


Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets

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 [Keywords to Follow]

1. Introduction

The performance of public procurement markets has major implications for the effectiveness of governance and the well-being of citizens, in both developed and developing countries. Public procurement accounts for a substantial proportion of gross domestic product—15–20 per cent on average in developed economies.¹ Moreover, procurement often involves goods and services having particular economic, social and/or developmental significance—e.g. transportation and other physical infrastructure which is vital to the competitiveness of business users and the mobility of citizens; hospitals and other public health facilities; schools and universities; and defence and policing. The economic and social significance of public procurement will only increase with the current macroeconomic downturn and the emphasis that is being placed on public infrastructure spending

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¹ OECD, *The Size of Government Procurement Markets* (Paris: OECD, 2001). In developing and transition economies with thinly-developed private sectors, the proportion of gross domestic product accounted for by public procurement can be substantially greater (according to some estimates, as much as 50%). William E. Kovacic, “Competition Policy, Consumer Protection, and Economic Disadvantage” (2007) 25 *Washington University Journal of Law & Policy* 101.



as an element of recovery strategies around the world.² The efficacy and transparency of public procurement processes also impact directly on the overall credibility of government and, hence, on citizens' level of trust, a factor which has important implications for the propensity to invest and engage in other wealth-creating activities.³

Ensuring the effective functioning of public procurement markets (and thereby maximising value for money for citizens) necessitates addressing two distinct but inter-related challenges: (1) ensuring integrity in related administrative processes (i.e. preventing *corruption* on the part of public officials); and (2) promoting effective competition among alternative suppliers, including by preventing *collusion* among suppliers. These two challenges sometimes merge, for example where public officials are paid to turn a blind eye to collusive tendering patterns or to release information that actually facilitates collusion (e.g. the universe of potential bidders or the bids themselves). However, analytically, preventing corruption on the part of public officials and promoting effective competition between potential suppliers are separable challenges, at least to a degree: the former (corruption) is first and foremost a principal-agent problem in which the official (i.e. the "agent") enriches himself at the expense of the government or the public (i.e. the "principal"); while the latter (promoting competition) involves preventing collusive practices among potential suppliers and removing barriers that unnecessarily impede healthy competition.⁴

The issue of ensuring integrity in public procurement processes has rightly received extensive attention in recent years. It is addressed by various international instruments, including: (1) the UN Convention Against Bribery and Corruption; (2) the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and (3) the OECD Revised Recommendation on Combating Bribery in International Business Transactions.

For the most part, the promotion of competition has not received similar high-level attention as an aspect of governance. This is despite the fact that competition is a core objective of national procurement systems which is vital to good performance.⁵ Competition can easily be thwarted by collusive tendering practices (i.e. bid rigging). Much evidence indicates that such practices are a recurring feature of government procurement markets even in countries where such practices are

² See "Obama economic recovery plan includes vast public works program", *International Herald Tribune*, December 7, 2008, <http://www.ihf.com/articles/2008/12/07/america/works.php> [Accessed December 30, 2008]; Communication from the Commission to the European Council: A European Economic Recovery Plan (COM(2008) 800 final, November 26, 2008); and A.E. Feldman, "Global Infrastructure Spending Soars: Competition for Talent Heats Up", September 25, 2008, <http://blog.aefeldman.com/2008/09/25/global-infrastructure-spending-soars-competition-for-talent-heats-up/> [Accessed January 17, 2009] (describing developments in emerging and other markets).

³ On the importance of public trust as an enabling condition for development, see Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (Free Press, 1996).

⁴ See, for useful clarification, Frédéric Jenny, "Competition and Anti-Corruption Considerations in Public Procurement" in OECD, *Fighting Corruption and Promoting Integrity in Public Procurement* (Paris, 2005), Ch.3, pp.29-35 (distinguishing between corruption involving public officials and collusion between potential suppliers, and noting factors contributing to each problem). Related perspectives are provided in Jean-Jacques Laffont and Jean Tirole, *A Theory of Incentives in Procurement and Regulation* (Cambridge, Mass.: MIT Press, 1993); in W.B. Bumett and W.E. Kovacic, "Reform of United States Weapons Acquisition Policy: Competition, Teaming Agreements, and Dual-Sourcing" (1989) 6 *Yale Journal on Regulation* 249; and in William E. Kovacic, "Commitment in regulation: Defense contracting and extensions to price caps" (1991) 3(3) *Journal of Regulatory Economics* 219.

⁵ Steven L. Schooner, "Desiderata: Objectives for a System of Government Contract Law" (2002) 11 P.P.L.R. 103; see also Steven L. Schooner, Daniel I. Gordon, and Jessica L. Clark, *Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations* (Working paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133234 [Accessed December 30, 2008].

legally prohibited⁶ and impose still heavier costs in countries that lack effective laws to suppress them. Clarke and Evenett suggest, in this regard, that as much as a quarter of documented competition law enforcement actions in developing economies involve bid rigging in relation to public procurement activities.⁷ Moreover, competition in national procurement markets is often limited by regulatory or other barriers to participation by alternative suppliers.⁸ This, in turn, enhances the feasibility of collusion by limiting the number of competitors.

This article reviews and synthesises relevant literature and policy developments concerning the challenges involved in ensuring effective competition in public procurement markets. The overall point of view of the article is that both trade liberalisation and national competition policies have important roles to play in promoting competition in such markets, and that neither is likely to fully achieve its objectives in the absence of the other. In this sense, the roles of competition and trade policy are complementary. While the article draws particularly on policy developments and experience in the United States and (to a lesser extent) Europe, an effort is made to illustrate the universality of the issues raised and their significance for developing as well as developed countries.

The remainder of the article is organised as follows. Part 2 reviews basic economic theoretical considerations and evidence concerning the importance of competition in procurement markets, based on existing literature. Part 3 discusses the role of international liberalisation (for example, via the WTO Agreement on Government Procurement) in promoting competition in such markets. Part 4 discusses and reviews relevant literature concerning the complementary role of national competition policies in regard to public procurement markets.⁹ This encompasses: (1) the importance and content of rules to prevent collusive tendering; (2) the role of such policy in addressing regulatory and other barriers to competition, chiefly through “competition advocacy” activities; and (3) the application of other aspects of competition law including the treatment of mergers and joint ventures. Part 5 illustrates some of the points developed in Parts 3 and 4 with reference to developments concerning transatlantic defence procurement. Part 6 provides concluding remarks.

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⁶ See, e.g., European Commission, “European Commission” in OECD, *Competition Policy and Procurement Markets* (Paris: DAF/CLP/(99)3FINAL); and Gerald F. Masoudi (Deputy Assistant US Attorney General for Antitrust), “Cartel Enforcement in the United States (and Beyond)”, February 16, 2007.

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⁷ Julian Clarke • and Simon J. Evenett, “A multilateral framework for competition policy?” in State Secretariat of Economic Affairs and Simon Evenett, *The Singapore Issues and the World Trading System: the Road to Cancun and Beyond* (Bern: State Secretariat for Economic Affairs).

⁸ See section 4.2, below, and references cited therein.

⁹ The term • “competition policy” is sometimes equated with the enforcement of laws that prohibit various forms of anti-competitive business practices (competition or antitrust law). Properly understood, however, competition policy encompasses a larger set of policy instruments by which a country can promote business rivalry as a means of improving economic performance. These include, very much, advocacy activities through which competition agencies and other bodies sharing similar interests encourage the adoption of pro-competitive and market-strengthening reforms (see, for related discussion, William E. Kovacic, “The Future of U.S. Competition Policy,” *theantitrustsource*, September 2004, pp.1–3; William E. Kovacic, “The modern evolution of U.S. competition policy enforcement norms” (2003) 71(2) *Antitrust Law Journal* 377; and Robert D. Anderson and Frédéric Jenny, “Competition Policy, Economic Development and the Possible Role of a Multilateral Framework on Competition Policy: Insights from the WTO Working Group on Trade and Competition Policy” in Erlinda Medalla (ed.), *Competition Policy in East Asia* (Routledge/Curzon, 2005)). In fact, competition policy need not always place the enforcement of antitrust commands atop its agenda. In implementing competition policy at the national level, there is considerable room to account for specific national circumstances and changing capabilities through the initial definition of responsibilities and creation of policymaking instruments, the sequencing of activities, and the adjustment of powers over time. See William E. Kovacic, “Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement” (2001) 77 *Chicago-Kent Law Review* 265.

2. Competition in public procurement markets: why and how much does it matter?

The idea that competition tends in most circumstances to generate lower prices and/or higher quality for a given price is one of the more basic propositions in industrial organisation, the branch of economics that deals with industrial structure and performance. It is nonetheless worth briefly reviewing the basis for this proposition. Although scholars continue to debate the finer points, economic literature identifies at least four main channels through which competition can have these desirable effects. First, with free entry and an absence of collusion, prices will be driven to marginal costs. Secondly, costs themselves will be minimised, as firms compete for survival. Thirdly, competition serves as an important driver of innovation.¹⁰ Fourthly, competition enables the participating firms to learn from one another and thereby to continuously improve their products in addition to their marketing, production and managerial techniques.¹¹

Apart from the guidance that emerges from the above-mentioned literature on competition and industrial organisation generally, the benefits of competition in addition to particular features of bidding markets that can help or hinder meaningful competition have been explored in economic literature that deals specifically with bidding processes and procurement. This literature establishes a clear relationship between the extent of competition in procurement markets and the costs to governments of the goods and services that are procured.¹² The importance of competition for cost-effective public procurement is corroborated by the considerable efforts that firms typically devote, in business-to-business commercial transactions, to ensure that their procurement departments make effective use of competition to reduce the cost and increase the quality of inputs.¹³

Case histories and examples that illustrate the gains from implementation of transparent and competitive government procurement regimes are fewer and less well documented than would be ideal.¹⁴ Nonetheless, such examples as are available suggest that the gains can be substantial. A number of such examples, taken from an OECD survey, are collected in Box 1. The examples referred to therein indicate that savings to public treasuries of between 17 and 43 per cent have been achieved in some developing countries through the implementation of more transparent and competitive government procurement regimes.

¹⁰ See US Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, October 2003; US Department of Justice and Federal Trade Commission, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, April 2007; and Robert D. Anderson and Nancy T. Gallini, *Competition Policy and Intellectual Property Rights in the Knowledge-based Economy* (Calgary: University of Calgary Press for the Industry Canada Research Series, 1998).

¹¹ Useful elaboration of all four channels referred to above is provided in Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization* (Addison-Wesley, 2004).

¹² See, generally, Paul Milgrom, "Auctions and Bidding: A Primer" (1989) 3(3) *Journal of Economic Perspectives* 3 and Paul D. Klemperer (ed.), *The Economic Theory of Auctions* (Cheltenham, UK: Edward Elgar, 2000). See also R.I. Carr, "Impact of the Number of Bidders on Competition" (1983) 109(1) *Journal of Construction Engineering and Management* 61.

¹³ See, e.g., David N. Burt and Richard L. Pinkerton, *A Purchasing Manager's Guide to Strategic, Proactive Procurement* (AMACOM, 2006).

¹⁴ Simon J. Evenett and Bernard Hoekman, *International Co-operation and the Reform of Public Procurement Policies* (2004, mimeo, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=821424 [Accessed December 30, 2008]).

Box 1: Examples of cost-savings in developing countries based on the implementation of more transparent and competitive procurement systems

A 2003 OECD study of the benefits of transparent and competitive procurement processes refers to the following examples of benefits achieved:

- In **Bangladesh**, a substantial reduction in electricity prices due to the introduction of transparent and competitive procurement procedures.
- A saving of 47% in the procurement of certain military goods in **Columbia** through the improvement of transparency and procurement procedures.
- A 43% saving in the cost of purchasing medicines in **Guatemala**, due to the introduction of more transparent and competitive procurement procedures and the elimination of any tender specifications that favour a particular tender.
- A substantial reduction in the budget for expenditures on pharmaceuticals in **Nicaragua**, due to the establishment of a transparent procurement agency accompanied by the effective implementation of an essential drug list.
- In **Pakistan**, a saving of more than Rs 187 million (US \$3.1 million) for the Karachi Water and Sewerage Board through the introduction of an open and transparent bidding process.

Source: OECD, *Transparency in Government Procurement: The Benefits of Efficient Governance* (TD/TC/WP/(2002)31/Rev2/14 April 2003). See also Robert D. Anderson, "China's Accession to the WTO Agreement on Government Procurement: Procedural Considerations, Potential Benefits and Challenges, and Implications of the Ongoing Re-negotiation of the Agreement" (2008) 17 P.P.L.R. 161.

In a broadly similar vein, an independent external study for the European Commission found that increased competition and transparency resulting from implementation of the Public Procurement Directives of the European Communities in the period between 1993 and 2002 generated cost savings of between a little less than €5 billion and almost €25 billion.¹⁵

A further important corroborating source of information regarding the benefits of competition which is sometimes overlooked is provided by evidence of *higher* costs to public treasuries that arise when competition is suppressed, for example through collusive tendering. Such evidence is reviewed in 4.1, below. For the present, it may be noted that collusion in public procurement markets has been conservatively estimated to raise prices on the order of 20 per cent or more above competitive levels.¹⁶ The benefit of introducing competition where it has not previously existed might be expected to be of a comparable magnitude.

