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The Evolving GPA: Lessons of Experience and Prospects for the Future

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1. Introduction

The WTO Agreement on Government Procurement occupies a central position as the most significant international instrument of procurement market liberalization. Its primary focus is the elimination of discriminatory laws and practices resulting in compartmentalized procurement markets and impermissible distinctions between domestic and foreign goods, services and suppliers based solely on origin and nationality. Procurement at the WTO is therefore first and foremost an issue of trade liberalization, market access and the avoidance of protectionism.¹

The WTO's web-based information on the GPA indicates that procurement markets open to competition among suppliers of the GPA Parties are 'currently valued at up to \$1.7 trillion dollars annually'² with around 75% of this value attributable to the EU and the US.³ Beyond this, a wealth of introductory information is provided on the GPA's expanding membership and contract / procuring entity coverage, as well as its development from the 1979 'Tokyo Round Code on Government Procurement' to the entry into force of the Revised GPA in April 2014. The picture presented is justifiably of a success story. While procurement market liberalization remains firmly rooted to the optional / plurilateral model, there have been significant gains. Market Access under the Revised GPA is estimated to have increased by between \$80 billion to \$100 billion annually. According to Robert Anderson, this results from coverage of 400-500 additional procuring entities, coverage by three major Parties of Build Operate Transfer Arrangements, generally expanded coverage of services procurement (especially telecommunications) and coverage by all Parties of the full range of construction services.⁴ Information on coverage commitments will become easier to access with the launch of the e-GPA portal which provides a single point of access to the market access information.⁵ The Revised GPA itself, with which national procurement regimes must comply, has a more logical structure and is improved in its content especially in its recognition of electronic forms of communication and procurement.

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¹ This is clear from the opening paragraphs of the GPA's Preamble:

Recognizing the need for an effective multilateral framework for government procurement, with a view to achieving greater liberalization and expansion of, and improving the framework for, the conduct of international trade; *Recognizing* that measures regarding government procurement should not be prepared, adopted or applied so as to afford protection to domestic suppliers, goods or services, or to discriminate among foreign suppliers, goods or services;

² http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (visited November 2014). See also, Robert D. Anderson, Philippe Pelletier, Kodjo Osei-Lah and Anna Caroline Müller, Assessing the Value of Future Accessions to the WTO Agreement on Government Procurement (GPA): Some New Data Sources, Provisional Estimates, and an Evaluative Framework for Individual WTO Members Seeking Accession, Staff Working Paper ERSD-2011-15, 6 October 2011, available at http://www.wto.org/english/res_e/reser_e/ersd201115_e.pdf

³ Pelletier, Osei-Lah and Müller at 18.

⁴ R.D. Anderson, 'The coming into force of the revised WTO Agreement on Government Procurement, and related developments' (2014) 5 *Public Procurement Law Review* NA160. It is difficult to comment on the extent of the achievement with regard to the market access dimension. This rather depends on whether the aspirations and expectations of negotiators were met. The gain in market access opportunities seems to be of the order of 5-10 percent. It therefore seems clear that substantial future gains will come more from accessions than from further commitments from existing GPA Parties. It has been estimated, for example, that the accession of China alone will yield market access gains in the range of \$US 113 and 289 billion. Pelletier, Osei-Lah and Müller, above note 2 at 13.

⁵ <https://e-gpa.wto.org/>

However, membership, while expanded, remains limited. The GPA covers 43 of the WTO's 160 WTO Members, a figure which includes the 28 EU Members States and which will shortly increase to 45 with the accession of Montenegro and New Zealand. The membership is also imbalanced towards developed countries, albeit that there is at least the possibility for this position to gradually change. Article V of the Revised GPA contains strengthened transitional arrangements for developing and least developed WTO Members. Furthermore, some WTO Members which have started the process of accession to the GPA are, according to World Bank criteria,⁶ lower middle income countries (Moldova, Kyrgyz Republic, Ukraine). Mongolia and Tajikistan, which have provisions on GPA accession in their protocols of accession to the WTO are respectively lower middle income and low income countries. Future accessions, in particular by China which submitted its first coverage offer in 2007, could prompt other states towards membership. Suppliers from other major developing / transition economies may petition their governments for the same access to overseas procurement markets as that enjoyed by China's suppliers by reason of GPA membership. It is therefore possible that we are on the brink of a period of intense activity towards an expansion in the level and diversity of membership.

Going forward, a total of five Work Programmes are in place which aim to progress negotiating issues which could not be fully resolved in the GPA renegotiation.⁷ These relate to supporting the participation of SMEs in procurement; improving the collection and reporting of statistical data relating to the GPA; promoting the use of sustainable procurement practices consistently with the GPA; addressing restriction and exclusions in coverage commitments and safety standards in international procurement.

The further sections below are divided as follows. Section 2 discusses the GPA's objectives. These can be better understood by locating the GPA within the overall tapestry of procurement regulation comprising national regulation and other international instruments. Section 3 discusses the principal area which the national case study papers have been asked to comment on – domestic review procedures. The role and value of these procedures is discussed and some questions which may have slipped under the radar are posed. Do the rulings of the bodies reviewing supplier complaints have to be binding on the procuring entity? Must it be possible for the review to eventually come before a court? If not, is this position consistent with the United Nations Conference Against Corruption (UNCAC)⁸? Section 4 turns to the new Work Programme on supporting SME participation. The economic and social justice rationales for supporting SMEs and, more broadly, enterprises in which historically disadvantaged individuals (HDIs) have a strong stake, are covered. As the Work Programme seems to be focused on removing discrimination in this area, the extent to which this can be realistically achieved is considered. Section 5 considers a doctrinal development arising from the *Canada – Renewable Energy*⁹ case. The question is whether procurement and buy national policies are carved out of multilateral coverage under the GATT to the extent that has been commonly understood. Section 6 concludes.

⁶ <http://data.worldbank.org/country>

⁷ The Work Programmes are referred to in Appendix 2 of Adoption of the Results of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement, Following their Verification and Review, as Required by the Ministerial Decision of 15 December 2011 (GPA/112), paragraph 5, GPA/113, 2 April 2012.

⁸ United Nations, Treaty Series, vol. 2349. The Convention was adopted by the United Nations General Assembly by its resolution 58/4. In accordance with article 68 (1) of the Convention, the Convention entered into force on 14 December 2005. The text of the Convention is also available at <https://www.unodc.org/unodc/en/treaties/CAC/> (accessed November 2014).

⁹ WT/DS412/AB/R *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*; WT/DS426/AB/R *Canada – Measures Relating to the Feed-In Tariff Programme*.

2. The GPA's objective/s – trade liberalization, non-discrimination, good governance, integrity, efficiency

What is the GPA for? What are its direct objectives and can GPA membership indirectly or incidentally contribute towards the achievement of other objectives? Where and how should the boundary between direct objectives and incidental benefits be drawn? As discussed below, the answers to these questions emerge not so much from considering the GPA in isolation, but rather from the GPA's relationship with both national procurement regimes, and other international procurement instruments.

As noted, procurement at the WTO is first and foremost an issue of trade liberalization, market access and the avoidance of protectionism. The GPA's primary General Principle in Article IV is non-discrimination. The more specific rules which require transparent procurement procedures are primarily directed towards making discrimination more difficult or easier to monitor and detect.¹⁰ For several reasons, however, it is appropriate for the GPA to refer to other values and objectives such as integrity and efficiency. This is to some extent inevitable because the very same general principles and specific transparency based rules which make discrimination more difficult, can also safeguard against corruption and contribute towards achievement of value for money. The GPA's Preamble recognizes this connection. While the opening Preamble recitals are devoted to trade liberalization and the avoidance of protectionism it is further provided in the third recital that:

the integrity and predictability of government procurement systems are integral to the efficient and effective management of public resources, the performance of the Parties' economies and the functioning of the multilateral trading system ...

