

Market Access under the Government Sector's Procurement Agreements

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The primary purpose of an agreement on government procurement² that included the issue of access is to expose that market to stronger competition and closer international scrutiny. Provisions are established for that purpose, binding the Parties to the agreement to apply the principle of non-discrimination to the legal framework and procurement practices employed by public agencies in their purchases.

This document reviews the manner in which government procurement agreements incorporate the principles of nondiscrimination – National Treatment (NT) and Most Favored Nation (MFN) – to attain trade liberalization. The general purpose is to explain, in plain and simple language, the nature and scope of negotiations for market access and some of their methodological considerations. The organization of the document is as follows: firstly, non-discrimination in government procurement is broached from a conceptual perspective, as a way of identifying non-discrimination disciplines in trade agreements and their relationship to market-access commitments. In this section, emphasis shall be laid on the relationship between procurement disciplines and the disciplines of border measures affecting goods and services. Secondly, the issue of coverage and exceptions to coverage shall be analyzed as considerations determining the scope of market access in an agreement. Thirdly, there shall be a description of offer filing procedures and market access commitments. Finally, a summary and conclusions shall be submitted.

The negotiation of trade agreements on public sector purchases remains a controversial subject at international level. However, since the first such agreement was signed during the Tokyo Round of the GATT in 1967, many countries have decided to negotiate disciplines for this market. In the Americas, the first two treaties that included this issue were the bilateral free trade agreement between Canada and the United States (1991) and the NAFTA (1994). Since then, four bilateral and six multilateral

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² In this document, the terms "contracts," "agreements," "purchases," "procurement" and "acquisitions" are used interchangeably; "public" and "government" or "governmental" are also considered synonymous.

agreements have been subscribed.³ All countries in this hemisphere, with the exception of CARICOM and MERCOSUR, have some experience in this area, in some cases with extraregional partners, as is the case of Chile and Mexico. That experience, however, has not resulted in the development of institutional capacity in most of the countries, and there are many misunderstandings and preconceptions regarding the type and scope of the disciplines adopted under the agreements. For that reason, it seemed desirable to include examples of treatment of the market-access issue under different agreements concluded in this hemisphere and under the WTO multilateral agreement (GPA). In this way it is expected to make it easy for interested readers to derive lessons applicable to current trade initiatives on government procurement.

Non-Discrimination and Government Procurement

The proposal advanced by some countries to consider the measures that affected government procurement and contracts like any other measure related to trade in goods was, as is known, rejected during the negotiations leading to the GATT in 1945. Some publications describe the reasons why the government procurement market was at that point excluded from the trade disciplines⁴ and others explain the economic and political rationale behind many governments' continuing resistance to allowing a market representing between ten and twenty percent of their domestic product and up to fifteen percent of international trade to be subjected to international rules.⁵ National security and defense considerations, for example, justify discrimination against foreign suppliers and foreign goods and services in the eyes of many a government. The same applies to the promotion of segments of domestic industries, local technology, or regions or social groups (such as small and medium-sized entrepreneurs or the indigenous population) within a country. In many cases, governments discriminate according to the nationality of the suppliers or goods.

The economic impact of these measures at the domestic level depends on their scope and nature, and on the State's size and relative efficiency. In the international arena, according to OECD estimates, the result of the lack of disciplines is a preference margin for local producers and domestic production

³ The bilateral agreements are those entered into by Mexico with Bolivia, Costa Rica and Nicaragua, respectively, and by Chile and the United States. Multilateral agreements have been concluded by Central American countries and Chile, Panama and the Dominican Republic, and between Mexico, Colombia and Venezuela (G-3). Save for the agreement between Chile and the United States, all the others are in effect. The CAFTA and FTAA negotiations also include the subject of government procurement.

⁴ See Blank Annet and Marceau Gabrielle, "The History of Government Procurement Negotiations Since 1945" and Bernard M. Hoekman and Petros C. Mavroidis, eds., "Law and Policy in Public Purchasing: the WTO Agreement on Government Procurement," Ann Arbor; University of Michigan Press, 1997.

which ranges between 13% and 50%, and the presence of barriers, sometimes significant, to the international trade in goods and services.

The negotiation of trade agreements for the public sector's procurement market may offer important new market opportunities, even if the goal set is not to abolish discrimination but to just cut it down.⁶ To this end, it is important for members to assume the substantive obligation to apply two basic principles of international legislation, National Treatment and Most Favored Nation status.

