

**An Evaluation of Soft Law as a Method
for Regulating Public Procurement
from a Trade Perspective**

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Abstract

This research is to evaluate soft law as a method to regulate public procurement from a trade perspective. The value of soft law is studied under this thesis according to a four-fold approach – bindingness, precision, discretion and delegation. An international legal instrument can be considered soft along one or more of the above four dimensions.

Based on the reviews of the current procurement regimes, the thesis outlines the values of soft law in regulating procurement. Soft law may serve as a second-best to hard law where the latter can not be achieved. It is explained that public procurement is a sensitive subject in the sense that many states are often unwilling to give up their regulatory freedom for protectionism purposes. Soft law in terms of all the four dimensions is argued as an effective device for breaking deadlock and fostering compromises in negotiating a procurement agreement. Also, it can serve as an ‘intermediate step’ towards the formation of hard law even though this is not necessarily the case.

Soft law can also be regarded as a better alternative to hard law even where the latter is attainable. Possible advantages of soft law are identified including its reduced negotiating costs; reduced implementing costs; reserved states’ regulatory autonomy for national legitimate objectives and better adaptation to changes. Meanwhile, its possible disadvantages are mentioned and possible ways of addressing these disadvantages are also suggested.

Special features of procurement are identified including intrusiveness, sensitivity, complexity and constant evolution, which might be relevant for soft law’s influence in that particular area. At the end, the thesis sets out both a short-term and a long-term proposal for developing a multilateral agreement on government by use of soft law.

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Chapter 1 Introduction

1.1 The Significance of Regulating Public Procurement with a Trade Objective and the Current Difficulties.

This thesis provides an evaluation of soft law as a method of regulating public procurement from a trade perspective. Before elaborating the precise research questions it is necessary to provide an introduction to both the significance of regulating public procurement internationally to promote trade and the current difficulty in opening up markets, and to the concept of soft law.

Government procurement¹ accounts for a substantial value of commercial activities in most countries, and the size of public procurement market represents considerable opportunities for international trade.² Public procurement, however, tends to favour domestic suppliers. Traditionally, procurement was utilised as a policy tool to achieve industrial, social and environmental objectives³. Also, public procurement constitutes a barrier to trade in many countries for illegitimate reasons like corruption, nepotism and political patronage. Moreover, even if there exists no deliberate discrimination, foreign suppliers are often disproportionately affected compared to domestic ones owing to structural inefficiencies of certain national systems.⁴ The empirical research indicates that government purchases are home-biased by the evidence found that governments exhibit consistently lower import share than the private economy.⁵

¹ There is no agreed definition of government procurement, however the term 'government procurement' or 'public procurement' (these two terms are interchangeable) in this thesis refers to 'the acquisition by public bodies, such as government departments and municipalities, of various goods and services that they need for their activities. see Arrowsmith, Linarelli and Wallace, Jr, *Regulating Public Procurement: National and International Perspective* (The Hague: Kluwer Law International Ltd, 2000) at p.1

² According to the recent statistics provided by OECD, in 1998, for OECD countries as a whole, the share of total public procurement (consumption and investment expenditures) for all levels of government is an estimated 19.96% of GDP, while for non-OECD countries it is 14.48% of GDP; the value of the worldwide potentially contestable part of the government procurement markets in 1998 is estimated to be equivalent to 7.1% of world GDP or 30.1% of the global merchandise and commercial services export. See OECD(2002), 'The Size of Government Procurement Markets' available at <<http://www.oecd.org/dataoecd/34/14/1845927.pdf>>

³ Such objectives are often referred to as 'secondary' or 'collateral' objectives, by way of contrast with the 'primary' concern of a procurement of obtaining goods or services on the best possible terms.

⁴ Such structural inefficiencies include opaque procurement procedures, inexperienced purchasing officers, badly drafted specifications.

⁵ See Trionfetti, 'Home-biased Government Procurement and International Trade: Descriptive Statistics, Theory and Empirical Evidence' In Arrowsmith and Tybus (ed), *Public Procurement: the Continuing Revolution* (Boston: Kluwer Law International, 2003) at p. 232

In recognition of the value of free trade which leads to more efficient use of world resources and maximum total economic welfare⁶, a lot of efforts have been made towards the liberalisation of public procurement markets. The last decade of the twentieth century has witnessed the start of a 'global revolution' in the regulation of public procurement, involving many ambitious programmes of domestic procurement reform as well as the growth of international trade agreements on procurement.⁷ As regards such international instruments, they are different in terms of their objectives, approaches as well as other key features.

In the contemporary legal system, international agreements on nearly all subjects have increasingly come to use various approaches to regulation. Many scholars distinguish soft law approaches from hard law ones, but the term 'soft law' is defined differently. This thesis defines 'soft law' in comparison with 'hard law'. 'Hard law' is defined as legally binding rules that create definitive rights or obligations, and enforceable through violation deterrence measures, dispute settlement procedures etc. Accordingly, 'Soft law' refers to rules of conduct that are formulated in instruments which lack certain core elements of hard law, namely, bindingness, precision, discretion and delegation, but nevertheless not devoid of all the legal effects of hard law, and that are aimed at and may have practical effects comparable to hard law. This definition will be elaborated in chapter 2.

Most international or regional procurement regimes, which seek to open up procurement markets, operate through formal negotiation and consequential binding agreements. For example, the Agreement on Government Procurement ('GPA') under the WTO system, the European Community ('EC') procurement directives, the North American Free Trade Agreement ('NAFTA') show one or more key dimensions of hard law notably bindingness. However, those liberalising efforts met with limited success in the sense that only a limited number of countries have accepted comprehensive multilateral disciplines on government procurement, leaving the procurement markets of the majority of developing countries unaddressed in the world trading system.

⁶ For general information as to the value of free trade, please refer to the literature on the economics of international trade, such as Krugman and Obstfeld, *International economics: theory and policy* (Addison-Wesley, 2004)

⁷ Arrowsmith, 'National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict', In Arrowsmith and Tybus (ed), *Public Procurement: Global Revolution* (London: Kluwer Law International, 1998) at p.3

On the other hand, certain international instruments regulating procurement can be also found operating on the basis of soft law commitments. The Asian-Pacific Economic Cooperation ('APEC') provides a remarkable example for such an approach. The Government Procurement Expert Group ('GPEG') within APEC was established in 1995 to consider ways to increase transparency of, and liberalise, government procurement market throughout the Asia-Pacific region.⁸ Pursuant to its 1996 Osaka Action Agenda, the GPEG developed a set of non-binding principles on public procurement (NBPs)⁹, which were endorsed by APEC member economies in 1999 and later revised in 2005. Like the usual APEC approach, there is notable state discretion in implementing these NBPs, and thus states' regulatory autonomy on procurement has largely been preserved. Such NBPs are of a non-binding nature, worded in an imprecise and discretionary way and without any delegation to a third party in enforcement. Member economies may decide which ones to apply and how to translate these elements into practical measures, taking into account the specific characteristics of their economy.¹⁰

It is hardly surprising that such an approach has made it much easier for members to agree on what should be included in the NBPs compared with hard law agreements, and it is also not necessary to set out detailed rules concerning scope, derogation etc, as is the case with most hard law agreements such as the GPA.¹¹ Similar soft law international instruments aiming at opening up procurement markets include the Common Market for Eastern and Southern Africa ('COMESA').

Despite the above benefits that such soft law arrangements can possibly offer, the central question is how they can generate incentives for member governments to comply with their principles or rules since they are entirely voluntary. In contrast, two features of binding hard law agreements such as the GPA make government officials refrain from taking measures contrary to the agreements¹²: one is the

⁸ See APEC website www.apec.org

⁹ The APEC GPEG NBPs are Value for Money; Open and Effective Competition; Fair Dealing; Accountability and Due Process; and Non-discrimination. Originally, the Principle of Transparency was also included in the NBPs, but it has now been subsumed into the area-specific APEC Transparency Standards on Government Procurement. Ibid.

¹⁰ Transparency Principal, see APEC website

<http://www.apecsec.org.sg/apec/documents_reports/government_procurement_experts_group/2003.html#I>

¹¹ Arrowsmith, 'The APEC Document on Principles of Transparency in Government Procurement', (1998) *P.P.L.R.* CS38 at p.CS40

¹² Evenett, S and B. Hoekman, 'Transparency in Government Procurement: What can We Expect from International Trade Agreement', In Arrowsmith and Trybus (ed), note 5, at p.279-281 ,

expectation of future trade negotiations and the market access benefits that they can bring to a nation's exporters; the other is that disputes can be brought before an independent body, and sanctions may be authorised against nations that break the provisions of an agreement. However, these features are obviously absent in the non-binding soft law international law regime due to its optional nature. Rather, 'peer' pressure and mutual verification are frequently pointed in order to explain the efficiency of APEC-like soft law regimes.

1.2 The Research Question for the Thesis

From the international law perspective, a variety of forms of international commitment have been adopted in the international legal system owing to an ever-growing number of transnational problems, among which soft law is playing increasingly important and varied roles.¹³

There exists a considerable scholarship that addresses the phenomenon of the increasing use of international soft law approach to tackle transnational problems across many subject areas especially the areas of human rights law, environmental law, arms control, and trade and finance. In the particular area of public procurement, a lot of research has been done in order to find ways to subject procurement to international competition, for example, how to expand the membership of the GPA especially to make it more attractive to developing countries.

However, little attention has been paid to the existing use of soft law in international public procurement instruments.¹⁴ No one has really analysed various soft law elements as well as different approaches utilised in the context of public procurement and the value of soft law in procurement remains a subject that has not been seriously addressed.

¹³ Shelton, 'Introduction: Law, Non-law and the Problem of 'soft law'', In Shelton (eds) *Commitment and Compliance: the Role of Non-binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000) at p.17

¹⁴ There are several remarks made by scholars. For instance, Arrowsmith was of opinion that there are grounds to believe that the APEC approach may produce considerable results despite many criticisms on its non-binding and optional nature. In particular, she believed that the flexibility of the APEC transparency agreement eliminates the need for detailed rules on both award procedures and scope of the agreement. See Arrowsmith, 'Public Procurement within the Asia-Pacific Economic Co-operation Forum' (1996) *PPLR* CS71 at p.SC72 and Arrowsmith, note 11, at p.CS40

This thesis will mainly focus on the value of soft law as a method for regulating procurement from the trade perspective. Based on the analyse of the use of soft/hard law in various procurement instruments, it attempts to outline the possible advantages and disadvantages that soft law could have in the context of public procurement. For example, the use of soft law eliminates the need for detailed definition of coverage, which avoids certain problems involved in GPA-type binding agreements such as the complexity of rules that might be needed, the difficulties of achieving uniform coverage due to economic and political difference among member states and so on. However, the choice of soft law in a procurement agreement might affect the credibility of its rules by increasing the chance for opportunistic states to shirk from their obligations or failing to provide an effective deterrent to non-compliance.

The chapter also seeks identify factors specific to procurement that might be relevant for soft law's influence in that particular context. For example, public procurement is a sensitive area especially in some developing countries with high-level corruption and patronage. Is this a factor that might make soft law easier to be agreed upon but more difficult to be observed by such countries? Or could the intrusive nature of international procurement law on state sovereignty make certain soft law a better alternative to hard law in terms of preserving states' regulatory freedom in pursuing their legitimate procurement objectives? The thesis seeks to answer these questions.

However, it should be noted that the thesis is not aimed at providing any factual conclusion on the market opening effects of soft law approaches because of the absence of empirical work.

At the end, based on the conclusions on the value of soft law and the specific features of procurement, the thesis will set out both short-term and long-term proposals for developing a multilateral procurement agreement by use of soft law. Instead of proposing any substantive rules for a future multilateral procurement agreement, the short term proposal explores ways in which soft law can be used to achieve a multilateral procurement agreement by mitigating the current political oppositions especially from developing countries, whilst the long-term proposal intends to design hard/soft law elements for a future multilateral agreement taking into account the particular features of procurement. Again due to the lack of empirical evidence, the value of these two proposals is only

limited to providing some theoretical hypotheses to be verified by further empirical research.

1.3 Methodology

The method employed by the thesis is essentially that of legal analysis. Since the research question of the thesis aims at evaluating the use of soft law as a method for regulating procurement from a trade perspective, the research will generally involve two different areas of law, namely, public procurement law and public international law. The primary focus is the application of general soft law arguments raised in the field of public international law scholarship to a particular area of law – public procurement law. It seeks to consider the value of soft law to regulate procurement in contrast to that of hard law

A theoretical literature review concerning soft law from the public international law perspective is important not only for defining the scope of the subject matter, but also for setting out a framework to study the value of soft law in later chapters. After examining a vast amount of existing literatures on soft law, the thesis develops a framework of types of soft law largely based on Abbott *et al's* legalization framework¹⁵ but with slight adaptations. The framework makes it clear that what types of soft law elements utilised in the area of public procurement will be examined in relation to its value for regulating this area.

The analysis of a variety of current international procurement instruments and initiatives, focusing on techniques, is expected to illustrate how soft/hard law functions in implementation as well as how the choice of soft/hard law during negotiations influences the conclusion of a procurement agreement. The choice of legal analysis is justified by the theoretical nature of the work and the classic doctrine of the sources of law. The analysis concerns both international procurement law in force and the failed initiative to negotiate international procurement agreements.

To do this will involve a contrast between soft law approaches and hard law approaches within the current international procurement instruments to see what soft law can better offer over hard law, and

¹⁵ See Abbott, K., R. Keohane, A. Moravcsik, A-M. Slaughter, D. Snidal, 'The Concept of Legalization' (2000), 3 *International Organization* 401-419

also to compare different techniques employed by different soft law regimes in the context of international procurement law. It aims to show the benefits and pitfalls of using different soft law elements in existing procurement regimes, which largely contributes to final conclusions on the value of soft law in regulating procurement.

The analysis will cover all major international and regional procurement instruments that have the English version of their relevant documents available, including both trade and non-trade instruments. Although the final analysis will focus on trade instruments, the study on non-trade instruments is meant to establish possible options for the value of soft law in regulating procurement.

Besides existing procurement instruments in force, the failed initiatives to negotiate procurement agreements are also examined to show the situations or obstacles we currently face in finding a way to subject public procurement to international competition. This helps to explore the possible value of soft law to tackle the current obstacles and to facilitate the successful conclusion of a procurement agreement.

The thesis approaches the value of soft law in international procurement law exclusively from a legal perspective instead of an economic or political one. The political situation in international trade negotiations and the political attitude toward compliance with international procurement law will be analysed. However it is only relevant to the extent that international procurement rules will or should be shaped according to the current political background.

Moreover, compliance with soft law is considered a central factor as far as the value of soft law is concerned. Various incentives and disincentives to compliance may be identified but little can be done to quantify these factors because the decisions of states and non-state actors to comply or not to comply involve complex and holistic determinations, not always based on rational preferences.¹⁶

The limited time and resources available also leads to a methodology that confines the research work to drawing out relevant factors purely based on legal analysis and certain secondary data sources rather than relevant empirical study. As a result, the research work is limited owing to the absence of

¹⁶ See Shelton, note 13, at p.17

quantifying the relative value, from the trade perspective, of the various different types of soft law approaches in the context of procurement.

1.4 Outline of the Thesis

Besides the introduction (Chapter 1) and conclusion (Chapter 12), the thesis will be divided into four parts and ten chapters.

The first part is Chapter 2, which mainly involves a theoretical analysis of soft law from the public international law perspective. This part includes not only a definition of the term ‘soft law’ and an analysis of the concept of soft law, but also sets out a four-fold framework for studying the value of soft law for the rest of thesis. It generally evaluates the role of soft law in the contemporary international legal system by comparison with hard law, and the possible advantages and disadvantages of four different types of soft law are identified and explained in this chapter. The important issue of compliance is also addressed, and reasons for compliance with soft law instruments, sources of non-compliance, and measures for inducing compliance are generally discussed.

The second part of the thesis comprises Chapters 3-6. This part examines the current international procurement instruments and initiatives including those with trade-related objectives as well as non-trade objectives, focusing on their objectives, general approach, coverage, secondary policies and soft law and hard law issues.

Chapter 3 examines the public procurement instruments and initiatives within the WTO framework including Agreement on Government Procurement (‘the GPA’); the initiative to negotiate the proposed Agreement on Transparency in Government Procurement (‘the proposed transparency agreement’) and the Negotiating Mandate Pursuant to GATS Article XIII:2.

Chapter 4 deals with the major procurement instruments with trade objectives at regional level: the EC procurement rules; the NAFTA Chapter 10; Chapter XVIII of the third draft of FTAA agreement; and the COMESA directives.

Chapter 5 reviews other procurement instruments, which also have the trade objective but can hardly

be classified in either of the above categories. They are the UNCITRAL Model Law on Procurement of Goods, Construction and Services ('the Model Law') and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('the OECD Convention').

Chapter 6 provides an overview of a number of other international instruments regulating procurement with non-trade objectives including the World Bank's rules governing its aid-funded procurement and the OECD's Recommendation on Untying Aid

After having evaluated the role of soft law in the international legal system and examined the current international procurement instruments, the third part of the thesis looks at whether or how the possible advantages and disadvantages of soft law identified earlier can apply in the context of public procurement law. This part provides a detailed analysis of current soft law procurement instruments, focusing on techniques. Finally it attempts to provide conclusions on the value of soft law for trade instruments in procurement, based on the above analysis and highlights the factors specific to procurement that might be relevant for soft law's influence in that particular context. The third part consists of Chapter 7-10, dealing with the analysis of the value of soft law in terms of bindingness, in terms of precision, in term of discretion and in terms of delegation respectively.

The final part of the thesis raises both short-term and long-term proposals for developing a multilateral agreement on government procurement by means of soft law. The short-term proposal seeks to employ soft law to tackle the 'illegitimate' concerns of many states and achieve a multilateral agreement by mitigating the political opposition from domestic vested interests, whilst the long-term proposal uses the combination of both hard and soft law elements to address states' legitimate concerns and the particular features of public procurement.

Chapter 2 Soft Law: A Theoretical Analysis

2.1 Introduction

Soft law instruments can be found in many systems, and the phenomenon seems to be increasing in the contemporary international legal system.¹ The focus of this thesis is to evaluate soft law as a means to regulate public procurement from a trade perspective. However, before looking at the use of soft law in procurement, it may be helpful to discuss the emergence and influence of this phenomenon as whole. Firstly, this chapter attempts to provide for a definition of ‘soft law’ to set out the scope of the subject matter for the purpose of the thesis.

Soft law has generated vast amounts of doctrinal debate but not produced any universally agreed definition. The term ‘soft law’ was first formulated by McNair, who designated it as a ‘transitional stage in the development of norms where their content is vague and their scope imprecise’.² The ‘essential ingredient’ of soft law, in Gold’s analysis, is ‘an expectation that the states accepting these instruments will take their content seriously and will give them some measure of respect’.³ There are two elements which could contribute to the ‘legal’ quality of soft law norms: states’ consent to the norm, which gives it an authoritative basis, and an expectation that states will take it seriously, which communicates an intention that states will respect behavioural values expressed in the norm.⁴

Some jurists restrict the term ‘soft law’ to norms in legally binding form, usually created by treaty but with vague content or weak requirements of the obligation and termed these as ‘legal soft law’, while many concentrate on instruments in non-legal form, such as declarations⁵, resolutions⁶, codes

¹ There are various reasons to explain the growing use of soft law in contemporary international relations, see Wellens K. C. & G. M. Borchardt, ‘Soft Law in European Community Law’ (1989), *E.L.R.* 14; Handl, G.F., W. M. Reisman, B. Simma, P. M. Duputy, C. Chinkin and R. D. L. Vega, ‘A Hard Look at Soft Law’ (1988) 82 *Amer.Soc.Int’l. L. Proc.* 371 at pp.376, 379-340

² See G.J.H. van Hoof, *Rethinking the Sources of International Law*, (1983: Netherlands) at pp187. Moreover various other terms were proposed by individual jurists, such as ‘non-binding agreements’; ‘de facto agreement’; ‘non-legal norms’; ‘weak law’; ‘para-legal’; ‘imperfect law’. For critiques on these terms, see Bierzanek, R. ‘Some Remarks on ‘Soft’ International Law’ (1988) *P.Y.I.L. Vol 17* at pp.21-22

³ See Gold, ‘Strengthening the Soft International Law of Exchange Arrangements’, (1983) 77 *AM. J. INT’L L.* at 443

⁴ See Carlson, J. ‘Hunger, Agriculture Trade Liberalization, and Soft International Law: Addressing the Legal Dimensions of a Political Problem’ (1985) 70 *Iowa L.Rev.* at p.1194

⁵ Declaration is often issued by states to express their will, their intent or their opinion regarding certain international issue, which can be made through a conference, or through an international organisation. Not all declarations are legally binding and whether a declaration is binding very much depends on its wording and the circumstances under which the declaration

of conduct⁷, decisions of international organizations, and even unilateral statements, named ‘non-legal soft law’. Some other authors include both categories in the definition.⁸ ‘Legal soft law’ refers to treaty norms with vague content or weak requirements, while ‘non-legal soft law’ describes norms embodied in non-binding instruments.

The distinction between soft law and hard law only applies to international agreements. In the areas of customary international law and general principles of law, a norm is either international law or not, and the result is binary⁹ depending on whether the norm meets the relevant requirements.

In order to work out a definition for soft law, it is important to specify the meaning of ‘hard law’ in advance as the concept ‘soft law’ owes its existence to the comparison with the term ‘hard law’. ‘Hard law’ in this thesis refers to legally binding rules that create definitive rights or obligations, and enforceable through violation deterrence measures, dispute settlement procedures etc. Accordingly, ‘Soft law’ is defined as rules of conduct that are formulated in instruments which lack certain core elements of hard law, but nevertheless not devoid of all the legal effects of hard law, and that are aimed at and may have practical effects comparable to hard law.

Furthermore, ‘law’ in the context of soft law implies that it must establish rules of a normative nature, prescribing or inviting its participants to adopt or abstain from certain behaviours, which is very different from political statements only expressing a certain view or instruments merely providing information.¹⁰ However, soft law is distinguished from hard law because of the lack of certain legal features of the latter such as legally binding force and precision. Soft law is ‘soft’ in the

is made. International organisations as well as individual states have been increasingly enunciating important principles by means of declarations. Examples can be found in numerous UN declarations, which are generally regarded as legally non-binding but have significant legal effect in practice.

⁶ The term ‘resolution’ referred originally to a binding decision by an international organisation or an international conference. A resolution could be regarded as a simplified form of international agreements between states when it was reached unanimously. However, the original meaning has been gradually changed. Nowadays, the term ‘resolutions’ often refers to non-binding decisions adopted by international organisations which normally have no power to take binding decisions.

⁷ Codes of Conduct refer to written sets of rules which are intended to be followed in multinational business activities. It can be set up not only by states and international organisations but also by private parties and organizations, and be agreed upon in either binding or non-binding form.

⁸ On the different meanings of the term ‘soft law’, see Gruchalla-Wesierski, T. ‘A Framework for Understanding ‘Soft Law’ (1984) 30 *McGill. L. J.* 37 at pp. 44-45

⁹ Binary basically means characterized or consisting of two parts or components, and here refers specifically to the only two options of either being international law or not.

¹⁰ See L. Senden, ‘Soft Law in European Community Law’ (Oxford and Portland Oregon, 2004) at p.112

sense that it either adopts a non-binding form, or contains vague and ambiguous provisions embodying merely hortatory, aspirational, or promotional obligations.

Many international obligations couched in a legally binding form lack significant levels of precision or delegation in enforcement and are thereby soft law under the above definition. Nevertheless, in many cases, soft law performs legal functions comparable to hard law. This definition seems to include both legal and non-legal soft law and thus embrace a wide range of international instruments including agreements, declarations, communications, recommendations, resolutions, guidelines, and codes of conduct.

In so defining soft law, it has been made clear that what types of soft law instruments utilised in the area of procurement will be examined in relation to its value for regulating this area. In addition to this definition, this chapter will explain the scope of soft law in further detail. By doing so, a framework of types of soft law will be set up, which classifies soft law instruments according to a fourfold approach: an international legal instrument can be made soft along one or more of the dimensions of bindingness, precision, discretion and delegation. This approach will be employed when analysing soft instruments regulating public procurement in later chapters.

Secondly, this chapter will evaluate the role of soft law in international legal system by comparison with hard law. Such an evaluation will be based on the four-fold framework as previously developed, and thus distinguish different purposes the four types of soft law fulfil in the contemporary legal order. Legal functions of different types of soft law will be identified and explained in this chapter, and the later chapters is to look at whether or how these functions of soft law apply in public procurement law.

Lastly, the important issue of compliance will also be addressed. Soft law can only be effective if states comply, and therefore the issue of states' compliance with soft law instruments deserves special attention in view of the lack of certain legal features of hard law. In this regard, reasons for compliance with soft law instruments, sources of non-compliance, and measures for inducing compliance will be generally discussed in this chapter, and their application in the area of

procurement will be examined in the later chapters in order to answer the question concerning the value of soft law in public procurement.

2.2 The concept of soft law

Soft law appears in an ‘infinite variety’ of forms.¹¹ Abbott, Keohane, Moravcsik, Slaughter, and Snidal developed a new approach to illustrate the wide variety of international legal arrangements. They distinguished three dimensions along which variations in the degree of legalisation of international instruments are to be observed¹²: ‘obligation’ (the degree to which states are legally bound by rules or commitments); ‘precision’ (the degree of ambiguity of the rules put in place); and ‘delegation’ (the degree to which third parties, independent or not, have been granted the authority to implement rules, issue detailing rules and/or resolve disputes).

The legalisation acknowledges the binary world, i.e. the extreme states of complete legalisation or complete anarchy, but asserted that most of international regimes are somewhere between the ‘high/hard’ and ‘low/soft’ pole on each of these dimensions, which is a matter of degree and graduation, not a rigid dichotomy.¹³

Moreover, this framework emphasises the functional value of particular combinations of each triplet referring to the level of obligation, precision, and delegation.¹⁴ States can opt for an arrangement that is highly legalised on all three dimensions when appropriate and feasible, and thereby constitutes hard law, or vice versa. Alternatively, states can make any combination of different degrees of these three parameters to produce an arrangement exactly suited to their specific needs.¹⁵

This approach is very useful for analysing the various degrees of legality of international

¹¹ See Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 *I.C.L.Q.* 850 at p.851

¹² See Abbott, K., R. Keohane, A. Moravcsik, A-M. Slaughter, D. Snidal, ‘The Concept of Legalization’ (2000), 3 *I.O.* 401-419

¹³ Ibid

¹⁴ See Abbott, K. and D. Snidal, ‘Hard and Soft Law in International Governance’, (2000) In Goldstein, J., M. Kahler, R. Keohane, A-M. Slaughter (eds) *Legalization and World Politics* (The MIT Press, 2000) at pp. 39-40

¹⁵ Ibid

instruments as it can indicate the continuous gradations of softness and hardness of an international instrument in the most important aspects, but it analyses the bindingness of obligation in the similar way it does the other two dimensions. While it is true that the dimensions of ‘vagueness’ and ‘delegation’ could be considered as a matter of graduation, the issue of bindingness is quite different in this regard because an international obligation can only be binding or not in terms of its form and there is nothing in between.

In Jan Klabbers’ words, an international agreement cannot be ‘more or less binding’.¹⁶ According to the fundamental principle of ‘pacta sunt servanda’¹⁷ embodied in Vienna Convention on the Law of Treaties (‘the Vienna Convention’), every treaty is binding upon the parties to it and must be performed by them in good faith.¹⁸ Technical rules for the formation of legally binding treaty obligations can be found on such matters as capability to conclude treaties; subsequent confirmation; adoption/authorisation of the text; means of express consent to be bound by a treaty and etc. Although it is not necessarily easy, as shown in the Qatar-Bahrain Maritime Delimitation Case¹⁹, to determine whether an agreement is a binding treaty, the international legal system contains criteria for distinguishing binding instruments from non-binding ones in international law.

Furthermore, it is recognised by the Abbot et al’s framework that the content of an obligation can also affect its legal character, but this framework seems to solely address the dimension of vagueness without mentioning the issue of discretion. In the author’s viewpoint, ‘vagueness’ and ‘discretion’ are closely-related, but not interchangeable concepts.

The level of precision in treaty provisions is very relevant to states’ discretion in implementation. In the absence of authorised interpretation by a third party, the more ambiguously the obligations are defined, the more discretion states may have in implementing them. Nevertheless, issues of precision and discretion remain conceptually distinct, and it is possible for an obligation to be very precise but still allow considerable discretion in its implementation. For example, it may set out a precise result

¹⁶ See J. Klabbers, *The Concept of Treaty in International Law*, (The Hague, 1996)

¹⁷ Latin for ‘pacts must be respected’

¹⁸ See Article 26 of the Vienna Convention, available at <<http://www.un.org/law/ilc/texts/treaties.htm>>

¹⁹ See Qatar v. Bahr., 1994 I.C.J. 112, Available at <<http://www.icj-cij.org/icjwww/idocket/qb/qbframe.htm>>

while leaving open the means by which the result is to be achieved, or only requiring states to use ‘best endeavours’ to attain the result. As a result, the issue of discretion should also be considered when discussing the concept of soft law.

Largely based on Abbott *et al*’s legalization framework but with slight adaptations, this chapter will examine the concept of soft law in the following four dimensions:

1. *bindingness*, referring to whether states are legally bound by obligations;
2. *precision*, referring to the degree of ambiguity of the language defining parties’ obligations in legislative text;
3. *discretion*, referring to the degree of discretion states have in negotiating and implementing their obligations;
4. *delegation*, referring to the degree to which states have delegated the power to a third party to implement rules.

States make choices of varying degrees in each dimension and different combinations across these four dimensions in response to their interests, needs as well as different characteristics of subject matters. Accordingly, the realm of soft law begins once legal instruments are weakened along one or more of the dimensions of bindingness, precision, discretion and delegation, and comes in many varieties. Again, it is emphasised that it involves a matter of degree and graduation with regard to the dimensions of precision, discretion and delegation, but it is not the case for the dimension of bindingness. The choice is binary in terms of the dimension of bindingness.

The distinction between hard law and soft law is neither purely a matter of being legally binding or not, nor is there such a specified point somewhere between the ‘hard’ and ‘soft’ pole on each of the other three dimensions, from which hard law ends and soft law begins. The line between hard and soft law becomes increasingly blurred. As Baxter stated, ‘provisions of treaties may create little or no obligation, although inserted in a form of instrument which presumptively creates rights and duties, while on the other hand, instruments of lesser dignity may influence or control the conduct of

States or individuals to a certain degree, even though their norm are not technically binding’.²⁰ In treaties, thousands of ‘empty formulae’ can be found while such agreements in a non-legal form as the Final Helsinki Act ‘create something less than strict legal obligations but are not lacking in legal influence or impact’.²¹

2.2.1 Binding force of obligations

According to this quadripartite approach, soft law can be soft in four ways: in terms of its form, in terms of its content (precision and discretion respectively), in terms of its compliance mechanism. First of all, hard obligation is characterised by the predominance of legally binding rules in an international regime.²² Although a treaty form does not always guarantee hard law obligation, the non-binding form of an agreement can by itself categorise it into soft law group.

In other words, if international agreements are of a non-binding form, like political declarations, codes of conduct, guidelines, it is safe to call them soft law instruments. There are many instruments that explicitly negate any intent to create legally binding obligations. The frequently-mentioned example is the 1975 Helsinki Final Act, under which the parties signified that it was not an ‘agreement...governed by international law’.²³

However, the non-binding character of soft law could possibly be lost or altered once it begins to interact with binding agreements. For example, norms contained in a non-legal soft law could be incorporated into a legally binding treaty by parties and therefore the origin of the norms contained therein may be overlooked due to the legal nature of a subsequent binding agreement.

An example of the incorporation of soft norm into a binding agreement can be found in the Aarhus Convention²⁴. The Preamble of the Convention makes explicit reference to Principle 10 of

²⁰ Baxter, ‘International Law in ‘Her Infinite Variety’’ (1980) 29 *I.C.L.Q.* at p. 565

²¹ Ibid. at p. 559

²² Abbot, K., R. Keohane, A. Moravcsik, A-M. Slaughter, D. Snidal, note 12

²³ See Conference on Security and Co-operation in Europe Final Act, Helsinki 1 August 1975, available at <http://www.hri.org/docs/Helsinki75.html> >

²⁴ Available at <http://europa.eu.int/comm/environment/aarhus/> >

the Rio Declaration on Environment and Development²⁵. Accordingly, Principle 10 of the Rio Declaration, a soft law instrument, has become legally binding by being incorporated into a binding convention.

2.2.2 Vagueness of rules

As Baxter pointed out, even treaties with a binding form can be soft in the sense that they are so ambiguous or vaguely stated that they do little or nothing to control the conduct of states, unless they are fleshed out by the decisions of courts or other agencies.²⁶ Precise sets of rules in international instruments will specify clearly and unambiguously what is expected of a state or other actors, detailing conditions of application, spelling out required or proscribed behaviours in numerous situations etc.²⁷

Much of binding international law is formulated as quite precise, elaborated and dense rules and precision seems to be increasing over time, as exemplified by the WTO trade agreements.²⁸ However, ambiguousness or vagueness can be associated with both binding and non-binding instruments. The Vienna Convention does not require any precise or identifiable obligations within a treaty.²⁹ Ambiguous provisions in a treaty may be deprived of the character of hard law despite their legally binding form.

The Framework Convention on Climate Change adopted at 1992 Rio Conference furnishes a good example. The core articles of this convention are so cautiously and obscurely worded that it is uncertain whether any real obligations are created. The U.S. interpretation of these articles was that ‘there is nothing in any of the language which constitutes a commitment to any specific level of emissions at any time...’³⁰

The low level of precision in international legal provisions implies a necessity for interpretation in

²⁵ Available at <<http://www.unep.org/Documents.Multilingual/Default.asp?ArticleID=1163&DocumentID=78&l=en>>

²⁶ See Baxter, note 20, at p. 560

²⁷ See Abbot, K., R. Keohane, A. Moravcsik, A-M. Slaughter, D. Snidal, note 12.

²⁸ Ibid.

²⁹ See I. Brownlie, *Principle of Public International Law*, 3rd ed. (1979) at p.6; A.A. D’Amato, *The Concept of Custom in International Law* (1971) at 47-56

³⁰ Available at <http://unfccc.int/kyoto_protocol/items/2830.php>

determining compliance. However, unlike the position under domestic legal systems with well-established courts or agencies to interpret and apply imprecise norms, imprecise norms in international agreements are, in practice, most often interpreted and applied by the very actors whose conduct they are intended to govern.³¹

Indeed, each state is entitled to interpret the law, that is, the right of auto-interpretation in the absence of delegated interpreting authority, but this interpretation, is neither final nor binding upon other parties.³² If all the parties agree on a uniform interpretation, no problem will arise; and if, as what frequently happened in practice, divergent views are held by different parties, and then dispute settlement procedures can take place, but if these procedures do not produce a result accepted by the parties concerned, the divergent interpretations will persist and the controversy may remain unsettled for a long time.

Nevertheless, in some international regimes, institutional bodies are set up and entrusted with functions such as implementing agreed rules, thus elaborating vague norms. Again, the ambiguousness of treaty provisions is generally a deliberate choice on the part of parties rather a failure of legal drafting.

2.2.3 Discretion

International instruments may vary in terms of the degree of discretion states possess in implementing their obligation. Even for the choice of binding treaty form and precise content, it may present a different degree of states' discretion in their application of rules to agreements. On the one hand, there are instruments imposing unconditional obligations, for instance, Article 24 of the Vienna Convention on Diplomatic Relations specifies that 'the archives and documents of the mission shall be inviolable at any time and wherever they may be'.³³ On the other hand, binding instruments can be found with only hortatory, best-endeavour weak legal obligations, which are soft

³¹ See Abbot, K., R. Keohane, A. Moravcsik, A-M. Slaughter, D. Snidal, note 12

³² L. Gross 'States as Organs of International Law and the Problem of Autointerpretation', In L. Gross (ed) *Selected Essays on International Law and Organisation* (1993) at p.186

³³ See Vienna Convention on Diplomatic Relations 1961, available at <http://www.un.org/law/ilc/texts/diplomat.htm>

in terms of a very broad states' discretion in their implementations.

These soft law rules can be adopted as a legally binding obligation to make best-endeavour to achieve a certain result, or only to carry out certain conduct without setting a concrete result to be achieved. Article IV of the IMF Articles of Agreement, for example, requires each party only to 'endeavour' to adopt specified domestic economic policies, 'with due regard to its circumstances', and to 'seek to promote' economic stability.³⁴ Meanwhile, best-endeavour provisions can also be adopted in a non-binding form. Therefore best-endeavour obligations, which grant a significant states' discretion, can be of either binding or non-binding nature depending on the relevant intention of member states.

Furthermore, significant discretion may also be given to states through the presence of many mechanisms, such as reservations, escape clauses or remedies for breach. By virtue of these mechanisms, the 'hard' form of the intent to be bound and its effects can be 'softened'. Taking escape clauses as an example, they are widely used devices to limit the binding force of treaties, under which states are exempted from fulfilling the treaty obligations upon the occurrence of particular events and/or upon the judgment of the party.

The use of such clauses can be exemplified by Article XIX of the GATT, which permits WTO members to apply temporary 'safeguard measures' to protect domestic industries injured or threatened with injury caused by unexpected surges in imports.³⁵ The rationale underlying such a escape clause is that states would be more likely to agree to trade concessions if there were a way to temporarily 'escape' from their obligations in the case of emergency.³⁶

However, it is evident that the GATT escape clause had serious problems resulting from the ambiguity of its wording. For instance, the definition given by Article XIX for the circumstances under which it should be used is very ambiguous. A number of terms such as 'unforeseen

³⁴ See Articles of Agreement of the International Monetary Fund, Article IV, available at <http://www.imf.org/external/pubs/ft/aa/>

³⁵ The GATT Article XIX: Emergency Action on Imports of Particular Products, available at http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm

³⁶ For more information, see J. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, Second Edition. (Cambridge: MIT Press, 1997)

developments', 'serious injury', 'like or directly competitive products' were left undefined, giving states leeway in applying safeguards measures.³⁷

The various GATT rounds attempted to address this issue but ended in failure until the Uruguay Round, in which the Agreement on Safeguards was concluded in response to many of the inadequacies of GATT Article XIX. Many areas of ambiguity have been cleared up by this agreement, and the Safeguards Committee has been set up to oversee the operation of the agreement and be responsible for the surveillance of members' commitments.

Similar exemptions clauses can be found in other multilateral binding agreements. The example here demonstrates that such escape rules can be exposed to very broad, self-serving interpretations. As Baxter argued, many treaties are particularly exposed to the operation of *rebus sic stantibus* clause³⁸ and are 'legally fragile'.³⁹

In many cases, states' discretion can be largely controlled if a secondary obligation has to be fulfilled as a pre-condition for relying on the escape clause. For example, a procedural OECD Council Decision obliges member countries to notify their exceptions to the provision of national treatment, and establishes follow-up procedures to deal with such exceptions.⁴⁰ Thus, the subjectivity of an escape clause has been made more objective. Notification obligations must be fulfilled before invoking the escape clause and failure to notify is by itself a breach of an obligation, which has a more objective element and of which non-compliance can be more easily determined.

2.2.4 Delegation

Another way of identifying soft law is to focus not on issues of form or content of an agreement but

³⁷ However, this escape clause was infrequently invoked by member states because governments prefer to protect their domestic industries through 'grey areas' measures bilaterally negotiated outside the GATT auspices until a more detailed WTO Safeguard Agreement was adopted in 1995, which prohibits 'grey area' measures and set time limits (a 'sunset clause') on all safeguard actions. See the WTO Agreement on Safeguards, available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

³⁸ This is a clause indicates that an agreement be ruled non-applicable if circumstances change fundamentally from the time of the signing of the treaty. But it cannot be used if one of the parties produced the change through a breach in its treaty obligations, or if there was a time limit set in the treaty which has not yet been reached, see International Law Definitions, at <http://www.hfienberg.com/irtheory/intlawdefinitions.html>

³⁹ Baxter, note 20 at pp.549-566

⁴⁰ See the OECD, Decision of the Council on National Treatment, 21 June 1976, O.E.C.D. Doc. C (76) 118

on the extent to which parties delegate authority to designated third parties, including courts, arbitrators and administrative organisations, to implement it.

As with the sliding scales of discretion and precision, the ‘hard’ pole is characterised by the presence of developed bureaucracies, entrusted with functions such as interpreting agreed norms, inducing compliance and resolving disputes in cases of non-compliance, while at the softened pole one finds regimes which are no more than fora for negotiation and consultation.⁴¹

Regarding the function of interpretation, many international instruments delegate third parties with the power to interpret the agreed rules. As will be discussed in Section 3.2.4.2, precise and detailed obligations can be developed from vague wording of treaty provisions by means of third parties’ interpretation. As a result, it remains possible that vague soft law provisions harden up to imply hard law obligations through judicial development.

The general rule of interpretation can be found in Article 31 of the Vienna Convention, saying a ‘treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.⁴² However, the imprecision of certain treaty provisions can leave designated third parties considerable discretion in the process of interpretation, and in practice, the degree of power third parties possess in interpreting the rules varies and methods of interpretation they employ are very different.

There are international courts or tribunals in the habit of interpreting a treaty provision text in an extensive way with a view to achieve the goals for which this treaty was created or those goals as perceived by those courts and tribunals themselves. The most distinct example of teleological interpretation can be found in much of the case law of the European Court of Justice (‘ECJ’). The ECJ has been playing a very creative role in interpreting the EC law (see Section 4.1.4.4a). In contrast, the WTO Dispute Settlement Body (‘DSB’) seems to be more cautious and put emphasis on the exact wording of the WTO treaty texts. It is required to take seriously the wording of the treaty text, and especially must neither add to nor diminish the rights and obligations provided in the

⁴¹ See Abbot, K., R. Keohane, A. Moravcsik, A-M. Slaughter, D. Snidal, note 12

⁴² Available at <www.untreaty.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf>

covered agreements (see Section 3.2.4.4a).

As regards dispute settlement, the sequence of methods recognised by international law is found in Article 33 of the UN Charter: ‘negotiation, enquiry, mediation, conciliation, arbitration, (and) judicial settlement’⁴³. ‘Soft’ means of dispute settlement mechanism (‘DSM’) range from traditional political means of dispute settlement including negotiation and consultation⁴⁴; and ones in which disputes are referred to non-binding mediation or conciliation⁴⁵. Meanwhile, there are ‘hard’ DSMs including arbitration and international courts or tribunals such as the International Court of Justice⁴⁶; the European Court of Justice⁴⁷ and the European Court of Human rights⁴⁸.

However, it should be noted that most international regimes incorporate more than one of these means of dispute settlement and are usually a mix of soft and hard approaches. The WTO DSM, for example, consists of three possible stages. The first stage is for parties in dispute to resolve the dispute by themselves and if that fails, they can ask the WTO director-general to mediate and the director-general may assist at its sole discretion⁴⁹. Failing the first stage, the complaining country can ask for a panel to be appointed to consider the case, and the panel recommendation will become binding when adopted by the DSB - the General Council in another guise, which consists of all WTO Members.

The third stage is the appeal process starting when there is an objection to the finding by either side to the dispute. The dispute is referred to the Appellate Body, a standing body established by the DSB, which may uphold, modify or reverse the legal findings and conclusions of the panel. The ruling

⁴³ See Charter of the United Nations Article 33, available at <<http://www.un.org/aboutun/charter/>>

⁴⁴ Negotiation and consultation are diplomatic means of dispute settlement directly carried out by the parties to the disputes, without the intervention of a third party.

⁴⁵ Both of mediation and conciliation involve the intervention of a third party. In the case of mediation, the third party is involved as an active participant in the interchange of proposals between the parties to a dispute, and may even offer informal proposals of his or her own. In the case of conciliation, the third party assumes a more formal role and often investigates the details underlying the dispute and makes formal proposals for the resolution of the disputes.

⁴⁶ The International Court of Justice is the principal judicial organ of the United Nation with a dual role to decide in accordance with international law the legal disputes submitted to it and to give advisory opinions on legal questions referred to it by duly authorised international organs and agencies. See International Court of Justice: General Information, available at <<http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html>>

⁴⁷ The European Court of Justice is the judicial institution of the EC and is required to ensure that in the interpretation and application of the EEC treaty ‘the Law is observed’. Its information is available at <<http://curia.europa.eu/>>

⁴⁸ The European Court of Human Rights was established under The European Convention on Human Rights of 1950. Its information is available at <<http://www.echr.coe.int/ECHR>>

⁴⁹ In fact, the first stage here is simply a formality.

made by the Appellate Body when adopted by the DSB will be binding and final.

In the case of soft dispute settlement there is an attempt to find an agreed solution rather than to engage in adversarial adjudication or claims for reparation. Such soft dispute settlement is well exemplified by Article 13 Settlement of Disputes under the Framework Convention on Climate Change. Disputes regarding the implementation of the Convention will be resolved by a ‘multilateral consultative process’, conducted by a panel of experts empowered to recommend measures to facilitate co-operation and implementation. No suspension of rights and privileges can be imposed, let alone any kind of sanctions; and the process relies on negotiation and persuasion rather than formal findings of breach of convention or state responsibility.

However, in the absence of institutional machinery or other means of reviewing states compliance with their obligations, a state’s refusal to fulfil its treaty obligations cannot be met with any measures of compulsion. Such soft dispute settlement has been criticised by Koskenniemi for undermining the binding character of the treaties concerned and setting them apart from ‘normal’ treaties.⁵⁰ By contrast, Chinkin asserted that formal adjudication is inherently unsuited to soft law instruments with subjective and discretionary content.⁵¹ Instead, she believes that soft law with an informative and educative role is well suited to non-judicial means of dispute settlement and to self-regulation between interested parties.

Clearly, opinions are divided between jurists who press for a process of formal adjudication and those who believe that disputes will be settled better through a more flexible process. It is hard to say whether a more judicialised DSM is desirable or not without a given context of a concrete legal instrument, but for sure, an appropriate degree of dispute settlement design improves the likelihood of states’ decision to comply.

2.3 The role of soft law

There has been much debate over whether soft law plays a positive role in the contemporary

⁵⁰ Koskenniemi ‘Breach of Treaty or Non-compliance’ (1992) 3 *Y.I.E.L.* at p.123

⁵¹ Chinkin, C.M. note 11 at p.862

international system. Soft law has been criticised and even dismissed as a factor in international relations. Klabbers, for example, is of the opinion that soft law is a redundant concept and fulfils no useful function at all, but instead contributes to the crumbling of the entire international legal system.⁵² However, many scholars contend that soft law should not be viewed as a 'normative sickness' but rather as a symbol of contemporary times and a product of necessity.⁵³

2.3.1 As a second best to hard law

States do not just happen to arrive in soft law instruments, instead soft law approaches are deliberately chosen. It is especially true when hard law instruments have been expressly rejected or proven to be unachievable, but the subject matter still demands at least a degree of international regulation. In many cases, there is a sufficient community of interest among states for them to wish to formulate some sort of restraint on their actions, which inspires the formulation of certain instruments, but at the same time will be counterbalanced by the divergent interests of different states.⁵⁴ Consequently, a soft law instrument is often reached as a compromise between some states which wish to have a hard law instrument and others which would probably prefer to have no instrument at all, but will accept it in soft law form.⁵⁵

Schafer has viewed the main value of soft law to resolve deadlock during negotiations.⁵⁶ In the case of a deep disagreement among negotiating parties, cooperation does not necessarily end and soft law can be used as techniques to avoid the failure of international negotiations. It could be much easier even for opposing parties to accept it if an agreement is non-binding, or defines only general goals leaving the exact meaning unspecified, or leaves a broad discretion in implementation, or involves no delegation in enforcement. These techniques may involve any or all of the four aspects

⁵² See J. Klabbers, 'The Redundancy of Soft Law', (1996) 65 *N.J.I.L.* 167; J. Klabbers, 'The Undesirability of Soft Law' (1998) *N.J.I.L.* 67, p.381.

⁵³ See Handl, G.F., W. M. Reisman, B. Simma, P. M. Duputy, C. Chinkin and R. D. L. Vega, note 1

⁵⁴ *Ibid.* at p. 386

⁵⁵ *Ibid.*

⁵⁶ Three case studies concerning the EU, the OECD and the IMF have been conducted to demonstrate that international organisations have widely relied on soft law to overcome disagreements among their member states: the IMF, the OECD and the EU introduced soft law at times of institutional crisis to prevent a breakdown of negotiations. See A.Schafer, 'Resolving Deadlock: Why International Organisations Introduce soft law' (2006), 12 *E.L.J.* 2

of soft law discussed in the thesis.

Furthermore, soft law can be regarded as ‘intermediate step’ towards the formation of hard law. Non-binding rules have the potential to harden into binding rules by providing a basis for later treaty negotiations. Some authors attribute the significance of non-binding instruments exclusively to their later transformation into hard law and assert that this transformation is a major goal of the formulation of non-binding rules.⁵⁷

However it could be argued that non-binding instruments do not play merely a preliminary role and assume functions that go well beyond that of being an intermediate step to the formation of later treaties. Not all non-binding instruments necessarily become legally binding; not all of them are intended to do so. Even if soft law does not harden, it still performs important legal functions and plays an indispensable role given the structure of the international system.⁵⁸ Similar to non-binding soft law, soft law in terms of precision, in terms of discretion or in terms of delegation also have the potential to develop into the relevant hard law though this is not necessary the case.

Lastly, soft law has the effect of internationalising an issue by taking the subject matter covered by such norms out of the exclusive domain of states.⁵⁹ As a result of agreeing to any of the four kinds of soft law regulating a particular subject, a state will be deprived of the right to complain of intervention in its internal affairs if another state accuses it of non-compliance or demands compliance with soft law regulating activities wholly within the territory of the former state.⁶⁰ The mere fact there is an international agreement on the subject matter whether binding or not makes the subject matter a proper object of international concern. A prominent example is the Declaration of the United Nations Conference on Human Environment of 1972 which, for the first time, raised the issue of the environment protection to a global level and paved the way for the later development of international environment law.

⁵⁷ See Chinkin, C.M, note 11, at p.856

⁵⁸ See Handl, G.F., W. M. Reisman, B. Simma, P. M. Duputy, C. Chinkin and R. D. L. Vega, note 1

⁵⁹ Baxter, note 20 at p. 554

⁶⁰ A. Schachter, ‘The Twilight Existence of Non-binding International Agreements’ (1977) 71 *A.J.I.L.* 296 at p.304

2.3.2 As a better alternative to hard law

Klabbers has claimed that soft law is frequently used in many international organisations because they have no other options.⁶¹ Chinkin has further argued that soft law can be presented ‘as the only alternative to anarchy’ in situations where some states are resisting international legal regulation but there is a political awareness, perhaps engendered by civil society, that ‘something must be done’.⁶²

However, it is worth emphasising that the unachievability of hard law should not be regarded as the only reason for choosing soft law, because it does not explain why states would prefer soft law to hard law even if the latter could be achieved in many cases. For example, there seems to be an increasing use of soft law even in organisations such as the EU with the power to enact hard law. Abbott and Snidal hold the view that states often deliberately choose softer forms of legalisation as superior institutional arrangements.⁶³

Soft law can be preferable on its own terms as it offers many of the advantages of hard law, but avoids some of the costs of hard law. Also it has many independent advantages of its own. It is believed that soft law measures is a better alternative to hard law rules when there is a concern about the possibility of non-compliance and when there is a need for flexibility and rapid reactions⁶⁴, and soft law measures are preferable when dealing with complex and diverse problems characterized by uncertainty.⁶⁵ Therefore states may opt for different types of soft law in order to serve different purposes.

Firstly, the drafters may intentionally select a soft formula in order to lower the possibly high costs associated with a hard law instrument including negotiating costs, implementing costs and sovereignty costs. As with negotiating costs, every agreement entails some negotiating costs – delegates from different countries sitting together, exchanging ideas on the subject matter, restricting

⁶¹ J. Klabbers, ‘Institutional Ambivalence by Design: Soft Organizations in International Law’ (2001), *N.J.I.L.* 70, 403-421

⁶² Chinkin, ‘Normative Development in the International Legal System’, In Shelton (eds) *Commitment and Compliance: the Role of Non-binding Norms in the International Legal System*’ (Oxford: Oxford University Press, 2000) at pp.41-42

⁶³ See, Abbott, K. and D. Snidal, note 14, at p.423

⁶⁴ See, Abbott, K. and D. Snidal, note 14, at pp.421-456; also, D Shelton, ‘Introduction: Law, Non-law and the Problem of ‘Soft Law’, in D. Shelton (ed), note 62, at pp.1-42

⁶⁵ See A, Héritier, ‘New Modes of Governance in Europe – Increasing Political Efficiency and Policy Effectiveness’, in Tanja Boerzel and Rachel A. Cichowski (eds), *State of the European Union*, Vol.6 (Oxford: Oxford University Press, 2003),

the scope of negotiation, bargaining for different interests, drafting the legislative text and debates and preparation work back home etc.

In many cases, obligations defined too 'hardly' would entail significant negotiating costs, especially where subject matters are sensitive or complex. Generally speaking, the negotiating costs of international treaties may probably be higher than those of non-binding soft law agreements, as states are normally more cautious in negotiating and drafting legally binding agreements owing to its higher costs of violation. Moreover, the ratification process of treaties, which typically involves legislative authorisation, is often more complex and costly for that of non-binding agreement.

In a similar way, soft law in terms of precision, in terms of discretion or in terms of delegation can also reduce negotiating costs. Vague soft law may avoid the difficulty in formulating detailed rules, while soft law with a high level of discretion in implementation or with a low level of delegation in enforcement may make it easier for negotiating states to agree especially for controversial issues. Consequently, a legal instrument would arguably involve less negotiating costs if it could be made soft in the sense that it has a non-binding form, a less precise content, a higher degree of states' discretion, a lower level of delegation, singularly or in combination. In other words, all the four dimensions of soft law discussed in this thesis can be helpful in terms of mitigating negotiating costs.

As far as implementing costs are concerned, states entering into an international agreement are required to implement their obligations. Some international obligations call for states' abstention from action (e.g. not resort to war), while others demand positive actions (e.g. ensuring that vessels flying its flag comply with applicable international pollution rules and standards). The implementation of international obligations demanding positive action can be costly for participating states, as states have to enact domestic implementing legislation and sometimes to establish particular implementing institutions.

However, the use of soft law can arguably significantly reduce implementing costs of an international agreement. By resorting to non-binding soft law that entails no adverse legal

consequences in the case of noncompliance, states are provided with a learning process of adapting national policies to the requirements of the agreement. Meanwhile, under an international regime that does not involve a high level of delegation of interpreting power to a third party, the preference for vague soft law which grants states a significant discretion in implementation may also help reduce implementing costs, as states obtain more freedom to formulate their own appropriate national implementing rules.

Soft law can also mitigate sovereignty costs of an international agreement. Having recognised the fierce debate over the concept of sovereignty⁶⁶, sovereignty costs is defined for the purpose of this thesis as the distance between the policy that a state would implement if it were not a party to an international agreement and the one it actually adopts once it has joined.

Consequently, every international agreement imposes certain sovereignty costs on its participating states, because states are required to change its national laws and practices as a consequence of joining the agreement. The sovereignty costs of international agreements vary according to different subject areas. For example, sovereignty costs are especially high in areas related to national security, while technical issues such as international standardisation involves lower sovereignty costs. Even for a given subject, sovereignty costs may vary across states. In general, the further a country's practices are divergent from the requirements of a treaty, the higher the sovereignty costs the ratification of treaty entails.

More importantly, the soft/hard elements of an international agreement are also relevant to sovereignty cost it entails for participating states. A legally binding hard law agreement that involves delegating the authority to a third party in enforcement is often costly to its participating states. Conversely, the choice of soft law can arguably protect states from excessive sovereignty costs as a result of participating in an international agreement.

⁶⁶ See S.D. Krasner *Sovereignty: Organized Hypocrisy*. Princeton, (N.J.: Princeton University Press, 1999).

Firstly, soft law in terms of non-bindingness can preserve states' freedom to depart from their obligations under unexpected adverse circumstances as non-compliance with nonbinding international rules does not incur formal legal consequences. Secondly, soft law in terms of vagueness may avoid trying to accommodate divergent national conditions within a single detailed text and thus reduce sovereignty costs by allowing states to implement international rules to their particular national conditions.

Next, soft law in terms of discretion can significantly mitigate the infringement of international rules on states sovereignty by providing states with discretion in negotiating and implementing their obligations. Moreover, soft law in terms of discretion can reduce sovereignty costs by serving as a softening device to circumscribe the obligatory force of hard law rules. Soft devices such as escape clause⁶⁷ can protect participating states from being locked into unfavourable situations where they find the implementation of their obligations is detrimental to their essential national interests.

Lastly, hard law with a high level of delegation in enforcement provides the greatest source of unanticipated sovereignty costs. As pointed out by Lindblom, a grant of 'authority always becomes to a degree of uncontrollable'.⁶⁸ For example, as will be examined in 4.1.4.2 & 4.1.4.3, the ECJ has been exerting its delegated interpreting authority in ways that go beyond the initial intentions or anticipations of the EC states, which increasingly restricts states' regulatory freedom in many respects. In contrast, soft law with a low level of delegation can avoid such unanticipated sovereignty costs.

Except for the consideration of reduced negotiating, implementing and sovereignty costs, soft law has increasingly been employed to accommodate states' diversified needs and to facilitate states compliance in the case of varied domestic systems. The international system has undergone dramatic changes since World War II. Many newly independent countries have emerged with weak economies, while developed countries have lost assured access to raw material from their ex-colonised countries.

⁶⁷ Escape clause in an international agreement refers to any clause that allows a party to that agreement to avoid having to perform its obligations under specified circumstances.

⁶⁸ Lindblom. *Politics and Markets: The World's Political-Economic Systems*, (New York:1997)

An international instrument may include diversified member states whose national legal and financial systems, economic circumstances and other characteristics vary widely in type and sophistication.

Soft law provisions making vague or discretionary assertions rather than creating definitive legal obligations, or the use of non-binding form instead of binding one can make an instrument acceptable to more countries. Moreover, these soft law approaches allow governments to participate in a cooperative arrangement based on their ability to do so. The atmosphere of mutual trust can be established over time through regular meetings between national experts from various countries, which assists in achieving the purposes desired. The striking success of the soft law approach in setting international financial standards is illustrative of this point.

Taking the particular area of ‘money laundering’ as an example, the earlier effort to address the problem of money laundering has been severely hampered by many disagreements among states as to the fundamental issues like whether money laundering itself should be illegal. The Financial Action Task Force (the ‘FATF’)⁶⁹ resorted to recommended principles for action rather than binding legal accords towards harmonising national rules to fight money laundering.⁷⁰ These FATF recommendations have provided a substantial core for developing international rules in the field of anti-money laundering. Despite their non-binding nature, the degree of compliance with its recommendations has been fairly high at least among the most industrialised countries.⁷¹

Apart from those soft law arrangements that apply equally to all participating states, the general principle that ‘one size does not fit all’ has been widely acknowledged, asserting that a set of uniform multilateral rights and obligations among a deep diverse set of nations could not serve the best interests of all parties.⁷² In consideration of significant differences in economic power and

⁶⁹ The FATA is an inter-governmental body aimed at developing and promoting national and international policies to fight money laundering. See the FATA website at http://www.fatf-gafi.org/pages/0,2966,en_32250379_32235720_1_1_1_1_1,00.html

⁷⁰ The FATF has established a series of Recommendation to ensure that they remain up to date. At present, the FATA Recommendations are comprised of the Forty Recommendations on Money Laundering and the Nine Special Recommendations on Terrorist Financing. For detailed information, see the FATF official website at http://www.fatf-gafi.org/pages/0,2966,en_32250379_32236920_1_1_1_1_1,00.html

⁷¹ See B. Simmons, ‘International Efforts against Money Laundering’, In D. Shelton (ed), note 62, at p.261

⁷² See A. Keck and P. Low, ‘Special and Differential Treatment in the WTO: Why, When and How’. Staff Working Paper

benefits gained by developed and developing countries, obligations may be formulated with different level of hardness for different categories of member states within the same international instrument.

For example, in the field of international environmental regulation, the principle of ‘common but differentiated responsibility’ (‘CDR’) has become a normative standard. The meaning of CDR was elaborated in the 1992 Rio Declaration on Environment and Development. Given the different contributions to global environmental degradation, States have common but differentiated responsibilities. Developed countries acknowledge the responsibility that they bear in the pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command’.⁷³

The notion of CDR contained in the Rio Declaration has become one of guiding principles in the development of international environmental law. Many international environmental instruments, if not all, have special provisions for developing countries including the application of different standards, delayed compliance timetable and less stringent commitments.

Similarly, in the area of international trade law, Special & Differential Treatment (‘S&DT’) provisions have frequently been utilised as a tool to ensure the proportionality of trade agreements, commensurate with the levels of development of developing countries and their capability to manage the burdens of the adjustment process.⁷⁴ Under the GATT/WTO system, for example, the formal inclusion of S&D provisions as an element of the trading system could be traced in 1979 through the so-called ‘Enabling Clause’⁷⁵.

Since then, the S&D provisions have evolved over time but remained as a political demand by developing countries during trade negotiations. The inclusion of longer transitional periods, reduced levels of commitments and special derogations or exceptions etc for developing countries in these

ERSD-2004-03, May 2004, WTO Economic Research and Statistic Division at p.3

⁷³ See Rio Declaration on Environment and Development, (the United Nations Conference on Environment and Development, 3-14 June 1992)

<<http://www.unep.org/Documents/multilingual/Default.asp?DocumentID=78&ArticleID=1163>>

⁷⁴ See F. Ismail, ‘Mainstreaming Development in the World Trade Organization’, 39(1) *J.W.T.* 11-21 (2005) at p.13

⁷⁵ The Enabling clause was introduced under the Tokyo Round ended in 1979. The clause allows exception from non-discrimination and MFN treatment, and allows for possible extension of differential and more favourable treatment to developing countries through preferential tariffs, non-tariffs measures, and regional or global arrangements. See Tokyo Round Codes, *Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries*, Decision of 28 November 1979 LT/TR/D/1

S&DT provisions grant developing countries more discretion in implementing their trade obligations.

Thirdly, soft law is more capable of adapting to changes in comparison with hard law. As with the non-binding rules, they can be amended more quickly and relatively easily. States can refine and experiment with new notions in a non-binding situation, thus providing a learning process for regulating a new or sensitive area as changes continually arise.

Similarly, the more ambiguous international rules are or the more discretion states possess in implementing them, the stronger capability they will have in the face of rapidly changing environment. As a result, to respond more quickly and flexibly to changing information makes soft law particularly appropriate for many areas of regulation, including environment protection, arms control and telecommunications

Next, states sometimes prefer soft law to hard law for technical reasons. It is well-known that the ratification or termination of treaties by states is usually subject to complex formalities pursuant to national law. It takes a considerable period of time for multilateral treaties to be concluded and to come into force. Many countries require that treaty ratification be submitted for parliamentary approval, and federal states often require the approval of their constituent parts.⁷⁶ For example, the US Constitution specifies that the President's ability to make treaties is subject to a two-thirds majority vote of the Senate.⁷⁷

In contrast, the conclusion of non-binding instruments is less time-consuming as the simpler procedures facilitate more rapid finalisation. Also, non-binding instruments are more easily extinguished, thus avoiding the difficulties presented in terminating treaty obligations.⁷⁸ Obviously, this technical reason only applies to soft law being soft in the sense of non-binding form, but not in the sense of the other three dimensions.

⁷⁶ See Bothe, 'Legal and Non-legal Norms – a Meaningful Distinction in International Relations?' (1980) 11 *N.Y.U. L. Rev.* 65 at p.90

⁷⁷ See The US Constitution Article II, Section 2 available at <http://www.house.gov/Constitution/Constitution.html>

⁷⁸ According to the Vienna Convention, the rules relating to the termination and the amendment of treaties are very stringent. See the Vienna Convention Article 62, available at <http://www.un.org/law/ilc/texts/treaties.htm>

Lastly, there may be a matter of compromise among the four aspects of bindingness, precision, discretion and delegation with respect to a particular instrument. For instance, it is normally easier for clear and ambitious commitments to be adopted if they are put in a non-binding form. States might only bind themselves to modest or ambiguous commitments should a binding instrument be chosen, especially in cases where there is a high degree of diversity of interests or where the future development of the subject matter cannot be foretold.

By contrast, non-binding agreements can benefit from a high degree of clarity and are often drafted by specialists with technical knowledge. States are often more willing to be innovative when an agreement is not explicitly legally binding. On the other hand, a comparatively less precise or ambitious content may raise the chances for states to agree on a binding form.

Therefore designing an international instrument can be considered as a process for prioritising these four aspects depending on its specific needs and circumstances. In many cases, balancing between the different types of soft law options rather than strictly sticking to the hard law approach enhances the effectiveness of legal rules.

2.4 Compliance with Soft Law

Meanwhile, many jurists point out negative phenomena associated with the development of soft international law. Some observers criticised the very concept of soft law claiming that it was a pathological phenomenon of international law introducing a graduated scale of normativity and also a practice that lends itself to legal pretension. Certain commentators fully denied the desirability of soft law that it has nothing to contribute to the solution of the political problems but instead contribute to the crumbling of the entire legal system.⁷⁹ The law could only be made through the procedures that themselves have been created to regulate the creation of law, which protects us from arbitrariness on the part of the powers.⁸⁰

Even for jurists who do not deny the concept of soft law as a whole, it is criticised that soft law

⁷⁹ See J. Klabbers, note 52 (1998) *J. I. L.* 67: 381 at p.391

⁸⁰ *ibid*

may have the potential to inappropriately relieve policy pressure for more aggressive action or weaken already thin notions of international law.⁸¹ Bothe expresses fears that the executive branches of government might be interested in evading the requirement of obtaining parliament's approval to ratify the agreement by concluding it in the form of non-binding norms.⁸²

Most importantly, the use of soft law may arguably affect the credibility of international law. Despite advantages soft law can better offer over hard law, the rule of law requires compliance for law to be effective, and likewise soft law can only be effective if states comply. Obviously, as with soft law instruments, the issue of their implementation by states is crucial. If any such instruments are adopted but ultimately not implemented, their mere existence could not produce any practical legal consequence but only lead to a false sense of security.

By using the term 'compliance', this chapter follows Jacobson and Weiss' definition: 'compliance refers to whether countries in fact adhere to the provision of the accord and to the implementing measures that they have instituted'.⁸³ Doubts have been cast on states' compliance with their soft law obligations in view of its absence of certain core legal features of hard law.

2.4.1 A choice to comply?

Compliance is a matter of state choice. Famously, Henkin asserted that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'.⁸⁴ More recently, broad empirical works regarding the conditions under which compliance with international obligations occurs have been conducted⁸⁵, which seem largely to confirm Henkin's assertion. Chayes also claims that as a general rule, states acknowledge an obligation to comply with the agreements they have signed and although the violation of obligations does occur occasionally, it

⁸¹ See E. B. Weiss (ed), *International Compliance with Non-binding Accords*, (The American Society of International Law: 1997) at p.225

⁸² See Bothe, note 76 at p.94

⁸³ See H. Jacobson and E. B. Weiss, 'Compliance with International Environmental Accords' (1995) *I.G.G.* 123

⁸⁴ See L. Henkin, *How Nations Behave: Law and Foreign Policy* (2nd edition, 1979)

⁸⁵ Especially in the field of international trade, see, e.g. E. Petersmann and G. Jaenicke (eds.) *Adjudication of International Trade Disputes in International and National Economic Law* (1992); R. Hudec, *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System* (1993); R. Hudec, *The GATT legal System and World Trade Diplomacy* (2nd edition, 1990); C. Reitz, 'Enforcement of the General Agreement on Tariff and Trade' (1996) *17 U. Pa. J. Int'l Bus. L.* 555

cannot be seen as a normal practice of states.⁸⁶

If there is a general propensity for states to comply with their international obligations, the questions here will naturally be why states comply with international law, and whether and how each different type of soft law within the meaning of this thesis affects states' choice to comply?

'Interests' is the most frequently mentioned reason for states' choice to comply with international rules. International agreements are concluded on the basis of states' consent, which represents, to a certain extent, an accommodation of the interests of participating states. A state will not commit itself to an international legal instrument, no matter how hard or soft obligations such an instrument may contain, unless it believes that signing this instrument furthers its interests and it complies for the same reason. International rule making, like democratic legislation, can be considered as a creative process through which the parties weigh the benefit and burdens of commitment and redefine or sometimes even discover their interests.⁸⁷

In general, states are motivated to respect international rules by virtue of their own interests. In this sense, there is little difference between soft or hard law obligations and states will comply with both for the sake of their own interests.

Admittedly, international rule making process is not absolutely consensual, but is heavily affected by uneven bargaining power of different states. It is not a secret that powerful states are more influential in formulating international law. However, many regimes allow small or weak states to form coalitions and organise blocking positions and therefore, to a certain extent, the international rule-making process leaves room for accommodating divergent interests.⁸⁸

Furthermore, states' interest is not a static concept. Often economic and technological changes can cause governments to change their minds about which rules should be reinforced and observed and which should be disregarded and changed.⁸⁹ Also, it is decision-makers who will have a say in

⁸⁶ A. Chayes and A. H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreement* (Harvard University Press: 1995) at p.3

⁸⁷ Ibid.

⁸⁸ Ibid

⁸⁹ S. Strange, 'Cave! Hic Dragons: a Critique of Regime Analysis', in S Krasner (ed) *International Regimes*, (Cornell University Press, 1983) at p. 348

defining state interests with respect to the conclusion of an international agreement and state interest will normally be decided according to the ruling party's own value preferences.

However, elections or other large social or political events often change the bargaining power of domestic bureaucratic and political groups, which will inevitably alter how a state assesses its interests in compliance. Most international instruments can be adapted to inevitable changes by incorporating amendment procedures, delegating to relevant organs the power of interpretation. In the case of unforeseeable changes for a few individual states, those states may still choose to comply owing to the cost involved with non-compliance.

In this regard, the binding form of international instruments, the first dimension of soft law, makes a difference in legal consequences of non-compliance. A failure to comply with binding international obligations involves legal consequences as set out in the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001 ('ILC Articles on States' Responsibility').⁹⁰ A breach of a legally binding obligation by a state entails international responsibility of the state and that responsible state is obliged to cease the wrongful conduct and to make full reparation for the injury caused by the breach⁹¹. Full reparation for the injury shall take the form of restitution⁹², compensation⁹³ and satisfaction⁹⁴, either singly or in combination.⁹⁵

The legal consequences of non-compliance can therefore serve as an important deterrent to those states which might have violated their international obligations in the absence of such consequences. However, there are no similar legal consequences in the case of violating non-binding soft obligations. An act of a state does not constitute a breach of an international obligation and lead to the above legal consequences if the state is not legally bound by the obligation in question at the time the act occurs.⁹⁶ Consequently, the question arises whether the binding form of a legal

⁹⁰ See the Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001, available at http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm >

⁹¹ See Article 1, Article 30, Article 31 of the ILC Draft Articles on States' Responsibility

⁹² See Article 35 of the ILC Draft Articles on States' Responsibility

⁹³ See Article 36 of the ILC Draft Articles on States' Responsibility

⁹⁴ See Article 37 of the ILC Draft Articles on States' Responsibility.

⁹⁵ See Article 34 of the ILC Draft Articles on States' Responsibility

⁹⁶ See Article 13 of the ILC Draft Articles on States' Responsibility

instrument is crucial to secure comply.

While the legal consequences flowing from binding obligations induce conforming behaviours by making the choice of non-compliance more costly, states are still demonstrating concerns about compliance with legally non-binding obligations for other reasons. States may fear the unknown and unwanted side effects of their current non-compliance on the future of their relationship with other countries as states especially small and medium ones view the maintenance of the stability and effectiveness of the international legal system as one of their boarder and long-term interests. Or states may fear the lost of their trustworthy reputation and the bad name of violator, domestically or internationally.

Clearly, appropriate institutional design would also largely improve the likelihood of states' decision to comply (to be discussed in section 2.4.3). Coercive enforcement measures such as sanctions may help deter violations. Traditionally, supervisory mechanisms were more likely associated with formal treaties, but recently, delegated supervisory bodies have increasingly been created to oversee compliance with soft law norms.⁹⁷ It is possible for soft law instruments equipped with an efficient follow-up mechanism to be equally, or even more troublesome or threatening to states violating obligations undertaken than treaties.⁹⁸

Despite states' calculation of benefits and costs, states may still comply with international rules they have agreed to even if it is at times costly to do so. It has been argued that states may comply out of a sense of obligation.⁹⁹ It is often said that the fundamental norms of international law is *pacta sunt servanda* – treaties are to be obeyed, and compliance arises from a basic normative sense of obligation. Scholars such as Ostrom¹⁰⁰ and Ellickson¹⁰¹ show how relatively small communities in contained circumstances generate and secure compliance with norms in the absence of the

⁹⁷ See D Shelton, note 64 at p.11

⁹⁸ See Handl, G.F., W. M. Reisman, B. Simma, P. M. Duputy, C. Chinkin and R. D. L. Vega, note 1 at p.378

⁹⁹ See E. B. Weiss (ed), note 81, at pp.28,29; A. Chayes and A. H. Chayes, note 86 at pp.8-9

¹⁰⁰ See E. Ostrom, *Governing the Commons: the Evolution of Institutions for Collective Action* (Cambridge University Press, 1990)

¹⁰¹ See R. Ellickson, *Order without law: How Neighbors Settle Disputes* (Harvard University Press, 1991)

intervention of an implementing authority. Others, like Schauer¹⁰² and Kratochwil¹⁰³, have reached the conclusion that the norm by itself is a 'reason for action' and therefore becomes an independent reason for explaining states' choice of compliance.

This 'norm' argument applied to compliance seems to suggest that there should be a fundamental distinction between the uses of binding hard law form and non-binding soft law form since the choice of instrument reflects and represents a prior expectation of the degree of compliance.¹⁰⁴ The use of treaty form appears to impose more normative expectations than the resort to non-binding soft law on the part of states.

No study has concluded, however, whether the rate of compliance with binding international norms is greater than that of non-legally binding international rules. On the contrary, empirical studies of compliance find great variation over time for different subject matters without any indication of higher rate of compliance with hard law.¹⁰⁵ Although legally binding obligations bring about greater expectation of conforming behaviour and more serious consequences for non-compliance, it can and frequently it does happen that parties to a non-binding agreement comply with their obligations under it.¹⁰⁶

Factors that influence compliance with binding instruments and those that influence compliance of nonbinding ones overlap to a large extent.¹⁰⁷ This thesis presumes that there is no distinct variation in compliance depending upon the nature of international obligations. The key issue to be discussed will be the factors which influence states choice to comply with international obligations of any nature.

2.4.2 Sources of non-compliance

¹⁰² See R. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making In Law and Life* (Clarendon Press, 1991)

¹⁰³ See F. Kratochwil, *Rules, Norms and Decisions* (1989)

¹⁰⁴ See E. B. Weiss, note 81 at p. 29

¹⁰⁵ On the subject area of trade, see J. Jackson et al. *Implementing the Tokyo Round* (1984); R. Hudec (1993), note 85; J. Jackson, note 36; on human rights, see, J. Donnelly, *Universal Human Rights in Theory and Practice* (1989); on arms control, see J. Nolan (ed), *Global Engagement: Cooperation and Security in the 21st Century* (1994), L. Spector, *Nuclear Ambitions* (1990)

¹⁰⁶ See D Shelton, note 64 at pp10

¹⁰⁷ Ibid.

Although there are reasons for states to comply with their international obligations, states from time to time do violate them. There must be factors leading to such noncompliance. If a state's decision whether to comply is purely the result of calculation of costs and benefits, states would sometimes find it preferable to violate international law.

Werksman and Roderick summarise three types of cases of non-compliance which takes such form¹⁰⁸: the first case is that a state may be a classic free-rider which values the compliance by others but seeks to avoid of the costs of its own compliance; second, a state may prefer devoting the compliance-related resources to more pressing problems even if it values compliance by itself and by others; third, a state may view compliance as having no real benefit compared to its costs. It would therefore imply that noncompliance is a premeditated and deliberate action.