In a limited sense, it can now be argued that the GPA now pursues the objective of value for money which is clearly related to 'the efficient and effective management of public resources'. However, it is probably more accurate to view the recital above as reflecting the potential benefits which GPA membership can bring towards achieving value for money, with the precise content of this imprecise concept, and exactly how to achieve it, remaining within the domain of national policy makers.

It is possible here to use the analogy of passing the baton in a relay race. Non-discrimination is not an end in itself in the trade context unless we attach moral opprobrium to treating foreign suppliers differently merely because of their nationality. Rather, non-discrimination is a device to facilitate the materialization of the benefits of competition in the market place. Non-discrimination is a useful device in this regard, but it is not sufficient in itself. The benefits will only materialize to the extent that there is some conception of the efficient use of public resources at the national level. An admittedly improbable scenario can be used to illustrate this point. Suppose that a procuring entity does not discriminate. Indeed, it places all its contracts with foreign suppliers and consistently purchases the most expensive and poorest quality goods and services available in the market place. The discrimination norm here, while observed, has not contributed towards its ultimate end because the procuring entity has no conception of the efficient use of public resources. The question raised is the extent to which international rules need to address the achievement of value for money. In terms of regulating this matter, the baton should be passed at an early stage, partly because all states have some conception of the efficient use of public

¹⁰ R.D. Anderson and S. Arrowsmith, 'The WTO regime on government procurement: past, present and future' in S. Arrowsmith and R.D. Anderson (eds.) *The WTO Regime on Government Procurement: Challenge and Reform* (2011) Cambridge University Press 3 at 15.

resources, and partly because there are legitimate and wide differences in what this means – especially in the extent to which procurement is used to achieve horizontal policies, such as the advancement of previously disadvantaged groups and support for SMEs. As such, references to efficiency can appropriately feature in preamble recitals, but caution should be exercised before developing such statements into enforceable specific obligations. Non-discrimination is the GPA’s main enforceable obligation, while value for money is among the benefits which GPA membership can contribute towards achieving.

Moving to the GPA’s relationship with other international procurement instruments, many of these instruments both replicate the GPA’s rules and share the GPA’s primary concern with trade liberalization. This applies most strongly to bilateral / regional trade agreements with procurement chapters. On the other hand, other instruments with broadly similar rules to the GPA may *not* share its primary concern with non-discrimination and trade liberalization, or at least may approach these concepts from a different perspective.

Under the GPA, the main barrier to international trade is discrimination itself which is generally prohibited for covered procurement. In contrast, the barriers to international trade with which the UNCITRAL Model Law on Public Procurement¹¹ is more directly concerned are in the form of regulatory voids, deficiencies or divergences. These problems can generate a ‘chilling’ effect on international trade. As the Model Law’s Guide to Enactment notes, ‘the ability and willingness of suppliers and contractors to sell to foreign governments is hampered by the inadequate or divergent state of national procurement legislation in many countries’.¹² Expressed in an exaggerated manner, markedly divergent national laws could all be non-discriminatory and therefore of limited direct concern under the GPA.¹³ However, this divergence generates the chilling effect on international trade of greater concern under the Model Law.

The idea that the Model Law is not as directly concerned with discrimination as the GPA is reinforced by its coverage. It is designed to be applicable to all procurement within enacting States¹⁴ some of which will inevitably involve discriminatory laws and policies¹⁵ which could violate the GPA for covered procurement. The somewhat different perspectives of the Model Law and the GPA are arguably appropriate and intuitive. More than the GPA, the Model Law is an instrument of particular value to states which are developing procurement rules for the first time or improving and modernizing their existing rules.¹⁶ It is understandable that these states are primarily concerned with the integrity of the procurement process and the avoidance of abuse with

¹¹ The full text of the Model Law 2011 and its Guide to Enactment are available at http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html visited November 2014. See, Caroline Nicholas ‘Work of UNCITRAL on government procurement: purpose, objectives and complementarity with the work of the WTO’ in Arrowsmith and Anderson (eds.) *The WTO Regime on Government Procurement* 746; Caroline Nichols ‘The 2011 UNCITRAL Model Law on Public Procurement’ (2012) *Public Procurement Law Review* NA 111.

¹² Guide to Enactment (henceforth Guide) 2012 page 2, para. 2.

¹³ GPA membership can of course promote convergence in national procurement systems and thereby reduce the extent to which regulatory divergence is itself a barrier to trade. Indeed, this is implicit in the GPA’s first Preamble recital: ‘Recognizing the need for an effective multilateral framework for government procurement, with a view to achieving greater liberalization and expansion of, and improving the framework for, the conduct of international trade...’ For a discussion of the value of harmonization and related themes, see Christopher Yukins and Steven Schooner, *Incrementalism: Eroding the Impediments to a Global Public Procurement Market* 38 *Georgetown Journal of International Law* (2007) 529.

¹⁴ Article I of the Model Law declares, ‘This Law applies to all public procurement’.

¹⁵ This is recognized in the following Model Law provisions :

Article 8. Participation by suppliers or contractors

1. Suppliers or contractors shall be permitted to participate in procurement proceedings without regard to nationality, except where the procuring entity decides to limit participation in procurement proceedings on the basis of nationality on grounds specified in the procurement regulations or other provisions of law of this State.

¹⁶ Guide, page 2, para. 5.

a view to enhancing value for money.¹⁷ States can go a considerable way towards enhancing integrity and at least some way towards enhancing value for money without opening their procurement markets to international competition. Undoubtedly, ‘external liberalization’ will tend to produce competition among a deeper pool of suppliers thereby further enhancing value for money. International liberalization also brings the possibility of other benefits such as access to technology that is not available in the home market.¹⁸ However, it may be that many states view these benefits as accruing from a potential second phase of procurement liberalization, the first phase being devoted to enhanced integrity and value for money through internal competition.¹⁹

Even though instruments such as the Model Law and the GPA may have a different focus or primary rationale, there is every reason for these instruments to co-exist in a mutually reinforcing manner. This is clearly recognized in the Model Law’s Guide to Enactment which refers to ensuring the widest possible use of the Model Law and the consequent need for harmony, in particular, with the GPA.²⁰ While the GPA does not refer to the Model Law, it is interesting to note that the Appellate Body referred to it in *Canada – Renewable Energy*. In probing the meaning of the term ‘procurement’ in the GATT Article III:8 derogation, it referred not to perhaps the most obvious source of inspiration, the GPA, but rather to the 2011 Model Law. It was noted that the formal procedures under which governments acquire products ‘typically express principles, such as efficiency or transparency’.²¹

Perhaps more significantly, the GPA and the Model Law are brought into a mutually reinforcing relationship via the reference in both instruments²² to the UNCAC. Article 9.1 of UNCAC requires that procurement is ‘based on transparency, competition and objective criteria in decision-making, that are effective, *inter alia*, in preventing corruption’. Article 9.1(d) was of particular relevance to the strengthening of the domestic review procedures in the Chapter VIII of the Model Law. The Model Law now gives effect to the UNCAC requirement for an ‘effective system of domestic review, including an effective system of appeal’. As such, the Model Law 2011 and the GPA are now more closely aligned in this respect. A new general principle has also been added to the Revised GPA under which procurement should be conducted in a ‘transparent and impartial manner that ...avoids conflicts of interest and prevents corrupt practices’.²³ This provision reflects the realization that GPA membership has always had the potential to promote good governance through channels such as ready access to applicable procurement rules and contract opportunities, limiting the discretion of procurement officers and independent review of compliance with procedural rules.