National Treatment

Under a National Treatment rule, the parties to an agreement agree to give foreign suppliers and products (goods and services) a treatment no less favorable than that accorded to domestic suppliers and products. The purpose is to remove the barriers included in the laws, regulations and sundry requirements that adversely affect the non-domestic ones. Traditionally, within the GATT/WTO framework, this principle has entailed the prohibition to impose on imported goods, after the payment of tariffs, any sort of taxes, overcharges or administrative procedures other than those applicable to domestic goods. After the Uruguay Round, the National Treatment concept was extended to the agreements on services (Art. XVII GATTs) and intellectual property (Art. III TRIPS). It was also included in the agreement on technical barriers (TBT).

Promotion of an environment of international competition in the government procurement market essentially depends on the reduction of the discriminatory measures applied by governments and contained in different aspects their national purchasing systems. This is why, as happens in other areas of international trade and related subjects, the application of the principle of non-discrimination to public purchases essentially implies a prohibition to apply discriminatory measures deriving from any law, regulation, procedure or established practice anywhere in the purchasing process, including conflicts between agencies and suppliers. This provision is contained in all regional, bilateral or multilateral purchase agreements that include the issue of market access, including the GPA. But its application is subject to exceptions, clarifications and provisos, depending on what the countries may have negotiated as part of the scope of the agreement, which will be discussed in detail in the next section. In this regard,

⁵ See, for example, Evennet Simon, "Multilateral Disciplines and Public Procurement" and "Development, Trade and the WTO Part VI" by Bernard M. Hoekman, Philip English and Aaditya Mattoo. pdf version. www.worldbank.org.

⁶ Lack of transparency in legislation and, above all, in the practices of government bodies and the discretionality with which they conduct their business in many countries, introduce criteria other than technical or economic ones in purchasing processes and makes market access even more difficult for foreign bidders. This dimension, however, is not considered in this document.

there is a significant difference with free trade agreements that establish the national treatment principle for the entire universe of goods.

Below is a list of the measures that governments typically resort to, which would be prohibited.

Commonly Applied Discriminatory Measures Against Foreign Suppliers, Goods and Services

- ?? *Price preferences for domestic suppliers at the time of evaluating an offer*
- ?? *Buy National (prohibition to buy foreign goods or services) or provisions excluding foreign suppliers from certain purchasing processes.*
- ?? *Reserving part of the purchases of an agency to:*
 - Domestic suppliers*
 - Domestic goods and services (or goods and services from a specific region of the country)*
 - Certain groups of domestic suppliers*
- ?? *Performance Requirements: Preference for suppliers meeting specifications on local content, licensing of technology, hiring of personnel, setting up consortia with local firms, export goals, counter-trade, or any other similar requirement.*
- ?? *Different requirements imposed on foreign suppliers at the time of registration, prequalification, request for technical specifications or others.*
- ?? *Direct contracts with domestic suppliers.*
- ?? *Restricted access to the mechanisms for reviewing and challenging the purchasing processes.*

The inclusion of a national treatment clause in a purchase agreement is extremely important to define market liberalization. However, it is to be noted that it does not remove border barriers to the trade in goods or regulatory restraints to the provision of services of any kind. Thus, tariffs, import regulations and other aspects of entry of foreign goods and services into the market are not regulated by the purchase agreement but by the provisions of the respective chapters. These provisions become highly significant in the case of services, as for instance in the construction sector, which require the physical presence of the workers and facilities for the movement of individuals.

In the same sense, the rules of origin are those applicable to “normal trade transactions and at the time of the transaction”⁷. For the procurement chapter in free trade agreements, such a clause assumes the application of preferential rules included in the chapter on goods, no national treatment being accorded unless such requirements as local content, tariff shifts, etc., are met. In some cases, the preferential rules represent a hindrance capable of annulling the concessions granted in the area of purchases. An alternative treatment of this issue was obtained by Chile in the agreement negotiated with the United

⁷ Article IV of the GPA.

States, with the introduction of non-preferential rules, which are generally less stringent.⁸ Thus, Chilean products are placed on an almost equal footing with goods of U.S. origin when participating in purchasing processes covered by this agreement.

Most Favored Nation (MFN)

An MFN clause binds the signatories to give products (goods and services) and suppliers of a given country a treatment no less favorable than that accorded to the products and suppliers of any other member country signatory to the same agreement. Its basic goal is to promote equality of opportunity among all participants, maximizing the potential economic benefits for the importing country. MFN Treatment is included in Art. I of the GATT and of the GATS, as well as in article IV of the agreement on intellectual property (TRIPS).

