A history of multilateral negotiations on procurement: from ITO to WTO

BLANK, Annet, MARCEAU, Gabrielle Zoe


Available at: http://archive-ouverte.unige.ch/unige:35132

Disclaimer: layout of this document may differ from the published version.
This leaves rather a large gap in this document, because government purchases could be extremely extensive and could cover many millions or hundreds of millions of dollars' worth of purchases for public works - for power installations and so on. The purchasing Government can discriminate as between foreign suppliers; it is perfectly free to discriminate flagrantly. That in effect is what we are saying.

—US delegate to the ITO negotiations

Although governmental purchases are the object of extensive coverage in the GPA, existing disciplines are still far away from the US proposal made during the International Trade Organization (ITO) negotiations to subject government procurement to the national treatment and MFN principles. In the event, the only provision dealing with government procurement inserted into the GATT in 1947 was an article dealing with state-trading, imposing very modest best-endeavor language requiring "fair and equitable treatment" of foreign commerce. This chapter retraces the history of multilateral negotiations on procurement. We summarize the discussions on this topic since the Second World War, starting with the ITO negotiations and ending with the 1996 WTO Agreement.2

The ITO/GATT Negotiations

In 1946, the United Nations Economic and Social Council (ECOSOC) was established. At the first meeting of ECOSOC, the United States called for a "United Nations Conference on Trade and Employment" to draft a charter for an International Trade Organization and pursue negotiations for reductions in import tariffs. The US tabled its famous "Suggested Charter" for an ITO, which formed the basis for the ensuing negotiations. Articles 8 and 9 of the
US draft charter for the ITO subjected government procurement to the MFN and national treatment disciplines:

Article 8 (MFN): With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation or exportation, and with respect to all matters relating to internal taxation or regulation referred to in Article 9, any advantage, favor, privilege or immunity granted by any Member country to any product originating in or destined for any other country, shall be accorded immediately and unconditionally to the like product originating in or destined for all other Member countries. The principle underlying this paragraph shall also extend to the awarding by Members of governmental contracts for public works, in respect of which each Member shall accord fair and equitable treatment to the commerce of the other Members (emphasis added).

Article 9 (National Treatment on Internal Taxation and Regulation): The products of any Member country imported into any other Member country shall be exempt from internal taxes and other internal charges higher than those imposed on like products of national origin, and shall be accorded treatment no less favorable than that accorded like products of national origin in respect of all internal laws, regulations or requirements affecting their sale, transportation or distribution or affecting their mixing, processing, exhibition or other use, including laws and regulations governing the procurement by governmental agencies of supplies for public use other than by or for the military establishment. The provisions of this paragraph shall be understood to preclude the application of internal requirements restricting the amount or proportion of an imported product permitted to be mixed, precessed, exhibited or used (emphasis added).

The ITO negotiations lasted one year. A first Session of the Preparatory Committee occurred in London in November 1946, followed by a meeting of the Drafting Committee in Lake Success, New York in early 1947. A second formal Session of the Preparatory Committee began in Geneva on 10 April 1947. The final Session took place in Havana, Cuba, in November 1947 where the stillborn ITO Charter (often called the Havana Charter) was concluded. At the first meeting of the London Conference, the United Kingdom focused immediately on the issue of the coverage of government
procurement, raising the question whether the word "governmental" applies to state, provincial or municipal governments. The UK delegate emphasized the difficulty of ensuring observance of regulations by local governments, and thought that it would be wise to confine discussions to central government. He added that British Commonwealth countries extended preferences to supplies from Commonwealth members, and these should not be wiped out by a general nondiscrimination rule. The representative of India also considered that the word "governmental" should apply only to central governments, and be limited to state-owned or state-controlled enterprises, not government sponsored companies. The US delegate responded that: "Our [tentative] view ... is that the obligations should apply to contracts of local governments in those cases in which the action of the local government can constitutionally or traditionally be controlled by the central government."

There seems to have been some confusion between the treatment of government procurement, governmental contracts and state-trading activities generally. Although these situations can be related, a distinction needs to be drawn between state-trading and government procurement. In state-trading, governments or their agents are involved in buying, selling and sometimes reselling: governments are trading-actors like any other firms. Government procurement involves governments or their agents acting as consumers, procuring for their own consumption and not for resale. Finally, the act of awarding of contracts by governments involves elements of the nature of services in addition or in parallel to the purchase of products and to the procedural steps of awarding the contracts. Early in the negotiations, the US delegate clarified that:

Our purpose [in Article 8(1)] was to confine it to the awarding of the contracts. Purchases of materials by governments for public works or other government use would be covered by the preceding sentence, which requires the granting of most-favored-nation treatment in respect of all laws and regulations affecting such purchases. You will note from the draft that certain provisions of Article 9 are incorporated there by reference. In determining whether the governmental purchases themselves, as distinct from the laws or regulations governing them, are in fact on a nondiscriminatory basis, the rules laid down in Article 26 [state-trading] would apply. That Article requires that purchases be made where they can be made to best advantage; in other words, the so-called commercial considerations.
For the US, therefore, there was a distinction to be made between state-trading, the awarding of a contract as such, and purchases for a government. Imports of products for governmental use were to be treated as any other import and be subject to MFN and national treatment. The awarding of contracts was covered by the last sentence of Article 8(1), and therefore subject to the "fair and equitable treatment" standard being accorded to the commerce of other Members. Purchases by governments for commercial (resale) purposes were to be governed by the provision on state-trading (the then Article 26). At this point, it was still agreed that government procurement should be widely covered by the general principles of the ITO. However, the report of the London Committee reveals that it was felt that national treatment could not be applied to the procurement by governmental agencies of supplies for governmental use. Since the national treatment issue was of concern to many countries, further negotiations took place in the Sub-Committee on Procedures (together with the continuing negotiations on the MFN obligation). It was in this sub-committee that the ambitious US proposal for a general coverage of government procurement was rejected.

