

THE NEW TEXT OF THE AGREEMENT ON GOVERNMENT PROCUREMENT: AN ANALYSIS AND ASSESSMENT

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ABSTRACT

This article describes and analyzes the new, tentatively agreed text of the WTO Agreement on Government Procurement; and it compares this text with the existing agreement of 1995, offers interpretation of its provisions and discusses its potential implications for the regulation of international government purchasing. The objective of the article is to examine whether the new text has indeed delivered on its promise, namely to improve the existing agreement and to eliminate any remaining discriminatory measures and practices. To that aim the article presents the critique that has been leveled against the provisions of the existing GPA and examines to what extent the flaws detected by this critique have been rectified in the new text. The article concludes with a scorecard of the new text assessing its overall strengths and weaknesses.

Government procurement is a big business. In most countries it accounts for 10–20% of the gross domestic product, depending on the scope of the government's responsibilities and involvement in the economy.¹ It is also one of the last frontiers for international trade liberalization. Despite half a century of attempts and initiatives to open up public procurement markets to

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¹ For instance, in the European Union (EU) the percentage is 14%, if one includes military procurement, fuel purchases and procurement by privately owned enterprises that are subject to government influence. See European Commission, *The Single Market Review*, subseries III, Vol. 2, Public Procurement (1997), at pp. 171–178 and Sue Arrowsmith, *Government Procurement in the WTO* (Kluwer Law Int'l, 2003) 3, fn. 4. Data from the International Monetary Fund suggests that for countries in Africa and the Middle East the percentage is even higher than in developed countries. See Federico Trionfetti, *Government Procurement and International Trade: Theory and Empirical Evidence* (Paper Prepared for the World Trade Organization, 1997).

international competition,² these markets are still mostly dominated by local supply and most countries refuse to join any international agreement aimed at liberalizing them. The most important international agreement with the highest number of signatories in this regard is the Agreement on Government Procurement (GPA) concluded under the auspices of the World Trade Organization (WTO).³ While this agreement is not a part of the WTO Single Undertaking, and, therefore, most of the WTO members have opted not to join it, most developed countries of the world, including the United States, the EC, Japan and Canada, are GPA members. The GPA has, therefore, significant economic importance. Recently, the accession of Taiwan to the GPA was completed and nine other WTO members, including China with its huge state sector, are in the process of acceding.⁴ The GPA has also had a strong influence on the development of regional procurement regimes, such as the EC and NAFTA, and on procurement chapters in many bilateral free trade agreements.⁵

However, even within the GPA membership, many areas of government procurement are still not covered by the rules of the agreement, and negotiations are currently underway to expand its coverage and improve its disciplines. In the meanwhile, these negotiations have produced a tentative agreement on a new text for the GPA.⁶ This text relates to non-market access-related provisions, such as those on tendering procedures and legal remedies. It is expected to replace the existing text of the GPA once the parties also manage to reach agreement on a new coverage package,⁷ one that hopefully will extend its coverage to more procurements and more procuring entities than what is covered today.

² For a description and extensive discussion of the history of these attempts and initiatives, see Arie Reich, *International Public Procurement Law: The Evolution of International Regimes on Public Purchasing* (Kluwer Law International, 1999).

³ Agreement on Government Procurement, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4 (hereinafter 'GPA'), reprinted in *Results of the Uruguay Round* (WTO, 1994) at 438.

⁴ 'Chinese Taipei becomes a Party to the WTO Government Procurement Agreement', WTO News Item, 15 July 2009 <http://www.wto.org/english/news_e/news09_e/gpro_15jul09_e.htm> accessed 15 November 2009. See also Wang Ping, 'Coverage of the WTO's Agreement on Government Procurement: Challenges of Integrating China and other Countries with a Large State Sector into the Global Trading System' (2007) 10 *JIEL* 887.

⁵ The various regimes and their sources of influence are discussed in Reich, above note 2.

⁶ Revision of the text of the 1994 Agreement on Government Procurement, GPA/W/297 (11 December 2006) (hereinafter 'Revised Text'). For a discussion of the Revised Text and the negotiations that led up to it, see Robert D Anderson, 'Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiations' (2007) 4 *PPLR* 255–73.

⁷ See Report of the Committee on Government Procurement (November 2005 to December 2006), GPA/89 of 11 December 2006, para 20. The text is also subject to a 'final legal check', which means that rectifications of a purely formal character that do not affect the substance of the text may still be made. In addition, Article XXII (Final Provisions) of the Revised Text and a related draft Decision on the Co-existence between the 1994 GPA and the Revised GPA remain open to substantive discussion.

This article describes and analyzes this new, tentatively agreed text of the WTO Agreement on Government Procurement (the ‘Revised Text’). It compares it to the existing agreement (the ‘existing GPA’), offers interpretations of its provisions and discusses its potential implications for the regulation of international government purchasing. The objective of the article is to examine whether it has indeed delivered on its promise, namely to improve the existing agreement and to eliminate any remaining discriminatory measures and practices.⁸ To that end, it will present the critique that has been levelled against the provisions of the existing GPA and examine to what extent the flaws detected by this critique have been rectified in the Revised Text. The article concludes with a scorecard of the Revised Text, assessing its overall strengths and weaknesses.

I. BACKGROUND: THE AGREEMENT ON GOVERNMENT PROCUREMENT

Before proceeding to discuss the Revised Text of the GPA, it could be helpful to provide some background on the existing GPA, its history and objectives.

