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Will the WTO Finally Tackle Corruption in Public Purchasing? The Revised Agreement on Government Procurement

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Introduction

On March 30, 2012, the Parties^[1] to the World Trade Organization's Agreement on Government Procurement (GPA) adopted revisions that would explicitly require them to fight corruption in public purchasing activities.^[2] These revisions will not become binding until two-thirds (ten) of the current Parties have accepted them.^[3] Although currently ratifications are still pending, once the Parties officially accept the text, it will be the first time that a legal instrument of the World Trade Organization (WTO) has directly addressed a question that has hovered in the background of trade relations for years: what should WTO Members do about corruption in international trade regulation?

This *ASIL Insight* describes the significance of the proposed GPA revisions in moving the WTO toward actively supporting international law's condemnation of corruption. With the first acceptances of the Revisions expected in the near future, several new observers to the GPA, and accession talks underway for other WTO Members, it is now time to investigate the full implications of the corruption-reducing potential of the Revised GPA's provisions.

Corruption in Governmental Procurement: the Problem

Every government's procurement activities are prone to corruption. Citizens globally pay approximately twenty-five percent more than they should for public goods and services due to corruption of government buyers, and they suffer from lower quality infrastructure, fewer services, and a loss of voice as a result.^[4] The reason for this is simple: the nature of public procurement is such that a small number of officials have substantial discretion over the granting of contracts for complex projects often worth tens of millions of dollars. The combination of these four factors (few officials, broad discretion, complex contracts, and large sums) ensures that the incentives for corrupt behaviour are particularly high, but the chances of detection particularly low. Moreover, even if corruption is detected, charges are

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often politically unwelcome and difficult to prove.

Corruption in Government Procurement: the Law

Governmental corruption in its many forms (including bribery, extortion, embezzlement, and theft) is prohibited by all states' national laws. Despite a clear distaste for corruption at home, states were slow to regard corruption in foreign governments as problematic. In the late 1970s, the United States began pushing to spread its own prohibition on bribing foreign officials^[5] to the global level to equalize the conditions of competition for US companies abroad. This reframed corruption as an issue of competition and prompted international legal action.

Beginning with the 1994 Organization of Economic Cooperation and Development (OECD) Recommendation on Bribery in International Transactions^[6] and the World Bank's subsequent confirmation of the developmental disadvantages of corrupt governance, the international community began to move rapidly toward a position of unified condemnation of corruption. Moving from non-binding guidelines,^[7] to enforceable policies for restricting funding eligibility where bribery is detected,^[8] to treaties created under the auspices of the OECD^[9] and the UN,^[10] the anti-corruption agenda has succeeded in making condemnation of corruption in governmental contracting a core of political and economic good governance.

Government Procurement in the WTO: Transparency Is Not Anti-Corruption

Despite the growth of international instruments making procurement corruption illegal (or at least objectionable), the WTO has long remained an observer to the process.^[11] None of its agreements include any references to "corruption" at all, despite the fact that corruption is known to distort trade, and most WTO Members are subject to anti-corruption rules outside the WTO.

The Members' approach to transparency rules for government procurement activities highlights their resistance to bringing an anti-corruption fully within the scope of their trade relationships. Transparency in trade law generally refers to making available to traders information about the government's regulations and practices that affect market participants. Publicizing such information can encourage commercial exchange by reducing the practical difficulties facing foreign suppliers. Transparency is also a key element in anti-corruption programs because allowing for greater scrutiny of governmental decision-making increases the likelihood that illegal activities will be detected and prosecuted.

