The Prospects for the World Trade Organisation Agreement on Government Procurement

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Abstract

This thesis questions the prospects for the World Trade Organisation, Agreement on Government Procurement. This is the most important international agreement seeking to promote cross-border trade in hitherto closed national procurement markets. For the above threshold goods, services and construction services contracts which it covers, the Agreement's principal objective is to require the non-discriminatory treatment of foreign suppliers.

It is because of this general insistence on non-discriminatory treatment that the Agreement's membership is limited to 27 of the 134 World Trade Organisation Members. The first theme of this thesis is therefore devoted to explaining this problem of limited membership, and to proposing possible solutions.

While the Agreement's limited membership means that it is not yet capable of liberalising international procurement markets among the general WTO membership, the thesis also considers the Agreement's prospects among the major trading partners which have acceded to date. Our second theme therefore explores two of the problematic areas presenting very different difficulties and challenges, which will impact on the Agreement's success among its present and prospective Members. These distinct areas are, firstly, the use of information technology in public contract awards, and, secondly, the need for an effective system of remedies and enforcement.

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Abbreviations

CANs	Contract Award Notices
CBD	Commerce Business Daily
CCR	Central Contractor Registration
CPA	Classification of Products by Activity
CPV	Common Procurement Vocabulary
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
ECA-PMO	Electronic Commerce Acquisition Programme Management Office
ECR	European Court Reports
EDI	Electronic Data Interchange
EU	European Union
FACNET	Federal Acquisition Computer Network
FAR	Federal Acquisition Regulations
FASA	Federal Acquisition Streamlining Act
GAO	General Accounting Office
GATT	General Agreement on Tariffs and Trade
GPA	Agreement on Government Procurement
HRS	Human Resource Specification
ICTs	Information and Communication Technologies
IWG	Informal Working Group
MERX	The central source of on-line Federal Procurement opportunities in Canada
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
NT	National Treatment
OECD	Organisation for Economic Cooperation and Development
OFPP	Office of Federal Procurement Policy
RDP	Reconstruction and Development Plan
SDR	Special Drawing Rights
SIMAP	Systètme d'information pour les marchés publics
SMEs	Small and Medium sized Enterprises
SMMEs	Small Medium and Micro Enterprises
TED	Tenders Electronic Daily
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
VANs	Value Added Networks
WTO	World Trade Organisation

Introduction

The Agreement on Government Procurement (GPA)[1] is the main international instrument seeking to regulate government purchasing. The Agreement was concluded under the auspices of the last round of negotiations under the General Agreement on Tariffs and Trade (GATT) and formed an integral part of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations ('the Final Act'). The main achievement of these negotiations was to establish a much-strengthened organisational framework, with a binding system of dispute settlement, in the form of The World Trade Organisation (WTO).[2] Also crucial to the Final Act was the opening for acceptance of an ambitious new package of multilateral and plurilateral side agreements.[3] These were designed to eliminate various types of tariff and non-tariff barriers (NTBs), and (for the most part) collectively form part of the Single Undertaking, comprising the multilateral agreements which are binding on all 134 current WTO Members. By the entry into force of the WTO Agreement on the 1 January 1995, the GATT had therefore been transformed from a single trade agreement into a legally cognisable international organisation.

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[1] Agreement on Government Procurement, Annex 4(b) of the WTO Agreement, reprinted in "Uruguay Round of Multilateral Trade Negotiations: Legal Instruments Embodying the Results of the Uruguay Round", Vol. 31, GATT Secretariat, Geneva, 1994, and in (1994) OJ L336/273. The GPA, along with a loose leaf system of appendices, can also be viewed at http://www.wto.org.

[2] The WTO was established in 1994 by the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement Establishing the World Trade Organisation, published in (1994) OJ L336/3.

[3] Annex 1A of the WTO Agreement contains the General Agreement on Tariffs and Trade and 12 multilateral side Agreements on Trade in Goods. These include the Agreement on Technical Barriers to Trade; the Agreement on the Implementation of Article VI of the GATT (the Antidumping Code); the Agreement on Subsidies and Countervailing Duties; and the Agreement on Safeguards. Annex 1B contains the General Agreement on Trade in Services, and Annex 1C contains the Agreement on Trade Related Aspects of Intellectual Property Rights.

Upon the conclusion of the WTO Agreement, a new GPA was also signed in Geneva. This replaced the earlier version of the Agreement which had been in existence since the Tokyo Round of 1979. While the new Agreement greatly increases both entity and sector coverage,[4] and incorporates an innovative enforcement mechanism,[5] it does not form part of the Single Undertaking. Like its predecessor, it is an optional agreement binding only on those WTO members who choose to sign it. It is one of only two remaining "plurilateral" agreements contained in Annex 4 of the WTO Agreement.[6] The GPA however is qualitatively different from the other Annex 4 Agreements, which, when they were in force, dealt with specific products and commodities. In contrast, the procurement which the GPA seeks to regulate spans an enormous range of public purchasers, and supplies and services.

Government procurement is a crucial economic activity in all states,[7] and closed procurement markets amount to highly significant non-tariff barriers to trade.

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[4] The new GPA increases the areas which are subject to open competition to include services, public works, procurement by regional and local governments and public utilities.

[5] Article XX requires members to provide for national challenge procedures for aggrieved suppliers.

[6] Up until the end of 1997, the GPA was one of four plurilateral Agreements. These were the Agreement on Trade in Civil Aircraft, the International Dairy Agreement, and the International Bovine Meat Agreement. However, the parties to the Meat and Diary products agreements requested the WTO Ministerial Conference to delete the two agreements from Annex 4, on the basis that the remit of the agreements had been largely subsumed by the establishment of the Committees on Agriculture and on Sanitary and Phytosanitary Measures.

[7] In 1994, public procurement accounted for an average of 14 per cent of Gross Domestic Product (GDP) in the states of the European Union. This data was compiled by EuroStrategy Consultants in the course of producing a report on the economic impact of procurement policy for the European Commission. The results of the project are summarised in a Communication from the Commission to the European Parliament and the Council, "The Impact and Effectiveness of the Single Market" COM(96)520 final (see pp.16-17 on public procurement). See also H. Gordon, S. Rimmer and S. Arrowsmith, "The Economic impact of the European Union Regime on Public Procurement and Lessons in for the WTO" in S. Arrowsmith and A. Davies eds. Public Procurement: Global Revolution, 27 (Kluwer Law International; 1998).

For South Africa in 1995/6 the procurement of central, provincial and local government amounted to 13 per cent of GDP, and 30 per cent of all government expenditure. Green Paper on Public Sector Procurement Reform in South Africa, GN No.691 GG17928 of 14 April 1997, p.13. The figure is even higher for some developing countries. For example, data from the International Monetary Fund shows

Procurement markets have tended to remain closed because governments have traditionally favoured their national firms in obtaining their requirements, rather than sourcing from the supplier able to offer the best value for money, in terms of highest quality or lowest price. This desire to favour national suppliers, whether through explicit rules, or through the natural tendency of purchasers, causes a sub-optimal allocation of resources, and both national and global inefficiencies. Given the massive amount of expenditure involved, the potential for large savings to the public purse to be realised from open and efficient purchasing is clear.[8] On the other hand, the potential for wasted expenditure through inefficient purchasing is equally large.

Procurement cannot therefore be regarded as a marginal activity. Rather, it is the political sensitivity of subjecting government contracts to international competition, and removing the freedom which governments have in the placement of contracts, which explains the GPA's exclusion from the Single Undertaking. This political sensitivity is clearly demonstrated by the fact that most WTO members have taken full advantage of the optional status of the current and previous GPA. The Agreement now in force has only 27 members (as of January 2000), and most of these are developed countries.

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higher figures for many countries in the Middle East and Africa than for members of the Organisation for Economic Cooperation and Development (OECD) (see F. Trionfetti, "The Government Procurement Agreement and International Trade: Theory and Empirical Evidence" (1997; paper written for the World Trade Organisation).

[8] The EU's Green Paper on procurement, noted that procurement spending on goods and services among the Member States amounted to some ECU 720 billion per annum. It was also observed that, "The extent of European public procurement means that buying goods and services by effective purchasing systems can make significant savings for governments and thus for taxpayers." See the European Commission's Green Paper on "Public Procurement in the European Union: Exploring the Way Forward" COM(96) 583 Final, p.3.).

1. The purpose of this thesis

This thesis investigates the extent to which the GPA is likely to achieve its principal objective of opening up the procurement markets which fall under its disciplines to international competition. The thesis has two related themes in addressing the GPA's prospects as the main international procurement instrument. The first theme, dealt with in Chapters Two to Four, focuses on the most pressing problem which procurement regulation on the WTO level faces; namely the question of why the Agreement has failed to attract a more significant and balanced membership. The GPA will not even be capable of making a significant contribution to the opening up of procurement markets, among the WTO Members in general, unless its membership is significantly increased. The second theme, occupying Chapters Five and Six, questions whether the GPA will be a success among its existing members. The author focuses on two distinct subject areas raising diverse problems and challenges which are likely to emerge as barriers to the Agreement's success. The nature of these challenges and problems, and the possible responses to them, are of interest both to the present GPA members, and to the non-members, presently either considering the merits of membership, or anticipating the possible introduction of multilateral WTO procurement disciplines on a compulsory basis.[9]

a) The First Theme : The Problem of Limited Membership

At present, the very limited membership of the GPA is a major concern and must be regarded as its most significant weakness. The Agreement's Preamble begins

[9] There are two multilateral fora under which discussions towards the introduction of multilateral disciplines are currently underway. These are the Working Party under General Agreement on Trade in

by, "recognising the need for an effective multilateral framework ... [for] achieving greater liberalisation and expansion of world trade and improving the international framework for the conduct of world trade." It will be difficult for the GPA to make a significant contribution towards these objectives unless more states accede to the Agreement. Many existing members have entered into either regional agreements or have bilateral procurement agreements with other states.[10] Often, these agreements existed before the entry into force of the GPA on January 1st, 1996. For these GPA Members, it is arguable that the Agreement has had only a limited impact beyond further formalising obligations already entered into, and requiring states to open some of their procurement market to an extended list of states.

The GPA has had virtually no impact on the development of procurement disciplines in states lacking a tradition of regulating procurement activities, where awareness of the benefits of liberalisation may be low. The low priority given to procurement regulation is a significant reason for non-membership among many developing countries, who may not regard the resource expenditure involved in setting up national procurement rules (and implementing the GPA) as likely to produce any tangible and immediate benefits. Some developing states, however, have prioritised procurement regulation and have launched detailed reform packages. Nevertheless, they shy away from GPA membership. Here, the reasons for non-membership have much to do with the perceived limitations

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Services (GATS), and the Working Group on Transparency. A description of the progress of these bodies to date is provided in Chapter 1.

[10] For an overview of regional and bilateral procurement agreements, see S. Arrowsmith, J. Linarelli and D. Wallace, Jr., *Regulating Public Procurement: National and International Perspectives*, forthcoming; Kluwer International.

placed by the GPA on the ability to strategically place contracts to promote socio/economic objectives. It may be politically difficult for many governments to implement an Agreement likely to curtail the use of mechanisms which afford advantages to domestic firms at some stage during the contract award process. The interests of domestic industry in maintaining protectionist measures in their favour are far more concentrated and vocal, than the diffuse interests of tax-payers in achieving price savings through efficient purchasing. More cynically, GPA membership may be a problem for some states because rules governing the conduct of award procedures are likely to make corruption (such as bestowing contracts for political or personal gain) more difficult.

Some developed members have also declined to accede to the GPA. Here, the use of procurement for national development objectives is again likely to be at the forefront of the reasons for non-membership. There may also be different considerations however. The fact that GPA members are permitted to negotiate derogations from the Agreement for some of their procurement means that non-members may be dissatisfied with the level of procurement opened up, and the consequent limitations on export opportunities. Ironically therefore, the very flexibility of the GPA, which in some respects can be seen as advantageous to membership, can also be regarded as an impediment to membership for some states.

A significant portion of this thesis, comprising Chapters Two to Four, is therefore taken up by explaining the problem of limited membership from the perspective of both developed and developing countries. Chapter Two presents an analysis of

the various factors which continue to contribute towards the GPA's limited membership. Chapters Three and Four then deal with the most important and intractable barrier to increased membership, being the perceived limitations which the Agreement imposes on the use of procurement for secondary objectives. Chapter Three deals with the GPA's treatment of secondary objectives of a socio/economic nature. The secondary uses which governments have traditionally made of their procurement power are described, and the extent of their compatibility with the GPA is analysed. The GPA's insistence on non-discriminatory procurement is identified as a major reason for limited membership, and as an explanation for the complicated coverage which necessitates that each state must effectively negotiate with every other state to determine the Agreement's application as between them. On balance, it is considered that rules which require non-discriminatory procurement should be relaxed with the objectives of expanding membership, and of moving towards uniform coverage for all states. It is acknowledged, however, that such changes to the GPA are unlikely and that a possible new instrument to introduce procurement disciplines, based on transparency alone, should now be regarded as the main WTO initiative for the multilateralisation of procurement disciplines.

Chapter Four, deals separately with the use of procurement to strengthen trade and competition law policies. This separate treatment reflects the distinct issues which are raised here. It was felt to be important to include a Chapter on procurement power in relation to competition and trade policies for several reasons. Foremost, the author became aware of China's desire to use procurement to reinforce their antidumping strategies at an early stage in the

preparation of this thesis.[11] It is also notable that the issues analysed have received little academic consideration.

The possible adoption of multilateral competition law disciplines has been placed on the WTO negotiating agenda.[12] This move has rejuvenated the academic debate where there has been considerable disagreement over whether multilateral disciplines are desirable or even workable. The debate has a particular significance in the procurement context, especially as it has been predicted that the very process of liberalising procurement markets may increase the incidence of trade distortions originating in the private sector.[13] The GPA confers rights and obligations on governments and contracting authorities to implement and follow non-discriminatory and transparent procurement laws and procedures. It has therefore been pointed out that the GPA's enforcement rules can only be invoked for breach of the procurement rules by procuring entities, and not because of anti-competitive behaviour.[14]

Given the present absence of multilateral competition law disciplines, Chapter Four considers what can be done under the GPA to tackle trade distortions originating in the private sector. In particular, it is considered whether procurement power can be used to strengthen or reinforce competition and trade

[11] This desire was expressed by Chinese delegates at the conference, "Public Procurement Global Revolution", held at the University of Wales, Aberystwyth in September 1997.

[12] The Final Declaration of the December 1996 Ministerial Conference in Singapore includes an agreement to establish a Working Group to study issues raised by the Members relating to "the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework." The Final Declaration can be found on the WTO homepage at http://www.wto.org/wto/archives/wtodec.htm.

[13] See, for example, D Konstadakopulos, "The linked Oligopoly Concept in the Single European Market: Recent Evidence From Public Procurement", (1995) 5 *Public Procurement Law Review* 213.

laws which deal with problems such as collusion and dumping respectively. Clearly, any use of procurement in this respect must be done compatibly with the GPA itself. This may not be problematic where the problem tackled is collusive tendering which defeats the whole rationale for competitive tendering. However, even here, questions are raised by the fact that there is no provision in the Agreement dealing directly with collusion.

Greater difficulties are encountered where the problem is that domestic or foreign firms submit low tenders which are part of a dumping strategy. Arguably, it would be consistent with the GPA for procuring entities to accept such low tenders where the firm is fully capable of performance at the low price tendered. Indeed such savings in public expenditure may be regarded by some states as one of the principal benefits which the implementation of non-discriminatory and transparent laws and procedures can contribute towards. However, acceptance of such tenders could be seen to conflict with national antidumping measures. If the GPA imposes limitations on the use of procurement power to reinforce trade policies embedded in antidumping legislation, then similar obstacles to expanded membership arise to those considered in of Chapter Three. In other words, the strengthening of trade and competition policies (along with social, economic and environmental policies) are among the secondary uses which can be made of procurement power, and the present lack of acceptance of these limitations is a large part of the explanation for the GPA's limited membership.

[14] see A. Blank and G. Marceau, "The History of the Government Procurement Negotiations Since 1945", (1996)4 *Public Procurement Law Review* 77.

The question addressed is therefore whether the inclination of contracting authorities to award the contract to the lowest tender from a capable supplier, can be reconciled with the desire to use procurement power to strengthen antidumping laws. This not only depends on the content of the GPA's rules, but also on the broader WTO obligations in the Antidumping Code. Chapter Four also considers the possible responses to the unauthorised subsidisation of firms seeking to participate in GPA covered procurement. The permissible responses under the GPA are again found to be influenced by broader obligations contained in the Subsidies Code.

b) The Second Theme : Obstacles to the Operation and Success of the Agreement

The second theme of this thesis focuses on a selection of issues having a strong bearing on the GPA's likely level of success among its members. The challenges which the WTO faces in the subject areas identified below, can be considered as presenting barriers to the Agreement's success, while the nature of the WTO's responses to these challenges will be strongly indicative of the extent to which international competition in procurement markets is achieved. At the present time, information on the actual impact of the GPA on increasing cross-border participation in procurement among its members, and the extent to which discriminatory laws and practices have in fact been reduced, has yet to become available. It is important to note, however, that the analysis presented in this thesis has been undertaken against a background of available evidence at the European Union (EU) level. In 1995 the Commission called upon the EuroStrategy Consultants to undertake a study on the economic impact of the EU

rules from 1987 to 1994.[15] This was part of a wider study addressing the European Single Market Programme. While this evidence indicated a considerable potential within the EU for cross-border competition in procurement, the general conclusions indicated that procurement rules have been largely ineffective to achieve their market opening objectives.

The Study highlighted a low level of publication of notices finding that only around 14 per cent of all covered authorities routinely advertised their procurement requirements. Also in evidence was a lack of awareness among potential suppliers of the opportunities available in the Official Journal. While it was found that firms of all sizes had been successful in winning some additional business, the main beneficiaries had been the larger established firms. The extent of price convergence, which one would have expected to result from cross-border competition between EU suppliers, was found to have occurred only in a very limited number of sectors. For 'commodity' purchases (low-tech, standard purchases) the main barrier to price convergence was found to be the supply chain structure with any price savings being realised by intermediaries who then pass supplies onto contracting authorities at inflated national price levels. For high cost strategic purchases, the lack of any real price convergence was found to be more indicative of differing technical standards.

[15] European Commission, "Study on the Impact and Effectiveness of the Internal Market", chapter on public procurement. The results of the project are summarised in a Communication from the Commission to the European Parliament and the Council, The Impact and Effectiveness of the Single Market COM(96)520 final (see pp.16-17 on public procurement). See also H. Gordon, S. Rimmer and S. Arrowsmith, "The Economic Impact of the European Union Regime on Public Procurement and Lessons in for the WTO" in S. Arrowsmith and A. Davies eds. *Public Procurement: Global Revolution*, 27 (Kluwer Law International; 1998).

The above findings have significant implications for the GPA's chances of success. The Agreement is largely based on the same approach as the EU Directives and more than half of its membership is composed of the EU Members States. The EU also enjoys a higher degree of market integration than the GPA Members. If these Member States have generally been unable to open their markets to internal competition within the EU, it is unlikely that any greater a level of success will be achieved in opening procurement markets to international competition.

In the absence of any specific evidence on the GPA's impact to date, the second part of this thesis concentrates on two of the other areas likely to present obstacles and challenges to the task of opening procurement markets to international competition. The issues which are considered relate to the following areas and comprise Chapters Five and Six:

- The use of Information and Communication Technology in GPA covered procurement
- Enforcement and remedies

i) The use of Information and Communication Technologies in procurement procedures covered by the GPA

The use of Information and Communication Technologies (ICTs) is increasingly becoming a vital tool in facilitating international trade. It is thus in connection with the growth of electronic commerce that the maxims of the globalisation process such as 'the borderless economy', and 'the global village' are most

frequently used. The ease with which information can now be communicated and exchanged allows for greater awareness of opportunities, and an increased potential for bringing what were once second and third world economies into direct competition with the richer industrialised societies. Electronic procurement provides the potential for conducting the entire procurement transactions electronically, even to the extent of final delivery of the end product to the customer in the form of digitised information flows. In the supplies context, much of the purchasing process can be carried out electronically, with the obvious difference that goods are later delivered in a tangible form. However, while the use of ICTs can minimise the barrier to trade presented by the geographical dispersion of firms, it could also lead to the marginalisation of firms in those states which do not have ready access to the new technologies. A significant barrier to trade caused by difficulties in accessing new technologies could thereby be created.

Chapter Five provides a full account of the potential contribution which ICTs can make to the GPA's objectives. It is emphasised however that ICTs cannot be regarded as a complete solution, even for those procurement problems where new technologies find a clear application. The Chapter therefore considers the challenges which face the WTO in promoting the development of national procurement databases in such a manner as to strengthen the Agreement's non-discrimination and transparency obligations. An account of the adaptations to the Agreement's text, which will be necessary in order to accommodate electronic commerce, is provided. Chapter Five concludes with a view of the long-term developments in procurement practices and regulation, which may occur as

experience, and confidence in the operation of electronic procurement systems develops.

ii) Enforcememt and Remedies under the GPA

The EuroStrategy Consultants study identified the inadequacy of national remedies systems as one of the principal explanations for the disappointing level of success of the EU regulatory regime. Similarly, the GPA's rules would be unlikely to be effective without suitable mechanisms for their enforcement. The GPA presently provides for enforcement mechanisms at two different levels. The first is the system of inter-governmental dispute settlement under the Dispute Settlement Understanding (DSU), which applies to all the WTO Agreements including the GPA. Of more importance from the perspective of providing for timely and effective remedies for aggrieved suppliers are the national challenge procedures required to be established by GPA Members under Article XX.

The thesis considers the important functions of the DSU in the procurement context, although finds that it is unlikely to provide useful remedies for aggrieved suppliers, and that this should not be regarded as its principal purpose. Article XX, however, is intended to directly address the need for accessible remedies at national level. It is the most innovative and controversial provision of the GPA, requiring members to provide challenge procedures for aggrieved tenderers before national fora against any aspect of the conduct of the procurement process. However, it is arguable that Article XX does not go far enough and may not provide meaningful and timely remedies for aggrieved tenderers.

As well as exploring the uses and limitations of the DSU and the national challenge procedures, it is questioned whether additional enforcement mechanisms may be necessary to promote compliance with the Agreement. It can be noted that the EU Green Paper on procurement reform seeks comments on the idea of setting up independent enforcement authorities in the Members States.[16] It is envisaged that such authorities could have various functions such as providing advice to procuring entities on their procedural obligations, as well as receiving and lodging formal complaints relating to breaches of the Agreement. The EU has also placed the possibility of setting up independent agencies, on the GPA's built-in negotiating agenda under Article XXIV:7, as one of the means by which the Agreement may be improved.[17] Chapter 5 considers the roles which independent agencies could play in strengthening compliance with the Agreement, and the progress of negotiations towards their possible implementation.

[16] European Commission, "Green Paper, Public Procurement in the European Union: Exploring the Way Forward", 27 November 1996, COM (96) 538 final, paragraphs 3.42 – 3.45.
[17] See the Working document on GPA Review of the Advisory Committee on the Opening-up of Public Procurement CCO/98.21-EN, pp. 2-3.

Chapter 1

The GPA's negotiating history, objectives and structure and content

Introduction

This Chapter provides the background information necessary for the understanding of the motivations for procurement regulation at the international level, and the arguments presented in this thesis. Section 1 provides an overview of the negotiations leading up to the present GPA, from the early and abortive work towards an International Trade Organisation, through to the resumption of negotiations within the Organisation for Economic Cooperation and Development, the transferral of the work programme to the GATT Tokyo Round, to the conclusion of the present Agreement in parallel with the conclusion of the Uruguay Round negotiations. Section 2 clarifies what the GPA's principal objective should be understood as being, and outlines the other objectives which the GPA can make a strong contribution towards. Section 3 details the Agreement's structure, scope and coverage. The author indicates where particular provisions are given detailed consideration in the thesis. Section 4 provides an overview of the work on government procurement within the WTO other than under the GPA.

1. The history of negotiations leading up to the current GPA[1]

Negotiations for the opening up of national procurement markets to international competition date from the mid 1940s. The starting point for these negotiations continues to seem striking, despite the significant improvements which have been made to international disciplines dealing with procurement, in particular, with

regard to entity and sector coverage. In 1946, the US published a "Suggested Charter for an International Trade Organisation", under which the GATT negotiations were conducted, and which first set out the now familiar Most-Favoured-Nation (MFN) and National Treatment (NT) obligations.[2] The formulations contained in Articles 8 and 9 of the suggested charter, clearly contemplated that the MFN and NT obligations should apply to trade barriers whether goods were traded between private undertakings, or where governmental purchases were involved. Negotiations towards an International Trade Organisation lasted one year.

During the first Session of the Preparatory Committee in London in November 1946, it quickly became clear that the application of MFN and NT obligations to government procurement would be unlikely to be politically acceptable, because of widespread desire to preserve discriminatory government purchasing, giving preference to national suppliers. By the end of the second meeting of the Preparatory Committee in April 1947, the intention of the delegations that imports for government procurement should be outside the scope of these obligations was clear. This intention was at least partly reflected in the text of the Havana Charter, which arose from the third meeting of the Preparatory Committee in November 1947, and whose text is almost identical to the that of

[1]Section 1 of this Chapter has been summarised from a detailed analysis of the negotiating history, undertaken by A. Blank and G. Marceau, "The History of the Government Procurement Negotiations Since 1945", (1996) 4 *Public Procurement Law Review* 77.

[2] In general terms, Most-Favoured-Nation treatment requires that any advantage granted by a contracting party to the products of another contracting party, must also be granted to the like products of all other contracting parties. In this way, discrimination between the same goods from different exporting countries is prohibited. National treatment requires that imported products be treated no less favourable than like domestic products, so as to prohibit discrimination between domestically produced goods and the same imported goods. For an analysis of these principles in the present GATT context see, J.H. Jackson, W.J. Davey and A.O. Sykes, Jr., *Legal Problems of International Economic*

today's GATT. Article I of both instruments, dealing with MFN, contain no reference to government procurement, so that uncertainties remain as to whether, and to what extent it applies to government procurement.[3] Conversely Article III leaves no room for doubt by incorporating an express exclusion for procurement in paragraph 8(a). It is also notable that Article XVII which imposes both notification and substantive obligations on state trading enterprises,[4] provides in paragraph 2 that its obligations do not apply, "to imports or products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale." It goes on to provide that, in the context of government procurement, "each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment." The inclusion of this latter sentence was intended to address concerns, expressed initially at the London Conference, that the exclusion of procurement from the ITO draft charter, would leave a large gap in the document in a subject area of huge economic importance.

It was not until the early 1960s that government procurement re-emerged on the international negotiating agenda in response to general concerns over high levels of protectionism and national preferences. The Organisation for Economic Cooperation and Development (OECD) provided the forum for negotiations, and impressive achievements were made here from 1963 to 1975, especially in the

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Relations (West Publishing, 1995) pp. 436-460 (Most-Favoured-Nation Clause) and pp. 501-550 (National Treatment Clause).

[3] This question was most recently investigated by A. Reich, "The New GATT Agreement on Government Procurement. The Pitfalls of Plurilateralism and Strict Reciprocity" [1997] 31(2) *Journal of World Trade* 125.

[4] For an overview of the regulation of state trading enterprises under the GATT, see J.H. Jackson, W.J. Davey and A.O. Sykes, Jr., *Legal Problems of International Economic Relations* (West Publishing, 1995) pp. 1140-1145.

context of the reconciliation and "cross-fertilisation"[5] of the regulatory approaches emerging from the then European Economic Community, and the United States.

This period of negotiation is distinguished from the ITO negotiations, by the recognition that the mere acceptance and application of MFN and NT principles to government purchasing, would be unlikely to engender significant liberalising effects in themselves. The development of procurement specific rules, designed to reflect the need for non-discriminatory treatment, but also setting out procedural obligations for contract awards was therefore a key objective. It was in this negotiating period that the foundations for the structure and content of the present GPA, and its predecessors, were laid.[6] These foundations were represented by the OECD Draft Instrument on Government Purchasing Policies, Procedures and Practices[7] transmitted to the GATT at the end of 1976, when the OECD's work reached an impasse. Despite the consensus which had been reached on the necessary content of many of the procedural rules, further progress was prevented by crucial areas of disagreement. These related to the extent of entity coverage beyond central government bodies, the appropriate financial thresholds which would trigger the procedural obligations, and the

[5] This term was used by A. Blank and G. Marceau, *supra* note 1.

[6] For example, the delegations agreed upon alternative tendering procedures which correspond to the open, selective and limited procedures found in the GPA. While states retained the choice over which procedure to use, it was also agreed that limited tendering (where contracting authorities contact and can negotiate with suppliers individually) should be confined to certain defined situations, due to the detrimental effects on competition brought about by this procedure. It was also agreed that publicity requirements would be crucial to safeguarding the non-discriminatory operation of the rules, although disagreement over the necessary extent of publicity requirements, after contract award, remained to be resolved by the Tokyo negotiations. On the subject of contract award criteria, it was during the OECD negotiations that the concept of multiple award criteria, including, but going beyond price alone was first recognised, subject to the now familiar safeguard that all criteria should be published from the outset.

[7] See OECD Doc. TC(76) 27.

procedures for the settlement of disputes. Disagreements here led to the suspension of negotiations at the end of 1975, and with the establishment of the Tokyo Sub-Committee on Government Procurement in 1976, it was decided to transfer the OECD's work to the GATT.

Within a little over a year later the GATT Secretariat had circulated a "Draft Integrated Text for Negotiations on Government Procurement", which was largely based on the principles of the OECD Draft Instrument. Negotiations during the Tokyo Round centred on the entity and sector coverage of the Code, aspects the transparency requirements (in particular relating to post award obligations), the procedures for dispute settlement, and the treatment of developing countries. The last two subject areas were of particular significance given that it was only in the broader GATT forum that these issues could possibly have been addressed. Developing countries have no formal standing within the OECD forum, which also has not traditionally provided for any dispute settlement mechanism. Blank and Marceau[8] comment that

"There would not be an international agreement on government procurement if the negotiations had not been transferred from Paris to Geneva.... Such an agreement could not have taken place without providing rights to accession for developing countries (although their participation turned out to be very low.) Moreover such an agreement needed a dispute settlement mechanism to ensure its implementation and its evolution and such mechanisms are foreign to the OECD forum."

[8] A. Blank and G. Marceau, *supra* note 1 at p.101.

Negotiations on substantive issues were completed by April 1979. Provisions were incorporated for Special and Differential Treatment for Developing Countries, and disputes were subject to the inter-governmental panel procedure under negotiation in the other Tokyo Codes. The Agreement which was limited to central government supply contracts, entered into force on 1 January 1981. The original signatories were Austria, Canada, the then six members of the European Community, Finland, Japan, Norway, Singapore, Switzerland and the US. Greece and Spain joined in 1982 and Hong Kong (for whom the UK had originally signed) began participating in its own right from mid 1986 onwards when it became a Contracting party to the GATT. While several developing countries were active both in the negotiations leading up to the Tokyo Round Agreement, and in the activities of the Committee on Government Procurement, only Hong Kong, Israel and Singapore had actually acceded by 1995. Developing country participation in the GPA remains disappointing to this day.

Article IX:6(b) provided a built in agenda for the enhancement of the Agreement in terms of broadening its entity coverage, expansion to include service contracts, and textual improvements. Work under the built in agenda began in November 1983, and ended with the conclusion of the Protocol of Amendment some three years later. Much of the negotiations here were conducted in the meetings of the Informal Working Group (IWG) established in 1985. While the three objectives above were intended to be of equal importance, it quickly became apparent that textual improvements would become the most prominent for several reasons. Most importantly, the actual mandate of the IWG was concerned primarily with

textual improvements. It was not until 1987 that the IWG actually adopted its work programme in the areas of broadening entity coverage, and inclusion of service contracts. Unsurprisingly therefore, the concrete achievements of the 1986 Protocol of Amendments were limited to textual improvements, dealing with various aspects of the Agreement from adjustments to the threshold and to the procedural deadlines, to the strengthening of the non discrimination requirements and the controls over offset requirements. Beyond these concrete achievements, the Parties agreed to continue their work on broadening entity coverage, and work towards the inclusion of services.

The crucial stage of establishing the framework for the broadening of coverage was reached by the IWG in 1988, when government entities to be covered by the Agreement were grouped into three categories. Group A referred to central government entities, Group B to regional and local government entities, and Group C to other entities whose procurement policies are substantially controlled by, dependent on, or influenced by central, regional or local government. These Groups correspond to Annexes 1, 2 and 3 of the existing GPA which set out the potential entity coverage of the Agreement between its Parties.

The period after the establishment of the negotiating structure was again marked more by the strengthening of the Agreement's procedural obligations (especially in regard to dispute settlement, national challenge procedures and offsets) than by agreement on entity coverage. Progress here was being held back by delays in the conclusion of the Uruguay Round of Trade Negotiations, which had become closely linked with the prospects for any progress in the formally separate

procurement negotiations. Disagreements between the US and the EC over appropriate market opening opportunities, especially in the utilities sector, also strongly contributed toward the impasse. The conflict here was at least partly resolved by a bilateral agreement in April 1993 providing, in particular, for mutual access to works and supply contracts in the electricity sector.[9] The relaxation of the tension between these two major trading parties, and the expectation that the Uruguay Round would be completed by December 1993, reinvigorated the procurement negotiations. Several meetings of the IWG from mid 1993 saw further negotiations on coverage offers and the finalisation of textual issues. It was at this late stage that a new provisions was inserted in Article XXIV to acknowledge the potential future uses of information technology in the procurement process.

The new GPA was concluded on December 13, 1993 in parallel with the conclusion of the Uruguay Round negotiations two days later. It was signed of April 15, 1994 in Marrakesh, along side the signing of the Final Act embodying the results of the Uruguay Round.[10] Bilateral negotiations on coverage were to continue however between the Agreement's conclusion and its entry into force on January 1, 1996. The Parties were therefore permitted to provide, in their Annexes, for sector and country specific derogations to the non-discrimination obligations of Article III. These derogations were accompanied by a declaration that they would be withdrawn only at such times as the respective signatory has accepted that the other Party has given comparable access to its suppliers. While

[9] [1993] O.J. L125/1. See further A. Halford, "An overview of E.C.-U.S. Relations in the Area of Public Procurement". (1995) 1 *Public Procurement Law Review* 35; P. Trepte, "The E.C.-United States Trade Dispute: Negotiation of a Partial Solution" (1993) 4 *Public Procurement Law Review* CS82.

some of these 'reciprocity derogations' remain to this day, most were withdrawn before the GPA's entry into force.

2. The GPA's objectives

The principal objective of the GPA, as expressed in its preamble, is to remove discriminatory laws and practices in the area of government procurement, which afford protection to domestic products or services or domestic suppliers.[11] The non-discrimination principle also extends to removing unequal treatment as between different foreign products and services and suppliers. The removal of discriminatory procurement as a non-tariff barrier to trade is seen as a crucial part of the WTO's work in promoting the liberalisation and expansion of world trade.

Apart from the gradual removal of discriminatory laws and practices, there are also other objectives which the GPA can go a long way towards promoting. While the Agreement makes no reference to the objectives of probity and integrity among procurement officials within decision making processes, it is clear that its implementation can make a significant contribution to these goals. Conducting entire procurement cycles via transparent procedures which are publicised and predictable, can make corrupt practices, such as bestowing contracts for personal or political advantage, at least more difficult to undertake. The GPA therefore provides for specific rules which apply in situations which would otherwise present considerable opportunity for undetected corrupt practices. For example, Article XV requires entities to prepare a report for every

[10] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement Establishing the World Trade Organisation, published in (1994) OJ L336/3.

occasion a contract is awarded under the limited procedure whereby tenders are sought from individual suppliers without an advertisement of the contract. The primary motivation for defining when limited tendering may be used, and imposing reporting requirements is to ensure that foreign suppliers are not excluded from participating without justification. However, the objectives of non-discrimination and maintaining probity and integrity are closely linked, to the extent that the same rules will often be relevant in both areas.

It is also clear that implementation of the GPA can make a significant contribution towards reducing public expenditure, even though the achievement of value for money should not be regarded as one of the Agreement's primary objectives. In common with most regional and international procurement agreements, it will be seen that the GPA emphasises the key principles of competition, publicity, the use of commercial criteria for awarding contracts, and transparency. These are also the principles which are frequently found to underpin domestic procurement laws. However, while one of the principal motivations for domestic rules is the achievement of value for money, it has been pointed out that the GPA is only incidentally concerned with rules which can result in price savings, to the extent that they are necessary to safeguard the non-discriminatory treatment of foreign suppliers.[12] Thus while both international and domestic rules contain provisions on the requisite financial and technical standing of selected suppliers, only the latter require standing to be tested, and establish the precise means by which this is to be done. In contrast, Article VIII of the

[11] The term supplier is used in this thesis to include service providers.
[12] See S. Arrowsmith, "National and International perspectives on the Regulation of Public Procurement: Harmony or Conflict?" in S. Arrowsmith and A. Davies eds. *Public Procurement: Global Revolution*, 3 (Kluwer International; 1998) pp. 15-23.

GPA is clearly limited to ensuring that any process for determining the standing of suppliers which *is* carried out, does not produce any discriminatory effects.

3. The GPA's structure and coverage

The GPA's structure is presently divided into its main body (provided in Annex 1 to this thesis) composed of 24 Articles, and four Appendices. Under Appendix I, each Party maintains five Annexes and a set of general notes. These Annexes set out the scope of the Agreement (as is explained in sections (a) and (c) below). Appendix II lists the publications used by the Parties for the publication of notices of intended procurements. Appendix III lists the publications used for the annual publication of information on permanent lists of qualified suppliers. Appendix IV lists the publications used for the publication of laws, regulations, judicial decisions, administrative rulings of general application and any procedure regarding government procurement covered by the Agreement.

The GPA's remit is to ensure that procuring entities conduct their procurement according to the procedural rules. While foreign suppliers and service providers can rely upon the GPA for non-discriminatory access to covered contracts, this is subject to any customs duties and charges on importation and measures affecting trade in services under the GATT or GATS. Article III:3 of the GPA therefore makes it clear that the non-discrimination obligations which underpin the Agreement are applicable only to the, "laws, regulations, procedures and practices regarding government procurement covered by this Agreement".

Subject to this caveat, there are a number of considerations which are relevant to the question of whether a contract is covered by the GPA, and whether a supplier can therefore expect and enforce a right to participate on a non-discriminatory basis. These considerations relate to:

- The type of entity involved.
- The value of the contract, in terms of being above minimum thresholds.
- The subject matter of the contract.
- The content of any applicable exceptions to the non-discrimination principle.

It is notable that Article IX:11 requires that notices of invitations to participate in an intended procurement make it clear, either in the notice itself, or in the publication in which it appears, whether the procurement in question is covered by the Agreement.

a) The type of entity involved

The procurement must be carried out by entities which are specifically listed in the Annexes of each signatory, which are contained in Appendix 1. Annex 1 lists central/federal government entities. Annex 2 lists sub-central government entities and Annex 3 lists other entities which procure in accordance with the Agreement, such as those operating in the Utilities sectors.

b) The value of the contract

The GPA only applies to contracts which are above a certain financial value and which are therefore likely to be of international interest. Each Annex for each

Party specifies the relevant thresholds for goods, services and construction services. For Annex 1 (central government) all Parties maintain the same threshold of SDR[13] 130,000. Beyond this common threshold, the thresholds vary within modest limits as between the Parties. For example most Parties maintain a threshold of SDR 200,000 for Annex 2 (sub-central) services although Canada and the US maintain a higher threshold of SDR 355,000. Most Parties maintain a SDR 5,000,000 threshold for construction services across all the Annexes, while Japan's threshold here is dramatically higher at 15,000,000 in both Annexes 2 and 3.

c) The subject matter of the contract

The procurement must either be for goods, or for the services and construction services which are specifically listed in Annexes 4 and 5 respectively. While the above threshold goods procurement of all covered entities must therefore be subject to international competition, a 'positive list' approach is used for services and construction services, which are only covered if specifically listed. It should also be emphasised that the above principles apply only to civil procurement. The Parties are permitted to exclude defence procurement from the scope of the Agreement's application. This is made clear by Article XXIII:1 which provides that,

"Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms,

[13] Special Drawing Rights: the International Monetary Fund's international reserve unit of account. In 1997, US$ 1.13 amounted to 1 SDR. SDR 130,000 amounts to around US$ 182,000.

ammunition or war materials, or to procurement indispensable for national security of for national defence purposes."

In practice, defence procurement has been excluded from coverage to differing extents among the Parties, although all have excluded war-like materials from coverage. Some Parties such as Israel simply do not list defence departments and agencies in their Annexes so that defence procurement is completely excluded even for non war-like materials. Other Parties such as Canada and the US list these departments and agencies and then set out either the procurement which is covered or that which is not or both.

d) Exceptions to the non-discrimination principle

Having verified the value of the contract, its subject matter and the type of entity involved, the coverage of the contract could also be affected by exceptions to the non-discrimination principle contained in the General Notes at the end of most Parties' Annexes. For example, while the GPA covers above threshold procurement of services expressly listed in each Party's Annex 4, this position does not apply when a covered Canadian entity has a services requirement. Canada's General Notes provide that, "Until such time as there is a mutually agreed list of services to be covered by all parties, a service listed in Annex 4 is covered with respect to a particular party only to the extent that such party has provided reciprocal access to that service." Further details of the derogations maintained by the parties are provided in Chapter 3.

4. The GPA's content

It is arguably not possible to describe the GPA's content in a logical and coherent manner by adhering to the provisions in the order and structure of their present presentation. The description of the rules presented here is based on the improved structure for the Agreement, suggested by the European Commission's Advisory Committee on Public Procurement, as part of the review process pursuant to Article XXIV:7(b) and (c). These provisions provide a built in agenda for periodic negotiations towards improvement of the Agreement. The first set of negotiations were due to commence not later than the end of 1999. However, the WTO's Committee on Government procurement in its 1996 Report to the Ministerial Council[14] decided to undertake an early review, starting in 1997. Informal consultations to date have focused on three areas being the simplification and improvement of the Agreement, the elimination of discriminatory measures and practices, and expansion of coverage.[15]

As indicated above, the European Commission, through its Advisory Committee on Public Procurement, has been particularly proactive in the review process. In a September 1998 Report,[16] the Committee considered that structural improvements should be an essential part of the simplification and improvement process, with the view of making the Agreement more logical and easy to follow by suppliers and entities. To this end, the Report contained a suggested new structure, seeking to group provisions according to their purpose, and re-arrange

[14] Report of the Committee on Government Procurement, 9 December 1996 which can be viewed on the WTO's home page at www.wto.org.

[15] Paragraph 22 of the 1999 Report of the Committee on Government Procurement, states that "good progress has been made on improving the text of the Agreement, that the momentum of the work needs to be maintained and that all three elements need to be covered." The full report can be viewed on the WTO home page at www.wto.org.

procedural rules so that they correspond to the chronology of steps taken during the procurement process.

At present, the main body of the GPA appears in 24 Articles which are not grouped under any headings. The suggested amended text envisages that the Agreement should be divided into 5 sets of provisions as follows:

- Scope and coverage.
- Basic principles.
- Procedural provisions.
- Bid review.
- Institutional provisions.

a) Scope and coverage

According to the suggested new structure, Part A of the GPA should comprise the existing Articles I and II. The opening provisions will therefore establish that the covered procurement may involve any combination of goods or services obtained via purchase, lease, rental or hire purchase. No attempt is made to set out the Agreement's entity and sector coverage. As explained above, this depends upon the content of the national Annexes in Appendix 1.

Article II then sets out the rules relating to the valuation of contracts. As the GPA only applies to above threshold procurement, the division of requirements to avoid its application is prohibited. Article II also requires the aggregation of

[16] Advisory Committee on Public Procurement, Working Document, GPA Review, CCO/98/21-EN, 17.09.98.

"similar recurring contracts" over set periods, which form part of an "individual requirement." There is considerable uncertainty over the practical application of the aggregation rules; a matter which is considered in Chapter 3.

b) Basic principles

It has been suggested that Article XIX:1 which deals with the publication of procurement laws, regulations, judicial decisions and administrative rulings should incorporated into Part B. Article III, which sets out national treatment and non-discrimination obligations, would also fall under Part B. These fundamental obligations, which underpin the entire Agreement require that, with respect to covered procurement, GPA products, services and suppliers be treated no less favourably than domestic products, services and suppliers, and no less favourably than the products, services and suppliers of any other Party. Article III also requires the equal treatment of locally established suppliers regardless of their degree of "foreign affiliation or ownership" and the "country of production of the good or service being supplied." The latter obligation of non-discrimination does not apply however, where the country of production is not a GPA Party in the sense established by Article IV.

Article IV on Rules of Origin falls under Part B. At present Article IV:1 merely requires that the Parties should not apply any rules of origin in the procurement context which are different to those applied, "in the normal course of trade and at the time of the transaction in question..." At present entities are therefore permitted to discriminate against locally established suppliers on the basis of the

country of production of the goods or service being supplied, to the extent that this is permitted in the normal course of trade.

Article IV:2 refers to the work programme for the harmonisation of rules of origin for goods under the Agreement on Rules of Origin[17] in Annex 1A of the Agreement Establishing the World Trade Organisation, and requires that the Parties take the results into account in amending paragraph 1.

It is finally envisaged that Article XVI on offsets should be moved to Part B. For developed countries, an absolute prohibition on the use of offsets is imposed. Developing countries are, however permitted to negotiate for the use of offsets, for the qualification of suppliers, at the time of their accession. The offset prohibition is further considered in Chapter 3.

c) Procurement procedures

i) Tendering procedures

It is envisaged that Part C will begin with a description of the three tendering procedures currently found in Article VII, being the open, selective and limited procedures. Under the open procedure, all interested suppliers may submit a tender. However, there is nothing to prevent entities from operating a qualification system and then permitting only qualified suppliers to submit

[17] The Agreement on Rules of Origin calls for the harmonisation of non-preferential origin rules (those which generally apply in the absence of any special treatment under bilateral or multilateral trade agreements) through a work programme to be undertaken by the WTO Committee on Rules of Origin and the Customs Cooperation Council. Article 2 provides for a number of general rules which are applicable until such time as the harmonisation work is completed. For example, the rules applicable to imports and exports are not to be more stringent than those applicable for determining domestic origin. Upon completion of the harmonisation programme, Article 3 requires that origin rules be applied equally for all purposes (for antidumping and countervailing purposes; safeguard purposes,

tenders. Selective tendering involves the submission of tenders only by those suppliers invited to do so by the entity. Under the present Article X, entities are required to invite tenders from, "the maximum number of suppliers consistent with the efficient operation of the procurement system". Limited tendering involves entities contacting suppliers individually under the exhaustive conditions set out in the present Article XV. These circumstances include the absence of responsive tenders, extreme urgency and additional deliveries by the original supplier to avoid interchangeability problems. Under the proposed new structure, Article XV will form part of Part C.

It has sometimes been stated that the GPA provides for a fourth tendering procedure, described as competitive negotiation. This is because Article XIV makes provision for entities to conduct negotiations with suppliers. However, it is better to regard this as a possible additional step in any of the three procedures described above, rather than an independent tendering procedure. Entities may conduct negotiations either where an intention to do so has been indicated in the tender notice, or where no one tender appears to be most advantageous under the published evaluation criteria. It is provided that negotiations should be used primarily to identify the strengths and weaknesses in tenders. Safeguards are also provided for, to ensure that negotiations are not used to discriminate between suppliers.

ii) Qualification conditions

origin marking purposes and any discriminatory quotas or tariffs, as well as for government procurement).

Provisions relating to qualification requirements which suppliers may have to meet, are currently dealt with in Article VIII which falls under Part C of the suggested new structure. Article VIII(b) provides that "any conditions for participating in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question." This raises questions of whether qualification conditions can be used to eliminate firms which cannot meet 'secondary objectives' (such as the engagement of long-term unemployed or targeted minorities). The issues here are fully explored in Chapter 3. Otherwise, the provisions of Article VIII are largely directed towards ensuring that qualification procedures are not used to discriminate among foreign suppliers or between domestic and foreign suppliers.

iii) Provision of information to suppliers

The suggested new structure proposes that provisions dealing with information to bidders should be grouped together. The existing Article IX deals with the information which must be included in the invitation to participate. The requirements do not apply where limited tendering is exceptionally used. Entities in all Annexes may use a notice of *proposed* procurement as an invitation to participate. In contrast, entities in Annex 2 (sub-central entities) and Annex 3 (other entities which procure in accordance with the GPA) may use a notice of *planned* procurement or a notice regarding a qualification system as the invitation to participate.

The difference is that the notice of proposed procurement involves the provision of more information to suppliers, at an earlier stage, than the notice of planned

procurement. The latter therefore provides more flexibility to Annex 2 and 3 entities who need only provide information on the contract's subject matter, contact details, and a statement that interested suppliers should express their interest in the procurement to the entity within the applicable deadline. Responding suppliers must then be provided with the more detailed information required under the notice of proposed procurement (such as the applicable tender procedure, delivery and completion dates and any economic and technical requirements) in order for them to decide whether to confirm their interest. Where Annex 2 and 3 entities use a notice regarding a qualification system as invitation to participate, they must give suppliers the chance to assess their interest in participating by providing them with as much of the information required by the notice of proposed procurement as is available.

Article XII deals with another aspect of information provision to bidders; namely that which must be provided in tender documentation. This must contain all the information necessary to permit bidders to submit responsive tenders including the information which must be included in the notice of proposed procurement under Article IX. The additional information which must be provided is listed. In particular, entities must include, "the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders..."

iv) Technical specification

Part C of the proposed new structure also incorporates the provisions on technical specifications. Article VI presently requires that descriptions of products and

services as well as the processes and methods for their production should not create "unnecessary obstacles to international trade." Specifications should focus on performance rather than design or descriptive characteristics and should be based on national standards or regulations only when international standards are not available.

v) Time limits and deadlines

Article XI deals with time limits for tendering and delivery, which must be adequate to allow domestic suppliers as well as suppliers of other parties to prepare and submit tenders. The minimum time periods for the receipt of tenders, and for submitting an application to be invited to tender (where selective tendering is used) are set out, as are the circumstances in which these time limits may be reduced. These time limits are detailed in Chapter Five.

vi) Submission, receipt and opening of tenders and award of contracts.

Article XIII sets out the rules on submission, receipt and opening of tenders and award of contracts. The suggested new structure splits the rules on awarding contracts into a separate provision, and indicates that Article XIII could also be further divided. The submission rules currently envisage that tenders shall normally be submitted in writing although tenders by telex, telegram or facsimile are also expressly permitted. It is likely that electronic means of submission will soon be permitted to take account of the use of Information and Communication Technologies. The rapid developments here are considered in Chapter Five.

The award rules require the entity to award the contract to the supplier whose tender is either the lowest, or the most advantageous according to the published evaluation criteria. Abnormally low tenders may be rejected, and entities may decide not to award a contract at all if the public interest demands this. The author considers the scope of these provisions in the context of anti-competitive behaviour in Chapter Four.

vii) Publication of information on awarded contracts

Finally it is envisaged that part C will incorporate Article XVIII:1 which deals with the publication of information on awarded contracts. Under this provision there is some information which must be provided in the national publications listed in Appendix 2, within 72 days of the award of each contract. This information includes the nature and quantity of products or services in the contract award, and the name and address of the winning tenderer. Entities may however decide that any of the listed information should be withheld where certain concerns are present. These include prejudice to the legitimate commercial interest of particular enterprises or to fair competition between suppliers.

Under paragraph 2, the listed information need only be provided to individual suppliers upon request from any GPA supplier. On request, information regarding the rejection of a supplier's application to qualify, and why it was not selected must be provided. The provision also requires details of why a tender was not successful, and details of the relative advantages of the selected tender, to be made available to individual suppliers requesting the information. In respect

of this latter obligation, the information may also be withheld under the same conditions as specified in paragraph 4.

viii) Bid review

The proposed new structure places Article XX under a separate section (C.1). Article XX provides for an innovative form of dispute settlement in the form of national challenge procedures. These are intended to provide for timely and effective redress for individual suppliers believing that entities have handled a procurement inconsistently with the GPA's requirements. Each party must therefore provide for a legal or administrative procedure before national courts or an independent and impartial review body. The designated body must have the authority to order correction of the breach or compensate for the loss or damage suffered. It must also be able to order rapid interim measures, including the suspension of the procurement process, to correct breaches, and to preserve commercial opportunities. A critical analysis of Article XX and of proposals to strengthen the review of procurement decisions is provided in Chapter Six.

d) Institutional provisions

Part D of the suggested new structure groups together those provisions concerning the obligations which the member governments owe to each other in the GPA's application.

i) Information exchange between member governments

The present Article XXI:2-4 deals with the information which may need to be exchanged between governments to enable them to determine that the Agreement

has been properly applied. The provisions therefore complement Article XVIII:1 which deals with post-award information, which must be published, or made available to individual suppliers on request. In contrast Article XIX:2 enables the government of an unsuccessful tenderer to seek such additional information on the contract award as may be necessary to ensure that the procurement was made fairly and impartially. It will be recalled that under Article XV, governments can refuse to disclose requested information to individual suppliers for various reasons including the prejudice of fair competition. However, where the information is exchanged between governments under Article XIX:2, the information (concerning the characteristics and relative advantages of the winning tender and contract price) cannot be withheld. Neverthless, the government providing the information is entitled to demand that the information should not be further disclosed to other persons, such as national suppliers, where this would cause prejudice to competition in future tenders. In such a case, the authorisation of the government providing the information is required before its further disclosure. Article XIX:4 also requires that such authorisation be obtained where confidential information has been provided to a member government.

ii) Exceptions to the Agreement

Part D also comprises the exceptions to the Agreement provided in Article XXIII at present. In addition to the defence procurement exception described above, this provision permits measures, "necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to

the products or services of handicapped persons, of philanthropic institutions or of prison labour."

iii) Special and differential treatment for developing countries

Article V on Special and differential treatment for developing countries falls under Part D. The provisions here recognise the development, financial and trade needs of developing countries, and least developed countries, by requiring account to be taken of development objectives in coverage negotiations. Article V also contains provisions on technical assistance, establishing information centres giving information on procurement practices in developed countries. It also has a built-in review mechanism. Further consideration to Article V is given in Chapter 3.

iv) Statistical reporting

The rules on statistical reporting currently forming the latter half of Article XIX are included in Part D. Under Article XIX:5, each Party must collect and provide to the other Parties, through the Committee on Government Procurement, statistics on its procurement on an annual basis. Reporting requirements are more onerous for Annex 1 entities than for Annex 2 and 3 entities. For example, under paragraph (a), Annex 1 entities must report statistics on the estimated value of contracts awarded, both above and below the threshold value, on a global basis and broken down by entities. The same obligation applies to Annex 2 and 3 entities but only in relation to above threshold procurement.

In its September 1998 Report, the European Commission's Advisory Committee on Public Procurement identified statistical reporting as an area where simplification and streamlining needs to be considered to address concerns over the burdensome and costly nature of present requirements.[18] The Committee questioned whether more flexible procedures affording greater discretion to the Parties could be instituted without unduly detracting from the level of transparency potentially engendered by the present rules. In particular, it was noted that the possibilities for simplification and streamlining are closely linked with advances in the use of information technology. An innovative proposal was that Parties should be permitted to apply for waivers from reporting requirements, if the obligation to published Contract Award Notices (CANs) (currently provided for in Article XVIII) were reinforced. The principal condition for the suggested waiver is that interested parties should be able to access data on awarded contracts through one single electronic point of access. They should then have access to at least the following: price information; type of contract and categories of goods and services involved (to be identified via a common nomenclature such as the Common Procurement Vocabulary); award procedure; date of contract award; and date of publication of tender notice.

The need for statistical reporting would then be obviated by the readily accessible CANs which would ensure the transparency of contract awards and enable suppliers and governments to monitor compliance with the procedural obligations.

[18] Advisory Committee on Public Procurement, Working Document, GPA Review, CCO/98/21-EN, 17.09.98.

v) Inter governmental consultations and dispute settlement

The final significant provision of the suggested Part D is Article XXII which deals with inter governmental consultation and dispute settlement. Under this provision, the Parties have adopted the WTO Understanding on Dispute Settlement as their dispute settlement system, with a few adaptations to take account of the nature of procurement disputes and the GPA's plurilateral character. Thus paragraph 6 seeks to accelerate the Panel procedure and bring forward the date of the final report. Since the GPA is not part of the Single Undertaking, paragraph 7 disallows cross-retaliation. The Parties cannot therefore suspend concessions under the GPA as a result of dispute under the other WTO Agreements, because of any dispute under the GPA. Inter governmental dispute settlement under the GPA is analysed in Chapter Six.

4. Work on government procurement in other WTO fora

There are three on-going activities in the WTO in the area of government procurement. The first is the review of the existing GPA pursuant to in built agenda of Article XXIV:7(b). Secondly negotiations are in progress under Article XIII:2 of the General Agreement on Trade in Services (GATS), within a Working Party on GATS Rules. Thirdly, a Working Party on Transparency in Government Procurement was established by a decision at the WTO Ministerial Conference held in December 1996, "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." The work within the GATS Working Party and Transparency

Working Group, is distinguished from the GPA review process in that the negotiations are multilateral in character. Any resulting procurement disciplines will therefore bind all WTO Members unlike the plurilateral GPA which applies only to those states choosing to accede to it. There follows an overview of the progress of the multilateral negotiations.

a) Working Party on GATS rules

In common with the GATT, procurement activities are excluded from the GATS. Article XIII:1 of GATS states that Article II (most-favoured nation treatment), Article XVI (market access) and Article XVII (national treatment) shall not apply to laws, regulations or requirements governing the procurement by government agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale. However, Article XIII:2 goes on to require the commencement of multilateral negotiations on government procurement in services within two years from the date of entry into force of the WTO Agreement. The Working Party on GATS Rules was established in March 1995 by the Council for Trade in Services.[19]

The most significant achievement to date has been the implementation of an information gathering exercise in the form of a questionnaire circulated to all WTO Members, requiring them to provide details of their procurement practices, and the extent of regulation.[20] The questionnaires deal with how procurement is

[19] The Reports of the Working Party on GATS rules can be viewed on the WTO home page at www.wto.org and can be downloaded via the Document Dissemination Facility.
[20] The questionnaire itself as well as the responses to it can be downloaded from the WTO documents on-line facility.

defined; the level of centralisation of procurement activities; the laws and regulations in force; tendering procedures; the extent of registration, residence or other requirements for potential suppliers; the treatment of foreign services and service providers and procedures for receiving and hearing complaints. Some 22 responses have been received to date which will provide the foundation for discussions on multilateral disciplines.

The Reports suggest that much of the discussion to date has focused on the definition of government procurement, with the view of moving on to consider non-discriminatory treatment at a later date. The definitional issue has been sub-divided into three questions:

- What entities are involved in procurement activities?
- What is being procured in terms of goods, services and construction services?
- What types of transactions are covered?

