Working Party of the Trade Committee

THE RELATIONSHIP BETWEEN REGIONAL TRADE AGREEMENTS AND THE MULTILATERAL TRADING SYSTEM

GOVERNMENT PROCUREMENT

This paper forms part of a broader study on the relationship between Regional Trade Agreements and the Multilateral Trading System. Together with other chapters and an overall assessment it will be incorporated into a consolidated document to be submitted to the Trade Committee on 28-30 October, 2002.
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GOVERNMENT PROCUREMENT

I. Key points emerging

1. This chapter surveys government procurement provisions contained in RTAs, discusses their relationship with the WTO and its Agreement on Government Procurement (GPA)—a plurilateral agreement applied by 28 WTO Members—and assesses the extent to which RTA provisions may go beyond the WTO provisions. Public procurement is relevant for the wide range of goods and services bought by governments as well as public entities on the national, provincial, and municipal levels throughout the world. Such purchases are estimated to represent 14-20 percent of a country’s gross national product. With the increasing globalisation of the world economy, international procurement is also on the increase and currently amounts to several hundred billion dollars.

2. The review of the procurement provisions in RTAs shows that there are many common elements, if not a symbiosis, between the procurement liberalisation process in the WTO GPA and the procurement reform process at the regional level. This reflects the recognition that foreign suppliers of goods and services require not only market access in the sense of non-discriminatory treatment; in order to compete effectively they also require transparent, predictable and fair procedures. These happen also to be the features that are needed as part of the ongoing modernisation and reform of procurement rules and systems at the national level.

3. Awareness that economic development benefits can be derived from a transparent and competitive procurement system has prompted increased attention to the issue of public procurement in recent years. APEC provides an interesting example. Even though the intended co-operation does not entail preferential treatment between them, APEC Members have developed a set of non-binding principles intended to be used on a voluntary basis, taking into account the individual characteristics of Members’ economies. The principles are supplemented by detailed illustrative examples of such initiatives that would contribute to putting them into practice. They are intended to provide a basis to help APEC Members in the course of achieving liberalisation of government procurement markets.

4. Another example, although it is not a regional arrangement, is the United Nations Commission on International Trade Law (UNCITRAL) Model Law on procurement of Goods, Construction and Services. The Model is now being used in virtually all Eastern European countries and provides a template on which to base a modern and market-oriented procurement law. The Model—given that it codifies what are widely recognised as a set of procurement procedures providing economic efficiency, competition, transparency and accountability—may also prove useful for countries in other geographic regions to measure the adequacy of existing rules on procurement and to serve as a model for national procurement law reform that can be used to help implement the procedures dictated by regional and multilateral procurement

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1 The European Communities are counted here as a Member.
2 OECD, 2002.
3 See Sahaydachny and Don Wallace (1999); Application of these principles in efficient government procurement has also been studied in the context of OECD work on regulatory reform and market openness.
arrangements in national law. Use of the Model Law to help implement in national law a country’s regional and multilateral procurement commitments is made possible by the broad similarity between the procedures and principles in the Model Law and those contained in regional and multilateral arrangements.

5. In a number of recently signed RTAs government procurement is a major focus, with a whole chapter dedicated to the issue. This includes the EU-Mexico FTA as well as initiatives in the Pacific Rim region, such as the agreement between New Zealand and Singapore on a Closer Economic Partnership (CEP) and the Japan-Singapore Economic Partnership Agreement (JSEPA). These agreements contain extensive provisions dealing with transparency and various aspects of procurement procedures. Another important observation concerning regional initiatives in the procurement field is that developing and emerging economies are increasingly entering into bilateral or regional procurement agreements whether or not they are parties to the GPA. The Group of Three Accord and other bilateral agreements concluded by Mexico, such as the Mexico-Bolivia FTA, the Mexico-Costa Rica FTA and the Mexico-Nicaragua FTA, show that developing countries are increasingly concluding regional procurement agreements with other developing countries. Likewise, NAFTA and more recently the EU-Mexico FTA demonstrate that it is possible to bring countries at different levels of economic development together in a liberalising agreement on public procurement.

