

## 1 Introduction

For many developing countries government procurement reform is a key issue, and one which is, or ought to be, high on the good governance agenda. Where procurement is conducted in accordance with sound principles there is the potential for direct benefits to the economy of a country; where it is not the door is opened to corruption, wasteful expenditure, higher prices, failure to deliver, loss of faith and integrity in the public sector, and many more ills.

It is not surprising, therefore, that agencies representing a broad range of interests are drawing attention to the need to revisit government procurement policies and practices; one such is the World Trade Organization (WTO). The only WTO instrument currently directed at these issues is the plurilateral Agreement on Government Procurement (GPA). This was first negotiated by member states at the Tokyo Round and later revised at the time of the Uruguay Round. As a plurilateral agreement, membership is voluntary. But some WTO members want to bring government procurement fully into the WTO.

While few would argue that reform of government procurement is undesirable or that improvements are not needed, there is some disagreement as to how to approach reform. What improvements are needed, and how should they be prioritised? Much depends on the goals to be achieved. In a country riddled with corruption, procurement reform would be aimed at eliminating this; in one where there are socio-economic inequities, it may be directed at redressing them. The limited resources and capacity of developing countries necessitate a prioritising of expenditure, the identification of the goals, and the most efficient mechanisms for achieving them.

It is in this framework that WTO endeavours to bring government procurement into the multilateral fold should be seen. Developing countries may well be in need of procurement reform, and any initiative to assist should be welcomed. But a country's specific needs and constraints should not be overlooked in determining which procurement regime is the most appropriate.

Multilateral rules are in their infancy, with a considerable lack of clarity even on the goals to be

# Multilateral Talks on Transparency in Government Procurement: *Concerns for Developing Countries*

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achieved. In contrast to the case of agriculture, for example, it is neither necessary nor feasible to focus on the appropriateness of special and differential treatment (SDT) in current or proposed rules. Rather, the aim of this article is to identify the key features that need to be present in any procurement rules negotiated in the WTO, and to explain why many arrangements could prove to be not only highly technical, costly and burdensome on the public sector, but also irrelevant to the ills faced by a particular country.

This article aims to help developing countries identify and prioritise their internal procurement requirements and to assess the extent to which their goals may be met within the WTO. Only when they are clear about their own needs can the costs and benefits of any multilateral agreement be properly weighed. This is particularly the case because of the absence of clear direction from the WTO as to what multilateral negotiations on procurement reform aim to achieve.

Readers of this article should bear in mind one caveat: research in this field is very much in its infancy: Evenett (2002) refers to it as 'embryonic'. A number of developing countries at Doha argued that because of this, meaningful multilateral negotiations cannot yet commence. They argued that the WTO should continue discussing and studying the issue of procurement. A clearer understanding of the issues is required before negotiations on transparency are launched. This caution contrasts starkly with the fast-track approach suggested by some larger WTO members, such as the United States of America (USA) and the European Union (EU).

In the event, Doha provided a longer time-frame, which is to be welcomed. Developing countries won a window through which to gain a clearer understanding of how procurement negotiations will impact upon their developmental and other needs.

## **2 Multilateralism and government procurement**

### **2.1 Why should government procurement be regulated?**

If ever there was a topic, which holds up a mirror to changing attitudes within the WTO, government

procurement must be it. During early General Agreement on Tariffs and Trade (GATT) negotiations, and for some time thereafter, most member states took a strong non-interventionist approach to government procurement, but over the years there has been a steady watering down of this hands-off approach. We are now seeing a steady trend towards an interventionist, regulatory approach. The GATT expressly excluded government procurement from its ambit. Most states were unwilling to extend most-favoured-nation (MFN) or national treatment (NT) to government imports. At that stage, they wished to reserve the privilege to procure government goods and services in whatever manner they saw fit. Member states routinely applied price preferences for domestic products, and goods required for government consumption were often imported on the basis of political or other ties.

In recent years, voices have been raised against the additional cost that these discriminatory measures could impose on the state and therefore the taxpayer. It has also been argued that the regulation of government procurement could open new markets for less developed nations (see, e.g. Commonwealth Secretariat 2000). These arguments have given impetus to moves to include procurement matters in the WTO stable.

Government procurement accounts for a substantial percentage of world trade. In my home country, South Africa, government procurement represents about 13 per cent of GDP and 30 per cent of all government expenditure (Ministry of Finance/Ministry of Public Works 1997). In developing countries, it can often account for 50–70 per cent of imports (Wittig 1999). For anyone interested in liberalising international trade, the holes that procurement represents in the WTO umbrella must appear large.

Thus at first glance the motivation for regulating procurement on a multilateral level appears patent. The goal of the WTO is to liberalise and establish rules for trade, government procurement represents a large chunk of international trade, and so the WTO would be falling short if government procurement were left largely unregulated. Yet what form of regulation is feasible, and does it automatically involve liberalisation? What do WTO members hope to achieve? In order to answer these

questions it is necessary, first, to provide an overview of the fora within the WTO where procurement matters are being canvassed. Thereafter, the expressed rationale for each one will be discussed.

## 2.2 The World Trade Organization fora on procurement

Government procurement is working its way up the WTO agenda and is currently being addressed in no fewer than three different fora: the GPA, the Working Party on the General Agreement on Trade in Services (GATS) Rules, and the Working Group on Transparency in Government Procurement (WGTGP). While this multiple approach may indicate a commitment to grapple with the nuances of the issues, it could just as easily indicate an absence of concerted commitment. Certainly the three-forum approach has led to a fragmentation of thinking that does not facilitate ready access for negotiators. Unless and until there is some formal integration of work, negotiators will have to familiarise themselves with all three.

The Working Party on GATS Rules, which reports to the Council on Trade in Services, is dealing with government procurement in services as provided for in Article XIII of GATS.<sup>1</sup> This is one of the three negotiating mandates for the renewed negotiations on GATS that began in 2001. The WGTGP was formed under a mandate from the Singapore Ministerial Conference of December 1996. As the name suggests, the focus of this group is on transparency issues rather than discrimination, MFN or NT.