In the area of government procurement, transparency provisions, which are currently understood to be aimed solely at facilitating traders' understanding of the regulatory conditions to be expected, could also be seen as a tool to fight corruption. However, in 2004, the potential of using transparency obligations to bring corruption control into the WTO was derailed when the Members officially stopped work on the multilateral Transparency in Government Procurement Agreement (T-GPA) that had been initiated in 1996.^[12] The T-GPA would have required all WTO Members to increase the predictability and reviewability of their national procurement procedures, and subjected them to the WTO dispute settlement mechanism. By so doing, it would also have dampened officials' readiness to exchange contracts for extra payments.^[13] In the context of the Doha Round, the WTO Members refused to accept such openness.^[14]

Two years after the suspension of the T-GPA discussions, however, the GPA Parties renewed their commitment to integrity in procurement by making anti-corruption a goal of the Revised GPA.^[15] With the GPA Parties' decision to accept the draft revision of the GPA

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last year, the WTO's agnosticism on corruption ended.[16]

The Revised GPA's Corruption Provisions

The GPA commands the Parties to seek to improve the Agreement through periodic negotiations.[17] The Revised GPA is the result of this "built-in agenda" rather than the product of a Ministerial Declaration. The purpose of the renegotiation was to extend the number and types of purchases covered by the Agreement's provisions.[18] Parties also aimed to adapt the Agreement's rules to technological developments in procurement practices and to make GPA accession more attractive for developing country WTO Members.[19] The results reflect the Parties' success in achieving all of these goals.

In addition, the Revised GPA incorporates explicit and implicit anti-corruption obligations. The first reference is contained in the Preamble:

Recognizing the importance of transparent measures regarding government procurement, of carrying out procurements in a transparent and impartial manner and of avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention against Corruption.[20]

The significance of this direct reference to corrupt practices goes beyond the symbolic. Preambular language may be non-binding, but WTO jurisprudence has confirmed its use as an interpretive aid.[21] Thus, if a future dispute should arise alleging official favouritism, a complainant will be entitled to point to this paragraph in interpreting the Revised GPA.

The reference to the UN Convention against Corruption (UNCAC), too, is significant. Article 9 of the UNCAC applies specifically to government procurement and includes many of the principles contained in the GPA: publication and notice rules, the preference for opening tenders to bidding by all suppliers, and the establishment of clear selection criteria. The Convention goes further, though, in calling on governments to have their accounts audited according to international standards and suggesting public reporting of budgets.[22] It also encourages governments to set up anti-corruption bodies[23] and to install personnel systems that foster the development of a civil service resistant to the temptations of corruption.[24] The Revised GPA brings such norms into the WTO framework as guiding principles.

Of particular import is Article IV of the Agreement. This sets forth the "General Principles," requiring Parties to conduct procurements in a "transparent and impartial manner that ... (c) prevents corruption." [25] The use of the term "impartial" in addition to "transparent" makes clear that impartiality is not simply an emanation of transparency. Here the duty of impartiality is focused on individuals and is general in application; parties are not to treat *any* supplier, national or foreign, preferentially. Where favoritism is detected to the disadvantage of a foreign supplier, the WTO dispute settlement provisions may be invoked.[26] This puts corruption-induced procurement contracts directly at odds with WTO law.

A second distinguishing feature of Article IV.4(c) is the use of an active command to establish procurement structures that "prevent" corruption. Parties are obliged not simply to avoid corruption, but to prevent it. As an affirmative duty to act, it might open up a possibility of challenging a Party's procurement rules that do not specifically provide safeguards against corruption.

Conclusion

The Revised GPA's explicit acknowledgement of the need to combat corruption demonstrates that the WTO is moving further into the mainstream of international law. Whether enough GPA Parties ultimately accept the enhanced commitment to good governance, the WTO will not be able to remain an outsider in the global legal movement to combat corruption.

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Endnotes:

[1] Members of the World Trade Organization do not have to accept the Agreement on Government Procurement. The subset of Members bound to this "plurilateral" agreement is referred to in this Insight as "Parties."

[2] See World Trade Organization [WTO] Committee on Government Procurement, *Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement*, GPA/113, Apr. 2, 2012 [hereinafter Revised GPA].

[3] See *id.*, Appendix 1, ¶ 2. The GPA has fifteen Parties if the EU is counted as one, forty-two if the EU Member States are counted separately.

[4] See Transparency International, *Corruption and Public Procurement 2* (TI Working Paper #05/2010), available at http://www.transparency.org/whatwedo/pub/working_paper_05_2010_corruption_and_public_procurement (estimating corruption-caused overpayment of ten to twenty-five percent on average, with higher rates in some states).