A related aspect to take into account involves the stipulations relative to the “denial of benefits” since they help to clarify who are the suppliers benefiting from advantages according to their origin. A standard clause in government procurement is that which extends national treatment to individuals or companies of non-member Parties if they have a commercial presence (there is no discrimination among companies on the basis of the degree of foreign affiliation or ownership) and carry out a “substantial activity” in a member country’s territory. The relation in this regard must be made with the chapter on services, since the restrictions on the “right of establishment” in certain sectors could become a barrier to participation in the market for purchases.

The application of the Most Favored Nation Clause has exceptions in the framework of procurement agreements. The most important one is that which refers to the issue of the multilateralization of commitments. In the GPA and in the majority of free trade agreements, countries have found it difficult to give the same treatment to all the Parties involved. What prevails, rather, is the concept of reciprocity, under which a country does not liberalize a sector unless other countries do the same, or comply with certain conditions. Reciprocity makes it possible to reach a balance in coverage, or equivalence in the size of the market negotiated.

Although reciprocity is present in all trade negotiations, the application of the MFN principle would imply that the concessions reached should be extended to all the Parties in an “immediate and unconditional”

⁸ Article 9:2. -3 of the text under linguistic comparison, subject to legal revision.

manner, independently of the size of each one's market. The exception of this rule in other areas of trade, such as goods, is only of a temporary nature. Without an unconditional MFN treatment, it is unlikely that small and scarcely developed countries will enjoy a major liberalization of the markets of the senior partners, even if they offer the most significant share of their domestic market⁹. To make matters worse, both factors lead to scarce transparency in the market-access obligations of the Parties to an agreement, turning a multilateral one into a combination of bilateral deals. This fact has been mentioned by many members of the WTO as a reason not to enter the GPA. At a regional or subregional level it has created and could continue to generate resistance to submitting the government procurement market to international disciplines.

Examples of restricted or conditional application of MFN treatment:

- ✍ GPA. The U.S. applies higher thresholds to Korea than to the other members for the subcentral level and public enterprises, since Korea has a higher threshold in this sector (and applies it to MFN).*
- ✍ NAFTA: The U.S. will not open its electrical companies and the Department of the Interior's purchases to Canada until Canada accepts to commit its provincial and local governments..*
- ✍ MEXICAN BILATERALS: Costa Rica's access commitments toward Mexico are broader than those the latter acquired with regard to Chile, Panama and the Dominican Republic. Costa Rica, Bolivia and Nicaragua include agencies at sub-federal levels. Mexico has not included them.*

The GPA model is not, however, the only possible one. Some countries have signed agreements with a much more comprehensive scope. In this regard, the bilateral agreement between Australia and New Zealand appears as the opposite paradigm to the GPA's. In the region, the agreements signed by Chile with the Dominican Republic and with the Central American countries, as well as that between the latter and the Dominican Republic, are characterized by the broadness of their scope.

Another exception is that which refers to special and differential treatment. It is interesting to note that the majority of agreements specifically on the issue of procurement do not contemplate stipulations regarding special and differential treatment, which has not precluded an asymmetrical treatment to be awarded, sometimes temporarily, at other times permanently, to less developed countries. The exception is the GPA, whose article V establishes that exceptions to national treatment may be negotiated, and the lists of commitments modified, taking development needs into account.

Some examples of asymmetrical treatment in hemispheric agreements:

⁹ For a lengthy discussion on this subject, see David J. Walker, "A Small Open Economy View," as well as Michael Hart and Pierre Sauvé, "Does Size Matter? Canadian Perspectives on the Development of Government Procurement Disciplines in North America," both in Bernard Hoekman, op. cit.

- ~~///~~ *NAFTA. Global Reserve for Mexico: purchases shall not exceed an annual \$1 billion until 12/31/2003.*
- ~~///~~ *NAFTA. G-3 Gradual liberalization for 10 years for the corporations in the energy sector and for construction services in the NAFTA non-energy sector.*
- ~~///~~ *BILATERALS MEX- BOLIVIA AND NICARAGUA Threshold differentials for Bolivia and Nicaragua for 6 years.*

Additionally, the inclusion in the GATT of an article (XXIV) on regional agreements, allowing members to award greater tariff advantages to the “substantial” part of trade, represents a deviation from MFN treatment- In the framework of the procurement agreements, it entails the possibility of not extending some or all of the stipulations of the treaty, including national treatment, to those members that do not form part of a regional arrangement.