Initially, the representative of the UK proposed the inclusion of a new article to deal with procurement, on the following lines:

The principles underlying Articles 8 and 9 shall also extend to the purchases by members, and the awarding by them of contracts for the supply, of goods for the use of their central governments and the organs and enterprises of their Central Governments which are not intended for resale either in their original state or after processing.\(^5\)

Delegations expressed the view that this new draft made reference to the awarding of contracts for public works, and that this involved the "services" and the supply of goods. A delegate thought that the Charter should be confined to the treatment of goods, and that the question of services should not be entered into at all. The Committee concluded that:

the awarding of public works contracts was more closely related to the question of the treatment of foreign nationals and corporations than to the treatment of the trade in goods. It was considered that Chapter V of the Charter should be confined to matters affecting trade and that questions relating to the treatment of nationals, etc., should be the subject of future agreements developed under the auspices of the International Trade Organization as contemplated under para (5) of Article I of the Charter. Under this para as well as under Article 75, the International
Trade Organization could recommend the adoption of special agreements dealing with public works contracts. Since para I of Article 8 of the United States Draft Charter had been amended by deletion of the provision relating to governmental contracts, it was felt necessary to insert a new para in Article [31] dealing with the subject. 6

During this meeting, delegations began to make direct parallels between the rules concerning the awarding of governmental contracts and those on state-trading (discussed below). There was a virtual consensus that an attempt to apply a general national treatment rule to procurement would lead to wide ranging exceptions to safeguard existing 'Buy National' laws. It was therefore decided that all purchases by governments should be outside the scope of Articles 8 and 9. Indeed, it was suggested that the last sentence of Article 8:1 and the concluding words of the first sentence of Article 9 be deleted. The following was added to Article 9: "The provisions of this Article shall not apply to the procurement by governmental agencies of supplies for governmental use and not for resale." In addition, a new paragraph in Article 31 (state trading) was added to deal with issue.

At this time, although government procurement and contracts had been excluded from Articles 8 (MFN) and 9 (national treatment), delegations still agreed that such purchases would be subject to the MFN and national treatment disciplines in a separate article dealing exclusively with government procurement and state-trading enterprises. However, language dealing with government procurement and contracts was never inserted into the draft. In the words of the Chairman: "So that means we should drop the question of public works altogether from Articles 8 and 9. That would only leave one thing to decide, whether that matter in that new Article should be discussed now or later, or whether we should say no, that it is such a special thing that it should not be in the Charter at all. I think it comes down to that." 7

The issue was reopened in the State-Trading Sub-Committee in dealing with the question if the acts and purchases by government through state-trading were covered by the general non-discrimination obligations (MFN and national treatment). 8 The Chairman concluded that purchases for government use and not for resale would be excluded from Article 26, as they were from Articles 8 and 9. The US agreed with this conclusion, but pointed out that this would have the effect of allowing government purchases to be made in a flagrantly discriminatory manner. Indeed, Article 26 as redrafted would provide for non-discriminatory treatment in respect of government purchases from abroad whether for re-sale or for government use. "The question becomes, whether you want to strike out or qualify this, to eliminate the application of the most-favored-nation provision to purchases for Government use...
I should be quite content if there were some provision in very general language to the effect that given all the circumstances of a particular case Governments should seek to afford fair and equitable treatment among foreign suppliers, and that questions coming up in this field should be subject to discussion and consultation within the International Trade Organization.\(^9\)

As a result, an additional paragraph taking over the language of the last sentence of Article 8 of the initial US draft was introduced into Article 26: "The foregoing provisions of this Article relate to purchases by State enterprises for re-sale. With respect to purchases by State enterprises for governmental use and not for re-sale, Members agree to accord to the commerce of other members fair and equitable treatment having full regard to all relevant circumstances. This was confirmed in the London final Report of Preparatory Committee: "...The commitment regarding governmental purchases of supplies for governmental use was removed from the scope of the most-favored-nation clause because a suitable clause dealing with such governmental purchases is recommended for inclusion in Article 31" [Non-discriminatory Administration of State-Trading Enterprises].\(^{10}\)

This understanding was legally incorrect. As mentioned before, government procurement, state-trading and the awarding of contracts are different legal concepts. In the absence of any reference to government procurement Article 8 (MFN) could apply. The inclusion of a paragraph dealing with government procurement in the state-trading article should not legally exclude the situation of government procurement and government contracts outside the context of state-trading. Government procurement could be effected through a private firm. But delegations understood it differently and after the London Conference, the treatment of government procurement was not much altered.

The New York, Geneva and Havana meetings

The provisions on MFN and national treatment reappeared as Articles 14 and 15 in the New York Draft Charter. The MFN clause did not refer in any manner to public works or governmental contracts, and, as agreed in the Procedure Sub-Committee in London, the last paragraph of Article 15 on national treatment explicitly excluded procurement by governmental agencies. The then Article 31 on state-trading maintained a general MFN obligation towards trade or distribution of products by state-enterprises but qualified this by referring to "commercial considerations." Article 31:2 excluded from this principle governmental purchases not for re-sale and imposed on governments a "fair and equitable treatment" obligation for all purchases for governmental consumption.

At the Geneva Session, the MFN and national treatment obligations appeared as Articles 16 and 18. Article 16 did not refer explicitly to governmen-
tal contracts and Article 18 repeated the New York Article 15:5, but replacing the term "supplies" with "products purchased" for governmental purposes, thus eliminating the ambiguity as to the coverage of services. Article 30 on state-trading maintained the non-discrimination principle to all activities of state-trading enterprises except those imports of products for immediate or ultimate consumption in governmental use. After the Geneva meeting, it was clear that imports for government procurement were not going to be subject to nondiscrimination, but simply to an obligation to accord fair and equitable treatment to the commerce of the other countries. The same language was used in the final draft of the Havana Charter, Articles 16 (MFN), 18 (National Treatment) and 29 (State-Trading). The text of the Havana Charter on government procurement corresponds almost verbatim to the articles that were ultimately included in the GATT: there is no reference to government procurement in Article I (MFN), there is an exclusion of government procurement from Article III (national treatment) and Article XVII (state-trading) contains only a soft obligation of "fair and equitable treatment" with regard to government procurement.