6. Typically, RTAs include provisions that are similar to the WTO GPA, but to different degrees. There are two ways in which RTAs appear to have gone beyond or provide something in addition to the WTO Agreement. First, some RTAs have gone beyond the WTO by adopting obligations substantially similar to the GPA, but including countries that are not parties to the GPA. In the post-Doha scenario, particularly with the scheduled negotiations on transparency aspects of procurement, this can have a positive effect in that countries not Members to the GPA can gain experience in meeting the transparency requirements agreed to at the regional level. In this regard, it may be noted that a number of countries are seeking accession to the GPA (see Section II).

7. Second, some RTAs have gone beyond the WTO by providing for broader coverage or by allowing for the provision of additional information. For instance, several RTAs have expanded the procurement coverage, widened the scope by covering more entities or reduced the thresholds of procurement contracts covered.

8. Another noteworthy point concerns the effects on third-party goods and services. Although procurement-related provisions contained in most RTAs are of a preferential nature, the procedures dictated in these provisions may help foster the practice of transparency more widely and so, eventually, yield more far-reaching benefits. In addition, the regional experience may point the way toward confidence building among a wider group of countries, thereby helping extend WTO disciplines.

II. Provisions in WTO agreements

9. As with investment and services trade, government procurement was traditionally a sector excluded from the scope of the multilateral trade rules. In the GATT, government procurement was explicitly excluded from the key national treatment obligation and, more recently, public procurement has

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4 Examples of features that show significant common ground include scope of application, non-discrimination principles, qualification assessment procedures, variety of procurement methods (with a preference for competitive ones), transparency requirements, notice of contract award, and review procedures. See Sahaydachny and Don Wallace (1999).

5 Parties to the Agreement include Colombia, Mexico and Venezuela.
also been carved out of main commitments of the GATS\(^6\). A growing awareness of the trade-restrictive effects of discriminatory procurement policies resulted in a first effort to bring government procurement under internationally agreed trade rules in the Tokyo Round. As a result, the first plurilateral Agreement on Government Procurement (GPA), also called the GATT Government Procurement Code, was signed in 1979, entered into force in 1981, and was amended in 1987. The Agreement intended to allow members to implement stringent procurement procedures and requirements in an open, transparent and non-discriminatory manner.

10. The limited initial scope of the GPA reflected the tentative steps with which the process of multilateral trade liberalisation advanced into the procurement field. Its scope was confined to procurement of goods, it was subject to quite high monetary thresholds, and it extended only to contracting entities expressly listed in the annexes. This “positive list” approach resulted from the negotiation of individual commitments among participating countries.

11. The Uruguay Round resulted in a substantial expansion of coverage. A new Agreement took effect on 1 January 1996 covering procurement of services and construction in addition to goods, monetary thresholds have been lowered, and sub-central authorities now fall within the scope of the GPA. The WTO reports that the GPA applied annually to a total value of contracts of around US $30 billion in 1990-1994. It also reports that the value of procurement that is opened up to international competition is estimated to have increased by ten times under the revised GPA.

12. Even though the GPA is essentially a market access agreement because it has lowered trade barriers in the procurement field, the bulk of the text of the Agreement is concerned with various aspects of procurement proceedings. The Agreement provides for a framework of common procurement procedures, transparency at all stages of the procurement process and the opportunity—through the establishment of an impartial and independent review body with no interest in the outcome of the procurement—for aggrieved private bidders to challenge procurement decisions and obtain redress in a timely fashion in the event of inconsistencies with the rules of the Agreement. This reflects the recognition that to give meaning to the provisions on market access it is also necessary to ensure that the procurement systems are transparent, fair, objective and accountable.

13. Although the scope of procurement covered by the GPA has expanded after the Uruguay Round, it remains a plurilateral agreement mainly among developed economies\(^7\), with benefits accruing to Members. Moreover, the scope of application depends, in addition to monetary thresholds, on a “scheduling” system where each party lists its covered entities. With respect to goods and services, most countries have a negative list for goods and a positive list for services. There are, however, countries that have done just the opposite. Coverage of defense-related goods also varies widely among the Parties. Hence, coverage under the GPA is flexible, allowing Members to select the approach that is preferable.

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\(^6\) Article III of the basic GATT reads as follows at paragraph 8(a): “The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.” An analogous exclusion of government procurement is set forth in Article XIII of the GATS. However, GATS Article XIII:2 provides for negotiations in the government procurement of services (see below).