### The agreement on government procurement

The first of the three, the GPA, is a plurilateral agreement, which came into force in 1996. It is dominated by developed nations; few developing countries have chosen to join. Signatories have been conducting on-going negotiations with a view to extending the ambit of the agreement and enlarging its membership. It aims to address the commercial concerns raised by discriminatory measures. Some developed countries want the agreement to have an expanded ambit.

The goal of the GPA in regulating government procurement finds clear expression in its opening paragraphs:

*Recognizing the need for an effective multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement with a view to achieving greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade;*

*Recognizing that laws, regulations, procedures and practices regarding government procurement should not be prepared, adopted or applied to foreign or domestic products and services and to foreign or domestic suppliers so as to afford protection to domestic products or services or domestic suppliers and should not discriminate among foreign products or services or among foreign suppliers[.]<sup>2</sup>*

In other words, the GPA hopes to achieve greater liberalisation and expansion of world trade, to improve the international framework for the conduct of world trade, to avoid protection of domestic products, services or supplies or discrimination against foreign providers of products, services or supplies. This rationale is actualised in Article III (National Treatment and Non-discrimination), which provides as follows:

1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than:
  - (a) that accorded to domestic products, services and suppliers; and
  - (b) that accorded to products, services and suppliers of any other Party.
2. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall ensure:
  - (a) that its entities shall not treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership; and
  - (b) that its entities shall not discriminate against

locally established suppliers on the basis of the country of production of the good or service being supplied, provided that the country of production is a Party to the Agreement in accordance with the provisions of Article IV.

Thus all the provisions, including those on transparency, have non-discrimination as their *raison d'être*. The detailed procedural obligations relating to transparency in tendering (Articles VII to XVI) are designed to serve the goal of non-discrimination.

Yet this bold allegiance to NT and non-discrimination is to some extent undermined by the agreement's piecemeal application. It allows signatories to specify the extent to which they will be bound by its terms.

- States may specify in a schedule, which entities are to be covered by the agreement.
- All goods are covered, but services (including construction services) are covered only to the extent that they are listed.
- Signatories can specify the thresholds above, which the provisions in the GPA will apply.
- The parties are allowed to provide for exceptions.

Moreover, there are specific provisions for SDT allowing developing countries which wish to maintain discriminatory practices to enter the GPA through the provisions of Article V. This Article expressly recognises the need of developing countries *inter alia* to 'promote the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backwater areas; and economic development of other sectors of the economy'.

Should a developing country wish to enter through this door the transparency issue will come to the fore. There will need to be full disclosure of all relevant laws, regulations, judicial decisions, administrative rulings, etc. In other words, allowance is made for discriminatory practice on condition that it is applied in a transparent manner. Depending on its extent, disclosure could impose something of a burden on developing countries (see below).

These exemptions and limitations make the GPA a particularly cumbersome agreement. Any state that wishes to know whether a particular contract is bound by the GPA needs to check a whole range of details. First, is the state a signatory, and is the particular entity bound? Where the contract is for the supply of a service, the next question is whether the activity is covered. In all cases, is the contract threshold higher than that specified by the party? And: Is the contract excluded by one of the exceptions?

Thus the only WTO instrument regulating government procurement, while bold in intent, is somewhat fractured in actualisation. It has failed to achieve uniform consensus among its signatories. Can multilateral negotiations hope to do better and achieve this consensus? Or does government procurement encompass so many varied policy and practical considerations, so many sensitive social and political issues and so much variation in domestic practice and procedure as to render it unsuitable for multilateral regulation?

#### **The working party on the General Agreement on Trade in Services rules**

As is the case under the GPA, the GATS enunciates the relationship between transparency and market access in the preamble:

*Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries ...*

Here the primary goal is the expansion of trade. Transparency is a condition precedent for this expansion, and is closely related to the opening of previously closed markets.

#### **The working group on transparency in government procurement**

The WGTGP was given a mandate by the Singapore Ministerial Conference 'to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement'. While the

GPA boldly declares the relationship between transparency and discrimination, the WGTGP is far more coy. In fact, one of the issues that persistently raises its head in deliberations is whether the working group is mandated to consider issues of discrimination at all, or whether it is strictly limited to transparency issues. Participants have proposed various answers to this question.

Some have suggested that a clear distinction should be made between obligations on transparency on the one hand, and market access commitments on the other. This approach argues that potentially discriminatory mechanisms fall under the mandate of the WGTGP only insofar as their transparency is concerned; their discriminatory substance does not fall under the mandate. The implication is that nations are free to discriminate as they see fit, as long as they do so in a transparent manner!

The response to this argument (which has also been raised in the WGTGP) is that foreign suppliers are not concerned with transparency for its own sake in markets to which they have no access. Further, it is argued, the administrative burden imposed by transparency obligations is far too weighty to warrant their application where procurement opportunities are open only to domestic suppliers.

The logical outcome of this argument is that where the procurement opportunity is open only to domestic suppliers there is little need for transparency disciplines. By contrast, where the market is open to foreign suppliers the need for transparency is greater. This leads to the somewhat paradoxical conclusion that members who open their procurement markets to international competition will find themselves burdened with transparency disciplines, while those that retain discrimination are excused!

These points are made to emphasise that there is a lack of lucidity on precisely what multilateral negotiations on transparency would hope to achieve. Further, they point to the difficulties that are encountered when attempting to divorce transparency from discrimination issues. For developing countries that may have their own agendas in initiating procurement reform, this lack of clarity is unfortunate. It is hard to assess the desirability of reform measures when one is unclear why they are being introduced.

Similar problems arise for the design of appropriate SDT. To the extent that any rules are limited to transparency, the goal of SDT might be to relieve poor states from obligations which, while desirable in themselves, have a high opportunity cost (the potential scale of which is elaborated below). If the rules cover market access, the goal of SDT might shift *inter alia* to permit the types of intervention legitimised by the GPA Article V as noted above. If a WTO regime were to aim for both transparency and market access, cross-cutting SDT would be required in each to avoid a situation, for example, in which markets were opened only to states able to justify high levels of *formalised* procedures for transparency.

