

Social and environmental policies under the GPA: some general reflections and emerging issues

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See further:

- Arrowsmith, “A taxonomy of horizontal policies in public procurement”, forthcoming *Journal of Public Procurement*
- Arrowsmith, *Government Procurement in the WTO* (2003; Kluwer Law International), chapter 13
- Arrowsmith and Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (CUP)
 - http://www.cambridge.org/uk/browse/browse_highlights.asp?subjectid=1011243

Industrial policies

- To maintain employment in declining industries (including for gradual adjustment for political and social reasons)
- To develop new industries:
 - E.g. high technology industries (e.g. Airbus in Europe)
- To support small business development
- To support and develop industry in poor regions

Policies with a social dimension

- To promote businesses of disadvantaged groups
 - E.g. women, disadvantaged ethnic groups (minority or majority groups), disabled persons
- Aim at equity and/or optimal industrial development

Environmental policies

➤ Increasingly common

- See OECD, *The Environmental Performance of Public Procurement*

➤ Aim to ensure:

- Government purchasing does not damage environment
- Promotion of good environmental policy more widely e.g. by encouraging manufacturers to use environmental standards

A note of caution.....

- Procurement is a “soft” target – but is it the best approach?
 - Hidden costs
 - Can avoid need for legislation
 - Hard to withdraw
 - Can be counter-productive

A note of caution.....

- Which procurement *mechanism* should be used?
 - E.g. set asides, contract specifications or award criteria?
- E.g. set asides
 - ensure that only these groups receive contracts, so can be more effective and produce rapid and visible effects
 - *But:*
 - Higher prices because of very limited competition
 - Costs are difficult to identify
 - Limited competition reduces incentive for the favoured groups to operate efficiently
 - Set asides are particularly difficult to remove

A note of caution.....

- Need for evaluation



A note of caution.....

- Can the GPA be an opportunity to reconsider unsound policies?
- How can GPA balance *sound* policies with trade considerations?

General issue

- Industrial/social/environmental need?
 - Permanent measures - or measures lasting until need is met
- Or political need?
 - Temporary only

Approach of the GPA

1. Allowed if comply with the rules of the Agreement:
 - National treatment and MFN and
 - Rules on transparent award procedures
 - *or*
 - Can justify under Article XXIII exceptions
2. If not, exceptions can be made when coverage is negotiated

1. Rules of the Agreement

➤ Uncertainty

- No directly relevant panel/Appellate Body rulings
- *Burma/Massachusetts* case

1. Rules of the Agreement: national treatment

Must give treatment no less favourable than to domestic products, services and suppliers etc (Art.III:1)

- Prohibits policies favouring national industries that have no comparative advantage
 - E.g. 10% price preference for locally-made products
- Policies with a social or environmental dimension???
 - E.g. preference for tenders employing disadvantaged local groups

1. Rules of the Agreement: offsets

- Article XVI prohibits offsets
 - = “measures used to improve local development or improve the balance of payments accounts by means of any domestic content, licensing of technology, investment requirements, counter-trade or similar requirements”
- Many would anyway be contrary to NT or other GPA rules

1. Rules of the Agreement: award procedures

➤ *Prohibits:*

- Set asides
- Conditions for participation that concern the supplier's general business practices (e.g. investment practices)
 - Article VIII(b) – conditions for participation limited to those essential to ensure the firm's capability to fulfil the contract

➤ Thus, even if comply with NT, allowed only if:

- Article XXIII applies; or
- An exception is negotiated

1. Rules of the Agreement: award procedures

- *Allows* social and environmental specifications and other contract conditions concerning performance of the contract
 - Limits on pollution of motor vehicles; requirement for buses to be accessible for wheelchairs

1. Rules of the Agreement: award procedures

- What exactly does this allow?
 - Consumption measures
 - Disposal measures
 - Workforce measures
 - Delivery and production measures
- Need for “whole life-cycle approach”
 - Nothing explicit to prohibit this
 - But will panels prefer to allow only under Article XXIII, even if do not violate NT?

1. Rules of the Agreement: award procedures

- Award criteria
 - Article XIII(4)(a) – award to lowest tender or “most advantageous” tender
- Can include social or environmental benefits in performing the contract
 - Whole life-cycle approach applies?
 - EC argued against inclusion of workforce benefits in *Burma case*
- What about award criteria unrelated to performance?
 - e.g. price preferences for SMEs

1. Rules of the Agreement: Article XXIII

- Exception to national treatment and rules on award procedures
- Applies:
 - where necessary to protect public morals or human, animal or plant life or health; or which relate to products or services of handicapped persons, prison labour or philanthropic institutions
- Possible use for:
 - Set-asides for workshops for handicapped persons?
 - Whole-life cycle environmental measures?
 - Fair trade measures?

2. Coverage negotiations

- For states negotiating accession exceptions may be desired for:
 - Policies clearly not allowed:
 - To promote national SMEs
 - To promote poor or rural regions;
 - Technology transfer
 - Most set asides or exclusions (social or economic)
 - Areas of uncertainty
 - e.g. preferences for disadvantaged groups; fair trade measures

2. Coverage negotiations

- Can exclude sensitive products, services or entities from coverage
- Some GPA parties have exceptions for specific policy programmes
 - Especially for small and minority businesses e.g. Korea, Canada, US

2. Coverage negotiations

- GPA 1996, Article V: developing countries may limit the application of the GPA to enable them to promote development, financial and trade needs
 - including BOP, development of domestic industries and supporting units dependent on government procurement
- Can negotiate such exceptions anyway
- Any obligation to *consider* allowing exceptions that this might involve is not binding/enforceable

2. Coverage negotiations

- GPA 2006, Article IV.3
 - Allows price preferences and offsets
 - Are time limited and subject to specific detailed rules
 - Phased additions and temporary high thresholds
- How does this fit with general flexibility in negotiations?
- How does this square with existing Parties' exclusions?
- How far are these provisions (rather than general flexibility) relevant for exclusions for targeted social and industrial development policies?
 - I.e. for policies (of potential permanent value) meeting industrial/social/environmental needs that go beyond political value or allowing gradual adjustment to shocks of trade
- Will it have real impact on ability of DCs to negotiate?

2. Coverage negotiations

- Should inclusion or retention of such policies be subject to specific evaluation by Committee on Government Procurement?