In respect of the third question, attention has focused on the issue of how concessions should be treated, with delegations expressing the need to define concessions[21] before moving on to consider the relevance of GATS disciplines. It has also been recognised that the Working Groups on Transparency in Government procurement is also considering questions of definition and scope of procurement, so that there is a continuing need for consultations on how best to co-ordinate the work with other for a dealing with government procurement.

b) Working Group on Transparency in government procurement

The work here has again been centred upon information gathering on transparency related provisions in existing instruments on government procurement procedures and practices. Discussions have been conducted under the structure of some 11 headings under which the Parties have provided details of their existing experiences.[22] The possible content of any agreement emerging from the activities of the Working Group is considered in Chapter 3.

[21] A services concession would involve a contracting authority engaging a service provider to provide a service to the public lying within its area of responsibility, and under which the consideration provided by the contracting authority consists of, or includes the right the exploit the provision of the services.
[22] These headings can be downloaded from WTO home page at http://www.wto.org/wto/govt/working.htm.

Chapter 2

The Problem of Limited Membership of the GPA[1]

1. The Present Membership Situation

The original "GATT" procurement agreement which came into force in 1981 having been negotiated at the time of the Tokyo Round, applied only to those GATT members which chose to sign it. Likewise, the revised and expanded Agreement negotiated during the Uruguay Round and currently in force, still fails to deal with procurement on a multilateral basis. Rather, it is one of the "Annex IV" or plurilateral Agreements, in that its disciplines apply only to those WTO members that have signed it. Membership of the Agreement is very limited, and little interest has been attracted from developing countries. Of the 134 WTO members only 27 are GPA signatories. These are Aruba, Canada, Hong Kong, Israel, Japan, Korea, Norway, Singapore, Switzerland, Liechtenstein, the United States and the European Community and its 15 Member States.[2] Korea and Israel are the only current parties which have acceded to the Agreement as developing countries.

Panama, Chinese Taipei and Iceland are currently engaged in negotiations for accession. The accession procedure is provided in document GPA/1 Annex 2. It involves the submission of an offer to the existing Parties containing lists of entities and services which would be covered by the Agreement. There are also several newly acceded WTO Members with commitments to accede to the GPA. These are Bulgaria, Kyrgyz Republic, Latvia and Mongolia. 14 WTO members

[1] See S. Arrowsmith, "Prospects for the WTO Agreement on Government Procurement: Obstacles and Opportunities", (1997) 1 *Malaysian Journal of Law and Society* 15.

are observers. These are Argentina, Australia, Bulgaria, Chile, Colombia, Estonia, Iceland, Kyrgyz Republic (requesting observer status) Poland, Latvia, Lithuania, Mongolia, Panama, Slovenia and Turkey. Four non-WTO members, Chinese Taipei, Croatia, Georgia and Lithuania, and three inter governmental organisations, the IMF, the ITC and the OECD, also have observer status. This means that they are entitled to sit in at the meetings of the GPA's Committee on Government Procurement[3], follow its proceedings and receive official documents. Observers may be interested to follow developments within the Committee to benefit their trading links with other WTO members, while, for other states, Committee discussions provide an educational input for their own regional procurement initiatives. While membership of the WTO is not formally subject to GPA accession, its significance to the WTO's overall package of trade liberalisation measures should not be underplayed. Existing GPA signatories have indicated that prospective WTO members will be expected, at least, to undertake commitments to join the GPA before their WTO membership is approved.[4] Thus it is hoped that future WTO members from among the economies in transition, such as Russia and China will conduct their bilateral negotiations with existing GPA members in parallel with their WTO accession negotiations.

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[2] Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.

[3] This body represents all GPA Parties and is responsible for, "affording Parties the opportunity to consult on any matters relating to the operation of [the GPA] or the furtherance of its objectives." GPA Article XX(1).

[4] See V. Kulacoglu, "An Overview of Developments within the WTO Singapore Ministerial Conference", paper delivered to the conference Public Procurement Global Revolution, University of Wales Aberystwyth, September 11-12, 1997.

2. The need for expanded membership

The increased membership of the GPA will be crucial if the Agreement is to have a pronounced impact on achieving its objectives. These objectives can be described under two broad headings being, the need to introduce a consistent framework of procurement rules among the WTO members, and the need to eliminate discriminatory procurement laws and practices.

a) The need to introduce procurement rules

One of the GPA's key objectives, as expressed in the Preamble is the need to provide, "transparency of laws, regulations, procedures and practices regarding government procurement." This clearly envisages that the GPA is intended to have a positive effect on the introduction or consolidation of procurement laws and practices. Notwithstanding the separate issue of opening national markets to international competition, there is an initial need to ensure that procurement procedures are conducted according to published, predictable and commercial criteria. Regulation at the national level can lead to various crucial benefits.[5] Prominent among these benefits is obtaining "value for money" or "economy" in procurement. This involves the acquisition of goods or services that are appropriate to the need identified, on the best possible terms. These terms need not be confined to price alone, so that various other factors such as total life-cycle costs, can be specified as relevant.

[5] See S. Arrowsmith, "National and International Perspectives on the Regulation of Public Procurement : Harmony or Conflict?" in Arrowsmith and Davies eds. *Public Procurement: Global Revolution,* 3 (Kluwer International; 1998) at pp.7-8.

A further prominent concern of national policy makers is usually to safeguard the "probity" or "integrity" of the decision making process. Successful regulation can therefore lessen the opportunity for corrupt practices, such as placing contracts for personal or political gain. Regulation may also be directed at private restraints of trade such as collusion among bidders. Of equal importance is to safeguard the appearance of independence in the decision making process. Thus purchasers should not have any personal interest in the placement of contracts, regardless of whether they would ever in fact act on those personal interests. This independence can be seen as essential to safeguarding the participation and confidence of suppliers, in procedures which they may already regard as overly bureaucratic and burdensome. Quite apart from promoting supplier participation and value for money in general, the maintenance of probity in procurement can be regarded as important for other reasons. Thus Westring and Jadoun observe that corruption in procurement can undermine confidence in governments as a whole, and provide funding for criminal activities.[6]

These are some of the advantages that procurement regulation can engender, ever if national markets remain closed. In some instances the GPA has had a crucial impact on actually introducing open procurement procedures. For example, until Japan implemented the original GATT procurement Code in 1981, it had little experience with open competitive bidding, to the extent that around 90 per cent of contracts were single tendered to local suppliers, without the publication of

[6] G. Westring and G. Jadoun, Public Procurement –Manual for Central and Eastern Europe (International Training Centre for the ILO, 1986).

contract notices.[7] In other cases, the GPA has had a crucial impact on increasing the scope of application of existing national laws. In Israel the Public Tenders Law governs the award of central government contracts.[8] This came into force in 1992, and, for the first time, requires that contracts let by the central administration be subject to a system competitive tendering. Under the Law, however, the general position is that there is no requirement to publish a contract award notice in no less than 28 types of procurement contract.[9] Nevertheless, where the GPA applies to the contract in question, it overrules Israeli legislation. The exemptions can only then be operated in so far as they are compatible with the GPA, or where specific derogations have been negotiated for their retention.

In other instances, it has not been the fact of GPA membership that has led signatories to introduce or consolidate their procurement laws. Thus, the EU Treaty's articles on the free movement of goods and services have, in principle, applied to discriminatory procurement among the Members States for over 25 years.[10] The Treaty provisions have been supported by secondary legislation taking the form of Directives since the 1970s, albeit that the momentum towards ensuring effective observance of the rules dates from the late 1980s. The new

[7] See J.H. Grier, "An Overview of the Japanese Government Procurement System", 1998(6) *Public Procurement Law Review* 131.
[8] See G. Shalev, "Public Procurement Contracts in Israel", 1997(5) *Public Procurement Law Review* 185.
[9] The motivation for these exemptions has been the existence of some interest prevailing over the economic and public interests in favour of competitive tendering. Examples include contracts for the marketing of agricultural produce, and contracts for the acquisition of unique medicaments. The exemptions are contained in the Public Tender Regulations 1993, which implement the details of the main Law.
[10] For an account of the evolution of the EU's policy on procurement, see J.M. Fernández Martín, *The EC Public Procurement Rules: A Critical Analysis* (1996; Clarendon Press Oxford) chapter 1; S. Arrowsmith, *The Law of Public and Utilities Procurement*, (1996; Sweet & Maxwell), chapter 4. For an account of the current legislative and policy context, see S. Arrowsmith, "The Community's Legal Framework on Public Procurement: "The Way Forward" At Last?" (1999) 36 *Common Market Law Review* 13.

programme involved strengthening the existing award procedures, setting up an effective enforcement system and expanding the coverage of the rules to cover services contracts, as well as the previously excluded utility sectors, of water, transport, energy and telecommunications.[11] Implementation of the GPA has involved the extension of market access under the existing rules to GPA suppliers. It has also been necessary to undertake minor amendments to the EC Directives, to avoid the situation of GPA suppliers having access to EC procurement markets on more favourable terms than EC suppliers themselves.[12] Thus the rights which Member States enjoy under the current Directives, are no less favourable than those which third countries enjoy against Community states under the GPA. The Directives also ensure that compliance with their procedures automatically ensures compliance with the GPA.[13]

The beneficial impact which the GPA has undoubtedly had on promoting the regulation of procurement according to consistent criteria, has, however, been limited to its small body of existing members. Many WTO members lack any formal regulation of procurement activities relying instead on administrative guidelines and strong channels of accountability for purchasing decisions. For

[11] The current directives are Directive 93/36/EEC on public supply contracts, [1993] O.J. L199/1; Directive 93/37/EEC on public works contracts, [1993] O.J. L199/54 and Directive 92/50/EEC on services contracts, [1992] O.J. L209/1. Procurement in the utilities sectors of water, energy, transport and telecommunications are governed by Directive 93/38/EEC, [1993] O.J. L199/84, and remedies by Directive 89/665/EEC, [1989] O.J. L395/83 (public sector) and Directive 92/13/EEC, [1992] O.J. L76/14 (utilities).

[12] For example, the thresholds for access to central government services contracts were lower under the GPA than under the public sector Services Directive . In some respects, the award procedures under the Directives were more flexible than those under the GPA. For example, prior to the amendment of the Directives, the rules on reducing time periods for the receipt of tenders following the issue of Periodic Indicative Notices (which give advance notice of future purchases) were different under the GPA. Time limits could formerly be reduced to a greater extent under the EC Directives compared to the GPA.

[13] It is the Member States themselves, however, who are responsible for the correct implementing the GPA.

example, in New Zealand, there are no laws, regulations or central controls dealing specifically with government procurement. Reliance is placed on the strict accountability of Chief Executives to their Ministries, and scrutiny of their performance by the Parliament and the Audit Office. Purchasing guidelines stress that procurement decisions should ensure efficient, cost-effective and ethical use of public resources.[14] Many WTO members with developing country status lack both formal laws and administrative guidelines on procurement procedures. The GPA has therefore had a positive but limited impact on procurement regulation among the WTO members. Of course, the Agreement's objectives are more ambitious, and go far beyond the mere introduction and consolidation of procurement rules. Crucial to the purpose of these rules is the liberalisation of procurement markets, through the removal of practices involving discriminatory treatment among, and against domestic and foreign suppliers.

b) The need to eliminate discriminatory treatment

The GPA has had an impressive positive effect on reducing discriminatory procurement laws among its existing members. One would also hope that it has had a corresponding effect on discriminatory practices, although evidence on this issue is not yet available. While many existing members had already prioritised procurement regulation before joining the GPA, this had not involved any broad scale commitments to opening their markets to international competition. Thus it is possible to envisage regulation at national or regional levels, which prioritises value for money considerations, and safeguards the transparency of procurement

[14] For an overview of procurement regulation in New Zealand see the Asia Pacific Economic Cooperation home page at www.apec.org.

procedures, but which also makes no attempt to systematically ensure that markets are open to foreign suppliers.[15] The achievements of the GPA in opening up previously closed, or protected procurement markets, has been considerable.

Negotiations leading to the present GPA resulted in a substantial widening of the scope of the rules. The extension of the Agreement to procurement by sub-central government bodies, as well as entities in the utilities sector achieved much, as did the extension of coverage to services and construction services. It should be noted however, that while the GPA covers these sectors and entities in principle, the actual coverage of the Agreement as between any two states remains dependent on the results of bilateral negotiations. The value of the GPA in this regard is that it provides a negotiating forum for the gradual extension of its coverage, on the basis of reciprocal concessions. However, there is little that can be achieved through negotiations without the political commitment to reducing the incidence of discrimination, and increasing cross-border trade in procurement. The manner in which the GPA's coverage has been extended as between the EU and the US clearly exemplifies this.[16]

At the time of negotiations leading to the adoption of the revised GPA concluded in parallel with the Uruguay Round in December 1993, little was achieved in terms of expanding coverage between these Signatories, at sub-central

[15] On the interplay between the objectives of national and international procurement rules, see S. Arrowsmith, "National and International Perspectives on the regulation of Public procurement : Harmony or Conflict?" in Arrowsmith and Davies eds. *Public Procurement: Global Revolution,* 3 (Kluwer International; 1998).

[16] See A. Halford, "An Overview of EC – United States Trade Relations in the Area of Public Procurement" 1995(1) *Public Procurement Law Review* 35.

government and utilities sector level. However, the April 1993[17] and April 1994[18] EU – US bilateral agreements on government procurement substantially widened the scope of regulated procurement between the two parties and achieved an acceptable reciprocal balance in bidding opportunities on both sides of the Atlantic. Three factors have been identified[19] as instrumental to the broadening of the US offer at the sub-central government, and utility level, and the reduction of discrimination in favour of domestic suppliers required by the Buy American Act.[20] Firstly, under the 1993 bilateral agreement, the EC was able to secure an undertaking that the US Administration would seek the voluntary commitment of sub-federal entities to be included in the lists of covered entities. Secondly, under Article 4 of the 1993 agreement, provision was made for a jointly sponsored study to quantify the procurement opportunities that would arise from the GPA coverage of the entities and sectors offered or requested by either of the trading partners. By the 1994 agreement, the report had been published,[21] and it clearly demonstrated that the EC is by far the greatest provider of bidding opportunities at the sub-central level, making it politically untenable for the US to defend its limited offer. Thirdly, the conclusion of the broadened agreement in 1994, was due in part to a US domestic policy initiative to cut costs in federal procurement as part of a process of "reinventing government".[22]

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[17] Council Decision 93/323/EEC [1993] O.J. L125/1 of May 1993.
[18] Commission of the European Communities, Proposal for a Council Decision Concerning the conclusion of an Agreement in the form of an exchange of letters between the European Community and the United States on government procurement, COM 994 251 Final, June 16, 1994.
[19] See A. Halford, *supra* note 16, at pp. 44-55.
[20] Buy American Act 1933 47 Stat. 1520 (1933) (current version at 41 U.S.C. S. S.s. 10a-10d (1976)).
[21] The report was carried out by Deloitte and Touche, Reported in "EU-US negotiations on public procurement", Commission press release April 21, 1994.
[22] Facts on File, September 9, 1993, pp. 665-66 A1.

The fact of GPA membership is thus only a first necessary step towards the elimination of discriminatory procurement as a non-tariff barrier to trade. Membership itself can achieve only a limited amount without the political will to reach agreement on the gradual extension of the GPA's coverage. The author now describes the possible barriers that have prevented most WTO members from taking the first necessary step, of acceding to the GPA.

3. Practical considerations

There are a number of practical considerations which may prevent WTO members from prioritising GPA accession. One factor is the cost and complexity of accession negotiations. It will be recalled that accession involves more than merely agreeing to open the procurement which is, in principle covered by the Agreement, to international competition. In practice, the scope of the GPA's coverage as between any two members is determined through bilateral negotiations. The task of conducting accession negotiations will become increasingly complex as the number of signatories swells, due to the need for each new member to reach agreement with each and every existing member. It has also been noted that the insistence of many parties on obtaining reciprocity on a sectoral or entity basis also hinders accession negotiations.[23] Negotiations are likely to be protracted if members are only prepared to open their procurement markets in particular sectors, if other members can likewise commit to opening the same sectors to the same extent. As noted, the US and EC continued

[23] See B.M. Hoekman and P.C. Mavroidus, "The WTO Agreement on Government Procurement : Expanding Disciplines, Declining Membership" (1994) 5 *Public Procurement Law Review* 63.

negotiations on coverage, beyond the period leading up to the adoption of the current GPA in parallel with the Uruguay Round. The 1994 bilateral agreement eventually concluded between them (which has for the most part been incorporated into the GPA's Annexes) was based on coverage on a "dollar for dollar" approach rather than strict entity and sector reciprocity. Even this approach has its difficulties, however, as there is obvious scope for disagreement as to the actual dollar value of the offers on coverage which are made. As noted above, one of the factors leading to the conclusion of the EU – US bilateral agreement was the publication of the study which quantified the values of the offers made.

A further potential barrier to increased membership is the short-term resources which need to be devoted to implementing the GPA, by providing for contract award procedures and training purchasers to use them. The challenges of implementation are greater for states lacking a domestic legal tradition of regulating procurement activities. It was noted above that the beneficial impact which the GPA has had on promoting the introduction of procurement rules, has been limited to its small body of existing members. This is not to suggest, however, that WTO members which have yet to accede to the GPA have generally failed to prioritise the regulation of procurement, or have not recognised the economic importance of efficient procurement practices. Under various trade liberalisation agendas at bilateral and regional levels, states are increasingly agreeing to enter into commitments on cross-border trade in procurement. Such is the momentum of current developments, that it can realistically be said that we

are now experiencing a global revolution[24] in the area of procurement regulation. For the GPA, which is firmly the principal vehicle for procurement liberalisation at the global level, there are clearly positive consequences here for the prospects of increased membership. Developments at regional and bilateral levels increase the profile of procurement as an economic activity which is crucial to national economies. Such developments can also be seen, in many respects, as a facilitating step towards GPA accession, since it will frequently be easier for states to implement the GPA through the adaptation of existing laws or regulations, than through the adoption of rules for the first time.[25]

4. The desire of states to retain their secondary uses of procurement

The author considers that the perceived limitations, which the GPA imposes on the use of procurement for secondary purposes, constitutes the most significant, and intractable barrier to increased membership. Governments have traditionally used procurement as an instrument for the promotion of innumerable secondary objectives, sometimes motivated only by the desire to isolate domestic suppliers from foreign competition, but often connected with more legitimate objectives of a social, economic/industrial or environmental character. There are various explanations for the use of procurement for purposes other that the purchase of

[24] The descriptions "global revolution" or "revolution" were first used by D. Wallace, Jr., "The Changing World of National Procurement Systems: Global Reformation" (1985) 4 *Public Procurement Law Review* 57. See also Arrowsmith and Davies eds. *Public Procurement: Global Revolution* (1998; Kluwer International).

[25] For an overview of the various trade organisations and regional groupings which currently have on-going initiatives in the area of international procurement, and for an analysis of whether these initiatives should be seen as beneficial from the perspective of multilateral liberalisation, see S. Arrowsmith, J. Linarelli and D. Wallace, Jr., *Regulating Public Procurement: National and International Perspectives*, forthcoming; Kluwer International.

goods and services on a value for money basis. The more prominent explanations are explained below.

Some policies are overtly protectionist, and motivated solely by the desire to systematically displace foreign with domestic industry in government contracts to increase domestic employment and profits in the industries concerned. The US Buy American Act[26] of 1993, as amended, represents one of the most comprehensive policies of this kind. The legislation covers a number of discriminatory measures taking several forms, including preferences and set asides for domestic industries, as well as local content requirements.

Other policies may be motivated by the desire to correct market imperfections. For example, in some countries, especially developing countries, capital markets are inadequate and finance may not be available for the development of industries which would be able to develop a comparative advantage, and flourish in perfect market conditions. Guaranteed government contracts then provide a means of redressing the market imperfections which hamper the natural development of the protected firms. In practice, many countries adopt policies to foster the development of small businesses, which are based to a large extent on the idea of correcting market imperfections. Such policies also frequently incorporate a social dimension such as the desire to promote businesses owned by disadvantaged groups.

[26] Buy American Act 1933 47 Stat. 1520 (1933) (codified at 41 USC S.s. 10a-10d (1976)). For a description of the Buy American Act, see M.J. Golub & S.L. Fenske, "U.S. Government Procurement:

Part of the motivation for discriminatory procurement may also be to reduce procurement costs in imperfect markets. Economists have identified that the application of price preferences in favour of relatively inefficient domestic firms, may reduce the prices bid by competing, and more efficient, foreign firms.[27] Whether a preference can have such a positive effect depends on the structure of the industry involved and the relative costs of domestic and foreign firms. Using price preferences may lower procurement costs, if domestic firms are at a competitive disadvantage, and only a limited number of firms bid for the contract. Where there are a large number of firms competing in the same market, and they are invited to bid for government contracts, this generally ensures that the market price is paid. Where domestic firms are at a competitive disadvantage, they will submit relatively high bids. The more competitive foreign firms are capable of submitting much lower bids, but choose to undercut domestic firms only by enough of a margin to win the contract. Where price preferences in favour of domestic firms are adopted, the hypothesis is that foreign firms are forced to lower their bids in response to the increased competition from domestic firms.

Finally, as noted above, preferential procurement policies may also be used as a bargaining tool to retain some leverage in trade negotiations, rather than unilaterally opening national markets without securing reciprocal access.

Procurement has become an increasingly significant non-tariff barrier to trade, as states lose their ability to protect domestic industry via the quotas, duties or

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Opportunities and Obstacles for Foreign Contractors" (1987) 20 *The George Washington Journal of International Law and Economics* 573.

subsidies outlawed by the GATT, and other WTO Agreements, on a multilateral basis. It is therefore perhaps not surprising that most WTO Members have chosen to retain their freedom to discriminate against foreign suppliers in one of the few areas where this option is still available to them. The inclination towards protecting domestic suppliers may be stronger among developing countries than their developed counterparts. It has been suggested that discriminatory procurement policies are only effective in protecting domestic producers (by displacing competitive imports with non-competitive domestic products or services) under certain conditions and that these conditions are far more likely to be present in developing countries than in industrialised countries.[28] A crucial condition here is that government demand for goods, which are frequently procured must exceed domestic supply in order for a discriminatory procurement policy to be effective. This is more likely to be the case in developing countries, which tend to be characterised by a shortage in domestic production of goods that governments procure heavily.

It can also be noted that developing countries are frequently characterised by relatively large public procurement markets so that, in signing the GPA, they generally liberalise a larger market than an industrialised country would. The author is aware that representatives from some developing countries view the GPA as a "battering ram" to prise open large procurement markets with

[27] see R.P. McAfee and J. McMillan, "Government Procurement and International Trade" (1989) 26 *Journal of International Economics* 291.
[28] See F. Trionfetti, *The Government Procurement Agreement and International Trade: Theory and Empirical Evidence*, paper written for the World Trade Organisation (1997)(unpublished).

insufficient by way of reciprocal market access opportunities.[29] While these concerns are genuinely held, it is repeated that the GPA's coverage is determined via a process of bilateral negotiations. Concerns over the size and value of the respective markets which are offered can be resolved at this time, through a 'dollar for dollar' approach if necessary. It can be tentatively suggested that the argument belies a lack of confidence among developing countries of their ability to secure a mutually acceptable result in accession negotiations.

As noted above, regional agreements are having a considerable impact on reducing the ability of governments to routinely place contracts domestically, and this undoubtedly limits the effectiveness of procurement as an instrument of secondary policy. Nevertheless, states may have retained a considerable scope for pursuing secondary objectives under regional arrangements. The strategic uses of procurement may also be crucial to reform programmes instituted at national level.[30] The situation may therefore be that states are concerned that that their secondary uses of procurement will be further limited by GPA accession, or that their reform programmes will be threatened.

The objective of trade protectionism will involve the routine exclusion of foreign firms from participation in contract awards. As will be seen, however, the use of procurement for more legitimate secondary objectives, such as to redress regional disparities, also frequently involves discriminating against foreign suppliers. It is

[29] Such views were communicated to the author at the Conference, *Public Procurement: Global Revolution*, at the University of Wales, Aberystwyth Sept. 1997.

[30] For example, it will be seen in the following Chapter that the strategic uses of procurement to the procurement reforms currently being instituted in South Africa pursuant to the Green Paper on Public Sector Procurement (GN No. 691, GG17928 of April 14, 1997).

the large potential of procurement for contributing towards socio/economic goals which makes it extremely difficult to persuade states to give up (or limit) their strategic uses of procurement, in favour of the long term benefits to the national and global economy, which open trade can generate. Public procurement is one of the functions of governments, through which they can pursue the policy goals which they have represented to the electorate, who, in turn, have given them the mandate to govern. It is therefore understandable that governments are reluctant to enter into international obligations which may mean that their strategic uses of procurement are lost where some discriminatory effects are likely. While there are numerous issues in this area, they are all referable to the overall question of whether the GPA strikes the appropriate balance between the objectives of trade liberalisation, and the desire of states to retain at least some of their freedom in the placement of contracts. Such is the importance and topicality of the issues here that the following Chapter is devoted to providing a detailed perspective on the GPA's approach to limiting, and accommodating the secondary uses of procurement.

Chapter 3

The GPA's limitations on the instrumental uses of procurement as an explanation for its limited membership

Part I

The use of procurement for the use of socio/economic policies

Introduction

It has been widely suggested that a key part of the explanation for the GPA's present limited membership is that non-members desire to retain their ability to discriminate against foreign products or suppliers when awarding contracts.[1] There may be several reasons for this, ranging from a desire to isolate domestic industry from competitive pressures to the tendency of governments to use procurement to achieve other secondary objectives of a social and economic character. This broad use of procurement power, is in conflict with a view which sees the principal ideal which should inform procurement decisions as the reduction of public expenditure through the purchase of goods and services on a value for money basis. In this connection, two conflicting ideologies on the role of public procurement have been identified.[2]

The first approach can be described as the 'economic rationale'.[3] This is concerned primarily with opening-up procurement markets and increasing cross-

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[1] See, for example, B.M. Hoekman and P.C. Mavroidis, "The WTO's Agreement on Government Procurement: Expanding Disciplines, Declining Membership" (1994) 5 *Public Procurement Law Review* 63.

[2] See J.M. Fernández Martín, *The EC Public Procurement Rules, A Critical Analysis* (Clarendon Press, Oxford; 1996) at pp. 41-49.

[3] *Ibid.* at p.41.

border procurement opportunities. Under a strictly economic approach, the aim of social welfare is closely equated with the reduction of wasted expenditure in procurement through a transparent regime of competitive tendering. The discretion of public authorities is narrowly circumscribed to favouring the contractor who is able to offer either the best price, or the most advantageous tender according to strict commercial criteria, relevant only to the firm's ability to perform the contract. The economic rationale seeks to sever procurement from the various other instruments at the disposal of governments to achieve their economic and social objectives. Under this view secondary objectives should be dealt with by using alternative instruments. Procurement may be seen as a second best and inefficient option.

Economic savings can indeed result in several ways from sourcing procurement requirements from the most competitive firm internationally, rather from a favoured domestic supplier. Prices charged by domestic firms are likely to drop, as they compete with foreign firms, on government contracts as well as on contracts with private clients. The liberalisation process is therefore seen as crucial to the achievement of value for money and the avoidance of wasted expenditure. The fair and equitable use of taxpayers' money is ensured. Re-structuring and adjustment also promote macro-economic growth, as firms are forced to become more efficient and innovative. In the mid-1980, it was estimated that the effect of competition on domestic firms, and restructuring effects alone, would generate savings worth an enormous ½ per cent of total

European Union GDP.[4] While estimates of this kind are unavailable in the WTO setting at present, it is clear that comparable savings on the global level could be generated by an effective, observed, and enforced regulatory system.

It is also clear however, that there are significant barriers to the success of the EU regime in *actually* achieving these economic benefits. These barriers have a strong relevance to the GPA's success and future development.[5] Both these regimes have the same basic objective of opening up procurement markets to free competition through a body of rules which are broadly similar in content. In 1995, the EU commissioned a substantial study to assess the economic impact which the EU procurement rules have had between 1987 and 1994.[6] The study was characterised by striking conclusions contributing to the overall impression that the EU rules have not had a significant impact in promoting cross-border trade in procurement markets. It was found that less than 14 per cent of entities covered by the rules had published any contract award notices at all. At an early and fundamental point in the procedure, suppliers had therefore generally been deprived of the opportunity of becoming aware of procurement opportunities.[7] The study also highlighted the apparently limited impact of the rules on

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[4] "The Cost of Non-Europe", in Public Sector Procurement, Research on the Cost of Non-Europe, Basic Findings, Vol. 5A, by W.S. Atkins Management Consultants (Commission of the European Communities, 1998), p.54.

[5] See H. Gordon, S. Rimmer and S. Arrowsmith, "The Impact of the European Union Rules on Public Procurement and Implications for the GPA" in S. Arrowsmith and A. Davies eds. *Public Procurement: Global Revolution*, 27 (Kluwer International; 1998).

[6] Published on the European Commission's internet pages under The Single Market Review Series, Subseries III – Dismantling of Barriers : Public Procurement, July 1996. <http://europa.eu.int/comm/dg15/studies/stud26.htm>

[7] The author would suggest here that the publication of procurement notices is merely a first step towards bringing about the economic benefits envisaged by the EU and WTO procurement rules. There is no obligation on the supply side to respond to advertised procurement opportunities. Indeed, in the GPA context, it is arguably unrealistic to expect suppliers to have access to all the government gazettes and equivalent publications which would enable them to become aware of all opportunities. This is a concern even at present when the GPA has failed to attract a significant membership. The

competition. It was assumed that the liberalisation process would lead to price convergence among the Member States, in frequently procured supplies. No price convergence was in fact observed in most product sectors, suggesting that the EU rules have been largely ineffective in increasing the competitiveness of the covered markets. While the potential economic benefits of open procurement have been strongly emphasised, it is therefore now clear that any system of rules should only be regarded as a necessary first step towards the achievement of these benefits.

In contrast to the 'economic rationale', the instrumental approach recognises the value of public procurement for promoting innumerable objectives beyond market liberalisation and value for money. Thus Fernández Martín notes that, "[t]he responsibilities of public authorities for ensuring harmonious and peaceful economic and social development, together with the volume of government procurement, justify this use of public procurement as a socio-economic policy instrument."[8] On this view, public authorities assume political responsibility to the electorate, which reflect prevailing values in society. These responsibilities materialise in all their activities, and public interest considerations are inherent in decisions relating to procurement methods, and the placement of contracts.

One of the challenges for any system of rules seeking to regulate government purchasing, is to attempt to reconcile these different ideologies. It is clear from the GPA's preamble that the Agreement is concerned to achieve the appropriate balance between the need for market liberalisation, and the desire of states to

potential difficulties will become greatly pronounced if and when the Agreement attracts an increased membership. The problems here are fully analysed in the Chapter 5.

retain the instrumental uses of procurement. The Preamble identifies the need for the expansion of world trade, the non-discriminatory treatment of foreign suppliers, and the need for transparent procedures. It also recognises that these objectives should be attained consistently with the development needs of developing and least-developed countries. The question considered by this Chapter, is whether the GPA is likely to achieve the appropriate balance.

In the context of the EC rules, Fernández Martín reaches the firm conclusion that the interpretation of the rules by the European Court of Justice, and the Commission's insistence on an economic approach, leans too far in favour of the economic rationale. Thus the author points towards the political responsibilities of contracting entities in addressing disparities in regional development, and the unavoidable relevance of public interest considerations in procurement decisions.[9] The inadequacy of alternative means of safeguarding regional and social cohesion is also cited as a reason against restricting the instrumental uses of procurement.[10] These conclusions have been reached in the context of a political and legal system intended to create an internal market, leading to Economic and Monetary Union, and the common treatment of third parties by the Member States. The WTO's objectives are, of course, not nearly as ambitious as this. The two regimes share common objectives such as raising standards of living, promoting full employment, and expanding the production and exchange of goods. However, the WTO's remit is restricted to removing the tariff and non-

[8] J.M. Fernández Martín, *supra* note 2, at p. 45.
[9] *Ibid*, at pp. 89-92.
[10] *Ibid*, at pp. 86-88. The author argues that until such time as common rules are adopted on how to deal with regional disparities, a flexible approach should be taken under Articles 92 to 94 EC (now Articles 87-89) to permit preferential procurement policies to be assessed in the light of the State Aids

tariff barriers to trade among its Members on the basis of reciprocal and mutually advantageous arrangements. Its remit does not extend to the creation of a customs union, still less the creation of an internal market. More generally, it may be noted that the differences in economic development between some WTO states, is far greater than those existing between, and within the EU's Member States. It can therefore be suggested that it would be surprising if one could find the same emphasis on the 'economic rationale' to procurement under the GPA, as one can now detect in the EU context.

It is against this background that the author analyses the approach which the GPA takes to balancing the conflicting ideologies identified here. This is a difficult undertaking, not least because of the lack of WTO Panel decisions which would provide some indication of the policy underlying the Agreement's text. The author's arguments are guided by the obvious need for an increased subscription to the GPA, but also by the recognition that increased membership cannot be achieved at any cost, and that there must be convincing reasons for departing from the traditional GATT principles of competition, and non-discrimination.

It is also emphasised that the issues presented here are of real and immediate concern. Of the three dispute settlement cases initiated under the present GPA, two have been directly concerned with the use of procurement power for secondary purposes. In October 1998, at the request of the European Communities and Japan, a panel was established to examine a Massachusetts

provisions. This would allow for the Commission to undertake a full examination of the measure in light of all the relevant considerations.

law,[11] prohibiting its contracting entities from having any business dealings with firms from, or having business interests, in Burma due to the latter's human rights abuses.[12] Regrettably (from the point of view of gaining authoritative guidance on the meaning of the GPA provisions which were allegedly infringed) the Panel suspended its work in relation to this complaint in February 1999. This was in response to a US court ruling which granted an injunction restraining enforcement of the Massachusetts law, when it was challenged as unconstitutional by the US National Foreign Trade Council (NFTC) in November 1998.[13]

In the same month as the Massachusetts complaint was withdrawn, the US made a request for consultations concerning the procurement practices of the Korean Airport Construction Authority. Part of the complaint involves requirements that participating suppliers have manufacturing facilities in Korea, and that foreign firms undertake to partner with local Korean firms. Both the European Communities and Japan have since joined the consultations, and a request for the establishment of a panel was made in May 1999.[14] The nature of these disputes

[11] Massachusetts "Act regulating State contracts with companies doing business in or with Burma" of June 25, 1996, Chapter 130, S.s.1, 1996 Mass. Acts 210, codified at Mass.Gen. Laws, Chapter 7, S.s.22G-22M.

[12] See A. Oram, "WTO Complaint against a Massachusetts Procurement Measure", 1998(6) *Public Procurement Law Review*, CS171.

[13] The Panel's work was suspended in response to the decision of the District Court of the First Circuit which found that the Massachusetts Burma Law unconstitutionally infringed on the foreign affairs powers of the foreign government. (National Foreign Trade Council, 26 F. Supp 2d at 290; National Foreign Trade Council v Baker, No. 98-10757 (D. Mass, Nov. 17, 1998 (order granting relief)). In June 1999, the Court of Appeals for the First Circuit also ruled in favour of NFTC's position, and also expanded on the District Court's ruling by unanimously holding that the Burma Law violated the foreign commerce clause, and was pre-empted by federal law regarding Burma. (National Foreign Trade Council v Natsios, No. 98-2304). The Supreme Court heard the case on March 22, 2000, and upheld the Court of Appeals ruling on 19 June 2000. (National Foreign Trade Council v Natsios, No. 90-474). These judgements can be located on the Find Law web site at http://caselaw.findlaw.com.

[14] The panel was established on 16 June 1999, and handed down its report on 1May 2000. (WT/DS163/R, Korea – Measures Affecting Government Procurement). The principal finding was that the various agencies responsible for the construction of the airport were not covered by Korea's

clearly illustrates the continuing desire of states to use their procurement for secondary purposes such as encouraging good human rights standards, and promoting the development of domestic firms.

New issues surrounding the GPA's approach to secondary policies are also on the horizon. The Republic of South Africa has recently embarked upon an ambitious programme of procurement reform.[15] As will be seen in Section 10 of this Chapter, the use of procurement is envisaged by the Green Paper on Procurement Reform as an essential tool for the development of black South African's and the promotion of equality. Those actors responsible for the policy are also insistent that the new measures will strike the appropriate balance between the economic benefits which open procurement can produce, and the strong reliance on procurement power for achieving socio/economic objectives. While South Africa is not even a WTO Member, it is likely that it will begin accession negotiations in the foreseeable future. It is also seeking to 'export' its procurement methods to developing countries and economies in transition. The question of the GPA compatibility of the South African reforms may therefore have a bearing on GPA's prospects of attracting new members. The reforms are fully explored in a case study at the end of this Chapter.

Section 1 of this Chapter describes the secondary objectives which are pursued through procurement rules. No attempt is made to exhaustively enumerate all the

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Appendix I of the GPA, and therefore did not have to conduct their procurement in accordance with the Agreement. The report can be located on the WTO document dissemination facility at http://www.wto.org.

[15] See the "Green Paper on Public Sector Procurement Reform in South Africa", GN No.691 GG17928 of 14 April 1997. On the reforms, see D. Letchmiah, "The Process of Public Sector Procurement Reform in South Africa" (1999) 1 *Public Procurement Law Review* 15.

secondary objectives which have been pursued through procurement.[16] The principal reason for this is that the content of secondary objectives, and the manner in which procurement power is deployed in this context varies immensely. In this Chapter, the author therefore links broadly defined categories of secondary objectives, with the various procurement based methods (such as qualification criteria, contractual conditions, preferences, offsets and the offer-back mechanism) which can be used to contribute towards these objectives. The extent to which the various methods for pursuing secondary objectives can be operated compatibly with the GPA is examined in detail.

1. The secondary policies which have been pursued under procurement rules

a) Social Policies

Governments have used procurement as a tool of *social policy* either as a mechanism to enforce existing legal obligations or to promote standards of behaviour in the private sector going beyond those required by law. The term 'contract compliance' has been used here to describe the use of procurement as an instrument of social policy. While the term has become closely linked to achieving equality of opportunity between different groups, such as gender, race and religion, the term is widely applied more generally to any policy of a social character which governments identify as important. There are therefore innumerable social policies which can be identified and potentially pursued under procurement rules.

[16] Even a detailed study in this area, restricted to the Member States of the EU acknowledged that it did not necessarily identify all secondary uses of procurement actually in operation. See C. McCrudden, "Public Procurement and Equal Opportunities in the European Community, A Study of "contract

Many social policies are directed at specific segments of the population which are identified as being disadvantaged in some way. Thus some policies have, for example, focused on the long term unemployed. Several local authorities in the UK during the mid-1980s required participating firms to demonstrate that, employment under the contract would be given to those living within the council area. Liverpool City Council required their contractors to prove that reasonable steps were taken to recruit local labour through job centres and/or trade unions.[17]

Disabled workers have also been targeted by procurement based policies. Provisions in the Spanish law on public procurement,[18] for example, provide that covered authorities may give preference to firms whose total labour force includes at least two per cent of disabled workers. This preference can apply only in those cases where the offers presented by these firms are equivalent to the most economically advantageous offers made by other tenderers.

Ethnic minorities may also be targeted by social policies. For example, since 1991 in the US, there has been a Government-wide goal of awarding five per cent of the total value of all contracts and sub-contracts to small businesses owned and operated by socially and economically disadvantaged individuals.[19] In 1994,

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compliance" in the Member States of the European Community and under European Community law", study conducted for the European Commission (1995) unpublished, at p.111.

[17] *Ibid*, at p. 110. It is clear, following the Local Government Act 1988, that such offset type requirements, are not permitted under UK law. Section 17 imposes a duty on local authorities to exercise their functions in relation to public supply or works contracts "without reference to matters which are non-commercial. Under Section 17(5)(a), such non-commercial considerations include conditions imposed on contractors relating to the composition of their work forces,

[18] Ley 13/1995 of May de Contractos de las Administrativas Públicas.

[19] Office of Federal Procurement Policy, Policy Letter 91-1, 56 Fed. Reg. 11796 (Mar.20, 1991).

Congress authorised federal government agencies to apply a ten per cent price preference for such businesses.[20]

Other policies may be based on protecting, or improving, the rights of the general population. Thus some policies focus on protecting labour conditions relating to remuneration, health and safety at work or security on site. For example, contract compliance was used in this sense in the UK to promote fair wages and conditions in the private sector up until 1983. From 1990, the application of the conditions were extended to apply to employees of sub-contractors as well as to the prime contractors' own employees. Despite the fact that compliance was specified as a term of the contract, often with a right to terminate for breach, the policy was largely ineffective due to a lack of awareness among workers of their rights and consequent non-enforcement.[21]

Policies aimed at environmental protection have also become increasingly important in recent years.[22] Procuring entities may, for example, seek to specify the characteristics of the products they require in terms of the environmental impact of the production methods used for those products, or in terms of the extent to which they can be recycled when they reach the end of their life-cycle. Here, the environmental considerations are directly relevant to the actual products which are procured. Entities may, however, pursue broad environmental goals not specifically connected to the subject matter of the contract. For example,

[20] PL 103-335, 108 Stat. 3243.
[21] For further details of the policy, see S. Arrowsmith, "Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation" (1995) 111 *Law Quarterly Review* 235, pp. 242-243.
[22] For a discussion of the compatibility of environmental considerations with both the EU and GPA rules, see P. Kunzlik, "Environmental Issues in International Procurement", in S. Arrowsmith and A. Davies eds. *Public Procurement : Global Revolution* (Kluwer; 1998).

entities could impose a qualification requirement that employees should have access to secure storage, and shower facilities to encourage them to cycle to work.

States may also use their procurement power to promote human rights internationally. Thus the Massachusetts law[23] mentioned above forbade procuring entities from purchasing goods and services from any company doing business with Myanmar, because of the country's poor human rights record. The policy under the law operated by imposing a ten per cent price penalty on bids from firms which deal with Myanmar.

b) Economic/Industrial Policies[24]

Procurement may also be used to pursue policies of an economic or industrial character. These policies are generally related in some way to industrial development objectives. There may be a significant overlap, however, between the social policies described above and the economic policies described here. For example, it has already been seen, in the US examples of preferences for minority owned businesses provided above, that one way of promoting disadvantaged segments of the population, is to favour firms which are owned or operated by these social groups. The upliftment of disadvantaged groups clearly has a social dimension. There is also an economic aspect in that the growth of the targeted

[23] Massachusetts "Act regulating State contracts with companies doing business in or with Burma" of June 25, 1996, Chapter 130, S.s.1, 1996 Mass. Acts 210, codified at Mass.Gen. Laws, Chapter 7, S.s.22G-22M.

[24] Jeanrenaud has provided a classification of the various functions procurement can play as a policy instrument in the area of economic and industrial policies. See C. Jeanrenaud, "Marchés publics et politique économique" (1984) 72 *Annales de l,Économique Publique, Sociale et Coopérative*, No.2, 151 at pp. 154-156. An English language version of this classification can be found in J.M. Fernández Martín, *The EC Public Procurement Rules, A Critical Analysis, supra,* note 10, at pp. 46-47.

businesses is likely to be promoted. A complete separation of social and economic policies, is therefore not possible.

Economic policies may pursue various different objectives. The policy may be central to reviving the economy as a whole. Thus procurement has been extensively used in the field of trade-cycle regulation. In times of economic recession, an increase in procurement can help to increase overall demand and thereby stimulate economic activity. Among the range of goods and services purchased, orders with an investment character such as construction of buildings, or civil engineering works are the ones most frequently used in budgetary policies which respond to cyclical effects. Thus, a general post-war trend in Europe was the adoption of large programmes of public works to fight unemployment.

Procurement may also be used to improve the competitiveness of domestic industry. This tends to occur in industries where the government is the largest purchaser operating in the sector which normally coincides with high technology industries such as information technology, telecommunications and defence. Providing some government business to these industries is seen as important, because these sectors normally provide the technological innovations capable of stimulating the economy as a whole by boosting foreign investment and providing skilled jobs.

Economic policies may also seek to encourage the participation of SMEs in procurement procedures given the importance of these enterprises to national and

regional economies. The Green Paper on Public Procurement in the European Union[25] estimated that SMEs account for over 65 per cent of turnover generated by the private sector in the European Union. However, the number of contracts won by SMEs remains limited, which was regarded as a significant limitation to the overall success of the EU procurement regime. Economic policies may therefore be used to foster the development of SMEs, and to promote their actual participation in contract awards, given their importance to national economies.

In the US, set asides have been established for small businesses on a legislative basis under the Small Business Act 1953,[26] with the objective of preparing these businesses to be able to compete in open markets independently of government assistance. The Federal Acquisition Regulations (FAR)[27] implements the requirements of the Small Business Act. It requires generally that the maximum practicable procurement opportunities be afforded to small business concerns, small disadvantaged business concerns, and women owned small business concerns.[28] More specifically, the FAR requires that all contracts for supplies or services between $2000 and $100,000 be automatically reserved for small businesses. The automatic set aside will not apply, however, where the procuring entity determines that there is not a "reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality and delivery".[29] The FAR also seeks to ensure the

[25] Green Paper, Public Procurement in the European Union: Exploring the Way Forward. Commission of the European Communities, Brussels, 27.11.1996 COM(96) 483 final, at p. 30.
[26] 15 USC § 631.
[27] See FAR Part 19 ("Small Business and Small Disadvantaged Business Concerns"). The FAR can be viewed on the US General Services Administration's home page at http://www.gsa.gov.
[28] FAR Part 19.201. The legislative requirements have also been accompanied by a government wide policy goal of awarding 20 per cent of the total value of all prime contracts to small businesses. See, Office of Federal Procurement Policy, Policy Letter 91 -1, 56 Fed. Reg. 11796 (Mar.20, 1991).
[29] FAR Part 19.502-2.

participation of small businesses as sub-contractors. Prime contractors responsible for contracts of over $100,000 in value must therefore undertake to provide small businesses with the maximum practicable opportunity to participate.[30]

Finally, many economic policies may be motivated by the desire to isolate or shelter national industry from foreign competition. For example, protection is afforded to domestic industry under the Buy American Act.[31] Under the Act, the basic legal requirement on federal purchasers since 1933 has been that procurement of materials, supplies, articles, or (since 1990[32]) services be substantially American, except in exceptional circumstances. Such circumstances exist, for example, where the goods concerned are unobtainable in the US, "in sufficient and reasonably available commercial quantities and of satisfactory quality" or when the head of a procurement agency determines that domestic procurement is "inconsistent with the public interest, or the cost ... unreasonable". The operation of the Act is suspended where the procurement in question is covered by the GPA which provides an incentive towards membership especially as the US is likely to be a major source of export opportunities for many prospective members.

c) Trade and Competition Law Policies

[30] FAR Part 19.702.
[31] Buy American Act 1933 47 Stat. 1520 (1933) (codified at 41 USC § 10a-10d (1976)). On the Buy American Act, see D.P. Arnavas and W.J. Ruberry, Government Contract Guidebook (1994; Federal Publications Inc., 2nd. edn) chapter 6.
[32] Omnibus Trade and Competitiveness Act of 1998, PL 100-418, tit. VII (amending the Buy American Act).

Procurement rules may also be used to strengthen trade law or competition law policies. For example, a group of firms may tacitly collude in tendering for government contracts and the procuring entity may wish to reject tenders from these firms. Alternatively firms may be dumping goods on the procuring government's market. The government would normally deal with this situation by imposing antidumping duties on the imported goods. However, it may also wish to reject low tenders which are part of a dumping strategy, or even refuse to qualify, or reject the tenders of firms whose exports have attracted an antidumping investigation in the past. The question here is to what extent these problems can be tackled consistently with the obligations contained both in the GPA and wider WTO obligations. The distinct issues here are addressed separately in Chapter Four.

The manner in which procurement obligations are implemented may also give effect to certain trade policies. The US implementation of the GPA provides an example of trade bargaining, in that all non-GPA countries are precluded from participating in any tenders for US government contracts subject to the Agreement.[33] The same was done in the US implementation of the Tokyo Code.[34] The US is the only GPA member required by law to exclude bids by non-members from consideration, and appears to operate the Act stringently. Both Hong Kong and Singapore were removed from the "designated country list" of GPA members when the new Agreement came into effect. There has been

[33] See 19 USC 2512(a), entitled *Authority to Bar Procurement from Non-Designated Countries*, which requires the President to prohibit the procurement of products originating from countries not parties to the GPA or to other reciprocal trade agreements. The prohibition does not apply to less-developed countries. An exception also applies when there are no offers of products from the United States or from GPA countries, or where such offers are inadequate.

[34] Trade Agreements Act of 1979, 302(a)(1).

some debate of the compatibility of such national measures with the GPA and broader WTO obligations.[35]

The bar on non-GPA participation could lead some states to re-consider their non-membership because of the limitations on export opportunities which it imposes. An Australian study has cited the example of one Australian company which reported a loss in export business of around US £350,000 annually because of the Trade Agreements Act.[36] Australia has yet to join the GPA however, which indicates that it still inclined to the view that ant benefits are outweighed by the disadvantages.

2. The means by which procurement power can be deployed to pursue secondary objectives

a) The qualification stage

i) The purpose and operation of qualification procedures under the GPA

The qualification of suppliers involves the identification of those suppliers who are deemed to be capable of performing the contract as defined in the tender documentation. Article VIII(b) of the GPA, makes it clear that entities are permitted to set minimum standards for participation in the award procedure relating to the financial, commercial and technical capacity of suppliers. These considerations will invariably be relevant, regardless of the type of tendering procedure which is used.[37] Where the open procedure is used, all interested suppliers may submit a tender, without any further action from entities beyond

[35] See, A. Reich, "The New GATT Agreement on Government Procurement. The Pitfalls of Plurilateralism and Strict Reciprocity". (1997) 31(2) *Journal of World Trade* 125.
[36] World Trade Organisation Agreement on Government Procurement, Review of Membership Implications. http://www.pa.gov.au/policy/wto/rpv.ht.

the invitation to participate. Selective tendering involves the submission of tenders only by those suppliers which have been invited to participate, while limited tendering involves entities contacting suppliers individually in the face of unusual circumstances such as an absence of tenders, or the receipt of non-responsive or collusive tenders.[38] In all tendering procedures, a qualification procedure needs to be carried out at some point before the contract is awarded in order to ensure that the successful supplier possesses the minimum acceptable attributes to perform the contract.

The qualification procedure will not necessarily take place before suppliers submit their tenders. This will ordinarily be the case where selective tendering is employed, and here it will be open to entities to request tenders from some, or all of the firms included in lists of qualified suppliers, where such lists are maintained. However, where the open procedure is used, the same considerations relating to financial, commercial and technical capacity will often be applied after suppliers have submitted their tenders. Price will sometimes be the single most important award criterium where the open procedure is used, since contract award and delivery of the supplies or services would be considerably delayed by having to compare the relative merits of tenders submitted by a large number of firms, on the basis of expansive award criteria. Where the open procedure is used, entities would then be expected to identify the best tenders, and then check whether the firms submitting those tenders have the requisite qualifications to perform the contract at the price tendered. Those firms not possessing these

[37] The tendering procedures under the GPA are described in Article VII.
[38] The circumstances in which limited tendering may be used are laid down in Article XV.

qualifications would be disqualified. This position is expressly envisaged by Article XIII:4(a) on the *Award of Contracts* which provides as follows:

"To be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and be from a supplier which complies with the conditions for participation ..."

The GPA leaves the matter of when and how entities should satisfy themselves that participating firms have the competence to perform the contract in question, to national implementation. The Agreement's main concern is to ensure that qualification procedures which are employed, do not discriminate against, and among foreign suppliers. For example, Article VIII(c) incorporates a safeguard by providing that,

"the process of, and time required for, qualifying suppliers shall not be used in order to keep suppliers of other Parties off a suppliers list or from being considered for a particular intended procurement..."

The GPA does, however, provide some guidance on the use of lists of qualified suppliers, and the process of selecting suppliers to participate from those lists. Qualification lists are of relevance to both open and selective tendering procedures where the entity wishes to limit the number of tenders to manageable proportions, which will normally be the case. Where the open procedure is used, entities may be content to receive tenders from all interested suppliers. Qualification conditions would then normally be used to disqualify suppliers

prior to contract award. However, entities may also choose to use the open procedure and receive tenders only from all interested firms who are included on qualification lists. The entity would then be relieved of having to check the minimum qualifications of listed supplier who submitted a tenders.

Where the limited tendering procedure is exceptionally used under the conditions provided for in Article XV, entities are given the discretion to apply any procedure for contacting suppliers individually, provided the procedure is not used, "with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among suppliers of other Parties or protection to domestic producers or suppliers."[39] It can therefore be inferred that entities may either contact suppliers which are included on qualification lists, or contact any other supplier, and ensure that the favoured supplier can perform the contract by checking its qualifications at some point prior to award. The author now considers the provisions which regulate the use of qualification lists.

Article IX:9 establishes that qualification lists are permitted under the GPA where the selective tendering procedure is employed. It requires that where entities do maintain permanent lists of qualified suppliers, they must publish the lists with references to the products or services to be procured through the lists. Entities must also provide details to suppliers on the conditions they must fulfil, with a view to their inclusion, and specify the period of validity of the lists.

[39] Article XV:1.

Article X on *Selection Procedures* provides for various safeguard for the use of qualification lists to ensure that they do not operate to restrict competition among suppliers, or to restrict the participation of foreign suppliers. Article X:2 provides that, "[e]ntities maintaining permanent lists of qualified suppliers may select suppliers to be invited to tender from among those listed. Any selection shall allow for equitable opportunities for suppliers on the lists." The latter sentence suggests that a system of rotation could be used whereby preference would be given to those suppliers who have not previously been invited to bid. It is clear from Article X:1 that any selection method employed would have to operate in a "fair and non-discriminatory manner".

Article IX:9 of the GPA which deals *with Invitation to Participate Regarding Intended Procurement*, enables entities to use a notice of a qualification system, as an invitation to participate. The principal purpose of Article IX is to ensure that entities publish invitations to participate in all cases of intended procurement, in order to alert suppliers of forthcoming opportunities. Paragraph 4 permits an invitation to participate to take the form of a notice regarding a qualification system.[40] Where this is done, information relating to the contract must be provided to interested suppliers to enable them to decide whether to proceed further to be considered for inclusion on qualified supplier lists. This information includes details of the subject matter of the contract, details of the economic and technical qualifications which may be required of suppliers, and details of how

[40] Only entities in Annexes 2 and 3 may use a notice regarding a qualification system as an invitation to participate. These Annexes cover sub-central government entities and all other covered entities respectively. Central government entities must, in contrast use a notice of proposed procurement, as the invitation to participate.

the awarding entity should be contacted.[41] It is also necessary to include a statement that the notice regarding the qualification system constitutes an invitation to participate.[42] In the event that an entity uses a "qualification system", the following conditions apply: (1) if the duration of the qualification system is three years or less, and (2) the duration of the system is made clear in the notices and (3) it is also made clear that further notices will not be published, then (4) it is sufficient to publish the notice only once, at the beginning of the qualification system, rather than for each individual procurement. This is subject to the safeguard that, "Such a system shall not be used in a manner which circumvents the provisions of this Agreement."[43]

Entities therefore have the discretion to use qualification lists from which firms may be invited to submit tenders. Where qualification lists are used, the safeguards detailed above must be complied with. However, where qualification lists are in existence, there is no obligation to invite tenders only from suppliers on those lists. Entities can choose to advertise the contract to all suppliers and, where this is the case, if firms not included in lists seek to participate, they must be permitted to do so. In other words, 'Optional Lists' are entirely compatible with the GPA. Equally, it would seem that entities are impliedly permitted under the GPA to insist upon registration on qualified supplier lists as a pre-condition

[41] Article IX, paragraphs 6-8 provide details of the type of information which should be made available to suppliers. The extent of the information which must be made available, depends on what form the invitation to participate takes. All entities may use a notice of proposed procurement, which imposes the most burdensome requirements in that all the information specified in paragraph 6 must be provided. However where a notice of planned procurement as the invitation to participate, slightly relaxed requirements apply. All entities other than central government entities may use a notice of planned procurement. Where this is the case, Article IX:7 requires that the information referred to in paragraph 6 must be published where it is available. In any case where a notice of planned procurement is used, it must contain certain basic information provided for in paragraphs 7-8 relating to the subject matter of the contract, and time limits for tender submission.

[42] Article IX:9(e).

for possible further participation in contract awards which are covered by the lists. There is nothing in the GPA which prohibits the use of such Mandatory Lists, provided they are operated compatibly with the above safeguards.

b) Can secondary objectives influence the qualification of suppliers under the GPA?

To this point the author has described the various ways in which qualification systems can be operated under the GPA. The extent to which secondary conditions can be relevant to the qualification of suppliers is now considered. Entities may wish to refuse the qualification of suppliers prospectively because of their anticipated failure to meet secondary objectives. Those secondary objectives may relate to factors which are internal to firms, such as the extent to which they are owned or operated by targeted disadvantaged groups. They may also relate to performance requirements, such as where some firms are refused qualification because of their anticipated failure to engage targeted labour. Effectively, certain contracts would be completely reserved, or set aside, for firms who have demonstrated their ability to fulfil the secondary objectives in question. Set asides will be particularly restrictive of trade where their purpose is to protect domestic firms from competitive pressures on at least part of their business, since this will normally entail the complete reservation of a quota of contracts for domestic firms.

Entities may also wish to remove suppliers from qualification lists as a remedial sanction. Thus they may seek to disqualify suppliers because of their

[43] *Ibid.*

unacceptable or criminal business conduct, whether or not the nature of the offensive conduct has any bearing on the ability of firms to perform the contract. More broadly, entities may wish to use the qualification process to pursue any secondary objectives which have some bearing on the obligations to be undertaken by suppliers, or their internal characteristics.

If disfavoured suppliers can be excluded at the qualification stage, then this would provide a significant method for pursuing secondary objectives. It would also mean that other mechanisms, operated at later stages in the award process, would become less important, as only those suppliers able to meet the secondary objectives would remain after the qualification stage.

Article VIII deals with the considerations which entities can have regard to in the process of qualifying suppliers, and provides that, "any conditions for participation in the tendering procedure shall be limited to those which are essential to ensure the firm's capability to fulfil the *contract in question*" (emphasis added). It is arguable that "the contract in question" can include contractual conditions relating to secondary objectives. On this basis, provided these contractual conditions are stated in tender documentation, then ability to perform the secondary objective can be used to qualify suppliers.

Article XII:2 states that, "Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders ... ". The following paragraphs list the specific information which must be provided. For example, paragraph (a) requires that tender documentation include

the "address of the entity to which tenders should be sent", and paragraph (f) requires that, "any economic and technical requirement, financial guarantees and information or documents required of suppliers" be included. In addition, paragraph (j) requires "any other terms or conditions" to be specified. This latter provision could be read as suggesting that qualification conditions relating to secondary objectives can be included in tender documentation.

Whether this is the case depends upon whether such an interpretation would be compatible with the overall framework of rules under the GPA. Thus, it would have to be shown that the disqualification of suppliers on the basis of their inability to undertake secondary objectives, could operate on a non-discriminatory basis consistently with Article III. The discriminatory effect of policies is discussed in detail below. More specifically, the question of whether secondary objectives can be specified in tender documentation as qualification conditions, depends on whether Article VIII should be understood as permitting this.

