency with which public goods are supplied. Stakeholders should care about procurement practices in other countries not just because of specific market access concerns but because market access goals are likely to be better served through cooperation and engagement on procurement policy more generally. Such collaboration will also be beneficial by helping to identify better practices and improve national procurement policy.

It is an open question whether trade agreements can be designed to do more to assist governments and stakeholders to cooperate on identifying good procurement practices. The experience in the WTO with the effort to launch a discussion on transparency in procurement as opposed to market access illustrates that it is difficult to separate the latter from a discussion on the substance of procurement practices. That said, it must be recognized that much of what is in the GPA deals with procurement practice, even if the underlying motivation for most of what is embodied in the GPA is to safeguard and expand market access opportunities for foreign bidders. Transparency in particular is a critical input and pre-condition for better procurement and may be the most important international regulatory cooperation objective that should be pursued in the context of trade agreements. There is a strong case for enhancing the use of now well-established trade mechanisms for this purpose, including emulation of procedures that have been put in place by WTO Committees dealing with product standards (SPS and TBT), where members can table specific trade concerns that are raised by product regulations of a given country.

Trade agreements more generally may have important indirect impacts on improving procurement outcomes by reducing trade and investment barriers. The more open are markets for goods and services to foreign competition the less costly from a welfare perspective discriminatory procurement regimes are likely to be, as firms will be operating in a more competitive environment. The importance of FDI as a channel to contest procurement opportunities may imply a high payoff to efforts to use trade agreements to reduce barriers against FDI. The same is true of trade policy more generally given that governments may seek to use other instruments to favour local firms, including tariffs, which may well be more distorting than procurement discrimination via price preferences (Branco, 1994; Cole and Davies, 2014). Thus, assessing the effects of trade agreements on procurement outcomes must go beyond a narrow consideration of whether procurement per se is included and centre on the extent to which agreements promote a pro-competitive environment.

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