The first version of the GPA was negotiated in the 1970s as part of the Tokyo Round of Multilateral Trade Negotiations in an effort to counter the problem of protectionism in public procurement. Most governments practice some kind of domestic preference policies in their procuring practices, whereby local products and suppliers are preferred over foreign ones.⁹ A notable example of such policies is the US Buy American policy, which recently gained much attention when it was expanded as part of Barack Obama’s 2009 stimulus package.¹⁰ However, not all preference policies are as explicit as the US ones; in many countries, they are less visible, and often obscured by non-transparent procurement procedures that leave much discretion to the decision makers. Whether overt or disguised, these policies constitute international trade barriers, which serve to induce inefficient allocation of production resources and waste of taxpayers’ money. The GPA aims to correct this problem by trying to open up public procurement markets to international competition. This is done through an international

⁸ The negotiations that led to this new text were conducted within the GPA’s ‘built-in agenda’ for further negotiations, aimed at ‘improving this Agreement and achieving the greatest possible extension of its coverage among all Parties’, and at eliminating any remaining discriminatory measures and practices (GPA, above n 3, Article XXIV:7(b) and (c)).

⁹ For an extensive description and taxonomy of the various policies and practices employed to such effect, see Reich, above n 2, pp. 3–18.

¹⁰ The Buy American Act was enacted back in 1933 and is still in force (41 U.S.C. §10a). However, in the Stimulus Package (formally known as The American Recovery and Reinvestment Act of 2009), some Buy American provisions were added to procurement under the act. This prompted harsh criticism and threats of retaliation from other countries. See for instance, ‘Trade Wars Brewing In Economic Malaise’. *The Washington Post*, 15 May 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/14/AR2009051404241_pf.html> accessed 15 November 2009.

reciprocal agreement that prohibits discrimination between local and foreign products and suppliers,¹¹ and prescribes a binding procedural regime for conducting public procurement.¹² This regime includes detailed provisions requiring competitive and transparent procurement procedures and sets out rules on, among other things: where to publish calls for tenders, what information such calls have to include, minimum time limits for submission of tenders, how to formulate technical specifications for the required goods or services, how to qualify and select suppliers, what the criteria are for evaluating bids and awarding contracts and what information must be published or notified to participating bidders after such awards. The GPA negotiated in the Uruguay Round also introduced the requirement to provide non-discriminatory, timely, transparent and effective bid-challenge procedures enabling suppliers to challenge alleged breaches of the Agreement.¹³

However, the GPA only applies to certain 'covered' procurements that are defined in annexes to the agreement, according to four main parameters: value of procurement (only contracts estimated to exceed a certain value threshold), identity of the procuring entity (only those listed by each party in its annexes), type of goods or services procured (all goods, apart from some expressly excluded by each party, and only services listed by each party in its annexes) and the origin of the goods or services (only countries that are GPA parties).¹⁴ When the first version of the GPA was signed in 1979, the coverage was quite limited under all of these parameters, with coverage extending only to goods and only to some central government entities listed in the annex of covered entities.¹⁵ Over the years, the coverage has been expanded,¹⁶ and the current Uruguay Round GPA covers both products and some services (most notably construction services and certain other services, as set out in the annex of each contracting party). The lists of covered entities have also been considerably expanded so as to include almost all of a country's central government agencies, along with many sub-central entities, such as provincial and state governments (relevant to federal states) and municipalities, as well as various government corporations and other related entities. For the last several years, there have been ongoing negotiations on further expansion of GPA coverage. Formally, these

¹¹ See Article III of the GPA, above n 3.

¹² *Ibid* Articles VI–XV.

¹³ *Ibid* Article XX.

¹⁴ *Ibid* Article I and fn. 1, which sets out the list of annexes and their functions. For a discussion and critique of the GPA's approach to coverage, see Arie Reich, 'The New GATT Agreement on Government Procurement: The Pitfalls of Plurilateralism and Strict Reciprocity' (1997) 31 *J World Trade* 125.

¹⁵ For a description of the Tokyo Round GPA and its coverage, see Reich (n 2) 110–35.

¹⁶ In 1987, as part of the built-in agenda of the Tokyo Round GPA, the value threshold for coverage was lowered from SDR 150,000 to 130,000 and leasing contracts were also included, thus expanding somewhat the agreement's coverage. See Protocol Amending the Agreement on Government Procurement, reprinted in GATT BISD 30th Suppl., 12.

negotiations are not part of the Doha Round, but of a built-in agenda of the GPA that were to commence in 1998.¹⁷ In practice, however, the coverage negotiations started much later (around 2002),¹⁸ and judging from the current lack of progress, one may suspect that the successful conclusion of these negotiations is linked to a successful wrap-up of the entire Doha Round. On the other hand, in 1987, the GPA parties did manage to reach an agreement on some improvements to the Tokyo Round agreement within that agreement's built-in agenda, notwithstanding the fact that the then ongoing Uruguay Round was still far from completed.¹⁹ Whether they will be able to do so now too depends on various political circumstances that are very different today from what they were back in the 1980s. As noted above, only once agreement is reached on extended coverage will the Revised Text of the GPA come into force.²⁰ When this will happen is hard to predict.

II. EFFORTS TO ATTRACT DEVELOPING COUNTRIES

One of the GPA's main shortcomings is that it is not part of the WTO's 'Single Undertaking'.²¹ As a result, the majority of WTO Members (113 out of 153) have decided to remain outside the GPA, at least for the time being. While almost all of the developed countries have opted to join (Australia and New Zealand being among the few exceptions), developing countries have almost en-bloc refrained from joining.²² As a result, their government procurement policies are not subject to any international standards²³ and many of them suffer from inefficiency, corruption and lack of transparency. Since it was felt that one of the main reasons for developing countries' lack of willingness to join the GPA was their reluctance to waive their governments' ability to use public procurement as an industrial development tool by granting preference to domestic producers,²⁴ the initiative of a multilateral

¹⁷ See n 8, above.