A related aspect that has been discussed in the hemispheric context is whether MFN treatment, in the regional or subregional framework, means automatically awarding what has been committed with third parties. In general, that has not been the case. For example,

- ~~///~~ *NAFTA The U.S. does not commit state governments, as it does in the GPA and recently with Chile.*
- ~~///~~ *THE U.S. AND CANADA maintain lower thresholds for themselves than those awarded to Mexico (\$25,000 instead of \$50,000).*
- ~~///~~ *CENTRAL AMERICA does not have internal obligations, but as a bloc it has signed agreements with other trade partners*
- ~~///~~ *G-3. Colombia and Venezuela do not extend the national treatment awarded to Mexico to their Andean partners.*

Summing up this section, the treatment awarded to foreign and local suppliers, goods and services in a procurement agreement is determined by the combination of the provisions referring to:

- ~~///~~ National Treatment
- ~~///~~ Most Favored Nation
- ~~///~~ Special and Differential Treatment
- ~~///~~ Rules of Origin
- ~~///~~ Denial of Benefits

Specific commitments, exceptions and market access

Coverage

The coverage of a government procurement agreement defines the range of application of its trade disciplines and its market-access commitments. Normally, the coverage is defined on the basis of the following factors:

1. Definition of government purchases
2. Modes of purchase / contracting
3. Value of the purchases or contracts
4. Levels of government and Agencies
5. Goods and Services covered by the contract

1. Definition. In general, the majority of agreements, such as the GPA, NAFTA, those signed by Mexico with the countries of the hemisphere and with the EU and those between Chile and the U.S. and Chile and the EU, have avoided employing the definition of procurement as an element for determining the coverage of the agreements. As will be seen below, this kind of “gray area” appears to have been adopted for the purpose of limiting the application of the non-discrimination obligations to the elements of coverage that were clearly identified by the Parties. Others, especially those signed by the Central American countries with Chile, Panama and the Dominican Republic, use “what is established in national legislations” as a definition, which generally refers to the procurement amounts subjected to specific purchasing methods (public, selective, direct, etc.)

2. Modes of purchase. The majority of agreements include all modes of purchase and rental with or without option to buy, save concessions. Chile and CA were the first in the hemisphere to specifically include concessions. The bilateral agreement between Chile and the U.S. also includes them.

In general, they exclude the indirect purchases carried out by government agencies, which are those carried out by other agencies with funds under the form of donations, loans, subsidies, fiscal incentives, etc. Likewise, they tend to exclude the purchases carried out with the resources of multilateral organizations, since the agencies are obliged to apply the procedures established by those organizations.

In the same way, there is a trend to exclude the contracting of services provided “in the performance of government functions” such as social security, pensions or unemployment insurance, education, health (Chile – CA). In addition to excluding them from the articles on the scope of application of the agreement, some countries exclude them from the specific commitments on market access (education and health in the case of Canada within NAFTA).

3. Value of the purchases or contracts. Another element that limits the coverage of the agreement is the issue of the “thresholds” or the value of the contracts to which national treatment and competitive bidding procedures are applied. The thresholds are normally different according to the level of government and the type of purchase. The following table shows the thresholds established in diverse agreements.

Levels of government	GPA	NAFTA	G-3	Mexican bilaterals	Central American bilaterals
Government					
Goods	177	50(1)	50	50	National legislation
Services	177	50 (1)	50	50	National legislation
Construction	6800	6500	6500	6500	National legislation
Corporations					
Services	545	250	250	250	National legislation
Construction	6800	8500	8500	8500	National legislation
	GPA	NAFTA	G-3	Mexican bilaterals	Central American bilaterals
Sub-central					
Goods	483			50 (3)	National legislation
Services	483			50 (3)	National legislation
Construction	6800			6500 (3)	National legislation

Thresholds have turned out to be a contentious issue in negotiations, because they reduce the size of the market opened up and especially because they do not promote the participation of small and medium-sized companies in purchases closer attuned to their size. For some countries, on the other hand, stipulating a threshold avoids meeting the administrative costs entailed by a public tender for small amounts. What has not been precisely determined is how small a contract is to rule out the application of a competitive process, so that the issue remains to be settled by the Parties.

With the ever more generalized use of e-government procurement, however, the answer appears to be that no amount is too small. According to some studies by the International Trade Center, if governments were to adopt the recent advances in electronic trade ... any standard purchase of goods could be carried out with competitive procedures, processed and paid in less than five minutes.¹⁰ This happens because the system automates a large part of the purchasing process, reducing its costs and duration. Despite its benefits, countries have done no more than mention the subject of electronic trade in the framework of purchase agreements, and even in the current review of the GPA that is being carried out in the WTO, the delegations have difficulties in coming to terms on the most appropriate treatment for this matter.

