Definition and scope of government procurement: conceptual issues and the principle of non-discrimination

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What is government procurement?

- The obvious part: purchasing by government of:
  - Supplies/goods (commodities, commercial items, manufactured items)
  - Services (including research and development)
  - Construction and public works
- The less obvious part: what about
  - Concessions, B-O-Ts/B-O-O-Ts and public-private-partnerships?
  - Purchases by state-controlled corporations?

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The scope and coverage of the GPA: Article I:1

- **"This Agreement applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement, as specified in Appendix I."**
- **Hence, <u>scope and coverage defined by Appendix I</u> (important basic point)**

The scope and coverage of the Agreement: Appendix I and the Annexes

- As specified in footnote 1 of the Agreement, for each Party, Appendix I is divided into five Annexes. These define the scope and coverage of the Agreement with respect to:
  - Central government entities (Annex 1)
  - Sub-central government entities (Annex 2)
  - Other covered entities such as public utilities (Annex 3)
  - Covered services (Annex 4)
  - Construction services (Annex 5)
  - General notes

Non-discrimination in the WTO: basic concepts (1)

- Two main dimensions: most-favoured-nation (MFN) and national treatment (NT)
- MFN treatment: requires equal treatment as between different foreign goods/services/suppliers
- National treatment: requires equal treatment of foreign vis-a-vis domestic goods/services/suppliers
  - Essential aspect of "market access"
- Note: application of these principles differs as between the main WTO agreements

Non-discrimination in the GPA: how it works/built-in limitations

- Applies only to covered procurements (hence, importance of coverage rules and schedules)
- Benefit is for Parties to the GPA (this is a key benefit of joining)
- For practical purposes, national treatment is of primary interest (role of MFN limited by extensive exceptions/exclusions)
- Requires treatment of other Parties' products, services and suppliers that is "no less favourable than" that accorded to domestic products, services and suppliers.
- Also requires non-discrimination against locally-based suppliers on the basis of foreign affiliation

Special advantages for developing countries

- General provisions regarding special and differential treatment (to be discussed in separate session)
- Provisions regarding “offsets” (see over)

Special advantages for developing countries: the treatment of offsets

- **"Offsets" 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" (footnote to Article XVI)**
- **Use of offsets in qualification and selection/contract award procedures is generally prohibited (Article XVI:1)**
- **However, <u>developing countries have special authorization for the use of offsets</u>, to be negotiated and set out in relevant schedules.**