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Preventing Corruption – A Swiss Perspective

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**PUBLIC PROCUREMENT REGULATION: FOSTERING  
MARKET ACCESS AND SIMULTANEOUSLY PREVENTING  
CORRUPTION – A SWISS PERSPECTIVE**

Elisabeth Lang and Marc Steiner\*

*Abstract:*

Much like in German legal thinking, the initial and predominant position in Switzerland during the late nineties of the last century was that public procurement is only about market access, internal market, competition and money. Therefore, the GPA 1994 was interpreted accordingly by the majority of scholars. The revised GPA 2012 explicitly addresses sustainability, good governance and corruption, topics which are from the point of view of classical trade-officials “unrelated to the benefits of international trade”. The WTO nowadays more or less officially shares the view of Transparency International, according to which few government activities create greater temptations or offer more opportunities for corruption than public sector procurement. That is why the aims and purposes of public procurement regulations have been or are about to be redefined.

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\* Elisabeth Lang, Judge, Administrative Court of the Canton of Aargau,

\* Marc Steiner, Judge, 2nd Division of the Swiss Federal Administrative Court.

## 1 Introduction

In the preamble to the OECD Convention on Bribery, it is held that bribery is a widespread phenomenon in international business transactions, including trade and investment, which [...] undermines good government [...] and distorts international competition conditions. Nicholas C. Niggli, a former chairman of the WTO Government Procurement Committee, summarizes the current situation on the interplay between trade and good governance as follows: “*Addressing the links between trade, foreign direct investment, transparency and good governance at the WTO was yielding infrequent results just over a decade ago, but now such associations are much more widely accepted, highlighting the rapidly-shifting perceptions of the strategic importance of government procurement as a key policy-making instrument not just to promote trade and support economic development, but also to tackle corrupt practices.*”<sup>1</sup> The strategic importance of public procurement is, at least in so far obvious as its volume in 2014, was estimated close to \$78 trillion in nominal terms according to the World Bank. This merely represents between 10 and 15 percent of the world economy, if we follow the estimation of the World Trade Organization. So what is basically argued by Niggli is that more than a decade ago market access was – put in a slightly simplified manner – perceived as the only purpose of international regulation on public procurement. Every other (national) purpose of public procurement regulation and policy was understood to be a potentially dangerous non-tariff barrier to trade. This could be said not only about the WTO Government

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<sup>1</sup> Nicholas C. Niggli, *Helping Nations, Businesses and People to Succeed: How Government Procurement Influences Institution Building, Good Governance, Economic Growth and Sustainable Development*, in: *Trade, Law and Development VII*, p. 17

Procurement Agreement [GPA] 1994, but also about the first European directives on public procurement.

The second argument Niggli makes is that there has been a paradigm change, especially when it comes to good governance, avoiding conflicts of interest and preventing corruption. This is due to the fact that, particularly during the last decade, corruption has become a more and more internationally perceived topic. Therefore, ignoring this issue would question the international regulations on public procurement (such as the WTO GPA) as part of a – to a certain extent – coherent legal system and therefore also their legitimacy. The same phenomenon can be seen when dealing with sustainability topics. Ignoring them does not only entail problems with the European Union, respectively its members as parties of the GPA, but also conflicts with the United Nations Environmental Programme UNEP and the International Labour Organization ILO<sup>2</sup>. This integrated view of the international landscape is the basis of the United Nations Sustainable Development Goals (SDGs). It is therefore not surprising, that the SDG 16 (promoting peace, justice and strong institutions) comprises as associated targets the points 16.5 (substantially reduce corruption and bribery in all their forms) and 16.6 (develop effective, accountable and transparent institutions at all levels)<sup>3</sup>. The earlier spread message was that this is only needed in developing countries; whereas developed countries were supposed to be more or less safe (as long as money laundering is not taken into account).

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<sup>2</sup> See on the sustainability issues for instance Marc Steiner, *The WTO Government Procurement Agreement: Assessing the scope for green procurement* (<http://www.ictsd.org/bridges-news/biores/news/the-wto-government-procurement-agreement-assessing-the-scope-for-green>, last visited 25 August 2016).