¹⁷ The Guide (page 3, para. 8) refers to ‘value for money and the avoidance of abuse in public procurement’ as the ‘overarching aims of the Model Law’, without also referring to non-discrimination in this immediate context

¹⁸ The benefits of ‘external liberalization’ is among the themes explored in R.D. Anderson, W.E. Kovacic and A.C. Müller ‘Ensuring integrity and competition in public procurement markets: a dual challenge for good governance’ in Arrowsmith and Anderson (eds.) *The WTO Regime on Government Procurement* 681.

¹⁹ This suggestion is corroborated by the Pelletier, Osei-Lah and Müller (above note 2) at 24-25. The authors comment that countries often note in technical assistance seminars that enhanced competition and good governance can be achieved without GPA membership. The authors suggest: ‘The real question is whether the GPA accession process, and continuing participation in the Agreement, can stimulate or reinforce the necessary domestic reforms, and introduce a degree of ongoing monitoring that helps in maintaining a “clean” and competitive procurement system.’

²⁰ Guide pages 11-12, section 6. Article 3 of the Model Law provides that Treaty obligations prevail when in conflict with the Model Law.

²¹ Appellate Body report, above note 9, para. 5.59.

²² GPA Preamble: *Recognizing* the importance of transparent measures regarding government procurement, of carrying out procurements in a transparent and impartial manner and of avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention Against Corruption.

While the Model Law does not itself refer to UNCAC, there are several references to it in the Guide to Enactment. Page 3, para. 8; page 306, para. 1.

²³ Revised GPA Article IV(4).

As for the enforceability of the new provisions, it is difficult to accept that panels and the Appellate Body will be prepared to engage directly with whether it has been breached. Apart from the uncertain scope of the provision, conflicts of interests and (even more so) corruption are very sensitive matters. The Appellate Body does not actually engage directly with another sensitive (but less sensitive) matter; that of whether a measure is ‘applied so as to afford protection to domestic production’. While it is clear that this is an independent legal test which must be considered separately under GATT Article III:2 second sentence, no attempt needs to be made to ascertain the subjective intent of individual policy makers. The matter is desensitized by considering whether protective application can be ascertained from the, ‘design, the architecture, and the revealing structure of a measure’.²⁴ Panels are therefore likely to distance themselves from direct engagement with alleged conflicts of interest and corruption, choosing instead to view the new provision as providing interpretive context for other more specific provisions. As such, the main impact of the new provision is likely to be to inform the future development of the specific transparency based rules.

In sum, the GPA remains first and foremost an instrument of trade liberalization. Undoubtedly this liberalization can also enhance the achievement of value for money through increased competition even though the meaning of this concept and how to achieve it is a matter for national regulation. When trade liberalization means that contracts are placed with foreign suppliers, this is not at all necessarily at the expense of domestic suppliers. The local capacity to perform large contracts might not exist, but existing small firms could benefit from sub-contracting and technology transfer.²⁵ Trade liberalization in the procurement context should not have any pejorative connotation. There is also growing understanding of the ways in which GPA membership can contribute towards good governance albeit that this has more to do with the emergence of this concept than any shift in focus in procurement regulation at the WTO. It is also increasingly possible to think about international procurement instruments which may have somewhat different primary rationales as each contributing towards a coherent whole. To some extent, the GPA takes over the baton from the Model Law.

3. Enforcement and Remedies under the GPA

The country studies focus in part on the national implementation of the GPA requirements on enforcement and remedies. This section provides an account of these requirements.

When suppliers consider that the GPA has not been properly implemented, or that it has been breached in the context of a particular award procedure, they can take advantage of the requirement to provide for domestic review procedures. Significantly, suppliers can resort to these procedures independently of their governments so that this form of enforcement is fundamentally different to intergovernmental dispute settlement under the Dispute Settlement Understanding (DSU).

The rationale for the obligation in international instruments to provide for domestic review procedures is referred to in the Model Law 2011 Guide to enactment:

An effective challenge mechanism helps to make the Model Law to an important degree self-policing and self-enforcing, since it provides an avenue for suppliers and contractors that have a natural interest in monitoring procuring entities' compliance with the provisions of the Model Law in each procurement procedure. It also helps foster public confidence in the procurement system as a whole. An additional function of a challenge mechanism is to act as a deterrent: its existence is designed to

²⁴ WT/DS8,10, 11/AB/R Japan – *Taxes on Alcoholic Beverages* adopted November 1, 1996 page 29.

²⁵ These are among the themes developed by Pelletier, Osei-Lah and Müller, above note 2.

discourage actions or decisions knowingly in breach of the law. For these reasons, a challenge mechanism is an essential element of ensuring the proper functioning of the procurement system and can promote confidence in that system.²⁶

In the Revised GPA, the minimum requirements for domestic review procedures are set out in Article XVIII:

Article XVIII:1 Domestic Review Procedures

1. Each Party shall provide a timely, effective, transparent, and non-discriminatory administrative or judicial review procedure through which a supplier may challenge:

(a) a breach of the Agreement; or

(b) where the supplier does not have a right to challenge directly a breach of the Agreement under the domestic law of a Party, a failure to comply with a Party's measures implementing this Agreement,

arising in the context of a covered procurement, in which it has, or has had, an interest. The procedural rules for all challenges shall be in writing and made generally available.

The GPA 1994 did not contain paragraph (b) above, so that suppliers apparently had to be given the opportunity to challenge 'a breach of the Agreement'. Some commentators interpreted this language as indicating that the GPA was intended to have direct effect in the legal systems of all its Parties.²⁷ Had this been correct, national review bodies would be required to apply the GPA itself, rather than national implementing measures in the event of a conflict. It is now clear from the inclusion of paragraph (b) that direct effect is a matter for individual Parties. Therefore, when the supplier's complaint is that the GPA has not been properly implemented by a state which does not recognize the direct effect of the WTO agreements, the appropriate course of action would be for the supplier to petition its government to institute intergovernmental proceedings under the DSU.

In contrast, when the GPA has been properly implemented, but when the relevant national rules have not been followed by an entity in a specific procurement, suppliers can usefully have recourse to domestic review procedures. Indeed, the requirement for Parties to provide for these procedures stems from the inadequacy of the DSU in providing a meaningful solution where the complaint relates to a specific procurement. The timetable for resolving disputes under the DSU is understandably protracted²⁸ and there is no provision for interim remedies, such as the suspension of the award procedure, at the start of the dispute. Indeed, there would be little point in providing for suspension, unless a panel could order the recommencement of the procedure in the event of a breach being confirmed. It is generally understood, however, that the standard recommendation under DSU Article 19 has only prospective effect. The requirement to 'bring the [inconsistent] measure into conformity' is a forward looking remedy which does not entail reparations for injury caused by WTO violations.²⁹

²⁶ Guide page 228, para. 2.

²⁷ T Cottier 'A Theory of Direct Effect in Global Law' in Von Bogandy, Mavroidis and Mény (eds.), *European Integration and International Co-ordination* (2002) Kluwer Law International.

²⁸ The GPA 1994 Article XXII.6 had provided that that, '[e]very effort should be made to accelerate the proceedings to the greatest possible extent' and then went on to recommend specific reduced deadlines. Interestingly, this provision has been jettisoned from the Revised GPA, which probably reflects the view that breaches of the GPA in the context of a specific procurements can only realistically be challenged at the national level.