### 2.3 The Doha Declaration

The Doha Declaration appears to resolve the issue: it expresses a clear divorcing of transparency from non-discrimination. Paragraph 26 provides that future negotiations shall be limited to the transparency aspects and will not restrict the scope for countries to give preferences to domestic supplies and suppliers. The declaration goes on to state that transparency in procurement negotiations is to be separated from the plurilateral GPA. The import of this provision is clear: multilateral talks will proceed on transparency issues alone; discrimination will not be addressed. As bold as the GPA is in uniting transparency and discrimination, so bold is the Doha Declaration in divorcing them.

However, to declare transparency and discrimination divorced is one thing, to separate them from each other in theory and practice is quite another. Furthermore, if discrimination is not at issue then what is to be achieved through WTO negotiations on transparency? There are, clearly, numerous advantages to having transparent procurement processes, but are these all trade issues? And, to the extent that they are, can they best be addressed through a *multilateral* agreement?

Notwithstanding the express words of the Doha Declaration, negotiators may well find that the issues of transparency and non-discrimination are so closely linked that non-discrimination issues flavour the outcomes of these, and subsequent, transparency negotiations. The starting point for any future, more ambitious, negotiations would be the agreements already reached in transparency negotiations.

With this in mind, any negotiations on transparency need to keep open a weather eye on the possible implications for subsequent negotiations on discrimination (and SDT provisions will need to be framed accordingly). Moreover, one of the opportunities presented by negotiations on transparency is that they may force developing countries to revisit their (discriminatory or non-transparent) procurement policies and instruments (Evenett 2002). If the threat of multilateral negotiations on transparency achieves little more than forcing countries to assess critically their procurement policies, much will have been achieved (albeit not all trade related).

### **3 Transparency as a means to an end**

Is transparency a goal in and of itself, or is it a means to an end? While transparency is clearly desirable, positive and constructive, it has these characteristics because it serves certain desirable, positive goals. These include: undermining corruption, promoting the integrity and effectiveness of the public service, competition and value for money, the collection of reliable data on procurement, good governance and sound administration and – key for the WTO – the interest of non-discrimination.

These differing goals may be served by different regimes on transparency, operating at various levels. For example, the transparency required to avoid corruption might be different from that needed to promote international trade; a transparency discipline to ensure that all potential suppliers have access to information will not necessarily promote the collection of data. Sometimes a stringent transparency regime is required and warranted in order to achieve a particular goal, but in other instances the goal may not be so important as to justify the most costly, burdensome regime.

Given limited finance and capacity, developing countries need to prioritise their procurement reform measures. Otherwise, the WGTGP could propose measures that place an immense burden<sup>3</sup> on them without necessarily addressing their priority needs. Their task is complicated by the lack of clear direction from the WGTGP as to what it hopes to achieve through multilateral

transparency talks. The Doha Declaration tells us quite clearly what transparency talks do not hope to achieve, but still shies away from enunciating what they will achieve.

This lack of clarity also presents an opportunity. Developing countries have, now, the chance to determine what they hope to achieve through transparency negotiations and to ensure that their domestic aspirations are included in negotiations. So, what sorts of function could a multilateral agreement on transparency provide?

#### **3.1 Domestic benefits of procurement reform**

In recent years attention has, in many countries, been directed at the spending power of government and the need to ensure that it is done in accordance with appropriate principles. Many countries have set off on a path of procurement reform, often with the assistance of outside agencies.

When a country embarks on procurement reform it is usually taking one of two possible routes. The first is what might be called “true reform”. It aims to deal with problems within the procurement system which render it less transparent, more open to corruption, less cost effective, inequitable or otherwise inefficient and in need of reform. The second route is what might be called “reform for development”. It describes the case when governments wish to use their spending power in order to achieve certain socio-economic goals. This could occur in an environment where the underlying procurement system is appropriate, cost effective, equitable, transparent, competitive and generally healthy but where procurement restructuring is aimed at achieving certain socio-economic ends.

These two paths are not necessarily divergent. A country may embark upon both reform of the procurement system and directing the system at particular goals. The relationship between the two paths is neatly illustrated in the South African Constitution, which is thus far the only constitution worldwide to regulate procurement. It provides, in s.217, that:

1. When an organ of state in the national, provincial or local sphere of government, or

any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

2. Sub-section (1) does not prevent the organs of state or institutions referred to in that sub-section from implementing a procurement policy providing for:
  - (a) categories of preference in the allocation of contracts; and
  - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
3. National legislation must prescribe a framework within which the policy referred to in sub-section (2) must<sup>4</sup> be implemented.

The first two sub-sections of this provision neatly encapsulate the two levels at which procurement restructuring may be directed:

- Sub-section (1) focuses on internal reform of the procurement process itself so as to ensure that there is a procurement system and that it is fair, equitable, transparent, competitive and cost effective.
- Sub-section (2) allows procurement restructuring where the goal is to achieve the socio-economic goal of uplifting those members of the society who have been disadvantaged by, among other things, South Africa's apartheid history.

Reform for development may, for example, be directed at poverty alleviation programmes, at sustaining a particular macro-economic policy, at advancing smaller enterprises or, as is the case in South Africa, at overcoming the socio-economic imbalances created by apartheid. These indirect goals are invariably achieved through some form of preferencing and with instruments, which are, by their very nature, discriminatory. There are numerous forms that this discrimination may take, some of them transparent, objective and measurable, others more discretionary.

Thus, in assessing the domestic benefits of a reformed procurement regime developing countries

will need to determine the ills at which their reform programme is targeted. Is this true reform in that the procurement system itself is ill? Is it using a healthy procurement system to address socio-economic ills in the society? Or is it a combination of the two?