If the intention of the contracting parties was to remove government procurement purchases and contracts from both the MFN and the national treatment obligations it would have been better to maintain an explicit exclusion in Article I (MFN) as was done in Article III; indeed from the general wording of Article I, it could be argued that government procurement remains subject to MFN obligations, even though this goes against the understanding of delegations at the time.11 The inclusion of a modest obligation of "fair and equitable treatment" in Article XVII:2 for government procurement imports by state-trading enterprises in lieu of the initial similar obligation for the awarding of governmental contracts was illogical, as governmental purchases and contracts can take place outside the context of state-trading enterprises. Finally, rules applicable to the "awarding of government contracts" were simply deleted because they were argued to address issues of services and rights of firms considered to be outside the scope of the ITO charter.

**OECD Activities**

In July 1962, the Council for the Organization for Economic Cooperation and Development (OECD) recommended that "Members keep under review their administrative and technical regulations in order to eliminate those provisions which are not essential and which hamper trade."12 At about the same time, the US government increased domestic price preferences for defense procurement from 6 percent to 50 percent as a balance of payments measure.13 Belgium and United Kingdom requested consultations regarding this measure in the Trade Committee of the OECD. This led to a more general examination
of the issue of preferences in governmental procurement. In January 1963 the
OECD decided to gather information on procedures for government purchasing of supplies by central governments. A first compilation, published in 1966, illustrated that practically all countries maintained "preference" policies of some kind, and that procurement practices varied widely.14

In 1964 a working group was established to ensure the "fairest possible government procurement procedures, seeking to limit discrimination against foreign suppliers." This led to a draft set of guidelines in 1967.15 At that point the United States, which had been playing a rather passive role, proposed to establish more binding norms and suggested that work initially focus on heavy electrical equipment.16 In February 1969, the US tabled a draft Procurement Guidelines to be used for heavy electrical equipment.17 This draft became the focus of subsequent negotiations. These differed from the ITO talks. Instead of determining the reach of MFN and national treatment, the focus was on establishing a framework where the non-discrimination principle would be reflected in the procedures to by procuring governments.

The initial US proposal to focus only on the electrical sector proved impossible because of differences in the degree of governmental ownership of that sector.18 It also became clear that to achieve reciprocity discussions should cover at least a group of sectors. This led to the early conclusion that some sort of list of entities would have to be drafted to allow countries to pursue reciprocal exchange.19 It was agreed to limit the scope of the guidelines to central authorities, given that the legal status and the extent of dependence of various purchasing agencies on the central authorities varied considerably between countries. The difficult question of coverage of purchasing agencies then remained. The EEC suggested the general definition used in its Public Works Directive: "the State, the regional and local authorities, and other legal persons constituted under public law."20 Most delegations favored a system of lists. However, such a list was never agreed upon in the OECD. Another question on which no consensus emerged was the minimum threshold value for contracts to be covered by the procurement rules.

Lengthy discussions took place on nondiscrimination for foreign products and suppliers (Art. 1 US Draft).21 The Japanese delegate, supported by European members insisted many times that the dual nature of discrimination (formal and procedural) had to be addressed. For most delegations the elimination of formal discrimination was of the utmost importance. The US delegate, on the other hand, proposed to first finalize the provisions on procedures. This discussion on formal and procedural discrimination was directly linked to the opposition by many countries to the US suggestion to make public tender the rule and other procedures exceptions which had to be justified. Three categories of tendering were identified: public, selective, single
tendering. A public tender was defined as a public solicitation from all potential suppliers for sealed bids to be opened in public, with the winning bid announced publicly. A selective tender comprised requests to a number of preselected potential suppliers for bids. These did not need to be sealed nor opened in public, or the winning bid publicly announced. A single tender consists of inviting only one supplier to bid.\textsuperscript{22} The US Draft had as a basic principle that each "entity shall make all purchases pursuant to public tenders, unless special circumstances justify a purchase pursuant to an informal tender, as provided for in Part IV." Part IV referred to purchases that: were incidental to the procurement of personal or professional services; occurred outside the country; involved food, medicine, or medical equipment for authorized resale; were for experimental, development or research purposes; or involved replacement parts. Many delegations considered this too constraining.

Although all participants agreed that the use of single tendering should be restricted, the circumstances under which selective tenders could be used were the object of several discussions. The Canadian delegation proposed an "open selective tender" as a third "normal" procedure. This would require that a call for proposals be sent to a given number, say 20, of "qualified suppliers in respect to a specific contract ... and where the selection for bidding would include qualified foreign suppliers at least in the same proportion they bear to the total number of qualified suppliers."\textsuperscript{23} Although this proposal was rejected, it led to the introduction of: (i) improved procedures referring to lists of qualified suppliers and list of all interested suppliers, which did not exist in the initial text on selective tendering; (ii) further rules on \textit{ex ante} and \textit{ex post} publicity; and (iii) the principle that those entities which maintain permanent lists of qualified bidders do not have to invite them all for bids as long as any selection allowed for equitable opportunities for suppliers on the lists. The expression "open procedures" has since been maintained.

Over time delegations moved towards what are now the basic principles of multilateral rules on tendering: entities are free to select the method they wish (open or selective) as long as the tendering procedures are consistent with the provisions detailed in the agreement. The use of single tendering was restricted along EEC lines, influenced by the Directive for public works\textsuperscript{24} and the third Directive on the awarding of public supply contracts.\textsuperscript{25} Concerning technical specifications, it was emphasized that it would be very difficult to decide whether a procurement entity was practicing discrimination through its choice of technical specifications. Article 15 of the Draft Instrument attempted to address this issue by requiring signatory governments to preclude the prescription by purchasing entities of any technical characteristics designed to be an obstacle to suppliers of foreign products or to give an advantage to domestic production.
There was consensus regarding the information that notices of public tender should contain, and that opening of bids should occur in such a way as not to favor any supplier. The US took the position that *ex post* transparency was also of great importance and argued that the publication of awards was the only basis for ensuring that contracts were awarded in accordance with the agreed rules and procedures. The Europeans were opposed to this proposal, maintaining that it would endanger subsequent competition, encourage collusion between suppliers, and lead to an excessive number of disputes. This matter was one of the most divisive issues in the negotiations.

