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On Fairness and Freedom: The WTO and Ethical Sourcing Initiatives

Rachel Thrasher

Abstract

Although the concepts of fair trade and free trade have little to do with one another, in the context of public procurement, the two come head to head. Proponents of free trade argue that governments should act like private market actors when purchasing; others hold that governments are obligated to promote justice and equality by way of procurement “linkages” to social policy like fair trade. An increased awareness of the importance of sustainability has re-opened the debate over whether governments should link their spending to social concerns. In Europe a sustainable approach to public procurement is commonplace and EU enthusiasm has reached the WTO. A Revised GPA seeks to encourage broader acceptance of the agreement by including exceptions for environmental and social policy linkages. The exceptions include a general exception in cases where derogation is “necessary to protect human, animal or plant life or health”, excludes public procurement in international development assistance from the scope of the agreement, and explicitly permits governments to apply technical specifications for environmental protection. A recent case against sustainable public procurement in the Netherlands demonstrates the space given countries in Europe to select and implement their own procurement practices. Countries vary widely in their government procurement. Although the EU maintains a region-wide consensus toward encouraging ethical sourcing and consumption, other regions have not created the same supportive structure. Within the WTO, it is even clearer that policies creating obstacles to liberalized trade would be less favorable than other policies, regardless of the reason for those obstacles. We conclude that while the Revised GPA has made more policy space for governments to prioritize development and environmental goals, it does not go far enough. Future revisions of the GPA should provide policy space for horizontal linkages, including those aimed at long-term sustainability.

Practically speaking, “fair trade” and “free trade” have had relatively little to do with one another. Global “free trade” is characterized largely by efforts at the World Trade Organization (WTO) to lower tariffs, reduce non-tariff trade barriers, and otherwise open up borders to market forces. “Fair trade” on the other hand, has come to mean a specific set of commercial standards established by private organizations to help promote certain socially and environmentally beneficial behavior by private producers and consumers. WTO rules and standards apply only to states; fair trade commerce standards apply only to private cooperatives and producers who desire to certify their products as fairly traded.

In the context of public procurement, however, the two have come head to head. Public procurement involves a government purchasing goods and services from private contractors. Proponents of free trade have argued that governments should act like private market actors when purchasing, taking into account only commercial considerations. Others argue that governments should be permitted (indeed, may even be obligated) to promote justice and equality by way of procurement “linkages” to social policy like fair trade (McCrudden 2007).

The WTO’s Government Procurement Agreement (GPA) takes a free trade approach to public purchasing. Governments may pursue social aims through procurement policies only as a narrowly negotiated exception to the rule. In recent years, however, pressure from the European Union and others has resulted in a Revised GPA proposal.

This paper discusses the potential impacts of the Revised GPA text on public procurement linkages, especially in the context of ethically sourced goods. It argues

that the revised agreement does not go far enough in making policy space for governments to prioritize development and environmental goals.

Government Procurement Trends

Governments have employed their purchasing power for public purposes at least since the mid-19th century. Policy makers used procurement rules to protect domestic industry and promote development across industrial sectors and regions. Due in part to the Civil Rights movement in the United States and other similar initiatives world-wide, governments use procurement policy to protect disadvantaged groups and promote equality in society. The emphasis on the state as disinterested market actor arose only with the widespread acceptance of neo-liberal economics in the 1980s and 1990s (McCrudden 2007).

The same economic and political environment gave birth to the WTO, resting solidly on two guiding principles: non-discrimination and Most Favored Nation treatment between members. The GPA exhibits these underlying principles, aiming to prohibit origin-based discrimination in public procurement and promote transparency. The rules of the original GPA focus entirely on opening procurement markets and make no mention of exceptions for “horizontal policies” or linkages. As a result, “[a]ll the ‘work’ . . . is done in the annexes” (McCrudden 2007, 223). That is, where a government would like to reserve space for horizontal policy linkages, it must carve out individual exceptions. During that time, regional approaches mirrored the WTO, with the United Kingdom and the European Community

interpreting and introducing laws that restricted linkages to social policy (McCrudden 2007).

Much has changed, however, in the past decade. Increased awareness of the importance of environmental and economic sustainability has re-opened the debate over whether governments should link their spending to non-commercial concerns. In the EU, a 1999 Commission publication discussed the use of public procurement to promote social and environmental labeling. Ten years later, the European Community published a communication on fair trade, dedicating a large part of it to fair trade public procurement and sustainable procurement practices more generally. The UK initiated its Public Sector Food Procurement Initiative in 2003, promoting sustainable government procurement by public entities purchasing food or catering (EFTA 2010).