However, it has been argued that violations of international agreements infrequently fall into the category of wilful flouting of legal obligations and that premeditated violations are the exception rather than the rule.¹⁰⁹ If violations of international rules are not always deliberate, what explains this behaviour? The following are factors which may possibly affect states' choice to comply except states' consideration of benefits and costs.

Incapability to comply

The first point here is that states may be willing to comply with their international obligations, but incapable of doing so. As explained in Section 2.3.1, some international obligations call for states' abstention from action, while others demand positive action. The requirement of inaction could be easily met should states so desire.

However, with regard to international obligations demanding positive action, even when states wish to comply, not all are capable of doing so. Compliance entails committing national resources either in terms of staff time, political energy and attention or money of a state.¹¹⁰ Violations may

¹⁰⁸ See J. Cameron, J. Werksman and P. Roderick, *Improving Compliance with International Environmental Law*, (Earthscan Publications Limited, 1996) at p.12

¹⁰⁹ See A. Chayes and A. H. Chayes, note 86, at p.10

¹¹⁰ See P. Haas, 'Why Comply, or Some Hypotheses in Search of an Analyst', in E. B. Weiss (ed), note 81, at p.22

result from financial, administrative or technological incapacities rather than unwillingness to comply. Once a state has formally subscribed to an international agreement, it will need to develop, adopt or modify the relevant national legislation to give effect to it. A state may lack technical capacity to fulfil its obligations, which is especially true for developing countries with fewer financial resources and less developed administrative systems.

In this case, it is irrelevant whether an international legal obligation is soft in terms of its bindingness, vagueness and delegation, as states do not comply because they face no choices. However, soft law granting states a high level of discretion in negotiating and implementing their obligations may help reduce the occurrence of such kind of non-compliance, as it allows states to devise their own way of complying based on particular national circumstances.

Ambiguity of the rule

The wordings of many international rules, as discussed above, are so vague that they can not provide determinate answers to disputes as to their interpretation. These international rules fall into one of the four categories of soft law defined earlier. In many cases, provisions were deliberately drafted in a vague manner to serve particular purposes.

Furthermore, the ambiguous nature of treaty obligations may result from the drafter's lack of foresight of many possible applications at the time of negotiation. Also, the legal form often inhibits states from agreeing to very specific obligations taking into account that political, economic, technological and scientific conditions may change over time. All the above factors could lead to a zone of ambiguity in international obligations within which it is hard to say exactly what is permitted and what forbidden.

Consequently, there can be a considerable ambit within which states can interpret the meaning of relevant provisions as they want it to. Some states may even take advantage of the indeterminacy of treaty language to justify indulging their preferred course of action or to design the desired activity

as complying with the letter of the obligation.¹¹¹ Therefore, differing interpretations as to the meaning or requirements of vague soft law rules could possibly be another factors leading to non-compliance.

2.4.3 Measures for inducing compliance

It has been widely acknowledged that agreements made by consensus are the best hope for ensuring compliance and there must be political will behind such agreements in order for them to be effective.¹¹² Meanwhile, different techniques/mechanisms can be employed by international regimes to induce compliance.

Sanctions

The traditional remedy for non-compliance involves deterrence through the threat or use of sanctions. If the choice of compliance lies in states' benefit-costs calculation, the availability of sanction may encourage compliance in the sense that reluctant states would probably be convinced that the likelihood that a violation will be detected and sanctioned makes the expected costs of violation exceed those of compliance. There are mainly three types of sanctions¹¹³:

- *Treaty-based Sanctions* (military or economic action authorised by treaty instrument to punish violation of the norms established by it);
- *Membership Sanctions* (expulsion or suspension of rights and privileges of a violating party to the treaty); and
- *Unilateral Sanctions* (coercive action not expressly authorised by the treaty but applied unilaterally or by several states in concert to bring a party into compliance)

As with the first two types of sanctions, hard law rules in terms of delegation in enforcement may involve the delegation of power to a third party to authorise such sanctions, which is normally

¹¹¹ See A. Chayes and A. H. Chayes, note 86, at pp.12-13

¹¹² See J. Cameron, J. Werksman and P. Roderick, 'Introduction', in J. Cameron, J. Werksman and P. Roderick, note 108.

¹¹³ See A. Chayes and A. H. Chayes, note 86, at p 30

unavailable under soft law rules. Regarding unilateral sanctions, there is no difference between hard and soft law as states take actions unilaterally.

In practice, sanctioning is rarely used and often proves ineffective when used. The imposition of sanctions involves costs for the sanctioner as well as the sanctionee. It might not fundamentally solve the problem but instead serve only to exacerbate tensions. As argued by Chayes', states obey international law not because they are threatened with sanctions, but because they are motivated to comply by the dynamic created by the international agreements of which they are parties.¹¹⁴

Capacity Building

It is submitted that lack of technical and administrative capability and financial resources have become a major deterrence to compliance. Many international agreements include technical and financial assistance provisions, but most take the form of 'best endeavour' efforts instead of firm obligations, or have tacit conditions. Such provisions are often too soft to have any practical significance because aiding states are left with excessive discretion over whether or how technical or financial assistance will be provided.

The difficulties of imposing hard law obligations on technical and financial assistance provisions may arguably result from the very nature of such obligations. Financial aids or the funds needed for technical assistance constitute part of a government's budget, which must go through parliamentary approval procedures annually in many developed countries. Therefore it is very difficult for the governments of developed economies to legally commit themselves in a precise way by stating what kind of or how much technical assistance is to be given.

However, the Montreal Protocol, for the first time, expressly provides that the parties are obliged to provide significant financial assistance to defray the incremental costs of compliance for developing countries and the obligations of developing countries are explicitly conditioned on the

¹¹⁴ Ibid.

provision of financial resources by developed member states.¹¹⁵ These financial and technology transfers may help states who want, but are unable, to comply, to fulfil their international obligations.

Moreover, the fear that the provision of technical and financial assistance will be withheld from non-compliance states may, to a certain extent, elicit greater compliance. States may re-examine the costs of non-compliance and probably be encouraged to comply.

Dispute Settlement Mechanisms

It is essential for an international regime to have certain dispute settlement machinery available when a dispute arises. Many treaty regimes make it possible to submit disputes before delegated adjudication bodies, either by external bodies like International Court of Justice or by internally-established tribunals or panels for this purpose. However many regimes especially soft law regimes, resort to a variety of relatively informal processes if the parties to a dispute are unable to resolve the issues among themselves. As previously discussed in Section 2.2.4, international rules can be soft in the sense that a low level of authority or even no authority at all has been delegated to a third party to interpret the rules and to adjudicate disputes.

Although formal international adjudication, like its domestic counterpart, is often costly, slow and cumbersome, it has been argued that compliance would be better fostered if allegations of non-compliance could be submitted to a sort of 'hard' dispute settlement such as judicial or quasi-judicial rulings.¹¹⁶ A recent disposition in some regimes is to revert to compulsory and binding forms of hard law dispute settlement.¹¹⁷ The most important example is the WTO Dispute Settlement Mechanism, which is to be discussed in Section 3.2.4.4a.

Violation Preventive Measures

¹¹⁵ See Montreal Protocol, Article 10,

¹¹⁶ See C. A. Flesischhauer, 'Inducing Compliance', in O. Schachter and C. Joyner (eds), *I United Nations Legal Order* (1995) at P. 231

¹¹⁷ See A. Chayes and A. H. Chayes, note 86, at p.24

Besides dispute settlement and remedies after violation have occurred, some international regimes, especially soft law regimes with a low level of delegation such as the OECD¹¹⁸, mainly rely on efforts to raise obstacles to non-compliance in the first place.

Such a strategy focus on 'preventive' control measures, i.e. efforts to inspect and survey behaviour before violations occur, rather than to detect and investigate violations afterwards.¹¹⁹ For instance, the availability of and access to information operates to enhance compliance with international law. The probability that conduct departing from international rules will be discovered may deter parties contemplating violation.

More significantly, self-reporting by participating states can be an early warning system for identifying compliance problem, for example, whether a particular non-compliance is the result of deficits in domestic capacity or ambiguity of the rules or anything else. Therefore the publication and dissemination of self-reported and independently-collected information improves transparency and provides a 'basis for wider critique and evaluation of a party's performance and policies'.¹²⁰ Furthermore, policy review and assessment can arguably exert significant pressure on states to make changes and meet standards.

While effective dispute settlement mechanisms and remedies for aggrieved parties could deter violations from occurring in the future, the demands for dispute settlement would be dramatically reduced if violation preventive rules had been effectively established. Also, a prevention-oriented approach can largely avoid the problems of detecting violations that violators intend to keep hidden, collecting legally legitimate proof of violations, as well as restoring deprived benefits of other parties due to violations in the process of dispute settlement.

Denial of Benefits

Some international organisations especially international financial institutions can induce

¹¹⁸ For detailed discussion, see Section 5.2.2.4

¹¹⁹ See A. J. Reiss, 'Consequences of Compliance and Deterrence Models of Law Enforcement for the Exercise of Police Discretion', (1994), 4 *Law and Contemporary Problems* 47, at pp.83-122 and 300

¹²⁰ See C. A. Flesischhauer, note 116

compliance through their power to confer or deny benefits. The World Bank, for example, makes its detailed policies on various matters legally binding by means of incorporating them in loan agreements as a precondition for the grant of loans.¹²¹ Similarly, the International Monetary Fund can enforce its economic policies by denying further assistance for failure to comply with conditions of its assistance.

Such deprivation of benefits, as pointed by Bothe, is perhaps the most potent sanction that any international organisation can use against a state in the case of non-compliance. The constitution of most international organisations does not provide them with sufficient resources or power for similar sanctions, but still many international organisations can deny technical assistance or rights of participation to violator.

2.5 Conclusion

Although there is no universally agreed definition of the term ‘soft law’, soft law has been defined for the purpose of this thesis as rules of conduct that are formulated in instruments which lack certain core elements of hard law, but nevertheless not devoid of all the legal effects of hard law. It is also recognised that there is no black and white distinction between ‘soft law’ and ‘hard law’, but rather a graduation.

This chapter has examined the concept of soft law in four dimensions, i.e. bindingness; precision; discretion and delegation. International law can be ‘soft’ in terms of its non-binding form; in terms of the vagueness of its rules; in terms of a wide margin of discretion states possess in negotiating and fulfilling their obligations and in terms of its low level of delegation in enforcement.

States can resort to any or all of these four parameters at the soft end of spectrum to produce a soft law instrument as circumstances demands. Except for the issue of bindingness, it is possible for states to choose varying degree of softness along each of the other three dimensions. An international agreement can, however, only be either binding or non-binding and the non-binding

¹²¹ For the discussion on the World Bank rules on public procurement, see Section 6.2.2

form of an agreement by itself leads to soft law obligations.

Next, the role of soft law has been examined in comparison with hard law. It is recognised that soft law instruments are often adopted as a deliberate choice by states. Different types of softness based on the fourfold approach serve different purposes. States would opt for soft law instruments when hard law instruments had proven unachievable but there was still a pressing need for regulation. In the absence of hard law, soft law can act as a second-best in terms of overcoming deadlock and promoting agreement during negotiation, in terms of its possible transformation to hard law and in terms of its internationalisation effect of subject matters.

More importantly, in many case, states might still prefer soft law to hard law even if the latter could be achieved. Soft law can sometime be regarded as a better alternative than hard law. Different types of soft law may produce similar effects of hard law but with reduced costs. Soft law in terms of bindingness, precision, discretion or delegation has been argued to entail less negotiating costs, implementing costs and sovereignty costs associated with the relevant had law. Different types of soft law have their own advantages. Soft law in terms of bindingness, precision or discretion has been argued to have better ability to adapt to changes, whilst soft law in term of bindingness can avoid technical problems with the ratification and termination of binding hard law.

Meanwhile, possible disadvantages of soft law have also been pointed out. Most importantly, it has been emphasised that soft law can only be effective if states comply. The important issue of compliance with soft law has been discussed and it has been examined how different types of soft law can affect states' compliance in view of various factors influencing compliance.

It is a normal practice for states to comply with international agreements they subscribed to. Several reasons have been presented to explain the general propensity for states to comply with their soft or hard international obligations including self-interests; violation costs and a sense of norm. Generally speaking, states are motivated by their own interests to respect their international obligations, and in this sense, it does not make any difference that the obligation is hard or not.

While it is true that the legal consequences flowing from binding obligations may deter

non-compliance by making the choice of non-compliance more costly, states are still reluctant to violate their non-binding soft law obligations for other reasons such as the maintenance of the stability of international legal system and the fear of the bad name of violator.

Although a sense of norm has been presented as an independent reason for explaining states' choice of compliance as the use of binding form appears to impose more normative expectations than the resort to non-binding soft law, no study has concluded that the rate of compliance with binding international norms is greater than that of non-legally binding international rules. As a matter of fact, factors that affect states' compliance with binding instruments and those that affect compliance with nonbinding ones overlap to a large extent.

Then, the factors such as incapability to comply and ambiguity of the rule have been pointed out as sources for states non-compliance. In this regard, soft law in terms of discretion may induce compliance by leaving states with more freedom in choosing their own way of implementing international obligations, while soft law being soft in terms of its ambiguous content may negatively affect states' compliance as the indeterminacy of legislative language creates opportunities for states to shirk their obligations.

Furthermore, appropriate institutional design would arguably improve the likelihood of states' compliance with international law. Measures frequently employed by international regimes to induce compliance have also been discussed including sanction; capacity building; dispute settlement mechanisms; violation preventive measures and denial of benefit.

In conclusion, it has been argued that soft law plays a positive role in contemporary international system despite the possibility of abused use of it.

Chapter 3 An Overview of International Instruments Regulating Procurement towards Market Liberalisation

It is widely believed that domestic discriminatory procurement practice could constitute a significant barrier to trade. Traditionally, governments employed procurement as a policy tool to promote industry development or support social, political, environmental objectives. The evidence shows that governments are unlikely to liberalise their procurement markets unilaterally even if the economic benefits of liberalisation outweigh the costs.¹ In order to open up international procurement market, various arrangements have been concluded at both international and regional levels, under which states promise to accord effective market access in procurement to other Parties.

These international and regional trade instruments share similarities as well as have differences in terms of objectives, approaches, memberships and etc. This chapter provides an overview of current international procurement instruments with a trade objective, mainly, the procurement instruments within the World Trade Organization ('WTO') framework.

3.1 Background

The WTO, formally established in 1995 during the Uruguay Round negotiations, is the successor to the General Agreement on Tariffs and Trade ('GATT') which had functioned since its inception in the wake of World War II as the most important international framework for promoting trade between nations. The primary goal of the WTO is to improve the welfare of the people of its

¹ This is a general phenomenon in the procession of trade liberalisation not only in the area of public procurement but also in other areas. This is mainly because political lobbying tends to push governments towards protectionism. The principle of reciprocity can solve this problem by confronting the protectionists with another lobby that may be equally powerful: the set of firms that gain from greater access to foreign market. However in this case, restrictions on market access could also be utilised as a tool for negotiating reciprocal access with trading partners. The sensitive nature of procurement exacerbated this problem. Procurement could be employed to support non-economic secondary policies especially when other measures like subsidies have been largely ruled out under current international trading system. For detailed discussion, See Trebilcock and Howse, *The Regulation of International Trade* (Routledge, 1999) at pp. 7-17; Jackson, *The World Trading System: Law and Policy of International Economic Relations* (The MIT Press, 1997) at pp.19-25; Hoekman and Kosteck, *The Political Economy of the World Trading System: from GATT to WTO* (Oxford University Press, 1995) at pp.21-23; Arrowsmith, *Government Procurement in the WTO* (Kluwer Law International Ltd, 2002) at pp.11-19

Member countries by liberalising trade across the globe.²

The past 50 years have seen a significant success achieved by the WTO in terms of promoting trade. A series of WTO agreements, as the result of negotiations between its Members, have been reached to eliminate or lower most trade barriers such as import bans, quotas, and tariff etc. Nevertheless, the area of procurement remains largely neglected at the WTO multilateral level.

Within the WTO framework, the major multilateral agreement dealing with trade in goods is the GATT 1994³, which includes general obligations of national treatment and a Most Favoured Nation ('MFN')⁴. However, the national treatment provision in the GATT includes an explicit exception regarding procurement.⁵ Meanwhile, it is widely believed that the GATT MFN obligation is also not applicable to procurement despite the fact that no similar exception can be found⁶. Similarly, procurement are also exempted from main commitments of the General Agreement on Trade in Services (GATS)⁷, which regulates trade in service under the auspices of the WTO.

Although the key obligations of MFN as well as national treatment have been excluded, certain general transparency obligations found in both GATT (Article X) and GATS (Article III) do apply to public procurement practice. Under these rules on transparency, states are mainly required to publish their general measures on trade which concern procurements, such as laws and regulations, rather than relevant information on specific contracts, either in terms of ex ante publication of invitations to bid or ex post announcement of decisions.⁸

The GATT Article XVII is the only other possibility for a general obligation for procurement at

² See Pre-ambles to the Agreement Establishing the WTO, available at <www.wto.org>

³ The GATT was originally negotiated in 1947, and the GATT 1994 is mainly made up of the text of the GATT 1947, certain other pre-Uruguay Round measures relating to GATT and some new agreement reached in the Uruguay round.

⁴ National treatment obligation and the Most Favoured Nation obligation are contained in Article III and Article I of the GATT respectively, which are also regarded as the key principles for the whole WTO system.

⁵ See the GATT Article III:8(a) of GATT

⁶ Favoured by most scholars, for example, Arrowsmith, note 1 at pp. 61-63; Dischendorfer, 'The Existence and Development of Multilateral Rules on Government Procurement under the Framework of the WTO' (2000) 9 *P.P.L.R.* 1 at pp. 15-17; Footer, 'International Developments: GATT: Development in Public Procurement Procedures and Practices' (1993) 6 *P.P.L.R.* 1 at pp. CS193-204. However, some other commentators hold a different standpoint that there should be a limited and special application of MFN obligation in the GATT to procurement policies, for instance, Reich, 'The New GATT Agreement on Government Procurement: the Pitfalls of Plurilateralism and Strict Reciprocity', (1997) 31 *J.W.T.* 1 at pp.125-151

⁷ See GATS Article XIII(2)

⁸ See Arrowsmith, note 1, at pp. 75-76; Low, Mattoo and Subramanian 'Government Procurement in Services' (1996) 20 *W.C.* 5 at pp. 8-10

the WTO multilateral level. The field of state trading⁹ is specifically regulated under this provision in which an exception echoing the procurement exclusion of Article III:8 can also be found¹⁰. That is to say, the non-discrimination provisions of the GATT Article XVII do not apply to the concept of public procurement in this provision as well, i.e. procurement of goods or services for their own use or for use by other government bodies.

The GATT Article XVII.2, however, imposes another obligation to give imports of other WTO Members ‘fair and equitable treatment’¹¹. This obligation applies only to state trading enterprises with regard to ‘imports of products for immediate or ultimate consumption in governmental use’. But there is no equivalent provision regulating procurement of other government bodies which are not state trading enterprises. Also, it is difficult to define the exact meaning of ‘fair and equitable treatment’ in this provision since it has never been interpreted. Some commentators argued that it might amount to a ‘weak’ MFN rule on procurement, while others viewed it as a requirement for WTO Members to afford to other Members reciprocal treatment.¹²

Consequently, public procurement was largely neglected from the scope of the multilateral trade rules under the WTO system, in the areas of both goods and services. Nevertheless, currently there are three avenues through which the WTO seeks to subject procurement to international competition.

- Reviewing the plurilateral Government Procurement Agreement (GPA), seeking to simplify and improve its text to attract new members as well as expand coverage;
- Initiatives towards negotiations on a transparency agreement in procurement at the multilateral level.
- Multilateral negotiations on government procurement in services pursuant to the GATS Article XIII:2;

⁹ The definition of state trading enterprise given by Article XVII.1 of GATT is not very precise. See Davey, ‘Article XVII GATT: an Overview’ in Cottier and Mavroids (ed) *State Trading in the Twenty-First Century* (the University of Michigan Press, 1998)

¹⁰ The wording in GATT Article XVII: 2 is slightly different from that in the GATT Article III:8(a), however it is suggested that these two exclusions should be interpreted, so far as possible, to have the same meaning. See Arrowsmith, note 1, at p.72.

¹¹ See GATT Article XVII: 2

¹² See Arrowsmith, note 1, at pp.73, 74

3.2 Agreement on Government Procurement (GPA)

3.2.1 Introduction, objectives and general approach

In recognition of trade barriers created by discriminatory procurement policies and of the existing ‘loophole’ relating to procurement under the WTO system, the first Agreement on Government Procurement¹³ was originally signed in 1979 and entered into force in 1981, which was amended in 1987. In 1994, the current version of GPA was signed.

In contrast with the old agreement, the GPA 1994 significantly expanded its scope and coverage in the sense of the extension of rules to cover procurement of services as well as goods and to cover sub-central entities and a number of utilities as well.¹⁴ It is estimated that the value of procurement open to international competition has increased by ten times by virtue of this extension.¹⁵ Also, enforcement provisions have been strengthened by introducing challenge procedures under the new agreement.

Moreover, a ‘built-in’ commitment can be found in the current GPA to further negotiations.¹⁶ Accordingly, the GPA has been currently undergoing a formal review since 1997. In 2006, a revised draft text was provisionally agreed supersede the current GPA text, which is subject to a legal check and a satisfactory outcome from negotiations on the expansion of coverage.¹⁷ In essence, the agreement, however, remains a plurilateral agreement, in that its disciplines apply only to those WTO members that have signed it. Therefore the GPA is left outside of ‘the single undertaking’, which all states are obliged to assume as a condition for WTO membership.¹⁸

As declared in its Preamble, the official objectives of the GPA are ‘to contribute greater liberalisation and expansion of world trade; eliminate discrimination among foreign products,

¹³ It is often referred to as the GATT Government Procurement Agreement/Code although it never formed strictly part of GATT. The agreement did not bind all GATT Parties, but only those countries which chose to sign it.

¹⁴ The old GATT Government Procurement Agreement was very limited in scope, covering only supplies contracts (not services or constructions), and only central or federal government entities (not sub-central or local entities).

¹⁵ See *Overview of the Agreement on Government Procurement* available at www.wto.org

¹⁶ See GPA Article XXIV.7(b)

¹⁷ The provisionally agreed revised GPA text can be found at www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm

¹⁸ See Article II:2 of Agreement Establishing the World Trade Organization

services or suppliers; and enhance the transparency of relevant laws and practices'. In other words, the main objective of the GPA is to open up procurement to international competition by ensuring effective market access to foreign bidders.

The principle objective of GPA is connected with that of WTO, the focus of which is fairly different from domestic objectives for regulating procurement such as 'value for money'¹⁹, the maintenance of 'probity', the implementation of secondary policies and so on.²⁰ It is submitted that those domestic goals are clearly outside the scope of the GPA's mandate and also are not appropriate for the WTO to address. Such a difference in objectives can be reflected in the provisions under the GPA. For instance, procurements that are of a value below specified financial thresholds²¹, which are normally not of foreign interests, are not subject to any requirements under the GPA. Further, the implementation of social, environmental policies in procurement is largely restricted by the GPA for covered procurement.

However, there exist close connections among some of these objectives.²² For example, the objective of 'value for money' will be more likely to be achieved should the goals of integrity and international competition be fulfilled. It can be argued that the similarity between GPA and domestic regulations lies in the fact that the tool of transparency is used in both contexts instead of sharing common objectives.²³ Obviously, transparent procedures can contribute to all of the above mentioned objectives by making it more difficult not only to conceal discrimination but also to conceal corruption, and at the same time achieving better value for money.

In order to achieve its objectives, the GPA lays down two basic principals prohibiting

¹⁹ That is, ensuring effective delivery on the best possible term and an efficient procurement process. See Arrowsmith, note 1 at p. 17

²⁰ For detailed information regarding domestic regulatory objectives of procurement, See Arrowsmith, Linarelli and Wallace, Jr, *Regulating Public Procurement: National and International Perspective* (Kluwer Law International Ltd, 2000), Ch. 2

²¹ The GPA applies only to procurements of value not less than relevant thresholds specified in Appendix I to the agreement, which are different depending on the level of government and type of procurement concerned.

²² For detailed discussion of the relations between international and national objectives, see Arrowsmith, 'National and International Perspectives on the Regulation of Public Procurement: Harmony or conflict', in Arrowsmith and Davies (ed), *Public Procurement: Global Revolution* (Kluwer Law International Ltd, 1998)

²³ Arrowsmith, 'Reviewing the GPA: the Role and Development of the Plurilateral Agreement After Doha' (2002) *J.I.E.L.* at p. 766

discrimination in procurement, namely national treatment obligation and MFN²⁴, which are supported by detailed transparency procedural requirements governing the award of contract. These transparency procedures are mainly aimed at making it difficult to conceal discrimination and at facilitating participation by suppliers unfamiliar with the system.²⁵ Under the GPA, the Parties are required to have domestic rules governing contract award procedures in place so as to give effect to their obligations under the GPA.

3.2.2 Coverage

Regarding the coverage of current GPA, whether a procurement contract is regulated depends on three basic parameters: the procuring entity, the type of contract and the contract value. The precise entity covered, contracts covered and the thresholds at which the GPA applies are specified in each Parties' own coverage annexes, which vary from state to state.²⁶ This is because states are only willing to subject certain types of procurement to international competition, which are quite different according to their own particular considerations.

Furthermore, the differences in coverage for different Parties lead to the problem of 'reciprocity'²⁷. Not surprisingly, states would probably hope to give market access concessions to other states only if comparable access is accorded to their own industry by those states in order to exclude 'free riders' benefiting from other Parties' bilateral bargains for free.

Consequently, the agreement covering central government entities was reached on the basis of MFN treatment, while at sub-central government level and in the utilities sectors, Parties departed from MFN treatment and agreed coverage on the basis of strict reciprocity.²⁸ That is to say, most Parties have inserted specific derogations to exempt them from applying parts of the agreement to

²⁴ It should be noted that the national treatment obligation and MFN under the GPA is subject to any trade- restrictive rules to a member's market as a whole. See GPA Article III (3)

²⁵ Arrowsmith, note 23 at p.765

²⁶ The precise coverage for each party is set out in Appendix I to the GPA, which contains a series of separate annexes on coverage for each party.

²⁷ The major problem of the reciprocity is asymmetry in the size of countries so that small countries have little to offer to large ones in terms of export potential, see, Hoekman and Kosteck, note 1 at pp. 27-30. This reciprocity approach could arguably be an important reason for limited participation to the GPA by developing countries.

²⁸ Graaf, G.D. and M. King, 'Towards a More Global Government Procurement Market: the Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round', *I.L.* 29 (1995), at p. 446

other Parties not offering reciprocal coverage. Under the principle of reciprocity, Parties are, in effect, invited to work out bilaterally the economic equivalence of concessions between themselves; the GPA thus only serving as a suggested framework within which such bilateral deals are concluded.²⁹

As Graaf and King pointed out³⁰, reciprocity-based derogations to MFN obligations are instrumental in helping to expand the coverage of GPA since offers would have been scaled down to the level of the lowest common denominator in order to achieve balance on the basis of MFN treatment. However, Reich held different standpoint that there are immense problems connected with this tit-for-tat approach based on the idea of ‘fair trade’ instead of ‘free trade’. Also, he proposed ‘the common objective approach’ as a better way to succeed in reaching a broad coverage without compromising on the MFN principle.³¹

While the MFN approach has been proved to be successful in achieving extensive tariff cut under the GATT negotiations, it might be questionable to what extent such a common objective could be achieved and whether a mechanism of determining how each party’s offer could meet such a common objective could be agreed given the fact that procurement is much more complicated and sensitive than the issue of tariff cut to most states.

As pointed out by Arrowsmith, a precise assessment of whether the beneficial effects of reciprocal derogations from MFN under the GPA outweigh their detrimental effects is difficult in the absence of empirical evidence on trade diversion and trade creation effects.³²

3.2.3 Secondary Policies

Many GPA Parties have traditionally used procurement as an instrument to promote industrial, social, environmental policies, and the GPA also provides its Members with some scope to pursue such secondary policies. It seeks to strike an appropriate balance between free trade goals and the

²⁹ Reich, note 6 at p.137

³⁰ *ibid*

³¹ Reich, note 6

³² Arrowsmith, note 1, at pp.111-112

legitimate domestic policies concerns.

Due to its flexible approach to coverage, states may exclude particular entities or type of contracts from the coverage of the agreement if they wish to utilise the procurement of those entities or contracts to promote secondary policies. It is also possible for states to negotiate specific derogations to cover certain programmes using procurement as a policy tool though it is envisaged that such derogations are temporary. Many Members such as the U.S., Canada and Japan have derogations for specific existing programmes. For instance, the agreement does not apply for the U.S. to set asides for small and minority businesses for all covered entities.³³

However, the GPA rules can restrict the implementation of secondary policies for covered procurement practices of its Members. Firstly, such secondary use of procurement will be caught by the national treatment rule in Article III if it has a discriminatory effect. Apparently, measures to support non-competitive domestic industries are *prima facie* prohibited for covered procurement.

Furthermore, even if there is no discrimination involved, the rules on contract award procedures may affect a procuring authority's ability to employ procurement as a policy tool. Taking qualification conditions as an example, Article VIII(b) expressly requires that conditions of qualification are limited to those 'essential to ensure the firm's capability to fulfil the contract', and thus procuring entities would probably not be able to disqualify a firm which does not meet certain social or environmental criteria such as providing equal opportunity for women or having a good environmental record.³⁴

Additionally, the GPA also expressly prohibits the use of offsets³⁵ subject to special provisions for developing countries. However, it is not always clear in terms of the compatibility of certain secondary use of procurement with the GPA. For example, it is unclear whether social or environmental considerations can be used as contract award criteria. Article XIII4 allows a contract to be awarded to the tender which is the 'most advantageous' provided that the specific criteria for

³³ The GPA, U.S. Appendix 1, General Notes

³⁴ See Article VIII.

³⁵ For the meaning of offset under the GPA, see the GPA Article XVI footnote 7.

evaluation are set forth in advance, but there is no further indication on what kind of criteria may be used in this context.³⁶ Such uncertainties in the law create practical problems for purchasers and governments.

3.2.4 Soft Law & Hard Law Issues

3.2.4.1 Bindingness

The first dimension of soft law discussed in Chapter 2 was the non-binding nature of an agreement. In this regard, the overall context of the GPA and its negotiating history reflect the intent of the Parties to create legally binding obligations governed by international law. In the early 1960s, the issue of government procurement was initially addressed at the Organisation on European Economic Cooperation, the predecessor of the Organisation for Economic Cooperation and Development ('OECD').

Later the negotiations for international procurement rules were transferred to the GATT, which was remarkable for its rule-making focus, legally-binding nature and dispute settlement system with trade sanctions. The transfer of the work on procurement from the OECD forum to the GATT may indicate negotiating parties' intention to produce binding obligations. In the words of Blank and Marceau, 'in bringing the work on government procurement from the OECD to the GATT, Governments made a choice to opt for enforceable and multilateral disciplines on government procurement, rather than anything weaker',³⁷

Moreover, the legislative language of the GPA text also implies that the instrument creates legally binding obligations. The National Treatment and Non-discrimination clause is illustrative of this point: it provides 'each Party *shall* provide *immediately* and *unconditionally* to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less

³⁶ As a result, it can be argued that secondary criteria can be considered, however the EC and Japan are arguing that this provision is limited to economic criteria. See Massachusetts-Myanmar case, available at http://www.wto.org/english/tratop_e/gproc_e/disput_e.htm

³⁷ See Blank and Marceau, 'the History of the Government Procurement Negotiations since 1945' (1996) 4 *P.P.L.R.* 77 at pp. 86-91 & 108

favourable than...'(Article III (1), emphasis added).

As for legal procedures on the ratification of treaties, the agreement has undergone the traditional legal formalities of signature, accession, and entry into force³⁸, and has been deposited with the Director-General of the WTO and registered with the United Nations³⁹. Undoubtedly, a legally binding obligation is imposed on Member governments to abide by the rules for covered procurement.

However, as previously argued in Chapter 2, some treaty rules may create little or no obligations owing to their lack of precision or award of too much discretion, which consequently negate the general presumption of being binding treaty rules. Under the GPA, it can be argued that its four general principles governing national challenge procedures are not legally binding by themselves due to their lack of precision.⁴⁰ The wordings of these principles are too vague to ascertain their precise content, and it remains unclear if any violation claim can solely based on them without further resorting to more specific rules (See Section 3.2.4.2).

Another possible example is the GPA's provisions on Special and Differential Treatment (S&DT) for developing countries. As will be examined in 3.2.4.3, the rules requiring developed countries to negotiate concessions for the interests of developing countries confer a very broad discretion for developed countries over whether or how to implement them. Therefore the bindingness of these S&DT provisions might be largely negated by their discretionary feature.

3.2.4.2 Precision

The second dimension of soft law is precision, referring to the degree of ambiguity of language defining parties' obligations. In this respect, detailed rules have been laid down in the GPA to govern the conduct of the contract award procedures, which mainly focus on the pre-contractual stage from invitation to participate to award of contracts.

³⁸ GPA Article XXIV (1)

³⁹ GPA Article XXIV (14) (15)

⁴⁰ See Arrowsmith, note 1 at pp.388-391

Procuring entities are required to award contracts mainly through competitive tendering procedures, i.e. either ‘open tendering procedures’ or ‘selective tendering procedures’⁴¹, with the exception of ‘limited tendering procedures’⁴² permitted under exceptional circumstances. Minimum standards for the conduct of the competitive award procedures are fairly elaborated including minimum time-limits for different stages of the procedures (Art. XI); minimum information required in tender documentation (Art. XII); rules on qualification of suppliers (Art. VIII); and rules on award criteria and the evaluation of bids (Art. XIII).

The GPA contains rules on minimum time-limits for tendering and for other phases of the procedure. As a general principle, it requires that suppliers must be granted a sufficient period of time to prepare and submit their tenders, with an illustrative list of factors procuring entities shall take into account in setting time-limits such as the complexity of the intended procurement and the extent of subcontracting anticipated.

In addition to this general principle, the GPA also lays down precise rules on certain minimum deadlines that must be allowed for the preparation, submission and receipt of tenders. For example, Article XI.2(a) provides that generally in open procedures the period for the receipt of tender shall not be less than 40 days from the date of publication of invitation to participate. Also, Article XI.3 specifies the circumstances in which the standard time-limit may be reduced. The first case, for example, is when a separate advance notice of the procurement has been published within a specified time and the notice contains the information required, the 40-day period can be reduced so long as the period chosen is sufficiently long to enable responsive tendering, which in general shall not be less than 24 days, but in any case not less than 10 days.

It can be seen that the GPA provisions on time-limits are formulated as general principles and precise rules rather than general standards alone. In contrast, the issue of time-limits could potentially be dealt with in a less precise way. For example, vague terms like ‘sufficient time-periods’ or ‘a reasonable period’ without further elaborations have been suggested for the

⁴¹. For the meaning of open tendering procedures under the GPA, see the GPA Article VII(3)

⁴² For the meaning of limited tendering procedures under the GPA, see the GPA Article VII (3)

time-limits provisions of the proposed transparency agreement (see Section 3.3.5.2).

However, it is not necessarily true that all the GPA obligations are highly precise and dense. The degree of precision varies widely among its provisions, and some provisions are found pretty vague and general. For example, the GPA rules governing qualification criteria are quite general, merely requiring that ‘any conditions for participation shall be limited to those which are essential to ensure the firm’s capability to fulfil the contract in question’.⁴³ Apart from this general standard, there is no further elaboration or illustration on exactly what kind of criteria can be regarded as ones ‘essential to ensure the firm’s capability to fulfil the contract’.

Compared with the GPA’s general approach in this respect, more precise provisions are included in other regimes. For instance, the EC public sector directive contains a highly detailed list of criteria which can be considered at the qualification stage (see Section 3.1.4.2).

There are also the GPA rules which are too vague to ascertain their content. The four general principles governing national challenge procedures can furnish a good example. The GPA Article XX.2 provides that ‘Each Party shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest’. Judging from the vague wording, it is difficult to find out any concrete obligation this provision alone entails. In contrast, as will be discussed in Section 4.1.4.2, the EC principle of effectiveness on remedies is also couched in similarly vague language, but precise obligations have been developed from this principle by the European Court of Justice (‘ECJ’) through judicial interpretation.

However, in the case of the GPA’s general principles on remedies, a lack of relevant disputes brought under the WTO prevents its Dispute Settlement Body (‘DSB’) from making any interpretations of the vague principles. Nevertheless, even if there were plenty disputes, it is still unlikely that the DSB would approach the issue in a similar way as the ECJ did taking into account their different interpretation methods (see Section 3.2.4.4a and Section 4.1.4.4a below).

⁴³ See the GPA Art. VIII(a)

Consequently, it has been argued that these GPA principles themselves are only enforceable to the extent that they are given effect through other more specific provisions.⁴⁴

Despite its varied level of precision among provisions, the GPA possesses a fairly high level of details in general. Although this generally detailed approach can clarify the precise requirement of obligation and promote certainty, many problems can be found in the detailed text of the GPA including textual errors, omission, lack of coherence, and need for updating.⁴⁵

It is proposed by Arrowsmith that the current text of the GPA should be radically simplified and reformulated in terms of general principles rather than detailed requirements.⁴⁶ In essence, this proposal opts for a lower degree of precision to resolve many difficulties with the current GPA. By reducing its current level of detail, the agreement would be softened along the dimension of precision. However, it is still possible, as pointed out by Arrowsmith, to retain many of the advantages of detailed rules in other ways, notably by issuing guidance.⁴⁷

As mentioned in Section 3.2.1, the GPA has been undergoing a formal review and a revised legislative text was provisionally agreed. The first phase of review is exactly aimed at simplifying and improving the non-market-related provisions in the GPA text.⁴⁸

3.2.4.3 Discretion

The third dimension of soft law is the discretion, referring to the degree of discretion states have in negotiating and implementing their obligations. As mentioned earlier in Section 3.2.1, the GPA remains a plurilateral agreement, that is to say, states in theory have absolute discretion in deciding whether to sign the GPA when acceding to the WTO. However the role of the GPA has been changing gradually: a commitment to GPA accession now is often requested for prospective new

⁴⁴ Arrowsmith, note 1 at pp.389-391

⁴⁵ For a detailed analysis of the current problems, see Arrowsmith, note 1, chs 8-12

⁴⁶ See Arrowsmith note 23 at pp.775-779

⁴⁷ Ibid at p.777

⁴⁸ The review has three distinct aims: the first is simply to improve the text of agreement; the second aim is to expand coverage by existing parties and the final aim is to remove existing discriminatory restrictions on coverage.

WTO members as a condition of WTO accession.⁴⁹

Although the GPA membership is theoretically not a precondition for accession to the WTO, certain existing WTO members mainly parties to the GPA such as the U.S. and the E.C. insist that prospective new WTO members should be committed to join the GPA upon accession to the WTO. As a result, 18 out of 21 new WTO members since 1995 have provisions in their respective Protocols regarding their commitments to accede to the GPA.⁵⁰ For example, China, upon its accession to the WTO, has undertaken an obligation to become an observer to the GPA and to initiate negotiations for the GPA membership as soon as possible⁵¹, and more recently it had further committed to commence formal negotiations by tabling an Appendix I offer of coverage no later than December 2007.⁵²

Saudi Arabia could serve as another example: it was obliged to initiate negotiations for the GPA membership upon its accession to the GPA, and also confirmed that it would complete the negotiations within a year of accession.⁵³ Currently, there are eight WTO members in the process of negotiating accession to the GPA, all of which are these new WTO members with a commitment for the GPA membership upon their accession to the WTO.⁵⁴

Moreover, other measures have also been taken by the existing Members to speed up accession. For example, 'punitive measures' are even taken by the U.S. against non-members to the GPA by

⁴⁹ Robert Anderson, as Counsellor of WTO, addressed this changing role of the GPA at his presentation named 'Government Procurement in the WTO: Overview of Ongoing Activities' at School of Law, University of Nottingham, 16 March 2006

⁵⁰ They are Albania, Armenia, Bulgaria, China, Croatia, Estonia, the Former Yugoslav Republic of Macedonia, Georgia, Jordan, Kyrgyz Republic., Lithuania, Latvia, Moldova, Mongolia, Oman, Panama, Saudi Arabia, and Chinese Taipei. There are only 3 new members left out: Ecuador did not mention the GPA membership issue in its Protocol, while Cambodia and Nepal expressly indicated their intention not to take part in the GPA in their Protocol. Protocols of accession for new members since 1995 are available at http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#arm

⁵¹ See the Report of the WTO Working Party on the Accession of China (1 October 2001), WT/ACC/CHN/49, para. 337-341. In China's Protocol on Accession, it is explicated stated that this Protocol including the Commitments referred to in paragraph 342 of the Working Party Report shall be an integral part of the WTO Agreement. See Protocol on the Accession of the People's Republic of China 30 (November 2002) WT/MIN(01)/3, Part I 1(2)

⁵² See the US Department of Commerce, *The U.S.-China Join Commission on Commerce and Trade (JCCT) Outcomes on U.S. Requests*. (April 11, 2006). Available at http://www.commerce.gov/opa/press/Secretary_Gutierrez/2006_Releases/April/11_2006_JCCT_Outcomes_Factsheet.htm

⁵³ See Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization (1 November 2005), WT/ACC/SAU/61, para.229-231. Accession of the Kingdom of Saudi Arabia (11 November 2005), WT/L/627, Part I 1(2)

⁵⁴ They are Albania, Bulgaria, Jordan, the Kyrgyz Republic, Moldova, Oman, Panama and Chinese Taipei.

essentially barring them from all U.S. federal procurement.⁵⁵ Consequently, state's discretion over whether to join the GPA has been significantly curtailed.

So far as coverage of the GPA is concerned, there is no uniform coverage for states under the GPA, and they thus enjoy a broad discretion in negotiating their coverage lists. Each state is allowed to freely decide which entities should be covered, the types of contracts covered and the precise thresholds above which the contracts are covered, provided its offer is acceptable to other negotiating parties. In contrast, under the EC procurement rules, as will be discussed in Section 4.2.1.2, states' discretion in negotiation is substantially restricted by the uniform coverage applied equally to all EC Members.

The difference in coverage under the GPA may arguably result from the great difference in the extent to which different signatories were prepared to subject their procurement to international regulation. The GPA would probably be an agreement very narrow in scope had it followed the EC's approach to adopt a uniform coverage for all signatories, as was the case with old GATT Government Procurement Agreement.⁵⁶

Regarding states' discretion in the implementation stage, the GPA does not attempt to regulate the contract award process in an exhaustive manner, and instead, it merely lays down minimum procedural standards under which states have a significant discretion to tailor their own procurement rules to the needs of specific domestic objectives.

As with the issue of procurement methods, the GPA requires covered contracts to be awarded by using either 'open tendering procedures' or 'selective tendering procedures', which are essentially a kind of competitive tendering procedures; however, in certain clearly defined exceptional circumstances the GPA also allows procuring entities to use more informal procurement method without a competition, namely 'limited tendering'. Nevertheless, Parties are free to apply more stringent rules than the GPA rules, for example, states can require the use of open tendering as the

⁵⁵ See 19 US Code 2512(a), titled 'Authority to Bar procurement From Non-Designated Countries'. Available at http://assembler.law.cornell.edu/uscode/html/uscode19/usc_sec_19_00002512----000-.html

⁵⁶ See the old GATT Government Procurement Agreement, Art.1, available at http://www.wto.org/english/docs_e/legal_e/prevto_legal_e.htm

sole procurement method, even where selective tendering or limited tendering is permitted under the GPA.

Taking the issue of award criteria as another example, Article XIII (4) states that contracts shall be awarded to ‘either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous’. However it does not provide clear guidance on the scope of the acceptable non-price criteria, nor provide any examples to illustrate what types of criteria are allowed to be considered. A wide range of award criteria can surely be included by procuring entities such as technical features, delivery conditions and after-sale services, however the range is interpreted.

Moreover, unlike the EC directives (see Section 4.1.4.3), the GPA doesn’t expressly require the criteria linked to the subject-matter of the contract, and then states can arguably include award criteria unrelated to the subject-matter. Apparently, a broad discretion is given to states here by allowing them to choose different sets of award criteria for different contracts.

Apart from a fairly high degree of discretion accorded to all Members, it seems that developing countries are granted with an even higher degree of discretion in negotiating and implementing their obligations. S&DT provisions for developing countries are included in the GPA to accommodate states with different level of development.

First of all, developed countries are required to give developing countries concessions in the process of negotiations or in the later modification of their coverage lists after their accession to the agreement. Such provisions, however, deliberately leave a very broad discretion for developed countries, which are arguably no more than a set of ‘best-endeavour’ undertakings. The essentially soft nature of these obligations is apparent from the language in which they are couched. For example, Article V.3 provides that ‘developed countries, in the preparation of their coverage list under the provisions of this agreement, *shall endeavour to* include entities procuring products and services of export interest to developing countries’ (emphasis added).

Although the presence of word ‘shall’ in treaty provisions may theoretically imply binding

obligations, or mandatory formulations in the classifications made by the WTO Secretariat⁵⁷, considerable discretion can still be allowed in their implementation. As for this provision, soft law obligations are disguised in a hard law form: it may still impose a legally binding obligation but only to the extent that states make 'best-endeavour' to include entities of export interests to developing countries.

Consequently, the effectiveness of these provisions largely depends on the willingness of developed countries. As criticised by Davies, all these special provisions failed to establish any firm guarantees for the treatment of developing countries because they only amount to a vague commitment of good faith to the developing countries and any benefit derived from them depends very much on the negotiating attitude taken by the developed countries.⁵⁸ As a result, the GPA S&DT obligations are very soft in the sense that developed country parties possess a remarkably high degree of discretion over whether or how to implement them.

Secondly, developing countries, with lower levels of motivation and readiness for international regulation on procurement, are supposed to be granted with more discretion by these GPA S&DT provisions. For instance, these provisions seek to impose less stringent obligations on developing countries by allowing them to negotiate derogations from the rules on national treatment for certain entities, products or services included in their coverage lists.⁵⁹ Therefore developing countries might be allowed to employ preferential procurement policies in sectors where continued maintenance of such preferences is vital.

Similarly, the GPA generally prohibits offsets, but Article XVI.2 allows developing countries to negotiate for the use of offsets at the time of accession to the GPA. However, it only states a kind of

⁵⁷ Regarding the binding nature of S&DT provisions in the WTO agreements, the WTO Secretariat classifies the 155 S&DT provisions as either mandatory or non-mandatory: formulations containing the word 'shall' are considered mandatory, whilst those containing the word 'should' are non-mandatory. See the WTO, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, 2001 WT/COMTD/W/77/Rev.1/Add.1. Moreover, it was noted by the Secretariat that even 'shall' formulations, which are mandatory according to their clarifications, could be rather limited in their binding character as they may allow considerable flexibility in their implementation. See the WTO, *Non-Mandatory Special and Differential Treatment Provisions in WTO Agreements and Decisions*, 2002, WT/COMTD/W/77/Rev.1/Add.3

⁵⁸ Davies, 'The World Trade Organization Agreement on Government Procurement: Current Initiatives to Expand Membership' (1997) 18 (5) *European Competition Law Review* at p 303

⁵⁹ GPA Article V.4

possibility rather than an automatic right for developing countries to obtain such a higher level of discretion.

The provisionally agreed GPA text goes a step further by clearly specifying certain transitional measures developing countries can negotiate for when acceding to the agreement, including price preference, offset, phased-in addition of specific entities and a higher threshold; and/or an implementation period to delay the application of any specific obligation.⁶⁰

However, it can be argued that such measures still fail to guarantee a higher degree of discretion for developing countries because whether or to what extent a developing country can enjoy such a transitional period is subject to the consent of other parties during negotiations.

In the negotiating process, developing countries have to conduct hard bargaining in order to benefit from such soft law provisions, and whether a higher degree of discretion can be obtained solely relies on the attitude of developed countries. In fact, the higher discretion given to developing countries in negotiation is largely restricted by their limited bargain power, simply because they have less to offer under the principle of reciprocity. In practice, most developing countries may find it difficult to insist on leaving out certain entities or obtaining derogations from the annexes given their limited bargaining power.

It is impossible for applicant states to accede to the GPA without the admission of the existing Parties. Ironically, the schedule offers of new entrants now receive a great deal of more scrutiny than the schedules of existing members, which makes it more difficult for new entrants especially developing countries to join in the GPA. One member of the old GATT Government Procurement Agreement, reflecting a majority view, stated that it was not willing to accept 'purely symbolic offers'.⁶¹

Later, in the Uruguay Round, the demands for extensive coverage in relation to developing countries were further stiffened, making them not much different from their developed

⁶⁰ The new GPA text Article IV(3)(4)

⁶¹ Hoekman and Mavroidis, 'Multilateralizing the Agreement on Government Procurement' in Hoekman and Mavroidis (ed), *Law and Policy in Public Purchasing: the WTO Agreement on Government Procurement* (The University of Michigan Press, 1997) at p.310. endnote 14

counterparts.⁶² Consequently, terms for accession set by applicant states and those expected by the existing parties were too wide and in the end discouraged them from making additional offers.⁶³ Taking India as an example, India initially put on record its intention to join the old GATT Government Procurement Agreement but ended up with its trading partners finding its offer unsatisfactory,⁶⁴ and more recently India explicitly showed its position that it was not ready to negotiate any agreement beyond transparency.⁶⁵

The issue of technical assistance is also included in the GPA S&DT provisions. The GPA Article V.8 requires ‘each developed country party shall, upon request, provide all technical assistance *which it may deem appropriate* to developing country parties’ (emphasis added). Again, it is the case that soft obligations are dressed up as hard law by using the word ‘shall’. The mandatory nature of these ‘shall’ formulations is nearly diminished by the use of subjective language like ‘deem appropriate’, which makes whether or how to provide technical assistance to developing countries at the sole discretion of developed countries.

3.2.4.4 Delegation

3.2.4.4a Inter-governmental Mechanism

The final dimension of soft law is delegation referring to the degree to which states have delegated the power to a third party to implement rules. As with the GPA, the WTO’s general Dispute Settlement Mechanism (‘DSM’) is applicable if not superseded by certain special provisions contained in GPA Article XXII, which responds more closely to the specific nature of procurement disputes.

The preferred objective of the WTO DSM is to secure a positive solution mutually acceptable to

⁶² Reich, *International Public Procurement Law: the Evolution of International Regimes on Public Purchasing* ((London: Kluwer Law International, 1999), at p. 351

⁶³ Blank and Marceau, note 37 at p.99

⁶⁴ *ibid*

⁶⁵ Srivastava, *India’s Accession to the GPA, Identifying Costs and Benefits* (1999) available at http://www1.worldbank.org/wbiep/trade/services_files/Srivastava.pdf

the parties concerned and consistent with covered agreements.⁶⁶ Accordingly, the process for setting disputes starts with consultations between the Parties to the dispute in order to find a satisfactory solution without resorting to litigation.

Apart from mandatory consultation⁶⁷, good offices, conciliation and mediation may be undertaken voluntarily should the Parties so agree. The non-judicial or diplomatic nature of such consultations is, however, shadowed by the availability of formal adjudications. The WTO DSB, consisting of all Members, is delegated with the power to adjudicate disputes and to authorise coercive measures.⁶⁸

If consultations have failed to settle the dispute, the complaining party may request adjudication by a panel, and then appellate review in the case of appeal. The request for establishment of a panel initiates the phase of adjudication. By virtue of the rules of negative consensus, the complainant has a firm guarantee that the panel will be established if it so wishes.⁶⁹ Panels are a sort of quasi-judicial bodies in charge of adjudicating disputes between members in the first instance.

Rules and procedures governing the selection of panelists are laid down to insulate the panel from political or governmental influence. For example, Art.8 of the DSU provides that panelist nominations will be proposed by the Secretariat with a view to ensuring the independence of members, a sufficiently diverse background and a wide spectrum of experience, and the parties to the dispute may only oppose the nomination for 'compelling reasons'.⁷⁰

The Uruguay Round Agreement introduced a more judicialised or 'harder' DSM. A number of reforms were adopted towards the 'hard' end of the enforcement spectrum. Arguably, the most important innovation is that the DSU removed the right of individual states, especially the one whose measure is being challenged, to block the establishment of panels and the adoption of a

⁶⁶ See the DSU Art.3.7

⁶⁷ See the DSU Art.4. However, this requirement seems to be a procedural formality rather than any meaningful obligation in practice.

⁶⁸ See the DSU Art.2

⁶⁹ The only possibility to prevent the establishment of a panel is a consensus in the DSB against the establishment, but this is never going to happen unless the complainant itself is willing to join in that consensus. See the DSU Art.6

⁷⁰ In practice, however, Member States use this clause quite extensively and oppose nominations very frequently, and in such cases, the Secretariat will normally propose other names without reviewing whether the reasons given are truly 'compelling'. See the WTO, *A Handbook on the WTO Dispute Settlement System*, (Cambridge University Press: 2004) at p.51

ruling.⁷¹ Under the previous GATT DSM, it was difficult for the DSB to deliberate and reach legal judgments independently of governmental influence. Now, the DSB is empowered to automatically establish panels and to adopt panel rulings unless there is consensus not to do so.

Another important reform of the Uruguay Round Agreement is the introduction of an appeal system. Unlike panels, the Appellate Body is a permanent body delegated with the task of reviewing the legal aspects of the reports issued by panels. Like the panel report, the appellate report can only be rejected by a negative consensus of the DSB.⁷² The establishment of the Appellate Body reflects a judicialised character of the WTO DSM – the separation of the judicial power from other organs.

Regarding the discretion possessed by the DSB in interpreting the WTO rules, the DSU provides that the DSB serves ‘to preserve the rights and obligations of members under the covered agreements, and to clarify the existing provisions’ and its recommendations and rulings ‘cannot add to or diminish the rights and obligations provided in the covered agreements’.⁷³ The DSU also states that all solutions to matters formally raised shall be consistent with those agreements and shall not nullify or impair benefits under those agreements or impede the attainment of their objectives.⁷⁴ By adhering the DSB rulings to treaty texts, states choose to delegate the task of disputes settlement to third-party tribunals with applying the agreed rules instead of resolving disputes through institutionalised bargaining. This can arguably provide predictability and certainty for the WTO system.

The recommendations or rulings adopted by DSB are binding upon the parties concerned. The use of the term ‘recommendation’ by no means implies that the party is given discretion to decide whether to follow the recommendation. As argued by Jackson, the general effect of an adopted dispute settlement report has ‘by practice the effect of providing an international legal obligation for disputants to obey’.⁷⁵ The DSB monitors the implementation of adopted recommendations or rulings,

⁷¹ See the DSU Art.16.4 and Art.17.14

⁷² See the DSU Art.17.2&3

⁷³ See the DSU Art. 3.2

⁷⁴ See the DSU Art. 3.5

⁷⁵ See J. H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on treaty law and economic relations* (2000: Cambridge University Press) at p.127. Most of scholars agree with Jackson that the rulings of an adopted DSB report has

with the delegated power to authorise retaliation in the case of non-compliance with a ruling.⁷⁶ A state that does not comply with the DSB recommendations or rulings risks serious consequences - it either has to provide compensation acceptable to the complainant or otherwise face retaliatory countermeasures.

However, departing from the general provisions under the DSU, no cross-retaliation is allowed in relation to the GPA, that is to say, a dispute under the GPA cannot result in the suspension of concessions under any other WTO agreement, and nor can a dispute under any other WTO agreement lead to the suspension of concessions under the GPA.⁷⁷

Also, due to its inter-governmental nature, the parties in proceedings under the WTO DSM are its Member State governments. Private individuals or companies and other international organisations do not have direct access to the WTO DSM. In practice, individuals and groups may still exert influence on a state government with respect to the triggering of a dispute, but they must do so by convincing the government to support their claim as a state claim against another government. Also, the GPA Article XXII.3 makes it clear that only governments that are parties to the GPA may invoke the DSM in relation to the GPA.

3.2.4.4b National Challenge Procedures

The most distinctive feature of the GPA in contrast with the majority of other WTO agreements is that a novel concept of challenge procedure⁷⁸ was introduced to allow private bidders to challenge decisions taken in award procedures covered by the agreement before domestic review bodies and to seek redress for the infringement of rights.

Under the GPA Article XX, each signatory is required to provide in its domestic legislation for

the actual effect of an international legal obligations, but some disagree, asserting the DSB rulings may only amount to mere recommendations as there is no obligation under the GATT to obey the results of the dispute settlement procedures.

⁷⁶ See the DSU Art. 22

⁷⁷ See the GPA Art. XXII:7

⁷⁸ Detailed discussion on the national challenge procedure under the GPA see Arrowsmith note 1 at pp. 384-405; Footer, 'Remedies under the New GATT Agreement on Government Procurement' (1995) 4 *P.P.L.R.* 80; Reich, note 62, pp. 312-316; Dendauw, 'New WTO Agreement on Government Procurement: an Analysis of the Framework for Bid Challenge Procedures and the Question of Direct Effect' (2000) 18 *J.E.N.R.L.* 254.

procedures before a national court or an independent review body to allow the aggrieved supplier to challenge the tender procedure or its award. This provision is new in that it marks a ‘hard law’ feature of the GPA in terms of delegation. It is a rare example in the WTO system where private parties can invoke WTO rules before domestic courts.⁷⁹ By providing direct access for aggrieved suppliers to domestic legal adjudication, the GPA takes advantages of well-established national judicial systems to enforce its rules.

Historically, the issue of DSM was one of the most controversial issues during the GPA negotiations.⁸⁰ The fact that consensus was finally reached on a relatively stringent approach could be mainly attributed to the specific features of procurement, which have been described as being ‘often a single event, costly to reverse, and where modifications to national rules of general application would not necessarily provide adequate guarantees of non-recurrence’⁸¹.

Another important reason for including such a different approach from ‘normal’ WTO DSM is probably explained by the GPA’s plurilateral character and limited membership, especially the fact that most of the GPA’s founding members such as the EC member states and Norway were already obliged to provide challenge procedures under regional agreements.⁸²

It is required that such national challenge procedures must be ‘non-discriminatory, timely, transparent and effective’.⁸³ It might be interesting to mention the time/efficiency requirement of procedures. It provides that the challenge procedure shall normally be completed in a timely fashion so as to preserve the commercial and other interests involved.⁸⁴ Unless speedy action can be taken, inconsistencies with the agreement would probably be tolerated as firms will not have an interest in bringing cases.

⁷⁹ The WTO system does not, as a rule, allow for private parties to bring an action against a contracting party to the WTO. The enforcement of most WTO agreements mainly rely on inter-governmental measures, which means the aggrieved private party’s only chance to seek redress is to get its own home state to bring the violating state before the panel established under the WTO’s DSU. Private challenge procedures are required under certain WTO agreements but none go as far as the GPA. See Arrowsmith note 1 at p. 385

⁸⁰ See Blank and Marceau, note 37 at pp. 93-94.

⁸¹ Low, Mattoo and Subramanian, note 8 p. 16

⁸² See Arrowsmith, note 1 at pp. 404-405

⁸³ GPA Article XX. 2

⁸⁴ GPA Article XX. 8

This concern is also reflected in the available remedies⁸⁵ under the GPA, among which rapid interim measures aimed at correcting breaches and at preserving commercial opportunities would be provided. Review bodies have certain discretion in deciding whether such measures should be granted on a case by case basis, and may normally refuse to grant an interim measure in the case of overriding adverse consequence for the interests concerned including public interest.⁸⁶ Furthermore, the award of interim measures and expedition in completing procedures are closely connected for the reason that the longer it takes to complete the procedures, the more serious the adverse consequences for those affected by a delay.⁸⁷

Although such a private challenge mechanism is deemed to give more teeth to the agreement, some criticisms have been made. For instance, Reich claimed that it was very regrettable that compensation awarded is limited to costs for tender preparation or protest only but not lost profits because aggrieved firms might be very reluctant to complain against violations of the agreement and thus the objective to provide ‘effective’ challenge procedures would not be achieved.⁸⁸ Another concern is the possibly divergent interpretations of the GPA rule. All Parties have been put in a position to interpret the agreement under such a private challenge system and consequently much depends on the diligence and the good faith of Parties.⁸⁹

Lastly, it is important to note that any remedies under national challenge procedures will only be available to aggrieved suppliers if the relevant state has incorporated the GPA rules into national law. In most national systems that do not themselves give an international agreement direct effect, the agreement cannot be enforced unless the relevant national legislation has been adopted to implement it.

Consequently, aggrieved suppliers would get no remedies by bringing GPA-inconsistent procurement practices before their national review body unless such practices are prohibited under

⁸⁵ Under GPA XX.7, three remedies should be made available: interim measures, correction and compensation.

⁸⁶ *ibid*

⁸⁷ See Arrowsmith, note 1, at p.398

⁸⁸ See Reich, note 62 at p. 311

⁸⁹ Hoekman and Mavroidis, note 61 at p.69

national law. For example, if a state maintains in its national legislation discriminatory measures inconsistent with the GPA and has no general recognition of the overriding effect of treaty rules over national rules there will be no remedies. This represents a big difference between the GPA rules and the EC rules, which will be discussed in Section 4.1.4.4b.

3.3 Agreement on Transparency in Government Procurement

3.3.1 Introduction

Although it does not seem possible to simply multilateralise the current GPA in the short term, major developed countries continue to make enormous efforts to gain market access for their industries to international procurement market, especially to the multi-billion dollar government procurement business in developing countries.⁹⁰

The view of negotiating an interim agreement in procurement at the multilateral level was raised during the preparation for the first ministerial meeting of the WTO. At the 1996 Singapore Ministerial Conference, the areas of possible future negotiations including procurement were agreed⁹¹, and a Working Group on Transparency in Government Procurement ('the WGTGP') was also set up with the mandate to 'conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement'.⁹²

After conducting a study of transparency-related provisions of international instruments as well as drawing elements from regional initiatives, the WGTGP identified twelve issues⁹³ that could form the contents of a possible transparency agreement.⁹⁴ However there was a wide division between the

⁹⁰ See Khor, 'The Real Aim of the Majors' available at <www.twinside.org.sg/title/real-cn.htm>

⁹¹ These issues are the so-called Singapore issues, including trade and competition; trade and investment; transparency in government procurement and trade facilitation.

⁹² See Singapore Ministerial Declaration, adopted on 13 December 1996, WT/MIN(96)/Dec, para.21. available at <http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm>

⁹³ For those issues identified by the WGTGP, See the WGTGP, *List of the Issues Raised and Points Made: Informal Note by the Chair*, 5th edition, 24 September 1999, Job(99)/5534. Several WTO Members made submissions on elements of this list and the detailed submissions is available at <<http://docsonline.wto.org/>> under WT/WGTGP/

⁹⁴ Priess and Pitschas, 'World Trade Organization: the Proposed WTO Agreement on Transparency in Government Procurement – Doha and Beyond', *P.P.L.R.* 2002, 2, NA13-18 at p.14

WTO members almost over each of these twelve issues⁹⁵.

The 2000 Doha Ministerial Declaration took the issue of transparency agreement a step further, stating that negotiations regarding a multilateral transparency agreement in procurement would start after the fifth Ministerial Conference.⁹⁶ According to the Declaration, participants' development priorities, especially those of least-developed countries should be taken into consideration and more importantly, negotiations shall be limited to the transparency aspects explicitly excluding the issue of market access.⁹⁷

However, there are marked disagreements among the WTO members over the interpretation of the mandate on procurement in this Declaration, over the role and purpose of the WGTGP, as well as over the specific elements of a potential multilateral transparency agreement in procurement.⁹⁸

In 2003, the Cancun Ministerial Conference ended in deadlock by failing to produce a consensus as to whether negotiations should be started over the Singapore issues within the context of the Doha Work Programme. In the end, the General Council Decision of 1 August 2004 finally concluded that the issue of transparency in government procurement would not be taken forward in the Doha Work Programme and therefore no work towards negotiations on this issue would take place within the WTO during the Doha Round.⁹⁹

The main reason for the failure of including the issue of transparency in government procurement inside the Doha Work Programme is the fear shared by many developing countries that a multilateral transparency agreement would only be a first and tactical measure to be taken to eventually address the question of market access, which only serves the export interests of the developed industries.¹⁰⁰

⁹⁵ See Zanamwe, 'Transparency in Government Procurement' (2003), available at <www.tralac.org/scripts/content.php?id=2189>.

⁹⁶ The WTO, Ministerial Declaration, Ministerial Conference Fifth Session, 2001, WT/MIN(01)/DEC/1, para.20-26. available at <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>

⁹⁷ Ibid

⁹⁸ See the WGTGP, 'Report on the Meeting of 29 May 2002' (2002) WT/WGTGP/M/14. 13 August 2002; the WGTGP, 'Report on the Meeting of 10-11 October 2002' (2003) WT/WGTGP/M/15. 9 January 2003; the WGTGP, *Work of the Working Group on the Matters Related to the Items I-V of the List of the Issues Raised and Points Made 2002-Note by the Secretariat*, 23 May 2002, WT/WGTGP/W/32

⁹⁹ In 1st August 2004, the WTO General Council passed a historic package of framework and agreements agreed on a set of actions (the 'July Package'). See Decision Adopted by the General Council on 1 August 2004 1 (g) para.2. General Council-Doha Work Programme-Draft General Council Decision of 31 July 2004, WT/GC/W/533 Available at <http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm>

¹⁰⁰ Decker and Priess 'The WTO General Council Decision of 1 August 2004 – a Note on the Decision not to Launch

Admittedly, non-discrimination and market access commitments are clearly delinked from the proposed transparency agreement in view of the Doha Mandate, but it has been made clear that the ultimate goal of developed countries is to upgrade the proposed transparency agreement into a full-blown agreement granting full access and national treatment for their companies to the government procurement business, especially of developing countries.¹⁰¹

3.3.2 Possible objectives

Some commentators viewed that the decision not to launch negotiations on a multilateral procurement agreement on transparency in the Doha Round is regrettable and hopefully this issue will be reignited in future negotiating rounds since it has only been excluded from the Doha Work Programme.¹⁰² However, the first question one should consider is the objectives of such a multilateral transparency agreement in procurement at the WTO.

The E.C. and the U.S. submitted to the WGTGP their draft texts for a transparency agreement in procurement respectively. Ensuring transparency in procurement was identified as the very objective of transparency agreement under both of their draft texts. However, as argued by Arrowsmith, ‘transparency is merely a means to an end rather than an end in itself’.¹⁰³ Transparency can serve different objectives in procurement such as value for money, integrity, and trade etc. Although the benefits of transparency could not be denied by any states, the targeted objectives regarding the proposed transparency agreement had not been clarified before states went further to discuss elements for inclusion in such an agreement.¹⁰⁴

The possible benefits associated with a future multilateral agreement on transparency in

Negotiations on Transparency in Government Procurement during the Doha Round’ (2004) P.P.L.R.2004, NAY.14 at p.17

¹⁰¹ Developed countries did not attempt to hide this goal, and instead it was stated so candidly in their proposal that government procurement was considered to be a gigantic business which had hitherto remained outside the WTO’s ambit and should be brought in through multilateral rules so that their companies could have full access to the developing countries markets. See Khor, note 90

¹⁰² Decker and Priess, note 100, at p.19

¹⁰³ See Arrowsmith, ‘Transparency in Government Procurement: the Objectives of Regulation and the Boundaries of the World Trade Organization’ (2003) *J.W.T.* 37(2) 283 at p.283

¹⁰⁴ Some Member States expressed the view that the principles and objectives of a transparency agreement should be clearly defined before discussing other issues. See the WGTGP, note 93, para.22; Report on the Meeting of 25 September 2000 WT/WGTGP/M/1, 19 December 2000, para.8.

procurement identified by the WGTGP include enhanced efficiency and increased innovation; better value-for-money; encouragement of domestic and foreign investment and partnership between local and foreign suppliers; the effect of reducing corruption; good governance; the establishment of a minimum set of applicable rule.¹⁰⁵

Possible benefits of such an agreement were, on the whole, not a controversial matter and none had put forward a view against the value of transparency in the procurement process; however many did raise the question how a transparency agreement would enhance the relation among states or how a state apply enhanced transparency rules would affect and benefit its trading partners.¹⁰⁶

Among the possible benefits flowing from a future transparency agreement, the role of transparency in implementing domestic objectives such as value for money and the reduction of corruption can only be regarded as a side effect rather than the underlying rationales for negotiating such an agreement given the existing 'trade' remit of the WTO.¹⁰⁷ It is the primary role of the WTO to enhance market access conditions so that any agreement that have little or no implications for market access does not belong in the WTO.¹⁰⁸

Put simply, it cannot be justified to negotiate a WTO transparency agreement solely with the aim of promoting better value-for-money or reducing corruption.¹⁰⁹ If the objective of the agreement is limited to addressing the issue of non-transparency as an independent trade barrier, it need to be so stated, or if there are other objectives, they have to be precisely defined, because the possible contents of the transparency agreement will largely depend on the objectives.

3.3.3 Possible coverage

¹⁰⁵ The WGTGP, *Report (2003) of the WGTGP to the General Council*, WT/WGTGP/7, 15 July 2003. available at www.wto.org/english/tratop_e/gproc_e/gptran_e.htm

¹⁰⁶ This is the view stated by the representatives of Brazil and Philippine etc, See the WGTGP, *Report on the Meeting of 7 February 2003-Note by the Secretariat*, 15 April 2003, WT/WGTGP/M/17 para.10; WGTGP (December 2000) note 104, para.8.

¹⁰⁷ See Arrowsmith, note 103 at p.297

¹⁰⁸ Evenett and Hoekman, 'Transparency in Government Procurement: What can We Expect from International Trade Agreements', In Arrowsmith and Tybus (ed), *Public Procurement: the Continuing Revolution* (Kluwer Law International, 2003) at p.271

¹⁰⁹ However, corruption can pose a significant problem for trade in the sense that market access commitments may have little impact in practice whilst corrupt practices continue. See Evenett and Hoekman, note 108. This issue is going to be discussed later in Section 5.2.

The first issue debated was whether the proposed transparency agreement should only apply to procurement open to foreign suppliers, which would largely depend on the objectives of the agreement. An agreement limited to transparency can only ‘facilitate international competition to the extent that there is procurement open to foreign industry on which the agreement can ‘bite’, and the significance of the agreement will thus depend on the extent and nature of discriminatory policies maintained by Parties’.¹¹⁰

If the objectives of the agreement are limited to promoting trade, such an agreement will not have any direct effect on closed procurement markets and thus there is no justification for its application to closed markets. Nevertheless, it was suggested by some states that the proposed transparency agreement should apply even where a tender was not open to foreign bidders.¹¹¹

There was a wide divergence on the definition and coverage of the proposed transparency agreement. Some states maintained that the agreement should have a broad coverage extending to goods, services and construction services, to central entities as well as sub-central entities since it would not include market access obligations. Also, this broad approach to coverage could arguably avoid the difficulty in distinguishing where transparency rules should apply. However, most of developing countries argued for a narrow coverage. The Indian representative, for example, said that the coverage should only reflect the common minimum standards of national procurement systems and be limited to goods and to central government entities.¹¹²

A comparatively less contentious issue was about the use of thresholds. Most states agreed that the concept of a threshold should be incorporated into the scope of the agreement given that otherwise the agreement would become too onerous and apply even to the smallest procurements.¹¹³ Some developed countries such as the EC agreed that different thresholds might be given to developing

¹¹⁰ Arrowsmith, ‘Towards a Multilateral Agreement on Transparency in Government Procurement’ (1998) *I.C.L.Q.* 47 793-816 at p. 804

¹¹¹ See the WGTGP (April 2003), note 106, para.10 & para.7

¹¹² See the WGTGP (August 2002), note 98, para.25,26

¹¹³ This view was supported by India, Malaysia, Indonesia, the E.C., and Switzerland etc. See the WGTGP (August 2002), note 98, para.28,29

countries, or at least, for least-developed countries.¹¹⁴

3.3.4 Secondary policies

A future transparency agreement would not necessarily affect or reduce states' ability to implement secondary policies in procurement since the Doha mandate limits negotiations to the transparency aspects.¹¹⁵ In this regard, its participating states could freely utilise procurement to support their industry, social, or environmental objectives. However, there was still a debate over whether the transparency rules would apply to procurement reserved for domestic suppliers or procurement utilised to pursue policies of economic, social and regional development.¹¹⁶

The implementation of secondary policies in a transparent way might make a big difference for foreign suppliers because even where there is certain domestic preference involved, foreign suppliers with adequate information could still choose to participate if their bid is lower than the comparable domestic bid by more than the differential preference and they could still win the contract.¹¹⁷

3.3.5 Soft Law & Hard Law Issues

3.3.5.1 Bindingness

The possible binding nature of the proposed transparency agreement was one of the most contentious issues among the WTO States. Many countries especially developed countries insisted on the binding nature of the agreement. Reservations, however, were expressed by a number of developing countries, that obligations under the transparency agreement should be of a non-binding nature given difficulties and complexities faced by many developing countries in this area.¹¹⁸

¹¹⁴ See the WGTGP, *Report on the Meeting of 18 June 2003-Note by the Secretariat*, 7 July 2003, WT/WGTGP/M/18, para.8

¹¹⁵ See Doha Ministerial Declaration, adopted on 20 November 2001, WT/MIN(01)/DEC/1, para.26, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm

¹¹⁶ See the WGTGP (August 2002), note 98, para.33

¹¹⁷ In very rare cases when one foreign supplier enjoys a significant comparative advantage over all other bidders, a preferential margin scheme may have a positive effect similar to that of the 'optimal tariff', under which a foreign supplier is forced to lower than it would in the absence of this scheme, resulting in all lower profit margin for that supplier and savings for the government. See Deltas and Evenett, 'Quantitative Estimates of the Effects of Preference Policies', in Hoekman and Mavroidis (ed), note 61, at p.84

¹¹⁸ This view was shared by Pakistan, India, Egypt and Malaysia. See the WGTGP, *Report on the Meeting of 25 September 2000-Note by the Secretariat*, 19 December 2000, WT/WGTGP/M/11 para.33

3.3.5.2 Precision

There was no agreed general approach for the proposed transparency agreement. The draft texts for such an agreement submitted by both the E.C. and the U.S. include certain prescriptive transparency rules. However some others maintained that a simple and flexible framework without seeking to define in any detail the content of national procurement procedures should be negotiated.¹¹⁹ Later, the E.C. revised its original draft to favour a more ‘principles-oriented approach’, taking into account observations made by other delegations.¹²⁰

Regarding the issue of time-limits, there was a disagreement over whether this issue was an element of transparency.¹²¹ Negotiating states, however, generally agreed that the proposed transparency agreement should not include provisions setting out specific time-limits for each procurement period.¹²² This is different from many procurement agreements such as the GPA and the EC directives which contain prescriptive rules on minimum time-limits for different phases of the tendering procedure (see Section 3.2.4.2 and Section 4.1.4.2).

When discussing the issue of qualification criteria, most agreed that national authorities or procuring entities should have sufficient discretion in developing qualification criteria suited to different types of procurement, sectors and circumstances, and the prescription of any harmonised qualification criteria or even an illustrative listing should be avoided for a transparency agreement.¹²³

Taking into account difficulties for developing countries to implement a future transparency

¹¹⁹ Japan, for example, stated that the provisions of a transparency agreement should be flexible enough so that all WTO Members could accept them and the framework of such an agreement should be simple, focusing on core principles such as transparency in procurement opportunities. See the WGTGP, *Japan's View on Transparency in Government Procurement-Communication from Japan*, 14 October 2002, WT/WGTGP/W/37

¹²⁰ See *Transparency in Government Procurement: Communication from the EC: Elements for an agreement on transparency in government procurement* 5 November 1999, available at http://ec.europa.eu/comm/trade/issues/sectoral/gov_proc/wto_nego/transpa5.htm

¹²¹ The representative of India said that time-limits per se were not a matter of transparency and thus should be deleted from the topics for discussion, while many states such as the US and Malaysia held the view that it was relevant to transparency, in the sense that transparency would be affected if sufficient time was not provided or if sufficient time was provided to one party and not to others. See the WGTGP (August 2002), note 98, para.56 & 57

¹²² Ibid.