²⁹ See A Davies 'Reviewing Dispute Settlement at the World Trade Organization: a Time to Reconsider the Role/s of compensation' (2006) 5 *World Trade Review* 31.

In the procurement context, the *Trondheim*³⁰ case, decided under the Tokyo Round GPA, confirms that remedies following intergovernmental proceedings at the WTO cannot have an impact on past conduct. The case involved the Norwegian Public Roads Administration which awarded a contract relating to electronic toll collection equipment for a toll system around the city of Trondheim to a Norwegian company, Micro Design. As limited tendering was used, (then referred to as single tendering) the award was not preceded by any competitive tendering procedure. This was challenged by the United States on the basis that the use of limited tendering had excluded ‘viable and eager competition from a capable United States supplier’. The panel first found that the use of limited tendering was not justified under the governing provisions in effect at that time.³¹ Therefore the national treatment provision then contained in Article II:1 (now Article IV:1) was found to have been breached. The panel then considered the remedies which the United States had requested:

4.17 ... the Panel noted that all the acts of non-compliance alleged by the United States were acts that had taken place in the past. The only way mentioned during the Panel’s proceedings that Norway could bring the Trondheim procurement into line with its obligations under the Agreement would be by annulling the contract and recommencing the procurement process. The Panel did not consider it appropriate to make such a recommendation. Recommendations of this nature had not been within customary practice in dispute settlement under the GATT system and the drafters of the Agreement on Government Procurement had not made specific provision that such recommendations be within the task assigned to panels under standard terms of reference. Moreover, 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.

The panel also noted that proposals had been made in relation to revising the Tokyo Round GPA which were intended to ‘address the difficulty felt to exist in obtaining effective redress in respect of complaints about specific procurements’.³² The negotiations resulted in revisions to the Uruguay Round GPA which are now found in Article XVIII of the Revised GPA 2012. This provision advises that ‘the Party of the procuring entity conducting the procurement shall encourage the entity and the supplier to seek resolution of the complaint through consultations’.³³ It then sets out requirements on the identity and attributes of the review body, and the remedies which it should have at its disposal.

a) The Identity and Attributes of the Review Body

Article XVIII:4 provides that, ‘[e]ach Party shall establish or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of a covered procurement’. Paragraph 5 goes on to provide that ‘a body other than an authority referred to in paragraph 4’ can initially review a challenge’. It may therefore be permissible for the procuring entity complained of to initially review the challenge, although this could be regarded as an unnecessary procedural formality if the formal complaint was preceded by consultations between the aggrieved supplier and the procuring entity. An alternative could therefore be for challenges to be initially reviewed by the government entity with oversight of the entity complained of.

Where there is an initial review by a non-independent authority, Parties must provide for an appeal against the initial decision to an impartial administrative or judicial authority. Paragraph 6 provides that where this review body is not a court, it must either be subject to judicial review or operate with what might be

³⁰ *Norway – Procurement of Toll Collection Equipment for the City of Trondheim* panel report adopted by the Committee on Government Procurement 13 May 1992, BISD 40S/319.

³¹ Article V:15(e) of the Tokyo Round GPA.

³² Para. 4.27.

³³ Revised GPA Article XVIII:2.

described as ‘court-like’ procedures. Participants must, for example, have the right to be heard prior to a decision and have access to all proceedings.

It is not expressly provided that entities must follow review body recommendations, although this is arguably implicit in the need to provide for access to courts or court-like procedures. Some international rules are not as strict in this respect. For example, the North America Free Trade Agreement rule states that entities should ‘normally’ follow the recommendations of the review body.³⁴ It is unclear whether this position would be acceptable as an implementation of the GPA. This is because reference is made to the review body making ‘decisions or recommendations’.³⁵ The use of ‘recommendations’ can be interpreted as indicating that the entire content of the review body report can be non-binding. However, this interpretation is difficult to accept bearing in mind that review procedures must be ‘effective’. A possible intermediate interpretation would be that the decision on whether the rules have been breached must be binding, while recommendations on how to remedy the situation can be non-binding. However, this interpretation would make the GPA less strict than the 2011 Model Law whose Article 67.9 refers to ‘decisions’ as opposed also to recommendations, and gives a strong impression that the content of these decisions is binding through use of language such as ‘prohibit’, ‘require’ and ‘overturn’.

For a couple of reasons, the minimum requirements described above arguably provide less protection to aggrieved suppliers than the equivalent rules in the previous text. The GPA 1994 did not envisage the possibility of initial review of a challenge by a body other than an impartial administrative or judicial authority. It will be interesting to see whether the country studies comment on the incidence and efficacy of this procedural step.³⁶ It occurs to me that it could be viewed by suppliers as either an unwanted hurdle, or as an opportunity to ‘nip the matter in the bud’.³⁷ A second aspect which arguably reduces the level of protection relates to the attributes of the review body. As noted, the Revised GPA requires Parties to ‘designate at least one impartial administrative or judicial authority that is independent of its procuring entities’. The previous text was more fulsome in requiring that challenges, ‘be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment’.³⁸ On this change, Arie Reich comments that, ‘[n]ot only is the exact nature of such independence not elaborated in the Revised Text but it also ignores the need to ensure that the body’s members are secure from other external influence, such as influence from competing suppliers’.³⁹ This may slightly overstate the problem as a review body whose members could be subject to influence by competing suppliers would not be impartial. However, I am inclined to agree that there was no need to streamline the old language.

A final observation here is that it remains permissible under a minimal GPA implementation to keep review out of the courts. It is permissible under the GPA for the appeal to be to an impartial administrative authority operating under ‘court-like’ procedures. The question raised is whether this is consistent with the UNCAC which requires an ‘effective system of domestic review, including an effective system of appeal’. It is

³⁴ NAFTA Article 1017:1(l).

³⁵ Revised GPA, Article XVIII:6(f).

³⁶ The Model Law Guide indicates that there are different state practices in this area: ‘Some States are more flexible by not requiring the supplier or contractor to exhaust the challenge mechanism at the procuring entity before filing an application before the independent body or the court.’ Page 237, para. 7.

³⁷ The Guide elaborates on both possible perceptions. Review by the procuring entity itself may, ‘facilitate a swift, simple and relatively low-cost procedure, which can avoid unnecessarily burdening other forums with applications and appeals that might have been resolved by the parties at an earlier, less disruptive stage, and with lower costs’. On the other hand, it is also noted that, ‘procuring entities [sometimes] simply ignore the request, and submitting one operates in practice merely to delay a formal application in another forum’. Page 230, para. 11.

³⁸ GPA 1994, Article XX.6.

³⁹ A. Reich ‘The new text of the Agreement on Government Procurement: An Analysis and Assessment’ 12 *Journal of International Economic Law* (2009) 989 at 1015.

submitted that the possibility of appeal to the courts is not required. The Guide to Enactment to the Model Law 2011 gives the impression that this would be inconsistent with the legal traditions of states with established systems of review in non-judicial independent bodies.⁴⁰ In such states, the effective system of appeal could be from the procuring entity itself to the independent body, or within the independent body. However, this matter is not free from doubt as indicated by the following statement from the UNCITRAL Guidance on Procurement Regulations (2013):

...the procurement regulations must be compliant with the international obligations of the enacting State, including under the United Nations Convention against Corruption (New York, 31 October 2003) and the WTO GPA, which may require them to ensure effective appeal to an independent body and that decisions of any review body that is not a court be open to judicial review.⁴¹

b) Remedies

Article XVIII:7 Each Party shall adopt or maintain procedures that provide for:

(a) rapid interim measures to preserve the supplier's opportunity to participate in the procurement. Such interim measures may result in suspension of the procurement process. The procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether such measures should be applied. Just cause for not acting shall be provided in writing; and

(b) where a review body has determined that there has been a breach or a failure as referred to in paragraph 1, corrective action or compensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both.