Another system that could be adopted to overcome the hurdle of the thresholds is to respect what the national legislations envision for the selection of purchasing methods. Thus, the agreements signed by Central America do not include thresholds; rather, the national legislations are applied.

4. Levels of government and agencies. Governments at subcentral or subfederal level are big buyers of goods and services that also have the capacity to impose barriers to international trade; hence the importance of including them in the coverage. Nevertheless, it has not been easy to get central governments to adopt commitments in this area. In some cases there exist constitutional barriers that limit the capacity at central level to adopt obligations without the consent of the states or provinces, as happens in Canada and to a lesser extent in the United States. But in general it appears that the problem is mainly one of economic policy and refers anew to the issue of the balance in market-access commitments. Thus, for example, Canada's refusal to include the Canadian provinces in the GPA and in NAFTA had to do with the United States' refusal to eliminate the programs for small and medium-sized companies.

The agencies covered by the obligations derived from the agreement are established based on the government levels involved, but also on the agreement of the Parties. In certain agreements, the main point is "the degree of influence or control on the agency's procurement decisions" exerted by governments (NAFTA, GPA). Latin American countries, however, except for Mexico, have been inclined to use "the content of national laws" as a criterion to determine the type of governmental agencies likely to be subjected to disciplines. The discussion on the criterion is especially significant to define what kind of State enterprises,¹¹ or other type of autonomous agencies, are included in the coverage, but the ambiguity of those that have already been employed causes this issue to be resolved by negotiation

¹⁰ Paul Holden, "SME and Public Procurement, Lowering Transaction Costs to Increase Participation," in "Practical Guide for Assessing and Developing Public Procurement to Assist SME." Anexo B. International Trade Center, PDF Version.

between the Parties. The criterion is also important if provisions are to be considered in the event of privatization.¹²

The common feature at international level is that treaties cover a large number of agencies at central government level. But there is a wide diversity in coverage at sub-central government levels and State enterprises. Below are some examples taken from treaties applied in the region:

Coverage of independent Agencies, utilities and State enterprises

~~///~~ **CHILE – CENTRAL AMERICA** Only El Salvador.

~~///~~ **COSTA RICAN BILATERAL AGREEMENTS** It includes them with Mexico but not in its other agreements.

~~///~~ **MEXICAN BILATERAL AGREEMENTS** Costa Rica, Bolivia and Nicaragua include them, but not Mexico.

~~///~~ **NAFTA.** The U.S. and Mexico include them but not for Canada.

~~///~~ **PANAMA BILATERALS** Exclude the purchases of the Canal Authority

Coverage of State and Departmental Governments, Municipalities and other forms of local government.

~~///~~ **CHILE – CENTRAL AMERICA** Only El Salvador.

~~///~~ **COSTA RICAN BILATERALS** Costa Rica includes them with Mexico but not in its other agreements.

~~///~~ **MEXICO BILATERALS** Bolivia, Costa Rica and Nicaragua include them but not Mexico.

~~///~~ **NAFTA** It is left to future negotiation. A condition to provide NT to Canada in US and Mexican electric power companies.

~~///~~ **CHILE-US** Chile includes regional governments and 341 municipalities. The US includes some states (38) and only certain agencies.

5. Goods and Services. The goods and services to be acquired by the agencies identified in (4) are established through negotiation between the Parties. At first, international agreements only covered trade in goods, but since services, including construction services, were included in the bilateral agreement between Canada and the U.S. and later in the GPA, they have become standard in all agreements.

In general, goods coverage is rather larger than that of services. Also in most cases, the goods relating to national security and defense, such as weapons, ammunition and military stores are not generally part of

¹¹ It should be borne in mind that for WTO members, Government enterprises are required to purchase competitively and apply a MFN treatment to the import of goods “other than for their own use, resale or for use in the production of goods and services for sale” (Section XVII of the GATT).

¹² In some agreements, privatization is understood as the act of eliminating governmental control or influence on the agency.

the coverage. Below are some examples of goods and services that countries have excluded from the agreements:

Goods and Services Coverage

- ✍* **BILATERAL AGREEMENTS WITH MEXICO** *Bolivia excluded agricultural goods purchased for support programs to certain sectors.*
- ✍* **G-3** *Venezuela excluded all goods related to social programs, such as milk and school uniforms and implements.*
- ✍* **GPA** *The countries excluded postal, telecommunications, audio -visual, entertainment and tourism services (Canada did include the latter).*
- ✍* **NAFTA** *Canada excluded goods of the shipbuilding and ship repair industry and urban transport and railroad equipment. Transportation services are excluded by all parties, as well as research and development and financial services.*
- ✍* **CHILEAN BILATERAL AGREEMENTS** *They excluded financial services, even in the one negotiated with U.S.*

Exceptions

In order to understand the scope of the market access reached through a procurement agreement, it is imperative that exceptions be analyzed. In the free trade agreements that have followed the NAFTA format, we can distinguish between the exceptions general to the chapter, exceptions to the scope of application, and exclusions from coverage identified in the commitment lists of the countries.