\(^7\) Parties to the GPA comprise Austria, Belgium, Canada, Denmark, European Communities, Finland, France, Germany, Greece, Hong Kong China, Iceland, Ireland, Israel, Italy, Japan, Korea, Liechtenstein, Luxembourg, Netherlands, Netherlands with respect to Aruba, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, United Kingdom, and the United States.
14. As is the case with other WTO Agreements, the GPA is not static. Indeed, several countries are currently seeking accession to the Agreement\(^8\). In addition, the GPA contains a mechanism for periodic review and negotiations with the aim of improving the Agreement\(^9\). The goal of these negotiations, currently underway, is the expansion of the coverage of the GPA, the elimination of discriminatory measures and practices which distort open procurement and the simplification and improvement of the GPA, in particular adoption of advances in the area of information technology. An important consideration underlying this review mechanism is the desire to make the Agreement more accessible to non-members and to promote the expansion of its membership.

15. In addition to promoting accession to the GPA, WTO Members have also been exploring a multilateral agreement on transparency in government procurement. A Working Group on Transparency in Government Procurement, established after the 1996 WTO Ministerial meeting in Singapore, has been gathering information on national practices and was charged with developing elements of an agreement on transparency in government procurement.

16. At the Ministerial meeting in Doha, WTO Members agreed that "negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations…Negotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers." This highlights the benefits to national economies expected to accrue from transparent public procurement procedures, irrespective of other factors that may impinge on market access. WTO Members also stressed the importance of enhanced technical assistance and capacity building in this area and the need to take into account participants’ development priorities.

17. In the WTO, government procurement is also discussed separately in the context of the GATS negotiations. Although the initial GATS agreement excluded public procurement of services, Member countries agreed to begin multilateral negotiations on government procurement in services within two years from the date of entry into force of the WTO. These discussions are being pursued in the context of the overall GATS negotiations currently underway, under the so-called “Built-in Agenda”.

III. Provisions in Regional Trade Agreements

18. With different degrees of intensity, RTAs promote a procurement component for their economic integration. In the EU, the removal of trade barriers in public procurement has been an important element of the integration efforts. This has resulted in the issuance of a number of directives freeing market access and establishing procedural standards in the procurement field.\(^{10}\) The same rules now also apply between EU Member States and non-members Norway, Iceland and Liechtenstein by virtue of the EEA. And EFTA, as well as the recent EU-Mexico FTA also contain extensive provisions aiming at liberalising public procurement markets. Within Central Europe, CEFTA provides for the opening up of public procurement between the Members as part of a general free trade programme, at first limited to central

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\(^{8}\) The following countries are in the process of negotiating accession or have applied for accession: Bulgaria, Chinese Taipei, Estonia, Jordan, Kyrgyz Republic, Latvia, Panama. The following governments have undertaken commitments with regard to the Agreement: Croatia, Georgia, Mongolia, Oman.

\(^{9}\) GPA Article XXIV(7)(b).

\(^{10}\) The public authorities Directives 93/36/EC, 93/37/EC and 92/50/EC (amended by 97/52/EC) and the utilities Directive 93/38/EC (amended by 98/4/EC). The amendments were made in an effort to accommodate procedural changes required by the GPA.
government supplies in accordance with the 1979 GATT Agreement on procurement, but with the prospect of later expanding coverage.

19. Trade liberalisation in government procurement is also an integral component of NAFTA, with an extensive chapter of the Agreement devoted to the issue\(^\text{11}\) (see below). Other developments in the Western Hemisphere include the procurement-related provisions in the Group of Three (G-3) Accord, other neighbouring bilateral agreements concluded by Mexico\(^\text{12}\), the recently concluded EU-Chile Agreement\(^\text{13}\), and the on-going negotiations on government procurement in the context of a US-Chile FTA. Elsewhere in the Americas, consideration to cover procurement issues has been given in regional agreements such as MERCOSUR, the Canada-Costa Rica FTA, the Andean Community, the CACM and the CARICOM. Negotiations are also underway within the FTAA framework, where a Negotiating Group on Government Procurement was created with the broad aim of expanding access to the procurement markets of the FTAA countries. Specifically, the objectives include non-discrimination among members within a negotiated scope of covered procurement, transparency and openness in the normative framework, and fairness and impartiality in the review procedures.