<sup>3</sup> Niggli, *loc. cit.* (footnote 1), p. 9.

Meanwhile, this has changed for two reasons. In Switzerland, which used to be judged as a little paradise miraculously spared from any imaginable lack of governance (except when it comes to the financial market), there were some incidents like the SECO-case<sup>4</sup> and the INSIEME-case<sup>5</sup>, both concerning IT-procurement. There is some irony in this, because the SECO is responsible for the implementation of the GPA in Switzerland and points out the importance of combatting corruption when dealing with international economic relations and the respective OECD instruments<sup>6</sup>.

This does not mean that Switzerland has become more corrupt, but that awareness has risen and tolerance therefore decreased. At the same time, it has been accepted that developed economies need to implement credible tools on corruption and good governance if they want to convince emerging economies and developing countries to act likewise. The idea of the UK and Germany expressed when it came to the regulation on concessions within the EU, that – to put it in slightly simplified terms – the EU Commission should not bother the UK and Germany if there is a problem in Romania, proved not to be selling; the result was the Directive 2014/23/EU on the award of concession contracts<sup>7</sup>.

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<sup>4</sup> SECO = (Federal) State Secretariat for Economic Affairs ([www.seco.admin.ch](http://www.seco.admin.ch), last visited 25 August 2016).

<sup>5</sup> Involving the Federal Tax Administration ([www.estv.admin.ch](http://www.estv.admin.ch) [last visited 25 August 2016]), which lost its highest official in this context.

<sup>6</sup> See, [https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik\\_Wirtschaftliche\\_Zusammenarbeit/Wirtschaftsbeziehungen/Korruptionsbekaempfung.html](https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Korruptionsbekaempfung.html), last visited 25 August 2016.

<sup>7</sup> Cf. on our topic recitals 61 and 69; articles 35, 39 and 45.

The authors try on the one hand to inquire whether and where the alleged change of mind-set can be traced, in particular in analysing the WTO Government Procurement Agreement.

On the other hand, they undertake to discuss the Swiss legal framework, the SECO- and INSIEME-cases and the consequences thereof. This article does not address the distinct issue of anti-competitive collusion.

## 2 The revised Government Procurement Agreement as a good governance tool

### *2.1 The significance of the revised Government Procurement Agreement in general*

Since the entry into force of the Government Procurement Agreement (GPA 1994) on January 1, 1996, the GPA has gained great momentum, culminating in the adoption of the revised GPA in March 2012<sup>8</sup> and its subsequent entry into force on 6 April 2014<sup>9</sup>. Already in February 2010, former WTO Director-General Pascal Lamy had stated that "the GPA appears to be in the process of taking on relatively greater importance in the constellation of WTO Agreements".<sup>10</sup> Interestingly enough, the (provisionally) revised text of the GPA was agreed on long before the negotiations on coverage could be concluded. Accordingly the Committee insisted on the fact that "nothing is agreed

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<sup>8</sup> [https://www.wto.org/english/news\\_e/news12\\_e/gpro\\_30mar12\\_e.htm](https://www.wto.org/english/news_e/news12_e/gpro_30mar12_e.htm); last visited November 2016 (GPA/113); based on the ministerial-level meeting of the Committee on Government Procurement on 15 December 2011 (GPA/112).

<sup>9</sup> [https://www.wto.org/english/news\\_e/news14\\_e/gpro\\_07apr14\\_e.htm](https://www.wto.org/english/news_e/news14_e/gpro_07apr14_e.htm); last visited November 2016.

<sup>10</sup> [https://www.wto.org/english/news\\_e/sppl\\_e/sppl147\\_e.htm](https://www.wto.org/english/news_e/sppl_e/sppl147_e.htm); last visited November 2016.

until everything is agreed".<sup>11</sup>

The revision extended GPA coverage by between US\$80 and US\$100 billion annually, the revised GPA now covering public purchasing valued at US\$ 1.7 trillion a year. The revision of the GPA and the WTO Symposium of 17-18 September 2015<sup>12</sup> were driven by the view that the GPA should be understood not only as a trade facilitating instrument, but also as an instrument relevant beyond the circle of the treaty members fostering a coherent common international understanding of public procurement regulation. Equally significantly, the new text sharpens – as will be shown immediately in more detail – the WTO's attention to governance issues related to public purchasing.

