

Special Issue: Government Procurement

EDITORIALS

Ali Amerjee, *(Are) Government(s) Pro-‘Cure’(ment)? The WTO and Beyond*

Nicholas C. Niggli, *Helping Nations, Businesses and People to Succeed: How Government Procurement Influences Institution Building, Good Governance, Economic Growth and Sustainable Development*

ARTICLES, NOTES AND COMMENTS

Justice Chang-fa Lo, *Making the Anti-Corruption Provisions in the New Government Procurement Agreement under the WTO Operable*

Robert Anderson & Anna Mueller, *The Revised WTO Agreement on Government Procurement as an Emerging Pillar of the World Trading System: Recent Developments*

Caroline Nicholas, *Negotiations and the Development of International Standards in Public Procurement: Let the Best Team Win?*

Christopher Yukins & Johannes Schnitzer, *GPA Accession: Lessons Learned on the Strengths and Weaknesses of the WTO Government Procurement Agreement*

Sandeep Verma, *Life Cycle Costing in Defence Acquisition: The Challenges of Transforming Complex Aspirations into Factual Ground Realities*

Geo Quinot, *Innovation, State Contracting and Public Procurement Law*

Anna La Chimia, *Cui bono? Scope, rationales and consequences of the exemption for development procurement in the revised text of the GPA*

TL
&D

Trade, Law *and* Development

Vol. 7, No. 1

2015

PATRON

Poonam Saxena

FACULTY-IN-CHARGE

Bipin Kumar

EDITOR-IN-CHIEF

Ali Amerjee

EDITORS

Aswin A.
(SENIOR CONTENT)
Sagnik Das

Aabbas Kshetarpal
(MANAGING)
Thomas J. Vallianeth

ASSOCIATE EDITORS

Arpit Gupta
Sparsba Janardhan

Dishi Bhomawat
Supritha Suresh

Pranjal Mehta
Vatsal Vasudev

COPY EDITORS

Aarushi Nargas
Kruti Venkatesh

Anjali Menon
Sanjana Rao

Divpriya Chavla
Sneha Singh

CONSULTING EDITORS

Aman
Prateek Bhattacharya

Meghana Sharafudeen

Nakul Nayak
Shashank P. Kumar

BOARD OF ADVISORS

Raj Bhala
Daniel Magraw
Ricardo Ramírez Hernández

Glenn Wiser
B. S. Chimni
Vaughan Lowe

Jagdish Bhagwati
M. Sornarajah
W. Michael Reisman

Published by

The Registrar, National Law University, Jodhpur

ISSN : 0976-2329 | eISSN : 0975-3346

Ali Amerjee, *Are Government(s) Pro-
'Cure'(Ment)? The WTO and Beyond*
7(1) TRADE L. & DEV. 1 (2015)

Anniversary Editorial

(ARE) GOVERNMENT(S) PRO-‘CURE’(MENT)? THE WTO
AND BEYOND

ALI AMERJEE*

We cannot solve our problems with the same thinking we used when we created them
– Albert Einstein

Policies on regulating public procurement markets emerged as a necessary response to the patronization of corruption, inefficient use of taxpayer’s money, the need to increase market access for international competitors in the sector and an ostensible desire for governments to display visible standards of accountability. Of course, negotiations between states with respect to government procurement were more sensitive than those on other topics in the economic realm because such laws would be more intrusive than their usual trade-barrier obliterating counterparts such as tariffs-caps. Not surprisingly, government procurement was explicitly excluded from the GATT (art. III: 8a) and GATS (art. XIII: 1).¹ However, a global agreement on public procurement laws is not a nascent development.

The genesis of an international regime on government procurement can be traced to the OECD framework.² It was further nurtured in the Tokyo Round where a text signed in 1979 was amended and subsequently entered into force in 1988.³ Thereafter, a finalized version was resurrected at the same time as the Marrakesh Agreement under the aegis of the WTO.⁴ Although it did not find instantaneous

* Editor-in-Chief, *Trade, Law and Development*; Candidate 2015, B.Sc. (Tech. Hons.) LL.B. (Business Law Hons.), National Law University, Jodhpur, India. E-mail: ali.amerjee[at]tradelawdevelopment.com.

¹ World Trade Organization, ‘WTO and government procurement’, https://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm.

