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Accession Of EACCA Countries To The WTO Government Procurement Agreement: Commitments And Expectations

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Abstract

Following the timely completion of Armenia's accession, the debate on the membership of the WTO Government Procurement Agreement (GPA) becomes nowadays very relevant for EACCA countries. In the last few years, many former Soviet Republics are actively negotiating international commitments and initiated a process of modernization of their national public procurement systems. This article aims to clarify some important aspects of the GPA accession process and the status of the negotiation of the EACCA countries.

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ACCESSION OF EECCA COUNTRIES TO THE WTO GOVERNMENT PROCUREMENT AGREEMENT: COMMITMENTS AND EXPECTATIONS

INTRODUCTION

Government procurement has recently emerged as an important economic and political instrument of national economic growth. In EECCA countries, public procurement constitutes a considerable part of the GDP (between 5% to 15%, according to the World Bank Country Procurement Assessment Reports) but its strategic usage as instrument of political economy presents many critical issues. The lack of transparency in budget and procurement planning, the need of capacity and independence in the procurement institutions, the insufficiency of rules regarding conflict of interest, fraud and corruption in public procurement laws are only few of these concerns.

The growing importance of public procurement as instrument of market regulation has led to the proliferation of different international regulatory approaches and minimum standards for the regulation and good governance of the international public procurement market. The most important example is the WTO Government Procurement Agreement (GPA), reformed in 2011 and entered into force in 2014. The GPA represents the most significant binding agreement of public procurement regulation on the multilateral level and it is a powerful instrument to foster international competition and good governance. The principal scope of the GPA consists, in fact, of achieving international standards of transparency, non-discrimination and efficiency in public procurement activities covered by the Agreement and negotiated by the GPA Members.

The accession to the GPA offers undeniable and concrete benefits in terms of A) gaining secured access to the procurement market of other GPA Members and B) many advantages derive from the increased integrity, transparency and efficiency in the management of their own procurement system.[1] However, to become member of the GPA, acceding countries face major challenges and costs of reforming their national procurement legislation, according to the international standards imposed by the GPA. Apart from the direct negotiating costs implicit in any complex trade negotiation process, it has been estimated that in the specific case of public procurement, the adjustment and implementation costs (related to the extension of the necessary institutional and legislative reforms to draft and adopt through the national legislative processes, associated the costs related to the impact of these reforms on the local industries and workers) and the challenges connected to the legislative and institutional adjustment to the transparency requirements set in the GPA are very high for both developing and developed countries.[2] For these reasons, many WTO Members still maintain a strong adverse attitude towards

GPA membership, as they have difficulties in assessing the benefits and the impact of the GPA's non-discriminatory rules on their procurement policy space. The debate on GPA accession becomes nowadays very relevant for EECCA countries, particularly in light of the revision of the GPA completed in 2012. In the last few years, many former Soviet Republics are actively seeking accession to the GPA Agreement and others like Russia and Tajikistan already have negotiated commitments related to public procurement in their WTO Accession Protocols.

This article aims at clarifying some important aspects of the GPA accession process and the status of the negotiation of the EECCA countries. In particular, the analysis emphasises the role of the UNCITRAL Model Law in the process of reform of public procurement law and the progresses of modernization already conducted in the regions.

THE ARCHITECTURE OF THE GPA AND ITS ACCESSION PROCEDURE

Before entering in the specific analysis on the EECCA countries, it is important to provide an overview of the major commitments imposed by the GPA regulatory framework and the main legal aspects of its accession procedure. The GPA is the main public procurement regulation within the WTO, one of the plurilateral Agreements of the WTO and, formally, Annex 4 to the Marrakech Agreement. It therefore stands outside of the system of the "Single Undertaking" and it is only binding for the signatories, not for all WTO Members.

The text of the GPA creates legally binding commitments, imposing two main sets of obligations on the Signatory Parties. First, the general principle of non-discrimination. Second, a set of detailed rules of transparency in the award procedure. The GPA regulation of procurement is based on the commitment of each party to "*provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable*" (Art III GPA 1994). Moreover, the commitments imposed by the GPA can be challenged under the WTO's Dispute Settlement Mechanism (Art. XX GPA).

In the WTO's negotiating history, since the 1988 Tokyo Round Government Procurement Code, the protectionist and reluctant attitude toward public procurement regulation of both developing and developed countries' governments has been a constant.[3] As a result, notwithstanding the flexibilities introduced in the final Revised GPA agreement, the membership of the GPA has always remained very limited.

The GPA membership is obtained "on terms to be agreed" between an acceding Member and the Parties to the Agreement by the successful completion of the accession procedure (Article XXII.2 GPA). More precisely, GPA accession necessarily involves three main elements: 1) the acceptance of the coverage offer of the acceding applicant, to be negotiated in bilateral and multilateral consultations with the existing GPA Parties; 2) the assurance of the conformity of the national procurement law and regulations with the GPA

obligations; 3) the agreement on possible transitional measures in the implementation of the obligations.

The negotiation on GPA candidate's coverage commitments, in terms of both entity coverage and monetary thresholds, often results in a complex and lengthy process of different negotiating offers between the acceding candidate and the GPA Parties. Moreover, the necessary institutional adjustment of the national procurement legislation (summarized in a "Checklist of issues") is a long and costly procedure, often requiring technical assistance from the WTO Secretariat and other international organizations.[4]

THE ROLE OF THE UNCITRAL MODEL LAW

In light of these difficulties traditionally related to the GPA accession, other international regulatory instruments have provided developing and transition economies with the necessary flexibility for the modernization of their national procurement systems. The most important regulatory reference for the reform of domestic procurement is represented by the UNCITRAL Model Law on Procurement of Goods, Construction and Services, adopted in 1994 and reformed in 2011.