20. In the Pacific Rim region substantial achievement in the liberalisation of procurement markets has been accomplished in ANZCERTA. Liberalisation of procurement markets is also an integral component of the CEP, which adopts a similar approach to ANZCERTA, and of the JSEPA. In the APEC framework a process is underway with the aim of collecting and disseminating information on existing procurement regimes, enhancing transparency and ultimately leading to liberalisation of procurement markets. In 1995, the Government Procurement Experts Group (GPEG) was established as part of APEC with the key goal of achieving liberalisation of government procurement markets through-out the Asia-Pacific region. GPEG fundamentally embraces a set of six Non-Binding Principles on Government Procurement that were agreed in 1999 for adoption by members on a voluntary basis\(^\text{14}\).

21. Members of GPEG are committed to working towards adopting these principles in their procurement regimes. To identify how GPEG members are adopting the non-binding principles, they have been invited to review their alignment with the principles and report outcomes and findings to GPEG member economies. Once members have made their initial report, they will provide updates on developments within their procurement framework that also contribute to the achievement of the non-binding principles. The first principle that GPEG members have been reporting on is Transparency, for submission to the GPEG meeting as part of the SOM III in August 2002 in Acapulco, Mexico. The second identified principle for reporting on is Accountability and Due Process. As only two principles are currently being reported against by GPEG members, it is too early to undertake an assessment of the principles and provide a report on their practical outcomes in member economies.

**Some features of government procurement systems**

22. The remainder of this section discusses a series of features central to public procurement systems and describes the way these features are given concrete expression in RTAs. The discussion includes

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\(^\text{11}\) NAFTA, Chapter 10 (“Government Procurement”).

\(^\text{12}\) For example the Mexico-Bolivia FTA, the Mexico-Costa Rica FTA and the Mexico-Nicaragua FTA.

\(^\text{13}\) A detailed presentation of the provisions of the EU-Chile Agreement cannot be included in the analysis here because the text of the Agreement is currently under translation and legal revision, and therefore it is not available yet.

\(^\text{14}\) The principles comprise transparency; value for money; open and effective competition; fair dealing; accountability and due process; and non-discrimination.
APEC principles because they are one of the most elaborated examples of reflection on the issue of public procurement, despite their non-binding nature. The sections dealing with procurement procedures, rules on transparency, and accountability and due process, in particular, are directly relevant to ongoing work in the WTO Working Group on Transparency in Government Procurement.

Scope and coverage

23. With respect to the scope of commitments, many RTAs adopt approaches similar in many respects to the GPA, although a number of RTAs have gone beyond the scope of the WTO Agreement. Some RTAs have expanded the procurement coverage, other RTAs have widened the scope by covering more entities, and yet other RTAs have reduced the thresholds of procurement contracts covered. The EC Directives, for example, apply to purchases of supplies, works and services, including entities in the formerly excluded utilities field. The extended coverage includes purchases of products, works and services, by railway operators, entities active in the field of energy other than electricity and telecommunications providers. In contrast to the GPA, the entity coverage includes all entities, at the State, regional and local level, whether or not they are listed in annexes to the Directives.

24. In ANZCERTA, while the original 1983 agreement extended preferential trade in goods to purchases made by the Australian Commonwealth and the New Zealand Government, it did not apply to purchases by Australian State Governments. This omission was overcome in 1989 by allowing New Zealand to join the National Preference Agreement (NPA) under which States had earlier agreed not to apply preferences against each other. The two countries are now parties to the Australia-New Zealand Government Procurement Agreement (ANZGPA) that superseded the NPA, reflecting the wider range of agreement between them on public procurement policies and practices. Indeed, with some exceptions, the agreement covers all goods, services and construction activities. The broader scope of application extends also to entities as all contracting entities, unless specifically exempted (a negative list approach), are covered. Nevertheless, both countries exclude local authorities and public enterprises though the Agreement stipulates that the parties are to use their best endeavours to encourage wider application. A similar approach was adopted by New Zealand and Singapore in the CEP.

