

August 2021

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Recommended Citation

Suherman, Ade Maman (2021) "Global Administrative Governance: Liberalization of Government Procurement in Third World Countries," *Indonesian Journal of International Law*. Vol. 8: No. 4, Article 3.

DOI: 10.17304/ijil.vol8.4.313

Available at: <https://scholarhub.ui.ac.id/ijil/vol8/iss4/3>

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Global Administrative Governance: Liberalization of Government Procurement in Third World Countries

Ade Maman Suherman¹

Globalization and the rise of global governance are transforming the structure of International law. From the perspective of the classical, interstate consent-based international law, global governance may still appear merely as a quantitative increase in international legal instruments. On the other hand, some requirement for adoption international law is needed, particularly through a classic scheme for binding force of international law into national legal system. Classic method means that such agreement which is concluded by states. One of the interstate consent based international law is Government Procurement Agreement (GPA) which legally binding agreement in the WTO focusing on the subject of government procurement. Since GPA is a multilateral treaty administered by a Committee on Government Procurement, which includes the WTO Members that are parties to the GPA, and thus have rights and obligations under the Agreement. In fact, the majority of member state, particularly most developing countries are not party the GPA, so there is no legal obligation to observe all the provision of GPA. It seems to be a great obstacle for developing countries to adopt the GPA provisions by several reasons. In sum, global administrative governance takes some roles to reform some legal frame works in developing countries. A great contribution produced some positive legal reforms in term of the achievement of competitive and transparent government procurement.

Keywords: *Global Administrative Governance, Government Procurement, third world countries*

I. Introduction

International trade law is regulated under WTO which adopts free trade principles, therefore entire the international trading system should be based on the free competition, reduce trade barriers and against protectionism. However, such endless debate concerning free trade and trade liberalization remains open and even invites eagerness, curiosity. All related parties

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keep on serious negotiation by bringing their own interest. The following illustration reflects the real condition which can be drawn as follows:

Trade negotiations are like volcanoes: there are three phases. They can be sleeping, smoking or erupting. After a period of relative calm-with only some underground activity-the WTO volcano is 'smoking' again, and the smoke is pretty dense.²

One of an important issue in WTO rules is government procurement which its liberalization efforts remains disputable between developed and developing countries. Procurement of products and services by government agencies for their own purposes represents an important share of total government expenditure, and also has a significant role in domestic economies. While ensuring best value for money will be secured through an open and non-discriminatory procurement regime, governments sometimes seek to achieve certain other domestic policy goals through their purchasing decision, such as promotion of local industrial sectors or business groups³.

The policy and measures to this effect may be either explicitly prescribed in national legislations, for example prohibition against the purchase of foreign goods or services or from foreign suppliers, preferences margins, set aside and offset, or in the form of less overt measures or practices which has effect of denying foreign products, services and suppliers, the opportunity to compete in domestic government procurement markets including excessive use of single or selective tendering. Those facts can lead to lack of transparency in tendering procedures including contract awards and such discriminatory government procurement procedures and practices also can lead to distortion of international trade⁴.

On the other hand, government procurement has been effectively omitted from the scope of the multilateral rules under the WTO, in the areas of both goods and services⁵. In the General Agreement on Tariffs and Trade,

² Daniela Decker and Hans-Joachim Priess, The WTO General Council Decision of August 1, 2004: A Note On The Decision Not To Launch Negotiations On Transparency In Government procurement During The Doha Round, *Public Procurement Law Review*, 2005, 1, NA1-4, 2005.

³ World Trade Organization Report: Government Procurement: The Plurilateral Agreement: overview of the agreement on government procurement.