The rationale for rapid interim measures is that if the procurement process is permitted to continue during the challenge procedures, the final remedy is unlikely to be very helpful in terms of encouraging suppliers to complain, and deterring breaches. This is because a contract might be concluded or even performed during the review procedure. Should these events be permitted to occur, any remedy other than a declaration that a breach has occurred becomes unlikely because of prejudice to the successful supplier and the public interest in the prompt delivery of government functions. In contrast, if the procurement process can be suspended at an early stage, the possibility of re-commencement being ordered is preserved.

The language in paragraph (a) above could be more prescriptive without clashing with prevailing legal traditions. In particular, the language could indicate that review bodies must have the power to suspend the procurement process at any point until the conclusion of a procurement contract subject to taking account of the 'overriding adverse consequences' referred to. However, it would probably be a step too far to require that review bodies be empowered to suspend the performance of a contract. This is envisaged only as a possible option in the Model Law 2011.⁴²

As regards the final remedies envisaged by the paragraph (b) above, it is reasonably clear that review bodies must have both remedies (correction and compensation) at their disposal, again, on the basis that 'effective' challenge procedures are required. Of these two remedies, corrective action will generally be by far the most

⁴⁰ Guide Page 231, para. 15.

⁴¹ Guide Page 61, para. 4.

⁴² Article 67.3.

important, given that the compensation remedy can permissibly be a limited one.⁴³ Corrective action might involve preventing the procuring entity from following a non-compliant procedure and requiring it to proceed in a compliant manner. It could also extend to overturning the award of a wrongfully awarded contract when this possibility is recognized in the jurisdiction in question.

The GPA's minimum requirements for domestic review procedures have been criticized as insufficiently strong and prescriptive. However, they are minimum requirements and there is nothing to prevent states from applying more robust procedures. Also, the GPA has to be a reasonably good fit for many jurisdictions. Prescriptive language could make it difficult for some states to comply even when they provide for an overall system which is effective.

4. Supporting the participation of SMEs in procurement

Taking a step back from the new Work Programme on SMEs, it is worth sketching the different perceptions on the nature of the problems and challenges in this area. The different perceptions have a common origin. National policies to support SMEs and, more broadly, enterprises owned by historically disadvantaged individuals (HDIs), tend to be discriminatory. From here, perceptions split off in two directions. On one view, the discrimination is problematic and the challenge is to remove it. The opposing perception views the discrimination as an intractable, necessary and justifiable aspect of the social policy. The challenge is not to remove the discrimination, but rather to assess how the GPA can better accommodate these policies with a view to expanding its membership. The SME Work Programme appears to be focused on the former perception.

The intention is to consider, 'best practice with respect to measures and policies that the parties use to support the participation of SMEs in government procurement'.⁴⁴ Glancing at the relevant Decision,⁴⁵ it is immediately apparent that the Work Programme views policies which discriminate in favour of domestic SMEs as undesirable, thereby reinforcing the GPA's primary rationale. The second paragraph provides:

Avoidance of Discriminatory SME Measures: The Parties shall avoid introducing discriminatory measures that favour only domestic SMEs and shall discourage the introduction of such measures and policies by acceding Parties.

Reference is later made to a SME survey and to the implementation of the outcome of this survey. However, the wording implies that SME policies which favour only domestic SMEs cannot qualify as best practice:

4.2 Implementation of the Outcome of the SME Survey

(a) The Parties shall promote the adoption of the best practices identified in the assessment of the survey to encourage and facilitate participation of SMEs of the Parties in government procurement.

⁴³ It notable that the Israel-Mexico Free Trade Agreement provides that compensation 'shall [rather than may] be limited to costs for tender preparation or protest.' Article 6.17.7(c). The Model Law 2011 also envisages this formulation as a possible implementation of its Article 67.9(i).

⁴⁴ http://www.wto.org/english/tratop_e/gproc_e/gpa_wk_prog_e.htm visited November 2014.

⁴⁵ Appendix 2, Annex C of Adoption of the Results of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement, Following their Verification and Review, as Required by the Ministerial Decision of 15 December 2011 (GPA/112), paragraph 5, GPA/113, 2 April 2012.

(b) With respect to other measures, the Committee shall encourage the Parties that maintain such measures to review them with a view to eliminating them *or applying them to the SMEs of the other Parties*. These Parties shall inform the Committee about the outcome of the review. (emphasis added)

Accepting that the Work Programme is about fostering SME participation while also removing discrimination, there are a number of related queries. The first relates to its narrowness or breadth since states can have different perceptions of what is meant by SME participation. A second query is whether there are plausible rationales for promoting SME participation. Why, if at all, is this important? A third query is whether it is realistic to expect much progress in removing or reducing the discriminatory content of SME policies.

On the first query, some states pursue SME participation in a direct and literal sense based on measurements broadly related to the size of enterprises.⁴⁶ States also pursue SME participation indirectly or incidentally, for example, because relatively small enterprises are disproportionately owned by HDIs. While the Work Programme refers only to SMEs, the possibility of a broad remit should not be excluded at this early stage. In the envisaged survey, Parties will be required to indicate how they define SMEs, and what ‘economic, social, and other goals’ are pursued. It is possible that some GPA Parties, the US in particular, will highlight that some of its policies are directed towards minority owned enterprises. Perhaps the likelihood, however, is that the Work Programme will be restricted to national policies which define SMEs with reference to size as opposed to ownership parameters. This is because the Work Programme applies to current GPA Parties, among whom SME participation in the direct and literal sense is more prevalent than policies supporting companies owned by HDIs. This tends to be more closely associated with states which are not yet GPA Parties such as South Africa and Malaysia (which has observer status). It may be that the focus on SME participation in the narrow sense is a sensible starting point before consideration of social policies more broadly. There is more potential for agreement on what a SME is when only size parameters are considered. Also, there may be more scope for removing discrimination when SME participation is understood in the narrow sense (as discussed further below).

What are the rationales for promoting SME participation? As John Linarelli asks:

Why should law and public policy allocate scarce resources to SMEs? Why not let the capital markets decide which businesses should succeed and which not? Why is government intervention beyond that of supporting efficient capital markets necessary to support SMEs?⁴⁷

Based on a review of the literature, Linarelli identifies a number of possible economic arguments in favour of policies to assist SMEs in general. Competition and entrepreneurship can be enhanced with benefits for economy wide efficiency, innovation and aggregate productivity. The industrial base can be broadened thereby countering monopolistic practices. SMEs may also be more productive than larger enterprises and more labour intensive with greater potential to alleviate poverty. Suffice it to say that these are not uncontested arguments. Linarelli proceeds to review the studies of SME preference policies in procurement, finding some evidence that they can enhance

⁴⁶ For a discussion of the various methods for defining small businesses and SMEs in the EU and US, see, Max V. Kidalov, "Small Business Contracting in the United States and Europe: A Comparative Assessment" (2011) 40 Public Contract Law Journal 445.

⁴⁷ J. Linarelli 'The limited case for permitting SME procurement preferences in the Agreement on Government Procurement' in Arrowsmith and Anderson (eds.) *The WTO Regime on Government Procurement* 444 at 447.

competition by encouraging other firms to bid more aggressively in order to overcome preferences and win contracts. Of course, the possibility of enhanced competition is more strongly associated with SME preferences than set-asides.