### 3.2 Weighing up the procurement options

Unless multilateral rules are specifically tailored to developing country needs, they will not necessarily be the cheapest or the most effective means of achieving particular goals. The problem is illustrated by the example of corruption. One country riddled with corruption might determine that the most appropriate way of overcoming it is not to place additional burdens on an already overworked public sector, but to form an independent anti-corruption agency; to introduce a charter of ethics; to send officials on training courses; to introduce a system for the protection of whistle blowers, etc. Another country might decide that, in its case, the problems arise from inadequate policing of the procurement system, and might decide to allocate funds to monitoring, policing and reform of the criminal justice system. A third country might determine that the corruption results from inadequate legislation, and a fourth country might feel that its problems are the result of all of these.

Since the potential solutions to corruption are as many and varied as are causes, the implication is that any WTO rules should provide a broad enabling framework legitimising a wide range of approaches. This is, in truth, the norm in many parts of the WTO texts (not least Article V of the GPA, and see also the provisions on agriculture as described by Michalopoulos, this volume). But the obverse is that the gains to be obtained from a WTO regulation may be reduced correspondingly. For example, while bribery and corruption are on the WGTGP's list of "Issues Raised and Points Made", the strong view expressed in its deliberations is that they do not fall within its mandate. Thus, a developing country which wishes to use procurement reform to address issues of corruption may well find that the topic does not come into the deliberations, still less the subtleties in approach required to cure ills.

If anti-corruption reform initiatives are required separately from any multilateral reform, developing

**Table 1: Types of pro-development discriminatory government procurement**

Scheme type	Methods	Actions associated with the method
Reservation	1. Set-asides	Allow only enterprises that have prescribed characteristics to compete for the contracts or portions thereof, which have been reserved for their exclusive execution.
	2. Qualification criteria	Exclude firms that cannot meet a specified requirement, or norm, relating to the policy objective from participation in contracts other than those provided for in the law.
	3. Contractual conditions	Make policy objectives a contractual condition, e.g. a fixed percentage of work must be sub-contracted out to enterprises that have prescribed characteristics or a joint venture must be entered into.
	4. Offering back	Offer tenderers that satisfy criteria relating to policy objectives an opportunity to undertake the whole or part of the contract if that tenderer is prepared to match the price and quality of the best tender received.
Preferencing	5. Preferences at the shortlisting stage	Limit the number of suppliers/service providers who are invited to tender on the basis of qualifications and give a weighting to policy objectives along with the usual commercial criteria, such as quality, at the shortlisting stage.
	6. Award criteria (tender evaluation criteria)	Give a weighting to policy objectives along with the usual commercial criteria, such as price and quality, at the award stage.
Indirect	7. Product/service specification	State requirements in product or service specifications e.g. by specifying labour-based construction methods.
	8. Design of specifications, contract conditions and procurement processes to benefit particular contractors	Design specifications and/or set contract terms to facilitate participation by targeted groups of suppliers.
Supply-side	9. General assistance	Provide support for targeted groups to compete for business, without giving these parties any favourable treatment in the actual procurement.

Source: Watermeyer (2002).

countries will need to ensure that no conflict exists between the requirements of their internal anti-corruption initiatives and a multilateral agreement. At the very least it seems potentially overburdensome to require procurement anti-corruption initiatives to operate in addition to the transparency requirements of a multilateral agreement.

Another example of the need to tailor multilateral rules on procurement to the needs of a particular country is provided by the example of unbundling of contracts. Unbundling is a process whereby major contracts are divided into several sub-units to help smaller, possibly marginalised, suppliers to engage in mainstream contracting. One country to



employ this mechanism is South Africa, where the apartheid history necessitates steps to assist those disadvantaged by the past. One of the recognised mechanisms used by the South African government as a means of assisting previously marginalised players is the unbundling of state contracts, also known as “break-out procurement”.

To see how such a policy could easily fall foul of future multilateral rules, consider how such regulations might be applied differentially according to contract size. *De minimis* provisions are well recognised in the WTO. It has been suggested, for example, that smaller contracts should be excluded from the scope of any agreement or, if included, should have less burdensome procurement requirements. But if such thresholds are included in an agreement there will be a positive obligation on member states to avoid deliberate evasion. It would not be unreasonable to require them to avoid the deliberate splitting up of large contracts so as to bring each one under the value threshold, and to include this positive obligation in their legislation.

While necessarily hypothetical, this example is not implausible, and it demonstrates how a WTO requirement, perfectly reasonable in itself, could undermine the desirable development objectives of a government. This is because a government which chooses to employ unbundling strategies for development purposes will specifically aim to award many small contracts instead of a few major ones. How are these governments to deal with “one-size-fits-all” threshold requirements that may be negotiated into a multilateral agreement? This would be a clear candidate for SDT provisions, but how would they be framed? It would not be difficult to adopt provisions that apply just to contract unbundling, but the reasonable assumption is that this is just the tip of an iceberg. There will be other, less easily recognised, areas in which a potential conflict could arise.

The issue of unbundling is just one example of how discriminatory government procurement can be used to achieve socio-economic goals. Watermeyer (2002) identifies nine implementation methods (Table 1).

A brief glance indicates that there are advantages and disadvantages attached to each method. The

choice will depend on factors such as the socio-economic goals to be addressed, the ability of officials properly to adjudicate tenders, the extent to which cost-effectiveness is to be sacrificed, and how far beneficiaries of the scheme are able to exploit the advantages. Set-asides, for example, are easy for officials to understand and introduce, simple to explain to tenderers and transparent; but they may be the least cost effective, the least competitive and the least equitable. For a country determined to preference directly one group of people regardless of the additional costs, set-asides may present the best option. But a country concerned about cost and competitiveness, with a public sector capable of properly adjudicating tenders, may find the use of preferential award criteria better suited.

Given this diversity of cost-effectiveness, any multilateral rules need to be framed sufficiently broadly to allow developing members to choose the most suitable form. This will be a challenge. But, in fact, the difficulty in identifying rules that are both sufficiently precise to be binding and adequately flexible may be even greater than is suggested by Table 1. These nine discriminatory mechanisms do not necessarily encapsulate all of the subtle, often opaque, forms of discrimination. The reality is so complex that discrimination is often not amenable to rules-based regulation.

