

Government Procurement

Case study 1: Government Procurement Liberalization in EU FTAs

Significance of Procurement Liberalization

Public procurement markets can be subject to politicization as these are under the control of the governments. Procurement practices are frequently utilized as a tool for a state's developmental strategies, aimed at directing investment towards specific sectors or supporting domestic industries. Unfortunately, in nations with unstable institutions, public procurement processes can become susceptible to corruption and rent-seeking behavior by those in charge of contracting. Despite limited literature on the impact of international commitments on institutional reform, existing studies that delve into procurement mechanisms and their vulnerability to corruption indicate that corrupt practices within public contracting hinder efficiency, result in wastage, and generate opposition to reform efforts from entrenched interests.

The EU and Government Procurement Liberalisation

Adapted from: S. Khorana and M. Garcia (2014), Diffusion of Procurement Liberalisation through EU Bilateral Agreements: Signalling Stewardship? *Journal of World Trade*, 48 (3): 481-500.

In the European context, a key driving force behind the globalization of government procurement (GP) liberalization stems from the establishment of its single market. Ever since the enactment of the Single European Act in 1985, the EU has implemented a system of procurement liberalization, eliminating preferential treatment of domestic industries in government procurement. The EU has pursued strategies to "externalize" its regulatory framework by promoting the expansion of membership in the Government Procurement Agreement (GPA) and the adoption of GPA-standard regulations in Free Trade Agreements (FTAs). It has extended to the global stage the same rationales used to justify EU procurement liberalization, including the argument that the advantages to domestic suppliers of protected markets are outweighed by the increased costs of procurement.

Given that the GPA operates outside the comprehensive negotiation's framework of the WTO's "single undertaking," increased access to government procurement markets cannot be traded against other issues within the WTO. The European Union's (EU) liberal internal procurement regime, which prioritizes transparency, openness, and selecting the most economically advantageous tender, limits the EU's ability to leverage its government procurement market within the GPA. Legally, procurement entities are prohibited from retaliating against closed government procurement markets by excluding bids from companies based on their origin. However, at the level of Free Trade Agreements (FTAs), where the EU can offer concessions on other matters to its partners in exchange for access to government procurement markets, it has a greater opportunity to externalize its preferred government procurement regime.

EU FTAs and Government Procurement Provisions

Prior to the 2000s, EU Free Trade Agreements (FTAs) were primarily motivated by political objectives such as development and improving relations with neighboring countries. However, with the introduction of the "Global Europe" trade policy, current FTAs are driven by a competitiveness agenda

aimed at market liberalization and addressing the "Singapore issues." Within this framework, government procurement has emerged as a new focal point with considerable untapped potential for EU exporters.

The EU-Singapore FTA represents a significant development, granting EU bidders access to public tendering opportunities, including in the utilities sectors, for the first time. Both parties have agreed to transparency and non-discrimination rules that extend beyond the scope of the World Trade Organization's Government Procurement Agreement (GPA).

Other notable EU agreements include the FTA with Korea, which is already in effect, Economic Partnership Agreements (EPAs) with African, Caribbean, and Pacific (ACP) states (such as the EU-CARIFORUM agreement), and Association Agreements (AAs) with Central American countries and Peru/Colombia (pending implementation).

The EU-Korea FTA signals a commitment to further liberalization by expanding Korea's coverage of procurement entities beyond those listed under the GPA. Similarly, the EU's agreements with Peru/Colombia and Central America feature comprehensive coverage of procurement entities, with entities listed affirmatively. However, goods and services are subject to a negative list approach, meaning those not explicitly mentioned are subject to liberalization commitments.

The EU is currently engaged in negotiations for additional FTAs in Asia with countries like India, Malaysia, and Vietnam. However, these negotiations have encountered challenges related to discussions on government procurement.

The GP chapters within EU Free Trade Agreements (FTAs) exhibit provisions that closely resemble the language, classifications, and commitments outlined in the GPA. These agreements primarily focus on key GPA elements, including non-discrimination and national treatment, as well as general institutional enhancements through procedural reforms such as electronic publication of planned procurements to bolster transparency.

EU agreements with non-GPA signatories reflect a strong alignment with the GPA, featuring both procedural and substantive provisions on e-procurement and transparency. In instances where the legal framework differs from the liberalization commitments established through the FTA, partner countries are obligated to make adjustments to their existing procurement frameworks. These commitments may involve higher initial procurement threshold values, limited coverage of entities, and transitional periods for implementing obligations, all consistent with a harmonized approach based on GPA-style obligations.

Through these mechanisms, EU FTAs serve to catalyze the streamlining of legal procurement frameworks in partner countries while fostering competition and transparency. Consequently, these agreements present an opportunity for multilateral convergence, as a shared liberalization matrix supports efforts to reduce discrepancies with partners and harmonize practices within the broader multilateral system.