Support for the view that Article VIII permits the achievement of secondary objectives to be specified as qualification conditions, is provided by the fact that Article VIII does not impose any express limitations on the kinds of conditions which can be imposed as qualification criteria beyond the requirements that any conditions for participation, "shall be no less favourable to suppliers of other Parties than to domestic suppliers, and shall not discriminate among suppliers of other Parties".[44] Read on its own, therefore, Article VIII does not appear to

[44] Article VIII(b).

preclude qualification conditions dealing with secondary objectives. Non-exhaustive examples are provided. Conditions relating to "technical capacity are specified as being potentially relevant. The phrase is also used in the EC Directives, and it has been argued in this context that it relates to the ability to carry out the contractual conditions, broadly defined as including the performance of secondary objectives.[45]

One view of Article VIII is therefore that entities have a broad discretion to specify the achievement of secondary objectives as contractual conditions, and can refuse to qualify firms which cannot fulfil these contractual conditions. This may be either because there is no limitation (in Article VIII or elsewhere) on the kinds of contractual conditions which can generally be imposed, or because the "technical capacity" of suppliers includes their ability to give effect to defined secondary objectives.

It is considered that this view of Article VIII cannot be maintained when considered in the overall GPA context. This is because failure to meet qualification criteria has the absolute effect of excluding firms from further participation in the contract award. The expansive use of qualification criteria relating to the achievement of secondary objectives can therefore have a serious effect on competition and limit the value of the GPA in contributing towards the liberalisation of procurement markets. Even if it could be demonstrated that

[45] See C. McCrudden, "Social and Policy Issues in Public Procurement : A Legal Overview" in S. Arrowsmith and A. Davies eds. *Public Procurement : Global Revolution* (Kluwer; 1998). The author acknowledges, however, that this is probably not a tenable view, at least where social conditions are concerned, because the European Court of Justice has held that a condition relating to the use of the long term unemployed was not a matter of technical capacity. See Case 31/87, *Gebroeders Beentjes BV v The Netherlands* [1998] ECR 4635, paragraph 28.

disqualification of firms would be done on a non-discriminatory basis, it would continue to be inappropriate to use secondary considerations as qualification conditions. Even though all firms, domestic and foreign could potentially meet the required secondary objectives, it would be inappropriate to disqualify suppliers who are unwilling to undertake those objectives. To do so would still have a detrimental effect on competition, especially as some of these firms may be able to present highly competitive tenders in terms of price, or the quality of the required works, supplies or services. Suppliers should only be disadvantaged by their unwillingness to undertake secondary objectives at the award stage when the relative merits of tenders are considered.

A further reason against a broad view of Article VIII, is that some secondary objectives can only be pursued under procurement rules by imposing requirements which resemble offsets. As will be discussed below, Article XVI prohibits developed Parties from seeking offsets, and restricts their use for developing countries.

The better view, therefore, is that the purpose of Article VIII(b) is to restrict qualification conditions to those which relate directly to the provision of the works, supplies or services. An appropriate test would be to ask whether it is possible to perform the contract competently, without imposing secondary objectives as contractual conditions in tender documentation, and using those conditions to qualify suppliers. Thus it is not essential to the performance of the contract that the long term unemployed be engaged, nor that only firms owned by targeted groups can qualify. It will always be essential, however, that

participating firms are financially sound, and that they possess the necessary expertise to perform the contract. It is these essential considerations which can be used as qualification conditions, where they have been notified to firms in the invitation to participate and tender documentation.

Sometimes, the issue of whether contractual conditions can be regarded as essential considerations (and therefore be imposed as qualification conditions), or be regarded as extraneous secondary objectives, will depend on the context in which the conditions are imposed. The example of the construction of a nuclear power plant may be considered. Here, entities may wish to impose requirements relating to the environmental impacts of the construction, operation and decommissioning of the plant. These requirements would be part of the technical specifications, included in the tender documentation. The requirements could be specified as award criteria, so that the non-price factors would include the quality of the responses developed to the environmental challenges of the project.

In a recent essay, however, Kunzlik goes further than this.[46] The author suggests that where contractual conditions such as those above are imposed, then further conditions relating to the general environmental performance of potential participants, such as whether they have infringed environmental protection legislation, can also be specified as qualification criteria. Convicted firms would either be refused qualification, or removed from the lists. The additional conditions are appropriate in the context of the above example, since they are

[46] See P. Kunzlik, "Environmental Issues in International Procurement" in S. Arrowsmith and A. Davies (eds.) *Public Procurement Global Revolution* (Kluwer International; 1998, at p.205.

closely connected with the ability or "technical capacity" of potential participants to deliver the contract as specified in the technical specifications.

However, in a different context, entities may consider that environmental concerns are less important, and therefore not refer to matters such as production methods or the extent to which a product can be recycled, in the technical specifications. In such cases, additional conditions relating to the general environmental performance of potential participants cannot be imposed as qualification criteria. Here, such additional conditions must be regarded as extraneous secondary considerations because they do not support clear environmental objectives expressed as part of the technical specifications.

Where there is doubt in any context as to the compatibility of a qualification condition with Article VIII, the question should be whether that condition is relevant to the efficient delivery of the subject matter of the contract. This conclusion is permissive of the use of procurement for environmental protection objectives. Entities will invariably be able to include conditions relating to environmental performance in technical specifications, regardless of the subject matter of contract. The nuclear power plant may have innumerable environmental impacts. The office desk may also have such impacts in terms of the extent to which a product can be recycled, or whether the wood used for its construction has come from sustainable forests. Given that considerations such as these can form part of the technical specifications, secondary objectives relating to the general environmental performance of firms, may also be stated as contractual conditions, and therefore operate as qualification criteria. This is

because the general conditions support the specific requirements set out in the technical specifications.

Because of the reasons stated above relating to the overall context of the GPA, it is submitted that Article VIII should not be understood as permitting non-environmental secondary objectives to be used as qualification conditions. This should be the case even where those conditions have been permissibly included in some part of the tender documentation.

Assuming that the US complaint over the procurement practices of the Korean Airport Construction Authority does proceed to panel proceedings, authoritative guidance on the correct interpretation of Article VIII should be available in the near future. The complaint currently being pursued jointly by the US, the EU and Japan, is based partly on multiple infringements of Article VIII. Two points in particular have been raised in the consultation process as being incompatible with Article VIII, as well as various other provisions. Firstly, in order to qualify, suppliers must have manufacturing facilities in Korea. Secondly, qualification is made subject to domestic partnering requirements such as the engagement of Korean firms as consortium members, or sub-contractors. On the analysis presented above these qualification conditions should be regarded as incompatible with Article VIII(b) which requires that any conditions for participation in contract awards must be limited to those which are essential to ensuring the capability of suppliers to fulfil the contract in question. As the Korean conditions are not relevant to the efficient delivery of the subject matter

of the contract, it is submitted that they are likely to be found to breach Article VIII.

c) Disqualification of firms as a sanction in addition to other legal sanctions

While the usual position is that qualification conditions must relate directly to the ability of firms to provide the works, supplies or services required, Article VIII appears to envisage that suppliers can be disqualified because of their business conduct. Article VIII(h) provides specific examples of how the business conduct of firms could be relevant to their presence on qualified supplier lists, and some of the examples provided do not appear to have any bearing on the ability of firms to fulfil the contract. Thus, "...grounds such as bankruptcy or false declarations..." are envisaged as reasons for exclusion. While bankruptcy clearly affects the firm's ability to perform the contract, it is not so clear that false declarations have a similar effect.

In providing the example of false declarations, Article VIII therefore seems to envisage that exclusion could operate punitively against unacceptable or criminal business conduct, independently of the firm's ability to perform the contract.

While it does not appear to be a precondition of exclusion that the business conduct in question has been criminalised, the examples provided are distinguished in that their existence must be affirmatively established. The non-discrimination obligation contained in Article III GPA is pivotal to the Agreement's operation. It would be most unusual if procuring entities were permitted to punish firms by disqualifying them without affirming that

participants had actually committed the legal wrong in question. To suggest otherwise would be to vest too much discretion in the procuring entity, and to allow for the possibility of discriminatory treatment. Thus it is submitted that the mere suspicion that firms have been involved in false declarations is not sufficient to lead disqualification, which provides a safeguard against discriminatory treatment and lack of transparency in the decision making process. Similarly, it is likely that the GPA requires that the existence of other legal wrongs (such as breach of environmental protection legislation, or insider dealing) be objectively ascertained before any action is taken against firms under the rules for their involvement in collusion.

3. The award stage

There are various mechanisms which can potentially be applied at the award stage in order to favour suppliers deemed to be capable of meeting defined secondary objectives. A selection of these mechanisms are analysed below.

a) Price preferences

A price preference will normally involve the acceptance of a favoured firm's bid, even if it is higher than other bids submitted. The granting of price preferences may be conditional on the ability of suppliers to meet various kinds of secondary objectives. The preference may establish a price margin whereby the domestic bids will be favoured provided they do not exceed the price of other tenders by more than a designated amount. Here, the secondary objective pursued can be broadly described as the promotion, or protection of domestic industry by affording domestic suppliers an artificial advantage over foreign competitors.

Beyond this example, price preference programmes may differ markedly in the content of secondary objectives to be achieved. The secondary objectives may relate to matters which are internal to firms such as whether they are owned or operated by members of a targeted group, or whether they have a good environmental record. Considerations which are external to the characteristics of the firm may also be relevant. Preferences might therefore be conditional on willingness to sub-contract parts of the contract to targeted groups.

b) Preferences in award procedures based on points allocation

Entities may seek to award contracts on the basis of points gained by tenderers in the evaluation process. Participating firms will receive points for the price tendered and the lowest tender will gain the most points. Points would also be awarded, however, for ability to undertake a secondary objective, and the extent to which such objectives can be undertaken. Where there is a weighting of available points in favour of undertaking the secondary objectives, the firms which are able to perform those objectives to the greatest extent are effectively preferred over their competitors. For example, where a maximum of thirty points are available for price tendered, but a maximum of seventy points are available to firms which can engage targeted labour, then the firms which are able to undertake this objective to the fullest extent will gain a strong competitive advantage over other firms.

c) Can preferences be used to pursue secondary objectives?

The general response to the question of whether preferences can be given to firms which can meet secondary objectives is that, where the preference operates in a

discriminatory manner, the ability of suppliers to fulfil the preference cannot be taken into account in evaluating their tenders. This is not apparent from Article XIII itself, however, which deals with the award of contracts.

Article XIII:4(b) requires that the contract be awarded either to the firm with 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." It is not therefore necessary for a procuring entity to demonstrate any price saving to itself in the application of the contract award criteria. Article XII:2(h) requires that, "the criteria for awarding the contract, including any factors other than price..." be included in the tender documentation." No attempt is made to circumscribe the type of non-price factors which may be specified as relevant and there is no express indication that these need relate specifically to the firm's ability to perform the contract.

Arguably therefore, the procuring entity may be able to impose contractual conditions in tender documents requiring firms to undertake secondary objectives, as a condition of being granted a preference. If a firm cannot give such an undertaking, then this will weigh against them when the relative merits of the bids are compared. The procuring entity cannot, however, impose any absolute conditions at the award stage, such as to reject all tenders from firms which have not been able to give the required undertakings. Article XIII itself would therefore appear to permit the use of price preferences and non-price preferences. All other things being equal a tender from a supplier which is capable of employing a high proportion of targeted groups in performing the

contract, for example, will be looked at more favourably than tenders from suppliers only able to take on a low proportion, or none at all.

It is clear, however, that preferences which have a discriminatory effect cannot operate as award criteria. This is because Article VII:1 applies across the board to all tendering rules and provides that, "Each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner ..." Also, Article III:1 provides for a general non-discrimination obligation, which is applicable to all aspects of procurement laws and procedure, in the form of a national treatment provision. The Massachusetts Law described above[47] was also attacked by the complainants as breaching Article III:1. Thus it was argued that the Law did not provide to the suppliers of other Parties, immediate and unconditional treatment no less favourable than that accorded to domestic services and suppliers, and that accorded to services and suppliers of any other party. It was therefore argued that Article III:1 was breached. As noted above, the Panel was disbanded in response to the eventual non-implementation of the Law. One of the broad questions raised by the Massachusetts proceedings, however, was whether and when laws which apply to both domestic and foreign firms should be understood as breaching the GPA's non-discrimination requirements. This broad issue will also need to be visited should the recently instituted complaint over the Korean Airport Construction Authority's procurement practices prove to be less abortive than the Massachusetts proceedings. Given that the offset requirements upon which the complaint is partly based apply equally to Korean and foreign firms, the dispute may lead to

[47] See pp. 69-70.

panel guidance on whether Article III applies to formally identical treatment which nevertheless has an indirect discriminatory effect.

Certain general observations on the requirements of the non-discrimination obligations can already be made however. Some kinds of price preferences will always have a discriminatory effect. Protectionist preferences establishing a price margin available only to domestic firms, or which are dependent on performance requirements which only domestic firms can meet, clearly discriminate against foreign firms. They cannot therefore operate where the contract is covered by the GPA, because they breach both Article III:1 and Article VII:1.

However, price preferences linked to other secondary objectives, may not have such an obvious discriminatory effect. Where the granting of the preference is linked to the achievement of conditions which are external to the suppliers themselves, such as the engagement of targeted labour, or use of locally manufactured components, it may be open to the entity to demonstrate that the secondary conditions are no more difficult for foreign firms to meet than domestic firms. The possibility of preferences linked to secondary objectives operating on a non-discriminatory basis is analysed fully below. However, in the context of external secondary conditions, even if it is possible to show that the external secondary objective has no discriminatory effect, a further and sometimes fatal barrier remains. Secondary objectives which are external to firms, will often fall within the GPA definition of offsets under Article XVI. The fact that some form of preference is granted to firms which are capable of

fulfilling the secondary objective does not mean that the preference operates outside of Article XVI's remit. As Article XVI contains a general prohibition on offsets, it would be inconsistent with this to interpret Article XII(h) broadly to permit the inclusion of award criteria, dealing with external secondary objectives which resemble offset requirements, in the tender documentation. This conclusion applies even if entities could demonstrate that imposing the secondary requirements could be done on a non-discriminatory basis.[48]

A different conclusion applies, however, where the granting of the price preference is linked to the achievement of secondary objectives which are internal to potential suppliers. Examples here would be the firms' level of compliance with equal opportunities legislation or the ethnic composition of their staff, or whether they have trading links with countries which have been black listed. As requirements of this nature do not resemble offsets in any way, only the non-discrimination provisions are relevant to determining the compatibility of the preference with the GPA. It may be possible for entities to establish that internal secondary conditions do not breach the non-discrimination requirements and the possibilities here are analysed below in Section 4.

The conclusion here is that entities can give a price preference at the award stage to firms which can meet internal secondary conditions, and external objectives which do not resemble offset requirements, provided this does not breach the non-discrimination requirements. At this point, the author refers back to a point made in the section on qualification to the effect that, Article VIII could not be

[48] The author considers what kind of external secondary objectives should be regarded as falling within the prohibition on offsets in a separate section on offsets below.

read as permitting secondary objectives to be used as qualification conditions. Yet it is concluded here that internal secondary objectives can be relevant at the award stage, and that entities may even grant those suppliers which can meet the secondary objectives preferences to increase their chances of success.

These apparently conflicting conclusions can be reconciled by reference to the different effect which conditions have at the qualification and award stages. Qualification conditions operate on an absolute basis. If suppliers cannot meet qualification conditions, they are excluded from further participation in the contract award. Excluding potential suppliers because they cannot meet conditions which are unrelated to the subject matter of the contract, could have a significant adverse effect on competition between suppliers, and on procurement market liberalisation in general. In contrast, award criteria can only be used to compare the relative merits of tenders received. Thus one tender may be more attractive than another because it is responsive to the required secondary objectives. This will only be one relevant factor among many however. Tenders which are responsive to the secondary objectives may be significantly more expensive than other tenders, and even any price preferences granted to favoured suppliers may not offset the additional expense of their tenders. Even though suppliers which are able to meet secondary objectives are favoured, competition between suppliers is retained. It can also be recalled that secondary objectives can only be relevant at the award stage in so far as they do not have a discriminatory effect, which further safeguards the competitive process.

It can be doubted however whether such a clear demarcation of the different roles of qualification conditions, and award criteria can be maintained. Where a price preference of five to ten per cent is granted to firms which can operate defined secondary objectives, then those firms will still have to present commercially realistic tenders in terms of price. However, the price preference could also be set at such a high level as to negate any real competition on price, and, effectively, exclude or disqualify all firms who cannot undertake the secondary objective. The same disqualifying effect could also be achieved where a points system is used in the award of contracts. Here an overwhelming weighting of available points for secondary objectives could be set, which would make price almost irrelevant. It is submitted that it would be an abuse of award procedures to make the achievement of secondary objectives so important, as to disqualify those who cannot undertake those objectives. The purpose of the award procedure is to compare the relative merits of bids. It should clearly not be possible to use award criteria to effectively disqualify certain suppliers for reasons connected with their inability to undertake secondary objectives, when those same reasons cannot be invoked to disqualify them during the qualification process under the provisions detailed above.

Of course, while the argument in favour of a clear demarcation between qualification and award procedures is appealing, it is rather more difficult to specify how such a demarcation should be achieved. The author would submit that where secondary considerations are used as award criteria, they should always be relatively insignificant, in comparison with price and other award criteria which relate directly to the performance of the contract. Entities should

not be permitted to depart too far from the 'economic rationale' for procurement which is to produce savings in public expenditure, where the procurement in question is covered by the GPA. Where secondary considerations are given an overriding significance in any part of the procurement process, firms have little incentive to compete on the basis of price. The inefficiency of firms would then be perpetuated, which would be especially damaging for the competitiveness of firms which rely heavily on government contracts for their business. If governments insist on setting aside contracts on the basis of secondary considerations, they may only do so for contracts which are not covered by the GPA, either because they fall under the financial thresholds, or because of negotiated derogations.

The author would also hope that governments would not routinely desire to remove competitive pressures from the procurement process, even where the achievement of secondary objectives is a priority. There is some evidence that pursuing development objectives and securing value for money need not be mutually exclusive. For example one of the principal objectives of the procurement reforms proposed by the South African Green Paper[49] is to minimise any premium payable for incorporating socio-economic objectives into projects. In August 1996, the State Tender Board approved the piloting of the 'Affirmative Procurement Policy'[50] on all construction projects. For the 15 month period between August 1996 and October 1997, 3423 building and civil contracts were

[49] Green Paper on Public Sector Procurement Reform in South Africa, GN No.691 GG17928 of 14 April 1997.

[50] The term 'Affirmative Procurement' is used to by the Green Paper to describe the new method of procurement which is envisaged. The objective is to increase the engagement of small, medium and micro enterprises, especially those owned by members of 'previously disadvantaged groups'.

awarded using the Affirmative Procurement Policy specifications. Around 45 per cent of the total financial values of these contracts went to targeted enterprises (described in the Green Paper as Affirmable Business Enterprises), either as prime contractors on smaller projects or as joint venture partners, subcontractors and service providers on larger projects. The average financial premiums for contracts falling within various bands, ranging from R0 to 45 000, to R2 000 000 and over, was 1.2 per cent. The lowest premium was 0.2 per cent for contracts in the lowest band, and the highest was 1.5 per cent for contracts in the R100 000 to R500 000 band.[51] These statistics clearly indicate that procurement can be used for development objectives while still promoting competition and securing value for money.

In conclusion to this section, the author's view is re-stated that the correct interpretation of the GPA is that entities cannot use award criteria to effectively disqualify suppliers on the basis of secondary considerations. However, under the present rules, the difficulty lies in identifying when award criteria should be regarded as disguised qualification conditions. It is suggested that a clear demarcation of the purpose of award criteria and qualification conditions could be achieved by ensuring that entities do not grant a price preference of more than five to ten percent to firms which can undertake secondary objectives. In the context of a points based system for contract award, the same safeguard could be achieved by ensuring that points available for undertaking secondary objectives do not exceed a set percentage of total points available. The percentage would

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Secondary objectives are, however, to be achieved in a manner which does not compromise the principles of, "fairness, competition, cost efficiency and inclusion."

need to be independently set or approved to ensure an appropriate balance between the importance of the secondary objectives on the one hand, and price and factors relating directly to the delivery of the contract, on the other hand. It follows that some kind of approval or validation mechanism would be required, to ensure that preference policies would not operate with the effect disqualifying suppliers during the award process. Such an approval mechanism would also be required to ensure that secondary considerations operate on a non-discriminatory basis, regardless of the precise procurement mechanism used. The need for such a validation mechanism is further considered in Section 9.

Aside from preferences, there are other ways in which suppliers capable of meeting secondary objectives can be favoured at the award stage. These mechanisms are considered below.

d) The offer back mechanism

A further way of favouring certain suppliers is for entities to consider all bids equally but then to give preferred tenderers the opportunity to match the lowest bid submitted. An example of the use of this mechanism is the Priority Supplier Scheme which operated in the UK between 1979 and 1994.[52] This involved a network of factories employing severely disabled people under sheltered conditions, and the Prison Service Industries and Farms. Entities were required to award contracts to a priority supplier if the cost was no greater than the most economically advantageous tender received from other suppliers. If a priority

[51] These figures are taken from S.M. Gouden, "Implementation of the Affirmative Procurement Policy on Construction Projects by the National Department of Public Works." Paper presented at the Conference on Project Partnership, Johannesburg 1997.

supplier's tender was equivalent to others, but more expensive, the contract would be "offered back" to the priority supplier. If the priority supplier could match the lowest responsive tender received its tender would be accepted. In 1994, the scheme was withdrawn due to its incompatibility with the EU procurement rules.

The result of using the 'offer back' mechanism, is that preferred firms capable of undertaking secondary objectives will not win the contract if their final bids are any higher than the most commercially competitive received. However, it does afford the preferred firms an advantage over their competitors, in that only they are able to 'step in' after all tenders have been opened and given a chance to improve their own bids.

It is clear that permitting preferred firms to 'step in' is not a practice which is permitted by the GPA. Article XIV deals with Negotiation. Paragraph 4 provides generally that, "Entities shall not, in the course of negotiations, discriminate between different suppliers." Specific examples are provided of how discriminatory treatment must be avoided. In particular, paragraph 4(d) provides that, when negotiations are concluded, all participants remaining in the negotiations shall be permitted to submit final tenders in accordance with a common deadline." Clearly, the 'step in' practice breaches this provision, since only the preferred firm is permitted to amend the price of its bid. Paragraph 3 provides that entities "... shall not provide information intended to assist particular participants to bring their tenders up to the level of other participants."

[52] As publicised through the Treasury's Public Procurement Committee papers PPC(79)5 and PPC(79)8.

Again, this provision is breached since the 'step in' practice involves entities supplying information on the lowest tender received to the preferred tenderer, with a view of permitting the preferred tenderer to lower its own bid.

e) Offsets[53]

The general rule under the GPA is that governments cannot adopt measures which amount to offsets, to encourage local development or improve the balance of payments. The GPA defines offsets as follows:

"Offsets in government procurement are measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements."[54]

Numerous estimates on the economic significance of offsets exist, although precise figures are not available. Martin cites various estimates on the proportion of world trade which offset requirements account for.[55] These range from a minimum of $80 million or some five per cent of world exports, to much higher figures of twenty to thirty per cent of the roughly $2 trillion of total world trade. Both these estimates date from 1983.

Article XVI:1 contains a general prohibition against offsets in the following terms :

[53] On the subject of offsets, see S. Martin ed. *The Economics of Offsets, Defence Procurement and Countertrade*, (1996; Harwood Academic Publishers).
[54] GPA Article XVI, fn. 7

"Entities shall not, in the qualification and selection of suppliers, products or services, or in the evaluation of tenders and award of contracts, impose, seek or consider offsets."

However, Article XVI:2 goes on to provide a limited exception to this prohibition for developing countries as follows :

"... having regard to general policy considerations, including those relating to development, a developing country may at the time of accession negotiate conditions for the use of offsets, such as requirements for the incorporation of domestic content. Such requirements shall only be used for qualification to participate in the procurement process and not as criteria for awarding contracts."

The latter sentence here means that absolute conditions can be applied at the qualification stage, and if a firm is not prepared to undertake an offset requirement, it can be excluded from the particular contract award or from qualification lists. At the award stage, the ability to perform an offset cannot be relevant. Therefore, if one firm offers more by way of offset than other firms, its tender cannot be regarded as more advantageous.[56]

[55] See S. Martin, "Countertrade and Offsets: An Overview of the Theory and Evidence", in S. Martin ed. *supra* note 51, at p. 17.

[56] As will be seen below, the manner in which this exception has been formulated has significant implications for the compatibility of the procurement regime developed in South Africa (which forms the subject matter of a case study below), with the GPA.

Paragraph 2 is a new provision and represents a more prescriptive approach to the use of offsets than the rather vague and general provision in the Tokyo Round Agreement. This provided in Article V:14(h) that,

"entities should normally refrain from awarding contracts on the condition that the supplier provide offset ... opportunities ... In the limited number of cases where such requisites are part of a contract, Parties concerned shall limit the offset to a reasonable proportion within the contract value ..."

Typically, offset agreements will commit the selling firm to undertake some performance requirements, which are not indispensable to the provision of the works supplies, or services, in order to secure the contract. In this way, the purchasing government can recoup, or offset some of its investment. The inward investment created by offset work is one of the ways in which vote sensitive governments can appease concerns over high public spending, which would otherwise generate few benefits to the domestic economy. The extra requirements which are imposed may be linked to various related policy objectives.

Offset requirements may be used to support employment and regional policies. Thus the successful contractor may have to make use of domestic content or domestic labour. There may even be a requirement that labour or components be obtained from specific regions. In the UK during the mid 1980s, several local authorities required firms tendering for council work to demonstrate that, where possible, employment under the contracts would be given to residents within the

Council's area. For the construction of the Birmingham International Convention Centre, a local labour clause required contractors to ensure that a minimum of thirty per cent of those employed be local residents.[57] The contractor may have to purchase manufactured components from domestic firms. The successful firm may well have entered into sub contracts to purchase these components even without the offset, but may instead have relied on favoured suppliers from its own state for the components needed. Offsets of this nature, where the components purchased actually contribute toward the final product, are known generally as direct offsets. In contrast, the successful firm may have to purchase goods and services from firms in the buying country which are unrelated to the goods or services which are procured. The offset requirement would then be indirect.

Offsets may also be used as a means of securing investment in domestic industry. Australia, for example, has numerous industrial development programmes in place which are arguably incompatible with the prohibition on offsets contained in Article XVI.[58] These include the Endorsed Supplier Programme, where suppliers must be endorsed before the Commonwealth Government will consider listing their products on its common use contracts. Becoming an endorsed supplier involves demonstrating commitment to long term value adding in Australia, which amounts to an offset requirement. The system of 'two envelope tendering' is also arguably incompatible. This applies to all contracts of more

[57] See C. McCrudden, *supra* note 14, at p. 111. Following the Local Government Act 1988, contractors are required not to have regard to non-commercial considerations, thus preventing offset type conditions from being imposed at any point in the contract award process.
[58] See Purchasing Australia, "World Trade Organisation Agreement on Government Procurement, Review of Membership Implications" http://www.pa.gov.au/policy/wto/rpv.

than $10 million and requires a supplier to submit information about the bid's impact on the development of Australian industry.

The procurement practices of the Korean Airport Construction Authority, noted above, provide a less systematic example of offset requirements directed at industrial development. The qualification conditions of requiring firms to have manufacturing facilities in Korea, and of domestic partnering are now likely to be the subject of panel proceedings because they allegedly breach both Article VIII (on the Qualification of Suppliers), and the prohibition on offsets in Article XVI.

Another major policy objective may be the transfer of technology into the domestic economy. Many offsets provide a direct stimulus to technology transfer in that the selling firm agrees to operate a domestic facility or license a domestic firm to produce certain components of the final good. Technology transfer may lead to an upgrading of the average skill level of the domestic work force, and the exploitation of any technological spill-overs to other industries that may result from domestic design and production. Offsets are not necessarily the most efficient way of acquiring new technology. However, it has been suggested that their use here might be more efficient than a straightforward purchase.[59] The argument is that, with a direct purchase, the buyer bears all the risk associated with a failure of the technology. However, when the technology transfer is part of a wider contract, the risk is shifted to the vendor who will have a greater incentive to transfer the technology successfully, for fear that failure will tarnish his reputation for the provision of the entire system.

[59] See S. Martin, "Countertrade and Offsets: An Overview of the Theory and Evidence", in S. Martin ed. *supra* note 51, at p. 38.

Offset requirements aimed at supporting industrial development policies in the ways identified above are effectively prohibited by the GPA, where the entities and sectors fall within the Agreement's coverage, and where the contracts are above the thresholds. However, where states remain outside the GPA, or where the contract in question is not covered, states are free to operate offsets relating to the performance of government contracts. Industry development measures, pursued through offset requirements, are consistent with WTO obligations in that they apply to government purchasing for government consumption within Article III:8(a) of GATT 1994, which excludes government procurement from the GATT national treatment provision.

However, where offset requirements are imposed in the general trade context, and do not relate to the performance of government contracts, they are subject to the Agreement on Trade-Related Investment Measures. The Agreement applies to investment measures related to trade in goods only, referred to as "TRIMs". Article 2 prohibits Members from applying any TRIM that is inconsistent with the National Treatment provision contained in paragraph 4 of Article III of GATT 1994. An illustrative list of TRIMs that are inconsistent with this provision is contained in the Annex to the Agreement. The illustrative list provides, *inter alia*, that TRIMs which require, "the purchase or use by any enterprise of products of domestic origin or from any domestic source..." are inconsistent with Article III(4) of the GATT. Thus offsets requiring the use of local products are effectively prohibited.

f) The scope of the offset prohibition

The analysis above on the use of procurement for secondary objectives, concluded that GPA members are not generally permitted to pursue secondary objectives. At the qualification stage, it was argued that the relevant provisions should not be interpreted so as to allow the rejection of suppliers for their inability to meet secondary objectives. This was because of the detrimental effect on the competitive process which could be precipitated by the outright rejection of suppliers for non-commercial reasons.

In the context of award procedures however, it was argued that entities should generally be permitted to take secondary considerations into account when comparing the relative merits of bids at the award stage. This was because firms would continue to compete on price (and non-price factors specified as relevant) even where some firms were advantaged by their ability to meet specified secondary objectives. However, the rules prohibiting discrimination were thought to often preclude this possibility. It was noted that where preferences are only available to domestic firms, they will always breach Article III where the particular contract is covered by the GPA. However, the granting of preferences may be linked to secondary objectives other than the protection of domestic firms. Where this is the case, the state operating the preference may be able to demonstrate that domestic and foreign firms have the opportunity to compete for the contract on equal, or at least reasonably equal terms.[60] As far as concerns the non-discrimination obligations, it is arguable that the state would then be permitted to operate the preference.

[60] The precise requirements of the GPA's non-discrimination requirements are discussed further below.

The further problem identified, however, was that certain secondary objectives strongly resemble offsets. For example, the granting of a price preference may be conditional on the use of targeted labour, or the use of components or raw materials from a targeted area. It was then suggested that the secondary objective fell within Article XVI and was thereby prohibited. Article XVI contains a clear and broad prohibition of offsets. To permit entities to favour firms which can meet secondary objectives which impose offset requirements, would clearly breach the provision. This would be the case regardless of what mechanism is used to pursue the secondary objective, and regardless of what stage in the tendering process that mechanism is employed. The relevant question is whether the manner in which the entity seeks to achieve the secondary objective amounts to an offset requirement, as defined in the GPA.

Of course, not all of the secondary policies enumerated at the beginning of this Chapter amount to offsets. Firms supplying government markets may have to meet legislative or extra-legislative requirements which have no connection to encouraging local development or improving the balance of payments. Where this is the case, the prohibition on offsets has no application. Thus the use of procurement power to improve labour standards, or the environmental performance of firms, is not affected by Article XVI. These kinds of secondary objectives are internal to firms. In contrast, where the secondary considerations are external to firms, they will invariably involve preferred suppliers committing themselves to performance requirements which are merely incidental to the delivery of the contract. It is difficult to envisage any external secondary

objective which would not be connected to encouraging local development or improving the balance-of-payments. Most external secondary objectives would therefore fall within the definition of offsets. It is further submitted that it would not be open to an entity to demonstrate that the offset prohibition is not applicable where the secondary policy operates on a non-discriminatory basis. It is clear that the overall WTO policy is that offsets are impermissible in the context of international trade. There is no suggestion, in any of the WTO Agreements, that they are less objectionable, or permissible, where they do not have a discriminatory effect.

It is arguable that a more relaxed approach to the use of offsets should be taken in the context of an Agreement which has attracted so few members, and where one of the reasons for this may be the desire of states to retain some flexibility in the placement of contracts to encourage local development or improve the balance-of-payments. States can at present negotiate derogations from the GPA's obligations, and can therefore pursue development objectives where the contracts are excluded from coverage. However, negotiated derogations are the exception to the rule that offset requirements cannot be imposed. Once the contracts fall under the GPA, the same development objectives cannot be pursued because they often amount to offsets. Removing or relaxing the prohibition on offsets could therefore encourage prospective members to join, and increase the coverage of the Agreement. Under such a relaxed approach, where entities seek to favour suppliers which can meet secondary objectives, the validity of the mechanism used could be determined by the non-discrimination rules, even where the secondary objectives in question resemble offsets.

It is submitted that this is an attractive argument from the point of view of expanding both the membership, and the coverage of the Agreement for existing members. However, the value of increased membership, would be significantly diminished, if provisions which are fundamental in both the GPA, and overall WTO context were departed from. While the use of offsets on a non-discriminatory basis would remove some of the concern surrounding their use, it would have no impact on increasing their efficiency as an instrument of socio/economic policy. This is an example of the conflicting interests which would need to be balanced if a validation mechanism were introduced into the GPA framework, for the approval or review of secondary policies. The economic efficiency of award stage mechanisms, and the possibility of adopting a validation mechanism are examined below. The author now questions whether secondary policies can be operated compatibly with the national treatment and non-discrimination obligations of the GPA.

4. Can secondary policies be operated compatibly with the national treatment and non-discrimination obligations of the GPA?

The particular focus of this section is on whether secondary policies can be operated compatibly with the national treatment and non-discrimination obligations of the GPA. This is an important question since, to the extent that compatibility with these provisions can be demonstrated, it is arguable that any other rules in the GPA which still preclude the pursuit of secondary objectives should be relaxed, since one of the major objections to the secondary uses of procurement will then have been removed. If these further rules could be

relaxed, this would go at least some way toward addressing the impediment to increased membership caused by the perceived limitations which the Agreement imposes on the use of procurement for secondary objectives.

However, it is not considered that increased membership should be achieved at any cost. An Agreement to which more, or most WTO Members accede to would be rather meaningless unless it sought to promote realistic cross-border opportunities for suppliers, and genuine competition between them. Even if it could be shown that secondary policies would not breach the national treatment and non-discrimination obligations, this would not necessarily mean that they should be permitted. A further issue is whether the policy in question would actually be effective to achieve its aims. Some kind of forum would be required, whereby secondary policies could be validated by balancing their costs against the benefits produced. A relevant question would be whether the same benefits could be realised more efficiently, and in a manner less restrictive of trade, by using a means other than targeted procurement. There would also be a need to ensure that policies operate on a transparent basis, that they do not operate as a form of disguised protection for domestic suppliers, and that they do not continue beyond the point at which they are no longer necessary. These issues are considered fully below. The initial question however, is whether secondary policies can, in any circumstances, be operated consistently with the GPA's fundamental provisions. The answer depends on what kind of treatment of foreign suppliers is actually required by the GPA's national treatment and non-discrimination obligations.

Article III:1 sets out the general obligation of non-discrimination, in the form of a National Treatment clause, in the following terms:

"1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and supplies of other Parties offering products or services of the Parties, treatment no less favourable than:

(a) that accorded to domestic products, services and suppliers; and

(b) that accorded to products, services and suppliers of any other Party."

More specific obligations of non-discrimination are provided for in various provisions. Article VII begins with the exhortation that Parties must ensure that their tendering procedures are applied in a non-discriminatory manner. Article VII is supplemented by various other provisions. Thus Article X:1 requires that, in selective tendering procedures (those in which a limited number of suppliers are invited to tender) firms must be selected in a "fair and non-discriminatory manner." Article X:2 provides that where participants are chosen from qualification lists, "Any selection shall allow for equitable opportunities for suppliers on the lists." Article XIII:3 on the Opening of Tenders, requires that, "The receipt and opening of tenders shall ... be consistent with the national treatment and non-discrimination provisions of this Agreement." Finally, Article XIV on post tender negotiations between entities and suppliers, requires that, "Entities shall not, in the course of negotiations, discriminate between different suppliers."

It is clear from these provisions that governments cannot exclude foreign firms from procurement procedures, or only give preferential treatment to domestic firms using any of the award stage mechanisms described above. However, what kind of treatment as between foreign and domestic suppliers do the above provisions require, when the disparity of treatment is not as pronounced as in these situations? For example, do the provisions apply where it is possible in principle for foreign firms to meet the content of secondary objectives, even if their costs are increased by doing so, where the costs of domestic firms are not increased? Do the provisions apply prohibit secondary policies where any increased costs that are incurred are not markedly higher than any increased costs which domestic firms must also bear? Is all unequal treatment prohibited, or do the rules permit some limited disparity in treatment? Regrettably, there is, as yet, no guidance on the requirements of the relevant provisions under the GPA. However, there is a considerable jurisprudence under the GATT on the national treatment provision provided in Article III:4 of that Agreement. The general principles which have been established by some of the leading Panel decisions, and their relevance in the procurement context, are described below.

Article III:4 of the GATT provides that,

"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment *no less favourable* than that accorded to like products of national origin in respect of all laws, regulations

and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use..." (emphasis added).

Numerous Panel decisions have dealt with the meaning and requirements of the obligation to treat imported products no less favourably than imported products.[61] It should be noted that the GATT Article III:4 does not apply in the procurement context.[62] However, as has been seen, the GPA Article III:1 does apply to procurement covered by the Agreement, and requires *inter alia*, that foreign products and suppliers be treated no less favourably than domestic products and suppliers. The requirements of the GATT provision are clearly, therefore, relevant to the requirements of the equivalent GPA provision.

One of the most significant rulings which dealt with the meaning of GATT Article III:4 was the 1958 Panel Report on "Italian Discrimination against Imported Agricultural Machinery"[63] which examined the consistency with Article III:4 of an Italian law providing special credit facilities to farmers for the purchase of tractors, provided they were manufactured in Italy.

The Panel considered that there was a clear breach here as the provision required imported products to be treated in the same way as like domestic products once they had cleared through customs. The fact that the preferential credit facilities were only available for the purchase of Italian machinery amounted to unequal

[61] See generally, the *Analytical Index: Guide to GATT law and practice*, 6th ed. (1994; World Trade Organisation) pp. 148-157.

[62] The GATT Article III contains an express exception for government procurement in paragraph 8(a) which provides that, "The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental

and discriminatory treatment. In the Panel's opinion, paragraph 4 covered both laws and regulations directly governing the conditions of sale and purchase, and (more broadly) any laws or regulations which might adversely modify the conditions of competition between domestic and imported products on the internal market. The Panel suggested that if the object of the Law was to stimulate the purchase of tractors by small farmers and co-operatives in the interest of economic development (as Italy had argued), then the breach could have been removed by extending the credit facilities to the purchase of imported tractors.

A more recent case arose out of a complaint by the EC that Section 337 of the US Tariff Act 1930 violated Article III.[64] The case involved proceedings directed towards prohibiting unfair and damaging competition and acts in the importation of goods into the US. Such unfair practices include the importation or sale of goods that infringe US patents. Alleged patent infringements by imported products were under the joint jurisdiction of federal district courts, and the US International Trade Commission; an independent administrative agency of the US Government. Where imported products are concerned, the complainant had the choice of which forum to proceed before. In contrast, products of US origin could only be challenged on grounds of a patent infringement, before a federal district court. The EU maintained that the differences between the two proceedings were such that the treatment accorded to imported products was less favourable than that accorded to the products of US origin.

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purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale."

[63] GATT Panel Report Adopted October 23, 1948 7th BISD 60 (1959).

[64] GATT Panel Report Adopted November 7, 1989 36th Supp. BISD 345 (1990).

The Panel noted that effective equality of treatment and competitive opportunities for imported products was required by GATT Article III:4; its purpose being to protect, "expectations on the competitive relationship between imported and domestic products." It was also noted that there could be cases of formally identical legal provisions which would, in practice, accord less favourable treatment to imported products. The Parties were still required however, to ensure that the treatment of imported products was, in fact, no less favourable than that accorded to domestic products. There will therefore sometimes be a positive obligation to apply formally different rules to domestic and imported products in order to ensure equal treatment. Additionally, it was not open to Parties to derogate from Article III:4 in some cases, on the ground that more favourable treatment had been accorded to imports in other cases. If this were permitted it would enable a contracting party to derogate from Article III:4 in one case, or with respect to another state, on the ground that more favourable treatment had been accorded in some other case, or with respect to some other Contracting Party. Whether Article III:4 had been contravened was a question which had to be asked in each and every case. Therefore an element of more favourable treatment would only be relevant if it would always accompany, and offset an element of differential treatment causing less favourable treatment.

The effect of Article III:4 is not limited to rectifying the less favourable treatment of imports after the event. A crucial question is whether the law itself is capable of having a discriminatory effect, not whether the presence or absence of discriminatory effects can be demonstrated in past cases of the application of any

particular law. On this point, it has been noted that "...a mandatory law which *might* result in a GATT violation, violates the GATT and no negative impact needs to be shown" (emphasis added).[65] There is clearly no need to demonstrate an actual discriminatory effect. However, does this mean that any law which could potentially be applied in a discriminatory manner, automatically breaches Article III:4? Arguably such a law would be capable of having a discriminatory effect contrary to the provision.

It is submitted that where a state seeks to show that a law is capable of having a discriminatory effect, it will in fact be necessary for it to adduce evidence that the law is likely (if not very likely) to produce discriminatory effects. In the above case, the Panel found that that the difference in the procedures available to complainants for attacking patent infringements, between imported and domestic products, was capable of producing discriminatory effects by reason of six factors.[66] Taken together, these factors made the possibility of inequality of treatment at least likely, notwithstanding that no actual discrimination had been shown.

Translated to the procurement context, the following observations may be made. It seems that it would not be possible for a state or entity to argue that, because of the manner in which a preferential policy has been applied, there has in fact been no discriminatory effect. It would also not be possible to argue that less

[65] J.H. Jackson, W.J. Davey and A.O. Sykes, Jr, *Legal Problems of International Economic Relations, Cases Materials and Text*, (1995; American Casebook Studies, West Publishing Co.), at p. 518.
[66] These included the non-availability of opportunities under S337 to raise counterclaims, as is possible in proceedings under federal district court, and the possibility that general exclusion orders may result from proceedings under the USITC under S337, where no comparable remedy was available against infringing products of US origin.

favourable treatment of a foreign supplier, product or service was permissible in any particular instance, on the basis that more favourable treatment had been accorded in another instance. Elements of less and more favourable treatment can only be offset against each other to the extent that they always arise in the same cases, and necessarily would have an offsetting influence on each other. It can be suggested that situations of this kind would be of the rarest occurrence.

If it is established that the procurement law or purchasing policy does in fact lead to inequality of treatment which is sufficiently serious to affect the competitive opportunities afforded to foreign suppliers or foreign goods or services, then GPA Article III:1 will be breached. If the procurement law or purchasing policy, could potentially be applied in a discriminatory manner, and inequality of treatment is likely to result, then Article III:1 would also be breached. A high threshold is therefore established for any state attempting to establish that the use of procurement for secondary purposes is compatible with the GPA. It will be difficult to establish that the operation of the relevant policies, either does not, or is unlikely to restrict the equality of competitive opportunities afforded to foreign suppliers. Clearly, the propositions formulated above are unlikely to be especially helpful to those involved in formulating, and applying procurement laws and practices. It will always be a question of degree whether alleged inequality in treatment will be sufficiently serious to amount to discriminatory treatment. Given the strictness with which the GATT has been interpreted, however, it can be suggested that there is little scope under the GPA for procurement laws and practices which actually, or potentially make it any more difficult for foreign firms to participate than their domestic counterparts. As will

be seen below, however, states may seek to retain some of their secondary uses of procurement, even for covered procurement, by removing the discriminatory effect of policies, and therefore avoiding the application of Article III.

5. What can states do to remove or reduce the discriminatory effect of secondary policies?

The question considered here is whether secondary policies can be formulated with the objective of minimising their discriminatory effect. To the extent that the removal or reduction of discrimination against foreign suppliers is possible, it is asked whether the strict standard of national treatment described above can be met.

The discriminatory effect of many secondary policies could be reduced by simply extending the benefit of the policies to foreign firms. For example, where the secondary objective is to reduce the numbers of long-term unemployed, the ability of firms to employ such persons either from their own territory, or the territory of the state which is letting the contract, could be specified as relevant to the award criteria. Where the secondary policy is designed to target members of a disadvantaged group existing only in the territory of the awarding state, then, the discriminatory effect of the policy could be removed by defining the targeted group more broadly to include the particular targeted domestic group, and equivalent or similar groups from other states. Foreign suppliers would therefore be given the option of meeting the secondary objectives on their own territory, as a condition of receiving favourable treatment at the award stage. Because of this, much of the actual and potential discriminatory effect of the policy is removed.

It is clear that any possibility of disguised discrimination would have to be removed from secondary policies. For example, a requirement to employ black South Africans imposes the same formal obligation on South African and other firms. It is clear, however, that the stringent equality of treatment which is probably required by GPA Article III:1 would be breached. The local knowledge of domestic firms will give them some advantage in knowing how to make the best use of domestic resources or labour, which would probably be sufficient to distort the competitive process. The letting state could argue that the cost of foreign firms would be increased, but that they would not be increased significantly more than the costs of domestic firms who would also have to engage the same labour force. This would especially be the case where domestic firms would not have chosen to engage the targeted labour. Here, domestic firms will have no greater expertise, and no advantage over foreign firms. However, domestic suppliers would still retain at least a potential advantage. This would be sufficient to breach the GPA, Article III:1. In the above example, the requirement to employ black South Africans, would have to be extended to other similarly disadvantaged groups in other territories. Only then would it be arguable that the policy could be operated consistently with Article III.

This means of avoiding discriminatory treatment, by applying the same secondary conditions to foreign firms to be attained on their own territories does have its limitations. The impact of the policy on the national level, would of course be reduced by such an approach when contracts are awarded to foreign firms, since the benefit of the policy would only then be realised in the territory

of the foreign firm. In fact the benefit of the policy may not be realised at all, since the entity awarding the contract to a foreign supplier would have a reduced incentive in monitoring the achievement of the objectives, where they are required to be carried out on foreign territory.

Governments could consider it critical that the benefits of secondary policies be realised domestically, and would therefore wish to award the contract domestically. The operation of the secondary objectives would then be clearly contrary to the GPA. Whether it would be critical for contracts to be awarded domestically, would depend to some extent on the objectives of the secondary policy. Where the granting of the preference is conditional on factors which are internal to firms, such as their having good environmental or equal opportunities records, the achievement of the objective is not unduly hampered by awarding some contracts to foreign firms. The use of procurement power makes some contribution to the achievement of the secondary objective every time entities are able to award contracts domestically, and the other available mechanisms, such as the use of the criminal law, are reinforced.

However, where the performance requirement is external to suppliers themselves, such as their ability to use targeted labour, it is submitted that there would be a greater desire to award contracts domestically. The use of procurement power to achieve external objectives would be highly inefficient, unless entities could routinely award contracts to domestic suppliers capable of undertaking the specified commitments. Awarding contracts to domestic suppliers on a non-discriminatory basis, as and when this could be justified under all the relevant

award criteria, would be unlikely to have any noticeable, and sustained effect on external objectives such as alleviating long term unemployment, or regional economic depression. This leads to the interesting conclusion that when efforts are made to remove the discriminatory effect of secondary policies, their effectiveness at achieving their objectives may be significantly reduced.

Apart from the potential limitations of this means of avoiding discriminatory treatment, the critical question in this section is whether the approach described would be compatible with the national treatment obligation of GPA Article III:1. In other words, would foreign suppliers be treated any less favourably than domestic suppliers? Would the use of the method described above be capable of adversely modifying the conditions of competition between foreign and domestic suppliers, such as to breach Article III:1?

On these questions, it is submitted that states could establish that policies operating in the manner described above do not breach Article III. The secondary objectives specified as award criteria would impose additional, non-commercial performance requirements. However, these requirements would apply equally to domestic and foreign firms. They would therefore receive treatment "no less favourable" than domestic firms, and, arguably, there would be no real possibility of departure from this standard. It is submitted that any nominal advantage held by domestic firms because of their increased experience with operating secondary objectives of the kind in question would not be sufficient to produce discriminatory effects contrary to GPA Article III:1.

It is, therefore, at least arguable that GPA Members can operate secondary policies compatibly with the national treatment obligation of Article III:1. It is therefore submitted that states can use their procurement power to pursue internal secondary objectives, because such policies can operate without a discriminatory effect. For internal objectives, their compatibility with the non-discrimination rules is the only relevant concern. However, it will be recalled that the prohibition of offsets precludes the use of procurement for external secondary policies notwithstanding the absence of discriminatory effect. An important question is therefore whether there can be any justification for relaxing this prohibition for secondary policies which operate on a non-discriminatory basis? It is submitted that a key question in this regard is whether discriminatory procurement can be regarded as an efficient instrument for achieving secondary policies.

6. The efficiency of discriminatory procurement as an instrument of secondary policy[67]

A large number of considerations can be identified as relevant to the efficiency of discriminatory procurement policies. Thus it is relevant to ask whether discriminatory procurement is likely to produce the intended benefits to national economies, such as boosting the profitability of local firms, or reducing unemployment or the transfer of technology. It is also relevant to consider whether such benefits, if achieved, are likely to be outweighed by trade effects which harm efforts towards multilateral liberalisation. The efficiency of procurement also needs to be considered in relation to the efficiency of other

instruments such as subsidies and tax-breaks. The questions in this area have a strong bearing on the validity of the GPA's general requirements of non-discriminatory competitive tendering, compared to other possible approaches to regulation, which would be more permissive of the secondary uses of procurement. In this section, the author describes the conclusions which economists have reached on leading recent studies which have been undertaken. A recurrent theme which can be detected is that the efficiency of procurement in any given case, will depend on all the relevant market conditions. Given the uncertainty which is inherent in this area, it can be tentatively suggested that the GPA's general requirements of non-discriminatory competitive tendering, are probably correct from the perspective of enhancing both national and global welfare.

One of the most prominent motivations for discriminatory procurement is the desire to isolate or shelter domestic firms from foreign competition. It has been pointed out, however, that preferential procurement may sometimes fail completely to displace foreign trade with national supply. Trionfetti has explained that a discriminatory procurement policy will not necessarily amount to a barrier to trade, and will not necessarily affect international specialisation, or produce any of the anticipated national welfare benefits.[68] Government procurement will generally only be effective to protect domestic producers where government demand is greater than domestic supply. There are a number of indicators for the presence of this market condition. For example, the higher the

[67] Section 6 has been summarised in part from an overview of the relevant issues presented by, S. Arrowsmith, J. Linarelli, and D. Wallace Jr., *Regulating Public Procurement: National and Regional Perspectives*, forthcoming Kluwer International, Chapter 5 at pp. 240-253.

proportion of Gross Domestic Product that is attributable to government procurement, the more likely it will be that government demand will exceed domestic supply. The existence of small national supply markets, and the lack of availability of the kinds of goods and services required by government, also indicates that discriminatory procurement will be more likely to generate the anticipated trade effects.

If, to the contrary, government demand is less than domestic output, the economic outcome is that discrimination in the filed of government contracts, merely raises the prices paid by governments. A further negative consequence is that private purchasers shift their demand towards cheaper imports. Where trade effects *are* produced, the consequence is to increase the profitability of domestic firms. However, this does not mean that the policies are beneficial even from the national perspective, since there are significant costs which must be offset against the benefits. There are firstly the higher prices which will be paid for domestic goods or services. Secondly, the shift in production towards protected domestic industry, may involve a shift away from production of those goods and services for which a state enjoys a comparative advantage. Thirdly, the protectionist effect reduces competitive pressures so that the incentive towards efficiency and innovation is also reduced. States with discriminatory procurement policies are themselves more likely to be discriminated against thereby producing further welfare losses.

[68] F. Trionfetti, "The Government Procurement Agreement and International Trade: Theory and Empirical Evidence", paper written for the World Trade Organisation (1997)(unpublished).

Economists have also suggested that the benefits of discriminatory procurement policies can outweigh the costs in certain limited cases. In particular, discriminatory procurement can be an efficient tool where the government is seeking to develop an industry operating in imperfect market conditions. However, these benefits are hard to achieve in practice as governments are frequently likely to be motivated more by the political pressures they are exposed to, than by the desire to choose the optimum policy for the situation at hand.

There are clear reasons why governments persist with discriminatory procurement policies despite the probability that foreign trade will not be displaced with domestic supply, in most market conditions, and despite the negative consequences which are brought about, even when the desired results are achieved. The demand for protectionist measures among national firms, is far more vocal and concentrated than the diffuse interests of tax payers who lack the individual incentive to organise themselves politically. Thus Deltas and Evenett note that, even small price preferences can generate large economic rents which are "...concentrated in those domestic firms that bid for government contracts. These rents may generate a constituency which can actively defend its interests in the political arena. In contrast, the benefits of joining the GPA are widely dispersed among tax payers who would pay less on average for government purchases."[69] Even where market conditions mean that the policy is unlikely to produce the desired trade effects, domestic firms still derive the benefit of guaranteed government business, at increased cost to the government, and ultimately to taxpayers.

The indications are therefore that where market conditions are such that discriminatory procurement *can* lead to the desired trade effects, accompanying adverse effects on international trade are among the probable side-effects. Whether a preference based mechanism, or offset requirements are used, economic activities will tend to be shifted towards areas where states do not enjoy a comparative advantage. In the long term, this effect is likely to damage both national and global welfare.

The WTO has clearly taken the stance that it is more appropriate to generally prohibit the use of discriminatory procurement as a policy instrument, than to provide states some leeway in their use, until such time as their trade effects are more fully understood. It is submitted that this is an entirely appropriate approach. To relax the GPA's prohibition on discrimination would be too high a price to pay for increased membership and would devalue the WTO's achievements to date in the field of regulated procurement. Some flexibility could however be built into the GPA, by providing for a validation mechanism where the efficiency and transparency of proposed secondary uses of procurement could be tested on an individual basis. The possibility of adopting such a validation mechanism is explored in section 9. The author now examines the means by which GPA Members do in practice use procurement for secondary objectives via negotiated derogations.

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[69] G. Delatas and S. Evenett, "Quantitative Estimates of the Effects of Preference Policies" in B.M. Hoekman and P. Mavroidis eds. *The WTO Agreement on Government Procurement* 73 (Michigan; 1997).

7. The use of procurement for secondary objectives by way of securing derogations or exemptions from the GPA's obligations

The extent to which secondary policies are, in practice, pursued under the GPA is now examined and the positions of developed, and developing countries is compared. The general position is that secondary policies often cannot be pursued where the contract is covered by the GPA, since this will normally entail breach of the GPA's fundamental or procedural obligations, in the ways described above. Generally, for secondary policies to be permissible, the contract must either be under the financial thresholds, or excluded from coverage in some other way.

States may secure derogations and exemptions for procuring entities, or certain products or services, from the strict obligations of the Agreement, in accession negotiations, in order to use procurement for secondary objectives. Under the Agreement, developed and developing members are formally placed in a different position in this regard. Thus there is no express legal basis in the Agreement's text which permits developed country members to depart from the strict non-discrimination obligation in Article III. In contrast special provisions in Article V apply to developing and least developed members, and Article V:4 lays down rules relating to *Agreed Exclusions*.

It might therefore be thought that there is no scope for developed members to pursue secondary objectives where this involves the less favourable treatment of foreign suppliers, whereas developing countries can do so subject to the safeguards in Article V. This is not the case however. In considering the issues

here, the positions of all states generally will firstly be considered before considering the special provisions included for developing countries.

a) The general position

Most GPA members discriminate against foreign suppliers for some of their procurement, and many maintain domestic preferences. Both developed and developing countries can discriminate against foreign firms, either when the procuring entity is not subject to the GPA's obligations, or where the entity is covered, but where derogations from Article III are negotiated and contained in the Annexes.

i) Exclusion of an entity from coverage

With respect to entity coverage, Article 1 of the GPA specifies that,

"This Agreement applies to any law, regulation, procedure or practice regarding any procurement by *entities covered* by this Agreement, as specified in Appendix I." (emphasis added)

It is clear therefore that entities which are not covered by the Agreement can discriminate against foreign firms and apply domestic preferences. Entities not covered by the GPA must also be regarded as free to use offsets despite the absolute prohibition on their use (for developed countries) under Article XVI. Where the procurement in question is not covered by the GPA, it might be thought unlikely that the awarding state would apply a preference, when it can exclude all foreign participation by using a set-aside. In practice however, states

are more likely to use preferences because they are more economically efficient than set asides. Preferences entail that targeted firms continue to be subject to competitive pressures which may benefit their development. Where entities are completely excluded from coverage, they may, if they so wish, advertise their contracts, and consider tenders from all participating suppliers. However, no GPA supplier has a right to compete for business from these entities. The more common situation, however, is where the entities are, in principle, covered by the GPA. However, whether these entities are opened to suppliers in any particular state, depends on whether reciprocal rights of access have been agreed upon in bilateral negotiations. The issues here are explored below.

ii) Derogations from the GPA

Even where the entity in question is covered by the GPA, most states have secured derogations from Article III, and the GPA's procedural obligations. These derogations take two forms. Firstly, there are derogations on entity coverage on the basis of reciprocity. Secondly, there are complete or blanket derogations, for particular policies, not connected with any reciprocity requirement.

As regards reciprocity derogations, the current GPA, unlike the Tokyo Code, does not have a uniform opening of all listed procurement opportunities to all signatories. Rather, the coverage of the GPA as between any two individual states depends on the outcome of bilateral negotiations. Negotiations are conducted on a reciprocity basis. In other words, the derogations which are agreed upon are accompanied with the declaration that they will be withdrawn

only at such times as the respective signatory has accepted that the other party has given comparable access to its suppliers. Members are therefore invited to conclude bilateral deals between each other within the framework of the GPA. Sometimes, not even this much is done, and agreements reached are not incorporated into the GPA.[70]

There are numerous examples of reciprocity derogations contained in the GPA's Annexes. Korea's Annex V provides that, it will not extend the benefit of the GPA as regards the award of contracts in the rail, airports and urban transportation sectors to EU Member States and Austria, Norway, Sweden, Finland and Switzerland, until such time as Korea has accepted that those countries give *comparable and effective access* for Korean undertakings to their relevant markets. The US originally denied access to its state governments and the electric utilities to suppliers from the EU, Canada, Austria, Switzerland, Norway, Sweden, Finland and Japan. The only signatories left to which the GPA would apply, were Israel and South Korea. Only in April 1994 was a bilateral agreement reached between the US and the EU to extend coverage.[71] Reciprocity derogations may also have the effect of increasing the relevant financial thresholds for particular states. For example, while the normal threshold for construction services is SDR 5 million, the General Notes to the US' Annexes specify that the threshold is SDR 15 million for Korean suppliers.