### 3.3 Discrimination and transparency in practice

The process of procuring goods, services or works is often a lengthy, staged one that allows many entry points for discrimination and a lack of transparency. This can be seen more clearly by breaking the process into three stages:

1. The invitation stage (sometimes referred to as the enquiry).
2. The adjudication stage (sometimes referred to as evaluation).
3. The execution stage.

Since it is beyond the ambit of an article to discuss all possible discriminatory mechanisms, this section discusses a few of the more important and representative.

### Discrimination at the invitation stage

Is an open invitation made to all interested suppliers or to only some? Article VII of the GPA distinguishes three different types of invitation:

- the 'open' invitation, to which 'all interested suppliers may submit a tender';
- the 'selective' invitation, to which only 'those suppliers invited to do so by the entity may submit a tender', and
- the 'limited' invitation, where the entity 'contacts suppliers individually'.

In addition, the government may use the mechanism of set-asides to direct certain work for a (named) class of person.<sup>5</sup>

While set-asides and all but the open form of invitation are clearly discriminatory, they are transparent and overt. This makes them relatively amenable to rules-based regulation. It is fairly straightforward to regulate the circumstances when selective or limited tenders will (not) be allowed. Also, monitoring how contracts are invited ought not to be too difficult. This amenability to regulation is reflected in the GPA, which has very neat rules regulating when selective and limited tendering procedures may be used.<sup>6</sup>

For many suppliers the tidy regulation of open, selective and limited tenders provides cold comfort in the face of the less overt and far more costly forms of discrimination that may be employed. At least an excluded supplier does not go through the time-consuming and expensive process of preparing a bid, unaware that some other, covert form of discrimination is operating to prevent it being accepted. Where bidders find themselves preparing numerous futile bids, there is a real danger that prices for the supplies being offered may increase as bidders factor preparation cost into the prices of those jobs that are won. Thus, not only do these mechanisms prevent a particular supplier from accessing a market on an equal footing, but they could also increase the world price for the goods or services being supplied.

Less overt discrimination techniques include drafting the technical specifications of the work in such a manner as to ensure that only a limited number of

suppliers are able to meet them or to make it more costly for certain suppliers than for others. Another more covert mechanism is the manipulation of time periods for the submission of tenders. They may be made so short as to reduce the number of tenderers who can meaningfully participate. Another, potentially discriminatory mechanism is the choice of contract document. A proliferation can seriously hamper would-be suppliers: the allocation of risk between different contracts may mean that tenderers who are unfamiliar with a particular form are at a disadvantage.

Regulation of these mechanisms is very difficult at the national level and could prove well-nigh impossible at a multilateral level. In attempting to develop multilateral rules to prevent the more subtle forms of discrimination negotiators may need to tread a very fine line. Rules that are too prescriptive could bring unwanted side-effects, while those that are too flexible could render their effect nugatory. An agreement, for example, that prevents overly technical specifications could open the door to greater abuse by officials who are granted increased discretion through vague specifications. If time periods for the submission of tenders are too long they could interfere with budgetary cycles and financial planning by procuring agencies. It would surely be overly prescriptive to limit the forms of contract that procuring entities may employ.

Some of these difficulties are clear from the somewhat vague, aspirational wording of the GPA provisions on technical specifications. This code provides, in Article VI, para. 1, that: 'Technical specifications laying down the characteristics of the products or services to be procured ... shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.' It goes on to provide, in para. 2 of the same Article, that:

Technical specifications prescribed by procuring entities shall, *where appropriate*: (a) be in terms of performance rather than design or descriptive characteristics; and (b) be based on international standards, where such exist; otherwise, on national technical regulations, recognized national standards, or building codes.<sup>7</sup>

The prohibition is framed in very broad terms, focusing on the intention and the effect of the

specifications rather than the nuts and bolts of what is and what is not to be allowed. To be more specific is to run the risk of unwanted side-effects.

#### **Discrimination at the evaluation stage**

The evaluation stage of procurement is ripe with opportunities for discrimination. The tender documents may have provided for a price preference to be allocated to named classes of suppliers at expressed percentages. Alternatively, the preferencing may, as in the South African case, be provided for in legislation<sup>8</sup> or in the contract specifications.<sup>9</sup> The prospective suppliers may be made aware of the preferencing: the formula used to calculate the preference and the class of people to be preferred. In such a case the system, while discriminatory, is transparent. But other, less transparent, mechanisms may be employed. These include the elimination of any tender that does not, in the opinion of the official, meet the formal requirements for the tender. Clearly, the more complex, technically specific and prescriptive the tender documents, the easier it will be for an official to reject a tender on the basis of non-compliance. In the most opaque circumstances, officials may discriminate at this stage by awarding tenders as they see fit, independent of any rules, regulations or guidelines.

#### **Discrimination during the execution stage<sup>10</sup>**

Most of the disciplines suggested by the WGTGP and GPA are aimed at transparency in one of the two earlier stages of procurement, probably since any discrimination which occurs during the execution stage is both difficult to track and hard to remedy. But the discriminatory mechanisms employed at this stage should not be ignored, particularly since they illustrate some of the difficulties encountered in attempting to regulate government procurement. One device employed at this stage to prefer one supplier over another is differential “bailing out”.

The most widely recognised circumstance for bailing out is when the government client agrees to assist a supplier who has bid too low and finds, during the execution, that he is unable to fulfil the contract due to financial constraints. This commonly occurs in the construction industry when contractors underbid at the tender stage. When the contractor realises that he cannot possibly make a profit on the

contract he is often tempted to abscond or to declare insolvency, leaving the client with incomplete works. The government client, faced with this situation can do one of two things. The first option is to refuse to bail the contractor out. While this may be the most contractually sound route, it is often not the most cost effective. The client now has to re-invite tenders, and may well find that new bidders, wary of the risks associated with completing someone else's (possibly defective) work and aware that the client may now be under severe time constraints, submit inflated bids. Many government clients faced with this situation choose the second option, and bail the incumbent contractor out by agreeing to finance the completion of the works. This process is often justifiable in the interests of completing the works in the shortest time and at the lowest cost.