While there may be commercial rationales for SME preferences (they may enhance value of money), the stronger tenet of Linarelli's work is to argue that there are more important social justice and human rights rationales especially in the context of enterprises owned by HDIs:

Distributive justice and economic efficiency may work at cross-purposes. A social arrangement may be efficient and yet fundamentally unjust. Let us assume that governments only focus their attention on transaction costs and reducing barriers to entry in government procurement. Facilitating the operation of markets in government procurement does not 'guarantee' fair participation in those markets by SMEs and HDIs. It might be efficient to only have large multinational enterprises, which have the benefits of economies of scale and low-cost global supply chains, providing bundled goods and services to government, regardless of the national origins of these goods and services, and regardless of the working conditions or wages paid for these goods and services to labour, and regardless of ownership of these firms, and so on. Governments, however, have duties that go beyond efficiency in procurement. They have duties of justice. While all social institutions are required to meet the demands of justice, a government as a buyer is a special role to promote justice; it is now well accepted that governments can and do use procurement as a social policy tool.⁴⁸

In sum, SME participation can, at the same time, promote strictly economic goals and broader social justice goals. However, there is a compelling argument that social justice goals stand alone and can be legitimately pursued independently of economic goals.

The third query is whether it is realistic to expect much progress in removing the discriminatory content of SME policies. Do states wish to continue pursuing discriminatory SME policies outside of GPA coverage by way of negotiated derogations, or do they perceive that the benefits of these policies can be achieved even when the discrimination is removed?

Preferences and set-asides in favour of domestic SMEs are *de jure* discriminatory and contrary to the national treatment principle in Article V:1 of the GPA. This is because the nationality based discrimination is indisputable from the face of the measure. All foreign firms are ineligible, while some domestic firms are eligible. This discrimination could be removed by extending eligibility to all SMEs of the GPA Parties. A common definition of a SME would help in aiding understanding of eligibility, but this is not strictly necessary in order to remove discrimination. Eligibility of all enterprises of the GPA Parties meeting national criteria would be *de jure* non-discriminatory and probably also *de facto* non-discriminatory. The extended eligibility removes the explicit differentiation between domestic and foreign suppliers. On *de facto* discrimination, foreign suppliers as a group (foreign SMEs and non-SMEs) are treated no less favourably than domestic suppliers as a group (domestic SMEs and non-SMEs).⁴⁹ An additional observation is that the point made earlier when contrasting the GPA and Model Law applies here. Divergent national rules on the definition of a SME can all be non-discriminatory and, therefore, of limited directed concern

⁴⁸ Ibid., at 452 (notes omitted).

⁴⁹ In WTO law, it is now firmly established that a group comparison applies as opposed to an approach which has been variously termed individual or diagonal comparison or best treatment. Under this (discredited) approach, there could be *de facto* discrimination on the basis that there is a foreign non-SME which is treated less favourably than a domestic SME. This area is the subject of the author's forthcoming work which compares the choice between group comparison and best treatment in the trade and investment law context.

under the GPA. However, divergent definitions could still have a chilling effect on international trade of more direct concern under the Model Law.

Of course, any discussion of what steps would remove discrimination must consider the practicalities and political considerations. Reaching a common definition of a SME among GPA Parties is probably unrealistic by reason of the volume of variables. Individual states may have different definitions for different types of industries and procurement contracts⁵⁰ and it might be regarded as incomplete to consider the positions of only existing Parties as opposed to also future accessions. Furthermore, the formulation and enforcement of SME recognition rules even at the national level can be a formidable challenge.⁵¹ Perhaps the most that can be achieved here is a soft mutual recognition principle, along the lines of Article 2.7 of the TBT Agreement, under which a GPA Party would give positive consideration to recognizing a supplier as a SME when that supplier is so recognized in any other Party. The alternative of allowing foreign suppliers to apply for SME status under national rules may not be any more realistic. SME preferences and set-asides respond to the difficulties encountered in accessing national procurement markets. Suppliers can reasonably be expected to apply for recognition under their national rules, but they are unlikely to have the resources to apply for recognition under the rules of many other GPA Parties.

Apart from these practical difficulties, the question is whether it is politically realistic to expect states to extend domestic SME preferences and set-asides to foreign suppliers. The perception might be that the achievement of the policy is undermined every time a contract is awarded to a foreign SME. This need not be the perception if the policy is intended to gradually improve the competitiveness of domestic SMEs. Extending the SME preference or set aside to SMEs of all GPA Parties would deepen and intensify competition among similarly situated enterprises. However, this raises another barrier. States may wish to shelter their SMEs from competition not only from larger domestic and foreign enterprises, but also from foreign SMEs.

When we move beyond SMEs *per se*, towards enterprises owned by defined national HDIs, the desire to reserve the policy's benefit for the defined enterprises may be overwhelming. Phoebe Bolton and Geo Quinot note that, in South Africa, a HDI is defined in regulations 'to refer to those individuals disenfranchised under apartheid, women and the disabled, but in all instances restricted to South African citizens'.⁵² In describing the regulations adopted under the relevant enactment,⁵³ the authors note the possibility of preference points 'for being an HDI and/or contracting with an HDI'.⁵⁴ They also note that, under the regulations, 'preference points ... must include preference points for equity ownership by HDIs'.⁵⁵ While these preferences may not be *de jure* discriminatory, because a small number of foreign firms could be eligible, they are certainly *de facto* discriminatory on the basis that the preferences will disproportionately benefit domestic suppliers.

⁵⁰ See Kidalov, above note 46, at 461-465. Of the US position, the author notes that a 'business concern may be small in one industry category and yet large in another' at 463.

⁵¹ On the development of this process in China, see Fuguo Cao, 'Building up SME programmes in government procurement in China: legal structure, recent developments and the way forward towards the WTO-GPA' (2013) *Public Procurement Law Review* 211.

⁵² P. Bolton and G. Quinot 'Social Policies in procurement and the Agreement on Government Procurement' in Arrowsmith and Anderson (eds.) *The WTO Regime on Government Procurement* 459 at 463.

⁵³ Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000).

⁵⁴ Preferential Procurement Regulations 2001, regulation 4(2).

⁵⁵ *Ibid.*, regulation 13(1).

Subsequent to the Bolton and Quinot contribution, revised regulations entered into force in 2011.⁵⁶ The new regime is less trade restrictive and less overtly discriminatory than the previous regime, and therefore enhances competitive opportunities for foreign firms. The primacy afforded to domestic HDI ownership at the award stage has been reduced. Indeed, the terminology has changed from HDI to Broad Based Black Economic Empowerment (B-BBEE). For contracts up to a Rand value of R 1 million, a maximum of 80 points can be awarded for price, and a maximum of 20 points for the level of attainment of B-BBEE status. Within this 20 points, there are a number of elements with different weightings:⁵⁷

Ownership	25 points
Management Control	15 points
Skills Development	20 points
Enterprise and Supplier Development	40 points
Socio-economic development	5 points

While the first two elements will tend to heavily favour domestic suppliers, the further elements are more neutral in terms of the capacity of domestic and foreign suppliers to score highly. As an example, the most important component of the Enterprise and Supplier Development element is Preferential Procurement on which foreign suppliers could score highly by sub-contracting to high level B-BBEE suppliers.

More than the outgoing regime, the new regime recognizes that pursuing the social policies at issue is not necessarily incompatible with awarding contracts to foreign firms. However, the revised regime at least could amount to *de facto* discrimination on the basis that it still disproportionately favours domestic suppliers.