[70] For example, an agreement was reached in 1996 between the EC and Israel to bilaterally open up the procurements of the telecommunication sector to their respective suppliers. This agreement was not incorporated into the GPA Annexes.
[71] [1995] O.J. L 134/25.

The position is even more restrictive in the services sector, where coverage is limited exclusively to certain listed services, and then only subject to "strict reciprocity" clauses. This means that access will not be provided to service providers of Parties which themselves have not included the specific service category in question in their coverage. Thus the procurement of legal services, and hotel and catering services, which are, in principle, opened up by Canada to all GPA Members, are in effect closed to all of them except the US, as a result of the strict reciprocity clause. This is the case even though other parties may have included alternative services of equivalent importance as the services included by Canada.

Overall, a significant proportion of contracts are not open to most GPA members. Derogations are numerous and complicated. The coverage of the Agreement between individual states can only be determined by consulting the Annexes, assuming that bilateral arrangements are included in the Annexes which is not always the case. This position has attracted sometimes trenchant criticism. Perhaps most notably, Reich has noted that the GPA,

"... could quite accurately be described as an accumulation of preferential bilateral agreements between a limited number of parties somehow brought together under one shaky roof."[72]

Arrowsmith concurs that the position as regards coverage is far from ideal. However, the author also notes that the flexibility inherent in bilateral

[72]A. Reich, "The New GATT Agreement on Government Procurement, The Pitfalls of Plurilateralism and Strict Reciprocity", [1997] 31(2) *Journal of World Trade* 125.

negotiations is, at least amenable to expanded membership because the Agreement's scope and coverage is open to negotiation rather than set in stone.[73] On the other hand, the need for bilateral negotiation between prospective members and each existing member is likely to be seen by many states as extremely complex and expensive. Also, ironically, the GPA's flexibility may have the effect of dissuading prospective members from joining. This is certainly Australia's view, which regards the various derogations from the non-discrimination principle maintained by most members as one of the impediments to membership because of the consequent reduction in export opportunities to major trading partners.[74]

Ultimately, however, this flexible approach was the only possible starting point to ensure the beginnings of effective regulation and further liberalisation through continued negotiations on coverage, and possible moves towards the adoption of a Most Favoured Nation (MFN) principle. Article III:1, set out above in Section 7 already provides MFN obligations. The MFN principle here, however, refers only to the treatment of products, services and suppliers to which the state of the products, services and suppliers in question is given access under the Agreement. It has not been applied to determine the coverage of the Agreement between states. Each state must effectively negotiate with each other state on a bilateral basis, to determine the coverage of the Agreement for them.

[73] S. Arrowsmith, "Prospects for the World Trade Organisation Agreement on Government Procurement: Obstacles and Opportunities" [1997] 1 *Malaysian Journal of Law and Society*, 13, p. 17.
[74] Purchasing Australia, "World Trade Organisation Agreement on Government Procurement, Review of Membership Implications". http://www.pa.gov.au/policy/wto/rpv.

Arguably, the necessity for such negotiations is a consequence of the approach which the WTO has taken to liberalising procurement markets. The reason why some states are unwilling to open all listed procurement opportunities to all signatories is because they desire to retain national control over their purchasing.[75] Where the procurement is not covered, then the state is free to use that procurement for secondary objectives. Once the procurement is covered, it is generally subject to a compulsory regime of international competitive tendering. It is submitted that the present structure of the GPA's coverage, which resembles a series of detailed bilateral agreements, is the price which has been paid for the present insistence on non-discriminatory procurement. An alternative approach to regulation might therefore be to transitionally permit discriminatory procurement (subject to safeguards), but to insist upon a general opening of all procurement opportunities. The attractiveness of such an alternative approach would depend upon several factors. For example, there would need to be general confidence that any system of safeguards, against a lack of transparency, or the prolonged use of procurement for secondary purposes, could operate to the satisfaction of all GPA Members. The strength of the system of safeguards put into place would be crucial to the success of such an alternative approach. The validation mechanism discussed in Section 9 could have a strong role in this regard.

It was mentioned above that states retain control over their purchasing where the procurement is not covered. However, it is arguable that derogations on the basis of reciprocity present little opportunity for pursuing secondary objectives on a

[75] Some states, in contrast, may be prepared to open all or most procurement opportunities to foreign suppliers, but will not do other than on a reciprocity basis.

routine basis. Secondary objectives will often infringe Article III (as interpreted above), because they involve foreign suppliers being treated less favourably than domestic suppliers. The usefulness of procurement power to achieve secondary objectives is very much curtailed if the procuring entity is not free to routinely pursue the objective in question. This will be the case where some suppliers can be excluded from the contract award, because of deficiencies in their country's entity and sector offers, but where other suppliers have to be treated in an equivalent manner as domestic firms, because of their country's willingness to open their corresponding entity and sector to competition from the awarding state's firms. Derogations on the basis of reciprocity are not amenable to such routine discrimination. It can therefore be suggested that they have more to do with trade bargaining and extracting reciprocal concessions than retaining the secondary uses of procurement. This is in contrast to 'blanket derogations', which do not operate on a reciprocity basis. Again, such derogations can be maintained by both developed and developing nations.

Where the procuring entity is free to discriminate against foreign suppliers by virtue of 'blanket derogations' then procurement potentially becomes an important tool for achieving secondary objectives. Many states have negotiated derogations from the GPA, to cover certain secondary objectives. This is the situation where the contracting authority may be covered by the GPA, but the particular policy is excluded from the GPA's disciplines.

While all signatories have excluded the procurement of certain kinds of goods and services from the GPA and all maintain state specific derogations, Canada,

Korea and the US[76] are the only three signatories which have provided for complete derogations from the GPA in order to further their socio/economic objectives. The General Notes to the Annexes of Canada and the United States provide that the Agreement does not apply to set-asides for small and minority businesses. Korea's Annexes I to III[77] contain derogations in similar terms. The US also maintains derogations aimed at the development of distressed areas and businesses owned by women, minority groups, and disabled veterans in its Annex 2. These states are thus free to award contracts to the targeted firms, outside of the GPA's international competitive bidding regime.

As it is clearly possible to negotiate for the complete exclusion of targeted firms from the Agreement's operation, one might think it anomalous if it is not possible to negotiate for the use of preferences. Preferences are less restrictive of trade than set asides, because foreign firms can participate in the contract awards where preferences are used, albeit that they may be disadvantaged. Also the targeted domestic firms are subject to at least some competition, which should be beneficial to their development. In practice, some of the derogations from the GPA for the promotion of small businesses have operated through price preferences, which is perhaps indicative of the belief that preferences are more beneficial to these businesses than the complete reservation of some government business for them. For example, in the US, since 1991, there has been a government-wide goal of awarding five per cent of the total value of all contracts

[76] For an analysis of the US legislative and administrative measures which deal with the secondary uses of procurement, see D.P. Arnavas and W.J. Ruberry, Government Contract Guidebook (1994; Federal Publications Inc., 2nd. edn) chapter 6.

[77] For all GPA Members, Annex I applies to central government entities; Annex II applies to sub-central government entities and Annex III applies to all other entities which procure in accordance with the GPA. In practice Annex III applies to the utility providers.

and sub-contracts to small businesses owned by socially and economically disadvantaged individuals.[78] In 1994, Congress authorised agencies to apply a ten per cent price preference for such businesses.[79] Even though some policies operate through price preferences rather than set asides, no GPA Member has negotiated for the use of preferences. Rather, they have negotiated to exclude the policy from the GPA's coverage altogether. The question therefore arises whether states can negotiate for the use of preferences, in the absence of any mandate to do so in the text of the GPA, and in the absence of any state practice in this area.

Where the procurement is excluded from GPA coverage, it is submitted that states are permitted to operate domestic preferences. It can equally be argued that there is no reason why Members should not impose offset requirements where the procurement is excluded from coverage. Thus states may negotiate to have the entity, product or service completely excluded from coverage, but continue to advertise the contracts, opening them to foreign competition, while specifying the level of the domestic preference, or the content of the offset. Alternatively, the sector or entity in question could fall under the GPA, but derogations from Article III (and the tender procedure rules which support Article III), as well as the offsets prohibition in Article XVI could be negotiated for the use of preferences and offsets. In this way states would have to follow the GPA's procedural obligations in terms of advertising contracts, and permitting the participation of firms on a non-discriminatory basis. However, because of negotiated derogations, they would also be able to give the benefit of the

[78] Office of Federal Procurement Policy, Policy Letter 91-1, 56 Federal Regualtion 11796 (March 20, 1991).

preference only to domestic firms, or only to those firms which can meet defined secondary objectives (including offset requirements).

Of course, it does seem peculiar that states should undertake negotiations to have some procurement completely excluded from coverage, but also be prepared to subject the excluded contracts to most of the GPA's obligations, save any of the rules which prevent it from treating some firms less favourably than others, or from imposing offsets. This is the direct consequence of the approach to procurement regulation which the GPA presently takes however. It is clear that the use of procurement for secondary objectives is intended to be temporary and exceptional.

In conclusion, it is submitted that all GPA Members may negotiate to retain the right to use procurement for secondary objectives. This may mean that foreign suppliers have no right to participate in contract awards. However, where states only negotiate derogations from Article III, or the offset prohibition, the other procedural obligations of the GPA will apply. GPA suppliers do then have the right to participate although they can expect that their tenders may be treated less favourably than suppliers which are able to meet defined secondary objectives. The author now considers the position of developing countries, and questions whether they are in a different position as regards their ability to pursue secondary policies.

8. Developing countries and the use of procurement for secondary objectives

[79] PL 103-355, 108 Stat. 3243.

Thus far the means by which both developed and developing countries can retain their ability to favour national firms have been investigated. Developing, and least developed countries, are, at least formally, placed in an advantageous position by Article V, which provides for *Special and Differential Treatment for Developing Countries*. It is provided that, existing members are enjoined to have regard to the needs of developing countries in accession negotiations. However, the extent to which developing countries can secure derogations very much depends on how accommodating existing members are prepared to be. They might be expected to be unsympathetic to discriminatory procurement policies whose objectives are unclear and which do not operate transparently. The provisions of Article V are described below.

Article V:1 provides the basic principle that Parties should take into account the needs of developing countries in relation to their balance of payments, establishment and development of domestic industries, general economic development, the support of units dependent on procurement, and the development of regional and global arrangements among those countries. Regard should be had to these factors in, "the implementation and administration" of the Agreement.

Article V:4 also allows developing countries negotiating to accede to the Agreement to agree upon, "mutually acceptable exclusions from the rules on national treatment for certain entities, products and services which are included in its coverage lists ..." Existing members must have regard to the particular circumstances of each case, and must take account of the considerations in

Article V:1. Therefore, it seems that (subject to successful negotiations) developing countries can pursue secondary objectives by negotiating exemptions from Article III, and the tender procedure rules which support it. However, where there are external secondary objectives which resemble offsets, the state will have to negotiate an exemption to the offsets prohibition.

Under Article V:5 developing countries may modify their entity, products or services coverage lists, after their accession to the Agreement. This is subject to the modification rules contained in Article XXVI:6, which requires notification to the Committee on Government Procurement. This means that if circumstances change, and developing countries feel that they need to operate set asides to promote infant industries, for example, they may modify their coverage lists to exclude some of their procurement. Article V:5 also allows developing countries to request the Committee on Government Procurement to grant exclusion from the national treatment rules after their accession to the Agreement.

This is an important provision, since Article V can, for the most part, be subject to the criticism that it amounts to little more than a vague commitment of good faith to the developing world. Any benefit derived from it depends very much on the negotiating attitude taken by the developed countries. Developing countries may feel that they have not secured enough scope to operate preferences in accession negotiations. If they are still prepared to join the GPA, then they may seek to further their ability to operate secondary policies compatibly with the GPA through liaison with the Committee, thereby circumventing the need for negotiations with existing members. It is submitted, however, that the provision

should be strengthened to allow the Committee to authorise derogations from the rules on national treatment even before the developing country joins. Of course, this could be subject to conditions such as the apparent failure of negotiations for the use of preferences. The developing country might also have to convince the Committee that the preference is necessary in order to achieve a particular secondary objective and that it will operate in a transparent manner. These are questions which could be considered in the context of a possible validation mechanism for authorising, and reviewing permitted secondary uses of procurement.

In conclusion the author would argue that developed and developing countries are only formally placed in a different position regarding their ability to use procurement power for secondary objectives. In practice, because of the broad scope for developed countries to negotiate derogations, either from the GPA in its entirety, or from particular provisions, it is argued that all GPA Members are effectively in the same position. The only difference is that developing countries are expressly given the right to negotiate for derogations from the rules on national treatment by Article V, and also given to right to negotiate for the use of offsets by Article XVI.

9. Approval or review mechanisms as a means of controlling secondary policies

At various points in this Chapter, the possibility of an approval or review mechanism to authorise and control the use of procurement for secondary

objectives has been suggested. The validation of secondary policies could be dealt with by an appropriate body on either an *ex post facto* review basis, or on a prior approval basis. Such a validation process could bring about three distinct advantages. Firstly, there would be the potential of increasing the GPA's membership and coverage, if states were permitted to use procurement for secondary purposes. Indeed, moves could be made towards the uniform coverage of the GPA for all its Members, as one of the principal reasons for the current bilateral negotiations on coverage would then have been removed. Secondly, states would be required to ensure the transparency of the secondary policies operated by them. The validation of secondary policies could, for example, be made conditional on transparency requirements being met. The third possible advantage would be to engender an understanding that procurement is often a relatively inefficient instrument for the achievement of socio/economic objectives. States would then hopefully rely increasingly on other instruments which are more appropriate for achieving socio/economic objectives, and the GPA would make a greater contribution toward reducing public expenditure.

As was suggested in Chapter 2, one of the explanations for the GPA's lack of success in this area is that prospective members are aware that their ability to use procurement for secondary objectives is greatly curtailed once the procurement in question in covered. The approach which the GPA currently adopts to balancing the demands of the GPA's obligations, with the reality of limited membership, is to allow the negotiated derogations which were described above. It is arguable that allowing negotiated derogations is not the optimal way of building flexibility into the GPA. An alternative approach would be to permit states to pursue

secondary objectives, even for covered procurement. The secondary uses of procurement would however be subject to appropriately formulated safeguards.

A third possibility (which the author favours) would to retain the use of negotiated derogations, but, at the same time, permit covered procurement to be used for secondary objectives. Rather than alternatives, these two means of building flexibility into the GPA, would operate as steps towards the exposure of procurement to the GPA's full obligations. It was established above that the GPA does permit Members to pursue secondary policies through negotiated derogations. It was also argued that members should in theory be able to negotiate derogations only from certain provisions, such as Article III and Article XVI, so that the procurement would otherwise be covered by the GPA's procedural obligations. However, this must at present be regarded as a possibility, given that no Member has actually sought to secure such a limited derogation. The other possibility is, regrettably, that the GPA does not provide any compromise between allowing states to use their procurement power for any purpose they desire, when the procurement is not covered, and requiring adherence to all of its obligations when the procurement is covered. If this is the true position, then permitting states to transitionally pursue secondary objectives, subject to safeguards, would be a most welcome development from the point of view of expanding membership and coverage. An approval/review mechanism would have a strong role to play in this, and other, respects. It is envisaged that it could have one or more of the following objectives:

- It could have the limited purpose of ensuring that secondary objectives are pursued in a manner which is compatible with the GPA. Thus it would have to be demonstrated that secondary objectives do not have a discriminatory effect, and that the tender procedure rules are not circumvented in any way.
- Beyond the matter of GPA compatibility, states might also have to demonstrate that procurement can be an efficient instrument through which to pursue secondary objectives. Even where procurement cannot be regarded as the optimal instrument through which to pursue the policy in question, it could be open to states to demonstrate that the benefits generated by the use of procurement still outweigh any adverse trade effects. A proportionality test could be developed for use in this context.
- To the extent that the efficient or proportionate use of procurement can be demonstrated, it could be open to states to argue that the GPA's rules should be relaxed to enable the secondary objective to be pursued, even where the procurement is covered by the GPA. Thus, an appropriate review body could consider it reasonable not to require the application of the GPA's strict non-discrimination obligations, or the prohibition on offsets, to approved secondary uses of procurement.
- The relaxation of the GPA's strict obligations could be granted on a transitional basis for states which are unable to accede immediately to the full rigours of international competitive tendering which the GPA envisages. The use of a validation mechanism would have a clear application to developing countries with a desire, or tradition of using procurement for secondary purposes. It would give them an opportunity to expose previously excluded procurement to international competition, while also retaining at least some of the secondary

policies previously pursued. Relaxation of obligations could also be granted on an interim basis, subject to the periodic demonstration of the continued usefulness of procurement for achieving the secondary objective.

These are some of the objectives which a validation mechanism could pursue. There could however be significant, and even insurmountable, practical problems surrounding the operation of an approval/review mechanism. A strong indication of the nature of these potential problems is provided by the WTO's experience in the context of reviewing the compatibility of regional trade agreements with Article XXIV of the GATT 1994.

a) Practical problems in the review of regional trade agreements under GATT Article XXIV[80]

Article XXIV of the GATT provides for the most important exception to the most favoured nation (MFN) obligation provided for in GATT Article 1. Article XXIV operates by way of exception to the MFN obligation, in recognition of the, "desirability of increasing freedom of trade by the development ... of closer integration between the economies of the countries party to such agreements."[81] The exceptions for trade groupings applies to free trade areas,[82] customs unions,[83] and interim agreements leading to one of the above. Article XXIV:5 provides that the GATT should not be interpreted as preventing the establishment of the

[80] For an account of the growth of regionalism, and an indication of the benefits and dangers of bilateralism to the international trading order, see H. Jackson, W.J. Davey and A.O. Sykes Jr., Legal Problems of International Economic Relations (1995; West Publishing, American Casebook Series) pp. 464-471.

[81] Article XXIV:4.

[82] A free trade area, as defined in Article XXIV:8(b) involves an association of nations with duty free treatment for imports from members.

above trade groupings. However, certain safeguards are incorporated to ensure that the purpose of the trade grouping is to facilitate trade between its members, rather than to create new, or increased barriers to trade for non-members. To this end the general obligation is that any new duties and regulations introduced at the commencement of any trade grouping, and applying to non-members, "shall not on the whole be higher or more restrictive" than the duties and regulations applicable before the formation of the trade grouping. This obligation applies to free trade areas, customs unions and interim agreements leading to the formation of either of these.[84] Additionally, interim agreements must contain a "plan and schedule" for the formation of the trade grouping within a "reasonable period of time."

Article XXIV:7(a) requires prospective members of trade groupings to notify GATT Parties of their intention to do so, and "make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate." Paragraph (b) then goes on to provide that if the GATT Parties consider that a customs union or free trade area is unlikely to result within the period contemplated by the Parties, or the contemplated period is not a reasonable one, "...the CONTRACTING PARTIES shall make recommendations to the parties to the agreement." The parties to the trade grouping are then required, "not to maintain or put into force ... such agreement if they are not prepared to modify it in accordance with [the] recommendations."

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[83] A customs union as defined in Article XXIV:8(b) amounts to a closer association of nations than the free trade area. Not only is there duty free treatment of imports from within the union, but a common level of external tariffs for imports from non-members is also applied.
[84] Article XXIV.5(a) and (b).

There are clear parallels between the review of trade groupings under Article XXIV, and the possible adoption of a validation mechanism for secondary policies under the GPA. Most obviously, the experience under Article XXIV provides some insight into what body should have the responsibility of conducting any validation process. Also, the issues which have been raised in proceedings on the correct interpretation of the MFN exception, would be relevant in the context of a GPA validation process. Thus under Article XXIV:5, a trade grouping may begin with an interim agreement which includes a "plan and schedule" for its formation within a "reasonable length of time." This would involve the gradual elimination of internal trade barriers between the trading partners. This situation can be compared with the gradual elimination of the discriminatory effect of secondary policies, or their removal when they have either achieved their objectives, or where there are concerns that they are unlikely to make any contribution towards those objectives. Additionally the GATT Parties can make recommendations concerning the implementation of trade groupings. An appropriate body might also be empowered to make recommendations concerning the use of procurement for secondary objectives. It would be essential that the approval/review body should have the power to impose conditions on the secondary uses of procurement, or ultimately to declare the policies to be incompatible with the GPA. The effect of the recommendations made in the GATT context under Article XXIV:7, provides some indication of how the powers of validation should be formulated under the GPA. A brief consideration will now be given to some of the practical and political problems which have arisen in the GATT context, and of the extent to which these

problems would also be likely to arise under a possible GPA validation mechanism.

b) What body should be entrusted with the review process?

The review of free trade areas, customs unions, or interim agreements has been carried out on an *ad hoc* basis by working parties, which report their findings to the GATT Parties. Typically, they do not reach any firm conclusions and, while numerous trade groupings have been considered, few have been approved by any formal action of the Parties. For example, the GATT Parties have never taken a position on the compatibility of the EC, or its three enlargements, with Article XXIV despite extensive discussions on the matter. In 1992, it was stated that, "over fifty previous working parties on individual customs unions or free-trade areas had been unable to reach unanimous conclusions as to the GATT consistency of those agreements. On the other hand, no such agreements had been disapproved explicitly."[85]

At the very least therefore, it can be stated that Working Parties have not been uniformly successful in reviewing the compatibility of trade groupings with Article XXIV. In order to address concerns in this area, a Committee on Regional Trade Agreements was established in February 1996.[86] The Committee was primarily created to centralise the effort of working parties in one body, and to perform detailed examinations of regional trade agreements notified to the WTO, including those related to trade in services. The Committee is also to provide a forum to discuss ways of dealing with the issue of regionalism in the

[85] *Analytical Index: guide GATT law and practice*, 6th ed. (1994; World Trade Organisation) p. 760.

WTO. To date, 184 regional trade agreements have been notified to the WTO, of which 109 are still in force. By the end of 1998, the Committee had commenced examination of 58 regional trade agreements. At the time of writing, no examination has yet been completed.

The review process has also been strengthened by the confirmation that the compatibility of regional trade agreements with Article XXIV can be raised in dispute settlement proceedings. The Uruguay Round Understanding on Article XXIV provides that,

"The provisions of Articles XXII and XXIII of the GATT 1994 may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area."

In the future therefore, we may have panel reports discussing the compatibility of regional agreements with Article XXIV. There are significant unresolved questions here of what the working relationship between the investigation conducted by the Committee on Regional Agreements, and any investigation conducted under the Dispute Settlement Understanding, will be. In particular, there is considerable uncertainty over whether a Dispute Settlement Panel will be able to reach a conclusion on the issues before it, when the review decision of the Committee on Regional Agreements is still pending.

[86] The general information on the Committee provided here is extracted from the WTO's page on regionalism at http://www.wto.org/develop/regional.htr

There is no guidance on this matter at the time of writing. The only complaint alleging violation of Article XXIV, and the Understanding on Article XXIV, was settled by a mutually agreed solution between India and Poland notified in 1996. The questions here go far beyond the remit of this Chapter. It is therefore merely suggested that if panels were prepared to express conclusions as to the Article XXIV compatibility of regional agreements, this would represent a surprising departure from their position prior to the enactment of the Understanding of Article XXIV. Panels have uniformly adopted a non-interventionist approach where questions have come before them which have yet to be resolved by Working Parties. An example is provided by the unadopted panel report on the EU's tariff treatment of Mediterranean citrus products.[87] On the question of the Article XXIV compatibility of the bilateral agreement before it, the Panel considered its role as limited to providing an advisory opinion on the Article XXIV conformity of an agreement, or an interpretation of specific criteria under Article XXIV. However this guidance could only be provided to assist the GATT Parties to make their own findings or recommendations under Article XXIV:7(b), through the Working Parties.

In the context of validating the use of procurement for secondary objectives, it would be essential for the body entrusted with this task, to be able to reach a clear and timely determination of the GPA compatibility of the secondary policy in all cases. It is submitted that this would be a realistic task in this context. It is the political sensitivity of reviewing regional agreements which has made it extremely difficult for Working Parties to reach authoritative conclusions. In the

[87] L/5776 (unadopted, dated 7 February 1985), para. 4.6.

procurement context, however, the issues involved would be more amenable to definition, and more manageable, than the complex process of reviewing regional agreements. One could envisage that GPA Members would have to prepare detailed submissions on their proposed policies, including an analysis of such factors as: what objectives the secondary policy is intended to achieve; why it is necessary or desirable to use procurement power rather than other instruments; what mechanisms will the state establish to monitor the achievement of the objectives and how long procurement will be used to pursue the secondary policy. Thus much of the burden would fall on the GPA Members themselves, and the role of the designated body would be to validate the plans laid before them, where appropriate. It is submitted that under the GPA the existing Committee on Government Procurement could assume the role of validating secondary policies, given the expertise on the GPA's operation which this body has already accumulated.

c) Interim agreements and eliminating internal trade barriers within a "reasonable time"

As noted above, under GATT Article XXIV:5, a customs union or a free trade area may begin with an interim agreement which includes a "plan and schedule" for the formation of the union or free trade area within a "reasonable length of time." The question of what constitutes a reasonable period would also be relevant to validating secondary policies on a transitional basis, and removing them when they have achieved their objectives, or gradually removing their discriminatory effect. Again, significant difficulties have been faced in the GATT context in reaching firm conclusions on what amounts to a "reasonable

length of time". The notion of reasonableness in this context has been described as "so vague as to defy meaningful enforcement",[88] and numerous Working Party reports have highlighted the fact that no determination on appropriate time limits has been reached by the GATT Parties.[89] The Uruguay Round Understanding on Article XXIV does now, however, provide that, "[t]he 'reasonable length of time' should exceed 10 years only in exceptional cases".[90] The Understanding also provides that if an interim agreement does "not include a plan and schedule, contrary to Article XXIV:5(c), the working party in its report shall recommend such a plan and schedule."[91]

A common conclusions reached by many Working Parties, is that the reasonableness of the time periods envisaged by the members to the proposed trade grouping, depends on the relative levels of economic development of the members. Where there are marked discrepancies in the levels of development, Working Parties have been tolerant of lengthy deadlines for meeting defined objectives, or even an absence of firm deadlines for meeting objectives. Related to this is the further common conclusion that plans and schedules initially drawn up need not be precise and exhaustive where the members to the trade grouping are at different levels of economic development. The plans can therefore be of an "evolutionary" nature and be adapted over time to reflect the progress which is being made towards the achievement of the customs union or free trade area.

[88] H. Jackson, W.J. Davey and A.O. Sykes, *op.cit.* p472.
[89] See, for example, the 1972 Report of the Working Party on "European Economic Community - Agreement of Association with Turkey" L/3750, adopted on 25 October 1972, 19S/102, papa. 8.
[90] Paragraph 3.
[91] Paragraph 10.

The Association Agreement between Greece and the European Economic Community (the Athens Agreement), provided for a transitional period of twenty-two years plus ten years for certain products.[92] The parties to the Agreement indicated such a protracted transitional period was required because of the marked difference in the degree of development of the members. The 1962 Working Party on the Athens Agreement expressed doubt as to whether the period envisaged, "could be considered a reasonable length of time for the realisation of the customs union".[93] However, the submissions of the members to the Agreement, that the time period envisaged was in the nature of a guarantee, and that strict procedures were laid down for the achievement of the customs union within that maximum time limit, were accepted and the time limits upheld on this basis.

The 1972 Report of the Working Party on the Association of Malta with the European Economic Community, recorded different views on the need for a "plan and schedule".[94] Certain members of the Working Party maintained that the Agreement lacked the necessary precision on the elimination of duties, in particular, on the elimination of restrictions into the Community of agricultural and textile products from Malta. Because of the importance of these product groups to Malta, the benefits accruing to it from the Association Agreement could have been significantly impaired by the lack of clear plans. The majority of the Working Party were of the contrary view that an evolutionary time-table, was preferable to a prescriptive schedule where the members concerned differed in

[92] Association of Greece with the European Community, GATT, 11th Supp. BISD 149 (1963).
[93] L/1829, adopted 15 November 1962, 11S/149, 150, para. 6.
[94] L/3665, adopted 29 May 1972, 19S/90, 92-93 paras. 10-12.

their level of economic development and that there was no reason to doubt the political will of the parties to achieve a customs union.

Even where the parties to trade groupings have been of equivalent level of economic development, they have successfully argued for extended periods where import restrictions could be maintained or re-introduced. For example, in the Working Party report on the Free Trade Agreement between Canada and the United States, several members expressed concern about the measures which allowed a 'snapback' to the imposition of non-tariff barriers on fresh fruit and vegetables over a period of twenty years, and the lack of a time-table for the phasing out of Canadian import permits for grain and grain products.[95]

States entering into interim agreements are not therefore required to draw up detailed plans for the realisation of customs unions or free-trade areas. It would also seem that they have a broad discretion to decide for themselves what periods for the realisation of the trade grouping should be reasonable. From the Working Party Reports outlined above, it can be suggested that timetables for achieving free-trade areas or customs unions would need to be entirely beyond the realms of reasonableness to result in a Working Party recommendation of incompatibility with Article XXIV. The Working Parties have been highly reluctant to interfere with the plans to establish interim agreements, or even to require that detailed plans be drafted before the interim agreement is introduced.

[95] L/6927, adopted 12 November 1991, 28S/47, 63, para. 52.

d) Can the review of regional agreements actually result in a declaration of incompatibility?

The extent of the obligations which the parties to interim agreements must undertake are therefore rather uncertain. There is also a lack of clarity on what Working Parties (or the new Committee) can do, or recommend, in the face of questionable arrangements for achieving a customs union or free-trade area. As noted above, Article XXIV:7(b) provides that if the GATT Parties consider that a customs union or free trade area is unlikely to result, within the period contemplated by the Parties, or that the contemplated period is not a reasonable one, "...the [GATT Parties] shall make recommendations to the parties to the agreement." The parties to the trade grouping are then required, "not to maintain or put into force ... such agreement if they are not prepared to modify it in accordance with [the] recommendations."

There is no case which has resulted in a final and unanimous disapproval of plans for the establishment of a customs union or free-trade area. Article XXIV is intended to provide a safeguard against blatant abuse where states seek to avoid their MFN obligations by creating the superficial impression that a customs union or free-trade area will be created.[96] The normal position is that Working Party Reports have contained no definite conclusions, because the information available at the time of the review does not enable any conclusions to be drawn. It is also unclear what the nature and quality of additional information, which

[96] This was the approach towards the application of Article XXIV envisaged during discussions on the GATT at the Geneva session of the preparatory Committee. It was noted here that: "If the [GATT Parties] find that the proposals made by the country that is making them will in fact lead towards a Customs Union in some reasonable period of time, why they must approve it. They have no power to object. It is simply a mechanism foreseeing, if necessary, that some Member does not find a way out

would enable a definitive conclusion, would have to be. There must surely now be sufficient information available on the operation of the European Union to determine whether it can justifiably claim a derogation from MFN under Article XXIV, given that this question was first investigated all of three decades ago.

There is also doubt as to the legal status of regional agreements which have not been expressly approved or disapproved. The position is probably that their legal status remains open until it is authoritatively determined. Working Parties have commonly come to this conclusion, as did the unadopted panel report on the EU's tariff treatment of Mediterranean citrus products mentioned above.[97] This is not, however, a conclusion which is generally shared by the parties to regional agreements. For example, the above panel conclusion was criticised in the GATT Council on the basis that, "Article XXIV agreements had to be presumed to be in conformity with the General Agreement as long as the [GATT Parties] had not made a recommendation on them."[98]

It is repeated that the limited impact which working Parties have faced, reviewing regional agreements, is strongly indicative of the political difficulty of interfering with the establishment of trade groupings, or interim agreements intended to mature into customs unions or free-trade areas. These political difficulties were, for example, raised by the unadopted 1985 Panel Report cited above, which described the review process as involving, "... an assessment of all the duties, regulations of commerce and trade coverage as well as the interests and rights of

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of its obligations under Article I under the guise of entering into a Customs Union when it is really not likely that a Customs Union will eventuate". EPCT/TAC/PV/11,p. 37.

[97] L/5776 (unadopted, dated 7 February 1985), para. 4.6.

[98] C/M.186, pp. 9, 10, 16, 17.

all [the parties to the agreement in question] ... and not just the interests and rights of one party raising a complaint."[99] Concerns about the political sensitivity of a finding of incompatibility with Article XXIV, are not as prominent in the context of validating secondary policies. The validity of a secondary policy is of immediate and direct importance to the state implementing the policy. Of course, all other GPA Members also have an interest in the validity of the policy, in so far as it affects their ability to access, and compete in foreign markets. Is is submitted, however, that the conflicting interests here are more amenable to definition and resolution.

In the procurement context, the Committee on Government Procurement (or other appropriate body) ought to be more prepared to refuse to validate, or strike down, a proposed or current use of procurement for secondary purposes. This might be done on several bases. A refusal to approve a secondary policy could be based on the Committee's lack of satisfaction with the plans laid before it. The Committee could be required to give reasons for its decision and, possibly, to make recommendations on the steps which would need to be taken before re-submitting the secondary policy for the Committee's consideration. In the context of a periodic review of existing policies, the Committee may be dissatisfied with evidence presented that the use of procurement power is achieving the desired outcome/s, and that the continued use of procurement is necessary and proportional. The Committee could also make recommendations on how the discriminatory effect of secondary policies could be gradually removed.

[99] L/5776 (unadopted, dated 7 February 1985), para. 4.18.

e) The criteria for the validation of secondary policies

The above comments raise the issue of what criteria should be adopted by the designated validation body when reviewing, or approving secondary policies. It is submitted that a proportionality test could be developed, and applied in this context. The principle of proportionality is firmly established in EU law as a means of reviewing the acts of public authorities,[100] albeit that Emiliou points towards disagreement as to its precise legal origin.[101] Broadly stated, the various elements of the proportionality principle can be expressed as follows,

"Measures adopted by public authorities should not exceed the limits of what is appropriate and necessary in order to attain legitimate objectives in the public interest; when there is a choice between several appropriate measures recourse should be made to the least onerous, and the disadvantages caused (to the individual) should not be disproportionate to the aims pursued."[102]

The proportionality principle is composed of three separate components. The first component is the suitability of the measure for the situation to which it is applied. In the EU context, judicial deference to the judgement of the institutions

[100] On the principle of proportionality in EU law see, N. Emiliou, *The Principle of Proportionality in European Law, A Comparative Study*, (1996; Kluwer); T. Tridimas, *The General Principles of EC Law* (1999; Oxford EC Law Library) Chapters 3 and 4.

[101] N. Emiliou, *supra* note 98, at pp. 134-139. The author identifies three possibilities for the origin of the proportionality principle in EU law. The first is the combined effect of the Right to Liberty and Right to Choose Trade, Occupation or Profession in the German *Grundgesetz*. The second is that proportionality is derived from a general principle of EU Law, that the individual should not have his freedom of action limited, beyond the degree necessary in the general interest. The third possible source is an express and clear provision of the Treaty, being Article 40 (now Article 34) of Title II on Agriculture, which, in the context of common organisations of the market in agricultural products, permits only the use of those measures which are *necessary* for the attainment of the objectives under Article 39 (now Article 33).

[102] N. Emiliou, *supra* note 98, at p. 2.

has generally meant that the suitability of a measure has been assessed in such a manner as to limit interference. Thus the Court has generally only gone so far as to question whether the "...measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to achieve."[103]

The second component is necessity, which requires that when there is a choice between several appropriate measures, recourse should be had to the least onerous. In the procurement setting, where the secondary objective can be pursued using a variety of instruments, the state or individual purchaser would need to employ the instrument which is among the most efficient, in achieving the desired ends.

The third component is proportionality *stricto sensu*. In addition to the suitability and necessity of the chosen instrument, the ECJ has questioned the extent to which the measure in question interferes with the fundamental right concerned. Again, the Court has formulated its responsibility here in such a manner as to constrain the review process to narrow limits. As long as the measure does not constitute, "with regard to the aim pursued, a disproportionate and intolerable interference impairing the very substance of those rights", it is lawful.[104] In the EU context, this component of the proportionality principle has been applied where a measure encroaches upon a Treaty right, or a fundamental human right forming part of the general principles of EC Law. Under the GPA, the fundamental right would be the right of suppliers to be treated in a non-discriminatory manner during all stages of the contract award process. A state

[103] Case C-331/88 *Fedesa* [1990] ECR I-4023, p. 4063 *per curiam.*
[104] Case 5/88 *Wachauf* [1989] ECR 2609, p. 2639 *per curiam.*

could argue that procurement would be a particularly efficient way to achieve a secondary objective so that both the necessity and suitability criteria would be satisfied. However, the use of procurement could entail significant encroachment on the fundamental right to non-discriminatory treatment. It is here that proportionality *stricto sensu* would be applied, to balance the pros and cons of using the most efficient instrument, and the instrument which is least damaging to obligations of non-discrimination. The question of how the proportionality principle would apply in the context of a GPA validation mechanism, will now be considered.

f) The principle of proportionality in the context of a GPA validation mechanism

As noted above, one of the factors which would affect the success of any review of secondary policies, is the rigour with which the review body would examine the reasons underlying proposed secondary policies. In the EU context, the ECJ has been prepared to apply the proportionality principle to assess the legality of normative and administrative acts, although it has been generally unwilling to examine the merits of the measures before it. This is because of the limitations inherent in the separation of powers embodied in the institutional structure of the Community. The ECJ is therefore understandably reluctant to evaluate the economic facts and circumstances underlying the acts of the institutions. Under the EU approach, it is for the administration to evaluate the basic primary information before it accurately. It must then consider what options are available to it, balance the pros and cons of those alternatives, and choose the one which, in its view, will best serve the public interest.

In contrast, the ECJ may only assess the legality of a measure. Of course, it is impossible to maintain a clear division between the legality and the merits of the choices which are made by the institutions. Thus it has been noted that, "...where rights of constitutional importance are affected, or where private interests have special strength, an appraisal of administrative action may properly have an intensity which reduces the gulf between legality and merits"[105] The same author also notes that the standard of review in the EU context has tended to be more intensive for administrative measures than for legislative acts.[106] From the description of the components of proportionality given above, it is clear that the threshold of illegality (or disproportionality) is generally set at a high level. It can also be noted that should the ECJ find a measure to be illegal, it may not require that the policy be pursued using a more appropriate instrument. This is a decision for the Community institutions or Member States depending on whose act is being reviewed.

Concerns about the doctrine of separation of powers limiting the evaluation of secondary policies, and hence the effectiveness of a validation mechanism, ought to be avoidable in the procurement context. This is because the GPA Parties would not be given any general legal authority to use procurement for secondary objectives. The legal authority to do so would only exist in so far as the policy in question is expressly approved by an appropriate body. The situation would be rather different from the EU context where the institutions have been vested with the legal authority to pursue legislative and administrative measures for the

[105] N. Emiliou, *supra* note 98, at p. 173.
[106] *Ibid.* at p. 181.

harmonisation of laws necessary for the achievement of a single market. There is therefore less objection to allowing a validation body to review the merits of a proposed secondary use of procurement where the Parties do not have the legal authority to use procurement power in this way, in the absence of express approval.

Nevertheless, the suggestion that a validation body should be able to review the merits of a proposal by a GPA Party, does raise distinct difficulties. A state could declare that it considers the proposed secondary use of procurement meets all the requirements of proportionality, taking account of the particular socio/economic conditions present in its territory. There is a strong argument here that the state itself is the best judge of what measures are appropriate and necessary to achieve its legitimate ends, notwithstanding that the state has no legal authority to implement the policy unless it is approved. Concern about a validation body 'second guessing' a state's determination of the measures which are deemed to be suitable, and necessary and proportional, can however be dispelled by reference to how a validation process could potentially operate.

It would not be open to a state to merely make a declaration that the proposed secondary uses of procurement conform with the proportionality requirements. States would have to justify and explain their reasons for reaching their conclusions in a detailed manner. The burden would be firmly on them to demonstrate that their proposals are not disproportionate.[107] The review body

[107]This is a reversed burden of proof to that which operates in the EU context. In assessing the proportionality of measures of the EU institutions, it is the applicant affected by the measure which must produce evidence supporting an allegation of excessiveness of the disadvantages of the contested measure, in relation to its advantages.

would need to have the expertise to assess the contents of the proposals made to it, as well as the contents of alternative instruments which could be used. However, from the detailed submissions made to it, a review body with the relevant expertise would gain a clear impression of the validity of the policy without having to perform its own economic analysis; a task which would probably be beyond the resources of any designated body. In practice therefore, it is likely that states would be permitted considerable discretion in formulating their policies, and the role of the review body would be limited to identifying any manifest errors in the analysis leading to a state's conclusions.

This is not to say, however, that a validation body would routinely approve proposed secondary uses of procurement. It can be suggested that states carrying out a thorough analysis of the economic merits of using procurement for achieving secondary policies, would frequently find that procurement is an inefficient instrument, and that other, more efficient, instruments which are less restrictive of trade should be employed. Perhaps one of the principal merits of requiring states to undertake a study of the proposed secondary use of procurement, for the attention of the validation body, would therefore be to promote an understanding that, in many (if not most) circumstances, procurement is not the optimal instrument for the pursuit of secondary objectives, however convenient its use might seem.

g) Could a GPA validation mechanism for secondary policies operate successfully?

The overall success of any validation process would depend on two broad factors. Firstly, the Committee on Government procurement (or other review body) would have to be prepared to undertake an inquisitive and critical examination of the secondary uses of procurement, rather than act as a mere conduit through which GPA Members would be able to exercise their own discretion. This ought to be possible. As noted above, it is unclear what the consequences of a Working Party conclusion of incompatibility of a regional agreement with Article XXIV would be. However, if a secondary policy were determined to be non-GPA compliant, the clear consequence would be either the entire removal of the policy, or the removal of that part of it which breaches the GPA. There would be no question of retaining the policy in the face of the Committee's non-approval, and attempts to do so could be subject to consultations and inter-governmental dispute settlement under the DSU. The alternative would then be to seek a negotiated derogation, either for the policy, or for the procurement under which the policy is most frequently applied. It is understandable that there is some doubt about the role of the review of regional agreements under GATT Article XXIV. The deference of the ECJ to the judgement of the political institutions when applying the proportionality principle is equally understandable. However, there are legitimate reasons why the intensity of the review processes have been limited in the different contexts which have been considered. The author has argued that these same concerns are present, although not as prominent, in the context of validating secondary policies. The problems which would be encountered in the procurement context, it is submitted, would not be insurmountable.

The success of any validation mechanism would also be dependant on the good faith of the GPA Parties. It would require that states refrain from seeking the validation of policies whose only real objective, is the isolation of domestic industry from foreign competition. If the Parties consider that procurement should be used as an instrument of protectionism, then this should be done only where the procurement is not covered by the GPA. One of the advantages of a validation mechanism, however, is that states should be less inclined to seek to entirely exclude some of their procurement from coverage. The entire rationale for the validation mechanism would be to reconcile the secondary uses of procurement, with the demands of international competitive tendering. For secondary policies which are more meritorious than protectionism alone, it would be desirable that states only have recourse to the validation mechanism when they reasonably consider that the use of procurement can make a genuine contribution to the achievement of a secondary policy. Both the Parties themselves, and the review body would therefore have important roles in securing the success of the process.

10. South African Procurement Reform and the attainment of social and economic objectives[108]

a) The relevance of this case study

It has been argued that one of the major reasons for the GPA's limited membership is the restrictions which it imposes on the use of procurement for secondary objectives. An important question is whether an approach to regulation more permissive of the secondary uses of procurement could be

[108] On the South African procurement reforms, see D. Letchmiah, "The Process of Public Sector Procurement Reform in South Africa" (1999) 1 *Public Procurement Law Review* 15.

adopted with a view to increasing both the Agreement's membership and coverage. This is one of the issues which the WTO's Working Group on Transparency in Government Procurement is currently addressing. The desirability of an alternative approach would depend on the associated costs, in terms of departing from, or abandoning, the GPA's efficiency, and wealth creation objectives.

The recent South African procurement reforms provide an important indication of these costs, since after the first democratic elections in 1994, the use of an 'Affirmative Procurement Policy' was identified as one of the key instruments for the economic and social reconstruction of the nation. The new South African Constitution incorporates specific provisions on procurement, providing the basis for the radical changes proposed[109], while public sector reform is also the subject of a new Green Paper,[110] which sets out strategies for achieving socio-economic objectives and good governance in procurement.

The starting point of the South African reforms is that the objectives of value for money, transparency and the broad participation of suppliers on the one hand, and the use of procurement for secondary objectives on the other, are all desirable, and complementary objectives which can, and must be accommodated within the regulatory environment. This is in contrast to the GPA which sees the secondary uses of procurement as exceptional and generally undesirable. Thus

[109] Article 217 of the Constitution requires that procurement systems be fair, equitable, transparent and cost effective, while it is also provided that these objectives do not prevent procuring entities from adopting categories of preferences, or from protecting or advancing those disadvantaged by unfair discrimination.

[110] Green Paper on Public Sector Procurement Reform in South Africa, GN No.691 GG17928 of 14 April 1997.

the reforms which are described below provide an important insight into how apparently conflicting objectives need not necessarily be regarded as mutually exclusive. For several reasons it is also important to ask whether the reconciliation of these objectives under South African reforms can be regarded as compatible with the GPA.

First and foremost, the GPA compatibility of the reforms is of interest for all prospective GPA Members wishing to use their procurement for secondary purposes. The South African reforms have been carefully designed to balance development objectives with value for money considerations, and place a strong emphasis on monitoring, enforcement and evaluation of results. The extent to which such a carefully formulated strategy, which indeed addresses many of the fundamental concerns of the GPA itself, can be regarded as compatible with the existing Agreement, is therefore of general interest. From the South African perspective, compatibility is of interest since the Green Paper recognises that South Africa must begin to engage the issue of GPA membership directly, as pressure from major trading partners to join begins to mount. The Green Paper also recognises the need for a detailed analysis of the GPA, to explore the scope of its flexibility in permitting the pursuit of secondary objectives.

b) The background of oppression and the beginnings of reform

Until the first democratic elections, the majority of the population was effectively prohibited from developing their potential and resources, by discriminatory laws which socially and economically favoured the white minority. Black South Africans were prohibited from operating any business in a so-called white area

which constituted the larger part of the country's territory. Before the new government came into power the Reconstruction and Development Plan (RDP) was drafted and implemented to provide an overall strategy for South Africa's economic and social development. The RDP emphasises the role of public procurement in developing the economy. Procurement spending by National, Provincial and Local government departments is estimated at approximately 13% of Gross Domestic Product and as representing some 30% of all government expenditure. As the law has historically been used to systematically exclude the majority of the population from participating in the economy, the RDP regards procurement as an important legal instrument to contribute to the reversal of this discrimination.

The marginalisation of the black majority, has meant that public tendering systems favoured the established and larger businesses, and it has been very difficult for any newcomer to enter into the system. Further, the participation of small and medium enterprises, and particularly those owned by 'previously disadvantaged individuals' on public sector projects has been negligible. Among the reasons why the established elite have continued to monopolise the procurement system, has been difficulty with access to tendering information and the complexity of tender documents. The process of adjudication of tenders has occurred under "a perceived veil of secrecy", while a lack of feedback to unsuccessful tenderers has made it difficult for emerging businesses to learn what is required of responsive and competitive tenders. Contracts have also generally been structured in such a manner that the large and well established contractors have been favoured. Thus contractors have traditionally been required to have all

the necessary resources, and technical and managerial skills to finance and perform the entire contract. Undertakings in certain impoverished regions, or those owned by members of minority groups, will not generally possess all the resources necessary to perform all aspects of the contract. They may, however, have the ability to perform some aspects of the contract and, may be able to do so at competitive prices. As will be described below, the reforms incorporate approaches to deal with this kind of situation.

A further aspect of the procurement system is that contracts have traditionally been awarded to the lowest financial offer, as this has been considered to be the proper criterion to represent value for money. The lowest tender has only been excluded where the bid seems overly optimistic, or where the firm lacks the financial or technical capacity to undertake the contract. This narrow view of value for money, generally prevents a firm's ability to undertake socio-economic objectives from being taken into consideration, even where the resulting tender prices are only marginally higher than the lowest compliant tender submitted. Again, the reform proposals incorporate strategies to re-define what is meant by value for money in the South African context.

Following on from the RDP, an urgent need for procurement reform was identified by the Ministry of Public Works after the national elections in 1994. Two concurrent approaches were implemented. It was decided that a series of short term strategies would have to be developed and implemented within the ambit of existing legislation. This has led to the interim 10 Point Plan on procurement, which was adopted by procuring entities in June 1996. Along side

the 10 Point Plan, it was decided to develop new procurement policies linked to legislative reform. This has resulted in the publication of a Green Paper on Public Sector Procurement Reform, which incorporates all the principles contained in the 10 Point Plan. The following ten strategies have been encompassed:

1. Improving access to tendering information.
2. The development of tender advice centres.
3. Broadening the participation base for contracts less than R7 500.
4. The waiving of security/sureties on construction contracts having a value of less than R100 000.
5. The unbundling of large projects into smaller contracts.
6. The promotion of early payment cycles by government.
7. The development of a preference system for small and medium enterprises owned by historically disadvantaged individuals.
8. The simplification of tender submission requirements.
9. The appointment of a procurement ombudsman.
10. The reclassification of building and engineering contracts.

The manner in which these strategies have been incorporated into the Green Paper, and the compatibility of the proposed reforms with the GPA will now be discussed.

c) The Green Paper and its strategies for pursuing Socio-Economic Objectives

The Green Paper uses the term Affirmative Procurement to describe the new method of procurement which is envisaged. The objective is to increase the engagement of small, medium and micro enterprises (SMMEs), in government contracts. Of particular interest are those SMMEs owned by members of 'previously disadvantaged groups', which may be geographically dispersed. In contrast, for construction projects, where procured assets have to be constructed in specific locations, area-based targeting of labour or enterprises is envisaged. This targeting may be coupled with the promotion of 'employment-intensive practices' in order to maximise employment and income generation among the poorest sectors of the community.

The Green Paper attempts to ensure, however, that these objectives are achieved in a structured manner. Thus it requires programmes to be implemented in a manner which is, "definable, quantifiable, measurable, auditable and verifiable." At the same time, the principles of, "fairness, competition, cost efficiency and inclusion" cannot be compromised. For example, it is provided that measures which are adopted to secure participation by the targeted business groups should not result in a failure in delivery, or a deterioration in the quality of the goods services or works delivered. Also, businesses falling outside of the target group should not generally be excluded from the contract award process.

Immediately, therefore, it is apparent that at least part of the Green Paper's remit is to reconcile the conflicting approaches to procurement, coined by Fernández Martín as the 'Economic Rationale' and 'Instrumental' uses. The Green Paper

sets out three key strategies in attempting to achieve this reconciliation, as follows:

- the 'unbundling' of contracts
- the use of Human Resource Specifications (HRS), and
- the use of a development objective/price mechanism adjudication system.

d) 'Unbundling'

Unbundling refers to the practice of splitting major contract requirements up into lots, so that the smaller individual contracts created are of a manageable size for targeted enterprises. SMMEs can participate in public procurement in several ways. Firstly, goods, services and works can be procured in the smallest practicable quantities. Where the risk is small, and where the contract can therefore be described as Micro or Minor, targeted enterprises can contract directly with the State. Thus where the period for completion of the contract is short, the value is relatively low, and the contractor's responsibility for appointment of sub-contractors is limited, there is no need to split the contract requirement up since targeted enterprises can safely undertake the contract on their own.

Direct participation by targeted enterprises, and full responsibility for the entire project will not be routinely possible. Where there is a major contract, SMMEs will not have sufficient resources to perform the entire contract unassisted by other larger enterprises. Indeed, where the contract is classed as 'International' the necessary resources may be beyond the capabilities of most large South

African firms. This is where unbundling becomes an important strategy to ensure the involvement of SMMEs, or larger South African firms, in the procurement process at some level.

Where the contract requirement is too onerous for SMMEs to assume complete responsibility for performance, there are nevertheless broadly three possibilities to ensure their involvement. Firstly, the State can split the contract up into smaller manageable lots itself and award the smaller contracts to the targeted enterprises. The Green Paper proposes that contracts involving more than one product or service should be separately adjudicated, and handled by different contractors where this is practicable. Also, products and services should be categorised in terms of their complexity in order to allow SMMEs to access the procurement process by tendering for simpler contracts which involve lower risks.

The second option is for the contract to be awarded to a domestic or foreign Prime contractor who then assumes contractual responsibilities for unbundling the contract it has been awarded by engaging targeted businesses. Here, the contract is between the contracting authority and the Prime contractor. However, as will be seen below, the prime contractor assumes contractual responsibilities for using SMMEs in performing the contract. The third option is to require joint venture formation between established businesses, and targeted emerging businesses. Here, the senior joint venture contractor will normally be a prime contractor with resources to perform all or most of the contract requirements. The junior partner lacks some of the necessary skills, but is able to develop them

through the joint venture. Joint ventures differ from the second option in that the SMME becomes jointly responsible to the contracting authority for performing the major prime contract. In contrast, the second option involves the SMME becoming responsible to the prime contractor for the performance of the specific responsibilities subcontracted to it. Unbundling is therefore one of the methods chosen to ensure the maximum possible participation of targeted enterprises, at an intensity which is appropriate for their level of development.

i) The Compatibility of unbundling with the GPA

The unbundling of contracts involves splitting procurement requirements up in order to maximise the involvement of SMMEs. The contracting authority may either split large contracts itself before they are awarded. Alternatively, it may award one large contract subject to contractual obligations undertaken by the successful firm to split the contracts. Both these different methods are motivated primarily by the aim of maximising the participation of SMMEs. The GPA contains rules on the splitting of contracts, and the aggregation of small contracts, which are relevant here.

Article II of the GPA on the *Valuation of Contracts* requires contracting authorities to add together the value of purchases made under a number of similar contracts. These are generally referred to as aggregation rules, and are intended to make it difficult for authorities to evade the GPA's application by splitting purchases up into smaller individual contracts, each of which falls below the relevant financial threshold. Article II:3 firstly contains an express prohibition against deliberate 'contract splitting' in the following terms :

"The selection of the valuation method by the entity shall not be used, nor shall any procurement requirement be divided, with the intention of avoiding the application of this Agreement."

This provision deals with the situation where the authority seeks to award two or more separate contracts, rather than a single contract which would have been above the financial thresholds. It is likely to be of limited value however in promoting the effectiveness of the Agreement, because of the need to establish that the motive for splitting a contract into separate lots was to avoid having to advertise the contract internationally. Procurements may be carried out on a frequent and small scale basis for reasons other than a deliberate intention to avoid the rules, such as a lack of communication among government departments on their requirements resulting in inefficient purchasing.

In the South African context, the primary motive for splitting large requirements will be to increase SMME participation. It is also crucial to the overall ethos of the reforms that they operate in a manner compatible with international competition, and the participation of foreign firms. If South Africa were to join the GPA, it could be argued that where unbundling involves splitting major contracts into smaller lots, Article II:3 is not breached because the primary intention is not to evade the Agreement and preclude the participation of foreign firms. They are permitted to compete for contracts, albeit that domestic firms sometimes have an advantage at the award stage, if the content of the secondary objective is more difficult for foreign firms to meet than domestic firms.

Whether, Article II:3 is breached depends on how the overall package of reforms will operate in practice. If unbundling strategies are merely the first step in a procurement system which can be assessed as being incompatible with the GPA, then the splitting of contracts could be regarded as a means of avoiding the Agreement's application. This question cannot be answered by considering unbundling in isolation from the wider context of procurement reforms.

However, the narrow question of whether contracts have been split with the intention of evading the Agreement is likely to be of limited importance under the GPA. This is because Article II:4 reinfroces Article II:3 by requiring "similar recurring contracts" to be aggregated regardless of the reason why they have been awarded separately, where it seems commercially reasonable that the separate purchases should have been awarded in one single large contract. It is provided that :

"If an individual requirement for a procurement results in the award of more than one contract, or in contracts being awarded in separate parts, the basis for evaluation shall be either,

(a) the actual value of similar recurring contracts concluded over the previous fiscal year or 12 months adjusted, where possible, for anticipated changes in quantity and value over the subsequent 12 months; or

(b) the estimated value of recurring contracts in the fiscal year or 12 months subsequent to the initial contract."

The contracting authority has the choice over which aggregation method to adopt, although it's choice must clearly be consistent with the obligation in Article II:3 not to be motivated by the intention of avoiding the application of the Agreement.

Whether, the authority is required to aggregate the contracts at all depends on whether an "individual requirement" can be identified, and of whether there have been "similar recurring contracts." It is submitted, however, that if "similar recurring contracts" can be identified, then this will be sufficient to establish that there has indeed been an "individual requirement" which has been split up. No guidance is provided by the GPA on when recurring contracts should be regarded as similar. To date, the same can also be said of the EC procurement regime, on which the GPA aggregation rules are broadly based. In the EC regime, slightly different formulations of the aggregation rules are provided in the different Directives. However, a common question is whether the separate contracts are of the same "type". This is analogous to the term "similar recurring contracts" used by the GPA.

In the context of the EC rules, Arrowsmith has suggested that contracts can be treated as of the same "type" where the goods or services contracted for are typically available from the same supplier or service provider.[111] Where the goods and services are generally only available from different specialist firms, then separate contracts should not be regarded as being similar or as being of the same type. On this basis, contracts for the supply of paper, correcting fluid and pens should be aggregated, whereas contracts for the supply of ambulances and

[111] S. Arrowsmith, *The Law of Public and Utilities Procurement* (1996; Sweet & Maxwell) p.170.

fire engines should not be aggregated because these specialist vehicles would normally be sourced from different firms. Arrowsmith notes that,

"Such a test reflects the objective of the rules, which is to ensure that purchases are advertised when it is commercially reasonable for those purchases to be packaged in a single contract which exceeds the threshold."[112]

The author also acknowledges that while this is a sensible test, it still leaves a great deal of scope for differences in judgement in an area which is very important for achieving an open procurement market.

It is important to emphasise that where an "individual requirement" must be aggregated, this does not force the authority to advertise and award one major contract. The authority may, if it chooses, continue to split the requirement up into smaller lots which are manageable for SMMEs, and which they can perform using their own resources. However, the effect of the aggregation rule is that all the separate contracts must be advertised and awarded under GPA procedures. In practice, the authority may consider this to be inefficient. It may therefore award a single large contract although this might limit the participation of SMMEs.