A second, less overt bailing out practice, common in government contracts in South Africa, occurs when officials choose to turn a blind eye to a failure by the contractor to meet his contractual obligations for broader developmental reasons. An example of this is in the construction industry where standard contracts often provide that the contractor will be entitled to additional time and/or additional money if (but only if) certain notice requirements are satisfied within a specified time period. In South Africa, where the Department of Public Works has spearheaded a campaign to advance “emerging contractors”, it is common for officials to waive the notice requirements should unsophisticated contractors fail to serve notices in circumstances where they would, otherwise, be entitled to claim additional time or money. Similarly, officials often choose to waive the government's right to claim liquidated damages where “emerging contractors” fail to complete on time. The same assistance is not always offered to established contractors, since officials do not necessarily feel the need to assist.

These two forms of bailing out raise different issues. The first case is the more straightforward, since bailing out may serve the financial interests of the state; the official who chooses not to bail out could cause additional cost to the state. It is therefore in keeping with sound financial management and competition. In the second case, by contrast, the decision to bail out is in direct conflict with the financial rights of the state, in the

short term at least. The decision to waive is not cost effective but is in keeping with the development agenda of the government.

Differential treatment may lead to effective discrimination. Potential suppliers may track the bailing out patterns of particular governments or departments and decide that the risk of not being bailed out is too high. Thus, one tenderer may submit a reasonable bid, which covers all the requirements of the works on the assumption that he will not be bailed out. Another may submit a bid, which is too low, secure in the knowledge that he will be bailed out should he find himself in financial difficulties.

Bailing out presents an interesting challenge to procurement regulation. It occurs after the contract has been awarded, and once the works are progressing. For tenderers to cry foul at this stage is usually ineffective and could prejudice future relations with the client. Also, it may be very difficult to separate the bailing out that serves a justifiable developmental or financial interest from that which serves a self-serving, corrupt interest.

#### **4 Rules-based regulation of procurement**

The scenarios painted above illustrate a mere handful of the discriminatory practices in which officials may engage. Governments have a wealth of discriminatory practices to choose from, and some are more cost effective or more transparent or more equitable than others.

Most importantly, these examples illustrate the intensity of intervention required if transparency and non-discrimination were truly to be ensured. Regulation would have to refer to the minutiae of procurement practices and would require monitoring of every stage of procurement at an extremely close level. The experience of other WTO agreements suggests that such tight regulation is unlikely, at least across the board. Furthermore, such tight regulation may not be desirable given the wide range of approaches to procurement reform. In the absence of any clear guidance from the WTO fora, this article assesses the implications of the two extreme alternatives: a very precise regime that might remove

discrimination but at the cost of a heavy burden of compliance, and a looser regime that would leave developing countries as victims of opaque or discriminatory practices by other member states.

In practice, any regime on discrimination might have elements of both extremes: highly detailed provisions in some areas and only general principles in others. This would not avoid the problems. The detailed sections could make developing countries vulnerable to challenge in dispute settlement with respect to their own policies. And even broad rules might create problems. Take the example of the South African constitution.

The relevant section of the South African constitution (s.217) was cited in Section 3.1.

The wording of sub-sections (1) and (2) is probably sufficiently broad and aspirational to accommodate the terms of a multilateral agreement. Sub-section (3), however, is more problematic. This sub-section clearly calls for national legislation, which prescribes a *framework* – and only a framework – within which the policies must be implemented. Legislation must not completely tie the hands of procuring officials, but must provide them with a framework within which they are allowed to exercise discretion and make choices.

This provision for administrative latitude is by no means accidental. The awarding of contracts is, by and large, a function of the administrative arm of government. While this function can be regulated by legislation, a certain amount of discretion is vested in the administrative officials who are responsible for budgets and spending.

This broad, framework approach to the regulation of procurement would surely be at odds with a highly technical, particular approach in a multilateral agreement, even in only one part of that agreement. Can the South African constitution accommodate a situation where national legislation prescribes more than simply a framework? It seems that the South African scenario may be an extreme one, where amendment to the constitution could be required rather than amendment of legislation.

Given the improbability of a highly detailed, prescriptive WTO agreement, the example is

provided to illustrate a systemic problem. Even if a WTO accord provided only a few tight provisions, it could still create a need to amend the South African constitution's *requirement* that the law provide only a framework.

#### 4.1 Administrative burden of compliance

Deliberations in the WGTGP have considered some of the detailed points in which discrimination could arise. They have raised, for example, the possibility of governments debriefing unsuccessful tenderers, providing detailed information on contract awards, reasons for the award, up-to-date information on procurement laws and regulations, etc. While all of these may well be desirable, compliance could place heavy burdens on an under-resourced administration.

To illustrate this point, consider two of the issues identified by the WGTGP's *List of Issues Raised and Points Made*:

- publication of information on procurement opportunities and on rules, regulations and laws governing procurement, and
- information on procurement opportunities, tendering and qualification procedures.

It would be hard not to argue that the publication of information on procurement opportunities and on rules, regulations and laws governing procurement is a cornerstone of transparency. The question is what level of publication will be called for and what a particular administration can realistically offer to provide. The burden of compliance will differ between countries, as will the capacity to fulfil. In South Africa, there exists a highly decentralised and flexible system. Each organ of state, of which there are hundreds, is free to determine its preferencing policies as long as this is done within a prescribed framework.<sup>11</sup> The administrative burden and financial cost of collecting and publishing each of the policies of each state organ would be immense, not least because any publication would have to be updated regularly.