A standard clause on general exceptions to a procurement chapter refers to the suspension of non-discriminatory treatment for reasons relating to national security, the protection of public morals and order, human, animal and plant life, and intellectual property, among the most relevant ones. Chapter XX of the GATT contemplates a similar provision, as does Art. XXIII of the GPA. Countries such as Chile and Latin American ones have resolved that general exceptions applicable to the free trade agreement extend to the procurement chapter and, therefore, the latter lacks a specific provision on exceptions.

Exceptions to the scope of application are used for those purchases where the Parties agree to exclusions by mutual agreement, for diverse reasons. For instance, they may consider that applying the agreement procedures is inadmissible. In general, this has been the case of transactions performed indirectly or with multilateral agency funds. However, it is above all a negotiation issue; thus, Chile reached consensus with Central America to exclude financial services from the scope of the bilateral agreement they signed, but not with the U.S. Consequently, Chile excluded these services from its national list. Panama was able to

exclude purchases by the Canal Authority from the scope of regional agreements, but is still negotiating their exclusion from the national commitment list in the GPA.

Negotiated exclusions from coverage are specific to each Party to an agreement and, as their name indicates, result from negotiation. Among the reasons to include negotiated exclusions we may mention a country's desire to:

- ~~///~~ Keep the right to enforce national protection policies for sectors, certain goods or services or certain social groups.
- ~~///~~ Preserve the preferential treatment to members of other regional or bilateral agreements.
- ~~///~~ Reach a balance in negotiations.
- ~~///~~ Grant a special treatment to the development and size levels of the economies.

The negotiated exclusions from coverage are included in the annexes to the agreement. The countries have alternatives for their treatment. For the sake of clarity in this regard, it is advisable to address the issue of commitment presentation, which will be dealt with in the following session.

Presentation of offers and market-access commitments

Lists are the main negotiation instrument as regards market access. Both in the case of negotiations to become a GPA member, and in free trade treaties, an Offer-Request format is followed, where the submission of national offers launches the negotiation process. The countries specify in their offer the agencies, goods and services that will form part of their coverage, as well as the exceptions. Those seeking a preferential treatment must include in their offers the temporary or permanent exceptions and any desired symmetrical treatment. Afterwards, in the improvement request process, the countries ask the counterparts to add the agencies, goods or services that interest them to the coverage. They also reply to the requests of the other parties to the negotiation by submitting "improved" offers.

Two basic formats or lists are used to submit offers. Lists may be positive or negative and are individual for agencies, goods and services. In positive lists, countries only take on commitments on listed items and are therefore referred to as restrictive. In a negative list, on the other hand, the countries take on commitments on ALL the universe [of agencies, goods or services] and only listed items are excepted. For certain countries, positive lists add more transparency to the commitments assumed, but certain countries

have found it difficult to have their partners include the agencies, goods and services that interest them. Nonetheless, negative lists must be carefully developed, as a country might be granting concessions in an area without being fully aware of it.

The exclusion of an agency from coverage means that the country keeps the right to further the procurement processes of that agency pursuant to discriminatory processes. However, a country may resolve to exclude an agency from coverage even when at present its purchases are made through competitive processes without favoring domestic ones. In this case, the country keeps a margin for maneuver, the possibility of imposing discriminatory policies in the future that force the agency to buy “national.” This applies both to goods and services.

Example of a Positive List of Agencies

☞ NAFTA

Annex 1001.1a-1: Federal Government Agencies Canadian List

Department of Agriculture

2. Communications Department

3. Consumer and Corporate Affairs Department

4. Employment and Immigration Department

5. Immigration and Board of Refugees

(continues)

Example of a Negative List of Agencies

☞ Chile – Central America

Section 16.01 Definitions For purposes of this Chapter: Agencies shall mean all public agencies of the Parties, except for those indicated in Annex 16.01;

ANNEX 16.01

AGENCIES

Chilean List:

Republic’s General Auditors’ Office (Contraloría General de la República)

b) Central Bank;

c) Armed Forces;

d) Law Enforcement and Public Security ;

e) Municipalities;

f) National Television Council;

(continues)

Lists are added to the body of an agreement as its annexes and constitute the format on which a country’s commitments on market access are submitted. Depending on the negotiated item, annexes are also added on thresholds and exclusions from coverage.