A final option is still available however. The authority may divide the contract into lots to be awarded in a single procedure. Numerous separate contracts whose value would be aggregated could then be advertised and awarded at the same time to different targeted firms. Administrative costs would be reduced

[112] *Ibid.*

since the tender documentation for all the contracts would be the same and duplication of award procedures would be avoided. SMMEs are also able to participate because the individual contracts can be packaged in manageable sizes.

ii) Application of the aggregation rules to unbundling strategies

It can be noted that all of the unbundling strategies envisaged by the Green Paper are potentially compatible with the aggregation rules. Where procurement is conducted for the smallest practicable quantities, which requires large, above threshold requirements to be split into smaller lots, the aggregation rules come into operation. However, as noted above, SMME participation can still be preserved by splitting the contract up into smaller lots and awarding the lots in one procedure.

In contrast, where the unbundling strategy involves a joint venture formation between SMMEs and larger, established contractors, the aggregation rules do not apply. This is because a major contract will have been awarded in one lot, which is covered by the Agreement if above the relevant thresholds, and not otherwise excluded. The same applies where the contract is awarded to a major contractor subject to contractual obligations to engage SMMEs in the performance of the contract. Here again, a single major contract is awarded and the splitting of the performance requirements later on has no bearing on avoiding the thresholds.

e) Human Resource Specifications

Contractors are normally required to perform the contract according to a technical specification which lays down the characteristics of the goods or services to be

procured, such as quality, performance, safety, packaging and labelling. However, the Human Resource Specification is to be used in South Africa and has already been piloted for construction projects. Human Resource Specifications set goals for targeted SMME participation, or the engagement of targeted labour or resources. These goals must be achieved in a manner which can be quantified, measured, verified and audited, and the HRS will set out how these objectives, which all relate to the transparency of the procurement process, are to be achieved. All HRSs share these common characteristics. However, they differ in the exact goals which must be achieved and the methods for their achievement.

As noted above, the participation of SMMEs can be provided for in different ways. SMMEs can be favoured at the award stage to increase their chances of winning smaller, manageable contracts which they are fully capable of performing using their own resources and expertise. Here the role of the HRS is to identify which SMMEs are to be regarded as Affirmable Business Enterprises. This is done by defining which businesses are owned and controlled by previously disadvantaged individuals. When firms possess the relevant characteristics, then they are favoured at the award phase of the contract. As will be seen below, however, certain firms are favoured via a system of allocating points to them for their characteristics, or for their ability to undertake secondary objectives defined by the HRS. The Green Paper makes no provision for the use of price preferences, or set asides, favouring a different method of awarding contracts, which is more conducive to international competition.

The HRS will also incorporate provisions on the firms reaching predetermined turnover milestones, and may specify that they are no longer to be regarded as Affirmable Businesses for the purposes of the particular HRS under which the smaller contracts were gained. In this way, participation measures cease at the point beyond which they are no longer justifiable. Determining when the HRS has achieved its objectives can be viewed as crucial in securing the confidence of South Africa's trading partners, and existing GPA members, in the transparency of the policies adopted. The GPA enjoins its members to recognise the development needs of developing countries. However, it is not expected that these members will tolerate protectionist measures which are not necessary to attain their objectives.

Once firms reach pre-determined levels of development, they can no longer expect to be favoured in the award of the smaller contracts under the HRS which led to their development. However, this does not mean that they immediately fall outside the scope of the Affirmative Procurement Policy. Emerging firms exiting the scope of one HRS can then move on to play a role in larger projects. Different HRSs will therefore enable the participation of South African firms at the level and intensity which is appropriate for their level of development. In this way, the Affirmative Procurement Policy serves to foster the sustainable growth of the targeted firms.

As described above, the participation of Affirmable Business Enterprises can be achieved by unbundling contracts. HRSs can be used here to impose minimum contractual obligations on the successful Prime Contractor relating to the

unbundling of the contract. Where the HRS is used as a tool for unbundling, it will not take a prescriptive form. For example, the HRS will not state that firms must engage targeted enterprises in order to qualify. Rather, it will set Participation Goals. The Green Paper defines these as, "the net value of goods, services and works for the supply of which the firm contracts to engage targeted small, medium and micro enterprises in the performance of the contract, expressed as a percentage of the tender value of the contract." A Participation Goal of 20% would therefore imply that 20% of the tender value of the contract should be funnelled through targeted enterprises. Domestic and foreign firms then have the discretion over how to meet or exceed the Participation Goal, and (obviously) over what price to tender.

There are various ways in which the Participation Goal can be met. These include:

- subcontracting portions of the contract to targeted SMMEs;
- obtaining manufactured components or supplies and materials from targeted SMMEs; or
- engaging professional, technical or managerial service providers who are targeted SMMEs;

Alternatively, joint venture formation can be used to provide targeted SMMEs with experience of working directly with larger domestic or foreign firms. Here, the SMMEs become responsible for performing part of the contract using their own resources. As noted above, this involves the SMME becoming jointly

responsible to the contracting authority for performance of the major prime contract rather than being responsible to the prime contractor for the performance of the responsibilities subcontracted to it. Where the objective is to target local resources or to engage targeted labour in depressed regions, HRSs can again be used to require prime contractors to develop solutions to meet these goals.

i) The Compatibility of Human Resource Specification with the GPA

Human Resource Specification which define Affirmable Business Enterprises

Where the HRS defines which enterprises are to be regarded as Affirmable Business Enterprises, and hence given favourable treatment at the award stage, the general rules prohibiting discrimination apply. Thus article III:1 requires that foreign suppliers be provided with the same competitive opportunities as domestic firms, which effectively prohibits the favourable treatment of those domestic firms which fall within the definition of Affirmable Business Enterprises provided by the HRS. The only means of avoiding a conflict with Article III would be to adopt a broader definition of Affirmable Business Enterprises to include equivalent disadvantaged groups in other States. However, this would probably be regarded as resulting in an unnacceptable detraction from the attainment of the secondary objectives on South Africa's territory. Thus where the HRS targets black owned South African firms, Article III is likely to be breached. Article VII[113] would also be breached because of the advantage afforded to targeted firms at the award stage.

[113]Article VII:1 provides that, "Each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner ..."

Human Resource Specifications involving joint venture formation

The HRS may require Prime contractors to enter into joint ventures with targeted domestic firms in order to gain development objective points at the award stage. Both large domestic, and foreign firms will have the opportunity here to compete for contracts, and both have a realistic chance of success. Domestic firms may have an advantage in formulating their proposals for the joint venture because of their local knowledge. However, it is submitted that domestic and foreign firms here are in a comparable position, and that any nominal advantage which foreign firms have would not be sufficient to amount to a breach of Article III, and other non-discrimination rules. However, the requirement to form joint ventures is likely to fall under the prohibition on offsets in Article XVI. As has been seen, a requirement to engage domestic firms in some way in the performance of the contract amounts to an offset. The effect of the HRS is that firms able to form joint ventures are favoured at the award stage. Article XVI provides that, "Entities shall not ... in the evaluation and award of contracts, impose, seek or consider offsets." Developing countries may negotiate for the use of offsets at the qualification stage. However, South Africa is not, at present a developing country in the WTO. Also, under the proposed reforms, the ability to form joint ventures, and hence perform the offset, is considered at the award stage, which will always breach Article XVI.

Human Resource Specifications used as a tool for unbundling

As noted above unbundling may involve several related strategies, such as subcontracting portions of the contract to targeted SMMEs or obtaining manufactured components or supplies and materials from targeted SMMEs.

The HRS can be used to require firms to develop their own unbundling strategies as a condition of being granted development objective points at the award stage. However, this kind of HRS is subject to the same provisions as the joint venture HRS above. Even if the absence of a discriminatory effect could be demonstrated, all the unbundling strategies involve objectives which amount to offsets under the GPA and are therefore prohibited.

f) Awarding Tenders in Terms of a Development Objective / Price Mechanism

Numerous domestic and foreign prime contractors will be capable of unbundling contracts to ensure SMME participation. Equally the same contractors would be able to enter into joint ventures with targeted SMMEs, just as many SMMEs will fall within the definition of an Affirmable Business Enterprise for the purposes of awarding small contracts directly to them. How then is the contracting authority to decide which prime contractor to award the work to? The most innovative feature of the Green Paper is its mixing of socio-economic objectives with competitive pressures, through evaluating tenders both in terms of meeting development objectives, and the price tendered.

The development objective/price mechanism is a points scoring system where firms are awarded points firstly, for the price tendered, and secondly, for their offer to meet or exceed socio-economic objectives, or their current enterprise status. Where tenderers must address socio-economic objectives these will be set out clearly in the tender documentation. The HRS will thus establish the adjudication criteria, and the manner in which points are to be awarded.

Tenderers may, for example, be awarded development objective points for their ability to sub-contract to Affirmable Business Enterprises, or use targeted labour or resources. The Green Paper seeks to ensure the transparency of the adjudication process by requiring that a qualified independent observer would be able to understand and identify the decision making process, and reach a similar result were they to perform the adjudication themselves.

Points may be awarded for what firms are prepared to do in terms of fulfilling specified development objectives. This involves no price preference in favour of domestic firms, and no discriminatory effect. If foreign and domestic firms present tenders fulfilling development objectives in a similar manner, then they will receive equal points in the tender adjudication. Points will also be awarded for price and in this situation, the lowest priced tender will win the contract, subject to the successful firm's financial and technical capacity. Both have the opportunity to compete on equal terms to be prime contractors, or joint venture contractors, in presenting their development objective and price offers. There is no reason, therefore, to regard the adjudication process as creating any inequality in the competitive opportunities between domestic and foreign suppliers. Consequently, there is no discriminatory effect.

The same cannot always be said, however, where development objective points are awarded for a firm's current enterprise status. If firms are awarded points on the basis of being owned or controlled by black South Africans, then this amounts to a form of preference and this will clearly impact heavily on a foreign firm's chances of success. There is therefore a discriminatory effect here which

would breach Articles III and VII:1. A possible response here would be to argue that the whole rationale of awarding points for a firm's enterprise status is to enable targeted firms to win relatively small contracts, which are unlikely to be of international interest, and which one would expect to fall below GPA thresholds. However, this does not avoid the incompatibility as these small individual contracts would need to be aggregated under Article II:4. Having been aggregated, the contract or contracts, would then have to be awarded under the GPA's procedures which require non-discriminatory treatment.

It should also be emphasised that foreign firms are not precluded from bidding for these contracts, even though they may be unable to gain any points for their enterprise status. If domestic firms present grossly uncompetitive tenders, the advantage which they gain from their enterprise status may be outweighed by the high price, and foreign firms may win the contracts. Even if foreign firms are disinclined to bid for small contracts, domestic firms are still subject to strong competition from all domestic firms sharing the same enterprise status, and subject to some competition from all the other domestic firms who are able to perform the contract. Therefore, the preferred domestic firms are prevented from submitting grossly uncompetitive tenders even if foreign and many domestic firms are disadvantaged in the adjudication process.

The principal objective of the chosen adjudication method is to minimise any premium payable for incorporating socio-economic objectives into projects. There is already evidence that it has been successful in this regard. In August 1996, the State Tender Board approved the piloting of the Affirmative

Procurement Policy on all construction projects. For the 15 month period between August 1996 and October 1997, 3423 building and civil contracts were awarded using the Affirmative Procurement Policy specifications. Around 45% of the total financial values of these contracts went to Affirmable Business Enterprises, either as prime contractors on smaller projects or as joint venture partners, subcontractors and service providers on the larger projects. The average financial premiums for contracts falling within various bands, ranging from R0 - 45 000 to R2 000 000 + was 1.2%. The lowest premium was 0.2% for contracts in the lowest band, and the highest was 1.5% for contracts in the R100 000 to R500 000 band.[114] These statistics clearly show that pursuing development objectives and securing value for money are not necessarily mutually exclusive, and have operated successfully together in the construction sector.

g) The Compatibility of the award process with the GPA

It need only be repeated that where the Prime contractor receives development points for the extent it can undertake secondary objectives, these secondary objectives amount to offsets which cannot be relevant at the award stage. Where firms receive development points for their current enterprise status, this involves discrimination against foreign firms which breaches Articles III:1 and VII:1. The proposed contract award system is therefore completely incompatible with the GPA in its present form, where the procurement is covered by the Agreement.

h) Conclusion

[114] These figures are taken from S.M. Gouden, "Implementation of the Affirmative Procurement Policy on Construction Projects by the National Department of Public Works," paper presented to the Conference on Project Partnership, Johannesburg 1997.

It is too early to tell as yet whether the South African reforms will be effective to their objectives. However, the reforms do demonstrate a clear commitment to formulating, and operating procurement laws and practices in such a manner as to permit the use of procurement for development objectives while minimising wasted expenditure through a lack of competition among suppliers. Even such carefully formulated strategies are likely to be incompatible with GPA membership in a number of respects. Even if the law or policy does not have a discriminatory effect, it will often fall foul of the GPA's prohibition on offsets where the procurement is covered by the Agreement. Thus GPA membership is unlikely to be regarded as a serious prospect for any nation wishing to routinely use procurement for development objectives.

The reforms do provide a positive indicator for any new instrument which may result from the ongoing work within the Working Group on Trnasparency. The reforms indicate that a new initiative could contain certain obligations to minimise the extent of departure from the important objectives of the existing GPA. Thus, a possible transparency agreement, could require its members to prioritise Value for Money in procurement, and to pursue secondary objectives in such a manner as to minimise discrimination. Members could also be enjoined to monitor the effectiveness of their secondary policies. It would be up to individual states to decide on the extent to which they would be prepared to meet these obligations of best endeavour. They would, however, have to publish the content of their procurement laws and practices to engender a transparent environment.

11. Conclusions and recommendations

Unless a significant proportion of WTO Members accede to the GPA, the Agreement will not even be potentially capable of achieving the liberalisation of procurement markets on the global level. A large part of the explanation for the present limited membership, is the desire of states to use procurement for secondary objectives which often involve treating foreign suppliers, or goods and services, in a discriminatory manner. Sometimes, it will be possible to use procurement strategically without contravening the GPA in any way. However, adapting secondary policies to bring them into compliance with the GPA, results in the loss of freedom to routinely place contracts domestically. At present, many states may not be prepared to relinquish the freedom they enjoy in the procurement context. It will also frequently not be possible to adapt a national policy to ensure GPA compliance. Thus, it has been shown that many policies which governments do in fact operate, fall foul of the GPA's prohibition on offsets, notwithstanding the presence, or extent of any discriminatory effect.

There are strong reasons for supposing that the GPA's general insistence on international competitive tendering on a non-discriminatory basis, is the correct approach from the point of view of enhancing both national and global economic welfare. Procurement is a relatively inefficient instrument for achieving secondary objectives, and its use will usually have adverse effects on the benefits which open international trade is capable of producing. In some market conditions, procurement may be efficient to promote some secondary objectives, such as the protection of domestic industry. It has been suggested that a validation mechanism for secondary policies could be incorporated into the GPA

to give states the opportunity to defend their secondary uses of procurement. Ultimately, however, it is not considered that such a step would achieve much by way of attracting new members. More often than not, a validation mechanism would merely reveal that secondary policies are indefensible in the long term from the point of view of national and global welfare. The present situation is that most WTO Members appear to be prepared to forego the welfare benefits which procurement liberalisation can bring, in favour of the short term benefits, and flexibility of strategically placing government contracts. The GPA has largely failed to dissuade governments from regarding procurement as an appropriate instrument for achieving many legitimate objectives, which they indeed have a responsibility to the electorate to achieve.

The approach, which the GPA currently takes to allow states to balance the liberalisation commitments undertaken, with their desire to promote national policy objectives, is to allow states to negotiate for the exclusion of some of their procurement from the GPA's coverage. Special provisions have been incorporated to give developing countries the express right to negotiate for such exclusions. It is clear however, that (for the most part[115]) they are in a very similar position to developing nations in practice. It can also be suspected that developing countries may not be convinced of their ability to negotiate for enough by way of exclusions to the GPA, to make membership politically acceptable. The consequence of the GPA's current approach is that its coverage of contracts is determined through bilateral negotiations. Each new Member

[115] The only real difference between the position of developed and developing nations is that the latter are permitted under Article XVI:2 to negotiate for the use of offsets to be used at the qualification stage. Of course any state may choose to operate offsets where the contract in question has been excluded from the GPA's scope of coverage.

must conduct accession negotiations with all existing Members at the time of accession. This makes it difficult for purchasers to determine whether the contract is covered by the GPA, and increases the complexity and costs of accession negotiations.

At the present time, the WTO is at a cross-roads regarding its activities in the area of regulated procurement. The GPA is not capable of making a significant contribution to opening up procurement markets at the global level, by reason of its limited membership. The question must therefore be asked what the future holds for procurement regulation among the WTO Members. As was noted in the introduction to the thesis, the WTO has itself determined that a new approach is necessary. At the 1996 Ministerial Conference at Singapore a Working Group on Transparency in Government Procurement was set up. Its mandate is to conduct a survey on transparency in government procurement practices and then to "develop elements for inclusion in an appropriate agreement."[116] It can also be noted that the Asia pacific Economic Co-operation forum, has already produced a document on transparency in government procurement and illustrative practices. Guidance is laid down on the importance of sufficient, accessible and relevant information on procurement opportunities, and procedures.[117] The experience here is likely to provide an important reference point for developments at the WTO level.

[116] For an assessment of what the possible new Agreement might, and should contain, see S. Arrowsmith, "Towards a Multilateral Agreement on Transparency in Government Procurement", (1998) 47 *The International and Comparative Law Quarterly* 793.

[117] APEC Government Procurement Experts Group, Non-binding Principles on Government Procurement: Transparency (September 1997) The text is available on the Internet at http://www.apecsec.orgosg under "1997 CIT Annual Report to Ministers." See also S. Arrowsmith,

It will be noted that the Working Group's mandate refers only to transparency and not to non-discrimination. According to the Secretary of the WTO Committee on Government Procurement, the work so far has been directed, "not at the overt use of procurement practices for protective purposes but at the transparency of the procedures."[118] Thus it is likely that any agreement emerging from the current study will be permissive of the freedom of states to engage in discriminatory procurement. Given this significant concession, the new agreement, if it comes to fruition, is likely to be multilateral or compulsory in character. There follows a brief overview of the possible content, and objectives of such a Transparency Agreement.

Transparency in government procurement involves that the rules governing the conduct of contract awards be formulated with clarity and published using accessible media. It also involves that information on specific procurement opportunities be published in a timely manner, and that any factors which are likely to discourage foreign participation – such as price preferences or offsets – be clearly notified to potential bidders. The detailed award procedures of the GPA would be less necessary in the context of an agreement based on transparency, since one of the main purposes of the GPA's rules is to prevent discriminatory procurement. Discrimination would probably be permissible under any new instrument, thereby obviating much of the need for detailed rules. There would however need to be a mandatory requirement to publish the content of the discriminatory policy, to enable suppliers to reach an informed decision on

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"The APEC Document on Transparency in Government Procurement" (1998) 7 *Public Procurement Law Review* CS38.

the extent to which the policy will affect their competitive opportunities. It has been strongly suggested that the any new instrument should not prescribe the precise content of national procurement rules. It should merely provide for certain fundamental obligations relating to the clarity and predictability of national rules, and require that those rules be published. This approach is reflected in the APEC transparency agreement, which has confined itself to laying down very broad principles and practices, in recognition of the belief that its individual members are in the best position to understand how the obligations should be incorporated into their national systems.

A multilateral agreement limited to transparency could potentially avoid many of the concerns surrounding accession to, and implementation of the GPA, while also making a strong contribution to the GPA's principal objectives. While it is likely that states will be permitted to discriminate against foreign suppliers under the terms of a possible future agreement, it is important to emphasise that the participation of foreign suppliers will be a crucial objective of the transparency-based obligations. Thus the current study is not indicative of the WTO's abandonment of its commitment to liberalising international procurement markets, by creating a regulatory environment which is conducive to realistic cross-border opportunities. On the contrary, the compulsory publication of procurement rules, and of contract opportunities, among all the WTO states, will make a vital contribution to promoting awareness of cross-border opportunities among the WTO Members. Given its limited membership, this is not something

[118] V. Kulacoglu, "Developments within the WTO since the Singapore Ministerial Conference", paper delivered to the conference Public Procurement Global Revolution, University of Wales Aberystwyth, September 11-12th 1997.

which the GPA is potentially capable of achieving, beyond its small circle of existing members.

An agreement limited to transparency obligations could also avoid some of the complexities of negotiations for accession to the existing GPA, and make it much easier for purchasers to determine whether the contract needs to be advertised internationally. The complex coverage of the GPA, in terms of the entities and types of contracts covered, is in part due to the fact that secondary policies can only generally be pursued to the extent that the procurement is excluded from coverage. If discriminatory procurement were permitted, then there ought to be little objection to subjecting a wide range of government procurement to the transparency agreement, nor in providing for uniform coverage for all signatories.

A transparency agreement could also emphasise the importance of value for money in procurement, by inviting states to formulate their secondary policies in such a manner as to minimise interference with the participation of interested suppliers, and hence increases in public expenditure. One of the most important aspects of the South African procurement reforms detailed above is that the secondary uses of procurement, and value for money are seen as crucial and complementary objectives. As was noted, one of the features of the reforms is its mixing of socio-economic objectives with competitive pressures, through evaluating tenders both in terms of meeting development objectives, and the price tendered. The experience to date in the construction sector indicates that pursuing development objectives and securing value for money need not be regarded as mutually exclusive, and can operate together successfully. Despite

the commitment to value for money, and the participation of foreign suppliers, concerns were expressed above over the compatibility of the South African reforms with the GPA's rules. Given the discretion which would need to be afforded to WTO Members, over the precise content of their national procurement rules, these concerns would be eliminated in the context of a transparency Agreement.

Finally, a transparency agreement might also invite, or require its Members to periodically monitor the operation of secondary policies, by incorporating aspects of the validation mechanism discussed above. Thus Members could be required to periodically question whether there is a continuing need to operate the secondary policy, whether the policy is actually effective to achieve its ends, and whether the same ends might not be achieved in a manner which is less restrictive of foreign participation. In order to make such obligations acceptable, it is suggested that the responsibility for carrying out a review process would be that of the Members themselves, and there would be no scope for interference in the decision making process, either by the WTO institutions or by other Members.

A transparency agreement would be capable of addressing many of the concerns which have led the majority of WTO Members not to join the GPA. A new instrument could also remain faithful to the existing Agreement's objectives of introducing procurement disciplines into national systems, promoting efficiency in procurement practices, and increasing supplier awareness of contract opportunities as well as their participation. Non-discriminatory procurement is one of the means by which these objectives can be safeguarded. However, the

present emphasis on non-discrimination need not be regarded as indispensable to their achievement . The WTO study currently in progress raises questions about the future, and continued existence of the GPA in its current form. Forthcoming developments in this area are therefore eagerly awaited.

Chapter 4

The GPA's limitations on the instrumental uses of procurement as an explanation for its limited membership

Part II

Tackling private anti-competitive behaviour in public contract awards under the GPA[1]

Introduction

This Chapter examines how far government procurement practices regulated by the GPA can be used to limit or prevent anti-competitive behaviour by bidding firms in order to support a state's trade or competition policies. From the point of view of the GPA's prospects for liberalising international trade in procurement, the issues presented here are important from two perspectives. Firstly, certain kinds of anti-competitive behaviour can have a direct impact on distorting the competition between firms which cross-border participation in procurement is intended to achieve. This will be the case with the collusive behaviour which is described below. Secondly, governments may also wish to use their procurement power to support laws dealing with dumping and subsidisation. These practices may be evidenced by the submission of low tenders for government contracts. While such tenders may be desirable in terms of reducing costs, governments may feel that these benefits are outweighed by the need to reinforce their trade laws.

[1] A version of this Chapter first appeared in (1998) 21 *World Competition* 55.

Any limitations on the pursuit of trade policies under the GPA can be regarded in the same light as the limitations on the secondary uses of procurement which were considered in Chapter three. In other words, the strengthening of trade and competition policies (along with social, economic and environmental policies) are among the secondary uses which can be made of procurement power, and the present lack of acceptance of these limitations is a large part of the explanation for the GPA's limited membership.

This Chapter firstly considers the kinds of business practices governments may wish to address through their procurement. Section two then reviews the limited scope of WTO law in so far as it currently regulates the competition and trade problems described. Section three considers how far the terms of the GPA permit the pursuit of competition and trade policies through the use of procurement power. Finally, it is questioned how far other WTO Agreements impose constraints which limit the freedom of governments to use procurement to tackle the identified problems, even if governments remain within the terms of the GPA itself.

1. What kinds of business practices might governments wish to pursue through procurement?

There are broadly three kinds of business practices which governments might wish to pursue through procurement as a means of strengthening their competition and trade policies. These can be described as collusive behaviour among participating firms, dumping, and the unauthorised subsidisation of firms. While both collusion and dumping will normally be due to independent decisions

among firms, unauthorised subsidisation will be the direct result of government action.

Collusion may involve some identifiable agreement among firms to take turns to bid the lowest price for similar repeat contracts, to seek to artificially raise the cost of goods or services or agree to contest only their domestic markets. Such express collusion can clearly impact heavily on the competitiveness of procurement markets.

Collusion may also occur tacitly, without any express agreement between firms, but where anti-competitive effects are nevertheless produced. Concern has been expressed that measures seeking to introduce international competition into public contracting may inadvertently have the effect of blunting the edge of competition between suppliers. The hypothesis here is that multiple contacts between firms are likely to strengthen the lines of communication between them when they bid for large procurement contracts, and that these 'multimarket' contacts are likely to decrease inter firm rivalry. Each firm then respects markets important to its competitors with the understanding that they will reciprocate. This tendency has been described as the "linked oligopoly theory"[2], and is sometimes evidenced by parallel pricing. Some authors anticipate that the opening up of procurement markets will further increase merger and acquisition activity, leading to the creation of global players producing scores of diverse procurement products. Inevitably mergers and acquisitions will mean a smaller

[2] On the linked oligopoly theory, see D. Konstadakopulos, "The linked Oligopoly Concept in the Single European Market: Recent Evidence From Public Procurement", (1995) 5 *Public Procurement Law Review* 213.

number of firms will have increased contact in an increased number of markets. The linked oligopoly theory dictates that this multimarket contact is more conducive to collusion than competition.

Whereas express agreement to collude normally results in higher tender prices, tacit collusion will normally result in the maintenance of uniform pricing levels among bidding firms. The impetus to address collusion through procurement rules applies equally to both express and tacit collusion however. Both can defeat any price savings derived from a competitive tendering process. Collusion, therefore, in contrast to the practices identified below, can directly damage the GPA's objective of securing competitive purchasing for governments.

The second broad area which governments may wish to address through procurement rules is the subsidisation of firms. Where firms are in receipt of subsidies of some kind from their governments, they may be able to sell goods (or submit bids for government contracts) at price levels which do not reflect any competitive advantage they have over firms producing similar goods. Subsidisation may take the form of a direct transfer of funds by governments to a firm or firms within their territory whether by way of grant, loan or other means. Alternatively, governments may purchase goods at a premium from their firms and this, in some circumstances might amount to a subsidy. Releasing firms from their liability to taxation can also be regarded as a subsidy because of the financial benefit which is thereby conferred.[3]

[3] These are some of the examples which form part of the definition of a subsidy in Article 1 of the WTO Subsidies and Countervailing Measures Code.

Thirdly, governments may also wish to pursue their trade policies against dumping through procurement rules. Dumping occurs where firms export at prices below those charged on the domestic market, or even below cost price. Importing states may be particularly concerned where dumping is motivated by the 'predatory' intent of 'evicting' competitors from the market by selling to the customers of competitors at prices which are so low as to force them either out of the market completely, or into other areas of production. Predatory conduct is seen to threaten the capacity for domestic production and the interests of consumers.

Dumping may result in the submission of low tenders for government contracts for the purchase of goods. In some instances, firms may also be able to submit low tenders due to the receipt of subsidies. On the face of it, acceptance of such low tenders would clearly be advantageous to a procuring entity under budgetary restraints. However, governments may wish to pursue policies against dumping or unauthorised subsidies through procurement rules. Thus they may wish to adopt a policy of rejecting low bids which are actually part of a dumping strategy, or, more broadly require procuring entities to reject *all* bids from a firm which is either suspected of dumping, or established as having dumped goods on an export market.

There are concerns here that measures taken may have more to do with protection of particular firms which are already established, and have a political voice to lobby for antidumping duties, than protection of competition in the market place.

It is thus antidumping actions (rather than dumping) which is seen by some to have an anti-competitive effect[4] by hindering the process of competition through allowing inefficient firms to survive, at the expense of the rationalisation of existing industry, or the development of more efficient industries in different areas of production. On this view dumping is unlikely to result in 'unfair' competition between firms beyond that which is an acceptable and beneficial effect of contact between firms in the market place. Further, it can be argued that the public interest in consumer welfare (generated by the availability of cheap imports), whilst not paramount, has generally been an underplayed consideration in antidumping actions.[5] Antidumping duties are arguably used too often as an unwarranted form of protection[6], and the nature and operation of the laws currently in place are generally sympathetic to this process.[7]

Where antidumping duties are used as a tool of protectionism and governments seek to pursue their antidumping policies through procurement rules, the pursuit of these policies could have a significant effect on future GPA accessions especially among developing countries.

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[4] See, for example, G. Neils and A. Kate, "Trusting Antitrust to Dump Antidumping" (1997) 31(6) *Journal of World Trade* 29.

[5] See W.J. Davey, "Antidumping Laws : A Time for Restriction" in Jackson, Davey & Sykes, *International Economic Relations,* 673 (West Publishing Co.; 1995).

[6] For example, under the WTO Antidumping Code, lobbying by domestic producers can have a strong effect on the decision of whether to initiate antidumping investigations. Article 5.4 of the Code requires that an investigation shall not normally be initiated unless supported by the domestic industries who are collectively responsible for at least half of the domestic production of the like product, out of the total portion of domestic industry which responds with either support for, or opposition to the investigation. It is difficult to envisage that any representative of domestic industry involved in production of like products to those allegedly being dumped would object to an investigation being conducted, and thereby forego the protection from foreign competition which antidumping duties can afford.

[7] The Antidumping Code makes no attempt to reconcile the injury to domestic industry which dumping can cause, and the benefits to consumers which it can bring. The only input consumer groups might have is through making representations to national authorities following public notice of investigations as required by Article 12. Further, a frequently cited justification for antidumping laws is that they are a necessary response to 'unfair' competition from foreign firms. The competition is regarded as unfair because of access restrictions on the exporter's market of some kind which prevent arbitrage. Surprisingly, however, no enquiry is made of whether these access restrictions actually exist before antidumping duties may be imposed.

These states may be especially concerned to negotiate for the ability to pursue antidumping policies through procurement rules as a condition of GPA membership. It has been suggested that discriminatory procurement policies are only effective in protecting domestic producers under certain conditions and that these conditions are far more likely to be present in developing than in industrialised countries.[8] A crucial condition here is that government demand for goods which are frequently procured must exceed domestic supply in order for a discriminatory procurement policy to be effective. This is more likely to be the case in developing countries which tend to be characterised by a shortage in domestic production of goods that governments procure heavily. Further, developing countries are frequently characterised by relatively large public procurement markets so that, in signing the GPA, they generally liberalise a larger market than an industrialised country would. For these reasons, the potential for firms in industrialised countries to affect production in developing countries by submitting low bids for government contracts, could be perceived by to be particularly threatening.

While discriminatory procurement policies are likely to be relatively effective in protecting domestic producers in developing countries, it should be emphasised that such policies will usually be accompanied by a loss in efficiency, and innovation.[9] In so far as governments may have to weather these negative effects, due to the political pressures they are exposed to from their protected industries,

[8] See F. Trionfetti, "The Government Procurement Agreement and International Trade: Theory And Empirical Evidence", paper written for the World Trade Organisation (1997)(unpublished).
[9] *Ibid.*

and pursue their antidumping policies through procurement rules, questions are raised concerning the compatibility of such policies with GPA rules.

These are the private and governmental restraints of trade which governments may wish to tackle through procurement rules as a means of strengthening their trade and competition laws. Before turning to consider the relevance of the GPA's rules, the current state of play under general WTO competition law disciplines will first be described, insofar as relevant to the specific problems noted above.

2. Competition law disciplines under the WTO Agreements

Competition policies have always been on the WTO agenda as trade liberalisation, transparency and non-discrimination requirements all have greater competition as an objective. It is not surprising therefore that a large number of WTO Agreements contain provisions which either explicitly address private anti-competitive practices,[10] or provide mandates for the future examination of competition law issues.[11] However, the further step of developing more general competition law rules on a systematic basis to deal with practices such as restrictive agreements, abuse of dominant market position and mergers, has yet to be taken. The WTO does incorporate rules relevant to some of the problems

[10] The Agreement on Trade Related Aspects of Intellectual Property (TRIPs) contains provisions on the control of anti-competitive practices or conditions in contractual licenses relating to the transfer of technology or of other proprietary information. The General Agreement on Trade in Services (GATS) contains provisions on consultation and exchange of information and requires countries to ensure that monopoly service providers do not abuse their positions in activities outside the scope of their monopoly privilege.

[11] For example, Article 9 of the Agreement on Trade Related Investment Measures provides for a review, to be conducted within five years of its entry into force, to consider whether the Agreement should be complemented with provisions on competition policy. This provision was included at the request of developing countries to meet their concern that governmental trade-related investment measures may be necessary in order to counter the anti-competitive practices of multinational enterprises.

discussed in Section 1. Thus dumping is regulated under the Dumping Code[12] and subsidies are subject to the Subsidies and Countervailing Duties Code.[13] These Codes are analysed in Section 4. Regulation of anti-competitive business conduct is far from comprehensive however.

The WTO has no rules on restrictive practices which could be used where express or tacit collusive tendering is suspected. There are no general rules on abuse of dominant position. As noted above, concern has been expressed that retaliatory measures against dumping in the form of antidumping duties have more to do with protecting national firms than protecting competition in the market place.[14] Calls have therefore been made for the regulation of dumping through competition law disciplines, and the law relating to abuse of dominant positions has been mooted as an appropriate means of achieving this.[15] Also, laws relating to abuse of dominant position might be used to attack parallel pricing among conglomerate firms where no agreement to collude can be established. Similarly, the law relating to mergers could be used where the proposed concentration of the industry raises suspicion that anti-competitive effects could ensue. Again, the WTO currently has no rules in this area, and the question of whether multilateral competition law rules should be adopted has formed the subject matter of a continuing debate.[16] In this connection the European Commission proposed the

[12] For the text of the Agreement on Implementation of Article VI of GATT, see *Law and Practice of the World Trade Organisation* (Oceana Publication Inc.) loose leaf p. 131.
[13] For full text of the Agreement on Subsidies and Countervailing Measures, see *Law and Practice of the World Trade Organisation* (Oceana Publication Inc.) loose leaf p. 223.
[14] See W.J. Davey, *supra* note 5 and G. Neils and A. Kate *supra* note 4.
[15] See J. Miranda, "Should Antidumping Laws be Dumped?" (1996) 28 *Law and Policy in International Business* 255.
[16] See, for example, E.U. Petersmann, "The Need for Integrating Trade and Competition Rules in the WTO World Trade and Legal System" *Programme for the study of International Organisation(s)*, WTO Series Number 3; M.C. Malaguti, "Restrictive Business Practices in International Trade and the Role of the World Trade Organisation" (1998) 32(3) *Journal of World Trade* 117; B. M. Hoeckman, "Trade and Competition Policy in the WTO System",

establishment of a Working Party to identify core competition rules or principles and procedures, which could be adopted at the international level.[17] To this end, the Final Declaration of the December 1996 Ministerial Conference in Singapore includes an agreement to establish a Working Group to study issues raised by the Members relating to "the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework."[18] Given the present limitations of WTO competition law disciplines, the scope for procuring entities to tackle objectionable practices under the GPA's rules is considered below.

3. The possibility of pursuing policies relating to the business conduct of firms under the GPA

Even though the GPA has no rules dealing specifically with the business conduct of firms seeking to participate in contract awards, several provisions can be identified as relevant. As will be seen below, the various provisions operate at different stages during the contract award process from the initial qualification of suppliers, to the eventual decision of who to award the contract to, and indeed, whether to award the contract at all. For the purposes of this section only the rules of the GPA are analysed. However, it is argued in Section 4 that the GPA should be interpreted in the light of other WTO Agreements. This normally

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Discussion Paper Series - Centre for Economic Policy Research London, 1996; E. Fox, "Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade" (1995) 4(1) *Pacific Rim Law & Policy Journal* 1; M. Matsushita "Competition Law and Policy in the Context of the WTO System" (1995) *De Paul Law Review* 1097; D. Wood, "International Standards for Competition Law : An Idea Whose Time Has Not Yet Come", *Programme for the Study of International Organisation(s)*, WTO Series Number 2; I. De León, "The Dilemma of Regulating International Competition Under the WTO System", (1997) 3, *European Competition Law Review*, 162; M. Pullen and B. Ris, "Does the World Need a Global Antitrust System", (1996) 6 *International Trade Lawyer* 203.

[17] For details of the proposal, see L. Brittain and K. Van Miert, "Communication to the Council COM (96) 296 final, 18.06.96.

[18] WTO Ministerial Conference Singapore, Final Declaration (Dec. 13 1996).

entails that the applicable Agreement and provisions are those which are most specific to the situation at hand, and this has a considerable effect on the scope for tackling private anti-competitive behaviour under the GPA.

a) The qualification of suppliers

Before the process of evaluating bids commences, procuring entities may wish to exclude certain firms from participation in the contract award because of their involvement in anti-competitive practices. Article VIII GPA lays down conditions for the establishment and maintenance of lists of qualified suppliers from whom tenders may be requested if procuring entities choose to use such lists. It also lays down conditions for *ad hoc* qualification of suppliers for participation in individual contract awards. For the most part, these relate to the "financial, commercial and technical capacity of suppliers." While paragraph (b) provides that, "any condition for participation in tendering procedures shall be limited to those which are *essential to ensure the firms capability to fulfill the contract in question*"(emphasis added), paragraph (h) operates independently of this requirement. It provides specific examples of how the business conduct of the firms could be relevant to their presence on qualified supplier lists, and some of the examples provided do not appear to have any bearing on the ability of firms to fulfill the contract. Thus, "...grounds such as bankruptcy or false declarations..." are envisaged as reasons for exclusion. While bankruptcy clearly affects the firm's ability to perform the contract, it is not so clear that false declarations have a similar effect.

In providing the example of false declarations, Article VIII therefore seems to envisage that exclusion could operate punitively against unacceptable or criminal business conduct, independently of the firm's ability to perform the contract. The specific examples which are provided by Article VIII(h) are not expressed as being exhaustive. Collusive tendering can possibly be regarded as a similar type of business conduct as false declarations. It will not necessarily bear on a firm's ability to perform, but will always be unacceptable in its circumvention of the benefits of competitive tendering. Therefore, just as procuring entities may refuse to include firms on qualified supplier lists because they have submitted false declarations, it can be argued they may also refuse to include them because of collusion.

While it does not appear to be a precondition of exclusion that the business conduct in question has been criminalised, the examples provided are distinguished in that their existence must be affirmatively established. The non-discrimination obligation contained in Article III GPA is pivotal to the Agreement's operation. It would be most unusual if procuring entities were permitted to punish firms by refusing qualification, or rejecting tenders, without affirming that participants had actually colluded with each other. To suggest otherwise would be to vest too much discretion in the procuring entity, and to allow for the possibility of discriminatory treatment. Such discrimination could impact especially heavily on suppliers from states with weak competition law disciplines who might (rightly or wrongly) be under the greatest suspicion of involvement in collusion. Thus it is submitted that the mere suspicion that firms have been involved in false declarations is not sufficient, which provides a

safeguard against discriminatory treatment and lack of transparency in the decision making process. Similarly, it is arguable that the GPA requires that the existence of collusion has to be objectively ascertained before any action is taken against firms under the rules for their involvement in collusion. Certain problems are introduced by this suggested requirement of having to affirmatively establish collusion however.

Bid rigging may be relatively easy to detect where there is express agreement between firms. Thus, they could agree to adopt a bid rotation by designating a winner and supporting this winner by submitting higher complementary bids. Detection of such collusion would require prompt investigation so as not to delay the procurement. Detection would be greatly facilitated by nation-wide systems for recording bids, and closer cooperation between investigating authorities. Computerisation of the information collectively available to all authorities would be desirable.[19]

Detection and enforcement problems become more acute where there is no express agreement between firms. This may be the case where firms behave in the manner described by the "linked oligopoly theory" noted above. As firm interdependence increases through encounters in more and more markets, inter firm rivalry is reduced. Each firm respects markets important to its competitors with the understanding of reciprocity. Firms may therefore consciously behave in a parallel manner without any express agreement to do so. This might result in

[19] For an assessment of national and EC detection and punishment of collusive tendering, see J. Lang "Subsidiarity and Public Purchasing : Who Should Apply Competition Law to Collusive Tendering, and How Should they do it?" Paper presented at a British Council Meeting, London, March 1997.

the submission of very similar tenders for contracts which do not reflect the competitive advantages which distinguish the firms.

The difficulty for the competition authority is whether it can intervene to challenge the distortion which results from parallelism even where there is no express agreement. In the EU collusion falls under Article 81 (formerly Article 85) of the Treaty which prohibits agreements and concerted practices between undertakings which prevent, restrict or distort competition. It has been established that parallel behaviour does not amount to a concerted practice. It may be used as evidence of such a concerted practice, when the concerted practice is the only plausible explanation for this parallel behaviour. Thus experts might consider that simultaneity in price announcements was a natural characteristic of the market due to high levels of transparency in the market's operation. This was the situation in the *Woodpulp* case where the ECJ rejected the Commission's arguments of a concerted practice derived from parallel behaviour.[20]

Where express or tacit collusion are subject to provisions in national laws however, there is no reason why an established case of collusion should not lead to a refusal to qualify a supplier. As a deterrent, it is submitted that if a firm has been found by national investigating bodies to have infringed laws dealing with collusion, the procuring entity should thereafter have the discretion to refuse qualification, or reject tenders from the infringing firms.

[20] See Cases C-89,104,114,116-7, 125-129/85, *Re Woodpulp Cartel : A Ahlstorm Oy and Others v EC Commission*, [1993] E.C.R. I-1307, on which, see A. Jones, "Woodpulp : Concerted Practice and/or Conscious Parallelism. (1993) 14 *European Competition Law Review*, 273.

However, if the GPA does permit a punitive response against firms involved in collusion upon affirmative evidence of some kind of concerted practice, a further complication is what burden of proof would be required by the non-discrimination principle in Article III. It is submitted that a wide latitude should be afforded to states to determine whether collusion has occurred in accordance with the procedures and safeguards which national laws provide for. As the WTO has yet to develop common rules on concerted practices, it is suggested that the requirements of Article III would be too intrusive if the validity of determinations made under national laws could be called into question. It is therefore suggested that the non-discrimination principle requires only that where national laws incorporate procedures for use in concerted practice cases, those procedures should be used and the procuring entity should not be permitted to reach its own determination independently of the procedures provided for by national laws. The corollary of this is that where a state does not have any laws dealing with concerted practices, Article III requires that there be no scope for tackling collusive tendering through procurement rules. States would either have to develop laws and procedures for dealing with concerted practices or implement any multilateral rules developed within the WTO, as a pre-condition to using its procurement rules to address collusion in the case of procurement covered by the GPA.

b) Rejection of tenders

i) Rejection of abnormally low bids

It was suggested in Section 1 that central governments in some states may wish to impose on their procuring entities an obligation to reject tenders which are so low as to potentially have an impact on domestic production. Foreign tenders may be very low for several reasons. It may be because foreign firms are in receipt of subsidies or it may be because they have decided to dump certain products on foreign markets. Also, a firm in financial difficulties may be prepared to undertake a contract at a loss, or with minimal profit, either in order to retain its full work force for as long as possible, or to damage the position of its competitors.

Article XIII of the GPA on "Submission, Receipt and Opening of Tenders and Awarding Contracts" is relevant to all these forms of business conduct. Under Article XIII:4(a), a tender must conform to the essential requirements of the notices or tender documentation in order to be considered for award. It goes on to provide that,

"If an entity has received a tender abnormally lower than other tenders submitted, it may enquire with the tenderer to ensure that it can comply with the *conditions of participation*." (emphasis added)

Article XII deals with tender documentation which sets out the conditions of participation. Among the information which must be provided to suppliers are details of "economic and technical requirements, financial guarantees and information and documents..." which may be required from them. If a firm submits a bid which is markedly lower than others, the procuring entity will be

put on alert, and may want to evaluate whether the firm can make a profit at the low price tendered. If enquiries with the firm reveal that it cannot make a profit at the tendered price, then the bid can properly be described as "abnormally low" within the meaning of Article VIII. If on the other hand the firm can make a profit at the low tendered price (for example, because it has superior technical capacity by reason of new manufacturing techniques, or because it pays its employees less) then the bid should not normally be regarded as abnormally low. In such a case, enquiries with the firm should stop at this point and its bid should be considered along with all others.

Where the bid is abnormally low, the procuring entity may wish to enquire as to the financial standing of the firm to evaluate whether it can perform the contract at a loss by drawing on its financial resources. Where enquiries reveal that the firm has submitted a hopelessly unrealistic bid, then there would clearly be a discretion to reject the tender because of the risk of failure to complete at the contract price. The GPA does not seem to remove this discretion. National laws may even provide for an obligation to reject in these circumstances.

The more difficult situation is where the tender is abnormally low but the firm is able to sustain a loss on some contracts because of its strong financial standing. Here, it is submitted that, so far as the rules of the GPA are concerned, the procuring entity should still retain the discretion to reject the tender. There are several reasons for this.

Firstly, the procuring entity may be concerned that even financially sound firms could demand more money to complete the contract despite their ability to bear the losses. Secondly, due to the problem of attracting new members to the GPA, states should generally be permitted to retain their use of procurement for secondary objectives at least where this does not involve discriminating against foreign undertakings. Thus if a state has used its procurement to strengthen its antidumping policies, there is no reason (under the GPA) why it should not continue to do so under the abnormally low bids provision. For example, where a bid is part of a dumping strategy, it will often be abnormally low in the sense that it will not yield a profit. However, firms involved in dumping are likely to have a strong position at least on their domestic markets, and so are also likely to have the financial standing to sustain losses. Here it is submitted that the GPA permits the discretion to reject these abnormally low tenders, in the absence of any discriminatory effect, and in the interests of expanded membership.

The position is complicated however, by the provisions in the Antidumping Code. If a tender is rejected because the firm cannot make a profit, but it is prepared to sustain a loss because the tender is part of a dumping strategy, then the tender is being rejected on a mere suspicion of dumping. On the issue of whether this is permitted when rules other than those in the GPA are taken into account, several possible approaches can be identified.

The first approach is that the GPA should be interpreted in the light of the Antidumping Code, which does not envisage rejection of tenders, even where dumping has been established. On this view, there can be no scope for tackling

dumping under the GPA where this involves the rejection of tenders, simply because this is not a response envisaged by the Antidumping Code, which provides exhaustive rules for the conduct of antidumping investigations.

An alternative argument starts from the proposition that the procuring entity must be able to protect itself from the possibility of a contractor demanding further payment before completion of a contract. It has therefore been argued that the correct interpretation of the abnormally low bids provision is that there is a discretion to reject all tenders which do not appear to be capable of yielding a profit. A possible consequence of this is that low tenders which cannot yield a profit, and are part of a dumping strategy will be rejected. It is arguable that the conflict with the Antidumping Code which is thereby produced must be tolerated. As noted above, interpreting the GPA in light of broader WTO obligations normally entails that the applicable provisions are those which are most specific to the situation at hand. The abnormally low bids provision is the most relevant to protecting the procuring entity from having to make further payment before completion of a contract. If application of the abnormally low bids provision leads to the indirect consequence that dumped tenders are sometimes rejected then it is arguable that this must be tolerated. Otherwise, the provision, as interpreted would surely be rendered redundant.

A third argument can also be adopted which would permit the abnormally low bids provision to operate while also avoiding all conflict with the Antidumping Code. This could be achieved by interpreting the abnormally low bids provision to mean that tenders cannot be rejected if firms submitting low bids are prepared

to give assurances that they will not demand any extra payments, and the procuring entity is satisfied with the assurances given. This is an approach which could be applied without any modification of the abnormally low bids provision. As noted, if the procuring entity receives a bid which it believes cannot yield a profit, it can enquire whether the firm can comply with the conditions of participation. These conditions may include financial guarantees where this has been notified to firms, in the tender documentation.

If the procuring entity is satisfied that the firm will not require extra payment and is capable of sustaining a loss, then there is no need to apply the abnormally low bids provision since accepting the low tender will be advantageous and free of any risk. If, on the other hand, the procuring entity believes that extra payment will be required, then it will be appropriate to apply the abnormally low bids provision. Conflict with the Antidumping Code here is unlikely because firms which are involved in dumping are normally those with a strong market position, who are quite obviously capable of sustaining losses. It is submitted that this would provide a workable approach, and should be favored because the rules under the GPA and the Antidumping Code would thereby be restricted to their correct sphere of operation.

Where a firm is receiving a subsidy, it will normally be able to make a profit on the contract at the price tendered, and one would not therefore expect the abnormally low bids provision to have any application. However, a purposive reading of Article VIII would enable the procuring entity to take account of the firm's financial position independently of the aid received. This is important

since under the WTO Agreement on Subsidies and Countervailing Measures (Article 4.7), prohibited subsidies may be subject to proceedings under the Dispute Settlement Understanding, and the Panel must recommend that the subsidizing member withdraw a prohibited subsidy[21] without delay." The Subsidies Code also has a category of subsidies described as "actionable" in the sense of causing adverse effects to the interests of another member. Here, the subsidising member must either take appropriate steps to remove the adverse effects of the subsidy or withdraw it.[22]

Enquiries with the firm could reveal that it would not be able to make a profit at the price tendered were it not for the subsidy. There may therefore be a real danger of the firm not being able to complete the contract at the price tendered upon withdrawal of a prohibited or actionable subsidy. Where this danger is foreseen, it is submitted that the GPA (independently with broader obligations) permits a discretion to reject tenders affected by a prohibited or actionable subsidy, because of the desirability of retaining the instrumental uses of procurement in so far as compatible with non-discrimination and transparency obligations.

The problem of conflict with broader WTO obligations is once more encountered in the form of the Subsidies Code. As detailed in Section 4, the Code does not envisage rejection of bids as a possible response to subsidisation of a firm. Once again, it is arguable that there should be a discretion to reject tenders which may

[21] Article 3 defines prohibited subsidies as those which are contingent upon export performance or the use of domestic over imported goods.
[22] Article 7.8.

not yield a profit, because of the chance that the firm could demand further payments before completion. It is also arguable that conflict with the Subsidies Code must be avoided. It would then be inappropriate for a procuring entity to reject tenders on the basis of mere suspicion that they are prohibited or actionable. Such subsidies can be withdrawn, or attract countermeasures or countervailing duties, but only after panel proceedings or (in the case of countervailing duties) after an investigation by the appropriate national authority.[23]

On this view, rejection of subsidised tenders cannot be an appropriate response, firstly because the determination of whether a subsidy is prohibited or actionable involves a detailed consideration of the matter which the procuring entity is unlikely to be able to perform, and secondly, because rejection of tenders is not envisaged by the Subsidies Code. Regrettably, in the context of subsidies, there is no third argument capable of reconciling the operation of the GPA and the Subsidies Code.

It is therefore submitted that the appropriate conclusion here is that a purposive reading of Article VIII should not be permitted. The use of the abnormally low bids provision should be restricted to the situation where enquiries reveal that the tenders is unlikely to yield a profit, and where the procuring entity believes that further payment will be demanded by the firm before completion of the contract. This conclusion restricts the GPA and obligations deriving from other Agreements to their correct sphere of operation. It also entails that there is no

[23] The procedures for investigating prohibited or actionable subsidies are described in Section 4.

scope for tackling dumping or subsidisation under the GPA. It is argued, however, that this is the correct approach since the procedures and safeguards of the Antidumping and Subsidies Codes would otherwise be circumvented.

ii) Rejection through use of non-price factors in bid evaluation

Under the GPA, it is arguable that considerable scope for rejection of tenders is provided through a broad use of non-price factors in the evaluation of bids. Thus, a procuring entity might be able to pursue policies relating to the business conduct of firms through specifying relevant non-price factors in tender documentation.

Article XIII:4(b) requires that the contract be awarded either to the firm with 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." It is not therefore necessary for a procuring entity to demonstrate any economic advantage in the application of the contract award criteria, still less any direct economic advantage to itself. Article XII:2(h) requires that, "the criteria for awarding the contract, including any factors other than price..." be included in the tender documentation." No attempt is made to circumscribe the type of non-price factors which may be specified as relevant and there is no express indication that these need relate specifically to the firm's ability to perform the contract.

Arguably therefore, the procuring entity may be able to impose contractual conditions in tender documents requiring firms to certify that they have not been

involved in collusion or dumping or have not received unauthorised subsidies. If a firm is unwilling to certify its conduct in these areas, or if the procuring entity becomes aware that firms have made false certifications, then this will weigh against them when the relative merits of the bids and of the firms submitting them are compared. What the procuring entity must not do is impose any absolute conditions at the award stage, or, for example, reject all tenders from firms which have been involved in any of the kinds of business conduct dealt with by this Chapter.

This leads to the situation that the procuring entity could not even impose an absolute condition that bids affected by collusion could be rejected outright, even though collusion will always defeat the benefits sought from competitive tendering. However, tenders affected by collusion will normally be higher than those which have not been affected. Therefore, the procuring entity will normally choose from among the lower bids not affected by collusion, without needing to invoke Article XIII to reject any bids. It could be argued however that collusion would have to involve most, if not all firms bidding for a contract, in order for the collusion to be effective and to minimise the chances of detection. If this were the case, the inability of the procuring entity to impose absolute conditions in tender documents could be regarded as problematic. However, it is argued in section (iii) below that a provision permitting all tenders to be rejected in the public interest goes some way towards redressing this potential problem.

The suggested scope for comparing the business conduct of firms at the award stage could be considered unnecessary because of the possibility of imposing

absolute qualification criteria. However, it should be remembered that the analysis in Section 3(a) is speculative. Collusion is arguably similar to the exclusion criteria specified as examples (in particular, the submission of false declarations), but the same cannot be said of dumping and subsidisation. If it is not possible to refuse to qualify suppliers on these grounds, then their relevance to assessing the relative merits of participating firms becomes especially important.

If procuring entities are permitted to assess the relative merits of the business conduct of firms at the award stage, the danger would then be that comparisons made would operate (or appear to operate) as absolute conditions which can be used only at the qualification stage. A possible means of avoiding this would be to adopt a 'trade off' between the merits of the bid and those of the firms. For example, award criteria could specify that tenders from firms receiving unauthorised subsidies will be accepted only if they are at least ten per cent cheaper than the next best. While this imposes a disadvantage on the subsidised firm, it avoids the possibility of an award criterion being challenged as having the same effect as an absolute qualification condition.

It may be doubted however whether this 'trade off' approach is practical or even permissible. Firstly, it could clearly have no application to collusion since the effect here would be to raise the price of the contract. Secondly, if procuring entities are not permitted to take dumping and subsidisation into account at the qualification stage, is it at all appropriate that they should to do so at the award stage? It is of course arguable that the award stage is distinguished from

qualification criteria in that absolute conditions cannot apply. It would still seem illogical, however, if award criteria can be used to attack subsidisation and dumping when qualification criteria cannot be used in a similar manner. The result after all is that the subsidised or dumping firm is not looked at as favorably as other firms whether this leads to refusal to allow it to participate at the qualification stage, or a decision to reject its tender at the award stage.

A third consideration weighing against the broad use of factors relating to the relative merits of firms relates to the practical problems which would arise. It has been argued that the GPA's non-discrimination obligation requires that mere suspicion of any form of anti-competitive business conduct should be regarded as insufficient to warrant any negative response against a firm. Decisions here must be made by national investigating authorities so that it would be inconsistent with the GPA for procuring entities to reach their own determinations on whether tenders evidence dumping or subsidisation as part of the 'trade off' process. No balancing of the merits of the bids and firms could operate consistently with the GPA without very close liaison between procuring entities and investigating bodies on a case by case basis.

The conclusion here is that, on the one hand, there should be consistency in the considerations relevant at both the qualification and award stages. If dumping and subdisisation cannot be taken into account at the qualification stage, then they should also be irrelevant at the award stage.[24] If, on the other hand, dumping and

[24] It is acknowledged however that this is only one approach among many. A markedly different approach was taken by the ECJ in the difficult case of Case 31/87 *Gebroeders Beentjes BV v The Netherlands* [1988] E.C.R. 4635. Here it was held that a condition relating to the ability of participating firms to employ the long term

subsidisation can be grounds on which to refuse to qualify a firm, any response against these business practices should be done at this stage rather than at the award stage. A clear separation between the factors relevant at the two stages should be maintained in order to avoid the difficulties of how to reconcile the relative merits of the bids and the merits of participating firms at the award stage.

iii) Rejection of all tenders in the public interest

Under Article XIII:4(b), a procuring entity may decide not to issue the contract in the public interest. It is provided that,

"Unless in the public interest an entity decides not to issue the contract, the entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract ..."

This provision might be invoked where circumstances change and the goods or services are no longer required or where the project appears to be too expensive when the procuring entity has seen the bids. Alternatively, the public interest may demand that the award procedure is abandoned and a new one commenced where the competitive process in the original award has been tainted in some way.

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unemployed was concerned neither with qualification criteria nor with award criteria. It was in the Court's own words, "an additional specific condition" and therefore was compatible in principle with the Directive's provisions as it was not covered or explicitly prohibited by any of the terms." (para, 28 of the judgement). There is still some uncertainty over the precise legal basis on which criteria other than those specified in the Directive can be relevant when awarding a contract, and subsequent decisions have cast considerable doubt on the decision. See J.A. Winter, "Public Procurement in the EEC", (1991) *Common Market Law Review* 741; C. McCrudden, "Social Issues in Public Procurement" Ch. 13 in S. Arrowsmith and A. Davies (eds.) *Public Procurement : Global*

Genuine competition between suppliers will certainly have been limited where a number of suppliers collude with the aim of raising prices. There could be little objection to abandonment of the award in the public interest on this ground. Procuring entities may also feel that the 'public interest' demands abandonment of the award where the process of competition has been distorted by the involvement of participating firms in dumping or subsidisation. Here, tenders submitted, however, attractive, may be regarded as having a distorting effect on competition.

It is arguable that the 'public interest' might indeed extend to these kinds of business conduct. One of the rationales for antidumping legislation is the public interest in maintaining domestic production of goods subject to foreign competition perceived to be 'unfair', and in offsetting the negative effects which some argue dumping can produce such as loss of employment in the affected industries. The public interest might also dictate that public procurement should not support firms with an unfair competitive advantage due to their receipt of unauthorised subsidies. Further still, it might even be considered that the public interest provision should actually be used to ensure that firms receiving unauthorised subsidies should not be awarded government contracts. This depends on how broadly the public interest provision in Article XIII:4(a) is interpreted and applied.

Revolution, (Kluwer; 1998); J.M. Féranadez Martín, *The EC Procurement Rules. A Critical Analysis* (1996; Clarendon Press, Oxford), pp. 58-63.