Even if this burden is shouldered, other member states may attain little more than the belief that they

understand the procurement regime applied in South Africa. Anecdotal evidence suggests that the policies that have been put in place by various organs of state diverge quite widely (notwithstanding the framework) and that many organs of state either have no policy or do not follow the one that they have. A recent report (Manchidi and Harmond 2002) into the impact of the targeted procurement specifications employed by the South African Department of Public Works for seven years<sup>12</sup> found itself unable to make an accurate assessment of the effect due to the absence of uniform procedures and reliable information. This report, interestingly, ends up by relying on anecdotal evidence and drawing conclusions that are necessarily limited as a result. The constraints to accurate assessment identified by the report were:

- reliable and consistent data were limited, and the available data were often unsubstantiated;
- some procuring entities have made efforts to capture data on tender awards but different entities have used different mechanisms, thus making it difficult to compare like with like;
- while there are statutory instruments regulating procurement, some entities introduced these instruments late;<sup>13</sup>
- there is a lack of policy evaluation tools;
- researchers found limited information on supply-side interventions.

The report concludes that:

Even National Treasury, which is the guardian of the Preferential Procurement Policy Framework Act and Public Finance Management Act does not have comprehensive instruments to monitor and evaluate performance. The current [State Tender Board] instrument does not capture goods awarded by departments, provinces, local governments and other organs of state (Manchidi and Harmond 2002: 25).

Even if a country were able to comply, the introduction of onerous technical procurement disciplines could be counter-productive. In South Africa, for example, a much publicised concern is

under-spending by the public sector. In the period April 2000–January 2001, for example, both the Department of Housing and the Department of Health spent less than half of their allocated capital expenditure budgets (SAFCEC, quoted in Dept of Public Works 2002). A key reason appears to be a lack of capacity to manage complex, difficult procurement processes. This paralysis will not be eased by additional onerous, highly technical procurement procedures.

## 4.2 Benefits for developing countries of a multilateral agreement

While developing countries stand to gain directly from domestic procurement reform, they will gain from this being linked to multilateral rules only if the link facilitates domestic reform (on which the foregoing analysis casts doubt) or if the adherence of other states to the reform is beneficial. The most obvious way in which the second of these might apply is from the opening of new markets for developing country exports. How likely is it that a WTO regime will open markets? There are two areas of doubt. First, there is no guarantee that a multilateral agreement will prevent discrimination (as explained above), and other barriers could prevent developing countries from exploiting even truly open procurement markets.

The message from Doha is clear and unequivocal: multilateral talks will not be aimed at discrimination but at transparency. The “gains” for developing countries of opening new markets will therefore not occur as a result of the type of multilateral agreement that Doha envisages.<sup>14</sup> Even so, it could be argued that the mere fact that tendering opportunities become transparent, published and available to all will lead to a degree of market opening. This argument has merit only if two requirements are satisfied: developing countries have the resources to track the opportunities (which, clearly, some do but some do not), and are not prevented from exploiting them by discriminatory practices that fall outside the WTO regulations.

### Non procurement-related barriers

What sorts of discriminatory barrier do suppliers from developing countries face? To provide an illustration, I have chosen the South African construction industry.<sup>15</sup> A large percentage of the

South African procurement market is construction related.<sup>16</sup> The South African construction industry has been something of a guinea pig on a number of government initiatives that extend price preferences and other potentially discriminatory preferences to certain groups of contractors. It is represented by relatively well-organised industry bodies, which have put considerable effort into gathering information on the industry at home and abroad. The South African construction industry is already exporting construction works quite widely and it therefore stands to gain from any liberalisation of international trade. Finally, construction services are to be negotiated in this round of negotiations on trade in services and some of the issues discussed here may be relevant to those negotiations.

An April 2002 report of The South African Federation of Civil Engineering Contractors (SAFCEC 2002) shows that South African construction companies are exporting to the following countries:

- *in Africa:* Angola, Botswana, Eritrea, Ethiopia, Ghana, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritius, Mozambique, Namibia, Seychelles, Swaziland, Tanzania, Uganda, Zambia, Zimbabwe;
- *in the Middle and Far East:* Abu Dhabi; Dubai, India, Turkey, Malaysia, Singapore, Australia;
- *in South America:* Argentina and Brazil.

A glance shows that we are dealing predominantly with developing countries, even though the South African construction industry is relatively sophisticated, globally competitive and bolstered by a weak currency. Much of the construction work undertaken in these countries will be financed by funding agencies such as the World Bank or the EU, which apply their own procurement requirements. These may serve as effective barriers to entry by firms from “the wrong country”.

In such cases, multilateral regulation of government procurement, however effective, is either irrelevant or is a sledgehammer to crack a nut. If it excludes aid procurement it is irrelevant. If WTO members are willing to untie aid, then the

gains for developing countries of increased market access can be achieved much more easily than via a WTO accord on government procurement. How much simpler to untie aid procurement (perhaps through the OECD) than to attempt a multilateral agreement, and, for many developing countries, how much more effective.

Even in an aid programme that does not serve protectionist ends, like that of the World Bank, there may be problems. The World Bank (1999) lists five “basic concerns” that govern its procurement policies, with a tension between two of them:<sup>17</sup>

- to give all qualified bidders from the Bank’s member countries an equal opportunity to compete for Bank-financed contracts;
- to encourage development of local contractors and manufacturers in borrowing countries.

While the former will allow firms from most developing countries to tender since they are Bank member countries, the latter raises the spectre of discrimination, which may or may not be mitigated by transparency requirements.

Procurement policies, narrowly defined, are not the only obstacles to trade. One common complaint is that restrictions over the movement of persons are a non-tariff barrier to trade. The SAFCEC Export Committee has found that South African construction companies doing work abroad source about 30 per cent of staff in South Africa and move them on to the projects. Most of these staff members are key management and skilled workers who are familiar with the firm’s project management systems, technical methodologies and implementation requirements. A firm could be seriously prejudiced if it found itself prevented from moving these people through visa requirements, residence requirements or other barriers.

Similarly, many construction contracts require the cross-border movement of plant and equipment. SAFCEC reports that plant and equipment supply companies estimate that 80 per cent of new plant bought in South Africa is taken out of the country for use in fulfilling foreign contracts. Aside from the non trade-related, logistical problems presented by such movements, construction companies may face

barriers in the form of import permits, licences, health and safety requirements and the like.