Exclusions

That an agency is listed, in any of the formats, does not mean that *all* of its purchases are liberalized or excluded. Amounts or percentages may be excepted from overall purchases, part of them be set apart for certain groups, or the discriminatory purchase of certain goods or services be allowed. Additionally, goods and services are listed under classification systems that tend to group several products under the same code. The countries may request exceptions of parts of a code. Therefore, riders and qualifications are used on lists of agencies, goods or services.

Exclusions from coverage through exclusions/riders

~~NAFTA~~ NAFTA

*Attachment 1001.2b. Services
Canadian List*

B Studies and Analyses – research and development excepted

B002 Animals and Fishing Studies

B003 Studies on Grazing Areas / Flatlands

B507 Legal Studies (except for Foreign Legislation Consulting Services)

B503 Medical and Health Studies

B400 Aeronautical and Space Studies

~~NAFTA~~ NAFTA

*Annex 1001.1a-1: Federal Government Agencies
United States List*

Department of the Interior, including the Bureau of Reclamation (For Canadian goods, the suppliers of those goods, and the suppliers of Canadian services, this Chapter will be applied to purchases made by the Bureau of Reclamation of the Department of the Interior as from the moment when this chapter is applied to the purchases performed by the hydroelectric powerplants of Canadian provinces, excluding local plants.)

Department of Energy (It does not include purchases for national security carried out in support of safeguarding nuclear materials or technology and executed under the authority of the Atomic Energy Act, and oil purchases relating to the Strategic Petroleum Reserve.)

Additionally, horizontal exclusions or exclusions for specific programs tend to be listed on additional annexes, even when riders have been made to the other lists. Small and medium-sized company programs, social programs and agricultural and food support programs have been excepted under reservation or

general notes. Measures granting a differential treatment to one of the Parties or any other measure have also been reflected in this way.

Exclusions from coverage through reservation/general notes

~~ES~~ G-3

Annex 7 to section 15-02: Reservation

Notwithstanding any other provision in this chapter, annexes 1 through 5 of section 15-20 are subject to the following:

Colombian List:

Temporary Reservation

1. Colombia may reserve from the obligations of this chapter for the years and in the percentages described in paragraph 2: ...

[]

2. Below are the years and percentages mentioned in paragraph 1:

1995	1996	1997	1998	1999	
50%	45%	45%	40%	40%	
2000	2001	2002	2003	2004	and thereafter
35%	35%	30%	30%	0%	

~~ES~~ G-3

Annex 7 to article 15-02:

Venezuelan List

Reservations

Notwithstanding any other provision in this chapter, annexes 1 through 5 to article 15-02 are subject to the following:

30. This chapter is not applicable to purchases performed in connection with social programs (such as “Milk Allowance,” “Food Allowance,” “Cereal Bond,” “School Implements and Uniforms,” “Day-Care Homes,” “Mother-Child Food Program”), carried out by the Ministries of Education, Family and Health, and are destined to address education, health and food.

~~ES~~ NAFTA

Annex 1001.2b: General Notes

Canadian List

1. This chapter is not applicable to purchases relating to: ... (d) reserves for small and minority enterprises; ... (f) purchases of agricultural goods acquired for agricultural support programs or for human nutrition.

Annex 1001.2b: General Notes

Mexican List

a) 6. Notwithstanding other provisions in this chapter, an agency may establish a local-content requirement of not more than: 40 percent for “turn-key” projects or larger integrated, labor-intensive projects; or (b) 25 percent for “turn-key projects” or larger integrated, capital-intensive projects.

Conclusions

The importance of negotiations on market access in the government procurement arena should not be underestimated. Besides the efficiency gains at a domestic level, the incentive of securing greater opportunities for domestic companies in other markets is one of the reasons for accepting international disciplines in this area.