By the end of 1975, there was no further movement in national positions. Three major issues remained unresolved: (i) the scope of the agreement, i.e. the list of national entities to which disciplines were to apply; (ii) the minimum contract value ("threshold"); and (iii) procedures for enforcement and dispute settlement, including *ex post* publication requirements. By this time the Tokyo Round of multilateral trade negotiations had been launched. The report of the October 1976 Working Party meeting concluded that:

The EC and probably also the other European Member countries consider that the OECD work should continue for some time at least and even do not exclude that in the longer term complementary activities in the GATT and in the OECD could lead to two distinct instruments. The United States do not seem to be opposed to complementary work in both places, but press for an immediate start of substantive discussions in the GATT bearing in mind the (still valid) target for winding up the [Tokyo Round] by the end of 1977. Japan, which has never shown a great interest in an instrument in this field, considers that work should continue in the OECD, the subject not being ripe enough to be taken up in the GATT context. Canada (and probably Australia) wish to see OECD work terminated with the November meeting of the Trade Committee.

It was decided to transmit a paper to the Tokyo Round Sub-Committee on Government Procurement on the state of negotiation and the outstanding issues. This Sub-Committee was established in July 1976 at the behest of developing countries who believed that government procurement held out possibilities for expansion of their trade and provided scope for special and differential treatment in their favor. On December 8, 1976 the OECD Draft Instrument on Government Purchasing Policies, Procedures and Practices was sent to the GATT with the following disclaimer "...this draft is the result of work carried out at the level of experts, and ... does not represent final Government positions." The Draft Instrument identified the parameters, the logic and the results of more than 15 years of reflection and negotiations, both
in the OECD proper, and in the context of the EEC. Much of it was embodied into the Tokyo Round Agreement on Government Procurement.

The Tokyo Round Negotiations

Following the tabling of a number of proposals concerning various elements of a possible Agreement, the GATT Secretariat prepared and circulated a "Draft Integrated Text for Negotiations on Government Procurement" in December 1977. To a very large extent the logic and wording of the OECD Draft was maintained. The preamble of the Draft Text referred to the Tokyo Round Ministerial Declaration language regarding developing countries and the need for special and differential treatment for least-developed nations. Abstracting from the issues that were left outstanding in the OECD discussions, the treatment and status of developing countries was perhaps the main additional negotiating issue that emerged upon the transfer of talks to Geneva.

Coverage

The idea of agreeing to a definition of government procurement suggested by the OECD Instrument was dropped, as most countries thought that the definition provided in Article II1:8 of the GATT was sufficient. With regard to threshold values, it was recognized that too low a threshold would cause an unwarranted administrative burden on entities, while too high a level would greatly reduce the relevance of an Agreement. Parallels were drawn between the level of the threshold and the number of entities to be covered: the higher the threshold, the fewer the entities to be covered. Developing countries sought the lowest possible threshold in developed country markets. In the end, agreement was reached on a threshold of SDR 150,000. In June 1978, an agreement was reached on a procedure for negotiations on entities, through the familiar GATT process of offers and requests. Initially the US offered to subject the entire Federal establishment. The EC indicated informally that electrical generating and telecommunications equipment should be exempted as the EC Directive excluded them. At the end of the day, many important entities were not covered.

Transparency and review

In comparison to the OECD Draft, ex-post information requirements were strengthened. It was decided that unsuccessful bidders would to be informed in writing or by publication, not later than seven days after the award. If requested, the procuring authority had to provide information on the contract award as may be necessary to ensure that the purchase was made fairly and
impartially, including both the characteristics and relative advantages of the winning tender and the contract price. Extensive discussions took place on dispute settlement, something that had been difficult for OECD members to agree on given the absence of enforcement mechanisms in the OECD. It was decided that the dispute settlement provisions would follow GATT practice: i.e. panel procedures in conformity with the dispute settlement provisions under negotiation in other Tokyo Round fora, with some adjustments regarding the procedures for selection of panelists, shorter time-periods, and an automatic right to the establishment of a panel. An OECD proposal to allow the use of arbitration or domestic-type dispute settlement rules were considered too ambitious.

Special and differential treatment for developing countries

Much attention was also devoted to the question of differential treatment for developing countries. Developing nations were initially convinced that government procurement was an area where special and differential treatment was feasible and appropriate. Special provisions in the GPA attempted to provide such differential treatment. For instance, developing countries could ask for limited derogations from national treatment obligations; benefits of the Agreement could be extended to least-developed countries not parties to the Agreement; government procurement subject to tied-aid to developing countries were excluded of the application of the Agreement as they were in the OECD Instrument. But this was not sufficient. The threshold of SDR 150,000 was too high and the offers of developing countries were not of any interest to the developed countries. Only Hong Kong and Singapore ended up signing the Agreement (Israel joined later), although countries such as India, Korea, Nigeria, and Jamaica participated actively in the negotiations.

On April 12, 1979, within 18 months of the start of effective negotiations, an agreed text had emerged. The Agreement was to enter into force on January 1, 1981 "for the governments which have accepted or acceded to it by that date" (Art. IX). Procedures for completion and changes in entity lists were adopted enabling countries to finalize such lists as soon as possible and before the entry into force of the Agreement (January 1, 1981).

Re-Negotiating the Tokyo Round Agreement, 1981-86

Article IX:6(b) of the 1979 GPA stipulates that within three years of the entry into force of the GPA (and periodically thereafter), Parties undertake further negotiations with a view to broadening and improving the Agreement. It also called upon the Committee on Government Procurement to explore the possibilities of expanding the coverage of the GPA to service contracts. The
terms "broadening", "expansion" and "improvement" took on a specific meaning. "Broadening" referred to the enlargement of entity lists; "expansion" referred to the inclusion of service contracts; and "improvement" referred to improvements in the text of the Agreement.

After only a few years of experience with implementing the GPA, shortcomings began to be recognized. Parties generally felt that the Agreement was not implemented in a reciprocal fashion and that this created a credibility gap, which could perhaps be overcome by improving the text of the existing Agreement. Hence, improving the text itself was considered at least as important as broadening and expanding its scope and coverage. Members also felt that the positive momentum created in negotiating the Agreement should be maintained. Preparatory work for further negotiations would contribute to building momentum and might assist governments in resisting protectionist pressures. Preparations for further negotiations began in December 1982, less than two years after the entry into force of the GPA.