The foregoing does not take into account explicitly the additional benefits that can accrue to countries by opening their markets to *foreign* as compared to domestic competitors. International

¹⁵ Europe Economics, Evaluation of Public Procurement Directives, Markt/2004/10/D, September 2006, available at http://ec.europa.eu/internal_market/publicprocurement/docs/final-report-en.pdf [Accessed December 30, 2008].

¹⁶ See Luke M. Froeb, Robert A. Koyak and Gregory J. Werden, "What is the effect of bid rigging on prices?" (1993) 42(4) *Economics Letters* 419 and other sources cited in Part 4, below.

liberalisation—whether with respect to markets for public procurement or other economic sectors—is often conceived principally as a tool through which countries gain access to foreign markets for their national suppliers.¹⁷ In fact, however, much of the benefit (arguably, the main benefit) of international liberalisation actually accrues to the countries undergoing liberalisation. A principal aspect of this benefit is the enhanced competition in the home market that external liberalisation generates. External liberalisation also creates the possibility of specialisation and exchange based on the principles of comparative advantage. This is no less true for the international liberalisation of procurement markets than it is for other markets.¹⁸ International liberalisation of procurement markets can also provide access to technology that is not available in the home market (i.e. the market in which goods and services are being procured).¹⁹ Clearly, this point may be of particular significance for developing, transition and smaller economies. A further important benefit of international competition that should not be overlooked is that it can make it more difficult—though not impossible—for competition to be suppressed through collusion among suppliers.²⁰

In sum, competition plays a central role in ensuring good performance in public procurement markets. This has been verified through both case studies and econometric analyses. Moreover, experience suggests that competition from abroad can complement competition provided by domestic suppliers in important ways. The next two parts of this article discuss two principal public policy tools through which competition can be maintained and enhanced in public procurement markets—international trade liberalisation and competition policy.

3. International liberalisation as a tool for enhancing competition: the WTO Agreement on Government Procurement

The WTO Agreement on Government Procurement (GPA) has multiple purposes, including the promotion of trade, transparency and good governance in addition to the efficient and effective management of public resources and the prevention of discriminatory procurement practices.²¹ A key effect of the Agreement is, in any case, to promote competition, consistent with the principles of comparative advantage.²² The Agreement on Government Procurement promotes competition in at least four distinct ways. First, it provides a vehicle for the progressive opening of parties' markets to international competition through market access or "coverage" commitments that are negotiated

¹⁷ This is the all-too-familiar "mercantilist" paradigm for international trade relations.

¹⁸ Sue Arrowsmith, *Government Procurement in the WTO* (The Hague: Kluwer Law International, Studies in Transnational Economic Law, Vol.16, 2003), provides a useful discussion.

¹⁹ Schooner, "Desiderata: Objectives for a System of Government Contract Law" (2002) 11 P.P.L.R. 103.

²⁰ See, for further discussion, 4.1.5 below.

²¹ See Preamble to the Revised Text of the Agreement on Government Procurement (GPA/W/297 of December 11, 2006), available at <http://docsonline.wto.org/DDFDocuments/t/PLURI/GPA/W297.doc> [Accessed December 30, 2008].

²² As stated by Judge Diane Wood, a former US Deputy Assistant Attorney General for Antitrust: "While the focus [of the Agreement on Government Procurement] might appear to be on securing access to the government's business for foreign companies, the effect just as surely will be to secure the benefits of competition for the procuring government itself." Diane P. Wood, "The WTO Agreement on Government Procurement: An Antitrust Perspective" in 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), Ch.14. See also Arwel Davies, "Tackling Private Anti-competitive Behaviour in Public Contract Awards under the WTO's Agreement on Government Procurement" (1998) 21 *World Competition* 55.

and incorporated in the schedules contained in Appendix I of the Agreement. Procurement which is “covered” in this way then becomes subject to rules requiring non-discriminatory treatment (“national treatment”) of other GPA parties’ goods, services and suppliers. Secondly, the various provisions of the Agreement relating to the provision of information to potential suppliers, contract awards, qualification of suppliers and other elements of the procurement process provide a framework that is intended to ensure transparent and non-discriminatory conditions of competition between suppliers, including both domestic and foreign suppliers.²³ The need for such a framework of rules to ensure competition derives from the potentially overwhelming pressures that most governments face to limit competition and use procurement processes to benefit particular suppliers.²⁴

Thirdly, the Agreement on Government Procurement requires that all GPA parties put in place national bid challenge systems (“domestic review procedures”) through which suppliers can challenge questionable contract awards or other decisions by national procurement authorities. Minimum standards and procedures to ensure the independence and impartiality of the bodies responsible for such systems are also set out in the Agreement. Effective bid challenge systems are an essential tool for ensuring integrity and can help to establish a culture of competition on the merits in public procurement markets.²⁵ Fourthly, the GPA provides recourse to the WTO Dispute Settlement Understanding (DSU) in circumstances where parties believe that international competition has been suppressed through measures taken by other parties in breach of their GPA commitments. Applicability of the DSU is a standard feature of WTO Agreements. In the area of public procurement, recourse to the DSU has been vastly less extensive than individual bid challenges before national authorities. Such applicability nonetheless represents an essential complement to individual bid challenges as a mechanism for considering systemic matters that may not be adequately addressed in individual bid challenges.²⁶

The GPA is a *plurilateral* agreement, meaning that not all Members of the WTO are bound by it. Currently, the Agreement covers 40 WTO Members, namely: Canada; the European Communities, including its 27 Member States (two additional countries, namely Bulgaria and Romania, became Member States of the European Communities and therefore parties to the GPA on January 1, 2007); Hong Kong, China; Iceland; Israel; Japan; Korea; Liechtenstein; the Kingdom of the Netherlands with respect to Aruba; Norway; Singapore; Switzerland; and the United States.²⁷ The coverage of the Agreement is, moreover, in the process of being further expanded through the accession of a number of additional Parties. On December 9, 2008, the Committee on Government Procurement, which administers the Agreement, adopted a decision that invites Chinese Taipei to accede to the Agreement

²³ Davies, “Tackling Private Anti-competitive Behaviour in Public Contract Awards under the WTO’s Agreement on Government Procurement” (1998) 21 *World Competition* 55. Possible tradeoffs between competition and transparency are discussed below.

²⁴ Arrowsmith, *Government Procurement in the WTO* (2003), Chs 1 and 2; see also Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement and Social Change* (Oxford: OUP, 2007).

²⁵ An important contribution of such systems, in this regard, can be to enhance supplier confidence that contracts will ultimately be awarded on the basis of product quality and competitive pricing, rather than patronage or cronyism. See, for related discussion, Christopher R. Yukins and Steven L. Schooner, “Incrementalism: Eroding the Impediments to a Global Public Procurement Market” (2007) 38 *Georgetown Journal of International Law* 529.

²⁶ For a review of key international disputes under both the current Agreement on Government Procurement and its predecessor, the Tokyo Round Code on Government Procurement, see Mitsuo Matsushita, “Major WTO Dispute Cases Concerning Government Procurement” (2006) 1 *Asian Journal of WTO and International Health Law and Policy* 299.

²⁷ Apart from its Member States, the EC itself is recognised as a Member of the WTO—hence, together with the Member States, it accounts for 28 WTO members.

on the basis of terms that have been agreed with the existing parties.²⁸ Currently, eight other WTO members are in the process of acceding to the Agreement on Government Procurement: Albania, China, Georgia, Jordan, the Kyrgyz Republic, Moldova, Oman and Panama. In addition, a further six WTO members have provisions in their respective Protocols of Accession to the WTO which call for them to seek accession to the GPA. These additional members are: Armenia, Croatia, the Former Yugoslav Republic of Macedonia (FYROM), Mongolia, Saudi Arabia and (most recently) the Ukraine.²⁹

The Agreement on Government Procurement is, therefore, an important international legal instrument for promoting competition, transparency, integrity and enhanced value for money in national procurement regimes. In promoting these values, it shares and reinforces the objectives of national reforms aimed at promoting competition, efficiency and transparency in the procurement process.³⁰ Consistent with this view, Inbom Choi, a Korean scholar, makes the case that the process of acceding to the GPA helped Korea to implement procurement reforms that served its own best interests.³¹ In these respects, the values and objectives of the GPA are also broadly consistent with and reinforce those of other important international instruments and work in this area such as the United Nations Convention Against Corruption, the UNCITRAL Model Law on Procurement, relevant guidelines of the World Bank and the OECD's work on prevention of corruption.³²

Recently, the text of the Agreement on Government Procurement has been renegotiated. Although the revised text is not yet in force, it is expected to come into force once a separate renegotiation of the coverage of the Agreement has been completed. In general, the revised text of the Agreement on Government Procurement is based on the same principles and contains the same main elements as the existing Agreement. Nonetheless, it improves on the existing text of the Agreement in various significant ways. First, the revised text entails a complete revision of the wording of the provisions of the Agreement with a view to making them more streamlined, easier to understand and user-friendly. Secondly, the provisions have been updated to take into account developments in current government procurement practice, notably the use of electronic tools. The revised text of the Agreement also sets out related requirements regarding the general availability and interoperability of the information technology systems and software used; the availability of mechanisms to ensure the integrity of requests for participation and tenders; and maintenance of data to ensure the traceability of the conduct of covered procurement by electronic means. Thirdly, in the revised GPA text *additional flexibility* has been provided for parties' procurement authorities in various potentially significant ways, for example by permitting shorter notice periods when electronic tools are used. Shorter time-periods have also been allowed for procuring goods and services of types that are available on the commercial marketplace. Fourthly, the revised Agreement embodies more explicit recognition of its significance for governance and development, and of its shared purpose with other international instruments

²⁸ "Chinese Taipei to accede to WTO Government Procurement Agreement", at http://www.wto.org/english/news_e/news08_e/gproc_9dec08_e.htm [Accessed December 30, 2008].

²⁹ Annual Report (2006) of the WTO Agreement on Government Procurement to the General Council (GPA/89).

³⁰ See also Robert D. Anderson, "China's Accession to the WTO Agreement on Government Procurement: Procedural Considerations, Potential Benefits and Challenges, and Implications of the Ongoing Re-negotiation of the Agreement" (2008) 17 P.P.L.R.161.

³¹ See Inbom Choi, The Long and Winding Road to the Government Procurement Agreement: Korea's Accession Experience, in Will Martin and Mari Panjestu (eds), *Options for Global Trade Reform: A View from the Asia-Pacific* (Cambridge: Cambridge University Press, 2003), Ch.11, pp.249-269.

³² Robert D. Anderson, "Current Developments on Public Procurement in the WTO" (2006) 15 P.P.L.R. NA167.

and initiatives in this regard. Fifthly, in the revised text of the Agreement the transitional measures (“special and differential treatment”) that are available to developing countries that become parties to the Agreement have been extended and more clearly spelled out.³³

Some countries have chosen to pursue liberalisation of their government procurement markets via bilateral or regional trade agreements (i.e. RTAs) rather than through the WTO Agreement on Government Procurement. In many cases, however, the provisions and even the coverage of such agreements are modelled, at least partly, on the GPA.³⁴ Other countries, for example, Australia and New Zealand, have pursued significant liberalisation of their government procurement markets largely on a unilateral basis. While this approach may have its own advantages, it does not, by itself, provide the reciprocal access to other countries’ procurement markets that liberalisation in the context of a bilateral or multilateral trade instrument can provide.

4. The complementary role of national competition laws and policies in ensuring competition in public procurement markets

A key premise of this article is that, while international liberalisation—whether via the GPA, a bilateral agreement or unilaterally, is an important tool for enhancing competition in procurement markets, it is not, by itself, a *sufficient* tool for ensuring an optimal degree of competition. National competition laws and policies play an essential complementary role in this regard. This role encompasses, at a minimum, the following elements: (1) the adoption and enforcement of effective rules to prevent *collusive tendering*; (2) “*competition advocacy*” activities that promote the use of sound public contracting procedures and the progressive elimination of regulatory and other barriers to competition. As will be discussed, such advocacy may have a specific role to play in ensuring that currently envisioned public infrastructure spending programmes follow proper contracting procedures and thereby maximise long-run value to citizens; and (3) *other aspects of the enforcement of competition rules* including the treatment of mergers and joint ventures. In the EC, a further important such aspect is the treatment of “state aids” to industry, which can have significant interactions with competition in public procurement markets (in other jurisdictions these effects would be dealt with, if at all, as a competition advocacy issue). The following reviews pertinent literature and policy developments concerning each of these broad elements, in turn.³⁵

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³³ See, for additional background and analysis of relevant textual changes, Robert D. Anderson, “Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiations” (2007) 16 P.P.L.R. 255.

³⁴ Government procurement • provisions in recent regional trade agreements (RTAs) notified to the WTO are examined in Robert D. Anderson and Anna Caroline Müller, “Market Access for Government Procurement of Services: Comparing Recent PTAs with WTO Achievements” in Martin Roy and Juan Marchetti (eds), *Services Trade Liberalization: Preferential Trade Agreements vs. the GATS* (Cambridge University Press, forthcoming 2008) and in Robert D. Anderson, Anna Caroline Müller and Kodjo Osei-Lah, “The Treatment of Government Procurement in Recent Regional Trade Agreements: Characterization and Analysis”, mimeo.

³⁵ As is true of this article generally, this part of the article draws particularly on policy developments and experience in the US and (perhaps, to a lesser extent) Europe. An effort is nonetheless made to illustrate the universality of the issues raised and their significance for developing as well as developed countries.

