# 3
# Market Access

That procurement is now firmly part of the international trade debate is in no doubt, as is evidenced by the large number of bilateral and regional trade arrangements which contain provisions relating to it.[53] These include the numerous bilateral free trade agreements (FTAs) entered into by the USA, the EU and EFTA with parties around the world, as well as the EU's move towards economic partnership agreements (EPAs) with the 77 ACP countries. Whilst the provisions of each of these agreements are somewhat, and in some cases very, different,[54] the general trend is that most are now beginning to follow the model provided by the WTO's GPA, i.e. they include text establishing basic transparency provisions (the legal framework) and separately negotiate the coverage (market access) conditions. The transparency provisions will reflect those discussed above and will be based on an underlying procurement system which meets the requirements of the organisation in question. These may include the EU directives on procurement, the main text of the GPA 1994, the UNCITRAL model law on procurement[55] or the OECD/DAC baseline indicators and their associated scoring methodology, which rewards features in a system that reflect good practice. In addition, the 'coverage' (market access conditions) of the provisions is be negotiated separately. These contain reference to the entities and contracts covered as well as any exemptions and reciprocity conditions.

It is not possible in this report to consider all potential trade agreements. Given, however, that a trend is now beginning to emerge, we will take the GPA as an example of the way in which international procurement agreements have been negotiated. The history of the GPA serves this purpose well, since it highlights very clearly the difficulties and pitfalls of the negotiating process and offers some lessons for aspiring members. This will allow us to investigate the potential trade effects and possible policy decisions to be taken.

The GPA was signed in 1994 as part of the Uruguay Round of international trade negotiations held under the auspices of the General Agreement on Tariffs and Trade (GATT), which led to the creation of the WTO. The current GPA replaced the earlier GPA (1979), which was itself amended in 1987. The GPA is a plurilateral, as opposed to multilateral, agreement, signifying that it applies to a limited number of states only, i.e. only to those who have signed up to it and not to the whole membership of the WTO.[56] While it remains part of the GATT/WTO family by virtue of its inclusion in the WTO annexes, and is served by the WTO Secretariat and the Dispute Settlement Body, the GPA is binding on and confers benefits only to those members who have signed up to it.

The stated objective of the GPA (1994), as set out in its preamble, is to provide an effective and transparent multilateral framework of rights and obligations with respect

to laws, regulations, procedures and practices regarding government procurement with a view to achieving greater liberalisation and expansion of world trade and improving the international framework for the conduct of world trade. Ostensibly, it does so by extending the GATT principles of non-discrimination (MFN and national treatment) to the tendering procedures adopted by government bodies at both central and regional levels as well as to those of other specified entities.

However, this extension of the GATT principles is not complete. First, it is a plurilateral agreement, so that only those states which have signed up to the agreement are bound by it. Second, the non-discrimination obligations do not apply to all government procurement by the signatories. Rather, they apply in a qualified manner to specified entities, goods and services which have been the subject of extensive bilateral negotiations between the signatories. The results of these negotiations are contained in a series of annexes to the GPA which are critical to an understanding of its scope of application.

## 3.1 A brief history of the GPA negotiations

The progress of the negotiations leading to the original GPA and its subsequent amendments is indissolubly linked with the very contentious issues which formed the basis of those discussions, notably the issues of entity coverage and the scope of application of the GPA.[57]

Despite being considered in the early International Trade Organization discussions, the original GATT did not apply to government procurement and Article III, on national treatment, specifically excluded government procurement. The issue of government procurement nevertheless again emerged in the context of the OECD which had the more general objective of examining the general issue of government preferences in government procurement and of compiling information on the procurement procedures of its member governments. The results of this study were published in 1966[58] and formed the basis for the further discussions which took place in a working group under the auspices of the OECD Trade Committee with a view to ensuring the 'fairest possible government procurement procedures, seeking to limit discrimination against foreign suppliers'.

This early work of the OECD was critical in the sense that it changed the way in which government procurement was approached by the negotiators. Unlike the initial International Trade Organization (ITO)/GATT discussions, which started from the premise that government procurement could be approached in the same way as general trade in goods and services and could thus be made subject to the general application of the GATT non-discrimination principles, the OECD showed that it would not be possible to impose such obligations without at the same time addressing the rules for the conduct of procurement, which differed widely in form throughout the potential membership.

At the same time as the OECD discussions were taking place, the European

Economic Community (EEC) had also started work on liberalising government procurement among its member states and there is little doubt that there was extensive cross-fertilisation between the two forums.[59] The EC's co-ordinating directives took essentially the same approach as those discussed in the context of the OECD. They regulated coverage of the directives by reference to broad descriptions of the entities covered, together with (non-exhaustive) lists of the entities, and imposed a common set of procedures to be applied to procurement in member states.