¹²³ See the WGTGP, *Work of the Working Group on the Matters Related to the Items VI-XII of the List of the Issues Raised and Points Made 2002-Note by the Secretariat*, 3 October 2002, WT/WGTGP/W/33, para.15

agreement, it was generally agreed that a robust principles-based approach should be employed both with respect to transparency and due process aspects.¹²⁴

3.3.5.3 Discretion

The proposed non-binding nature or principled approach of such a transparency agreement may grant states a broad discretion in their implementation. It is natural to expect that states would have more discretion over whether or how to implement the relevant rules should their obligations be made non-binding. As regards the possible choice for general principles over precise rules, it seems that terms such as ‘sufficient time’ or ‘reasonable information’ imply a clear intention to confer discretion.

For example, in response to the concern about the use of ambiguous term ‘sufficient’ in the relevant time-limits clause of the EC’s proposal, it was clarified that the term should be interpreted as procuring entities retained considerable discretion to determine time-limits for individual procurements.¹²⁵ However, the possibility remains open that these general principles could be interpreted in a way to impose precise obligations or largely constrain discretion, as many general principles have been under the EC regime (see Section 4.1.4.2 & 4.1.4.3).

A transparency agreement might be formulated in a principled way as an agreement with detailed obligations would be politically unachievable during the time of negotiation. However, by means of judicial interpretation, soft law provisions in terms of their low level of precision in legislative text still have a potential to harden up at a later stage when circumstances permit.

Apart from a significant discretion states might possibly possess owing to the proposed non-binding nature or principled feature of the transparency agreement, it was widely recognised that states should be granted with a considerable discretion in implementation in light of their varied domestic circumstances. For example, any discussion on the use of procurement methods was based on a general consensus that states should retain discretion in using different procurement procedures,

¹²⁴ The WGTGP, note 105, para.11

¹²⁵ See the WGTGP (May 2002), note 98, para.59

and any obligation imposed on states should focus on ensuring transparency in choice and use of methods in question rather than on attempting to be prescriptive about the conditions governing the use of different methods.¹²⁶

Regarding S&DT for developing countries, it was generally agreed that developing countries should enjoy more discretion in negotiating and implementing their obligations. As for the types of S&DT to be included in the proposed transparency agreement, most of suggestions made related to the provision of transitional periods, the application of high level threshold values and exemptions from coverage.

However, many developing countries pointed out that these traditional S&DT provisions had proven to be ineffective in solving problems of substance.¹²⁷ The GPA S&DT provisions, as discussed in Section 3.2.4.3, serves an example of this point - they are very soft in the sense that developed countries are only under a legally binding obligation to make best-endeavour to implement these S&DT provisions, and thereby whether developing countries could have a higher level of discretion in negotiating and implementing their obligations solely relies on the goodwill of developed countries. It was suggested that the S&DT provisions for the proposed transparency agreement should not remain a best-endeavours clause.¹²⁸

Technical assistance was another important issue for many developing countries. As the representative of Brazil argued, transitional periods or other types of discretion awarded to developing countries had proven to be inadequate as a number of developing countries were unable to implement their commitments due to the lack of technical assistance.¹²⁹

3.3.5.4 Delegation

Whether to include any DSM has always been a contentious issue during negotiations towards a procurement agreement. As for the proposed transparency agreement, the situation was exacerbated

¹²⁶ See the WGTGP, note 123, para.23

¹²⁷ See the WGTGP (April 2003), note 106, para.79-83

¹²⁸ See the WGTGP, note 118, para.41

¹²⁹ See the WGTGP (April 2003), note 106, para.79

by the fact that it would only include rules on transparency without having rules on market access. The issue of dispute settlement, namely the linkage to the WTO DSU as well as the availability of domestic review procedures, was thus extremely contentious and became a big factor in opposition to the transparency agreement by some countries. It seemed more difficult for negotiating parties to reach an agreement on matters like dispute settlement without agreed objectives, coverage, content or other elements of the agreement.

3.3.5.4a Inter-governmental Mechanism

A number of countries, such as the U.S., the E.C. members, Canada, Japan and Australia etc, agreed that obligations under the transparency agreement should be subject to the WTO DSM. It was said that the application of inter-governmental DSM in the transparency agreement should reflect the general approach adopted in the WTO, and if without clear provisions on dispute settlement, the agreement would not have any merit.¹³⁰

However, many other countries especially developing countries were strongly against any application of the WTO DSU to a future transparency agreement. Brazil, for example, challenged whether the DSU was the best way to ensure the enforcement of an agreement on transparency.¹³¹

In addition, the view was expressed that whether the DSU should apply would depend on the nature of obligations under the transparency agreement and the DSU would not be necessary should the agreement be made of a non-binding nature.¹³² In this regard, a ‘peer review mechanism’ was also suggested as an alternative to the WTO DSM to ensure the implementation of the transparency rules.¹³³

3.3.5.4b National Challenge Procedures

Many States including all the GPA Members have procedures allowing aggrieved suppliers to file

¹³⁰ See the WGTGP, note 123, para.99

¹³¹ See the WGTGP (April 2003), note 106, para.16

¹³² See the WGTGP, note 123, para.101

¹³³ Ibid. para.103

complaints against any alleged breaches of the applicable rules and to seek review of the procurement proceedings of a public entity.¹³⁴ It was advocated by developed members, particularly the U.S.¹³⁵ and the E.C.¹³⁶, that the proposed transparency agreement should contain provisions requiring states to make available certain domestic review procedures for both domestic and foreign suppliers.

Proponents for the inclusion of domestic review procedures referred to the important roles they played in ensuring the overall transparency and enforcement of underlying rules. The view was expressed by the E.C. representative that complying with such a requirement would not entail any additional burden on many countries since they appeared to have domestic review systems in place already.¹³⁷

However, even for states which have already had their own domestic review systems in place, many of them such as China and Malaysia objected to any provision on domestic review mechanisms in the proposed transparency agreement for the reason that the issue of domestic review procedures would eventually go beyond transparency-related issues into the realm of market access.¹³⁸ A further suggestion was made that the choice of review procedure should be left with individual states provided the review system itself was transparent and independent.¹³⁹

3.4 Negotiating Mandate Pursuant to the GATS Article XIII:2

Another WTO initiative to multilateralise procurement can be found in the existing negotiating mandate on procurement within the GATS framework. While Article XIII of the GATS exempts public procurement from the disciplines contained in Article II (MFN treatment), Article XVII (national treatment), and Article XVI (market access rules), it requires multilateral negotiations to be

¹³⁴ Ibid. para.59

¹³⁵ See the WGTGP, *Considerations Related to Enforcement of an Agreement on Transparency in Government Procurement-Communication from the U.S.*, WT/WGTGP/W/38

¹³⁶ See the WGTGP, *Domestic Review Mechanisms related to Transparency in Government Procurement-Communication from the European Communities*, WT/WGTGP/W/39

¹³⁷ See the WGTGP (January 2003), note 98, para.41

¹³⁸ See the WGTGP (April 2003), note 106, para.45,47

¹³⁹ See the WGTGP, note 123, para.56

held on procurement in services under GATS.

Consequently, the Working Party on GATS Rules ('the WPGR') was established, among other purposes, to provide a forum for negotiations on procurement of services.¹⁴⁰ Although there is no corresponding provision in the GATT, any multilateral rules agreed for services will certainly be applied to goods in practice, especially since there is more support for opening up procurement market in goods than that in service.¹⁴¹

The issue of procurement was first put on the agenda of the WPGR in 1995 and to date, the work of the WPGR has mainly focused on the other issues. Since the WTO's broader transparency launched at Singapore, the WPGR has concentrated on defining procurement and facilitating market access negotiations, leaving the issue of transparency to the WGTGP.¹⁴² However, limited progress has been made so far.

According to a note on progress in the negotiations circulated by the Chairperson of the WPGR in June 2003, the issue of procurement had been 'dormant for some time' as a result of other priorities.¹⁴³ Not surprisingly, its Member States failed to meet the deadline to conclude the negotiations on procurement prior to the conclusion of the Doha round negotiations.¹⁴⁴

The main reason why the negotiations have remained 'dormant' is because of continuing disagreement over the scope of the negotiating mandate. The latest annual report of the WPGR still shows that no common understanding has been reached on the scope of the negotiating mandate under Article XIII.¹⁴⁵ It seems that the negotiations towards multilateralising procurement in this forum would be one of the most cumbersome ongoing activities under the WTO regime.

¹⁴⁰ Another two mandated issue are the establishment of an emergency safeguard mechanism for services and disciplines on subsidies. Ibid.

¹⁴¹ Arrowsmith, note 110 at p.804 footnote 26

¹⁴² See Working Party on GATS Rules, Report of the Meeting of 26 November 1997 S/WPGR/M/14, available at <http://www.wto.org/english/tratop_e/gproc_e/gpserv_e.htm>

¹⁴³ The WPGR, '*Negotiations on Government Procurement*', reported by the Chairperson of the WPGR (2003) S/WPGR/11 available at <http://www.ictsd.org/issarea/stds/Resources/Docs/WPGR_Report_on_GovProc.pdf>

¹⁴⁴ Kunkel, 'Trade Negotiations on Government Procurement of Services' (2003), available at <<http://apseg.anu.edu.au/pdf/kunkel.pdf>>, at p. 2

¹⁴⁵ See the WPGR, Annual Report of the Working Party on GATS Rules to the Council for Trade in Services (2007) S/WPGR/17 available at <<http://www.wto.org.tw/SmartKMS/fileviewer?id=91739>>

Chapter 4 An Overview of Regional Instruments Regulating Procurement towards Market Liberalisation

In view of the drop of public procurement issue from the Doha Work Programme and the little progress pursuant to the GATS Article XIII:2, the GPA currently remain the most important instrument regulating procurement under the WTO despite its limited membership. Besides the WTO initiatives, the opening up of procurement markets has increasingly been a target of regional trade arrangements (RTAs). This chapter will examine the major RTAs on procurement, namely, the EC procurement rules; the NAFTA Chapter 10; Chapter XVIII of the third draft of FTAA agreement; the COMESA directives and the APEC NBPs.

4.1. The European Community ('EC')¹ Procurement Regime

4.1.1 Introduction, objectives and general approach

The EC procurement regime is the most developed regime, which has to a large extent served as a model for subsequent procurement regimes, and has had a significant influence on the development of the current GPA.²

General prohibitions on discriminatory procurement within the EC can date back to the execution of the Treaty of Rome in 1957 when the EC was set up, under which theoretically no EC Member State should discriminate against any firm or individual from outside that country but from within the EC wishing to sell goods or services to any public or private body in its own country.³ Such

¹ The European Community (EC) is the main economic organisation of the European Union (EU). The other two EU Communities are European Atomic Energy Community (Euratom) and European Coal and Steel Community (ECSC). The EU is made up of the above three European Communities and certain inter-governmental activities outside the scope of the Communities, under other Treaties. The current EU Members include Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, The Netherlands, United Kingdom.

² Gordon, Rimmer and Arrowsmith, 'The Economic Impact of the European Union Regime on Public Procurement: Lessons for the WTO', in Arrowsmith and Davies (ed), *Public Procurement: Global Revolution* (Kluwer Law International Ltd, 1998) at p. 28

³ Cox, 'The Single Market Rules and the Enforcement Regime After 1992' (Hull: Earls Gate Press, 1993) at pp.29-30

initial liberalising efforts, however, had little influence on the area of procurement due to both economic and political reasons.⁴

In addition, the EC adopted a series of directives regulating award procedures in detail for major contracts, the first of which were adopted in 1970s, but these early rules were largely ignored in practice.⁵ Despite its uncelebrated origin, the EC's procurement policy has undergone a remarkable evolution.⁶ More and more detailed and stringent measures on procurement have been developed within the EC.

The main EC legal rules on procurement derive from two sources. The first one is the general free movement principles of the EC Treaty which forms a basis of European procurement framework. Certain general provisions of the EC Treaty prohibit Member States from discriminating against firms or products originating from other member states, notably, Art.28 (ex Art.30) on free movement of goods; Art.43 (ex Art.52) on freedom of establishment; and Art.49 (ex Art. 59) on freedom to provide services.⁷ These provisions are aimed at establishing an integrated market of the Member States, in which goods, services and capital can freely move across the internal borders, but do not contain any express reference to public procurement.

Another source of legal rules on procurement in the EC consists of a series of directives, regulating award procedures for major contracts. Recognising the insufficiency of the EC Treaty alone to open procurement markets, directives had been adopted to regulate award procedures for major contracts where cross-border trade is more likely to happen since 1971. Originally these procurement directives were widely disregarded and little attempt was made to enforce the rules.⁸ Nevertheless, from 1987 onwards the Community has been taking measures to improve the efficacy

⁴ Ibid

⁵ Directive 71/305/EEC, [1971] O.J. (L185) 1 was adopted in 1971 dealing with public works contracts at the same time as Directive 71/304/EEC, and a similar directive on suppliers, Directive 77/62/EEC, [1977] O.J. (L13) 1, was adopted six years later. See Arrowsmith, *The Law of Public and Utilities Procurement* (London: Sweet & Maxwell, 2nd Edition 2005) at p.53

⁶ Fernández-Martín, 'The EC Procurement Rules: a Critical Analysis' (Oxford: Clarendon Press, 1996) at p.4

⁷ For detailed information on the application of the EC Treaty to procurement, see Arrowsmith, 'The Application of the E.C. Treaty Rules to Public and Utilities Procurement' (1995) *P.P.L.R.* 6, 255-280

⁸ Arrowsmith, note 5, at p.54

of its procurement rules, as part of the drive to achieve the single market by 1992.⁹

The EC directives can be divided into two categories apart from the remedies directives¹⁰: the public sector directives and the utilities directives. Previously the public sector directives included three key directives applicable to the procurement of goods, services and construction works.¹¹ As regards the utilities directives, Council Directive 93/38/EEC¹² regulated so-called public utility bodies engaged in certain activities in the water, energy, transport and telecommunications sectors¹³. In March 2004, the Community adopted two new directives and made significant changes in order to simplify, consolidate, and increase flexibility of the previous framework.¹⁴

Consequently, a single new directive¹⁵ for the public sector was set up to replace the previous three directives, while a new directive¹⁶ for utilities to replace the old one. The new directives entered into force on the day of its publication, 1 May 2004.¹⁷ Member States are required to transpose the new directives into their national legislation no later than 31 January 2006.¹⁸

The main aim of the EC procurement rules is to eliminate restrictive procurement practices so far as they affect trade between Member States and thus to realise the full benefits of a single market in those sectors affected by public procurement.¹⁹ Similar to the GPA regime, national objectives such as value for money, integrity, and the implementation of secondary policies are not by themselves the objectives of the EC directives, albeit the similar tools of transparency have been employed for

⁹ Ibid.

¹⁰ For discussion, see Section 4.1.4.4b

¹¹ They are Council Directive 93/36/EEC, 1993 O.J.(L 199); Council Directive 92/50/EEC, 1992 O.J.(L 209); Council Directive 93/37/EEC, 1993 O.J.(L 199) respectively. All the three directives were amended by Council Directive 97/52 EEC, 1997 O.J. (L 328) 1. This directive introduced changes to harmonise the EC rules with the GPA, of which the EC is a member.

¹² Like the public sector directives, Council Directive 93/38/EEC, 1993 O.J.(L 199)⁸⁴ was also modified by Council Directive 98/4 EEC, 1998 O.J.(L 101)1 for the reason mentioned above

¹³ Telecommunication sectors are excluded from regulation by the new utilities directive of 2004, and postal services are newly covered instead.

¹⁴ Arrowsmith, 'An Assessment of the New Legislative Package on Public Procurement' (2004) *41 C.M.L.R.* at p.1277

¹⁵ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, 2004 O.J.(L 134)114

¹⁶ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services, 2004 O.J.(L 134)1

¹⁷ Directive 2004/18/EC Art.83; Directive 2004/17/EC Art.74

¹⁸ Directive 2004/18/EC, Art.80 (1); Directive 2004/17/EC, Art.71(1). Except for the new rules on postal service which are currently regulated by the public sector rules, will be covered by the new utilities directive instead, with a later date, 1 January 2009.

¹⁹ Arrowsmith, note 5, at p.48

implementing both supranational and national objectives.

The EC directives, like the GPA, seek to ensure non-discrimination in award procedures by mainly requiring procuring entities to follow detailed transparency procedures so that it is more difficult to hide discrimination. There are two fundamental general principles underlying the directives, namely, the principle of equal treatment and the principle of transparency.²⁰ These principles have been used to assist in interpreting the express provisions of the directives as well as imposing additional obligations which are not expressly set out in the directives.

4.1.2 Coverage

Different from the GPA's flexible approach to coverage, the coverage of the EC rules is the same for all Member States, ruling out any possibility of derogations for particular entities or sectors. The EC Treaty applies in principle to all contracts awarded by public bodies including small contracts without cross-border interests.

As regards the bodies covered by the public sector directive, the entities falling within the scope of the directives are called 'contracting authorities', which is defined in Art.1 of the directive.²¹ Also, the directive applies only to 'contracts for pecuniary interest concluded in writing'²², and the value of which above certain financial thresholds²³. Certain contracts are expressly excluded from the scope of the directive.²⁴

The sectors covered by the utilities directive, were not regulated until 1991.²⁵ The alleged reason

²⁰ These two fundamental principles were originally articulated in the judgment of the ECJ, for interpreting the explicit rules in the directives as well as supplementing additional obligations to the directives' explicit requirements. See Case Commission of the European Communities v Kingdom of Denmark [1993] E.C.R. I-3353; Case C-87/94 Commission of the European Communities v Kingdom of Belgium [1996] E.C.R. I-2043; Case T-203/96 Embassy Limousines & Services v European Parliament [1998] E.C.R. II-4239; Case C-16/98 Commission of the European Communities v French Republic, [2000] E.C.R. I-8315; Case T-203/96 Embassy Limousines & Services v European Parliament [1998] E.C.R. II-4239. Furthermore, the new directives now expressly incorporate these principles into their texts. See Directive 2004/18/EC Art.2; Directive 2004/17/EC Art.10.

²¹ See Directive 2004/18/EC Art 1 (9)

²² Directive 2004/18/EC Art.2(a)

²³ Directive 2004/18/EC Art.7 specifies the different value thresholds for various kinds of public sector contracts. Moreover, Art 9(3) expressly prohibits purchasers from splitting up purchases in order to bring the value of each contract below the specified threshold and thus circumvent the application of the directives. Art. 9 (4) also lay down 'aggregation rules' which makes it difficult to avoid the rules by contract splitting.

²⁴ Directive 2004/18/EC S.3 excluded contracts Art.12-18

²⁵ Utilities sectors of water, energy, transport and telecommunication were firstly addressed in 1990 by Directive 90/531 [1990] O.J.(297)1, having the procurement of suppliers and works regulated, and three years later services were also

for this delayed regulation is that these activities were carried out in some Member States by public bodies, while in others by private entities and it would be unfair to regulate these activities only in those states in which they were carried out by public bodies since it was not previously considered acceptable to regulate private entities.²⁶

The idea behind regulation, however, lays in the fact that these entities even if in the private sector were still susceptible to public influence because of their dependence on government.²⁷ Activities covered, as contained in Article 3-9 of the new utilities directive²⁸, are those in which there involves limited competition and state influence plays an important part.

As for entity coverage, a broad approach was adopted that most entities operating in the relevant sectors are subject, *prima facie*, to the directive.²⁹ Three groups of entities are covered pursuant to Article 2(1) of the new utilities directive³⁰: ‘contracting authorities’³¹; ‘public undertakings’ and entities carrying out the covered activities on the basis of ‘special or exclusive rights’. Like the public sector directive, the utility directive applies only to the contracts above certain thresholds³² and a number of exemptions are included from its coverage³³.

In view of the privatisation and liberalisation of these utilities sectors since the mid to late 1980s, the Community’s recent reform in 2004 made some significant changes to limit the scope of the utilities rules and to exempt certain activities carried out in competitive markets. In particular, purchasers in telecommunications sector are no longer covered; the narrow definition of ‘special and exclusive rights’ is given to exclude certain entities that were covered, or arguable covered, by the previous rules and exemption for utilities in competitive markets is introduced on the basis that

brought into the regime by Directive 93/38 [1993] O.J.(L199)84

²⁶ See Arrowsmith, ‘Deregulation of Utilities Procurement in the Changing Economy: towards a Principled Approach?’ (1997) 7 *E.C.L.R.* 4 at pp.4-5

²⁷ Arrowsmith, note 5, at p.56

²⁸ Directive 2004/17/EC S.2

²⁹ Arrowsmith, note 26, at p.5

³⁰ Directive 2004/17/EC Art.2(1)

³¹ Its meaning is the same as ‘contracting authorities’ under the public sector procurement directives. Most contracts of these entities are governed by the public sector directives, but their contracts in relation to utility activities are governed instead by the utilities directive

³² Directive 2004/17/EC Art.16

³³ Directive 2004/17/EC Art.18-26, such exemptions are based on the fact that the entity in question is subject to some form of competitive pressure which provides sufficient incentive for it to resist any governmental pressure for ‘buy national’.

competition is sufficient to ensure commercial purchasing.³⁴

Again, all the contracts awarded by public bodies which are not regulated by the directives for various reasons are nevertheless governed by the EC treaty.³⁵

4.1.3 Secondary policies

Under the EC procurement rules, many secondary uses of procurement are prohibited by the non-discrimination principle derived from the Treaty. Most procurement policies to promote national industry or regional development would inevitably involve discrimination against foreign suppliers and thus be prohibited by the EC Treaty. For example, in *Du Pont de Nemours case*,³⁶ the European Court of Justice ('the ECJ') ruled that Italian legislation reserving to undertakings established in a particular region proportion of public supply contracts was incompatible with Article 28 (ex Article 30) since such a preferential system constitutes discrimination against products originating from other Member States.

Meanwhile, the use of procurement for secondary objectives is also largely restricted by the detailed rules on award procedures contained in the directives. The EC directives generally adopt a restrictive approach in terms of utilising procurement to promote secondary policies.³⁷ For example, it is not generally permitted to consider social or environmental criteria in awarding contracts, unless such criteria 'linked to the subject-matter of the contract in question' (see Section 3.2.4.3).

Although most rules are the same between the public sector directive and the utilities directive, there is an arguably greater scope for the secondary use of procurement under the utilities directive in qualifying and shortlisting stage.³⁸ For example, the public sector directive allows firms to be excluded mainly for lack of financial standing or technical capacity to deliver the goods or services

³⁴ See, Arrowsmith, note 14, at pp.1300-1306

³⁵ See Braun, 'A Matter of principles- the Treatment of Contracts Falling outside the Scope of the European Public Procurement Directives' (2000) *P. P. L.R.* 2000, 1, at pp 39-48

³⁶ Case C-21/88, *Du Pont de Nemours Italiana SpA v. Unita Sanitaria Locale No.2 di Carrara* [1990] 1 ECR 899.

³⁷ Arrowsmith, note 14 at pp.1306-1307

³⁸ Arrowsmith, 'The Community's Legal Framework on Public Procurement; the Way Forward at Last', (1999) 36 *C.M.L.R.* 13 at p 46

contracted³⁹, while the utilities directive only requires the objective rules and criteria to be used for selection.⁴⁰

Given the EC's restrictive approach to its Members' use of procurement to support national secondary policies, it is interesting to note that a different approach is applied as with the use of procurement to promote the EC's policies. For example, the new directives require states to exclude firms convicted of participation in criminal organisation, corruption, fraud, money laundering, as defined in relevant EC instruments, to support the European criminal policy.⁴¹

4.1.4 Soft Law & Hard Law Issues

4.1.4.1 Bindingness

Regarding the EC Treaty and directives, the EC Treaty obligations are legally binding on Member States and enforceable without the need for national implementing measures, while the directives define a legal framework within which each Member State are under a legally binding obligation to transpose the rules into national legislation in a specified period of time.

According to the EC Article 249 (ex Article 189), the directives are 'binding as to the result achieved' but 'leave to the national authorities the choice of form and methods'. As previously noted, the binding nature of certain treaty rules may be negated by virtue of their vagueness. However, many ambiguous provisions of the EC procurement rules are still binding and enforceable, and impose precise obligations as a result of judicial interpretation.

Taking the principle of effectiveness in the Remedies Directives as an example, it is couched in general and vague terms like the GPA's general principles on remedies. But different from the possible non-binding nature of the GPA principle of effectiveness on remedies, the EC principle of effectiveness is legally binding and enforceable, in that this has been developed by the court

³⁹ See Directive 2004/18/EC Art.45 (2)

⁴⁰ Directive 2004/17/EC Art.54 (1)(2)

⁴¹ Directive 2004/18/EC Art.45(1) and Directive 2004/17/EC

imposing additional obligations to the explicit requirement of the Remedies Directives.⁴²

Nevertheless, this does not necessarily mean that all the EC procurement rules are of a binding nature no matter how ambiguous they are. Article 23 (1) of the new public sector directive on accessibility may furnish a rare example for being non-binding rules owing to its vague content. It only generally provides that ‘whenever possible technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users’. The vagueness of this provision may fail to create any legally binding obligations. As Arrowsmith pointed out, this provision arguably does not intend to impose any legally binding obligation taking into account the use of the words ‘whenever possible’ and the nature of the decisions to be made on these matters, which mainly involves balancing costs and social benefits.⁴³

4.1.4.2 Precision

In the same way as the GPA sets minimum standards rather than a complete set of rules, the EC procurement regime was originally intended to be a broad framework, within which states still have significant freedom to tailor their own procurement rules to the needs of specific domestic objectives.

The EC Treaty forms a basis of European public procurement framework by setting out general principles, while the directives lay down detailed transparency rules in support of the Treaty’s principles. Similar to the GPA’s approach, the EC directives set out detailed rules governing the conduct of the contract award from invitation to participate to award of contracts, with a higher degree of precision compared with the GPA rules though.

In recognition of the complexity of the previous directives and the rigidity of their procedures, the two new directives were adopted with the aim to simplify the complex rules as well as increase the

⁴² For more detailed information regarding the concept of effectiveness, see Arrowsmith, ‘Enforcing the Public Procurement Rules: Legal Remedies in the Court of Justice and the National Court’ In Arrowsmith (eds) *Remedies for Enforcing the Public Procurement Rules* (Winteringham:Earlsgate House,1993).

⁴³ Arrowsmith, note 5, at pp.1155-1156

flexibility of previous legal framework.⁴⁴ The new legislative package has introduced many important changes. For example, a single consolidated directive has been adopted for all the public sector contracts, which eliminates unnecessary differences between the treatment of works, supplies and services contracts.

However, as argued by Arrowsmith⁴⁵, the new directives remain excessively detailed and complex and for the most part, even more complex than the previous ones despite the original intention of simplification. Indeed, the precision of the procurement rules has been increasing with the deeper integration of the EC and consequential legislative reforms, in spite of their intended framework nature at the outset.

Taking the rules on time-limits as an example, Art.38(1) of the public sector directive generally requires that procuring entities shall take account the complexity of the contract and the time required for drawing up tenders in determining the time-limits for the receipt of tenders and requests to participate. Apart from this general principle, different minimum time-limits are also included for different procurement methods. For example, in the case of open procedures, it provides that the minimum time-limit for receipt of tenders should generally be 52 days from the date of dispatch of the contract notice (Art.38(2)); and if a prior information notice has been published within a specified period of time this minimum time-limit may be shortened to 36 days as a general rule but under no circumstances to less than 22 days (Art.38(4)).

The EC directives lay down a general principle followed by precise minimum time-limits to ensure that non-domestic firms will not be disadvantaged by unreasonably short tendering periods, which closely resembles the GPA's approach. In contrast, as for the proposed WTO transparency agreement, it was agreed that no similar provisions should be included, and general principles requiring 'sufficient' or 'reasonable' time alone could suffice (see Section 3.3.5.2).

The rules on qualification criteria may serve as one of the most striking examples to illustrate the detailed nature of the EC directives. Different from the GPA's general approach, the EC public sector

⁴⁴ European Commission, *Public Procurement in the European Union of March 11, 1998* COM (98) 143 at p.3

⁴⁵ See, Arrowsmith, note 14, at pp 1277-1352

directive requires that suppliers can only be excluded from participation on certain explicitly stated grounds, including a highly elaborated list stating grounds for exclusion as well as relevant evidences which procuring entities may demand as means of proof of standing (Art.48).

This list possesses a very high degree of precision, which includes grounds ranging from financial position to technical capacity; from enrolment on a professional or trade register to other miscellaneous grounds.⁴⁶ The grounds on technical capacity, for example, also have an exhaustive list of specific evidence that procuring entities may demand from suppliers, stating not only the information that the entities may demand from suppliers but also the substantive evidences they may require. For example, according to the public sector directive Article 48(2), suppliers' previous work experiences over the past five years may be considered in assessing technical capability. Further, it prescribes the details of the evidence that may be required from suppliers – certificates of satisfactory execution for the most import works which 'shall indicate the value, date and site of the work and shall specify whether they were carried out according to the rules of the trade and properly completed'(Art. 48(2)(a)(i)).

Moreover, much more detailed obligations than those written out in the legal provisions have been developed by the ECJ's generous interpretation.⁴⁷ With the development of judicial interpretation, there is now in fact a huge difference between the GPA and the EC rules in the degree of detail and strictness though provisions of the two regimes still look superficially similar with a bit more detail in the latter.

The EC Treaty principles are couched in general and imprecise terms in a similar way as the GPA general principles; however the former clearly impose more detailed obligations than the latter. Compared with the WTO DSB we discussed in Section 3.2.4, the ECJ plays a much more active role in applying the Treaty principles, and pays more attention to the spirit behind the language of the Treaty provisions rather than to the language itself. The abstract nature of the EC Treaty, together

⁴⁶ Public Sector Directive Article 45-52 and Utilities Directive Article 52-55

⁴⁷ See Arrowsmith, 'the Past and Future Evolution of EC Procurement Law: from Framework to Common Code?' presentation to conference "Government Contracts: Year in Review", Washington DC, February 2006

with a great amount of cases brought before the ECJ have allowed the ECJ to exercise judicial creativity in many areas. The Treaty principles consequently imply detailed obligations even though their legislative language remains imprecise.

One of the most significant judicial developments in interpreting the Treaty can be found in the ECJ judgment in *Telaustria*⁴⁸. In this case the ECJ held that the non-discrimination principle of the Treaty implied an obligation of transparency entailing ‘a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed’.⁴⁹

In the later case of *Coname*, the Court stated that the transparency requirement does not necessarily imply ‘an obligation to hold an invitation to tender’⁵⁰, but did not clarify whether this obligation might be imposed under certain circumstances and if so, the conditions that trigger such an obligation. The precise requirements of such a transparency obligation remain unclear from the current case law.

Nevertheless, it is clear that the ECJ ruling in *Telaustria* developed the concept that the EC Treaty itself imposes positive obligations of transparency, which overturned the traditionally submitted view that the Treaty only imposed ‘negative’ obligations on Member States to refrain from certain positive measures that restrict access to contracts. As argued by Arrowsmith, ‘the *Telaustria* rulings imposes important obligations for all public contracts in the EC and creates the potential for significant judicial control over the precise detail of all procedures’.⁵¹

Certain types of contracts were deliberately excluded from detailed procedural requirements when the directives were adopted. The *Telaustria* rulings, however, indicate the possibility for the ECJ to impose procedural rules in a similar way as the directives do but for the contracts excluded by the coverage of directives. It can be argued that the ECJ’s attempt to impose procedural requirements on contracts outside the directives may risk undermining the carefully achieved regulatory balance

⁴⁸ Case C-324/98, *Telaustria Verlags GmbH v. Telekom Austria AG*, 2000 E.C.R. I-10745

⁴⁹ See *Telaustria*, 2000 E.C.R. I-10745 para.60&61

⁵⁰ Case C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de’ Botti*, 2005 E.C.R. I-7287 para.21

⁵¹ See Sue Arrowsmith, note 47, at p.67

between the free trade goal and other domestic concerns.

The ECJ's general tendency in expansive interpretation can also be reflected in its interpretation of the directives. The general principles of transparency, equal treatment and non-discrimination were held by the ECJ to underlie the directives⁵², which now have been expressly written into the new directives.⁵³ The ECJ has employed these general principles not only to interpret the explicit rules in the directives but also to imply additional obligations alongside the detailed and precise rules of the directives.

For example, Article 1 of each Remedies Directive provides that procurement decisions shall be 'viewed effectively and, in particular, as rapidly as possible'. Despite its vague wording, the principle of effectiveness entails precise binding obligations, which dramatically differ from those general principles governing remedies under the GPA (see 3.2.4.2).

Member States are required to comply not only with the specific requirements of the directives but also the principle that the remedies system as a whole is effective. This principle has been interpreted to impose precise obligations in addition to the minimum requirements of other more specific provisions of the directives. For instance, in *Alcatel*⁵⁴, the ECJ stated that the principle of effectiveness requires Member States to make available the set-aside remedy against any disputable award decision. This requirement, the Court further indicated, would not be satisfied if a national system which prohibits the setting aside a concluded contract could not give aggrieved suppliers a practical opportunity to challenge the award decision before the contract is concluded.

The judgment of *Alcatel* seems to suggest that a period of reasonable delay between the award decision and the conclusion of the contract should be provided to allow time for suppliers to make a challenge if states choose to prohibit the setting aside of a concluded contract, which has been

⁵² The ECJ in *Storebaelt* stated that the duty to observe the principle of equal treatment 'lies at the very heart of the directive' despite the absence of explicit reference of that principle in the directive text. See Case C-243/89, *Commission v Denmark* [1993] E.C.R. I-3353, ECJ para.33. As with the principle of transparency, the ECJ recognised that transparency is another principle implied by the principle of equal treatment and non-discrimination in order to enable compliance with it to be verified. See Case C-275/98 *Unitron Scandinavia and 3-S* [1999] E.C.R. I-8291, ECJ, para.31; Case C-19-00, *SIAC Construction v County Council of the County of Mayo* [2000] E.C.R. I-7725, ECJ, para.41

⁵³ See Article 2 of Directive 2004/18/EC and Directive 2004/17/EC

⁵⁴ See Case C-81/98 *Alcatel Austria v Bundesministerium für Wissenschaft und Verkehr* [1999] ECR I-7671

expressly written into the new Remedy Directives as a ‘standstill period’ requirement.⁵⁵

In later case of *Universale-Bau*⁵⁶, the vague term ‘reasonable’ used in the judgment of *Alcatel* has been further clarified and very short time periods has been accepted as ‘reasonable’ including a two-week period from publication of an award notice, or six months after the award of the contract where the notice is not published.

4.1.4.3 Discretion

Different from the plurilateral nature of GPA, the procurement rules are an integral part of the EC agreement and thus mandatory for all EC Member States. Furthermore, states have little discretion in negotiation in the sense that there is a uniform coverage for all Member States without any possibility of derogation for particular entities or sectors.

Previously, it was possible for Member States to gradually abolish discriminatory measures in light of politically difficulties for removing these measures overnight. When the European Economic Community was first formed, members were provided with a transitional period only on expiry of which the rules on free movement of goods⁵⁷ became fully operational.⁵⁸

As mentioned above, the EC procurement regime was designed as a form of legal framework, within which states enjoy discretion in adopting their own national procurement legislation. States may choose to include stricter or more detailed rules in their national legislation than what are required in the directives.

The rules of the public sector directive and the utilities directive are quite similar, but the latter seem to grant more state discretion in implementation. For instance, under the public sector directive, formal tendering procedures, i.e. the open procedures⁵⁹ and restricted procedures⁶⁰, have to be used

⁵⁵ See the new Remedy Directive 2007/66/EC, and also Section 4.1.4.4b

⁵⁶ See Case C-470/99 *Universale-Bau v EBS* [2002] ECR I-11617

⁵⁷ Article 28, ex Article 30

⁵⁸ According to the old EEC Treaty Art.33 (7), directives shall be issued to establish timetables and procedures for eliminating measures having an effect equivalent to quantitative restrictions. As for the procurement of goods, Directive 70/32/EEC, a so-called ‘liberalisation directive’, was adopted under the Art. 33 (7) mandate listing discriminatory practices which Member States were obliged to eliminate

⁵⁹ For the meaning of ‘open tendering’ under the EC procurement directives, see Art. 11 (a) of Directive 2004/18/EC and Art.9 (a) of Directive 2004/17/EC

in most cases with the availability of negotiated procedures⁶¹ only in exceptional cases.⁶² However, the utilities directive allows procuring authorities a free choice between the open procedures, the restricted procedures and the negotiated procedures provided that a call for competition has been made.⁶³

Generally speaking, the EC directives represent a much harder approach than the GPA in terms of states' discretion in implementation. As discussed in the previous section, the EC procurement rules possess a higher degree of precision than the GPA. In particular, the ECJ's broad judicial interpretation of the rules results in more detailed obligations.

On the one hand, a higher level of precision may not necessarily of itself imply greater constraints but just greater clarity of treatment. For example, the new explicit provisions on framework, auctions and electronic communications in the EC directives serve to remove legal uncertainties rather than to limit states' discretion in using them.

On the other hand, the more detailed feature of the EC rules together with the ECJ's broad interpretations does restrict states' discretion in many respects. The rules governing award criteria can serve as an example. Although the previous directives only listed certain criteria for determining the most economically advantageous tender as illustrative examples⁶⁴, the ECJ went a step further to held in *Concordia Buses* that all the criteria for awarding the contract must be 'linked to the subject-matter of the contract' on the ground that all illustrative criteria are of this type, which has been expressly written into the current directives now.⁶⁵ By contrast, under the GPA, it is still possible to argue that criteria unrelated to the subject matter could also be considered (see Section 3.2.4.3).

In addition to the detail in explicit provisions, the ECJ's expansive interpretations on the general

⁶⁰ For the meaning of 'restricted procedure' under the EC procurement directives, see Art. 11 (b) of Directive 2004/18/EC and Art.9 (b) of Directive 2004/17/EC

⁶¹ For the meaning of 'negotiated procedure' under the EC procurement directives, see Art. 11 (d) of Directive 2004/18/EC and Art.9 (c) of Directive 2004/17/EC

⁶² See Art.28 of Directive 2004/18/EC

⁶³ See Art. 40 (2) of Directive 2004/17/EC

⁶⁴ These examples includes price, delivery date, period for completion, running costs, aesthetic and functional characteristics profitability, technical merit. See Directive 93/37 Art.30.1(b), Directive 93/36 Art.26.1(b), Directive 92/50 Art.6.3.1(a), and Directive 93/38 Art.34 (a)

⁶⁵ Case C-513/99, *Concordia Bus Finland v Helsinki* [2002] E.C.R. I-7213 ECJ, para.59&64

principles of transparency, equal treatment and non-discrimination further restrict states' discretion. Taking the principle of equal treatment as an example, this principle was first articulated by the Court in *Storebaelt*⁶⁶. In this case, *Storebaelt*, the contracting authority, conducted negotiations with a tender which did not comply with the tender conditions. It was held by the Court that *Storebaelt* infringed the principle of equal treatment by accepting a tender that did not comply with a fundamental requirement of the tender conditions.

The Court also made it clear that the duty to observe the principle of equal treatment 'lies at the very heart the directive'⁶⁷, although it was yet written into the explicit provisions. Since then, the Court applied this principle to several cases without clarifying its precise meaning.⁶⁸

However, in the case of *Fabricom*, the Court stated that 'the equal treatment principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified'⁶⁹. In so defining the principle, the Court is left with a broad discretion in determining the meaning of 'comparable' or 'different' situations and the justifications for departing from this requirement.⁷⁰

Arrowsmith, in her recent article⁷¹, demonstrates how states' discretion has increasingly been reduced by the ECJ's case law in deciding under what circumstances the procuring entity may treat two suppliers in a different way. In *Fabricom*, the Court held that the Belgian law prohibiting all persons involved in preparatory work from tendering contravened the directives because it was not proportionate. As explained by the Court, the rules went 'beyond what is necessary to attain the objective of equal treatment for all tenderers', and the principle of equal treatment could be achieved by a less restrictive measure – to only exclude those who were unable to prove that their participation entailed no risk for competition.⁷² As a result, the proportionality test stated in

⁶⁶ Case C-243/89, *Commission v Denmark* [1993] E.C.R. I-3353

⁶⁷ *Ibid.* para.33

⁶⁸ For example, Case C-87/94, *Commission v Belgium* [1996] E.R.C. I-2043; Case C-16/98, *Commission v French Republic* [2000] E.R.C. I-8315

⁶⁹ See Case C-21/03, *Fabricom v Etat belge* [2005] E.R.C. I-1559, para.27

⁷⁰ See Arrowsmith, note 47, at p.41

⁷¹ *Ibid.* at pp.41-46

⁷² See note 68, para.32-36

Fabricom further constrains states' discretion in implementing the principle of equal opportunity.

Furthermore, even in the absence of explicit legislation and case law, states' discretion could also be affected by the vagueness of these widely-interpreted principles. For instance, there are neither legislative provisions nor judicial interpretations expressly dealing with the issue of later tender under the EC regime. The rules on time-limit, as discussed above, is to ensure suppliers sufficient time to prepare and submit their tenders, which should by no means restrict states' discretion to accept later tenders as the deadline is set by the procuring entity only for its own convenience.

However, whether the procuring entity is allowed to freely accept late tenders still depends on how the Court is going to apply the principle of equal treatment here. It can be interpreted to allow the procuring entity to accept late tenders so long as it gives other suppliers equal opportunities to improve their tenders during the extension period it gives to a particular supplier; but the principle of equal treatment can, however, alternatively be interpreted to require that the procuring entity adheres to any rules set by itself – failing to apply them to one supplier involves unequal treatment of others, which thus generally precludes the procuring entity from accepting later tenders.⁷³ Because of the unclear implication of this principle, states' discretion in deciding whether to accept late tenders can be constrained for the fear of being caught by this principle, especially taking into account the ECJ's previously restrictive approach in its interpretation.

Recently, many interpretations given by the ECJ have been incorporated into the new directives, for example, the requirement that the criteria for awarding the contracts must be 'linked to the subject-matter of the contract in question' has now been explicitly included in the directives.⁷⁴ Consequently, states' discretion in implementing the EC procurement rules has been increasingly curtailed by the unnecessarily detailed rules of the directives and the restrictive interpretation of them by the ECJ.

4.1.4.4 Delegation

⁷³ See Arrowsmith, note 5, at pp.458-459

⁷⁴ See Article 53 of Directive 2004/18/EC and Article 55 of Directive 2004/17/EC

4.1.4.4a Inter-governmental Mechanism

The EC's inter-governmental enforcement system is an advanced centralised enforcement regime, under which the ECJ is delegated with the power to adjudicate disputes, elaborate the agreed rules and to authorise coercive measures.

The ECJ is comprised of 25 judges at present, who shall be 'appointed by common accord of the governments of the Member States for a term of six years'.⁷⁵ Unlike the composition rule for the EC Commission and Council, there is no explicit nationality requirement and judges are chosen depending solely on their independence and legal qualifications or competence. Its structural and procedural elements form a barrier against potential attempts by national governments to exert an influence over the ECJ decisions. For instance, the Statue of the ECJ requires that the deliberations of judges shall remain secret,⁷⁶ which makes it difficult for national governments to discern how their proposed judge actually behaves in reaching the final decisions of the ECJ.

The prominent place occupied by the ECJ in the EC regime finds no parallel in other international arrangements where judicial organs are generally confined to a relatively modest role. The powers of the ECJ within the framework of the EC are closer to those of national rather than international jurisdictions.

Like all other international dispute settlement bodies, the main function of the ECJ is to deal with disputes between Member States as well as cases concerning interpretation and application of the EC law. However, unlike most of legalised dispute settlement bodies which adhere closely to treaty texts such as the WTO DSB (see Section 3.2.4.4a), the ECJ has been deriving its judgment from the objectives of the Treaty without explicit grounding in the Treaty text or the intent of national governments.⁷⁷

The ECJ rulings are binding upon parties to the dispute. If the ECJ finds a breach of rules by an institution for which the relevant Member State is hold responsible, the state is obliged to take

⁷⁵ See the EC Treaty Article 223 (*ex* Article 167)

⁷⁶ See Statue of the Court of Justice November 2005, Article 35.

⁷⁷ The EC Treaty Article 213 (*ex* Article 157)

‘necessary measures’ to comply with the judgment.⁷⁸ If the state fails to do so, the Commission may bring it before the ECJ again for failure to redress breach, and then penalty payment can be imposed.⁷⁹ During the process of proceedings before the ECJ, interim measures are available to suspend a concluded contract.

Although the ECJ is not rigidly bound by their own previous decisions, it usually follows its own precedents in the interests of legal certainty and the consistent development of the case law. As argued in Section 4.1.4.2, the ECJ has actually been acting as a law-maker by its expansive interpretation of the fundamental principles under the Treaty and the directives rules. Apart from its own case law the ECJ usually applies, many interpretations given by the ECJ have been clearly incorporated in the secondary regulations such as the directives.

The proceedings before the ECJ can be brought either by the European Commission⁸⁰ or by other Member States⁸¹. Like most of other inter-governmental DSM, there is no right for private parties to bring a proceeding against governments directly. The only avenue of legal redress open to private parties is to present their complaints to the Commission in the hope that it will initiate legal proceedings. The Commission may consider breaches brought to its attention by private parties but there is no guarantee that it will do so.

In practice, the institution of proceedings has been largely left to the Commission as the guardian of the European rules.⁸² The Commission can refuse or take up a case with its sole discretion.⁸³ The Commission used to take up and pursue all valid complaints brought to it, but now it concentrates on cases having a community-wide impact or raising major questions of interpretation.⁸⁴ The vast majority of disputes which are not of general importance will be expected to be dealt with through relevant national challenge procedures.

⁷⁸ The EC Treaty Article 228 (*ex* Article 171)

⁷⁹ More detailed information, see Arrowsmith, note 5, at pp.40-42

⁸⁰ The EC Treaty Article EC 228 (2) (*ex* EC Article 169)

⁸¹ The EC Treaty Article 227 (*ex* Article 170)

⁸² The EC Treaty Article 226 (*ex* Article 169)

⁸³ This position has been confirmed by the ECJ, see Case C-191/95 *Commission v Germany*, judgment of 29 September 1998; Case 247/87 *Star Fruit v Commission* [1989] ECR 291.

⁸⁴ European Commission Communication, Public Procurement in the European Union COM (98) 143, available at <<http://www.eipa.nl/Topics/Procurement/Commission%20Communication%20on%20public%20procurement%20COM-98-143.pdf>> at p.12

The essential role that the Commission plays in pursuing breaches of EC law can be regarded as one of most novel features of the EC enforcement system. As for other procurement regimes involving the delegation of formal adjudication power such as the GPA, the task of detecting and correcting non-compliance is largely relied upon the institution of challenge proceedings by one government against another, which may probably be motivated by their own political interests rather than appreciations of the value of the whole system. In contrast, the Commission, an institution largely independent from Member governments, is in a better position to act in the general interest of the Community.

4.1.4.4b National Challenge Procedures

However, the enforcement by suppliers at national level is considered the primary enforcement mechanism. The EC States are required to make the EC procurement rules enforceable by affected parties in their national courts and to ensure the relevant remedies fair and effective. In particular, the specific legislation on remedies was adopted: Directives 89/665/EEC [1989] O.J. (L395)33 for the public sector, and Directives 92/13/EEC [1992] O.J. (L76)14 for the utilities sector, which has recently been amended by the new directive, the Directive 2007/66/EC.⁸⁵

Like the GPA approach, Member States enjoy the freedom to design their own precise remedies system provided that certain minimum standards set by the directives are met. Also, the vital aspect of the form of remedy under both of the GPA and the EC regimes is that rapid interim measures should be provided to correct breaches of the agreement and to preserve commercial opportunities, but in the case of EC directives the anticipated measure is more precise on what forms of procedures must be made available.⁸⁶

⁸⁵ The new directive was adopted on 20 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC to improve the effectiveness of review procedures concerning the award of public contracts. Member States are obliged to implement the new directive into national law by 20 December 2009.

⁸⁶ See The GPA Art. XX(7) (a) and Art. 2(1)(a) of Directives 89/665/EEC and Directives 92/13/EEC

The EC directives are more detailed and further provide that the review bodies shall have the power to set aside or ensure the setting aside of decisions taken unlawfully,⁸⁷ and different from the GPA rules, both set aside of unlawful decisions and damages must be made available in the case of breach.⁸⁸ The newly adopted EC directive further introduces a ‘standstill’ period requirement under which the procuring entity should wait a certain number of days before concluding a public contract. If this standstill period has not been respected, the new directive requires national courts under certain conditions to set aside a concluded contract.⁸⁹

By contrast with the position under the GPA, national review bodies may independently seek a preliminary ruling of the ECJ on interpretation of the EC rules if they do not feel competent to resolve on their own. The ECJ answers specific questions concerning the rules and then sends the case back to national review bodies for deposition of the merits of the dispute. Such a link between the ECJ and national review bodies helps to ensure consistent interpretation of the EC rules.

Lastly, the concept of direct effect represents one of most remarkable features of the EC rules, referring to the capacity of EC rules to confer rights on individuals which can be enforced by national courts.⁹⁰ The doctrine of direct effect was firstly established by the ECJ in *Van Gend en Loos*,⁹¹ which may have the effect to put the enforcement of the EC law on dual levels: at the inter-governmental level, the Commission is delegated with the power to take a non-complying state before the ECJ; meanwhile, it also gives private individuals, at national level, rights to enforce the EC law before their national courts.

However, the Court also made it clear in *Van Gend en Loos* that not every treaty provision has direct effect and laid down a test for Treaty provisions to be held to have direct effect.⁹² Regarding the EC directives, they were not initially considered to have direct effective. The ECJ, however,

⁸⁷ Art. 2(1)(b) of Directives 89/665/EEC and Directives 92/13/EEC

⁸⁸ Except in the case where a contract has been concluded or where a penalty payment system is used for utilities. However Parties are not required to provide for both correction of the breach and compensation under the GPA Art.XX(7)(c)

⁸⁹ See Directive 2007/66/EC

⁹⁰ See Hanlon, *European Community Law, Third Edition* (London: 2003) at p.144

⁹¹ See Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Balastingen* [1963] E.C.R. I para.3

⁹² Ibid.

decided otherwise. In the case of *Van Duyn*, the Court held that the directives could be directly effective as the criteria for direct effect are satisfied.⁹³

In particular, as for the procurement directives, it has been ruled by the Court that most of substantive rules of the directives governing contract award procedures have direct effect.⁹⁴ That is to say, if a state fails to take the implementing measures or adopts measures which do not conform to such a directive with direct effect, affected parties will have the right to rely on the directive rules against the defaulting state. This direct link between the directives and domestic laws found in the EC is unique among international organisations. As discussed in Section 3.2.4.4b, most of international agreements including the GPA, international norms can only take effect in domestic legal system through legal incorporation or statutory recognition.

Nevertheless, the direct effect of the EC directives does not absolve Member States from the obligation to take measures to implement them.⁹⁵ Member States are legally obliged to properly transpose the directives into national law in due time. If a state fails to transpose the directives into national legislation, a creative interpretation made by its national court to meet the requirement of the directives will not suffice in itself to make that state comply with its obligation to implement the rules, as judicial interpretation in the absence of legislation is not sufficiently clear to confer the rights provided for by the directives.⁹⁶

A Member State which has not adopted the implementing measures required by the directives in the prescribed period cannot rely on its own failure to perform the obligations against individuals,⁹⁷ and continues being subject to a legally binding obligation to take steps to transpose them. Also, it may risk being brought before the ECJ, which may ultimately result in the Court imposing a financial penalty. Meanwhile, state liability may also be incurred for the non-implementation of

⁹³ Case 41/74 *Van Duyn v Home office* [1974] E.C.R. I-1337.

⁹⁴ These mainly include most rules of the public sector directives and the utilities directives such as the obligations for advertising, conducting the competition, criteria and evidence for qualification and award criteria. Many rules of the remedies directives which give states discretion over how to give effect to their obligations, however, do not have direct effect. See Arrosmith, note 5, at p.1393

⁹⁵ See Case C-433/93, *Commission v Germany* [1995] E.C.R. I-2303, para.24; Case C-102/79 *Commission v Belgium* [1980] E.C.R. I-1473, para.12

⁹⁶ See Case C-236-95 *Commission v Greece* [1996] E.C.R. I-4459

⁹⁷ See Case 148/78 *Pubblico Ministero v Ratti* [1979] E.C.R.I-1629.

directives: individuals who have suffered loss as a result of the failure of a national government to implement the directives may bring proceedings in tort before national courts against the government.⁹⁸

4.2 Code of Conduct on Defence Procurement of the EC Member States Participating in the European Defence Agency ('the Code')

4.2.1 Introduction, objectives and general approach

As have been examined at the previous section, public procurement of goods, services and constructions is highly regulated by the EC Treaty and directives, which are hard law rules in nature and with the effect of de facto harmonisation. Although procurement of military equipments is, by law, still covered by these hard law rules, in practice it is largely left unregulated owing to Member States' extensive use of derogations.

Derogations concerning public security can be found in the EC procurement rules. Most famously, Art.296 of the Treaty provides a general exemption from the procurement rules in cases where states consider necessary for the protection of the essential interests of their security in connection with 'the production of or trade in arms, munitions and war materials'.⁹⁹ Under this provision, states currently have very broad discretion over the application of the EC rules on their defence procurement. It has been recognised that the majority of defence contracts are exempted from the EC procurement rules and awarded on the basis of national procurement rules, and the European defence sector remains fragmented, with relatively small and closed national markets and divergent national regulatory frameworks.¹⁰⁰

In view of the economic and military benefits which could be achieved through a more liberalised defence procurement market, the European Commission has issued a series of Communications with

⁹⁸ However three conditions were laid down by the ECJ in *Francovich* before a Member State can be found liable: (i) the directive must confer rights for the benefit of individuals; (ii) the content of the right must be identifiable from the directive; (iii) there must be a causal link between the breach and the damage suffered. See Case C-6, 9/90 *Francovich and Bonifazi v Italy* [1991] E.C.R. I-5357, ECJ

⁹⁹ See the Treaty Art. Art.296 (1)(b) (ex Art.223)

¹⁰⁰ See the Commission, 'Green Paper on Defence Procurement' COM (2004)608 at pp.4&7-8

an attempt to improve the situation and two major initiatives have been announced. One is to adopt a restrictive interpretation of Art.296 to confine states' discretion in excessive use of the derogation; the other is to agree on a new and more flexible directive on the defence procurement to which derogation in Art.296 does not apply.¹⁰¹

Recently, the Commission issued a Communication clarifying that the derogation under Art.296 should be construed narrowly and is subject to strict conditions.¹⁰² Although the Communication is not a legally binding instrument solely with the effect of confirming existing law, it would oblige the Commission to abide by this interpretation when deciding whether to take actions before the ECJ,¹⁰³ which presumably has a persuasive force to convince Member States to comply. As with the possible new directive on defence procurement, Member States are yet to agree on anything so far.

In addition to the above initiatives taken by the European Community, a number of efforts have been made outside the EC framework. An early effort was made by the Western European Union ('the WEU'), which is a partially dormant European defence and security organisation established on the Treaty of Brussels of 1948.¹⁰⁴ In 1991 the defence ministers of the WEU Member States agreed to the Maastricht Declaration with the objective of creating a European Armaments Agency, which led to the creation of the Western European Armament Group ('the WEAG') a year later.¹⁰⁵

The basis for WEAG-wide armaments activities was a set of principles laid down in the Coherent Policy Document aimed at liberalising defence procurement market of Member States.¹⁰⁶ Given the non-binding nature of the Coherent Policy Document, its application depended on the political willingness of WEAG Members, and in practice was largely ignored from the outset.¹⁰⁷ The WEAG

¹⁰¹ See the Commission, 'Communication from the Commission to the Council and the European Parliament on the Result of the Consultation Launched by the Green Paper on Defence Procurement and on the Future Commission Initiatives', COM(2005)626 at p.5

¹⁰² The Commission, 'Interpretative Communication on the Application of Article 296 of the Treaty in the field of Defence Procurement', COM(2006) 779 final, Brussels, 7.12. 2006

¹⁰³ See the Commission, note 100, at p.9

¹⁰⁴ For more detailed information concerning the WEU, visit its official website at <<http://www.weu.int/>>

¹⁰⁵ See Western European Armaments Group, *History & Objectives*, available at <<http://www.weu.int/weag/>>

¹⁰⁶ See Western European Armaments Group, *Panel III: Procedures & Economic Matter*, available at <<http://www.weu.int/weag/panel3.htm>>

¹⁰⁷ Although it included a kind of monitoring system, in practice this monitoring exercise had limited success as Member States did not always submit all the relevant data. See A. Georgopoulos, 'The European Defence Agency's Code of Conduct for Armament Acquisitions: A Case of Paramnesia', (2006) 2 *P.P.L.R.* 51, at p.59

was closed in 2005 and most of its workings have now been transferred to the European Defence Agency (to be discussed below). Accordingly, the WEAG Coherent Policy has also been replaced by the new European Defence Agency initiatives.

The second initiative is the establishment of a management agency of collaborative defence projects. In 1996 the Organisation for Joint Armament Co-operation ('the OCCAR') was established by the defence ministers of France, Germany, Italy and the UK to provide more effective and efficient management of certain existing and future collaborative armament programmes.¹⁰⁸ The success of the OCCAR was limited as small states considered it as an attempt of larger ones to dictate the way of European defence procurement integration, and the latter soon also realised that it is impossible to sustain European armaments co-operation without the participation of the majority of European states.¹⁰⁹

The most recent initiative is a Joint Action of the Council of European Union established the European Defence Agency ('the EDA') in 2004.¹¹⁰ The participation of the EDA is not automatic for all EU Members though open to all of them. The EU Members can freely decide to participate immediately or at a later stage after the adoption of the Joint Action or to withdraw from the EDA at any time provided they notify their intention accordingly.

In 2005, the EDA adopted a non-binding Code of Conduct on Defence Procurement of the EU Member States Participating in the European Defence Agency ('the Code').¹¹¹ In consistent with the flexibility of participation for the EDA, states may subscribe to it or not; they may cancel their participation at any time; and no sanctions would apply if a subscribing state does not observe the rules.¹¹² Currently, out of the 24 EDA participating Member States, that is, all EU members except

¹⁰⁸ The membership of the organisation is open to any other EU Member States, and it has recently been joined by Belgium and Spain, respectively in 2003 and in 2005. The Netherlands, Luxembourg and Turkey are actually participating in the relevant programme, without being members of the organisation. See its official website at <http://www.occar-ea.org>

¹⁰⁹ See A. Georgopoulos, 'Defence Procurement and EU Law', (2005), 30 *E.L.R.* 559 at p.562

¹¹⁰ See the Council of European Union, Council Joint Action 2004/551/CFSP of July 12, 2004 on the establishment of the European Defence Agency [2004] O.J. L245/17

¹¹¹ See the Code of Conduct on Defence Procurement of the EU Member States Participating in the European Defence Agency, November 21, 2005, Brussels, available at <http://www.eda.europa.eu/edemregime/edemregime.htm>

¹¹² See the Code at p.2

Denmark, 22 have committed to follow the Code principles and rules.¹¹³

The objective of the Code is to encourage application of competition in the segment of defence procurement derogated from the EC procurement rules.¹¹⁴ To this end, a set of general principles have been laid down including the principles of fair and equal treatment of suppliers, mutual transparency and accountability, mutual support and mutual benefit. Under each of these principles, comparatively more precise rules are provided, explaining what the principle entails and indicating any concrete measure needed to implement it.

Taking the principle of fair and equal treatment of suppliers as an example, transparency and equality of information is pointed out as an important element of the principle. Further, concrete measures are also required to substantiate this element. First of all, participating states may make arrangements to publish all new defence procurement opportunities covered by the Code on one single portal. Secondly, all participating states are encouraged to provide suppliers with a 'vade mecum' to familiarise foreign suppliers with their national procurement procedures. Thirdly, a standard-format announcement on contract awards will also be posted to the public; and lastly, certain transparency and equal treatment rules are also included governing the conduct of the procurement proceedings itself including the rules on selection criteria, specifications and statement of requirement, award criteria and debriefing.

Additionally, the Code recognises, as part of its principle of mutual benefit, that the regime shall expand procurement opportunities for Small and Medium Enterprises (SMEs) from across Europe to sell into a continental scale market.¹¹⁵ Consequently, a Code of Best Practice in Supply Chain was also adopted in 2006, as an integral part of the Code, to ensure that fair competition and the benefits of the regime are driven down the supply chain.¹¹⁶

¹¹³ Spain and Hungary have initially declined to participate. See <http://www.eda.europa.eu>

¹¹⁴ The Code at p.1

¹¹⁵ The Code at p.4

¹¹⁶ See the Code of Best Practice in the Supply Chain, May 15, 2006, Brussels, available at <http://www.eda.europa.eu/edemregime/edemregime.htm>

4.2.2 Coverage

The Code covers all defence procurement contracts whose value exceeds 1 million and which meets the condition for application of Art.296, excluding certain clearly specified contracts.

Art.296 allows Member States to derogate from the Treaty and directives rules, in those cases where an exception from those hard law rules is required for the protection of their essential security interests. The application of the Code attempts to subject massive defence procurements derogating from the hard law rules to a certain degree of soft law regulation.

Like the EC directives, a value threshold above which the rules apply is set to ensure cross-boarder interests. Moreover, the Code excludes certain highly sensitive defence procurements such as nuclear weapons procurement, which seem inappropriate for any international regulation from a free trade perspective.

The way how Art.296 is interpreted is very important to determine the application of the Code for participating states, which provides a dividing line between the application of the EC procurement rules and that of the Code. For example, the Commission's restrictive interpretation on Art.296 might make more defence-related contracts fall under the EC procurement rules, and thus outside the application scope of the Code.

The Commission explicitly clarifies the relationship between the EC procurement rules and the Code as pursuing the same objective in a different segment of defence market.¹¹⁷ The Code and the proposed new directive on defence procurement can also work as complementary instruments, as the former applies in cases where the conditions for the use of Art.296 are met and the latter applies where are not.

4.2.3 Secondary policies

Defence procurement has extensively been utilised as a policy tool to promote secondary objectives. States may directly award domestic firms the contracts to develop or support their own national

¹¹⁷ See the Commission, note 101, at p.8

defence industries to guarantee the security of supply in time of emergency; or allow foreign participation with the requirement of transferring the relevant technological know-how to enhance their national defence capabilities. Alternatively, states may use defence procurement as an investment vehicle in a particular industry which is located in a distressed region or of strategic interest.

After subscribing to the Code, Member States' secondary use of covered defence procurement would be ruled out by its principle of fair and equal treatment if it has a discriminatory effect. For example, measures favouring non-competitive national defence industries will be prohibited by this principle. However, if there is no discrimination involved, the Code does not explicitly prevent states from using defence procurement to promote secondary objectives.

More importantly, unlike other procurement regimes such as the GPA and the EC (see Section 3.2.3 & 4.1.3), the Code does not prohibit the use of offset, and on the contrary, it expressly mentions the consideration of offset as one of possible criteria when evaluating 'the most economically advantageous solution'.¹¹⁸ Consequently, states are left with considerable freedom to pursue secondary objectives at the evaluation stages.

4.2.4 Soft Law & Hard Law Issues

4.2.4.1 Bindingness

The Code is a voluntary non-binding instrument. It is expressly stated in the Code that 'no legal commitment is involved or implied', and 'the regime or operate on the basis of sovereign Member State voluntarily choosing to align their policies and practices...those who elect to join the regime, and follow this code, will be free to cancel their participation in the regime at any time'.¹¹⁹ The non-binding nature of the Code echoes that of the context in which the Code was concluded, namely, the EDA, which is essentially a voluntary inter-governmental forum.

Defence procurement, because of the very nature of the procured products, are often very

¹¹⁸ The Code at p.3

¹¹⁹ The Code at p.2

politically sensitive in the sense of its being closely connected with national sovereignty and security. Derogations are therefore often included in international procurement regimes to protect states' essential security interests.

Besides the EC rules, the GPA, for example, also contains a general exemption for action and non-disclosure of information by any state that 'considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security for national defence purpose'.¹²⁰ Indeed, national security interests are widely considered a legitimate reason to exempt certain defence procurements from international regulation.

Therefore, it is reasonable to assume that the non-binding nature of the Code is largely owing to the very area it attempts to address: an extremely sensitive area excluded from the application of binding hard law rules. Legally binding rules such as the EC treaty or directives are theoretically inappropriate or politically infeasible to regulate certain defence procurements closely related to states' essential security interests. However, it is also undesirable to leave them completely unregulated, especially in consideration of the EC states' extensive use of derogations from the hard law rules. In this regard, the non-binding Code was brought in to fill the gap, providing a certain degree of soft law regulation.

4.2.4.2 Precision

In general, the Code possesses a very low degree of precision, laying down general principles rather than prescriptive rules. It does not include a complete set of detailed procedural rules, which can be found in many other procurement regimes such as the GPA, the EC directives, the NAFTA and the FTAA (see Section 3.2.4.2, Section 4.1.4.2, Section 4.3.4.2 and Section 4.4.4.2 respectively). Instead, it resembles the COMESA's or the APEC's principled approach (see Section 4.5.4.2 & 4.6.4.2), and sets out general principles such as fair and equal treatment of suppliers, mutual transparency and

¹²⁰ See the GPA, Art.XXIII(1)

accountability, mutual support and mutual benefit.

In comparison with the COMESA directives or the APEC NBPs, the Code generally shares a similar degree of precision with them, and in some respects, it seems even more general and ambiguous. Regarding the issue of qualification criteria, the Code only generally states that all companies will be selected ‘on the basis of transparent and objective standards, such as possession of security clearance, required know-how and previous experience’. Moreover, the Code contains no specific rules governing the issues of minimum time-limits for the receipt of tenders etc

Despite the similarly imprecise feature, different reasons can be raised to explain their imprecision. Regarding the COMESA directives and the APEC NBPs, the principled approach is mainly used to accommodate the diversity of their Member States, whilst in the case of the Code consisting of more economically and politically homogenous states, again, the reason for its vagueness is because of the particular area it intends to address – certain defence procurement contracts exempted from the EC hard law procurement rules for the protection of Member States’ essential security interests.

Soft law rules in terms of its vague content are believed to be better suited to their highly sensitive nature. Further, in the case of the Code, all its Member States have taken hard law obligations in procurement of civil goods, services and constructions as well as of defence goods and services not closely relating to national security under the EC rules. However, regarding the procurement of military products and services concerning essential security, it has been proven politically impossible for Member States to accept any hard law regulation. These types of defence procurement are expressly excluded, even for limited soft law regulation in regimes such as the COMESA and the APEC.¹²¹

4.2.4.3 Discretion

The EDA membership does not predetermine the participation in the Code. The EDA Member States may, in their absolute discretion, choose to participate in the regime or not. It is explicitly stated in

¹²¹ See the COMESA Directives, Part B (2)(b) and the APEC NBPs, at para.73

the Code that the Member States may freely subscribe to it or not; and ‘those who elect to join the regime, and follow this Code, will be free to cancel their participation in the regime at any time’.¹²²

Furthermore, a considerable wide discretion is left with subscribing Member States over how to transpose the Code principles into their national legislation. It does not contain a series of detailed procedural rules restricting states’ discretion in implementation. For example, there are no rules governing the choice of procurement methods.

As have been examined in Section 3.2.4.3, Section 4.1.4.3, Section 4.3.4.3 and Section 4.4.4.3, regimes such as the GPA, the EC, the NAFTA and the FTAA confine states’ discretion over the choice of procurement methods by indicating certain formal competitive tendering as ‘standard’ procedures with the possibility of using other procedures under prescribed conditions, while others like the COMESA and the APEC leave states with more discretion by only recommending the generally preferred procurement methods for normal contracts, but allowing states to define their own particular conditions for the use of alternative methods (see Section 4.5.4.3 & 4.6.4.3).

In the absence of any rules on the use of procurement methods, the Code Member States may, in their sole discretion, allow the general use of more informal procurement procedures to facilitate communications between the procuring entity and suppliers. Apparently, extensive negotiations with suppliers at all stage of the procurement process are normally indispensable given the highly technical and complex feature of the defence contracts covered by the Code.

So far as the issue of award criteria is concerned, the Code suggests that the fundamental award criteria should be ‘the most economically advantageous solution for the particular requirement, taking into account inter alia consideration of costs, compliance, quality and security of supply and offset’.¹²³ Although the Code emphasises value-for-money concern by referring to ‘the most economically advantageous solution’, it also expressly points out other factors for consideration such as security of supply.

The special features of covered defence procurement distinguish it from other types of

¹²² See the Code at p.2

¹²³ The Code at p.3

procurement, which are not only economic and technological, but also closely related to the national security and defence policies of Member States. For example, the nature of defence procurement requires sources of supply to be guaranteed for the entire duration of an arms programme no matter at times of peace or at times of war, as well as demands confidentiality of information concerning its technical specifications.¹²⁴

The list of possible criteria contained in the Code is non-exhaustive, and there are no explicit restrictions on the scope of permissible award criteria as those of the EC directive, such as the requirement that award criteria should be linked to the subject-matter of the contract. Arguably, Member States may include additional award criteria for consideration as they see fit. Again, this wide state discretion can be explained by the sensitivity of the procurement contracts that fall under the scope of the Code.

Although the vast majority of the Code rules are very soft in terms of broad discretion given to states in implementation, some are quite prescriptive and to a large extent constrain states' discretion. For example, the Code foresees the establishment of a single online portal operated by the EDA, the Electronic Bulletin Board, and requires that all relevant new defence procurement opportunities should be published on that portal in advance.¹²⁵ This requirement largely restricts states' discretion over the choice of media for publication. In this regard, the Code follows the approach of many hard law regimes such as the EC, the GPA, the NAFTA and the FTAA by requiring the use of precisely indicated media for advertising procurement opportunities.¹²⁶

However, relevant rules of other soft law regimes may be found less restrictive; for example, the COMESA directives only suggests that national law should require the publication of a notice of contract award for contracts the value of which exceeds a specified threshold, without any guidance on what types of media should be used for the publication¹²⁷. Similarly, in the case of APEC NBPs,

¹²⁴ See the European Commission, note 100, at pp.4-5

¹²⁵ See the Code at p.2

¹²⁶ See the EC Public Sector Directives, Art.36 and the EC Utilities Directives, Art.41; the GPA, Art.IX; the NAFTA, Art.1010; the FTAA, Ch.XVIII, Art.16

¹²⁷ See the COMESA directives

procurement opportunities are generally recommended to be published in ‘a medium readily accessible to suppliers’, such as official journals/gazettes, newspapers, specialised trade journals, and internet.¹²⁸

4.2.4.4 Delegation

4.2.4.4a Inter-governmental Mechanism

Given its non-binding nature, the non-compliance with the Code will result in political embarrassment rather than legal consequences. As clearly stated in the Code, ‘no sanction is envisaged for any non-observance of this Code by any SMS (‘subscribing Member States’), beyond the requirement to account to the other members of the regime’.¹²⁹ There is no delegation of adjudicative power to a third party to enforce the rules, and instead a monitoring and reporting system is created to induce state compliance.

According to the Code, the EDA is not expected to assume the role of independent investigator of the Member States’ compliance, but it will function as monitor of the regime with regular reports to the Steering Board which consists of defence ministers of 24 participating states.¹³⁰ Apparently, the EDA is delegated with no specific power to take actions against those Member States which breach the Code, but may report the breaches to its Steering Board where the circumstances can be debated by Member States.

Such a monitoring and reporting system may exert significant ‘peer pressure’ on Member State to comply. In the absence of legally binding rulings, sanctions or other hard law enforcement mechanisms, ‘peer pressure’ is regarded as the driving force which makes the soft law rules effective, and it has been frequently resorted to by many other soft law regimes such as the APEC (see Section 4.6.4.4a) and the OECD (see Section 5.2.2.4).

In the case of the Code, the generation of ‘peer pressure’ mainly involves the invocation of the

¹²⁸ See the APEC NBPs, para.8

¹²⁹ See the Code at p.2

¹³⁰ See the Code at p.2

exemption provided by the Code. The Code permits non-competitive procurement in certain exceptional cases, which is subject to certain safeguard measures: states are required to provide an explanation for non-competitive procurement to the EDA.¹³¹ The EDA may then report any suspicious incompliance to the Steering Board so that the matter can be discussed in that forum.

‘Peer pressure’ can be generated through the discussion and debate among Member States, which may bring the non-complying Member back in line with the Code rules. Furthermore, although the Code relies on Member States voluntarily choosing to comply with its principles and rules, it operates on a reciprocal basis. Member States may refrain from violating the Code rules out of fear that their own national defence industries could be locked out from the defence procurement market of other Member States, which was described by Georgopoulos as ‘another hidden stick’ to the Code regime.¹³²

Nevertheless, in contrast with other soft law regime such as the APEC and the OECD (see Section 4.6.4.4a and Section 5.2.2.4), the Code still lacks an institutionalised ‘peer review’ system, under which comprehensive and systematic peer reviews will be conducted on a regular basis to monitor compliance. The details of the monitoring procedure remain unclear – it spells out neither how the discussions in the Steering board will proceed nor in what circumstances such discussions can take place. Therefore the influence of the Code monitoring system is still hard to be predicted.

4.2.4.4b National challenge procedures

The Code does not require Member States to make available any national challenge system for aggrieved suppliers concerning the defence procurement contracts to which the Code applies

4.3 North American Free Trade Agreement (‘NAFTA’)

4.3.1 Introduction, objectives and general approach

The NAFTA is a regional binding agreement between Canada, the U.S., and Mexican to implement

¹³¹ Ibid

¹³² See A. Georgopoulos, note 107, at p. 60

a free trade area, which was signed in 1992 and entered into force in 1994. Such an agreement largely builds upon the Canada-US Free Trade Agreement ('CFTA') with an extension to Mexico¹³³, but it includes many expansions and improvements of the CFTA rules.¹³⁴

The objective of the NAFTA is to integrate the whole North American continent into one free trade area and to promote trade and economic co-operation between North American and South American countries.¹³⁵ The issue of public procurement is dealt with in the NAFTA Chapter 10, which is regarded as one of the most outstanding achievements of NAFTA as well as one of the most difficult to accomplish. The aim of the NAFTA Chapter 10 is to liberalise procurement measures so as to create balanced, non-discriminatory, predictable and transparent government procurement opportunities for firms from all Member States.¹³⁶

Similar to that of the GPA, the heart of NAFTA Chapter 10 is national treatment, non-discrimination and transparency provisions. Also, the obligations contained in the NAFTA Chapter 10 clearly reflect the influence from the EC procurement rules and GATT Government Procurement Code ('the GATT Code'). Like the approach adopted by the EC and the GPA, detailed minimum procedural rules for the award of contracts have been set out to support its general principles of national treatment, non-discrimination and transparency.

4.3.2 Coverage

The coverage of NAFTA Chapter 10 is considerably wider than that of the old GATT code as well as CFTA in terms of entities and types of contracts covered. Unlike the EC directives, NAFTA Chapter 10 does not include a uniform coverage for Member States, and it simply lists covered entities in Annex 1001.1a in a schedule for each party, including federal government entities and

¹³³ The CFTA is a bilateral free trade agreement between Canada and the U.S., which was signed in 1987 and entered into effect in 1989.