A significant advancement in these FTAs is the introduction of comprehensive and non-discriminatory review procedures, allowing suppliers to challenge the award of tenders. While the depth of these procedures may vary among agreements, all ensure the presence of an impartial administrative authority to oversee such challenges.

The European Union's approach to procurement liberalization through FTAs aligns with its belief that deep FTAs can assist developing countries in navigating complex multilateral negotiations. The

convergence achieved through these agreements is seen as a catalyst for enhancing multilateral cooperation on procurement matters.

In this regard, FTAs aim to leverage trading obligations as a means to reform partner countries' national procurement systems and to extend the influence of the EU's procurement model externally. By doing so, these agreements aspire to utilize their provisions as vehicles for driving reforms and promoting the adoption of best practices in procurement across partner nations.

EU's Global Governance Model

The close alignment between the Government Procurement Agreement and the European Union's concluded FTAs indicates the potential for the EU to utilize its "new generation" FTAs to gradually expand the multilateral system over the long term. In this context, the EU is poised to assume a central role in shaping a framework for global governance.

A fundamental aspect of these FTAs has been the emphasis on enhancing transparency within partner countries. This emphasis underscores the effectiveness of FTAs as vehicles for transmitting multilateral rules beyond the immediate EU neighborhood. By promoting transparency and adherence to international standards in procurement, these agreements contribute to the broader goal of establishing a more transparent and accountable global governance framework.

Overall, the convergence between the GPA and EU FTAs suggests that the EU's proactive engagement in promoting transparency and adherence to multilateral rules through its trade agreements could serve as a catalyst for extending the reach of the multilateral system in the longer term.

The recent successful conclusion GPA-compliant FTAs between the EU and its partner countries highlights the potential for the EU to utilize bilateral relations as a means to harmonize FTAs with the plurilateral GPA. Given that the GPA has limited participation from developing countries, leveraging bilateral agreements could facilitate deeper cooperation and position the EU to take a leading role in shaping a roadmap for global governance.

While acknowledging the impasse in the Doha talks, the EU's trade policy underscores a commitment to redirect efforts towards outlining a clearer long-term vision for global governance. From the EU's standpoint, FTAs serve as a means to gradually advance its preferred governance model and ensure market access for its firms.

Assuming that the EU can incorporate similar provisions in FTAs with countries like India, Malaysia and others, it would lay the groundwork for potential future GPA membership by these countries. Additionally, it would afford EU firms access to larger markets under a consistent set of conditions, thereby fostering greater trade harmonization and facilitating smoother international business operations.

Therefore, EU Free Trade Agreements can serve as an alternative avenue for inter-regional engagement, reinforcing the EU's position as a global actor shaping a functional multilateral order. However, the extent of progress hinges on the political will of partner countries to engage in dialogue on contentious issues, such as the principles of sovereignty and non-interference.

Case study 2: Government Procurement Provisions in Korea-US FTA

Adapted from: Hong-Sik (Justin) Chung, *Government Procurement in the United States– Korea Free Trade Agreement: Great Opportunities for Both Sides?* 34 Nw. J. Int'l L. & Bus. 299 (2014).

Introduction

The Korea-United States Free Trade Agreement (KORUS FTA) stands out among the FTAs signed by Korea, particularly in its efforts to foster free and equitable trade within the government procurement sector. This agreement demonstrates a commitment to promoting fair competition while also introducing additional obligations beyond the Government Procurement Agreement (GPA) provisions.

Both Korea and the United States have actively pursued the expansion of access to each other's government procurement markets through the negotiations embedded within the KORUS FTA. Notably, there has been a concerted emphasis on providing opportunities for small and medium enterprises (SMEs). As a result of these negotiations, significant milestones have been achieved, such as reducing thresholds related to central (federal) government procurement and prohibiting the imposition of conditions related to prior work experience in tender processes. Furthermore, public works concessions have been included among the projects covered by government procurement.

However, despite these advancements, the accessibility for SMEs from both parties to access each other's government procurement markets remains somewhat limited. Challenges persist, particularly in addressing issues related to the mutual recognition of entities issuing guarantee insurance policies and the recognition of technical personnel qualifications.

Korean Approach to Government Procurement Provision in FTAs

The government procurement provisions within Korea's FTAs can be categorized into two types: those that apply GPA provisions *mutatis mutandis* (such as the Korea-EFTA FTA and Korea-Singapore FTA), and those that, while also applying GPA provisions *mutatis mutandis*, establish additional obligations (exemplified by the KORUS FTA and Korea-EU FTA).

The government procurement chapter of the Korea-Chile FTA extensively incorporates provisions from the Government Procurement Agreement (GPA), albeit without explicit mention due to Chile's non-membership. Notably, it diverges from the GPA by not granting the most favored nation status, encouraging electronic interchange of tender information, and allowing exclusion of privatized entities from concession lists without compensation.

