
33. Government Procurement: Green/Sustainable Government Procurement

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Abstract

This chapter outlines the existing framework related to sustainable procurement in the WTO's revised Agreement on Government Procurement (GPA) and develops an agenda for further work in this area based on the discussions in the WTO's Committee on Government Procurement and developments in Regional Trade Agreements (RTAs).

Keywords

Sustainable public procurement; green/environmental objectives; social policies; Agreement on Government Procurement; UN SDG; Regional Trade Agreements.

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1. Introduction

Government procurement is an important part of economic activity directly impacted by government policies, and is thus a viable tool to promote sustainable development. The strategic role of government procurement in facilitating sustainable development is recognized by the UN Sustainable Development Goals (UN SDGs),

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which outline the importance of “promot[ing] public procurement practices that are sustainable, in accordance with national policies and priorities”.²

In recent decades, sustainability has become an important dimension of government procurement. The role of government procurement in advancing sustainability objectives has been recognized in the WTO’s Agreement on Government Procurement (GPA). The GPA is the WTO’s plurilateral agreement whose revised version entered into force in 2014.³ The GPA aims to open up procurement markets between its Parties and to set minimum principles with regard to government procurement processes, such as non-discrimination, procedural fairness and transparency. Importantly, the revised version of the Agreement introduces a good governance dimension through explicit requirement to prevent conflict of interest and corruption. Overall, the revised GPA aims to strike a balance between the primary procurement objectives of procuring goods and services, and strategic government considerations including sustainability. In that regard, the revised GPA brings an environmental dimension to its provisions in several ways. It contributes to the facilitation of the environmentally-friendly public procurement both through market liberalization, related policy flexibilities and specific procedural elements. In addition to the existing framework, the revised Agreement also sets out a Work Programme on Sustainable Procurement (‘Work Programme’) which intends to shape these policies further and potentially contribute to the renegotiation of the Agreement in the future.

Furthermore, an increasing number of regional trade agreements (RTAs) incorporate government procurement chapters. While in many instances such chapters are based on the GPA, thus extending the scope of the GPA, some recent comprehensive RTAs go further in introducing novel elements with regard to sustainable public procurement (‘SPP’). These elements could potentially serve as an important input for the discussions in the WTO’s Committee on Government Procurement (‘GPA Committee’).

The remainder of the chapter is organized as follows: Part 2 outlines the existing framework related to sustainable procurement in the revised GPA; Part 3 develops an agenda for further work in this area based on the discussions in the GPA Committee and developments in RTAs; and Part 4 provides concluding remarks.

2. The revised GPA’s role in promoting environmental objectives: key elements and flexibilities

The revised GPA enables sustainable procurement in two key ways: through its market access coverage and related exceptions, and through the Agreement’s procedural requirements.

2.1. Market access: GPA coverage and environmental exceptions

As an international trade agreement, the fundamental aim of the GPA is to mutually open government procurement markets among its Parties. The public procurement activities opened to international

² UN, ‘Sustainable Development Goal 12’ <<https://sustainabledevelopment.un.org/sdg12>> accessed 24 May 2020.

³ Currently, the Agreement covers 48 WTO Members comprising 20 GPA Parties (counting the European Union and its 27 member states, and the United Kingdom, all of which are covered by the Agreement, as one Party). See WTO, ‘Parties, Observers and Accessions to the Agreement on Government Procurement’ https://www.wto.org/english/tratop_e/gproc_e/membobs_e.htm accessed 24 May 2020. For an update on the membership and the impact of the Agreement, see also Robert D. Anderson and Nadezhda Sporysheva, ‘The revised WTO Agreement on Government Procurement: Evolving Global Footprint, Economic Impact and Policy Significance’ (2019) 3 P.P.L.R. 71.

competition under the GPA are estimated to be worth around USD 1.7 trillion annually.⁴ The GPA applies to public procurement when it is carried out by covered procuring entities purchasing covered goods, services or construction services above specified threshold values. Thus, through guaranteeing open, non-discriminatory and transparent conditions of competition in government procurement, the GPA contributes to ensuring that foreign suppliers of environmentally-friendly goods and services can participate and have incentive to participate in domestic tenders, and consequently that domestic procuring entities receive such suppliers' tenders. Environmentally-friendly goods or services may not be available for purchase domestically or may be available domestically only at a substantially higher cost (less value for money) or at lower quality. Furthermore, the GPA also provides protection and predictability for foreign suppliers operating directly within the domestic territory through foreign subsidiaries (Article IV:2), thus contributing to attracting foreign direct investment (FDI).⁵ This could facilitate green FDI in jurisdictions which lack internal resources.