Negotiations based on Article IX:6(b) were officially opened at the Committee meeting held on November 3, 1983. It was noted that nowhere had the increasing pressure for protecting domestic industries been so keenly felt as in the area of government procurement. Liberalization in this field was therefore difficult. At the same time, it was considered important to move forward to roll back protectionist measures and prevent them from spreading. It was also noted that after three years of operation, the Agreement had only succeeded in attracting three developing countries (Hong Kong, Israel and Singapore). The negotiations provided the opportunity to give serious consideration to facilitating the accession of developing countries. Such were the hopes and ambitions at the outset.39

To ensure transparency, it was agreed that non-members interested in accession could participate as long as they tabled an entity offer. This could be done at any point in time during the negotiations.40 In May 1985, an Informal Working Group (IWG) was established, which was given the task of drafting texts on less controversial issues and narrowing down differences on more controversial points relating to improving the Agreement. It is clear from its mandate that the IWG was initially intended to work on the improvement of the text, rather than on broadening and expansion of the coverage of the Agreement.41

At the outset of the negotiations, it was generally recognized that all three elements mentioned in Article IX:6(b) (improvement, broadening, expansion) were of equal importance. By 1986, however, it became evident that most progress was being made in the area of improving the text of the Agreement. As of end-1985 only three Parties had made suggestions for broadening the Agreement through entity request lists to other Parties.42
Progress on broadening and the inclusion of service contracts was in part dependent on discussions taking place elsewhere. For example, India and Argentina, both observers in the GPA, argued that any advance in the area of including service contracts should be compatible with ongoing discussions on services in general. The process of putting an EC-wide procurement regime in place was also a factor slowing down progress, as the EC was unable to go faster in the GATT than it could internally.

November 1986: Protocol of Amendments

In November 1986 negotiators concluded their work and agreed on textual amendments to the Agreement. These amendments were embodied in a Protocol to the Agreement, and entered into force in January 1988. Two Decisions were taken on broadening and services contracts, committing GPA Parties to continue work in these areas. Amendments to the 1979 GPA included the following.

Article I (scope and coverage): instead of only the purchase of products, any "procurement" of products was covered, including through lease, rental or hire-purchase, with or without an option to buy. The word "procurement" replaced "purchase" throughout the Agreement. In addition, the threshold value was decreased from SDR 150,000 to SDR 130,000.

Article II (non-discrimination): a new paragraph 2 was added to the effect that Signatory governments would be under the obligation to ensure that procuring entities abide by the rules of the Agreement in their tendering procedures and do not discriminate against locally-established suppliers on the basis of degree of foreign affiliation or ownership. Similarly, entities may not discriminate against locally-established suppliers on the basis of the origin of the good being supplied, provided that the country of production is a Party to the Agreement.

Article IV (technical specifications): a new paragraph 4 was added: "Procurement entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement."

Article V (tendering procedures): certain additions were made to the rules on procedures to qualify suppliers; the minimum period for the receipt of tenders in open procedures was increased from 30 days to 40 days, and that for submitting an application to be invited to tender in selective procedures decreased from 30 days to 25 days; a new provision was added to take account of situations where a state of urgency, duly substantiated, would render impracticable these periods, but the period in no case to be less than 10 days from the date of publication of the notice of proposed procurement. The
provision on the use of offset and technology transfer was augmented by the following sentence: "in the limited number of cases where offset procurement opportunities or similar conditions are required, these requirements shall be included in the notice of proposed procurement and tender documentation." New provisions were added on the use of option clauses for additional purchases (stipulating that these should not be used in a manner which circumvent the provisions of the Agreement) and requiring that awards be made in accordance with the criteria and essential requirements specified in the tender documentation.

Article VI (information and review): post-award notices are to be published by procuring entities within sixty days of contract award. The written notices which procuring entities must send to the unsuccessful tenderers informing them of the contract award, must include the value of the winning bid and the name and address of the winning bidder.

Article VI:10 (statistical reports): obligations were added to report statistics on country of origin of goods procured through single tendering and on contracts awarded under derogations to the Agreement.

Towards the WTO Agreement on Government Procurement, 1986-96

In May 1988 the IWG agreed on the principles that would apply regarding expansion of the coverage of the Agreement. The following criteria were adopted: coverage of the Agreement would normally result from individual Parties' own cost-benefit analyses, including the determination whether the additional procurement opportunities justify the additional costs of implementation-overall and on an entity-by-entity basis—with negotiations aiming at a balance of rights and obligations (overall and, possibly, by sector). The following classification structure was agreed:

Group A: Central government entities, including those operating at regional and local levels.

Group B: Regional and local government entities.
(a) for which the central government could ensure compliance with GPA obligations; and
(b) for which the central government could not ensure compliance.

Group C: Other entities whose procurement policies are substantially controlled by, dependent on, or influenced by central, regional or local government:
(a) over which the central government could ensure compliance and which are engaged in: (i) non-competitive activities; or (ii) competitive activities; and
(b) over which the central government cannot ensure compliance and which are engaged in: (i) non-competitive activities; or (ii) competitive activities.

Group D: Other entities whose procurement policies are not substantially controlled by, dependent on, or influenced by, central, regional or local government, including cases where they are engaged in commercial activities.

Entities in Groups A, B and C would be the subject of negotiations on broadening. As far as entities in Group D were concerned, governments were to refrain from interference with transactions of these entities, including their procurement activities. This decision can be considered an important landmark in the negotiating history of the 1996 GPA because it effectively laid the groundwork for the reciprocity element, (negotiations aimed at a "balanced package") which became an unmistakable feature of the new Agreement. It also laid the groundwork for the structure of the new Agreement. The innovative idea to group the various entities to be covered into different categories was sanctioned by the above agreed structure for negotiations.

From the establishment of this structure until 1990, negotiations consisted mainly of creating inventories of the various issues in all three categories of the negotiations, gathering and exchanging information and continuing discussions improvements in the text. The latter included challenge mechanisms, strengthened disciplines on offsets, privatization, the desirability of a "self-denial "commitment, possible rules to take account of the new coverage at the level of sub-central governments and Group C entities, as well as different aspects of including service contracts into the Agreement. It was felt that special, more flexible tendering rules might be appropriate for Group C entities, in view of their (semi)-commercial character.