It is suggested that it would certainly not be an abuse of the public interest clause to reject all tenders where some have been involved in dumping or have received unauthorised subsidies. However, it is highly unlikely that the procuring entity would want to take such a drastic step, especially as it has been argued that the abnormally low bids provision indirectly permits a discretion to reject bids evidencing dumping or unauthorised subsidies.

The GPA provides no guidance on how the public interest provision should be applied. However, an interesting comparison is provided by the UNCITRAL Model Law.[25] This was drawn up under the auspices of the United Nations Commission on International Trade Law (UNCITRAL), and is intended as a framework of rules to help states develop disciplines on public procurement with the view of promoting international competition and enabling purchasers to realise price savings. The Model Law expressly envisages that rejection of tenders could be an appropriate response to collusion in the procurement process.

Article 12 deals with "Rejection of all tenders, proposals, offers or quotations." It provides that procuring entities may, "reject all tenders ... at any time prior to acceptance of a tender." There is also an obligation to communicate to the suppliers the reason for the rejection of the tender, although these grounds need not be justified. Further the decision to reject all tenders is not subject to the right to review provided under Chapter VI. The Model Law is accompanied by a

[25] UNCITRAL Model Law, Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17). For further readings on the Model Law see: J.J. Myers, "UNCITRAL Model Law on Procurement" (1993) 21 *International Business Lawyer* 179; D. Wallace, "The UN Model Law on Procurement", (1992) *1 Public Procurement Law Review*, 406; and G. Westring, "Multilateral and Unilateral Procurement regimes: to

Guide to Enactment which provides advice on how the provisions should be applied and what their intended purpose is. In relation to Article 12, the Guide to Enactment provides that its purpose is to enable the procuring entity to reject *all* tenders for reasons of public interest. An example provided here is "where there appears to have been a lack of competition or to have been collusion in the procurement proceedings."

The suggested approach of the Model Law thus differs from the GPA in that the Guide to Enactment expressly recognises that tenders may be rejected because of collusion. This lends support to the view that the public interest provision in the GPA should be regarded as encompassing, at least, the public interest against collusion in the tendering process. Both the Model Law and the Guide to Enactment require that all tenders be rejected where Article 12 is invoked. This will also be the case under the GPA where the procuring entity decides not to issue the contract in the public interest. Rejection of all tenders may well be appropriate where the tenders devised as a result of collusion are rejected, and an insufficient number remain to ensure competition between firms. Collusion, in order to be effective and minimise chances of detection, will have to involve most, and preferably all firms participating in the contract award. The public interest provision will clearly have an important role to play where this is the case. Here, rejection of all tenders would be advisable in order to ensure transparency in the procurement process, especially if it happened that only national firms remained after rejection of the collusive tenders.

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which camp does the UNCITRAL Model Law on Procurement belong?" (1994) 3 *Public Procurement Law Review* 406.

However, there is no reason why the whole procurement should be abandoned and recommenced where a sufficient number of tenderers remain to ensure a competitive process. Provided the contract had been advertised properly in the first place, it might be unrealistic to expect that a new contract notice in the same form would attract a different or broader class of tenders and, presumably, the procuring entity would be unprepared to accept new tenders from the previously rejected firms. Therefore, there will not normally be any reason to invoke Article XIII:4(b) where some of the participating firms have colluded to raise the price of the contract. If there are tenders not affected by collusion then these would be likely to be the most competitive and will be accepted.

While the Model Law is prescriptive in its requirement to reject all tenders, the rather vague language in the Guide on the circumstances in which Article 12 may be invoked is in sharp contrast to this. Similarly, the GPA provides no guidance on the circumstances in which its public interest clause may be invoked. As noted above, under the Model Law all tenders may be rejected "where *there appears to have been* a lack of competition or to have been collusion in the procurement process" (emphasis added). This suggests that rejection could operate on suspicion of collusion unsubstantiated by investigation into the matter. It has already been argued that such a discretion (whether applied to collusion, dumping, or subsidisation) would be too broad creating at least the possibility of discriminatory treatment. This lack of transparency would not be improved by the requirement to give reasons. Because of the proviso that reasons need not be justified, the explanation provided would be unlikely to go beyond a mere

statement of suspicion of collusion which firms would not be able to challenge in review proceedings.

Conversely, it could be argued that procuring entities would be unlikely to use their discretion in a discriminatory manner, where the consequences would have to be rejection of all tenders, and either abandonment or re-commencement of the procurement. Procuring entities might be expected to think carefully before incurring the wasted expenditure involved in such a decision, and it is submitted that this should be sufficient to allay fears of discriminatory treatment.

In conclusion, it is suggested that the GPA's public interest clause permits a broad scope for penalising firms for anti-competitive business conduct. Its practical use is likely to be limited to contract awards where all or most of the tenders are affected by collusion. Where there are only a small number of tenders, there will rarely be any reason to invoke the provision since tenders not affected by collusion will normally be the lowest and most attractive. Also the requirement to reject all tenders means that the provision can have little application to dumping and subsidisation since the objective here will be to eliminate only those tenders which evidence these practices. Procuring entities will be understandably reluctant to penalise some firms, where others have submitted competitive and responsive tenders, and to incur extra cost and delay in commencing a new award. This is not a significant problem however, because of the wide scope for rejecting tenders under the abnormally low bids provision.

4. Tackling private restraints of trade through procurement rules and compatibility with WTO obligations

While the procurement rules highlighted would appear to permit some scope for pursuing policies relating to anti-competitive business practices, such policies would have to be compatible with broader WTO obligations. At the outset, it can be noted that the ability of a procuring entity to pursue policies relating to collusion is unaffected by any conflicting obligation under WTO law. This will be the case where collusion seeks to raise prices, or where firms seek to rotate their chances of success by agreeing to allow one bid to appear more attractive than others. Equally, there is no reason in WTO law generally why procurement rules should not be used to challenge parallel pricing resulting from tacit collusion. Collusion defeats the efficiency gains envisaged by competitive tendering, and is not subject to specific rules under any WTO Agreement.

The GPA also permits considerable scope for tackling dumping and unauthorised subsidisation. It has already been suggested that the Antidumping and Subsidies Codes impact heavily on the possibility of doing so. It was argued, however, in relation to the abnormally low bids provision, that strict adherence to the procedural obligations of the Codes is not always possible because of unnecessary complications in the application of the Agreement which would then be produced. The effect was that states could indirectly strengthen their trade laws dealing with dumping and subsidisation through the abnormally low bids provision. This was regarded as exceptional. Normally it will be inappropriate for the procedural safeguards outlined below to be circumvented.

a) The Antidumping Code

The Antidumping Code is a multilateral Agreement containing detailed rules on the determination of whether injurious dumping has occurred and on the imposition of antidumping duties. The determination of injury is based on the volume of dumped imports, their effect on the price of like domestic products and their impact on domestic producers. The emphasis is on actual or potential threat to domestic industry with no reference to injury to consumers or a recoupment test.[26] Article 5 on *Initiation and Subsequent Investigation* would seem to permit, in principle, that a procuring entity could initiate and conduct a dumping investigation "on behalf of the domestic industry." The only strict requirement would be that all procuring entities competent to investigate would have to be designated by national governments to the Committee on Antidumping Practices as required by Article 16.

However, the responsibility of the investigating body in determining the existence of dumping, injury resulting therefrom, and a causal connection in accordance with the rules would be far too burdensome for procuring entities without considerable investment in qualified investigating personnel. National governments will probably see the role of procuring entities as limited to alerting the designated investigating authority of a case of suspected dumping, and be unprepared to train procurement officials to be able to conduct investigations themselves.

[26] Recoupment tests are generally used as indicators of predatory behaviour where low pricing strategies are dealt with under competition law standards, rather than antidumping laws. They are used to determine whether the alleged predator firm could possibly recoup losses sustained during the predation episode by raising prices once the firms under attack have been forced to leave the market. The absence of a recoupment test in antidumping cases, together with the lack of any enquiry into whether the predator actually has sufficient market power to

There is little incentive in any case to designate procurement officials as competent to carry out dumping investigations, because rejection of tenders or refusal to qualify firms would not be a proper outcome of these investigations. If, following investigation, all the requirements of a dumping duty have been met, the low tender (and other tenders from the exporting state for the same products) may attract a dumping duty. Thereafter, the Antidumping Code would appear to require that tenders from the exporter be treated in the same manner as all other tenders. It would not be open to the procuring entity to reject tenders from the exporter even following a finding that injurious dumping had occurred. This would be equivalent to banning imports where the exporter has dumped on a foreign market, a practice which is not envisaged by the Antidumping Code. A complication is that the contract will normally have to be awarded before the dumping investigation is complete.[27] Rejection of a tender will still be inappropriate here, in that the procedural safeguards established by the Code would be circumvented. The procuring entity must either treat the tender in the same manner as all others or reject the tender on some ground independent of the suspected dumping.

Dumping is distinguished from cases of collusion where rejection of a tender is an entirely appropriate response as a punitive measure with a deterrent effect. Dumping, in contrast should be dealt with by imposing an antidumping duty. The Code demands this, it is the primary piece of legislation operating in this area and

nudge its competitors out of the market has led many commentators to observe that antidumping actions are far more likely to succeed than predation actions in competition law.

it grants no exemptions to policies pursued by government procurement or by any other means. Secondly, certain kinds of dumping are arguably not injurious even in the narrowest sense of causing harm to domestic industry. For example, dumping that involves the absorption of differences between transport costs or tariffs among various suppliers to the importing economy will involve no injury to the domestic producers of that importing economy. Where an export market is served by suppliers from various states, the domestic price on the import market will be that of the cheapest supplier. This will be the supplier facing the lowest transport and/or tariff costs to enter the export market. All other importers would then have to compress their prices to accommodate any larger transport or tariff costs they may face, if they wish to retain a share of the export market. This may mean that the exporters sell on the export market at a lower price than on their domestic markets. In so doing however, they are merely meeting the market price in the country of import. Whatever injury domestic industry suffers by way of low prices is unrelated to dumping (provided that the price charged by the market leader is undumped).[28] It is suggested that such dumping is undeserving of any response beyond that expressly envisaged by the Code.

b) The Subsidies and Countervailing Measures Code

Where a firm is able to submit a low tender by reason of its receipt of a government subsidy or a tender which compares favourably with other tenders due to receipt of the subsidy, then the response of the procuring entity dealing

[27] Article 5(10) provides that "investigation shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

[28] This is recognised by Article 3.5 of the WTO Antidumping Code which provides that, authorities must examine "any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports."

with that tender would have to be consistent with the Subsidies Code. As with the Antidumping Code, the nature of the obligations set out would make it unrealistic for a procuring entity to investigate foreign industries suspected of receiving subsidies.

Article 1 of the Code defines a subsidy as "a financial contribution by a government or any public body within the territory of a member", which includes direct transfer of funds and relief from taxation, as well as the purchasing of goods by a government. The concept of a "specific" subsidy is introduced by Article 2. This is important since subsidies must be specific in order to be actionable in the sense of being capable of attracting countervailing duties. In order for a subsidy to be specific, its availability must be explicitly limited by the granting authority, or by the legislation governing the granting authority, to certain enterprises rather than generally available to all. Subsidies will not be specific (and hence will not be actionable) where strict conditions are established governing the eligibility for, and the amount of a subsidy. Where application of the above criteria indicate that a subsidy is non-specific, yet there are reasons to believe that the subsidy may in fact be specific Article 2.1(c) provides further criteria by which the correct categorisation of the subsidy can be established. For example, despite the appearance of non-specificity provided by paragraphs (a) and (b), the subsidy may nevertheless be specific where regard is had to certain enterprises receiving "disproportionately large amounts of subsidy" and, "the manner in which discretion has been exercised by the granting authority."

The Agreement stipulates that no member shall cause, through the use of subsidies, adverse effects to the interests of other signatories in the form of injury to domestic industry of another signatory. Certain non-actionable subsidies are also enumerated (Article 8). These can either be non-specific subsidies (as described above), or specific subsidies in some circumstances. Thus subsidies assisting research activities are considered as non-actionable provided a list of conditions are satisfied relating to the proportion of the total cost of the research which the subsidy covers, and the exact purposes to which the money is to be applied.

The definition of non-actionable subsidies also encompasses assistance to disadvantaged regions given as part of "an internally consistent and generally applicable regional development policy."[29] Again, this is subject to specific conditions to ensure that the granting of non-actionable status for a subsidy is not abused.

The Code recognises that subsidies may play an important role in economic development programmes of LDCs and in the transformation of centrally planned economies to market economies. Article 27 therefore provides for "special and differential treatment for developing Country Members" in the form of time bound exemptions on prohibited subsidies. Thus while subsidies conditional on export performance, or the use of domestic over imported goods are prohibited by Article 3, article 27 recognises that such subsidies may be used by LDCs where

[29] Article 8.1(b) of the Subsidies Code.

consistent with its development needs and subject to an agreed phasing out period.

The use of countervailing measures on subsidised goods is detailed in Article 19. All relevant economic factors must be taken into account in assessing any injury to domestic industry caused by the subsidy, and causality between the subsidy and alleged injury must be established. Resort may only be had to countervailing duties where reasonable efforts to complete consultations have failed and if the subsidy causing injury is not withdrawn. Article 21 provides that countervailing duties may only remain in force "as long as and to the extent necessary to counteract the subsidisation which is causing injury".

Article 24 creates a Committee to hear representations from the Members and give advisory opinions on any subsidy proposed to be introduced or one which is currently in force. As is the case with the Antidumping Code, Members must also notify to the Committee the national authorities which are competent to carry out investigations.[30] There is therefore no reason why a procuring entity should not conduct investigations. However, the onerous nature of the procedures would render it impractical for a procuring entity to be directly involved in investigations unless Members were prepared to invest heavily in qualified personnel. Again, the practical role which procuring entities might play is limited to alerting national authorities where a low tender raises concerns about possible receipt of actionable or prohibited subsidies. Also, the procuring entity could not reject bids from firms even where they are found to be subsidised in an

unacceptable manner. Once the countervailing duties have been attached to the subsidised firm's imports, its bids must be treated equally with all others. An outright ban on imports from subsidised firms is not a solution envisaged by the Subsidies Code so that a rejection of bids from such firms would circumvent the policy of the Code.

It has been argued that any policy pursued by a procuring entity in relation to anti-competitive business practices would have to be done consistently with obligations under the WTO Agreements. The GPA contains no explicit rules on pursuit of such policies. Further, neither of the Codes described above contain any exemptions for policies pursued via government procurement. Purchasing policies must therefore, in general, take place subject to express WTO obligations. While the ability of procuring entities to penalise firms for involvement in collusion is unaffected, the possibility of pursuing policies against dumping and subsidies would appear to be precluded by the Antidumping and Subsidies Codes. If future WTO negotiations reveal that there is a desire among existing or prospective GPA members to pursue their trade policies through procurement rules, then efforts will have to be directed towards clarifying the relationship between procurement rules and those of the above Codes.[31]

5. Conclusion

The reduction of traditional government barriers to trade through periodic GATT negotiating Rounds has led to private restrictions on trade to assume a new

[30] Article 25.12 of the Subsidies Code.

significance. While anti-competitive business conduct has always existed, its effects are becoming increasingly prominent as government barriers have been progressively rolled back. It is now widely thought that multilateral competition law rules will form part of the agenda for the next Round of WTO negotiations, and the EU's proposal for common disciplines placed before the Singapore Ministerial Meeting may go some way towards ensuring this. Given the present absence of general competition rules and any express guidance in the GPA, this Chapter has examined the extent to which the GPA's rules can be applied to the business conduct of firms in support of existing trade and competition laws.

The GPA permits considerable scope for attacking collusion among participating firms, both through the initial stage of qualification of suppliers and the public interest provisions (even though the rejection of all tenders was envisaged as a rare and drastic step). This is to be welcomed since collusion among suppliers can defeat the benefits of competitive tendering and therefore limit the success of any procurement agreement seeking to open markets to genuine international competition. The Agreement can be regarded as deficient in its treatment of collusive practices however. Aside from Article XV:1(a) which permits the use of limited tendering when collusive tenders are received, there is no reference to how firms suspected of collusion should be dealt with. In the absence of express provisions, this Chapter has analysed the range of possible responses which existing provisions would appear to provide for. Concrete guidance on the appropriate responses to collusion would be most welcome however.

[31] The author is aware that Chinese delegates expressed considerable interest in pursuing their dumping policies through procurement rules at a conference *Public Procurement : Global Revolution,* organised by the Public Procurement Research Group at the University of Wales, Aberystwyth on the 12-13 September 1997.

Some scope for tackling the anti-competitive effects of dumping and subsidisation is also provided by the GPA itself. However, if the argument that the GPA must be interpreted in the light of other WTO Agreements is accepted, then the scope for tackling dumping and subsidisation (otherwise than under the abnormally low bids provision) is severely limited by the procedural obligations and safeguards in the Antidumping and Subsidies Codes. Here, it has been argued that, as a matter of national law, procuring entities will normally have only the limited role of alerting national investigating bodies of their suspicion that tenders received form part of a dumping or subsidisation strategy. Even then, rejection of such tenders will not be an appropriate response.

The fact that the GPA should not be interpreted as permitting a broad scope for the strengthening of trade policies against dumping and subsidisation, should not however be regarded as a deficiency in the Agreement, or as a reason for supposing that it will fail to liberalise international procurement markets. There are several reasons for this. Firstly, this Chapter has shown that it is rather difficult to reconcile the tender procedure rules which the GPA provides for, with a desire to use those rules to reinforce trade policies. This difficulty presents a good reason for maintaining as clear a separation as possible between the procurement function, and that of trade laws and policies. GPA Members should therefore be persuaded to rely exclusively on their appropriate national laws when dealing with suspected cases of dumping and unauthorised subsidisation.

Secondly, the restrictive interpretation of the relevant provisions which has been suggested in this Chapter, should not be regarded a reason for the reluctance of states to accede to the GPA. This is the case even for those states with a strong desire to use their procurement power to strengthen their trade laws. The reason for this is that the suggested interpretations have been motivated by the need to maintain a consistency between the GPA, and the broader obligations of the Dumping and Subsidies Codes. States lose their ability to use their procurement power in connection with trade policies, by reason of their WTO membership and the binding nature of the multilateral Codes, rather than through GPA accession.

Chapter 5

The use of Information and Communication Technologies in procurement procedures covered by the GPA

Introduction

The WTO is currently in the process of examining the issues surrounding the potential uses of Information and Communication Technologies (ICTs) in the procurement process. The work in this area is being guided by the Committee on Government Procurement under the GPA's built-in agenda. This is provided by Article XXIV:8 which calls on the Parties to consult regularly on developments in the use of information technology, and to negotiate modifications to the Agreement if necessary. While the GPA was not drafted with the use of ICTs in mind, Article XXIV:8 provides a clear acknowledgement of the need to investigate their potential usages. To date, work within the Committee has been limited to compiling the broad issues needing consideration. Progress here has been informed and influenced by experiences of electronic procurement at national and regional level. The Secretariat, on behalf of the Committee, has also prepared a factual note identifying those provisions of the GPA needing to be re-examined to permit certain uses of ICTs compatibly with the GPA.[1] At the time of writing, it can be said that the WTO has yet to fully examine and define the extent of its role in promoting the use of ICTs in GPA covered procurement. Clear goals, and a timetable for their achievement have yet to be put in place. Any analysis of how ICTs will operate in the context of GPA covered procurement can only therefore be tentative at the present time.

[1] WTO, Committee on Government Procurement, "Provisions of the Agreement which might need to be re-examined in the light of Information Technology." GPA/W/25, 22 August 1996.

This Chapter will firstly highlight how the use of ICTs can potentially contribute towards the achievement of the GPA's objectives. It also describes how significant difficulties have been encountered at national and regional levels, to the extent that ICTs have failed to streamline procurement processes and produce the anticipated efficiency savings. National and regional difficulties are important from the WTO perspective, because they are also likely to affect the contribution of ICTs to the liberalisation process envisaged by the GPA. For example, if national suppliers do not have sufficient confidence in the operation of their national databases to routinely use them, then ICTs are unlikely to promote the inclusion and participation of foreign suppliers in cross-border opportunities.

Following on from the problems that have been experienced at national and regional levels, section 2 considers the challenges which face the WTO in promoting the development of national and regional systems in such a manner as to strengthen the GPA's role in opening up international procurement markets. As emphasised by Article XXIV:8, the main challenge for the WTO will be to oversee that ICTs are not implemented in such a manner as to threaten the GPA's non-discrimination and transparency obligations. The accessibility of procurement information, and the interoperability of different databases are identified as crucial to the safeguarding of these obligations. The possible extent of the WTO's involvement in the development of national and regional systems is questioned, and the positive steps which the WTO can take in connection with the accessibility and interoperability objectives are identified.

Section 3 considers how the GPA needs to be adapted to accommodate and maximise the potential benefits of ICTs. These questions are asked both from the perspective of adapting the Agreement to permit current procedures to be operated via electronic means, and from the perspective of adaptations necessary to accommodate new methods of procurement made possible only through the use of ICTs. While Section 2 considers the potential problems of accessing information electronically, Section 3 deals with opposite scenario of an unmanageable level of supplier response to electronically posted notices.

Section 4 presents a tentative view of the long term developments in the regulation and practice of government procurement, which may occur as experience and confidence in the operation of electronic procurement systems develops. The end of the first phase of developments will be marked by the operation of existing procedures via electronic means. It has been suggested that to stop here would be to deny the full contribution which ICTs can make to the GPA's objectives.[2] With new methods of procurement, however, come new difficulties in securing the transparency of procedures and the non-discriminatory treatment of suppliers.

1. Public Procurement and ICTs: The Potential Benefits and the need for caution

a) The potential benefits to the GPA's success which ICTs can achieve

The use of ICTs can potentially contribute to achieving some of the fundamental goals which will be crucial to the GPA's success. Their use may allow for the

closer integration of procurement markets. This could be achieved by increasing the accessibility of procurement related information regardless of supplier location. Thus suppliers may be able to search databases for relevant calls for tender notices, or be automatically informed of relevant opportunities. Suppliers would then be able to receive information on a real time basis, and avoid the possible delays of hard copy communication by mail. Having identified opportunities of interest, suppliers could then proceed to download the tender documentation, and even submit tenders electronically. The wider and potentially cheaper accessibility of procurement information, could therefore promote the broader inclusion, and participation of suppliers, increase the choice for purchasers, and contribute towards the price savings which the liberalisation of procurement markets can achieve. Another related benefit is that supply side competitiveness could be increased as a result of greater contact between firms in the market place.[3] In these respects, the implementation of ICTs could play an important role in the overall success of the GPA for existing members, and boost the attractiveness of membership for non-members, to the extent that they have prioritised the achievement of the above benefits.

Not only does procurement information become available to suppliers more quickly, but ICTs can also make it easier to find that information once available. Suppliers could, for example, be able to search databases using various different methods, to which the database would respond by compiling relevant

[2] See A. Haagsma, "Information and Communication Technology Issues in International Public Procurement", in S. Arrowsmith and A. Davies eds. *Public Procurement Global Revolution,* 161 (Kluwer Law International; 1998) at p. 162.

[3] Conversely, such increased contact would also raise the possibility of decreased competition should the linked oligopoly theory described in Chapter four have its predicted effect. (See Chapter 4, pp. 149-159.

procurement opportunities. The US Federal Acquisition Regulation (FAR)[4] requires Federal agencies to identify proposed contract actions and contract awards in hard copy form in the Commerce Business Daily (CBD). This hard copy publication is supported by the CBD*Net* which is the government's official free version of the CBD, operated via an on-line database, and accessible via the Internet. Suppliers have several options for searching the database for 'proposed contract actions' including searching for all notices from a specific geographic area, searching via the date the notice was posted, and searching for all opportunities for set asides for small and minority businesses. Suppliers may also search via the Federal Supply Classification codes by which notices appearing in the CBD and CBD*Net* must be arranged. These codes are divided into Supplies and Services, which are described under broad headings, the latter being supported by examples. Thus category P refers to Salvage Services and lists demolition and salvage of aircraft as examples. Category 31 on supplies refers only to ball bearings. The use of classification codes is effectively mandated by the FAR whose part 5.207 provides that,

"Each synopsis shall classify the contemplated contract action under the one classification code which most closely describes the acquisition. If the action is for a multiplicity of goods and/or services, the preparer should select the one category best describing the overall acquisition based upon value. Inclusion of

[4] The FAR is the primary regulation for use by all Federal Executive agencies in their acquisition of supplies and services with appropriated funds. It became effective on April 1, 1984, and is issued under the joint authorities of the Administrator of General Services, the Secretary of Defence, and the Administrator for the National Aeronautics and Space Administration, under the broad policy guidelines of the Administrator, Office of Federal Procurement Policy, Office of Management and Budget. The FAR can be viewed on the US General Services Administration's home page at http://www.gsa.gov.

more than one classification code, or failure to include a classification code, will result in rejection of the synopsis by the Commerce Business Daily."

The cost of obtaining information electronically may also be significantly lower than the use of hard-copy publications. While many databases have subscription charges, and optional services for the retrieval and presentation of information at extra cost, these costs are at least potentially lower than subscription costs to the periodicals which currently carry the contract notices of GPA Parties. At present, keeping up to date with procurement information in all the Parties to the Agreement, involves subscription to a large number of publications. Individual states frequently maintain several different publications where central and federal entities are required to publish their notices in different publications. In Switzerland, for example, Annex 1 entities publish their Notices in the Swiss Official Trade Gazette, whereas Annex 2 entities must publish their Notices in the designated Official publication of every Swiss Canton of which there are twenty six. The impracticality of keeping up to date with relevant procurement information, can be regarded as a significant impediment to the opening up of procurement markets, and may be one of the reasons for the low involvement of SMEs in contract awards. It is difficult to envisage that larger firms hold many of the publications from among their non-major trading parties, and completely unrealistic to expect SMEs to subscribe to these publications. It can also be recalled that membership of the GPA is very disappointing at present, both in terms of the number, and balance of Parties involved. The accessibility of information will involve an ever-burgeoning list of publications as more states hopefully accede to the GPA.

b) The need for caution in the implementation of ICTs at national and regional levels

The mere adoption of ICTs cannot automatically bring about the above mentioned benefits. It is clear from the various electronic procurement projects which have been piloted that significant problems have been encountered. The US has perhaps accumulated more experience with electronic procurement than any other nation. It is therefore not surprising that the key authorities are already acutely aware of the barriers which have blighted the successful implementation of their electronic procurement initiatives. There follows a description of the leading electronic procurement initiative in the US, and of the problems which have been encountered in its implementation. The US example provides a clear indication of the typical problems that individual WTO Parties are likely to face in developing their national strategies. The desirability of WTO policy guidance to minimise the problems which states will face, and maximise the benefits of GPA membership, can also be questioned.

It is notable that a legislative mandate exists in the US for streamlining procurement through the use of electronic commerce, in the form of the Federal Acquisition Streamlining Act of 1994 (FASA). Title IX of FASA, enacted on October 13, 1994, provides the statutory framework for the establishment of a Federal Acquisition Computer network (FACNET) system to enable government agencies and suppliers to do business electronically in a standard way. FACNET is intended primarily for contracts let by federal agencies valued at between $2,500 to $100,000. Its main objectives are to provide, widespread public notice

of contracting opportunities and awards; a means for suppliers to electronically review, request information on, and respond to solicitations; and record keeping on each procurement action. FASA also requires that if practicable, FACNET provide other capabilities, such as issuing orders under existing contracts and making payments.

There is a degree of functional overlap between FACNET and the CBD referred to above. The CBD is a bulletin board for tender notices. FACNET also provides suppliers with tender notices. However, tender documentation (also known as solicitations in US terminology) cannot be obtained directly from the CBD or the CBD*Net*. Suppliers interested in tender notices located from the CBD, can get a copy of the tender documentation from the persons designated as the point of contact in the notice. While tender notices are available both from the CBD and FACNET, in practice, the two systems are completely separate. Proposed procurement actions need not be posted to the CBD where the contract will be awarded through FACNET. Contracts covered by FACNET are exempted from the general requirement to publish tender notices in the CBD.[5] It follows that suppliers can only be alerted of procurement opportunities valued between $2,500 and $100,000, and receive tender documentation for federal contracts within these thresholds by accessing FACNET. This exclusive availability of information is intended to avoid duplication of work by contracting authorities, and encourages the use of FACNET by suppliers.

[5] Federal Acquisition Regulation 5.202 paragraph 13.

Responsibility for the management and implementation of FACNET has been spread across several bodies. The Office of Federal Procurement Policy (OFPP) has responsibility for overall policy direction and leadership of the FACNET programme. The Electronic Commerce Acquisition Programme Management Office, (ECA-PMO) has been chartered to co-ordinate and oversee FACNET implementation throughout the federal government, while several agencies have been tasked to lead specific government wide FACNET projects. It was expected that FACNET would contribute towards many benefits including expanded business opportunities for small businesses, increased competition and lower prices, and reduced contract processing times. However, a report by the General Accounting Office (GAO)[6] found that the difficulties of doing business through FACNET, overshadowed any observable benefits.

By way of background a brief explanation of the way in which information flows between federal agencies and suppliers will be provided. It should be emphasised that, under FACNET, suppliers cannot directly access procurement information from the agencies themselves. Agencies and suppliers communicate with each other through private firms which are licensed to receive and process procurement information. These firms provide Value Added Networks (VANs), of which there are around 35 at the time of writing. Purchasers electronically prepare and transmit requests for quotations, and tender documentation, and the FACNET infrastructure then performs several functions automatically. These include translating the data into standardised formats which can be understood by

[6] United States General Accounting Office, Acquisition Reform, Obstacles to Implementing the Federal Acquisition Computer Network, GAO/NSIAD-97-26, January 1997. The report can be down loaded from the home page of the US Government Printing Office at http://www.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=gao&docid=f:ns97026.txt.pdf.

the computers receiving the data, and relaying the information to VANs. Communication between agencies and the VANs is always via Electronic Data Interchange (EDI). This is a descriptive term for the computer-to-computer exchange of routine business documents using standardised data formats. It is an older technology than the Internet, and is thought to provide a more secure channel for the flow of information than the latter can presently provide.

In order to receive information, suppliers must subscribe to a FACNET certified VAN, and buy the ICT tools necessary to establish an electronic linkage with the chosen VAN. Communication between VANs and suppliers is normally EDI, although there is nothing to prevent the use of other technologies such as e-mail or the Internet to handle the connection. Suppliers must also register on the Government's Central Contractor Registration (CCR) site, as a pre-condition to receiving any information, which can be done over the Internet.

The presentation and content of the information received from the VAN will depend on how much suppliers want to spend on Value Added Services from their VAN. The GAO Report found that VAN charges varied tremendously from about $70 to several thousand dollars monthly for VAN services depending on the volume of transactions and types of services. The greater the expenditure, the more tailored the information is likely to be to the specific interests of individual suppliers. VANs may monitor FACNET for requests for quotations which they have been told are of interest to their customers, and alert them of relevant opportunities via fax or e-mail. Tender documentation may then be obtained through the VAN. Ensuing bids are faxed to the VAN, which will then post the

bids back to the agency. In turn, a purchase order is transmitted to the successful supplier, and a broadcast message is transmitted to the VANs for distribution to participating suppliers. Through the infrastructure described above, one of the key goals of FACNET is to present a "single face to industry." This involves that suppliers, having registered once in the CCR database, can have access to FACNET information from any single point of entry (in practice any certified VAN) using the single set of standards for the electronic transmission of information provided by EDI.

As mentioned above, the General Accounting Office Report on the obstacles to the implementation of FACNET, found that there were serious difficulties with its operation. These problems were reflected in the fact that federal agencies had executed relatively few transactions through FACNET. Data for 1995 indicated that less than two percent of about two million federal 'procurement actions'[7] valued between $2,501 and $100,000 were accomplished through FACNET. The concerns which the Report drew attention to are highlighted below.

c) Concern with the operation of the US Federal Acquisition Computer Network (FACNET)

i) Operational problems throughout the FACNET Infrastructure

The confidence of users in FACNET was greatly undermined by malfunctions in sending and receiving transactions, with common experiences of late, lost and duplicate transactions. For example, in 1996, a senior purchaser at the Army's Training and Doctrinal Command stated that FACNET did not function well

[7] The Report defines procurement actions as including purchase orders, and other new contract awards as well as orders under existing contracts.

enough to support the Command's requirements. Outgoing calls for tender had been lost, or received as long as two weeks after transmission, and timely responses by suppliers had only been received after the closing date in many cases. The lack of supplier confidence in (and even awareness of) FACNET was reflected in the fact that very few had actually registered on the CCR. It was therefore found that agencies were forced in practice to fulfil their requirements from non-registered suppliers, and frequently cancel FACNET solicitations because of lack of vendor response. Lack of confidence in FACNET's operation, and VAN costs, were found to impact most heavily on small businesses who would need to sell large quantities to the government to justify the expenses involved.

ii) The emergence of other electronic procurement methods

It was found that the usefulness of FACNET as the single mechanism for electronic procurement had been limited by the emergence of other electronic purchasing methods found to be more reliable, cheaper and faster. For example, since the FASA was drafted, purchase cards (government issued commercial credit cards); the internet; on line catalogues and other commercial alternatives have been introduced into government contracting. Indeed it was noted that most federal agencies were co-operating in the development of internet based initiatives. The emphasis is now on moving away from a single electronic solution for all procurement needs, in favour of allowing agencies the flexibility to employ the best technology for any particular procurement. Policy-makers are now encouraging purchasers to use all types of electronic procurement depending on which makes the most business sense. However, the report emphasised that

the single face to industry goal would remain a key policy objective. Regardless of the electronic tools used, procurement information should be readily accessible using common standards for data transmission.

iii) The legislative requirements underlying FACNET may not be sound

As mandated by FASA, FACNET implementation has focused primarily on competitive contract awards, requiring agencies to exchange information with a large number of often unknown vendors. However, the technology of choice for implementing FACNET has been Electronic Data Interchange (EDI). This is a technology that has been successfully used to support a high volume of routine one-to -one transactions, between organisations with established and close working relationships. Examples of such transactions include delivery orders under existing contracts, and invoices exchanged between a company and its suppliers. The report highlighted that federal agencies had made considerable use of EDI in streamlining their procurement, but that this had occurred only in the context of one–to-one transactions, and therefore outside of the FACNET project. Incompatibility with the FACNET objectives was also found in the fact that the organisations processing these one-to-one transactions were primarily using proprietary solutions, or non compliant standards, and therefore not presenting the required single face to industry. Difficulties with adapting existing uses of EDI to the one-to-many situation envisaged were found to stem from this being a 'government-unique' application of the technology.

The report therefore recommended that legislative relief be sought if a consensus were to be found that FASA's requirements - such as providing widespread

public notification, and exchanging information with multiple vendors – represented impediments to the government wide electronic commerce strategy.

iv) Leadership and management problems

Both government agencies and suppliers consistently cited the lack of clear leadership, direction and adequate programme management as major reasons for delays in problem resolution and implementation of FACNET. It is therefore likely that, without a coherent overall strategy and proper and continuous training of managers and purchasers, ICTs will only duplicate or exacerbate the problems experienced with current methods of procurement. The Report noted that a government wide strategy for implementing FACNET has yet to be convincingly communicated. Individual agencies have been left to adopt their own implementing strategies with neither the OFPP nor the ECA-PMO operating as a focal point of central guidance and accountability. As a consequence, the development of key components of FACNET such as the CCR database, business information to attract suppliers, and policy guidance for using FACNET, have not been clearly linked.

2. Problems with implementing electronic procurement from the international perspective

The GAO Report detailed above provides a clear indication of the problems which can beset moves towards electronic procurement at the national level. This section considers the challenges which face the WTO, in promoting the development of national and regional systems in such a manner as to strengthen

the GPA's role in the liberalisation of international procurement. The possible responses to these problems, at the WTO level, are also considered.

a) International electronic procurement : the likely problems

From the international perspective, the problems surrounding the use of ICTs in procurement are related to the need to ensure non-discriminatory treatment, and the transparency of procurement procedures.[8] The fear is *not* that ICTs would be used to systematically and deliberately favour national suppliers, or even that the non-discrimination obligations of the GPA would necessarily be breached. Concern has however been expressed that the use of ICTs could widen the gap between those who can and do participate in contract awards, and those who face difficulties in accessing the relevant information and preparing tenders to the required standard. The fear is therefore that a situation of *de facto* discrimination could arise against SMEs in all states, and suppliers in developing countries not having ready access to the necessary technology, or unwilling to incur the necessary expenses, perhaps in the expectation of minimal returns. The possibility of ICTs having the effect of reducing the broad participation of suppliers (or at least failing to improve the presently limited cross-border participation) could arise from problems relating to the accessibility and interoperability of national and regional databases. Conversely, concerns have also been expressed that the immediately increased accessibility of procurement information electronically, could boost supplier participation to unmanageable proportions. The task will often then be one of eliminating all but the most

[8] The Committee on Government Procurement recognised these concerns at an early stage of its work on electronic procurement. See Information Technology: Compilation of Issues, Note by the Secretariat GPA/W/15 10 May 1996.

appropriate suppliers in a non-discriminatory manner. The possible responses to this problem are considered further in Section 3.

Regarding the issue of accessibility, suppliers will need to subscribe to a number of databases, available either over the Internet, through VANs, or other means of electronic communication in order to keep abreast of GPA covered procurement information. Information will generally be available for free where it is obtained directly from a government maintained database, although suppliers are likely to encounter varying costs when they obtain information from private providers who process information to the needs of individual suppliers. Established government suppliers, and suppliers in developed countries are likely to be in a stronger position to access the various sources of procurement information, than SMEs and suppliers in developing countries. Suppliers are also likely to discover inconsistencies in the procurement covered, both in terms of entity and sector coverage. They may not yet be able to readily identify GPA covered contracts (even though entities are formally required by Article IX:11 to specify in tender notices whether the contract is covered by the Agreement) or know whether foreign tenders will be considered for contracts which are not covered. Suppliers may also find that the search facilities available vary in their usefulness. As regards interoperability, problems may also be encountered with different computer languages used for electronic communication

b) The WTO's role and possible responses to these problems

i) The limitations of the WTO's involvement

The WTO is unlikely to have any direct involvement in the evolution of national and regional systems. Indeed, in many instances, even national governments have assumed only joint involvement in the development and management of their databases, as activities in this area become increasingly devolved to the private sector. For example, Korea's database is operated by a private firm. Procurement information at all levels of government can be obtained via the GINS (Goldstar Information Network Service). The government does however intend to establish its own network on government procurement. In Finland, four private databases exist where a company can obtain information - stored on the EU's Tenders Electronic Daily database (TED) - about tender notices. In Canada, the operation of the database has been contracted out to private firms. In contrast, the databases in Japan and Chinese Taipei are managed by a public authority.

In the context of EU developments, the Commission has suggested that the development of the necessary ICT tools should take place as much as possible within the private sector. There will be no Community wide obligations on the implementation of electronic procurement. The Commission has suggested that Member States draw up individualised electronic procurement plans. These plans are to contain a listing of all steps to be taken and a time-table for implementation. The only general expectation is that Member State's should commit themselves to conducting 25 per cent of their procurement electronically

by 2003.[9] It was also noted that this approach of minimum central intervention was in line with the international consensus in the discussions in the G7 meeting on electronic commerce.[10]

Perhaps one of the strongest reasons for the policy of limited governmental intervention is provided by the GAO Report described above. Policies which earmark particular technologies for the implementation of electronic procurement are likely to fail by reason of the availability of newer and better technologies. Another lesson from the Report is the need to retain flexibility, so that entities can choose to use the procedures and technologies which are the most appropriate for the particular procurement in question. A formal tender procedure (whether conducted electronically or by paper based means) may be appropriate for complicated contracts where entities seek innovative responses to the need identified. However, entities may also desire to purchase their routine requirements from on-line catalogues from which the market price can be easily determined. The optimum technology differs according to the nature of the procurement activity in question. New methods of procurement made possible only because of ICTs (such as the use of electronic catalogues) also raise implications for the content of the GPA's rules, which generally insist upon a formal tender procedure, for all covered procurement. These implications are discussed in Section 3(b).

[9] See *The Implementation of Electronic Procurement in the EU*, Working Document, Advisory Committee on the Opening-up of Public Procurement, 9 July 1998.
[10] *Ibid* at p.4.

ii) A strong residual role for the WTO

Within the constraint that individual states will have primary responsibility for the development of their electronic procurement systems, it is suggested that the WTO should have a strong residual role. As noted above, WTO efforts will need to be centred upon ensuring that there is sufficient uniformity among GPA Parties, concerning the use of ICTs, to protect, and strengthen, the general obligations of transparency and non-discrimination in GPA covered procurement procedures.

It will be crucial to the achievement of these objectives that the single face to industry approach emphasised in the GAO Report, is ultimately developed across all the GPA Members. Procurement information will need to be reliably and readily accessible across national frontiers, in order to secure the confidence of suppliers. Regardless of the precise technology which is used, and regardless of the source from which information may be obtained, suppliers with access to the necessary ICT tools should be able to obtain the same procurement information under the same conditions, regardless of geographical location. It is therefore suggested that the development of national databases which are accessible on a world wide basis is the single most important policy objective which the WTO needs to emphasise. Advances in electronic procurement are presently occurring most rapidly at national and regional levels. Understandably, perhaps, the primary concern has been to improve the efficiency of procurement at these levels.

Even at present however, it is encouraging that national and foreign suppliers alike are being permitted access to most of the procurement databases currently in operation or under development. This is usually achieved through Internet access. For example, the EU initiative in the area of electronic procurement known under the acronym SIMAP (*Système d'information pour les marchés publics*) is now moving towards making procurement information available to all interested suppliers over the Internet without charge through the SIMAP homepage.[11] Any EU contracting authority can now submit its tender notices through filling in the interactive standard forms available through SIMAP. In turn, suppliers can use the Search and Retrieval Mechanism provided on the SIMAP homepage to search for information on specific procurement opportunities. These are seen as first steps towards the development of a fully electronic tendering system, going beyond the electronic publication of tender notices, and encompassing the exchange of tender documents, bidding and contract payment. The objective is to encourage the central availability of national procurement information through the single point of entry provided by the SIMAP homepage. However, SIMAP will not be the exclusive source through which procurement information can be obtained. This possibility would be inconsistent with the nature of the Internet as a medium of communication. It can therefore be expected that private firms will soon be seeking to obtain details of available contracts, with the view of processing and marketing the information to suppliers.

[11] See the SIMAP home page at http://simap.eu.int. For a brief discussion of the remit of the SIMAP project and of recent developments, see M. Dischendorfer, "New Functionalities of the SIMAP Web Services", 1999(1) *Public Procurement Law Review* CS1.

As has been seen, the US has chosen the different route of licensing procurement information to VANs. However, all of the VANs maintain Internet sites which describe the various services, relating to information retrieval and presentation, which are available. Any supplier may register with a VAN and receive tender notices and documentation either over the Internet or via EDI. It can be suggested that one of the value added services which VANs may be able to offer in the near future, would be the identification of procurements open to international competition by virtue of the GPA or other procurement agreements.

Canada has also chosen the approach of making procurement information available to suppliers through intermediaries. The central source of federal government opportunities is through a database known as MERX, which also provides information on provincial and municipal governments.[12] MERX provides various services including an Opportunity Matching service, which notifies suppliers via e-mail or fax when an opportunity becomes available which corresponds to the supplier profiles provided. Suppliers can also order tender documents from MERX as well as a list of other interested suppliers to enable the identification of possible partnering opportunities. The basic monthly subscription charge is $7.95 per month, not including nominal charges for the above services. Again, suppliers from all geographical locations may subscribe to MERX with a view to keeping abreast of Canadian opportunities, although there are no current moves towards the earmarking of GPA covered contracts.

[12] The MERX home page can be visited at http://www.merx.cebra.com.

It is also interesting to note the existence of firms providing procurement information on both US and Canadian opportunities. Some of these place a particular emphasis on helping small businesses to access government opportunities.[13]

The vast and rapid proliferation of sources from which GPA covered procurement information can already be obtained, is the most striking characteristic of developments now in progress. The alternatives available to suppliers could easily lead to confusion even in the context of retrieving exclusively national procurement information from a national database. The potential for 'information overload' is all the greater in the context of providing information on cross-border procurement opportunities, notwithstanding the GPA's present limited membership. From the earliest stages, the Committee on Government Procurement could have a strong role in improving access to GPA covered procurement opportunities and reducing the scope for confusion.

The Parties could be invited to provide addresses of any sites on the Internet that give information on procurement opportunities in their countries. These addresses could be published in the GPA Annexes, or on the WTO homepage. Agreement could also be sought on the identification of GPA covered opportunities in a standard manner across all the databases maintained by the Parties. This would involve the strengthening of Article IX:11 which already requires that entities identify contracts which are covered by the GPA. The next step could then be to seek agreement on the incorporation into national databases

[13] See, for example, the services offered by Business Information & Development Services at http://www.bidservices.com/home.html.

of information on procurement opportunities contained in the databases of other GPA Members. Through data swaps, national databases would provide summary or bulletin information of related contract opportunities held on other databases, and perhaps, information on how detailed information could be accessed. Data swaps could be automated if contracts for specific supplies and services could be identified by commonly recognised codes for the description of supplies and services. At a more advanced stage, provision could be made for all national sites to be accessible through a single point of entry. Thus the addresses contained in the GPA Annexes or WTO home page could be 'hyper- linked' to provide immediate access to them via the single interface.[14] The WTO might later maintain a search engine for GPA covered contracts, which would interrogate all national databases for the types of contract which suppliers search for. Again, the efficiency of such a facility would be greatly improved by the use of common codes for the recognition of contracts.

There is therefore much that the WTO can do to facilitate access to international procurement information. This is not likely to be an easy task however. Arranging the data swaps noted above, could be severely hampered by the commercial desirability of the information, and the fact that the VANs have paid for the procurement information in question. A recent SIMAP report on the performance of pilot projects noted that, "Closer co-operation between host partners has not come about, mainly for reasons of commercial competition."[15] One could therefore envisage that data swaps will occur among the VANs, as a

[14] It is notable that many national within, and outside, the EU can already be directly accessed through the EU's SIMAP home page at http://simap.eu.int.

[15] The Report entitled "Evaluation of SIMAP Pilot Projects" can be viewed on the SIMAP web site at http://simap.eu.int and is contained in the "About SIMAP" section.

service for the benefit of customers who are interested in international procurement opportunities.[16] The WTO would then have the residual role of encouraging data swaps between those databases providing information without charge directly from the government agencies or departments in question. At any rate, the establishment of a single WTO database, through which all GPA related procurement information can be obtained seems unrealistic at present, given the diversity of approaches to the provision of information, and the division of responsibility between public and private sectors, currently in evidence.

Problems with the accessibility of information and the ease of use of databases are likely to remain, therefore, as long as information is retrieved from separate national databases. This is again a consequence of the speed of developments at national and regional levels, and the implementation of different ICT solutions in response to the problems encountered. It is unlikely, however, that databases will become fully interoperable, in terms of the structure and content of the information, and the search facilities available, even when a WTO strategy for electronic procurement is finalised. Suppliers will probably still have to familiarise themselves with how individual national systems can be accessed, and how they work, depending on the solutions which individual states develop to the challenges faced. As indicated above, while the manner in which databases operate is likely to differ significantly between states, the problems which suppliers encounter could at least be reduced by the development or adoption of a commonly recognised procurement vocabulary for the description of goods and services.

[16] Around a third of the government certified VANs in the US currently make information from other VANs available to their customers.

iii) The adoption of a commonly recognised procurement vocabulary

A fundamental indicator of the success of electronic procurement systems will be how easily purchasers can describe the goods and services they require, and how easily suppliers can identify contracts of interest to them. The tasks of searching for relevant and current opportunities, or of researching the procurement needs of various authorities, could be greatly simplified by the designation of codes for the description of goods and services. The multilingual nature of these codes would facilitate both the translation of the most important elements in tender notices, as well as the compilation of statistics on the characteristics of procurement markets. While most of the tools for the implementation of electronic procurement have long been in existence, the WTO should have a strong role in promoting the recognition of a commonly recognised vocabulary, with the view of enhancing the usefulness and interoperability of different databases. While there is no multilingual vocabulary commonly recognised among all WTO Members, many states do have established systems or initiatives in this area. In particular, the European Union has had a Common Procurement Vocabulary (CPV) since 1993.[17] While the CPV dates from 1993, it was developed from the EU's Classification of Products by Activity (CPA) nomenclature which has been used primarily for collating statistics on trade flows, and includes services and works as well as goods. This was thought to provide a sound base from which to build upon, being focused on the supply/producer side and therefore reflective of the industrial structure of the EU.

[17] Both the CPV and its Supplementary vocabulary can be downloaded from the SIMAP Internet site at http://simap.eu.int/. On the CPV, see T. Laudal, "Advantages of a Common Product Nomenclature in Public Procurement and Recent Developments in Norway" (1995) 5 *Public Procurement Law Review*

Today's CPV dates from 1998 and is a more comprehensive and accurate way of describing goods and services than the CPA. It describes goods and services by reference to some 8300 separate nine-digit codes. The CPV provides for a higher level of specificity than the CPA, which was limited to six digits. Related goods and services are split into some 100 divisions. The first two digits define the product or service division. Thus 30 is the division for office, computing machinery, equipment and supplies. The greater the number of zeroes after the first two digits, the greater the level of the Code's generality. A ninth digit is inserted in order to allow users to verify that the eight other digits are correct, which is a further innovation over the CPA system.

Individual divisions vary markedly in the extent of their sub-division. Some 700 sub-divisions are required for Division 45 which deals with Construction Work, whereas a mere 70 are adequate to describe Division 21 which deals with pulp, paper and paper board. The existing CPV will continually evolve to meet the changing needs of its users. Thus many new divisions and sub-divisions are likely to be created, adapted or removed. It can be noted that the current version of the CPV dates from 1998 and replaces an earlier version in effect from 1996. The SIMAP web pages note that Division 30 has changed considerably between these two versions of the code. A whole new section has been created entitled "Various office equipment and supplies". A supplementary vocabulary also exists along side the CPV, designed to allow the subject matter of contracts to be described as comprehensively as possible. It includes a first letter defining the

CS 112; T. Street, "The Common Procurement Vocabulary (CPV): Development of the Community Nomenclature" (1995) 4 *Public Procurement Law Review* CS 86.

general field concerned, and four other digits, the fourth providing a check for the accuracy of the code. A British or Irish entity might, for example, want to specify that it requires "Left-hand drive" vehicles by using supplementary code X000-9.

It is important to emphasise that (in contrast to the US Federal Supply Classification Codes) the use of the CPV is optional. The Directives do, however contain some references to the compulsory use of the CPA codes;[18] an obligation which contracting authorities have not generally followed. Moreover, the CPV has not formally replaced the CPA. The Commission has strongly urged authorities to use the CPV when drafting procurement notices, while stopping short of proposing amendments to the Directives to compel compulsory use.[19] The EU's Green Paper on procurement questioned whether use of the CPV should be made obligatory, or whether a charge should be imposed on those entities which have not used the CPV and the standard electronic forms to identify the products or services required, and the procedure to be used.[20] The charge envisaged would be proportional to the extra costs of processing those notices.

The author would suggest that the use of the CPV needs to be established on an exclusive and compulsory basis, if it is to have any meaningful impact on streamlining procurement processes. Its ad hoc use is unlikely to promote familiarity with the content of the vocabulary, or the potential benefits its use can

[18] For example, Supplies Directive 93/36/EEC. O.J. 1993, L199/1, requires public authorities to identify their likely annual procurement requirements in indicative notices, by reference to the CPA.
[19] Commission Recommendation O.J. 1996, C 255/8.

bring. It can also be noted that the EU would be in a much stronger position to recommend the use of its CPV among all the WTO Parties, were it able to demonstrate its successful use, and the realisation of its intended benefits. It would be beneficial for the WTO to adopt a credible procurement vocabulary already in common usage among some of its Members, and which has a proven track record.

The most critical concern over the CPV, however, which is as true of the present version as of its predecessors, is that it is firmly producer based. The usefulness of the CPV for purchasers is limited by the difficulty of organising specifications according to the physical nature of the requirement. Thus while a classification for concrete products might be beneficial for firms specialising in the supply of concrete materials, it is less helpful for the purchaser of railway sleepers concerned more with the performance and cost of the product, rather than their material of construction.[21] In the procurement context, the CPV does more to help suppliers to identify the contract opportunities of interest to them, than it helps purchasers to describe their requirements through a numerical code for their specifications.

The present bias of the CPV reflects the difficulty of formulating a code in such a manner as to be universally useful to both purchasers and producers. A shift of bias in favour of enabling suppliers to select a code to identify the required goods or services, according to performance based specifications, would shift a greater burden onto suppliers in identifying the contracts of interest to them. To use the

[20] Green Paper, Public Procurement in the European Union: Exploring the Way Forward. Commission of the European Communities, Brussels, 27.11.1996 COM(96) 483 final, at p. 22.

above example, where the code is for railway sleepers with particular performance based characteristics, the producer of concrete products would have to search for the codes for all the products they are capable of providing. They would then need to determine whether the manufacture of those products from concrete would be capable of meeting or exceeding the performance based specifications. The policy questions are therefore, whether such a change of emphasis would be desirable, and whether any attempt to reconcile purchaser and producer interest would render the CPV rather meaningless to both groups.

The use of a commonly recognised vocabulary could certainly streamline procurement procedures under the GPA at least by facilitating the identification of procurement opportunities by suppliers, and reducing the barrier of multilingualism. Indeed, it can be suggested that developments in this area will be necessary to maximise the benefit gained from electronic publication of notices, since their availability over databases is unlikely to be helpful unless easily identifiable and retrievable. There are still concerns however that the CPV does not serve the needs of purchasers, and indeed, over whether it would be possible to adapt the Code to make it responsive to the needs of both producers and purchasers. Any benefits which the CPV is presently capable of producing, would be unlikely to be realised in the context of GPA covered awards, unless established on a compulsory and exclusive basis. If it were thought desirable to implement the CPV, or equivalent vocabulary, it is suggested that the text of the Agreement could perhaps be changed to require use of the codes after a transitional period during which entities should be encouraged to use, and gain

[21] This example is taken from T. Street, *supra* note 16.

familiarity with the codes. This raises questions relating to the time tabling of changes to the GPA's rules as moves are made towards electronic procurement.

c) The development of a timetable for the application of ICTs to GPA covered procurement

In order to fulfil its mandate of protecting the transparency of the Agreement, and the non-discriminatory treatment of suppliers, the WTO will need to establish a timetable for the application of ICTs to GPA covered procurement. One of the aspects here would be to set out time periods for the adoption, and use of a common vocabulary, if and when such an instrument is hopefully agreed upon. Beyond this specific example, there is also a more general need to clearly set out the duration of transitional periods during which traditional, and electronic forms of communicating procurement information will co-exist. A timetable for the phasing out of paper based methods will also need to be developed. The likelihood and danger is that national and regional systems will develop at differing rates. A GPA Party may consider that its system has developed sufficiently to permit paper-based forms of communication to be phased out altogether. However, to do this may be highly disadvantageous to suppliers not having the necessary technology to access the relevant databases.

At the same time, it would probably be unworkable to insist that all GPA suppliers had access to national databases before permitting the exclusive use of electronic communications. An interesting question here is whether Parties breach the GPA if they implement the use of ICTs at their own pace, when the situation of de facto discrimination against suppliers not having access to the

necessary technology potentially arises. The question is relevant firstly from the perspective of the requirements of the GPA in its present form, and secondly, from the perspective of how the Agreement may need to be changed to incorporate additional safeguards against discrimination. Two different situations can be identified here, as follows.

i) Is the GPA breached when parts of the procurement process are operated both electronically and by paper based methods?

This is the situation where procurement procedures such as the dissemination of information, and tender submission and award, are operated both by traditional means, and electronically. Both foreign and domestic suppliers can participate under the assurances provided by the GPA. However, most domestic suppliers and some foreign suppliers are advantaged because they have access to the electronic databases, by virtue of the technology available to them. Thus they are alerted to procurement opportunities more quickly than other suppliers who depend, for example, on an unpredictable postal service. Article III:1 effectively provides that, in respect of all matters relating to GPA covered procurement, the suppliers of other Parties shall be treated no less favourably than national suppliers, and no less favourably than the suppliers of any other Party. Is this provision breached by the use of ICTs when some foreign suppliers are disadvantaged in their ability to retrieve information, and participate in contract awards? It is submitted that there is no breach of Article III in this situation.

It is firstly arguable that there is no disparity in treatment between domestic and foreign suppliers. Many domestic suppliers (especially SMEs) will be subject to

the same disadvantages as foreign suppliers in the same position of not having access to the necessary technology. Indeed, the possible disadvantage to domestic suppliers would be a strong reason for the co-existence of electronic and paper-based methods. Moreover, if it were the case that all suppliers must have the opportunity of receiving procurement information simultaneously, then existing procedures would breach Article III given that divergences in the quality of telecommunication and postal services, mean that some suppliers are alerted to procurement opportunities earlier than others. Complete equality of access does not exist now, and it will probably never arise even through the use of ICTs.

ii) Is the GPA breached when procurement information is only available electronically and when entire procurement cycles are conducted by electronic means only?

This is the situation where tender notices and even tender documentation is available electronically and the Party in question is sufficiently satisfied with the operation of the system to use ICTs as the exclusive means of delivering this information. The analysis also applies to electronic procurement where a large part of the procurement process is conducted electronically. At the outset, it can be stated that if the databases are only open to domestic suppliers, then Article III of the GPA is breached. Article III clearly covers the situation where the inability of foreign suppliers to participate is the direct result of a discriminatory law or policy.

The more difficult situation is where national databases are, in principle, open to foreign suppliers, but, in practice, many of them are excluded for want of access

to the necessary technology to retrieve information relevant to them. It was concluded above that Article III was not breached partly because there was no disparity in treatment between domestic and foreign suppliers. There is more likely to be such disparity in the scenarios described here. Before moving on to the exclusive use of ICTs, the states operating the databases will presumably be satisfied that national suppliers, at least, will be able to access the databases. Where this is the case, states would probably be reluctant to delay the phasing out of paper based processes. The rationale for their investments would be savings in public expenditure, which would be partly defeated by the operation of two juxtaposed systems. There is therefore a stronger case for arguing that the exclusive use of ICTs leads to a discriminatory effect by affecting the competitive opportunities open to foreign firms.

However, while the disparity in treatment is greater in the case of exclusive use of ICTs, than in the case of the co-existence of old and new methods, the reason for the disparity is the same. That is, lack of access to the necessary technology. It would therefore appear to be illogical to conclude that Article III is breached in one situation but not the other, when the underlying cause of possible de facto discrimination is the same in both cases. This is especially the case when, in neither scenario, is there an express or even tacit policy of excluding foreign suppliers. They do have the opportunity to participate on equal terms with domestic suppliers. The conclusion is therefore that Article III is not breached, even where entire procurement cycles are conducted exclusively by electronic means, provided that all suppliers are, in principle, able to access the relevant information and participate on equivalent terms to domestic suppliers. This may

create a problem in the immediate future if some states become particularly advanced in the use of ICTs, and regard themselves as ready to dispense with paper based procurement in some areas.[22] Some GPA Parties would be understandably reluctant to accept lengthy delays before the exclusive use of ICTs, when they consider that the operation of two procurement systems, would be wasteful.

d) Towards a possible solution

The dilemma is therefore to try to protect the position of SMEs generally, and suppliers in developing countries, while at the same time ensuring that that the GPA does not become an anachronistic inconvenience for some states. One could begin with a note of optimism. The tumbling prices of ICT tools, and the universal awareness of the importance of computer literacy, may mean that the difficulties referred to above, relating to equality of access to information, may not arise. Most GPA suppliers are likely to have access to the necessary technology by the time national and regional databases replace paper-based methods of procurement.