Another aspect of the market access obligations in the GPA is the inclusion of exceptions to its coverage to allow policy space. This includes policies related to environmental objectives. In line with the spirit of other WTO Agreements, the GPA allows for exceptions “necessary to protect human, animal or plant life or health”, provided they “are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade” (Article III).

In addition to the general exception clause in the GPA, some GPA Parties' coverage schedules provide for additional exceptions related to environmental considerations. For example:

Nothing in this Annex shall be construed to prevent any state entity included in this Annex from applying restrictions that promote the general environmental quality in that state, as long as such restrictions are not disguised barriers to international trade.⁶

Therefore, the GPA's market access obligations' contribution to environmental objectives is two-sided. While the Agreement opens up public procurement to goods and services from foreign suppliers, it also provides policy space for domestic suppliers through its general exceptions clause and GPA Parties' more-specific exceptions, subject to negotiations during the GPA accession.

2.2. The GPA's procedural requirements: accommodating environmental objectives

In addition to the explicit promotion of trade, both the Preamble and the operational provisions of the Agreement manifest a clear concern with the efficient and effective management of public resources. While the GPA's foundational principles of non-discrimination, transparency and procedural fairness contribute indirectly to sustainable objectives, the Agreement also includes more specific rules in that regard.

The GPA includes a number of procedural flexibilities to “sufficiently [...] accommodate the specific circumstances of each Party” (GPA Preamble). More specifically, Article X:6 allows Parties to “prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment”. Relatedly, the same provision requires Parties, where appropriate, to “set out the technical

⁴ WTO, ‘Agreement on Government Procurement’ <https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm> accessed 24 May 2020.

⁵ Robert D. Anderson and Anna Caroline Müller, ‘The revised WTO Agreement on Government Procurement (GPA): key design features and significance for global trade and development’ (2017) 48(4) *Georgetown Journal of International Law* 949.

⁶ See Annex 2 of the US schedules of commitments, available at <https://e-gpa.wto.org>.

specification in terms of performance and functional requirements, rather than design or descriptive characteristics” and “base [them] on international standards” (Article X:2). Through facilitating innovative and creative solutions, these rules contribute to making procurement more sustainable.⁷

Another set of rules relates to how the procurement contract is evaluated and rewarded. Article X:9 sets out that environmental characteristics may be included among other elements of the evaluation criteria set out in the notice of intended procurement or tender documentation. In addition, Article XV:5 allows qualitative contract award criteria (as opposed to solely price- or cost-based criteria) (Article XV:5 and X:6). According to some scholars, these elements could facilitate a life-cycle approach, thus enabling SPP.⁸

Thus the revised GPA provides significant scope for sustainability considerations in procurements covered by the Agreement. While this is particularly clear with respect to environmental or green policy objectives, it is certainly less explicit with regard to social and economic dimensions. The discussions within the Work Programme on Sustainable Procurement provide a useful forum to reflect on these issues (see discussion in part 3, below).

3. Way forward: discussions on sustainable procurement in the WTO and RTAs

3.1. The GPA’s Work Programme on Sustainable Procurement and current debate

The Work Programme on Sustainable Procurement was launched in April 2014 as a result of the GPA renegotiation. It is intended to assist in improving the implementation and administration of the revised GPA and may also provide input to further renegotiation of the Agreement at a later date. The relevant Decision mandates the Committee to examine the following topics:

- (i) the objectives of sustainable procurement;
- (ii) the ways in which the concept of sustainable procurement is integrated into national and sub-national procurement policies; and
- (iii) how sustainable procurement can be practised in a manner consistent with the principle of "best value for money", and with the Parties’ international trade obligations.⁹

Since the launch of this Work Programme, the GPA Parties have provided the contributions describing the relevant legislative framework policies and objectives. Various contributions indicate that sustainability is reflected, at least in particular respects, in procurement systems of most if not all GPA Parties.