Similarly, the Korea-Singapore FTA adopts a significant portion of GPA provisions *mutatis mutandis*. However, it differs by promoting electronic tender information exchange and permitting privatized entity exclusion from concessions without compensation.

In the Korea-EFTA FTA, GPA provisions are applied *mutatis mutandis*, with exceptions including the absence of most favored nation status and allowing privatized entity exclusion from concessions without compensation.

The Korea-U.S. FTA reaffirms GPA principles while introducing additional measures for opening up government procurement markets. Notably, it emphasizes evaluating suppliers based on their

financial, commercial, and technical capabilities both domestically and internationally. It also allows for the imposition of technical specifications ensuring compliance with labor laws. Additionally, the establishment of a Working Group on Government Procurement facilitates the exchange of information and addresses procurement issues.

In the recently concluded Korea-EU FTA, provisions prohibit certain conditions on suppliers, akin to the Korea-U.S. FTA. Notably, definitions and coverage of public works concessions vary between parties, with Korea adopting a 'build-operate-transfer contract' definition, while the EU employs a broader definition aligned with its directives. Procedural rules for public works concessions are limited to non-discrimination and transparency obligations, with other procedures governed by respective domestic laws.

Comparison of KOR-US with the WTO GPA

The text of the agreement adopted following negotiations on government procurement under the KORUS FTA emphasizes its relationship to the WTO GPA, of which both parties are signatories. Article 17.3.1 of the KORUS FTA applies a wide range of WTO GPA provisions, including national treatment, non-discrimination, rules of origin, technical specifications, tendering procedures, counter-purchase, and challenge procedures, through a *mutatis mutandis* approach. Additionally, Article 17.3.3 recognizes the provisional approval of the revised GPA by the WTO Committee on Government Procurement on December 8, 2006. It stipulates that once the revised GPA enters into force for both parties, the appropriate provisions of the revised GPA will be promptly incorporated by reference in place of the corresponding provisions in the agreement.

Consequently, the government procurement chapter of the KORUS FTA anticipates the application of WTO GPA provisions as they stand, covering significant principles as well as individual concessions. Moreover, upon the completion of negotiations on the revision of the GPA currently underway, the outcome will also be incorporated into the text of the FTA and operationalized accordingly.

Key Negotiating Outcomes

1. Reduction of Thresholds by Central Government

In Section A of Annex 17-A to Chapter 17 (Government Procurement) of the KORUS FTA, thresholds for federal government procurement markets were lowered. This adjustment specifically targeted contract values ranging from approximately US\$ 100,000 to 200,000, aiming to reduce barriers to accessing government procurement markets within this value range. It is worth noting that despite these negotiations, access to state government markets, which represent a significant portion accounting for approximately 63% of the total U.S. government procurement markets as of the fiscal year 2005, remained unchanged.

During negotiations for opening up regional government procurement markets, concession proposals can vary significantly. While 37 states of the United States have opened up their markets under the WTO GPA, certain states such as New York, Pennsylvania, Maryland, Michigan, Florida, and Illinois have opted to exclude automobiles and steel from the application of the GPA.

European member countries have explicitly stated in Annex 2 to the WTO GPA that all state or regional government agencies will be opened up, adhering to this principle. However, countries like Japan and Korea, where the application of the WTO GPA is limited to regional governments with populations over 500,000 people, apply a limited most-favored nation status. This status imposes restrictions on the right to utilize challenge procedures concerning regional government agencies under Annex 2 or other agreements.

The procurement markets of 37 states in the United States are already open under the WTO GPA, albeit with applicable lower thresholds (SDR 355,000) that remain higher than the federal government procurement threshold agreed upon in the KORUS FTA (SDR 100,000). The recent trend of reduced federal control over state governments may complicate trade negotiations. However, given the importance of pursuing FTAs to achieve improved market access beyond the framework of WTO multilateral negotiations, and considering recent FTAs signed by the United States with other countries, both governments should have made more active efforts to lower thresholds, even if not universally across all state governments.

2. Provisions for Exceptions to Application, including Preferential Policies for Small Business under General Note

In Section E (General Notes) of Annex 17-A to the government procurement chapter of the KORUS FTA, it is stipulated that the following General Notes from each Party's Schedule are universally applicable to this Chapter, encompassing all sections of the Annex: From the Schedule of Korea: 1. This Chapter excludes procurement related to human feeding programs. 2. This Chapter also excludes: (a) single tendering procurement and set-asides for small- and medium-sized businesses under the Act Relating to Contracts to which the State is a Party and its Presidential Decree; or (b) set-asides for small- and medium-sized businesses according to the Act on Private Participation in Infrastructure. From the Schedule of the United States: 1. This Chapter does not cover any set-aside on behalf of small or minority-owned businesses, including preferences such as exclusive rights to provide goods or services or any price preference.