It had become apparent during the ITO discussions that there was no consensus on what the term 'government' meant in the context of government procurement. This was the result of the constitutional arrangements of the different states, notably in respect of the extent of the constitutional powers of central government in federal and unitary systems, and the degree of central control over regional, local or municipal governments. However, the central debate did not concern the level of control exercised by central government and its ability to impose and enforce procurement procedures at the various levels. Rather, these discussions took place in an attempt to reach international agreement on the opening up of and access to procurement markets. What was of concern to the negotiators, therefore, was to ensure that any agreement would bring trade advantages to all the signatories and that these advantages would be of equivalent value. The key was the achievement of reciprocal trade advantages.[60] This issue was brought to a head in discussions over the extent to which public utilities could be covered by an agreement.

It was clear that in order to assess and ensure reciprocal advantages, a list of entities would need to be prepared based on the size and nature of the market in question. The idea was to devise a system under which, whatever the entity or market concerned, each member could offer the other members equivalent access to its government procurement in proportion to its size and the size of the economy as a whole.[61] The solution was to turn to a system of offers and requests used widely in the multilateral negotiations under the GATT, whereby coverage would be limited to an agreed list of (governmental) entities which each party would offer, subject to the approval of the other parties. They, in turn, could reject the offer and request those entities in the country making the offer, which they would like to see included in the list. This is the system that was eventually adopted in the Tokyo Round and Uruguay Round GPAs.

The first Government Procurement Agreement was signed in 1979 and entered into force in 1981. It was clearly based on the work of the OECD and many of the solutions worked out in the OECD discussions were evident in the final text. The two broad elements of entity coverage by entity list and the introduction of detailed procedural requirements were maintained and formed the basis of the Agreement and later of the 1994 GPA 1994.

On the basis of the system of offers and requests, the lists of entities included in Annex I were those whose inclusion in the list had been negotiated between the parties. For the most part, these entities were agencies of central or federal government and entities under the direct and substantial control of governments. Local, provincial

and municipal entities were not covered, nor were state-owned enterprises or corporations of a commercial character, which excluded many state utility companies, notably in the fields of energy and telecommunications. Defence entities were also largely excluded; only non-military products purchased by them were covered.

Linked to the issue of entity coverage was the question of thresholds, i.e. the minimum value of a contract above which the Agreement would apply. This issue had been discussed in the OECD, but became a serious point of disagreement under the Tokyo Round negotiations. This partly involved the question of the value of procurement offered by the different parties. The lower the threshold, the more contracts and entities would be covered. The higher the threshold, the fewer there would be and this could well affect the net value of the 'contribution' of the different parties. At a more practical level, however, it was also recognised that a low threshold would cause a significant administrative burden on governments as a result of the large number of small value contracts undertaken by them on a daily basis. On the other hand, too high a threshold would limit, if not frustrate, the objectives of the Agreement, since fewer contracts would be covered. Developing countries also favoured lower thresholds, since this would enhance their prospects of gaining access to the procurement markets of developed countries by enabling them to compete for the lower value and less sophisticated contracts. In the end, a threshold value of SDR150,000 or more was agreed.

The second main element of the Agreement was the imposition of common tendering procedures to govern the parties' procurement under the Agreement. The core provision is contained in Article II, which incorporated into the Agreement the GATT obligations of MFN and national treatment. This requires the parties immediately and unconditionally to provide to the products and suppliers of other parties treatment no less favourable than: (a) that accorded to domestic products and suppliers; and (b) that accorded to products and suppliers from any other party. As is evident from the wording, this provision is limited to suppliers from parties offering products originating from those countries.

The negotiating parties had concluded that the non-discrimination obligation was not on its own sufficient to open up procurement markets and that the solution lay in the adoption of detailed and specific rules for the conduct of the procurement process. This was to be done by setting out specific tendering procedures inspired by the results of the OECD findings in relation to the parties' existing procedures. The Agreement also contained publicity requirements for announcing tenders and for notifying the award of contracts; minimum time limits providing sufficient opportunity for all eligible bidders to respond and submit bids; transparent and objective bidder selection and contract award criteria to be made known to all bidders in advance; and requirements regarding the use and development of objective technical specifications. These provisions remain largely unaltered in the 1994 GPA.

The amendments made in 1987 consisted essentially in amending the publicity requirements and the minimum time limits for submitting tenders; amending the qual-

ification criteria; introducing provisions relating to urgency; imposing restrictions on the use of offsets; and improving publication of post-award information. Negotiations on the Agreement continued after 1987 under the Committee on Government Procurement established by the Agreement.