25. The approach taken by NAFTA concerning the scope of liberalisation is in many respects similar to the GPA, relying on monetary thresholds and a positive list approach to covered entities. However, there are also a number of differences. NAFTA, in contrast to the GPA, does not cover state and provincial governments. At the same time, NAFTA—which also comprises goods and services, including construction services—expands upon the obligations of the GPA by adopting lower thresholds and a negative list approach to the coverage of services procured by the listed entities. Consequently, all services are covered unless specifically exempted. NAFTA seems to have influenced other RTAs concluded in its periphery, such as the Group of Three Accord and several bilateral agreements signed by Mexico with other Latin American counterparts. Indeed, the relevant provisions of these agreements are in many respects similar to the procurement provisions in the NAFTA, although they contain a number of reservations and in some cases the applicability varies among the countries.

\[15\] Some of the telecommunication services are excluded from the scope of Directive 98/38/EEC. The list of excluded telecommunications services was published in the Official Journal (OJ C 156, 3.6.1999, p. 3). EFTA members have also adopted a similar expanded coverage.

\[16\] The Mexico-Bolivia FTA and the Mexico-Costa Rica FTA.

\[17\] The Group of Three Accord, for example, provides reservations—to be reduced and ultimately eliminated in 2004—of 45% (in 1996) of the procurement of goods, services and construction services have been made for Federal
26. In this connection, another interesting RTA is that signed by the EU and Mexico. In this Agreement, Mexico offers to the EU the lower thresholds of the NAFTA, while the EU offers to Mexico the higher thresholds of the GPA (and of the EC Directives). This has been done to facilitate the tender procedure through a transparent and widely-known rule identical for all tenderers within each of the Members, and to avoid, for both procuring entities and suppliers, the need to handle different thresholds and verify which agreement applies for each call for tender.

Non-discriminatory treatment

27. As with the GPA, non-discriminatory treatment of foreign supplies and services among members of the agreement is an essential element of the government procurement provisions in most RTAs. For instance, non-discriminatory treatment at all stages of procurement is an integral part of the provisions contained in agreements concluded in the Americas, such as NAFTA and the other agreements signed by Mexico. This includes qualification of suppliers, selection procedures, receipt and opening of tenders, and objective award criteria. As in the case of the GPA, these agreements also include explicit prohibition of so-called offsets, policies such as the imposition of conditions that encourage local development or improve a party’s balance-of-payments account by such methods as local-content requirements, licensing of technology, or investment. But, unlike the GPA where a developing country may at the time of accession negotiate conditions for the use of offsets\(^{18}\), in these agreements these measures are prohibited for all countries.

28. The EC Treaty places a general ban on discriminatory measures and unfair treatment. The main liberalising principles include non-discrimination, free movement of goods, free movement of services, and competition\(^{19}\). The Directives supplemented the ban by establishing co-ordinating procedures to make sure that public contracts throughout the Community are open to firms from all members and non-members on equal terms\(^{20}\). The co-ordination was based on three main principles: a) Community-wide advertising of contracts to develop real competition between economic operators in all Members; (b) the banning of technical specifications liable to discriminate against potential foreign bidders; (c) application of objective criteria for the selection of tenderers and the award of contracts. However, on the latter point it should be mentioned that although it may be argued that offsets are inconsistent with the rules on non-discrimination, the Directives do not contain any explicit prohibition of their use.

29. APEC principles call for procurement laws, regulations and practices not to be adopted so as to afford discrimination against the goods and services of any particular country. The principles apply to all stages of procurement, including in the criteria for qualification of suppliers, provision of the same information to all parties, technical specification, evaluation of bids and award of contracts. Some RTAs explicitly make reference to the APEC principles. One such case is the CEP, and the prospective US-Singapore FTA is also expected to contain such a reference. The provisions contained in the CEP stipulate that procurement procedures, including supplier invitation, qualification and award procedures, shall be applied in a manner consistent with the APEC principles.

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\(^{18}\) The practical application of these measures is very important, but empirical evidence is lacking.

\(^{19}\) Respectively: Articles 12; 28; 49; and 81, 82, 86.