¹⁸ Report (2002) of the Committee on Government Procurement, GPA/73, 6 November 2002, para 39.

¹⁹ See n 16, above. The Uruguay Round had been launched in September 1986, by a Ministerial Declaration in Punta del Este in Uruguay, but ran into many problems and crises on the way to its final conclusion in 1994.

²⁰ See n 7, above.

²¹ Reich (n 2) 317.

²² The only exceptions being: Aruba (of the Kingdom of the Netherlands), Hong Kong (China), Korea, Singapore and Israel, most of which are rather developed 'developing countries'. Also, following their recent accession to the EU, several East-European and Mediterranean countries, which could be considered as developing countries, have joined: Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia.

²³ Article III:8(a) of the GATT excludes government procurement from the National Treatment obligation, and it is generally thought that it is exempt from all other GATT disciplines, such as MFN treatment, as well.

²⁴ Sue Arrowsmith, 'Towards an Agreement on Transparency in Government Procurement' (1998) 47 *Int'l & Comp. LQ* 793, 800-801.

agreement—different and distinct from the GPA and requiring only transparency—was born. Such an agreement, if successfully incorporated into the WTO's Single Undertaking, would require all WTO members to at least abide by basic standards of transparency and competitive tendering procedures in their procurement activities, while not holding them to any national treatment obligation. This would allow them to maintain their domestic preference schemes and other industrial development policies, until such time as they decide to join the GPA. In effect, what was envisaged was a GPA 'waiting room'. Thus, at the 1996 Singapore WTO Ministerial Conference, a Working Group on Transparency in Government Procurement was set up with the mandate to conduct a study on transparency in government procurement practices and 'to develop elements for inclusion in an appropriate agreement'.²⁵ By 2001, in the Doha Ministerial Declaration, agreement was reached on initiating negotiations concerning a multilateral agreement on transparency in government procurement (the 'Transparency Agreement').²⁶ However, following strong opposition from developing countries and the collapse of the Cancún Ministerial in 2004, it was later agreed to abandon three of the four Singapore initiatives, including the Transparency Agreement.²⁷ Thus, government procurement is no longer formally on the multilateral agenda of the long overdue Doha Round.

It is with this background in mind that one should read Article IV in the proposed revision of the GPA. This is the provision dealing with the Special and Differential (S&D) treatment that is to be accorded to developing and least-developed countries. Interestingly, and unlike the existing S&D provision (Article V), this provision provides for the possibility of a developing country that accedes to the GPA to retain price preference programmes, which grant preference to its own domestic goods or services.²⁸ While this would need to be agreed to by all other GPA parties, it could only exist for a 'transitional period' and would have to be transparent. Nevertheless, it means that a developing country could join the GPA and only assume its transparency and procedural obligations. It would not be entirely bound by

²⁵ Article 21 of the Singapore Ministerial Declaration, adopted on 13 December 1996, available at <http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm> accessed 15 November 2009.

²⁶ Doha Ministerial Declaration, adopted on 14 November 2001, para 26, available at <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#transparency> accessed 15 November 2009.

²⁷ See the WTO General Council's decision on the Doha Agenda work programme (the 'July package'), agreed on 1 August 2004, para (g) <http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm#invest_comp_gpa> accessed 15 November 2009. According to this decision, three of the four 'Singapore issues' (Trade & Investment, Trade & Competition and Transparency in Government Procurement) will no longer form part of the Work Programme set out in the Doha Declaration and, therefore, no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.

²⁸ Revised Text (n 6) Article IV:3(a).

the GPA's National Treatment obligation,²⁹ and even to some extent exempt from its Most Favoured Nation (MFN) obligation.³⁰ In essence, this would amount to something similar to what was contemplated in the abandoned Transparency Agreement. It would seem, therefore, that the negotiators of the new GPA text have decided to offer developing countries an alternative route to a similar outcome as that contemplated by the Transparency Agreement, namely: 'retain your domestic preference policies but adopt a transparent and otherwise competitive public procurement regime'.

Of course, this alternative route is not identical to that contemplated by the Transparency Agreement. There are two major differences: (i) the GPA is still only a plurilateral agreement and not an integral part of the multilateral Single Undertaking. Thus, the accession by a developing country to the GPA is still voluntary and not compelled, as it would be if the Transparency Agreement had been successfully included in a new Single Undertaking within the package deal of the Doha Round. In addition, by acceding the developing country would only have rights under the GPA towards other GPA parties, not towards the rest of the WTO members. (ii) The rights that such a developing country would obtain include the right to full and equal access to other GPA parties' covered procurements, notwithstanding the fact that it itself would not be required to grant such full reciprocal rights to suppliers of other GPA parties. It is unlikely that such a right would have been included in the aborted Transparency Agreement. Rather, all the Transparency Agreement's parties were to be required to observe the transparency and procedural requirements of the new agreement, but were to remain exempt from any National Treatment obligation.³¹ Thus, the new GPA will offer a significant incentive to join for those developing countries that are willing to assume the GPA's procedural procurement regime.³²

²⁹ Only as far as it applies to such domestic price preference schemes. They would of course still be prohibited from discriminating against foreign products, services and suppliers in all other contexts. For instance, set-asides of certain contracts for only domestic suppliers could not be maintained except under a special transitional delay negotiated on accession (see Article IV:4).