⁴ *ibid*

⁵ Article 19 - 23 Vienna Convention 1969 concerning reservation, acceptance of and objection to reservation, legal effects of reservations and of objections to reservations, withdrawal of reservation and objections to reservations, procedure regarding reservations.

originally negotiated in 1947, government procurement was explicitly excluded from the key national treatment obligation.⁶

Based on that rules, international trade in government procurement cannot applied the principle of national treatment obligations, thus the liberalization of government procurement remains untouchable by the WTO rules. Due to those facts, international trading system in government procurement took several breakthroughs by designing act of international organizations such as the international rules presented by the global governance organizations, like World Bank, Asian Development Bank, UNCTRAL and other international banking institutions.

II. Theoretical Point of view: Grotius versus Hobbes?

A. Inter state based agreement as a Conventional Method

Today, public international law contains a broad set of rules regulating the behaviour of the states of the world. The political theory of public international law emerges with Grotius in the form of an argument about *Jus Gentium* at the very same time as the political philosophy of the state takes definitive form with Hobbes, focusing upon positive law as the commands of the sovereign.⁷ A further explanation presented by Jan-Erik and Svante Ersson that:

Grotius and Hobbes were preoccupied with interpreting the very same organization, Grotius looking at it from the point view of its external relations- other states- whereas Hobbes examined it from the point of view of its internal relation –the subjects of society. A giant international code for rule of law among state managed by numerous international organization, the number and activities of which have increased correspondingly to the proliferation of rules. Can we conclude that Grotius has finally defeated Hobbes, that the state Leviathan has been chained by an international *Rechtsgessellschaft* guarded by effective custodians- so called international regimes?⁸

In some respects, The Leviathan seems to be weakening and dominated by international regime of rule of laws, particularly it was being ex-

⁶ GPA is one of the "Plurilateral" agreements included in Annex 4 to the agreement Establishing the WTO, signifying that not all WTO members are bound by it.

⁷ Jan-Erik Lane and Svante Ersson, *Government and The Economy, A global Perspective, Continuum, 2002, p.9*

⁸ *Ibid.*

perienced and faced by mostly developing countries. Leviathan concept represents in purely interstate based agreement which has critical weaknesses appear in transforming international legal orders into national legislation. It is clearly stated that public international law is mainly contract law between sovereign states. Thousand agreement lie at the core of this international legal order, made at specific points of time by the legal representatives of the states, i.e. their government and later often ratified by the national assemblies of these countries.⁹

In another meaning, Grotius perspective is much stronger than Leviathan of Hobbes, whereas Grotius perspective more applicable in international economic orders rather than Hobessian one. The problem of different source of international law arises, first, Global administrative governance derived from Act of international organization as an additional source of international law, on the other hand, Hobessian perspective works under international convention (interstate based agreement) as primary source of international law as already firmly stated in article 38 of International Court of Justice.

The crucial problem from market economy point of view, Hobbesian reflects some difficulties because of the time consuming procedures, which state adopts all international agreement by consulting with parliament members, in legal term so called ratification. On the other hand the nature of market and economic activities require a quick response to execute all the projects related to the economic state policies. As long as the state not party of the treaty, the state remains no obligation to observe the rules¹⁰. Due to the law of the treaty principles, today practices more commonly is changed its mechanism by inserting rules into act of international organization such as world bank, IMF and other international financial institutions. The following section below elaborates evidences of how decisive role of global institution particularly concerning liberalization of government procurement is.

B. The Decisive Role Of Global Institutions

The existence of state sovereignty is questionable when a global institution creates and enforces various global market regulation. Therefore state concerns how to make the market economy workable and of course

⁹ Vienna Convention on the Law of Treaties, 1969.

¹⁰ Article 13 Vienna Convention 1969 concerning consent to be bound by a treaty expressed by an exchange of instrument constituting a treaty and; article 14 states that : consent to be bound by a treaty expressed by ratification, acceptance or approval

gives governments much to do. The custodian state is the machinery that implements the rule of law in a society, base up on the sovereign will of the state, however globalization process is conducive to reduction of state sovereignty.¹¹ The real evidences of that phenomena particularly in formulating government legislation into national level already occurred.