\(^{20}\) An interesting observation about the Directives is that they apply to all procurement, whether or not of EU origin.
Open and fair procurement procedures

30. RTAs recognise the importance of a framework of common procurement procedures. Such a framework provides a predictable environment for suppliers where the procurement process, including rules and regulations, is clear and understandable. This has also been recognised in the WTO Working Group on Transparency in Government Procurement. The terms of RTAs provisions in this area often parallel quite closely corresponding GPA provisions, to which several RTAs refer explicitly. For instance, EFTA reaffirms the commitments under the GPA, to which all EFTA States are parties. A similar approach was also taken by the JSEPA, which stipulates that relevant GPA articles shall apply to the covered procurement of goods and services of the two countries.

31. NAFTA’s procurement chapter corresponds with much of what can be found in the GPA. This includes e.g. guidelines to follow under open, selective and limited tendering procedures and rules on the submission, receipt and opening of tenders and awarding of contracts. In open tendering procedures any interested supplier may submit a tender. In selective tendering procedures only those suppliers invited to do so may submit a tender. Entities desiring to make use of these procedures should keep lists of qualified suppliers interested in bidding. In limited tendering procedures, when specific circumstances apply, the entity may contact suppliers individually. NAFTA requires that to be considered for award a tender must, at the time of openings, conform to the essential requirements of the notices or tender documentation and be from a supplier which complies with the conditions for participation. An entity must award the contract to the supplier who has been determined to be fully capable of undertaking the contract and whose bid is either the lowest or the most advantageous.

32. The EC Directives are also generally similar to the GPA, although the terminology used at times differs. The Directives allow for the provision of additional information, for example by requiring in the qualification system that evidence of the suppliers’ financial, economic and technical standing must be obtained through administrative certificates, guarantees and records. On the other hand, the GPA covers issues that are not addressed in the Directives, such as specific rules on the opening of bids. The basis of the contract award is similar. It shall be either the lowest price or the most economically advantageous tender, based on e.g. price, delivery date, running costs, cost-effectiveness, quality, technical merit, after-sale service and technical assistance. Abnormally low tenders may be questioned and rejection of too low tenders must be communicated to the Commission.

33. APEC principles in this area, while non-binding, are comparable to those of the GPA. They call for the procurement process to be designed to encourage levels of competition among suppliers, commensurate with the benefits received. As in the GPA, buyers may choose from open, limited or restricted procedures and steps are laid down to ensure effective competition. This includes, for example, ensuring that any negotiation undertaken with suppliers is conducted in a structured manner. The principles also call on buyers to conduct themselves in ways such that procurement activities are managed fairly and equitably. In practice, this can be achieved by e.g. ensuring that contact between all procurement and evaluation personnel and tenderers is on a formal basis; tenders are sealed until they are opened; and tenders should be opened by a designated tender opening team, which should authenticate the tenders and keep a duplicate copy. Finally, the principles call for best value for money. Besides price and fitness of

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21 NAFTA’s approach has also been subsequently adopted by neighbouring agreements to which Mexico is a party.
22 See NAFTA Article 1016.
23 For example, the GPA’s limited tendering corresponds to the EC negotiated procedures (also, in exceptional circumstances, without prior call). In contrast to the GPA, which considers negotiation a modality of awarding contracts and not a separate procedure, the Directives consider negotiation a procedure of its own.
purpose, other factors that may be taken into account include performance, quality, reliability, delivery, inventory costs, running costs, warranties and after-sale support, and disposal. At the same time, benefits in terms of savings to taxpayers and suppliers may also be obtained through improvement in the procurement processes and management.

Rules on transparency

34. Transparency of laws, regulations and procurement procedures is a cornerstone of procurement systems in most RTAs, especially in order to ensure that suppliers of countries within the region do not meet with discrimination and that an unsuccessful foreign bidder has the right to seek redress where he finds that the contract has been wrongly or arbitrarily denied to him. The decision at Doha to undertake negotiations on transparency in government procurement underlines the importance of this area, and the transparency requirements agreed to regionally may prove useful for countries not parties to the GPA in gaining relevant experience.