¹³⁴ See Greenwold, 'The Government Procurement Chapter of the North American Free Trade Agreement' (1994) *P.P.L.R.* 1994, 4 at p.131; Reich, *International Public Procurement Law: the Evolution of International Regimes on Public Purchasing* (1999), at pp.261-262

¹³⁵ Reich, note 134, p.261

¹³⁶ Bovis, 'liberalising Public Markets in America: the North American Free Trade Agreement (NAFTA) Government Procurement Code' (1993) *P.P.L.R.* 1993, 4, CS 115-116 at P.115

enterprises. As with state and provincial government entities, the negotiation failed to include any such kind of entities under the regime and thus the list for state and provincial government entities is currently left blank. However, the three parties are committed to commence further negotiations in order to eventually subject them to this agreement.¹³⁷

The NAFTA rules apply not only to contracts for goods but also to contracts for services. NAFTA Chapter 10 takes the 'negative' list approach, where in principle all goods and services are covered unless specifically exempted.¹³⁸ In general, the NAFTA's approach to coverage are similar to that of the GPA (see Section 3.2.2): the coverage offered by the parties is largely based on the principle of reciprocity in terms of market opportunities, which eventually ends up with non-MFN treatment among parties of the same agreement. For instance, Canadian firms (but not Mexican firms) are denied access to most of the government enterprises listed in the U.S. schedule until Canada opens procurement by its provincial hydro utilities to U.S. firms.¹³⁹

Also, like most of international procurement regimes, the value of procurement contracts will need to be above certain financial thresholds in order to trigger the application of the NAFTA rules,¹⁴⁰ and the rules for valuation of contracts are also in place to prevent parties from splitting contracts to avoid obligations under the agreement.¹⁴¹

4.3.3 Secondary Policies

Both Canada and the U.S. have many existing programmes or legislations concerning the use of procurement as a policy tool, while the Mexican government enjoys extensive control over its national key industries. Consequently, the issue of secondary use of procurement has received particular attention under NAFTA Chapter 10.

Like the GPA or the EC procurement rules, the implementation of any secondary policies can be

¹³⁷ See NAFTA Annex 1001.a3

¹³⁸ Exceptions could be found in the areas of transportation, public utilities, research and development etc. See `NAFTA Annex 1001. b1 and b2

¹³⁹ See NAFTA Annex 1001.1a Schedule of the United States, Note, and NAFTA Annex 1001.1a-1 Schedule of the United States, para.6.

¹⁴⁰ The thresholds are set to rise in relation to the rate of inflation. See NAFTA Art.1001

¹⁴¹ See NAFTA Art.1002

affected by the national treatment and non-discrimination rule¹⁴² as well as its detailed rules on award procedures. NAFTA Article 1006 explicitly prohibits the use of offsets in the qualification and selection of suppliers, goods or services and evaluation of tenders.¹⁴³ Offset measures are considered to produce trade-distorting effects, and although they are not allowed under the EC Treaty, NAFTA is the first international procurement agreement that provides a clear prohibition against such measures.¹⁴⁴

As discussed in Section 3.2.3, the later new GPA has also incorporated a similar prohibition subject to special provisions for developing countries. Different from the position under the GPA, Mexico, as a developing country is not entirely exempted from this prohibition, but only permitted to impose a limited local content requirement under certain circumstances.¹⁴⁵ Canada and the U.S. are allowed to continue the existing set-asides programmes for small and minority business is allowed¹⁴⁶, while Mexico, which does not have parallel programmes, has been permitted to allocate a non-specific sector set-aside subject to specified restrictions¹⁴⁷

Furthermore, it is interesting to find that there are joint programmes for small business under Article 1021 of NAFTA, which call for the establishment of the Committee on Small Business to facilitate procurement policies in each country for small businesses. In view of the free trade objective of NAFTA Chapter 10, it seems a bit odd to include such programmes under the regime since they are to be conducted through trade discrimination, despite the fact that the promotion of small businesses may in itself be well worthy of Member countries' own domestic concerns. It can be argued that such programmes would be better justified if they are required to be conducted in the way that each Member's set-asides procurement opportunities are equally opened to small and minority businesses from all three parties.¹⁴⁸

¹⁴² See NAFTA Art.1003

¹⁴³ See NAFTA Art.1006

¹⁴⁴ Reich, note 134, p.268

¹⁴⁵ See NAFTA Annex 1001.2b Schedule of Mexico para.6.

¹⁴⁶ See NAFTA Annex 1001.2b Schedule of Canada, para.1(d); and Schedule of the United States, para.1

¹⁴⁷ NAFTA Annex 1001.2b Schedule of Mexico, para.3

¹⁴⁸ See Reich, note 134, p.267

4.3.4 Soft Law & Hard Law Issues

4.3.4.1 Bindingness

NAFTA is a legally binding instrument. Art.105 of NAFTA provides that Member States ‘shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement’. In Art.103 and Art.104, it states its relationship to pre-existing rules of other international agreements to which its Member States are also parties. Member States’ existing rights and obligations under the GATT and other agreements are affirmed, but the NAFTA agreement shall prevail in the case of any inconsistency between it and such other agreements, except as otherwise provided in the NAFTA agreement.¹⁴⁹ As regards legal formalities, the NAFTA agreement went through the traditional legal formalities of signature, ratification, and finally entered into force in 1994 on an exchange of written notifications certifying the completion of necessary legal procedure.¹⁵⁰

As a whole, both the content and the form of this agreement reflect the intent of the participating parties to create legally binding obligations rather than merely personal or political obligations in effect.

4.3.4.2 Precision

Both Canada and the U.S. were parties to the old GATT Code, but Mexico had not yet joined the GATT Code. As a result, a complete set of detailed provisions are laid down under the NAFTA Chapter 10 rather than the parties relying on direct incorporation of the GATT Code rules by reference with certain modifications, which is found under the CFTA.

Like the GATT Code, the NAFTA Chapter 10 includes general principles prohibiting discrimination in procurement as well as detailed transparency procedural rules to ensure non-discrimination. However, it goes into much greater detail than the GATT Code in almost every topic, and makes significant changes in certain aspects. For example, both the GATT code and the

¹⁴⁹ See NAFTA Art.103 & 104

¹⁵⁰ See NAFTA, Art.2203

EC procurement directives do not contain any express provision on the circumstances in which the post-tender negotiation with suppliers can be used. The NAFTA Chapter 10, however, introduces new disciplines governing the use of such negotiations, under which negotiations can only be allowed in two circumstances as specified under NAFTA Article 1014.1¹⁵¹. A similar provision on the use of the negotiation was later adopted under the new GPA¹⁵².

Except for the inclusion of additional detail, the NAFTA rules are very similar, if not identical, to those of the GPA on nearly every aspect including minimum time-limits for tendering and qualification criteria, because both regimes closely mirror the old GATT Code.

Taking the issue of minimum time-limits for tendering as an example, exactly like the GPA's approach, the NAFTA Chapter 10 lays down general principles as well as prescriptive rules to ensure that suppliers have sufficient time to prepare and submit their tenders. On the one hand, Article 1012 generally requires that the procuring entity provide suppliers with adequate time to prepare and submit their tenders, and also illustrates factors it must take into account when determining time-limits. On the other hand, it sets out specific minimum periods that must be allowed for the preparation, submission and receipt of tenders.

The wording and content of the NAFTA's general principles and precise rules on time limits closely resembles that of the GPA with only minor differences. For example, both the NAFTA Chapter 10 and the GPA provides that in selective procedures the period for the receipt of tender shall generally not be less than 40 days from the date of the initial issuance of invitations to tender, with the possibility of this standard time-limit being reduced in specified circumstances.¹⁵³

However, the GPA specifically states that this minimum period applies regardless of whether or not the date of initial issuance of invitations to tender coincides with the date of the publication of the notice of the list,¹⁵⁴ while the NAFTA Chapter 10 further requires that there shall not be less than

¹⁵¹ See NAFTA, Art 1014.

¹⁵² The new GPA Art .XIV lays down conditions governing the use of negotiations at the post tender stage, which is similar to NAFTA Art. 1024

¹⁵³ See the NAFTA Article 1012 and the GPA Article XI

¹⁵⁴ See the GPA Article XI.2(C)

40 days between the publication of the notice of the list and the receipt of tenders where the initial issuance of invitations to tender does not coincide with the date of publication of the notice.¹⁵⁵

In general, the transparency procedural rules of the NAFTA Chapter 10 share a similar degree of precision with those of the GPA.

4.3.4.3 Discretion

Similar to the GPA's approach, and in contrast with the EC rules, the NAFTA Chapter 10 does not attempt to define a uniform coverage for Member States, and thus states have a broad discretion when negotiating their coverage schedules.

Each party can freely make its offer regarding the covered contracts and entities as well as its country-specific threshold. However, like the position under the GPA, the coverage offered by the NAFTA parties is mainly based on the principle of reciprocity with the consequential result of the non-MFN treatment among members. As a result, small or developing countries may enjoy less discretion than big or developed countries in negotiating their coverage due to less market opportunities available for the former to offer, as discussed at Section 3.2.4.3.

When it comes to states' discretion in implementing their obligations, the NAFTA rules only set out minimum procedural standards under which states have a significant discretion to formulate their own domestic procurement rules. Since the NAFTA rules are very similar to those of the GPA in many respects, it is not surprising that a similar degree of discretion is granted to states in implementation under both regimes. For example, compared with the GPA rules, the NAFTA Chapter 10 also allows states a free choice between open and selective tendering for normal contracts, with the exception of limited tendering in specific circumstances, which are defined almost identically to those under the GPA with some new additions.¹⁵⁶

This is also the case with regard to the rules governing award criteria. Both of the regimes require that contracts be awarded to either the lowest-priced tender or the most advantageous tender in terms

¹⁵⁵ See the NAFTA Article 1012.2(C)

¹⁵⁶ See NAFTA Article 1016.2 and the GPA Article XV.1

of the specific evaluation criteria set out in the notices or tender documentation, but leave undefined the scope of acceptable non-price criteria.¹⁵⁷

As previously discussed in Section 2.3.1, soft law can be resorted to in order to accommodate states with different levels of readiness for legalisation in a particular area. In practice, more discretion is often given to developing countries in implementing their obligations, which is the case under the GPA. By contrast, the EC directives apply exactly the same rules to every Member States without granting any more discretion to any one of them, probably because of the comparative similarity of their economic, political, and legal conditions.

Mexico is the only developing country of the NAFTA members, whose procurement system was not as transparent, predictable and sophisticated as those of either Canada or the U.S. prior to its accession to NAFTA.¹⁵⁸ As a result, Mexico had to make significant changes to its procurement system to make it compatible with the NAFTA regime.

The nature of Mexico's reluctance to undertake the same level of commitment as Canada and the U.S. is analogous to that of other less developed countries towards the obligations under other procurement agreements.¹⁵⁹ These countries whose weak economies, institutions and laws prevent them from implementing hard legal commitments may possibly accept softer forms of agreement through S&DT provisions. Over time, the initially reluctant states may accept harder commitment if the soft arrangements work well without serious adverse consequence.

NAFTA Annex 1001.2a sets out transitional provisions to provide special concessions to Mexico for the gradual opening of its procurement market on one hand, and to temporarily soften certain procedural requirements for Mexico on the other. In terms of market access obligations, the liberalising rules initially apply only to a certain degree to some of its entities and sectors, then, are progressively extended to all the contracts covered by its schedule. For example, Pemex and CFE,

¹⁵⁷ The substances of the rules under both regimes are completely the same, though certain parts of the rules are worded in slightly different ways. See GPA Article XIII.4 (a) and the NAFTA Article 1015.4 (a)

¹⁵⁸ Greenwold, note 134, 4 at p.140

¹⁵⁹ Rege, 'Transparency in Government Procurement: Issue of Concern and Interest to Developing Countries' (2001) 35 *J.W.T* 489, at pp.495-497

two of the dominant Mexican energy enterprises, are allowed to set aside from the obligations of Chapter 10 the specified percentage of the total value of their procurement contracts, and the specified percentage for exemption started at 50% in 1994 but gradually decrease at the annual rate of 5% eventually ending in 2003.¹⁶⁰

These concrete concessions given by the NAFTA are much more meaningful than those under the S&DT provisions of the GPA. As argued in Section 3.2.4.3, the GPA S&DT provisions only states certain possibilities rather than concrete market concessions, under which developing countries may exercise a certain degree of discretion in terms of exempting certain entities, products or services from the national treatment rules, but subject to the prior consent of other parties. In contrast, Mexico can, at its sole discretion, make similar exemptions from the NAFTA rules for listed entities and sectors according to its specified transitional arrangement.

In terms of procedural requirements, Mexico may also enjoy a higher degree of discretion in implementation pursuant to these transitional provisions. For example, it provides that ‘Mexico shall use its best efforts to comply with the 40-day time limit requirements of Article 1012’.¹⁶¹ According to the NAFTA Article 1012, states are legally bound to ensure a minimum period of 40 days for suppliers to prepare and submit their tenders. Mexico, because of the above-stated special provision, is only under a legally binding obligation to ‘use its best efforts’ to comply with the requirement, which gives more discretion in implementation.

These transitional provisions have arguably made it easier for Mexico to accept the NAFTA rules and to agree to the inclusion of its state-owned enterprises for regulation. However, the greater discretion Mexico has in implementing its obligations is not permanent. Mexico has to fully comply with the NAFTA rules once its specified transitional period expires. Soft law provisions, in the context of NAFTA Chapter 10, have therefore served as an intermediate step towards the eventual hard law regulations which were unachievable at the negotiating stage.

Meanwhile, the introduction of the NAFTA procurement disciplines in Mexico may have also

¹⁶⁰ See NAFTA Annex 1001.2a para.1&2

¹⁶¹ See NAFTA Annex 1001.2a para.7

speeded the process of its accession to the GPA, because the compliance with the NAFTA rules have made things easier for Mexico to comply with the GPA rules owing to the similarity of procedural requirements between the two regimes.

Further, if Mexico's experience with open procurement markets turns out to be positive, other developing countries might be encouraged to consider the idea of liberalising their procurement markets.¹⁶² More importantly, the soft and gradual approach of NAFTA Chapter 10 to Mexico sets a valuable example for other international procurement instruments seeking wider participations from the part of developing countries.

4.3.4.4 Delegation

4.2.4.4a Inter-governmental mechanism

Chapter 20 of NAFTA provides a means for resolving disputes¹⁶³ over the interpretation or application of the NAFTA agreement including Chapter 10.

The procedures set out in Chapter 20 encourage states to make every attempt to arrive at a mutually satisfactory solution of any dispute, if at all possible. Like many other inter-governmental DSM, including the WTO DSM (See Section 3.2.4.4a), the NAFTA process calls first for mandatory consultations between governments concerned.¹⁶⁴ If consultations fail, a party may also require conciliation before the 'Free Trade Commission'¹⁶⁵, which is comprised of the Trade Ministers of the Parties.¹⁶⁶ If the Commission is unable to resolve the dispute, any consulting party may request the establishment of an arbitral panel.

Like the WTO DSU, mutual consent is not required to initiate the panel process and an arbitral panel will be automatically established on an ad hoc basis by the Commission upon the request of

¹⁶² Ibid.

¹⁶³ Except for the matters covered in Chapter 19 (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters) and as otherwise provided in this Agreement

¹⁶⁴ See NAFTA Art.2006

¹⁶⁵ According to NAFTA Article 2001, the 'Free Trade Commission', comprising cabinet-level representatives of the three governments, was created to supervise the implementation of this Agreement and resolving disputes.

¹⁶⁶ See NAFTA Art.2007

any complaining party.¹⁶⁷ The arbitral panel consisting of five panellists is selected from national Rosters¹⁶⁸, members of which are chosen strictly on the basis of objectivity, reliability and sound judgment, and expertise in international trade law.¹⁶⁹ Also, the arbitral panel shall be established by using a reverse selection process - instead of picking from one's own national roster as happened in the CFTA, the disputing parties are required to select panellists from each other's rosters.¹⁷⁰ It can be argued that such a reverse selection process greatly increases the impartiality of the panellists.

The panel shall present the disputing parties with a final report which contains findings of fact, a determination as to whether the measure at issue is or would be inconsistent with the Agreement and any recommendations to resolve the dispute. Like the WTO DSU, the final report of the panel shall automatically be adopted unless there is consensus not to do so.¹⁷¹

The arbitral decision is, however, not automatically applicable and binding upon the parties. Rather, it is more in the nature of a strong recommendation: upon receipt of the final report, the disputing parties shall agree on a resolution which should 'normally' conform to the panel recommendations, and the resolution shall be non-implementation or removal of a measure inconsistent with the Agreement or, failing such a resolution, compensation.¹⁷²

If mutual agreement has still not been reached at this stage, the complaining party may retaliate with the suspension of trade benefits of equivalent effect; and the party need not have to approach the panel for authorisation.¹⁷³ Then, while the disputant is entitled to turn to a panel to determine whether the level of suspension is 'manifestly excessive', it's left unaddressed for the choices available to the disputant even if the panel so concludes.¹⁷⁴

Therefore, different from the GPA and the EC, NAFTA Chapter 20 allows the disputing parties themselves to tailor a remedy and grants a wide discretion to the complaining party to assess the

¹⁶⁷ See NAFTA Art.2008

¹⁶⁸ See NAFTA 2009.1

¹⁶⁹ See NAFTA Art.2009.2

¹⁷⁰ See NAFTA Art.2011.

¹⁷¹ See NAFTA Art.2016 and 2017

¹⁷² See NAFTA Art.2018

¹⁷³ See NAFTA Art.2019.1

¹⁷⁴ See NAFTA Art.2019.3

other party's implementation. Although it essentially delegates the legal authority to an ad hoc panel for formal adjudication, the recommendatory nature of the arbitral panel decision reflects a softer arrangement, under which the dispute resolution process involves political bargaining to reach a 'mutually satisfactory resolution' and disputing parties can accept or depart from an arbitral decision without legal justification. Thus it represents a DSM that blends legalistic and political elements.

The NAFTA DSM also clearly manifests a preference for reaching political solutions by leaving the implementation of panel decision solely to the disputing parties themselves without legalistic supervision. It can be argued that such a system may discriminate in favour of more powerful states against weaker ones owing to the power asymmetry, under which the latter are more vulnerable to the former's greater penalties.

Again, like most of inter-governmental DSMs, no right of action for private parties is provided under the NAFTA DSM. Private suppliers have to lobby its government in order to initiate the NAFTA DSM machinery.

4.3.4.4b National Challenge Procedures

Apart from the inter-governmental DSM under NAFTA Chapter 20, a national bid challenge system is also introduced by Article 1017 of NAFTA. Member States are required to adopt and maintain a bid challenge system which allows aggrieved suppliers to challenge any aspect of the procurement process.

However, the requirements of national bid challenge procedures under NAFTA Chapter 10 are considered to be weaker in comparison with those under other procurement regimes such as the GPA and the EC (See Section 4.1.4.4b & 3.2.4.4b). For example, as regards the status of a review body, the NAFTA rules simply require that the review body shall have 'no substantial interest in the outcome of procurements'¹⁷⁵ There are no further requirements concerning the independence of the

¹⁷⁵ See NAFTA Annex 1017.1(9)

review body like those under the GPA or the EC directives.¹⁷⁶

More importantly, the review body decisions are only recommendations, which should normally be followed, rather than binding decisions pursuant to NAFTA Article 1017(k)(l). In contrast, the EC rules explicitly state that challenge decisions shall be legally binding and effectively enforced.¹⁷⁷

4.4 Free Trade Area of the Americas ('FTAA')

4.4.1 Introduction, objectives and general approach

In 1994, the FTAA was founded by 34 countries in South, Central, and North America¹⁷⁸, with the aim of uniting the economies of the Americas into a single free trade area.

The FTAA negotiations were formally launched in 1998 and it was agreed that the FTAA Agreement shall be balanced, comprehensive, WTO-consistent and will constitute a single undertaking.¹⁷⁹ There are three drafts of the FTAA Agreement on its official website and each of them includes a chapter on government procurement. The latest one is the third draft which has been available to public since 2003. More recently, the FTAA negotiations have been stalled mainly due to the unsettled differences between the approaches of the U.S. and Brazil.¹⁸⁰ The negotiations had not been successfully completed by the agreed deadline, 31 January 2005.

The latest or the third draft of FTAA agreement is made up of three sections, namely, General Aspects, Substantive Provisions and Procedures and Institutions. In General Aspects, Article 2 provides that the objective of planned Chapter XVIII on Government Procurement is to expand access to the procurement markets of the FTAA members. In order to achieve the said objective, certain general principals are laid down including the principles of non-discrimination, transparency and the principle of differential treatment. Similar to other procurement regimes including the GPA,

¹⁷⁶ See The GPA Article XX.6, Art. 2(8) of Directives 89/665/EEC and Art.2 (9) Directives 92/13/EEC

¹⁷⁷ See Art. 2(7) of Directives 89/665/EEC and Art.2 (8) Directives 92/13/EEC

¹⁷⁸ The 31 FTAA countries are Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, the United States, Uruguay, Venezuela.

¹⁷⁹ See, FTAA Summit of the Americas 1998, *Declaration of Santiago*. Available at <http://www.summit-americas.org/chiledec.htm>

¹⁸⁰ Kovacs, 'The Global Procurement Initiative' (2005) *P.P.L.R.* 2005, 1, 15-38 at p.23

the EC, and the NAFTA, detailed procedural requirements on the award of contracts are set out so as to ensure the implementation of the above principles.¹⁸¹

Furthermore, explicit provisions can be found requiring Member States to criminalize relevant corrupt practices in procurement.¹⁸² As argued in Section 3.3.2, the maintenance of ‘probity’ is one of main domestic objectives for governments to regulate procurement, and consequently major efforts to deal with corruption are often made at national level.

However, corruption can pose a significant problem for trade in the sense that market access commitments may have little impact in practice whilst corrupt practices continue.¹⁸³ The impact of corruption as a barrier to trade has led to several international initiatives aimed at combating corruption in the domain of public procurement, notably, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which is to be discussed in Section 5.2.

4.4.2 Coverage

Like NAFTA Chapter 10, the third draft of FTAA Chapter XVIII does not attempt to provide a general definition of procuring entity, but instead it includes a positive list of covered entities for each FTAA countries. However in contrast to the position under NAFTA, the FTAA intends to apply to the procurement of all goods and services for the listed entities except particular procurements contained in Article 3.2, and thus all the Member countries will have a uniform product coverage.

Moreover, the FTAA acknowledges the possibility to apply different financial thresholds to different Member countries.¹⁸⁴ It was agreed, in principle, that there should be higher thresholds for the smaller economies.¹⁸⁵ As with the entities covered, it is envisaged that there should be broad

¹⁸¹ See the third draft of FTAA Chapter XVIII Section B Substantial Provisions

¹⁸² See the third draft Chapter XVIII Article 28

¹⁸³ See Evenett and Hoekman, ‘Transparency in Government Procurement: What can We Expect from International Trade Agreements’

¹⁸⁴ See the third draft of FTAA Chapter XVIII, Article 3.1(b)

¹⁸⁵ See FTAA Trade Negotiations Committee, *Methods and Modalities for Negotiations*, FTAA, TNC/20/Rev.1.,18

coverage including central or federal level government entities and entities belonging to other categories of government.¹⁸⁶

However, it is not very clear about the exact way that Member countries shall make their offers. If offers were to be made on the basis of reciprocity as happened under the GPA and NAFTA regime, a number of small and poor countries would probably end up with no offers attractive enough to big and rich countries. In light of the principle of differential treatment, it was agreed to develop specific measures with regard to coverage entity that take into account the differences in the level of development and size of the economies.¹⁸⁷

4.4.3 Secondary policies

It seems that the FTAA third draft provides a greater scope for smaller countries to use procurement as a tool to pursue secondary objectives.

Despite the national treatment rules set forth in Article 5, smaller countries may retain the right to utilise procurements to promote secondary policies under certain circumstances. For instance, according to Article 6.1 and 6.2, it remains possible for smaller countries to employ procurement to promote the development of the national production apparatus and the participation of small, medium enterprises, or to support national industries as long as they are wholly or substantially dependant on government procurement.

In many small FTAA countries, production of national industries are confined to a narrow range of goods and services by virtue of their limited resource endowment and limited size of the domestic market, which makes these countries heavily dependent on a wide range of imported goods. As a result, foreign suppliers in many fields would not be significantly affected by such secondary procurement policies as long as the MFN rules are observed owing to the unavailability of similar domestic goods or services in those small countries.

October, 2002, available at <http://www.ftaa-alca.org/TNC/tn20r1_e.asp>.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

Moreover, smaller or developing Member countries may apply offsets in accordance with their scheduled market access commitments to be negotiated.¹⁸⁸ Also, small or developing countries may be allowed to temporarily institute emergency safeguards by means of higher percentage offsets, set asides, higher thresholds and margins of preference etc pursuant to Article 6.4. This might be justified by the smaller countries' concentration on a limited range of export goods and services also makes them extremely vulnerable to many factors such as the fluctuation in the price of exports and the changeable demand of international market.

4.4.4 Soft Law & Hard Law Issues

4.4.4.1 Bindingness

The FTAA agreement had not been concluded by the end of 2005 which is the deadline originally fixed. As early as 1994, the heads of the 34 economies of the Americas agreed to conduct negotiations towards a FTAA agreement. During its preparatory phase, the structure for the negotiations has been set out and general principles and objectives to guide these negotiations have been agreed to guide the negotiations. Among these general principles, it requires that 'all countries *shall* ensure that their laws, regulations and administrative procedures conform to their obligations under the FTAA agreement'.¹⁸⁹

The FTAA negotiations were formally launched in 1998 and three versions of the draft FTAA agreement have been made available till now. The draft FTAA agreement has been increasingly detailed and comprehensive over time. Art.4.1 of both the second draft and the third draft provides that 'each party is *fully responsible* for the observance of all provisions of the FTAA Agreement, and *shall* take such reasonable measure as may be available to it to ensure such observance by regional and local governments and authorities within its territory'.

It can be discerned from the FTAA negotiating history and the content of the draft agreement that

¹⁸⁸ See the third draft of FTAA Chapter XVIII, Article 7.2

¹⁸⁹ See *Summit of the Americas Fourth Trade Ministerial Joint Declaration*, San Jose Costa Rica March 19th, 1998 Annex I General Principles (k), available at http://www.ftaa-alca.org/Ministerials/SanJose/SanJose_e.asp

the intent of negotiating parties is clearly to conclude a legally binding agreement though the agreement has not yet entered into force at present.

4.4.4.2 Precision

Like most of other procurement instruments, the FTAA third draft attempts to regulate procurement by certain general principles which are supported by detailed procedural rules on the award of contracts. The procedural rules under the FTAA seem to be formulated in a relatively high degree of precision compared with other regimes. This high degree of precision can be illustrated by reference to, for example, its relevant provisions concerning the issues of minimum time-limits for tendering and qualification criteria.

With regard to the issue of minimum time-limits for tendering, the FTAA Chapter XVIII, like the GPA, the EC directives, and the NAFTA Chapter 10, lays down general principles as well as detailed rules on the minimum time-limits for submitting tenders. On the one hand, it generally provides that ‘the Parties shall guarantee that the prescribed time periods for the tendering process shall be adequate to allow participating suppliers of all Parties to prepare and submit responsive tenders’.¹⁹⁰

On the other hand, precise rules are set out to prescribe certain minimum deadlines that must be allowed for the preparation, submission and receipt of tenders. For example, it provides that in open tendering procedures a procuring entity shall provide bidders with no less than 40 [or 30 – the exact figure has yet to be decided] calendar days after the date of publication of a notice of invitation to tender for delivery of their proposals.¹⁹¹

Another example to be discussed is the relevant provision on qualification criteria. The FTAA Chapter XVIII does not include a detailed list elaborating grounds for excluding suppliers from participation and relevant evidences which procuring entities may demand as means of proof of standing, which can be found in the EC public sector directives (see Section 4.1.4.2). Instead, similar

¹⁹⁰ See the third draft of FTAA Chapter XXIII, Article 17.1

¹⁹¹ See the third draft of FTAA Chapter XXIII, Article 17.3 (a)

to the GPA's approach (see Section 3.2.4.2), the FTAA generally provides that technical qualification should be 'limited to the areas of greatest importance and significant value of the procurement'.¹⁹²

However, in this regard, the FTAA is a bit more precise than the GPA in the sense that the former further specifies what kind of conditions for participation should not or may be imposed. For example, according to the FTAA, the procuring entity should not impose certain conditions for participation, including that the supplier has previously been awarded one or more contracts by that party or that the supplier has prior work experience in the territory of that party.¹⁹³

4.4.4.3 Discretion

Instead of trying to harmonise the procurement rules of Member economies, the FTAA Chapter XVIII intends to merely provide a normative framework to ensure non-discrimination and transparency, under which states are left with a considerable discretion in implementing the rules according to their specific domestic conditions.

In general, the FTAA regime seems to accord a similar degree of discretion to states as the GPA and NAFTA. For example, similar to the GPA and the NAFTA rules (see Section 3.2.4.3 and Section 4.3.4.3), the FTAA allows both open and selective tendering procedures for normal contracts, while it restricts the conditions for the use of procedures departing from these formal competitive procedures - limited tendering procedures.

Regarding the issue of award criteria, the FTAA rules reflect an awareness of the need for state discretion. Similar to the GPA, the EC and the NAFTA, the FTAA provides that the contract shall be awarded to either the lowest price or the most advantageous tender. In determining the most advantageous tender, like the GPA and the NAFTA but not the EC, it is silent on the scope of acceptable non-price criteria. Therefore it can be assumed that the procuring entity is free to consider a broad range of non-price criteria in the absence of relevant judicial interpretation.

¹⁹² See the third draft of FTAA Chapter XXIII, Article 20.1 (b)

¹⁹³ See the third draft of FTAA Chapter XXIII, Article 20.1 (d)

Moreover, the FTAA differential treatment provisions for developing and/or small economies mean that such economies have more discretion in implementing their obligations. It is expressly stipulated that Member economies may assume different levels of commitments, and smaller or less-developed economies are allowed to implement softer forms of agreement by means of transitional periods and differential thresholds etc.¹⁹⁴

Meanwhile, small economies have more discretion in implementing certain procedural requirements. For example, regardless of the FTAA's general rules on procurement methods, it specifically states that small economies retain the right to utilise all procurement methods, provided that such methods are used in a transparent manner.¹⁹⁵ Lastly, the specified emergency safeguards can be temporarily resorted to by developing and/or smaller economies.¹⁹⁶

The main reason for granting different levels of discretion to different Member economies can arguably be explained by the wide differences between the FTAA countries. There are massive differences in terms of size of population, land mass, availability of national resources, culture, economic development and political system etc. the FTAA will be unique among regional trading blocs in the sense that it will bring within the same economic regime the world's largest and most powerful economies and the smallest, poorest, and most vulnerable economies.¹⁹⁷ Consequently, the highly diversified conditions of FTAA countries have always been a major concern for the planned draft of Chapter XVIII.

Besides the higher degree of discretion accorded to developing and/or small economies, developed countries are imposed with a legally binding obligation to give small economies certain market concessions, which is seldom the case under other procurement regimes. For example, it provides that 'developed Parties *shall guarantee*, for the benefit of Parties with smaller economies, a procurement quota equal to (...) ¹⁹⁸ of the total value of the contracts to be awarded' ¹⁹⁹

¹⁹⁴ See the third draft of FTAA Chapter XXIII, Article 6.1

¹⁹⁵ See the third draft of FTAA Chapter XXIII, Article 6.3

¹⁹⁶ See the third draft of FTAA Chapter XXIII, Article 6.5

¹⁹⁷ Myrtle, Bishop, Samuel and Chandler, 'Opportunities and Challenges: the Caribbean Involvement in the Free Trade Area of the Americas' (2004) 27 *F.I.L.J.* 909 at p.912

¹⁹⁸ The precise percentage here is still undefined

Although developed countries may still have a certain degree of discretion in deciding the precise way to meet such a quota, they do not have a choice over whether to meet it, as they are under a legally binding obligation to do so. In contrast, the GPA also requires developed Members to give developing Members concessions during negotiations or in the later modification of their coverage lists, but it deliberately leaves developed countries a very broad discretion by using the ‘best-endeavour’ clause (see Section.3.2.4.3).

However, the obligation to provide technical assistance, which is regarded as one of fundamental principles, is very soft in terms of states’ discretion in implementation. For example, it provides that ‘developed economies *shall endeavour to* provide technical cooperation and assistance to smaller and developing economies upon request, ... The mode, scope and extent of application *shall be agreed bilaterally* among the relevant Parties’. Similar to the position under the GPA, it seems here that developed economies can freely decide whether or how to provide technical assistance, owing to the presence of the subjective terms such as ‘best endeavour’ and ‘agreed bilaterally’ in these provisions.

4.4.4.4 Delegation

4.4.4.4a Inter-governmental mechanism

The dispute settlement provisions contained in the third draft Chapter XXIII were mainly based on Chapter 20 of NAFTA, but with significant modifications. Chapter XXIII is envisaged to apply to all disputes arising between the FTAA parties regarding the interpretation, or application of the FTAA Agreement.

The process begins with government-to-government consultations, and then if the dispute is not solved, the party that requested consultations may then request the establishment of a neutral panel. Lastly, parties to the dispute may appeal a final report issued by the neutral panel before the

¹⁹⁹ See the third draft of FTAA Chapter XXIII, Article 6.5

Appellate Body.²⁰⁰ As for other alternative methods of dispute resolution procedures like good office, conciliation and mediation, they may be undertaken voluntarily at any time if the Parties to the dispute so agree.²⁰¹

Generally speaking, the DSM of the FTAA third draft Chapter XXIII represents a more legalised approach than that of the NAFTA. For example, like the WTO DSU, an appellate level of review is available before the standing Appellate Body upon the request of any disputing Party.²⁰² Provisions regarding the Appellate Body and appellate procedure here are closely modelled on those under the WTO DSU. The Appellate Body is composed of seven persons, three of whom shall serve on any one appeal, on a rotating basis and members of the body serve a four-year term, with the possibility of reappointment once for an additional term. The relatively small numbers, serving for relatively long periods on multiple cases may help to achieve a higher level of legal expertise and consistency in dealing with FTAA Chapter 10 cases.

Another notable example of its more legalised feature is the binding nature of final decisions. Under the FTAA DSM, the decisions of neutral panel where no appeal is sought; or otherwise the decisions of the Appellate Body will be binding on the disputing Parties from the moment of their notification and have the force of *res judicata*.²⁰³

4.4.4.4b National challenge procedures

The FTAA Chapter XVIII also provides for national challenge procedures for suppliers.²⁰⁴ Many requirements here are similar to those under NAFTA Chapter 10, including the establishment or designation of an independent review authority, the availability of interim measures and the provision of decisions in a timely fashion.

However, the FTAA may impose more stringent requirements in many respects. For instance,

²⁰⁰ See the third draft of FTAA Chapter XXIII, Article 27

²⁰¹ See the third draft of FTAA Chapter XXIII, Article 44

²⁰² See the third draft of FTAA Chapter XXIII, Article 25

²⁰³ See the third draft of FTAA Chapter XXIII, Article 30

²⁰⁴ See the third draft of FTAA Chapter XVIII, Article 26

interim measures, pending the resolution of a challenge, may be taken by the review authority, including suspending the contract award or the performance of a contract that has already been awarded.²⁰⁵ In the case of the NAFTA rules, or even the GPA and EC procurement rules, interim measures including only the possibility of suspending the award procedures but arguably not of suspending the performance of a concluded contract are required to be made available under the bid challenge system.²⁰⁶

In general, the requirement for establishing national challenge systems for private suppliers is essential to ensure compliance and also not difficult for many Member countries to comply with since they've already undertaken similar commitments by virtue of their participation in other procurement regimes such as the EC and the GPA. This remains, however, a big problem for a number of small and less-developed FTAA countries taking into account their limited resources available.

4.5 Common Market for Eastern and Southern Africa ('COMESA')

4.5.1 Introduction, objectives and general approach

There are many African initiatives aimed at developing a harmonised regional public procurement regime, such as Common Market for Eastern and Southern Africa (COMESA); Arab Maghreb Union (AMU) and the West African Economic and Monetary Union (UEMOA). This section will look at the COMESA but no others, as it is the only one of these African initiatives which has the English version of relevant document available.

COMESA was established in 1994 and now has 19 Member States.²⁰⁷ The main objective of COMESA is to fully integrate the countries of eastern and southern Africa into an economic union

²⁰⁵ See the third draft of FTAA Chapter XVIII, Article 26.5

²⁰⁶ In the case of the EC rules, Article 2(6) of the remedy directives expressly provide that whether the review body has the power to set aside or suspend a concluded contract shall be determined by national law. However the Alcatel decision implies that states which prohibit setting aside or suspending a concluded contract should provide reasonable time between the award decision and the conclusion of the contract to allow aggrieved suppliers to file a challenge. See Case C-81/98, Alcatel Austria AG v Bundes-Ministerium für Wissenschaft und Verkehr [1999] ERC I-7671

²⁰⁷ The 19 Member states of COMESA include Burundi, Comoros, D.R. Congo, Djibouti, Egypt, Eritrea, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, Zimbabwe. See COMESA official website <<http://www.comesa.int/countries>>

through trade and investment.²⁰⁸ As the region gets more integrated and more liberalised, the COMESA Council has recognised the importance of harmonising procurement policies in line with the process of effective liberalisation of trade.²⁰⁹

A sample study conducted by the Secretariat indicated that many aspects of procurement laws in COMESA countries tended to restrict trade and concluded that a more detailed study needed to be carried out to facilitate the development and harmonisation of procurement rules within the COMESA region.²¹⁰ As a result, COMESA Public Procurement Reform Project (PPRP), funded by the African Development Bank, was launched in 2001, and commenced operations in 2002 with a baseline survey of the procurement rules and practices of its Member States until 2004.²¹¹ In essence, the PPRP seeks to liberalise the procurement market in the region through harmonised and improved domestic systems.²¹²

In contrast, the objective of both the GPA and the EC procurement regimes is not to harmonise procurement laws of Member States, but rather to liberalise and expand trade in procurement mainly through non-discrimination rules and detailed transparency procedural requirements. However, it can be argued that the EC has resulted in significant de facto harmonisation in practice. Reich even argued that the GPA also had an important harmonising effect on its Member States' laws.²¹³

Under the PPRP, the COMESA public procurement framework was approved in 2003, which was mainly developed on the basis of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the UNCITRAL Model Law).²¹⁴ It is a set of public procurement directives, setting out the main principles and essential components of modern national legal frameworks.

The COMESA procurement directives are divided into two parts, namely, 'Part A: Core contents

²⁰⁸ Karangizi, *Regional Procurement Reform Initiative* 10 (2003) (Paper presented at Joint WTO-World Bank Regional Workshop on Procurement Reforms and Transparency in Public Procurement for English Speaking Africa Countries), available at <http://www.wto.org/english/tratop_e/gproc_e/wkshop_tanz_jan03/karangizi1_e.doc>

²⁰⁹ Ibid.

²¹⁰ Karangizi, *Government Procurement in COMESA* (8-10 June 2004) (Paper Presented to the WTO Workshop in Accra, Ghana) at p.6

²¹¹ Ibid.

²¹² Ibid.

²¹³ Reich, 'The WTO as a Law-harmonizing Institution' (2004) 25:1 U. Pa. J. Int'l Econ. L.321 at pp.333-336

²¹⁴ The UNCITRAL Model Law is to be discussed in Section 5.2.2.4

of a national procurement law’ and ‘Part B: Specific principle for enhancing regional integration of procurement markets’. Instead of detailed procedural rules similar to those under the EC directives, a principled approach is employed here to formulate essential components of national legal frameworks. Also, the COMESA directives deal with issues which are absent from the EC directives. For example, it is required that the COMESA Member States should adopt measures to ensure adequate supervision of the performance of procurement contracts.²¹⁵

4.5.2 Coverage

With regard to the COMESA directives Part A, it contains core contents of an appropriate national procurement law rooted on the principles of good governance and therefore it states that it should be apply as widely as possible.²¹⁶ As with the principles set forth in Part B aimed at enhancing regional integration, it was agreed that certain thresholds should be set to define the applicability of certain parts of the reform initiative, such as region-wide advertisement of bidding opportunities.²¹⁷ Also, certain types of procurement are expressly excluded from Part B application including defence related procurement and donor-funded procurement.

4.5.3 Secondary Policy

Under the COMESA Part A, there are no explicit rules restricting the implementation of secondary policies in procurement. On the contrary, Measures to promote participation by small and medium-sized enterprises are identified as a core element of a national procurement law. In this regard, it also provides many examples for measures favouring small business, such as establishing small-enterprise set-sides and making awards first to small enterprises in the event of equal low bids.

However, Part B includes the principles of national treatment and non-discrimination. Consequently, the implementation of secondary procurement policies with discriminatory effect will

²¹⁵ See the COMESA Directives: Essential Components of National Legal Frameworks, para.5(g) and 7(i)

²¹⁶ See the COMESA Directives: Essential Components of National Legal Frameworks, para.1

²¹⁷ See the COMESA Directives: Essential Components of National Legal Frameworks, para.13, 14

be caught by the above principles. For example, it is required that any use in individual state of a preference in favour of domestic bidders should be replaced by a regional preference with regard to procurement above the COMESA thresholds. Also, it is stated that bidders from other COMESA Member States should not be barred from participation even for procurement contracts below the thresholds.

However, different from the position under the GPA or the EC rules (see Section 3.2.3 and Section 4.1.3), secondary uses of procurement without discrimination may not be affected in any way due to the absence of detailed rules on contract award procedures.

4.5.4 Soft Law & Hard Law Issues

4.5.4.1 Bindingness

The COMESA directives are non-binding in nature. Member states are expected to voluntarily adopt relevant national legislation to give effect to such directives. Given the fact that the COMESA directives were mainly developed on the basis of the UNCITRAL Model law, Member States which adopted their procurement legislations according to the UNCITRAL Model Law such as Zimbabwe, would be fully consistent with the COMESA Directives.

The creation of a Technical Committee of Procurement Experts ('TCPE') makes the procurement reform initiative a permanent programme of COMESA.²¹⁸ The Committee is made up of the Heads of national procurement agencies and will be setting on a regular basis to provide strategic and tactical guidance to the reform.²¹⁹ One of the immediate challenges facing the technical committee is to commence negotiation on a Regional Public Procurement Agreement, which is expected to be a legally binding instrument.²²⁰

4.5.4.2 Precision

²¹⁸ See Karangizi, note 210 at p.9

²¹⁹ Ibid.

²²⁰ Ibid.

The COMESA directives are much more skeletal than other procurement regimes despite the fact that the COMESA seeks harmonisation as an objective per se. Unlike the GPA or the EC directives, the COMESA regime does not include detailed procedural rules governing the award of contracts.

Instead, it lays down the main principles and essential components of modern national legal frameworks in a general manner. For example, several fundamental mechanisms are stated to be necessary for ensuring transparency in procurement process, one of which is a notice of contract award. Regarding this mechanism, it only generally provides that national law should require the publication of a notice of award for contracts, the value of which exceeds a specified threshold. However it does not provide detailed guidance on issues, such as what type of media should be used for the publication; what kind of information should be included in the notice; and the period within which the notice should be published.

Under the COMESA directive, there are no rules specifically addressing the issues of minimum time-limits for tendering and qualification criteria etc, as we can find in other procurement regimes

4.5.4.3 Discretion

The COMESA directives set out a broad framework under which states have a large amount of discretion in implementing their obligations.

Taking procurement methods as an example, under the COMESA directives, as a general rule, contracting authorities shall use 'tendering' as the normal method for procurement of goods or construction, and request for proposals for procurement of consultant services. It is required that national law shall specify the types of situations in which methods other than either of the above methods can be used, but there is no guidance at all on what kind of situations could justify alternative methods or how these contract award procedures should proceed. As a result, different from the restrictive approach adopted by other regimes such as the GPA and the EC, states are entirely free to formulate their own requirements on the derogations from formal competitive tendering.

Furthermore, clear guidance is not provided on many issues such as award criteria, which are frequently addressed under other procurement regimes. In view of the non-binding nature and vague content of the COMESA directives, states are left with a very wide discretion in applying the COMESA directives to their domestic systems.

4.5.4.4 Delegation

4.5.4.4a Inter-governmental Mechanism

The COMESA directives can not be enforced through any inter-governmental dispute mechanism. The compliance with the rules mainly depends on Member States' attitude towards it, which represents a soft law approach in terms of delegation.

Nevertheless, operational measures have been taken to induce Member States to comply with the directives. Given the fact that 13 out of 19 Member States are on the World Bank list of least developed countries, the lack of capacity can be a major deterrent to the effective implementation of procurement reform. In light of this, the COMESA Secretariat has established a Regional Public Procurement Centre to provide capacity building for the Member States.²²¹ Apart from capacity building, the TCPE is also delegated with the authority to monitor and keep constant reviews on the implementation of the COMESA directives by Member States.

By September 2004 nine of the nineteen member states had either put legislation in place or were in the process of amending existing legislation according to the COMESA directives.²²²

4.5.4.4b National Challenge Procedures

The availability of national challenge procedures is mentioned both in Part A as an essential element for modern national procurement law, and in Part B as an important factor to ensure national compliance.²²³ However, no further guidance is given on the detailed requirements of such national

²²¹ COMESA, Public Procurement Rules and Regulations Harmonised. Available at <http://www.comesa.int/trade/issues/procurement/MS-Office-Document.2004-06-04.5502/view>

²²² These nine countries are Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Uganda, Zambia and Zimbabwe

²²³ See COMESA Directives on Public Procurement Reform: Essential Components of National Legal Frameworks, para 5

challenge procedures.

4.6 Asia-Pacific Economic Cooperation Forum ('APEC')

4.6.1 Introduction, objectives and general approach

APEC was established in 1989 in order to promote, as its name suggests, economic co-operation within the Asia-Pacific Region. The forum currently has 21 members²²⁴ and 3 observer organisations²²⁵. APEC is the only intergovernmental grouping in the world operating on the basis of non-binding commitments, under which decisions are reached by consensus and commitments are undertaken on a voluntary basis.²²⁶

In 1995, the Government Procurement Expert Group ('GPEG') within APEC was set up to consider ways to improve transparency and to achieve voluntary liberalisation of procurement markets throughout the Asia-Pacific region.²²⁷ Pursuant to its 1996 Osaka Action Agenda, the GPEG had developed a set of Non-Binding Principles (NBPs) on public procurement by 1999. The original set of NBPs comprised Transparency; Value for Money; Open and Effective Competition; Fair Dealing; Accountability and Due Process; and Non-Discrimination. The principle of Transparency has now been subsumed into the APEC Transparency Standards on Government Procurement.

Among the NBPs developed by the GPEG, it is interesting to note that the principles of Value for Money, Fair Dealing and Accountability and Due Process also assist individual government to achieve the objectives of 'best value for money' and 'integrity' in procurement, which are often addressed by national procurement regulation. In view of the APEC's trade goal, the principle of Value for Money might be justified to some extent by the concept that foreign suppliers may be more willing to compete for government contracts in a system in which value for money is

(h)(v)

²²⁴ The APEC's 21 Member Economies are Australia; Brunei Darussalam; Canada; Chile; People's Republic of China; Hong Kong, China; Indonesia; Japan; Republic of Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; The Republic of the Philippines; The Russian Federation; Singapore; Chinese Taipei; Thailand; United States of America; Viet Nam. See http://www.apec.org/apec/about_apec.html

²²⁵ Its observer organisations are Association of South-East Asian Nations (ASIAN), Pacific Economic Cooperation Council (PECC), and Pacific Islands Forum (PIF)

²²⁶ See APEC official website, http://www.apec.org/apec/about_apec.html

²²⁷ See Government Procurement Expert Group at http://www.apec.org/apec/apec_groups/committees/committee_on_trade/government_procurement.html

effectively implemented. Also, it promotes trade in a way that the best firms will thrive should contracts always be awarded to the most competitive firms.

Similarly, principles of Fair Dealing and Accountability and Due Process, which contribute to the objective of integrity, could guide Member states to achieve optimum allocation of resources or domestic good governance on the one hand, and address corrupt practices in procurement as a trade barrier on the other. In essence, the APEC NBPs promote trade through measures aimed at improving domestic procurement systems of its Member States in which foreign suppliers are assumed to be more willing to compete for government contracts.

4.6.2 Coverage

The non-binding nature of the APEC NBPs makes it unnecessary to formulate detailed rules concerning types of entities and contracts covered.²²⁸ Individual Member countries can freely decide how to implement the APEC principles in their own systems including the coverage issues. The freedom in coverage may avoid many problems associated with negotiations on coverage of a binding agreement such as the problem of ‘reciprocity’ on coverage, the difficult balance between free trade goals and the legitimate domestic concerns and the high negotiating and implementing costs.

4.6.3 Secondary policies

According to the principle of Non-discrimination, national procurement laws, regulations and policies should not favour to or discriminate against the goods, services or suppliers from any particular Member economy.²²⁹ It also illustrates several ways through which non-discrimination can be achieved, one of which requires that criteria for qualification of suppliers, evaluation of bids, and award of contracts should be based solely on suppliers’ ability to meet the procurement requirements

²²⁸ Arrowsmith, ‘The APEC Document on Principles of Transparency in Government Procurement’, (1998) *P.P.L.R.* CS38 at p.CS40

²²⁹ See APEC GPEG, *Non-Binding Principles on Government Procurement*, para.70

such as technical competence and value for money considerations.²³⁰ In this regard, the implementation of secondary policies in procurement could be largely restricted.

However, these illustrative practices included in NBPs are never intended to be prescriptive or exhaustive. In practice, the APEC members could always balance the non-discrimination principle with other domestic concerns, and then find appropriate ways to give effect to the elements of this principle, or even depart from this principle where they feel it is necessary. As a result, the APEC Member countries' ability to employ procurement as a policy tool remains unaffected.

4.6.4 Soft Law & Hard Law Issues

4.6.4.1 Bindingness

Like the usual APEC approach, the APEC NBPs is a non-binding instrument that explicitly negates any intent to create legal obligations. This is clearly indicated by the very title of this instrument - 'APEC Government Procurement Experts Group Non-Binding Principles on Government Procurement'. This non-binding nature is further confirmed in its introduction by expressly saying that 'the principles developed by the GPEG are non-binding'.²³¹ Undoubtedly, the NBPs are merely an informal understanding instead of legal commitments in international treaty.

4.6.4.2 Precision

Compared with most other procurement rules like the GPA or the EC directives, the APEC NBPs are much less detailed and prescriptive. The NBPs only generally identify the basic elements of these principles and state possible ways to give effect to them in practice. By way of illustration, this section will undertake discussions on the relevant rules governing the issues of minimum time-limits for submitting tenders and qualification criteria, as has been done with other regimes, to show the degree of precision of these NBPs

The APEC NBPs provide some general guidance on the issue of minimum time-limits for

²³⁰ Ibid para.72

²³¹ Ibid. para.2

submitting tenders. Firstly, one important element of the Transparency principle is that procurement opportunities should be transparent, and it is also stated that certain measures may possibly be adopted in practice to promote this element, one of which is ‘allowing adequate and reasonable time for interested suppliers to prepare and submit responsive bids’.²³²

Secondly, under the principle of Open and Effective Competition, ‘sufficient time for tendering is allowed to enable interested suppliers to prepare tender’ is considered to be necessary to ensure that a procurement action facilitates effective competition.²³³ Lastly, as an element of the principle of Fair Dealing, the procurement process should be fair, and should treat all parties even-handedly. Possible practices to achieve it have been specified including that ‘clear and reasonable time limits should be set for various stages of the procurement process’.²³⁴

Despite the repetitive emphasis on this issue by the different NBPs, vague terms like ‘adequate’, ‘reasonable’ or ‘sufficient’ are employed without further clarifying the actual meaning of these terms. The NBPs set out neither possible factors to be considered in setting time-limits nor detailed rules on minimum deadlines for the preparation, submission and receipt of tenders, which can often be found in other procurement regimes such as the GPA and the EC (see 3.2.4.2 and Section 4.1.4.2).

Regarding the issue of qualification criteria, it is stated that the principle of Non-discrimination can be achieved through certain practices including the envisaged correct practice for setting qualification criteria. It generally provides that qualification criteria should be ‘based solely on the ability to meet the procurement requirements’.²³⁵ It also illustrates the acceptable criteria including ‘technical competence, and value for money considerations in terms of relevant benefits and costs on a whole of life basis’.²³⁶ However, the guidance on qualification criteria is still in very general terms, and detailed elaborations such as a highly prescriptive list of acceptable qualification criteria, which can be found in the EC public sector directives, are not included in the APEC NBPs.

²³² Ibid. para.8

²³³ Ibid. para.40

²³⁴ Ibid. para.47

²³⁵ Ibid. para.72

²³⁶ Ibid.

In general, it can be seen that the APEC NBPs mainly lay down general principles rather than setting out precise rules, and therefore possess a lower level of precision than most of other procurement regimes

4.6.4.3. Discretion

Given the non-binding nature of the APEC NBPs, economies are free to decide which principles to apply and whether to translate an element of a principle into a practical measure. It is explicitly stated that ‘individual members economies are in the best position to decide on the applicability of individual elements to them, taking into account the specific characteristics of their economy and the costs and benefits of adopting specific measures’.²³⁷ That is to say, Member economies have absolute discretion in practice to depart from the principles.

Even if an APEC country decides that certain NBPs should apply, it will still enjoy a very broad discretion over how to achieve the principles of the system. Under many procurement regimes such as the GPA and the EC (see Section 3.2.4.3 and Section 4.1.4.3), states are obliged to put in place certain domestic measures to give effect to the detailed procedural rules but may exercise a certain degree of discretion on exactly how to do it.

In contrast, the APEC regime does not set out detailed procedural rules to restrict Member countries’ freedom to decide how best to translate an element of NBPs into a practical measure according to their own particular national conditions, which vary from state to state in a significant way. Consequently, the APEC NBPs accord states a greater discretion in their implantation, which will be demonstrated in the following paragraphs by reference to the issues of procurement methods and award criteria.

Firstly, one element of the Transparency requires ‘making open and competitive tendering the generally preferred method of tendering’ with the possibility of using other procurement procedures. However, like the position under the COMESA directives (see Section 4.5.4.3), it does not define

²³⁷ Ibid. para.2

specific circumstances under which other less competitive procedures can be used. Therefore states can freely decide the range of procurement methods that can be used and what kind of situations could justify the use of less competitive procurement methods.

Despite its indicated preference for open and competitive tendering, it is further clarified under the principle of Value for Money that the procuring entity should choose an appropriate procurement method in consideration of achieving the best value for money outcome.²³⁸ It involves balancing the aim of encouraging competition among suppliers with the anticipated value for money gained from that competition.

This position is also confirmed under the principle of Open and Effective Competition. It provides that 'procurement methods should suit market circumstances and facilitates levels of competition commensurate with the benefit received'.²³⁹ Consequently, states have a very wide discretion in formulating their own rules on the use of procurement methods. Some may require the use of open tendering for most procurement followed with detailed transparency rules to limit the exercise of discretion by procurement officers to ensure value for money, while other states with professional officials buying in well-developed markets with little corruption may prefer leaving a broad direction with procurement officials by using the less competitive procurement procedures.

Secondly, with regard to the issue of award criteria, relevant guidance can be found under the principles of Value for Money; Non-discrimination; and Transparency. Under the principle of Value for Money, it provides that evaluation of bids should be done in a whole-of-life context to ensure the best value for the procurement.²⁴⁰ It mainly suggests that bids evaluation should be done in consideration of best value for money. However, states' discretion in setting out award criteria may not be affected in any way by this principle, as what exactly the best value for money means in different procurements can only be determined by the relevant states themselves.

Meanwhile, the principle of Non-discrimination also provides that criteria for award of contracts

²³⁸ Ibid. para.22

²³⁹ Ibid. para.34

²⁴⁰ Ibid. para.28

should be based ‘solely on the ability to meet the procurement requirements such as technical competence, and value for money considerations in terms of relevant benefits and costs as a whole of life basis’.²⁴¹ As an element of the principle of Transparency, award criteria should be transparent and bids should be evaluated strictly according to these criteria.

4.6.4.4. Delegation

4.6.4.4a Inter-governmental Mechanism

Despite the remarkable states discretion offered by the APEC NBPs, the central question is how the APEC procurement regime can generate enough incentive for Member governments to comply with these principles since they are entirely voluntary.

Two features of binding agreements such as GPA make government officials refrain from taking measures contrary to the agreement.²⁴² One is the expectation of future trade negotiations and the market access benefits that they can bring to a nation’s exporters; the other is that disputes can be brought before an independent body, and sanctions may be authorised against nations that break the provisions of an agreement. However, these features are obviously absent in the APEC procurement regime.

Rather, voluntary policy review, a kind of soft enforcement mechanism or more accurately managerial mechanism, has been used to induce compliance. It is a process for Member economies to report to the GPEC their voluntary review of the consistency of their procurement systems with the NBPs, through which Members are exploring how best to implement the principles and to voluntarily bring their system into conformity with the principles. Presentations on the voluntary review against the NBPs have also been conducted as a fundamental element of GPEG activities in promoting information sharing and greater understanding of procurement regimes of Member economies.

Such policy review and assessment are not primarily accusatory or adversarial, the object of

²⁴¹ Ibid. para.72

²⁴² Evenett and Hoekman, note 183 at pp.279-281

which is to discover how the systems of individual economies can be improved. The dynamics of dialogue and accountability are most valued. Although in comparison with a hard law system with a high level of delegation in enforcement this procedure may lack coercive force, it still exerts significant pressures on Member economies to comply. For the most part it relies on persuasion, but frequently the threat of exposure or public shaming is a powerful spur to action towards compliance

All Member countries have now completed their voluntary reviews and reports of their procurement systems against the NBPs, and will continue to update any changes to their procurement rules that may enhance the NBPs.

Meanwhile, the GPEC has also been working on capacity building and dissemination of procurement information within the APEC region. For example, workshops, seminars, training courses on government procurement procedures, laws, and regulations have been held for educational purposes, and a large amount of information has been made available at its official website including information on specific procurement opportunities voluntarily offered by Member economies.

4.6.4.4b National challenge procedures

Although the availability of a national challenge system for suppliers is widely considered to be essential for monitoring and ensuring compliance with procurement rules, in practice it acts as a deterrent to accession by many non-member states and to negotiations towards a broader coverage by existing Member states under many binding procurement agreements such as the GPA. As discussed in Section 3.3.5.4b, it was also one of most controversial issues during negotiations for the proposed WTO transparency agreement.

However, the availability of a channel for domestic review of complaints was agreed to be an element of Transparency as well as Accountability and Due Process principles despite the highly diversified membership of the APEC, probably because the non-binding nature of the APEC regime makes it much easier for Members to agree on what should be included in NBPs than would

otherwise be the case.

The APEC NBPs only provide very broad guidance on this issue, without setting out any procedural rules on exactly how such a challenge system should work, such as rules requiring the availability of certain kinds of 'remedies' similar to those under the GPA or the EC directives. It is generally stated that such mechanisms should provide independent, impartial, transparent, timely and effective procedures for the review of complaints.

Certain examples are also provided to illustrate some of the possible ways to give effect to the above principles. These illustrative examples include designating a review body which may take the form of a court, an independent review body, a government agency not directly involved in the procurement, or a reputable private sector arbitration/mediation service; making the review mechanism available equally to domestic and foreign suppliers etc. However these examples are not intended to be prescriptive or exhaustive. Member countries have absolute discretion over how to put in place their own national challenge procedures. Even Member states which reject the fundamental idea of such national challenge system would not feel compelled to establish one owing to the optional nature of the NBPs.

Chapter 5 Other International Instruments with Trade Objectives

Two categories of international procurement instruments have been discussed in previous chapters: Chapter 3 has examined trade-liberalising initiatives in procurement under the WTO, while Chapter 4 has reviewed the major procurement instruments with trade objectives at regional level. There are still some other procurement instruments such as the UNCITRAL Model Law on Procurement of Goods, Construction and Services ('the Model Law') and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('the OECD Convention'), which can hardly be classified in either of the above categories.

Although both the Model Law and the OECD Convention are aimed at liberalising international trade in procurement, they have significant differences compared to those instruments addressed in the previous two chapters. As with the Model Law, it was designed as a voluntary model comprising fundamental components of good procurement practice for states to follow when formulating or reforming their own procurement laws. Different from the international and regional procurement agreements mentioned in Chapter 3 & 4, there are no particular states subscribing to the Model Law. A state may decide, in its sole discretion, to adopt the Model Law in whole or in part, but without any legal or political commitment to do so.

Regarding the OECD Convention, it is a legally binding instrument with the aim to diminish the trade-distorting effect of corruption in international business transactions. In the field of public procurement, non-discrimination procurement rules would have little significance in the event of corrupt procurement practice. Unlike the previously mentioned instruments, this convention contains no provisions on procurement procedures. Instead, it has general provisions requiring Member countries to adopt legislation to criminalise 'bribery of a foreign public official', which have deep impact on corruption in procurement. This chapter will specifically look at the Model Law and the OECD Convention.

5.1 The UNCITRAL Model Law on Procurement of Goods, Construction and Services ('the Model Law')

5.1.1 Introduction, objectives and general approach

The United Nations Commission on International Trade Law ('UNCITRAL'), as a representative inter-governmental technical organ of the UN General Assembly, has formulated a variety of widely used legal texts including conventions, model law and guides in the field of international trade law.¹

Among them, the Model Law was designed to serve as a blueprint for use by national legislatures in either the reform of their existing procurement laws or the establishment of new procurement regulations where none presently exists.² In order to assist states using the Model Law, the UNCITRAL has also produced a Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services ('the Guide').

The draft work of the Model Law attracted wide participation of UN members at all levels of economic development and with different legal and political systems, which ensures it to be internationally recognised as the fundamental components of good procurement practice and to have a considerable impact on legal reform in the area of procurement.³ A number of states especially many transition economies newly adopted or reformed their procurement legislation based on the Model Law. Although the Model Law emphasises its particular value for developing countries and countries whose economies are in transition, its wide use by transition economies in practice is largely due to the fact that its adoption took place coincidentally at a time when a significant number of transition economies were in the process of reforming their procurement systems.⁴

As declared in its Preamble, the objectives of the Model law include maximizing competition and efficiency in procurement; fostering and encouraging participation in procurement proceedings by as

¹ See <<http://www.uncitral.org>>

² The UN, *Guide to Enactment of UNCITRAL Model Law on Procurement of Goods, Constructions and Services* (New York: United Nations, 1995), Para.1

³ Hunja, 'The UNCITRAL Model Law on Procurement of Goods, Construction and Services and its Impact on Procurement Reform' in Arrowsmith and Davies (ed), *Public Procurement: Global Revolution* (Kluwer Law International Ltd, 1998) at pp.104-108

⁴ These countries are mainly those in central and eastern Europe such as Poland, Albania, Slovak Republic, and Kosovo and of the former Soviet Union such as Russia, Estonia and Latvia.

many suppliers and contractors as possible; promoting competition among suppliers and contractors; providing for the fair and equitable treatment of all suppliers and contractors; promoting integrity and fairness in the procurement process and achieving transparency in the procurement procedures.

Taking into account that the UNCITRAL was established with the mandate to further harmonisation and unification of international trade law to tackle the trade obstacles caused by divergence in national laws⁵, it is not difficult to understand that the Model Law was mainly produced to promote international trade in procurement. Consequently, the content of the Model Law tries to discourage national preferences as a whole. However, the Model Law also recognises as a political reality that many countries may wish to utilise procurement as a policy tool to implement secondary objectives, and then it provides certain possibility for states to do so but restricts it in a transparent and least trade distorting fashion.

The Model Law, however, is significantly different from most procurement instruments with trade objectives. Procurement regimes like the GPA are directed at eliminating discrimination by laying down non-discrimination principles as well as detailed transparency provisions to make discrimination more difficult to hide and to ensure procurement opportunities known to foreign suppliers. Moreover, they provide mutual trade-related rights and obligations for participating states but do not aim to provide any guidance on how to achieve domestic objectives such as value for money and the implementation of social/industrial policies.

In contrast, the main effect of the Model Law has been to assist states in achieving their domestic procurement objectives of value of money, efficiency, integrity etc. The rationale for adopting the Model Law by UNCITRAL, an organisation primarily concerned with promoting trade, is that foreign suppliers would be more willing to compete under a system of sound and familiar rules, and consequently trade in procurement would be promoted through improved and harmonised domestic systems.

However, states which adopt the Model Law, or essential features of it, do not obtain privileged

⁵ See UN General Assembly Resolution 2205(XXI) of 17 December 1966. available at <http://www.jus.uio.no/lm/uncitral.2205-xxi/doc.html>

access to procurement markets of any other country.⁶ A government's decision on whether to adopt the Model Law is solely based on its value to domestic procurement objectives without any motivation by the desire to improve market access for exporters. Nevertheless, given, as explained above, that the Model Law was conceived and adopted by the UNCITRAL as an instrument of trade liberalisation, during the process of evaluating the Model Law, a government is likely to find some provisions to belong to a multilateral procurement agreement rather than a national code, emphasising non-discrimination rather at the expenses of domestic interest in economy and efficiency.⁷

5.1.2. Coverage

It is expected that legislation enacted on the basis of the Model Law should be applicable to the procurement of goods, construction and services that are financed by public funds. This should include procurement by central and sub-central government bodies as well as by certain state-owned/controlled companies. It is envisaged that the objectives of the Model Law are best served by its widest possible application.⁸

However, Article 1 (2) of the Model Law provides for the exclusion of defence and security related procurement, as well as other types of procurement that might be indicated by enacting states. In order to facilitate its widest possible application, Article 1(3) provides the possibility for the excluded procurements identified in Article 1(2) to be subject to the Model Law at the discretion of the procuring entities.

In addition, it should be noted that the Model Law only sets forth award procedures to be used by procuring entities in selecting the most competitive supplier, but does not intend to address other issues like contract performance or implementation.⁹

⁶ Westering, 'Multilateral and Unilateral Procurement Regimes: to Which Camp does the Model Law Belong' (1994) 3 *P.P. L.R.* 142 at p.149

⁷ Hunja, note 3, at pp.104-108. This article also lists the relevant provisions illustrating the multilateral features of the Model Law.

⁸ The Guide Section I, para.9

⁹ *Ibid.*

5.1.3. Secondary policies

As a general rule, the Model Law prohibits discrimination against foreign suppliers and therefore the use of procurement to support national industries is *prima facie* precluded. However, the Model Law recognises that many states may still wish to use procurement for industrial policies in some cases. It expressly provides certain possibilities for states to seek industrial policies, but restricts the implementation of such policies in a transparent and least trade-distorting fashion.

Firstly, according to Article 8, a procuring entity may choose to restrict foreign participation in procurement subject to certain requirements: the grounds for restriction should be specified in the law; a statement of the grounds and circumstances on which it relied should be included in the record; and the restriction of foreign participations should be declared when first soliciting the participation in the procurement proceedings. These requirements are included in order to promote transparency and to prevent arbitrary or excessive resort to this exception. Enacting states are suggested by the Guide to only use this exception to protect ‘certain vital economic sectors of their national industrial capacity against deleterious effects of unbridled foreign competition’.¹⁰

Secondly, Article 34 (4) (d) allows states to grant a margin of preference at the evaluation stage to support national industries. As contracts shall be awarded to either the tender with the lowest price or the lowest evaluated tender under the Model Law, Article 34 (4) (c) lists the criteria in determining the lowest evaluated tender in addition to price. Under this provision, certain criteria related to economic development objectives can be considered, including balance of payments and foreign exchange reserves considerations, ‘offsets’ requirements, local employment and transfer of technology.

The provision leaves it open for states to include their own additional criteria such as regional development in the list, however the expansion of such secondary criteria contained in this provision should be cautious in view of the risk that such other criteria may pose to the objective of good

¹⁰ The Guide Section I, para.25

procurement practice.¹¹

It can be seen that the Model Law allows states to utilise procurement for industrial purposes mainly by using price preference instead of other more harmful types of methods like set-asides, which insulates domestic suppliers from any foreign competition. Nevertheless, the use of price preference in evaluating tenders is still trade-distorting and less objective, and the provisions can be found restricting its operation. For example, resort to the margin of preference may be made only if authorised by the procurement regulations and the margin calculated in accordance with the regulations and subject to approval by the state designated authority.

Apart from the pursuit of industrial policies, the Model Law gives little advice on the issue of implementing social or environmental objectives in procurement. Article 6 (1)(iv) and (v) allows states to disqualify firms or their directors or officers which have been convicted of any criminal offence relating to their professional conducts. It also refers to the fact that firms which have been subject to administrative suspension or debarment proceedings could be excluded.

However, it is unclear whether a margin of preference could be given to support social or environmental policies. However, it can be argued that the implementation of social or environmental objectives should be recognised in the Model Law and regulated through mechanisms similar to those used for the implementation of industrial policies, taking into account their widespread use in practice and the potential to operate them in a transparent and effective way.¹²

5.1.4. Soft Law & Hard Law Issues

5.1.4.1. Bindingness

The Model Law is in nature a non-binding instrument creating no obligations upon countries to adopt it, in whole or in part. Its very title indicates that it is solely served as a model to be followed voluntarily by national legislation, without any intent to be converted into an international treaty.

¹¹ The Guide Chapter III, Section III, Article 34para. 3

¹² Arrowsmith, 'Public Procurement: an Appraisal of the UNCITRAL Model Law as a Global Standard' (2004) 53 *I.C.L.Q.* 17, at p.44

As has been discussed in Section 2.3.1, there is a matter of compromise among the four aspects of soft law. In the case of diversified domestic circumstances, interests and capacity, states might want to legally bind themselves only to ambiguous and modest rules. However, it would be normally easier for clear and ambitious rules to be adopted if they were put in a non-binding form. This is the case with the Model law, which serves as a universal model for all states to follow when establishing or revising their domestic legislation in procurement.

The Model Law was designed for states with different levels of economic development and diversified political and legal systems. Surely, only extremely vague and discretionary rules could be agreed upon had it been made a binding instrument, which would be contrary to its original purpose of harmonisation and standardisation. Arguably, it is the non-binding nature of the Model Law that makes it benefit from a fairly high degree of clarity and being substantively drafted by specialists rather than politicians.

The Model Law provides a good example which seems to support the argument that not all non-binding instruments are intended to become legally binding in the future, and they assume functions that go well beyond that of being an intermediate step to the formation of later treaties.

5.1.4.2. Precision

Like the APEC NBPs (Section 4.5.4.2), the Model Law intends to promote trade through improved and standardised domestic procurement system. However, the rules under the Model Law are far more detailed than those of the APEC NBPs. This section is to illustrate its degree of precision by looking at the relevant rules on time-limits for tendering and qualification criteria, in a similar way in which these rules have been reviewed in previous chapters.

First of all, the Model Law contains no specific provisions governing the issue of time-limits for tendering. In the Guide, it is recognised that allowing suppliers a sufficient period of time to prepare their tenders is an important element in fostering participation and competition in procurement.¹³

¹³ See the Guide Section II Article 30 para.1

Although the Guide also points out the possibility that an enacting state may establish in its procurement regulations minimum periods of time that the procuring entity must allow for the submission of tenders, neither the Model Law nor the Guide provides any guidance on the precise formulation of such minimum time limits.

Next, the Model law has detailed rules governing qualification criteria. It contains a list of criteria only which the procuring entity may consider with respect to the qualifications of suppliers, including that they have the necessary professional and technical qualifications, financial resources, equipments, managerial capability, reliability, experience, reputation, personnel and other capabilities or facilities, to perform the procurement contact.¹⁴

In this regard, the Model Law represents a more detailed approach than many other procurement regimes such as the GPA, the NAFTA, the FTAA and the APEC (see Section 3.2.4.2, Section 4.3.4.2, Section 4.4.4.3 and Section 4.6.4.3 respectively), which only lay down principles generally requiring that qualification criteria shall be limited to those essential to ensure the supplier's ability to fulfil the contract or similar, without an illustrative or exclusive list of acceptable criteria. As with the proposed WTO transparency agreement, it was generally agreed that the precise approach with a detailed list of qualification criteria should be avoided (See Section 3.3.5.2).

However, the acceptable qualification criteria listed under the Model Law are less detailed compared with those under the EC directives (see Section 4.1.4.2). For example, the Model Law only generally provides that a procuring entity may require suppliers to provide appropriate documentary evidence in accordance with the listed qualification criteria¹⁵, whilst every ground for exclusion listed under the EC directives is followed by the concrete evidences which procuring entities may demand as means of proof of standing (see Section 4.1.4.2).

The above examples show that the Model Law is more precise than most of the previously discussed procurement instruments with the possible exception of the EC, though not universally so. The precise feature of the Model Law is largely due to the fact that its original objective was to

¹⁴ See the Model Law Article 6 (1)(b)

¹⁵ See the Model Law Article 6 (2)

promote trade through improved and harmonised domestic systems. Bearing its objective of harmonisation in mind, the Model Law attempts to codify ‘good procurement practice’ in a manner that is sufficiently specific for enacting states to use it directly.¹⁶ More importantly, as argued above, the non-binding nature of the Model Law also makes it possible for such detailed rules to be adopted.

However, despite the precise feature of the Model Law, it envisages the issuance by enacting states of procurement regulations to fill in the procedural details and to customise the procurement procedures to the specific needs of the enacting states.¹⁷ It is necessary for the Model Law to deliberately leave gaps for enacting states to fill in according to their own specific domestic circumstances, as it is designed as a template for the universal application in almost any state, irrespective of its level of economic development and type of legal system. As a whole, the Model Law provides a ‘framework’ rather than a complete and comprehensive code for the regulation of procurement in spite of its high degree of precision.

In addition, as can also be seen from the above examples, the degree of precision can vary between rules governing different issues, which can hardly be attributed to any particular reason. Apart from the varied degree of precision with regard to the rules governing different issues of tendering procedure, the Model Law goes into every detail on tendering procedure but does not do so on other procurement procedures.

5.1.4.3. Discretion

The detailed nature of the Model Law does not prejudice a substantial discretion it gives to enacting states in implementation. Most important of all, the non-binding nature of the Model Law ensures states’ discretion. It was adopted as recommendations and thereby enacting states are free to accept or reject any elements of the Model Law. National choice over the adoption of the Model Law only

¹⁶ Beviglia-Zampetti, ‘The UNCITRAL Model Law on Procurement of Goods, Construction and Services’, in Hoekman and Mavroids (ed), *Law and Policy in Public Purchasing: the WTO Agreement on Government Procurement* (The University of Michigan Press, 1997) at p. 278

¹⁷ See the Guide Section I, para.12

has some implications as to whether the national procurement system in question could represent internationally recognised good practice.

Meanwhile, the discretion possessed by enacting states can be illustrated by reference to its contents. As regards the methods of procurement of goods or construction, the Model law prescribes the use of ‘tendering’ proceedings as the standard procurement method for acquiring goods or constructions, leaving the possibility of using other procurement procedures only in limited cases.

The standard procurement method ‘tendering’¹⁸ referred to under the Model Law should be what is normally called ‘open tendering’ under other regimes with certain adaptations, under which a contract is publicly advertised and all interested firms have a chance to bid. Even for the restricted tendering procedure, essentially a formal tendering process is allowed only in specified circumstances, which differs from the ‘tendering’ procedure only in that it permits the procuring entity to invite a limited number of suppliers to submit the bids and it does not require any advertisement of the procurement.¹⁹

As for the use of procurement methods, the Model Law seems to share a similar level of hardness with the EC rules in terms of states’ discretion. Although the EC rules allow the procuring entity a free choice between ‘open’ and ‘restricted’ tendering procedures (see Section 4.1.4.3), the ‘tendering’ procedure under the Model Law is more similar to the EC restricted tendering procedure, because both require an advertisement of the procurement and both allow a pre-qualification stage which is not permitted under the EC open tendering procedure.²⁰ One major difference between the ‘tendering’ procedure under the Model law and the EC restricted tendering procedure is that the procuring entity can shortlist the pre-qualified suppliers for bidding under the latter but not under the former.²¹

Consequently, the Model Law represents a harder approach compared with many other regimes in

¹⁸ It is quite confusing here for the Model Law to only use term ‘tendering’ as many of the other procedures set out in the Model law of the Model Law could usually be described as types of tendering.

¹⁹ See the Guide, para 21

²⁰ The Model Law Art.7 & Art.24;

²¹ See the Model Law Art.7; the EC Public Sector Directive Art. 43 (3) and the EC Utilities Directives 51

terms of state discretion. The GPA, the NAFTA, and the FTAA regimes, as previously examined in Section 3.2.4.3, Section 4.3.4.3 and Section 4.4.4.3, do not indicate any preference between ‘open’ and ‘selective’ procedures for ‘normal’ contracts, and under the ‘selective’ procedure the procuring entity can only invite a limited number of suppliers to submit tenders.