First, world bank as a decisive global banking takes an important role particularly in supporting developing countries to integrate with global economic. The economic coordination is carried out by the global markets and the international organizations supporting it. Working on liberalization government procurement, world bank and other international financial institution have a commitment to fostering long term economic development. It is active in Third World Countries financing investment that are to be paid back over long period of time or more than ten years. It rises its favorable term to the borrowing countries, meaning lower interest rate than could be obtained in the market. In year 2000 the number of countries members of world bank was already 183.¹²

Indonesia as one of developing country invites technical assistance of world bank and Asian Development Bank experts and conducted a country procurement assessment Review (CPAR). It recommended the development the professional capacity to undertake procurement at all levels of government. The TA addressed this requirement to build capacity with the long term objective of developing a cadre of trained procurement professionals.

Second, another effort also conducted by OECD and DAC. Task Force of OECD/DAC concerning Practice of granting donation OECD countries by conducting conference in 14 December 1960, introducing the following targets which should be achieved, such as :

1. achieve the highest sustainable economic growth and employment and a rising standard of living in member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
2. contribute to sound economic expansion in member as well as non-member countries in the process of economic development; and
3. contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations"¹³; has

11 Jan-Erik Lane and Svante Ersson *supra*. p. 10.

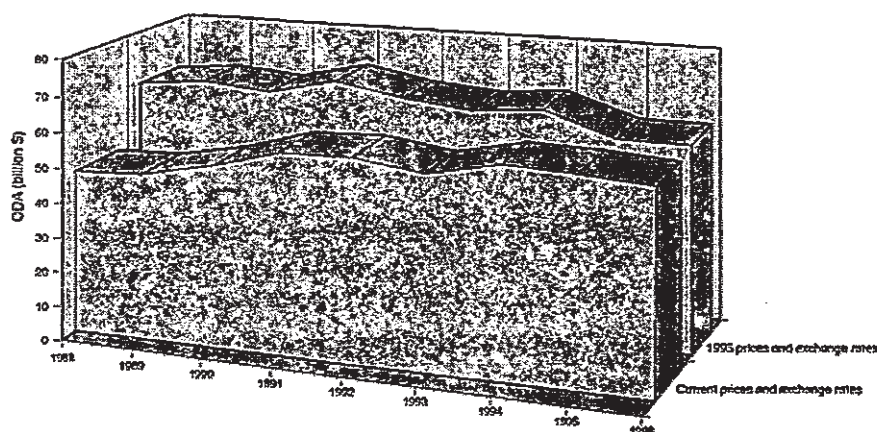
12 *ibid*

13 Art.1, OECD Convention 1960, available at www.oecd.org/document

played a significant role in the harmonization agenda, particularly under the umbrella of one of its specialized committees.¹⁴

The committee of Development Assistance Committee (DAC) which consist of 30 member states yang¹⁵ cooperates to increase the effectiveness of their assistances in most developing countries.¹⁶ Therefore they review periodically either the number o assistance and it must be consulted in bi-lateral or multilateral frame work as long as it related with assistance for development policies.¹⁷ The total number of assistance for official development reported by International Development Research Center (IDRC) can be described as follows:¹⁸

Graphic 1.
Total Official Development Assistance (ODA)



source: DAC (1997b).

14 Eche Nwogwugwu, *Towards The Harmonisation Of International Procurement Policies And Practices*, *Public Procurement Law Review*, 2005.p.139.