Fairness and Freedom in the Revised GPA

Enthusiasm for sustainable public procurement (SPP) has reached the WTO, though in a more muted fashion. The GPA currently has only 15 signatories (counting the EU as one member), despite the fact that government procurement makes up 15-20 percent of global trade flows in goods and services each year (Davies 2011). The potential, then, for increased global trade flows, is enormous. The Committee on Government Procurement openly seeks to expand membership of the agreement, especially among developing countries. In order to do so,

however, the agreement must reflect the needs of those countries, as well as the general consensus in favor of procurement linkages.

The Committee on Government Procurement unveiled substantial progress in the area of government procurement negotiations within the WTO in December of 2011 (formally adopted in March of 2012). GPA ministers drafted a Protocol Amending the Agreement on Government Procurement (GPA Protocol) which, subject to ratification by its members, seeks to encourage broader acceptance of the agreement. The Protocol includes a general exception in cases where derogation is “necessary to protect human, animal or plant life or health” (Art. III.2(b)), excludes public procurement in international development assistance from the scope of the agreement (Art. II.3(e)), and explicitly permits governments to apply technical specifications for environmental protection (Art. X.6).ⁱ

On its face, the GPA Protocol retains its commitment to a “value for money” assessment:

“A procuring entity shall limit any conditions for participation in procurement to those that are *essential* to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement.” Art. VIII.1 (emphasis added).

“Value for money” is described elsewhere as encompassing many other factors besides price, including supplier performance and reliability, warranties, and after-sale support, among others – none of which explicitly include social, developmental or environmental policies (APEC Non-binding Principles, Annex 1, 3.4). In other words, except within the contexts of the three specific exceptions

(discussed in more detail below), governments should primarily concern themselves with getting the best (commercial) value of goods or services for the money and doing so transparently.

Still, recent trends suggest that rather than interpret the “value for money” assessment strictly, governments may take a life-cycle approach. In that case, the public entity may “consider and reconcile the economic, social, and environmental impacts . . . over the whole duration” of the contract (Semple 2012, 3). This approach, taken by the European Union, makes space for horizontal policies, but also must remain consistent with the principles of non-discrimination and transparency in the WTO (EC 2011). The balance is certainly a delicate one.

Acceptable Exceptions

Since much of the work of procurement regulation happens within the annexes, there has been little need to create exceptions within the text of the agreement. That is, until recently. The new GPA Protocol reflects varying degrees of responsiveness to horizontal policy linkages through newly incorporated exceptions.

At one end of the scale, the General Exceptions allow derogations from the agreement *only* where they are *necessary* to protect human, animal or plant life and health (among a few other specific things). A finding of necessity can be one of the most burdensome, legally speaking, because of the likelihood of alternative, less trade-restrictive means of achieving the aim of the horizontal policies. One piece of

WTO case law, however, has interpreted a necessity test in a more flexible way, upholding a challenged procurement measure where it is part of an over-arching strategy to promote a public policy goal (Davies 2011). In *Brazil-Tyres*, the Appellate Body noted that necessity may be found where an import ban was part of a multi-pronged strategy at addressing the health and safety concerns of waste tire products. “[S]ubstituting one element of this comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect” (*Brazil-Tyres* 2007, para. 172). Although this case did not deal specifically with government procurement, the flexible treatment of the term “necessary” within a similar provision describing “general exceptions” could be instructive for future conflict under the GPA. In the case of ethical sourcing initiatives, where a government employed an over-arching strategy to promote fair prices and sustainable practices, procurement measures requiring ethical sourcing could be considered a “necessary” part of that strategy, and thus permissible under GPA Protocol Article III.

Scope limitations within the Protocol provide another possible loophole for sustainable public procurement (SPP). Article II.3 states that the procurement rules do not apply to “procurement conducted for the specific purpose of providing international assistance, including development aid”. The intended application of this provision likely extends only to cases of government aid taking place within a developing country (ex. U.S. AID development projects in Africa). However, were a government to choose to limit certain procurement to specific ethical sourcing

guidelines, it could arguably make the case that it is for the “specific purpose” of providing development aid to the targeted population.

Article X represents the most promising exception for purposes of fair trade public procurement. While prohibiting *unnecessary* obstacles to international trade, paragraph six allows governments to use technical specifications in procurement “to promote the conservation of natural resources or protect the environment”. Though social considerations are not mentioned specifically, some think they would not be ruled out entirely under this title (Semple 2012).

Furthermore, this exception could indirectly influence social policies alongside of environmental ones in two distinct ways. First, sustainable environmental practices often have positive social consequences and can be used to protect the health and well-being of vulnerable classes like poor farmers and seasonal workers. Countries can employ sustainability criteria, therefore, in a way that is aimed also at the social goods they hope to create. Second, allowing environmental protection and conservation in procurement measures could indicate an openness to related horizontal policies. If the most recent negotiations permitted a carve-out for the environment, there is a greater likelihood that future changes to the text may explicitly include space for social policy as well.