4.1 Preventing collusion among suppliers³⁶

Bid-rigging in government procurement accounts for a striking percentage of prosecutions by competition authorities against supplier collusion. For example, from 1972 through 1992, the US Department of Justice (DOJ) obtained 1,159 criminal indictments for Sherman Act violations. Some 625 of these indictments, nearly 54 per cent, attacked collusion against public procurement bodies.³⁷ The frequency of such cases suggests that suppliers view public bodies as attractive targets for collusive schemes.

Although the opening of national procurement markets either through unilateral action or via negotiations under the WTO Agreement on Government Procurement or other international instruments makes possible substantially increased competition in procurement markets, it does not guarantee this result. Rather, collusive agreements between potential suppliers directly undercut this possibility. For this reason, competition or antitrust rules relating to these practices are an essential counterpart to a liberalised government procurement regime. While the WTO Agreement on Government Procurement does not require parties to adopt measures to prevent collusive tendering, it recognises the role of such measures, at least in passing.³⁸

A further basic premise of this part of the article is that insights regarding the harm caused by bid rigging, the factors that can facilitate it and the means for preventing it that have emerged from the experience of jurisdictions in which competition law and policy are well established (e.g. the United States, the European Communities and Canada) also have relevance to countries in which competition law is much more recently adopted.³⁹ This is not at all to suggest that the maintenance of competition in such countries does not involve special issues and challenges. Factors differentiating the role of competition policy in developing as compared to developed countries may include any or all of the following: (1) higher “natural” entry barriers due to inadequate business infrastructure, including distribution channels, and (sometimes) intrusive regulatory regimes; (2) asymmetries of information in both product and credit markets; (3) a greater proportion of local (non-tradable) markets; and (4) over-stretched/inadequately developed law enforcement and judicial systems.⁴⁰ The point is simply that the problems faced by developing and transition economies in maintaining competition are not wholly dissimilar to those of developed countries and, therefore, that there is much to be gained for both sides in sharing experiences.

In support of this premise, Box 2 presents examples of bid rigging schemes that have been successfully prosecuted in recent years in various jurisdictions including developed, developing and transition economies. Several of the examples (those from China, Indonesia, Peru and Chinese Taipei) are taken from inputs prepared by those countries for the 2001 OECD Global Forum on Competition. These cases illustrate a number of common characteristics of bid rigging schemes that appear to transcend the distinctions between developed and developing countries. For example, in several of the cases collusion seems to have been facilitated by restrictive regulations and/or practices

³⁶ See, for complementary discussions and additional information on policy developments in OECD member countries, OECD, *Public Procurement* (Policy Roundtable, 2007); OECD, *Competition in Bidding Markets* (Policy Roundtable, 2006) and OECD, *Competition Policy and Procurement Markets* (Policy Roundtable, 1998).

³⁷ These data were collected from the Commerce Clearing House Trade Regulation Reporter for the years in question.

³⁸ In particular, art.XV of the Agreement provides for the use of limited tendering procedures in circumstances where the tenders submitted in an open or selective tendering process have been collusive.

³⁹ Currently, approximately 100 countries have national competition laws of one kind or another.

⁴⁰ See Kovacic, “Institutional Foundations for Economic Legal Reform in Transition Economies” (2001) 77 *Chicago-Kent Law Review* 265; and Anderson and Jenny, “Competition Policy, Economic Development and the Possible Role of a Multilateral Framework on Competition Policy” in *Competition Policy in East Asia* (2005).

of the procuring entities. The role of common orthographic errors in the tendering documents of “competing” bidders as a “suspicious sign”—illustrated in the case from Peru—is well known to developed country competition officials.⁴¹

The cases in Box 2 also illustrate that the mere opening of bidding processes to foreign-based suppliers may not generate effective competition, if effective rules are not in place to deter collusion. The fourth case noted in the table—a conspiracy to rig bids on construction contracts funded by the United States Agency for International Development (USAID) in Egypt—is interesting in that it shows the ability of collusion in tendering processes to impact directly on international assistance efforts. Of course, these are but a few examples of the much larger numbers of bid rigging schemes that have been successfully prosecuted by relevant authorities.

Box 2: Examples of international and domestic collusive tendering schemes that have been prosecuted in various jurisdictions

(a) International removal and relocation services in Belgium

In 2008, the European Commission imposed fines totalling €32,755,500 on various large firms providing international removal and relocation services in Belgium for fixing prices, sharing the market and bid rigging, in violation of the EC Treaty’s ban on cartels (art.81). The cartel operated for almost 19 years. Cartel members fixed prices, presented bogus quotes to clients and compensated each other for lost bids.

Source: “Antitrust: Commission fines providers of international removal services in Belgium over €32.7 million for complex cartel” (EC Commission, Press Release, IP/08/415, March 11, 2008).

(b) The International Marine Hose case

Marine hose is a flexible rubber hose used to transport oil between tankers and storage facilities and buoys. According to court papers and other documents, firms based in the United Kingdom, France, Italy, and Japan conspired to fix prices and rig for hundreds of millions of dollars worth of marine hose and related products which was sold to other firms in addition to government agencies. The conspirators met in locations such as Key Largo, Florida Bangkok, and London. The investigation of this case involved co-ordinated enforcement efforts by the US Department of Justice, the EC Commission and the UK Office of Fair Trading.

Source: US Department of Justice, “Eight executives arrested on charges of conspiring to rig bids, fix prices, and allocate markets for sales of marine hose”, Press Release, May 2, 2007, and “Three United Kingdom Nationals Charges With Participating in Worldwide Bid-Rigging Conspiracy in the Marine Hose Industry”, US Department of Justice, Press Release, December 3, 2007.

(c) Prosecution of bid rigging in school construction in China

Ten construction companies were prosecuted for bid rigging on contract for the construction of a school building. The 10 companies including No.2 Construction Company agreed that No.2 Construction Company would get the contract in exchange for payments to the other companies. They also assigned one of the companies to calculate the bidding prices of all candidates. No.2 Construction Company won the bid at a higher price than before. The administration for industry

⁴¹ See related discussion, below.

and commerce issued a decision, declaring that the bid was invalid and the illegal gains were confiscated.

Source: OECD Global Forum on Competition, Summary of Cartel Cases Described by Invitees (CCNM/GF/COMP(2001)4, October 5, 2001).

(d) Bid rigging on USAID contracts in Egypt

Philipp Holzmann AG, a Frankfurt, Germany construction firm, pleaded guilty and was sentenced to pay a \$30 million fine for its participation in a conspiracy to rig bids on construction contracts funded by the United States Agency for International Development (USAID) in Egypt.

Source: US Department of Justice, “German Company Pleads Guilty To Rigging Bids on USAID Construction Contracts in Egypt”, Press Release, August 18, 2000.

(e) The rigging of bids for the supply of pipe and pipe-processing services in Indonesia

Three pipe processors were found to have exchanged their prices with each other at a meeting in a hotel the evening before the bids were opened. Material evidence was contained in statements of a complainant, as well as in the testimony of witnesses from the respondents. As this was the first case ever brought by the Commission, no fines or other sanctions were imposed. Instead, the Commission ordered that the contract between Caltex and the apparent lowest bidder be dissolved and that entire tender process be redone.

Source: OECD Global Forum on Competition, Summary of Cartel Cases Described by Invitees (CCNM/GF/COMP(2001)4, October 5, 2001).

(f) Rigging bids for the supply of construction services in Peru

Three companies were convicted of participating in bid rigging on a contract for the construction of a secondary electricity net in Puerto Maldonado City. The claim was based on evidence from the documents presented by the three bidders. The documents contained the same redaction and the same format; they also presented the same orthographic errors, the same time of construction and almost the same price bid. Following appropriate investigation, the Free Competition Commission ordered the three companies to cease the practice and imposed fines of amount of nearly €1,800 on each of the respondents.

Source: OECD Global Forum on Competition, Summary of Cartel Cases Described by Invitees (CCNM/GF/COMP(2001)4, October 5, 2001).

(g) The rigging of bids for the procurement of truck-mounted mobile cranes by the Taiwan Power Company in Chinese Taipei

Six companies were prosecuted for having knowingly, and through mutual communications, apportioned the number, suppliers, and amounts of the winning bids before the bid opening. These acts violated art.14 of the Fair Trade Law, which prohibits concerted acts. The Commission ordered them to cease the concerted practices. The case also included another violation of the Law committed by Taiwan Power Company that improperly restricted the criteria to bid on its contract. The company was ordered to cease its actions.

Source: OECD Global Forum on Competition, Summary of Cartel Cases Described by Invitees (CCNM/GF/COMP(2001)4, October 5, 2001).

More generally, a large proportion of cartel agreements that have been uncovered by the competition authorities of major developed jurisdictions in the past decade (including both collusive tendering for government contracts and price-fixing arrangements not involving government procurement processes) have been international in scope.⁴² Such arrangements directly undercut the gains from trade liberalisation in addition to impacting directly on the welfare of citizens.⁴³ They manifest a clear need for international co-operation in the enforcement of competition laws. They are also of interest in that they demonstrate that, contrary to the assumptions of some trade policy practitioners, external market opening alone cannot always ensure vigorous competition in the absence of effective antitrust laws.⁴⁴

4.1.1 Varieties of collusive tendering

Collusive tendering schemes take a variety of common forms. Probably the most common is “bid rotation”, by which suppliers organise their bids to determine which firm will win a contract.⁴⁵ The “losers” agree to refrain from bidding or to inflate their bids in the expectation that they will win when their turn comes up. Other common forms of bid rigging include “complementary bidding”, in which some competitors agree to submit bids that either are too high to be accepted or contain special terms that will not be acceptable to the buyer, and “bid suppression”, in which one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor’s bid will be accepted. The low bidder often secures support for the plan by giving its co-conspirators side payments or subcontracts.⁴⁶ All such schemes have at least one element in common, namely an agreement between some or all of the bidders that limits or eliminates competition between them and (normally) predetermines the winning bidder.⁴⁷ Additional information on specific forms of bid rigging is summarised in Box 3.

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⁴² See Simon J. Evenett, Margaret Levenstein and Valerie Suslow, “International cartel enforcement: lessons from the 1990s” (2001) 24(9) *World Economy* 1221; and Clarke and Evenett, “A multilateral framework for competition policy?” in State Secretariat of Economic Affairs.

⁴³ Anderson and Jenny, “Competition Policy, Economic Development and the Possible Role of a Multilateral Framework on Competition Policy” in *Competition Policy in East Asia* (2005).

⁴⁴ See also Anderson and Jenny, “Competition Policy, Economic Development and the Possible Role of a Multilateral Framework on Competition Policy” in *Competition Policy in East Asia* (2005).

⁴⁵ Representative illustrations include *United States v Dynalectric Co* 859 F. 2d 1559 (11th Cir. 1988); *United States v Northern Improvement Co* 814 F.2d 540 (8th Cir. 1987); *United States v A-A-A Electrical Co* 788 F. 2d 242 (4th Cir. 1986); *United States v Portsmouth Paving Corp* 694 F. 2d 312 (4th Cir. 1982).

⁴⁶ See • *United States v All Star Indus.* 962 F. 2d 465 (5th Cir. 1992). The use of side payments to facilitate bid rotation conspiracies is common where contractors face each other regularly, such as bidding for highway paving contracts. See, e.g. *United States v A-A-A Electrical Co* 788 F. 2d 242 (4th Cir. 1986); *United States v Inryco, Inc* 642 F. 2d 290, 292 (9th Cir. 1981); *David Thompson* 621 F. 2d at 1149–1150; *Azzarelli Construction* 612 F. 2d at 297.

⁴⁷ See, for a useful overview, US Department of Justice, “Price-Fixing, Bid-Rigging and Market Allocation Schemes: What They Are and What to Look For”, available at <http://www.usdoj.gov/atr/public/guidelines/211578.htm> [Accessed December 30, 2008].

Box 3: Basic types of collusive tendering

Bid suppression: In bid suppression schemes, one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.

Complementary bidding: Complementary bidding (also known as "cover" or "courtesy" bidding) occurs when some competitors agree to submit bids that either are too high to be accepted or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the buyer's acceptance, but are merely designed to create a (false) appearance of genuine competitive bidding.

Bid rotation: In bid rotation schemes, all conspirators submit bids but take turns being the low bidder. The terms of the rotation may vary; for example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that correspond to the size of each conspirator company.

Sub-contracting as a compensating mechanism: Competitors who agree not to bid or to submit a losing bid frequently receive sub-contracts or supply contracts in exchange from the successful low bidder. In some schemes, a low bidder agrees to withdraw its bid in favour of the next lowest bidder in exchange for a sub-contract that divides the illegally obtained higher price between them. Note, however, that sub-contracting is not necessarily anti-competitive if it is not done in furtherance of efforts to limit competition in the award of the main contract.

Source: Adapted from US Department of Justice, "Price-Fixing, Bid-Rigging and Market Allocation Schemes: What They Are and What to Look For", available at <http://www.usdoj.gov/atr/public/guidelines/211578.htm> [Accessed January 17, 2009].

4.1.2 Estimates of the price impact of collusion in public procurement processes

Collusion adds directly to the price paid by procuring entities for goods and services procured. An obvious question of interest is the extent of the premium that is paid. One of the more sophisticated estimates was done by Froeb et al. using data from an investigation of the rigging of bids for the supply of frozen seafood to the US Department of Defense. They found, with a high degree of statistical confidence, that the rigging of bids had raised the price paid by the Department by 23.1 per cent (this was the smallest point estimate).⁴⁸ This is broadly in line with more recent estimates of the costs of cartelisation in international markets.⁴⁹ Clearly, the costs imposed on governments by collusion in public tendering processes are substantial.