² *Id.*

³ Caroline Nicholas, Work of the UNCITRAL on government procurement: purpose, objectives and complementarity with the work of the WTO, *in* The WTO Regime on Government Procurement: Challenge and Reform 746 (Sue Arrowsmith & Robert Anderson eds., 2011) [hereinafter ‘Nicholas: WTO Regime’].

⁴ Agreement on Government Procurement, 1994, 1869 U.N.T.S. 508.

popularity amongst WTO member nations, it is now emerging as an engine for global economic growth because of its several benefits including increased market access, competition and transparency. Recently, the revised WTO Government Procurement Agreement (“GPA”) came into force during April, 2014.⁵ At present, the GPA consists of 17 parties covering 45 WTO members.⁶ However, 10 out of its 30 observers are in the process of accession. Importantly, acceding members include Australia, China and the Russian Federation and other emerging economies.⁷ Therefore, several opportunities and vibrant activity in global government procurement seem to be on the horizon.

The concept of regulating public procurement is not restricted within the walls of the WTO and has found its way into other international fora. In 1994, the United Nations Commission on International Trade Law (UNCITRAL) formulated a Model Law on the Procurement of Goods, Construction and Services (‘Model Law’).⁸ However, the ambits of the GPA and Model Law differ. The former is relevant for inter-state regulation whereas the latter deals with intra-state policies. Hence, the Model Law is more flexible and can adapt to local requirements in contrast to a more rigid treaty structure.⁹

In the contemporary economic scenario, public procurement has been a subject of intense scrutiny at several prominent bilateral and multilateral trade agreements. It finds mention in the Trans-Pacific Partnership. Here, parties have agreed to use fair and objective technical specifications, to award contracts based solely on the evaluation criteria specified in the notices and tender documentation, and to establish due process procedures to question or review complaints about an award.¹⁰ The element of government procurement in the proposed Trans-Atlantic Trade and Investment Partnership involves a tussle between the EU and US revolving around the coverage of various levels of authorities that can be brought

⁵ *Revised WTO Agreement on Government Procurement Enters into Force*, WTO News Item, Apr. 07, 2014, http://www.wto.org/english/news_e/news14_e/gpro_07apr14_e.htm.

⁶ World Trade Organisation, ‘Parties, Observers and accessions’ , https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm.

⁷ World Trade Organisation, ‘Ukraine to join WTO’s Government Procurement Agreement’, https://www.wto.org/english/news_e/news15_e/gpro_11nov15_e.htm.

⁸ Model Law and accompanying Guide to Enactment, GAOR, 49th Sess., Supplement No. 17 and corrigendum (A/49/17 and Corr.1), annex I, *available at* http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

⁹ Nicholas: WTO Regime, *supra* note 3, at 748.

¹⁰ Office of the United States Trade Representative, ‘Summary of the Trans-Pacific Partnership Agreement’, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership>.

within the agreement's remit.¹¹ Government procurement provisions are also being negotiated in the Regional Comprehensive Economic Partnership FTA.

A culmination of these factors and developments prompted a proposal for 'Government Procurement' as the theme for this Special Issue. However, detailed proposals for other themes based on their relevance to 'Trade, Law and Development' ('Journal'), its subject areas of focus, contemporary significance and the prospective target audience were also submitted. In keeping with the Journal's democratic decision making process, the theme for this special issue was also chosen by consensus. The Board of Editors ('Board') now had to choose from an array of topics including TRIPS, Regionalism and World Trade, 'Bilateralism v Multilateralism', Trade and Public Health, and International Financial Regulation. After weeks of intense debate, considered opinion and prodding junior editors incessantly, all themes were put to vote. In the end, the Board reached a consensus on 'Government Procurement'.

In making its choice, the Board departed from its traditional proclivity towards themes with a Global South narrative. The Board was of the opinion that there was an absence of comprehensive scholarship in the field. Moreover, the contemporary relevance of this theme was incontrovertible. Accordingly, the Journal embarked on a yearlong journey from July, 2014 with the ambition that this special issue would crystallize into the sole reference point for cutting edge analysis on contemporary issues surrounding the topic. Consequently, the Board invited the submission of articles, notes and comments on Government Procurement. Mr. Nicholas Niggli elaborates on the contents of this special issue and the contemporary debates surrounding Government Procurement in his 'Guest Editorial'.