³⁰ Under the proposed Article IV:3(a) they could also maintain price preferences for goods or services of other developing countries with which they have a preferential agreement requiring them to provide national treatment. In other words, they could discriminate against the goods or services of other GPA parties in favour of goods or services from such other developing countries. In the absence of such a special permission, this would be counter to the MFN obligation.

³¹ Under Article III:8(a) of GATT 1994, the National Treatment obligation of Article III does 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. The initiators of the Transparency Agreement did not intend to change this situation. Only GPA parties are bound by National Treatment obligations in government procurement but only towards each other. See Arrowsmith (n 24) 804.

³² Of course, the permission to use domestic preference schemes would only be for a transitional period, so acceding developing countries would have to be willing to agree to some phase-out

It remains to be seen whether this incentive will be enough to convince some of the developing countries to try to join and whether the current GPA parties will indeed stand behind their apparent promise to grant such an incentive.³³ Or perhaps, as one commentator fears, without improved access to the markets of other (developed) GPA countries, developing countries are not likely to join.³⁴

III. AMENDMENTS TO TRANSPARENCY AND PROCEDURAL RULES

The Revised Text of the GPA proposes to introduce several amendments designed to streamline the tendering procedures, allow more flexibility for procuring entities, take account of the electronic means of procurement that have become so much more available today than when the GPA was negotiated and make the rules more ‘user-friendly’. Most provisions, however, have remained intact and only ‘changed places’ as a result of the restructuring of the agreement. The main amendments shall be discussed below according to their order of appearance in the Revised Text.

A. Preamble

1. *Non-trade rationales*

The preamble to the Revised Text introduces some new objectives that are absent in the current GPA. While the latter provides a standard international-trade rationale for the GPA (‘to achiev[e] greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade’³⁵), the Revised Text adds several domestic welfare rationales that are unrelated to the benefits of international trade.³⁶

period of these schemes, at the end of which their domestic industry would have to be prepared to compete on equal terms with foreign suppliers for local government contracts.

³³ As indicated before, under Article IV:3, in order to retain a price preference programme, a developing country will require consent of all GPA parties and it will be based on ‘its development needs’.

³⁴ Valeria Guimaraes De Lima e Silva, ‘The Revision of the WTO Agreement on Government Procurement: To What Extent May it Contribute to the Expansion of Current Membership?’ (2008) 61 PPLR 98. Such improved access could be in the form of lower value thresholds for suppliers from developing countries and unconditional MFN treatment with no derogations aimed at developing countries. Of course, only the more developed among the developing countries, which have industries with a potential to sell to foreign governments, can be induced by such incentives to join the GPA.

³⁵ This rationale is very similar to the general objective of the WTO, as set out in the preamble to the WTO Agreement (Marrakesh Agreement Establishing the World Trade Organization, (1994) 33 ILM, 1): ‘... expanding the production of and trade in goods and services ...’, as well as in most other of the WTO agreements. See, for instance, the preamble to the Agreement on Technical Barriers to Trade, which declares that its purpose is to ‘improving efficiency of production and facilitating the conduct of international trade’.

³⁶ Similar rationales can be found in the UNCITRAL Model Law on Procurement of Goods, Construction and Services, which is designed to be adopted as domestic legislation. For instance, preamble (a) of the Model Law speaks of the objective of ‘Maximizing economy

Thus, the third recital of the preamble stresses the importance of the integrity and predictability of government procurement systems to the efficient and effective management of public resources and the performance of the national economy. And the sixth recital introduces for the first time the theme of corruption and conflict of interests and the importance of transparency in government procurement as a means to prevent such problems. In this connection, this recital also makes reference to 'applicable international instruments, such as the United Nations Convention Against Corruption'.³⁷ The significance of these new themes would at first blush appear to be mainly declarative and political, in that they may help to convince more states to join the GPA. This new emphasis on the intrinsic value of transparency could be seen as connected to the option for developing countries, discussed in the previous section, of joining while assuming what amount to chiefly the transparency obligations of the GPA.

However, these new objectives mentioned in the preamble may also have some *legal* significance, considering that the Appellate Body and WTO panels often refer to preambular language as a source of interpretation for the context and purpose of the agreement at hand.³⁸ This approach is mandated by Article 31 of the Vienna Convention on the Law of Treaties, which mentions the preamble as part of the context of the treaty in light of which the treaty should be interpreted.³⁹ Thus, the new emphasis on the GPA as aimed to serve pure domestic welfare rationales, not directly related to international trade, may have important implications when a WTO panel or a national court or review body is called upon to interpret the agreement in circumstances not affecting foreign suppliers, products or services. Under the existing GPA, one may think that the objective of the agreement, as stated in

and efficiency in procurement' and preamble (e) of 'Promoting the integrity of, and fairness and public confidence in, the procurement process'. The Model Law was adopted by UNCITRAL in 1994 and is available at <<http://www.uncitral.org/pdf/english/texts/procurement/ml-procurement/ml-procure.pdf>> accessed 15 November 2009.

³⁷ United Nations Convention Against Corruption, adopted by the General Assembly by its resolution 58/4 of 31 October 2003; available at <http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf> accessed 15 November 2009.

³⁸ See, for instance, Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, paras 129–31; Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157, para 243; Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475), para 188–9.

