

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

DISPUTE SETTLEMENT

WORLD TRADE ORGANIZATION

3.12 Government Procurement



UNITED NATIONS
New York and Geneva, 2003

NOTE

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WHAT YOU WILL LEARN

This module provides the reader with a general overview of the Agreement on Government Procurement (GPA) of the World Trade Organization, and the distinctive scope of its obligations. Section 1 gives an overview of the main characteristics of the GPA. Section 2 highlights and analyses the special and differential treatment provisions of the Agreement. Section 3 examines the various interpretations of the GPA provisions under the dispute settlement system of the GATT 1947 and, more recently, under the Dispute Settlement Understanding (DSU) of the WTO. Case studies are presented in section 4 and recommended reading in section 5.

1. THE AGREEMENT ON GOVERNMENT PROCUREMENT (GPA)

After completing this section, the reader should be able to:

- **Identify the objectives of the GPA;**
- **Discuss the procedures ensuring transparency under the GPA;**
- **Explain the dispute settlement mechanism of the GPA; and**
- **Explain the similarities and differences between the legal principles underlying the GPA and those of other WTO agreements.**

1.1 Introduction

The generic definition of government procurement relates to the process by which a state agency procures a product or service for its own use. The principle objective of keeping open and non-discriminatory government procurement regimes is to allow for competition between potential suppliers, and hence to ensure that *best value for money* is obtained. In practice, government procurement may often be influenced by a range of secondary objectives which are not related to, or might even conflict with, the principle of *best value for money* in obtaining products or services under procurement. Examples of such secondary objectives are: the promotion of national industries by shutting out foreign competition; favouring foreign suppliers for the purpose of acquiring foreign currencies; or discriminating against certain foreign products or services for other reasons. The procedures used to reach these secondary objectives, such as discriminatory tendering requirements, closed or selective tendering and non-technical specification requirements can lead to trade distortion.

1.1.1 *Government Procurement in the Context of International Trade*

Government procurement often accounts for a large proportion of a government's total expenditure, estimated at an average of 10–15 per cent of GDP, which represents a substantial purchasing power on domestic markets. In combination with the potential trade distorting effects of a government's secondary objectives, it is understandable that *transparency* of government procurement procedures and rules has become a fundamental issue within international trade.

Notwithstanding their economic importance, regulations on government procurement have traditionally been omitted from the scope of the multilateral rules on market access of both goods (Articles III:8(a) and XVII:2 of the GATT 1947),¹ and services (Article XIII:1 of GATS).²

This exclusion was discussed in the Havana Charter negotiations and led to the following conclusion:

“Government procurement practices have traditionally been considered unreached by the language of GATT Article I, and the language of GATT Article III and the preparatory work of GATT seem to support this approach.”³

GATT, Analytical Index⁴

The ITO Charter, as proposed in the original United States draft, would have provided for national and most-favoured-nation treatment in respect of governmental purchases of supplies for governmental use. However, this provision was deleted from the London Draft Charter “as it appears to the Preparatory Committee that an attempt to reach Agreement on such a commitment would lead to exceptions almost as broad as the commitment itself...”²⁴⁷ During discussions in Sub-Committee A at Havana, it was agreed that “paragraph 5 (III:8) was an exception to the whole of Article 18 (III).²⁴⁸ It was noted later that “the Sub-Committee had considered that the language of paragraph 8 would exempt from the scope of Article 18 (III) and hence from Article 16 (I), laws, regulations and requirements governing purchases effected for governmental use where resale was only incidental”.²⁴⁹ ²⁴⁷London Report, p. 9, para. (d)(iv).²⁴⁸E/CONF.2/C.3/A/W.39, p. 1.²⁴⁹E/CONF.2/C.3/SR.41, p. 3.

1.1.2 Elaboration of Government Procurement Rules

The initial effort to bring government procurement under internationally agreed trade rules was made at the Tokyo Round of Trade Negotiations, which led to the signing, in 1979, of the first Agreement on government procurement⁵.

The Tokyo Round Agreement set out the principle of national treatment in terms of laws and regulations on government procurement. This obligation was clearly limited to those Parties that negotiated and adhered to this “plurilateral” agreement.

Plurilateralism

For the purpose of expanding the scope and coverage, the Tokyo Round Agreement was renegotiated, parallel to the negotiations held during the

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