I. RECENT DEVELOPMENTS

As a signatory to the Budapest Open Access Initiative, the Journal has always strived to ensure the distribution of its scholarship to a wider audience. In this context, the Board realized the importance of a presence on social media. In furtherance of this initiative, the Journal launched a Facebook page and a Twitter

¹¹ Steve Woolcock & Jean Heilman Grier, 'Public Procurement in the Transatlantic Trade and Investment Partnership Negotiations', 20 (CEPS Sp'1 Report No. 100, 2015).

handle.¹² This year, the Board continued in the same vein by launching a LinkedIn page,¹³ acknowledging the need for exposure to practitioners in the field.

In addition to the Journal's existing contracts with HeinOnline, EBSCO Publishing and Westlaw¹⁴, our content shall also now be available on Manupatra,¹⁵ a prominent Indian legal database.

I was happy to see all the editors display rare, unforeseen enthusiasm, albeit in attending our annual dinner, sponsored by the Journal's founder and now Consulting Editor - Mr. Shashank Kumar. There was more thought for food than conversely desired.

The Journal's chronicles also included the process of the annual reconstitution of the Board. In all likelihood, it is the consequence of being an active law review at the National Law University, Jodhpur and the best law journal in India¹⁶ that the Board received thrice the number of applications for the editor positions it had on offer this year. The Journal shall now be steered by two new 'Editors-in-Chief', both whom are final year students. One of them is Aabhas Kshetarpal, a student specializing in Intellectual Property laws. The other is Vatsal Vasudev who chose 'Trade and International Investment' as the specialisation for his degree. Dishu Bhomawat, a penultimate year undergraduate student specializing in commercial laws, will don the mantle of 'Managing Editor'.

In another departure from tradition, this year's anniversary editorial has a sole author. This is due to an unwillingness to contribute on the part of my erstwhile co-Editor-in-Chief. Of course, this constitutes just one of the numerous challenges of a student law review in India. I hope to explain these nuances in the next part of this editorial.

II. INDIAN LAW REVIEWS: THE CASE FOR THE MISSING CARROT AND STICK

The advent of specialised law universities in India — National Law Universities ('NLU') has initiated a paradigm shift in the way legal education is imparted in the country. The introduction of these premier institutes has improved the quality of

¹² Ali Amerjee & Nakul Nayak, *A 'Heated' Debate: The WTO's Climate Question* 6(1) TRADE L. & DEV. 5 (2014).

¹³ Trade, Law and Development, <https://www.linkedin.com/company/trade-law-and-development>.

¹⁴ Ali Amerjee & Nakul Nayak, *A 'Heated' Debate: The WTO's Climate Question* 6(1) TRADE L. & DEV. 5 (2014).

¹⁵ Manupatra, <http://www.manupatra.co.in>.

¹⁶ Washington & Lee University, St. Louis School of Law Rankings, 2013.

legal education and the competition between them simultaneously. Importantly, their arrival on the scene also paved the way for numerous student run law reviews. Over the years, most NLUs have launched their flagship law reviews and subject specific legal journals. Hence, there is now another co-curricular activity of consequence in addition to the existing plethora of activities law students could otherwise indulge in, in tandem with their education such as mootings (mock trials), conferences, debates, internships and the like.

However, amongst a plethora of other factors, the frequency of publication of most law reviews in India, quality of editing and final presentation leave much to be desired. My analyses and proposals are restricted to the root of these problems alone and questions raised on the quality of scholarship, research and authors are not in consideration here and are probably too wide in scope for a complete discussion in this editorial.

Arriving at a conclusion on the genesis of the plague primarily involves simple logical deduction. The factors plaguing legal academic journals elucidated above are related to the efficiency and sincerity of those who manage the functioning of these law reviews — students. *Prima facie*, there is a lack of student accountability towards timely publication and quality editorial work. Though it is not a well-kept secret that students have used editorial positions at legal journals to leverage their chances of employment or acceptance to masters, doctoral and post-doctoral courses, there are no immediate and/or assured academic returns for them accruing from membership. Students pursue this activity for either their interest in the subject or love of labour. There is no foreseeable or tangible benefit. Therefore, the entire ecosystem is devoid of a ‘checks and balances’ mechanism and there is no effective regulation over student functioning. Moreover, given that students’ work is voluntary, universities can impose little or no sanction for non-performance.