15 *Ibid.*,h. 140. The member of DAC (Development Assistance Committee) t Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, The Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Swiss, United of Kingdom, United State of America, and European Community

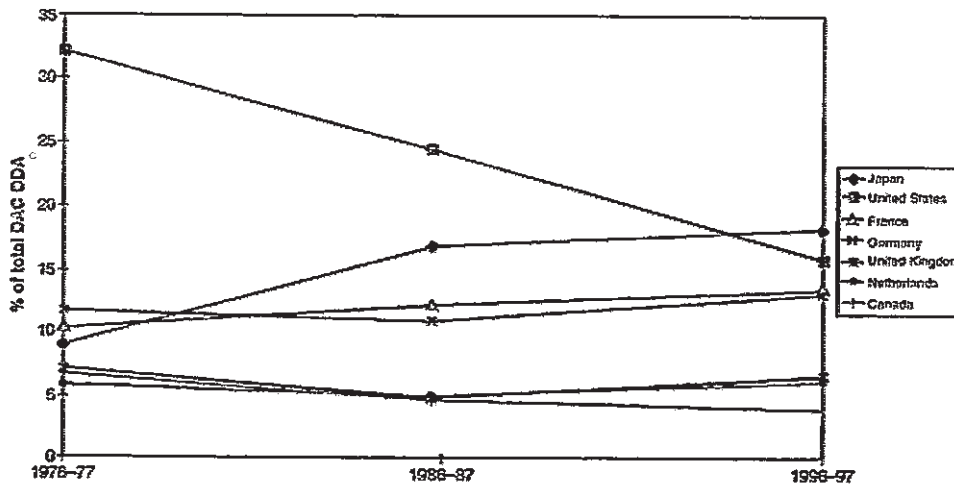
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17 ODA report Total official development assistance at current prices and exchange rates and 1995 prices and exchange rates.: DAC (1997b).

18 www.idrc.ca. *International Cooperation (Report)*, IDRC / The International Development Research Centre (IDRC) Canada.

Base on the OECD report that presented by DAC, the assistance for developing countries can be figured as follows:

Graphic 2.
Share of total OECD Development Assistance Committee (DAC) of-
ficial development assistance (ODA).Source DAC (1998)



Third, The United National Commission on International Trade Law (UNCITRAL) as at its nineteenth session, 1n 1986, The UNCITRAL decided to undertake work in the area of procurement. The UNCITRAL model law on Procurement of goods and construction, and its accompanying guide to enactment, were adopted by the commission as its 26th sessions in Vienna, 5-23 July 1993.¹⁹ The model Law is intended to serve as a model for states for the evaluation and modernization of their procurement laws and policies and the establishment of procurement legislation where none presently exists.²⁰ UNCITRAL Model Law on Procurement of Goods,

¹⁹ UNCITRAL works on the basis that in a number of countries the existing legislation governing procurement is inadequate or out of dated. This results in inefficiency and ineffectiveness in the procurement process, patterns of abuse, and the failure of the public purchaser to obtain adequate value in return for expenditure of public funds.

²⁰ Annex I to the report of UNCITRAL on the work of its twenty - sixth session (official Record of the general Assembly, 48 session, Supplement NO. 17 (A/48/17).



Construction and Services (the "Model Law"), and its explanatory rules also is set for some economic and social goals in developing countries. The expected achievement of the rules is adequate procurement, competition based procedure, transparency, justice and economic efficiency. The model law has affected in more than 30 developing countries procurement legislation.²¹

Market-based systems exert constructive pressures on suppliers to constantly adjust and improve the pricing, quality and performance of a product or service. A supplier that arranges to minimize market pressures through undue influence or bribery loses the initiative to make his product more competitive, and the buyer is far more likely to receive substandard products and services. Encouraging participation "regardless of nationality" is somewhat more controversial. While it is arguable that allowing foreign competitors to bid creates additional risks of corruption, those dealing with anti-corruption issues at international organizations certainly recognize the need to work in concern and share knowledge.²²

Fourth, Harmonization of Multilateral Banking for Development in Procurement also conducted by multilateral banking. Hence, Cooperation among Multilateral Banking Development (MDB) and other International Financial Institutions' "IFIs" concerning assistance harmonization commenced since 1990. Informal meeting led by Heads of Procurement ("HOP") concerning government procurement in February 1998, HOP started its regular meeting and agreed to harmonize government procurement document standard, anticorruption rules and other related issues related to government procurement. HOP meeting also was attended by Technical Working Group on Procurement and then so called "Harmonization Working Group", which derived from international bank representatives.