## *2.2 Is the fight against corruption a trade topic?*

Not every public procurement lawyer back home in Switzerland knows that besides the plurilateral WTO Government Procurement Agreement, there was also a postponed, but hopefully not definitely abandoned, WTO initiative aimed at reaching a multilateral agreement on transparency in government procurement.<sup>13</sup>

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<sup>11</sup> Report of the Committee on Government procurement 2006 of 11 December 2006 (GPA/89; the text itself was issued under the document-number GPA/W/297).

<sup>12</sup> [https://www.wto.org/english/tratop\\_e/gproc\\_e/gpa\\_symp092015\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gpa_symp092015_e.htm); last visited August 2016.

<sup>13</sup> Cf. on the mandate notably the Singapore Declaration (Ministerial Conference First Session, 13 December 1996 (WT/MIN(96)/DEC, paras 21-22, and the Doha Declaration (Ministerial Conference Fourth Session, 14 November 2001, WT/MIN(01)/DEC/W/1), paras 20-26; see also [https://www.wto.org/english/tratop\\_e/gproc\\_e/GPmand\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/GPmand_e.htm), last visited August 2016; see on this 'Singapore' issue for instance Anderson/Arrowsmith, *The WTO Regime on Government Procurement*, in: Arrowsmith/Anderson (ed.), *The WTO Regime On Government Procurement: Challenge and Reform*, Cambridge 2011, p. 8.



To make such an agreement more acceptable to non-members of the GPA, it was explicitly stated that the negotiations should be limited to the transparency aspects and therefore not restrict the scope for countries to give preference to domestic supplies and suppliers.<sup>14</sup> More than ten years later, it is difficult to understand the reflections on whether the corruption or the prevention of it may have a sufficient trade impact to justify a transparency agreement as being covered by the mission of the WTO, the trade impact of lacking governance being so obvious. As Arrowsmith stated already in 2003, many contracts awarded within corrupt circumstances are not available to foreign suppliers, and such covert policies may also have a significant effect in deterring participation (in particular from abroad).<sup>15</sup> It is nevertheless true that in the WTO, transparency was normally understood as a mean to improved market access,<sup>16</sup> which fact even led to the assumption of some WTO-members that the transparency agreement was part of a hidden agenda to force market access later based on it. At the same time, it has always been obvious that the transparency also plays “a major role in achieving national objectives in most procurement systems”.<sup>17</sup>

Nonetheless, meanwhile, from an international perspective, the transparency principle is also understood as being of

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<sup>14</sup> Doha Declaration (footnote 6 above), para 26.

<sup>15</sup> Sue Arrowsmith, *Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the World Trade Organization*, *Journal of World Trade* 37(2), p. 301.

<sup>16</sup> Peter Trepte, *Regulating Procurement*, Oxford 2004, p. 394; Sue Arrowsmith, *The Revised GPA: Changes to Procedural Rules*, in: Arrowsmith/Anderson (ed.), *The WTO Regime on Public Procurement* (footnote 13), p. 289.

<sup>17</sup> Sue Arrowsmith, *Government Procurement in the WTO*, The Hague 2003, p. 173. From a Swiss perspective it is clear that the transparency requirements are more than part of a market access concept; cf. for instance Martin Beyeler, *Ziele und Instrumente des Vergaberechts*, Zurich 2008, p. 15.

dual-use. As early as 1998, Cottier argued that the World Trading System is not confined to prescribing substantive rules on market access.<sup>18</sup> Since trade relations depend on good governance, it is logical from this perspective that the WTO contributes to the realisation of good governance (which means *inter alia* controlling corruption) as a matter of treaty law. And it is no surprise that one example quoted in this context are the rules on publication of tender procedures according to the GPA. This is of course also true for the initiative aiming at a multilateral agreement on public procurement. Assuring transparency helps to avoid problems such as fraud and corruption.<sup>19</sup>