Thus, in order to improve the accountability of law review ecosystem in India, it is suggested that a reward system must be created for student editorial positions in proportion to the work they do for a journal. Consequently, universities will have an indirect mechanism to chastise students for their lapses. Such a reward system can be linked to the academic credits awarded to a student each semester. This is not unprecedented in other countries. The NYU School of Law in USA offers one or two credits for third year editors’ supervisory or management work.¹⁷ At the Seattle School of Law, student members of the law review receive credits which they may choose to distribute to the Fall or Spring Semester of the academic year

¹⁷ New York School of Law, Non-Classroom Credits, Journal and Moot Court Credits, <http://www.law.nyu.edu>.

in which they are earned.¹⁸ The prospective of losing academic credits will serve as a deterrent to erring editors. Overall, the implementation of such a system is likely to overhaul the functioning of student run law reviews in India and contribute towards increasing their relevance. Importantly, a ‘carrot and stick’ methodology will also be an effective self-regulating mechanism which does not require much effort from a university administrator’s perspective.

Selection to the editorial staff of a law review has tremendous significance for a lawyer in the offing for numerous reasons. *First*, it proffers an opportunity to indulge in nascent, original scholarship of one’s choice in the case of a specialized law review. Conversely, editors of general law reviews get acquainted with a variety of different contemporary issues and debates. *Second*, membership involves the exposure to new scholarship in the field and an opportunity to interact with authors who could be academics, practitioners or prominent jurists. *Third*, it affords student editors a chance to improve on important skills they would require on an everyday basis as attorneys such as research and drafting.¹⁹ Moreover, they begin to comprehend the fundamentals involved in writing fine pieces of legal opinion. *Fourth*, students also interact with their peers who often have similar interests and goals. *Finally*, the factum of selection into law reviews itself hints of meritorious candidature.

Hence, these factors bolster a law student’s inclination towards membership at their law school’s premier publication. Thus, it is but logical that the law review itself must benefit from the student editors it is leveraging.

III. ACKNOWLEDGEMENTS AND PARTING REMARKS

Every aspect of the Journal is managed by the student editorial staff. Over the course of each issue, editors work tirelessly on several facets of publication. It is but natural that the Board should be the vanguard in any commendation for this issue’s successful publication. They whole-heartedly receive mine.

Each issue published by the Journal is the product of the work of the Board in tandem with the University’s administration. On the Journal’s behalf, I would like to extend my eternal gratitude to the Journal’s Patron and University’s Vice Chancellor, Prof. Poonam Saxena. Her confidence in our purpose and support to our new initiatives has been unwavering. The credit for the smooth management of securing the print version of our past issues, logistics and financial clearances goes to the ever self-effacing Registrar, Mr. Sohan Lal Sharma. Prof. Bipin

¹⁸ Seattle University School of Law, Co-Curricular Credit Registration (Journal and Competitions).

¹⁹ Seattle University Law Review, <http://www.law.seattleu.edu/academics/enrichment/journals/law-review>.

Kumar's periodical review of our functioning and suggestions in the capacity of 'Faculty-in-Charge' have helped us improve tremendously. This special issue could not have seen light without this 'holy trinity'.

The Consulting Editors, all of whom are Journal alumni, also deserve special mention for their constant support, valuable guidance and for surprisingly not bullying me into including this about them. It would be a travesty to part without being grateful to Mr. Vinod D, the University's Head Librarian.

On a personal note, this special issue marks the end of my five-year long journey with the Journal. It has been a wonderfully enriching tenure since I joined in 2010 as a Copy-Editor. I had opportunities to learn about nuances of international economic issues, develop negotiation and drafting skills when the Journal entered into contracts with online legal databases, understand minutiae of editing and the chance to interact with wonderful colleagues and distinguished academics. My sincerest gratitude extends to the Board which has had faith in my abilities in the past few years. As I bid an emotional farewell to the Journal, I hope that it continues in the same vein of success it has enjoyed in the past and that editors associated with it in the future have the occasion to benefit from the numerous opportunities it offers.