However, the freedom to use the government procurement power for economic and social development purposes or for non-economic reasons, is a powerful incentive to limit market access to foreigners. Therefore, except in the case of the bilateral agreement between Australia and New Zealand and a few regional examples, procurement agreements have followed the multilateral agreement model of the WTO (GPA) that applies non-discrimination principles within a restricted domain. Contrary to what many would think, in practice and even within the framework of free trade treaties, governments retain a sometimes substantial portion of the market where they may give more favorable treatment to domestic suppliers, goods and services and discriminate among them depending on origin. The result is that procurement agreements are complex, specially when they entail negotiating and evaluating the commitments for opening that a country takes on when signing it. This document has intended to clarify some of the issues at stake at the time of negotiating, emphasizing the relationship existing between non-discrimination principles, certain provisions included in the agreement’s wording and, above all, the negotiation of annexes or commitment lists. In this sense, it is possible to summarize the most important aspects:

The scope of the agreement is defined based on the coverage negotiated between the Parties. Therefore, the non-discrimination commitment applies to a specific purchase if and only if several elements concur:

- ~~///~~ The purchase method is not excluded from the agreement scope.
- ~~///~~ The purchasing agency is included/excluded from the country list.
- ~~///~~ The purchase value is equal to or higher than the threshold specified in the agreement.
- ~~///~~ The object of the purchase, good, service/construction service is included/excluded from the country list.

- ✍ No riders, provisos or reservations were made that affect the lists of agencies or of goods or services.
- ✍ The agency is not forced to comply with special programs included in the country exceptions list.

The annexes include each party's commitments on market access. Among the annexes there are national lists of agencies, goods and services. Lists, either positive or negative ones, are used to exchange offers in the negotiation and once accepted they become an integral part of the body of the agreement.

In positive lists, the countries only take on commitments on listed items, whereas in a negative list, the countries take on commitments on ALL the universe and only listed items are excepted. The choice of format is material for negotiation purposes: positive lists pose problems for countries with little market power, given the difficulty in bringing their partners around to including elements of greater interest. Nonetheless, due to their all-encompassing nature, negative lists might not be the most advisable ones for countries wishing to maintain a wide margin for maneuver for national policy enforcement.

Negotiated thresholds are usually included in an annex together with the inflation-based value adjustment formula. The choice of thresholds affects the size of the market open to competition but also the transaction costs that the agreement imposes upon the members, specially if public tenders are accepted as the favored purchase method. The lower the thresholds, or when they are non-existent, the higher the prospects for small-country suppliers in other markets, but the higher the administrative costs for their own agencies. The solution to this dilemma will likely involve bringing into the negotiations the progress made in electronic commerce. It would also be convenient to discuss in greater depth the advisability of respecting the thresholds established by the respective national legislations for different purchasing methods.

In negotiations it is accepted as valid that a country agree with its partners exceptions as regards the enforcement of national policies to favor specific suppliers or sectors, which are reflected in the annexes in various ways. The most usual ones are the riders or qualifications to the lists of agencies, goods or services. Another formula is to list the exclusions in a separate annex, commonly used for small and medium-sized enterprise programs and social programs. It is clear that the extension of the exceptions of each country is a matter subject to negotiation between the Parties.

The importance of provisions in the Most Favored Nation (MFN) area is to define who the benefits of an agreement apply to, specially national treatment. In this sense, related clauses such as “denial of benefits” and, above all, what is negotiated in services, are highly important, since the regulations on this matter may invalidate any concession in the procurement area. But lists are highly important, as they define the methods adopted by the exceptions to the enforcement of the principle of non-discrimination due to origin. These deal with special and differential treatment, the preservation of commitments acquired in sub-regional agreements and the multilateralization of negotiated concessions.

In procurement agreements, except for section V of the GPA of the GATT/WTO, no special provisions are found for special and differential treatment. This fact has not prevented the parties from granting a more advantageous treatment to less-developed partners, in the form of a progressive liberalization of the purchases of major agencies, the permanent reservation of a portion of the purchases of certain agencies, or a greater flexibility in the use of certain procurement methods, among others. These advantages are also reflected in the annexes to the agreement. Both in the case of negotiations to become a GPA member and in those for free trade treaties, the countries seeking special treatment must add the temporary or permanent exceptions they wish for to their offers. Likewise, in the application request for offer improvements they must request the counterparts to include the agencies, goods or services of interest in the coverage.

Procurement agreements have been negotiated to achieve reciprocity in the benefits interchanged. This is customary in the business environment, where countries meet “to give what they get” in negotiations. However, if MFN treatment is awarded, any advantage agreed by a partner should be “automatically and unconditionally” extended to the others, irrespective of market size. The temporary exception to this principle would be a free trade transition period, at the end of which the advantages should be multilateralized. In the GATS service agreement the term was ten years. Conversely, in most agreements following the GPA model, including the chapters of free trade treaties, the exception to this rule is permanent, restricting market opening and, above all, the opportunities for countries with less market power.

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