When compared with instruments like the COMESA directives and the APEC NBPs, which allow states to freely define specific circumstances under which other less competitive procedures can be used despite their general requirement or preference for open tendering (See Section 4.5.4.3 and 4.6.4.3), the Model Law restricts states’ discretion by laying down detailed conditions for the use of procurement methods other than ‘tendering’.

Nevertheless, a variety of flexible procurement procedures which involves informal competition are provided by the Model Law such as two stage tendering, request for proposal, and competitive negotiation.²² It specifies the detailed conditions under which procuring entities may choose one of these methods as an alternative to ‘tendering’ proceedings. Enacting states may, at their sole discretion, adopt one or more of these alternative methods in their own domestic legislation. This optional approach utilised by the Model Law on many issues provides detailed guidance both for states opting for a strict choice and those selecting a comparatively liberal solution.²³

When it comes to the issue of award criteria, the Model Law requires contracts to be awarded either to ‘the tender with lowest tender price’ or ‘the lowest evaluated tender’.²⁴ It further requires procuring authorities to only apply certain specified criteria in determining the lowest evaluation tender.²⁵ Under the Model Law, it seems superficially that states’ discretion in awarding contracts is largely constrained by the control over the scope of non-price criteria to be considered.

As has been examined, procurement regimes like the GPA, the NAFTA, the FTAA and COMESA and the APEC provide no clear guidance on the scope of the acceptable award criteria, and others

²² See the Model Law Article 18 (2)

²³ Arrowsmith, note 12, at p.22

²⁴ The Model Law, Art.34

²⁵ The Model Law, Art.34 (4)(c)

such as the EC only have certain general rules on the issue. In contrast, the Model Law adopts a more precise approach by listing all the award criteria the procuring entity is allowed to consider in determining the lowest evaluated tender.

Furthermore, unlike the above-mentioned instruments which lay down general award criteria rules applicable for all procurement procedures, the Model Law sets out the different award criteria rules for different procedures: for example, ‘unrestricted solicitation of suppliers’, which is the principal method for procurement of services, has a different list of the permissible range of award criteria compared to the one for the ‘tendering’ procedure. In this regard, the Model Law provides more detailed guidance on the issue of award criteria than other procurement regimes.

However in terms of applying award criteria to industrial objectives, enacting states retain a substantial degree of discretion in implementing the detailed rules of the Model Law on award criteria, as such criteria are explicitly included in the list of acceptable award criteria. According to the guide, it is important for procuring entities in some countries, especially developing or transitional countries, to be able to evaluate tenders in the context of economic development objectives.²⁶ In contrast, such criteria are generally banned under many regimes including the GPA, the EC, the NAFTA and the FTAA by virtue of the non-discrimination principle for covered procurement.

As argued in Section 4.1.4.3, the more precise approach may not necessarily of itself imply greater constraints in states’ discretion but just greater clarity of treatment. This is also the case here: by allowing economic development criteria in the evaluation of tenders, the detailed rules of the Model law leaves states more discretion in implementing industrial objectives at the evaluation stage.

The main reason for the inclusion of industrial consideration for award criteria can largely be explained by the fact that the Model Law intends to promote trade through harmonising divergent national procurement practice, but with limited ambitions in market access commitments.

²⁶ The Guide, Section III, Art.34, para.3

Meanwhile, it was recognised that many countries would still utilise procurement as a policy tool to implement industrial objectives even if the Model Law had banned it, since states can always easily depart from any rules of the Model law due to its voluntary nature.

Therefore the Model Law compromises best practice with political reality – it lays down the rules to ensure transparency and efficiency to the largest extent possible where procurement is used to promote industry objectives. For example, the use of price preference on award criteria is allowed under the Model Law²⁷, which is a kind of protective practice with trade-distorting effect. However, it is regarded as a preferable means of fostering the competitiveness of domestic industry as it can be conducted in a transparent way and also avoids total insulation from foreign competition.

In general, the voluntary nature of the Model Law itself accords enacting states a substantial discretion in implementation. As for its contents, on the one hand, as being a standardised template for all states, the Model Law tends to design its rules in a way that gives a significant discretion to accommodate diversified needs of different enacting states; on the other hand, the non-binding nature of the Model Law makes it possible to constrain states discretion on a number of issues, which seems to be proven unachievable under other binding procurement regimes.

5.1.4.4. Delegation

5.1.4.4a. Inter-governmental Mechanism

There is no inter-governmental enforcement mechanism available for the Model Law. It is designed as a voluntary model to assist states in establishing or reforming their public procurement legislation. There are no particular signatories to the Model Law and the enacting states are entirely free to accept or reject whole or parts of the Model Law.

²⁷ The Model Law, Art.34 (4)(d), In the case of contracts awarded to the tender with lowest price, the use of margin of preference allows the procuring entity to award the contract to a domestic tenderer when the difference in price between that domestic tender and the lowest-priced foreign tender falls within the range of the margin of preference. The margin of preference can also apply to procurement contracts to be awarded to the lowest-evaluated tender by giving domestic tenders certain prior specified favourable scores in the evaluation procedure.

5.1.4.4b.National challenge procedures

Given the importance of national review procedures to ensure the proper implementation of procurement rules and to promote confidence in that system, the Model Law provides for a tiered system for supplier review.

Firstly, suppliers shall submit their complaints to the procuring entity itself unless the procurement contract has already entered into force.²⁸ This compulsory review by the procuring entity is included to facilitate efficiency and economy in the view that the procuring entity could immediately correct procedural errors²⁹, which could arguably operate as an obstacle to rapid review.

Subsequently, the review may be sought from higher administrative authorities provided that such a procedure is consistent with the legal structure of enacting states³⁰, The Model Law lays down detailed suggestions on procedure and remedies on administrative review.³¹ Finally, it affirms the right to judicial review under the existing domestic legislation, but it does not provide any guidance on the procedural or other aspects of the judicial proceedings, which are left to the applicable national law.³²

Enacting states are free to choose either administrative review or judicial review or both according to their established legal frameworks. The Model Law envisages that adequate and effective procedures for review should be provided no matter what the exact form of such review procedures.³³ In general, the provisions on review are less detailed than other portions of the Model law, and less stringent than those of many other procurement agreements due to the fear of interfering with fundamental conceptual and structural framework of legal systems.³⁴

During the drafting process of the Model Law, some more detailed and stringent provisions modelled after the EC remedies directive were proposed³⁵ but eventually rejected for political

²⁸ The Model Law, Art.53

²⁹ The Guide, Section I, para.30

³⁰ The Model Law, Article 54

³¹ The Model Law, Article 53-55

³² The Model Law, Article 57

³³ The Guide, Section I, para.30

³⁴ The Guide, Chapter VI, para.5

³⁵ See Working Paper Submitted to the Working Group on the New International Economic Order at its Twelfth Session, 1. Procurement: Review of acts and decisions of, and procedures followed by, the procuring entity under the Model law on

reasons. The alleged reason for opposition was that a mere recommendation would not be an effective means of ensuring that enacting states would also provide for the necessary review procedure, and also, it was expected to be less effective than the EC directive in the absence of similar enforcement machinery to which the EC is subject.³⁶

Although the non-binding nature of the Model Law makes it easier for states to agree on rules which are more detailed and less discretionary, there still exists a compromise between ideal procurement rules and political constraints in reality. It was envisaged that more detailed and stringent rules especially those on sensitive issues like judicial review might risk making the Model Law politically unpopular as a whole. Therefore its rules on remedies were formulated as a remarkable exception to the overall detailed feature of the Model Law.

Remedies provisions of most procurement instruments such as the GPA, the EC, the NAFTA and the FTAA are skeletal, leaving a significant discretion to states over how to put in place domestic review procedures. Compared to the GPA, the EC, or even the FTAA, the Model Law provides less stringent rules on domestic procedures in many respects.

First of all, both the GPA and the EC set out provisions emphasising the independence of the review body to guarantee its judicial or quasi-judicial nature: for examples, the GPA requires that the members of the review body shall be secure from external influence³⁷, whilst the EC provides that such members shall be appointed and leave office under the same conditions as members of the judiciary.³⁸

In contrast, the Model Law, similar to the NAFTA and FTAA, contains no requirement for the availability of judicial or quasi-judicial review body to hear the complaints. It requires states to provide for either administrative review or judicial review or both, and where judicial review is not made available, no provisions can be found in the main body of the Model Law to ensure the

Procurement: report of the Secretary-General, A/CN.9/WG.V/WP.27, Annex II

³⁶ See Report of the Working Group on the New International Economic Order on the Work of its thirteen session, 15-26 July 1991, A/CN.9/356, Para.14

³⁷ The GPA, Art.XX, para.6

³⁸ See the Remedies Directives, Art.2.para.8

independence of the administrative review body. Such an administrative body is only required in the Guide to be independent of the procuring entity but not of the government.³⁹ On the contrary, most examples it gives as the possible administrative body seem to be part of government organs such as ‘one that exercises overall supervision and control over procurement in the state’ and ‘the body that exercises financial control and oversight over the operations of the government and of the public administration’.⁴⁰

Moreover, all of the GPA, the EC and the FTAA require that review procedures shall provide for certain ‘remedies’ and decisions of the review body shall be legally binding, while the Model Law only includes a list of ‘remedies’, which might be granted or recommended by the review body.⁴¹ Meanwhile, it makes clear that enacting states can freely choose one or more of the listed remedies and the review body may either be authorised the power to ‘grant’ the remedies chosen, or merely the power to ‘recommend’ such remedies.

However, when compared with the COMESA directives and the APEC NBPs, the Model Law seems to be more detailed. It contains a number of provisions dealing with procedural issues which are absent from the COMESA directives and the APEC NBPs. In particular, it specifies detailed procedural rules regarding administrative review. On the one hand, the Model Law is made more stringent than the COMESA directives and the APEC NBPs by virtue of certain procedural rules. For instance, Article 54 provides that the administrative body shall issue a written decision concerning the complaint within 30 days, stating the reasons for the decision and the remedies granted, if any.

On the other hand, the inclusion of detailed procedural rules does not always make the Model Law more stringent. For example, Article 52 lists certain decisions of the procuring entity which are not open to private challenge including decisions on the selection of the method of procurement and decisions to limit participation on the basis of nationality. These listed decisions are regarded as being only internal matters to the administration and the limitation on them is designed to avoid an

³⁹ The Guide, Chapter VI, Art.54, para.3

⁴⁰ The Guide, Chapter VI, Art.54, para.3

⁴¹ The Model Law Art.54 (3)

excessive degree of disruption.⁴² However, the exemption from review for such decisions could arguably provide procuring entities with excessive discretion, which could easily be abused in practice.

5.2 The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('the OECD Convention')

5.2.1. Introduction, Objectives and general approach

Corruption affects all types of nations, from industrialised, to poor, to transitional, and it has flourished throughout the history without exception to today's global society. There are many detrimental consequences of corruption for economic and social development.⁴³ In public procurement, corruption practices can lead to numerous undesirable consequences. Most notably, it prevents public authorities from achieving value for money by awarding contracts to the largest bribe makers rather than the best and cheapest goods producer or services provider, which results in the waste of taxpayers' money as well as the misallocation of resources.

Most countries prohibit public officials from receiving bribes but some are lax in enforcement allowing the demand side of corruption to flourish⁴⁴. Certain states have taken measures to deter their own businesses from becoming involving in corrupt activity outside their own jurisdiction because of moral and political considerations as well as the adverse impact that corruption can have on international trade.⁴⁵ Famously, the Foreign Corrupt Practice Act ('FCPA')⁴⁶ has been enacted as a federal law in the U.S. to make it a crime for American individuals or corporations to engage in corruption abroad since 1977.

Apart from domestic initiatives, there are several major international initiatives targeting the

⁴² The Guide, Chapter V, Art.52

⁴³ See World Bank, *Costs and Consequences of Corruption*. Available at <http://www1.worldbank.org/publicsector/anticorrupt/topic1.htm>

⁴⁴ Harms, 'Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption', 33 CORNELL INT'L L.J. 159 (2000), at pp.168-169

⁴⁵ Arrowsmith, 'The OECD Revised Council Recommendation on Combating Bribery' (1997) 6 *P.P.L.R.* CS231at p.CS231

⁴⁶ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, tit. I. 91 Stat. 1494. Available at <http://www.usdoj.gov/criminal/fraud/fcpa.html>

supply side of corruption⁴⁷, most notably, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('the OECD Convention'). This Convention was signed in 1997 by the OECD's all 30 member states and 5 non-members⁴⁸, and entered into force in 1999. It is considered one of the most far-reaching international efforts towards combating trans-national bribery as it represents the first successful effort to establish between major exporting countries a set of binding commitments targeting trans-national corruption practices.⁴⁹ The signatories to the Convention represent collectively over 70% of exports world-wide and over 90% of foreign direct investments.⁵⁰

The main objective of the OECD Convention is to address the trade-distorting effect of corruption in international business transactions. Previously, many countries had no effective laws or regulations in place to prohibit their firms from making bribery payments to foreign officials, and some even encouraged foreign bribery by allowing bribery payments to be tax deductible. Recognising that these practices undermine good governance and distort international competitive conditions, the Convention was therefore adopted aimed at preventing countries which are lax on foreign bribery or even support it from gaining a competitive advantage in international trade.

Before the conclusion of the Convention, the OECD Council issued a series of non-binding instruments to build up consensus. The first Recommendation on Bribery in International Transactions was adopted in 1994 ('the 1994 Recommendation'), which called on states to 'take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions'.⁵¹ In 1996, a second Recommendation on the Tax

⁴⁷ The other major international initiatives targeting the supplier side of corruption include the UN Declaration against Corruption and Bribery in International Commercial Transactions; the Inter-American Convention Against Corruption; the Protocol on Corruption to the EC Convention on the Protection of the Communities' Financial Interests and etc.

⁴⁸ The 30 members include Ireland, Japan, Germany, Hungary, the United States, Finland, the United Kingdom, Canada, Norway, Korea, Greece, Austria, Mexico, Sweden, Belgium, the Slovak Republic, Australia, Spain, the Czech Republic, Switzerland, Turkey, France, Denmark, Poland, Portugal, Italy, the Netherlands, Luxembourg and Ireland ;the 5 non-member countries are Argentina, Brazil, Bulgaria, Chile and Slovenia. See OECD official website at <http://www.oecd.org/document/12/0,2340,en_2649_34855_2057484_1_1_1_1,00.html>

⁴⁹ See Zedalis, 'How Does the New OECD Convention on Bribery Stack Up Against the Foreign Corrupt Practices Act' (1998) 32 (3) *J.W.T.* 167 at pp.167-168

⁵⁰ See M. Pieth, 'Taking Stock: Making the OECD Initiative Against Corruption Work', available at <<http://www.oas.org/juridico/english/pieth2000.htm>> at p.1

⁵¹ See OECD Council Recommendation C(94)75/FINAL on Bribery in International Business Transactions, May 27,1994. available at <http://www.oecd.org/document/21/0,2340,en_2649_34855_2017813_1_1_1_1,00.html>

Deductibility of Bribes to Foreign Officials ('the 1996 Recommendation') was adopted, which asks Member States which allows the deductibility of bribes to foreign public officials, to re-consider such treatment with the intention of denying this deductibility.⁵²

The above Recommendations were revised, and the Revised Recommendation of the Council on Combating Bribery in International Business Transactions ('the Revised Recommendation')⁵³ was adopted in 1997 to include specific suggestions for criminal procedures, tax laws, business accounting practices, banking provisions and public procurement rules etc. Signatories to the Convention are also committed to implement the Revised Recommendation

Regarding the rules on public procurement, the Revised Recommendation contains three items in relation to trans-national bribery in procurement:⁵⁴ firstly, it encourages Member States to support the WTO initiative on transparency in procurement (see Section 3.3); secondly, it requires states to allow their procuring authorities to suspend from competition for public contracts firms determined to have bribed foreign officials; and thirdly, it recommends the adoption of anti-corruption provision in bilateral aid-funded procurement.

Compared with the Revised Recommendation, the Convention contains binding commitments in the limited field of criminal law targeting the supply side of corruption. There are no specific provisions on procurement under the OECD Convention, except that general provisions requiring Members to adopt legislation to criminalise 'bribery of a foreign public official' would have a significant impact on corruption in procurement.

According to Article 1 of the Convention, the scope of 'bribery of a foreign official' offence is widely defined. Individuals or corporations of the Convention Member countries making bribery payment or advantage to a foreign public official in procurement will always commit a criminal offence, irrespective of the value of the advantage, its results, perceptions of local custom, or the

⁵² See OECD Council Recommendation C(96)27/FINAL on Tax Deductibility of Bribes to Foreign Public Officials, April 11, 1996. available at <http://www.oecd.org/document/46/0,2340,en_2649_34855_2048174_1_1_1_1,00.html>

⁵³ The 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions ('the Revised Recommendation'). Available at <http://www.oecd.org/document/32/0,2340,en_2649_34859_2048160_1_1_1_1,00.html>

⁵⁴ See the Revised Recommendation, Art. VI

tolerance of such payment by local authorities etc.⁵⁵

Moreover, it would be an offence even for the best qualified bidder which could properly have been awarded the contract in procurement to engage in bribery in order to guarantee its success where corruption is a usual practice rather than an exception.⁵⁶ In this regard, foreign suppliers from Parties to the OECD Convention could arguably be competitively disadvantaged since other less competitive suppliers which offer bribes would end up winning the contract.

In addition to the definition for 'bribery of a foreign official', the Convention sets out provisions governing how and to what extent the action of 'bribery of a foreign official' should be criminalised and provisions enhancing the effectiveness of criminalising the action of 'bribery of a foreign official'.

5.2.2. Soft Law & Hard Law Issues

5.2.2.1. Bindingness

Some have argued that a multilateral treaty of binding nature would be the most effective way of requiring countries to adopt measures to stop or discourage corruption outside of their borders.⁵⁷ Although it is the case with the OECD Convention now, it took several steps for the OECD to achieve an agreement of binding nature.

Before the OECD initiatives on combating bribery, the U.S. was the only country outlawing extraterritorial bribery under the FCPA. This U.S. policy was perceived as putting their own exporting industries at a comparative trade disadvantage when competing with other firms from countries that allowed, or in some cases encouraged, bribery of foreign public officials. Under strong pressure from its private sector, the U.S. had repeatedly tried to bring about comprehensive international anti-bribery legislation in an attempt to level the playing field for American firms in international

⁵⁵ See OECD, *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 21 November 1997 Available at http://www.oecd.org/searchResult/0,2665,en_2649_201185_1_1_1_1_1,00.html para.7

⁵⁶ Ibid, para.4

⁵⁷ Linarelli, 'Corruption in Developing Countries and in Countries in Transition: Legal and Economic Perspective' in Arrowsmith and Davies (ed), note 3, at p.131

business.⁵⁸ But this U.S. effort failed repeatedly in bilateral negotiations, at the United Nations, and elsewhere.⁵⁹

The major reason for the failure was explained by Abbott and Snidal to be that the U.S. had no interest-based negotiating leverage, at least within the issue area: it could not offer any reciprocal anticorruption concession to other negotiating parties, as it had already acted; or threaten to retaliate for inaction by relaxing its own legislation.⁶⁰

Despite the repetitive failure, the U.S. efforts to negotiate international rules on trans-national bribery did not stop. The 1988 amendments of the FCPA explicitly require the US President to conduct negotiations on foreign bribery among the members of the OECD.⁶¹ It was recognised that other 29 OECD countries are the major business competitors of the U.S and account for a large proportion of international contracting. However even within the OECD forum, it was also the case that firms from European countries or Japan etc face commercial incentives to conduct the bribery of foreign officials and their governments face political incentives to support them.

The U.S. originally believed that the ultimate product of OECD negotiations must be ‘hard law’ – a legally binding convention with a meaningful implementation mechanism, ideally with sanctions equivalent to the criminal penalties under the FCPA.⁶² Given the fact that this objectives could not be achieved on the basis of quid pro quo bargaining in the short run, the U.S adopted a gradualist strategy to achieve it through one or more stages of ‘soft law’.⁶³

The OECD is particularly famous as an organisation in the area of ‘soft law’, and much of its work leads to no-binding instruments such as Recommendations. The development of OECD instruments combating corruption illustrates its general approach that ‘soft law’ or particularly non-binding instruments are frequently resorted to on difficult issues where nothing mandatory

⁵⁸ See T. Martin, ‘Corruption and Improper Payments: Global Trends and Applicable Laws’, (1998) 36 *A.L.R.* 416 at pp 428-429

⁵⁹ *Ibid.* p. 429

⁶⁰ See K. W. Abbot and D. Snidal, ‘Values and Interests: International Legislation in the Fight against Corruption’ (2002) 31 *J.L.S.* 141 at p.152

⁶¹ See 15 U.S.C.A. § 78dd-1 (1998)

⁶² See K. W. Abbot and D. Snidal, note 62, p.153

⁶³ *Ibid.*

could be achieved, but without the prejudice to the possibility to harden up certain elements of such soft law where possible and desirable.

When the U.S. initially brought the issue to the OECD in 1989, again there was limited interest of other Member countries in negotiating a multilateral anti-bribery agreement. Many states such as Germany, France, Japan and Spain openly opposed any anti-bribery intervention.⁶⁴ Nevertheless, the anti-corruption initiative firstly resulted in some non-binding instruments that were used to build up consensus for the later passage of the Convention.

The first milestone in the OECD effort against international bribery was the adoption of the 1994 Recommendation, calling Member countries to criminalise the payment of bribes to foreign officials, which is far from a treaty in nature. It was argued that the 1994 Recommendation had all the advantages and disadvantage of 'soft law': bold political statements could be made without immediate legal obligations to act.⁶⁵ The U.S. initially made a strong push to make it legally binding, but this was objected to by Japan, with the backing of many European nations.⁶⁶

The 1994 Recommendation contains a so-called 'shopping list' of items to be further examined⁶⁷, and a dynamic process of close-up examinations of these items was undertaken over the next three years, leading to another 'soft law' instrument: the 1997 Revised Recommendation.⁶⁸ This Revised Recommendation then includes concrete and specific suggestions for the listed items in the 1994 Recommendation.

More importantly, it was agreed in the 1997 Revised Recommendation to open negotiations promptly on a convention to make payment of bribes to foreign public officials a crime in all OECD

⁶⁴ Many reasons were claimed by these countries to oppose anti-corruption intervention, for example, the German and French representatives objected on the ground that laws criminalising bribery of foreign officials were extra-territorial; and another argument raised by Germany was that bribery is a very insidious practice which may pose difficulty in the discovery and proof. However, some has argued that the real reason behind the resistance of France and Germany was to protect their domestic laws which made certain bribes tax deductible. See B. C. George, K.A. Lacey, and J. Birmele, 'The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes toward Corruption in Business Transactions' (2000) 37 *Am. Bus. L. J.* 485 at p.496

⁶⁵ See M. Pieth, note 52, at p.4

⁶⁶ Earle, 'The United States' Foreign Corrupt Practice Act and the OECD Anti-bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument' (1996) 14 *D.J.I.L.* 207 at p.225

⁶⁷ OECD Council Recommendation note 53

⁶⁸ M. Pieth, note 52, at p.4

countries.⁶⁹ This was the moment that many countries felt that a mere ‘soft law’ approach was not enough, and a legally binding form should be used and terms needed to be defined as clearly as possible, whilst some others feared that the dynamic process could be stalled by a too early move into binding law.⁷⁰ For instance, in 1997 France and Germany, which previously expressed a strong resistance to the OECD’s involvement in acting against bribery, surprisingly became the most vocal in asserting that the only way to ensure fairness was to negotiate a binding convention.⁷¹ This position was denounced by the U.S., saying that Germany and France might be using the argument as a delaying tactic to protect their domestic laws allowing the tax deductibility of bribes.⁷²

The final achievement is a compromise between different aspects of ‘soft law’ and ‘hard law’. In 1997, the OECD Convention, a hard law instrument in terms of its legally binding form, was eventually reached, whilst its substance continued on the basis of soft law in the terms of its vague content and broad discretion in implementation.

The formation of the Convention involved a process of prioritising and compromising, since a hard law approach in all the four aspects – bindingness, precision, discretion and delegation was proven unachievable within a short period of time. On the one hand, its legally binding form was widely perceived as an indispensable tool for resisting long-term political pressure from exporting industries. Furthermore, the wide participation of all major trading countries in the Convention was vital for any potential signatory as no one wanted its national firms to be placed in a similar position as the U.S. firms under the FCPA – being prohibited from engaging in foreign bribery while competitors from other countries without such prohibitions were winning the contracts.

On the other hand, the vague and discretionary feature of the Convention and the OECD’s inherent soft law enforcement system could better accommodate states’ divergent legal principles, which conversely made it possible for such a legally binding convention to be speedily adopted as well as

⁶⁹ See OECD Revised Recommendation C(97)123/FINAL, on Combating Bribery in International Business Transactions, May 23, 1997. available at http://www.oecd.org/document/21/0,2340,en_2649_34855_2017813_1_1_1_1,00.html

⁷⁰ M. Pieth, note 52, at p.4

⁷¹ See B. C. George, K.A. Lacey, and J. Birmele, note 66, at p.490

⁷² Ibid.

to attract wide participation.

From the gradual process of achieving a OECD convention on foreign bribery, it can be seen that 'soft law' in terms of non-binding recommendations was resorted to as an 'intermediate step' towards the formation of a binding 'hard law' convention by providing a basis as well as building up consensus for later treaty negotiations. Furthermore, the combination of hard and soft law features of the Convention itself suggests that certain hard law aspect of an international instrument could be more easily achieved when softening the other aspects.

5.2.2.2. Precision

The OECD Convention is formulated as relatively vague and general 'standards' which are only meaningful with reference to specific situations. For example, Art. 1 provides that 'each party shall take such measure as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer promise or give any undue pecuniary or other advantage...in order to obtain or retain business or other improper advantage in the conduct of international business'. This provision only establishes a sort of 'standard', under which states are not required to use its precise terms in defining the offence under their domestic laws.

In order to assist the interpretation of the Convention's vague standards, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transaction ('the Commentaries') were also adopted to serve the functions of clarifying the intended meanings of each provision of the Convention as well as giving definitions for key terms used in the provisions.⁷³ Although the Commentaries are not legally binding as an integral part of the Convention, it is an extremely important document to be referred to in case of divergent interpretations between Member States, as it can reflect the original intention of Member States during the negotiating process.

⁷³ Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transaction, DAF/IME/BR(97)20. Available at [http://www.oilis.oecd.org/oilis/1997doc.nsf/43bb6130e5e86e5fc12569fa005d004c/5005eebd0c0be05880256754005d2ba0/\\$FILE/04E81240.DOC](http://www.oilis.oecd.org/oilis/1997doc.nsf/43bb6130e5e86e5fc12569fa005d004c/5005eebd0c0be05880256754005d2ba0/$FILE/04E81240.DOC)

As a result, the Commentaries may, in effect, make the ambiguous principles of the Convention more precise. As regards the previous examples raised, the meaning of vague terms like ‘other improper advantage’ in Art.1 is defined in the Commentaries.⁷⁴ Moreover, it clarifies whether certain conduct shall be within the meaning of the offence under Art.1. For instance, it is made clear in the Commentaries that it is irrelevant whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business when determining whether there is a conviction for the offence under Art.1.⁷⁵

5.2.2.3. Discretion

The OECD Convention only sets forth minimum standards, which allows states a substantial discretion in implementation. Paragraph 2 of the Commentaries clearly states that the Convention ‘seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a party’s legal system’.

The above articulates the important principle of ‘functional equivalence’, according to which the Convention standards can be implemented in a way consistent with a given Member country’s existing legal systems. This principle makes the Convention directly comparable to the EC’s secondary legislation known as directives which are binding on the EC Member States ‘with respect to the result to be achieved’, but leaves national authorities with the choice of form and methods.⁷⁶

The ‘functional equivalence’ principle of the Convention ensures a high degree of discretion given to states in implementation, which can also be reflected by the vague and discretionary wording of its provisions. For example, Art.2 provides that Member States shall ‘take such measures *as may be necessary, in accordance with its legal principles*, to establish the liability of legal persons for the bribery of a foreign public official’. The language such as ‘as may be necessary’ and ‘in accordance

⁷⁴ See the Commentaries, para.5

⁷⁵ See the Commentaries, para.4

⁷⁶ See B. C. George, K.A. Lacey, and J. Birmele, note 66, at p.492. Also, see Section 4.1.4.1 for a discussion on the EC directives.

with its legal principles' imply that states are left with a significant discretion in implementing the rules.

Although the clarification provided by the Commentaries can sometimes curtail states' discretion for reasonable interpretation, it may not necessarily impose more constraints on states' discretion but just provide a greater clarity of the rules or even an emphasis on states' discretion. For example, regarding Art.2, the Commentaries make it clear that a Member State shall not be required to establish such criminal responsibility if criminal responsibility is not applicable to legal persons under the legal system of that Member State.⁷⁷

5.2.2.4 Delegation

There is no delegation of power to a judicial or quasi-judicial body under the OECD regime to interpret and enforce the agreed rules or standards. Instead, 'peer review', a soft law enforcement method, is used extensively in the OECD to monitor the states' compliance with its conventions and recommendations. The term 'peer review' has been described as 'the systematic examination and assessment of the performance of a state by other state, with the ultimate goal of helping the reviewed state improve its policy making, adopt best practice, and comply with established standards and principles'.⁷⁸

The OECD peer review process is conducted on a non-confrontational and non-adversarial basis. Its Member States accept the method of 'peer review' in most policy areas and as a whole, the OECD has been considered as a success in coordinating Members' policy over a broad range of areas in the absence of hard law enforcement mechanisms.

The monitoring system of the implementation of the OECD anti-bribery rules is illustrative of the general OECD peer review process. It was agreed in both the OECD Convention and the 1997 Revised Recommendation that a programme of systematic follow-up should be conducted within the

⁷⁷ See the Commentaries, para.20

⁷⁸ See F. Pagani, 'Peer Review: a Tool for Cooperation Change: an Analysis of an OECD Working Method', (2002). Available at <http://www.oecd.org/dataoecd/33/16/1955285.pdf> at p.1

framework of the OECD Working Group on Bribery in International Business and Transactions ('the Working Group').⁷⁹ In practice, this peer review process is divided into Phase 1 and Phase 2. The purpose of Phase 1 is to evaluate the adequacy of a country's legislation to implement the Convention as well as the 1997 Revised Recommendation.

The evaluation was conducted under a rigorous system of peer review. Under this review process, each signatory is required to produce a report against a questionnaire drawn up by the Secretariat, and the Secretariat then drafts a descriptive text based on the national report produced by the country under the review as well as legal materials submitted by them.⁸⁰ Two lead examiner countries chosen from a delicately balanced rota are assigned to give their opinion on the standard of implementation of the examined country.⁸¹

The Working Group then holds two hearings per examined country.⁸² The first hearing begins with a presentation by the examined country of the measures it has taken to comply with the rules, upon which the two examining countries present their evaluation, and then there are discussions within the Working Group - each signatory is allowed to ask questions and express an opinion where appropriate. The next hearing concentrated on finalising the evaluation, and in this phase, a final report is written up and adopted verbatim by the Working Group, detailing the collective opinion concerning the examined country's compliance with the Convention, and the final text of the report is submitted to the Ministerial Council of the OECD for formal adoption and then de-restricted for public availability.

Although any adopted report or recommendation on the implementation of the examined country is non-binding, the compliance with the OECD rules has largely been improved by such soft policy review procedures. Phase 1 of the monitoring process of OECD Convention has been substantially completed, and these rigorous and comprehensive country policy reviews have proven to be a

⁷⁹ See OECD convention Art and the Revised Recommendation, Section VIII

⁸⁰ See OECD, *Bribery Convention: Procedure of Self- and Mutual Evaluation-Phase I*, available at http://www.oecd.org/document/21/0,2340,en_2649_37447_2022613_1_1_1_37447,00.html

⁸¹ Ibid.

⁸² M. Pieth, note 52, at pp.7-8

powerful tool for inducing compliance.

All of the 36 signatories to the Convention to date have passed implementing legislation criminalising trans-national bribery and have submitted their implementation reports to the Working Group, and the examination of domestic implementing legislations has taken place in an efficient and effective manner, identifying shortcomings where they have been evident, and the majority of which strengthened their legislation following their Phase 1 review and assessment by the Working Group.⁸³

As the OECD convention is the critical first step towards attaching the supply-side of corrupt payments at the international level, it was reasonable to expect that the signatories with varied domestic circumstances would confront great hurdles in implementing the rules, including adverse influence from their exporting industries and lack of implementing capability or resources. Given divergent national policies and strong opposition from domestic vested interests, any 'hard law' enforcement mechanism might arguably achieve limited success, with the potential risk of the unintended and opposite effect of breeding animosity.

The 'soft law' quality of peer review seems more effective in encouraging and enhancing compliance than any traditional 'hard law' enforcement mechanism including the delegation of power to a court or other judicial bodies. On the one hand, the voluntary nature of peer reviews may make the reviewed country more co-operative during the process, with an increased willingness to provide information, respond to questionnaires and even highlight areas where a country may be encountering difficulty.

On the other hand, unlike a judicialised enforcement system, the peer review system can take into account a country's particular circumstances and look at its performance in a historical and political context. Therefore it can assess and encourage trends toward compliance even among relatively poorly performing countries, while noting negative trends in countries with a relatively highly

⁸³ The Working Group, *Statement of BIAC, ICC, TUAC and TI Regarding Consultations in Phase 2 of the OECD Monitoring Process*, 14 August 2001, DAFFE/IME/BR/WD(2001)23. available at <http://www.oecd.org/dataoecd/18/39/1837866.pdf>

performance record.⁸⁴

Peer pressure is frequently pointed out to explain the efficiency of OECD-like soft international law regimes. It is a means of soft persuasion which can become an important force to stimulate countries to make changes and meet standards. The peer review process can give rise to peer pressure in various ways. As described above, the process contains a mix of informal dialogues between the peer countries and formal recommendations adopted by the Working group, inevitably involving comparisons or even ranking among Member countries.

In addition to the emergence of peer pressure to stimulate compliance, the peer review system has many other merits including promoting transparency, motivating information and experience learning. Firstly, it serves as a transparency mechanism by evaluating and disclosing the implementing measures taken by the Signatories against the standards set by the Convention and the Recommendation. In practice, transparency has proved to be one of the most appreciated functions of the review mechanism. The OECD peer review process provides each Member country with opportunities to present and clarify national rules, practices and procedures. Also, the implementing reports of all the country are published on the OECD website at the end of the review process.

It can alert national authorities, their trading partners, and the public whether or if so, to what extent the national implementing legislation meets the agreed rules or whether there are particular aspects the examined country may consider improving. Therefore, states are likely to respect their legal obligations no matter whether the binding ones contained in the Convention or the non-binding ones in the Revised Recommendation out of the fear of ruining their trustworthy reputation. In this sense, transparency itself is instrumental to the enforcement of the OECD rules.

Secondly, the peer review process performs the function of fostering information sharing and mutual learning by conducting a regular exchange of information and experience on the implementation of the OECD bribery rules. Besides the objective of monitoring compliance, another important purpose of peer reviews is to provide states with an opportunity to consult on difficulties

⁸⁴ See F. Pagani, note 80, at p.12

in implementation and to learn from the solutions found by other countries.⁸⁵

The process is not only an exercise of evaluating whether the examined countries comply but also a chance for the examining countries and all other members participating in the process to learn. The translation and adaptation of foreign experience can be valuable for any participating states, and is, moreover, an important capacity-building instrument. In this regard, the value of the involvement of the Secretariat cannot be ignored. The Secretariat consisting of the related and neutral experts have expertise needed to produce documentations and analyses, to stimulate discussions, and to uphold quality standards in this learning process.

Phase 2 of the monitoring process examines actual performance of national systems with regard to the enforcement of domestic legislations implementing the Convention from an informal exchange of views with key representatives of the private sector, trade unions and civil society. Accordingly, teams of international experts will be sent to each Member State to meet with its political, administrative, police, customs and judicial authorities, or any other relevant body and discuss its actual implementation of the agreed standards.⁸⁶

This informal exchange of view in Phase 2 is important to enhance the effectiveness of the monitoring process because it involves non-governmental participation which would provide additional perspective and information important and valuable to implementation of the Convention. The Phase 2 review represents an important step in the sense that the focus of monitoring process is not only on examination of national laws and court cases, but also on the actual performance of domestic implementing legislations adopted by Member States.⁸⁷

Phase 2 of monitoring process began in 2001, and it was agreed that the review should be completed by 2005 at the latest.⁸⁸ However, the review has yet to be completed and Phase 2 reports

⁸⁵ See OECD Anti-Bribery Convention: Procedure of Self- and Mutual Evaluation – Country Monitoring Principles, Available at <http://www.oecd.org/document/12/0,2340,en_2649_37447_35692940_1_1_1_37447,00.html>

⁸⁶ See Wehrle, Frédéric, 'Making Sure that International Anti-corruption Standards are Enforced: the OECD Convention Monitoring Mechanism', (2002). Available at http://www.transparency.org/global_priorities/international_conventions/readings_conventions at p.2

⁸⁷ The Working Group, note 85

⁸⁸ See OECD note 87

have been completed for 27 member states.⁸⁹ Although these over 20 phase 2 reviews have triggered further changes by Member States⁹⁰, the general result of Phase 2 reviews still call for further monitoring.

In conclusion, the rigorous and comprehensive peer review system has proven to be a powerful tool for inducing compliance with the Convention and the Revised Recommendation. However, more efforts remain to be taken to urge states that have yet to fully and effectively implement the standards set by the OECD anti-corruption instruments for change.

⁸⁹ See Country Reports on the Implementation of the OECD Anti-bribery Convention and the 1997 Revised Recommendation. Available at

http://www.oecd.org/document/24/0,2340,en_2649_37447_1933144_1_1_1_37447,00.html

⁹⁰ See N. Ehlermann-Cache, 'Fighting Corruption in International Business Transactions: Impact on Public Procurement', (2006), *P.P.L.R.* 2006, 6, NA195-204

Chapter 6 An Overview of International Instruments Regulating Public Procurement with Non-trade Objectives

6.1 Introduction

In the previous chapters, it was explained that domestic discriminatory procurement practices constitute a significant barrier to international trade, and consequently various arrangements have been concluded at both international and regional levels to open up international procurement market. Besides those international initiatives with the aim of market liberalisation, there are a number of other international instruments regulating procurement with non-trade objectives, or with major objectives other than trade.

Firstly, many international aid institutions such as World Bank provide financial aid for projects in developing countries, and they also formulate their own procurement rules to be applied to the projects that they fund to ensure the effective spending of aid proceeds. This chapter will generally review the World Bank's rules governing its aid-funded procurement to illustrate how aid institutions can supervise and monitor the procurement process of their funded projects. The similarities as well as differences between the World Bank's rules and those of other aid institutions will also be discussed.

Although most aid institutions have sound procurement rules in place, the lack of capacity in the recipient countries can still present a practical barrier to effective procurement. In this regard, the World Bank initiative to improve the procurement system of the recipients as a whole will be briefly introduced.

Next, differences in various donor procurement policies and procedures can also reduce the effectiveness of external aid. International initiatives towards harmonising multiple applications of different donor regimes will then be discussed. Lastly, this chapter will address the practice of tied aid by many donors, which requires that the proceeds of their funded project are spent to benefit the donor country's industry as a condition for the provision of aid.

Because of the trade focus of this thesis, this chapter is only intended to provide a general introduction to rather than a detailed analysis of these international instruments with non-trade objectives.

6.2. Donors' procurement rules

6.2.1. Introduction

Multilateral development banks and bilateral and regional aid institutions provide financial aid for many important projects in developing countries and transitional economies. These normally take the form of loans or grants. Aid was initially provided for specific projects in infrastructure, industry and agriculture such as highways, dams or hospitals, but has increasingly been provided for structural or sectoral reforms of the recipient states.

Financial aid made by these institutions or countries is usually granted to governments or public sectors, in most cases which will carry out relevant procurement procedures. In order to ensure that the funds are used for project-related purposes as well as in economic and efficient ways, the aiding institutions or countries condition their loans or grants on the observance by the recipient states of particular procurement procedures laid down by them.

Financial aid of this kind is often provided through development banks, that is, the World Bank Group¹; and many regional development banks that work in specific regions of the World such as Inter-American Development Bank ('IDB'); The Asian Development Bank ('ADB'); The African Development Bank ('AfDB'); and the European Bank for Reconstruction and Development etc ('EBRD'). Apart from development banks, aiding institutions can also be regional organisations like the European Community ('EC'); the Organization of Petroleum Exporting Countries ('OPEC'), and individual countries, notably, the U.S.; Canada; Japan and some EC member states.

Among them, the World Bank procurement procedures have a significant influence on those of

¹ The World Bank Group is comprised of the International Bank for Reconstruction and Development (IBRD); the International Development Association (IDA); the International Finance Corporation (IFC); the Multilateral Investment Guarantee Agency (MIGA); and the International Centre for Settlement of Investment Disputes (ICSID). The 'World Bank' is the name that has come to be used for the IBRD and IDA. See www.worldbank.org

other multilateral development institutions and bilateral aid agencies of many individual countries. Most of multilateral development banks follow the World Bank's model in terms of procurement rules for projects they fund. Many bilateral aid agencies, such as the Overseas Economic Co-operation Fund of Japan, adopted procurement guidelines similar to those of the World Bank.² Therefore, the World Bank's Procurement Guidelines are to be mainly discussed to illustrate the way in which aid institutions regulate their funded procurement.

6.2.2. The World Bank procurement rules

6.2.2.1. Introduction, objective and approach

The World Bank is the most prominent and important multilateral aid institution in terms of both the volume of finance and the formation of procurement policies. It provides low-interest loans, interest-free credits, and grants to help developing countries to build schools and hospitals, to provide water and electricity, and also, increasingly to conduct domestic reforms.³ Meanwhile, the World Bank, as required by its Articles of Agreement, works to ensure that 'the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations'.⁴

The implementation of aid project including the award and administration of contracts often rests with the recipient states.⁵ The World Bank is neither a party to the procurement process nor a party to the procurement contract. However, it formulated a set of rules for international competitive bidding in its procurement Guidelines and sponsored various types of standard bidding documents for use by recipient states.

² See Arrowsmith, Linarelli and Wallace, Jr, *Regulating Public Procurement: National and International Perspective* (Kluwer Law International Ltd, 2000) at p.115

³ The World Bank has provided nearly US\$350 billion in financing for some US\$6,000 development projects since its inception; in the World Bank's fiscal year 2007, it provided US\$34.3 billion for over 620 projects in developing countries worldwide See www.worldbank.org

⁴ See IBRD Articles of Agreement, Article III, Section 5.(b) and IDA Articles of Agreement, Article V, Section 1(g)

⁵ However, it is not always the case that aid institutions devolve the power of procurement to recipient countries in their financed projects, see the discussion in Section 6.2.3

The detailed rules and procedures for the award of goods, works and services are laid down in the World Bank Guidelines for Procurement under IBRD Loans and IDA Credits ('the Guidelines'). The principal aim of the Guidelines is to ensure that loan proceeds are spent on goods, works, services needed to carry out the intended project on the most efficient and economical terms possible.⁶ The rules and procedures are laid down to limit the chance of the Bank loans being misused for other irrelevant purposes or being siphoned off through corruption.

The Bank views competition as the basis for economic and efficient procurement. The current version of the Guidelines does not contain procurement restrictions based on nationality and the borrowers are required to give all qualified bidders from any country an equal opportunity to bid for Bank-financed projects.⁷ However, in order to encourage the development of domestic industries, the borrowers are allowed to build in a limited margin of preference to bids offering domestically manufactured goods and to bids for works contracts from eligible domestic firms.⁸

Furthermore, transparent procedural rules are laid down to promote competition, to secure probity, and therefore to achieve better value for money. In general, the Guidelines are considered to be very strict. For example, in most cases it requires the use of International Competitive Bidding ('ICB') for the procurement of goods, works and services. ICB refers to a very formal tendering procedure in which the contract is opened to international competition, and awarded through a formal tendering procedure⁹ Under ICB, procurement opportunities are widely advertised; a clear specification is set; bids are submitted to a common set deadline; 'post tendering negotiations' are banned; bids are opened in public; and all qualified bidders are entitled to have their bids considered.

Similarly, the main rules governing the procurement of consultancy services are set out in the Guidelines for Use of Consultants by World Bank Borrowers and the World Bank as Executing

⁶ See the Guidelines, Section 1.2

⁷ Ibid Section 1.6, and exceptions to this are noted in Section 1.8. In contrast, the previous editions of the Bank Guidelines require that the procurement opportunities of the projects financed by the World Bank are not open to countries which are not Bank members. Such a restriction is contained in the January 1999 edition of the Procurement Guidelines and the May 2002 edition of the consultant guidelines.

⁸ Ibid. Appendix 2

⁹ Tucker, 'A Critical Analysis of the Procurement Procedures of the World Bank', In Arrowsmith and Davies (ed), *Public Procurement: Global Revolution* (Kluwer Law International, 1998) at p. 145

Agency ('Consultancy Guidelines'). The procedures for the award of consultancy services contracts are quite different from those for the award of goods, works and other services contracts. Consultancy Guidelines place greater emphasis on quality than the Guidelines do and Quality-and Cost-Based Selection ('QCBS') is the most commonly recommended method in the current version of Consultancy Guidelines.¹⁰

Meanwhile, the Bank procurement rules also impose the use of Standard Bidding Documents (SBD)¹¹ issued by the Bank for the procurement of goods, works and consulting services, which are intended to fill in the details for application of the basic procurement procedures contained in the Guidelines.¹²

6.2.2.2 Coverage

The Bank's procurement rules contained in the Guidelines shall apply to all contracts for goods, works and services financed in whole or in part from the Bank loans.¹³ There is no express monetary threshold set in the Guidelines below which the Bank's rules do not apply. In practice, however, the Bank will assess the adequacy of a borrower's procurement system early in the project cycle of a specific project, and the Bank's rules are not always required for small contracts if the borrower's own procurement procedures are regarded as adequate.¹⁴

As for large contracts, the Bank usually insists on the use of its procurement procedures instead of those of the borrower even if that borrower has its own procedures which are considered as adequate. It is hard to understand how the Bank's position for large contract can be reconciled with one of its main considerations specified under the Guideline to encourage the development of domestic

¹⁰ Consultancy Guideline II 2.1

¹¹ The latest version of the Bank Standard Bidding Documents is available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20062006~menuPK:84284~pagePK:84269~piPK:60001558~theSitePK:84266,00.html>

¹² The Guidelines, Section II B Bidding Documents; Consultancy Guidelines, Section II 2.12 Contract

¹³ The Guidelines, para.1.5 and Consultancy Guidelines, para.1.7

¹⁴ Arrowsmith, Linarelli and Wallace, Jr, note 2 at p.114. A procurement system adopted on the basis of the UNCITRAL Model Law is regarded as adequate provided that it does not follow the Model Law's provisions on the use of competitive negotiations.

industries in the borrowing country.¹⁵ In fact, the multiple applications of different donor regimes present a big problem for national procurement officers and harm aid effectiveness and the ownership of recipient states (to be discussed in Section 6.3).

6.2.2.3. Soft law & hard law issues

6.2.2.3a. Bindingness

The World Bank procurement rules can be categorised as a kind of internal policy, but may still acquire a legally binding force through being incorporated into loan agreements as a precondition for the grant of loans. The government agency who receives the funds must abide by the Bank's procurement policies and procedures, which is one of the key obligations in the loan agreement between the Bank and that government agency. It is submitted that the loan agreement between the World Bank and the borrowing state has the effect of treaties and is thus subject to international law instead of domestic laws of that borrower.¹⁶

6.2.2.3b. Precision

The Guidelines set out basic procedural standards for contract awarding process, while the extensive SBDs issued by the Bank fill in the details for the application of the Guidelines.¹⁷ Different from the framework feature of other procurement regimes in the previous chapters, SBDs are a series of comprehensive and complete documents including standard bidding documents and standard form for various types of contracts, which have all details these documents should have in practice and can be used directly after being filled out with concrete project information for a particular procurement.

Consequently, the Bank procurement rules possess an extremely high degree of precision, which can be illustrated by reference to the relevant rules on the issues of minimum time-limits for

¹⁵ The Guidelines, Section 1.2

¹⁶ See Head, 'Evolution of the Governing Law for Loan Agreements of the World Bank and other Multilateral Development Banks', 90 *A.J.I.L.*

¹⁷ The Guidelines, para 2.12

tendering and qualification criteria.

Regarding the issue of minimum time-limits for tendering, the Guidelines, like the GPA, the EC directives, the NAFTA, and the FTAA (see Section 3.2.4.2, Section 4.1.4.2, Section 4.3.4.2. and Section 4.4.4.2 respectively), lay down general principles as well as prescriptive rules. It provides that the time allowed for the preparation and submission of tenders ‘shall be determined with due consideration of the particular circumstances of the project and the magnitude and complexity of the contract.’¹⁸ Meanwhile, it also requires that the minimum time-limit for tender submission shall generally be not less than 6 weeks for ICB, from the date of invitation to bid or the date of availability of bidding documents, whichever is later, and this period shall generally be not less than 12 weeks for the large or complex contracts.¹⁹

So far as qualification criteria are concerned, the Guidelines require that they shall be ‘based entirely upon the capability and resources of prospective bidder to perform the particular contract’.²⁰ In addition to this general requirement, the Bank issued a Standard Prequalification Document for use by the borrowing countries. In this document, the rules governing qualification criteria are elaborated to enormous details. As argued in Section 4.1.4.2, the EC may represent the most detailed among all the regimes reviewed, in terms of the rules on qualification criteria. The Bank’s rules governing qualification criteria are at least as detailed as those of the EC directives if not more detailed, stating grounds for exclusion and relevant evidences which procuring entities shall demand as means of proof of standing.²¹

It can be seen that the Bank rules are more detailed than any of the previously examined procurement regimes. The main reason behind its exceptionally high level of precision lies in the special relationship between the Bank and the borrowing countries. Different from states’ free will to participate in a particular procurement agreement, the borrower countries have no involvement in

¹⁸ Ibid. para.2.44

¹⁹ Ibid.

²⁰ Ibid. para.2.9

²¹ See the World Bank, *Standard Procurement Document: Prequalification Document for Procurement of Work and User’ Guide*. Section III. available at <http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Prequal-08-06-ev1.doc> >

formulating the rules or no choice over whether to apply them for the Bank funded projects, as they must agree on the observance of the Bank rules in order to obtain the Bank's loans or grants. On the part of the Bank, without actual participation in the procurement process, it choose to laid down the rules as precisely as possible, with the aim of maintaining control over it.

6.2.2.3c. Discretion

States' discretion in implementing the Bank rules is highly restricted, as demonstrated by reference to its rules governing the issues of procurement methods and award criteria.

As with the issue of procurement methods, similar to the approach of the GPA, the EC, the NAFTA and the FTAA (see Section 3.2.4.3, Section 4.1.4.3, Section 4.3.4.3. and Section 4.4.4.3 respectively), the Guidelines require the use of ICB as standard procurement method for most contracts, with the possibility to use other methods in strictly defined and limited circumstances.²²

Even in the case of alternative methods, it can be argued, they are primarily methods relying on formal competition bidding procedures, or dealing with situations where the disadvantages of departure from open competitive bidding procedures are not significant.²³ For example, Limited International Bidding is 'essentially a ICB by direct invitation without open advertisement' and is only permitted where there is only a limited number of suppliers or other exceptional reasons, while National Competitive Bidding is a competitive bidding procedure between suppliers from the borrower country, and can only be used where the nature or scope of the procurement is unlikely to attract foreign interest.²⁴

As regards the issue of award criteria, the Guidelines provide that the contract shall be awarded to 'the bidder whose bid has been determined (i) to be substantially responsive to the bidding documents and (ii) to offer the lowest evaluated cost.'²⁵ The relevant Bank SBD provides more detail on this point, and states' discretion is substantially limited by the SBD's restriction on the criteria

²² The Guidelines, para.3.1

²³ See Arrowsmith, Linarelli and Wallace, Jr, note 2, at p. 117

²⁴ The Guidelines III 3.2 & 3.3

²⁵ Ibid. para.2.59

and methodologies to be used in determining the ‘lowest evaluated cost’ and by the requirement that ‘no other criteria or methodology shall be allowed’.²⁶

6.2.2.3d. Delegation

In order to guarantee the effective application of its procurement rules, the Bank takes up a supervisory role to prior or post review of procurement documentation.²⁷ A suitable threshold level should be agreed on in the loan agreement to determine whether a procuring contract is subject to prior or post review. As a general rule, the threshold for prior review will be set to include contracts for about 50-80% of the total value of Bank financed contracts in a project.²⁸

In the case of prior review, the award procedure will be reviewed as it proceeds. All relevant documents and decisions made by the borrower should be approved by the Bank before the borrower proceeds with each step of the procurement process.²⁹ As for all borrower actions subject to prior review, a ‘no-objection letter’ must be issued stating the Bank has no objection to the decision taken, without which the Bank may refuse the borrower’s demand for drawing on finance under the loan agreement.

However, it is important to note that such a ‘no-objection letter’ is issued based on the documentary evidence provided by the implementing agency. The Bank will neither get involved in actual proceedings and nor be responsible for verifying the accuracy of the substantive matters indicated in the documentation. As a result, the ‘no-objection’ letter does not guarantee the legality of actual procurement process in practice, but only indicates that the procurement procedures record in the documentation presented comply with the conditions of the loan agreement.

Nevertheless, the Bank may still declare misprocurement even if the contract has been awarded after obtaining a ‘no objection’ from the Bank, provided the ‘no objection’ was issued ‘on the basis

²⁶ Standard Bidding Documents for Procurement of Goods (May 2004, revised May 2005), para.36

²⁷ The Guidelines, the introductory part and the Appendix I

²⁸ However the acceptable coverage may vary between sectors and projects taking into account the different nature and size of contracts as well as the procurement capacity of the borrower’s implementing agency and the level of risk involved. See the World Bank Procurement Manual Section 20.3

²⁹ For a detailed list of the document to be review normally, see the Guideline Appendix I and the Procurement Manual Section 20.2

of incomplete, inaccurate or misleading information furnished by the borrower or the terms and conditions of the contract had been modified without Bank's approval'.³⁰

As for lower value contracts below the prior review threshold level, the Bank will conduct a post review to the procedure. All major documentation referent to the procurement process shall be kept by the borrower during the project implementation and up to two years after the closing date of the loan agreement.³¹ Post review is similar to prior review in terms of scope and method, but is carried out only on a random sample of awarded contracts and procurement related documentation.³² If misprocurement is revealed during such a review, the borrower will be advised to take corrective actions, and be obliged to repay any amount improperly withdrawn from the loan for the misprocured contract if any, and be subject to a more intensified review of past and future procurement documentation.³³

In this way, without being a party to the contract awarding process, the Bank still supervises and monitors the procurement process of the projects it funds. In the case of misprocurement detected by the review, the Bank might take several actions that are fatal to the project: it may choose to suspend or cancel the portion of the loan allocated to the misprocured goods and works, or decide to suspend or cancel the entire loan and to accelerate the maturity of the principal.³⁴

As discussed in Section 2.4.3, the deprivation of loan benefits can serve as a powerful sanction against non-compliance of the borrower. Although it is not a usual practice for the Bank to take such destructive actions against the borrower, the threat of taking these actions can still deter breaches from happening or to correct the ones that have already happened in many cases.

However, The Bank's review mechanism is not designed with any intention to provide aggrieved suppliers with means to challenge procurement procedures and decisions. Aggrieved bidders are

³⁰ See the Guidelines, Section 1.12

³¹ Ibid. Appendix I, 5

³² See the Procurement Manual Section 20.6.1

³³ Ibid. Section 20.6.2

³⁴ See IBRD, General Conditions Applicable to Loans and Guarantee Agreement for Single Currency Loans, May 30,1995 (amended on October 6, 1999), Section 6.03, 6.03 and 7.01

suggested to contact the borrowing state concerned directly,³⁵ but they are free to send copies of their correspondences with the borrower to the Bank or to write to the Bank directly.³⁶ The Bank might refer to the borrower with its comments and advice if the complaint from suppliers is received prior to the closing date for submission of the bids; if otherwise received after the opening of the bids, the Bank might consider the complaint in deciding whether its procurement rules has been met in the case of contracts subject to the prior review.³⁷

Nevertheless, the Bank will not enter into discussions or correspondences with any bidder during contract awarding process, and its communications with the borrower and considerations regarding the complaint from suppliers are conducted in its sole discretion.

As stated in Procurement Manual, the main aim of this review mechanism is to ‘ensure that its funds are used for the purposes intended and that procurement procedures outlined in the Loan Agreement are followed in letter and spirit’,³⁸ which is echoing the major concern of the Guidelines to achieve best value for loan proceeds rather than promoting trade in its funded procurement.

Bearing the main concern of the Guideline in mind, it is also not surprising to notice that the borrower is not required to have certain national bid challenge system in place, which is often required under the procurement regimes with trade objectives.

It can be argued that private suppliers could play a more important role in reinforcing the implementation of the Bank rules and thus assisting the Bank in achieving its goals, because they are usually in a better position to detect breaches and have greater incentives to complain in the case of suspected breach. In practice, aggrieved bidders may bring their complaints to the Bank through the Executive Directors³⁹ of their countries, which could arguably be the most effective mechanism available to bidders. The Guidelines does not mention such kind of complaints, but Procurement

³⁵ See the Guidelines, Appendix 3, para.6-9

³⁶ Ibid. Appendix 3, para.6

³⁷ Ibid. Appendix 3, para.11-14

³⁸ See Procurement Manual, Section 20.1

³⁹ Executive Directors work on-site at the Bank and are responsible for the conduct of the general operation of the Bank and exercise all the powers delegated to them by the Board of Governors who are the ultimate policy makers at the Bank. For more detailed information, see the World Bank website at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/BODEXT/0,,contentMDK:50004945~menuPK:64020014~pagePK:64020054~piPK:64020408~theSitePK:278036.00.html>

Manual does provide for the relevant guidance.⁴⁰

6.2.3. The procurement rules of other aid institutions

Compared with the procurement rules of the World Bank, other aid institutions share similar objectives of economy, efficiency, competition and transparency, and in most cases, competitive tendering is required to attain the optimum utilisation of their loan proceeds by the recipients. For example, the OPEC Fund's Procurement Guidelines seek to ensure that its aid-funded procurements are conducted in a way as to achieve the objectives of 'economy, efficiency and social equity' as stated in the preface of the Guidelines, and like the World Bank's approach, preference is also accorded to ICB as the standard procurement method with alternative methods available for exceptional circumstances.⁴¹

However, the procurement systems of other aid institutions are very different from that of the World Bank with respect to the devolution of decision-making-power to the recipient countries, procurement thresholds, eligibility criteria and specific award methods.

Taking the EC external aid procurement regime as an example, the responsibility for the implementation of the aid-funded procurements does not rest solely with the recipient countries. There are two possible ways to manage the procurement procedures for projects financed under the EC external aid programmes. The European Commission directly conducts the aid-funded procurements, acting for and on behalf of the recipient countries in the case of centralised programmes, while the recipient countries implement the procurement process under decentralised programmes.

As regards procurement thresholds, the EC system lays down extremely precise thresholds for each type of procedures, which is very different from the World Bank system where no monetary thresholds exist for this purpose.

⁴⁰ See Procurement Manual Section 3.7, 5.2

⁴¹ See the OPEC, Procurement Guidelines under Loans extended by the OPEC Fund (1982), General Introduction Available at www.opecfund.org/projects_operations/procurement.aspx

Another important difference between the World Bank and the EC lies in the eligibility rules. The EC has the nationality rule for supply contracts that extends to its Member States and associated and aided countries. All purchases made under a supply procurement it funds must originate in the EU or in an eligible country as defined in its nationality rule. In contrast, the World Bank does not have rules of origin restricting the eligibility of bidders based on nationality.

Additionally, difference can also be found between the World Bank and the EC in terms of specific award methods. For example, the EC allows for the use of ‘competitive negotiated procedure’ under certain conditions, which is completely banned under the World Bank’s rules.

6.3 Improvement of borrowers’ procurement system

The World Bank has attracted many criticisms for its rigorous procurement policies. Particularly, a criticism of the previous practice of the World Bank is that insufficient attention was given to the need to ensure the capability of the borrowers to procure efficiently in connection with the project once the immediate involvement of the Bank had ceased.⁴²

The procurement officials of recipient countries, who are not always very well-trained, lack of procurement skills to properly apply the Bank’s procurement rules, as well as to effectively carry out the project on their own once initial procurement has been completed. As the World Bank’s experience has shown, programmes and projects it helped finance may have been technically sound but failed to deliver intended results for reasons connected to the quality of government action.⁴³

Indeed, other aid institutions have also encountered a general problem of lack of capacity in their client countries despite having sound procurement guidelines in place for specific projects. Consequently, the World Bank has increasingly paid more attention to general capacity building and technical assistance in developing countries. Since 1990s, its lending for law reform projects has been given a priority, including project or sector investment loans containing funds for legal technical assistance tasks, free-standing technical assistance and institution/capacity building

⁴² See Tucker, note 9, at p.152

⁴³ World Bank *Governance and Development* (Washington DC: The World Bank, 1992) at p.1

loans.⁴⁴

This is based on the view that the Bank cannot afford to look the other way when a country is run by deeply dysfunctional public sector institutions. Sound procurement policies and practices are deemed to be essential to good governance. The World Bank assists its borrower countries in analysing their present procurement policies, procedures and institutions. This has been conducted mainly through Country Procurement Assessment Report ('CPAR') since 2000.

A CPAR is not limited to examining whether the country in question is complying with the World Bank procurement rules in projects funded by the Bank, but looks more generally at the issues of a country's procurement system, and to examine the application and enforcement of the related procedures and regulations in practice; and eventually provide a key input to the Country Assistance Strategy⁴⁵ for the Bank to support procurement reform of the concerned country as part of an agreed implementation strategy.⁴⁶ The main function of CPAR is to recommend an action plan to improve a country's procurement system after formulating a diagnosis of current situations and needs for change.

6.4 Harmonisation of donors' procurement rules

6.4.1. Introduction

As above mentioned, donor institutions or countries normally require their procurement procedures to be used instead of national procedures for their financed projects to ensure the efficient spending of their funds. In many cases, this has been helpful to achieve competition, transparency, and thus better value for money than would have been achieved using the less effective procurement rules of the recipient.

However, an additional burden is created if the local implementation agency is not familiarised

⁴⁴ See Tshuma, 'The Political Economy of the World Bank's Legal Framework for Economic Development' (1999) 8 *S.L.S.* 75 at pp.78-79

⁴⁵ A Country Assistance Strategy is prepared by the World Bank for its active borrowers, which includes a comprehensive diagnosis of the development challenges facing the country, with the aim to promote collaboration and coordination among development partners in a country. See www.worldbank.org

⁴⁶ See CPAR Instruction Section I-Introduction at p.1, available at www.worldbank.org

with the donor's procurement policies, or if it has to simultaneously handle several processes under different donor-funded projects. Although the recipient government and donors apparently subscribe to common objectives and principles of free competition, transparency, integrity and value for money, they use a multitude of different public procurement policies and procedures.

The multiplicity of donor regimes produces a number of failings in terms of aid effectiveness and the ownership of recipient states.⁴⁷ The differences in requirements from various donors result in significant administrative overload for aid recipients especially taking into account the limited administrative capacity of recipients and the increased number of donors over time.⁴⁸ The array of donors in a given recipient country can create an unworkable environment for the country government. A large number of donors and donor projects, each with its own specific procurement policies and procedures, can be staggering. A recent OECD survey conformed that difficulties with donor procedures were perceived as the second most important burden with regard to effective aid delivery and the restrictions over procurement was ranked as the biggest area in which the use of donor procedures caused problems⁴⁹

As a result, multilateral and bilateral donors have launched many harmonisation initiatives. These initiatives generally fall into two categories: the first one is to harmonise operational procurement policies and procedures of different donor institutions with the objective of progressively adopting agreed common guidelines; the second is to focus on capacity building in recipient countries with the objective of greater reliance over time on the countries' own procurement systems.

6.4.2. Adoption of agreed common guidelines

In 1997, the World Bank and many other major donors embarked on an initiative to harmonise their

⁴⁷ As shown in a study conducted for the OECD as part of the pilot review of the international aid system in Mali. See Study Report for the OECD Development Assistance Committee, *The Mali Donors' Public Procurement Procedures: Towards Harmonisation with the national Law*, (2000), Report Summer. Available at [www.oecd.org/COMNET/DCD/ProcurementCWS.nsf/viewHtml/index/\\$FILE/1_MaliProcurement-website.pdf](http://www.oecd.org/COMNET/DCD/ProcurementCWS.nsf/viewHtml/index/$FILE/1_MaliProcurement-website.pdf)

⁴⁸ See the World Bank, *Harmonisation of Operational Policies, Procedures and Practices: Experience to Date* April 13, 2001, DC2001-0006 at p.1

⁴⁹ See OECD, DAC Guidelines and References Series, *Harmonising Donor Practices for Effective Aid Delivery* (2003) at pp.14, 103-106

own procedures, which have had an impact on policies and procedures in the area of procurement.⁵⁰ Informal meetings of the Heads of Procurement (HOP) were held on common procurement concerns, and in 1999, the HOP agreed on and started using the first MBD on procurement of goods, which was later updated for continued use in 2002. It serves as standard bidding documents by four MDBs, namely, the ADB, AfDB, IDB and the World Bank. Similarly, harmonised standard bidding documents for procurement of works and a 'request for proposal' document on consulting services have been agreed on by the HOPs.

The two major groups of development institutions – the MDBs and the Development Assistance Committee (DAC) of the OECD - have worked through various technical groups on the issue of harmonisation in many areas including donors' procurement procedures. At the High Level Forum on Harmonisation held in Rome in 2003, a declaration was made to promote harmonised approaches in global and regional donor programs, referring to several aspects including procurement. More than 40 multilateral and bilateral development institutions and 28 aid recipient countries endorsed the Rome Declaration on Harmonisation.

The World Bank could arguably play a leading role in harmonising procurement procedures among donors given the wide recognition of its detailed guidelines on procurement procedures. Its procurement procedures are already used by the Netherlands, precisely 'in an effort to develop uniform internationally acceptable standards for procurement'.⁵¹

However, such exercises are still limited and it seems very difficult that different donors could agree amongst themselves and then present a single package to recipient countries. Some differences among donor's procurement rules such as the application of rules of origin are policy-oriented and may prove difficult to align. Even with regard to differences which are procedural in nature, donors tends to consider that their own procedures are best satisfy the objectives but hardly know anything

⁵⁰ See OECD/DAC-World Bank Roundtable, Strengthening Procurement Capacities in Developing Countries, International Benchmarks and Standards for Public Procurement Systems (Session 2: Priorities, Benchmarks and Standards for Good Procurement), 22-23 January 2003, para.3

⁵¹ See Guidelines for the procurement of works, goods and consultancy services with financial development assistance from the government of the Netherlands. Cited in Study Report for the OECD Development Assistance Committee, [note](#) 47

about the other donors' methods, which also makes it difficult to encourage them to harmonise their procedures.⁵²

6.4.3. Reliance on recipient countries' own procedures

Another type of initiative to tackle the question of the multiple applications of donors' rules is to rely on recipient countries' procurement procedures where their procurement systems are sufficiently developed.

This approach could serve the dual purposes of reducing administrative costs of both recipients and donors on the one hand, and solving a general problem of lack of capacity encountered by donors in recipient countries on the other. Also, it is an effective way of increasing the ownership of recipients in the aid process.

In 2002, the OECD/DAC-World Bank Joint Round Table Initiative on Strengthening Procurement Capacities in Developing Countries was established, aimed at strengthening the recipient country procurement systems and their ownership of the procurement process, and ultimately moving towards the use of recipient' own systems to improve aid effectiveness. At its Third Round Table in Johannesburg, participants endorsed the good practice papers they developed on mainstreaming, capacity development, benchmarking, monitoring, and evaluation.⁵³

The World Bank's CPAR is considered an important instrument for benchmarking and improving a country's procurement system as a whole. The countries under review would have the matrix available as a tool to understand how they are benchmarked and immediately see where they need to focus their own attention with regard to implementing changes in their procurement system.⁵⁴ The CPAR, which has been widely accepted by the donor community, could be also used as the matrix tool to identify the risks in the system as well as where to focus financial and capacity building

⁵² See Study Report for the OECD Development Assistance Committee, note 47

⁵³ For more information, see DAC Guidelines and Reference Series, *Harmonising Donor Practices for Effective Aid Delivery* Vol. 3 Strengthening Procurement Capacities in Developing Countries, available at <http://www.oecd.org/dataoecd/12/14/34336126.pdf>

⁵⁴ See OECD/DAC-World Bank Roundtable, note 50, para.10

support in the recipient country.⁵⁵

6.5. International initiatives to untie aid

6.5.1. Introduction, objective and approach

In contrast to the relatively open eligibility requirements of the MDBs⁵⁶, many bilateral and regional donors have often required recipients to buy products and services only from donor countries as a condition for awarding loans or grants. In building a bridge, for example, donors may insist that their companies, exports and equipments be used. Whether the aid is given may depend on the recipient country agreeing to do so, even if it would be more efficient to acquire the goods and services needed elsewhere.

Under certain circumstances, donors may choose not to make it a legally binding obligation that aid must be spent in the donor country but to simply make that outcome more likely.⁵⁷ This ‘informal tying’ occurs when powerful governments of donor countries exert their influences on the recipient governments to give preference to donor country suppliers in the bidding process.⁵⁸

Such restrictions on the eligibility of contractors and products on the basis of nationality in aid procurement could be seen as an export subsidy to enterprises from donor countries—a form of protectionism in international trade that runs counter to the idea of free trade as a means of increasing the global welfare.

Apart from its distortive effect on trade, there are a number of problems associated with tied aid.⁵⁹

⁵⁵ *ibid*

⁵⁶ Most multilateral development banks also apply ‘rules of origin’ in terms of eligibility of participants for their financed procurements. It is normally required that enterprises from their member countries should be provided with an equal opportunity to participate in the procurement financed by them, however, firms from non-member countries are not eligible to bid in the funded procurement. This practice by multilateral development banks leads to ‘partially untied aid’, that is, official aid for which procurement of the goods or services involved is limited to the donor country or to a group of countries which does not include substantially all developing countries. The World Bank’s recent Procurement Guidelines, however, abandoned such a restriction on the eligibility of contractors or products from non-member countries see note 7

⁵⁷ See Office of Technology Assessment US Congress, ‘How Aid Can Promote Exports’, in *Development Assistance, Export Promotion, and Environmental Technology*, background paper. Available at <www.www.princeton.edu/cgi-bin/byteserv.prl/~ota/disk1/1993/9319/931905.PDF>

⁵⁸ See Tajoly, ‘The Impact of Tied Aid on Trade Flows Between Donor and Recipient Countries’, *J.I.T.E.D.* Vol.8:4 at p.374

⁵⁹ However, donors may claim there are many reasons for keeping aid tied to the purchase of goods and services in the donor countries. See the OECD, Policy Brief: Untying Aid to the Least Developed Countries July 2001, at p.2. Available at www.oecd.org/pdf/M000006000/M00006938.pdf; La Chimia, ‘International Steps to Untie Aid: the ODC-OECD Recommendation on Untying Official Development Assistance to the Least Developed Countries’ (2004) 13 *P.P.L.R.* at

First of all, it reduces value for money in the funded procurement. Tied aid has been estimated to cost on average between 15-30% more than if the goods or services were procured through international competition or local sources.⁶⁰

Secondly, tying aid implies that the development of recipients is not the only concern of the donor countries, often resulting in inappropriate aid which does not address the real needs of the recipients. For instance, the projects selected for aid may be motivated primarily by potential benefits for donor export industries rather than the development priorities of recipients. Recipient countries are likely to be supplied with incompatible pieces of equipment provided by different donors, each with separate requirements for spares and back-up. For example, a survey in Kenya found more than 16 different kinds of water pumps in use, each funded by a different donor country.⁶¹

Lastly, tied aid reflects donors' lack of confidence in local systems and often excludes recipients from decision-making process for which the aid is granted, which severely undermines 'ownership' of the aid by the recipients and with it the effectiveness of the aid.

The DAC of the OECD has been discussing the concept of untied aid⁶² since 1969. An early effort in 1960s to reach an agreement on untying bilateral aid failed owing to the reticence of some DAC members.⁶³ In 1974, a Memorandum of Understanding for the reciprocal untying of bilateral development loans was endorsed by ten donors but never became operational owing to the oil price shock that constrained donors' aid budgets.⁶⁴ In 1991, the 'Helsinki Arrangement' was agreed by OECD members to regulate the use of tied export credits.⁶⁵

After having an agreement on a set of disciplines to guide the use of tied aid, the High Level meeting of the DAC in 2001 eventually reached a Recommendation on Untying Aid to the Least

pp.3-4

⁶⁰ See the OECD, [note](#) 59

⁶¹ See Baird, 'Tied to the Hand that Feeds: For Years the West Thought It was Good for Business, Now Many Countries Want to End the Practice of Forcing Poor Nations to Buy Goods from Donor Countries in Return for Aid' (1996) 2051 *New Scientist* at p.12

⁶² For the definition of Untied aid. See DAC, Glossary 'untied aid'. Available at www.oecd.org/glossary/0,2586,en_2649_33721_1965693_1_1_1_1,00.html

⁶³ See the OECD, [note](#) 59

⁶⁴ Ibid

⁶⁵ For detailed information, see Lammersen, 'The Helsinki Arrangement: its Impact on the Provision of Tied Aid', 6 *I.J.F.E.* 1(2001) at pp.69-79

Developed Countries ('the Recommendation'), which was amended on 2006 with the elimination of the thresholds criteria from the Recommendation.

This recommendation is the first multilateral instrument on aid untying. The main commitment endorsed under the Recommendation is to untie Official Development Assistance ('ODA')⁶⁶ to the Least Developed Countries to ('LDC') the greatest extent possible.⁶⁷ Donors are required to 'take any steps necessary to ensure that ODA untied in accordance with this Recommendation is both *de jure* and *de facto* untied'.⁶⁸ In order to achieve a *de jure* and *de facto* untying of ODA, the Recommendation has laid down a set of transparency principles and operational procedures aimed at providing foreign suppliers with equal opportunity to participate in the bidding process.

Moreover, a number of other obligations have been set out to help in completing and strengthening this untying initiative. For example, DAC members are obliged to ensure adequate ODA flows, especially to the least developed countries, and the level of ODA should not be diminished by virtue of the implementation of this Recommendation.⁶⁹ It would go against the very objectives of the Recommendation if donors attempt to circumvent their untie obligations by means of constraining ODA flows to LDCs.

6.5.2. Coverage

Under the Recommendation, aid loans and grants covering a wide range of financial support should be open to international competition. However the obligations of donors are subject to a number of limitations and exclusions, which significantly reduce the impact of the Recommendation on total OECD bilateral aid.⁷⁰

Firstly, the application of the Recommendation is only limited to ODA to Least Developed

⁶⁶ The definition of ODA offered by DAC Glossary is available at www.oecd.org/glossary/0,2586,en_2649_33721_1965693_1_1_1_1.00.html

⁶⁷ The Recommendation para.2

⁶⁸ Ibid. Annex I para.23

⁶⁹ Ibid, para.2

⁷⁰ For a critical analysis, see La Chimia, note 59, at pp.7-16

countries (LDCs) as listed in Annex II of the Recommendation.⁷¹ Secondly, certain categories of ODA, namely technical co-operation and food aid, are excluded from the Recommendation's coverage.⁷²

The coverage of the Recommendation was previously restricted by a threshold clause, which specifies minimum monetary thresholds for triggering the application of the Recommendation.⁷³ The major achievement of 2006 amendment on the Recommendation is the abolition of the threshold clause for its general application. Currently, this threshold clause is only relevant with regard to the Members' obligation of ex ante notification under the transparency principle.⁷⁴ Therefore the coverage of the Recommendation is significantly expanded. In particular, a large number of small aid projects are brought subject to the regulation of the Recommendation, which may be more attractive for the participation of local enterprises of aid recipient countries.