³⁹ The Vienna Convention on the Law of Treaties, 23 May 1969, 8 ILM, 679, Article 31:1 (titled 'General Rule of Interpretation') provides that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Article 31:2 adds that 'The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, *including its preamble and annexes*: (a) any agreement relating to the treaty etc.' (emphasis added).

its preamble, is only to ‘achiev[e] greater liberalization and expansion of world trade’ and, therefore, its provisions are only meant to ensure equal opportunities in government procurement for foreign suppliers (originating from other GPA parties), and not for domestic suppliers, whose rights are only regulated under national law. The Revised Text, in contrast, makes it clear that the agreement is equally applicable in a purely domestic context, in order to ensure efficiency and integrity of the procurement system. These objectives are also translated into operative provisions, found in Article V:4 of the Revised Text, which require procuring entities to conduct covered procurement in a ‘transparent and impartial manner that . . . avoids conflicts of interest and prevents corrupt practices’. Thus, an aggrieved supplier—foreign or local—will be able to bring a complaint under the new GPA not just in cases of discrimination based on nationality or other protectionist-motivated measures, but whenever basic anti-corruption and conflict of interest standards have been violated.⁴⁰ In other words, the combat against corruption and the promotion of good governance of procurement systems have been brought to the international plane, and are not just matters for domestic law to deal with anymore.

This amendment will serve to further strengthen the contribution of the GPA to the promotion of the rule of law in its signatory members. It will clarify that the various rule-of-law-promoting requirements of the GPA, such as the requirements of transparency regarding all procurement laws, regulations and procedures,⁴¹ transparency of procurement information⁴² and the requirement of judicial review,⁴³ are universal and not trade-dependent.⁴⁴

⁴⁰ Indeed, Article XX of the GPA (both in the existing and in the Revised text) provides that the right to challenge procurement decisions shall be given to ‘suppliers’, a term that includes both domestic and foreign suppliers. Also the cause of such challenge is not limited to discrimination against foreign suppliers, even though that was the original *raison d’être* of the GPA. With the official objective now formulated to extend beyond such trade-promoting goal, it is now clear that the right to challenge cannot be restricted, neither by reference to a specific category of suppliers (foreign) nor by reference to a specific category of breaches (protectionist motivated).

⁴¹ See, in particular, Articles VI and VII of the Revised GPA (n 6).

⁴² Ibid Article XVI.

⁴³ Ibid Article XVIII. While this provision allows also impartial administrative review of procurement decisions instead of judicial review, the former must be subject to appeal to a judicial authority (ibid Article XVIII:5).

⁴⁴ One should note in this regard the findings of an ABA (American Bar Association) working group according to which international trade agreements in general contribute to the advancement of the Rule of Law. See Report adopted by the American Bar Association, House of Delegates, 11–12 August, available at <<http://www.abanet.org/leadership/2008/annual/adopted/OneHundredEightB.doc>>. One of the prominent examples discussed in the report is provisions on government procurement found in US international trade agreements. See also Christopher R Yukins and Steven L Schooner, ‘Policy and Legal Frameworks for Open Procurement Markets’, in *Government Contracts Year in Review: Conference Briefs* (Thomson-West, 2007) Int’l 3–11 through 3–30.

2. The UN Convention against Corruption

Another interesting feature of the Revised Text preamble is the reference to the UN Convention against Corruption (UNCAC).⁴⁵ This reference is especially interesting considering that most of the GPA signatories were not parties to the UNCAC at the time when the Revised Text was agreed, and even today almost a quarter of GPA signatories have not joined.⁴⁶ Is there any legal significance to the preambular reference to the UNCAC?

The UNCAC covers a wide range of topics related to the battle against corruption. The provision that is most connected to the subject matter of the GPA is UNCAC Article 9:1, which deals with public procurement. It requires each State Party to 'take the necessary steps to establish appropriate systems of procurement based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption'. Much of what is included in this provision is also found in the GPA, so in that sense the reference to UNCAC in the GPA does not add much to the obligations that already exist within the GPA regime. The potential for legal significance is where the UNCAC adds to the rules of the GPA. One such provision may be UNCAC Article 9:1(e), which requires 'measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements'. Surprisingly, there is no similar provision in the GPA.⁴⁷ However, the reference to the UNCAC in the Revised GPA preamble, coupled with the positive obligation in the new Article V:4 to 'conduct covered procurement in a transparent and impartial manner that... *avoids conflicts of interest*', could be understood to require GPA parties to establish measures preventing conflict of interests for public procurement officials. It could also perhaps be understood to grant an aggrieved supplier a right to challenge (under the domestic review procedures required under Article XVIII), a procurement that has been conducted by a government official found to be in an undeclared conflict

⁴⁵ See n 37, above.

⁴⁶ According to the official Website of the UNCAC, on November 15, 2009, only 31 out of the 40 current GPA members have signed and ratified the UNCAC. In December 2006, when the Revised Text of the GPA was agreed, the number was 16 out of 40. See <<http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>>. The GPA members that are not parties to the UNCAC today (15 November 2009) are Aruba, Czech Republic, Estonia, Germany, Iceland, Ireland, Japan, Liechtenstein and Singapore.

⁴⁷ On the importance of codes of ethics for public procurement officials, and of the quality and integrity of procurement personnel in general, see Gösta Westring and George Jadoun, *Public Procurement Manual: Central and Eastern Europe* (1996) 45–8; reprinted in Sue Arrowsmith, John Linarelli and Don Wallace, Jr., *Regulating Public Procurement: National and International Perspectives* (2000) 33–6. On conflict of interest rules, see *ibid* at 39–40.

of interests. In other words, the preambular reference to the UNCAC provides the context in the light of which Article V:4 ought to be interpreted.⁴⁸

Would this conclusion hold only for UNCAC parties, or even for non-parties? On the one hand, if we were to see the reference to the UNCAC in the GPA as some type of incorporation of its provision, albeit limited to providing context, then it ought to apply to all GPA members. This is somewhat analogous to the incorporation of several intellectual property conventions into the TRIPs Agreement,⁴⁹ which clearly binds all the TRIPs members to such conventions, regardless of whether they are parties to these conventions or not.⁵⁰ On the other hand, one could argue that the reference in the preamble is to ‘*applicable* international instruments, such as the [UNCAC]’, and that an international convention can be applicable only between its parties. However, the term ‘*applicable*’ could also be understood in the material sense: those international instruments which in view of their subject matter are *relevant* to the objective of avoiding conflicts of interest and corrupt practices.⁵¹ This latter understanding seems more plausible than the former.