In October 2002, HOPs agreed to harmonize prequalification procedure toward civil works contracts. Another progress also was achieved by harmonizing tender document, and "request for proposal" document for consultant works.²³ Another meaningful achievement that all biddings must be published and applied standard bidding documents ("SBD") ap-

21 . M. Lemke, "The Experience of Centralised Enforcement in Poland" in *Public Procurement: the Continuing Revolution* (S. Arrowsmith and M. Trybus eds., Kluwer Law International, The Hague, London, 2003), h.106.

22 <http://www.uncitral.org/english/texts/procurem/proc93.htm>.

23 www.worldbank.org/projects/procurements.

proved by four IFI's: Asian Development Bank, World Bank, African Development Bank, and Islamic Development Bank²⁴

Besides that agreement above, harmonization included Joint Country Procurement Assessment Reports ("CPARs") conducted by banking institution in each region.²⁵ One of the progressive step was implementing government procurement through electronic media. Due to that demand, electronic procurement is highly needed and by harmonizing all standards electronically, MDB's E-Procurement Working Group in 2003, established Electronic government procurement in a single web site that covers the following banks: ABD, IDB and World Bank. A single Website already launched,²⁶ as an indication of their commitment in term of maximizing collaboration. In year of 2006, Multilateral Development Bank conducted a meeting attended by all Heads of Procurement in Manila that the members includes African Development Bank, Asian Development Bank, Black Sea Development Bank, Caribbean Development Bank, European Bank for Reconstruction and Development, Inter American Development Bank, Islamic Development Bank, IBRD, Nordic Development Fund and OECD.²⁷

In January 2003, OECD and World Bank presented Joint DAC/World Bank Procurement Round Table on Strengthening Procurement Capacities in Developing Countries initiative,²⁸ which required all borrowing states should reform and strengthen their procurement system and all donor states also should harmonize their procurement procedure.

The working program covers some aspects that can be classified into the following agenda: first, mainstreaming, how to change the mind set that increase public awareness that public procurement is not separated with financial system of state. Second, benchmarks and standards, determining standard operational procedure that all performance should be measurable, third, Capacity building means officials and stake holders should keep in the best performance in maintaining the quality of government procure-

24 www.aidharmonisation.org. Rodolfo C. Hernandez, Chief Procurement Policy and Coordination Office, Inter-American Development Bank; Report on the Progress of Work by Heads of Procurement, November 2002.

25 World Bank-OECD/DAC Task Force on Donor Practices: Harmonisation of Operational Policies, Procedures and Practices: Second Progress Report (March 2002) available at : www.oecd.org

26 www.mdb-egp.org

27 Philip Daltroop, Chair of ADB: Precise of HoP Minutes, Manila 14-16 February 2006, Multilateral Development Banks/Financial Institutions, Head of procurement (HoP) Meeting, h.17.

28 Summary Report, OECD/DAC Official Document: DCD/DAC/(2003)3/REV1, available at: <http://webdomino1.oecd.org/COMNET/DCD/Procurement/CWS.nsf/>