Korea has already exempted the manufacture and purchase of products made by small and medium enterprises from the obligation to open up markets, as outlined in its WTO GPA concession schedule under 'the Facilitation of Purchase of Small and Medium Enterprise-Manufactured Products Act'. Similarly, the United States has included in its WTO GPA concession schedule an exception to market opening requirements for set-asides benefiting small or minority-owned businesses under 'the Small Business Act'. These exceptions, including the set-aside for small businesses, are also incorporated into the provisions of the KORUS FTA.

Both Korea and the United States employ various measures to favor their small and minority-owned businesses in government procurement. Typically, this preferential treatment is facilitated through encouragement from the Administration and legislative bodies like the National Assembly in Korea or Congress in the United States. Government agencies are often encouraged to establish their procurement targets and then prioritize the purchase of products manufactured by these minority-owned businesses. This preference is usually implemented through voluntary initiatives rather than mandatory procurement requirements.

3. Provisions for Exclusion from Application of Procurement Related to Furtherance of School Feeding Programs

In Section E (General Notes) of Annex 17-A to the government procurement chapter of the KORUS FTA, item 1 of the Schedule of Korea specifies that the chapter does not apply to procurement activities related to human feeding programs. The Korean Government has indicated that this provision was newly added, particularly to exempt school feeding programs. These programs are funded through subsidies from central or local governments as well as contributions from parents. There's a concern that restricting the use of parental contributions to preferentially purchase domestic agricultural products for school feeding programs might raise issues related to national treatment.

On the other hand, paragraph 2 (Exceptions by Department of Agriculture) of the Notes to the United States Schedule, Section A (Central Level Government Entities), states that the chapter does not cover the procurement of agricultural goods in support of agricultural support programs or human feeding programs. Unlike the United States, which links government procurement of agricultural products to its domestic agricultural support programs requiring substantial budgets, the Korean Schedules do not include similar provisions regarding general exceptions for the procurement of agricultural products tied to domestic agricultural support programs.

4. Other Additional Concessions

a. **Central Product Classifications not included in the existing GPA signed by Korea**
When comparing the government procurement provisions of the KORUS FTA to the WTO GPA, several distinctions emerge. Firstly, under Section A of Annex 17-A, entities such as regional governments and government enterprises are excluded from the scope of the agreement. Secondly, in Section C, the services covered by the agreement align with Annex 4 of Appendix I to the GPA. Thirdly, regarding Section D on Construction Services, Korea's inclusion of Group 518 under Category 51 of the Central Product Classification contrasts with its absence from the WTO GPA, whereas the United States has already included Group 518 in its WTO GPA commitments.

b. **Opening up of Public Works Concession (Article 17.2.2)**
Article 17.2.2(b) of the KORUS FTA stipulates that government procurement encompasses various contractual means, including purchase, lease, rental or hire purchase, with or without an option to buy, build-operate-transfer (BOT) contracts, and public works concession contracts. This provision explicitly includes private participation in social overhead capital facilities, such as BOT arrangements, within the scope of government procurement subject to the regulations outlined in Chapter 17 of the agreement. Consequently, these arrangements are among the sectors obligated to open up to market access under the terms of the FTA.

The provisions within the text of the KORUS FTA do not surpass the level of market access established in the WTO GPA, of which the United States is a member. Korea already allows foreign corporations to engage in public works concession projects under the Private Participation Act, enacted on August 8, 1994. This legislation, originally titled the "Promotion of Private Capital into Social Overhead Capital Facilities Act," enables private sector involvement in infrastructure development. Therefore, it would be more pertinent to assess the significance of Korea's existing framework for private participation in infrastructure projects concerning market access, rather than solely relying on the specifics outlined in the government procurement section of the KORUS FTA.

Currently, the majority of public works concessions underway operate on a build-transfer-operate (BTO) or build-transfer-lease (BTL) basis. BTO arrangements typically pertain to the construction of highways and bridges, where the operation of such infrastructure falls outside the scope of services subject to market opening under the KORUS FTA. Similarly, BTL arrangements, commonly associated with schools and other essential infrastructure, involve private sector construction responsibilities while operational duties rest with the state. Consequently, for concessions solely involving construction services, the KORUS FTA could theoretically apply. However, the reality is different, particularly concerning new school construction or reconstruction projects, as it falls under the jurisdiction of regional governments, making it challenging to apply the KORUS FTA. In the United States, the scope of public works concessions remains relatively limited, with state or local governments primarily overseeing infrastructure construction and operation, even when federal funding is involved. Consequently, in practice, the KORUS FTA is unlikely to extend to public works concession projects.