During 1991 efforts focused in particular on procedures for the settlement of disputes and on coverage, where the fundamental issues were the questions of balance (reciprocity) and the inclusion of certain Group B entities, such as the States in the US and the Provinces in Canada and certain Group C entities, in particular entities in telecommunications, heavy electrical equipment and transport. Parties aimed at concluding negotiations by December 1991 in parallel with similar ambitions for the Uruguay Round. In tandem with the tabling of the Draft Final Act of the Uruguay Round (the so called "Dunkel text" named after the then Director-General Arthur Dunkel), the Chairman of the IWG circulated a complete draft new Agreement on Government Procurement on his own responsibility in December 1991. The text included specific language on controversial issues where divergences of views existed: e.g. challenge, offset, self-denial, privatization and scope of the
Agreement. The Chairman's text was based on the 1988 Agreement but the Articles had been split up in an effort to make the Agreement more reader friendly. Instead of nine Articles it now contained 24, of which two were new: the Articles on Transparency and Challenge. The draft text also suggested a structure for the new Agreement which was eventually adopted: an Appendix consisting of five Annexes containing the various lists of covered entities and services. Each Annex would indicate the threshold (minimum contract value below which the Agreement would not be applicable) for the relevant category of entities. Three additional Annexes would list publications utilized by the Signatories in the various stages of their tendering procedures for the sake of transparency.

It had become clear by this stage that textual issues were best dealt with in the plurilateral framework of the IWG, while coverage-related issue were best dealt with in a bilateral framework. Although the Uruguay Round negotiations and those on procurement were formally separate undertakings that just happened to be conducted in parallel, by 1992 it had become evident that the main players in both negotiations considered them intrinsically linked. Thus, the US Trade Representative was reported as saying that government procurement was one of the most important market access elements in the Uruguay Round. A direct consequence of this link was that progress in the negotiations on a new GPA was made dependent on progress in the Uruguay Round, which at that time suffered from a stalemate due mainly to disagreements in the agriculture negotiations. Consequently, little progress was made during 1992 in the procurement negotiations, with the exception of formulating rules and procedures for the settlement of disputes.

Agreement in principle was reached to adopt the Dispute Settlement Understanding (DSU), which was at that time being discussed in the framework of the Uruguay Round. Negotiators decided not to allow for the possibility of cross-retaliation: the GPA explicitly excludes the possibility to cross-retaliate in another area (and the WTO prohibits cross-retaliation on procurement). Negotiators also agreed to allow for the possibility of stronger remedies than the standard GATT panel recommendation of withdrawal of violating measures. The following words were added to the provisions of Article XXII:3 of the Agreement: "The Dispute Settlement Body shall have the authority to .... authorize ... consultations regarding remedies when withdrawal of measures found to be in contravention of the Agreement is not possible..."

During 1993, negotiations were complicated by a procurement-related conflict between the US and the EC. The EC "Utilities" Directive, which came into force in January of 1993 contained a provision allowing for discrimination in favor of Community suppliers. In retaliation, the US threatened
to apply sanctions against suppliers from the EC. After a flurry of diplomatic efforts at the highest level a Memorandum of Understanding (MOU) was agreed.\textsuperscript{51} The MOU opened up procurement in the electricity sector, which for years had been of keen interest to the US. It also contained a reference to future negotiations on a self-contained bilateral agreement on procurement of telecommunication equipment, to be negotiated after the completion of a joint study on procurement opportunities in the two markets. The MOU explicitly refers to the Article IX:6 negotiations on government procurement conducted in the GATT and states that the US and the EC "in the interest of facilitating agreement on a new Code, undertook bilateral negotiations to resolve certain outstanding problems between them," and that the "USA and the EEC have decided to make certain reciprocal commitments to open their respective procurement markets as a down payment towards an expanded Code in the areas of central government entities and electrical utilities." This comprehensive agreement was integrated for the most part in the new GPA.

The conclusion of the bilateral agreement between the EC and the US and the expectation that the Uruguay Round would be completed by December 15, 1993 provided the much awaited trigger to put the procurement negotiations back on track. Negotiations on procurement in the IWG resumed in June 1993. Several meetings were held in which remaining textual issues were discussed and coverage-related offers were tabled and revised. At the same time intensive bilateral negotiations took place on these offers. By this time it had become accepted that the negotiations would result in a completely new Agreement rather than amendments to the 1988 GPA, in view of its greatly increased coverage. It was also agreed that the new Agreement would be a plurilateral Agreement, so that membership of the WTO would not automatically entail membership of the GPA.

With the Uruguay Round entering its final stages, certain outstanding issues were becoming clearer, especially the link between the GPA and the treatment of services in the GATT. The GPA would set rules on how to purchase services; questions of access to service markets or trade in services in general would be addressed by the General Agreement on Trade in Services (GATS). This means that concessions on services procurement in the GPA are subject to whatever conditions on market access apply pursuant to each Party's commitments under the GATS. Article III:3 of the GPA was drafted accordingly, inspired by the provisions of Article II:3 of the 1988 Agreement, which was applicable only to trade in goods.\textsuperscript{52} A number of Parties make this conditionality explicit in their Annexes.

Other major textual changes to the 1988 Agreement included:

\textit{Offsets}. The issue here concerned the extent to which an entity in considering the qualification of a supplier or in the award of contract may seek
or take into account specific conditions proposed by the potential supplier of the bid. Examples are local content or licensing of technology. The 1988 GPA discouraged, but did not prohibit the use of offsets. The 1996 Agreement prohibits offsets for developed countries (Art. XVI). 53

**Transparency.** Parties are to encourage procuring entities to indicate any terms and conditions under which bids from suppliers situated in non-GPA countries that apply tendering rules assuring transparency will be considered (Art. XVII). This reflects an attempt to "reward" non-members that apply transparent tendering procedures, while also providing an incentive to join the Agreement. Non-members are also be entitled to participate in the Committee as observers.

**Challenge mechanism.** In Art. XX a new enforcement mechanism was introduced, allowing suppliers to launch a complaint against a procuring entity under the national law enforcement system of the entity for breach of GPA rules. This Article is new in that it allows private parties to contest violations of the GPA (an international treaty) directly, without having to go through their governments as is the case under "normal" WTO dispute settlement procedures. Parties must establish under their national legislation a system which is competent to receive complaints from foreign private citizens regarding procurement by covered entities.