35. The approach taken at the regional level in this area tends to resemble the one adopted in the GPA, but to different degrees from one RTA to another. For instance, NAFTA and neighbouring agreements replicate much of what can be found in the WTO Agreement. There are guidelines on matters such as: conditions for qualification of suppliers to be published sufficiently in advance so as to provide the suppliers adequate time to initiate and complete any necessary qualification procedures; invitation to participate in the procurement must be published with all required information; time-limits for tendering and delivery, which are meant to give all potential suppliers a chance to prepare a response tender for a contract or seek an invitation to participate in a procurement; where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders; tenders must be submitted in writing, directly or by mail, but cannot be presented by telephone; entities must publish a notice after the award of each contract including the value of the winning award or the highest and lowest offer taken into account; and on request, the awarding entity shall promptly inform suppliers participating in the tendering procedures of decisions on contract awards and provide pertinent information to a supplier whose tender was not selected, the reasons for not selecting its tender and the advantages of the winning supplier. NAFTA and the other agreements concluded in the Americas demonstrate that it is possible for countries with different levels of economic development to enter into agreements that promote greater regulatory transparency in the procurement field.

36. The EC Directives also contain similar requirements. Under the common advertising rules entities are to publish: an indicative notice after the beginning of their budgetary year to make known the total procurement they intend to award during the subsequent twelve months; a contract notice when the award procedure is about to be launched; and a contract award notice setting out the most important points concerning the conditions under which the contract has been awarded. In order to give all potential suppliers a chance to tender for a contract or seek an invitation, the Directives, like the GPA and NAFTA, lay down minimum periods to be allowed at the different stages of the procedures. An interesting feature of the Directives is that they stipulate that any notice published in the national press must not contain information other than that published in the Official Journal of the EC and may not be published at the national level before it is dispatched for publication at Community level. Similarly to the GPA, the Directives stipulate that any eliminated candidate has the right to ask for the reasons for his rejection and the name of the successful tender.

25 For a description of the information required in the invitation to participate see NAFTA Article 1010.

26 This includes also the EU-Mexico FTA.
37. The recently signed CEP also provides for disciplines on transparency in the procurement field. The relevant provisions, though not as detailed as WTO provisions, provide for each party to take steps to enhance transparency at all stages of their procurement procedures. This includes publication of invitation to tender, provision on request of information on contract awards, and provision of pertinent information concerning the rejection of an unsuccessful bidder. APEC principles call for sufficient and relevant information to be made available to all interested parties consistently and in a timely manner through a widely available medium. This general principle is applicable to all aspects of public procurement, including the general operational environment, procurement opportunities, purchase requirements, bid evaluation criteria and award of contracts.

38. RTAs also promote transparency through the collection and dissemination of all relevant information through electronic means. It should in addition be mentioned that several countries (e.g. NAFTA countries) have established such regimes nationally, but the focus here is on initiatives at the regional level. For instance, the EU has recently introduced a new Directive on the mandatory use of standard forms for the publication of contract notices. The aim is to simplify the implementation of the advertising rules while adapting them to the electronic means developed as part of the information system on public procurement (SIMAP), launched several years ago by the Commission in collaboration with the Member States. The EC launched the project in order to encourage best practice in the use of modern information technology for public procurement. Initially the project aims to improve the quality of information about the EU procurement opportunities and ensure that information is made known to all potentially interested suppliers. In the longer term it is envisaged that the project will address the whole procurement process, including bids, award of contracts, delivery, invoicing and payment. Moreover, the possible use of the common procurement vocabulary (CPV) will contribute to enhance transparency in the EU market. The CPV was created by the EC in 1993 as a tool for improving transparency and efficiency in the field of public procurement. Use of standard terms in the CPV makes it easier for potential suppliers to identify the procurement contracts in which they are interested. The CPV also facilitates fast and accurate translation of contract notices for publication in the EC Official Journal, and makes it easier to establish procurement statistics.

39. As part of the ongoing ASEAN integration initiatives, Member States recently signed the E-ASEAN Framework Agreement, which calls for the promotion of the use of electronic means in Members’ procurement of goods and services.