Furthermore, to support discussions within the Work Programme, in 2017, at the GPA Parties’ request the WTO Secretariat organized a WTO Symposium on Sustainable Procurement (‘WTO Symposium’). During

⁷ Liesbeth Casier, ‘Canada’s International Trade Obligations: Barrier or opportunity for sustainable public procurement?’ (2019) IISD Report.

⁸ WTO, ‘Committee on Government Procurement - Key take-aways from the Committee’s Symposium on Sustainable Procurement - Report by the Secretariat’ (GPA/W/341, 30 May 2017) <<https://docs.wto.org>> accessed 29 May 2020.

⁹ WTO, ‘Decision of The Committee On Government Procurement on a Work Programme on Sustainable Procurement’ (GPA/113, Annex E of Appendix 2, 30 March 2012) <https://www.wto.org/english/tratop_e/gproc_e/annexe_e.pdf> accessed 29 May 2020.

the WTO Symposium, the SPP was considered to be a strategic tool in relation to which priority and assessment are important at every stage of a procurement process. Life-cycle costing was suggested to be an obvious step that is already being implemented by many countries. It was highlighted that advancing sustainability through public procurement policy requires action at multiple levels (i.e., the GPA is only a part of the story and a lot depends on actions at the national and/or local levels).¹⁰

In fact, there is a common interest among the GPA Parties to promote at least some elements of sustainable procurement. At the same time, the concept of sustainability itself has various dimensions and meanings in different jurisdictions, such as (i) protection of the environment; (ii) social dimensions (e.g. human rights and/or working conditions and proactive measures to support the participation of particular social groups); and (iii) economic opportunities (e.g. innovation research/investment, open competition, supply chain competitiveness and the promotion of small businesses).¹¹

It has been stressed by a number of Parties that the revised GPA provides significant scope for appropriate reflection of sustainability, in particular with respect to environmental policies. This is less explicit in regard to the social aspects of sustainability, though these were suggested to be implicitly covered. While it was observed that sustainability objectives could already be implemented in full compliance with the core GPA principles, a potential concern is to avoid disguised protectionism in the promotion of SPP interests.¹²

Taking forward the work under this Work Programme, the Committee's small-group has been specifically examining the measures and policies related to social considerations in government procurement.¹³ The WTO Symposium as well highlighted the importance of the more explicit reflection of the social dimension in the Agreement.

3.2. Government procurement chapters in RTAs: extending and expanding GPA disciplines

In addition to the GPA, an increasing number of RTAs incorporates detailed chapters on government procurement. Typically, the language and the structure of market access commitments of such chapters are modelled entirely or substantially on the GPA. While some RTAs provide deeper commitments in specific sectors than those of the GPA, the overall market access opportunities available under the GPA are higher.¹⁴ In general, chapters on government procurement in RTAs may be seen as an extension of the GPA principles and requirements to a broader set of WTO Members.¹⁵ This importantly relates to the GPA's elements with regard to environmental policies.

¹⁰ WTO, 'Committee on Government Procurement - Key take-aways from the Committee's Symposium on Sustainable Procurement - Report by the Secretariat' (GPA/W/341, 30 May 2017) <<https://docs.wto.org>> accessed 29 May 2020.

¹¹ *ibid.*

¹² *ibid.*

¹³ WTO, 'Report (2019) of the Committee on Government Procurement' (GPA/AR/2, 4 December 2019) <https://docs.wto.org> accessed 29 May 2020.

¹⁴ Robert D. Anderson, Anna Caroline Müller and Philippe Pelletier, 'Regional Trade Agreements and Procurement Rules: Facilitators or Hindrances?' in Aris Georgopoulos, Bernard M. Hoekman and Petros C. Mavroidis (eds), *The internationalization of government procurement regulation* (Oxford University Press: Oxford, 2017).

¹⁵ Robert D. Anderson and Nadezhda Sporysheva, 'The revised WTO Agreement on Government Procurement: Evolving Global Footprint, Economic Impact and Policy Significance' (2019) 3 P.P.L.R. 71.

Furthermore, some of the most recent comprehensive RTAs, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), while replicating the GPA disciplines, move forward with regard to sustainability. Specifically, in addition to general exception allowing to protect human, animal or plant life or health, the CPTPP Government Procurement chapter includes elements related to environmental protection measures and compliance with international labour rights.¹⁶

Novel SPP disciplines in government procurement chapters of RTAs illustrate some potential options for the discussion on environmental and social considerations within the framework of the Work Programme and the future evolution of the GPA itself.