B. Definitions

The Revised GPA introduces a list of definitions of terms used in the agreement (Article I). There is no similar provision in the existing GPA, although some of the definitions are to be found in various provisions or in some of the Member States’ schedules. The compilation of all of the definitions in one article at the beginning of the Agreement is part of the effort to make the GPA more ‘user-friendly’ and clear. The section below will discuss some of the important aspects of those definitions.

1. *Commercial goods and services*

The definition of this term is required for Article XI:7, which permits shorter time periods for tendering of commercial goods and services.⁵² This is one of the innovations of the Revised GPA, aimed to introduce greater flexibility in

⁴⁸ In accordance with Article 31 of the Vienna Convention on the Law of Treaties, see n 39, above.

⁴⁹ See, for instance, Article II of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs), which incorporates the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.

⁵⁰ According to Article 34 of the Vienna Convention on the Law of Treaties, see n 39, above, ‘a treaty does not create either obligations or rights for a third State without its consent’. In this case, we would see the consent in a State’s signature and ratification of the Revised GPA.

⁵¹ One of the dictionary definitions of the word ‘*applicable*’ is ‘*relevant*’—see *The Merriam-Webster Dictionary* (1997) 52.

⁵² Instead of a minimum of 40 days for other types of goods, entities that publish their tender electronically can set a deadline of only 13 days for commercial goods or services. Where the entity also accepts tenders for commercial goods and services by electronic means, it may reduce the time period from 40 days to not less than 10 days.

the tendering procedures⁵³ and to encourage the use of electronic tendering. The assumption is that when what is required is goods or services of a type generally sold or offered for sale in the commercial marketplace, suppliers can submit bids in much shorter timeframes, and the procuring agency can speed up its procurement procedures.

2. *Construction services contract*⁵⁴

The GPA applies to construction services, and members are required to specify their covered construction services in their respective Annex 5. However, the current text of the GPA does not define what types of services are to be considered ‘construction services’. While such definitions can be found in the existing Annex 5 of most of the members,⁵⁵ which are generally identical to the new proposed definition, a common definition in the text itself will ensure uniformity of coverage in this respect.

It is not entirely clear, however, what the words ‘by whatever means’ are meant to add. If all that these words refer to is various construction methods, they would seem superfluous; why would it matter how a contractor performs civil or building work for it to be covered by the GPA? If, on the other hand, it refers to the way in which the government entity is realizing the construction project, and is meant to include B.O.T. (=‘Build, Operate & Transfer’) and concession contracts, where instead of payment for the service there is a right to operate it and collect revenues (usually for a limited time), this wording gains important significance. Whether such contracts are included in the existing and revised GPA will be discussed below.⁵⁶

3. ‘Countries’ or ‘Country’⁵⁷

This definition is aimed to alleviate somewhat a political problem that has surfaced over the last years. The general rule in the WTO is that you do not have to be an independent state in order to be a member and a party to any of the agreements. It is enough that you are a separate customs territory ‘possessing full autonomy in the conduct of [your] external commercial relations’.⁵⁸ Thus, Hong Kong is a party to the GPA, even though the People’s Republic of China

⁵³ See the Fourth preamble: ‘Recognizing that the procedural commitments under this Agreement should be sufficiently flexible to accommodate the specific circumstances of each Party.’

⁵⁴ Article I(b) provides: ‘*construction services contract* means a contract that has as its objective the realization by whatever means of civil or building works, based on Division 51 of the Provisional U.N. Central Product Classification (CPC).’

⁵⁵ Such definitions are included in the Annexes 5 of all of the members, except for Aruba and Singapore. These members include only some of the construction services, defined in accordance with the CPC sub-definitions, in their coverage.

⁵⁶ See Section 4B(3), below.

⁵⁷ Article I(c): ‘*country or countries* include any separate customs territory that is a Party to this Agreement. In the case of a separate customs territory that is a Party to this Agreement, where an expression in this Agreement is qualified by the term “national”, such expression shall be read as pertaining to that customs territory, unless otherwise specified.’

⁵⁸ WTO Agreement (n 35) Article XII:2.

(hereafter ‘China’) is not, and Taiwan could join the WTO without China having to abandon its claim that Taiwan is a renegade province of China.⁵⁹ However, Taiwan’s accession to the GPA was blocked by China for several years because of symbolic-political motives: to Chinese ears Taiwan’s proposed list of government entities sounded too much like a list of a sovereign state—‘Prime Minister’s Office’, ‘Foreign Ministry’, etc.⁶⁰ The proposed new definition clarifies that the term ‘country’ refers also to any separate customs territory that is a party to the GPA, and that whenever the term ‘national’ is used, ‘such expression shall be read as pertaining to that customs territory’, and, therefore, not as implying any political sovereignty. It is possible that the new pending text is what ultimately made Taiwan’s accession to the GPA possible.⁶¹