Fair trade and social policy in the European Union

In much of Europe, SPP and fair trade public procurement (FTPP) are an accepted and established practice. Nationally, only Wales has achieved the status of

“Fair Trade nation”, but many others have adopted policies and laws encouraging the use of fair trade and comparable ethical sourcing labels in procurement (EFTA 2010). The European Commission issued a directive in 2011, explicitly permitting government entities to use life-cycle costing in evaluating tenders (contractor offers to supply goods or services), and incorporate eco- and social labels in their procurement schemes (EC 2011). Despite the widespread practice, there is some uncertainty surrounding FTTP as the European Court of Justice has not yet faced a challenge to those policies.

Only in the Netherlands has a case come before the courts contesting that FTTP violates anti-discrimination and transparency laws in public procurement. *Douwe Egberts v. Province of Groningen*, however, can be instructive of the policy space available in Europe.

In 2007, the province of Groningen in The Netherlands issued an open invitation to suppliers for the delivery, service and maintenance of hot-beverage machines. The invitation requirements included, among others, that the coffee and tea be Max Havelaar (fair trade) and EKO (organic) certified. One supplier, Douwe Egberts, was Utz Certified, though it did not qualify for Max Havelaar certification. Upon request for clarification, the Province issued a revision specifying the basic premises required (based on the premises for fair trade certification) (*Douwe Egberts* 2007).

Douwe Egberts then attempted to sue the Province, arguing principally that the fair trade requirement was discriminatory. The District Court in Groningen ruled in favor of the Province, drawing from both European and national legislation

and policy to show that such requirements are not only permissible, but encouraged in Dutch government procurement. Neither the applicable Dutch nor European laws preclude the incorporation of social and environmental policies in public procurement (*Douwe Egberts 2007*). The central government of the Netherlands even made it a goal “to only purchase sustainable goods by 2010” (*Douwe Egberts 2007, 2.12*). Ultimately, the court decided that the Province’s requirements were “sufficiently related” to the contract and therefore acceptable and “in accordance with European and national policy – to pursue sustainability and positively influence social and environmental standards” (*Douwe Egberts 2007, 4.4*). It is important to note, as well, that the court found there to be no actual discrimination taking place – since the same requirements were applicable to all suppliers submitting offers, regardless of national origin, and that there were plenty of suppliers qualified to submit offers both inside and outside the country.

Global vs. Regional Procurement Policies

Although the Netherlands is a party to the GPA, its commitments extend almost exclusively to its fellow European States. Thus, the context in which the Province of Groningen was able to implement socially motivated government procurement was unique in that (1) the GPA provisions applied within the framework of a very permissible regional policy toward pursuing horizontal policies and (2) the wide array of availability of Max Havelaar certified European suppliers meant that the requirements could easily be applied without discrimination.

Broadly understood, this shows that regional organizations probably have the policy space to favor procurement linkages as long as they comply with the basic non-discrimination and transparency rules of the GPA. On a global scale, however, these conditions are not as likely to be met.

Countries vary widely in their government procurement rules (EFTA 2010). Although the EU maintains a region-wide consensus toward encouraging ethical sourcing and consumption, other regions have not created the same supportive structure. Within the WTO, it is even clearer that policies creating obstacles to liberalized trade would be less favorable than other policies, regardless of the reason for those obstacles. Furthermore, fair trade suppliers are not as widely available globally as in Europe. Even if FTTP does not discriminate on its face, the WTO dispute settlement system could find *de facto* discrimination because of the unequal distribution of fair trade suppliers globally.

An Ideal World?

We are then left with the question: What is best? Should governments have ultimate freedom (as commercial actors) to decide where and how to spend their money? Or should governments be constrained from creating obstacles to trade in this context? Certainly both fair trade and free trade have their downsides.

Free trade agreements have faced both economic and environmental criticism. Growing trade volumes from open markets have increased global transportation, worsening air and water pollution and depleting natural resources.

Rapid industrialization in places such as Mexico and China has taken its toll on the environment. Economically, trade liberalization has lifted many out of poverty, but overall has not been able to shrink the gap between rich and poor. In recent years, the 2008 financial crisis has highlighted market flaws that led economists and policy makers alike to question whether markets should remain free of government intervention.