Although a multilateral transparency agreement would not eliminate corruption (more sophisticated practices will be used), it would certainly reduce it.<sup>20</sup> On the other hand, the fact that the European Communities contribution dealt with corruption – even if in an indirect way<sup>21</sup> – was also expressly regretted and it was mentioned that the mandate of the WTO would not cover such a regulation's purpose (or even side-effect<sup>22</sup>) of a transparency agreement.<sup>22</sup>

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<sup>18</sup> Thomas Cottier, *Emerging Doctrines of Good Governance: The Impact of the WTO and China's Accession*, Abbott (ed.), *China in the World Trading System: Defining the Principles of Engagement*, The Hague 1998, p. 119

<sup>19</sup> APEC non-binding principles on government procurement 1998, as communicated by Hong Kong (WT/WGTGP/W/24, 21 September 1999), para. 48.

<sup>20</sup> Positive effects of transparency in government procurement and its implementation, Communication from the European Union (WT/WGTGP/W/41, 17 June 2003), paras 6-7, and very similar the proposal of the United States for a work plan to build on the progress of the Working Group (WT/WGTGP/W/35, 30 September 2002), para. 3

<sup>21</sup> Report on the meeting of 9 January 2003 (WT/WGTGP/M/15), para. 61.

<sup>22</sup> Report on the meeting of 18 June 2003 (WT/WGTGP/M/18), para. 39.

When the negotiations were stopped, it was however apparent that there were important GPA members in favour of the dual-use understanding of transparency standards, whereas the sceptics were found rather outside the circle of the GPA members. From an UNCAC-perspective, it is very clear that transparency is one of the main means to achieve integrity in the procurement process. Therefore “it is hoped” that the work on a transparency agreement will be resumed in the future.<sup>23</sup>

### *2.3 Good governance and prevention of corruption as elements of the revised GPA - a mind-set change.*

Besides the WTO Secretariat, eminent scholars also lead a kind of an advertising campaign for joining the WTO’s Government Procurement Agreement. One of their arguments is that a GPA accession would reaffirm the commitment to the rule of law and the rejection of corruption. Being a party to the GPA can – according to this view – be seen by foreign investors as a “stamp of approval”, indicating that the domestic public procurement regime is consistent with international best practice.<sup>24</sup>

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<sup>23</sup> UNODC (ed.), *Technical Guide to the United Nations Convention against Corruption*, New York 2009, p. 30.

<sup>24</sup> Christopher Yukins/Johannes S. Schnitzer, *GPA Accession: Lessons Learned on the Strengths and Weaknesses of the WTO Government Procurement Agreement*, *Trade Law & Development Journal* VII (2015), p. 98 s.

Similarly, Robert Anderson states, that the revised GPA manifests the Agreement's increasing importance as an instrument for the promotion of good governance in emerging markets "in addition to market access".<sup>25</sup> In a classical trade officials' view, the revision of the GPA brought new objectives that are "unrelated to the benefits of international trade".<sup>26</sup> From an Indian perspective, this is no surprise since the importance of the corruption issue justifies dealing with it "even under a trade agreement".<sup>27</sup>

What is it then that makes the revised GPA so spectacular? The classical GPA rationale is that the "need for an effective multilateral framework for government procurement, with a view to achieving greater liberalization", as it is said in the preamble, at the same time acknowledging that "the integrity and predictability of government procurement systems are integral to the efficient and effective management of public resources, the performance of the Parties' economies and the functioning of the multilateral trading system".

Moreover, 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, is

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<sup>25</sup> Robert Anderson/Anna Caroline Müller, *The Revised WTO Agreement on Government Procurement as an Emerging Pillar of the World Trading System: Recent Developments*, *Trade Law & Development Journal* VII (2015), p. 43.

<sup>26</sup> Arie Reich, *The new text of the agreement on government procurement: An analysis and assessment*, *Journal of International Economic Law* 12/4 (2009), p. 996.

<sup>27</sup> Chang-fa Lo, *Making the Anti-Corruption Provisions in the New Government Procurement Agreement under the WTO Operable*, *Trade Law & Development Journal* VII (2015), p. 21.