It is unlikely, however, that such optimism would be sufficient to allay fears of unequal access to information. This is especially the case when one recalls the need to increase the GPA's membership, especially among the developing nations who are likely to be less advanced in the use of ICTs. The answer might

[22] The necessary technology for electronic procurement is already available, and will become more advanced, and cheaper at a rapid rate. The following extract is taken from W. Rowan, *Guaranteed Electronic Markets - the Backbone of a twenty-First Century Economy?* (Demos; 1997)
"Computerisation gurus talk about a seven-for-one rule; on year in the life of on-line developments currently involves sweeping transformations that would take seven times as long in any other aspect of

therefore be seen to lie in the incorporation of new safeguards to take account of the problems noted above. In terms of changing the provisions of the GPA in some way, it is difficult to see how the Agreement could be amended to safeguard the right of the suppliers of all members to access, and respond to procurement notices. Article III already provides a strong safeguard against the exclusion of foreign suppliers, and Article XXIV:8 requires that ICTs be adopted in such a manner as to promote the aims of "open, non-discriminatory and efficient government procurement through transparent procedures..". While the possibility of textual change is not excluded, it is considered that the solution here will have more to do with political compromise, than modifications to the GPA.

It is suggested that the WTO strategy should be based firstly on a detailed examination of the timetables for the implementation of ICTs, which the Parties impose on themselves. The efficient operation of electronic procurement, and the realisation of public savings, demands that suppliers which service government markets have ready access to relevant information. All national and regional systems will be characterised by timetables for implementing the use of ICTs, and for the gradual phasing out of paper based methods. The WTO should impress upon the Parties the need to ensure that the use of ICTs does not breach Article III, in the sense of databases being accessible only to national suppliers. It has already been suggested that the single most important policy objective which the WTO needs to emphasise, is the development of databases which are accessible on a world wide basis, regardless of the technologies which are

human endeavour. The increasing power of computers, matched by real falling prices for the level of power delivered, is rewriting some of the rules of economic development".

employed. It can be added here that Article III, as understood above, *requires* such universal access, in so far as the procurement is covered by the Agreement.

Efforts should then be made to find a consensus among GPA Members on minimum time periods for the co-existence of paper based and electronic forms of communication. The focus should be on minimising any *de facto* inequality in treatment, even if such inequality does not entail breaching the GPA in any way. The immediate need is for a minimum time period beyond which states would be permitted to publish invitations to participate exclusively via electronic means. As the amount of information available over national databases increases, minimum time periods would also be required for the exclusive availability of tender documentation electronically. When fully electronic tendering systems to cover tender submission, and information exchange during the life of the contract including invoicing and payment becomes possible, minimum periods would ultimately be required for the phasing out of paper based procedures altogether. It is difficult to predict how forthcoming a consensus on minimum time periods would be in any future negotiations. While the EU Green Paper[23] envisaged a transitional period of several years, before the phasing out of the obligation to publish tender notices in the Official Journal, there have been rapid developments here. The S supplement to the Official Journal, which is where contract notices and Periodic Indicative Notices appear is now only available on CD-ROM and via the SIMAP home page. It can be anticipated that the transitional periods envisaged by other GPA Members will vary depending on their level of experience with the use of ICTs.

[23] Green Paper, Public Procurement in the European Union: Exploring the Way Forward. Commission of the European Communities, Brussels, 27.11.1996 COM(96) 483 final, at p.25.

3. How does the GPA need to be changed in order to accommodate electronic procurement?

In order to accommodate and maximise the potential benefits of ICTs, changes need to be made to the regulatory regime. The need for change can be understood from two perspectives.[24] Reforms may involve slight changes in detail to existing provisions to ensure that electronic means of communication are expressly envisaged. Whether or not ICTs eventually revolutionise procurement practice and regulation, these changes in detail will be a first and necessary step. There is a need, for example, to remove any doubt that tender notices can be posted electronically onto designated internet sites, and that tenders can be submitted electronically. Under this limited approach, only those changes which would enable ICTs to be used within the current procedures are in fact made. Such changes are necessary both to ensure that the Agreement does not "constitute an unnecessary obstacle to technical progress" (one of the requirements of Article XXIV:8), and to allow for at least the potential of streamlined procurement procedures. The downside of going only this far, is that the detailed (and often cumbersome) nature of the present regulatory regime is retained.

Far more drastic changes to procurement regulation have therefore been envisaged. The more ambitious approach starts from the proposition that ICTs can revolutionise the manner in which some procurement is conducted. This approach foresees entirely new methods of procurement, made possible only

[24] These two perspectives were first described by A. Haagsma, *supra* note 2.

because of ICTs. Purchasers now define their requirements in tender specifications and publish tender notices to which suppliers respond. For routine purchases this may be regarded as a cumbersome method of determining the market price. An available option here would be for the purchaser to choose from among existing offers in electronic catalogues maintained by suppliers. It has been noted that such purchasing methods will tend to involve an increased involvement of end users in purchasing operations, allowing the purchasing department to concentrate more on strategic and managerial tasks.[25]

The use of electronic catalogues could obviate the need for a formal tender procedure. Significant savings would then be made possible on both sides. Purchasers avoid having to formulate and write down complex technical specifications, and the cost of publishing tender notices. When routine goods or services are required, purchasers could access the on-line catalogues and obtain the spot price. They would then have the choice of whether to purchase immediately or wait for a possible drop in prices. On the supply side, the costs of formulating tenders and sending them to the purchaser are avoided. As might be expected, there are significant legal questions on the extent to which such new methods of procurement can operate compatibly with regulatory regimes which envisage only traditional tender procedures. These questions will be addressed at a later point. The author now turns to consider the changes in detail to the GPA necessary to permit states to implement the first steps towards electronic procurement compatibly with the Agreement.

[25] See J. Gebauer, C. Beam and A. Segev, "Impact of the Internet on Procurement", (1998) *Acquisition Review Quarterly* 167 at p.174.

a) Provisions of the GPA which require re-examination in the light of information technology

The first step towards harnessing the benefits of ICTs will be to expressly permit electronic means of communication. The GPA is not completely silent as to the importance of ICTs, even though its tender procedures do not presently envisage their use. Article XXIV:8 was added in the final stages of negotiations of the 1994 GPA to acknowledge that the Agreement did not take account of rapid developments in the use of ICTs in procurement. It provides as follows,

"With a view to ensuring that the Agreement does not constitute an unnecessary obstacle to technical progress, Parties shall consult regularly in the Committee regarding developments in the use of information technology in government procurement and shall, if necessary, negotiate modifications to the Agreement. These consultations shall in particular aim to ensure that the use of information technology promotes the aims of open, non-discriminatory and efficient procurement through transparent procedures, that contracts covered under the Agreement are clearly identified and that all available information relating to a particular contract can be identified. When a Party intends to innovate, it shall endeavour to take into account the views expressed by other Parties regarding any potential problems."

The provision has already led to discussions within the Committee on Government Procurement. At its meeting on 4 June 1996, the Committee requested that the Secretariat prepare a note on the aspects of the GPA requiring re-examination in the light of ICTs. The Agreement's provisions were

considered under five headings as follows: (i) publication requirements; (ii) submission of tenders and other communications between the tenderer and the procuring entity; (iii) selective tendering; (iv) deadlines; and (v) non-discriminatory treatment. Under these headings the Secretariat identified provisions which will have to be modified or clarified in order to permit the possibility of electronic dissemination of tender notices, and eventual moves toward electronic procurement. At present, many provisions do not allow for electronic forms of communication, mainly because they were drafted with hard-copy communications in mind. The Secretariat also identified how the express provisions would need to be adapted, in order to harness the full benefits of electronic procurement. The new dangers which may be created were also referred to. There follows a summary of the issues which were presented.

i) Publication requirements

The Secretariat first considered the various provisions imposing publication requirements and noted that many of these are neutral as to the form of publication which is required. It was noted that the provisions were undoubtedly drafted with hard copy forms of communication in mind, but that the means of permissible publication were not "explicitly prejudged". Article XI provides for the main publication requirements relating to publishing invitations to participate, summary notices and lists of qualified suppliers. Paragraph 1 is typical of the form of these provisions providing as follows,

"In accordance with paragraphs 2 and 3, entities shall publish an invitation to participate for all cases of intended procurement, except as otherwise provided in

Article XV (limited tendering). The notice shall be published in the *appropriate publication* listed in Appendix II". (emphasis added)

The limiting factor here is therefore at the discretion of the Parties depending on the means of publication they have decided upon and expressly designated in Appendix II. The publications listed here are largely hard-copy periodicals, although there are some exceptions such as MERX in Canada, the Commerce Business Daily in the US, and the Government Internet Tendering Information System in Singapore. In order to remove any ambiguity here, support has been received for the suggestion to add a footnote to the Agreement defining "publication" to include electronic and paper based methods. It was also suggested that the electronic publication would have to be available on the Internet, or from one location, and accessible world-wide by telephone. It might also be suggested that these two requirements could be identified as pre-conditions for the deletion of hard copy forms of publication.

ii) Tender Submissions and purchaser supplier communications

The Secretariat then turned their attention to the rules relating to the submission of tenders and other communications between suppliers and purchasers. It was found that the situation here was more restrictive of electronic means of communication. Many of the relevant provisions implicitly exclude electronic means of communication by listing the forms of communication which are appropriate. Thus Article XIII:1(a) provides that, "tenders shall normally be submitted in *writing* directly or by mail" (emphasis added). Tender submission by telex, telegram or facsimile is also permitted, although no mention is made of

electronic submission over the Internet. Various suggestions have been received here with a view to permitting electronic submission of tenders. It is clear that Article XIII:1(a) needs to be amended to add "electronic means" to the list of possible methods of receiving bids already listed. Submissions were also received that where the term "writing" is used in the GPA, it should be understood to include any worded or numbered expression which can be read, reproduced, and later communicated, and includes electronically transmitted and stored information.

There are various other provisions of Article X, XIII, XIV and XIII dealing with aspects of communications between suppliers and purchasers. These provisions either require that the communication be in writing or expressly envisage that telex, telegram or facsimile may be used as means of communication, to the exclusion of Internet based communications. Again, there is a need here to remove any ambiguity regarding the use of electronic means.

iii) Selective tendering

The Secretariat drew attention to observations that procurement authorities may rely more heavily on selective tendering procedures due to the increased volume of bids generated by electronic procurement. There would then be a need to ensure that foreign firms would be able to compete on an equal basis with domestic firms in selective tendering procedures operated via ICTs. Experience with the operation of electronic procurement in some markets, certainly illustrates an explosive growth in tenders submitted following the posting of notices on accessible Internet sites. As described above, the US has been moving towards

electronic procurement for federal contracts since 1994. One of the lessons learned thus far is that adjustments are needed to the traditional procedures when operated using ICTs, due to the receipt of thousands of tenders in some cases. It has been noted, however, that this finding need not lead to undue alarm in the GPA context.[26] The US government procurement market enjoys a far higher degree of integration than that found within the EU, and greater still compared to that found among GPA signatories. For this reason, fears of a vastly increased number of tenders need not be over emphasised.

At the same time, however, significant problems would be created for many entities if an electronically published notice yielded only a moderate increase in responses. Clearly such a large number of tenders would be completely unmanageable for many, if not most, entities, and competition between suppliers on such a large scale would be unnecessary to ensure that the best price is obtained. One possible response to an increased volume of tenders is to rely on selective tendering, which largely reflects existing practices in any case. While the Secretariat called for a possible re-examination of Article X (which deals with selective tendering) to ensure the equal participation of foreign firms, it is difficult to see how the provision itself could be strengthened with the view of securing this objective. A genuine competition among suppliers and their equal participation are already fundamental to paragraph 1 which provides as follows,

"To ensure optimum effective international competition under selective tendering procedures, entities shall, for each intended procurement, invite tenders from the

[26] *Ibid.* at p170.

maximum number of domestic suppliers and suppliers of other Parties, consistent with the efficient operation of the procurement system. They shall select the suppliers to participate in a fair and non-discriminatory manner."

The more simple and routine a contract is, the greater the number of suppliers which will be interested in participating in the award. Where contracts are for routine items the most significant element is likely to be price. Where price is the determining element, the number of tenders could be rendered largely irrelevant if all tenders submitted electronically could be filtered through a software package to produce a short list of potential suppliers. Of course, for many contracts price will be but one of the relevant elements. As the contract becomes more complicated, the qualifications of suppliers and the characteristics, and life-cycle costs of the goods or services required, assume a greater importance. Here, the Secretariat pointed toward submissions received by some parties that the emphasis should be on reducing the number of suppliers who are attracted to the contract, in a non-discriminatory manner.

The principal means whereby the number of participating suppliers could be reduced would be to allow them to de-select themselves though careful and precise formulation of technical specifications, and qualification criteria. In this way, suppliers who do not have a chance of success may be deterred from bidding. However, there will be a need for a significant investment in training here, as defining requirements in a clear and comprehensive manner is one of the most difficult tasks purchasers face. This was one of the findings of a SIMAP pilot project on electronic notification of tender notices, which started in 1995

and ran until October 1996.[27] The software used for the pilot project obliged the user to fill in all elements correctly and exhaustively. While the software did provide guidance for this task, incorrect notices were routinely rejected, and the participating authorities were often content to send these notices to the Publications Office by fax or mail, which would then be published as presented in the Official Journal. This is one of the areas in which the adoption of a commonly recognised code could potentially engender consistency in the description of goods and services. As noted above, the translation of the most important elements in tender notices, would also be facilitated.

A further means by which ICTs could be used to allow firms to de-select themselves would be the on-line availability of Contract Award Notices (CANs), in order to increase awareness of the characteristics of the market. Using CANs, ICT tools could then be developed to compile statistics on the types of products or services bought by particular authorities, the prices normally paid and the average number of submissions. If suppliers know that their prices are much higher than those paid by authorities either domestically or in another state, they will be unlikely to bid. On the other hand, competitive firms could also be attracted to markets where authorities have overpaid for their requirements. Article XVII of the GPA already requires entities to publish CANs not later than 72 days after covered contract awards. Among other things, entities must publish the details of the winning firm, the value of the awarded contract and the highest and lowest offers taken into account. On request, individual participants must also be provided with details of why, for example, their application to qualify was

[27] See the Report on the "Evaluation of SIMAP Pilot Projects" on the SIMAP home page at p. 11.

rejected or on the relative merits of the winning tender. The usefulness of CANs for enabling suppliers to learn the characteristics of the markets they seek to enter, would be greatly improved if suppliers could immediately access information through classification using commonly recognised codes. Further information of interest to suppliers could also be provided by 'purchaser profiles'. Where authorities maintain Internet sites, part of the information provided could relate to the type of procurement opportunities which are likely to be made available to the private sector, and annual purchasing plans. Suppliers would then be in a better position to judge whether particular entities are likely to provide them with a significant source of business. Purchaser profiles are an important part of the EU's SIMAP programme noted above.

Beyond the suggestions above, it can also be noted that intermediaries such as VANs already have an important role in absorbing the increased burden on public authorities which would otherwise be brought about by the use of ICTs. Intermediaries may act as a filter in the contract award process by operating qualification procedures. An authority may, for example, inform its certified VANs that all participating suppliers must have an annual turnover above a certain threshold. The relevant contract notices will then only be made available to the appropriately qualified suppliers. Article VIII of the GPA which deals with the qualification of suppliers does not preclude bodies other than the procuring entity itself from conducting qualification procedures provided the safeguards set out are followed.

iv) Deadlines

The Secretariat noted the possibility of reducing the minimum time periods required at various points in the procurement procedure, with a view to improving the overall efficiency of the procurement process. Reductions are made possible because suppliers can be alerted to procurement opportunities by electronic means more quickly than by periodical hard copy publication. Time is also saved if tender documents can be downloaded, and if tenders can be submitted electronically. Suppliers then have more time to prepare responsive tenders. The idea is that reducing deadlines could be promoted as one of the advantages of ICTs, and be seen as an incentive for authorities to use electronic forms of communication.

Beyond the minimum time periods described below, authorities can set deadlines which they deem to be appropriate, but in doing so, they are guided by Article XI:1. In referring to publication delays, and the need to ensure that time limits permit suppliers of all Parties sufficient time to prepare and submit tenders, Article XI:1 clearly envisages hard-copy publication of notices and submission of tenders, rather than the near instantaneous publication made possible by electronic communication:

"(a) any prescribed time-limits shall be adequate to allow suppliers of other Parties as well as domestic suppliers to prepare and submit tenders before the closing of the tendering procedures. In determining any such time-limits, entities shall, consistent with their own reasonable needs, take into account such factors as the complexity of the intended procurement, the extent of subcontracting

anticipated and *the normal time for transmitting tenders by mail from foreign as well as domestic points.*

(b) Each Party shall ensure that its entities shall *take due account of publication delays* when setting the final date for receipt of tenders or of applications to be invited to tender."

(emphasis added)

Regarding paragraph (a) above, the Secretariat received suggestions to delete the words "by mail" from the last sentence, in order to acknowledge that ICTs will generally permit suppliers a longer lead time in which to prepare their tenders.

The minimum time periods are dealt with in Article XI:2, which sets out the time allowed to potential suppliers to prepare and submit tenders and, in the case of selective tendering, to submit an application to be invited to tender. Thus Article XI:2(a) envisages a minimum period of 40 days for the receipt of tenders in open procedures. The 40 day period runs from the date of the invitation to participate. Paragraph (b) provides that where selective tendering is employed, suppliers be provided at least 25 days to apply to be invited to tender, again running from the date of the invitation to participate. Selected suppliers must also have a minimum of 40 days to submit their tenders, running from the date of the invitation to tender. The Agreement does envisage that these deadlines can be reduced in some circumstances. For example Article XI:3(b) envisages that where there are recurring contracts, the 40 day limit for receipt of tenders may be reduced to not less than 24 days.

Support has been expressed for reducing the minimum time periods above to reflect the quicker dissemination of procurement information made possible by ICTs. Consensus has yet to be reached on the extent to which the deadlines should be reduced. Suggestions received have ranged from reducing all deadlines by 10 days, to reducing the deadline for receipt of tenders to as little as one day, in the case of repeat invitations to participate for recurring contracts dealt with in Article XI:3(b). At the present time, the EU Commission envisages that, for its own procurement rules, time limits for tender receipt should be set so as to reflect the complexity of the transaction, and the extent to which translations will be required. The standard period for receipt of tenders is likely to be set at 30 days, but with a reduction to 15 days for 'off the shelf goods and services'. Where tender notices are posted electronically, and where the entity has a purchaser profile in place, a deadline of 10 days may be made available.

While the emphasis on reducing deadlines for the GPA is clear, notes of caution were also received by the Secretariat, to the effect that time gains arising from electronic transmission of documents could be relatively small compared to the total time needed for the preparation of responsive bids. It may well be that the time periods saved through electronic communications between authorities and potential suppliers will not be sufficient for any significant reductions in minimum time periods. On a related note, the Green Paper on procurement reform in the EC, drew attention to a study[28] which indicated that tight deadlines can severely prejudice the participation of SMEs in contract awards. It was

found that late communication of contract documents by contracting authorities prevented SMEs from presenting a valid bid in over 50 per cent of the cases studied. The same problem of late transmission could also persist when ICTs are used. There will always be a human element involved in deciding when to send information, regardless of how quickly that information can be transmitted once the decision has been made. This is an additional reason for the need for caution in reducing deadlines for tender submission, especially as changes will impact more heavily on SMEs than on larger firms. Negative impacts on SMEs are especially critical when their increased participation has been identified as crucial to the success of procurement rules in increasing supply side competitiveness, and when SMEs are already relatively disadvantaged in their ability to participle by factors such as unpredictable payment cycles, and ad hoc standards for their work as subcontractors.[29]

4. New methods of procurement and their GPA compatibility

As mentioned above, the use of ICTs can make new methods of procurement possible which are more reflective of the realities of public purchasing. For complicated procurements, such as construction projects, following detailed procedures may be necessary from the point of view of giving all qualified suppliers the chance to participate and to allow those suppliers to present innovative solutions to the needs clearly identified in tender documentation. However, for simple and routine purchases, the formality of tender procedures

[28] Euro Info Centre Aarhus County, "Analysis of irregularities occurring in tender notices published in the Official Journal of the European Communities 1990 -1993." Study presented to the Commission in 1996.
[29] Green Paper, *supra* note 22, at pp. 29-33.

can be regarded as excessively burdensome, and capable of significantly pushing up procurement costs.

One of the new buying mediums for routine items made possible through ICTs are electronic catalogues. Through these Internet based catalogues, purchasers can monitor fluctuations in prices, and source their requirements from the cheapest suppliers offering the required items. Actual prices may depend more on the level of discount available on a daily basis from individual catalogues, than on the standard set prices. Purchasers who can exactly identify the items they require, would clearly desire to take advantage of spot prices, and would clearly wish to limit the repetition of any formal tender procedures on each occasion suppliers or services are required. It can therefore be questioned whether electronic catalogues can be used compatibly with the GPA. If the GPA could be understood as permitting the use of the 'framework arrangements' described below then this would go some way towards facilitating the use of electronic catalogues.

A framework arrangement is a term to refer to various types of arrangements whereby purchasers and sellers agree to the contractual terms of future dealings without committing themselves to any specific orders at the time the framework is set up. The essence of framework arrangements is that transaction costs are saved by allowing part of the award process for future requirements to be eliminated in a single stage by setting up the framework with one, or a multitude of suppliers. There are many potential uses for framework arrangements, which can vary considerably in terms of the obligations undertaken by purchasers and

suppliers, and the procedural steps leading up to contract award and later conclusion. Purchasers may wish to enter into frameworks where they can set the basic terms of future contracts, but where it is difficult to predict who will be able to present the best bid at the time when actual requirements arise. The fluctuating prices of electronic catalogues provide an example of this stuation. Purchasers may wish to use frameworks to dispense with the initial stages of the contract award process (such as the definitions of the supplies or services required, and the qualifications of suppliers) while leaving other elements (such as price) to be determined at a later time when actual requirements arise. Purchasing needs could then be periodically met by 'call-offs' under existing contractual terms, without the need to repeat initial contract award stages on each occasion. The author only deals with framework arrangements here in so far as they are directly relevant to the potential usages of electronic catalogues.[30]

The use of frameworks to take advantage of changing prices in catalogues involves several steps being taken in the contract award process. The first step is the advertisement of the framework itself, as if it were a contract covered by the GPA. Purchasers may either conclude single or multi-supplier frameworks. Where a single supplier offers a very wide range of products, entities may be satisfied to conclude a single-supplier framework, considering that any premium paid for individual items would be offset by the convenience of the broad availability of items from one reliable source. In contrast, multi-supplier

[30] A comprehensive analysis of the different kinds of framework arrangements, and their compatibility with the EU Directives has been undertaken by S. Arrowsmith. The author draws considerably on the analysis presented in these papers. See S. Arrowsmith "Framework Purchasing and Qualification Lists under the European Procurement Directives: Part 1" (1999) 3 *Public Procurement Law Review* 115; S. Arrowsmith "Framework Purchasing and Qualification Lists under the European Procurement Directives: Part 2" (1999) 4 *Public Procurement Law Review* 161.

frameworks involve two or more suppliers which would enable advantage to be taken of the different prices offered. Both kinds of frameworks can involve different obligations being undertaken by purchasers and suppliers. Purchasers may undertake to source all future requirements which may arise during the lifetime of the framework from among the framework suppliers. These suppliers could in turn undertake to make themselves available to supply. There are various other options, ranging from firm commitments to purchase or supply being provided on one side only, to frameworks for future orders binding neither the suppliers nor the purchaser.

Given the GPA's current silence on the use of frameworks, there is considerable uncertainty over when a regulated contract arises under these various options. The same uncertainty also exists under the EU public sector Directives, and in this context it has been argued that, for each of the above options, a contract to which the Directives apply does not arise until a single supplier is selected to fulfil a specific order placed under the framework.[31] The principal reason for this conclusion is that the procedures of the directives envisage the selection of a single supplier for each order, and cannot be applied to contracts which have yet to identify a single supplier. This reasoning applies equally in the GPA context so that, for the above options, the framework itself should not be regarded as a contract. However, as noted above, the framework does have to be advertised as if it were a regulated contract. This is because Article IX of the GPA provides that the obligation to publish an invitation to participate arises "for all cases of intended procurement." The desire of purchasers to enter into frameworks is

[31] See S. Arrowsmith, "Framework Purchasing and Qualification Lists under the European Procurement Directives: Part 1" *ibid,* at pp. 133-141.

clearly indicative of future intended procurement. Thus an authority intending to conclude a framework will breach the GPA if it fails to advertise the framework itself, even though the regulated contract does not arise until a framework supplier is selected for a specific requirement.

After the initial step of advertising the framework, purchasers may be content to conclude a framework with only one supplier. In contrast, where a multi-supplier framework is favoured, there may be a desire to conclude frameworks with all qualified bidders submitting compliant offers. This situation is more likely where it is anticipated that prices or other terms will vary greatly over time, and where there is a need to retain flexibility in the placement of call-offs. All the qualified suppliers would then be notified of actual requirements when they arise and asked to submit their current price for the specified requirement. It is only at this stage that the award criteria, advertised when qualified framework suppliers were initially sought, are applied to the bids received.

The more likely situation however will be where the purchaser wants to limit the number of framework suppliers. This will involve different and additional procedural steps, between the advertisement of the framework and the selection of a supplier, to those identified above. The number of framework suppliers could be reduced to a manageable level, by advertising a framework inviting suppliers to submit prices based on a sample requirement. The framework would then be concluded only with the suppliers rating most highly on the specified award criteria, in response to the sample requirements. Unlike the first stage of the procedure above, the first stage here involves the application of award criteria

to the hypothetical need identified. The next stage will then be to notify the selected suppliers of the actual need which has arisen. The framework suppliers will then prepare offers in response to the actual need identified, basing their offers on current catalogue prices. An individual supplier will then be awarded the specific contract.

This kind of multi supplier framework is striking for two reasons. Firstly, it involves the application of the award criteria at two distinct stages, and for two separate purposes. At the first stage, the aim is to identify the suppliers who are most likely to present competitive bids for future requirements, by evaluating their responses to sample requirements. At the second stage, the objective is to identify the most competitive supplier for the actual requirement which has arisen. There is no provision in the GPA to prevent the splitting of the award procedure into two stages. Arrowsmith has also argued, in the context of the EU rules, that there are strong policy reasons for permitting this kind of procedure. Thus the author argues that multi supplier frameworks using a split award procedure should be permitted, because the only viable alternative of concluding a framework with a single supplier, would be no more transparent, inhibit the achievement of value for money, and would be likely to produce less competition.[32]

The second peculiarity of this kind of multi-supplier framework is that the successful firm is not awarded the contract on the basis of the original bid submitted in response to the hypothetical need identified. The successful

[32] *Ibid,* at pp. 134-135.

contractor, along with all other members of the framework, is given the opportunity to amend its bid. This is entirely permissible where the GPA's limited tendering procedure is exceptionally available, since purchasers can then choose what kind of tender procedure to operate. However, where the limited procedure is not available, the compatibility of this kind of framework with the GPA depends on the extent to which bidders can be permitted to change their bids following expiry of the original deadline, and the opening of bids. The GPA provides for considerable flexibility on post tender negotiations, subject to the safeguards provided. There is no reason, under the GPA itself, why bidders should not be permitted to amend their tenders (even on price) after the expiry of the original deadline. Article XIV provides that entities may conduct negotiations if this intention has been indicated in the invitation to participate. Negotiations should be primarily used to identify the strengths and weaknesses in tenders. This is arguably applicable to the situation where suppliers are required to provide their current prices, since the intention here is to assess the relative strengths of tenders in response to actual requirements. The other safeguards are directed at ensuring that negotiations are conducted on a non-discriminatory basis. There is no reason why the framework contemplated above should produce any discriminatory effects. In particular, all framework suppliers are permitted to submit final tenders in accordance with a final deadline as required by Article XIV:4(d).[33]

[33] It can be pointed our that the EU public sector directives are probably more restrictive of post tender negotiations than the GPA. A joint Council and Commission declaration ([1994] O.J. L111/114) currently provides that "all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out." Discussions may be held with bidders, "but only for the purpose of clarifying or supplementing the content of their tenders or the requirements of contracting authorities, and provided this does not involve discrimination." To the extent that the declaration limits the use of multi supplier frameworks, it has been strongly criticised on the basis that the restrictive approach is not necessary to address transparency concerns, and many defeat the price savings which frameworks can produce. See S.

On the basis of the above considerations the GPA would appear to permit purchasers to enter into frameworks with suppliers offering electronic catalogues. Frameworks may either be concluded with all suppliers responding to advertised frameworks, or with those suppliers likely to offer the best value for money for future requirements. However, important questions concerning the application of the GPA's rules to frameworks arise given that the Agreement was clearly not drafted with their use in mind. Perhaps the most important concern is over the need for safeguards to ensure that frameworks do not unjustifiably prevent new suppliers from entering foreign markets. Frameworks of excessive duration could clearly limit the competition for contracts contemplated by the GPA. There is therefore a need to consider whether existing tender procedure rules directed at the transparency of award procedures, and the non-discriminatory treatment of suppliers are sufficient, or whether specific rules are required to prevent the abuse of frameworks. There is some uncertainty over how the aggregation rules contained in Article II of the GPA should apply to frameworks. The position is particularly complicated in the case of 'multi user frameworks' where a number of entities form a consortium, and then set up a joint framework with one or more suppliers, or where there are separate sub-units of a single entity. The question on which policy guidance or new rules may be required is therefore at what level the aggregation rules apply.

These concerns are relevant to the use of frameworks in general. A particular uncertainty, however, relates to the usefulness of frameworks concluded with suppliers providing electronic catalogues. It was noted above that frameworks can go some way towards facilitating the use of electronic catalogues by avoiding

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Arrowsmith "Framework Purchasing and Qualification Lists under the European Procurement

the repetition of parts of the contract award procedure for each contract periodically placed under the framework. Once the framework itself has been advertised, and framework suppliers have been selected, the specifications of the goods and services required and the qualification of suppliers will have been determined on a once and for all basis for the duration of the framework. The need to advertise each and every call off will then be avoided. However, it is clear that the existence of the framework only obviates the need for separate calls for competition, and that the remaining contract award procedures must be followed. For the frameworks which are most likely to be used in connection with electronic catalogues (those involving the submission of current prices for actual requirements arising) the procedural rules require that framework suppliers be notified of the actual requirement which has arisen, and given the opportunity to present new bids. Thus Article IX:6(a) requires that where there are recurring contracts, each notice of proposed procurement shall provide, "an estimate of the timing of the subsequent tender notices." This provision exemplifies a policy of taking active steps to inform suppliers of new requirements which have arisen. However, it would clearly defeat the purpose of the framework if entities were required to publish a formal tender notice for each call-off. There is therefore a need to clarify the GPA on how the framework suppliers need to be notified of individual requirements, and whether this can be done by fax or E-Mail.

The GPA provisions dealing with the right of suppliers to formally submit tenders also casts some uncertainty over the usefulness of frameworks for the exploitation of electronic catalogues. For example Article XI:3(b) envisages that where there are recurring contracts, suppliers must be provided with at least 24

Directives: Part 1" *supra* note 30, at pp. 136-137.

days to submit their tenders. The GPA does not define what is meant by a recurring contract although it is arguable that this phrase would cover periodic orders for the same or similar goods or services. If the provision is applicable to the use of electronic catalogues, the period of 24 days for tender submission could be regarded as unnecessarily long given that the framework will have finalised most aspects of the transaction other than price. This particular aspect of the apparent inflexibility of the rules could be dealt with by relying on the approach to the regulation of periodic call-off suggested above. That is, the submission of an up to date tender could be regarded as a negotiation based on the original bid. The relevant provision is then Article XIV:4(d) which permits entities to set their own deadline for the submission of final tenders. Clarification over the scope of these provisions would be most welcome however.

While it is clear that the use of a framework removes the need for each requirement to be advertised via a formal tender notice, it is unclear how the remaining procedural obligations should be applied. There is therefore a need for discussion and guidance on what safeguards are necessary when framework suppliers are periodically selected. It is clear however that the GPA does not permit purchasers to simply check electronic catalogues for up to date prices for their requirements, and immediately conclude a contract with the supplier advertising the lowest price. For routine purchases, this is arguably an option which purchasers would want in order to take advantage of spot prices offered by electronic catalogues. While frameworks do remove some of the formalities of tendering procedures, it is arguable that they do not go far enough to allow the advantages of new purchasing methods to be fully exploited. To allow purchasers to select suppliers based on their own assessment of market prices

could be seen to reduce the transparency of award procedures, and increase the potential for discriminatory treatment. It is therefore not suggested that the GPA's procedural obligations should be dramatically revised at this stage. However, the wider issue which needs to be addressed is the extent to which these disadvantages can be outweighed by the commercial advantages of building more flexibility into the regulatory framework. In the EU context, the Commission has recently announced that it will soon be inviting Member States to devise pilot projects on electronic procurement at the sub-threshold level. This could provide an opportunity for testing the extent to which the equal treatment of suppliers, and the transparency of award procedures are compromised by new and flexible procurement methods regulated only by the Treaty's fundamental obligations rather than the detailed rules of the Directives.

Conclusion

There is no doubt that the use of ICTs for procurement covered by the GPA can make a significant contribution to the Agreement's objectives. The operation of existing procedures via electronic means has the potential to facilitate both the identification of procurement opportunities, and the retrieval of tender documentation. Supplier awareness of national and cross-border procurement opportunities could be enhanced, thereby contributing towards the price savings which membership of the GPA, and adherence to its procedural obligations, is capable of achieving. Contracting authorities may also benefit from reduced deadlines at various points in the procedures thus enabling goods and services to be obtained more quickly than via existing paper-based procurement methods. These are some of the potential advantages which can improve the benefits of

GPA membership. This Chapter has considered whether these benefits are likely to be achieved in the short to medium term.

It is concluded that the use of ICTs is unlikely to enhance the benefits of GPA membership at least in the short to medium term. This is primarily due to the emphasis which has been placed upon streamlining procurement processes at national and regional levels. To date, these developments have done little to make procurement opportunities covered by the GPA easier to discover. Thus national and regional databases do not at present earmark contracts covered by the GPA which would clearly indicate to foreign suppliers that their participation is permitted, and their non-discriminatory treatment required. Nevertheless, the development of national and regional databases, which are in principle accessible to all suppliers, are likely to be of benefit to larger established firms, with access to the necessary ICT expertise, and the desire to serve international procurement markets. There are therefore legitimate concerns that ICTs will widen the gap between established government suppliers, and suppliers who face difficulties in the identification of procurement opportunities and the preparation of tenders to the required standard.

The division of responsibility for the development of databases between the public and private sectors, is regarded as entirely appropriate as it is the private sector which will offer the most innovative solutions to the problems which are encountered. However, an inevitable consequence of private sector involvement is that procurement information will become a tradable commodity, and the quality of information available to suppliers will depend on the level of services

which are purchased from VANs or equivalent information providers. It is those suppliers which currently serve government markets that are likely to be in the best position to absorb the costs of the more sophisticated services on offer, and which will therefore be the most responsive to procurement needs. It is therefore suggested that the frequently cited benefit of ICT implementation in increasing SME involvement is likely to prove illusory in the short to medium term.

The role of the WTO as moves are made towards fully electronic procurement will be rather limited. Its most immediate task will be to give effect to Article XXIV:8 by removing the barriers to electronic forms of communication currently found in some provisions, to avoid the Agreement being seen as an impediment to the rapid developments in progress. It is clear that the WTO has already recognised this need in proposing the changes outlined in section 3. A more difficult question is the extent of the WTO's involvement in promoting the use of ICTs in such a manner as to enhance the transparency of procurement procedures and minimise any discriminatory treatment of foreign suppliers. The limited steps which the WTO will be able to take here will take the form of either additions to the GPA's text, or mutually agreed policies, with priority likely to be devoted to the latter. The importance of ensuring that electronically available procurement information can be accessed by all suppliers having access to commercially available ICT tools is the most important policy objective which the WTO needs to emphasise. This policy could be strengthened by pointing out that Article III will clearly be breached when databases are only accessible to national suppliers. Article III would also be breached if it were significantly

easier for national suppliers to access their databases because of the use, for example, of national standards for electronic communication.

However, the use of commercially available ICT tools for accessing databases is the limit of Article III's non-discrimination requirements. It does not prevent the rapid implementation of ICTs in such a manner as to result in de facto discrimination against those suppliers not having access to the necessary technology. An internationally recognised timetable for the implementation of ICTs and the phasing out of paper based forms of communication, could do much to minimise the effects of de facto discrimination. As regards the insertion of new provisions, it has been noted that the ease with which procurement information can be identified and retrieved could be enhanced by the adoption of internationally recognised codes for the description of goods and services. Such a code would need to allow purchasers to accurately and comprehensively define their requirements. A provision to require procuring entities to describe their requirements by reference to the CPV developed by the EU could be considered. However, while the current CPV is among the most comprehensive codes for describing goods and services, legitimate concerns over its responsiveness to the needs of purchasers remain. The credibility of the CPV will need to be improved, and its use within the EU established on a compulsory and exclusive basis, before meaningful calls for its adoption at the international level can be made.

It can finally be noted that the GPA can be interpreted as permitting the use of the new purchasing medium provided by electronic catalogues. However while

frameworks could be set up with a number of suppliers to facilitate the use of electronic catalogues, it is arguable that they do not permit sufficient flexibility to fully exploit the potential savings available. Greater flexibility however leads to legitimate concerns over how to safeguard the non-discriminatory treatment of suppliers and the transparency of contract awards. Such is the importance of these concerns that it is entirely inappropriate to accommodate new purchasing methods made possible by ICTs within the framework of existing rules which were not drafted with recent developments in mind. There is therefore a need for debate over what kind of tender procedure rules should govern the use of electronic catalogues, with a view to ensuring that they can be fully exploited consistently with appropriately formulated transparency and non-discrimination obligations.

Chapter 6

Remedies and enforcement under the GPA[1]

Introduction

The effectiveness of the GPA remedies and enforcement systems will be crucial to its overall success and of primary concern to both aggrieved suppliers and the member governments. The importance of enforcement systems is indicated clearly by the EU's experience in this area. It was found in 1996 that the ineffectiveness of enforcement measures was a key reason for failure of the original rules on procurement adopted in the 1970's.[2] The enforcement and remedies under the GPA, which are analysed in this Chapter, can be understood from two perspectives.

Firstly, there is the need to ensure that the procurement procedures established are followed in individual cases. While the Agreement guarantees suppliers the right to participate in covered procurement without being discriminated against, this assurance alone would be unlikely to inspire the confidence necessary to engender cross-border participation, without the means to verify that that the required procedures have been followed. Beyond a mere process of verification, it is also important that suppliers should be able to enforce their rights in a meaningful manner, with suitable remedies for breaches of the rules being provided. It is the

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[1] On remedies under the GPA see M. Footer, "Remedies under the New GATT Agreement on Government Procurement" (1995) 4 *Public Procurement Law Review* 80; C. Schede, "The "Trondheim" Provision in the WTO Agreement on Government Procurement : Does this "Major Revision" live up to the needs of the Private Sector?" (1996) 5 *Public Procurement Law Review* 161; A. Davies, "Remedies for Enforcing the WTO Agreement on Government procurement from the perspective of the European Community – A critical view" (1997) 4 *World Competition* 113.

[2] Euro Strategy Consultants, "The Single Market Review Series, Subseries III, Dismantling the Barriers: Public Procurement", Chapter 8 on Remedies and Enforcement, published on the European Commission's internet pages under The Single Market Review Series, Subseries III – Dismantling of Barriers : Public Procurement, July 1996. http://europa.eu.int/comm/dg15/studies/stud26.htm

considerable number of suppliers who can potentially respond to GPA procurement opportunities, who are in the best position to detect breaches of the rules in individual cases. It is therefore important that suppliers be given the proper incentive to challenge suspected cases of non-compliance, or pass their concerns on to investigating authorities.

Under this first perspective, it is clearly the suppliers themselves who assume primary responsibility for taking action to protect their rights. In contrast, under the second perspective to the enforcement process, it is the member governments who take up complaints against other member governments. The purpose of the complaint may overlap with that of the first perspective; in other words it may also be concerned with the observance of the rules in individual cases. The second perspective is distinguished however, in that it may be primarily concerned with issues of whether the Agreement has been properly implemented, and of whether particular provisions are understood in the same sense between the members. It is in these areas that the strength of inter governmental dispute settlement procedures potentially lie. The role of the member governments will also be complemented, however, by the involvement of individual suppliers. They too will be concerned to take action against implementation failures, through challenging individual decisions made under putatively unlawful legislation.

The GPA's present enforcement provisions are derived from two sources. Firstly, there is the general consultation and dispute settlement procedure (DSU), a compulsory and binding system of dispute settlement. It is the Contracting

Parties to the GPA which bring disputes under the DSU, to challenge specific procurements, or the general non-implementation of GPA obligations. The DSU is therefore concerned with the second perspective to enforcement identified above. Section 1 of this Chapter considers whether the GPA's proper implementation and the observance of its procedural obligations is likely to be reinforced and enhanced through actions by signatories under the strengthened DSU rules. It is suggested that the DSU is unlikely to provide aggrieved suppliers with effective redress, and that this should not be understood as its principal objective. Rather, the DSU is more likely to be an effective instrument for clarifying points of uncertainty concerning the meaning and requirements of the GPA, and for obtaining rulings against Parties who fail to fully, or properly, implement the Agreement.

Section 2 considers the remedies derived from the obligation to provide for national challenge procedures under Article XX. This represents a major revision by requiring the Parties to provide for procedures whereby aggrieved private entities can challenge awarded contracts. The GPA is one of only a few WTO Agreements requiring that national remedies be provided to individuals affected by breach,[3] although provision for such procedures had already been established in the regional agreements such as the North American Free Trade Agreement (NAFTA)[4], and under the EU's procurement regime. It will be suggested that the

[3] National remedies must also be made available under Part III of the Agreement on Trade Related Aspects of Intellectual Property Rights which requires the Parties to make civil judicial proceedings for the enforcement of intellectual property rights available to "right holders". These proceedings must permit the taking of effective action against any act of infringement covered by the Agreement including the provision of remedies such as injunctions and damages.

[4] NAFTA, published in the Free Trade Law Reports (CCH Int'l) Special Report Number 36. The text can also be viewed on the NAFTA home page at http://www.nafta.net/naftagre.ftm. For an analysis of

Article XX procedure is an important step forward. However, there is cause for concern over the level of discretion given to the Parties in implementing their obligations, and over their ability to determine their own timetable for dealing with complaints. This is especially so as rapidity and cost of relief are likely to be pivotal to the success of the national challenge procedures.

Section 3 deals with the relationship between international and national dispute settlement, and how the, 'exhaustion of local remedies rule' affects this position. The Dispute Settlement Body (DSB) and national courts may, in some circumstances, find that they are adjudicating on the same dispute in a situation where neither the GPA nor the DSU gives any guidance on which ruling should take precedence. This raises the issue of whether governments should be able to commence inter-governmental proceedings against a breach of the Agreement, when their national suppliers may be challenging the same breach before the review bodies of the breaching party.

Finally, section 4 suggests that the existing framework for enforcement and remedies may be inadequate to secure the observance of the Agreement and the confidence of potential suppliers. Recent proposals towards alternative and complementary enforcement mechanisms are examined.

1. The Dispute Settlement Understanding

a) The changing nature of international dispute settlement

NAFTA's treatment on public procurement, see most recently, A. Reich, *International Public Procurement Law: The Evolution of International Regimes on Public Purchasing* (1999; Kluwer Law

Prior to the adoption of the Uruguay Round texts, the dispute settlement framework reflected the emphasis on mutual negotiation and agreed solutions rather than international litigation with binding results. Most strikingly, until the 1989 improvements[5] the GATT Members ultimately had the possibility of blocking both the decision to establish a panel, and the adoption of a panel report. Although the use of the veto had been rare, it has been noted that that it was not so much the blocking itself which stagnated the system, but rather the possibility of blocking.[6]

The new DSU creates an integrated system of dispute settlement under the authority of a newly created entity - the Dispute Settlement Body (DSB) composed of WTO Members' representatives.[7] The DSU applies equally to all the multilateral and plurilateral trade agreements. This is made clear by Article II:2 of the WTO Agreement[8] which provides that, "the DSU is an integrated part of this Agreement, binding on all Members". However the GPA contains special dispute settlement rules and procedures, which prevail over the corresponding DSU rules.

Several key improvements are introduced by the new DSU. In many respects, these are mere codifications of existing practices. For example, while S11 of the

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International) Chapter IX.

[5] 1989 Dispute Settlement Procedures Improvements, BISD 36S/61 (1990)

[6] J. Bourgeois, *The Uruguay Round of GATT: Some General Comments from an EC Standpoint*, paper presented at the University of Michigan alumni reunion, Florence, 3 June 1994.

[7] The DSB is in charge of the establishment of panels, the adoption of panel and Appellate Body reports, the making of recommendations or rulings on the disputes and the surveillance of implementation of rulings and recommendations. See GPA, Article XXII:3.

[8] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement Establishing the World Trade Organisation, published in (1994) OJ L336/3.

new Understanding still stated that panel members would "preferably be governmental", Petersmann[9] notes the almost exclusive recourse, since 1952, to "panels of independent experts" for a strictly "rule oriented" settlement of disputes. Accordingly, the new text[10] provides that "panels shall be composed of well-qualified governmental and / or non-governmental individuals....", and goes on to emphasise the importance of ensuring the independence of the members. The arbitral quality of panels in the GPA context is further enhanced by the requirement that panels should include persons qualified in the area of government procurement.[11]

Other changes are completely new however. Of these, the most significant is, firstly, the introduction of an Appellate Review procedure. Secondly, there is a new requirement that there be a negative consensus to block the adoption of a panel report. Thirdly, complaints are subject to far stricter procedural deadlines. Finally the DSB can impose sanctions in the form of suspension of concessions if rulings are not implemented. The significance of these improvements in the procurement context is discussed below.

b) The Dispute Settlement Process

i) Consultations

The Parties are encouraged to enter into preliminary consultations aimed at clarifying and, where possible, settling disputes by agreement. Consultations remain a prerequisite for invoking the multilateral DSU process, and, "should not

[9] E.U. Petersmann, "The Dispute Settlement System of the WTO and the Evolution of the GATT dispute settlement system since 1948" (1994) 31 *Common Market law Review* 1157.

be intended or considered as contentious acts."[12] Nevertheless, several provisions, contained in the DSU itself, limit the autonomy of the parties to reach solutions bilaterally. Article 3(5) provides that, solutions to matters raised under the DSU, "... shall not nullify or impair benefits accruing to any member under [the covered Agreements] nor impede the attainment of any objective of those agreements." Article 4(4) further provides for all requests for consultation to be notified to the DSB in writing specifying the legal basis for the complaint.[13] These provisions greatly reduce the risks of "power oriented" dispute settlement where the solution reached may be influenced more by the imbalance of the economic power of the parties than by genuine compromise.

ii) Panel proceedings

Panel proceedings are central to the strengthening of the multilateral system. Accordingly, Article 23 DSU gives a firm exhortation against unilateral measures, whereas the explicit right of WTO members and of the DSB to challenge bilaterally agreed dispute settlements and arbitration awards (Article 3(6)) underlines the multilateral nature of the WTO Agreement. The right to a panel following the failure of consultations is virtually automatic. Article 6(1) of the DSU confirms that only a negative consensus of the DSB will prevent a panel from being constituted. The terms of reference are governed by Article XXII:4 of the GPA unless the parties to the dispute agree otherwise within 20 days of the

[10] DSU, Article 8.
[11] GPA, Article XXII:5 .
[12] DSU, Article 3(10).
[13] GPA Article XXII envisages two causes of action resulting from the misconduct of a member state in the form of either a "violation complaint" or a "non-violation complaint." DSU Article 26 clarifies the use of non-violation complaints, and places them on a very limited basis by providing that the

establishment of the panel. Otherwise, the panel will examine the dispute and make, "such findings as will assist the DSB in making the recommendations or in giving the rulings on the matter."

The GPA also modifies the DSU in respect of the timetable for DSB decisions with a view to accelerating final decision. Article XXII:6 requires that, "every effort be made" to reduce the period from the date of establishment of the panel until the date the DSB considers the panel or appellate report for adoption from 9 months to 7 months in the case of a panel report and from 12 months to 10 months in the case of an Appellate Body report. In the case of disagreement as to the existence or consistency with a covered agreement of measures taken to comply with recommendations and rulings, the panel shall attempt to issue its decision within 60 days.

It is suggested that even these deadlines are too long if one expects proceedings under the DSU to lead to an effective remedy in procurement related disputes. Suspension of the award procedure or rescission of a wrongfully awarded contract can only really be available as remedies within the first few weeks of the wrongful act leading to the proceedings. Following this period, the works or services envisaged by the contract are likely to have commenced, and any remedies other than compensation become increasingly impractical to grant, or disproportionate to the wrong committed. The limitation of the final remedy where the contract has been concluded, or where contractual performance has

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complaining party must present a detailed justification in support of the complaint relating to a measure which does not violate the covered agreement in question.

commenced, will frequently be justified by the inconvenience of delay and the prejudice caused to the successful (and potentially blameless) supplier to whom the contract has been awarded. The difficulties connected with granting an effective final remedy are further considered in Section 2(a)(iii) of this chapter below.

iii) Negative consensus required to block report adoption

The single most important achievement of the new DSU is the requirement of negative consensus of the DSB to block adoption of panel reports. Politically impalatable reports have been blocked in recent times. In the procurement context, of the small number of panel decisions handed down to date, one of them, the 1992 *Sonar Mapping Decision* remains unadopted to this day.[14] The blocking of panel report adoption by a single state (normally the losing state) is no longer possible, or, at least, cannot be done compatibly with international obligations under the DSU. Articles 15 and 16 provide that a panel shall submit its report to the Parties for initial comments and then re-issue its findings and conclusions at an interim review stage to the Parties. If no further comments are received then the interim report is issued as a final report and circulated to all WTO members for their consideration. Article 16(4) requires adoption at a DSB meeting within 60 days after the date of circulation to all Members, unless one of the Parties notifies the DSB of its intention to appeal. At the Appellate Body level, Article 17(14) leads to an effect similar to that of Article 16(4).

[14] *Re Procurement of a Sonar Mapping System: European Community v United States* GATT document GPR. DS1/R April 23, 1992, reported at [1992] 3 CMLR 573. For a detailed consideration

While this clear shift towards rule oriented dispute settlement can be regarded as essential to the promotion of confidence and credibility in the GPA dispute settlement process, it is to be expected that the "quasi automatic"[15] adoption of panel reports will lead to problems where members are forced to accept reports which condemn domestic policies. There is already clear evidence of uneasiness about the move away from decision making by consensus. The US, for example, has proposed implementing legislation which may force it to leave the WTO if too many adverse and legally questionable decisions are adopted against it.[16]

Questions must then be raised about the role of panel proceedings in procurement disputes. It seems unrealistic to expect that an individual contractor will receive an effective and timely remedy from panel proceedings when one considers the framework of rules in which the DSU operates. It is the Contracting Party to the GPA which brings the proceedings; the aggrieved contractor possessing only the limited possibe role of alerting its government of a possible infringement of the Agreement. Further, when one considers the actual remedies available to contractors under the DSU (discussed below), which are very limited in nature, it becomes clear that the DSU cannot be expected to routinely provide contractors with effective remedies. Indeed it may be doubted whether the provision of effective relief for the individual case should be regarded as the principal purpose of the DSU in the procurement context. Proceedings under the DSU are likely to be more effective at providing for the repeal of legislative or regulatory measures

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of this case, see M. Footer, "GATT: Developments in Public Procurement Procedures and Practices" (1993) 6 *Public procurement Law Review* CS 193.

[15] The term is Petersmann's, *supra* note 9.

[16] See G.N. Horlick, "WTO Dispute Settlement and the Dole Commission" (1995) 6 *Journal of World Trade* 45.

which are inconsistent with the GPA, securing non-repetition of wrongful procurement practices, and providing interpretations of the requirements of GPA provisions.

iv) Specific remedies under the DSU in the context of procurement disputes

Article 19(1) DSU requires the panel to, "recommend that the Member concerned bring the measure into conformity with that Agreement." The Panel may also recommend ways in which the member concerned could implement the recommendation. Further, Article XXII:3 GPA provides that the DSU, "shall have the authority to...make recommendations or give rulings on the matter", referred to it. However, when the rulings and recommendations the panel can actually make are considered, it becomes apparent that the new GPA has missed the opportunity to strengthen the system of remedies which had caused concern in panel proceedings under the Tokyo Round Agreement. Additionally, it is unlikely that a new provision under Art XXII(3) allowing the DSB to "authorise consultations regarding remedies when withdrawal of measures found to be in contravention of the Agreement is not possible" will markedly improve matters.

This latter provision was inserted because of the unsatisfactory experiences that signatories to the Tokyo Round GPA had with panel decisions finding GPA violations, but not offering any satisfactory remedy to the country discriminated against, or its unsuccessful tenderer/s. However, GPA Parties are likely to be unimpressed with the results of authorised consultations due to the severe limitations on the scope of the possible outcomes described below. The

proceedings which led to the introduction of the new provision in Article XXII:3; the *Trondheim* Panel Report,[17] will first be considered.

The case involved a contract relating to electronic toll collection equipment which had been single tendered to a domestic firm as a research and development contract. The US claimed that the Norwegian Government had excluded competition from a capable US supplier, and thereby violated the GPA. The Panel concluded that the single tendering of the contract could not be justified under any provision of the Agreement. However, it recommended merely that the Committee on Public Procurement[18] request Norway should take measures necessary to ensure that its entities conduct their procurement in accordance with the Panel's findings. It did not follow the US' request to provide it with what it called a "sufficient remedy" providing a deterrent effect. Specifically, the US requested a panel recommendation that Norway negotiate a mutually satisfactory solution with the US that took into account the lost opportunities of US companies. This solution, it suggested, "could take a number of forms, such as annulment of the contract, the provision of additional opportunities to bid for future contracts and assurances about future conduct."[19] In case event of the proposed negotiations failing to produce the envisaged result, the US requested the recommendation that the Committee be prepared to withdraw benefits under

[17] Report of the Panel on "Norway - Procurement of Toll Collection Equipment for the City of Trondheim", GATT Doc. GPR.DS2/R, 28 April 1992. For a detailed examination of the issues in the case, see C. Schede, *supra* note 1.

[18] This is the body representing all signatories, to adopt panel reports and supervise the application of the Agreement, which (under GPA Article XX:1) is now only responsible for "affording Parties the opportunity to consult on any matters relating to the operation of [the GPA] or the furtherance of its objectives", while the dispute settling function is now managed by the Dispute Settlement Body, GPA Article XXII.

[19] Report of the Trondheim Panel, *supra* note 17, at pp.14-15.

the Agreement from Norway with respect to opportunities to bid of equal value to the Trondheim contract.

However the Panel chose instead to require from the Norwegian Government what amounted to little more than a guarantee of non-repetition of the wrongful procurement practice. It refused to recommend that Norway take the necessary measures to bring its practices into compliance with the Agreement. Since all acts of alleged non-compliance had taken place in the past, bringing the Trondheim procurement into conformity with Norway's obligations would have meant annulling the awarded contract and recommencing the procurement process.

The Panel considered that recommencement of the contract award would be inappropriate, in particular because, "the panel considered that in the case under examination such a recommendation might be disproportionate, involving waste of resources and possible damage to the interests of third parties."[20] The ruling therefore did nothing to eliminate the wrongful act and its economic consequences. Further, except for the new provision in Article XXII:3 regarding authorisation of remedies neither the GPA nor the DSU provide additional remedies from those previously available. The unsatisfactory situation left to the complaining party by the Trondheim case may only be countered by authorised consultations regarding remedies under Article XXII:3. The likely impact of this provision will now be examined.

The most that the DSB can do is to authorise consultations which, along with any possible agreement, must take place on a voluntary basis. The GPA does not alter Article 19(1) of the DSU (detailed above). Therefore, even under the new GPA, a panel or the Appellate Body could not follow the US request in the Trondheim case which aimed at *recommending* that Norway negotiate a mutually satisfactory solution with the US. The emphasis is, therefore, very much on consensus both in terms of initiating the consultations, and their result. Annulment of the contract and recommencement of the procurement under the Trondheim provision remains a remote possibility.

The US had also suggested that the provision of additional opportunities to bid for future contracts might be a possible remedy. However, this possibility is greatly curtailed by legal obstacles resulting from the basic principles of the GPA itself. Article III:1(b) excludes any treatment less favourable than "that accorded to products, services and suppliers of any other Party." Therefore, any opportunity to bid that is provided to suppliers of one Party, would also need to be offered equally to suppliers of all other contracting Parties.[21]

Of particular importance to the aggrieved supplier will be the possibility of obtaining monetary compensation under the Trondheim provision. Compensation can only be granted on a voluntary basis. This is explicitly mentioned in DSU Article 22, and must also be the case under the Trondheim provision given that

[20] *Ibid.* p. 21.

[21] Additionally any qualification requirements structured so that they could only be met by the suppliers from the state which was promised additional opportunities to bid, would most likely constitute a violation of GPA Article VIII, which requires that only conditions which are essential to the firm's capability to fulfil the contract may be relevant to participation in the tendering procedure.

any solution reached must be by consensus. Under the non-discrimination principle of GPA Article III:1, it is likely that the Party granting the monetary compensation will be obliged to make equivalent offers to all trading partners which have been similarly affected by the same GPA infringement. Plainly, this will hamper the potentially liable Party's willingness to give ground in negotiations.