Based on these observations, I am sceptical of the prospects for completely removing the discriminatory nature of SME policies, especially when there is a HDI dimension. Having said this, it is a worthwhile endeavour to at least explore these prospects. The GPA is an instrument of trade liberalization whose central principle is non-discrimination for covered procurement. It arguably does not need to shift towards a different role served very well by other instruments such as the Model Law which, as noted, applies in principle to all procurement and is not so focused on removing discrimination.⁵⁸ On the other hand, it is also possible to argue that the Work Programme does not respond to the GPA's biggest challenge – that of expanding its membership. A recalibrated Work Programme would acknowledge that SME policies are understandably discriminatory and focus on how such policies can be better accommodated, in particular, for possible future members. The focus would then need to be on matters such as the asymmetry in the

⁵⁶ Preferential Procurement Regulations 2011, which must be read with the Broad Based Black Economic Empowerment Act (53/2003) Codes of Good Practice, Gazette No, 36928, 11 October 2013.

⁵⁷ Codes of Good Practice, Statement 000-8.1.

⁵⁸ It is clear that the Model Law is designed to accommodate the pursuit of socio-economic policies with discriminatory impact. This subject area is discussed in the Guide at pages 4-6. It is noted that through measures envisaged in the Model Law's substantive provisions, 'procurement may be set aside for particular groups or sectors of the economy, or those sectors or groups may receive a preferential treatment in the procurement procedure concerned'. (page 4, para. 13) At the same time, the Guide strikes several notes of caution. It highlights, for example, that preferences tend to be more beneficial than set asides in terms of fostering the development of protected enterprises. Socio-economic policies are described as 'exceptional measures' because they depart from 'full and open competition'. The danger of suppliers artificially remaining as SMEs is mentioned as is the importance of remaining in conformity with international obligations including the GPA.

capacity of large and small economies to negotiate for derogations, and the possibility of allowing GPA Parties to justify discriminatory policies on any legitimate public policy ground as opposed to the closed list of exceptions in Article III:2.

5. Procurement may not be carved out of multilateral rules such as GATT Article III to the extent that has been commonly thought

The questions of whether and how government procurement should be regulated are among the most challenging which GATT and WTO negotiators have faced. The sensitivity of the area became clear at a very early point in the history of international procurement regulation. It is striking that the Suggested Charter for an International Trade Organisation drafted by the United States, and published in September 1946, originally proposed that government procurement should be subject to the general national treatment obligation.⁵⁹ However, it quickly became apparent that this would not be possible because of the prevalence of discriminatory laws and practices involving preferences for domestic suppliers. Indeed the Charter's initial inclusion of procurement was substituted⁶⁰ with a derogation which survives to this day:

GATT Article III:8(a)

The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

This derogation may not be as broad as has generally been thought. The Appellate Body's message in *Canada – Renewable Energy* is that it will not serve to shelter challenged measures from the disciplines of Article III on a blanket or 'self-judging' basis. Japan and the EU complained of domestic content requirements applicable in the construction of solar and wind power generation facilities in the Feed-in tariff programme (FIT Programme) established by the Ontario Power Authority.⁶¹ Under the FIT Programme, generators of electricity via renewable sources delivered into the Ontario system are paid a guaranteed price under 20 year or 40 year contracts. The meeting of minimum domestic content levels are among the conditions for being offered a contract. Both Japan and the EU argued *inter alia* that the domestic content requirements infringed the GATT Article III:4 national treatment obligation on the basis that their energy generation equipment was being treated less favourably than like products of Ontario origin.⁶² Canada countered that the Article III:8 derogation applied. For Canada, the FIT programme constituted 'laws and requirements that govern the procurement of renewable electricity for the governmental purpose of securing an electricity supply for Ontario from clean sources, and "not with a view to commercial resale or with a view to use in the production of goods for commercial sale"'.⁶³

⁵⁹ Article 9(1) covered 'laws and regulations governing the procurement by governmental agencies of supplies for public use other than by or for the military establishment'. Available at <http://www.worldtradelaw.net/document.php?id=misc/Suggested%20Charter.pdf> visited November 2014.

⁶⁰ The derogation first appeared in Article 2(5) of the Tentative and Non-Committal Draft Suggested by the Delegation of the United States of February 7, 1947, E/PC/T/C.6/W.53. Available at <http://www.worldtradelaw.net/document.php?id=misc/Draft%202.pdf>

⁶¹ This body was established under Ontario's Electricity Restructuring Act of 2004 as a government agency responsible for managing Ontario's electricity supply.

⁶² There was no complaint under the GPA. Canada has not included government agencies in the electricity sector located in Ontario in its GPA commitments.

⁶³ Appellate Body report para. 1.10.

The panel ultimately found that the derogation was not available, even though the initial indications were favourable towards its application. According to the panel, the FIT Programme and the Contracts were ‘laws, regulations or requirements governing the procurement’ of electricity. This was because compliance with the local content requirements was a precondition for the award of a contract for the procurement of electricity. The local content requirements therefore governed the procurement of electricity. The panel then proceeded to the second part of the derogation. Was the electricity, ‘purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale’? The panel considered that a purchase could not be ‘for governmental purposes’ if it was ‘with a view to commercial resale’. It proceeded to find that the derogation was not applicable because the electricity was purchased ‘with a view to commercial resale’ by reason of the profit made by the Government of Ontario from resale of FIT Programme electricity to consumers, and because the resales were made in competition with licensed electricity retailers. However, the panel also noted that ‘commercial resale’ would not always necessarily involve profit noting that, ‘loss-making sales can be, and often are, a part of ordinary commercial activity’.⁶⁴ The domestic content requirements were then confirmed as a GATT Article III:4 violation.

The Appellate Body’s interpretation of the derogation was narrower than that of the panel. In other words, it considered the derogation inapplicable at an earlier stage of the analysis and independently of whether the purchase of electricity was ‘with a view to commercial resale’. The Appellate Body’s core idea was that the derogation had to be understood in relation to the obligations of Article III. The derogation ‘becomes relevant only if there is discriminatory treatment of foreign products that are covered by the obligations in Article III, and this discriminatory treatment results from laws, regulations, or requirements governing procurement by governmental agencies of products purchased’.⁶⁵ The ‘same discriminatory treatment’ had to be considered both under Article III and the derogation. It followed that the term ‘products purchased’ in the derogation was tied to the scope of the ‘products’ covered by Article III. This meant that, for the derogation to apply, ‘the product of foreign origin [electricity generating equipment] must be in a competitive relationship with the product purchased [electricity]’.⁶⁶ As there was no competitive relationship, the discrimination relating to generating equipment in the FIT contracts was not covered by the derogation.

The Appellate Body therefore introduced a condition for the operation of the derogation. The imported products allegedly being treated less favourably under Article III must be in a competitive relationship with the products purchased. It is not enough (as the panel considered) that there is a close relationship between the products discriminated against under Article III and the products purchased in the sense that electricity generation equipment is needed to produce electricity.

It is interesting to question the implications of this interpretation – specifically, the extent to which it expands the reach of Article III into what might loosely be described as the procurement realm. ‘Buy-national’ policies have been under the spotlight in recent years following the downturn of 2008-9 and the increased emphasis on public infrastructure spending. The American Recovery and Reinvestment Act of 2009⁶⁷ was among the most prominent instruments. The Act was passed with a provision stipulating that the new Buy American requirements ‘shall be applied in a manner

⁶⁴ Panel report 7.151.

⁶⁵ Appellate Body report para. 5.63.