The bargaining for entity coverage which had been the hallmark of previous negotiations reached a fever pitch during the Uruguay Round, most notably between the EU and the USA, which disputed the real value of each other's offers.[62] The dispute was only resolved after both countries agreed to sign an interim memorandum of understanding, in which they made certain reciprocal commitments to open their respective procurement markets as a 'down payment' towards an expanded Agreement in the areas of central government entities and electrical utilities.[63] This solution prompted other parties to improve their offers in an attempt not to be left outside an exclusive transatlantic procurement agreement.[64] These negotiations were largely bilateral, with each party negotiating with the others, resulting in a kaleidoscope of reciprocal arrangements between the parties. The resulting annexes to the GPA contain not only lists of entities and contracts covered; they also contain a variety of derogations and reciprocity clauses which apply differently between the various parties.

Notwithstanding the complications in implementation introduced by these various derogations, the parties succeeded in broadening entity coverage significantly. The GPA now includes an expanded list of central government entities, sub-central government entities (such as provinces and state authorities in federal systems and local and regional governments in centralised systems) and 'other' entities, such as public utilities, whose procurement policies are substantially controlled by, dependent on or influenced by central, regional or local government.

The second significant advance made during the Uruguay Round was the expansion of coverage of the GPA to services. The Tokyo Round Agreement was restricted to the procurement of products. The provisions of the GPA 1994 are framed in a way which does not distinguish between the procurement of goods and services, although there is a significant distinction in practice which is evidenced in the annexes. As with entity coverage, the approach taken was to provide a list of contracts covered. In the case of goods, this is a *negative* list, signifying that all goods are covered save for those specifically excluded. In the case of services, the lists are positive.[65] This means that the only services covered by the GPA are those which have been explicitly included in the lists. There is a further distinction to be made. Construction services have been treated separately and are listed in Annex 5. All other services are listed in Annex 4. While there was general agreement on the definition of construction services and no reservations made by any of the parties in respect of their offers for such services, no such agreement was reached for the Annex 4 services.

The offers of the parties differ considerably with some, notably the USA, offering a comprehensive list of services, and others, such as Japan, offering very few. Inevitably, some services are included in the lists of some parties and not in others, making it extremely difficult to identify with precision those services contracts open to bidders

from other signatory countries. The issue is further complicated by the many restrictions included in the different parties' offers which apply reciprocity conditions, where access will not be given to service providers of parties which have not themselves included the same category of services contracts in their own offer.

Finally, perhaps the most important institutional change made by the 1994 GPA 1994 consists in the requirement for parties to provide independent bid challenge procedures. In addition to the possibility of resorting to the WTO's Dispute Settlement Body at an intergovernmental level, the parties must ensure the existence of non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the GPA arising in the context of procurements in which they have or have had an interest. This gives aggrieved bidders access to judicial or otherwise impartial bodies in each of the parties' jurisdictions, and opens up the possibility of quick and effective remedial action, including the award of compensation.

## 3.2 Features of the 1994 GPA

The history of the negotiations, which highlights the tensions between the various parties, also explains the specific characteristics of the current GPA. They demonstrate very clearly the limitations placed on the GPA which result from the contracting parties' desire not to create a model international procurement system, but rather to extract the maximum benefit for their nationals by guaranteeing access to the procurement markets of other contracting parties and granting access to their own markets only on a reciprocal basis. This should be instructive for aspiring members.

The GPA applies to any law, regulation, procedure or practice regarding any procurement by entities covered by the agreement. It does not seek to replace national procurement systems, but sets out a requirement of consistency between the applicable national systems and the GPA. As a result, the national procurement systems of the parties have been modified to a greater or lesser extent in order to bring them into line with the GPA. This does, however, require there to be a sound national procurement system in place.

The GPA consists of the main text and four appendices. These appendices consist of lists of the agencies each government has committed to complying with the agreement, lists of services and construction services subject to the agreement, and lists of publications the governments use to publish tender notices, qualification lists and the procurement rules and procedures which they apply. These appendices are critical to the understanding and implementation of the GPA. This is notably the case in respect of Appendix I, which defines the coverage of the parties' obligations under the GPA in terms of procuring entities and services, including construction services. Each party, based on the system of offers and requests discussed above, provides its own appendix, which comprises five annexes. Annex 1 contains a list of central government entities covered; Annex 2 contains a list of sub-central government entities covered; Annex 3 contains a list of all other entities covered that procure in accordance with the

Agreement; Annex 4 specifies those services, whether listed positively or negatively, covered by the Agreement; Annex 5 specifies covered construction services. In addition, there are general notes to each party's Appendix 1 which qualify the commitments referred to in the annexes.

Implementation of the basic obligations of non-discrimination is ensured by setting out a number of detailed operational rules for tendering to be followed by procuring entities. This is done by prescribing three methods of tendering (open, selective and limited) and one additional mechanism which may be applied to each of those methods (competitive negotiation), supplemented by provisions relating to the preparation of tender documentation, the qualification of suppliers, selection procedures, receipt and opening of tenders, and the award of contracts. In addition, the rules also provide specific transparency requirements relating both to tender notices and their publication, time limits for tendering and delivery, and information on the award of contracts. The GPA also contains specific rules with regard to technical specifications.