The foregoing implies that the benefits of effective deterrence of bid rigging are very substantial. Indeed, as Clarke and Evenett have shown, the resource saving that can be generated by only a marginal reduction in bid rigging on government contracts (e.g. of the order of 1 per cent) is greater than the average annual operating budget of the competition agency in most countries, often by a factor of several times over.⁵⁰

⁴⁸ Froeb, Koyak and Werden, "What is the effect of bid rigging on prices?" (1993) 42(4) *Economics Letters* 419.

⁴⁹ See, e.g. John M. Connor, "Price-Fixing Overcharges: Legal and Economic Evidence", SSRN Working Paper, 2005, available at <http://ssrn.com/abstract=787924> [Accessed December 30, 2008].

⁵⁰ See Clarke and Evenett, "A multilateral framework for competition policy?" in State Secretariat of Economic Affairs, p.127.

4.1.3 Conditions that facilitate collusion

While collusion can occur in any industry, economists and antitrust enforcement officials have long sought to identify particular circumstances that facilitate collusion. A classic contribution by Stigler posited an inverse relationship between the number of competitors in a market and the possibilities for collusion.⁵¹ In other words, Stigler argued that the greater the number of competitors, the more difficult the firms will find it to collude and, hence, the lower will be the price paid by consumers. This proposition has been elaborated on and challenged in subsequent game-theoretic literature, including the literature on “super-games”.⁵² While this literature identifies a range of possibilities and outcomes on the basis of various assumptions regarding the behaviour of market participants, the basic idea that more potential sellers make collusion more difficult continues to command broad support. This reflects the simple fact that the greater the number of sellers, the more difficult it is for them to get together and agree on prices, bids, customers and/or territories and (perhaps even more so) to enforce the relevant agreements.

In addition to situations involving a small number of potential sellers, experience points to the following additional circumstances as potentially facilitating collusion⁵³:

- The probability of collusion increases where restrictive specifications are used for the product being procured.
- The more standardised a product is, the easier it is for competing firms to reach agreement on a common price structure. By contrast, it is harder to reach an agreement where other forms of competition, such as with respect to design, features, quality, or service, are important.
- The likelihood of collusion can be enhanced by repeat purchases, since the vendors may become familiar with other bidders and recurring contracts provide the opportunity for competitors to share the work.
- Collusion is more likely if the competitors know each other well through social connections, trade associations, legitimate business contacts, or shifting employment from one company to another.⁵⁴
- Collusion is facilitated if bidders have opportunities to meet together in advance of the submission of bids, for last-minute consultations.

As will be elaborated in 4.2 below, collusion can also be facilitated by aspects of the procurement process itself. Domestic content requirements that restrict the set of potential suppliers can thereby diminish the capacity of entry to upset cartel coordination.⁵⁵ The unsealing of bids in public for all

⁵¹ George J. Stigler, “A Theory of Oligopoly” (1964) 72(1) *Journal of Political Economy* 44.

⁵² See Jean Tirole, *The Theory of Industrial Organization* (MIT Press, 1988).

⁵³ These points have been adapted principally from US Department of Justice, “Price-Fixing, Bid-Rigging and Market Allocation Schemes: What They Are and What to Look For”, available at <http://www.usdoj.gov/atr/public/guidelines/211578.htm> [Accessed December 30, 2008]; similar material is available on the websites of other national competition enforcement authorities.

⁵⁴ US Department of Justice, “Price-Fixing, Bid-Rigging and Market Allocation Schemes: What They Are and What to Look For”, available at <http://www.usdoj.gov/atr/public/guidelines/211578.htm> [Accessed December 30, 2008]. Readers familiar with the writings of Adam Smith, *The Wealth of Nations* (1776) will recall his dictum that “People of the same trade seldom meet together, even for merriment or diversion, but the evening ends in a conspiracy against the public, or in some contrivance to raise prices”.

⁵⁵ Malcolm B. Coate, “Techniques for Protecting Against Collusion in Sealed Bid Markets” (1985) 30 *Antitrust Bulletin* 897, 899–890.

bidders to observe can enable cartel members to determine whether co-conspirators fulfilled promises either not to bid or to submit artificially high “cover bids”. The use of electronic procurement tools and framework contracts, while offering significant potential gains in efficiency for both suppliers and procuring entities, also pose complex challenges for the maintenance of competition. Advocacy efforts to address these concerns can, therefore, be an important additional element of a successful overall strategy to prevent bid rigging.

4.1.4 The deterrence of collusive tendering

A pre-requisite for the deterrence of collusive tendering is an effective legal prohibition of such conduct, normally in a national competition or antitrust law. (Reference is made here to “detering” rather than “preventing” collusion since it is probably impossible to eliminate such conduct altogether.) Often, bid rigging in public procurement processes is prohibited through general antitrust provisions against cartels or conspiracies in restraint of trade⁵⁶; however, it can also be the subject of legal provisions that focus specifically on collusion in public procurement markets.⁵⁷ In some jurisdictions, bid rigging can also trigger penalties under statutes aimed at the prevention of fraud. To be effective, legal prohibitions against collusive tendering should be backed up by an effective enforcement regime and by appropriate sanctions (penalties) including heavy fines and, in the view of many experts, prison sentences.⁵⁸ In transition economies, such a prohibition serves an important purpose by making clear that the government will not tolerate private efforts to recreate collective planning techniques that the country has abandoned. There are indications that the effective prohibition of “naked” or “hardcore” cartels is becoming an internationally accepted norm.⁵⁹

Recent efforts to more effectively deter bid rigging and other collusive arrangements have taken two main forms. First, sanctions for culpable parties have been substantially increased.⁶⁰ Convictions in bid rigging cases can now result in significant penalties. In the United States, for corporate defendants, the Sherman Act now sets a maximum fine of \$100 million. Corporate violators also may be fined up to the greater of twice the firm’s gross pecuniary gain from the violation or twice the gross pecuniary loss by victims.⁶¹ Individuals may be fined up to \$1,000,000, twice the pecuniary loss by victims, or twice the defendant’s gross pecuniary gain from the violation, whichever is greatest.⁶² Individuals also may be sentenced to as many as 10 years in prison. If it brings a civil suit to enforce the

⁵⁶ This is the case, for example, in the US and the European Community.

⁵⁷ This is the case, for example in Canada, where bid rigging can, depending on the circumstances, be dealt with under either a specific provision of the Competition Act which addresses bid rigging as such or under the more general provision on conspiracies in restraint of trade.

⁵⁸ See OECD, *Fighting Hard-Core Cartels—Harm, Effective Sanctions and Leniency Programme*, (OECD, 2002); see also Richard Whish, “Control of Cartels and Other Anti-competitive Agreements” in Vinod Dhall, *Competition Law Today: Concepts, Issues and the Law in Practice* (New Delhi: Oxford University Press, 2007), Ch.1.

⁵⁹ Harry First, “The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law” (2001) 68 *Antitrust Law Journal* 711 (prosecution of vitamins cartel suggests broader international acceptance of anti-cartel norm). The deterrence of hardcore cartels was also a major focus of work in the WTO Working Group on the Interaction between Trade and Competition Policy when that body was active. See *Report (2002) of the WTO Working Group on the Interaction between Trade and Competition Policy to the General Council* (WT/WGTCP/6), paras 47–64, available at http://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm [Accessed December 30, 2008].

⁶⁰ The expansion of antitrust sanctions for cartel behaviour is traced in Stephen Calkins, “Corporate Compliance and the Antitrust Agencies’ Bi-Modal Penalties” (1997) 60 *Law & Contemporary Problems* 127; Wouter P.J. Wils, “Is Criminalization of EU Competition Law the Answer?” (2005) 28 *World Competition: Law and Economics Review* ???.

⁶¹ 18 USC §3623 (1994).

⁶² 18 USC §3623.

Sherman Act, the DOJ may seek an injunction or may obtain treble damages for injury the Federal Government has suffered as a purchaser. Under the Civil False Claims Act,⁶³ the Department may seek treble damages in cases of collusive bidding and, even when no actual damages can be proven, may obtain civil penalties of up to \$10,000 for each separate voucher or invoice submitted under a government contract tainted by collusion. State governments injured in their capacity as purchasers also have standing to seek treble damages. In broad terms, the trend to impose heavy penalties on defendants in cases of bid rigging and collusive tendering has been progressively replicated in other jurisdictions such as the European Communities and Canada.

Antitrust violations involving bid-rigging can also result in a contractor's suspension or debarment. In the United States, Federal Acquisition Regulation (FAR) 9.407-2(a)(2) permits the purchasing agency to suspend contractors suspected of a violation of "Federal or State antitrust statutes relating to the submission of offers" and states that an indictment for antitrust violations "constitutes adequate evidence for suspension".⁶⁴ The entry of a criminal conviction or civil judgment for violating federal or state antitrust statutes relating to the submission of offers creates grounds for debarment.⁶⁵

A second important tool for the deterrence of bid rigging has been to provide inducements for cartel participants to inform government competition agencies of wrongdoing through so-called leniency programmes. In broad terms, such programmes encourage cartel members to come forward, confess to their activities and assist the competent authorities in investigating and prosecuting their fellow cartel members. In exchange, they receive amnesty for their own behaviour. Normally, only one company (the "first in") can qualify for leniency.

Leniency programmes for co-operation in anti-cartel enforcement cases were introduced in the United States in the 1980s and progressively strengthened through the 1990s.⁶⁶ Following the lead of the United States, the European Commission adopted such a programme in 1996.⁶⁷ The Commission's initial Leniency Notice, which was not as successful as expected, was replaced by a new one in 2002.⁶⁸ The main change was that, once a firm was admitted to the programme, immunity became automatic. Subsequently, the European Commission and all EC Member States adopted a model leniency programme developed within the European Competition Network (a network linking all competition authorities in the Community).⁶⁹ As a result, the Commission programme was again amended in 2006, mainly to clarify the type and quality of information to be provided by leniency applicants.⁷⁰

⁶³ 31 USC §§3729–3731 (1994).

⁶⁴ 48 CFR §9.407-2(a)(2).

⁶⁵ 48 CFR §9.406-2(a)(2).

⁶⁶ On the development and operation of modern leniency programmes, see Joe Chen and Joseph E. Harrington Jr, "The Impact of the Corporate Leniency Program on Cartel Formation and the Cartel Price Path" in Vivek Ghosal and Johan Sennæk (eds), *Political Economy of Antitrust* (forthcoming); Julian M. Joshua, "Leniency in U.S. and EU Cartel Cases" (2000) 14(3) *Antitrust* 19 (comparing US and EU leniency programmes); Donald C. Klawiter, "Corporate Leniency in the Age of International Cartels: The American Experience" (2000) 14(3) *Antitrust* 13 (describing development of US leniency policy); and Massimo Motta and Michele Polo, "Leniency Programs and Cartel Prosecution" (2003) 21 *International Journal of Industrial Organization* 347. Regarding leniency programmes in the European Community, see Robert D. Anderson and Alberto Heimler, "What has Competition Done for Europe? An Inter-Disciplinary Answer" (2007) 62(4) *Aussenwirtschaft* 419.

⁶⁷ Commission Notice on the non-imposition or reduction of fines in cartel cases [1996] OJ C207/4–6.

⁶⁸ Commission notice on immunity from fines and reduction of fines in cartel cases [2002] OJ C45/3–5.

⁶⁹ See <http://ec.europa.eu/comm/competition/cartels/legislation/leniencyLegislation.html> [Accessed December 30, 2008].

⁷⁰ Commission notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17–22.

US enforcement authorities stress the following three characteristics as being critical to the success of leniency programmes. First, there must be severe sanctions in place for firms and individuals that do not obtain amnesty. Without this, the incentive to co-operate will not be present. Secondly, there must be a genuine fear of detection, based on a credible possibility that illegal behaviour will be detected, prosecuted and sanctioned. Thirdly, there must be predictability and transparency to the amnesty programme such that potential applicants a high degree of assurance that, if they take the risk of coming forward, they will get the reward.⁷¹

In addition to the foregoing measures (effective sanctions and leniency programmes to induce co-operation), enforcement agencies also stress the importance of procurement personnel being alert to various “suspicious signs” that may signal the presence of collusion. A number of these are set out in Box 4. To be sure, the involvement of competition agencies (or, where appropriate, police or other investigatory authorities) is generally necessary to the investigation and prosecution of bid rigging. However, it is the procurement officials who are most likely to be in a position to observe behaviour that may indicate the presence of collusion.

Box 4. Suspicious signs: behaviour that may signal the presence of collusive tendering

(a) Potentially suspicious bid patterns

- The same suppliers submit bids and each company seems to take a turn being the successful bidder.
- Some bids are much higher than published price lists, previous bids by the same firms, or internal agency cost estimates.
- Fewer than the normal number of competitors submit bids.
- A company appears to be bidding substantially higher on some bids than on other bids, with no apparent cost differences to account for the disparity.
- Bid prices drop whenever a new or infrequent bidder submits a bid.
- A successful bidder routinely sub-contracts work to competitors that submitted unsuccessful bids on the same project.
- A company withdraws its successful bid and subsequently is sub-contracted work by the new winning contractor.