⁶⁶ Appellate Body report para. 5.74.

⁶⁷ Public Law No. 111-5, 123 Stat, 115 (17 February 2009). (Recovery Act).

consistent with United States obligations under international agreements'.⁶⁸ Commentators have assessed whether the Recovery Act and its implementing federal regulations breach the WTO commitments of the US.⁶⁹ Understandably, the primary focus has been on whether the Recovery Act breaches the GPA. It is generally thought that a breach is unlikely. When the contracts are not covered by the GPA, the Buy American requirements can be applied while covered contracts are exempt from Buy American treatment. With regard to GATT Article III, commentators tend to cite the paragraph 8 derogation as exempting government procurement from national treatment. However, as a result of *Canada – Renewable Energy*, it must also be asked whether buy national requirements are covered by GATT Article III:4.

Take the example of a buy national requirement under which steel used in the construction of a highway must be of US origin. Such a requirement clearly falls under Article III:4 to the extent that it applies since imported steel is treated less favourably than like domestic steel. Arguably, Article III:4 does not apply because the Article III:8 derogation may not be available. The product being purchased is a highway which is not in a competitive relationship with the steel being discriminated against under Article III:4. In contrast, the panel's approach has the potential of extending the derogation to this situation. There is a reasonably strong connection between the steel discriminated against under Article III and the highway construction project which cannot be completed without steel. Continuing with the other main element of the derogation, the purchase of the highway would clearly not be 'with a view to commercial resale' so that, under the panel's analysis, the buy national requirement in relation to the steel would fall under the derogation.

Of course, it would be rather surprising if buy national requirements are not covered by the derogation. The original Buy American Act was passed in 1933 and it is reasonable to suppose that GATT Article III:8 was incorporated in order to shelter this instrument and comparable instruments / policies maintained by other states from review under Article III.

In the example above, in order for the derogation to apply, a more refined view would need to be taken of what product is purchased. While the final aim of the procurement is to provide a highway, it could still be argued that the project involves the purchase of steel. Unlike the generating equipment, there would be transfer of ownership to the government of the steel which is physically incorporated into the highway. Furthermore, the invitation to tender could set out the specification of the steel to be used and bids would specifically indicate the price of the steel component of the highway project. As such, it is reasonable to think in terms of one of the products being purchased as steel. There would then be commonality between the products discriminated against and the products purchased bringing the buy national requirement within the derogation. At the same time, however, the project is ultimately about building a highway as opposed to purchasing steel leading us to wonder how a panel or the Appellate Body would refine the *Canada – Renewable Energy* test in a subsequent case.

In the context of NAFTA Chapter 11 investor state dispute settlement, the tribunal in *ADF v United States*⁷⁰ confirmed that a highway construction project in which Buy American requirements were applied in relation to steel was covered by a derogation. However, the reasoning and outcome here cannot be automatically applied in the GATT / WTO context because both the substantive obligations and the derogation are drafted in different terms. NAFTA Article

⁶⁸ Recovery Act Section 1605(d).

⁶⁹ J. Linarelli, 'Global Procurement Law in Times of Crisis: New Buy American Policies and Options in the WTO Legal System' in Arrowsmith and Anderson (eds.) *The WTO Regime on Government Procurement* 773.

⁷⁰ ICSID ARB(AF)/00/1, Award 9 January 2003.

1108(7) and (8) provides that several substantive obligations such as National Treatment, Most-Favored-Nation Treatment and Performance Requirements ‘do not apply to procurement by a Party or a state enterprise’. The very brevity of this derogation means that there are fewer express elements which must be satisfied compared to GATT Article III:8. It does not, for example, expressly provide that the products purchased must be for the benefit or use of government, albeit that it is arguable that this concept is inherent to the ordinary meaning of ‘procurement’. It may therefore be that the NAFTA derogation can shelter a measure from review under Chapter 11, when the same measure would not be sheltered from review in WTO proceedings under GATT Article III.

It is possible that this very issue (the scope of the GATT and NAFTA procurement derogations) will be considered in *Mesa Power v Canada*⁷¹ in which an American investor is challenging the measures at issue in *Canada – Renewable Energy*. The claimant in *Mesa* contends that the WTO Appellate Body’s reasoning should be carried over to the NAFTA Chapter 11 procurement derogation. It therefore considers that the NAFTA derogation can only apply when the goods being procured are identical to the goods subject to domestic content provisions.⁷² Of course, this is was not the test established by the Appellate Body since it is well established that non-identical products can be in a competitive relationship. Canada’s position is that the plain language of the NAFTA derogation does not envisage so tight a nexus between the product discriminated against and the product purchased.⁷³ Indeed, Canada goes so far as to argue that the derogation could not possibly be interpreted as not applying to domestic content requirements. Given that ‘the majority of the world’s nations discriminate in their government procurement’, had the NAFTA Parties intended for the Chapter 11 investment obligations to cover domestic content requirements in government procurement, they would have expressly so provided.⁷⁴

It will be interesting to see what the *Mesa* tribunal makes of these arguments. One point is reasonably certain. If the tribunal follows the methodology of many previous NAFTA Chapter 11 tribunals, it will at least engage with the WTO law position. The Award ought therefore to further elucidate on the relationship between the trade law and investment law regimes.

A final point here is that one of Canada’s statements in *Mesa* is particularly striking. It notes that, in the *ADF* case, ‘the state of Virginia was not procuring steel, and it certainly was not procuring the process by which steel was manufactured; it was procuring the construction of a highway interchange’.⁷⁵ As noted above, if this was indeed what was being purchased, the GATT Article III:8 derogation would not shelter a Buy American requirement in relation to steel from review under Article III:4. There is no competitive relationship between a highway and steel.

To conclude on the doctrinal development in *Canada – Renewable Energy*, the Appellate Body’s approach has the potential to bring swathes of discriminatory domestic content requirements, many of which may be excluded from the GPA’s coverage, within the scope of GATT Article III. If this is not going to occur, a retreat towards the panel’s overruled reasoning seems to be inevitable. The procurement of a highway which involves discrimination against imported steel falls under the Article III:8 derogation because (based on the panel’s approach) there is a close, albeit non-

⁷¹ As of November 2014, the case is at the hearing stage. The submissions are available at:

<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/mesa.aspx?lang=eng> visited November 2014.

⁷² *Mesa Power*, Claimant’s Reply Memorial, para. 205.

⁷³ *Mesa Power*, Canada – Rejoinder, para. 78.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, para. 77.

competitive, relationship between the subject matter of the procurement and the products discriminated against.

6. Conclusion

The idea of a ‘global revolution’ in international procurement regulation may never have been more apt. The Revised GPA with its increased contract coverage has finally entered into force. During the same time frame, another major international instrument, the UNCITRAL Model Law has been revised. At the preferential trade agreement level, the negotiations towards a Transatlantic Trade and Investment Partnership between the EU and US are on-going. In this context, reference has been made to both coverage commitments and new disciplines going beyond the GPA.⁷⁶

Within this on-going process, the GPA’s distinctive features are that it concentrates on trade liberalization and market access as between a significant and growing body of Parties with enforcement and remedies primarily via domestic challenge procedures. Going forward, the most significant challenge is likely to be to maintain and enhance the GPA’s relevance for an increasingly diverse membership. While there will continue to be difficult tensions to reconcile, there is every reason for optimism in light of recent developments and a sense of significant momentum.

⁷⁶ Richard Craven, ‘EU-US Transatlantic Trade and Investment Partnership Agreement: the European Commission’s negotiating position on public procurement’ (2014) *Public Procurement Law Review* NA65.