Despite its limited coverage, donors are encouraged to untie their aid 'to a greater extent' than that set out in the Recommendation: they are invited to continue to provide untied aid in areas not covered when they already do so, and to study the possibilities of extending untied aid in such areas.⁷⁵

6.5.3. Soft law & hard law issues

6.5.3.1. Bindingness

The notable feature of the Recommendation is its non-binding nature. This instrument is framed as 'a recommendation', which explicitly negates any intent to create legally binding obligations. As mentioned in Section 6.4.1, tied aid had been an established practice of donor countries for a long time before the Recommendation came into force. Despite its evident harmfulness, it was still politically difficult to untie, which can be demonstrated by the failure of early attempts to untying

⁷¹ This list in Annex II is based on the UN classification and therefore can be modified periodically.

⁷² OECD, *DAC Recommendation on Untying Official Development Assistance to the Least Developed Countries* (2001) at para.7

⁷³ The Recommendation, para.8

⁷⁴ Ibid. para.15

⁷⁵ Ibid. para.5

bilateral aid by means of binding agreements.

The Recommendation represents a remarkable breakthrough towards addressing the problem of tied aid. As the first multilateral instrument on aid untying, it can be argued that the non-binding form might be the only way acceptable to major donor countries in terms of the obligation of untying.

More importantly, the non-binding recommendation is arguably more appropriate than a binding agreement taking into account the nature of subject matter regulated. It is expressed stated in the Recommendation that one of the share intentions of DAC Members is to ensure that ODA to the least developed countries will not decline over time as result of implementation of this Recommendation.

In this regard, on the one hand, hard law in terms of binding obligations on untying aid may probably affect donors' decision on the volume or direction of ODA owing to their reluctance to untying certain kinds of aid as well as to infringe binding international law. On the other, it is infeasible for any international regime to impose mandatory requirements on the donors' provision of ODA because of the voluntary nature of aid. As a result, the use of binding form may end up being contradictory to the original intention of DAC Members.

Furthermore, promoting a more balanced effort-sharing among Members in their efforts to unite aid is a key principle of the Recommendation.⁷⁶ It has been recognised that the impact that the Recommendation has on each Members could be very different owing to variations in structures and geographical orientations of their aid programmes.⁷⁷ As the initial situations of Members evolve over time, a reference indicators matrix system is set up to help donors identify and undertake supplementary actions to promote a more balanced effort-sharing. Therefore, hard law in terms of bindingness seems inappropriate since states' behaviours are likely to change periodically in response to the assessments during the peer review process.

⁷⁶ Ibid. para.8

⁷⁷ Ibid. para.6

6.5.3.2. Precision

The main body of the Recommendation is vague and general, setting out abstract standards rather than detailed rules, while its Annex I details provisions concerning operational procedures and undertakings related to its coverage and implementation. The transparency rules discussed above can serve as an example: general standards are laid down in the main body of the Recommendation, followed by detailed rules contained in the Annex I to explain the precise obligations Members should fulfil to meet each of these transparency standards.

For instance, the Recommendation generally provides that Members should respond ‘promptly’ and ‘fully’ to enquiries by other Members concerning the covered untied aid offers. However, the Annex I clarifies the meaning of the words ‘promptly’ and ‘fully’ as being ‘within 14 calendar days’ and ‘providing all information relevant to the request, including information concerning donor financing of services related to the design and implementation of the notified project’ respectively.⁷⁸ Moreover, it further restricts the form of communications, by requiring that such enquiries and responses should use electronic means of communication.⁷⁹

Therefore, the Recommendation, as a whole, possesses a high degree of precision. It can be argued that the non-binding nature of the Recommendation may contribute to its precision, as states may be more ready to accept prescriptive rules when they take a non-legally binding form. As with the above example, under binding regimes such as the GPA and the NAFTA, similar rules can be found but they only generally require that upon request each state should provide to another state information concerning the covered procurement.⁸⁰ There are no further rules detailing the types of information states should provide or the timing and the means of communications.

Nevertheless, in this regard, similarly prescriptive rules are still absent under some other non-binding instruments including the COMESA directives and the APEC NBPs. The COMESA directives suggest the establishment of a Procurement Policy Office, which may serve as an

⁷⁸ Ibid. Annex I, para.33

⁷⁹ Ibid.

⁸⁰ See the GPA Art. XIX(3) and the NAFTA Art.1019(4)

international contact point or information centre on national procurement rules and opportunities.⁸¹ Similarly, the APEC NBPs generally recommend establishing contact points for enquiries on national procurement system.⁸² It can be seen that neither of them impose any prescriptive requirement as the Recommendation does.

One possible reason that might be raised to explain the difference is that Members of the Recommendation are mainly advanced industrial states with homogenous political and economical systems and with a long tradition of effective cooperation under the auspices of the OECD. Taking into the diversified membership of the COMESA and the APEC, such prescriptive rules may be either undesirable or unreachable, as some less developed states may consider the detailed requirements such as responding enquiries ‘within 14 calendar days’ or the use of ‘electronic means of communication’ constituting a huge administrative burden even though these rules are non-binding.

6.5.3.3. Discretion

The non-binding nature of the Recommendation itself may give Members a significant discretion in their implementation. The DAC Members can depart from any principle or rule of the Recommendation without assuming the legal liabilities for breach of binding international law.

So far as the content of the Recommendation is concerned, it confers as well as restricts states’ discretion. On the one hand, a broad discretion is awarded to states by using hortatory, best-endeavour language in certain legal provisions. For instance, regarding the obligation of effort-sharing, it provides that ‘members agree to undertake *their best endeavours* to identify and implement supplementary effort-sharing actions’. The presence of wordings like ‘best endeavours’, ‘to the greatest extent possible’ and ‘as they believe’ in the Recommendation largely soften the legal nature of these provisions and give states substantial discretion in their implementation.

On the other hand, as discussed in the previous section, detailed rules are included in Annex I to

⁸¹ See the COMESA directives para.26

⁸² The APEC NBPs, para.6

concretise the general standards contained in the main text. Although the precision does not necessarily constrain discretion⁸³, some prescriptive rules do largely curtail states' discretion in choosing the way how the required general standards can be met. For example, the rule requiring the use of 'electronic means of communication' in response to enquires explicitly excludes other possible expeditious ways of communication such as courier or face-to-face communication, which may equivalently meet the general requirement of responding 'promptly'.

Moreover, the Recommendation contains a derogation clause for individual aid offers in 'exceptional circumstances' where '*they believe* it to be justified on the basis of overriding, non-trade related, development interests'.⁸⁴ No definitions or explicative lists are provided for terms of 'exceptional situation' or 'overriding, non-trade related, development interests'. By virtue of this derogation clause, donors are granted a great deal of discretion in departing from their obligations under the Recommendation.

Nonetheless, certain transparency requirements are laid down as safeguard measures for avoiding misuse of the derogation: donors who want to apply the derogation must justify in 'a letter to the Secretary-General of the OECD and to the DAC Chair', and the application of the derogation will be followed up in review procedures. Therefore, donors' discretion can be controlled to a certain extent as the subjectivity of this derogation clause has been made more objective by a secondary obligation of notification. Donors have to fulfil the notification obligation before invoking the derogation clause and their failure to notify is by itself a breach of an obligation which has a more objective element and can be more easily determined in the case of non-compliance.

6.5.3.4. Delegation

The Recommendation is a kind of soft law instrument with no delegation of judicial power to a third body to enforce the agreed rules. There is neither enforcement mechanisms available to aggrieved private parties at the international level, and nor does the Recommendation become enforceable law

⁸³ For more detailed discussion, see Section 4.1.4.3

⁸⁴ The Recommendation Annex I at para.19

domestically unless it is incorporated into national law of Members. Instead, the DAC is designated with the role of monitoring the implementation of the Recommendation through a combination of different mechanisms including self-reporting, annual progress reports and peer review.

First of all, the DAC Members are obliged to provide ex ante notification for the untied aid offers above a certain specified threshold value, as well as to report ex post information on contract awards pertaining to all the covered untied aid offers.⁸⁵ Such reporting helps Members to share pre and post procurement information, thus promoting transparency and confidence building. It generates information indicative of each Member's performance of its obligations, which may induce compliance in three possible ways. Firstly, information reported serves a kind of early warning system for substantive compliance problems, which can be discussed and debated in the context of the overall review procedure. Solutions may be reached or suggestions may be given to address the compliance problem.

Secondly, the self-reporting requirement exercises deterrence against non-compliance. States contemplating non-compliance may refrain from actual infringement of the rules when the relevant information of contract award has to be reported and made available to other Members and eventually the public.

Lastly, this self-reporting system also provides reassurance for each Member that others are complying. As with the particular issue of untying aid, members may hesitate to untie aid unilaterally out of the fear that their domestic industries would remain disadvantaged in foreign market for aid originated from other Members while being deprived of the previous privileges under national tied aid policy. This situation has been described by Chimia as 'prisoner's dilemma', which can only be resolved if all major donor countries untie together.⁸⁶ The information collected from this self-reporting system reassures each Member that others are also untying aid in accordance with the Recommendation and its own domestic industries are not being taken advantage of.

Secondly, annual reports are reviewed by The DAC, covering 'all aspects of the Recommendation

⁸⁵ Ibid. para.15&17

⁸⁶ See La Chimia, note 59, at p.4

as well as the experience in delivering its objectives'.⁸⁷ The work of the DAC is supported by the Development Co-operation Directorate ('the DCD'), which is made up of experts and professionals specialised in the fields of review and evaluation, policy coherence, policy co-ordination and statistics and monitoring.⁸⁸ It is important for the DAC to have expertise needed to measure the level of compliance, to ascertain progress achieved, to discover unsatisfactory factors and make relevant recommendations.

Thirdly, 'peer review' is also included as a working method of the DAC. Every three to four year each of the 23 DAC Members is reviewed by its peers and five different Members are peer reviewed every year. Similar to the peer review procedures conducted within the framework of the OECD Working Group on Bribery in International Business and Transactions (see Section 5.2.2.4), the peer review process under the DAC is carried out on a non-adversarial basis, resulting in a report that assesses accomplishments, spells out shortfalls and makes recommendations.

In this regard, both the self-reporting and the annual reports provide information and input for the peer review of individual DAC members. Compared with annual report, peer review seems politically more effective than annual reports due to its individual focus.⁸⁹ However, the final outcome of neither annual report nor peer review takes the form of a binding act or a legal judgment, which does not involve coercive measures such as sanctions. Instead, it depends on political pressure and works as a sort of 'soft persuasion' which could become an important driving force to encourage positive change, support mutual learning and thus raise the overall effectiveness of the regime.⁹⁰

⁸⁷ The Recommendation, at para.19

⁸⁸ See the OECD, Development Co-operation Directorate, available at http://www.oecd.org/document/36/0,2340,en_2649_33721_1925604_1_1_1_1,00.html

⁸⁹ See La Chimia, note 59, at pp.7-16

⁹⁰ See Pagani, 'Peer Review: a Tool for Co-operation and Change – an Analysis of an OECD Working Method', (2002) unclassified document, No. SG/LEG, at p.6

Chapter 7 Analysis of advantages & disadvantages of soft law in regulating public procurement from a trade perspective – the Dimension of Bindingness

7.1. Introduction

The first dimension of soft law discussed in the current thesis is non-bindingness, that is to say, that laws can be soft in the sense that they are not legally binding. As examined in Section 2.3, soft law in terms of non-bindingness can play an important role in serving as a second best to hard law when a binding form is unachievable in the short run: non-binding rules are sometimes deliberately chosen as an intermediate step towards a later binding agreement; also it has been further argued that soft law is better than nothing even when there is no prospect of a hard law agreement at all.

Non-binding soft law, however, assumes functions more than of being a second best to hard law. It has its own value and is often preferable on its own terms. It has been argued that soft law can even be regarded as a better alternative to hard law under certain circumstances: sometimes it can produce practical effects comparable to hard law but with lower costs, and may also provide certain benefits not available under hard law.

7.2 Non-binding law being a second best to binding law

The first general argument is that soft law is better than nothing in the case that a hard law approach has been expressly rejected or proven to be unachievable, but the subject matter still demands at least a degree of international regulation. Non-binding soft law has therefore been resorted to break deadlocks during negotiations and to provide certain degree of regulation in its implementation. Such soft law regulation can sometimes serve as a stepping stone towards a future binding hard law, but surely this is not necessarily the case.

Public procurement is widely considered a sensitive subject area in which states are often jealous

of their sovereign autonomy for a number of reasons. Many states have a long tradition of utilising procurement as a policy tool to promote secondary objectives. States may desire to use procurement to implement their protectionist measures favouring uncompetitive national industries, which goes against the basic idea of comparative advantage underlying any free trade agreement.

Meanwhile, public procurement in many countries is extensively used to promote social equality or sound environmental standards, which often affects the participation of foreign suppliers. For example, states may reserve a certain number of procurement contracts exclusively for firms owned by some disadvantaged ethnic groups, or disqualify firms having a bad environmental record in the procurement process.

In addition, public procurement can be used by public officials for illegitimate purposes such as political patronage or corruption. The difficulty has been proved in eliminating such discriminative procurement policies owing to political reasons. It is politically difficult for governments to withdraw from discriminative procurement policies even if they wish to do so. Significant political influence may be exerted from lobbyists representing interests of certain categories of national industries which are beneficiaries of protectionist procurement policies, or even from public officials who have illegitimate interests in corrupt procurement practices.

History has showed that public procurement has always been a controversial issue during international trade negotiations, and it is not surprising that negotiating parties may find themselves stuck in a substantial disagreement on many aspects of the issue.

At the regional level, as mentioned in Section 4.4.1, the negotiations on FTAA were stalled mainly due to the unsettled disagreement between the US and Brazil. During negotiations, the U.S. pushed for a single comprehensive agreement to reduce trade barrier for goods but excluding real disciplines on agricultural subsidies, while Brazil wanted to pursue an agreement on market access in goods but to put off for later rounds more controversial issues including public procurement.¹ According to Schott, Brazilian negotiators showed strong resistance over reforms of important regulatory barriers

¹ See D.R. Mackay, 'The Miami FTAA Ministerial Meeting', (2003) *FOCALPOINT* Spotlight on the Americas Special Edition, ISSN 1703-7964, at p.1, available at <www.focal.ca/pdf/special_edition_november03.pdf>

including opening of some public procurement contracts for foreign participation, because although such reforms were supported by some parts of Brazilian business community, they were staunchly opposed by protectionist interests.²

Different legal traditions and values across states can further complicate the negotiations. It has proven even more difficult to negotiate a procurement agreement at the multilateral level. The firm resistance against negotiating a WTO transparency agreement in procurement demonstrates the general difficulty in negotiating a multilateral procurement agreement.

In view of the public procurement sector's significant implications for international trade, efforts have been made to develop multilateral disciplines on procurement, and the WTO has become the major locus of such efforts. However, the WTO initiative to negotiate the proposed transparency agreement ended in deadlock by failing to produce a consensus over a number of major issues. As explained in Section 3.3, apparently, the failure to commence negotiating the proposed transparency agreement was mainly due to substantial disagreements among the WTO Members.

The disagreements concerned both the content and the form of the proposed agreement. In particular, substantial disagreements over its binding nature, its coverage and its challenge procedure were regarded as the three major obstacles on the road to the proposed transparency agreement.³ There were heated arguments over whether the agreement should take the non-binding form⁴; whether it should have a broad coverage extending to goods, services and construction services, to central entities as well as sub-central entities⁵; and whether the WTO Dispute Settlement Mechanism should be applicable and domestic review procedures should be made available for aggrieved parties under the agreement.⁶

However, as explained in Section 3.3.1, behind the apparent disagreements over specific aspects of the proposed transparency agreement, there was an underlying difficulty in reconciling the

² See J.J. Schott, 'Does the FTAA Have a Future' (Institution for International Economics, 2005), at p.12, available at < www.iie.com/publications/papers/schott1105.pdf >

³ See Priess and Pitschas, 'World Trade Organization: the Proposed WTO Agreement on Transparency in Government Procurement – Doha and Beyond', *P.P.L.R.* 2002, 2, NA13-18 at pp.14-15

⁴ For detailed discussion, see Section 3.3.5.1

⁵ For detailed discussion, see Section 3.3.3

⁶ For detailed discussion, see Section 3.3.5.4

opposite positions held by developed and developing Member countries. Developed countries were keen to obtain a greater share of the developing countries' procurement market, while developing countries wanted to preserve their current procurement policies.

It can be argued that the above mentioned reasons explaining state's resistance to relinquish their sovereign power in procurement are particularly relevant for developing countries. As for the consideration of protecting national industries, developing countries with less competitive national industries may fear that they would suffer if foreign companies were put into direct competition with their unprotected national industries. National industries with vested interests under discriminatory procurement policies will be active in lobbying their governments to block a multilateral procurement agreement, and this opposing voice tends to be much louder than that in developed countries as they are more vulnerable to foreign competition.

Further, corrupt procurement practices are particularly rampant in many developing countries with loose or opaque procurement rules and weak monitoring systems, and consequently corrupt public officials and politicians may constitute another important political force against the proposed transparency agreement.

With regard to the value of soft law being a second best to hard law, in Section 2.3.1, it has been pointed out that soft law has been repeatedly resorted to as a method to overcome deadlocks during negotiations and to avoid the costs of having no agreement at all. The choice of soft law can be instrumental in negotiating an international agreement, and among its four dimensions, soft law in terms of non-bindingness has been argued as the first and foremost means to foster compromises where there are substantive disagreements.

The value of non-binding soft law for being an effective device for overcoming deadlocks deserves special attention in the area of procurement, in view of the difficulties in negotiating procurement agreements at both regional and multilateral levels.

First of all, when negotiating an international procurement agreement, different opinions concerning specific aspects of the agreement would more likely be resolved if negotiating parties

could agree on a non-binding form for the agreement. Taking the proposed transparency agreement as an example, if it were agreed to be of a non-binding nature, it would be unnecessary for the WTO dispute settlement procedure to be applied, it would be no need to formulate complex coverage rules, and it would be much easier for negotiating parties to agree on the precise content of the agreement. Consequently, it seems that almost all the substantial disagreements over the content and the form of the proposed agreement could easily be resolved by resorting to a non-binding form.

More substantially, the choice of soft law could arguably foster compromise between the different positions held by negotiating parties. As for the negotiations on the FTAA concerning the issue of procurement, the different positions held by Brazil and the U.S. would more likely be reconciled if a non-binding form were agreed for the agreement. Domestic opposition from Brazilian vested interests would be expected to be weaker if the relevant procurement disciplines were to be adopted in a non-binding form, while the U.S. might consider the non-binding international regulation to be better than nothing in terms of opening up Brazilian procurement market.

Similarly, in the case of the negotiations on the proposed transparency agreement in procurement, it is likely that many of the developing countries' concerns could be well addressed by resorting to non-binding soft law. Political oppositions against the transparency agreement in many countries especially developing countries might be mitigated by agreeing on a non-binding form for the agreement. Even for countries which opposed the very idea of having any agreement in procurement, they were more likely to accept the proposed transparency agreement if they were ensured to retain absolute freedom to respond in the case of unfavourable circumstances.

Meanwhile, as for developed countries aimed at opening up developing countries' procurement market, the non-binding transparency agreement could be regarded as a gradual approach towards future binding agreement in procurement. By accommodating different concerns of developed and developing countries, the non-binding soft law can probably resolve deadlocks during negotiations, promote mutual agreement between negotiating parties, and then avoid the failure of negotiations as a whole.

The development of the OECD instruments combating foreign bribery in international business transactions (see Section 5.2.2.1) provides a successful example of utilising non-binding instruments to overcome deadlocks during negotiations. The U.S., being the only country outlawing extraterritorial bribery brought the issue of foreign bribery to the OECD with the aim to level the playing field for its exporting industries in international business transactions. Other OECD states had, however, political incentives to allow their export industries to engage in foreign bribery, and thus were not genuinely interested in negotiating an anti-bribery agreement.

During the negotiation, some negotiating parties attempted to use the high costs of a binding treaty to impede any agreement on this issue. The U.S responded by taking a gradualist approach to achieve its ultimate goal of concluding a binding convention through a series of non-binding Recommendations.

The value of non-binding soft law is, however, beyond promoting agreement at the negotiation stage. At the implementation stage, it can provide a certain degree of regulation, which may, but not necessarily contribute to the later formation of hard law.

A non-binding procurement agreement can provide states with learning opportunities to know about the consequences of the agreement, while allowing them to maintain substantial control if adverse circumstances arise. It enables participating states to learn more about the subject, to build up confidence, and to gain real benefits, which may contribute to the final conclusion of legally binding rules in the future.

With the adoption of more transparent procurement rules and procedures, governments of participating countries might start to appreciate the more predictable domestic procurement market, the improved efficiency of public spending, and the reduced level of corruption in procurements. These benefits countries could actually reap by participating in a non-binding procurement agreement could often lower the perceived costs of subsequent moves to a binding one.

The use of non-binding soft law as an intermediate step towards binding hard law can be found in international procurement law. For example, as examined in Section 4.5.4.1, in the context of

COMESA, it has been recognised that hard law obligations could not immediately be obtained in face of major difficulties such as deficiencies in procurement practices and weak institutional capacities of its Members. Consequently, the non-binding directives were adopted to serve as an intermediate step towards the final realisation of a legally binding regional agreement by means of building capacity, generating consensus and promoting confidence in the area of procurement.

Nevertheless, it is worth mentioning that non-binding soft law is better than nothing even where there is no prospect of a hard law agreement at all. The APEC NBPs discussed in Section 4.6.4.1 furnish a good example. The APEC NBPs explicitly deny any intention to create legally binding obligations for its Members both at present and in the future. Despite its unchanging non-binding nature, the soft regulation provided by the APEC NBPs is surely better than no regulation at all especially for those which are yet to undertake any legally binding commitment under the GPA or regional procurement regimes.

7.3 Non-binding law as a better alternative to hard law

7.3.1 Possible advantages of non-binding soft law

The value of non-binding soft law is far beyond simply serving as a method to overcome deadlocks during negotiations or as an intermediate step towards the later formation of binding hard law where hard law is temporarily unachievable.

It has been argued in Section 2.3.2 that non-binding soft law can be regarded as a better alternative to hard law even where the latter is attainable. Non-binding soft law is sometimes preferable on its own terms, and may produce similar effects of hard law but avoid some of the costs of hard law. First of all, it can be used as a method to reduce negotiating and implementing costs associated with an international agreement; secondly, it entails less sovereignty costs for participating states; thirdly, it can offer better options to deal with changing circumstances; and lastly, the non-binding form may sometimes be chosen for technical reasons. All these arguments can generally apply in the area of public procurement and the first four are particularly relevant with

regard to international procurement law.

7.3.1.1 Reduced Negotiating costs

As discussed in Section 2.3.2, every agreement entails some negotiating costs and the negotiating costs of international treaties may probably be higher than those of non-binding agreements, as states are normally more cautious in negotiating and drafting legally binding agreements owing to its higher costs of violation. In particular, negotiating costs tend to be especially high where subject matters are sensitive or complex, and public procurement is exactly an area that is generally sensitive and often complex for international regulation.

As we saw in the previous reviews on various procurement instruments with trade objectives, their common approach is to lay down minimum procedural requirements governing the award of contract to ensure transparency, which is believed to make the concealed discrimination more difficult and thus to guarantee equal market access. Indeed, most instruments have to address numerous procedural aspects of procurement that are essential to the whole concept of transparency, including qualifications of suppliers, time limits for the submission of bids, minimum information required in tender documentation, and the award of contract. Such provisions on transparency are often comprehensive and complicated, and therefore potentially very difficult to negotiate and draft. It may take a long and tedious process for different countries with significant difference in their approach to regulation to agree on a single set of rules.

In principle, so far as a binding procurement agreement is concerned, the more complex its procedural rules are; the more diversified circumstances its participating countries have; the higher negotiating costs it will involve. As examined in Section 3.2.4.1, the negotiation for the current GPA was initiated from 1987 and eventually completed in 1993. The GPA's lengthy and heated negotiating history can demonstrate the high negotiating costs that a binding multilateral procurement agreement with detailed procedural rules may possibly entail.

In contrast, the EC procurement regime, which includes more detailed and complex rules than the

GPA, seems to involve lower negotiating costs. Besides the comparative similarity of EC Members' economic, political, and legal conditions, the EC's comparatively lower negotiating costs must be understood in the light of the particular institution where the negotiations took place. The EC is considered as a unique intergovernmental negotiating system due to the existence of supranational actors, bodies and decision-making procedures⁷, which are absent in other international regimes including the WTO. It is envisaged that the highly-institutionalised negotiating system largely facilitates negotiation and bargaining at the EC level.

In addition to the complexity of procedural rules, the complexity of coverage rules also contributes to the difficulty of negotiations on many procurement agreements. As explained in Section 3.2.2, Section 4.3.2 and Section 4.4.2, most binding procurements instruments such as the GPA, the NAFTA, and the FTAA adopt a flexible approach for coverage in order to achieve a reasonably broad coverage. The EC procurement regime is an exception, which laid down a uniform as well as comprehensive coverage for all EC Members. Again, this is mainly due to its similarly minded membership as well as highly integrated institutional context.

However, as with most binding instruments opted for a flexible approach, the difference in coverage for different states along with the principle of reciprocity add much more difficulty in negotiations. The GPA's negotiations on coverage are illustrative on this point.

As discussed in Section 3.2.2, by adopting a flexible approach for coverage, the GPA Member States were, in fact, conducting item-for-item bilateral negotiations between each other, in relation to types of covered contracts, types of regulated entities and thresholds. The principle of reciprocity further complicated this exercise: this tit-for-tat negotiation ended up with most states having a detailed and complicated list of derogations to different Members. It has been argued that the GPA is more like a series of bilateral agreements under the multilateral framework of the GPA rather than a multilateral agreement.

Due to the complexity of the issue, legal or economic specialists were often consulted to facilitate

⁷ For information about the EC's legislative process, see http://eur-lex.europa.eu/en/droit_communaute/droit_communaute.htm#2.3

negotiations. Most famously, the U.S. and the E.U. commissioned Deloitte Touche to prepare a report examining the dollar value of their respective procurement opportunities in some important areas such as sub-federal procurement in order to ensure a general equivalence between their offers.⁸

The continued negotiations to expand the GPA coverage have been carried out for years. Mostly recently, in 2006, states reached a provisional agreement on the text of a new procurement agreement to supersede the current GPA. However, it seems still difficult and time-consuming for parties to reach an agreement on coverage. Based on the publicly disclosed information, the EU has been highly disappointed by its alleged low level of ambition reflected in other major parties' offers.⁹ The EC warned that its revised offer might end up with a reduced coverage compared to its current one under the GPA, unless other parties' offers are substantially improved.¹⁰ The negotiations on coverage failed to be completed in the first half of 2007 as originally expected and it remains to be seen if any agreement will be reached.

Taking into account the complexity in procedural rules and coverage rules, a procurement agreement may involve considerably high negotiating costs, especially in the case of diversified membership. However, such high negotiating costs might arguably be reduced by resorting to soft law in terms of bindingness, precision and delegation. This section focuses on the dimension of bindingness, and the other two will be discussed in the following sections. The non-binding nature of a procurement agreement could arguably better address the complexity in procurement.

As far as the complexity of procedural rules is concerned, non-binding agreement might avoid detailed transparency rules or make it easier for negotiating parties to agree if such rules were included. It can be seen that most of non-binding procurement instruments examined in the current thesis, i.e. Code of Conduct on Defence Procurement of the EC Member States (see Section 4.2.4.2), the COMESA directives (see Section 4.5.4.2) and the APEC NBPs (see Section 4.6.4.2) do not

⁸ *Study of Public Procurement Opportunities, European Union, Government of the United States* (1994)

⁹ See R.D. Anderson, 'The WTO Agreement on Government Procurement: Update on Ongoing Negotiations and Related Developments', prepared for presentation at a seminar at the School of Law of the University of Nottingham, 22 March 2007 at p.6

¹⁰ See 'EU Warns It Could Pull Back GPA Commitments Over SME Treatment' *Inside US Trade*, 2 March 2007

include a complete set of detailed procedural rules, which can be found in many binding procurement regimes such as the GPA, the EC directives, the NAFTA, and the FTAA (see Section 3.2.4.2; Section 4.1.4.2; Section 4.3.4.2 and Section 4.4.4.2 respectively).

These non-binding procurement instruments tend to set out general principles rather than detailed transparency rules, and consequently the high negotiating costs associated with complex procedural rules can be largely avoided. However, even for a non-binding procurement agreement setting out detailed procedural rules, it is assumed that such non-binding procedural rules could be agreed upon with lower negotiating costs, as the non-binding nature of the agreement provide parties with substantial discretion in practice to depart from the rules where they feel it is necessary.

Moreover, given the voluntary nature of non-binding agreements, it seems not necessary for parties to negotiate and draft detailed rules concerning its scope in terms of types of entities and contracts covered, derogations for security reasons or secondary objectives etc, as is the case with most binding procurement agreements. For instance, the non-binding COMESA directives (see Section 4.5.2) only generally provide that its principles and rules should be applied as widely as possible with the exception of certain parts of its reform initiative subject to certain threshold to be set, whilst the APEC NBPs (see Section 4.6.2) include no rules for coverage. The generally defined uniform rules or even no rules for coverage avoid the problem of reciprocity and thus the occurrence of intensive arguing, bargaining and intricate negotiating for equivalence between their offers.

Indeed, it has been proved that the choice of non-binding form can largely reduce negotiating costs compared with that of binding agreements. The negotiating history of APEC NBPs provides some evidence. The clearly declared non-binding nature of these NBPs made the negotiation process comparatively simple and speedy, albeit with its large and highly diversified membership. The Osaka Action Agenda adopted in the 1995 Leaders' meeting firstly included the objective of liberalising the procurement markets of member economies, and in the same year the Government Procurement Experts' Group ('the GPEG') was established for this purpose. The GPEG developed a set of non-binding principles on government procurement, which were endorsed by all the APEC

economies in 1999.

7.3.1.2 Reduced implementing Costs

Secondly, non-binding soft law can be argued to entail lower implementing costs than binding hard law. By entering into an international agreement, states are required to implement their obligations under it. As explained in Section 2.3.2, some international obligations call for states' to refrain from certain actions, while others demand positive actions. The implementation of international obligations demanding positive actions can be costly for participating states.

The majority of procurement agreements including all examined under the current thesis set forth positive rules with which participating states are required to comply. Implementation of a procurement agreement would often involve amendments to the existing national procurement regime and training of procurement officers to get acquainted with the international rules. This might prove a costly process if the agreement is binding in nature and sets out very detailed rules which are complex and difficult to apply in practice.

The implementing costs could be even higher in countries where existing procurement rules are less developed and thus more difficult to be adapted in line with the requirement of the agreement. However, these countries, most of which were developing or least developed countries, often lacked sufficient technical knowledge and financial resources needed for implementing the agreement. According to Hunjia, 'complexity of substantive issues involved' and 'paucity of technical knowledge and capacity' constitute two of the three most difficult obstacles to public procurement reform in developing countries.¹¹

The use of non-binding form for a procurement agreement could arguably reduce its possibly high implementing costs for participating states. By entering into a non-binding procurement agreement,

¹¹ See R. Hunjia, 'Obstacles to Public Procurement Reform in Developing countries' In S. Arrowsmith & M. Trybus (eds), *Public Procurement: The Continuing Revolution* (2003)235 at pp.17-18 U. Although Hunjia identified these major impediments mainly in the context of developing countries' unilateral reform, the author holds the view that these reasons may also apply, to a large extent, to the reforms initiated by their participating in an international procurement regime, or partly explain the difficulty in attracting their participation in any procurement agreement.

states would be provided with a learning process of adapting national procurement policies to the requirements of the agreement, without fear of facing adverse legal consequence of the breach of international law.

A non-binding agreement could allow states with diversified conditions sufficient time to work out their own appropriate national legislation and to train procurement staff with the aim to fully comply with the agreement. Meanwhile, the experience of the applications of non-binding rules would enable participating states to review the rules and make them more responsive to the needs and realities in developing countries before they are made of binding nature.

7.3.1.3 Reserved regulatory autonomy to implement legitimate national goals

The third argument in favour of choosing non-binding soft law rather than hard law is that the former involves less sovereign costs. As explained in Section 2.3.2, every international agreement imposes sovereignty costs on its member states though such costs may vary according to different subject areas.

In the area of procurement, as explained in Section 7.2, states are often jealous of their sovereign autonomy for various reasons. As for states' protectionist policies, most of them are undesirable practices any free trade agreement in procurement is aimed to eliminate. In this regard, sovereignty costs are significant but are frequently outweighed by the benefits of market liberalisation.

However, with regard to states' legitimate concerns about national security, social equity and environmental protection, a proper balance should be stricken between trade and other national objectives when formulating a procurement agreement. In particular, certain kinds of procurement are, because of the very nature of the procured products, especially sensitive such as defence procurement. Defence procurement is highly sensitive in the sense that it may be closely connected with national security and sovereignty costs are extremely high in areas related to national security.

Even on a given subject, sovereignty costs can vary across states. The sovereignty costs of a procurement agreement are typically higher for developing countries where the sector is

economically less competitive but politically more important.

In Section 2.3.2, soft law has been argued to be better equipped to promote cooperation while preserving state sovereignty. This argument also applies to the area of procurement. By adopting soft law in terms of non-binding, precision, discretion or delegation, states can protect themselves from excessive sovereignty costs as a result of participating in a procurement regime.

The adoption of non-binding soft law, which is relevant under this section, can largely preserve states' ability to employ procurement as a policy tool to pursue social or environmental objectives. The APEC NBPs provides a good example. As discussed in Section 4.6.3, due to the non-binding nature of the APEC principles, the APEC members could always balance these principles with domestic objectives and find their appropriate ways to give effect to them, or even depart from them where they feel it is necessary. In contrast, under binding regimes such as the GPA and the EC, states' ability to use procurement for secondary purposes is largely restricted.¹²

Regarding certain types of procurements which are closely related to national security, their extremely high sovereignty costs may make them inappropriate for any international hard law regulation. Taking defence procurements as an example, the protection of national security interests is widely considered as one of legitimate reasons to exempt certain defence procurements from international regulation. Most procurement regimes explicitly exclude their application to defence procurements that are closely related to national security interests.

Code of Conduct on Defence Procurement of the EC Member States Participating in the European Defence Agency is the only procurement regime regulating defence procurements linked with national security interests. As explained in Section 4.2.4.1, legally binding rules such as the EC Treaty or directives are both theoretically inappropriate and politically infeasible to regulate such procurements. Meanwhile, it is undesirable to leave them completely unaddressed, especially in the case of states' extensive use of derogation from the hard law rules. Consequently, the non-binding Code was brought in to fill the gap, providing a certain degree of soft law regulation.

¹² See Section 3.1.2.3 and Section 4.1.3.

In this regard, non-binding soft law can be argued as a more appropriate means to regulate subject areas involving extremely high sovereignty costs. It is worth mentioning that such subject matters in procurement are not limited to defence procurement sector. The procurement of certain types of civil goods or services can also involve extremely high sovereignty costs owing to their important impact on national economy.

For example, in the context of the EC, the ECJ's judgement in *Campus Oil* case¹³ upheld an Irish measure requiring all importers of refined petroleum products to purchase a certain proportion of their requirements of petroleum products from a refinery situated in the national territory. This trade-restrictive measure was justified on the ground of public security: the measure was directed at ensuring a minimum supply of petroleum products at all times rather than purely economic reason, because of their exceptional importance as an energy source for a country's existence since.¹⁴

7.3.1.4 Better Adaptation to changes

The fourth argument concerns the value of soft law in its adaptation to changes. It has been argued that soft law can offer a number of attractive alternatives for dealing with changing circumstances.

Public procurement is a complicated and fast-evolving area for international regulation. In the context of many binding procurement regimes, difficulties have been found to adjust their complex procedural and coverage rules to technological and economic developments. The slow progress in reforming procurement rules to take account of the emergence of electronic procurement and new procurement strategies is illustrative on this point.

Along with the fast development of e-commerce in the last decade, new information technology has increasingly been used to increase procurement efficiency. The use of internet helps streamlining the traditional tendering process: the procuring entity may advertise contracts and communicate with providers electronically, which makes the tendering process easier, faster and less expensive. Also, the application of electronic commerce in procurement develops more novel procurement methods

¹³ Case 72/83, *Campus Oil* [1984] E.C.R. 2727, ECJ

¹⁴ See Judgement of the Court of 10 July 1983, Summary, para.7 Case 72/83, *Campus Oil* [1984] E.C.R. 2727, ECJ

such as electronic reverse auctions¹⁵.

However, procurement instruments which were adopted many years before the emergence of e-commerce, may fail to accommodate modern electronic procurement. The old EC procurement directives provide good illustrations. From their adoption in 1990s till the recent passage of the new directives, it had been unclear whether or how far procuring entities or suppliers could require communicating electronically in many actions.

The detailed nature of the EC's procedural rules limited the ability of regulated entities to exploit e-commerce. It was argued by Arrowsmith that, although a sensible interpretation of the rules could largely help accommodating many e-procurement practices, the old directives did present some significant obstacles to e-commerce.¹⁶ This legal uncertainty remained until the adoption of new directives in 2004 which include explicit authorisation of electronic communications for many actions¹⁷ as well as reduce minimum time-limits for key phases when electronic means are used¹⁸. Similar situation can also be found in the GPA and its newly-revised provisional text takes into account the important role of electronic means in procurement.¹⁹

Apart from the need to adapt to technological development, market development may also have significant impact on procurement rules. In particular, the coverage rules of hard law procurement regimes have to update constantly in accordance with the development of market liberalisation.

For instance, in the context of the EC, the utilities sectors of EC states have experienced a substantial progress of privatisation and liberalisation since 1990s. Many utilities sectors, which used to be vulnerable to government pressure to undertake discriminatory procurement practices, have started operating in a competitive market. However, the 1990 utilities directive only provided exemptions for limited sectors leaving entities in competitive markets still subject to regulation. The application of rules to entities which have already been operating under commercial pressure

¹⁵ Electronic reverse auctions refer to tendering procedures in which all tenderer post their tenders electronically, and can view information on other tenders and then amend their tenders through electronic means to beat others.

¹⁶ For a systematic analysis, see Arrowsmith, 'E-commerce Policy and the EC Procurement Rules: the Chasm between Rhetoric and Reality', (2001) 38 *C.M.L.R.* 1447-1477

¹⁷ See the Public Sector Directives Art. 42(1) & Art.1(12); and the Utilities Directives Art.48(1) & Art.1(11).

¹⁸ See the Public Sector Directives Art. 38(5)(6); and the Utilities Directives Art.45(5)(6)

¹⁹ The text of provisional agreement can be found in document GPA/W/297, available at <www.wto.org>

burdened them with bureaucratic procedural rules in procurement, which hindered the commercial performance of such entities, and placed them at a disadvantage when competing with other entities which were not subject to similar rules.

The problem persisted until the recent adoption of new utilities directives which reduce the coverage of the utilities rules by redefining the concept of 'special and exclusive rights' and adding a new exemption for entities in competitive market.²⁰ However, Arrowsmith argued that an exemption from the EC directive alone is of limited value for entities also covered by the GPA as the latter imposes similar procedural rules.²¹ In order to free them completely from detailed procedural requirements, the EC has to remove such entities from its coverage list of the GPA. This normally requires a renegotiation of concessions among the GPA members, which will be a complex and lengthy process, as we saw from the discussion earlier in this section.

International procurement law needs to adapt to the modern technological tools and changing industrial landscape. Hard law procurement regimes solve the inherent uncertainty in procurement mainly by either delegating the power to a third party for reasonable interpretation of the agreed rules, or constantly issuing legislative amendments. However, the former solution may involve significant sovereign costs, whilst the latter may experience considerable delays in legislative action. In contrast, soft law can offer a number of better alternatives to address the issue of uncertainty. The more ambiguous the legal rules are; the stronger capability they will have in the face of rapidly changing environment (to be discussed in Section 8.3.1.4).

In addition, and relevant for the current discussion, soft law in terms of non-bindingness is often more easily adapted to changing circumstances. Non-binding rules can be amended more quickly and easily than binding ones to accommodate changing reality. More importantly, the non-binding nature of a procurement instrument could avoid a situation in which states are locked into rigid rules with the change of circumstances.

²⁰ For a critic evaluation of the EC's new procurement directives, see S. Arrowsmith, 'An Assessment of the New Legislative Package on Public Procurement', (2004) *C.M.L.R.* 41:1277-1325

²¹ *Ibid.*

The APEC NBPs are suggestive on this point. It is explicitly stated that NBPs, economies are free to decide which principles to apply and whether to translate an element of a principle into a practical measure. Member economies, in practice, have absolute discretion to depart from the principles. Therefore, unlike binding instruments such as the GPA and the EC rules, the APEC NBPs are, in no way, affecting states' ability to exploit information technology in procurement or to modify its application scope according to changing market environment.

7.3.1.5 Some other technical reasons

Lastly, it has been argued that non-binding soft law may sometimes be preferable to binding hard law only for technical reasons – in some cases, it is chosen only for avoiding time-consuming and complex treaty approval and ratification formalities, typically involving legislative authorisation. This general argument can also apply in negotiating a procurement agreement.

7.3.2 Possible disadvantages of non-binding soft law

Despite various possible advantages soft law can better offer over hard law, possible disadvantages of soft law have also been identified. Firstly, soft law may lack the function of hard law being served to strengthen the credibility of commitment; secondly, soft law may raise the transaction costs of subsequent interactions. Both of the above arguments can be applied in the area of public procurement.

The first argument mainly concerns the dimensions of soft law being non-binding; of a low degree of precision; of a high level of discretion or of a low degree of delegation, and the second one is mainly concerned with soft law in the sense of low level of precision and delegation. This section will mainly focus on the dimension of bindingness.

The choice of soft law in terms of its non-bindingness sacrifices the binding form of agreements, which may affect the credibility of the rules for both internal and external purposes. As explained in Section 2.4.1, compared with non-binding soft law, binding agreements make a difference in legal

consequence of non-compliance. The law of responsibility fixes consequences for the violations of binding obligations, whilst there are no similar legal consequences in the case of violating non-binding soft obligations. The legal consequences flowing from binding obligations induce conforming behaviours by making the choice of non-compliance more costly.

This function of binding form can be used for internal purpose – to resist domestic negative political pressure and to bind government themselves or their successors in the future. This is particularly relevant in the area of procurement. It is envisaged that states' compliance with a procurement agreement can be severely challenged by significant political influence from lobbyists representing interests of certain categories of national industries which are beneficiaries of previous discriminatory procurement policies, or even from public officials who have illegitimate interests in corrupt procurement practices. In the absence of formal legal consequences for non-compliance, the compliance of soft law procurement agreements may possibly be more vulnerable to the strong domestic political influence.

Indeed, certain non-binding procurement rules can be found to have a very low rate of compliance or even being completely disregarded. The Coherent Policy Document towards the establishment of a European Defence Equipment Market ('EDEM') serves an example. As discussed in Section 4.2.1, in the absence of an effective monitoring system, the non-binding nature of the EDEM makes its compliance largely depending on the political willingness of participating states, and in practice it was largely ignored from the outset.

However, it is worth mentioning in this regard that this possibly different implication of non-binding form for compliance is only relevant in the case of states' deliberate choice of non-compliance. As explained in Section 2.4.2, in many cases, states may be willing to meet or comply with their international obligations, but are incapable of doing so. Violations may result from financial, administrative or technological incapacities rather than unwillingness to comply.

This is particularly the case with regard to procurement agreements demanding positive implementing actions. The COMESA directives furnish a good example. As discussed in Section

4.5.4.4a, although many states have adopted relevant national legislations to implement COMESA directives, there is still a large gap between the directives objective and output to date, which is arguably mainly due to lack of capacity at member state level.²² In this case, it is irrelevant whether the procurement rules take a legally binding form or not, as states do not comply simply because they face no choices.

Besides the function of binding form for internal purpose, it can also be used to enhance the credibility of commitments for external purpose. Because of the high cost of violation, the legally binding form of an agreement by itself may give states some assurance of each other's compliance. Obviously, the non-binding soft law lacks such assurance.

This kind of assurance tends to be quite important for procurement agreements with reciprocal market access commitments and non-simultaneous performances such as the GPA and the EC. In the area of procurement, despite evident benefits of market liberalisation, most countries are reluctant to do so unilaterally due to political difficulties. As a result, many procurement agreements, like the majority of trade agreements, are reached on the basis of the principle of reciprocity. Under such arrangements, strong opposition from domestic vested interests can be overwhelmed by supports from specific export-oriented domestic industries which will benefit from more liberalised foreign procurement markets. The action of entering into a binding agreement can assure states complying with their obligations that others will also comply.

Furthermore, the credibility of commitments in the area of procurement is also very important in terms of promoting confidence of foreign suppliers. Foreign suppliers may be more willing to compete for procurement contracts in a system in which governments legally commit themselves to give equal treatment to foreign bidders. In this regard, the non-binding soft law may be less attractive than binding hard law in terms of providing foreign supplier with confidence in national procurement markets of participating members.

However, it can be argued that the possible disadvantage of non-binding soft law's lack of

²² Karangizi, *Government Procurement in COMESA* (8-10 June 2004) (Paper Presented to the WTO Workshop in Accra, Ghana) at p.13

credibility might be well addressed by introducing effective monitoring mechanisms, which will be discussed in Section 10.3.2.1. In terms of resisting domestic negative political influence, the non-binding rules' lack of legal consequence for non-compliance might be compensated for by some soft law enforcement means. Peer review, for example, as examined in Section 5.2.2.4, can give rise to a kind of soft persuasion force to stimulate the compliance with non-binding rules. Even in the absence of legal consequence for non-compliance, states may still choose to comply with their non-binding obligations for other reasons, such as maintaining good relationship with other countries and their trustworthy reputation.

Furthermore, although the adoption of binding form can provide a certain degree of assurance of compliance among participating states and for foreign suppliers, it is definitely not the only way to do so. The assurance of each other's compliance can similarly be achieved in other ways. For example, as discussed in Section 6.5.3.4, the OECD Recommendation on untying aid includes a self-reporting system requiring states to provide the relevant pre and post procurement information, which is indicative of each other's performance of its obligations. It has been argued that the information collected from this self-reporting system reassure each member that other members are also untying aid in accordance with the Recommendation and its own domestic industries are not being taken advantage of.

7.4 Conclusion

It has been argued in this section that non-binding soft law can be regarded as a second best or even as a better alternative to binding hard law. Non-binding soft law plays an important part when binding hard law is temporarily unachievable owing to the political opposition from domestic vested interests of negotiating states, especially that of developing countries.

A number of reasons have been pointed out to explain the reluctance of many states to relinquish their sovereign power in the area of procurement. Public procurement has always been a controversial issue during international trade negotiations, and negotiating parties may get stuck in

deadlocks and fail to reach any agreement, as what happened in the negotiations on the FTAA and the proposed transparency agreement.

In this regard, non-binding soft law has been argued as an effective device for breaking deadlocks and fostering compromises during negotiations. It is more likely that substantial disagreements among negotiating parties over specific aspects of a procurement agreement would be resolved if a non-binding form could be agreed for the agreement. More importantly, non-binding soft law can arguably reconcile different oppositions held by different negotiating parties and mitigate political oppositions from domestic vested interests.

In addition to its value at negotiating stage, non-binding soft law is also desirable in terms of providing a certain degree of regulation, which may, but not necessarily contribute to the later formation of binding hard law.

Moreover, non-binding soft law is sometimes considered more desirable than binding hard law even if the latter is attainable, because non-binding soft law may entail less negotiating costs, implementing costs as well as sovereignty costs, and it has its independent advantages of being better adapting to changing circumstances.

It has been argued that the adoption of a procurement agreement may entail significant negotiating owing to the complexity of its procedural rules and coverage rules. The more detailed its procedural rules are, the more diversified membership it has, the higher negotiating and implementing costs it involves. The non-binding form of a procurement agreement can lower its negotiating costs by making it easier for detailed procedural rules to be adopted as well as avoiding the necessity of negotiating and draft detailed procedural and coverage rules.

Further, the implementation of a procurement agreement can also be costly for states because it often involves amendments to the existing national procurement regime and training of procurement officers to get acquainted with the agreed rules. Non-binding soft law could arguably reduce implementing costs by providing states with diversified conditions a learning process to work out their own particular way to comply with the agreement.

Next, adoption of international agreements entails sovereignty costs for all participating states. In the area of procurement, international trade objective should be balanced with states' legitimate concerns when formulating a procurement agreement. In this regard, the choice of non-binding soft law can largely preserve the ability of states to exploit procurement for legitimate national objectives. As with certain types of procurements which entail extremely high sovereignty costs, non-binding soft law is arguably the only appropriate and possible means to subject them to international regulation.

Lastly, public procurement is a fast-changing area for international regulation and international procurement regimes need to adapt to technological and economic developments in this area. The problems associated with adjusting procurement rules to the emergency of e-commerce and change of market reality under the EC and the GPA can demonstrate the general difficulty of a binding procurement agreement in its adaptation to changes. It has been argued that the complex procedural and coverage rules combined with the difficulties of updating internationally may present an important obstacle to binding procurement agreements. The choice of on-binding form can, however, make it much easier for a procurement agreement to adapt to changing circumstances: it can be amended more quickly and easily than binding agreements, and more significantly, the non-binding nature of the agreement itself provide states with flexibility in adapting to changes.

Meanwhile, the possible disadvantage of binding hard law has also been pointed out: it may arguably weaken the credibility of the rules in the absence of formal legal consequences for non-compliance. The adoption of binding form can serve to strengthen the credibility of states' commitments for both internal and external purposes, which is fairly important with regard to a procurement agreement, owing to its perceived challenge of negative political influence and reciprocal nature of obligations. The choice of non-binding soft law sacrifices the binding form of agreements and thus may be deprived of an important means to ensure compliance. Nevertheless, it also mentioned that the credibility of non-binding rules could still be assured by introducing a well-designed monitoring system.

Chapter 8 Analysis of advantages & disadvantages of soft law in regulating public procurement from a trade perspective – the Dimension of Precision

8.1 Introduction

The second dimension of soft law for the purpose of this thesis is precision, referring to the degree of precision of language defining states' obligations in legislative text. In Section 2.3, it has been argued that vague soft law can serve as a second best to precise hard law when the latter is temporarily unachievable, but the subject matter still demands international regulation.

Similar to the dimension of non-bindingness, soft law in terms of precision can be resorted to in order to avoid the failure of international negotiation and to provide a certain degree of regulation, based on which more precise regulation could possibly be developed in the future. This is considered at Section 8.2. However, vague soft law is not always less desirable than precise hard law, and because of its possible advantages identified in Section 8.3.1, the latter might often be deliberately chosen and perform the desired function more effectively, which is to be addressed at Section 8.3.

8.2 Vague soft law being a second best to precise hard law

Soft law with a lower level of precision may be adopted where precise hard law cannot be achieved. As explained in Section 2.2.2, hard law with a higher level of precision may be unattainable for various reasons when drafting international agreements. First of all, it is impossible for negotiating parties to write down an agreement anticipating all possible future contingencies given bounded rationality, and if the relevant contingencies are yet to be known, negotiating parties cannot achieve the precision of hard law even if they wish to do so. This is also the case in the area of procurement. For example, many procurement instruments do not address novel procurement methods such as

electronic reverse auctions because such concepts did not exist as a practical methodology when these instruments were formulated.

More importantly, it is also possible that negotiating parties cannot agree on more precise rules even if the relevant contingencies are reasonably predictable. States may be reluctant to commit themselves to precise international obligations especially with regard to controversial issues, because the degree of precision in international rules may affect the degree of discretion states have in implementing their obligations though this is not necessarily the case.

In the area of public procurement, because of its sensitive nature as explained in Section 7.2, many states are only willing to undertake very vague commitments when negotiating an international procurement agreement. The attitude of many states towards the proposed WTO transparency agreement can provide an example. As has been examined in Section 3.3.5.2, many states especially developing countries, insisted that a robust principle-based approach should be employed for the future transparency agreement, which does not seek to define in any detail the content of national procurement procedures.

Even for generally more precise procurement instruments in which detailed procedural rules are agreed such as the GPA and the EC directives, the degree of precision may vary widely among their provisions and some obligations can be found being worded in a very vague and imprecise way. For example, the GPA's general principles governing national challenge procedures has been argued to be too vague to ascertain any concrete obligations it entails (see Section 3.2.4.2). Similarly, in the case of the EC directives, it has been maintained that the public sector directive rules on accessibility are too vague to create any legally binding obligations (see Section 4.1.4.1).

Thirdly, the choice of vague soft law may result from the nature of the relevant obligations. As argued in Section 2.4.3, it would be infeasible to impose precise hard law obligations on states with respect to issues such as financial or technical assistance owing to the very nature of such obligations. Consequently, the provisions of financial or technical assistance are normally couched in very vague language in most international agreements including public procurement agreements.

Under the circumstances where precise hard law cannot be agreed for the above specified reasons, vague soft law may arguably have an important part to play in fostering compromise at the negotiating stage as well as providing a certain degree of regulation at the implementing stage, which might have the potential to develop into more precise rules over time.

Firstly, vague soft law can be chosen to facilitate negotiations among states, as found in many procurement agreements. The initiative towards negotiating the proposed transparency agreement can serve as an example. As for many countries especially developing ones, they had never participated in any international procurement regime, suspecting that the agreement would only serve the export interests of the developed countries. Consequently, it is not surprising to find that these countries preferred to leave the agreement imprecise to avoid the possibility of being caught in unfavourable commitments.

However, as mentioned in Section 3.3.5.2, some other countries represented by the U.S. and the E.C. initially intended to include prescriptive procedural rules to ensure transparency in procurement. In view of the strong opposition against detailed rules, the EC later made a compromise by revising its original draft text for the proposed transparency agreement in favour of a more principles-oriented approach. Eventually, there was a broad consensus among negotiating parties that a principles-based approach should be employed for the proposed transparency agreement.

However, general consensus reached on this particular aspect did not lead to the successful conclusion of the proposed transparency agreement, and instead the relevant negotiations were shelved at the WTO Doha Round. Although soft law has been argued as a method to overcome substantial disagreements and foster compromise among negotiating parties, it has different roles to play in terms of its four different dimensions.

The agreement on the use of vague soft law may, to a certain extent, reduce oppositions from many WTO Members but arguably it may not be as effective as the use of non-binding form. Some concerns of many states could be addressed by the choice of vague soft law, whilst some others could not. For example, states' resistance arising from the fear of possibly high implementing costs

associated with the transparency agreement could largely be reduced by opting for a principled approach. However, political oppositions from domestic vested interests against having any agreement in procurement could possibly not so easily be mitigated solely by virtue of the agreed approach on more ambiguous rules, especially considering the possible adoption of a binding form as well as the potential application of hard law enforcement system such as WTO dispute settlement mechanism.

Consequently, it seems to suggest that the use of soft law in terms of vagueness can, to a certain extent, help facilitate negotiations, but by no means, guarantee the success of negotiations at least at a multilateral level.

Apart from the situation where there lacks substantial agreement over major issues, the function of vague soft law can be particularly important when some uncertainties and controversies threaten to upset the overall deal. Vague soft law allows negotiating parties to achieve mutually preferred compromise on difficult issues and to avoid the controversies impeding the successful conclusion of the agreement.

The GPA's rules on national challenge procedures provide a good example of this point. As mentioned in Section 3.2.4.4b, the issue of national challenge procedure in the GPA was one of the most controversial issues during negotiations. Some negotiating parties such as the U.S. proposed that detailed and stringent rules should be drafted to ensure compliance, whilst some others like Korea opposed the very idea of including a common set of national challenge procedures in view of the diversified national traditions of judicial review.¹

Rather than hold up the overall agreement, vague soft law provisions were deliberately formulated to deal with the controversial issue of national challenge procedures, which allowed negotiating parties to proceed with the rest of the agreement. It can be seen that the GPA provisions on national challenge procedures are not as detailed as its other transparency procedural rules, and some general

¹ See M. Footer, 'Remedies under the New GATT Agreement on Government Procurement' (1995) 4 *P.P.L.R.* 80 at p.89

principles have been laid down but without specifying the precise and concrete meaning of them (see Section 3.2.4.1).

In this way, soft law facilitates compromise among different states by requiring the availability of a national challenge system to ensure the proper implementation of the procurement rules, but leaving unaddressed the precise way of putting in place such a system to respect the different litigation cultures of Member States.

Apart from the function of soft law to facilitate compromise during negotiations, vague soft law may also have the potential to develop further details in the future. It provides a broad framework within which states can learn by experience and may pursue more imprecise hard rules through gradual negotiations. This can be demonstrated by looking at the prior example of rules governing national challenge procedures under the GPA.

The provisionally agreed new GPA text develops more detailed rules governing national challenge procedures on the basis of the currently effective legislative text. For instance, the current GPA only generally requires the availability of national challenge procedures to enable suppliers ‘to challenge alleged breaches of the Agreement’.² In this regard, the new GPA text further elaborates the way ‘to challenge breaches of the Agreement’: an aggrieved supplier may challenge either a breach of the agreement directly, or a failure to comply with national implementing measures where the supplier is not entitled to challenge directly a breach of the agreement under the relevant national law.³

Although precise hard law is more likely to evolve from vague soft law than from no law at all, this does not imply that all vague soft law is only a means to more precise law. Certain vague soft law is never intended to or will never actually develop into more precise hard law. In particular, the main reason for some soft law rules being vague and imprecise is, as mentioned above, due to the very nature of those rules. As the nature of such rules remains unchanged, it is difficult to see how such vague rules could be redrafted in a more detailed and meaningful way through further

² See the GPA Art.XX.2

³ See the new GPA text Art.XVIII.1

negotiations. In the case of the GPA, for example, although its provisionally agreed new text contains more detailed and concrete S&DT provisions for developing countries, the new rules are made even more ambiguous when it comes to the issue of technical assistance.⁴

Nevertheless, similar to non-binding soft law without any prospect of becoming binding over time, even vague soft law with no prospect of developing into more precise hard law could arguably be better than nothing because soft law commits states to certain forms of discourse and procedure no matter how imprecisely it does so.

8.3 Vague soft law as a better alternative to precise hard law

8.3.1 Possible advantages of vague soft law

It has been argued in Section 2.3.2 that soft law in terms of precision may be more desirable than the relevant hard law even where the latter is attainable. Like soft law in terms of non-binding, soft law with a lower degree of precision can produce similar effects of hard law but with less costs. Firstly, vague soft law may entail less negotiating costs and implementing costs than precise hard law; secondly, vague soft law can accord states more discretion in implementation, and in this sense, it involves less sovereignty costs for participating states; thirdly, vague soft law may be more adaptive to changing circumstances. It seems that all the above advantages of vague soft law are very relevant with respect to international procurement law.

8.3.1.1 Reduced negotiating costs

The first argument in favour of vague soft law rather than precise hard law is that the former may involve less negotiating costs. As discussed in detail in Section 7.3.1.1, every international agreement entails some negotiating costs, and the negotiating costs of most binding procurement agreements tend to be extremely high due to the complexity of their procedural rules and coverage rules, as demonstrated by the negotiating history of the GPA.

⁴ See the new GPA text, Article IV.8

Apart from their binding form, the detailed feature of their procedural rules may arguably constitute another major factor that contributes to the high negotiating costs, in consideration of the complex nature of procurement as well as the diversity of states' regulatory approach in procurement. In this regard, the choice of vague soft law may help significantly reduce the negotiating costs of procurement instruments.

The common approach of most procurement agreements is, as mentioned in Section 7.3.1.1, to set out minimum procedural requirements governing the award of contract. However, it is often difficult to draft and agree on detailed procedural rules for a binding procurement agreement, which can be illustrated by reference to the rules on minimum time-limits for tendering.

Many regimes such as the GPA (see Section 3.2.4.2), the EC directives (see Section 4.1.4.2), and the NAFTA (see Section 4.3.4.2) lay down general principles as well as detailed rules on time-limits for submitting tenders in order to ensure that suppliers are granted sufficient time to prepare and submit their tenders. Besides general requirement such as 'a sufficient period' or 'a reasonable period' of time, detailed rules are included concerning all kinds of procurements with different levels of complexity, different types of procedures, and different publication or communication methods etc. By opting for a detailed approach, the complexity of the situations involved leads to inevitably complicated rules and sometimes even drafting errors.

Article XI of the GPA furnishes a good example on this point. As examined in Section 3.2.4.2, the provision includes both general principles and detailed rules. Apart from general principles, it sets out standard minimum time periods for tendering in open tendering and selective procedures with or without the use of a permanent list of qualified suppliers. Also, it specifies in great detail various circumstances under which such standard time periods for tendering may be reduced to certain days including the use of specified publication methods and state of urgency etc.

Despite the highly elaborated feature of this provision, Arrowsmith argued that the rules still fail to consider all the different methods of publications, and to cater sufficiently for iterative procedures,

and are now outdated in light of new developments in information technology.⁵ Such drafting errors and outdated rules need to be redrafted, which may lead to more complicated rules if the detailed approach is retained, as happened in the provisionally agreed new text of the GPA Article XI. It again involves a costly and time-consuming process.

The difficulty to draft, amend and update detailed rules on time-limits, which is only a small aspect of transparency in procurement, demonstrates the potential problems associated with the detailed approach for drafting transparency rules of a procurement agreement as a whole. However, even if a complete set of comprehensive and flawless transparency rules could be drafted, it would still take considerable time, efforts and resources for states to agree if at all possible.

The negotiating costs tend to be relatively lower if transparency rules are adopted at the regional level with similar minded membership such as at the EC. In principle, so far as a binding procurement agreement is concerned, the more detailed its rules are, the more diversified circumstances its participating countries have, the higher negotiating costs it will involve.

As a result, the negotiating costs associated with detailed transparency rules increase as negotiations move from regional to multilateral level. It seems extremely difficult to develop a single set of detailed procedural rules at the multilateral level within which states' divergent regulatory approaches in procurement can be accommodated.

In particular, as pointed out by Linarelli, there is a trend towards regulatory diversity in procurement: developing countries choose to use more formal methods, whilst developed countries increasingly opt for informal methods of procurement.⁶ In recently years, many developing and transitional countries have undertaken reform of their national procurement legislation based on a system of formal procurement procedures.⁷ In contrast, some developed countries, such as the US and the UK, have increasingly switched away from stringent transparency rules to greater reliance

⁵ See S. Arrowsmith, *Government Procurement in the WTO* (Kluwer Law International Ltd, 2002) at pp.198-201 208- 211, 419-422, 431

⁶ See J. Linarelli, 'The WTO Transparency Agenda: Law, Economics and International Relations Theory', In S. Arrowsmith & M. Trybus (eds), *Public Procurement: The Continuing Revolution* (2003)235 at pp.247-248

⁷ In particular, many transitional countries have newly adopted or reformed their procurement legislation based on the UNICTIRAL Model Law, see Section 5.1.1

on the exercise of professional judgment of procuring officials.⁸

Giving the difficulties of devising and updating detailed procedural rules suitable for all states, vague soft law can be argued as a more desirable option: it avoids the difficulty in formulating detailed rules addressing complicated situations in procurement, lowers the incidence of drafting errors and consequent redraft, and reduces the need for updating.

This can be demonstrated by looking at the previous example on time-limits again. If vague soft law rules on time-limits were adopted, generally requiring that a sufficient or reasonable period of time should be allowed for suppliers to submit their tenders without elaborating further details on the specific minimum time-limits, there would be no need to deal with complicated situations in procurement since such vague rules could apply to all types of procurement procedures and accommodate all circumstances.

Furthermore, such vague rules have a greater ability in adapting to changes and thus significantly reduce the need for repeated negotiations and legislative amendments, which will be discussed in Section 8.3.1.4. In the above example, the vague requirement for ‘a sufficient or reasonable period of time’ would not need any updates in view of the development of information technology

More importantly, it is much easier for negotiating parties to agree on vague soft law than precise hard law because the former can better accommodate states’ divergent regulatory approaches in procurement. Vague rules such as the requirement of a sufficient or reasonable period of time in the above example can accommodate the regulatory difference between countries opting for informal methods of procurement and ones relying on stringent transparency rules. Even for states with stringent national procurement law, they may hold different views regarding the precise minimum time-limits to be included in a procurement agreement and such vague rules can also be helpful in this regard to avoid arguments by leaving the formulation of detailed rules at the discretion of participating states.

⁸ See S. Arrowsmith, ‘Reviewing the GPA: The Role and Development of the Plurilateral Agreement after Doha’, *J.I.E.L.* (2002) 761-790 at p.773

8.3.1.2 Reduced implementing costs

The second argument is that vague soft law involves lower implementing costs than precise hard law. In the area of procurement, most binding agreements such as the GPA (see Section 3.2.4.2), the EC directives (see Section 4.1.4.2) and the NAFTA (see Section 4.3.4.2) lay down the basic principles as well as detailed minimum procedural requirements to support the basic principles. Detailed positive rules can be found addressing award procedures from invitation to participate to award of contracts.

The implementation of a procurement agreement entails either the amendment to the existing national procurement regime or the establishment of new procurement regulations where none presently exists in accordance with the requirements under the agreement. Participating states have to comply with not only the underlying general principles (vague soft law) but also the detailed procedural rules (precise hard law) under the relevant agreements.

As with vague soft law of general principles, they normally do not impose any positive obligation on states by the wording of legislative texts. For example, the principle of non-discrimination in most procurement regimes only imposes negative obligations on states to refrain from certain positive measures that restrict free access to procurement contracts. In principle, there are no implementing costs related to such vague general principles.

However, exceptions can be found in the case of procurement regimes in which a third party is delegated with a high level of authority to interpret the rules. Under the EC regime, for instance, the ECJ in *Telaustria* innovatively developed a positive obligation of advertisement from the non-discrimination principles under the Treaty (see Section 4.1.4.2). It can be seen that general principles could possibly be interpreted in a way to impose precise obligations.

Regarding precise hard law of detailed procedural rules, participating states have to revise the details of their existing national legislation consistent with detailed procedural rules of a procurement agreement, even when domestic rules and practices conform to the underlying principles of the agreement. It proves a costly process because of the detailed and complex feature of procedural rules of many procurement agreements, as illustrated by time-limits rules discussed

above. Also, resources have to be spent on training procurement officials to get acquainted with the newly adopted implementing rules.

Furthermore, the implementation costs can be increased taking into account the requirement for the availability of national challenge procedures under many procurement regimes. Apart from the costs of setting up and maintaining a national challenge system, states' implementing costs may be increased by virtue of detailed procedural rules of a procurement agreement. This is because, as argued by Arrowsmith, the detailed rules create greater potential for litigation including ones over technical breaches in situation where there is no real risk of discrimination.⁹

Vague soft law without a high level of delegation can significantly reduce implementing costs to the parties. For example, procurement regimes such as the COMEA directives (see Section 4.5.4.2) and the APEC NBPs (see Section 4.6.4.2) simply lay down general principles without prescribing any detailed procedural rules. Also, there are no designated organs equivalent to the ECJ in the context of the EC to interpret these general principles. Consequently, vague soft law in COMESA and the APEC NBPs entail much less implementing costs than precise hard law in the above-mentioned hard law instruments such as the GPA, the EC directives and the NAFTA.

Participating states in the COMESA directives or the APEC NBPs only have to make sure that their national procurement legislation complies with the general principles contained in the relevant instrument. There are no prescriptive requirements for them to adjust the details of their procurement rules. As a result, the costs of adapting legislation and training procuring officials can largely be reduced. This is particularly important for developing countries in view of their less-developed procurement legislation and limited resources available.

8.3.1.3 Reserved regulatory autonomy to implement legitimate national goals

Vague soft law may also be deliberately chosen as one of many possible ways to reduce sovereignty costs of hard law procurement rules.

⁹ See S. Arrowsmith, note 5, at p.420

As discussed in Section 7.3.1.3, Entering into a hard law procurement agreement often involves high sovereign costs for states, whilst states are especially jealous of their sovereignty autonomy in the area of procurement. Except states' protectionist procurement practices, the free trade objective of procurement agreements should be balanced with states' legitimate concerns about value for money, national security, social equity and environmental protection etc.

The high sovereignty costs of hard law procurement agreements can arguably be reduced by resorting to vague soft law. It allows states to implement their commitments to their particular situations rather than trying to accommodate divergent national circumstances within a detailed single text.

The general emphasis of the detailed transparency procedures contained in procurement agreements is aimed at making concealed discrimination more difficult so as to ensure effective market access for foreign suppliers. Although such transparency procedures can also contribute to many of the above-mentioned domestic concerns and have been widely utilised by domestic procurement legislation, they do, to different extents, restrict states' ability to achieve domestic objectives because they are solely motivated by free trade objectives.¹⁰

First of all, the details of transparency rules of many procurement regimes may affect states' aim to achieve value for money and efficiency. Such detailed rules may often restrict states' discretion in implementations and thus affect states' ability to pursue value for money, as to be discussed in Section 9.3.1.2.

Secondly, the detailed transparency rules may also restrict states' ability to employ procurement to implement secondary objectives. The EC's detailed rules on qualification criteria serve as a good example on this point. As examined in Section 4.1.4.2, the EC public sector directive require that suppliers can be excluded from participation only on certain explicitly stated grounds, followed by a highly elaborated list specifying grounds for exclusion and relevant evidences which procuring entities may demand as means of proof. Consequently, procuring entities are precluded from

¹⁰ For the discussion on the difference and connection between domestic objectives of procurement and the trade objective of international procurement, see Section 3.2.1

disqualifying a firm on the grounds that are not included in the list such as disqualifying a firm which does not meet certain social or environmental criteria, even if there is no discrimination involved against foreign suppliers.

In contrast, vague soft law can help reduce unnecessary restrictions on states' freedom to implement legitimate secondary policies. Taking the COMESA directives as an example again, as discussed in Section 4.5.4.2, it is generally required that qualification criteria may only be used if they are of the type permitted by law. This general requirement leaves states with absolute freedom to formulate their domestic rules on qualification criteria, which can allow procuring entities to disqualify suppliers for secondary reasons, so long as it is consistent with the underlying principle of non-discrimination.

In addition to the function of vague soft law giving states more discretion in achieving value for money and legitimate secondary objectives, vagueness can sometime be used to limit the binding character of certain obligations to protect the parties in case the obligation turns out to have hidden sovereignty costs. In the area of procurement, this use of vague soft law can be well demonstrated by the GPA's four general principles governing national challenge procedures. As argued in Section 3.2.5.1, the general principles governing national challenge procedures create little or no obligations due to their lack of precision. In this case, the vagueness of these principles negates the general presumption of all the GPA rules being binding and avoids the fear shared by many states of being locked into hard law commitments they regret.

However, it is not necessarily true that the use of vague soft law can always lower sovereignty costs. In the case of procurement regimes involving a high level of delegation in enforcement such as the EC, as elaborated in Section 4.1.4.2, even vague general principles can imply very precise obligations through judicial interpretation.

From this perspective, even vague soft law sometimes entails significant sovereignty costs. Meanwhile, as argued in section 4.1.4.3, precision may not necessarily of itself imply higher sovereign costs but just greater clarity of treatment, and it can even be used to lessen sovereignty

costs by precisely elaborating escape clauses or explicitly giving discretion.

8.3.1.4 Better adaptation to changes

The fourth argument in favour of vague soft law is about its better adaptation to changes. In Section 2.3.2, it has been argued that vague soft law is more capable of adapting to changes. It provides a broad framework within which states can automatically adapt their obligations as circumstances change. This general argument also applies in the area of public procurement.

As discussed in Section 7.3.1.4, public procurement is a fast-evolving area for international regulation, and international procurement agreements need to adapt to new technological and economic developments. It can be quite difficult to update a binding procurement agreement in light of new developments in this area, which could be even more difficult where there are complex procedural rules and coverage rules in the agreement.

So far as the transparency procedural rules are concerned, it has been articulated in Section 7.3.1.5 that many binding procurement regimes have experienced difficulty in adjusting their complex procedural rules to technological developments such as the emergence of e-commerce, and the use of non-binding form could arguably make it much easier for a procurement agreement to adapt to changing circumstances. However, even if a binding form is chosen for the agreement, the choice of vague soft law for its procedural rules can still be argued as an alternative way to make the rules more adaptable to changes. In principle, the lower the degree of precision, the greater ability such rules have to adapt to change.

This viewpoint can be demonstrated by looking at the previous example of the rules on time-limits. As discussed above, many binding procurement regimes contain detailed rules regulating time-limits for submitting tenders. The GPA, for example, lays down both the general principle and specific minimum time-limits for tendering. However, these specified periods are outdated in view of new developments in information technology, and the new version of GPA text to be adopted includes more detailed rules taking into account the speed of electronic

communications.¹¹ Similarly, the newly adopted EC directives also add more detailed rules to the previous directives specifying the shortened time-limits for tendering when electronic means are used.¹²

Compared with the GPA and the EC' approach to issue more detailed amendments, it can be argued that the use of vague soft law can well resolve the problem but without the consequence of more complex procedural rules. Also, it reduces the need for future updating through lengthy and costly legislative amendments. If a vague soft law rule were chosen, generally requiring that states must be allowed a sufficient or reasonable period of time for tendering, it could easily be adapted to the recent development of electronic communications without any amendments, as the vague term 'sufficient' or 'reasonable' can imply different minimum time-limits where there different types of publication or communication methods are used.

However, it is not true that the use of vague soft law in procedural rules can completely avoid the need for updating a procurement agreement. The coverage of hard law procurement regimes has to update constantly in accordance with the development of market privatisation and liberation no matter how vague their transparency rules are. For instance, as explained in Section 7.3.1.4, the EC new utilities directive had to reduce the previous coverage rule to provide an exemption for the newly privatised entities which have started operating in a comparative market. In the case of the GPA, Members are committed to conduct further negotiations periodically to extend their coverage to the agreement by virtue of its Art. XXIV.¹³

8.3.2 Possible disadvantages of vague soft law

Although the choice of vague soft law over precise hard law can largely reduce negotiating, implementing and sovereignty costs and have a greater ability in adapting to changes, disadvantages of vague soft law have also been identified in Section 2.4. Firstly, vague soft law may weaken the

¹¹ See Article XI of the new GPA text

¹² See the EC Public Sector Directive Article 38(5)(6) and the EC Utilities Directives 45(5)(6)

¹³ See Art.XXIV:7(b)

credibility of legal commitments; and secondly vague soft law may raise the transaction costs of subsequent interactions. Both of the above arguments are highly relevant to a procurement agreement.

8.3.2.1 Weakened credibility of obligations

The use of vague soft law in the procurement rules may arguably weaken the credibility of the rules by making it harder to determine whether a state is living up to its commitments and increasing the possibility of divergent interpretation of the rules among participating states. In Section 2.4.2, ambiguity of the rule has been identified as one of important factors for states' non-compliance with international rules.

Firstly, precise hard law rules that do not require the significant exercise of discretion make it relatively easy to determine if states' procurement practices comply with the agreed rules. As with the previous example of the rules on time-limits, it is pretty mechanical and straightforward to judge whether a particular proceeding observes the rules if the rules specify the precision of a certain minimum time-limits for tendering under various precisely defined circumstances.

However, if the rules are couched in vague terms such as a 'sufficient' or 'reasonable' period of time, various information has to be considered such as the complexity of the procurement concerned and particular publication or communication methods used in order to determine whether the actual time-limit given to supplier for tendering is consistent with the general requirement of 'sufficient' or 'reasonable'.

The difficulty associated with vague soft law in determining compliance can be very problematic in light of potentially strong negative political influence from domestic vested interests as well as the reciprocal nature of many procurement regimes. As mentioned in Section 7.3.2, states' compliance with international procurement rules can be severely challenged by significant political influence from their domestic vested interests. From this perspective, the vague soft rules in procurement may create opportunities for states to shirk their obligations out of domestic political pressure.