[5] The 1977 Foreign Corrupt Practices Act made it a crime for US persons to offer bribes to foreign officials. See Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 (a).

[6] Organisation for Economic Co-operation and Development [OECD], *Recommendation of the Council on Bribery in International Business Transactions*, OECD Doc.C(94) 75/FINAL, May 27, 1994, available at <http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/1952622.pdf>.

[7] See, e.g., OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Nov. 26, 2009, available at <http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/44176910.pdf>); OECD, *Recommendation of the Council on Fighting Bid Rigging in Public Procurement*, July 17, 2012, <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/44176910.pdf>.

[8] The World Bank's 1996 debarment program exemplifies the use of financial pressure to coerce compliance with anti-corruption policies. The program is based on the threat of making any supplier found guilty of fraud or corruption in a Bank-financed project ineligible for future work with the Bank. See generally, Sanctions Committee, *Report Concerning the Debarment Processes of the World Bank*, Aug. 14, 2002, available at <http://siteresources.worldbank.org/INTDOII/Resources/thornburghreport.pdf>.

[9] OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Nov. 21, 1997, <http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/38028044.pdf>.

[10] United Nations Convention Against Corruption, U.N. Doc. A/58/422 (Oct. 31, 2003), <http://www.unhcr.org/refworld/docid/4374b9524.html>.

[11] See Krista Nadakavukaren Schefer, *Corruption and the WTO Legal System*, 43 J. World Trade 737 (2009).

[12] See WTO, Ministerial Declaration of 13 December 1996, WT/MIN(96)/DEC, ¶ 21 (mandating the establishment of a Working Group on transparency in governmental procurement); WTO General Council, Decision of 1 August 2004, WT/L/579, ¶ 1(g) (stopping the work on transparency in governmental procurement).

[13] The EC pointed explicitly to the corruption-reducing potential of the Transparency GPA as a reason for supporting it. WTO, *Positive Effects of Transparency in Government Procurement and Its Implementation*, WT/WGTGP/W/41, ¶¶ 6-7 (June 17, 2003).

[14] See WTO General Council, Decision of 1 August 2004, WT/L/579, ¶ 1(g).

[15] Although there is evidence of a 2003 draft, the 2006 draft is the earliest text of the GPA revisions available online. It includes the corruption language.

[16] The negotiation results were agreed upon by the Parties' Ministers in December 2011, but the draft text was only adopted in March 2012. See WTO, *Provisional agreement on text of revised Government Procurement Agreement*, Dec. 8, 2006, http://www.wto.org/english/news_e/news06_e/gproc_8dec06_e.htm; Revised GPA, *supra*, note 2.

[17] WTO, Agreement on Government Procurement [GPA], Art. XXIV:7(b) (1994).

[18] WTO Committee on Government Procurement, *Modalities for the Negotiations on the Extension of Coverage and Elimination of Discriminatory measures and practices*, July 16, 2004, GPA/79; *id.* at Add.1.

[19] See WTO, *The Re-Negotiation of the Agreement on Government Procurement*, http://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm.

[20] Revised GPA, *supra*, note 2, Preamble, ¶ 6.

[21] Appellate Body Report, *US – Shrimp*, ¶ 153, WT/DS58/AB/R (Oct. 12, 1998); see also Appellate Body Report, *US – Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 89, WT/DS406/AB/R (Apr. 4, 2012) ("The preamble of the TBT Agreement is part of the context of Article 2.1 and also sheds light on the object and purpose of the Agreement").

[22] United Nations Convention Against Corruption, arts. 9(2), 10, U.N. Doc. A/58/422 (Oct. 31, 2003), <http://www.unhcr.org/refworld/docid/4374b9524.html>.

[23] *Id.* at art. 6.

[24] *Id.* at arts. 7-8.

[25] Revised GPA, *supra* note 2, at art. IV:4(c).

[26] *Id.* at art. XX.2 (domestic victims of corruption could possibly invoke the domestic review procedures required by the Revised GPA Art. XVIII).