Finally, it is not only procurement regulations that need to be transparent and non-discriminatory. Exporters of construction services need an understanding of local legislation, regulations on health and safety issues, licensing of practitioners, etc. Transparency in procurement regulations and opportunities will help little if there is a lack of transparency in all of these other areas. Indeed, many of the serious obstacles faced by South African exporters of construction works fall outside the mandate of the WTO (Teljeur and Stern 2002).

## 5 Conclusion

It is not surprising that the WTO is directing its attention towards government procurement reform and the possibility of multilateral talks on procurement matters. Many other agencies are also advising procurement reform and many developing countries are either currently reforming their procurement systems or are planning to do so. The question is not so much whether procurement reform is needed as it is which reform measures should be taken and with what goal in mind. Answering these questions is a prior requirement to the framing of appropriate SDT.

Given that the Doha Declaration expressly excludes discrimination from the issues to be included in a multilateral agreement, it is appropriate to consider, first, what SDT is required in an agreement on transparency. Here the issue is not one of development desirability: other things being equal, a transparent procurement regime is “a good thing”. The problem is a likely disproportion between costs and benefits. Substantial transparency could easily be costly to supply. In the light of other (possibly non WTO-related) barriers to exports from developing countries, the benefits of a multilateral agreement limited to transparency could be greatly outweighed by the administrative cost of compliance. A very light transparency regime limited to general principles would reduce the problem, but the question then arises as to whether it would serve any useful purpose. One potential purpose would be to provide the foundations for more ambitious, subsequent rule-making. In this case, however, it would be wise for the SDT provisions to be incorporated from the outset into the foundations.

If a WTO regime were to move beyond transparency (either in this Round or a subsequent one), what form would best suit developing country needs? Ideally, developing countries should use the Doha window to establish what they hope to achieve through procurement reform and, from this, how a WTO regime might help or hinder. In practice, of course, this may not happen, and so it is desirable to develop, in parallel, a list of the potential pro- and anti-development features of multilateral rules aiming to limit discrimination in public procurement.

Three arguments frequently advanced in favour of a multilateral regime are that:

1. *ex ante* it acts as a catalyst, increasing the influence of domestic lobbies seeking reform, and therefore makes it more likely that reform will take place;
2. *ex post* it locks in domestic reform and, hence, instils confidence in economic operators which, in turn, enhances the positive impact of reform;
3. it offers the “carrot” of improved access to export markets to offset the political pressure generated by domestic suppliers who fear increased competition.

Given the incoherence of the WTO debate, it is not clear how it could play the *ex ante* role at the present time. If things are to change it appears more likely that they will do so as a result of

governance and public administration debates within countries rather than at Geneva.

Again, WTO disciplines are unlikely to provide convincing *ex post* locking in; at least for the foreseeable future. There are so many ways in which officials can discriminate, and the prospect of a similarly precise and detailed set of WTO rules appears to be remote.

In these circumstances, it could be argued, the most developmentally friendly early plurilateral or multilateral rules would be those that:

- provide improved access for developing country exports;
- impose few demands in terms of reporting and procedures that go beyond the public sector reforms that developing country WTO members intend to introduce for domestic reasons.

A first step would be for all OECD states to untie procurement of their aid contracts. This need not occur in the WTO, although it could be linked. For example, if the OECD states were willing to untie, but wished to use this as a lever to encourage improved practice by developing countries, the WTO negotiations could be used to identify codes of “good practice”. These would be non-binding in terms of WTO dispute settlement, but could be used in the autonomous actions of the aid donors to justify extending procurement to some developing countries and not to others.

## Notes

1. The other two negotiating mandates being: emergency safeguard measures under Article X of GATS; and subsidies under Article XV of GATS.
2. Emphasis added.
3. The potential administrative burdens are discussed in Section 4.1.
4. This sub-section initially read ‘within which the policy referred to in subsection (2) may be implemented’. The word ‘may’ was changed to ‘must’ by the Second Amendment Act 61 of 2001.
5. The South African Department of Housing used this mechanism to set aside certain housing contracts for female contractors only.
6. See Article X, paragraph 3, and Article XV.
7. Emphasis added.
8. The Preferential Procurement Policy Framework Act 5 of 2000 provides for a preferencing in the ratio of 90:10 for contracts valued at above a prescribed amount (currently R500,000, or about US\$50,000) and a contract ratio of 80:20 for contracts below this amount, where the 10 and 20 points are allocated to preferencing criteria.
9. See, for example, the Targeted Procurement Specifications published by the South African Department of Public Works in 1995.
10. Some would argue that the term “procurement” covers only the invitation and adjudication stages. Such a limited definition does not, to my mind, capture the full process of procuring goods or services.



11. Preferential Procurement Policy Framework Act 5 of 2000 and accompanying regulations of August 2001.
12. These specifications introduce a price preferencing through the contract specifications. The system has a high degree of transparency in that formulae for the allocation of price preferences, criteria in adjudication and other factors are all freely available to tenderers in both hard copy and electronic form.
13. It is my experience that some entities have yet to introduce these instruments, while others consider themselves not obliged to do so.
14. The considerations will clearly be different should the ambit of multilateral negotiations be extended so as to include discrimination, or should it prove impossible to separate the two.
15. In choosing this sector, I realise that the problems experienced by the exporters of construction works will not necessarily be shared by other exporters. Exporters may experience more, fewer or different barriers.
16. Investment in construction-related goods by the public and private sectors has averaged just under 3 per cent of national output for most of the 1990s, with a significant contribution by the organs of the state (Manchidi and Merrifield 2001).
17. The World Bank's other three "basic concerns" are: (1) to ensure that the goods and services needed to carry out the project are procured with due attention to economy and efficiency; (2) to ensure that the loan is used to buy only those goods and services needed to carry out the project; and (3) to ensure that the procurement process is transparent.

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