For example, as examined in Section 4.2.1, Article 296 of the EC treaty vaguely provides a general exemption from its procurements rules for certain defence procurements which states consider necessary for the protection of the essential interests of their security. However, due to the vague and discretionary wording of this Treaty provision, the derogation has been extensively used by the EC states in practice, and in practice the majority of the defence contracts are awarded on the basis of discriminatory national procurement policies.

As with the importance of assuring state compliance for external purpose, it can be argued that vague soft law is less desirable than precise hard law in the sense that the former gives states less assurance of each other's compliance, as the former makes it more difficult for participating states to determine whether each other is living up to its commitments. The assurance of each other's compliance has been argued in Section 7.3.2 to be very important for most binding procurement agreements with reciprocal market access commitments and non-simultaneous performance. Also, a clear knowledge of a country's compliance with its international procurement obligations can help to build up the confidence of foreign suppliers to compete for procurement contracts in that country.

Secondly, vague soft law may increase the chance of divergent interpretation of the rules among participating states. International rules, even for those that are quite precise, must be interpreted to apply to specific factual situations. However, as discussed in Section 2.2.2, unlike the position under domestic legal systems with well-established courts to interpret and apply rules, international rules are, in practice, most often interpreted and applied by implementing states.

States have the right to interpret international law, i.e. the right of auto-interpretation in the absence of a delegated interpreting organ. However states' right of auto-interpretation on international rules may lead to divergent interpretation and consequently inconsistent implementation of the rules. The precision of international rules may constrain the scope of self-serving auto-interpretation, as it can limit states' discretion in interpreting and applying the rules.

On the contrary, the vague soft law provides states with a wider scope for auto-interpretation and

inconsistent implementation, which threaten the credibility of the rules both for internal purposes to resist domestic negative pressure, and for external purposes to provide the assurance of each other's compliance. In particular, the inconsistent implementation of the procurement rules may have the effect of discouraging foreign suppliers from participating in foreign procurement markets, because states can be dissuaded from competing for contracts under rules they are not familiar with.

Nevertheless, the vague soft law rules' possibly weakened credibility can arguably be compensated by issuing more detailed guidance regarding their implementation as well as incorporating an effective monitoring system. Furthermore, a high degree of delegation in interpreting the vague rules may largely help to constrain auto-interpretation and the tendencies to shirk obligations, but it involves significant sovereignty costs (see Section 10.3.1.3).

8.3.2.2 Increased transactional costs

The choice of vague soft law may also increase the transaction costs of subsequent interactions, that is, mainly the process of applying and elaborating agreed rules and the process of resolving disputes.

As with the process of applying and elaborating agreed rules, international rules even those that are quite precise, have to be interpreted to apply to concrete factual situations and elaborated to resolve ambiguities. Vague soft law, however, implies more transaction costs in applying agreed rules. This is because, as above mentioned, it provides states with a wider scope for auto-interpretation, which may possibly lead to divergent interpretation and consequential inconsistent implementation among participating states.

States normally designate a third party to take on the role of ensuring consistent interpretation of agreed rules. Generally speaking, the more ambiguous the agreed rules are, the harder the consistent interpretation and implementation of rules can be achieved. This general argument can also apply to the area of international procurement law.

As regards the process of resolving disputes, there are various means of international dispute settlement (see Section 2.2.4). Under soft law dispute settlement mainly based on political bargaining

such as negotiation and meditation, there is virtually no substantial difference in costs between precise hard law and vague soft law. However, under hard law dispute settlement mainly based on agreed rules like judicial settlement, vague soft law is arguably more expensive to enforce in comparison with precise hard law.

As for disputes over precise hard law rules, determining whether a violation has occurred is relatively mechanical and does not require significant information. However, in the case of disputes over vague soft law rules, it is often lengthy and costly for courts or other legal institutions to have relevant information in hand; to conduct judicial reasoning and eventually to make a judgement over the compliance with the rules. This disadvantage of vague soft law deserves serious consideration, because as explained in Section 3.2.4.4, the speedy legal proceedings in procurement is very important in terms of preserving commercial opportunities for aggrieved supplies.

Nevertheless, as pointed out by Arrowsmith, the advantages of detailed hard law can be obtained in other ways, notably by issuing more detailed guidance on how the rules should apply.¹⁴ Such more detailed but possibly non-binding guidance would be useful in providing information for parties implementing the rules as well as for judicial organs interpreting the rules, and the higher transaction costs of vague soft law would therefore be largely reduced.

8.4 Conclusion

It has been argued in the current section that vague soft law can be regarded as a second best or even as a better alternative to precise hard law. Vague soft law has an important part to play where precise hard law is temporarily unattainable due to the bounded rationality of drafters, the controversy of the issues or the nature of the relevant obligations etc.

At the negotiating stage, vague soft law may facilitate compromise and avoid the failure of the agreement as a whole. At the implementing stage, vague soft law can provide a certain degree of regulation as well as a broad framework within which more precise hard law might possibly be

¹⁴ See S. Arrowsmith, note 5, at p.420

developed through gradual negotiations over time. However, not all vague soft law will necessarily develop further details at a later stage, and even vague soft law with no prospect of hardening up can arguably be better than no law at all.

Moreover, vague soft law is sometimes considered more desirable than precise hard law even if the latter is attainable. Vague soft law may arguably entail less negotiating costs, implementing costs as well as sovereignty costs, and also is of the better capability in adapting to changing circumstances. Meanwhile, there are certain possible disadvantages of adopting vague soft law: it may weaken the credibility of legal commitments and raise the transaction costs of subsequent interactions. Consequently, the possible advantages of vague soft law have to be balanced with its possible disadvantages in consideration of specific characteristics of a certain area of law.

In the particular area of international procurement law, the incorporation of detailed procedural rules has been argued to involve higher negotiating costs, implementing costs and sovereignty costs than those of agreements regulating other areas of law, owing to the specific features of public procurement.

Firstly, the generally complicated feature of procurement makes it very difficult to draft a set of comprehensive and detailed procedural rules to address all possible contingencies. Also, the recent trend towards regulatory diversity in procurement makes it more difficult for negotiating parties to agree on the detailed rules. Secondly, most procedural rules of a procurement agreement demand positive actions and states have to amend the details of the existing nation procurement legislation, and to train public officials to get acquainted with the new rules. This has proven a costly process for many countries especially for developing and least-developed countries with limited resources available.

Thirdly, some detailed procedural rules of a procurement agreement constrain states' discretion in implementation; and thus entail high sovereignty costs by restricting states' ability in pursuing value for money and legitimate secondary objectives. In addition, public procurement is considered a fast-evolving area for international regulation, which makes precise hard law less desirable because

of its poor ability in adapting to changes.

From this perspective, the choice of vague soft law in a procurement agreement can be valuable in terms of its reduced negotiating, implementing and sovereignty costs, especially in cases where the agreement is couched in a binding form.

It has been argued that the use of vague soft law in a binding procurement agreement can significantly reduce its negotiating costs by avoiding difficulty in drafting complicated rules, lowering the incidence of drafting errors and reducing the need for updating; as well as by making it easier for states with divergent regulatory approaches to agree. Meanwhile, the lower level of precision can also lower the implementing costs by including less prescriptive requirements for states to adjust the details of their national procurement rules.

The high sovereignty costs of a binding procurement agreement can also be reduced by resorting to vague soft law, because it preserves states ability in pursuing vague for money and legitimate secondary objectives. With the increase of negotiating, implementing and sovereignty costs, vague soft law may be more attractive in proportion to the level of divergence among the regulatory preferences of states, which increases almost automatically as negotiations move from regional to multilateral.

The above benefits of vague soft law, however, do not come without costs. The choice of vague soft law over precise hard law in a procurement agreement may arguably weaken the credibility of the agreed rules by making it harder to determine states' compliance.

Vague soft law may create opportunities for states to shirk their obligations particularly in face of potentially strong political pressure from domestic vested interests. As with the credibility of the rules for external purposes, vague soft law may also be less desirable in terms of giving states the assurance of each other's compliance and promoting the confidence of foreign suppliers, which is quite important for most binding procurement regimes with reciprocal obligations.

Meanwhile, vague soft law may increase the possibility of divergent interpretation and inconsistent implementation of the rules among participating states. Furthermore, vague soft law can

also increase the transaction costs of subsequent interactions of applying and elaborating agreed rules and of resolving disputes over agreed rules. Nevertheless, these possible disadvantages of vague soft law might arguably be avoided by issuing more detailed guidance or delegating the power of interpretation to a third party.

Chapter 9 Analysis of advantages & disadvantages of soft law in regulating public procurement from a trade perspective – the Dimension of Discretion

9.1 Introduction

The third dimension of soft law to be discussed in this section is discretion, which refers to the degree of discretion states have in negotiating and implementing their obligations. Like the dimensions of bindingness and precision, soft law in terms of a lower degree of discretion has been argued in Section 2.3 to serve as a second best to hard law with a higher level of discretion when the latter is temporarily unachievable.

Soft law in terms of discretion can foster compromises during negotiations. At the implementation stage, it can provide a certain degree of regulation, and may have the potential to harden up at a later stage when circumstances permit. This is to be considered at Section 9.2. Furthermore, soft law with a higher level of discretion is sometimes preferable on its own terms – it may perform desired functions more effectively or with lower costs, which is to be discussed at Section 9.3.

9.2 Soft law in terms of its higher level of discretion as a second best to hard law with a lower level of discretion

Soft law which accords states a higher level of discretion in negotiating and implementing their obligations may be adopted as a second best where the relevant hard law is unattainable. As argued in Section 2.3, soft law in terms of discretion is helpful for reaching a compromise during negotiations.

As explained in Section 7.2, public procurement is a sensitive area and states are often unwilling to give up their regulatory freedom to use procurement for protectionism purposes. Procurement has been widely used to generally protect national industry and employment or more specifically to

support the development of particular regions or industries. For instance, governments may accept foreign bids only if the lowest domestic bid is more than certain percentage higher than the foreign one or set asides of certain public contracts for industries located in less developed regions.

Unlike barriers to trade in general goods, discriminatory procurement practices do not take the form of visible barrier imposed at the border such as tariff, but originate from government decisions, or sometimes are required by national legislation. Their effects are not easily measured, and also it is politically sensitive for international rules to address them.

When it comes to negotiations on trade liberalisation, political considerations often prevail over economic ones. Otherwise countries would engage in unilaterally liberalising their own procurement markets if economic considerations dominated, as governments can gain economically from more liberalised domestic procurement markets by obtaining better value for money in public contracts and maintaining the competitiveness of national industries.

However, most governments can hardly achieve such gains owing to strong political opposition from certain categories of national industries benefiting from protectionist procurement policies. Discriminatory procurement measures may sometimes be considered as a last-resort form of protection with other protectionist trade measures such as tariffs, quotas and subsidies being prohibited or restricted by the GATT and other WTO agreements.

In addition, political opposition against the liberalisation may also come from public officials who desire to use procurement for illegitimate purposes such as political patronage or corruption. The currently high level of protection in procurement is indicative of strong vested interest. In this regard, soft law may operate to promote the agreement among negotiating parties mainly by mitigating the political opposition from their domestic vested interest groups.

When negotiating a procurement agreement, it is not surprising to find that negotiating parties are only prepared to give up their protective measures over certain types of procurement, which could be quite different in terms of covered entities and contracts according to their own particular

considerations. The negotiating technique used for procurement is often different from the tariff negotiation.

Instead of negotiations on progressive tariff reduction in a wide range of goods for all states and the general application of MFN principle, the negotiation process of most procurement agreements is conducted bilaterally based on the principle of reciprocity, and states are normally given a significant discretion in negotiating their coverage to the agreements. For example, under the GPA (see Section 3.2.2), each state can freely decide which entities should be covered, the types of contracts covered and its country-specific thresholds, provided its offer is acceptable to other negotiating parties. Also, the GPA members are free to depart from the MFN principle by including specific derogations to exempt them from certain obligations to other members which do not offer reciprocal coverage.

This flexible approach in negotiating coverage is not unique in international trade agreements, and a similar approach can be found in the negotiation of service commitments in the GATS. The GATS negotiations aimed at liberalisation involve a bilateral exchange of request and offers, followed by the bilateral negotiation on an item-by-item basis across all services sectors.¹ The WTO members can freely decide whether to include a specific service sector in its schedule of national treatment and market access commitments, and exemptions can be made to avoid the automatic application of the MFN principle on grounds of insufficient reciprocity.

Similar to trade barriers in procurement, barriers in services take the form of discriminatory or burdensome regulatory requirements rather than tariffs, focusing on the local consumption of services or the local provision of services.² The similarly flexible approach in negotiating procurement commitments and service commitments may arguably be justified by reference to the general difficulty in tackling trade barriers embedded in domestic regulations.

Soft law with a high level of discretion over coverage can reduce the political opposition from particular interest groups of negotiating parties against a procurement agreement. The freedom states

¹ G. Fekete-kuty, 'Assessing and Improving the Architecture of GATS', In Sauve, P. and R. Stem (eds), *Services 2000: New Directions in Services Trade Liberalization*, (Brookings Institution and Harvard University, 2000), at p.89

² Ibid. at p.91

have in negotiating their country-specific coverage lists enables them to exclude particularly sensitive areas or entities from international regulation.

Also, it leaves open the possibility of states to negotiate derogations from international procurement rules to cover specific industrial policies, as discussed in Section 3.2.3. Although it is envisaged that such derogations are temporary and subject to future negotiations, they may help negotiating parties to make market access commitments by avoiding the direct objection from particularly strong political forces and interest groups domestically.

As with most binding procurement agreements, it can be argued that significant state discretion in negotiating their coverage seems inevitable in order to reach a reasonably broad coverage for every participating state. An only exception is the EC procurement regime (see Section 4.1.4.3), under which states have little discretion in negotiating their coverage schedules, since a uniform coverage is set out for all members without any possibility of derogation for particular entities or sectors. The achievement of both comprehensive and uniform coverage in the context of EC is largely due to its highly integrated internal market.

Different from international organisations like the WTO or the NAFTA, the EC is the main economic organisation of the European Union ('EU'), which is a unique inter-governmental or supra-national organisation which involves formal sovereignty-sharing across a wide range of policy areas from health and economic policy to foreign affairs and defence.

It had been a long process of gradual regional cooperation and integration before the EC states managed to withstand resistance from domestic vested interests and voluntarily concede shares of their sovereignty including regulatory freedom to the whole community for the establishment and administration of a common single market against. This evolving process is also reflected in the area of procurement. Initially, the EC provided its member states with a transitional period within which they could gradually eliminate discriminatory measures (see Section 4.1.4.3).

However, the previous soft approach has been developed into a hard one, and the current approach rules out any possibility for states seeking accession to the EC to negotiate for transitional measures.

Late comers are now obliged to abolish their discriminatory policies and to meet the detailed procedural requirements for all the covered procurement contracts without any derogation immediately after joining the regime.

However, the EC's uniform approach is unlikely to be applied in other binding regional or multilateral procurement regimes if a comparatively wide coverage is to be attained. For example, the GPA, as argued in Section 3.2.4.3, would probably have been an agreement very narrow in scope had it follow the EC's approach to adopt a uniform coverage applicable to all states. In consideration of its binding nature and comparatively wide coverage, it seems impossible to include a uniform coverage rule in the short run.

Apart from the difficulty in achieving a unified coverage to a procurement agreement among participating states, it may arguably be more difficult to attract more participation especially on the part of developing countries. Most developing countries are resolutely against the idea of giving up their freedom to use procurement as a policy tool for protectionist purposes.

Many developing countries have claimed that they need to use procurement to protect their 'infant industry'.³ However, even if preferential procurement policies in favour of 'infant industries' are theoretically justifiable, these policies are not generally successful in practice because governments are not in a position to judge commercially which industries to protect, and instead their decisions are frequently influenced by political lobbying rather than sound economic considerations.⁴ Local content requirements and the protection of domestic industries against foreign competition may have done more harm than good to the growth prospects of some developing countries.

Despite various alleged reasons for their use of preferential procurement policies, the reluctance of developing countries to undertake free trade procurement commitments may arguably reveal the political difficulties they face domestically - significant internal pressures can be exerted by lobbyists representing interests of certain categories of national industries which are beneficiaries of

³ According to infant industry argument, infant industry protection is necessary for developing countries at early stages of industrialisation in face of massive export expansion from developed countries.

⁴ See Arrowsmith, Linarelli and Wallace, Jr, *Regulating Public Procurement: National and International Perspective* (The Hague: Kluwer Law International Ltd, 2000), at p. 252

such preferential procurement policies or even by some of government officials who have illegitimate interests in corrupt procurement practices.

With regard to their participation in a procurement agreement, developing countries tend to incur more political costs in comparison with their developed counterparts. As argued by Hunja, the reform of public procurement law in developing countries is extremely difficult: those in private sector and their collaborations in the public institutions may have a very strong vested interest in maintaining a legal framework that prohibits competitions from foreign supplier, and in many developing countries, access to public contracts also serves as a means to reward political supports to finance political parties.⁵

Furthermore, Trionfetti pointed out that certain structural differences in the nature of markets between developed countries and developing ones may explain why preferential procurement practices are politically more difficult to be eliminated in the latter.⁶

Indeed, developing countries' less competitive industries which are beneficiaries under discriminatory procurement policies will be more active in lobbying their governments not to join in any procurement agreement, as they are more vulnerable to foreign competition. Meanwhile, corrupt procurement practices are most rampant in many developing countries with loose or opaque procurement laws and their corrupt public officials may become another political force against any international discipline in procurement.

Lack of economic resources and legal expertises can also make it difficult for developing countries to participate in a procurement regime. Many international procurement agreements, as examine in Section 7.3.1.2, set out detailed and complicated procedural rules, which require states to conduct a relevant legislative reform to give effect to them as well as to maintain an efficient

⁵ See R. Hunja, 'Obstacles to Public Procurement Reform in Developing Countries', In Arrowsmith and Trybus (eds) *Public Procurement: the Continuing Evolution*, (2003) at pp.17

⁶ Three possible reasons concerning the nature market has been suggested: first, the size of procurement market in developing countries is likely to create larger scope for political interplay between the government and domestic suppliers than in developed countries; second, discriminatory procurement may be utilised as a tool to protect domestic suppliers from a structural cost disadvantage; and third, procurement may be used as a tool to counter unfavourable agglomeration forces. See Trionfetti, 'Discriminatory Procurement and International Trade', (2003) 23 *T. W. E.* 57

administrative apparatus to implement them. The incapability of implementing procurement rules can arguably serve as a big deterrent to the participation of many developing countries.

Given the current political and economic realities of developing countries, it would be extremely hard to include them in a multilateral procurement agreement if rules imposed on them are of a similar level of hardness to those on developed countries. Consequently, soft law with a higher level of discretion may be formulated specifically for developing countries from the perspective of attracting their participation. For example, ‘gradual accession’ was proposed by Trionfetti, which allow developing countries to remove the discriminatory procurement policy over a determined period of time while benefiting from full access to other countries’ procurement market immediately.⁷

Soft law with a higher level of discretion for developing countries may arguably address many of their concerns, and sometimes make it easier for them to accept procurement rules during negotiations. It allows developing countries to devise a plan for gradually opening up their procurement market according to their particular domestic circumstances and to prepare domestic industries ready for foreign competition once the specified period elapses.

Strong political opposition from their domestic vested interests can be largely mitigated since there is no immediate danger of foreign competition, which might subsequently be overwhelmed by the support from domestic exporters winning more foreign government contracts under the improved market access to other member states of the agreement. The soft approach that gives developing countries more discretion in negotiation and implementation might arguably be more suitable for securing greater willingness on their part to accept the procurement rules, than one which imposes rigid and binding obligations.

In view of their lack of capability in implementing procurement rules, soft law enables developing countries to build up technical capacity through practice and eventually undertake hard law commitments similar to their developed counterparts. In this regard, soft law in terms of discretion

⁷ Ibid. at pp.72-73

allows different categories of states to participate in a cooperative arrangement based on their ability to do so.

In practice, this function of soft law has been frequently resorted to, and increasingly valued in international procurement regulation. It can be seen that many binding procurement agreements⁸ such as the NAFTA and the GPA include the S&DT provisions for developing or/and least developed countries. Such S&DT provisions might possibly serve as an effective mechanism of ‘gradual accession’, in the words of Trionfetti⁹, whereby a transitional period is made potentially available to developing countries, under which they would initially be allowed to undertake only part of their obligations, then, progressively, would be extended to assume all the obligations under the agreement.

For instance, as examined in Section 4.3.4.3, the NAFTA lays down transitional provisions for the only developing country member Mexico, which gradually extend the liberalising rules to its covered contracts, as well as temporarily soften certain procedural requirements for liberalised procurements. It was recognised that these transitional provisions have made it easier for Mexico to accept the NAFTA procurement rules and to agree to the inclusion of its state-owned enterprises for regulation.

Moreover, as discussed in Section 3.2.4.3, the S&DT provisions of the current GPA also seek to provide developing countries with a high level of discretion in implementation, but have been argued to only set out a kind of possibility rather than to establish an automatic right for developing countries to obtain such a higher level of discretion. Although the newly revised GPA text spells out the more clearly specified transitional measures for developing countries, it has been argued that such measures still fail to guarantee a higher degree of discretion for developing countries because whether or to what extent a developing country can enjoy such a transitional period is subject to the

⁸ As for the non-binding procurement instruments such as the COMESA directives and the APEC NBPs, it seems unnecessary to incorporate additional S&DT provisions for developing countries, as the non-binding nature of these instruments itself has already granted all states a very wide discretion in applying the relevant standards and principles in their domestic systems. See Section 4.5.4.3 and Section 4.6.4.3

⁹ See Trionfetti, note 6, at pp.72-73

consent of other parties during negotiations.

Limited coverage to most procurement agreements and little participation on the part of developing countries reflect the reality that the liberalisation of procurement markets cannot be attained overnight and that not every country can move at the same pace. Soft law with a higher degree of discretion reduces the likelihood of negotiations being blocked by domestic vested interest of negotiating states, and encourages wider participation of developing countries. In this sense, soft law in terms of discretion can be regarded as a second-best where an immediate and full liberalisation of procurement market is infeasible because of strong political oppositions.

In addition, soft law can be resorted to as a method to resolve disagreements over the substantive contents of a procurement agreement. As for controversial issues such as the issue of national challenge procedures, as discussed in Section 7.2, states hold different opinions regarding whether or how to set out the rules on national challenge procedures in a procurement agreement. Consequently, as with most procurement agreements such as the GPA, the EC, the NAFTA, discretion granted to states in implementing the rules on national challenge procedures is generally higher than that of other rules of those procurement agreements.

Besides its function of facilitating compromise at the negotiating stage, soft law with a high level of discretion is also desirable in terms of providing a certain degree of regulation, as well as having a potential to evolve into harder law over time. For example, the above-mentioned phase-in period clauses legally commit developing countries to certain forms of discourse and procedures, though granting a higher level of discretion in implementation.

Developing countries can only exercise their discretion in exempting certain procurement contracts from the implementation of non-discrimination rules or departing from some procedural requirements according to their specific transitional arrangements. Apparently, such softer regulations are much better than no regulation at all in terms of opening up the procurement market of developing countries.

Furthermore, the greater discretion developing countries enjoy in implementing their obligations is only temporary, and they are expected to fully comply with the relevant procurement rules when their specified transitional periods expire. In this regard, soft law in terms of a higher level of discretion for developing countries is supposed to harden up at a specified time in the future.

However, it is untrue that all soft law with a high level of discretion will always evolve into hard law over time. For instance, it is unlikely that the discretionary soft law rules on technical assistance will turn into any harder law, as the nature of the rules will remain unchanged. Again, even discretionary soft law with no prospect of developing into less discretionary hard law can still be argued to be better than no law at all.

9.3 Soft law in terms of its higher level of discretion as a better alternative to hard law with a lower level of discretion

9.3.1 Possible advantages of soft law with a higher level of discretion

As argued in Section 2.3.2, soft law in terms of a high level of discretion may sometimes be preferable to the relevant hard law. Soft law can be deliberately chosen over hard law even if the latter is attainable. Soft law with a low level of state discretion can be more desirable than hard law, and has its own advantages which are not available under hard law. First of all, soft law in terms of discretion involves less implementing costs than the relevant hard law; and secondly it is less intrusive on national regulatory autonomy. Both the above advantages of soft law can be applied in the area of procurement, and may have significant importance in practice.

9.3.1.1 Reduced implementing costs

Soft law in terms of discretion can be argued to involve lower implementing costs than the relevant hard law. As explained in 8.3.1.2, the implementation of international procurement rules demanding positive action can be costly for participating states, and they have to amend the details of their

existing national legislation to comply with the transparency rules under the agreement and train procuring officials to get acquainted with the rules.

Soft law with a high level of states' discretion in implementation may arguably help lower the possibly high implementing costs of procurement rules. Firstly, soft law in terms of discretion may lower the implementing costs by offering states a wider range of choices in implementing their obligations, from which states are more likely find a cost-effective way to transpose international rules into national legislation.

For instance, most regimes including the GPA, the EC and the NAFTA (see Section 3.3.5.4b, Section 4.1.4.4b and Section 4.3.4.4b) require states to make available an independent body to review complaints from aggrieved suppliers. Instead of prescribing a certain type of courts to take on this role, all of the above regimes provide for a number of possibilities for members to choose from including either an administrative or judicial authority or both which meet the specified independence and procedural requirements. Accordingly, states can freely establish or designate challenge review bodies depending on their own legal systems and available resources.

Secondly, soft law with a high level of discretion may also reduce the need for states to revise the details of their existing legislation. For example, the EC public sector directive provides that as a general rule the period for the receipt of tenders in open tendering shall not be less than 52 days from the date of publication of notice of intended procurement.¹⁰ This provision allows states to set their own general minimum time limit of any days longer than 52 days for the receipt of tender in open tendering. Assuming that a state has 50 days in its national procurement law, it thus needs to change it.

However, in the case of the GPA which confers a slightly wider scope of state discretion on this issue, requiring that such a general minimum time limit is no less than 40 days, there is then no need for this state to make any changes of its rule. Or as with the general requirement of 'reasonable' or 'sufficient' period of time suggested for the proposed transparency agreement (see Section 3.3.5.3),

¹⁰ the EC Public Sector Directive Article 38.2

the state with 50 days in its law will have no pressure in practice to change its law until the relevant court interprets the requirement as implying a certain number of days shorter than 50 days.

9.3.1.2 Reserved regulatory autonomy to implement legitimate national goals

As pointed out in Section 2.3.2, the choice of soft law can largely reduce the high sovereignty costs an international agreement may involve, and soft law in terms of discretion, which is relevant under this section, can significantly reduce sovereignty costs by leaving states more discretion in negotiating and implementing their obligations. In the particular area of public procurement, the use of soft law with a high level of states' discretion may operate to avoid overly restrictive approaches to national regulatory freedom.

International procurement rules with a trade objective are designed to ensure market access and not directly promote economic efficiency or social welfare. On the contrary, such procurement rules may often be at odds with such national goals. Since trade barriers in public procurement are embodied in a wide range of administrative and regulatory measures, the introduction of international procurement disciplines will inevitably add significant constraints on national regulatory autonomy.

The challenge here is to develop procurement rules which effectively tackle protectionist practices but without infringing the right of countries to pursue legitimate national goals. A common approach of many procurement regimes is to set out general principles of non-discrimination and detailed procedural requirements to ensure transparency. Both such general principles and detailed transparency requirements may potentially affect states' to obtain the 'primary' objectives such as 'value for money' and 'integrity' and the legitimate 'secondary' objectives such as social equality and environmental protection.

The principle of non-discrimination generally prevents states from using procurement to promote social or environmental objectives in a way which discriminates against foreign suppliers. For instance, under the principle of discrimination, governments are not allowed to reserve certain

procurement contracts for certain disadvantaged groups or give price preference in evaluating the bid to firms which meets national standards of sound environmental policy. Further, as discussed in Section 8.3.1.3, states' ability of pursuing legitimate domestic goals may also be affected by detailed procedure rules in procurement even if there is no discrimination.

The most notable advantage of soft law with a higher level of discretion is that it largely reserves states' regulatory freedom to implement legitimate national goals. Firstly, soft law in terms of discretion can lower sovereignty costs by allowing states to freely decide the scope of their procurement contracts subject to international regulation. The flexible approach in coverage allows states to retain regulatory freedom over certain entities or types of procurement not only for protectionist concerns but also for legitimate non-economic concerns. Under the GPA (see Section 3.2.3), for instance, many states include specific derogations to exempt certain existing programmes under which procurement may be used as a tool of social or environmental policy. By way of contrast, the EC procurement regime (see Section 4.1.3) lays down uniform coverage rules for all Member States, and therefore rules out any possibility of derogation for certain procurement programmes under national social or environmental policies.

Secondly, soft law in terms of discretion can significantly mitigate the infringement of international procurement rules on national regulatory autonomy by leaving states with considerable discretion in implementing their obligations. Most procurement agreements include only a limited body of rules on key issues, under which states have different degrees of discretion to tailor their own procurement rules to the needs of specific domestic objectives.

Generally speaking, the more restrictive the international rules are, the less discretion states have in implementation, and then the weaker ability they have in achieving their domestic objectives. Hard law with a lower level of state discretion in a procurement agreement may hinder states' aim to get value for money and efficiency in procurement as well as to use procurement as a policy tool to achieve secondary objectives.

As for states' primary aim of getting value for money and efficiency in procurement, hard law transparency rules of procurement agreements may largely affect states' ability to achieve it. For example, many procurement agreements such as the GPA (see Section 3.2.4.3), the EC (see Section 4.1.4.3) and the NAFTA (see Section 4.3.4.3) require the use of a certain kind of formal competitive tendering procedures as the standard method for normal procurement, with the possibility to use more informal procurement methods under clearly defined exceptional circumstances. This requirement largely restricts procuring entities' freedom to choose more informal procurement methods for a particular procurement.

In view of the recent trend of many developed countries opting for more informal procurement methods as explained in Section 8.3.1.1, states' ability to pursue value for money can be limited by virtue of their constrained discretion over the choice of procurement methods. Although the use of formal competitive tendering may ensure transparency, promote competition and reduce the chance of corruption, it is time-consuming, costly and inflexible process. In the words of Arrowsmith, 'a state with professional officials buying in well-developed markets with little corruption might well find that the costs of open procedures (a kind of formal competitive tendering procedure) often outweigh the benefits'.¹¹

In this regard, the use of soft law with a high degree of discretion can lower sovereignty costs by providing states with more freedom of choice in pursuing value for money. This can be demonstrated by reference to the relevant rules of the COMESA directives. As examined in Section 4.5.4.3, unlike the GPA, the EC and the NAFTA, the COMESA allows states to freely decide over what kind of situations can justify the use of alternative methods or how alternative methods shall proceed. States mainly relying on strict transparency rules can formulate stringent requirements on the derogations from formal competitive tendering, whilst others in favour of greater reliance on the exercise of professional judgement of procuring officials are free to permit the use of other informal procedures in a broad range of circumstances.

¹¹ See S. Arrowsmith, 'Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the World Trade Organization', (2003) *J.W.T.* 37(2) 283-303 at p.299

Meanwhile, the general principles of non-discrimination and detailed transparency rules contained in procurement agreements also restrict states' ability to employ procurement to implement legitimate secondary objectives. Discriminatory industrial policies are precluded by national treatment principle which targets at protectionist practices under most procurement agreements. However, social and environmental policies without any discriminatory effect may also be prohibited by the transparency rules on contract award procedure.

The EC's rules on award criteria serve as a good example on this point. As examined in Section 4.1.4.3, the EC public sector directive does not generally allow environmental considerations to be included as contract award criteria unless they relate to the 'subject matter of the contract'. For example, it is unacceptable to give price preference to firms with a generally good environmental records, but preferences can be given to firms which produce and deliver the procured goods in a most environmental-friendly way. Clearly, this requirement rules out many award criteria relating to secondary policies.

The GPA, in contrast, may probably represent a softer approach in terms of the freedom of states using award criteria to implement social or environmental policies in procurement. As argued in Section 3.1.2.3, social or environmental criteria which have nothing to do with the contract awarded could possibly be considered under the GPA. In the absence of the relevant judicial interpretation, states may enjoy a broad discretion in practice to take into account a wide range of social or environmental considerations as award criteria.¹²

In addition, as generally argued in Section 2.3.2, soft law in terms of discretion can reduce sovereignty costs by serving as a softening device to circumscribe the obligatory force of hard law rules. By incorporating such softening devices into a procurement agreement, participating states can be protected in case the obligation turns out to have hidden sovereignty costs.

This function of soft law is very important in the area of procurement taking into account its possibly close connection with national security and stability. Public procurement includes the

¹² However whether the GPA member states are actually allowed to use award criteria not relating to the contract's subject matter is still subject to the future judicial interpretation.

government's purchasing of a wide variety of goods and services, ranging from office equipments such as desks and paper to military weapons including tanks and missiles.

When it comes to certain defence procurements closely related to national security, sovereignty costs of free trade rules are extremely high. For example, it would damage national security if a state had to purchase military helicopters from enemy states at war according to international procurement rules. This is not limited to defence procurements. The procurement of certain types of civil goods or services can also involve extremely high sovereignty costs owing to their important impact on national economy (see Section 7.3.1.3). Consequently, governments should be allowed to depart from international procurement disciplines when it is necessary for the protection of their essential national interests.

One frequently used softening device is the escape clause. Most binding regimes including the GPA, the EC and the NAFTA contain certain exemption and derogation clauses, which limits the obligatory force of the relevant agreements, albeit to different extents. For example, the GPA Article XXIII permits states to derogate from their obligations under the agreement for the protection of national security interest and other specified public interests such as protection of health. Such escape clauses allow states to have more discretion in implementing their hard law obligations and protect them from being locked into unfavourable situations where they find the implementation of their obligations is detrimental to their essential national interests.

9.3.2 Possible disadvantages of soft law with a higher level of discretion

Although the use of soft law with a high level of state discretion can significantly lower implementing costs and sovereignty costs of an international agreement. It also has some possible disadvantages as pointed out in Section 2.4. Firstly, soft law in terms of discretion may affect the credibility of legal commitments and provide states opportunities to shirk from their obligations; and secondly, it may entail higher negotiating costs owing to the flexibility it offers in negotiation. Both of these disadvantages are very relevant to a procurement agreement.

9.3.2.1 Weakened credibility of obligations

The choice of discretionary soft law in a procurement agreement may arguably weaken the credibility of the agreement by making it harder to determine if a participating state is living up to its commitments and thus increasing the chance for opportunistic states to shirk from their obligations.

Soft law rules that grant states a very broad discretion in implementation may sometimes make it very difficult to determine states' compliance. The 'best endeavour' obligations furnish an example. Even if such discretionary soft law rules are couched in a binding form, it will only constitute a binding obligation to make best endeavour to achieve a certain outcome.

Failure to achieve the specified outcome does not necessarily constitute the non-compliance of the obligation. States comply with their obligation as long as they have used their 'best endeavour' but in practice it is often hard to determine whether states have done so. As with the previous example of the GPA Article V.3, it is difficult to know or challenge whether a particular developed country has failed to make their 'best endeavour' to include entities of export interests to developing countries

Such discretionary soft law rules in procurement may create opportunities for states to circumvent their obligations. As explained in Section 7.3.2, states' compliance with international procurement rules can be severely threatened by significant political influence from their domestic vested interests. Under the strong political pressure, the discretion provided by soft law in implementing legitimate national objectives can possibly be abused by states to support discriminative procurement policies.

The EC's experience on defence procurement provides an example of this possibility. As examined in Section 4.2.1, the EC Treaty provides a general exemption from its procurement rules for certain defence procurements which states consider necessary for the protection of the essential interests of their security. However, because of the discretionary wording of this Treaty provision, this exemption has been extensively used by the EC states in practice, and the majority of the defence contracts within the EC are awarded on the basis of discriminatory national procurement policies.

However, the possibly weakened credibility of discretionary soft law might be remedied for by introducing an effective monitoring system (to be discussed at Section 10.3.2.1), for instance, the establishment of a self-reporting system. Also, the credibility of discretionary soft law rules may also be enhanced by private party enforcement, as most procurement agreements demand the availability of national challenge procedures for aggrieved suppliers, which may, to a large extent, empower private suppliers motivated by self-interest to enforce the agreed procurement rules.

9.3.2.2 Increased negotiating costs

In contrast with the function of the other three dimensions of soft law to lower negotiating costs, soft law in terms of discretion may increase the negotiating costs of a procurement agreement.

As discussed in Section 7.3.1.1, hard law procurement agreements often entail high negotiating costs owing to the complexity of their procedural rules and coverage rules. The choice of soft law granting states a high level of discretion may help reduce the negotiating costs by making it easier for states to agree on procedural rules especially for controversial issues. However, it can be argued that soft law in terms of discretion can also raise negotiating costs, in a more significant way, by complicating the process of market access negotiations for a procurement agreement.

Soft law in terms of states' discretion in negotiation allows states freely to offer their country-specific coverage, which could be quite different in terms of covered entities and contracts according to their own particular considerations. This difference in coverage for different states may lead to the problem of 'reciprocity'. The difference in coverage along with the principle of reciprocity adds much more difficulty to negotiating a binding procurement agreement. As discussed in Section 7.3.1.1, considerable negotiating energy was devoted to negotiating the coverage issue under most procurement agreements, as demonstrated by the GPA's negotiating history.

Furthermore, the use of soft law with a higher level of states' discretion exclusively applicable to developing or least developed countries may also increase the negotiating costs of a procurement agreement. It takes time and resources for developing or least developed countries to bargain for

transitional measures as well as for all participating states to agree on them. The relevant transitional provisions included in the agreement can be drafted in a very precise and concrete way. For instance, as examined in Section 4.3.4.2, the NAFTA formulates specific transitional provisions for Mexico indicating the precise degree of exemption as well as the concrete sectors and entities to be excluded.

It can be seen that discretionary soft law employed by most procurement agreements such as the GPA in negotiating coverage is labour intensive and easily loses the benefits of a multilateral deal as negotiators bargain bilaterally. However, it has been argued in Section 7.3.1.1 that a high level of states' discretion in negotiation is crucial for most procurement regimes in terms of archiving a reasonably wide coverage and participation, and the hard law approach of the EC just cannot be copied by other procurement regimes in the short run.

As for a procurement agreement at the multilateral level, a short-term solution may arguably lie somewhere between the hard law approach of the EC and the current soft law approach of most procurement regimes. For example, in view of the difficulty in persuading the GPA Members to adopt more principled coverage approach in the short term, it was suggested by Wang that 'indicative criteria' capable of demonstrating the effective elimination of government control or influence over an entity's covered procurement should be fully explored.¹³

According to Wang, such indicative criteria can serve as guidance on what entities should be tabled for accession negotiation.¹⁴ This suggestion can largely address the GPA's current difficulty in preparing the offer of entity coverage due to the lack of unified practices but leaving states' broad discretion in negotiation unaffected.

9.4 Conclusion

In this section, soft law in terms of a high level of states' discretion in negotiation and implementation has been argued to serve as a second best or even as a better alternative to the

¹³ P. Wang, 'Coverage of the WTO's Agreement on Government Procurement: Challenges of Integrating China and Other Countries with a Large State Sector into the Global Trading System', *J.I.E.L.* 2007 10(4), at pp887-920

¹⁴ Ibid

relevant hard law.

Soft law in terms of discretion may be adopted where hard law cannot be attained. Apart from the exceptional case of the EC procurement regimes, currently it seems inevitable for procurement agreements to be soft in terms of discretion in negotiating coverage in order to achieve a reasonably broad coverage for every participating state. Moreover, soft law with an even higher level of discretion exclusively applying to developing countries has been argued indispensable for a procurement agreement in terms of attractive wider participation, given the economic and political reality of developing countries.

Compared with their developed counterparts, developing countries tend to incur more political costs to join in a procurement agreement and may lack of technical and financial ability to implement the agreement. Soft law with a higher level of discretion may address the above concerns of developing countries, and in practice, it has been frequently resorted to, and increasingly valued in international procurement regulation.

In addition, discretionary soft law may foster compromise on controversial issues of a procurement agreement, and to agree on binding rules on voluntary aid actions. Apart from the function of soft law to facilitate agreement among negotiating parties, it is also desirable in terms of providing a degree of regulation, and potentially evolving into harder law over time. However even discretionary soft law with no prospect of developing into hard law has also argued to be better than no law at all.

Furthermore, soft law with a higher level of discretion can sometimes be considered more desirable than the relevant hard law even if the latter is attainable. In the area of procurement, the most notable advantage of soft law in terms of discretion is the reduced sovereignty costs of a procurement agreement.

Taking into account the fact that trade barriers in public procurement are embedded in a wide range of administrative and regulatory measures, it is virtually impossible to develop effective multilateral trade disciplines in procurement without interfering with national sovereignty. Nevertheless, it is both desirable and feasible to develop procurement rules without unduly limiting

states' regulatory freedom. The use of soft law with a high level of discretion in negotiation and implementation enables states to retain entirely regulatory autonomy in particular procurement contracts by excluding them from their coverage offers, as well as provides states with more freedom of choice in pursuing legitimate national goals.

Regarding international procurement regulation, it is important to strike an appropriate balance between the free trade goal and states' right to implement legitimate domestic policies. As pointed out above, not all soft law with a high level of state discretion will develop into hard law. It can be further argued that the process of soft law turning into hard law cannot necessarily be considered as a positive step.

It was noted that the EC regime has been moving markedly from its original broad framework character in the direction of a system of common rules, which have significantly reduced the discretion left to its member states. However, the desirability of the EC's current trend towards harder law is doubtful, given the different national circumstances and values of its member states.¹⁵ In contrast, the current GPA has been argued to provide a proper regulatory balance.

Another major advantage of soft law in terms of discretion is to lower implementing costs, which is especially important for developing countries with limited financial and technical resources available. The adoption of soft law in procurement offers states a wide range of choices in implementing their obligations, from which states are more likely find a cost-effective way. Also, it reduces the need for states to revise the details of their existing legislation.

Despite the above-mentioned advantages, soft law with a higher degree of discretion may possibly lead to the weakened credibility of rules and the increased negotiating costs. The choice of discretionary soft law in procurement makes it more difficult for states to determine each other's compliance and thus raise the chance for opportunistic states to shirk from their obligations. However, this may possibly addressed by establishing both effective international monitoring systems and domestic challenge procedures.

¹⁵ see S. Arrowsmith, 'The Past and Future, Evolution of EC Procurement Law: from Framework to Common Code' (2006) 35 *P.C.L.J.*, at pp 337-384

Moreover, the choice of discretionary soft law raises the negotiating costs way by complicating the process of market access negotiations. In a short run, it has been argued that the optimal solution to the coverage rules of a multilateral procurement agreement may lie somewhere between the EC's hard law approach and the GPA's soft law one such as elaborating certain 'indicative criteria' to facilitate negotiations.

Chapter 10 Analysis of advantages & disadvantages of soft law in regulating public procurement from a trade perspective – the Dimension of Delegation

10.1 Introduction

The fourth dimension of soft law is delegation, which refers to the degree to which states have delegated the power to independent third parties, including courts, arbitral tribunals and administrative organisations, to interpret and apply the agreed rules. As elaborated at Section 2.2.4, a hard law enforcement system with a high level of delegation is characterised by the presence of independent third parties with the authority to adjudicate disputes, to interpret the agreed rules and apply them to particular facts.

Also, the degree of power delegated to such third parties in enforcement may vary. The delegation of power is at its highest level when the designated third parties are left with a significant discretion to interpret the rules and empowered to give legally binding rulings, which is the case under the EC regime (see 4.2.4.4a). At the other end of spectrum, soft law with a very low level of delegation does not involve the presence of any independent adjudicative bodies but instead provides a forum for negotiations and consultations such as the APEC rules (see Section 4.6.4.4a). The enforcement system of most procurement regimes fall somewhere between these two ends.

In Section 2.3, it has been argued that soft law with a low level of delegation can be a second best to the relevant hard law when the latter is temporarily unattainable. In this regard, soft law can be used to avoid the failure of international negotiations and to provide a certain degree of regulation which has a potential to develop into hard law regulation. This will be discussed at Section 10.2. However, soft law in terms of its low level of delegation may sometimes be regarded as a better alternative to the relevant hard law and this will be considered at Section 10.3.

10.2 Soft law in terms of its lower level of delegation as a second best to hard law with a higher level of delegation

Soft law with a lower degree of delegation may be chosen in the case of unachievability of the relevant hard law. As argued in Section 2.3.1, it is generally difficult to mobilise political support for the establishment of a strong judicial body that would significantly restrict the autonomy of participating states. This is particularly true in the area of international procurement law because, for the reasons elaborated in Section 7.2, public procurement is a sensitive subject area in which states are often reluctant to relinquish their regulatory freedom. Soft law with a low level of delegation can be utilised to foster agreement among negotiating parties by mitigating the political opposition from domestic vested interests.

As for an international procurement agreement, it is often politically difficult for states to agree on a hard law enforcement system under which an independent third party is delegated with the power to interpret the agreed rules, to adjudicate disputes, to issue binding rulings and to award remedies in disputes.

This difficulty can be demonstrated by reference to the initiative to negotiate a transparency agreement in procurement at the WTO level. As pointed out in Section 7.2, substantial disagreements over the issue of dispute settlement procedures, i.e. over the application of WTO Dispute Settlement Mechanism ('DSU') and the requirement for the availability of national challenge procedures, were considered as one of the three major obstacles on the road to a conclusion of the proposed transparency agreement.¹ Insisting on the use of a hard law enforcement system by some negotiating parties might have reduced the likelihood that some others, notably developing country parties, would accept the proposed new commitments in procurement, leading to a breakdown in the negotiations as a whole.

Furthermore, behind the apparent disagreements over specific aspects of the proposed transparency agreement, it has been argued in Section 7.2 that one of the main reasons for the failure

¹ See Priess and Pitschas, 'World Trade Organization: the Proposed WTO Agreement on Transparency in Government Procurement – Doha and Beyond', P.P.L.R. 2002, 2, NA13-18 at pp.14-15

to negotiate the agreement might lie in the resistance of some states to give up their freedom to use procurement for illegitimate purposes including protectionism, political patronage and corruption.

Arguably, it would be more likely for opposing states to accept a set of transparency rules in procurement which are soft in the sense of no coercive measures to enforce them though it may not be the case for those which oppose the very idea of entering into a procurement agreement. In this regard, the choice of soft law enforcement system is not a systematic flaw but rather a deliberate device to mitigate strong oppositions from certain negotiating parties as an agreement with a relatively softer enforcement system is preferable to no agreement.

In addition, certain procurements, because of the very nature of procured products and services, are extremely sensitive and closely connected with national sovereignty and security. As for a procurement agreement regulating procurements of such a nature, it is just politically impossible for states to agree on any hard law enforcement mechanism for them. This is the case with the EDA Code which addresses the defence procurements closely related to states' essential interests (see Section 4.2).

Apart from the sensitive nature of procurement, the choice of soft law in terms of delegation for a procurement agreement can also be attributed to the relevant institutional context in which the agreement is reached. As for loose international groupings as exemplified by the APEC, no binding obligations are required of its participants; and decisions are reached by consensus and commitments are undertaken on a voluntary basis. Therefore, it is not surprising that the APEC NBPs contain no hard law enforcement measures either (see Section 4.6.4.4a).

The sensitive nature of procurement as well as the informal political context may sometimes prevent states from agreeing on a hard law enforcement system for a procurement agreement. Under the circumstances where hard law with a high level of delegation is unattainable, soft law can be valuable in terms of facilitating negotiations and promoting agreements. Furthermore, it remains possible for a soft law enforcement system to evolve into a comparatively harder one over time, which can be demonstrated by the development of the GPA enforcement procedures.

As discussed in Section 3.2.4.4a, under the old GATT system, the Tokyo Round Agreement on Government Procurement ('AGP') delegated a very low level of authority to its inter-governmental Dispute Settlement Body ('DSB'), and the relevant dispute settlement rules optioned for political consensus in dispute settlement rather than legal certainty in rule application.

However, as a result of the Uruguay Round negotiations, the GATT system has been replaced by the WTO as an international organisation and the dispute settlement system of the original GATT has also been transformed from consensus-based to quasi-judicial. A number of reforms were adopted towards the 'hard' end of the delegation spectrum. The new GPA reaps the benefits of the more judicialised WTO dispute settlement procedures by explicitly referring to the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes ('the DSU')² as its own dispute settlement procedures with a few adaptations taking into account the particular features of procurement disputes.

Compared with its GATT predecessor, the new GPA has significantly enhanced the level of delegation to the DSBs. Notably, it strengthens the independent adjudicative power of its DSBs by removing the right of individual states under the old AGP to block the establishment of panels and the adoption of panel rulings.

Another important hard law element in the WTO dispute settlement system is the introduction of a standing Appellate Body ('the AB') delegated with the task of reviewing the legal aspects of panel reports. The appellate report, like the panel report, is subject to the DSB's automatic adoption. The establishment of the AB indicates the separation of the judicial power from the other organs of the organisation, and its standing nature also contributes to the consistency of decisions.

Apart from the applicability of a more judicialised inter-governmental dispute settlement system to GPA disputes, the most innovative hard law feature of the current GPA is the mandatory requirement for establishment of a national challenge system, under which states may confer the authority on national courts or on other independent review bodies to hear challenges by aggrieved

² Available at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm

suppliers. In essence, as explained at Section 3.2.4.4b, it is required that such challenge review bodies should be delegated with the power to adjudicate disputes, give rulings, and award damages or even rapid interim measures to correct breaches of the agreed rules, which may result in the suspension of the procurement process.³

It was pointed out in Section 3.2.4.4b that some WTO agreements include the obligation to set up similar domestic review bodies whilst others do not. Bajno argued that national challenge review is provided for the violations of certain WTO rules which will cause the biggest adverse material effect on business operators⁴.

Although the main area of the WTO rules which exempts states from setting up a domestic review system is the rules governing internal measures, the rules governing internal measures are covered whenever they are crucial obligations in the relevant agreement.⁵ This is the case with the GPA under which the rules addressing internal measures are core provisions, because trade barriers in procurement are mainly represented by national administrative and regulatory measures and the interests of foreign suppliers are most harmed by discriminatory procurement policies violating the National Treatment rule.

Furthermore, in the case of the GPA, compared with its inter-governmental dispute settlement procedures, the requirement for the availability of national challenge procedures arguably responds more closely to the specific nature of individual procurement disputes. First of all, this requirement aims at expediting the dispute settlement process, which is deemed essential in the context of procurement. This is because the procurement proceeding is often a one-off event as opposed to normal trade activities which involve a longer duration.

It is possible that the contract concerned may be concluded or even partly performed by the time the dispute is resolved, whilst it often contradicts public interest to delay contract award proceedings pending a dispute settlement procedure. Apparently, the longer period it takes to resolve disputes, the

³ See the GPA Article XX 6

⁴ G. Bajno, *The Private Right to a Remedy under Public International Law – The Law of the World Trade Organisation: A Case-Study*, section 7.3

⁵ *ibid*

more problematic the situation will be. By providing direct access for aggrieved suppliers to domestic adjudication, suppliers can save time lobbying their governments to initiate the lengthy and cumbersome inter-governmental dispute settlement procedures.

Secondly, compared with inter-government DSMs, national challenge procedures can be argued to provide a better channel to resolve individual procurement disputes. Most inter-governmental DSMs, because of limited resources available, are often incapable of dealing with possibly a large number of day-to-day individual procurement disputes.

More importantly, national review bodies, compared with inter-governmental ones, are in a better position to handle conflicts of interest when hearing a specific procurement dispute. For instance, as we have seen, any interruption of procuring proceedings or interference of concluded procurement contracts may affect public interest, whilst in some cases the suspension of award procedures or even concluded contract must be awarded pending the hearing in order to preserve commercial opportunities for aggrieved suppliers.

National review bodies are arguably in a better position than its inter-governmental counterpart to balance all interests likely to be affected and then decide whether such measures shall be awarded. Also, in view of the sensitivity of the procurement issues (see Section 7.2), a decision reached by national review bodies may be more politically acceptable and more easily implemented than one made at inter-governmental level.

Thirdly, in addition to international DSMs, the availability of national challenge systems may give more teeth to international procurement rules. It provides an important deterrent to non-compliance with the rules. Private suppliers are the primary parties to the procurement, and thereby they have the best opportunities to spot breaches as well as the greatest incentive to bring proceedings.

The right of private suppliers to file complaints before national review bodies increases the chance of non-compliance being detected and challenged and thus improves deterrence. Furthermore, as argued by Arrowsmith, the introduction of national challenge procedures also removes the possibility for governments to limit enforcement as a quid pro quo for a restrained approach by other

parties.⁶ The right of private suppliers to challenge, which is not dependent on the discretion of their governments, helps to ensure that the free trade rules are not undermined by protectionists influence at the enforcement level.⁷

Despite the desirability of national challenge procedures as mentioned above, it was impracticable for the old AGP to go that far to include it. Actually, the possibility of using domestic dispute settlement was proposed for the old AGP but this turned out to be too ambitious to accept.⁸

However, the experience of old AGP showed that relying solely on the inter-governmental DSMs is inadequate to address individual procurement disputes, which was highlighted in the Trondheim case⁹ during the course of the new GPA negotiation. In fact, states were reluctant to utilise it to resolve individual violation of the rules and there were only four disputes initiated under the old AGP.¹⁰ Having learnt from the past experience, the GPA states implicitly agreed that inter-governmental WTO DSMs could not always sufficiently address complaints over specific procurement awards and national challenge procedures might be more desirable in terms of dealing with individual complaints under the agreement.

More importantly, the GPA's plurilateral character and limited membership arguably made it possible for states to accept the lessons from the old AGP. The successful inclusion of the requirement for national challenge procedures in the current GPA could be partly attributed to the simultaneous evolution of regional procurement regimes such as the EC and the NATFA.

⁶ See Arrowsmith (2002) 'The Character and Role of National Challenge Procedures under the Government Procurement Agreement', *P.P.L.R.* 4 at p.253

⁷ *ibid*

⁸ See Blank, A and G. Marceau (1996), 'History of the Government Procurement Negotiations Since 1945', *P.P.L.R.* 4, 77-147 at p.93

⁹ In Trondheim, the US complained that Norway illegally awarded to a Norwegian company the construction of electronic toll collection system in the city of Trondheim. The panel held that Norway had not complied with its international obligations in the conduct of the procurement and recommended Norway to admit the illegality of its act and to provide guarantees for non-repetition. The panel, however, declined the US request for annulling and recommending the procurement process for the contract concerned which had already been concluded by the time the panel decision was reached. The panel did not consider it appropriate to make such a recommendation mainly for two reasons: the first one was that no legislative provisions or precedents could be found in dispute settlement under the GATT system to justify panels to make recommendations of a retrospective nature; the second was that such a recommendation might be disproportionate, involving waste of public resources and possible damages to the interests of third parties. See Norway – tendering procedures on Trondheim toll ring project (BISD 40S/319)

¹⁰ They are available at http://www.wto.org/english/tratop_e/gproc_e/disput_e.htm

It can be seen that the GPA rules on national challenge procedures are largely modelled on the relevant EC legislation.¹¹ It also made a consensus easier to be reached that many original GPA parties had already put similar national challenge procedures in place as a result of their membership to those regional agreements such as the EC Member States.

However, this is not to suggest that all soft law procurement instruments would follow the step of the GPA to evolve into hard law. For instance, the APEC economies never sought and probably never will seek to create a regional institution with interpretative, adjudicative or rule-making powers.¹² As a result, the APEC NBPs, in the foreseeable future, will probably remain soft in term of its low level of delegation in enforcement. Similarly, it is unreasonable or even undesirable to expect the EDA Code to adopt any hard law enforcement measures at a later stage since the extremely sensitive nature of its regulated matter will remain unchanged. Nevertheless, even soft law agreements without any possibility to harden up in the future have their own values and are better than no agreement at all.

10.3 Soft law in terms of its low level of delegation as a better alternative to hard law with a higher level of delegation

10.3.1 Possible advantages of soft law with a lower level of delegation

As generally argued in Section 2.3.2, soft law in terms of delegation may sometimes be more desirable than the relevant hard law even where the latter is achievable. This is because soft law has its own independent advantages and may produce similar practical effects of hard law but with reduced costs. The use of soft law can reduce the costs of negotiating and implementing an international agreement. More importantly, it can largely avoid unanticipated sovereign costs associated with hard law involving a high level of delegation in enforcement and thus protect states'

¹¹ Namely, the EC Remedies Directives (Directive 89/665)

¹² See Janow, M.E. (1996/1997), 'Assessing APEC's Role in Economic Integration in the Asia-Pacific Region', 17 (2-3) *N.J.I.L.B.* 947 at p.948

regulatory autonomy to achieve legitimate national goals. All the above arguments are applicable in the area of public procurement.

10.3.1.1 Reduced negotiating costs

The first advantage of soft law over hard law in terms of delegation is that soft law may help reduce negotiating costs of a procurement agreement. As discussed in Section 7.3.1.1, the negotiating costs of hard law procurement agreements tend to be very high because of, first sensitive nature, and secondly, complex nature of procurement. Soft law with a low level of delegation in enforcement may arguably reduce the high negotiating costs of a binding procurement agreement.

As shown in the negotiating process of both the GPA (see Section 3.2.4.4) and the WTO transparency agreement in procurement (see Section 3.3.5.4), the dispute settlement mechanism was always one of most controversial issue when negotiating a binding procurement agreement. Many countries especially developing countries do not want to subject their procurement policies and decisions to formal dispute settlement measures either internationally or domestically. Even for those prepared to accept hard law enforcement mechanisms, the precise content of the provisions governing national challenge procedures may not be easily agreed upon, as the litigation culture differs from one state to another. In this regard, the choice of soft law enforcement system may help reduce negotiating costs by accommodating the differentiated views of negotiating parties on enforcement.

Moreover, soft law with a low level of delegation may arguably make it easier for states to agree on other procedural rules and the coverage rules of a procurement agreement since the agreed rules will not be enforceable through coercive hard law measures.

As pointed out in Section 7.3.1.1, most international procurement agreements lay down transparency procedural rules governing the award of contract, which are often comprehensive and complicated, and thus potentially very difficult for countries with different regulatory approach to agree on a single set of rules. It has been argued in Section 8.3.1.1 that vague soft law may help

significantly reduce the high negotiating costs of a binding procurement instrument by making it easier for states to agree on the relevant procedural rules.

In a similar way, soft law with a low level of delegation in enforcement can also lower the negotiating costs of a binding procurement agreement. Taking the rules on time-limits as an example, many procurement regimes include provisions on the minimum time-limits for submitting tenders to ensure that suppliers are granted sufficient time to prepare and submit their tenders, whilst the complexity of the situations involved and the difference among states make it very hard for states to negotiate and agreed on the relevant provisions.

The choice of soft law in terms of delegation can help states reach an agreement on this issue. If the relevant provisions are to be formulated only in vague terms such as a 'sufficient' or 'reasonable' period of time, a soft law instrument without delegating the interpreting authority to a third party will allow states a significant discretion in defining the precise meaning of these terms, which may arguably make the provisions more acceptable to states of diversified conditions. Even if the provisions include precise rules which largely restrict states discretion in implementation, states which are not entirely happy with the rules would be more likely accept the rules if they are not going to be enforced by coercive measures. In both cases, it seems easier for states to agree on the provisions on time-limits.

Regarding the negotiating costs associated with the coverage rules of a procurement agreement, soft law in terms of delegation can reduce the costs only in the sense that it makes a uniform approach in coverage more likely to be achieved which avoids complicated tit-for-tat bilateral negotiations. It can be assumed that states might be more willing to subject more entities and contracts to international regulation if soft law with a low level of delegation is adopted, which leaves room for political bargaining at the enforcement stage. The more entities and contracts each individual state is prepared to offer, the more likely a uniform and reasonably broad coverage can be achieved for all negotiating states.

However, it has been noted in section 7.3.1.1 that a uniform coverage can hardly be obtained in most binding procurement regimes in the foreseeable future if a comparatively wide coverage is to be attained. In this regard, soft law in enforcement will not make much difference in the negotiating costs of coverage where a flexible approach is adopted and the principle of reciprocity is maintained in negotiating coverage. This is because states may still hold their market access concessions as a strategy to force others to open up their markets even if they are ready to open their market, and therefore the costs of bilateral bargaining among states cannot be mitigated by the introduction of soft law with a lower level of delegation in enforcement.

10.3.1.2 Reduced implementing costs

Next, soft law with no delegation to domestic review bodies entails lower implementing costs for states. Apart from the costs of amending the existing national legislation and training procurement officials, the implementing costs of a procurement agreement may be increased by its requirement of establishing national challenge procedures. The costs of setting up and maintaining a national challenge system can be fairly high, especially for developing countries which lack financial or technical capability to do so. As a result, soft law that does not contain such a requirement partly reduces the implementing costs of procurement agreements.

Moreover, soft law involving no delegation of adjudicative power to inter-governmental and domestic bodies avoids the potential litigation costs. It is often costly for governments or procuring entities to respond to legal proceedings brought against them for alleged breach of the agreed rules. Besides the potential litigation costs, extra burden may also be imposed on governments or procuring entities in order to reduce the risk of legal challenge.

This represents significant costs in many hard law regimes. For instance, in the case of the EC, an impact assessment report on remedies showed that the increased risk of litigation forces the procuring entities to provide arguably unnecessarily more detailed and documentation¹³ and the

¹³ See Europe Economics (2006), *Evaluation of Public Procurement Directives*, Markt/2004/10/D Final Report at 4.116 (e)

actual litigation costs are also substantial: around 2.5% of invitations to tenders published in the EC Official Journal lead to litigation and the average cost of a procurement case might be between 10% to 20% of contract value.¹⁴

10.3.1.3 Avoidance of unanticipated constraints on states' regulatory autonomy to pursue legitimate national goals

The delegation of legal authority to an independent international judicial or review body may, as explained in Section 2.3.2, provide the greatest source of unanticipated sovereign costs. The designated bodies may exert their delegated authority in ways that go beyond the initial intentions or anticipations of the contracting states, which may significantly restrict states' regulatory freedom in many respects. In contrast, soft law with a low level of delegation may largely protect states from such unanticipated sovereignty costs.

This advantage of soft law deserves special attention in the area of procurement. As elaborated in Section 9.3.1.2, trade barriers in public procurement are embodied in administrative and regulatory measures and therefore the introduction of international procurement disciplines will inevitably put certain constraints on national regulatory autonomy; however, the right of states to pursue legitimate national goals such as 'value for money' and 'integrity' and social or environmental secondary objectives in procurement should be protected.

A balance between international trade goals and national legitimate concerns should be struck when drafting a procurement agreement. As for a hard law procurement agreement, the exercise of judicial authority by the delegated body in interpreting and applying the agreed rules may threaten to upset such a delicate regulatory balance achieved by negotiating parties.

The best example on this point is the ECJ in interpreting the EC Treaty principles and procurement directives. As discussed in Section 4.1.4.4a, the EC procurement rules were initially intended to be a broad framework within which states should have significant freedom to tailor their

¹⁴ Ibid. at 7.60

own procurement rules to the needs of specific domestic objectives; however in practice such regulatory freedom of states has been increasingly limited and rapidly diminishing mainly as a result of the ECJ's creative judicial interpretation.

As elaborated in Section 4.1.4.3, by looking for the 'spirit' behind the languages of legal provisions rather than the languages of provisions themselves, the ECJ tends to interpret both the EC Treaty and procurement directives in an expansive way to impose detailed requirements without explicit grounding in the legislative text or the original intent of Member States. Many issues which are not mentioned in the legislation and were previously believed to be left to the choice of member states are now regulated by the rules created by the ECJ through its expansive judicial interpretation. Consequently, states' ability to implement their national procurement policies has been increasingly restricted.¹⁵ This risks undermining the carefully achieved regulatory balance between the goal of free trade and other domestic concerns.

By way of contrast, soft law with a low level of delegation in enforcement can largely avoid the unexpected high sovereign costs to states. In fact, even for procurement regimes which involve the delegation of judicial power to a third party, the unexpected sovereign costs associated with the delegation can be largely reduced by curtailing the breadth of the mandate granted to the dispute settlement body as well as the legal effect of its rulings. For example, under the GPA, as discussed in Section 3.2.4.4a, the WTO DSB is entrusted with the power to adjudicate disputes and to give rulings binding upon the parties to the dispute. However, in terms of its discretion in interpreting the rules, the WTO DSB differs from the ECJ, in the sense that it is required to adhere to the exact wording of the treaty texts without adding or diminishing the rights and obligations provided in the agreement.

More importantly, the interpreting role of the WTO DSB has been restricted owing to a lack of abundant cases brought before it. There is no designated organ within the WTO to actively pursue

¹⁵ For detailed discussion, see Section 4.1.4.2, also for a more comprehensive analysis on this point, see Arrowsmith (2006), 'the Past and Future Evolution of EC Procurement Law: from Framework to Common Code?' 35 *P.C.L.J.*, at pp 337-384

breaches and to bring legal proceedings as the European Commission does in the context of the EC. As argued in Section 3.2.4.3, the GPA states' freedom to promote national objectives is not so much affected by the fact that an adjudicative power is delegated to the DSB.

The NAFTA procurement regime represents an even softer approach in terms of delegation. As examined in Section 4.3.4.4a, although it essentially delegates the legal authority to an ad hoc arbitral panel for formal adjudication, the recommendatory nature of the arbitral panel decision manifests its soft law nature – it involves a process of political bargaining to reach a mutually satisfactory resolution and disputing parties can accept or depart from the panel decision without legal justification. As a result, the delegation in the NAFTA does not pose any threat to the discretion member states currently have in pursuing national procurement policies.

Moreover, as for soft law regimes involving no delegation of adjudicative or interpretative power such as the COMESA directives and the APEC NBPs, states' regulatory autonomy in procurement is best preserved under those soft law arrangements. For example, under the APEC NBPs, Member economies' ability to employ procurement as a policy tool is in practice left unaffected, as they can always balance the NBPs with other domestic concerns and find appropriate ways to give effect to them, or even depart from one or more of the principles where they feel it is necessary (see Section 4.6.3).

Apart from unexpected sovereign costs associated with the delegation of judicial authority at the inter-governmental level, the delegation of legal authority to independent domestic courts or review bodies to interpret and apply the agreed international rules can cause similar unexpected costs. The right of private suppliers to invoke international rules directly before national review bodies marks a hard law feature of an international agreement.

As mentioned above, private suppliers are in the best position to detect breaches as well as most motivated to file complaints. As argued by Keohane, Moravcsik and Slaughter, private access seems to increase the expansiveness of legal institution.¹⁶ The increased number of cases brought before

¹⁶ Keohane, R.O., A. Moravcsik, and A.M. Slaughter (1997), 'Toward a Theory of Legalization', *I.O.*

national review bodies create more opportunities for them to interpret and apply the rules, which may have adverse impact on the ability of governments to implement national procurement policies.

This is the case with the EC procurement rules. As examined in Section 4.1.4.4b, most substantive rules of the directives governing contract award procedures have direct effect. That is to say, private suppliers have the right to rely on the EC procurement rules before national courts even if states fail to properly transpose the rules into their national law. However, this direct link between the EC directives and domestic law found in the EC is unique among international agreements. As for other procurement agreements, international rules can only take effect in domestic legal system through legal incorporation or statutory recognition.

In most national systems that do not give an international agreement direct effect, the agreement cannot be invoked before national courts unless the relevant national legislation has been adopted to implement it. In this sense, states have ultimate control over domestic courts or review bodies in interpreting and applying international procurement rules.

For example, under the GPA, if a GPA member government maintains a procurement practice giving price preference to firms with sound environmental policies which is expressly permitted under the national law, then its national review body will be precluded from ruling out this practice through its interpretation of the GPA rules, no matter whether this practice is actually inconsistent with the GPA. In general, as with most procurement agreements, the domestic delegation generally implies lower sovereign costs for states in comparison with the delegation of legal authority to independent bodies at the international level.

10.3.2 Possible disadvantage of soft law with a lower level of delegation

Despite the fact that soft law with a low level of delegation may help reduce the negotiating, implementing, sovereignty costs associated with the relevant hard law, the possible disadvantages of soft law have also been identified in Section 2.4. Firstly, the use of soft law may affect the credibility of international agreements because of a lack of an effective deterrent to non-compliance and legal

uncertainty; and secondly, soft law may raise the subsequent inter-government transactional costs in the absence of a delegated body to interpret the agreed rules and to resolve disputes. Both of the above disadvantages are relevant to an international procurement agreement.

10.3.2.1 Weakened credibility of obligations

The choice of soft law with a low level of delegation in enforcement may arguably affect the credibility of the agreed rules by failing to provide an effective deterrent to non-compliance and to maintain legal consistency and predictability. At the inter-governmental level, some soft law procurement instruments such as the COMESA (see Section 4.5.4.4a) and the APEC NBPs (see Section 4.6.4.4a) directives do not delegate any third party with the authority to interpret the rules and to adjudicate disputes over the application of the rules.

As explained in Section 8.3.2.2, international legal provisions must be interpreted to apply to specific factual situations, and in the absence of a delegated interpreting organ, states have the right of auto-interpretation which may lead to divergent interpretation and consequently inconsistent implementation of the rules.

Meanwhile, as mentioned in Section 7.3.2, it is envisaged that states' compliance with a procurement agreement with a trade objective may be challenged by significant political influence from domestic vested interest of its members. Without the authoritative interpretation from an independent party on the agreed rules, a significant risk exists that states may take advantage of the vagueness of rules and to interpret them in a way to facilitate protectionist measures in procurement under strong domestic political pressure from vested interests.

Furthermore, even in the case of an apparent breach by a state, there are no independent third parties to which other states can make the complaint and no coercive enforcement measures such as sanctions can be awarded to address the non-compliance. It has been argued in Section 2.4.3 that compliance would be better fostered if allegations of non-compliance could be submitted to a sort of 'hard law' dispute settlement that provides for judicial or quasi-judicial rulings.

Furthermore, the availability of coercive enforcement measures may encourage compliance in the sense that reluctant states would probably be convinced that the likelihood that a violation will be detected and sanctioned makes the expected costs of violation exceed those of compliance. For example, according to an empirical research in 2006, the compliance with EC procurement directives had increased over time and became substantial.¹⁷ Although there are many factors influencing state choice of compliance as identified in Section 2.4.1, it can be argued that the hard law enforcement system of the EC might be one of important factors which contribute to this relatively high level of compliance.

In the absence of dispute settlement bodies and coercive enforcement measures, soft law procurement agreements seem to fail to provide an effective deterrent to non-compliance especially in view of the perceived strong internal negative political influence.

Meanwhile, soft law in terms of delegation and its consequential divergent interpretation and application of the rules may also undermine the legal inconsistency and predictability of the rules, which is important in terms of encouraging the participation of foreign suppliers. Foreign suppliers are less willing to compete for procurement contracts in a system with which they are unsure whether the fair competition rules will be carried out and their rights will effectively protected in the case of violation of the rules.

Nevertheless, despite the possibly weakened credibility of procurement agreements resulting from a low level of or no delegation in enforcement, it can be argued that carefully designed soft law enforcement measures could also induce states' compliance and promote the confidence of foreign suppliers. That is to say, the disadvantage of soft law could be well addressed.

Certain soft law preventative measures including self-reporting and policy review have been pointed out in Section 2.4.3 as measures to induce compliance, which mainly reply on efforts to inspect and evaluate state behaviours before violations occur rather than to detect and investigate

¹⁷ See note 13, at pp. 15-48

them afterwards. Although such preventative measures do not involve formal adjudication and coercive force, they may to a certain extent raise obstacles to non-compliance.

Most notably, peer review¹⁸, a soft law enforcement measure, is often employed by non-binding procurement agreements including the APEC NBPs (see Section 4.6.4.4.), the OECD Convention on Bribery (see Section 5.2.2.4) and the DAC Untying Aid Recommendation (see Section 6.5.3.4).

In the context of OECD which provides a very institutionalised and systematic peer review system, peer review is conducted on a non-confrontational and non-adversarial basis. Under the review process, the review countries make documents and data available, the examining countries represent the collective body and guide the debate, and the OECD Secretariat supports the whole process. The core output of the peer review comes in form of a final report, which contains policy evaluations and recommendations for the reviewed country. Although the final report neither takes the form of a legal binding judgement nor involves coercive measures, it can arguably exert significant ‘peer pressure’ on states, and becomes important forces to stimulate states to make changes and meet standards.

The publication and dissemination of self-reported and peer-assessed information also improves transparency and provides an opportunity for public critique and evaluation of a state’s procurement policies. This exposure or public shaming increases the reputation costs of violation, which may serve as a powerful spur to action towards compliance. Similar to the function of sanctions, states contemplating non-compliance may refrain from actual infringement of the rules when the relevant information on contract awards has to be reported and made available to other members and eventually the public.

Furthermore, the disclosure of information regarding states’ national procurement system and their compliance with international procurement rules may help foreign suppliers better understand the procurement regimes of different states and encourage their participation in national regimes with sound procurement policies. Meanwhile, the availability of information regarding states’

¹⁸ For the meaning of peer review, see Section 5.2.2.4

compliance may also provide reassurance for each member that others are complying, which is important in respect of reciprocal nature of many procurement agreements.

Despite the varying degrees of hardness in delegation at the inter-governmental level, most instruments including all examined under this thesis except the EDA Code demand/recommend the availability of national challenge procedures for aggrieved suppliers though with a different degree of hardness in delegation. Some require/recommend that the designated national challenge bodies be delegated with power to give legally binding adjudicative rulings, whilst others do not.

In either case, the requirement/recommendation for the availability of national challenge procedures to a large extent empowers private suppliers to enforce the relevant agreement before national review bodies.¹⁹ States are obliged or recommended to establish and maintain under their national legislation a system which is competent to receive complaints from aggrieved suppliers against one of their public entities. This requirement/recommendation strengthens the credibility of soft law agreements by promoting the confidence of suppliers. A private supplier that knows that it can sue a procuring entity for violating international procurement rules before national courts is more likely to tender than one whose redress depends on the discretion of its own government to invoke inter-governmental dispute settlement procedures.

10.3.2.2 Increased intergovernmental transactional costs

Soft law that involves no delegation of judicial power to a third party may increase the costs of subsequent inter-governmental transactions. As for all international agreements, even for those that are very precise, their legal provisions must be interpreted to resolve ambiguity; and applied to specific fact situations and to address new and related issues. The delegation of judicial power to a third party can be regarded as an effective way to interpret international procurement law.

Meanwhile, the delegation is also efficient in terms of updating international rules. As mentioned above, the absence of authoritative interpretations from the designated body leads to states' right of

¹⁹ However, the difference between the GPA/the NAFTA rules and the EC rules should be noted. See Section 2.2.4.4b, Section 4.3.4.4b and Section 4.1.4.4b.

auto-interpretation. If all the parties agree on a uniform interpretation, no problem will arise; and if, as frequently happens in practice, divergent views are held by different parties, disputes may then arise. However, under a soft law system without a delegated third party to adjudicate disputes, the parties to a dispute might spend years in political negotiations in order to reach a mutually acceptable solution.

Moreover, as explained in Section 7.3.1.4, public procurement is a fast-evolving area for international regulation and international procurement agreements need to adapt to new technological and economic developments. In this regard, the delegation of judicial power to a third party can provide reasonable interpretation of the agreed rules taking into account the change of circumstances. However, in the case of soft law with no delegation of interpreting power to a third party, the fast-changing nature of procurement may demand constantly issuing legislative amendments to a binding procurement agreement, which often involve considerable delay especially in view of the complex procedural rules and coverage rules a procurement agreement may possibly have.

Nevertheless, hard law with a high level of delegation is by no means the only way to address the evolving nature of procurement. As argued in the previous sections, the use of soft law in terms of non-bindingness (see Section 7.3.1.4) or in terms of vagueness (see Section 8.3.1.4) can also make a procurement agreement more capable of adapting to changes.