The UNCITRAL Model Law provides a highly articulated template supporting countries in modernizing and improving their national procurement systems, oriented to the achievement of best value for money, efficiency and competition. The Model Law is not a binding agreement but a traditional soft law instrument, which the parties are free to follow, fully or partially, in reforming national legislation. For this reason, the UNCITRAL Model Law represents a powerful instrument to gradually reform national procurement regulation, suggesting modern and efficient procurement regulatory solutions, and offering major flexibilities in terms of choice of possible procurement methods. For this reason, the Model Law is widely recognised as a "global standard" for good governance in the procurement regulation.

After the collapse of the Soviet Union and the establishment of new independent states, the introduction and the modernization of national public procurement laws in the EECCA countries has been mostly based on the 1994 UNCITRAL Model Law. In Ukraine, Moldova and Belarus, as well as in the Caucasus countries (Azerbaijan, Armenia and Georgia) the introduction of the first modern public procurement regulation dates back to early 2000s, as registered in the first generation of World Bank Country Procurement Assessment Reports for Armenia (CPAR 2009/06/29) and Georgia (CPAR 2002/06/30). In the Central Asian Countries, the process of modernization developed even later in the 2000s and always on the basis of the UNCITRAL Model Law. For example, in the case of Tajikistan the first Public Procurement Law was adopted in 2006 and only with the reform of 2012 minimum international standards were introduced on the base of the UNCITRAL Model Law, as confirmed in the World Bank evaluation (CPAR 2013/05/01).

For these reasons, the progressive integration of the UNCITRAL Model Law constituted a crucial first step for the establishment of a modern national

procurement system in the EECCA countries according to international minimum standards.

ACCESSION OF THE EECCA COUNTRIES TO THE GPA

The accession of EECCA countries to the GPA is the logical and natural next step in the development to push forward the reform of domestic procurement legislations. In this perspective, the revised Agreement, entered into force in April 2014, represent an incentive to enlarge the membership and the coverage of the Agreement between the countries of the region. The reformed GPA text now in force is a streamlined procurement regime and an easy readable legal instrument, representing an improved base for the future accession negotiations.

At the moment, according to the latest documents circulated in the GPA Committee, the EECCA countries can be grouped in four big categories, with respect to the status of the negotiation and accession to the GPA Agreement. First, there are many EECCA countries (Azerbaijan, Belarus, Kazakhstan and Uzbekistan) that are still in the accession process to the WTO and it is too early to say whether they will take obligations to join the GPA. Turkmenistan has not applied to become a WTO Member yet.

Another group of EECCA countries initiated a negotiating accession procedure and they are formally observers to the GPA. These countries are Georgia (observer since 5 October 1999), Kyrgyzstan (since 5 October 1999), Moldova (since 29 September 2000) and Ukraine (since 25 February 2009). In particular the accession processes of Moldova and Ukraine were strongly boosted by the work of revision of the GPA Agreement. In 2011, Ukraine filed its application for the GPA accession and its offer on the commitments coverage and Moldova, who applied for accession in 2002, circulated its second revised coverage offer in 2012.[5]

A third group is represented by GPA accession candidates that already took commitments on public procurement in the context of their WTO Accession Protocols: Tajikistan[6] and the Russian Federation.[7] In the debate on GPA accession, Armenia deserves a special attention and a category itself, being the only EECCA country that officially acceded to the GPA. Armenia started its accession procedure in 2009 and became a party of the GPA in September 2011. The timely completion of the Armenia's GPA accession has a crucial relevance for all the other acceding candidates of the region. Armenia proved that *"participation in the GPA brings real benefits not only in terms of access to other Parties' markets for procurement of goods, services and construction services, but also in the form of enhanced competition and transparency in the Party's internal markets"*, stated the former Director-General Pascal Lamy, welcoming country's achievement. The benefits in terms of market access and the political and legal commitments of good governance and transparency achieved in only 3 years by the government of Armenia during its accession procedure represented a important milestone, encouraging other transition economies and developing countries to consider acceding to the GPA.

CONCLUSION

The WTO Government Procurement Agreement represents a crucial instrument to foster international competition and good governance in the public procurement markets. Many EECCA countries have started a process of accession to the GPA Agreement and initiated the required reforms to their national procurement systems. In this perspective, the brief analysis in this article shows that the interaction of different international regulatory instruments, as the UNCITRAL Model Law and the GPA, have proved to be beneficial for the progressive modernization of the national legislations according international standards and best practices. The recent reform of the GPA Agreement, together with the fast accession of Armenia to the GPA, may only give more impetus to the process of reform of the procurement system in the region and facilitate the accession process of other EECCA countries.

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[2] Robert D. Anderson and others, Assessing the value of future accessions to the WTO Agreement on Government Procurement (GPA): some new data sources, provisional estimates and an evaluative framework for individual WTO members considering the accession (2011) pp. 4-35.

[3] Annet Blank, and Gabrielle Marceau, "The History of Government Procurement Negotiations since 1945," *Public Procurement Law Review*, Vol. 5 (1996), pp. 77-118.

[4] In the case of the negotiation of the accession of CIS countries the EBRD has organized a series of technical cooperation activities, establishing informal cooperation with the WTO Secretariat and UNCITRAL.

[5] WTO. Report (2013) of the Committee on Government Procurement, WTO/GPA/121, 24 October 2013.

[6] WTO. WT/ACC/TJK/30, dated 6 November 2012, paragraph 244.

[7] WTO. WT/ACC/RUS/70, dated 17 November 2011, paragraph 1143.