4. Concluding remarks

As we have seen, the revised GPA incorporates important elements related to sustainability objectives. They reflect the increasing awareness and commitment to sustainability that has developed over time. The GPA has adapted to the needs of the XXIst century and shares the perspective of other international instruments promoting sustainability such as the UN SDGs and RTAs. The revised Agreement also sets the stage for future negotiations on emerging sustainability matters through its Work Programme.

The revised GPA contributes to facilitation of green procurement through various ways. First, the GPA opens procurement markets among its Parties to foreign suppliers of environmentally-friendly goods and services. At the same time, the Agreement's general exceptions from its coverage provide policy space with regard to pursuing environmental objectives domestically. Furthermore, some GPA Parties have specific carve-outs in their coverage related to green public procurement. Second, the revised GPA introduces important procedural elements, which accommodate environmental objectives. It allows for environmental considerations during various stages of the procurement process: in the design of the technical specifications, evaluation and awarding of procurement bids.

While the revised GPA already provides policy space with regard to the issues of sustainability, the GPA Parties agreed to continue discussing these matters in the framework of the GPA-mandated Work Programme. The Work Programme is intended to provide input to further renegotiation of the Agreement at a later date. Various contributions in the GPA Committee indicate that sustainability is reflected, at least in particular respects, in procurement systems of most if not all GPA Parties. In that regard, an important question arises with regard to the concept of sustainability, which has various dimensions and meanings in different jurisdictions. This includes environmental, social and economic aspects. As previously noted, the GPA is explicit with regard to environmental policy objectives, and less explicit regarding the social aspects.

Furthermore, important synergies with regard to sustainability exist between the revised GPA and government procurement chapters in RTAs. In many ways, these chapters may be seen almost as an extension and even expansion of GPA principles. In particular, some of the recent RTAs move forward regarding the issues of sustainability and address the social dimension of the SPP. Arguably, these novel disciplines in RTAs provide potential options for the evolution of the GPA in the future.

Government procurement has an important role to play in the evolving global sustainability agenda. As a

¹⁶ For the text of the CPTPP see WTO Regional Trade Agreements Database, <<http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=640>> accessed 18 December 2020.

recently negotiated international trade agreement, the revised GPA has already incorporated some sustainability elements and it importantly contributes to shaping future policies in this area.

Bibliography

Anderson R D, Pelletier P and Yukins C R, 'Government Procurement in the Comprehensive and Progressive Trans-Pacific Partnership Agreement: A Global Beachhead for market Access and Good Governance' to be published in David A. Gantz and Jorge Huerta Goldman (eds), *The Trans Pacific Partnership Agreement: Its Substance and Impact on International Trade, NAFTA and Other FTAs* (Cambridge University Press, forthcoming 2020).

Anderson R D and Sporysheva N, 'The revised WTO Agreement on Government Procurement: Evolving Global Footprint, Economic Impact and Policy Significance' (2019) 3 P.P.L.R. 71.

Anderson R D and Müller A C, 'The revised WTO Agreement on Government Procurement (GPA): key design features and significance for global trade and development' (2017) 48(4) *Georgetown Journal of International Law* 949.

Anderson R D, Müller A C and Pelletier P, 'Regional Trade Agreements and Procurement Rules: Facilitators or Hindrances?' in Aris Georgopoulos, Bernard M. Hoekman and Petros C. Mavroidis (eds), *The internationalization of government procurement regulation* (Oxford University Press: Oxford, 2017).

Casier L, 'Canada's International Trade Obligations: Barrier or opportunity for sustainable public procurement?' (2019) IISD Report.

WTO, 'Decision of The Committee On Government Procurement on a Work Programme on Sustainable Procurement' (GPA/113, Annex E of Appendix 2, 30 March 2012) <https://www.wto.org/english/tratop_e/gproc_e/annexe_e.pdf> accessed 29 May 2020.

WTO, 'Committee on Government Procurement - Key take-aways from the Committee's Symposium on Sustainable Procurement - Report by the Secretariat' (GPA/W/341, 30 May 2017) <<https://docs.wto.org>> accessed 29 May 2020.

WTO, 'Report (2019) of the Committee on Government Procurement' (GPA/AR/2, 4 December 2019) <<https://docs.wto.org>> accessed 29 May 2020.