**Privatization.** Article XXIV:6(b) addresses the question what to do in case a listed entity is removed from a Party's entity list and as such from the coverage of the Agreement because it has been privatized. In general, a withdrawing Party must offer new entities undertaking procurement comparable to what is being removed from the entity list. Compensation is intended to redress the balance of rights and obligations and restore a comparable level of mutual benefits. Most Parties perceived that privatization was desirable and there should be no need to pay compensation for removal of privatized firms from entity lists. The underlying assumption is that privatized companies will follow market-based procurement, which is the objective of the GPA. The issue was to agree on a definition of what constitutes privatization. Views differed substantially on this. In the end, no explicit reference was made in Article XXIV:6(b) to privatization. Instead, it simply states that:

Where a Party wishes, in exercise of its rights, to withdraw an entity from Appendix I on the grounds that government control or influence over it has been effectively eliminated, that Party shall notify the Committee. Such modification shall become effective the day after the end of the following meeting of the Committee ... In the event of an objection, the matter may be pursued in accordance with ... Article XXII [dispute settlement]. In considering the proposed modification to Appendix I and
any consequential compensatory adjustment, allowance shall be made for
the market-opening effects of the removal of government control or
influence.⁵⁴

Technology. A new provision was included in Art. XXIV:8 in recogni-
tion of the fact that procurement practices are likely to occur differently in the
near future as a result of the use of information technology. In 1995, intensive
exploratory discussions took place on this issue in the Interim Committee on
Government Procurement, the Committee responsible for preparing for the
entry into force of the GPA on January 1, 1996. This might well become one
of the bigger issues to be tackled in the future.

As mentioned earlier, one element of the 1993 MOU between the EC
and the US was to undertake a joint study on the procurement opportunities
implied by their respective offers. As the results of this study would only be
available in early 1994, the coverage of their commitments under the new
GPA could not be finalized. A number of improvements in the coverage lists
of other delegations were also outstanding or under negotiation. Notwithstand-
ing this, Parties were determined to conclude the negotiations by December
15, 1993 using the time between then and April 15, 1994, the date on which
the Final Act of the Uruguay Round and the Agreement on Government
Procurement would be signed in Marrakesh, to finalize the coverage package.

Given this "unfinished" situation, a device was introduced in the Agree-
ment to ensure a balance of rights and obligations in the coverage of the
Agreement as it stood on December 15, 1993. This consisted of reciprocity
clauses, both sector- and country-specific, reflected in derogations to Article
III (non-discrimination) and in negotiated "notes" in entity and services lists,
including sectoral non-application and reciprocity provisions for services. The
intention was that these would mostly be temporary. By the time the Agree-
ment would come into force (January 1, 1996, two years after the conclusion
of negotiations), it was expected that most, if not all, non-application provi-
sions would have disappeared. Bilateral negotiations therefore continued after
1994 to improve coverage lists and reach a more "balanced" overall package
by January 1996. At the time of writing, most country-specific derogations
have been or are in the process of being withdrawn.

Hong Kong, one of the active participants in the negotiations, decided
not to become a member of the new Agreement. The introduction of sectoral
non-application provision and reciprocity provisions in services by a number
of participants was unacceptable to Hong Kong. It had already formally put
on record its strong objection to these developments in December 1993.
Singapore, another member of the 1979 GPA also did not sign the new
Agreement, but officially applied for accession in December 1995.
Conclusion

Despite decades of discussions, existing multilateral disciplines on government procurement fall short of the wide coverage initially envisaged in the US draft ITO Charter. Under this proposal MFN and national treatment would have applied to the award of governmental contracts for public works and the purchase by governments of supplies for governmental use. ITO delegates were very frank: an attempt to reach agreement on such commitments would have led to exceptions almost as broad as the commitments themselves. Public purchases of supplies for governmental use became subject only to an obligation of fair and equitable treatment in favor of other countries under the Article on state-trading enterprises. The legal logic of this decision is debatable. With regard to the award of public works contracts, negotiators were of the opinion that this subject was more closely related to the question of the treatment of foreign nationals and corporations than to the treatment of trade in goods. It was considered that the section on Commercial Policy in the ITO should be confined to matters affecting trade and that questions relating to the treatment of nationals should be the subject of future ITO agreements.

Almost 15 years later, substantive discussions on procurement were initiated in the OECD. A large number of problems and issues concerning government procurement were explored. The principles, rules and procedures developed in the OECD Draft Instrument were all maintained in the Tokyo Round Agreement. But the importance of the work undertaken by the Tokyo Round Sub-Committee should not be underestimated. If the negotiations had not been transferred from Paris to Geneva, there would not be any international agreement on government procurement. Such an agreement could not have been multilateralized without the participation of developing countries. Only multilateral and horizontal negotiations made the agreement on lists of entities and minimum thresholds possible. Moreover, such an agreement needed a dispute settlement mechanism to ensure its implementation and its evolution. Finally, it can be noted that the EEC played a fundamental role in the development of multilateral rules. The process of drafting EC Directives on government procurement generated significant positive spillovers.

Today, more government procurement is subject to multilateral non-discrimination and transparency disciplines than ever before. The 1996 GPA, successor to the Tokyo Round Agreement, is the culmination of the application of an economic philosophy, embodied in the GATT/WTO, to an area which by its very nature is often intrinsically protectionist. The GPA potentially opens up hundreds of billions of dollars worth of public procurement contracts to foreign competition, not only at the central government level but also at the regional and local level as well as of certain public companies. It breaks open contracts for public works and for other services to foreign
competition, and introduces a degree of transparency in public procurement which may assist in combating practices of bribery and corruption. The introduction of challenge mechanisms provides for an expedient means of enforcement suited to the nature of the procurement process.