**Accountability and due process**

40. Providing the opportunity for suppliers to challenge the consistency of the conduct of a procurement with the agreement in a timely manner is an important element of many RTAs, especially in order to ensure transparency and fairness in the application of the procurement process. This has also been recognised in the WTO e.g. with respect to bid procedures contained in the GPA as briefly discussed in Section II above; due process is also another element that might be included in a possible Agreement on Transparency in Government Procurement, subject to the outcome of the negotiations. The terms of relevant RTA provisions resemble corresponding GPA provisions. For instance, NAFTA and neighbouring agreements provide detailed provisions allowing suppliers to challenge procurement procedures for covered procurement contracts. These challenges are to be reviewed expeditiously by a national authority that has “no substantial interest” in the outcome of the purchase. The reviewing authority can recommend changes in the procurement procedures of the entity being challenged if these violate NAFTA rules. This recourse is available not only to suppliers of one NAFTA country wishing to challenge the procurement

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27 EC Directive 2001/78/EC.

procedure of another, but also to suppliers wishing to challenge the procurement practices of their own government. Recourse to panel procedures is an option in case of failure to produce a satisfactory result.

41. Two EC Directives address violations of EU procurement law. The first Directive deals with complaints regarding awards of contracts in the non-excluded sectors and the second provides for remedies in the “excluded” sectors. The Directives require Member States to set up competent bodies to take interim measures to correct alleged violations. This includes measures to suspend awarding procedures or implementation of any decision; set aside decisions taken unlawfully (including the removal of discriminatory specifications); and award damages. Where the Commission considers that an infringement has been committed during a contract award procedure, it is empowered to bring this to the attention of the competent authorities so that appropriate steps can be taken for the rapid correction of any alleged infringement. The EC may ultimately bring proceedings before the European Court of Justice.

42. With respect to bid challenge provisions, the ANZGPA adopts a different approach. The relevant procedures for dealing with complaints are designed to resolve problems and avoid recurrence through discussion and mutual agreement between the “designated bodies”. The Agreement relies on the political will and commitment of the parties for compliance, rather than any legal redress. Thus, the final authority for decision is the relevant Minister in the purchasing jurisdiction. Should there continue to be serious concern on the part of one or more of the other jurisdictions, this would be raised and discussed in the Council at officials’ and/or Ministerial level in order to reach a mutually agreeable outcome. But the Agreement does not contain any formal provision for negotiation of a solution at these levels.

43. APEC principles call on governments and individual agencies to establish and make known procurement laws and practices, and on procuring agencies and personnel to follow them without infraction throughout the entire procurement process. The principles lay down concrete examples on how this is to be achieved, such as record keeping of the entire procurement process, the establishment of scrutiny mechanisms to ensure accountability and of review mechanisms to handle complaints.

29 Directive 93/38/EEC.
30 Directive 92/13 EEC.
31 Annex 1: "Monitoring Procedures".
REFERENCES


GLOSSARY

Andean Community: Bolivia, Colombia, Ecuador, Peru and Venezuela.

ANZCERTA (Australia-New Zealand Closer Economic Relations Trade Agreement): Australia and New Zealand.

ANZGPA (Australia-New Zealand Government Procurement Agreement).

APEC (Asia Pacific Economic Co-operation Forum): Australia; Brunei Darussalam; Canada; Chile; China; Hong Kong, China; Indonesia; Japan; Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; the Philippines; Russia; Singapore; Chinese Taipei; Thailand; United States; and Vietnam.

ASEAN (Association of Southeast Asian Nations): Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

CARICOM (Caribbean Community): Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Republic of Suriname and Trinidad and Tobago. The Bahamas does not participate in the common market and Haiti is not yet a full member.

CEFTA (Central European Free Trade Agreement): Bulgaria, Czech Republic, Hungary, Poland, Romania, Slovakia, and Slovenia.

CACM (Central American Common Market): Guatemala, El Salvador and Nicaragua.

CEP (Closer Economic Partnership): New Zealand and Singapore.

EAA (Agreement on the European Economic Area): Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Portugal, United Kingdom, Spain and Sweden.

EFTA (European Free Trade Association): Iceland, Liechtenstein, Norway and Switzerland.

EU (European Union): Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, United Kingdom, Spain and Sweden.

FTAA (Free Trade Area of the Americas): Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St Lucia, St Kitts and Nevis, St Vincent and Grenadines, Suriname, Trinidad and Tobago, Uruguay, United States and Venezuela.

Group of Three Accord: Colombia, Mexico and Venezuela.

JSEPA (Japan-Singapore Economic Partnership Agreement).

MERCOSUR (Mercado Común del Sur / Southern Common Market Agreement): Argentina, Brazil, Paraguay and Uruguay.

NAFTA (North American Free Trade Agreement): Canada, Mexico, United States.