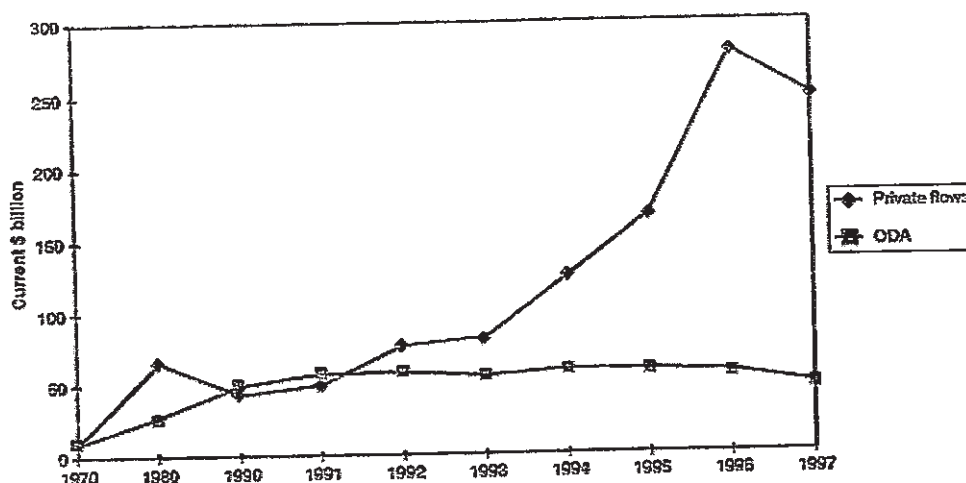


ment procedures; fourth, monitoring and evaluation means that the government should evaluate and monitor and all tools that are needed.²⁹

To comprehend all lending organizations and their assistance to most developing countries, in 1990 to 1996, there was a huge increase of 5 times fold and also the increase of percentage from financial institution to developing countries from 39 % to 77 %. World Bank estimated that net private capital flows to developing countries was exceeded of \$240 billion in 1996, and it was noted that means five times fold of government fund (World Bank 1997b).³⁰

Graphic 3.

Total net financial flows) for developing countries and Multilateral Organization



Source: DAC 1998)

Fifth, in February 2003, all the leaders of MDBs, international organization, and bilateral cooperation, states and creditor state and debtor states attended a conference in Rome. The conference results the High-Level Forum on Harmonisation (“Rome HLF”). That so called “Rome Declaration,³¹ The forum is approved by ministries, the head of assistance program

²⁹ Summary documented in 2004 Round Table Summary Report, OECD/DAC Official Document: DCD/DAC/EFM(2004)3, available at [http:// webdomin1.oecd.org/COMNET/DCD/ProcurementCWS.nsf/](http://webdomin1.oecd.org/COMNET/DCD/ProcurementCWS.nsf/)

³⁰ DAC Report , 1998.

³¹ Roma Declaration focused on the harmonization of government procurement to avoid ineffectiveness and inefficiency.

and other senior officials represented 28 beneficiary states and forty development institutions took part in that program. Declarations officially stated some crucial targets, *inter alia*:

- a. ensure that harmonization efforts are adapted to the country context, and that donor assistance is aligned with the recipient country's priorities;
- b. expand country-led efforts to streamline donor procedures and practices;
- c. review and identify ways to adapt institutions' and countries' policies, procedures, and practices to facilitate harmonization; and
- d. implement the good practices principles and standards formulated by the development community as the foundation for harmonization.³²

III. Conclusion

Transformation and adoption of international legal orders concerning government procurement into national legislation experienced a dramatic change from interstate based agreement into a global administrative governance. A big number of Rules and regulation of global institutions such as World Bank, IMF, ADB and other international financial institutions enforced to all borrowing countries in the third world countries. In another meaning, Grotius perspective is much stronger than Leviathan of Hobbes, whereas Grotius perspective is more applicable in international economic orders rather than Hobbesian one. There is a different source of international law, first, Global administrative governance derived from Act of international organization as an additional source of international law, on the other hand, Hobessian perspective works under international convention (interstate based agreement) as primary source of international law as already firmly stated in article 38 of International Court of Justice.

In sum, international organization is conveniently maximized its role and function upon third world countries particularly in reforming international trade laws concerning government procurement.

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³² "Johannesburg Declaration" [http://webdomino1.oecd.org/COMNET/DCD/ProcurementCWS.nsf/viewHtml/index/\\$FILE/3_Johannesburg_Declaration_15_12_04.pdf](http://webdomino1.oecd.org/COMNET/DCD/ProcurementCWS.nsf/viewHtml/index/$FILE/3_Johannesburg_Declaration_15_12_04.pdf) High Level Forum on Harmonisation and Alignment of Aid Effectiveness



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