In bringing the work on government procurement from the OECD to the GATT, governments made a choice to opt for enforceable and multilateral disciplines on government procurement, and to back up broad principles of non-discrimination and transparency with detailed procedural rules, ensuring the effective implementation of those principles. The most recent incarnation of the GPA, although representing a significant step towards creating enforceable multilateral rules on government procurement, only partially achieves this objective. Its coverage is incomplete and its membership remains limited. Prompted by a desire to extend international rules on procurement further, new developments are taking place, in a sense coming back full circle to the Havana Charter. Some very preliminary reflection is occurring on the desirability and feasibility of launching a process of establishing some truly multilateral rules or principles to be applied in the area of government procurement. One of the fora in which such reflections are taking place is the GATS, where discussions have started on possible rules on government procurement of services. The significance of these discussions arguably goes beyond services in that they focuses the attention of all WTO Members—and not just the Parties to the GPA—on the issue of government procurement. It is too early to predict the possible outcome of this discussion, or to have any idea about the relationship between this multilateral discussion and the detailed rules on the procurement of services which already exist in the plurilateral GPA. The dilemma that has haunted rule makers in the GPA context for many years will now have to be confronted by all WTO Members: how to balance the desirability of wide participation with the need to ensure that disciplines are effectively implemented.

NOTES

The authors would like to thank Kathryn Maisen for logistical support, and Serge Devos, Marie-Pierre Faudemay, and Jan-Eirik Sorenson for very helpful discussions and information.


2. For a much more comprehensive discussion of this material, see Blank and Marceau (1996).

5. E/PC/T/33, 24 November 1946.
7. E/PC/T/C.II/PV/9
11. See GATT Panel Report on Belgian Family Allowances, BISD 1S/59, which concluded that tax exemptions for imports from certain countries in the context of procurement by government entities violated MFN. This panel also concluded that Art.XVII:1 on state-trading does not cover Articles I and III.
18. Government participation in power generation varied from almost total ownership in France and the UK to less than 15% in Japan. Similar situations existed in telecommunications and transportation. See Pomeranz (1979).
20. See the report of the February 2, 1970 meeting, OECD Doc. TFD/TD/564.
21. "Government procurement entities shall, subject to the provisions of these guidelines, base their purchasing policies, procedures and practices on the principle of non-discrimination against foreign products and suppliers."
22. See OECD Doc. TFD/TD/546.
23. OECD Doc. TFD/TD/564.
24. See Article 5 of the Directive dated 13.4.65 which lists the following situations: absence of tenders; works connected with holding of licenses; for technical necessities; artistic works; for works done for studies, research etc; urgencies; secret nature; additional works not envisaged with the initial work if given to the initial bidder and for less than 50% of the value of the initial bidder; exceptional works executed for simple reimbursement of costs; and during the transition period.
26. A fourth related issue which was not much discussed was the use of subsidies to support national industries. Subsidies were subject to negotiations in the Tokyo Round.
27. See OECD Doc.TD/76.283
30. A revision was issued in March 1978; GATT MTN/NTM/W/133/Rev.1, 30 March 1978.
32. Senate Report No. 249, 96th Congress, 1st session.
33. In cases where release of this information would prejudice competition in future tenders, disclosure could be made conditional upon consultation with and agreement of the Party which provided the information to the government of the unsuccessful bidder.
34. See Articles 35 to 38 of the Draft Instrument.
35. See Article VII of the Tokyo Round GPA.
36. Note to GPA Art. I:1 stated: "Having regard to general policy considerations relating to tied aid, including the objective of developing countries with respect to the untying of such aid, this agreement does not apply to procurement made in furtherance of tied aid to developing countries so long as it is practiced by Parties." Article 7(c) of the OECD Instrument limited the exception to least developed countries: "This instrument does not apply ... as long as tied aid is practiced by the signatory governments, to purchases made in furtherance of aid to less developed countries".
38. The collective body of the Signatories.
40. BISD 31S/243.
41. BISD 32S/148.
42. BISD, 32S/149.
43. GPR/M/10 and GPR/M/11, February and April 1984.
44. BISD, 34S/12.
45. There are therefore two nondiscrimination obligations. Art. II:1 refers to "domestic" suppliers. This means "locally established" and requires non-discrimination obligation between such suppliers and those that are not established. Art. II:2 prohibits discrimination between locally established suppliers on the basis of the degree of foreign affiliation or ownership or the origin of the good or service which they supply.
46. BISD 35S/372-373.
47. In effect, Group D referred to a peculiar category of entities which on the one hand should be listed but on the other hand could not be subject to negotiations. This category was intrinsically linked with the commitment that a governments would refrain from influencing procurement decisions by certain entities which were not listed in categories A, B or C and which have a commercial character and are subject to government control, regulation or influence (sometimes also referred to as government agencies). This commitment (baptized as "self-denial"), or more precisely, the category
of entities or enterprises to which this commitment would be applied, remained a
source of divergence between the EC and the US for many years until the conclusion
of the negotiations in December of 1993. Ultimately, the 1996 GPA ended up without
a self-deny commitment and without a Category D entity list.

49. See Chapter 1 for a more detailed discussion.
50. Article 29 which became Article 36 in a later version: Council Directive
51. OJEC, L 125 of 20.5.93.
52. Article XIII of the GATS is relevant here, which states that Articles II, XVI
and XVII (MFN, Market Access and National Treatment) do not apply to government
procurement of services as long as no commercial resale or use in the supply of
services for commercial sale occurs. Negotiations on the topic are called for within two
years after the entry into force of the WTO Agreement. See Chapter 13 below.
53. They may be allowed for developing countries.
54. The definition of entities which fall under the provisions of the 1990 EU
"Excluded Sectors" or "Utilities" Directive, which basically deals with Group C-type
entities, covers: (i) public authorities or public undertakings which exercise one of the
activities [falling under the Directive: electricity, transport, water and telecommu-
nication], or, (ii) when they are not public authorities or public undertakings, have
as one of their activities any of those referred to [in this Directive] or any combination
thereof and operate on the basis of special or exclusive rights granted by a competent
authority of a Member State. In other words, either public entities or private entities
with exclusive rights. The EU's coverage of such entities in Annex 3 of the GPA is
limited to publicly owned entities. As a matter of fact, no delegation has listed private
entities under the new Agreement.
55. See Chapter 12 of this volume.

REFERENCES

to Trade," OECD Observer, 4:30-32.
OECD. 1966. Les achats gouvernementaux: Europe, Amérique du Nord, Japon:
Pomeranz, M. 1979. "Towards a New International Order in Government Procure-
ment" Law and Policy in International Business, 11:1264-1300.