Though proponents of ethical sourcing initiatives target these very shortcomings, the various movements face their own obstacles to effectiveness. Competition between the certification organizations can muddy the waters with respect to which approach is best at promoting economic growth and development. In the case of fair trade, for example, critics argue that fair trade's price floor and premium paid to producers actually demotivate farmers from improving their efficiency and product quality. One critic asks, "Does sustaining farmers on the land sound like a good strategy for economic development in the Global South" (Sidwell 2008)? The EU, traditionally a vocal supporter of fair trade standards, has also argued that alternative consumption models, though not as comprehensive, should be encouraged as well (EC 2004). Still, some say that other standards do not go far enough to protect small producers and workers (Douwe Egberts 2007).

Government Procurement and the Future

Indeed, maintaining an open and transparent system of government procurement, one focused on getting the best "value for money," could contribute to

more efficient government spending and corresponding economic growth. Additionally, the transparency provisions of the GPA are worthwhile in themselves. To the extent that governments are required to make their consumption decisions public, their citizens can better hold them accountable and corruption may noticeably diminish. The new agreement also has begun the work of making space for governments to prioritize development and environmental goals. But it does not go far enough.

Future revisions of the GPA should provide policy space for horizontal linkages, including those aimed at long-term sustainability, for three reasons. First, most people agree that sustainability is good and encouraging healthy, sustainable working conditions is an important aim. Since government procurement makes up such a large percentage of global trade, it would be good for everyone if we encouraged governments to make positive choices for our longer-range future.

Second, sustainable public procurement, and even FTTP, are accepted practices in Europe, and beyond (EFTA 2010). If the GPA seems to preclude such policies it could undercut the legitimacy of the agreement itself. In the alternative, it could throw a common practice into a legal uncertainty, increasing costs both to existing members and to those negotiating accession to the agreement.

Third, as the Revised GPA aims to attract new members, it must, at least in part, respond to their procurement needs and to the growing consensus in favor of these linkages.

Finally, to the extent possible, the GPA should keep governments from engaging in competition between ethical sourcing and sustainability labels. The EU

attempts to sidestep “label wars” by requiring states to focus on the underlying environmental and social standards rather than on a particular label (EC 2004). The GPA could fortify this approach through its non-discrimination provisions, ensuring that labels in a particular country or region do not receive special treatment. Subsequent revisions of the GPA must address these shortcomings and concerns if the agreement is to truly govern government procurement in the future.

References

- Commission of the European Communities (EC). 2011. *A Proposal for a Directive of the European Parliament and of the Council*. COM(2011) 896 final. Brussels (Dec. 20, 2011).
- Commission of the European Communities (EC). 2004. Communication from the Commission to the Council and the European Parliament. *Agricultural Commodity Chains, Dependence and Poverty: A proposal for an EU Action Plan* (COM(2004)89). Retrieved May 13, 2010 from, http://ec.europa.eu/development/icenter/repository/COMM_PDF_COM_2004_0089_F_EN_ACTION_PLAN.pdf.
- Davies, Arwel. 2011. "The national treatment and exceptions provisions of the Agreement on Government Procurement and the pursuit of horizontal policies." In *The WTO Regime on Government Procurement: Challenge and Reform* (Robert D. Anderson and Sue Arrowsmith, eds.). pp. 429-443.
- Douwe Egberts Coffee Systems Netherlands B.V. v. The Province of Groningen*, Case No. 97093/KG ZA 07-320, Judgment (Groningen District Court, Nov. 23, 2007). Retrieved Aug. 18, 2012 from, http://www.berlin.de/imperia/md/content/sen-wirtschaft/lez2/fairebeschaffung/urteil_groningen.pdf?start&ts=1260889819&file=urteil_groningen.pdf.
- European Fair Trade Association. 2010. "State of Play of Fair Trade Public Procurement in Europe." Public Affairs: Mobilising action for Fair Trade Public Procurement. Retrieved Aug. 21, 2013 from http://www.unpcdc.org/media/402778/state_of_play_of_fair_trade_public_procurement_in_europe_-_september_2010_-_efta.pdf
- McCrudden, Christopher. 2007. *Buying Social Justice: Equality, Government Procurement, and Legal Change*. Oxford: Oxford University Press. Semple, Abby. 2012. "Reform the EU Procurement Directives and WTO GPA: Forward Steps for Sustainability?" Retrieved July 20, 2013, from http://www.procurementanalysis.eu/resources/Reform+of+the+EU+Procurement+Directives+and+WTO+GPA_Semple.pdf
- World Trade Organization. Appellate Body (AB) report. 2007. *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R. (*Brazil-Tyres*).
- World Trade Organization. Committee on Government Procurement (GPA Protocol). 2011 *Decision on the outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement, Annex 2: Revised Text of the Agreement on Government Procurement*.

ⁱ All Articles and Annexes referenced in this article refer to the Protocol Amending the Agreement on Government Procurement (GPA Protocol), unless specified otherwise.