The practical value of the Trondheim provision is therefore likely to be very limited. Any consultations entered into must be on a voluntary basis and the outcome remains subject to the Parties' discretion. The situation is little changed from the pre-Trondheim position where the Parties were always free to reach a mutually acceptable agreement provided that this was consistent with the covered Agreements. All the new provision does is formalise this process and integrate it into the multilateral framework. This tends to confirm the observation made earlier that private entities should not focus their efforts on the DSU if they are seeking an effective remedy. Its role can more properly be seen as restricted to the giving of interpretations on the requirements of the GPA, and the repeal of national legislation or procurement practices found to be inconsistent with the Agreement. The time scale contemplated for panel proceedings, along with the nature of the remedies available are likely to mean that the DSU will perform the above functions while continuing to be an inappropriate source of effective remedies for private entities.

v) Compensation and the suspension of concessions

The DSU Articles 22:1 and 2 expressly provide for compensation as a preliminary remedy, to be resorted to, "only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered Agreement". While the granting of compensation is voluntary and is of a temporary nature, the entering into negotiations on compensation is mandatory, if requested by the successful complainant.[22]

This contrasts with the Trondheim provision, where the entering into negotiations on compensation is voluntary, and where compensation seems to be envisaged as a lasting and final solution. It is unclear whether compensation must be granted on a non-discriminatory basis under Article 22; the DSU ordering only that compensation be, "consistent with the covered agreements." However, as stated by Lowenfeld, "compensation by the offending party would, it seems clear, have to be granted on a MFN basis, because it would not fit into any of the permitted exceptions to that fundamental principle of GATT."[23]

If there is a failure to comply with the panel's ruling or recommendation within a reasonable period of time laid down in Article 21, and ensuing negotiation under DSU Article 22 on, "developing mutually acceptable compensation" fail, then recourse may be had to Article 22(2) on Suspension of Concessions. On this matter the GPA provides at Article XXII:7 that a dispute under the GPA cannot result in the suspension of concessions or other obligations under any covered

[22] DSU, Article 22(2).

agreement other than the GPA itself. The practice of cross-retaliation is not therefore permitted under the GPA.

However, if the panels restrict their recommendations to requiring only that Parties take measures necessary to ensure that their entities in future conduct their procurement in accordance with the findings of the panel, (as was the case in Trondheim), then this can easily be complied with and proceedings would never reach the Article 22 stage. It may finally be noted that it is unlikely to be possible to suspend concessions at all if negotiations towards compensation under the Trondheim provision come to an unsatisfactory end. This is because the consultations under the Trondheim provision are outside the system of dispute settlement which can eventually lead to suspension of concessions.[24] These are available only where the mandatory negotiations under DSU Article 22 fail.

vi) Conclusion

The new WTO dispute settlement system overcomes, to a large extent, the procedural fragmentation of the processes which had characterised its predecessor. It also places great emphasis on a "rule oriented approach" to dispute settlement by an independent appellate body and "professional" dispute settlement panel with expertise in the field of procurement. However, it does nothing to enhance the remedies actually available beyond placing the relevant procedures on an integrated, multilateral level.

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[23] A.S. Lowenfeld, "Remedies along with Rights: Institutional Reform in the New GATT", (1994) 88 *American Journal of International Law* 477 at p.486.

Undoubtedly, this will enhance the process of intergovernmental dispute settlement insofar as one is seeking interpretations on the meaning and requirements of the GPA, or a ruling against a Party who has failed to implement a GPA obligation. However the institutional and procedural enhancements described are unlikely to benefit suppliers seeking effective remedies. As will now be explained, unfairly treated bidders would be better advised to concentrate on the newly provided domestic bid challenge systems.

2. National Challenge Procedures Under Article XX GPA

The challenge procedures are intended to introduce nationally available remedies which respond more closely to the nature of procurement disputes. The first step under Article XX:1, is to encourage resolution of the complaint against the procuring entity by means of consultation but without prejudice to the instigation by the aggrieved supplier or service provider of an actual challenge procedure. Should consultations fail, the central obligation under Article XX:7(a) is to give suppliers with an interest in a procurement access to "non-discriminatory, timely, transparent and effective procedures" to challenge any alleged breaches of the Agreement in the context of that procurement. There follows an analysis of the remedies which must be accessible to suppliers before national review bodies, and of their likely effectiveness.

a) The available remedies under Article XX

[24] This process consists of, consultations, panel/Appellate Body recommendation or ruling, adoption, and implementation.

The available remedies which must be available are set out in Article XX:7(a), (b) and (c). These three paragrpahs require that review bodies must have the competence to perform three separate functions in relation to the complaints which come before them. Firstly, under paragraph (a), review bodies must have the power to award interim or temporary measures, as soon as they are alerted of a complaint. Secondly, under Article paragraph (b), they must have the power to reach decisions on the merits of the complaint, and to determine whether the Agreement has in fact been breached. Thirdly, under paragraph (c), review bodies must have the power to actually grant a final remedy.

i) The power to grant interim measures

Article XX:7(a) requires that review bodies have the power to grant, "rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities". It is provided that this may result in the "suspension of the procurement process." However, it is also provided that such measures may be refused because of "overriding adverse consequences for the interests concerned, including the public interest." This proviso suggests that the interests served by providing interim measures, may be outweighed by other competing interests such as the inconvenience or expense of delaying the contract award. A safeguard is provided against the abuse of this provisio, by the requirement to provide "just cause" for not granting interim measures in writing.

It is crucial that review bodies should be empowered to suspend the procurement process, pending the resolution of the complaint before them. The earlier review

bodies are able to intervene, the more effective and meaningful the final remedy is likely to be. Where review bodies are able to act swiftly to suspend a procurement process, they are likely to have a broad range of final remedies at their disposal, in the event of the complaint being upheld. In contrast, where the award procedure has been permitted to proceed without intervention, pending the resolution of the complaint, (perhaps even to the extent of the commencement of contractual performance) review bodies would be justifiably reluctant to annul an awarded contract as a final remedy. Where the contract has been concluded and, even more so, where performace has commenced "overriding adverse consequences" may militate increasingly against the holding up of the commencement or continuation of contractual performance.

Article XX does not specify or suggest any cut-off beyond which the granting of interim measures should not be permitted. The Parties may therefore either specify an appropriate cut-off point themselves, or leave it to their national review bodies to decide when the need for interim measures is outweighed by the need for finality and certainty in the decisions made.

It can finally be noted in relation to Article XX:7(a) that the reference to "...interim measures *to correct breaches*... " (emphasis added) in this provision is somewhat confusing. This is because the purpose of interim measures is to provide a breathing space, by delaying the procurement process. It is during this period that review bodies should proceed to the second and third steps of deciding whether the GPA has been breached, and, if so, what final remedy should be granted. As will be seen below, the final remedy may actually involve correcting

the breach, although actual correction is but one of several possibilities. Interim measures cannot therefore correct the breach; they merely provide a period during which the review body can decide whether, and how to correct the breach.

ii) The power to reach a decision on the merits of the complaint

Under Article XX:7(b) review bodies must be empowered to make, "an assessment and a possibility for a decision on the justification for the challenge." They must in other words be able to reach a decision on the merits of the complaint, and on whether, and in what way, the Agreement has been infringed.

iii) The power to grant a final remedy

Where it is found that the Agreement has been breached, review bodies must have power to grant the complaining supplier/s a remedy. Article XX:7(c) requires that challenge procedures provide for, "correction of the breach of the Agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest."

An important point here, recently made by Reich[25], is that there is some ambiguity over who should decide upon the scope of available remedies. It is clear that Article XX:7(c) envisages two possible remedies, being either the actual correction of the breach, or damages to compensate for the breach. The question is then whether the Parties are permitted to impelment the GPA to the minimum apparent extent of providing for recovery of protest costs, or whether

this must be left to the discretion of review bodies in individual cases. The author would agree that, of these two possibilities, the latter interpretation should clearly be favoured from the perspectives of providing an incentive for suppliers to complain, and a deterrent against non-compliance with the GPA. Support for this position is also provided by the requirement in Article XX:2 that challenge procedures must be effective.

It is however regrettable that there is any scope for ambiguity here. On a possible interpretation of Article XX:7(c), the Parties would be permitted to deny suppliers any remedy other than their protest costs, even in the face of serious breaches. Moreover, the low measure of damages could also be combined with restrictive conditions for recovery requiring suppliers to show that the contract would have been obtained, were it not for the infringement. Such a minimum interpretation would result in there being virtually no incentive for complaint, and little deterrence against non-compliance.

Assuming that the Parties must provide their review bodies with discretion to choose between correction of the breach or compensation in individual cases, it remains to be asked how established breaches should actually be corrected. There are various possibilities here ranging from the removal of objectionable parts of the tender documentation (such as tender receipt deadlines which are too short, or discriminatory technical specifications) through to the annulment of a contract award, and finally the annulment of a concluded contract. The precise manner in

[25] A. Reich, *International Public Procurement Law: The Evolution of International Regimes on Public Purchasing* (1999; Kluwer Law International, Studies in Transnational Economic Law, Volume 12),

which the breach is corrected will depend upon the severity of the breach, and the timing of the complaint. In deciding how to correct the breach, and whether to grant only compensation in lieu of correction, review bodies will again need to weigh the desirability of a particular remedy, against the desire for certainty and finality in procurement decisions.

Thus a minor breach (such as a tender receipt deadline which is a few days shorter than required) would arguable not justify the re-commencement of the award, where the entity has concluded a contract. Review bodies would be likely to regard such a minor breach as a *fait accompli*, and consider that compensation alone would provide an effective remedy. On the other hand, the need for finality and certainty would be less likely to outweigh a more serious breach, such as a failure to advertise a covered contract. In this situation, effective correction would be more likely to require the re-commencement of the procurement procedure with the required invitation to participate.

Of the two options presented above (either the Parties can implement the GPA to the minimum apparent extent of providing for recovery of protest costs, or available remedies must be left to the discretion of review bodies in individual cases), the latter is therefore clearly preferable. However, the author would conclude that the actual position is somewhere in between these opposing points. In other words, a proper implementation of the GPA does not require that review bodies have an absolute discretion over whether to correct breaches, or grant compensation in individual cases. It is submitted that the Parties are permitted to

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pp. 310-311.

provide for a cut-off point when implementing the GPA, beyond which remedies may be limited to compensation alone.

Thus it is argued that implementing laws limiting the remedy to compensation, where a contract has been concluded, or where performance has commenced, would be compatible with the Agreement. Such an implementation would reflect a judgement that the interests of certainty and finality in procurement decisions, generally prevail beyond such a late stage in the procurement process. This would be a satisfactory position subject to two provisos. Firslty there would need to be a system of rapid interim measures in place to halt the continuation of a procurement to eventual contract conclusion. Early suspension will avoid contracts being concluded in breach of procedure, and limit the incidence of the automatic restriction of available remedies. Secondly the compensation remedy, granted in lieu of correction, would, itself need to be an effective remedy to encourage complaint, and deter non-compliance. The author now turns to question the effectiveness of the compensation remedy.

On the analysis presented above, the final remedy of a supplier may (compatibly with the GPA) be limited to compensation in two sets of circumstances. Firstly, national implementing provisions may provide a cut-off point beyond which only compensation is avaialble. Secondly, review bodies should otherwise have the discretion to decide whether correction of the breach, or compensation should be awarded in individual cases. At this point it can also be added that, when review boides can exercise a discretion, there is no reason why both correction and compensation should not be avaialble in appropriate cases. Where compensation

is avaialble, the effectiveness of the remedy will depend upon the measure of available damages, and the conditions for recovery.

Article XX:7(c) expressly provides that "compensation for the loss or damage suffered", "may be limited to costs for tender preparation or protest." However, it is strongly argued that the GPA's requirement for effective challenge procedures in Article XX:2, would frequently be breached if the measure of compensation were limited to these possibilities in all cases, regardless of the severity of the breach. Indpendent review bodies should therefore have the discretion over the measure of damages. Effective compensation could, in some circumstances, be limited to protest costs alone where the complaint relates to a minor breach, such as a deadline which is a few days too short. This would be the case where the review body is also able or prepared to correct the breach, and where commercial opportunities remain intact. Allowing suppliers to recover their costs in these circumstances gives them some incentive to complain. A deterrent against non-compliance would also be provided, especially if the conditions for recovery were limited to demonstrating an interest in the procurement in question.

In the face of more serious breaches however, compensation for tender preparation or protest costs alone, would be inadequate. This would generally be the case where compensation is either automatically, or determined to be the only remedy. In such circumstances there is a strong case for allowing the recovery of lost profits. The difficulty is then to determine the appropriate conditions for recovery.

Damages for lost profits could be seen as an effective remedy when made available upon demonstrating a realistic chance of winning the contract. A genuine incentive to complain would be provided. Strong deterrence would also be provided by the prospect of having to compensate more than one supplier for their lost profits. On the other hand, the conditions for recovery could be so restrictive as to deprive Article XX:7(c) of any meaningful effect. Thus it would be extremely difficult to obtain any compensation (whether for lost profits, or the costs for tender preparation or protest) where the conditions for recovery require suppliers to show that the contract would have been obtained, were it not for the infringement. It is submitted that such restrictive conditions for recovery, where compensation is the only remedy, would render the challenge procedures ineffective, and therefore breach Article XX:2.

The above paragraphs have analysed the effectiveness of the final remedies which the GPA requires to be provided, where alleged breaches are upheld. The author now turns to other factors relevant to the success of the national challenge procedures.

b) Other factors relevant to the likely success of Article XX

The GPA explicitly requires that review be completed in a "timely" fashion.[26] Similarly, under the EU procurement regime, the Member States are required to provide rapid remedies to redress breaches of procurement law,[27] which is of particular importance in procurement disputes. If relief is not rapid, the contract

[26] GPA Article XX:8.

may be completed by the time of the hearing making correction of the breach through annulment of wrongful decisions more difficult. Also, the review bodies are unlikely to give interim measures to suspend contractual performance, because of the inconvenience to the public of holding up the contract for a long period.[28] The Member States have generally not taken the need for rapid relief seriously in their implementation of the Remedies Directives, and it may be doubted whether experience under the GPA will be any better.[29] Accordingly, one would have thought it better to have removed the timetable for relief from the discretion of the GPA Parties or, at least to have provided some targets to be met. The difference of approach here between the Article XX procedure and the elaborate system of deadlines operating under the DSU is notable.

It might also be expected that willingness to litigate will depend upon the confidence which firms have in the independence of the review. Here, the GPA provides that challenges must be heard either by a, "court or by an impartial and independent review body with no interest in the outcome of the procurement and whose members are free from external influence during the term of appointment."[30]

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[27] See Directive 89/665 [1989] O.J. L395/33, dealing with remedies for enforcing the rules applying to the public sector, and Directive 92/13 [1992] O.J. L76/7 on remedies in the utilities sectors of water, transport, energy and telecommunications.

[28] For an indication of the approach of the Court of Justice here, Case 45/87, *Commission v Ireland (Dundalk)*, [1988] E.C.R. 4929; Case 194/88R, *Commission v Italy (La Spezia)*, [1988] E.C.R. 5647; Case C-87/94R, *Commission v. Belgium ("Wallonian Buses")*, [1996] E.C.R. I-2043.

[29] See S. Arrowsmith, "Public Procurement: Example of a Developed Field of National Remedies Established by Community Law", in H.W. and N. Reich (eds.), *Public Interest Litigation before European Courts* 125 (Nomos; 1996).

[30] GPA Article XX:6.

There may be questions about what constitutes independence for a review body which is not a court. Given the nature of procurement disputes, which may often be politically sensitive, the appearance of independence of the review bodies will be essential to allay any fears of executive influence over decisions. Accordingly, while complete security of tenure in a body which is not a court will be impracticable for most GPA Parties, it is arguable that a period of appointment subject to approval, renewal or termination by the executive could infringe the requirement for independence. The same might be said of a review body staffed by employees of the state, which could infringe the requirement of detachment from external influence.

Weaknesses in the enforcement mechanisms may also transpire from the GPA's failure to regulate certain common practices. An example here is that, no restrictions on cash settlements provided by the successful firm, in return for an undertaking by the unsuccessful firm to drop its suit against the procuring body are imposed. This would appear to leave the way open to collusive behaviour whereby firms could strongly influence the bidding process by pre-determining which bid is the most favourable for individual contracts.[31]

c) Enhancement of challenge procedures through recourse to internally available remedies

The system of remedies required to be provided under Article XX should be enhanced, through the ability of GPA providers to enforce the internally available

remedies of the Parties. Under the non-discrimination principle of Article III, it is necessary that, for contracts covered by the GPA, suppliers should be able to enforce all the existing national procurement regulations on both remedies and procedure.[32] This will be of little assistance to providers where they seek to challenge contract awards in states which have not already developed their remedies. It will only be possible to hold these states to the GPA's minimum standards. Even some of the major Parties to the GPA, such as Japan, lack a tradition of bid protest mechanisms.[33]

Conversely, the Article III obligation may be of considerable benefit to providers challenging decisions before EU review bodies for example. The GPA does not expressly require that review bodies must have the power to set aside unlawful decisions up to the point of contract award. It has been strongly argued above that review bodies must in fact be given the discretion to exercise this power, as a means of correcting the breach under Article XX:7(c). Any uncertainty here is however resolved where the complaint is brought before an EU review body, because of the clear treatment of this remedy in the directives. Thus Article

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[31] See A. Mattoo, *supra* note for a full explanation of this practice and further details of weaknesses in the GPA. For an analysis of the possible responses to collusion among suppliers under the GPA, see Chapter 4.

[32] In the EU context, the ability of GPA suppliers to depend upon the internally available remedies systems may be limited by the fact that the Member States have done nothing to formally extend the benefits of the national remedies to GPA suppliers. Nevertheless, it may be that these failures in implementation will not deprive GPA suppliers of domestic remedies in the interim. The precise remedies available depend on whether the award procedures, the national challenge procedures and the non-discrimination principle resulting from GPA Article III have direct effect in the legal systems of the Member States. On these issues, see, D.D. Dingel, *A Harmonization of the National JudicialReview of the Application of European Community Law* (1999; Kluwer International); D.D.Dingel, "Direct Effect of the Government Procurement Agreement" (1996) 6 *Public Procurement Law Review* 245; G. Roebling, "Invoking the Agreement on Government Procurement", (1999) 4 *Public Procurement Law Review* 187.

[33]See J.H. Grier, "Japan's Implementation of the WTO Agreement on Government Procurement" (1996)17 *University of Pennsylvania Journal of International Business Law* 605.

2(1)(b) of the the Remedies Directive[34] requires the Member States to provide their review bodies with the power:

"either to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure".

The Utilities Remedies Directive[35] also requires the same power to be made available in its Article 2(1)(b). Accordingly, an aggrieved GPA supplier could seek the removal of discriminatory conditions, or the annulment of a decision to award a contract in breach of the GPA, by relying on the national law implementing the Directives.[36] The UK Regulations, for example, expressly confer on the court a power to "order the setting aside of [a] decision or action" where this is taken in breach of an enforceable duty",[37] although set aside, as with all other forms of non-financial relief, is not available once a contract has been concluded. This limitation on available remedies, where the contract has been concluded is clearly contemplated by the Directives. Article 2(6) of the Remedies Directive leaves the remedies available after contract conclusion to be determined by national law. The same provision of the Utilities Remedies Directive is

[34] Remedies Directive 89/665 EEC [1989] O.J. L395/33.
[35] Utilities Remedies Directive 92/13 EEC [1992] O.J. L/76/14.
[36] Where national laws have not correclty implemented the Directives, it is arguable that GPA Article III requires that GPA suppliers should be able to invoke the Directives themselves before the review body. In other word, to the extent that EU suppliers would be able to rely upon the direct effect of incorrectly implemented Directives before these review bodies, it is arguable that GPA suppliers should also have the right to do so by virtue of the non-discrimination principle in GPA Article III.
[37] Works Regulation 31(6)(b)(i); Supply Regulation 25 (5)(b)(i); Services Regulation 32 (5)(b)(i); Utilities Regulation 32 (5)(b)(i)

expressed in more explicit terms, and expressly permits Member States to retrict the remedy to damages where the contract has been concluded.

A second area where the EU rules may provide for a stronger remedy than that which must be available under the GPA, is in relation to compensation for loss or damage suffered as a result of an infringement. A possible interpretation of the GPA's minimum requirement is that implementing legislation can limit to compensation for tender preparation or protest costs, even in response to serious breaches. In common with the GPA, the express requirements of the EU Directives also afford the Member States considerable discretion as to the amount of recoverable damages, and the conditions of recovery. Thus Article 2(1)(c) of the Remedies Directive, and Article 2(1)(d) of the Utilities Remedies Directive, merely provide that review bodies must have power to award damages to persons injured or harmed by an infringement.

However, because of the broader legal context in which the procurement directives exist, there is little doubt that an EU Member State would be in breach of its Community obligations, if its national laws totally excluded damages for lost profits, or if this occurred in practice.

Even though the directives do not set out the criteria on which damages must be calculated, their implementation into national law can still be measured against the principle of effectiveness.[38] Unlike the general requirement in GPA Article

[38] On the principle of effectiveness, see most recently, T. Tridimas, *The General Principles of EU Law* (1999; Oxford Univeristy Press) Chapter 8 and references cited therein.

XX:2 that national challenge procedures be effective, effectiveness has established connotations in EU law. From the relevant case law of the European Court of Justice on the national conditions governing actions for the protection of Community rights,[39] it can be discerned that effectiveness firstly requires that the overall purpose of the Directive in question be ascertained. It is clear from the European Commission's Green Paper[40] on procurement reform, and its follow-up Communication of March 1998,[41] that it sees the purpose of the remedies directives as providing both a strong incentive for suppliers to challenge breaches of the rules, and a strong deterrent against non-compliance. Therefore, Member States choosing to limit available remedies to compensation where the contract has been concluded, must ensure that the remedy has a real deterrent effect,[42] that the compensation paid must be adequate in relation to the damage suffered,[43] and that the criteria do not render it virtually impossible, or excessively difficult to obtain damages.[44]

Taking these considerations into account, it is at least arguable that where the remedy is limited to damages, recovery for lost profits should be available upon the demonstration of an infringement of the directives, and of a realistic chance of

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[39] See for example, Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westaflen* [1984] ECR 1891; Case C-271/91 *Marshall v Southampton and South-West Area Health Authority* [1993] ECR I-1476.

[40] Public Procurement in the European Union: Exploring the Way Forward COM (96) 583 final, paragraphs 3.37 and 3.38.

[41] Public Procurement in the European Union COM (98) 143. The Communication can be viewed on the SIMAP homepage at http://simap.eu.int. On the implications of the Communication, see S. Arrowsmith, "The Community's Legal Framework on Public Procurement: "The Way Forward" at last?" (1999) 36 *Common Market Law Review* 13.

[42] See for example, Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westaflen* [1984] ECR 1891; Case C-271/91 *Marshall v Southampton and South-West Area Health Authority* [1993] ECR I-1476.

[43] *Ibid.*

[44] See, for example, Joined Cases C-46 and C-48 *Brasserie du Pêcheur v Germany and the Queen v Secretary of State for Transport, ex parte Factortame Ltd.* [1996] ECR I-1029, para. 83.

winning the contract. The required deterrent effect, and incentive to challenge would seem to require this (or a similar) conclusion. If EU suppliers can recover this measure of damages under this burden of proof, then GPA suppliers should also be able to claim compensation under the same conditions, by virtue of GPA Article III.[45] The conclusion applies notwithstanding what the precise requirements of the GPA itself are.

Given that the DSU cannot be expected to provide private entities with effective remedies, the domestic challenge procedures will be pivotal to the enforcement of GPA obligations, and overall confidence in the regime of regulated purchasing. The preferred analysis of Article XX presented above, would be capable of providing an effective framework of remedies. However on a different possible interpretation of the requirements of Article XX, it is also arguable that too much implementing discretion has been left to the Parties, and that a minimum implementation would leave a highly unsatisfactory system of national remedies. It is therefore regrettable that one can find this level of ambiguity in what is one of the GPA's most important provisions. Apart from differences in the actual remedies available, suppliers are also likely to encounter considerable differences in the speed and cost of national procedures. There is therefore rrom for concern over whether national procedures will be perceived by aggrieved providers as holding out a genuine chance of timely and effective remedies.

[45] It is notable that Article 2(7) of the Utilities Remedies Directive already permits recovery of damages for bid preparation or participation costs, upon the fulfilment of this burden of proof. It may only be a matter of time before both remedies directives are changed to expressly permit for the recovery of lost profits on the same burden of proof. This would remove any uncertainty caused by having to apply the principle of effectiveness.

The author would not wish to end this analysis of Article XX on a negative note however. The fact that the GPA makes any provision for national challenge procedures is a considerable achievement. Also the contribution which challenge procedures will make to the GPA's overall success, will depend far more on the commitment of the Parties to provide for effective procedures and remedies, and the willingness of suppliers to complain, than the precise requirements of Article XX itself.

3. International and domestic dispute settlement procedures and the exhaustion of Local Remedies Rule[46]

Under the GPA, both the challenge procedures before national courts and panel proceedings are mandated to examine a "breach of the Agreement". This raises the question of what the relationship between pronouncements of the panel and those of domestic review bodies should be for a disputed procurement which yields both types of action, and of whether the international law rule of exhaustion of local remedies is applicable.

This rule holds that, until a foreign national has, within the limits of reasonableness and good faith, done everything within his power to obtain redress through the ordinary channels, his home state lacks the requisite legal interest in taking up the claim on the international level. Its rationale is to encourage states to provide effective national remedies and to avoid unnecessary international

[46] See R.S.J. Martha, "World Trade Disputes Settlement and the Exhaustion of Local Remedies Rule" (1996) 4 *Journal of World Trade* 107.

litigation. The rule does not apply where the local remedies are ineffective, or illusory or where the national action is futile.

The rule of exhaustion of local remedies has found no application in the history of GATT dispute settlement practice. However, it has been suggested that its non application does not constitute proof that the rule has been dispensed with. Rather, its absence can be explained by the "interest structure" of traditional GATT obligations which have concerned the protection and enforcement of the rights and obligations of governments. Thus the obligations involved in dispute settlement under the GATT 1947, have not come within the sphere of application of the rule, which is understood by the International Law Commission to operate as a condition for the existence of a breach of an international obligation concerning the treatment of private parties.[47]

Given that the Uruguay Round has introduced judicial remedies at the national level in relation to procurement, it is arguable that the nature of these obligations requires the local remedies rule to be applied. Yet the WTO Agreement contains no provision on whether or how the rule should operate. Credence is, however, given to the view that the rule ought not to be excluded for this reason by the *ELSI* case.[48] Here the US argued before the International Court that if the parties had meant for disputes considered under the Treaty concerned of to require exhaustion of local remedies, they would have explicitly so provided in the Treaty. This argument was rejected; the Court noting that is was, "unable to

[47] See the Report of the International Law Commission on the Work of its Twenty - Ninth Session, 9 May- 29 July 1977, in ILC Yearbook, 1977, Vol. II, Part Two, Doc. A/32.10, p.40.

accept that an important principle of customary international law should have been tacitly dispensed with".[49]

If the exhaustion rule does apply in principle, in what circumstances should it operate? Under the GPA, the same conduct that injures a State's national (failure to follow the award procedures or failure to implement GPA obligations) will usually also injure the state itself. Where the GPA Party seeks merely declaratory relief based on the Agreement's application and interpretation under the DSU, in relation to a dispute which is pending before a national court, then the rule probably does not apply.[50] However, if the State adopts the cause of its national and seeks a remedy for that national before the DSU, then the rule will apply.[51] Following *ELSI,* the rule will also apply where the State pursues both objectives concurrently.[52] If the claim would not have been brought without the accompanying claim for the national's benefit, the DSU would probably make the State await the national's exhaustion of local remedies.

It is therefore submitted that where there are alleged breaches of the Agreement relating to specific procurements, an aggrieved supplier would have to exhaust the remedies available to him under the challenge procedure of the defendant State, before his home state would have the requisite legal interest to challenge the contract award under the DSU.

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[48] *United States v. Italy (Elettronica Sicula SpA)* [1989] I.C.J. Rep. 15.
[49] *Ibid* at p.42. See M.H. Adler, "The Exhaustion of the Local Remedies Rule After the International Court of Justice's Decision in ELSI" (1990) 39 *International and Comparative Law Quarterly*, 641.
[50] See *Swiss Confederation v. German Federal Republic* [1958] I 25 I.L.R. 38.
[51] See *United States v. Switzerland (Interhandel)* [1959] I.C.J. Rep. 6.
[52] In the case, the US sought both monetary redress for its injured national, and a claim for declaratory relief for injuries allegedly suffered through breach of the Treaty.

The rule will not apply where national remedies are inadequate. For example, on a possible interpretation of the GPA the Parties may provide for compensation limited to tender costs as the ultimate remedy for aggrieved providers.[53] However, it is unlikely that this would exclude the operation of the local remedies rule when the limitations on the internationally available remedies are considered. It will be recalled that any award of compensation under the DSU must be agreed consensually, so that it is difficult to regard a mandatory award of damages as inadequate even if limited to tender costs. In fact, findings that national remedies are futile have been of the rarest occurrence. In *Interhandel*[54], it was found that pursuit of a claim in a foreign court for 11 years was not a "futile" endevour.

4. Alternative enforcement mechanisms

The simplification and improvement of the Agreement currently underway as part of the built in review process under Article XXIV:7[55], has led the EU to suggest that attention should be directed towards providing an alternative to the existing enforcement mechanisms.[56] The proposal has its origin in the early stages of the EU's initiative towards strengthening its own enforcement framework through the setting up of 'independent enforcement authorities' in each of the Member States. A new approach has been seen as necessary in the EU context because of the inadequacy of national review actions observed by the report on the economic

[53] GPA Article XX:7(c).
[54] See *United States v Switzerland, supra* note 51.
[55] On the simplification and improvement process, see Chapter p.22.
[56] See the Working document on GPA Review of the Advisory Committee on the opening-up of public procurement, CCO/98/21-EN, pp.2-3.

impact of the EU procurement rules compiled by the EuroStrategy Consultants.[57] It was found that many Member States had failed to implement an effective system of remedies providing rapid relief for aggrieved firms. Given that Article XX relies on national challenge procedures as the principal means by which suppliers can obtain redress, the non-implementations of an adequate system of remedies is of equal concern in the GPA context. This is especially the case as 15 of the existing 23 members are composed of the EU's Members States who will apply their own inadequate remedies systems to GPA covered disputes.

There is of course much that can be done to strengthen existing national challenge procedures, quite apart from any need to introduce alternative mechanisms. The author has, for example, suggested that the Agreement presently affords the Parties too much discretion in the area of providing damages to aggrieved suppliers. Not only can damages (and indeed the only available remedy) arguably be limited to the costs for tender preparation or protest, but no guidance is given on the conditions under which damages may be available; in particular on how much of a chance of winning the contract the firm must demonstrate. Also no maximum time limits for the completion of challenge procedures are provided for. The problem here is that the longer the review process takes, the less likely the review body is to suspend the procurement process pending resolution of the dispute. Where it is not fair or practicable to grant interim relief due to the

[57] European Commission, "Study on the Impact and Effectiveness of the Internal Market", Chapter on public procurement. The results of the project are summarised in a Communication from the Commission to the European Parliament and the Council, The Impact and Effectiveness of the Single Market COM (96)520 final (see pp.16-17 on public procurement). See also H. Gordon, S. Rimmer and S. Arrowsmith, "The Economic impact of the European Union Regime on Public Procurement and Lessons in for the WTO" in S. Arrowsmith and A. Davies eds. Public Procurement: Global Revolution, 27 (Kluwer Law International; 1998).

prolonged nature of the proceedings, entities will usually conclude contracts so that the setting aside of decisions later found to be unlawful, and recommencing the procurement process, become increasingly remote possibilities.

a) The possible inadequacy of national challenge procedures

The EU's proposal is correctly motivated however by the feeling that actions before national courts to assess the legality of procedures, and provide remedies for breach, are unlikely to provide a complete answer to enforcement problems, even if challenge procedures were strengthened and properly implemented. There are several reasons for this observation. Firstly, challenge procedures involve a significant amount of commitment on the part of the complaining entity seeking redress. Any redress which is obtained will be before a court or other independent body, possibly in a foreign state whose procedures are likely to be unfamiliar. Those suppliers that are aware of the obligations under Article XX, would be justified in asking themselves whether challenging a decision is really worth their effort, especially if the eventual remedy is unlikely to go beyond compensating them for the cost of their protest. This is especially the case as the knowledge of the national procedures accumulated through challenging aprocurement decision may not necessarily ever be used a second time. It can also be argued that the formality of national challenge procedures, and the adversarial process which may be encountered in some states, tends to militate against firms complaining about procurement decisions in the manner envisaged by Article XX. Many suppliers may also be reluctant to challenge entities for fear of being black listed in future contract awards, especially when government procurement is a significant source of their business.

There is a clear need therefore for at least discussions on possible alternative mechanisms to strengthen the enforcement process, and this need is arguably stronger under the GPA than it is in the EU context. In the EU the Commission can bring enforcement proceedings under Article 226 (formerly Article 169) of the Treaty against both Member States for their failure to properly implement GPA obligations, and against individual procuring entities for their failure to follow correct contract award procedures. In practice, the Commission can only use its powers sparingly, to attack major infringements involving the faulty implementation of the Directives, or serious infringements during the award of major contracts. One off infringements, relating to smaller contracts, such as use of discriminatory technical specifications, or refusal to accept correctly presented offers from foreign firms, cannot be routinely attacked under Article 226. This is because of limited manpower and the ineffectiveness of Article 226 proceedings in correcting minor breaches of procurement rules; the whole procedure takes on average 20 months to resolve.[58] Notwithstanding these limitations however, the central role of the Commission does provide an extra layer of enforcement which the WTO cannot provide for. There follows an explanation of the possible roles of independent enforcement authorities, as derived from the pilot project currently underway within the EU.[59]

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[58] In the Green Paper on "Public Procurement in the European Union: Exploring the Way Forward (COM(96) 583 final) the Commission itself noted that it had, "neither the resources, nor the information, to identify and resolve every breach of Community rules throughout the E.U." and that, "(f)rom a practical point of view, the vast majority of individual problems encountered by economic operators should be tackled at national level" (point 3.42 at p.16). On the effectiveness of the Article 226 procedure for redressing breaches of the EU procurement rules, see J.M. Férnandez Martín, *The EC Public Procurement Rules : A Critical Analysis* (1996; Clarendon Press, Oxford) pp.146-169.

[59] For details on the pilot project, see the SIMAP home page at http://simap.eu.int. See also A. Haagsma, "The European Pilot Project on Remedies in Public Procurement" (1999) 2 *Public Procurement law Review* CS25.

b) The possible role of independent enforcement authorities

The pilot project currently underway involves six of the EU Member States being Denmark, Germany, Italy, The Netherlands, Spain and the UK. Its intention as originally expressed was that the states should, "designate independent authorities with the task of identifying problems of interpretation and discussing the treatment of individual cases."[60] The authorities would then "serve as contact points for the rapid, informal solution of problems encountered in gaining access to contracts, and could co-operate with each other and with the Commission."[61] As to the original conception of the role of the authorities, it is also notable that the Green Paper emphasised that the authorities should be "genuinely independent and have the power to require contracting entities to correct procedural errors."[62] Since the launching of the pilot project on December 10, 1998 some of the above objectives have been prioritised while others have not received the attention which one might have expected. In particular, it has been noted that the elements of co-operation and co-ordination have assumed primary importance, while the need for independence among the authorities has been largely ignored.[63]

The co-ordination and co-operation objectives which underpin the pilot will serve a number of different objectives. The most prominent will be to identify methods to obtain reliable and speedy informal solutions to procurement market access

[60] Communication adopted by the Commission on 11 March 1988, doc. COM (1998) 143 final, point 2.2.3.
[61] *Ibid.*
[62] Green Paper, *supra* note 58.
[63] A. Haagsma, *supra* note 59.

problems. The procedure envisaged is that interested parties can complain to their home authorities who will then take up the complaint with the authority in the state of the awarding entity. One of the clear advantages of this procedure over Article XX is that the pilot recognises that suppliers are far more likely to complain to their local authorities than they are to initiate challenge proceedings before a foreign body on their own initiative. The potential for bringing breaches of the rules to light is therefore greatly increased. A further difference between Article XX and the pilot project is that the rules relating to standing will normally be more relaxed in the latter. Thus while access to national challenge procedures under Article XX can be restricted to suppliers with a past or present interest in the procurement, anyone may notify a complaint to Denmark's independent authority (The Danish Competition Authority) even if they lack the requisite legal interest to bring an action before the Complaints Board, which is the body designated for the purposes of Article XX. The Competition Authority is obliged to examine all complaints which are well founded.

Where interested parties bring their complaints or observations to their home authority (or indeed directly to the authority of the awarding authority if so desired) the pilot requires that adequate resources be devoted to making immediate enquiries into the problem and to establish whether there is in fact a problem of market access. The investigating authority is also obliged to make their best efforts to pursue all reasonable sources of information, to complete their examination as quickly as possible, and to achieve a solution as soon as possible from the date of the complaint.

As to the achievement of solutions, it is important to note that any solutions reached will be based on a consensus between the authority dealing with the complaint and the entity concerned. The authorities are highly unlikely to have any powers to require entities to correct their mistakes or make any remedies available to aggrieved suppliers. In this respect, the possible adoption of a new enforcement mechanism is seen very much as an alternative to the formal challenge procedures under Article XX, or, in the EU context, a petition to the Commission to bring Article 226 enforcement proceedings. The non-availability of remedies ought not, however, be regarded as a disincentive towards the notification of complaints to authorities. If suppliers are confident that minor infringement, such as discriminatory qualification criteria or technical specifications, can be rapidly and informally corrected through an immediate complaint to their home authority then, their participation would not be prejudiced, and the need for recourse to the formality of challenge procedures would hopefully be avoided.

Given that authorities will not have the power to order that any particular solution be reached, their success in remedying problems will be influenced by the dominant tradition of dispute resolution in individual states. Authorities are more likely to be able to reach appropriate solutions with entities in states with a tradition of informal dispute resolution, than those with a preference for adversarial court based proceedings. Also, the manner in which the authorities address their complaints to entities will have a strong bearing on their success. For example, in handling complaints against Danish entities, the Danish Competition Authority has generally found that its lack of default powers has

done little to weaken its role in safeguarding observance of the rules.[64] It is believed that a large part of the explanation for the Authority's success has been its practice of thoroughly briefing entities of its role in order to commence a process of constructive dialogue. Further more, an increasing proportion of complaints made to the Competition Authority are involving tenders in progress where contracts have not therefore been concluded. In these cases, the Authority has sought to safeguard the observance of the rules and the participation of suppliers by approaching entities on the same day as complaints are received. In the rare cases where the Authority's recommendations have not been accepted, this has been due to entities failing to understand the binding quality of procurement rules.

As noted above, the designated authorities of the six EU member States participating in the pilot project cannot be regarded as independent from executive influence. Rather than create new independent authorities with responsibility in the procurement field, the participants have merely nominated existing bodies, which represents a considerable departure from the standard of genuine and unquestionable independence originally envisaged by the Commission. The non-independence of the existing authorities create the same concerns as noted earlier in the context of the independence of national review bodies under Article XX. In other words, the confidence of complaining suppliers would be likely to suffer where authorities are part of the state's administrative structure, where the possibility exists that they could be informed that a lenient view of a discriminatory procurement policy is required. However,

[64] See the SIMAP home page, *supra* note 59.

it is suggested that the establishment of independent authorities should perhaps be seen as the next objective beyond the three year duration of the current pilot. It is to be hoped in this regard that the positive experiences of the Danish Competition authority in dealing with domestic complaints can be replicated among the present EU participants. Serious consideration should then be given to the adoption of such an alternative mechanism at the WTO level. This would then allow advantage to be taken of the possibility of rapid and effective dispute resolution, without the significant commitment required of suppliers under Article XX proceedings.

Conclusions

The framework for enforcing GPA obligations may involve both the participation of individual firms, as well as the Parties to the Agreement and it is in the context of significant changes introduced by the Uruguay Round that such enforcement will occur. The DSU, while much strengthened, cannot be expected to be a source of effective remedies. While suppliers will play an important role in notifying complaints to their governments, it has been shown that the DSU is more suited to the settlement of intergovernmental disputes regarding the proper implementation of GPA obligations and their correct interpretation, than to providing timely and effective remedies to individual suppliers. Further, it has been shown that the changes introduced to the DSU by the GPA, (the Trondheim provision) are unlikely to have any material impact on the remedies available. The most that the DSB can do is to authorise consultations, and both the entering into consultations and any possible agreement must take place on a voluntary

basis. Limitations resulting from the GPA itself also restrict the possible result of authorized consultations.

Accordingly, providers should place their reliance on the new domestic challenge procedure, which represents an important step forward. However the effectiveness of available remedies may vary considerably between states due to the level of discretion given to the Parties in implementing the general obligations provided for, and because of the lack of clarity over some aspects of the Contracting Parties' obligations. In this regard, the absence of, at least, a timetable for the complaint procedure is regrettable. There is also room for concern over whether challenge procedures can provide a complete answer to enforcement needs due to the level of commitment required of individual suppliers in initiating formal proceedings before unfamiliar bodies, and possible fears of being black listed for future awards. It is therefore suggested that the level of success of the EU's current pilot project directed towards the informal and rapid resloution of market access problems should be closely monitored by the WTO.

The overall tenor of this Chapter must, however, be a positive one. The fact that a strengthened and innovative remedies system is now in place, is indicative of the belief of the negotiating Parties that procurement rules must be accompanied by such remedies if they are to be successful. The framework now established also provides a foundation for further strengthening of the remedies in future negotiating Rounds as GPA practice develops. For the present, it remains to be

seen what practical impact the rules described will have on enforcement under the mechanisms identified.

Conclusion

The non-tariff barrier to trade created by closed procurement markets has presented the WTO with some of the most intractable problems which it has faced. The political sensitivity of subjecting procurement activities to international competitive tendering, has led the GPA to retain its status as one of the few remaining plurilateral Agreements, despite the economic importance of the procurement function in all states. There is also no clearer an indication of the difficulty of persuading states to open their procurement markets, than the launch of a major new initiative towards introducing transparency based obligations in the procurement field, as an alternative regulatory approach on a multilateral footing. One can only speculate, however, as to the likely content of any new Agreement which may emerge from the study which is presently underway. It can also be noted that it is not, at present, any part of the study's mandate to produce an Agreement which will replace the GPA. For the present and foreseeable future, therefore, the GPA will remain the most important initiative for the liberalisation of international procurement markets. This thesis has questioned the likely prospects for the GPA in achieving its market opening objectives.

The most significant problem which procurement regulation at the WTO level faces is the GPA's limited membership. For the most part the WTO members have taken full advantage of the GPA's plurilateral status to the extent that only 27 of the 134 WTO Members have acceded to the GPA. Many existing members have entered into regional or bilateral procurement agreements independently of their GPA membership. For these Members, it is arguable that the Agreement

has had only a limited impact beyond further formalising the obligations already entered into, and requiring states to open some of their procurement to an extended list of states. Given the present membership situation, it can be observed that the GPA is not capable of making a significant contribution to opening up procurement markets among the WTO Members. Part I of this thesis has therefore investigated the principal reasons for the reluctance of states to accede to the GPA, and questioned whether realistic solutions to the problem of limited membership can be proposed.

A key part of the explanation for the GPA's limited membership is that non-members desire to retain their ability to use their procurement power for secondary purposes beyond the selection of suppliers, and the purchase of goods and services on commercial criteria alone. Thus it has been shown that procurement can be used as an instrument of social, economic or environmental policy, as well as a possible means of strengthening competition and trade laws and policies. From the point of view of GPA membership, such secondary uses of procurement power are problematic in that they frequently involve the unequal treatment of suppliers, (or at least the possibility of their unequal treatment) thereby potentially breaching the obligations of non-discrimination which underpin the Agreement.

In addition, it has been shown that many secondary uses of procurement will often be incompatible with the GPA even where those policies are capable of operating compatibly with the non-discrimination requirements. In particular the prohibition on offsets contained in Article XVI operates to preclude secondary

policies of an external nature, even if the non-discriminatory operation of those policies could be objectively demonstrated. It has therefore been argued that consideration should be given to relaxing the prohibition on offsets to the extent that the non-discriminatory treatment of suppliers could be demonstrated. This is one of the respects in which the introduction of a validation mechanism for secondary policies could play an important role in balancing the demands of non-discriminatory treatment with the desire of states to retain their secondary uses of procurement.

A further point of difficulty, however, is that where the discriminatory effect of secondary policies are reduced or removed, their utility for achieving their objectives at the national level may also be greatly reduced. It has been suggested that giving all suppliers the opportunity to meet the specified requirements on their own territories could reduce the discriminatory effect of certain secondary policies. Thus an obligation to engage the long-term unemployed on a construction project could be met by all suppliers without any discriminatory effects. However, it is clear that any benefits created by the policy at the national level, will be limited when procuring entities are not free to routinely place contracts with domestic firms. It is therefore the practice of favouring national suppliers which makes procurement a potentially useful (if inefficient) instrument for the achievement of secondary objectives.

There is therefore a more difficult and fundamental question than whether the prohibition on offsets should be relaxed where the non-discriminatory operation of secondary policies can be demonstrated. This is whether the GPA's current

insistence on non-discriminatory treatment should itself be relaxed in the interests of increased membership. This is a most difficult issue not least because various of the other WTO Agreements are also underpinned by obligations of non-discrimination. A section of Chapter 3 was therefore devoted to analysing what kind of treatment as between national and foreign suppliers Article III of the GPA requires, with reference to the Panel interpretations of the corresponding provisions contained in Article III:4 of the GATT. Given the prevalence of these provisions in the WTO Agreements, and the emphasis which has been placed on their strict interpretation, there would have to be convincing reasons for departing from the standards currently required in the procurement context by Article III of the GPA. On balance, however, it is submitted that there are a number of reasons why the GPA's emphasis on non-discriminatory treatment should be relaxed.

In the first place, GPA Members are permitted to pursue discriminatory policies where the procurement has been excluded from coverage by means of negotiated derogations. This is the approach which the GPA presently takes to balancing the demands of its obligations with the reality of limited membership. The negative consequence of this approach is that the coverage of the Agreement varies considerably as between any two Members depending on the outcome of the bilateral accession negotiations between them.

It has been argued that an alternative approach of allowing states to transitionally pursue discriminatory policies subject to the safeguards provided by the adoption of a validation mechanism of the kind described in Chapter 3, would be a more appropriate way of building flexibility into the GPA. It would permit states to

pursue discriminatory policies even where the procurement is covered by the GPA. The need for bilateral negotiations on coverage would then be reduced, and moves could then be made towards the uniform coverage of the Agreement for all Members. The validation mechanism could also play the important role of requiring states to justify their secondary uses of procurement, which could be done according to a principle of proportionality as described in Chapter 3. A principal benefit of the validation process could then be to gradually educate states that procurement is generally not an efficient instrument for the pursuit of secondary policies.

It is suggested that this possible alternative approach could have a significant positive effect on increasing membership by removing the perception that procurement covered by the GPA must immediately be subject to a regime of international competitive tendering on a non-discriminatory basis. The author is not convinced however that the compromise advocated in the preceding paragraphs would necessarily be enough to dramatically increase the GPA's membership. However, it is considered that any further a departure from the non-discrimination principle would effectively amount to an abandonment of the existing Agreement and its replacement with a qualitatively different instrument. It is not suggested that this should be regarded as an appropriate step. Rather, it is concluded that the possible adoption of a new transparency based agreement should be regarded as the appropriate instrument for the multilaterlisation of procurement disciplines at the WTO level. Such an agreement would probably only provide for certain fundamental obligations relating to the clarity and predictability of national rules along with a requirement that the content of all

laws and practices in the procurement field (including the content of discriminatory policies) be published.

A transparency based agreement could be viewed as a stepping stone to membership of the existing GPA. At the same time, the relaxation of the non-discrimination requirement, through the adoption of a validation mechanism, could be seen as a means of easing the transition from the limited obligations of a transparency agreement, to the rigours of GPA membership. The author would also suggest, however, that states could be entirely satisfied with the level of market opening brought about by the multilateral, but limited disciplines of any agreement emerging from the WTO's present study. If a transparency agreement ever does come to fruition, the possibility must be contemplated that it would signal the death-knell of the GPA, and hence the abandonment of an approach to regulation based on detailed rules to promote non-discriminatory access to procurement markets. Developments in the forthcoming years will, therefore, indicate just how dramatic a transitional period in the area of regulated procurement the WTO is presently going through.

While most of the thesis has been devoted to analysing the rights and obligations of governments, and procuring entities, Chapter 4 turned to consider how some aspects of supply side behaviour could affect the Agreement's operation. It is clear that collusion among suppliers can have a direct impact on the Agreement's success. Even if entities allow suppliers to participate on a non-discriminatory basis, any benefits of such broad participation to national and global economies,

would be likely to be defeated where price fixing removes any genuine competition among firms.

The GPA can be regarded as deficient in its treatment of collusive practices however. Aside from Article XV:1(a) which permits the use of limited tendering when collusive tenders are received, there is no reference to how firms suspected of collusion should be dealt with. The author has therefore suggested a range of possible responses which existing provisions provide for. While there would appear to be considerable scope for entities to take action against participating firms under the qualification and public interest provisions, concrete guidance on the appropriate responses to collusion would be most welcome however.

Chapter 4 has also dealt with the possible responses to tenders which are low by reason of dumping and subsidisation practices. Thus it has been questioned whether the GPA's rules can be used to reinforce national trade laws which deal with these practices. This is an important question since any limitations on the pursuit of trade policies under the GPA can be regarded in the same light as the limitations on the secondary uses of procurement which were considered in Chapter 3. In other words, the strengthening of trade and competition policies (along with social, economic and environmental policies) are among the secondary uses which can be made of procurement power, and the present lack of acceptance of these limitations is a large part of the explanation for the GPA's limited membership.

The GPA should not be interpreted as permitting a broad scope for the strengthening of trade policies against dumping and subsidisation. This is because any other interpretation would lead to considerable conflict between the GPA and the WTO Dumping and Subsidies Codes. This is not, however, considered to be a deficiency of the GPA in any way. This is principally because, the ability to use procurement power to strengthen trade policies is lost by reason of WTO membership, and binding nature of the Dumping and Subsidies Codes, rather than through GPA accession. The situation is therefore rather different than the limitations which the GPA itself imposes on the pursuit of the social and economic policies described in Chapter 3.

Beyond the question of whether the GPA will have a significant impact on opening up procurement markets among the WTO Members generally, Part II of this thesis has questioned whether the Agreement is likely to be successful among its existing Members. In the absence of specific evidence on any impact the GPA may have had on increasing cross-border participation, and reducing discriminatory practices, the author has focused on two controversial and distinct subject areas, raising problems and challenges which are likely to emerge as barriers to the Agreement's success. The issues which are analysed can be seen as relevant not only to the prospects of the existing GPA, but also from the perspective of the content of any new procurement instrument emerging from the WTO's present study. Given that a Working Group is presently investigating the possibility of introducing limited, but multilateral disciplines in the procurement area, the nature of the challenges and problems identified, and the possible responses to them, are relevant to all existing and future WTO Members.

Chapter 5 began the examination of the GPA's prospects by analysing the potential uses of Information and Communication Technologies (ICTs) for streamlining procurement processes, and contributing towards the GPA's market opening objectives. In many respects, there is no doubt that the use of ICTs, can enhance the benefits of GPA membership. The operation of existing procedures via electronic means has the potential to facilitate both the identification of procurement opportunities, and the retrieval of tender documentation. Supplier awareness of national and cross-border procurement opportunities could be enhanced, thereby contributing towards the price savings which membership of the GPA, is capable of achieving.

The use of ICTs is unlikely, however, to markedly enhance the benefits of GPA membership at least in the short to medium term. This is primarily due to the emphasis which governments have naturally placed on streamlining procurement processes at national and regional levels. To date, these developments have done little to make procurement opportunities covered by the GPA easier to discover. Thus national and regional databases do not at present earmark contracts covered by the GPA in such a manner as to clearly indicate to foreign suppliers that their participation is permitted, and their non-discriminatory treatment required.

The frequently cited benefit of ICT implementation in increasing SME involvement is likely to prove illusory for the foreseeable future. It is the larger established firms, with access to the necessary ICT expertise, and the desire to serve international procurement markets, who will be in the strongest position to

exploit the newly increased availability of procurement information. There are therefore legitimate concerns that ICTs will widen the gap between established government suppliers, and suppliers who face difficulties in the identification of procurement opportunities and the preparation of tenders to the required standard. While much procurement information will be available for free over the Internet, procurement information will also become a tradable commodity. The quality of information available to suppliers will depend on the level of services which are purchased from Value Added Networks or equivalent information providers. It is those suppliers which currently serve government markets that are likely to be in the best position to absorb the costs of the more sophisticated services on offer, and which will therefore be the most responsive to procurement needs.

The role of the WTO as moves are made towards fully electronic procurement will be rather limited, due to the speed of national and regional developments and the impossibility of re-commencing this process according to agreed common principles. In order to safeguard the GPA's relevance, the WTO will need to emphasise the importance of ensuring that electronically available procurement information can be accessed by all suppliers having access to commercially available ICT tools.

While agreement on such a policy among the GPA Members would do much to promote the broad inclusion of suppliers, it would not prevent the rapid implementation of ICTs in such a manner as to result in de facto discrimination against those suppliers not having access to the necessary technology. An internationally recognised timetable for the implementation of ICTs and the

phasing out of paper based forms of communication could, therefore, do much to minimise the effects of such discrimination. The need for such a timetable is becoming increasingly urgent; the EU already having phased out the hard copy publication of tender notices and Periodic Indicative Notices.

While the GPA can be interpreted as permitting the use of the new purchasing medium provided by electronic catalogues, it is arguable that the mechanisms described do not permit sufficient flexibility to fully exploit the potential savings available. With greater flexibility however, comes legitimate concern over how to safeguard the non-discriminatory treatment of suppliers and the transparency of contract awards. The question of how these conflicting interests should be reconciled requires the WTO's direct attention.

The potential benefits of ICTs ought not at present be held out as a means of increasing the GPA's contribution to increasing international competition in procurement markets. It remains to be seen whether GPA covered opportunities will become any more accessible than they presently are, and how suppliers will respond to the increased information potentially available to them.

Chapter 6 began with the proposition that a strong system of remedies and enforcement capable of ensuring the proper implementation of the Agreement, and of being responsive to the needs of aggrieved suppliers, will be crucial to the GPA's success. The achievements of the Uruguay Round in strengthening the Dispute Settlement Understanding (DSU), as well as the GPA's requirement to provide aggrieved suppliers with access to national challenge procedures, will go

a long way towards ensuring the Agreement's proper implementation and application.

The DSU will provide a valuable tool for the settlement of inter-governmental disputes regarding the proper implementation of the GPA's obligations and their correct and consistent interpretation. However, supplier involvement in inter-governmental dispute settlement will be limited to notifying complaints to their governments. The DSU should not be regarded as an appropriate instrument for the provision of timely and effective remedies for aggrieved suppliers. Suppliers will however have a role in safeguarding the proper implementation of the GPA. This will be through challenging individual decisions made under unlawful legislation. This process will, however, take place under the national challenge procedures rather than under the DSU.

Article XX, which requires the Members to provide an independent forum before which individual aggrieved suppliers can bring their complaints, is strongly indicative of a belief that procurement rules must by backed up by timely and effective remedies if they are to achieve their market opening objectives. It is a difficult question, however, as to whether Article XX goes far enough to secure the confidence of suppliers in the remedies which are likely to be available to them at the national level. Chapter 6 has drawn attention to the apparent short comings of Article XX. The provision arguably affords the Parties too much discretion in the area of providing damages to aggrieved suppliers. On a possible interpretation of Article XX, Members can limit the only available remedy to the costs for tender preparation or protest. Also, no guidance is given on the

conditions under which damages may be available; in particular on how much of a chance of winning the contract the firm must demonstrate.

The absence of maximum time limits for the completion of challenge procedures, and the difference of approach here between Article XX and DSU is also notable. The problem here is that the longer the review process takes, the less likely the review body is to suspend the procurement process pending resolution of the dispute. Where it is not fair or practicable to grant interim relief due to the prolonged nature of the proceedings, entities will usually conclude contracts so that the setting aside of decisions later found to be unlawful, and recommencing the procurement process, become increasingly remote possibilities.

The level of discretion afforded by Article XX has the advantage that it is easy to 'sell' such limited minimum obligations to non-members. Given the problem of limited membership this must be regarded as an important concern at the present time. However, among the present Members, Article XX cannot be regarded as going far enough to deter breaches of the Agreement, and encourage suppliers to attack those breaches which they detect. This problem is ameliorated to some extent by the effect of GPA Article III which requires that all the benefits of the remedies which are available to national suppliers, must be extended to all other GPA suppliers, where the complaint relates to a contract which is covered by the Agreement. However, while this is almost certainly a correct interpretation of Article III's requirements, tensions will inevitably result from suppliers demanding remedies from foreign review bodies, which are not available before their own courts. The effect of Article III, is therefore a far from satisfactory

solution to strengthening the limited remedies which must be made available by Article XX.

The limited nature of the remedies which *must* be provided under Article XX, reflects the understandable desire of the WTO to spread the GPA's broader disciplines to a greatly extended list of signatories, before moving towards strengthened compulsory requirements in the field of remedies. Article XX will contribute towards the success of the Agreement among the present Members, although it would need to be strengthened, in the ways which have been suggested by this thesis, in order to have a pronounced impact in this regard.

Chapter 6 has also drawn attention to mounting concerns that actions before national courts to assess the legality of procedures are unlikely to provide a complete answer to enforcement problems, even if challenge procedures were to be strengthened. The formality of challenge procedures, the unfamiliarity of suppliers with different procedures operated by each of the Members and a fear of 'biting the hand that feeds', may militate against frequent recourse to Article XX. The possibility of introducing independent enforcement authorities which would co-operate with suppliers, and with each other has therefore been raised by the EU, whose pilot project in this area is currently underway. Such authorities would be capable of removing much of the burden of seeking redress from suppliers themselves, and of taking immediate action (before the conclusion of contracts) in order to safeguard the participation of suppliers. The progress of the EU's pilot will undoubtedly be closely monitored by the WTO, and consideration

should be given to the potential advantages of independent enforcement authorities among the GPA Members.

The question posed at the beginning of this thesis was whether the GPA will make a significant contribution to opening up procurement markets at the international level. The current GPA is a much strengthened instrument over its Tokyo Round predecessor, with its extension to services contracts, and the introduction of national challenge procedures. However, its continued limited membership means that the existing Agreement is not capable of significantly contributing to the liberalisation process. There are ways of relaxing the existing barriers to expanded membership. However, the author is not convinced that the suggestions made would have a marked impact on boosting membership. It can also be suggested that many WTO Members will now be inclined to delay their membership decisions until it is clear what kind of strategy and direction will be taken towards the multilateralisation of procurement disciplines. WTO Members will naturally want to understand what kind of residual role (if any) the existing GPA will play, should the current study towards transparency based disciplines lead to any new procurement initiatives.

If the existing GPA cannot be expected to open up procurement markets among the WTO Members generally, what of its prospects of success among its existing Members? The conclusions here are largely positive. It can be expected that ICTs will do much to streamline procurement processes even though developments are currently firmly focused at the national and regional levels. The system of enforcement and remedies currently provided for represents a

crucial first step in this area. The WTO will undoubtedly monitor the level of success achieved at national and inter-governmental levels with the view of strengthening existing mechanisms and the possible adoption of new alternative mechanisms.

Ultimately however, it is against the objective of introducing a multilateral framework of transparent and non-discriminatory laws and procedures, that the GPA's prospects for success must be measured. Regardless of its precise form and content, it will not achieve these objective unless the general WTO membership can be persuaded that the national and global economic benefits brought about by non-discriminatory treatment, outweigh the benefits of retaining considerable discretion in the placement of contracts.

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