4. *Days*⁶²

The GPA’s tendering procedures sets out several different time limits of a certain amount of ‘days’ for the submission of bids, publication of post-award notices, initiation of challenge procedures and panel procedures, but there is nowhere in the Agreement any definition of this term. An argument could be made that it includes only business days, thus prolonging significantly the time periods in question. This uncertainty has now been removed by a clear definition of ‘days’ as ‘calendar days’, and not business days.⁶³

5. *Electronic auction*⁶⁴

One of the innovations of the Revised GPA is its introduction of electronic tendering, in general, and of electronic auction, in particular. The latter is a completely different way of conducting procurement when compared with a traditional public tender. A public tender is usually a relatively static process, involving one single interaction between the procuring entity and the bidder; each bidder submits one bid, and the procuring entity chooses the best one (either in terms of price or in terms of quality or some other predetermined evaluation criteria) among the bids that were submitted.⁶⁵ An auction, in contrast, is an iterative process where the bidders improve their bids as they

⁵⁹ The formal name of Taiwan within the WTO is: ‘the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu’.

⁶⁰ For a discussion of this and other political disputes between China and Taiwan within the WTO, see Arie Reich, ‘The Threat of Politicization of the World Trade Organization’ (2005) 26 *U Pa J Int’l Econ L* 779, 806–7.

⁶¹ See n 4, above.

⁶² Article I(e) provides: ‘*days* means calendar days’.

⁶³ Revised GPA (n 6) Article I(d).

⁶⁴ Article I(e) provides: ‘*electronic auction* means an iterative process that involves the use of electronic means for the presentation by suppliers of either new prices, or new values for quantifiable non-price elements of the tender related to the evaluation criteria, or both, resulting in a ranking or re-ranking of tenders’.

⁶⁵ Sometimes, procuring entities will conduct negotiations with the bidders before choosing the winning bid, in order to try to improve their offers, but this is not done routinely and is only permitted under the GPA if such intent was indicated in the notice of proposed procurement or if none of the tenders is obviously most advantageous (see GPA Article XVI:1). Also,

go along, thus competing among themselves for the contract, until only one with the lowest, or otherwise most advantageous, bid remains. This bid is then chosen by the procuring entity. The existing GPA does not provide for such a method of procurement, and it is, therefore, questionable whether today one may use auction in a GPA-covered procurement.⁶⁶ However, the advent of modern computer technology has made auctions quite popular, both in the private and the public sector, since it enables the conduct of auctions in an effective manner with remote parties, without gathering them into one room, like in traditional auctions, while enabling procuring entities to 'push the bidders to the limit' of what they are able to propose.⁶⁷

The Revised GPA, therefore, provides for the possibility of an electronic auction (see Article XIV), the definition of which is provided in Article I(e). The definition makes it clear that the iterative bidding does not have to relate only to the price of the procured goods or service, but could also relate to other quantifiable non-price elements of the tender, as long as these are related to the evaluation criteria. For instance, in an auction to purchase insurance for a fleet of cars, the competition can relate not only to the insurance premium but also to the amount of the deductible, or in a sale of computers, to the length of the warranty.⁶⁸

6. *In Writing or Written*⁶⁹

Another definition that is meant to adapt the GPA regime to the electronic era is the definition of the term 'in writing' or 'written'. The requirement that communications shall be in writing are found in relation to several

Article XVI:2 provides that 'Negotiations shall primarily be used to identify the strengths and weaknesses in tenders', that is, not in order to improve them.

⁶⁶ On the one hand, the open and selective tendering procedures allowed by the existing GPA, appear to provide for only one submission of bids by participants, which is followed by opening of tenders and award of contract. On the other hand, this is only implicit in the text and there is an express permission to use negotiations between the procuring entity and suppliers after submission of tenders, if such intent has been indicated in the procurement notice (Article XIV:1). For a detailed discussion of whether and how auction can be used under the existing GPA, see Arrowsmith (n 1) 264–70.

⁶⁷ Robert A Doyle and Steve Baska, 'History of Auctions: From Ancient Rome to Today's High-Tech Auctions', *Auctioneer* (November 2002), available at < <http://www.auctioneersfoundation.org/museum-articles-detail.php?id=5094> > accessed 15 November 2009. For a survey of game theory literature on auctions, see Paul Klemperer (Princeton University Press), *Auctions: Theory and Practice* (2004) Ch. 1.

⁶⁸ The possibility of using non-price criteria is in line with the general approach of the GPA (see, for instance, Article XV:5 of the Revised GPA and Article X:9, which provides that the evaluation criteria set out in the notice or tender documentation may include, in addition to price, other cost factors, as well as quality, technical merit, environmental characteristics and terms of delivery). The innovation here is that such criteria may be used even in an electronic auction, despite the rather technical nature of such a procedure. It remains to be seen whether procuring entities will take advantage of this possibility.

⁶⁹ Article I(f) provides '*in writing* or *written* means any worded or numbered expression that can be read, reproduced and later communicated. It may include electronically transmitted and stored information'.

aspects of the procurement process: publication of tenders (Article VI:2), submission of bids (Article XV:4), modifications or amendments of evaluation criteria or specifications (Article X:11), explanation for a rejection of a request to be included in multi-use purpose list (Article IX:14), post-award information (Article XVI:1) and decisions and procedures on bid challenges (Article XVIII), to mention a few. The new definition in this regard clarifies that all such communications can also be electronically transmitted, and that any worded or numbered expression that can be read, reproduced and later communicated, are also included in the term 'writing', regardless of whether it is on paper or in electronic form. In this, the GPA follows the 'functional approach' originally introduced by the UNCITRAL Model Law on Electronic Commerce,⁷⁰ and later adopted by several international and national instruments.⁷¹