(b) Suspicious statements and behaviour

- Bid proposals or forms submitted by different vendors contain common features or irregularities (e.g. identical calculations, spelling errors, handwriting or typeface that suggest they may have been prepared jointly).
- A company requests a bid package for itself and a competitor or submits both its own and another company’s bids.
- A company submits a bid when it is incapable of successfully performing the contract (this may be a complementary bid).

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⁷¹ Thomas • O. Barnett, “Criminal Enforcement of Antitrust Laws: The U.S. Model” (Remarks before the ?? Presented at the Fordham Competition Law Institute’s Annual Conference on International Antitrust Law and Policy New York, New York, September 14, 2006).

- A company brings multiple bids to a bid opening and submits its bid only after determining who else is bidding.
- A bidder or salesperson makes: (1) any reference to industry-wide or association price schedules; (2) statements indicating advance knowledge of competitors' pricing; (3) statements to the effect that a particular contract or project "belongs" to a certain vendor; or (4) statements indicating that a particular bid was only submitted as a "courtesy," "complementary," "token," or "cover" bid.

N.B.: It should be emphasised that the foregoing are merely signs that may trigger suspicions; they are not, by themselves, proof of collusion.

Source: Adapted from US Department of Justice, "Price-Fixing, Bid-Rigging and Market Allocation Schemes: What They Are and What to Look For" (available at <http://www.usdoj.gov/atr/public/guidelines/211578.htm>).

In addition to promoting collusion-awareness among procurement officials, the prevention of collusion in the procurement process requires effective co-operation between procurement and competition agencies. To facilitate this, competition agency staff can be invited to participate in training seminars for procurement officials that include modules on the detection and prevention of bid rigging, or can otherwise work with procurement officials to help ensure a high level of awareness. This is a standard practice in jurisdictions such as the United States, the European Community and Canada.

Efforts to deter bid rigging can also be facilitated by legal requirements to inform the enforcement authorities of apparent violations. In the United States, federal procurement statutes and regulations require executive agencies to notify the Department of Justice (DOJ) about bids or proposals that indicate antitrust violations.⁷² For sealed bid procurements, contractors often must certify that they have set their prices independently.⁷³

Collusion can be deterred through other means, as well. Advisory programmes can help purchasing officials adjust sealed bidding procedures to impede seller efforts to reach consensus on bid rigging plans and detect deviations from illicit agreements. Past advisory programmes for government procurement agencies have devoted some effort to helping purchasers identify suspicious bidding patterns,⁷⁴ but too little attention has focused on regulatory and institutional conditions that generate such patterns in the first place. Efforts to identify and alter public policies that reinforce collusion fit naturally into initiatives to improve the performance of government institutions. Studying the causes of collusion prosecuted by antitrust agencies could help to reveal circumstances in which public procurement

⁷² The statutory requirement appears in 10 USC §2305(b)(9) (1994) and 41 USC §253b(i) (1994). Section 3.303(a) of the Federal Acquisition Regulations directs agencies to notify the Attorney General of evidence of collusive bidding. 48 CFR §3.303(a). FAR 3.301(b) requires agency personnel to refer instances of identical bids in advertised bidding to the Attorney-General and to supply evidence of suspected antitrust violations to the agency office responsible for debarring and suspending contractors. 48 CFR §3.301(b).

⁷³ See FAR 3.103-1, 48 CFR §3.103-1 (solicitations for firm-fixed-price contracts must include Certificate of Independent Price Determination, by which supplier declares that it set its prices "independently").

⁷⁴ Researchers have developed sophisticated econometric methods for identifying collusive bids on government procurement programmes. See Robert H. Porter and J. Douglas Zona, "Detection of Bid Rigging in Procurement Auctions" (1993) 101 *Journal of Political Economy* 518; Robert H. Porter and J. Douglas Zona, "Ohio School Milk Markets: An Analysis of Bidding" (NBER Working Paper No. 6037, May 1997).

policies may facilitate collusion by discouraging entry and increasing the likelihood that cheating on cartel plans will be detected and punished.⁷⁵

Another useful initiative would be to assess how procurement policies that limit the pool of potential bidders can facilitate collusion. An advisory programme could recommend adjustments or help design experiments that give selected purchasing officials freedom to deviate from existing requirements.⁷⁶ Such changes can disrupt supplier co-ordination by spurring entry into the procurement market. More broadly, collusive tendering can also be deterred through the promotion of effective public tendering processes and the progressive removal of regulatory and other obstacles to competition as described in 4.2, below. This highlights the complementarity of competition law enforcement and advocacy activities.

4.1.5 Foreign competition as a factor that can make collusion more difficult

A final important tool through which collusion can be deterred or made more difficult and which is sometimes neglected by competition enforcers involves opening markets to competition from abroad. To be sure, the point has already been made that collusion in public tendering processes can extend to foreign as well as domestic suppliers. Hence market opening is not a substitute for effective enforcement of competition or antitrust laws. Nonetheless, the opening of markets to foreign competition substantially complicates the possibility of collusion in that it broadens the pool of competitors that must be included in a bidding ring if it is to succeed. Conversely, measures that exclude participation by particular classes of suppliers (e.g. foreign suppliers) can diminish the capacity of entry to upset cartel co-ordination.⁷⁷ One reason why foreign competition may be particularly effective in making collusion more difficult is that foreign competitors may come from a different business culture or, at any rate, may not have the ongoing contacts with domestic suppliers that favour effective collusion.⁷⁸ The usefulness of foreign competition in deterring collusion is a further illustration of the complementary roles of trade liberalisation and competition policy in ensuring viable competition in public procurement markets.

4.2 Competition advocacy and education: fostering support for pro-competitive procurement approaches and addressing regulatory barriers/other government measures that impede competition

Competition agencies—and other public interest-oriented institutions such as research institutes and policy think-tanks—can play an important role in regard to the reform of government measures

⁷⁵ See Luke M. Froeb, *Auctions and Antitrust* (US Department of Justice, Economic Analysis Group: August 22, 1988) (EAG 88-8) (noting government's extensive reliance on open auctions to sell property such as timber; describing how open auctions facilitate immediate punishment of cartel members who deviate from agreed-upon bidding strategy); and William E. Kovacic, Robert C. Marshall, Leslie M. Marx and Matthew E. Raiff, "Bidding rings and the design of anti-collusive measures for auctions and procurements" in Nicola Dimitri, Gustavo Piga and Giancarlo Spagnolo (eds), *Handbook of Procurement* (Cambridge: Cambridge University Press, 2006), Ch.15 (describing anti-collusion safeguards that can be built into auction and procurement mechanisms).

⁷⁶ See Lance Brannman and Luke M. Froeb, "Mergers, Cartels and Bidding Preferences in Asymmetric Second-price Auctions" (May 27, 1997) (examining the impact of small-business set asides on prices obtained in timber auctions).

⁷⁷ Coate, "Techniques for Protecting Against Collusion in Sealed Bid Markets" (1985) 30 *Antitrust Bulletin* 897.

⁷⁸ Recall the emphasis that is placed by antitrust agency officials on ongoing contacts between competitors in trade and similar associations as a factor facilitating cartelisation.

affecting competition. This is recognised in many jurisdictions where competition agencies engage in “advocacy” activities (e.g. research, analysis, submissions to parliamentary bodies, etc.) aimed at influencing the evolution of government policies and raising awareness of restraints on competition. There is, in fact, a growing recognition that such work is of critical importance, co-equal in many circumstances with the competition law enforcement function.⁷⁹

In the area of public procurement, four main foci for competition advocacy activities can be identified: first, general public education efforts aimed at building support for the institutions of a healthy market economy, including sound public contracting rules and procedures; secondly, educational efforts aimed at procurement authorities, for example regarding basic procedures for the detection and prevention of bid rigging and suspicious signs⁸⁰; thirdly, efforts aimed at modifying or eliminating specific aspects of procurement policy and regulations that may (intentionally or inadvertently) suppress competition; and fourthly, broader efforts to modify or reduce sectoral and/or cross-sectoral policies that are not specifically concerned with procurement but which affect the scope for competition in public procurement markets. These might include licensing or other restrictions on entry or participation in markets and cross-sectoral or “framework” laws and policies that unnecessarily make it more difficult for firms to compete.⁸¹ Each of these categories merits elaboration.

4.2.1 General public education efforts aimed at building support for the institutions of a healthy market economy, including transparent and competitive contracting procedures

An important aspect of competition advocacy concerns basic public education regarding the institutions of a healthy market economy. To have positive long-lived effects, procurement and other economic policy and legislative reforms ultimately must command public support. In this regard, competition advocates can be a catalyst for debate about the appropriate role of government intervention in the economy and the correct choice of strategies for conducting procurements. Performing the education function before constituencies outside the government can help to build a political constituency for market-oriented policies.

In the current economic environment, an important dimension of such advocacy may be to ensure that currently envisioned public infrastructure spending programmes follow proper contracting procedures and thereby maximise long-run value to citizens. As many commentators have noted, the apparent scale of the macroeconomic downturn has created demands for “bold action” to stimulate recovery, including through extensive public infrastructure programmes. This is the case, at least to a degree, in Europe and Asia in addition to the United States.⁸² Yet the public benefits to

⁷⁹ The importance of competition advocacy activities as a complement to competition law enforcement is emphasised in the competition-related work of the OECD and the WTO. See also Kovacic, “Institutional Foundations for Economic Legal Reform in Transition Economies” (2001) 77 *Chicago-Kent Law Review* 265, and Anderson and Jenny, “Competition Policy, Economic Development and the Possible Role of a Multilateral Framework on Competition Policy” in *Competition Policy in East Asia* (2005).

⁸⁰ Obviously, in this respect competition advocacy work also implicates and reinforces the law enforcement function.

⁸¹ This is not at all to suggest that regulation does not have a legitimate role to play as an element of governance; on the contrary, it is well established that regulation of one kind or another can serve an important role in remedying market failures whether due to the existence of externalities, asymmetries of information or “natural monopolies”. The challenge for competition agencies and other “competition advocates” is to identify situations where regulation has been imposed in the absence of a valid market failure rationale, or the degree or nature of regulation is counter-productive.

⁸² See “Obama economic recovery plan includes vast public works program”, *International Herald Tribune*, December 7, 2008, <http://www.ihl.com/articles/2008/12/07/america/works.php> [Accessed December 30, 2008]; Communication from

be created through infrastructure spending—which presumably will last well beyond the current recession—depend very importantly on adherence to procurement procedures that ensure vigorous competition in markets and accountability for the use of public funds.⁸³ Indeed, a time of greater-than-usual public procurement/infrastructure investment would seem to be a critical time for ensuring that proper procedures are followed to ensure competitive and transparent contracting. Competition advocates and procurement authorities have a common interest in fostering a consensus to this effect.

Competition advocacy in transition and developing economies raises special issues. While such economies often have the most pressing needs for upgrading of national transportation and other infrastructure, they may also suffer from a legacy of corruption and clientism in state procurement policies that undercuts efforts at modernisation and renewal.⁸⁴ A common path of reform efforts in such economies is to engage the elites—public sector and private sector professionals who often have gained formal training in Western universities or held positions that provide extensive contact with Western market institutions. While understandable, this approach has its limitations. Extending participation in and support for the reform process beyond the elites, to the larger body of citizens who live in extreme poverty or are politically disaffected, requires conscious efforts to increase public awareness of the rationales for reform and the encouragement of public participation in the design and implementation of specific measures.

4.2.2. Educational activities aimed at contracting personnel

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As already noted, a further important focus of competition advocacy in relation to public procurement involves efforts to ensure that contracting personnel—i.e. staff members of procuring entities—are well informed regarding the risks of collusion, the harm that it causes and the means of preventing it.⁸⁵ The prevention of collusion in the procurement process also requires effective co-operation between procurement and competition agencies. For these purposes, competition agency staff can be invited to participate in training seminars for procurement officials that include modules on the detection and prevention of bid rigging, or can otherwise work with procurement officials to help ensure a high level of awareness. Training seminars and workshops on government procurement which are presented by the WTO Secretariat for relevant officials pursuant to the Secretariat's annual technical assistance plan also typically include a module on the detection and prevention of collusive tendering, on the basis that this is important to ensure that the goals of procurement liberalisation are not undercut by such activities.⁸⁶ This can be seen as an aspect of competition advocacy.

the Commission to the European Council: A European Economic Recovery Plan (COM(2008) 800 final, November 26, 2008); and A.E. Feldman, "Global Infrastructure Spending Soars: Competition for Talent Heats Up", September 25, 2008, <http://blog.cefeldman.com/2008/09/25/global-infrastructure-spending-soars-competition-for-talent-heats-up/> (describing developments in emerging and other markets).

⁸³ See "Public works: filling the hole", *The Economist*, December 13, 2008, p.16.

⁸⁴ See, generally, Robert Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton University Press, 2003).

⁸⁵ OECD, *Third Report on the Implementation of the 1998 Recommendation*, p.21 (finding that "in many countries procurement authorities and officials are not yet sufficiently aware of the danger of cartels among companies participating in bidding procedures and of the important role they can play in preventing and detecting cartels.").

⁸⁶ See, for related details, the discussion at http://www.wto.org/english/tratop_e/gproc_e/gptech_coop_e.htm [Accessed December 30, 2008].