10.4 Conclusion

It has been argued that soft law in terms of delegation in enforcement can be regarded as a second best or even as a better alternative to the relevant hard law. It is often politically difficult for states to agree on a hard law enforcement system for a procurement agreement owing to the sensitive nature of its regulated subject and/or the informal political context in which the agreement is reached. Soft law with a lower level of delegation can play an important part where hard law is unachievable. It

can facilitate negotiations and promote agreements by mitigating the strong opposition from certain negotiating parties and avoids the failure of having no agreement.

Furthermore, soft law enforcement systems may have the potential to develop into a relatively hard one over time, which can be illustrated by the development of the GPA enforcement procedures.

Nevertheless, it is neither feasible nor desirable for all procurement regimes to move towards the hard law pole of enforcement system. Soft law with a low level of delegation can sometimes be more desirable than the relevant hard law for various reasons. Soft law with a low level of delegation can reduce the negotiating and implementing costs of a hard law procurement agreement. But most important of all, it can largely avoid unanticipated sovereign costs associated with hard law and therefore preserve states' regulatory autonomy to pursue legitimate national procurement policies.

The exercise of judicial power by designated international bodies may impose unanticipated constraints on states' regulatory freedom to promote legitimate national goals, as demonstrated by the ECJ's interpretation of the EC procurement rules. The ECJ's restrictive approach in judicial interpretation has deprived states of much of their previous freedom to pursue national procurement policies, which threatens to undermine the carefully designed regulatory balance achieved by member states.

In contrast, soft law with a relatively lower level of delegation can largely avoid the unexpected sovereign costs associated with hard law. Even for procurement regimes involving the delegation of adjudicative power to a third party, the delegated power can be softened by limiting the mandate granted to the third party or by weakening the legal effect of its rulings, as it is the case with the GPA and the NAFTA procurement regime respectively. In both cases, states' regulatory freedom in procurement is not much affected by the delegation of adjudicative power to the third party. However, states' regulatory autonomy is best protected under soft law regimes without any delegation in enforcement such as the COMESA directives and the APEC NBPs.

Regarding the delegation of judicial authority to domestic review bodies, most procurement

regimes, with the exception of the EC directives which have direct effect, may often involve relative low sovereignty costs because the scope of judicial discretion of domestic review bodies is largely constrained by the relevant national implementing legislation.

When it comes to the disadvantages of soft law with a low level of delegation, the first and foremost one discussed is the possibly affected credibility of the agreed rules. It has been argued that the choice of soft law may affect the credibility of a procurement agreement by failing to provide an effective deterrent to non-compliance and to maintain legal consistency and predictability. Without a designated interpreting organ at the inter-governmental level, there exists a significant risk that states may exploit their right of auto-interpretation and interpret procurement rules in a way to facilitate protectionist measures.

Furthermore, in the absence of dispute settlement bodies and coercive enforcement measures, soft law may also be argued to fail to provide an effective deterrent to non-compliance especially in view of the perceived strong internal negative political influence.

Secondly, it has also been argued that the choice of soft law in terms of delegation may increase the costs of subsequent inter-governmental transactions. The absence of an international adjudicative body to interpret and apply international procurement law may result in divergent interpretation among states and in the case of disputes frequent political bargaining. Also, soft law with no delegation of judicial power for reasonable interpretation with the change of circumstances, the fast-evolving nature of procurement may require constant legislation amendments to a binding procurement agreement.

Nevertheless, the possible disadvantages of using soft law in terms of delegation can be largely avoided if it is well designed. It has been pointed out that certain soft law enforcement measures could also serve the function of inducing states' compliance and promoting the confidence of foreign suppliers. A carefully designed peer review system, for example, can generate significant political pressure on states to comply. The disclosure of self-reported and peer-assessed information increases the reputation costs of non-compliance and helps foreign suppliers to better understand the

procurement system of different states.

Furthermore, the fact that most soft law procurement instruments also recommend the availability of national challenges procedures for aggrieved suppliers may to a certain extent enhance the credibility of such soft law regimes because of increased confidence on the part of private suppliers.

Moreover, except hard law in terms of delegation, soft law can offer a number of attractive alternatives for dealing with changing circumstances. Consequently, soft law with a lower level of delegation in enforcement may arguably produce similar effects of the relevant hard law but with reduced costs.

Chapter 11 Proposals for Developing a Multilateral Agreement on Government Procurement by Use of Soft Law

11.1 Introduction

As discussed in previous chapters, discriminatory public procurement practices in many countries present a significant barrier to international trade however they remain largely unaddressed by international trade regulation. Having recognised the economic importance of public procurement, a number of international instruments with different objectives, approaches as well as other key features have been brought in to regulate procurement, many of which have been examined in the current thesis.

With regard to international instruments with trade objectives, the first one examined was the GPA, which remains the most important instrument regulating procurement under the WTO despite its plurilateral nature (See Chapter 3). Meanwhile, major regional procurement instruments have been discussed including the EC procurement rules, the NAFTA chapter 10, Chapter XVIII of the third draft of the FTAA agreement, the COMESA directives and the APEC NBPs (see Chapter 4). Additionally, some other international instruments regulating procurement towards market liberalisation have been reviewed i.e. the UNCITRAL Model Law and the OECD Bribery Convention (see Chapter 5).

Besides those international instruments with the aim of free trade, many international instruments regulating procurement but with major objectives other than trade have also been addressed such as the World Bank's rules governing its aid-funded procurement, the CPAR and international initiatives to untie aid (Chapter 6).

However, it can be seen that no international disciplines are currently available at the multilateral level to regulate public procurement from a trade perspective. In view of the potential of procurement markets for international trade, there are international initiatives to develop multilateral disciplines on procurement, which mainly include the initiative to negotiate an agreement on

transparency in government procurement and the requirement under the GATS Article XIII.2 to institute negotiations on government procurement in services. However, as pointed out in Section 3.3 and Section 3.4, both initiatives have now effectively been put on hold mainly due to the strong opposition against multilateral rules on procurement from many WTO members, especially developing countries members.

Based on the previous analysis, states' major concerns about entering into a multilateral agreement in procurement are arguably as follows:

1. Many countries especially developing countries oppose the very idea of getting involved in a procurement agreement for both their legitimate and illegitimate concerns:
 - Legitimate concerns: they may fear that discretion in pursuing value for money and legitimate secondary objectives will be unduly restricted; and fear the possibly high negotiating and implementing costs of international procurement agreements
 - Illegitimate concerns: they may desire to continue using procurement as a policy tool to favour domestic industries; their corrupt officials may derive illegitimate personal or political gains from corrupt procurement practice and they may dislike the transparency rules of procurement agreements which make corruption more difficult
2. Even states not opposed to international regulation in procurement are unlikely to support an agreement that does not offer significant benefits.

This Chapter will set out both the short-term and the long-term proposals for achieving an international agreement in procurement at the multilateral level. Without attempting to propose any substantive rules for a future multilateral procurement agreement, this chapter will explore ways in which soft law can be used to develop multilateral disciplines on procurement. Also, these two proposals are not tied to any particular institutional context like the WTO or any other international fora, existing or not yet existing. Thus, suggestions will be made without considering constraints set by any existing institutional approach to certain issues.

Section 11.2 will discuss the feasibility of achieving a multilateral procurement agreement in the

short run by use of soft law, which will focus on the ways soft law can mitigate the negative political influence from domestic vested interests and thus help achieve a procurement agreement at multilateral level. Attainable soft law multilateral rules might arguably serve as a second best to unachievable hard law rules. Section 11.3 will set out a long-term proposal by exploring how hard/soft law can better serve the particular features of procurement in many respects as well as addressing the legitimate concerns of participating states. Even where hard law multilateral procurement rules could be reached, soft law may still be preferred to hard law in certain cases. Section 11.4 will conclude.

11.2 A short-term proposal – the use of soft law as a second best to hard law where the latter is unachievable

11.2.1 The imbalance in supply capability between developed and developing countries and its political implication for a future multilateral procurement agreement

In the short run, it seems virtually impossible to achieve a hard law multilateral procurement agreement because of the unwillingness of many countries especially developing countries to accept any hard law international procurement regulation. The attitude of developing countries can be understood by looking at their response to the existing GPA. Except for Singapore and Hong Kong, no other developing country/area is currently a party to the GPA¹, and even Singapore and Hong Kong have long been considered developed countries by many international organisations such as the IMF.²

Although states that are currently negotiating accession to the GPA include many developing countries, it has been explained in Section 3.2.4.3 that most of these developing countries are new

¹ There is no widely accepted definition for the categorization of ‘developed’ and ‘developing’ countries. According to the UN, in common practice, Japan in Asia, Canada and the United States in North America, Australia and New Zealand in Oceania, and Western European are considered ‘developed’ countries or areas. In international trade statistics, the Southern African Customs Union is also treated as a developed region and Israel is a developed country; countries of eastern Europe and the former Soviet Union are not included under either developed or developing countries. The rest are developing countries or areas. See the UN Statistics Division, Definition of developed and developing countries (Code 491), available at <http://unstats.un.org/unsd/cdb/cdb_dict_xrxx.asp?def_code=491>

² See International Monetary Fund; Country Information, available at <<http://www.imf.org/external/country/sgp/index>>

WTO members and they are doing so mainly because of the legal commitments they have undertaken as part of their WTO accession process WTO, as demanded by the EC and other GPA parties.

It has become obvious that if a GPA type of hard law was to be made multilateral it would not be acceptable to most developing countries in the near future, which is the major reason behind the Singapore Ministerial Decision to restrict the proposed transparency agreement to the issue of transparency excluding market access commitments. However, despite the limited ambitions for the proposed transparency agreement, it has failed to be taken forward for negotiations during the Doha Round.

As explained in Section 3.3.1, the failure to commence negotiating the proposed transparency agreement apparently results from substantial disagreements among the WTO members over a number of major issues, but more substantially reveals the difficulty in reconciling the opposite positions held by developed and developing countries – developed countries are keen to grab a greater share of the developing countries' procurement markets but developing countries still desire to preserve their current discriminatory procurement policies.

Although even unilateral liberalisation of a state's own procurement market could have evident economic benefits such as better value for taxpayer's money and more competitive national industries³, states are unlikely to do so for political reasons. Taxpayers who may gain significantly from increased foreign competition are too numerous and each have too little at stake to be organised politically to support liberalisation, while lobbyists representing the interests of national industries protected under discriminatory procurement policies and/or public officials having illegitimate interests in corrupt procurement practices can exert significant political pressure against market liberalisation.

Many international trade agreements address this problem by earning political support for liberalisation from exporters through promoting the exchange of market access concessions. The

³ It has been proven that protectionist procurement policies are not generally successful in promoting their economic development and sometimes even do more harm than good to the protected industries (Section 3.1.2.4.3)

support of export interests for liberalisation is expected to counter the opposition imposed by protected interests. However, it seems that this technique, used in many other trade agreements such as the GATT, does not work the same way in the particular area of procurement owing to the asymmetry in the distribution of potential import competing costs and export benefits between developed and developing countries.

As elaborated in Section 9.2, compared with developed countries, developing countries may generally expect much tougher political opposition towards an international agreement liberalising procurement markets. Developing countries' less competitive industries, which are beneficiaries under discriminatory procurement policies, will be more active in lobbying their governments not to join in any procurement agreement, as they are more vulnerable to foreign competition. Meanwhile, corrupt procurement practices are most rampant in many developing countries with loose or opaque procurement laws and their corrupt public officials and politicians may become another political force against any international discipline in procurement.

However, the compensating offset of political support can hardly be mobilised from the export industries of developing countries because of their limited capacity to compete in the procurement markets of developed countries: both their relative weak competitiveness and the lack of expertise required in filing the tenders prevent them from competing in the procurement market of developed countries.

Furthermore, this asymmetry between developed and developing countries is considerably exacerbated by the approach of strict reciprocity employed by many procurement agreements such as the GPA. Under the principle of reciprocity, parties to the GPA work out bilaterally the economic equivalence of market concessions between themselves and have extensive derogations from MFN to other parties which do not offer reciprocal concessions.⁴

As argued in Section 3.2.4.3, this approach largely restricts developing countries' discretion in negotiating the coverage of procurement of their interests simply because of their limited bargaining

⁴ For detailed discussion, see Section 3.1.2.2

power. Although the GPA includes special provisions on negotiation involving developing countries, they have been criticised for being too soft to have any practical significance for developing countries.⁵ In practice, developing country applicants have often been requested by existing parties to the GPA to offer extensive coverage while finding them increasingly difficult to obtain derogations and in the end many have been discouraged from participation in the Agreement as a whole.

With regard to the proposed transparency agreement in procurement, although it was explicitly limited to the transparency aspects, many developing countries still shared the fear that a multilateral transparency agreement would only be an intermediate step towards a full-blown GPA-like agreement with market access commitments, which only serves the export interests of the developed countries, given the imbalance in supply capability between developed and developing countries. Meanwhile, little political support can be gained from the export interests of developing countries by excluding the issue of market access. This may largely explain the failure to negotiate the proposed transparency agreement during the Doha Round.

11.2.2 Possible ways to address the asymmetry and promote the participation of developing countries in a future multilateral agreement

Consequently, in order to break the political logjam that prevents developing countries from liberalising their procurement markets, we can maximize domestic political support from their export interest or minimize the political opposition from their protected interest or do the both.

Despite the failed initiatives to attract the participation of developing countries at the international level, many regional procurement instruments have been successful in involving members with different levels of development, which may provide useful guidance for a future multilateral procurement agreement. Under many regional regimes such as the EC and the NAFTA, the procurement rules form an integral part of these regional trade agreements addressing a wide range

⁵ For detailed analysis, see Section 3.1.2.4.3

of trade-related issues.

It can be argued that the linkage between procurement and other trade issues under a single trade arrangement facilitates the acceptance of procurement rules even when there is a strong opposition from domestic vested interests. States that claims that adhering to the procurement rules would be disadvantageous to its development might still make compromises for the sake of potential benefits they could gain in other sectors from participating in a comprehensive regional trade liberalization programme.

At the international level, the success of the WTO Uruguay Round can partly be attributed to its negotiating strategy that involves linking issues across multiple sectors. The single undertaking concept of the Uruguay Round has allowed negotiating parties to overcome domestic obstacles to liberalisation by broadening the negotiation stakes. However, the plurilateral nature of the GPA places it outside the single undertaking for WTO membership, which largely denies the possibility of linking procurement to other areas which interest developing countries under the WTO from the outset.

Although the role of the GPA has begun to change and prospective new WTO members are often requested to undertake a commitment to join the GPA as a precondition for their WTO accession⁶, it does not make any difference to the vast majority of existing WTO members which are not parties to the GPA and might never be.

Apart from gaining political support from export interests, another possible way to achieve a future multilateral procurement agreement is to reduce the current political opposition of many developing countries towards the liberalisation of their procurement markets. In this regard, the experience of many regional procurement instruments may be valuable when it comes to their use of soft law to reach compromises and consensus.

11.2.3. A short-term proposal

⁶ For more discussion, see Section 7.2.1.1

Having reviewed various international and regional procurement instruments as well as examined the role of soft law serving as a second best to hard law, a short-term soft law proposal with market access commitments, consisting of a non-binding form, a low level of precision, a high level of discretion and a low level of delegation, is raised in this chapter for a future multilateral procurement agreement.

This proposal is put forward on the basis that no hard law procurement agreement with the wide participation of developing countries is currently available and an achievable soft law multilateral agreement is better than none. As a result, the proposal is designed mainly with the aim to reduce political resistance to a multilateral procurement agreement especially from developing countries and overcome deadlocks during negotiations.

Different from the proposed transparency agreement, the multilateral procurement agreement proposed in this chapter will include both market access commitments and transparency rules. This is because the value of a multilateral procurement agreement solely addressing the issue of transparency would be doubtful given its limited benefits of market liberalisation and potentially high costs of negotiation and implementation.

Furthermore, from the experience of negotiating the proposed transparency agreement as mentioned above, it can be learnt that although the issue of market access was explicitly excluded, many developing countries still believed that the proposed transparency agreement would only be a first and tactical measure to be taken to eventually improve market access for the exporters of developed countries. Therefore it seems that putting the market access issue back on the negotiation table for a multilateral procurement agreement would be unlikely to provoke more political opposition than has been generated for the proposed transparency agreement. However, it is assumed that a multilateral procurement agreement with market access commitments would mobilise more political support from domestic exporters than one without as the former might increase the probability of them winning profitable contracts from foreign governments.

Under the short-term proposal, member states will only undertake non-binding legal obligations,

which are worded in a vague and imprecise way and leave states a very broad discretion in implementation. As far as the coverage is concerned, developed country members will be recommended to extend all market access concessions they have made under other procurement regimes to developing country members, while developing country members will be encouraged to include as much procurement and as many entities as possible.

Also, this proposed multilateral agreement will include neither inter-government dispute settlement mechanism nor coercive enforcement measures. Certain soft law preventative measures will instead be employed including self-reporting and policy review, which mainly rely on efforts to inspect and evaluate state behaviour before violations occur rather than to detect and investigate them afterwards.

11.2.4 The short-term proposal to mitigate political oppositions and to induce agreement - how does it work?

Firstly and most importantly, the choice of soft law in terms of non-bindingness is argued to be the key to making a multilateral procurement agreement acceptable to many countries especially developing countries. For the reasons explained above, the idea of a future multilateral agreement is currently unappealing to most developing countries.

Both the limited membership of the GPA and the failed experience of negotiating the proposed multilateral transparency agreement in procurement reveal the reluctance of many developing countries to participate in any procurement agreement. In particular, as shown in the exercise of negotiating the proposed transparency agreement, the unsettled disagreement over its binding nature was considered as one of the major impediments to the successful conclusion of the proposed agreement.

As pointed out in Section 2.3.1, soft law can be instrumental in reaching an international agreement, and among all the four dimensions of soft law, non-bindingness is regarded as the first and foremost means to overcome deadlocks and foster compromises where there are substantive

disagreements. As for the failed initiative to negotiate the proposed transparency agreement, it has been argued in Section 7.2 that almost all other substantial disagreements over the content and the form of the agreement would probably have been resolved had a non-binding form been agreed upon it.

More importantly, the different position held by developing countries and developed ones could probably have been reconciled by means of non-binding, soft law. On the one hand, as with developing countries, it is more likely that the strong political opposition from their domestic vested interests to the proposed agreement would be very much mitigated because a procurement agreement of a non-binding nature leaves them with absolute freedom to respond in the case of unfavourable circumstances. On the other hand, developed countries with the aim to open up developing countries' procurement market, would probably prefer a non-binding agreement to no agreement at all because it can serve as an intermediate step towards a future binding, hard law agreement.

Although there is no firm evidence for the proposition that a non-binding procurement agreement with market access commitments would be widely acceptable to both developed and developing countries as none exists at present, it can be argued that a non-binding multilateral procurement agreement might possibly be achievable in the near future.

Soft law in terms of non-bindingness has been repeatedly resorted to as a method to overcome deadlocks and to promote agreement in many areas of international law. The use of non-binding soft law can help to reconcile different positions and produce an international agreement where there are strong political oppositions and there is no clear political support in many negotiating states. The negotiating history of the OECD instruments combating foreign bribery in international business transactions provides a good example on this point.

As elaborated in Section **5.2.2.1**, before the OECD initiatives on combating bribery, the U.S., which was the only country outlawing extraterritorial bribery, had repeatedly tried to bring about comprehensive international anti-bribery legislation with the aim of levelling the playing field for American firms in international business. However, all those U.S. efforts had failed because it had

no interest-based, negotiating leverage within the issue area.

When the U.S. first brought the issue of foreign bribery to the OECD, similarly, other OECD members were not genuinely interested in negotiating an international anti-bribery agreement and many even openly opposed any anti-bribery intervention since they had strong political incentives to allow their export industries to engage in foreign bribery. During the negotiations, some negotiating parties attempted to use the high costs of a binding treaty to impede any agreement on this issue. The U.S. responded by taking a gradualist approach to advocate non-binding rules instead and eventually achieved its ultimate goal of concluding a binding convention through a series of non-binding Recommendations.⁷

The success of the OECD anti-bribery initiatives is enlightening for a future multilateral procurement agreement. Both of the subject areas are sensitive for international regulation in terms of political resistance from domestic vested interests of many states – the former was from export industries having illegitimate gains from foreign bribery, while the latter mainly from domestic industries protected by national discriminatory procurement policies.

Moreover, insufficient political support can be harnessed to counteract political opposition in both cases: as for the anti-bribery initiative, the U.S. could not offer any reciprocal anticorruption concession to other negotiating parties as it had already put the relevant national law in place; in the case of a multilateral procurement agreement, the reciprocal market concession offered by developed countries may not be very attractive to most developing countries because of the latter's limited supply ability.

Therefore for similar reasons, insisting on a binding hard law form at an early stage for a multilateral procurement agreement may render negotiations in deadlock and block the conclusion of any agreement on the issue, as happened with the initiative to negotiate a multilateral transparency agreement in procurement.

In contrast, a non-binding multilateral procurement may more likely be accepted by many

⁷ The detailed discussion on the negotiating process towards the OECD anti-bribery instruments can be found in Section 5.2.2.1.

countries especially developing countries. By reviewing existing procurement instruments, one can find that the procurement instruments which currently attract most developing country members are of a non-binding nature, notably, the APEC NBPs and the COMESA non-binding directives. Although the majority of developing countries are indifferent to the membership of binding procurement agreements such as the GPA, many of them are actively participating in non-binding regional procurement regimes.

As has been examined in Section 4.6.1, the non-binding APEC NBPs attract the participation of a wide variety of both developed and developing countries including those that are unwilling to join the GPA or the proposed transparency agreement. The COMESA non-binding directives have 20 member states, most of which are developing countries (see Section 4.5.1). It may suggest that many countries especially developing countries are more likely to commit themselves to non-binding multilateral procurement disciplines.

Furthermore, a non-binding multilateral procurement agreement may have the potential to harden up into a binding one. In the above example, although the OECD anti-bribery initiative initially only resulted in some non-binding Recommendations, these non-binding instruments were used to build up consensus for the later passage of a binding convention.

This use of non-binding soft law as an intermediate step towards binding hard law can also be found in the area of procurement. For example, the COMESA non-binding principles were adopted towards the final realisation of a legally binding regional agreement within the region (see Section 4.5.4.1). It has been argued in Section 7.2 that non-binding procurement rules can provide participating states with good opportunities to know more about the subject matter and to build up more confidence and consensus, which may contribute to the final conclusion of legally binding rules in the future. Therefore, as for states, especially developed countries, aiming for legally binding trade regulations in procurement, a non-binding multilateral agreement may still be valuable in terms of its potential to develop into a binding instrument.

As a result, it can be argued that non-binding soft law would probably help to reach a multilateral

procurement agreement mainly by promoting compromises between different states. States that are reluctant to join any procurement agreement might nevertheless be persuaded to accept a non-binding one because of their reduced domestic political opposition towards it, while some others with the ultimate aim of a binding multilateral agreement could still accept it by regarding it as an intermediate step towards future binding hard law.

Secondly, soft law in terms of a low level of precision can also facilitate the negotiation of a multilateral agreement in procurement. As we discussed in Section 2.2.3, the degree of precision in international rules may affect the degree of discretion states have in implementing their obligations though it is not necessarily the case. With regard to a multilateral procurement agreement, many states especially developing countries may prefer vague international disciplines to detailed ones in general. In the case of the proposed transparency agreement, many WTO members insisted that a simple and flexible agreement, without defining in any detail the content of national procurement procedures, should be negotiated (see Section 3.3.5.2).

Given the reaction of most developing countries to the proposed transparency agreement, it is reasonable to expect that many developing countries would similarly be suspicious of the real aim of any future multilateral procurement agreement. Even for those without such suspicion, they would at least have some doubts over the possible outcomes of a multilateral procurement agreement because they might never have participated in any international procurement regime.

Therefore when negotiating a multilateral procurement agreement, it would be not surprising that many states might desire to commit themselves only to vague rules which leave them a broad discretion on implementation to avoid the possibility of being caught up in prescriptive rules. In this sense, the use of vague soft law could generally make it easier for many developing countries to agree on the concrete content of the multilateral procurement agreement proposed in this chapter.

Besides the role of vague soft law to address the special concerns of developing countries, it can also be useful in terms of tackling controversial issues in negotiations. The choice of vague soft law allows negotiating parties to achieve a mutually preferred compromise on difficult issues and to

avoid the controversies impeding the successful conclusion of the agreement. For example, it has been widely used to deal with the issue of national challenge procedures in many procurement agreements such as the GPA (see Section 8.2).

In a similar way, vague soft law can be used for a multilateral procurement agreement in the case of certain controversies threatening to upset the overall deal during negotiations. Rather than hold up the overall agreement, vague soft law provisions could be formulated on controversial issues to allow negotiating parties to proceed with the rest of the agreement.

However, it should be noted that the use of vague soft law may not always be necessary in the context of the proposed short-term agreement. This is because the non-binding nature of the proposed multilateral procurement agreement enables participating states to retain ultimate control over whether or how to implement the rules. Consequently, it would be much easier for members with different concerns to agree on its precise content than would otherwise be the case.

Furthermore, as explained in Section 8.3.1.3, not all precise procedural rules restrict state discretion: it is perfectly possible for a provision to be worded in a very precise way but still allow considerable discretion in its implementation; and precision can even be used to grant discretion by precisely elaborating escape clauses or expressly stating Special and Differential Treatment (S&DT) to developing country members. Obviously, the inclusion of such precise provisions in a future multilateral procurement agreement would be welcomed by negotiating states, which have various doubts or suspicion about the agreement.

Thirdly, it can be argued that the use of soft law in terms of a high degree of discretion also helps the conclusion of the proposed multilateral agreement in the near future. This extends to the high degree of discretion states have in both negotiating and implementing their obligations.

With regard to state discretion in negotiations, the proposed short-term multilateral agreement allows states freely to decide which kinds of procurement contracts are covered and to what extent they are regulated. In other words, states are allowed to exclude particularly sensitive sectors or entities from international regulation and negotiate derogations for their own specific industrial

polices. It has been pointed out in Section 9.2 that the freedom states have in negotiating their country-specific coverage enables them to reach a reasonably broad coverage for every member state under many binding procurement regimes such the GPA and the NAFTA.

In terms of negotiating a non-binding multilateral procurement agreement, the flexible approach in coverage can help negotiating parties to reach an agreement by avoiding the direct objection from particularly strong political forces and interest groups domestically. This is particularly important in view of the perceived strong political opposition from domestic vested interests of many developing countries against the conclusion of any multilateral procurement agreement (see Section 11.2.1). Therefore soft law with a higher degree of discretion reduces the likelihood of negotiations being blocked by domestic vested interest of negotiating states.

Moreover, different from those binding procurement agreements which grant a broad discretion in negotiating the coverage issue, the proposed multilateral agreement would not have to face the problem of reciprocity on coverage owing to its non-binding nature. Like most non-binding procurement agreements, there would be no need for states to negotiate and draft detailed coverage rules and reciprocity-based derogations for a non-binding multilateral agreement in procurement. It can generally be suggested that the agreement should be applied as widely as possible.

Further, in consideration of the imbalance in supply ability between developed and developing countries as we have explained in Section 11.2.1, developed country members may be recommended to extend their market access concessions made under other procurement regimes unconditionally to all developing country members within the proposed short-term multilateral agreement.

This approach would not do any significant harm to developed countries but instead could benefit them in the long run. Due to the limited supply ability of developing countries, the extension of market access to developing countries would be unlikely to impose an imminent threat to the procurement markets of developed countries. Instead it could provide a good opportunity for developing countries to compete in foreign markets and possibly to identify their exporting strengths, which might make them more interested in entering into a future hard law multilateral agreement.

As with state discretion in implementation, a high level of discretion may derive from the way in which the substantive content of the proposed multilateral agreement is drafted. Soft law provisions either being couched in vague words to leave discretion or precisely stated to grant discretion can be helpful for reaching a compromise in negotiating a future multilateral agreement in procurement. However, even if the legislative text is drafted in a restrictive way, the non-binding form of the proposed agreement itself could grant participating states a very broad discretion in implementing their obligations. Therefore, it would be much easier for negotiating states to agree on such restrictively drafted but non-binding provisions than ones which impose rigid and binding obligations.

Lastly, the choice of soft law with a low level of delegation could also make it easier to achieve the proposed multilateral agreement. As demonstrated by the failed initiative to negotiate the proposed transparency agreement, insisting on the use of a hard law enforcement system by some states may reduce the likelihood of some others, notably developing country parties, to accept new commitments in procurement, leading to the breakdown of negotiations as a whole.

As a result, the short-term proposal for a future multilateral agreement will not include any coercive enforcement measures and instead, it may mainly employ soft law preventive measures such as peer review and self-reporting to induce state compliance. This soft law approach in enforcement may ease the concerns of many developing countries as well as mitigate political opposition from domestic vested interests.

In sum, it can be seen that the short term proposal may tackle the illegitimate concerns of states and promote agreement by mitigating political opposition from domestic vested interests. Given the economic and political reality of developing countries, the use of non-binding soft law has been argued as the most decisive factor in terms of achieving a multilateral procurement in the near future. Moreover, the use of soft law in terms of vagueness, in terms of discretion, and in terms of delegation has also been considered as being instrumental in negotiating the agreement though none of them will play the same important role as non-binding soft law.

11.2.5. The possible limitations of the short-term proposal

Even if the short-term proposal could be achieved, there would be some possible limitations on the effects of the agreement. In particular, a doubt can naturally be raised over whether, or to what extent, states will respect the agreed rules. This is because the proposed agreement is soft law in all respects, which lacks the function of hard law to strengthen the credibility of commitment. Its non-binding nature will deny any formal legal consequence in the case of violating the agreed rules and there will be no independent third parties to which complaints can be made and no coercive enforcement measures can be used to address non-compliance under its soft law enforcement system. Moreover, its use of soft law in terms of vagueness and discretion will provide states with opportunities to shirk their obligations.

However, it is possible that the enforcement of the soft law rules might still be assured by introducing a well-designed soft law monitoring system including the establishment of peer review system and self-reporting system. The inclusion of an OECD-type peer review system⁸ in the proposed short-term agreement may generate peer pressure to stimulate state compliance with the soft law rules.

A self-reporting system requiring states to expose the relevant pre and post procurement information to public scrutiny may also serve as a powerful spur to the observance of the soft law rules by increasing the reputation costs of violation.⁹ As elaborated in Section 10.3, such preventative measures may to a certain extent raise obstacles to non-compliance despite the fact that they do not involve formal adjudication and coercive force.

Nevertheless, although the introduction of such soft law monitoring mechanisms can arguably induce states' compliance, their actual effects in the area of procurement are still open to debate, especially in view of the perceived challenge from strong negative political influences. Nevertheless, no matter how effective the proposed agreement may be, the conclusion of a multilateral

⁸ For detailed discussion on the OECD peer review system, see Section 5.2.2.4.

⁹ For detailed discussion on the role of a self-reporting system, see Section 2.4.6.1.

procurement agreement would be better than the current situation of no agreement at all and its value can also be seen in its potential to develop into a hard law agreement.

Different from this short-term soft law proposal, the next section is to set out a long-term proposal based on the assumption that even if a hard law procurement instrument is attainable at the multilateral level, certain soft law elements will be still preferred to the hard law ones because of the particular features of public procurement. The long-term model will focus on how hard/soft law better functions in the context of a multilateral procurement agreement. Therefore it will combine both hard and soft law elements for future multilateral disciplines on public procurement.

11.3 A long-term proposal – the choice of soft law as a better alternative to hard law

So based on the analysis in previous chapters, this section will firstly identify the specific features and concerns of public procurement from an international regulatory perspective. A long-term proposal will then be raised in consideration of those features and concerns. It will mainly explore the way in which the proposed long-term model could address those features and concerns and lastly explain its limitations.

11.3.1. The Main Features of Public Procurement and their implications for International Regulation

11.3.1.1. Intrusiveness

First of all, it has been argued in Section 7.3.1.3 that international public procurement rules tend to be more intrusive in comparison with many other areas of international trade law. As a general feature of international trade law, international procurement rules are designed to ensure market access and not directly promote economic efficiency or social welfare. On the contrary, they may sometimes be at odds with such national goals.

However, different from international regulations addressing trade barriers imposed at the border, international procurement rules deal with discriminatory procurement measures, originating from government decisions or required by national legislation, and thus are more intrusive on national

regulatory autonomy.¹⁰

Furthermore, the intrusiveness of international procurement agreements may also result from the particular way in which they tackle national discriminatory procurement practices. As we have seen from the previous reviews on various procurement instruments, the common approach of procurement agreements is to lay down general principles of non-discrimination as well as minimum procedural rules governing the award of contracts to ensure transparency.

While it is true that transparency procedural rules can enhance equal market access to foreign suppliers by making the concealed discrimination more difficult, the details of transparency rules contained in many binding procurement agreements may also restrict states' ability to achieve better value for money and high efficiency in procurement and to utilise procurement to promote social or environmental objectives (see Section 7.3.1.3).

Consequently, there is a need to consider national objectives when designing international procurement rules. The challenge here is to develop multilateral procurement rules which effectively tackle protectionist practices but without infringing the right of countries to pursue legitimate national goals. In other words, a balance should be struck between the free trade objective and the ability of governments to implement legitimate domestic policies. Although this is the unchanging theme of all international trade agreements, this balance is particularly important for a multilateral procurement agreement owing to its instructive nature.

11.3.1.2 Sensitivity

Secondly, as explained in Section 7.2, public procurement is generally a sensitive subject area for international regulation because states have a long tradition of utilising procurement as a policy tool and often desire to retain their regulatory freedom in this area for both illegitimate and legitimate reasons.

Some reasons are common to all trade topics whilst others are special to procurement. For

¹⁰ For detailed discussion, see Section 7.2.3.1

example, like many other trade barriers such as tariff, quotas and subsidies, states may desire to use procurement to implement their protectionist measures favouring uncompetitive national industries or to promote social or environmental objectives. However, compared with other trade barriers, preferential procurement policies are politically more convenient and can often be implemented without parliamentary approval and the costs of policies are more invisible.

Furthermore, the implementation of procurement policies have become increasingly important to many states as other types of trade barriers have been ruled out by international trade agreements. Apart from the difficulty of getting states involved in a multilateral procurement agreement as we discussed in the last section, it is also more difficult to ensure that states will in reality comply with the agreement.

As pointed out in Section 7.2, the difficulty has been proven in eliminating national discriminatory procurement policies owing to political reasons. Similar to other international free trade rules, it is envisaged that states' compliance with international procurement rules may be severely challenged by significant political influence from lobbyists representing interests of certain categories of national industries, which are beneficiaries of previous discriminatory trade policies.

However, in the particular area of procurement, such negative political pressure may even come from public officials who have illegitimate interests in corrupt procurement practices. Elections or other large social or political events may often change the bargaining power of domestic bureaucratic and political groups, which makes it possible for domestic interest groups, including the successor of governments, to undo their legal obligations under an international procurement agreement. Therefore, in consideration of the perceived challenge of negative political influence, it is particularly important for a future multilateral procurement agreement to include an appropriate institutional design of a compliance system to ensure the credibility of member states' commitments.

11.3.1.3 Complexity

Next, public procurement has also been argued to be a complex area for international regulation and

the complexity of issues relating to procurement could possibly lead to complicated rules.¹¹ In practice, many procurement rules have been considered complicated for both international negotiation and national implementation.¹²

Firstly, the coverage of most binding procurement agreements such as the GPA (see Section 3.2.2) and the NAFTA (see Section 4.3.2) are very complex. Due to the sensitive nature of procurement, member states of these agreements are only prepared to subject certain types of procurement to international competition, which vary from state to state, and the relevant negotiation is conducted bilaterally based on the principle of reciprocity in terms of market opportunities (see Section 7.2).

Consequently, with the aim to expand the coverage to the greatest extent possible, most procurement regimes, instead of formulating uniform coverage rules for all member states, allow every member to have its own country-specific coverage with a detailed and complicated list of derogations to different members. However, despite its increased flexibility for negotiating parties and consequential wider coverage for a procurement agreement, the difference in coverage along with the principle of reciprocity adds much more difficulty to negotiations.¹³ An exception can be found in the EC procurement regime, which lays down a uniform as well as comprehensive coverage for all states. But this is mainly due to the EC's similarly minded membership as well as highly integrated institutional context (see Section 4.1.4.3).

It seems that the coverage issue would be more problematic for a future multilateral agreement with a substantially higher number of members. On the one hand, if it adopts the EC's approach to include uniform rules for coverage, its coverage would be scaled down to the level of the lowest common denominator, and the coverage which could be accepted by a large number of diversified states is assumed to be minimum if any, which would be no comparison to the EC's broad coverage. On the other hand, if the agreement follows the GPA, the more negotiating parties it involves, the more diversified circumstances its negotiating parties have, the more complicated and

¹¹ For detailed discussion see Section

¹² For detailed discussion see Section 7.2.1.1

¹³ For detailed discussion see Section

time-consuming the negotiating process will be involved, but surely the multilateral nature of the agreement will make its negotiating costs even higher than those of the GPA. Obviously, either solution is far from desirable.

Meanwhile, the complexity of a procurement agreement may also be reflected in its procedural rules governing the award proceeding of public contracts. As mentioned above, many international procurement instruments rely heavily on minimum procedural rules to ensure transparency.

However, as elaborated in Section 8.3.1.1, if a detailed approach is adopted, the complexity of situations involved in procurement will inevitably result in complicated rules addressing every detail of all kinds of procurements with different levels of complexity, of different types of procurement procedures, and of different publication or communication methods, etc. Such transparency rules are often comprehensive and complex and thus potentially very difficult to draft. Even if a complete set of detailed and flawless transparency rules could be drafted, it would still take considerable time, efforts and resources for different countries with diversified situations to agree on it, if at all possible.

As with a binding procurement agreement, the more detailed its rules are, the more diversified circumstances its participating countries have, the higher negotiating costs involved. The negotiating costs tend to be relatively lower if transparency rules are adopted at the regional level with similar minded membership such as the EC procurement rules (see Section 7.3.1.1). However the negotiating costs associated with detailed transparency rules increase as negotiations move from regional to multilateral level. The lengthy and heated negotiating history of the GPA¹⁴ can illustrate the high negotiating costs that a legally binding multilateral procurement agreement, with detailed procedural rules, might possibly entail.

Consequently, it seems extremely difficult to develop a single set of detailed procedural rules for a future multilateral agreement within which states' divergent regulatory approaches to procurement can be accommodated, particularly taking into account recent trends towards regulatory diversity in

¹⁴ For a brief review of the GPA negotiating history, see Section 3.1.2.1

procurement.¹⁵

The complexity of procurement rules may also imply high implementing costs for participating states. Different from international rules calling for states' abstention from certain actions, the minimum procedural rules contained in most procurement agreements are positive rules addressing award procedures from invitation to participate to award of contracts, which demand positive actions – either amending the existing national procurement legislation or establishing new procurement regulations where none presently exists.

Participating states have to amend the details of their existing national legislation in accordance with detailed procedural requirements of a procurement agreement, even if domestic rules and practices conform to the underlying principles of the agreement. Also, more resources have to be devoted to training procurement officials to get acquainted with the newly adopted implementing rules. The implementing costs can be further increased by the requirement of most procurement agreements for the availability of national challenge procedures. It has been pointed out in Section 7.3.1.2 that the complex and detailed feature of procurement rules make the implementation of many procurement agreements a very costly process.

As elaborated in Section 7.3.1.2, the implementing costs could be even higher in countries where existing procurement rules are less developed and thus more difficult to be adapted in line with the requirement of the agreement. However, these countries, most of which were developing or least developed countries, often lacked sufficient technical expertise and financial resources needed for implementing the agreement. It has been argued that complexity of substantive issues involved and lack of technical knowledge and capacity constitute two major deterrents to public procurement reform in developing countries.¹⁶

It can be seen that the high negotiating and implementing costs associated with the complex

¹⁵ For detailed discussion, see Section 7.2.1.1

¹⁶ See R. Hunjia, 'Obstacles to Public Procurement Reform in Developing countries' In S. Arrowsmith & M. Trybus (eds), *Public Procurement: The Continuing Revolution* (2003) 235 at pp.17-18 U. Although Hunjia identified these major impediments mainly in the context of developing countries' unilateral reform, the author holds the view that these reasons may also apply, to a large extent, to the reforms initiated by their participating in an international procurement regime, or partly explain the difficulty in attracting their participation in any procurement agreement.

feature of international procurement rules creates obstacles to their wide acceptance and effectiveness. Therefore as regards a future multilateral procurement agreement, reducing its negotiation and implementing costs becomes one of the most important considerations in terms of calling for wide participation especially on the part of developing countries.

11.3.1.4 Ongoing evolution

Lastly, as we discussed in Section 7.3.1.4, public procurement is a fast-evolving area for international regulation, and international procurement agreements need to adapt to new technological and economic developments.

Compared with national procurement legislations, it often involves more considerable delay to issue legislative amendments to binding international agreements. In particular, as with a binding procurement agreement, this would be even worse in view of complex procedural rules and coverage rules it may possibly have. The transparency procedure rules should be kept updated with the development of new technologies and new procurement strategies, while the coverage rules may need to be revised constantly in accordance with the progress of market liberalization.

As demonstrated by the difficulty of the EC and the GPA in adjusting their procurement rules to the emergency of e-commerce and the change of market reality, the complex procedural and coverage rules combined with the difficulties of updating internationally may present an important obstacle to a multilateral procurement agreement.

11.3.2 A long-term proposal

Having considered the above features of public procurement and the possible advantages and disadvantages of soft law in terms of all the four dimensions identified in previous chapters, a long-term proposal for a multilateral procurement agreement is then raised, which is of a binding nature, with a low level of precision, a high level of discretion and a moderate level of delegation.

Under this long-term proposal, participating states will undertake legally binding obligations and

make market access commitments. General rules will be included in defining its coverage subject to generally specified exceptions. There will be no scope for states to negotiate derogations for protectionist purposes. For example, a state is not allowed to include derogations for its industrial policies setting aside a certain number of contracts for its own car industry.

However, each member state can negotiate country-specific derogations for existing procurement programmes promoting national social or environmental objectives. For example, states can negotiate derogations to exempt certain existing programmes under which price preferences are given to businesses employing disabled people or having sound environmental records even if they have adverse impact on foreign suppliers.

The possibility for states to exempt certain social or environmental programmes is to respect states' freedom to pursue their legitimate concerns while trying not to jeopardize the free trade objective. In this regard, the risk may still exist that such state discretion in implementing legitimate national objectives can possibly be abused to implement disguised protectionist procurement policies.

Therefore states' freedom to negotiate derogations for their procurement programmes will also be limited by certain abuse control techniques. For instance, states can negotiate derogations for their social or environmental programmes provided that the relevant programmes are not purely protectionist and satisfactory justifications are given, and the exempted programmes will be operated in a transparent way. Furthermore, an even higher level of discretion will be awarded to developing or least-developed countries - they will be allowed to negotiate transitional periods within which they can gradually adapt to the requirements of the agreement in implementation.

With regard to the procedural rules of the proposed agreement, a principle-based approach will be employed for their legislative text; and a high degree of discretion will be given to states in negotiating and implementing their obligations. Thus a rule on minimum time limits, for example, could be couched in terms of a general requirement of 'reasonable' or 'sufficient' period of time rather than specific standard minimum time limits rules as, for example, is the case with the GPA (see

Section 3.2.4.2) and the EC (see Section 4.1.4.2).

Taking the rules on the choice of procurement methods as another example, it would follow the COMESA's approach (see Section 4.5.4.3) and simply require the use of certain formal competitive tendering procedures as the standard methods, but leaving the possibility of using other alternative procurement methods to be defined by domestic law. However, the detailed, but possibly non-binding guidance, will be issued with the aim to provide information for parties implementing the rules as well as for judicial organs interpreting the rules.

In addition, a moderate level of authority will be delegated to an independent body to enforce the agreement. This enforcement body is to be conferred with the task of ex-ante monitoring such as the publication and dissemination of self-reported and independently-collected information and ex post dispute settlement to hear challenges by aggrieved suppliers. As with its dispute settlement mechanism, although it involves the delegation of power to a dispute settlement body to adjudicate disputes, interpret rules and give rulings, the dispute settlement body's discretion in interpreting the agreed rules will be confined to strictly adhering to the exact wording of the treaty texts, and its rulings will only be binding upon the parties to the specific dispute, but will not create binding precedents for future disputes.

11.3.3. The long-term proposal to address the particular features of procurement and the legitimate concerns of participating states – How does it work?

First of all, the intrusive feature of international procurement rules could arguably be mitigated under the proposed long-term multilateral agreement: it may largely preserve states' regulatory freedom to implement their legitimate national goals while effectively eliminating national discriminatory procurement practices.

With respect to its coverage, although the agreement includes general coverage rules applicable for all participating states, it leaves the way open for states to negotiate their country-specific derogations to exempt certain existing procurement programmes under which procurement is used as

a tool of social or environmental policy. In this way, the coverage of the agreement can target national discriminatory procurements in a wide range of sectors and industries but its relatively flexible approach still allows states to retain regulatory freedom over certain entities or procurement contracts for legitimate, non-economic concerns.

As with its transparency procedural rules, the choice of soft law with a lower level of precision and a high level of discretion in the proposed long-term agreement allows participating states to implement their obligations according to their particular situations rather than trying to accommodate divergent national circumstances within a detailed single text. Bearing in mind the fact that a multilateral agreement on procurement will be applied by a diverse range of countries with significant differences in their approach to regulation, vague soft law granting states discretion is desirable in the sense that it enables states to implement national procurement policies in a way most appropriate to their circumstances.

As explained in Section 8.3.1.3 and Section 9.3.1.2, soft law in terms of a low level of precision and a high level of discretion can provide states with more freedom of choice in pursuing value for money and efficiency. For example, it has been discussed that the detailed rules governing the choice of procurement methods in many procurement agreements such as the GPA (see Section 3.2.4.3); the EC (see Section 4.1.4.3) and the NAFTA (see Section 4.3.4.3) largely limit states' ability to pursue value for money in procurement.

By contrast, if the proposed long-term multilateral agreement follows the approach of the COMESA (see Section 4.5.4.3) directive and includes a general rule requiring the use of certain formal competitive tendering procedures as the standard methods, but without precisely defining conditions for the use of more informal procurement methods, states will have more freedom in designing their own systems. Those mainly relying on strict transparency rules can formulate stringent requirements on the derogations from formal competitive tendering, whilst others in favour of greater reliance on the exercise of professional judgement of procuring officials are free to permit the use of other informal procedures in a broad range of circumstances.

This discretion over the choice of procurement methods enables states to obtain best value for money and efficiency in procurement. The divergent approaches adopted by different states will not affect equal market accession to foreign suppliers as long as the general principles of non-discrimination and transparency are observed.

Moreover, by resorting to soft law in terms of vagueness and discretion, the proposed long-term agreement can also avoid unnecessary restrictions on states' freedom to implement legitimate secondary policies. It has been pointed out in Section 7.3.1.3 that both the general principles of non-discrimination and the detailed transparency rules contained in many procurement agreements restrict states' freedom to employ procurement as a policy tool to implement industrial, social and environmental objectives. As for the proposed short-term agreement, such secondary policies with either de jure or de facto discrimination will also be prohibited by its national treatment principle.

However, there will no detailed and restrictive transparency rules on contract award procedure to limit the pursuit of those social or environmental policies without any discriminatory effect. In this way, the agreement will target states' protectionist procurement practices while at the same time preserving states' ability to implement legitimate social and environmental policies in procurement.

Additionally, under the proposed long-term agreement, states' preserved freedom to promote their legitimate procurement objectives will to a certain extent be guaranteed by its moderate level of delegation in enforcement at inter-governmental level. As illustrated by the EC's experience (see Section 4.1.4.4a), precise and additional obligations can be developed from the vague wording of treaty provisions through expansive judicial interpretation, and consequently states' ability to implement their own national procurement policies may be increasingly restricted.

Indeed, as for a legally binding agreement with a high level of delegation in enforcement, vague soft law which is deliberately used to give states more discretion in implementation may also imply a wider scope for judicial interpretation, which may lead to more restricted states' discretion.¹⁷ However, although the proposed agreement will delegate an adjudicative power to a third party, its

¹⁷ For detailed discussion, see Section 7.2.4.2a

mandate as well as the legal effect of its rulings will be largely curtailed. It will be required to stick strictly to the exact wording of legal provisions.

Although the use of vague soft law in the proposed long-term agreement may leave the designated body more discretion in judicial interpretation, the detailed non-binding guidance issued alongside the general rules may largely restrain such discretion. The non-binding nature of the guidance makes it easily amendable in view of technological or commercial changes that affect the practice of procurement. Therefore the need for judicial organs to interpret the rules in adaptation to changing circumstances can be largely reduced. As a result, the threat posed by the designated adjudicative body to the regulatory balance achieved under the proposed agreement would be largely avoided by constraining its freedom in interpretation.

So far as the delegation of judicial authority to domestic review bodies is concerned, states' regulatory freedom often will not be too much threatened by the exercise of judicial power by designated domestic bodies. Like most procurement regimes, the proposed agreement will not have direct effect, and in most national systems that do not give an international agreement direct effect, the agreement can be invoked before national courts only if the relevant national legislation has been adopted to implement it. Consequently, the scope of judicial discretion of domestic review bodies in applying and interpreting the proposed agreement will be largely constrained by the relevant national implementing legislation. So states can ensure their freedom to pursue legitimate national objectives by explicitly writing them into their domestic law.

Secondly, the long-term proposal is designed to ensure states' compliance with the agreed rules taking into account the sensitivity of procurement. The choice of hard law in terms of bindingness for the proposed agreement may be justified on the assumption that it can increase the credibility of the agreed rules. As explained in Section 2.4.1, the legal consequences flowing from binding obligations can induce conforming behaviours by making the choice of non-compliance more costly. The form of legally binding convention has been argued in Section 7.3.2 as an indispensable tool for resisting long-term political pressure from domestic vested interest. Therefore in view of the

sensitive nature of procurement, a binding form is chosen for the agreement with the aim to resist the domestic negative political pressure and to bind government themselves or their successors in the future.

Besides the binding form of the agreement itself, its delegation of power to a third body to adjudicate disputes can also serve as an effective deterrent to non-compliance in spite of the perceived domestic political pressure. Under the proposed agreement, there will be an independent dispute settlement body which can receive alleged non-compliance complaints and award coercive measures such as sanctions in the case of established breaches. As discussed in Section 2.4.3, the availability of dispute settlement bodies and coercive enforcement measures may encourage compliance in the sense that reluctant states would probably be convinced that the likelihood that a violation will be detected and sanctioned makes the expected costs of violation exceed those of compliance.

Besides its hard law dispute settlement mechanisms, the proposed agreement will also utilise certain soft law preventative measure including self-reporting and policy review mainly related to efforts to inspect and evaluate state behaviour before violations actually occur.

Thirdly, the use of vague and discretionary soft law in the long-term proposal may address the complex feature of procurement, and significantly reduce the high negotiating and implementing costs associated with the coverage rules and transparency rules of a procurement agreement.

With regard to the issue of coverage, the proposed coverage rule will lie somewhere between the uniform approach of the EC ruling out any possibility of derogations (see Section 4.1.2), and that of most binding procurement regimes such as the GPA and the NAFTA which accords states absolute freedom in negotiating their coverage (see Section 3.2.2 and Section 4.3.2). The proposed agreement is intended to set out general coverage rules but states are allowed to negotiate country-specific derogations for certain existing procurement programmes while developing and least developed countries can also negotiate particular transitional measures.

The discretion states have in negotiating derogations and transitional measures can possibly help the proposed multilateral procurement agreement to achieve a broad coverage as well as to attract wide participation. States can participate in the multilateral procurement regime while maintaining their existing procurement programme to promote social or environmental goals. In the case of developing or least developed countries, it will be possible for them to negotiate transitional measures to gradually eliminate their discriminatory procurement practices.

This represents a more flexible approach than that of the EC, which is arguably indispensable in view of the much more diversified membership of the proposed multilateral agreement. However, different from the approach of the GPA, the proposed agreement will also restrict states' discretion by including general coverage rules for all member states, which largely avoids the complicated and time-consuming process of item-for-item bilateral negotiations between states and the problem of 'reciprocity' under the GPA¹⁸ and thus significantly lower negotiating costs.

As regards the transparency rules, soft law in terms of vagueness and discretion has been proposed for the long-term multilateral procurement agreement taking into account the complex feature of public procurement as well as the diversity of states' regulatory approach in procurement. It has been argued in Section 8.3.1.4 that the choice of vague soft law can avoid the difficulty in formulating detailed rules addressing complicated situations in procurement and therefore lowers the incidence of drafting errors and consequent redrafting.

More importantly, compared with the relevant hard law employed in many binding agreements, the use of vague soft law makes it much easier for negotiating parties to agree on transparency procedural rules owing to its better ability to accommodate states' divergent regulatory approaches in procurement (see Section 8.3.1.1). In this sense, the proposed multilateral agreement may involve less negotiating costs than many binding procurement agreements including the GPA.

Meanwhile, the use of soft law in terms of vagueness and discretion for the proposed agreement can also reduce its implementing costs. As elaborated in Section 8.3.1.2, vague soft law without a

¹⁸ For the discussion on the GPA's negotiating history on coverage, see

high level of delegation can significantly reduce implementing costs of a procurement agreement by reducing the need for states to revise the details of their existing legislation. In the presence of the designated body with strictly limited interpreting authority, states may only have to ensure that their national procurement legislation comply with the general principles in the proposed agreement.

There will be no prescriptive requirements expressly contained in its legal provisions or potentially to be developed through judicial interpretations for them to adjust the details of their procurement rules. Therefore the costs of adapting domestic legislation and training procuring officials can largely be reduced, which will be particularly important for many developing country members with less-developed procurement legislation and limited resources available.

Also, soft law with a high level of discretion in implementation in the proposed agreement can reduce its implementing costs by offering states a wider range of choices in implementing their obligations. As argued Section 9.3.1.1, the flexibility offered by soft law in terms of discretion can make it more likely for states to find a cost-effective way to transpose international procurement rules into national legislation.

This argument is also true with regard to a future multilateral agreement. For instance, similar to most procurement agreements, the proposed multilateral agreement will require states to make available a domestic review body for aggrieved suppliers but leave them a broad discretion in implementing this requirement. States can therefore freely establish or designate their own challenge review bodies according to their own legal tradition and available resources so long as certain general requirements are met. Obviously, this approach will entail less implementing costs than the one prescribing a certain type of court or administrative body to be set up to take on this role.

Lastly, the proposed long-term multilateral agreement will probably also fit well with the fast-evolving feature of public procurement. It has been pointed out in Section 7.3.1.4 that difficulties have often been found in many binding procurement regimes to update their procedural and coverage rules to technological and economic developments. In Section 7.3.1.4, and Section 8.3.1.4, soft law in terms of non-bindingness and in terms of vagueness have been identified

respectively as desirable options to make procurement rules more adaptive to changing circumstances.

In the case of the proposed multilateral agreement, its binding form will make the issuance of legislative amendments significantly lag behind developments, while its limited delegation in interpreting power will affect the ability of the designated body to interpret the agreed rules in a way reflecting the change of circumstances. Nevertheless, as with a binding procurement agreement, the more ambiguous its procedural rules, the stronger capability it has in the face of rapidly changing environment. So the use of vague soft law in the proposed agreement can enhance its ability in adapting to changes, and thus significantly reduce the need for constant updating through lengthy and costly legislative amendments.

11.3.4. The potential risks of the long-term proposal

Although the proposed long-term agreement can well address the particular features of procurement, it involves potential risks, in particular, with respect to its use of soft law in terms of vagueness and discretion. As argued in Section 8.3.2.1 and Section 9.3.2.1, the use of vague soft law may increase the possibility of divergent interpretation of the agreed rules among participation states, while a high level of discretion can make it very difficult to determine whether a participating state is living up to its commitments and thus increasing the chance for opportunistic states to shirk from their obligations.

As with the proposed agreement, the possible disadvantages of soft law identified in the previous analysis still apply: the vagueness of the rules may lead to legal uncertainty in terms of states' obligations, and the discretion given to states for legitimate national goals can be abused to implement disguised protectionist procurement policies instead.

However it is not necessarily true that the use of soft law with a low level of precision and a high level of discretion would inevitably jeopardize the fundamental principle of non-discrimination. Under the proposed agreement, these possible disadvantages of soft law may, to a certain extent, be

addressed by its detailed non-binding guidance on how to apply the rules as well as its effective enforcement system. Furthermore, the potential risks such as the implementation of disguised protectionist procurement policies may be associated with all procurement regimes even those with very detailed and stringent procedural rules in place because of the limits on what transparency rules can achieve as mentioned in Section 8.3.2.1.

11.4 Possible links between the short-term and long-term proposals

As we can see, the short-term and long-term proposals raised in this chapter are comprised of different soft and hard law elements. Furthermore, these two proposals are different in terms of the different aims they are trying to achieve: the short term proposal is intended to employ soft law to tackle the 'illegitimate' concerns of many states and achieve a multilateral agreement by mitigating the political opposition from domestic vested interests, whilst the long term proposal uses the combination of both hard and soft law to address states' legitimate concerns and the particular features of public procurement. Nevertheless the short-term and long-term proposals are interrelated in the sense that the former can develop into or contribute to the conclusion of the latter.

The short-term proposal consists of all the four soft law elements in terms of bindingness, precision, discretion and delegation and the long-term proposal combines both hard law elements in terms of bindingness and delegation and soft law elements in terms of precision and discretion. It can be seen that the short-term proposal would be adapted to become the long-term proposal if its soft law elements of non-bindingness and a low level of delegation could later harden into bindingness and a moderate level of delegation.

It has been argued in Section 2.3.1 that soft law can sometimes serve as 'intermediate step' towards the formation of hard law rules. As discussed in Section 11.2.4, the non-binding form of the proposed short-term multilateral agreement may have the potential to evolve into the binding one. Similarly, the low level of delegation in enforcement included in the short-term proposal may develop to be a higher level over time, which amounts to the moderate level of delegation in the

long-term proposal. As pointed out in Section 10.2, it is possible for a procurement agreement with a low level of delegation in enforcement to transform into the one with a higher level of delegation, as demonstrated by the development of the GPA enforcement procedures.

The development from the short-term proposal to the long-term proposal can be regarded as a process of transforming a second-best multilateral procurement agreement compromised with current political reality, to a desirable one in consideration of the particular features of public procurement. However, the short-term proposal is not necessarily made as a first step in a process eventually leading to the long-term proposal at a certain point in the future. Even if the short-term proposal does not harden up to the long-term proposal, it still performs important legal functions given the current situation. So the short-term and long-term proposals are raised separately and for different purposes despite their possible links.

Chapter 12 Conclusion

As explained at the outset, the research question of this thesis was to evaluate soft law as a method to regulate public procurement from a trade perspective, more specifically to outline the possible advantages and disadvantages that soft law could have in the area of procurement, and to identify factors specific to procurement that might be relevant for soft law's influence in that particular area. In order to answer the research question, the thesis developed a four-fold framework to study 'soft law', reviewed the existing international procurement regimes, examined the possible advantages and disadvantages of soft law in terms of regulating procurement, and set out both a short-term and a long-term proposal for a multilateral procurement agreement taking into account the special features of procurement.

Part I

The first part provided for a definition of and a framework for 'soft law' with the aim to limit the scope of the subject matter for the purpose of the thesis. Moreover, it generally discussed the role soft law plays in contemporary international system as a whole.

We saw that 'Soft law' was defined as rules of conduct that are formulated in instruments which lack certain core elements of hard law, but nevertheless not are devoid of all the legal effects of hard law, and that are aimed at and may have practical effects comparable to hard law. Largely based on Abbott et al's legalization framework but with slight adaptations, a framework of types of soft law was also set up, which classifies soft law instruments according to a four-fold approach – bindingness, precision, discretion and delegation. In this sense, an international legal instrument can be considered soft along one or more of the above four dimensions. This approach was employed throughout the thesis.

It was also pointed out that the role of soft law in international legal system mainly involves two functions. The first is that soft law may serve as a second-best to hard law where the latter cannot be achieved but the subject matter still demands international regulation. It was explained that soft law can be resorted to in order to break deadlocks and promote agreement during negotiations and to provide a certain degree of regulation in its implementation. Also, such soft law regulation can be

regarded as an 'intermediate step' towards the formation of hard law even though this is not necessarily the case.

The second role soft law mainly plays is that in some cases it can be chosen as a better alternative to hard law even where the latter is attainable, and it may produce similar effects of hard law but avoid some of the costs of hard law. Soft law was argued to have certain independent advantages of its own. In comparison with hard law, it was explained that firstly, soft law can be used as a method to reduce negotiating costs; secondly, it may entail lower sovereignty costs for participating states; thirdly, it can offer better options to deal with changing circumstances; and lastly the soft law form may sometimes be chosen for technical reasons.

Despite various advantages that soft law can better offer over hard law, possible disadvantages associated with soft law were mentioned and possible ways of addressing these disadvantages were also suggested. Most important of all, soft law may lack the function of hard law in strengthening the credibility of commitments and inducing compliance. Moreover, soft law may raise the transaction costs of subsequent interactions.

In order to study the issue of states' compliance with international rules, the factors which may possibly affect states' choice to comply were identified including the calculation of benefits and costs of violation, lack of capability to comply and ambiguity of the rule, whilst measures employed by different international regimes to induce compliance were also discussed such as sanctions, dispute settlement mechanism, violation preventative measures, denial of benefits and capacity building. It was examined how different types of soft law affect states' choice to comply in view of the above mentioned factors and measures influencing compliance.

Although it is true that the legal consequences flowing from binding obligations may deter non-compliance by making the choice of non-compliance more costly, states are still reluctant to violate their soft law obligations for other reasons such as the maintenance of the stability of the international legal system and the fear of the bad name of violator. It was then argued that compliance with soft law might still be ensured by introducing a well-designed soft law monitoring

system including the establishment of an OECD-like peer review system and self-reporting and publication system.

Part II

The second part of the thesis reviewed the current procurement regimes, either with or without a trade objective. These international and regional procurement instruments share similarities as well as differences, and they were examined and compared in terms of their objectives, general approaches, coverage, secondary policies and the soft law and hard law issues.

It provided an overview of procurement rules within the WTO framework. First of all, the GPA was reviewed. In terms of the soft law and hard law issues, it was found that the GPA is an international agreement of a binding nature, with a varying degree of precision among its provisions, with a fairly high degree of discretion accorded to all members and an even higher degree of discretion to developing countries members, and with a high level of delegation in enforcement.

In this part, the failed attempt to negotiate the proposed WTO multilateral agreement on transparency in procurement was also examined to illustrate the current difficulty of negotiating any procurement agreement at the multilateral level. During negotiations, there were substantial disagreements concerning both the form and content of the proposed transparency agreement, most of which involves the choices over the four dimensions of soft/hard law, especially over its binding/non-binding nature and its challenge procedures. Beneath the apparent disagreements, the underlying difficulty was also revealed in reconciling the opposite position held by developed and developing countries: developed countries were keen to obtain a greater share of developing countries' procurement market, while developing countries wanted to preserve their current procurement policies.

It then examined the major procurement instruments with trade objectives at regional level: the EC procurement rules; the NAFTA Chapter 10; Chapter XVIII of the third draft of FTAA agreement; the COMESA directives; and the APEC NBPs.

Among them, the EC procurement regime represents the hardest approach, which combines a

binding form, the highest level of precision, the lowest level of discretion, and the highest level of delegation. Most notably, the high level of authority delegated to the ECJ in interpreting the rules has further increased the precision of the rules as well as reduced states' discretion in implementation. At the other end of the spectrum, both the COMESA directives and the APEC NBPs employ a pure soft law approach, which are of non-binding nature, having a very low level of precision and an extremely high level of discretion and no delegation at all to the third party to interpret the rules or to adjudicate the relevant disputes.

Besides the above-mentioned international and regional procurement instruments, it also dealt with others also with trade objectives, namely, the UNCITRAL Model Law on Procurement and the OECD Convention on Combating Bribery. The UNCITRAL Model Law on Procurement is a non-binding instrument in nature, which serves as a model to be followed voluntarily by national legislation. Its high level of precision responds to its original objective of harmonisation, whilst its high level of discretion makes it suitable to be adopted by states with different levels of economic development and diversified political and legal systems.

It was also pointed out that the development of OECD instruments combating bribery seemed to support the argument made earlier that soft law instruments could be resorted to for difficult issues when the relevant hard law could not be achieved, but certain elements of such soft law might harden up when possible and desirable.

Although the focus of this thesis was to study the value of soft law from a trade perspective, a number of other international instruments regulating procurement with non-trade objectives were also reviewed including the World Bank's rules governing its aid-funded procurement and the OECD's Recommendation on Untying Aid. It was argued that either the use of hard law in the World Bank's rules or the choice of soft law for the OECD's Recommendation is appropriate in light of the nature of subject matter regulated.

Part III

After having examined the current procurement regimes, the third part of the thesis analysed the

possible advantages and disadvantages of the four dimensions of soft law in terms of regulating procurement with the aim of market liberalisation. It considered whether and how the advantages and disadvantages of soft law generally identified in Part I could apply in the particular area of procurement, drawing on the existing experiences of regulating procurement under international instruments that were discussed in Part III

This part studied the value of the four dimensions of soft law, i.e. non-bindingness, precision, discretion and delegation in the area of public procurement respectively. It was found that the function of soft law serving as a second best to hard law deserves special attention in this area. It was explained that public procurement is a sensitive subject area in the sense that many states are often unwilling to give up their regulatory freedom to use procurement for protectionism purposes. As illustrated by the failed experience to negotiate the proposed WTO transparency agreement examined in Part II, procurement has always been a controversial issue during international trade negotiations.

In this regard, the first dimension of soft law or non-bindingness was argued as an effective device for breaking deadlock and fostering compromises in negotiating a procurement agreement and avoiding the costs of having no agreement at all. It is more likely that substantial disagreements among negotiating parties over specific aspects of a procurement agreement can be resolved if a non-binding agreement is agreed upon. More importantly, non-binding soft law can arguably reconcile different oppositions held by different negotiating parties, and mitigate political opposition from domestic vested interests.

Like non-binding soft law, it was argued that soft law with a low level of precision, or with a high level of discretion, or with a low level of delegation could help to facilitate compromise and promote agreement during negotiations, and to provide a certain degree of regulation at the implementing stage, which may have the potential to harden up in the future. Nevertheless, even soft law procurement rules with no prospect of hardening up were argued to be better than no law at all.

Besides serving as a second best to hard law, soft law can be regarded as a better alternative to

hard law even where the latter is attainable. It was found that most independent advantages of soft law identified in Part I are relevant in the context of procurement such as its reduced negotiating costs, reduced implementing costs, reduced sovereignty costs and better adaptation to changes.

Firstly, due to the complexity of its procedural rules and coverage rules and its generally sensitive nature, the adoption of a hard law procurement agreement normally entails significant negotiating costs, and therefore the advantage of soft law in reducing negotiating costs is particularly valuable in this context. As regards soft law in terms of bindingness, it was explained that the non-binding form of a procurement agreement can lower the negotiating costs by making it easier for detailed procedural rules to be adopted as well as avoiding the necessity of negotiating and drafting detailed procedural and coverage rules.

Soft law in terms of precision or in terms of delegation can also significantly reduce negotiating costs of a procurement agreement. As we know, procedural rules governing tendering can be very complex and detailed. It was argued that soft law in terms of precision can reduce negotiating costs by avoiding the difficulty in formulating detailed rules, lowering the incidence of drafting errors and consequent redrafting, reducing the need for updating, and more importantly, by making it easier for states with different regulatory approaches in procurement to agree on procurement rules. Soft law in terms of delegation can produce similar effects by accommodating states' divided views on the enforcement rules as well as by making it easier for states to agree on other procurement rules.

Secondly, the implementation of an international procurement agreement would often entail amendments to the existing national government procurement regime and training of procurement officers to become acquainted with the international rules. This might prove a costly process if the agreement is binding in nature and sets out very detailed rules which are complex and difficult to apply in practice.

Consequently, the choice of non-binding soft law was argued to be a more gradual and less costly way of opening up procurement markets as far as the implementing costs are concerned. Moreover, soft law in terms of precision and in terms of discretion may arguably reduce implementing costs of

a procurement agreement by offering states a wide range of choices in implementing the agreement as well as reducing the need for states to revise the details of their existing legislation. Also, soft law with no delegation to domestic review bodies can help states to avoid the costs of setting up and maintaining a national challenge system for aggrieved suppliers and thus partly reduce the implementing costs of procurement agreements.

Thirdly, it was explained that legally binding procurement instruments often impose high sovereignty costs on participating states because of their more intrusive nature on states' regulatory autonomy compared with many other areas of international trade law. As a result, when formulating a procurement instrument, its trade objective should be balanced with states' legitimate objectives concerning national security, social equity, and environmental protection.

Bearing in mind the intrusive nature of procurement law, it was argued that soft law in terms of bindingness, in terms of precision, in terms of discretion or in terms of delegation, might reduce sovereignty costs of a procurement agreement by preserving states' regulatory autonomy to implement legitimate national goals though the effects of these four soft law dimensions depend on one another.

It was explained that soft law in terms of precision sometimes entails lower sovereignty costs because the vague wording of rules may accord states more discretion in implementing their obligations rather than trying to accommodate divergent national circumstances within a detailed single text. However, it was also pointed out that the actual implication of vague soft law on sovereignty costs still very much depends on the level of delegation agreed for a particular procurement agreement. It would be possible for some vague rules to be developed to impose precise obligations through judicial interpretations if a high level of interpreting authority was delegated to a third party. This is considered important in procurement but can be intrusive. Meanwhile, as for a procurement regime involving a high level of delegation, the precision may not necessarily of itself imply higher sovereign costs but just greater clarity of treatment.

Lastly, it was pointed out that public procurement is a fast-changing area for international

regulation, and international procurement regimes need to constantly adapt to technological and economic developments in this area. The thesis then argued that the choice of soft law in terms of bindingness or in terms of precision makes it much easier for a procurement agreement to adapt to changing circumstance. A non-binding procurement agreement can be amended more quickly and easily than a binding one, and more significantly, the non-binding nature of the agreement itself provide states with flexibility in adapting to changes. Soft law in terms of precision was also argued be more suitable to adaptation to changes. As for a procurement agreement, the more ambiguous its procedural rules, the stronger capability it has in the face of a rapidly changing environment.

Besides the above possible advantages of soft law in terms of bindingness, precision, discretion, and delegation, the relevant disadvantages were also identified. Most important of all, the choice of soft law for a procurement agreement may possibly weaken the credibility of its rules, which can arguably be very problematic taking into account its perceived challenge of negative political influence and reciprocal nature of obligations.

Regarding non-binding soft law, the legal consequences flowing from binding obligations can deter non-compliance and strengthen the credibility of member states' commitments for both internal and external purposes, and the choice of non-binding soft law sacrifices such deterrence. The use of vague soft law in procurement rules may also affect the credibility of the rules by making it harder to determine whether a state is living up to its commitments and increasing the possibility of divergent interpretation of the rules among participating states.

Moreover, it was argued that soft law, giving a high level of states' discretion in implementation, increases the chance for opportunistic states to shirk from their obligations, while soft law with a low level of delegation in enforcement may affect the credibility of the agreed rules by failing to provide an effective deterrent to non-compliance and to maintain legal consistency and predictability.

However, the soft law rules' possibly weakened credibility can arguably be addressed by incorporating a well-designed monitoring system. It was argued that carefully designed soft law

enforcement measures could induce states' compliance even though they do not involve formal adjudication and coercive force. In this regard, certain soft law enforcement measures were raised including OECD-like peer review, self-reporting and the publication and dissemination of self-reported and peer-assessed information. Also, the involvement of private actors in enforcing the rules was mentioned as a way to make it more difficult for states to shirk their obligations.

Another possible disadvantage identified is the increased intergovernmental transactional costs, which is mainly associated with soft law in terms of precision and in terms of delegation. It was argued that soft law with a low level of precision or with no delegation may imply more transactional costs in interpreting and applying the agreed rules. This is because without authoritative judicial interpretation, vague soft law provides states with a wider scope for auto-interpretation, which may possibly lead to divergent interpretation and consequential inconsistent implementation among participating states. However, under a soft law system without a delegated third party to adjudicate disputes, the parties to a dispute might spend years in political negotiations in order to reach a mutually acceptable solution. It was also argued that such possibly high transactional costs can partly be reduced by issuing detailed guidance on how the vague rules should apply.

Part IV

Based on the above conclusions, this part of the thesis set out both a short-term and long-term proposal for developing a multilateral agreement on government procurement by use of soft law.

The short-term proposal is premised on the fact that no hard law multilateral procurement agreement with a wide participation of developing countries can currently be achieved. It was disclosed that many countries, especially developing countries, are unwilling to accept any hard law international procurement regulation and their major concerns were also identified. It was found that although developing countries could economically benefit from joining a multilateral procurement agreement, it would be politically difficult for most of them to reap such benefits. Compared with developed countries, developing countries tend to incur more political costs in participating in a

procurement agreement, while no compensating political support can be mobilized from export industries, owing to their limited supply capacity.

Two possible ways were pointed out in order to break the political logjam holding back developing countries from liberalising their market: maximizing domestic political support from their export interest or minimizing the political opposition from their protected interests. More political support can be gained by linking procurement to other trade issues which interest developing countries. However, the short-term proposal only focused on the feasibility of using soft law to achieve a multilateral procurement agreement by reducing political resistance.

In this regard, non-binding soft law was suggested as the most important means to assist in achieving the proposed short-term agreement by reconciling the different positions held by states, in particular, mitigating the strong political opposition from many developing countries. Moreover, the choice of soft law in terms of vagueness, in terms of discretion and in terms of delegation were also included in this short-term proposal with the aim to help foster compromises and promote agreement during negotiations and to make it easier to achieve the proposed multilateral agreement.

From the perspective of international regulation, four main special features of public procurement were identified, i.e. intrusiveness, sensitivity, complexity and constant evolution. In view of the above special features of public procurement as well as the legitimate concerns of states, the long-term proposal for a future multilateral procurement agreement is raised, which is of a binding nature, with a low level of precision, a high level of discretion and a moderate level of delegation

The following arguments were made to justify the desirability of the long-term proposal. Firstly, its use of soft law in terms of vagueness and discretion may mitigate the intrusiveness of international procurement rules by preserving states' regulatory freedom to achieve legitimate national objectives while effectively outlawing states' protectionist procurement practices.

Secondly, despite the sensitive nature of procurement, the binding form of the proposed agreement as well as its enforcement system consisting of both a hard law dispute settlement mechanism and soft law preventive measures can resist the perceived strong political pressure from domestic vested

interests and thus ensure the credibility of the agreed rules. Thirdly, the choice of soft law in terms of vagueness and discretion in the agreement may tackle the complexity of procurement and significantly reduce its negotiating and implementing costs. Lastly, the use of vague soft law in the agreement can make it more capable of adapting to changes, which corresponds to the constant evolving feature of procurement.

Having examined the feasibility of the short-term proposal to achieve a multilateral procurement agreement and the desirability of the long-term proposal to serve the particular features of public procurement, their possible limits or potential risks were also spelled out. States' compliance with the proposed short-term agreement might be doubted even if it could be reached, while the proposed long-term agreement may possibly affect the legal certainty of the agreed rules and increase the chance of states implementing disguised protectionist procurement policies.

At last, possible links between the short-term and long-term proposals were also pointed out. Although these two proposals are different in terms of the different aims they are trying to achieve, they are interrelated in the sense that the short-term proposal can, but may not necessarily, develop into or contribute to the conclusion of the long-term one. The possible development can be regarded as a process of transforming a second-best multilateral procurement agreement compromised with current political reality, to a desirable one in consideration of the particular features of procurement.

Public procurement is an important aspect of international trade but still remain unaddressed by multilateral market-access rules. Trade in procurement has been and will continue being an important concern for future. The value of soft law in regulating procurement highlighted in this thesis as well as the proposals raised for a multilateral procurement agreement might provide a theoretical insight into possible ways of overcoming the difficulties in opening up procurement markets and thus achieving more efficient use of world resources.

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