The central premise of the GPA is non-discrimination in government procurement between the signatories; the two pillars of the GATT, national treatment and the MFN obligation, are incorporated in Article III. These principles are guaranteed by Article III:1, which requires each party 'immediately and unconditionally' to provide to the products, services and suppliers (including service providers) of the other parties, treatment no less favourable than: (a) that accorded to domestic products, services and suppliers (national treatment); and (b) that accorded to the products, services and suppliers of any other party (MFN). As discussed above, these non-discrimination principles are heavily contingent. They apply only between the signatories of the GPA and even then, only subject to the conditions and exceptions set out in each signatory's appendices.

In addition, Article XVI states emphatically that in the qualification and selection of suppliers, products or services, or in the evaluation of tenders and award of contracts, entities shall not impose, seek or consider offsets. Offsets in government procurement are measures used to encourage local development or improve the balance of payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements. Thus, there can be no discrimination in favour of domestic suppliers through the use of offsets. Nevertheless, an exception is made (in Article XVI:2) in the case of developing countries. At the time of accession, a developing country may negotiate objective, clearly defined and non-discriminatory conditions for the use of offsets (such as requirements for the incorporation of domestic content) which will be set out in their Appendix 1. The offset conditions may only be used for purposes of qualification and not as criteria for the award of contracts, i.e. only tenderers meeting the offset requirement will be eligible to tender. Offsets will not be used as a means of granting preferences between those tenderers meeting the offset requirement.

## 3.3 The continuing discussions

The GPA[66] calls on the parties to undertake further negotiations with a view to improving the Agreement and achieving the greatest possible extension of its coverage among all parties on the basis of mutual reciprocity, having regard to the provisions relating to developing countries and eliminating any remaining discriminatory measures and practices which distort open competition. Work began in February 1997. One of the stated aims of this review was the expansion of the membership of the Agreement by making it more accessible to non-parties. Indeed, this is one of the major themes of the post-GPA discussions, given the relative failure of the GPA to attract signatories other than from the developed world. This lack of a fully representative membership has clearly been of concern to the parties and has driven further attempts to make the GPA more attractive to developing countries. Simultaneously, with the review under Article XXIV and based on support from both the USA and the EU for an 'interim agreement' on government procurement,[67] work also began on developing a 'transparency agreement' which would offer to developing countries a less rigorous discipline than the GPA.

The process of review which began in 1997 has covered a number of elements, in particular, the simplification and improvement of the GPA, including adaptation, where appropriate, to advances in the area of information technology; expansion of the coverage of the GPA; and elimination of discriminatory measures and practices which distort open procurement. The objective of simplification and improvement was thought to be a key element in attracting wider membership and thus improve the multilateral aspect of the Agreement.[68] In addition to the ongoing discussions about policy improvements, the parties conducted an article by article review of the GPA. The results are now contained in provisionally agreed revised text, reached in December 2006. However, with no progress on the market access discussions which were being conducted separately, this has not yet been finally agreed.

Following the suggestions of the USA and the EU, the WTO Ministerial Conference in Singapore chose to 'establish a working group 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'.[69] The hope was that by concentrating on the core principle of transparency, the parties would be able to draft a less rigid and burdensome agreement which would encourage broader membership from developing countries. By avoiding the increased bureaucracy and financial burden which naturally flows from adherence to the provisions of the GPA, it was hoped that an agreement which requires only a limited number of basic procedural guarantees would encourage membership and thus an acceptance of the basic disciplines of an open and competitive public procurement system.

As is clear from the mandate given in Singapore, the working group's activities are to be considered in two phases: first, a study on transparency with a view, second, to

developing an agreement on transparency. To date, efforts have concentrated mainly on the study of national and international systems as they relate to transparency, and the working group has been collecting information from a number of sources, including national systems, international organisations such as the World Bank and UNCITRAL, OECD, United Nations Development Programme (UNDP), European Bank for Reconstruction and Development (EBRD) and other comparable studies such as the APEC survey and conclusions. Work has, however, been slow. While there appeared little disagreement on the importance of transparency as a fundamental principle, there was less agreement on how transparency might be achieved.[70]

Despite the submission of draft agreements at the disrupted Seattle meeting by both the USA[71] and the EU,[72] no agreed text of any transparency agreement has emerged. Indeed, the initiative would appear to have been abandoned following the General Council's decision on the Doha Agenda work programme of 1 August 2004. Despite the hiatus in the negotiations, it is important to bear in mind a number of things. Transparency has now been dissociated from market access. The existence of a sound and transparent procurement system is a precursor to membership negotiations, so that without such a system no market access discussions will take place.