4.2.3 Advocacy efforts focused on procurement policies and regulations that can limit competition

Public procurement policies can limit competition and even assist firms in behaving anti-competitively in at least two ways. A first way is to restrict entry into procurement markets, particularly by imposing domestic or local content rules that exclude potential bidders. To cite one of many possible examples, in the United States, foreign suppliers are effectively precluded from bidding on most federal government contracts unless they are: (1) based in another GPA party; (2) covered by provisions on government procurement in a preferential trade agreement between the United States and another country; or (3) based in a least-developed country (LDC).⁸⁷ Of course, the United States is far from being alone in this respect: the majority of countries have policies that favour their domestic suppliers in regard to at least some aspects of their public procurement.⁸⁸ The US exclusion of foreign suppliers not covered by applicable trade agreements or other measures has also been defended on the basis that it provides an essential inducement for countries to seek accession to the Agreement on Government Procurement or other arrangement providing access to the US market.⁸⁹

A second area of possible concern involves procedures that aim to increase the integrity of the procurement system but may also have the unintended effects of limiting entry and facilitating supplier co-ordination.⁹⁰ For example, expansive civil and criminal strictures against fraud in public procurement markets that create asymmetries between public and private contracting can discourage firms from serving public purchasers.⁹¹

A further important example concerns the process for opening bids in sealed bid procurements. Typically, bids are unsealed in public and displayed for all bidders to observe.⁹² While widely seen as being important as an anti-corruption measure, this process can also facilitate collusion by enabling cartel members to determine whether co-conspirators fulfilled promises either not to bid or to submit artificially high “cover bids” (recall the discussion in 4.1, above). A possible reform, in this regard, could be to permit the private inspection of bids by a guardian inside the purchasing agency, such as an inspector general. Such a measure could impede efforts by cartel members to detect cheating without undermining the integrity of the award process.⁹³

More generally, although there is a strong presumption in favour of most measures that enhance transparency as a tool for maintaining the integrity of procurement systems, there are also limits on the types of information that should be publicly shared. In addition to the above-noted example of

⁸⁷ See, for related discussion, Yukins and Schooner, “Incrementalism” (2007) 38 *Georgetown Journal of International Law* 529. These authors refer to the US market as a “walled garden”.

⁸⁸ An encyclopaedic description of domestic preferences programmes in regard to public procurement in OECD and non-OECD is provided in McCrudden, *Buying Social Justice: Equality, Government Procurement and Social Change* (2007). Recall also that the WTO Agreement on Government Procurement prohibits discrimination only in regard to “covered” procurement. Hence, parties to the Agreement are free to discriminate in regard to “non-covered” aspects of their procurement.

⁸⁹ Yukins and Schooner, “Incrementalism” (2007) 38 *Georgetown Journal of International Law* 529.

⁹⁰ See, generally, OECD, *Competition Policy and Procurement Markets* (Paris: DAFNE/CLP/(99)3FINAL, 1999).

⁹¹ William E. Kovacic, “The Civil False Claims Act as a Deterrent to Participation in Public Procurement Markets” (1998) 6 *Supreme Court Economic Law Review* 201.

⁹² John Cibinic Jr and Ralph C. Nash Jr, *Formation of Government Contracts*, 3rd edn (1998), pp.522–525.

⁹³ As stated by Kovacic *et al.*, “If an auctioneer with first-price sealed bidding reveals the amounts of the bids of all the bidders, then the problem that a bidding ring faces in policing the bids of its members is made much easier. In general, the less information provided on auction outcomes, the more difficult it is for a bidding ring to operate. Unfortunately, in many settings it will be impossible to hide the identity of the winner, but certainly the full range of bids with first-price sealed bidding need not be revealed.” Kovacic *et al.*, “Bidding rings and the design of anti-collusive measures for auctions and procurements” in *Handbook of Procurement* (2006).

details regarding losing (as opposed to winning) bids, which can facilitate policing of arrangements for cover bidding or bid suppression, information in this category may include: (1) detailed information on the universe of potential competitors, where this is available to procurement authorities; and (2) internal estimates of the appropriate price for goods or services to be procured and/or contingency funds allocated for particular contracts.⁹⁴

Developments in procurement methodologies, including the increasing use of electronic procurement tools, reverse auctions and framework contracts, while offering significant potential gains in efficiency for both suppliers and procuring entities, also pose complex challenges for the maintenance of competition. For example, electronic procurement tools (e.g. electronic reverse auctions) are capable of being used to facilitate collusion if potentially competing firms gain access to each other's bids. One key here is to ensure a high degree of confidentiality of individual bids prior to the contract award.

Similarly, the use of "framework agreements" or "frameworks" (sometimes also known as two-stage contracting) as a public contracting tool, while capable of generating important efficiency gains, can also pose significant challenges with respect to the maintenance of competition, accountability and non-discriminatory procurement processes. While the usage of the term "frameworks" can vary across jurisdictions, a broad definition would include the following elements:

- (a) The solicitation of tenders or offers against set terms and conditions;
- (b) The submission of tenders indicating the terms (e.g. price) on which different suppliers are willing to supply;
- (c) Chosen supplier(s) and the procuring entity entering into a "framework agreement" on the basis of the tenders; and
- (d) Subsequent placing of periodic orders (to conclude procurement contracts) with the supplier(s) under the terms of the 'framework agreement', as particular requirements arise."⁹⁵

Such contracts account for a large and increasing proportion of overall procurement activity in major jurisdictions.⁹⁶

Ongoing work on the issue of framework agreements in the context of the revision of the UNCITRAL Model Law on Procurement encompasses important concerns regarding their implications for the maintenance of competition and transparency, in addition to recognition of the efficiency benefits that they can bring. Summarising the thrust of this work, Arrowsmith and Nicholas observe as follows:

"... [I]t is also recognized that without precise and adequate controls the operation of frameworks can inflict undue damage on the twin principles of competition and transparency

⁹⁴ See Jenny, "Competition and Anti-Corruption Considerations in Public Procurement" in *Fighting Corruption and Promoting Integrity in Public Procurement* (2005), for useful discussion.

⁹⁵ See Sue Arrowsmith and Caroline Nicholas, "Regulating framework agreements under the UNCITRAL Model Law on procurement," in S. Arrowsmith (ed.), *Procurement Regulation for the 21st Century: Reform of the UNCITRAL Model Law on Public Procurement* (forthcoming, West, 2009), Ch.2. The US concept of "indefinite delivery/indefinite quantity" or "ID/IQ" contracts is a type of framework agreement. See, for useful background, Daniel I. Gordon and Jonathan L. Kang, "Task-Order Contracting in the U.S. Federal System: The Current System and Its Historical Context", mimeo, May 2007.

⁹⁶ According to Yukins and Schooner, as much as 40% of the approximately \$400 billion US federal procurement market is administered through such inter-agency framework agreements. Yukins and Schooner, "Incrementalism" (2007) 38 *Georgetown Journal of International Law* 529.

that underlie the Model Law. It has therefore been sought to devise a careful system for operating frameworks that preserves these twin principles throughout. Of particular note is the fact that the UNCITRAL system will provide for a clearly defined transparent and competitive procedure for placing orders under a framework agreement—a process that has not always been clearly regulated and adequately controlled in national procurement systems and which seems to present particular dangers. This will be allied to measures that require procuring entities to provide information on awards they have made and that apply the supplier complaints system to orders under a framework. In this way, states that implement the Model Law are encouraged to reap the benefits of framework agreements whilst reducing the risks that frameworks may present for transparent and competitive procurement.⁹⁷

An important question for competition advocates and trade liberalisation bodies is whether further work on these issues is needed in the framework either of national competition policies or of trade instruments.

4.2.4 Efforts to address regulatory and other obstacles to competition that are not specifically linked to the procurement process, but which nonetheless impact on competition in public procurement markets

Regulatory obstacles to competition that are not specifically linked to the procurement process, but which can nonetheless impact on competition in public procurement markets are of two main kinds: (1) industry-specific measures; and (2) cross-sectoral or “framework” laws and policies. With regard to the former, such measures include a wide range of licensing and other requirements that impede entry to markets, for example by imposing excessive financial solvency requirements. The anti-competitive effects that such requirements can entail have long been recognised. Experience in both developed and developing countries shows that, in many cases, rather than having regulation imposed on them for the public benefit, incumbent firms have sought regulation for their own benefit, for the purpose of limiting entry into the industry and helping them to enjoy higher prices for their products.⁹⁸ Recognition of the significance of such conduct as a barrier to economic development dates back at least to Krueger’s classic analysis,⁹⁹ and is affirmed in recent analyses by the World Bank and other development-related agencies.

Cross-sectoral or framework laws and policies that can affect competition in public procurement markets are also of many kinds. In a submission by the United States to the 2004 OECD Global Forum on Competition, the following examples, inter alia, were cited of laws and regulations potentially limiting competition, particularly in the context of developing countries¹⁰⁰:

- incorporation and business registration laws that impose burdensome registration requirements or permit licensing authorities to deny registration because they dislike the

⁹⁷ Arrowsmith and Nicholas, “Regulating framework agreements under the UNCITRAL Model Law on procurement” in *Procurement Regulation for the 21st Century: Reform of the UNCITRAL Model Law on Public Procurement* (forthcoming, 2009). See also Caroline Nicholas, “Framework Agreements and the UNCITRAL Model Law on Procurement” (2008) 17 P.P.L.R. NA20.

⁹⁸ The classic diagnoses of this problem are provided in George J. Stigler, “The theory of economic regulation” (1971) 2(1) *Bell Journal of Economics and Management Science* 3; and William A. Jordan, “Producer protection, prior market structure and the effects of government regulation” (1972) 15(1) *Journal of Law and Economics* 151.

⁹⁹ Anne O. Krueger, “The political economy of the rent-seeking society” (1974) 64(3) *American Economic Review* 291.

¹⁰⁰ United States, *Contribution to the Discussion on Challenges/Obstacles Faced By Competition Authorities in Achieving Greater Economic Development through the Promotion of Competition* (OECD Global Forum on Competition, 2004).

applicant's business plan or fear that the applicant will add "redundant" capacity to the sector it seeks to enter;

- ineffective mechanisms for executing commercial transactions and enforcing contracts that cause firms to rely on costly surrogates for judicial enforcement of contracts. In some countries, contract law also obstructs beneficial exchanges by requiring government approval for certain routine categories of transactions, such as an agreement to license a patent; and
- employment laws that bar enterprises from laying off employees.

The US submission concluded that:

"Careful . . . study of the operation of these and other public policies is an indispensable necessary element of the larger process of understanding the institutional arrangements that determine the level of competition and economic growth in any country."

The impact of regulatory obstacles to competition has also received attention in the context of international trading arrangements. For example, in the 1998 Report of the WTO Working Group on the Interaction between Trade and Competition Policy the following views were expressed regarding the significance of such obstacles:

"The following examples of regulatory situations having adverse effects on competition . . . were advanced: outmoded or unnecessary regulations; a failure by countries to recognize each others' technical standards; state zoning laws or sanitary and phytosanitary requirements that limited entry unnecessarily or served as disguised tools for excluding competing suppliers; legal systems that facilitated strategic use of the courts by firms to harass competitors; and discriminatory R&D funding practices. It was suggested that the regulations that needed to be reviewed could be classified as follows: regulation that openly discriminated in favour of domestic suppliers; regulations that were non-discriminatory on the surface but subtly discriminatory in their substantive requirements; regulations that simply were no longer needed; and poorly designed regulations that were desirable in principle but unnecessarily intrusive."¹⁰¹

Any or all of the above-noted regulatory measures can be an appropriate focus for competition advocacy activities. A competition agency can supply a valuable, pro-competition policy perspective by participating in the development of procurement legislation and regulations by advising legislators and procurement agencies about the competitive consequences of specific proposed measures. Even if a policy decision is taken to displace competition in favour of realising other social policies, the competition authority may be able to indicate ways that the social objective at issue can be attained in a manner most consistent with maintaining competitive pressure on suppliers who will be eligible to participate.

It should also be noted that, in some jurisdictions, the addressing of state measures affecting competition goes beyond mere competition advocacy. It may encompass, in addition, both "legislative" functions relating to the reform of government measures affecting competition and "executive" functions under which anti-competitive restraints are declared unlawful. In addition to some transition economies, this is the case, for example, in the European Communities, where the

¹⁰¹ WTO, Report (1998) of the Working Group on the Interaction between Trade and Competition Policy (WT/WGTCP/2), p.36.

EC Commission or, depending on the circumstances, the Court of Justice can declare a law or a regulation of a single Member State to be contrary to the Treaty because it allows companies to violate the competition rules. Through such measures, the Commission has dealt with a large number of practical challenges to efficient economic development and/or the welfare of consumers.¹⁰² A number of transition economy competition laws also directly limit the ability of government agencies to diminish competition. Some measures forbid government bodies to restrict entry by, for example, imposing licensing requirements, unless the national legislation expressly grants such authority. Other provisions bar public officials from granting exclusive franchise rights or otherwise discriminating improperly against entrepreneurs that seek access to the market.¹⁰³

4.3 Other aspects of competition law bearing on public procurement markets

Competition in public procurement markets is also affected by other aspects of competition law and policy. A first important example relates to the treatment of *mergers and joint ventures*. In the absence of effective legal provisions to prohibit anti-competitive mergers, competing firms can directly circumvent competition by merging their operations. This is a clear alternative to the use of bid rigging or similar agreements. In the event that firms desire to maintain distinct identities, joint ventures can be formed for the purpose of bidding on specific procurements. The effective regulation of anti-competitive mergers and joint ventures is a challenging problem, in that by no means all such arrangements are anti-competitive. Rather, a majority are likely to be either pro-competitive (i.e. likely to strengthen rivalry through cost savings and synergies) or at least neutral in their effects.¹⁰⁴ Effective tools must be developed to distinguish those arrangements that are likely to harm competition from the others.

Antitrust rules dealing with *single-firm monopolisation and/or abuse of dominant position* can also play a role in regard to public procurement markets.¹⁰⁵ One area in which such rules may come into play relates to privatisation. Economic law reform programmes commonly involve the privatisation of state-owned assets through various forms of auctioning mechanisms. Such programmes often raise significant competition policy issues. Without adequate attention to competition concerns, the

¹⁰² See Anderson and Heimler, "What has Competition Done for Europe?" (2007) 62(4) *Aussemwirtschaft* 419.

¹⁰³ See Kovacic, "Institutional Foundations for Economic Legal Reform in Transition Economies" (2001) 77 *Chicago-Kent Law Review* 265, and Damien Geradin and David Henry (2004). "Competition Law in the New Member States: Where Do We Come From? Where Do We Go?" in D. Geradin (ed.), *Modernisation and Enlargement: Two Major Challenges for EC Competition Law* (Intersentia Publishers, 2004), Ch.13, pp.273–310.

¹⁰⁴ In countries with mature competition regimes, typically only a small percentage (1% or less) of mergers are deemed anti-competitive. See Robert D. Anderson and S. Dev Khosla, *Competition Policy as a Dimension of Economic Policy: A Comparative Perspective* (Industry Canada Occasional Paper, 1995).

¹⁰⁵ See, for a recent review of relevant US rules and enforcement approaches, US Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (2008); see also William E. Kovacic, "Modern U.S. Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act" (available at <http://www.ftc.gov/os/2008/09/080908section2stmtkovacic.pdf> [Accessed December 30, 2008]). Related perspectives are provided in William E. Kovacic, "The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Behavior: The Chicago/Harvard Double Helix" [2007] *Columbia Business Law Review* 1 and in William E. Kovacic, "Designing Antitrust Remedies for Dominant Firm Misconduct" (1999) 31 *Connecticut Law Review* 1285. The evolution of corresponding approaches in the European Community is discussed in Anderson and Heimler, "What has Competition Done for Europe?" (2007) 62(4) *Aussemwirtschaft* 419; and in Robert D. Anderson and Alberto Heimler, "Abuse of Dominant Position: Enforcement Issues and Approaches for Developing Countries" in *Competition Law Today: Concepts, Issues and the Law in Practice* (2007), Ch.2, pp.59–92.

strategy and methods chosen to alienate assets may simply transform state-owned monopolies into durable privately held monopolies.¹⁰⁶

Competition policy oversight in the post-privatisation period can help the public reap the benefits of placing such assets into the private sector. For example, where the government dissolves a monolithic public enterprise into a number of privately owned successor firms, the successors may seek to use mergers, holding companies or other institutional arrangements to re-establish the monopoly structure of the public ownership era. Some forms of consolidation or co-operation will increase efficiency by enabling the participants, for example, to realise scale economies or link complementary assets. Competition policy oversight of outright consolidations or co-operation by contract can help ensure that such measures are not mere efforts to create a private variant of the predecessor public monopoly.

A further specific aspect of the enforcement of competition rules which is a prominent aspect of competition policy in the European Communities (EC) but which is not part of the formal competition policies of most other developed jurisdictions concerns *state aids to industry*. In the EC, this aspect of competition policy is intended to ensure that competition in the common market is not unduly distorted by government subsidies or similar measures.¹⁰⁷ Clearly, such aids can have an important interaction with competition in public procurement markets, for example where individual firms receive grants that may enhance their ability to compete against unsubsidised competitors. This begs important issues of policy co-ordination—e.g. what to do in situations where the provision of state aid is deemed to be warranted on general public policy grounds (e.g. local employment of workers) but may have adverse effects on competition in public procurement.¹⁰⁸ The fact that the competition policies of jurisdictions other than the EC generally lack jurisdiction over these issues does not mean that they are unaffected by the underlying coordination problems. To some extent, however, they might be addressed in such jurisdictions as a competition advocacy issue.

In conclusion, national competition laws and policies complement international liberalisation of procurement markets in essential ways. These encompass: (1) reducing regulatory and other barriers to competition, chiefly through “competition advocacy” activities; (2) the prevention of collusive tendering; and (3) the regulation of other potentially harmful practices such as anti-competitive mergers and joint ventures. An illustration of the interplay of these instruments is provided in the next section of the article.

5. An illustration of the complementarity of competition policy and trade liberalisation with respect to public procurement markets: transatlantic defence procurement markets¹⁰⁹

The business consolidations of the past 20 years have reduced the ability of US defence procurement authorities to use competition among firms headquartered within their own borders to motivate

¹⁰⁶ J.J. Laffont, *Regulation and Development* (Cambridge University Press, 2005).

¹⁰⁷ See, generally, Anderson and Heimler, “What has Competition Done for Europe? An Inter-Disciplinary Answer” (2007) 62(4) *Aussenwirtschaft* 419.

¹⁰⁸ A useful discussion of the state aids dimension of competition policy in relation to public procurement markets is provided in Michael Jürgen Werner, “Legal basis of European public procurement, antitrust and State aid rules” (Presentation at a conference on Interrelations between Public Procurement, State Aid and Antitrust Law, Stockholm, December 4–5, 2008).

¹⁰⁹ This subsection of the article is included for illustrative purposes only. It is recognised that any initiative to achieve greater integration in national defence procurement markets in the transatlantic sphere would have to be considered

individual suppliers to improve the quality and reduce the price of new weaponry. In many parts of the defence sector, mergers have reduced the number of suppliers from four or three to two or one. Major US defence industry segments with two suppliers today include reconnaissance satellites, space launch vehicles, surface combat ships such as destroyers and cruisers, and tracked vehicles. Segments with a single supplier include air-to-air missiles and ship-launched cruise missiles. These adjustments have enormous significance in an industry where rivalry among contractors has accounted substantially for success in sustaining technological superiority in armaments. Much of the existing commentary concerning the competitive effects of consolidation has focused on the use of antitrust scrutiny as the principal public policy tool for analysing the appropriateness of individual consolidation events and ensuring adequate levels of rivalry among defence suppliers.¹¹⁰ Consequently, while antitrust oversight particularly in relation to mergers remains an essential tool for ensuring competition in the defence procurement sector, policies governing international trade and economic integration are likely to be of equal significance. To stimulate adequate levels of cost reduction and innovation in the future, US and other procurement authorities must use strategies that exploit largely untapped sources of competition and encourage productivity improvements by sole-source suppliers.¹¹¹

Issues of competition and regulation are far from being a concern exclusively for the US defence establishment. Since the mid-to-late 1990s, many other nations have faced equally pressing questions about the future of their own arms producers.¹¹² Mergers among defence suppliers confront European policymakers with many of the same questions about competition policy as their US counterparts have faced in determining the appropriate regulatory policies and governance strategies for arms

carefully by the responsible governments from a variety of perspectives, including national security requirements and their respective trade obligations and commitments. The point should also be made that defence procurement can differ from other public procurement activities in significant ways, for example in the extent of scale economies and dynamic learning effects that are present in addition to the confidentiality and national security concerns that may be implicated.

¹¹⁰ See American Bar Association, Section of Antitrust Law, *The Antitrust Government Contracts Handbook* (1990); William B. Burnett and William E. Kovacic, "Reform of United States Weapons Acquisition Policy: Competition, Teaming Arrangements, and Dual-Sourcing" (1989) 6 *Yale Journal on Regulation* 249; Joseph Kattan, "The Declining Defense Sector and Federal Antitrust Enforcement" (1993) 23 *Public Contract Law Journal* 21; William E. Kovacic, "Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors" (1990) 58 *Antitrust Law Journal* 1059; William E. Kovacic, "Merger Policy in a Declining Defense Industry" (1991) 36 *Antitrust Bulletin* 543; Thomas B. Leary and Janet L. McDavid, "The Defense of Mergers in the Defense Industry" (Summer 1993) *Antitrust* 7; Mark Shwartz, Note, "The Not-So-New Antitrust Environment for Consolidation in the Defense Industry: The Martin Marietta-Lockheed Merger" [1996] *Columbia Business Law Review* 329; Gary R. Spratling, "Will Teaming Be a Problem?" (Spring 1995) *Procurement Lawyer* 23; Dennis A. Yao and Susan S. DeSanti, "Antitrust Analysis of Defense Industry Mergers" (1994) 24 *Public Contract Law Journal* 379.

¹¹¹ See William E. Kovacic, "Competition Policy in the Postconsolidation Defense Industry" (1999) 45 *Antitrust Bulletin* 421.

¹¹² Public officials in many jurisdictions began to warn in the 1990s about how structural change in their own defence sectors required a reassessment of public procurement policy. See, e.g., Douglas Barrie, "U.K. Aerospace Panel Stresses Urgency of Europe Consolidation", *Defense News*, August 31–September 6, 1998, p.8 (quoting George Robertson, the head of Britain's Ministry of Defence, as saying "If we go into the next century with a multitude of competing national companies and industries attempting to find a place in a global market dominated by giant American companies, then the result will be industrial suicide."); Gregor Ferguson, "Australian Firms Face Major Consolidation in '98", *Defense News*, November 24–30, 1997, p.24 (describing prospects for mergers among Australian defence suppliers); Brooks Tigner, "EU Weighs Bold Effort to Foster Free Trade", *Defense News*, November 17–23, 1997, p.1 (quoting Martin Bangemann, the European Union's Commissioner for Industrial Affairs, as saying Europe's fragmented defence industry "cannot survive in its current form").

suppliers.¹¹³ Progress towards a unified transatlantic arms industry could increase the ability of US and European defence acquisition officials to press arms producers to perform effectively.¹¹⁴

5.1 Impediments to transatlantic integration

For the United States, the competitive significance of defence-sector mergers between domestic producers depends partly on whether DOD can rely on foreign firms to satisfy its weapons needs. In this regard, a formidable array of legal and policy barriers impede the ability of foreign companies to compete for sales to DOD, either by acquiring interests in US contractors or by making direct sales of weapons being produced for foreign inventories.¹¹⁵ Two factors underlie this situation. The first consists of concerns that using foreign sources will undermine national security. Part of the concern here is that a foreign producer might, for economic or political reasons, delay or halt production or deliveries to the armed services. Concerns can also arise regarding the sharing of information about state-of-the-art technologies with foreign-controlled firms or joint ventures. A second obstacle is political: defence production is a key source of employment in many electoral subdivisions, and greater purchases of weaponry from foreign sources would move some jobs—including relatively high-paying, high technology positions—offshore.¹¹⁶

Though these and other impediments to sales by foreign contractors remain formidable, several developments may erode them over time. European participants in the North Atlantic Treaty Organization (NATO) have demanded more access to the US market as a condition for buying arms from US producers.¹¹⁷ The prospect of losing foreign sales may lead DOD, which benefits from foreign military sales by US firms, to persuade Congress to allow it to buy more weapons offshore.

5.2 Industrial integration by contract and merger

Increasingly, US and European firms are using commercial alliances to design, produce, and upgrade weapon systems.¹¹⁸ Some European firms have entered the US defence market by purchasing

¹¹³ See Luke Hill, "EU Fosters Consolidation Forum", *Defense News*, February 1, 1999, p.1 (describing European Commission's formation of policy forum to influence direction of consolidation of European defence industry); John D. Morrocco, "Sweden to Join Consolidation Effort", *Aviation Week & Space Technology*, April 27, 1998, p.32 (describing agreement by government officials from Britain, France, Germany, Italy, and Spain to encourage European industry leaders to continue efforts to merge civil and military suppliers into "an integrated European aerospace company"; reporting that the group of five countries had invited Sweden to participate in talks about restructuring Europe's aerospace and defence sectors).

¹¹⁴ See "Platform Envy", *The Economist*, December 12, 1998, p.23 (describing benefits to US and European defence policy officials from strengthening of transatlantic industrial ties).

¹¹⁵ See Kovacic, "Merger Policy in a Declining Defense Industry" (1991) 36 *Antitrust Bulletin* 543, 558–561 (discussing statutory and regulatory obstacles to foreign participation in the US defence market).

¹¹⁶ See Robert Holzer, "Shipyards Fight to Survive Shrinking Market", *Defense News*, November 10–16, 1997, p.8 (describing political deterrents to policies that would force US shipyards to close; noting that most US shipyards are the largest employers in their states).

¹¹⁷ See Adrian Kendry, "From South West to Southlands: Exploring the American Aerospace Industry" (June 1996), p.5 (noting "the growing disquiet within Europe regarding the transatlantic trade imbalance in aerospace and defense goods and the indignation arising from the perception that the United States seeks to achieve both domestic industrial protection together with unrestricted access to European markets"); Brooks Tigner, "European Leaders Want to Balance Trans-Atlantic Trade", *Defense News*, June 24–30, 1996, p.3 (discontent among European defence industry and government officials about US policies that impede imports from European arms makers).

¹¹⁸ See Douglas Barrie, "U.K. Missile Bid Seen As Europe Litmus Test", *Defense News*, October 19–25, 1998, p.10 (competition to supply Britain's Royal Air Force with air-to-air missiles for Eurofighter aircraft; team headed by UK

substantial US companies. One of the most important moves took place in 1998, when Britain's General Electric Company (GEC) made what at that time had been the largest purchase by a foreign company of a US defence firm with its \$1.1 billion acquisition of Tracor, then the sixth largest US supplier of defence electronics.¹¹⁹ In 1995, Rolls Royce purchased the Allison Gas Turbine Division of General Motors. Further transatlantic consolidation moves are likely to occur.

Other foreign companies participate in US weapons programmes through teaming arrangements or joint ventures. Along with acquisitions of US firms, increased use of international joint ventures and teaming arrangements that give prominent design and production roles to foreign firms may increase acceptance within the United States for greater involvement by foreign producers.¹²⁰ British Aerospace (BAE) provides a noteworthy example. BAE collaborates with Boeing to produce the AV-8B vertical take-off and landing aircraft for the US Marine Corps. BAE also belongs to the Lockheed Martin team that is developing the Joint Strike Fighter for the US inventory and for Britain's Royal Navy. Boeing's unsuccessful JSF team included firms in the United Kingdom and in other European nations which DOD hopes will buy JSF variants.¹²¹

5.3 Multinational weapons programmes

An additional force for convergence of the US and European arms industries is participation in multinational weapons development programmes. An example is the Vector programme, which took place between 1998 and 2004 and involved collaboration among Germany, Sweden, and the United States to explore ways to enable stealthy fighter aircraft to take off and land on short runways.¹²² The Vector project drew upon contributions from Boeing, Daimler-Chrysler, SAAB Military Aircraft and Volvo Aerospace Corp. Collaborations of this type can help dismantle barriers to efficient international integration by establishing precedents for DOD and its suppliers to share advanced technologies with foreign firms.¹²³ In some cases, DOD may regard co-operation of this type as a necessary means to fund new weapons development programmes.¹²⁴

subsidiary of Raytheon Hughes opposed team led by Matra BAE Dynamics); Steve Rodan, "U.S., Israeli Firms Target F-16s", *Defense News*, October 26—November 1, 1998, p.28 (agreement between Lockheed Martin and consortium of Israeli defence suppliers to seek contracts to upgrade Lockheed Martin's F-16 fighter aircraft).

¹¹⁹ See Anthony L. Velocci Jr and John D. Morrocco, "GEC Vaults Further Into U.S. With Tracor Buy", *Aviation Week & Space Technology*, April 22, 1998, p.28 (describing GEC's purchase of Tracor). GEC previously had acquired Hazeltine from Esco Electronics. Hazeltine had absorbed the defence assets that previously belonged to Singer Co and Lear Astronics.

¹²⁰ See "BAe, Aerojet Team On Warhead Effort", *Defense News*, November 10–16, 1997, p.38 (teaming arrangement between BAE and U.S.-based Aerojet to develop the British Royal Ordnance Augmented Charge for possible integration into US missiles).

¹²¹ See "Boeing Establishes Joint Strike Fighter Industry Team", *Boeing News*, October 2, 1998, p.1 (foreign participants on Boeing JSF team included the UK companies Flight Refueling, Messier-Dowty and Rolls-Royce).

¹²² See Christian Lowe, "Test Plane's Value Lies in Innovation", *Navy Times*, May 5, 2003, p.40 (describing history and conclusion of Vector programme); Jeff Ehrlich, "U.S. Navy Clears Vector for Liftoff", *Defense News*, January 19–25, 1998, p.1 (describing co-operation between Germany, Sweden and US on Vector programme).

¹²³ See Lisa Burgess, "Pentagon Board To Make Last-Ditch MEADS Choice", *Defense News*, October 19–25, 1998, p.1 (German/Italian/US effort to develop new air defence system; US teams headed by Raytheon Hughes and Lockheed Martin each included European joint venture EuroMEADS); George I. Seffers, "U.S., U.K. Await TRACER/Scout Concept Bids", *Defense News*, August 31—September 6, 1998, p.10 (competition between two multinational teams of US and UK firms to develop armoured reconnaissance vehicle for United States and United Kingdom).

¹²⁴ See George I. Seffers, "U.S. Eyes Foreign RAH-66 Partners", *Defense News*, January 19–25, 1998, p.1 (suggesting that US Army might enlist foreign participation to develop Comanche helicopter in co-operation with Boeing and Sikorsky); George I. Seffers, "Rising Costs Trouble U.S. Light Howitzer", *Defense News*, August 31—September 6, 1998, p.3 (plans by United Kingdom and Italy to develop new lightweight howitzer for US Army and Marine Corps).

5.4 The 2008 US Air Force tanker contract award: implications (and non-implications) of the subsequent GAO review

In March 2008, the US Air Force awarded a contract for the replacement of its aging fleet of air refuelling tankers to a consortium consisting of Northrop Grumman, an American defence contractor and the parent of Airbus Industries, namely the European Aeronautic Defence and Spaces Co (EADS). The consortium's bid was chosen over a rival bid by Boeing, which has supplied the Air Force's needs for airborne refuelling capacity for the past 50 years. The contract had a value of approximately \$39 billion, and was the largest ever awarded by the US armed forces to a supplier which is based at least partly in Europe.¹²⁵

The Air Force tanker contract award illustrated many of the points made above. As one analyst noted:

“This is not a simple American defence procurement contract but a flagship one that will link the winning consortium to the [US Department of Defense] for the next 20 or more years . . . If the contract progresses then the voices for a more protectionist European market will not be as strong as before because one of their main arguments, namely the [alleged] favouritism of US authorities towards American defense contractors will be . . . weakened . . . Moreover the finalisation of the award of the contract to Northrop Grumman-EADS will create a positive precedent for the development of closer industrial partnerships between companies based on the two sides of the Atlantic.”¹²⁶

Subsequent to the contract award, it was the subject of a bid protest (i.e. a challenge) by the alternative supplier, Boeing, before the US Government Accountability Office (GAO). In considering the protest, the GAO identified a number of errors in the underlying acquisition process.¹²⁷ As explained by the Office's managing associate general counsel for procurement law, Michael R. Golden, in a press release regarding the decision:

“Our review of the record led us to conclude that the Air Force had made a number of significant errors that could have affected the outcome of what was a close competition between Boeing and Northrop Grumman. We therefore sustained Boeing's protest . . . We also denied a number of Boeing's challenges to the award to Northrop Grumman, because we found that the record did not provide us with a basis to conclude that the agency had violated the legal requirements with respect to those challenges.”¹²⁸

In the light of these errors, the Office recommended as follows:

“The GAO recommended that the Air Force reopen discussions with the offerors, obtain revised proposals, re-evaluate the revised proposals, and make a new source selection decision,

¹²⁵ See, for a useful summary of the factual background, Aris Georgopolous, “US Air Force Air Tanker Contract: Revisiting American Protectionism in Defence Procurement” (2008) 17 P.P.L.R. NA162. See also “Tanker contract award announced”, *Air Force Link*, February 29, 2008, available at <http://www.af.mil/news/story.asp?id=123088392> [Accessed December 30, 2008].

¹²⁶ Georgopolous, “US Air Force Air Tanker Contract” (2008) 17 P.P.L.R. NA162, NA163.

¹²⁷ See Decision in the Matter of the Boeing Company, June 18, 2008, available at <http://www.gao.gov/decisions/bidpro/311344.pdf> [Accessed December 30, 2008].

¹²⁸ US Government Accountability Office, “GAO sustains Boeing bid protest”, Press Release, June 18, 2008, available at http://www.gao.gov/press/press-boeing2008jun18_3.pdf [Accessed December 30, 2008].

consistent with the GAO's decision. The agency also made a number of other recommendations including that, if the Air Force believed that the solicitation, as reasonably interpreted, does not adequately state its needs, the Air Force should amend the solicitation prior to conducting further discussions with the offerors; that if Boeing's proposal is ultimately selected for award, the Air Force should terminate the contract awarded to Northrop Grumman; and that the Air Force reimburse Boeing the costs of filing and pursuing the protest, including reasonable attorneys' fees."¹²⁹

Subsequently, US Defense Secretary Robert Gates indicated that further action regarding the tanker contract would be deferred until the new US administration took office in 2009.¹³⁰

In the light of these developments, it remains to be seen how the Air Force tanker contract award will ultimately be resolved. It is important, however, to be clear on one point: neither the GAO's decision nor its underlying reasoning has called into question the merits of non-discriminatory and competitive approaches to defence procurement. In explaining the GAO's recommendation, the agency was careful to observe that:

"The GAO decision should not be read to reflect a view as to the merits of the firms' respective aircraft. Judgments about which offeror will most successfully meet governmental needs are largely reserved for the procuring agencies, subject only to such statutory and regulatory requirements as full and open competition and fairness to potential offerors."¹³¹

In sum, the foregoing review of recent developments in the US defence sector illustrates many of the points made in this article regarding the complementarity of trade liberalisation and competition-enhancing measures in public procurement markets. Given the scale of consolidation that has occurred, neither trade liberalisation nor competition policy is likely to achieve its full objectives in this sector without the other. The recent GAO review of the Air Force tanker contract award has in no way called into question these premises; it has simply identified some apparent deficiencies in the process by which the contract was initially awarded in that particular case.

6. Concluding remarks

As has been discussed in this article, the performance of public procurement markets has major implications for the efficient allocation of resources and the well-being of citizens in all economies. In addition to constituting a substantial proportion of economic activity, public procurement often involves goods and services having particular economic, social and/or developmental significance. The economic and social significance of public procurement policies and procedures will only increase with the current macroeconomic downturn and the emphasis that is being placed on public infrastructure spending as an element of recovery strategies around the world.

¹²⁹ US Government Accountability Office, "GAO sustains Boeing bid protest", Press Release, June 18, 2008, available at http://www.gao.gov/press/press-boeing2008jun18_3.pdf [Accessed December 30, 2008].

¹³⁰ The "Air Force's Tanker Tailspin," *Time*, September 10, 2008, available at <http://www.time.com/time/nation/article/0,8599,1840396,00.html> [Accessed December 30, 2008].

¹³¹ US Government Accountability Office, "GAO sustains Boeing bid protest", Press Release, June 18, 2008, available at http://www.gao.gov/press/press-boeing2008jun18_3.pdf [Accessed December 30, 2008].

Ensuring good governance in relation to public procurement systems (and thereby maximising value for money for taxpayers) requires the addressing of two distinct but interrelated challenges: (1) ensuring integrity on the part of public officials administering the procurement processes; and (2) promoting *competition* and preventing *collusion* among alternative suppliers. Both corruption and collusion undermine the intended benefits of procurement reforms and international liberalisation. Although they may sometimes occur together, they are also analytically distinct problems that each merit attention in their own right. This article has focused, in particular, on tools for promoting competition including both trade liberalisation and national competition policies.

The WTO Agreement on Government Procurement (GPA) promotes competition in national procurement markets in at least four distinct ways. First, it provides a vehicle for progressive opening of parties' markets to international competition through market access or "coverage" commitments that are negotiated and incorporated in the schedules contained in Appendix I of the Agreement. Secondly, the various provisions of the Agreement relating to the provision of information to potential suppliers, contract awards, qualification of suppliers and other elements of the procurement process provide a framework that is intended to ensure transparent and non-discriminatory conditions of competition between suppliers. Thirdly, the Agreement requires that GPA parties put in place national bid challenge systems that provide a means for suppliers to challenge questionable contract awards or other decisions by national procurement authorities. Fourthly, the GPA provides recourse to the WTO Dispute Settlement Understanding where parties believe that international competition has been suppressed through measures taken by other parties in breach of their GPA commitments.

This article has argued, nonetheless, that international liberalisation is not, by itself, a *sufficient* tool for ensuring an optimal degree of competition. National competition laws and policies play an essential complementary role in this regard. As has been discussed, this role encompasses: (1) the adoption and enforcement of effective rules to prevent bid rigging (collusive tendering); (2) promoting the progressive elimination of regulatory and other barriers to competition, chiefly through "competition advocacy" activities; and (3) other aspects of competition law enforcement including the treatment of mergers and joint ventures. Specific challenges for competition authorities in the area of public procurement include: (1) promoting awareness among procurement officials of "suspicious signs" of collusion between suppliers; and (2) fostering institutional links between procurement and competition agencies.

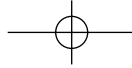
Over and above the generic arguments that have been made, the short review in this article of pertinent developments in the US defence sector has provided a concrete illustration of the complementarity of trade liberalisation and competition-enhancing measures in public procurement markets. In this and other contexts, neither set of measures is likely to achieve its full objectives without the other.

In developing the foregoing themes, this article has also provided a further and hitherto insufficiently appreciated illustration of the complementarity of international trade liberalisation and national competition policies.¹³² In particular, we have shown that both trade liberalisation and national competition policies have important roles to play in promoting competition in national procurement

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¹³² Other • linkages are discussed, inter alia, in Robert D. Anderson and Hannu Wager, "Human Rights, Development and the WTO: the Cases of Intellectual Property and Competition Policy" [2006] *Journal of International Economic Law* ???; and in Robert D. Anderson and Peter Holmes, "Competition Policy and the Future of the Multilateral Trading System" (2002) 5(2) *Journal of International Economic Law* 531.

markets, and that neither is likely to fully achieve its objectives in the absence of the other. This is a practical example of why, independent of any question of possible institutional links or legal rules implicating the two areas, the trade liberalisation and competition policy communities have an interest in extending each other their mutual support.



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