7. Measures

Article I(f) introduces a new definition of a key term—'measure'—and defines it as meaning 'any law, regulation, procedure, administrative guidance or practice or any action of a procuring entity relating to a covered procurement'. This is an important term that recurs in, and, therefore, defines the scope of, some of the central provisions of the GPA, such as the scope of the Agreement (Article II:1), the National Treatment and Non-Discrimination obligations (Article V:1 and 2), the General Exceptions provision (Article III:2), the Domestic Review Procedures provision (Article XVIII) and the Dispute Settlement provision (Article XX). Besides streamlining the text of the new GPA and avoiding the repetitious language found in the existing GPA,⁷² this definition makes it very clear that it does not matter what form the protectionist action of the government or the procuring entity takes. It may be a law, a regulation or even a non-binding administrative guidance or practice. If the measure in question relates to a covered procurement and is discriminatory or in conflict with any of the other GPA rules, it will constitute a violation of the GPA. In this, the GPA adopts explicitly the ruling of the *Japan-Film* Panel according to which 'administrative guidance' given by a government may also rise to the level of a government 'measure', in particular where it creates incentives or disincentives

⁷⁰ 'UNCITRAL Model Law on Electronic Commerce' (1997) 36 ILM 200. Article 6(1) of the Model Law provides: 'Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.' See also *Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session, 28 May–14 June 1996*, U.N. GAOR, 51st Session, Suppl. No. 17, U.N. Doc. A/51/17 Annex I (1996).

⁷¹ See, for instance, Amelia Boss, 'Electronic Commerce and the Symbiotic Relationship Between International and Domestic Law Reform' (1998) 72 *Tulane L Rev* 1931.

⁷² The wording 'any law, regulation, procedure, administrative guidance or practice, or any action...' appears in various versions at least 10 times in the existing GPA.

largely dependent upon governmental action for private parties to act in a particular manner.⁷³

There is, however, one small problem with this definition; it does not fit all of the 'measures' mentioned in the Revised GPA. For instance, when Article XVIII refers to 'rapid interim measures', it does not mean 'any law, regulation, procedure, administrative guidance or practice, or any action of a procuring entity', but rather an injunction issued by a court or an administrative tribunal ('review body').⁷⁴ This, and some other similar problems,⁷⁵ could have been avoided if Article I had included a proviso stipulating that the following definitions apply 'insofar as they are consistent with the context and that no other meaning is implied', or something along those lines.

C. Scope and coverage

The scope and coverage of the revised GPA is dealt with in Article II (and in the coverage annexes which have not yet been agreed). In essence, this provision does not introduce any major overhaul in relation to the existing GPA. Its main contribution is that it brings together the various definitions of coverage, exceptions and methods of calculating the value thresholds into one article, unlike the existing GPA, where these are dispersed over several articles and sometimes even in parties' coverage annexes.⁷⁶ There is also a certain improvement in the introduction of a clear definition of government procurement as being 'procurement for governmental purposes...not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale'.⁷⁷ This definition is not new; it is largely taken from the General Agreement on Tariffs and Trade (GATT) Article III:8 (formulated in 1947), which exempts government procurement from the GATT National Treatment obligation.⁷⁸

⁷³ Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179.

⁷⁴ All of the terms, except for 'action', used by the definition imply various types of generally applicable measures, that is, rules that apply to more than one specific case. A rapid interim measure, in contrast, applies only to a specific case and addresses a one-time situation. As for the words 'any action of a procuring entity', they can also not apply to such a measure, because a review body is not 'a procuring entity' (see definition in Article I(n)).

⁷⁵ See, for instance, Article V:7 where it is also clear that the word 'measures' does not refer to procurement measures.

⁷⁶ In the existing GPA 'Scope and Coverage' is dealt with in Article I and 'Valuation of Contracts' in Article II, with some of the important provisions found in fn. 1 and 2. Some important definitions of the type of public procurement that is covered can be found only in some of the parties' annexes.

⁷⁷ Article II:2.

⁷⁸ GATT Article III:8(a) provides: '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.'

One GPA party even included it in its coverage annex.⁷⁹ Therefore, even today it is quite clear that this is the binding definition of the procurement covered by the GPA (ie for governmental purposes, and not for commercial resale), since the *raison d'être* of the GPA is the GATT Article III:8 exemption. Because of this exemption, GATT signatories are free to practice domestic preference policies in their government procurement (as defined there), which otherwise would be in violation of the National Treatment obligation of GATT Article III. In order to restrict such policies among some of the GATT signatories, the GPA was born and it is, therefore, only natural that its scope is the same as the GATT exemption. This conclusion is also supported by the finding of a GATT Panel in *United States—Procurement of a Sonar Mapping System*.⁸⁰ So the 'new' definition is more of a clarification than an innovation. What is important, however, is that the new text introduces a uniform definition of 'procurement' and of its exceptions that applies to all GPA parties. This definition will, therefore, not be dependent anymore on definitions in national rules or in the parties' coverage annexes. On the one hand, this is an improvement since it will bring an end to the existing situation where some parties have excluded certain transactions from the definition of procurement, and others have not, and, hence, contribute to uniformity of application.⁸¹ On the other hand, by extending all existing exceptions to all of the GPA parties, it may to some extent reduce coverage.

By leaving these definitions more or less intact, the drafters have missed an important opportunity to clarify the status under the GPA of concession contracts—that is, arrangements whereby a provider is remunerated not directly by the government, but through payments from public users of a service or facility. These arrangements have become increasingly popular in many countries, as a means to use private financing and private expertise to build major infrastructure projects.⁸² They include Build–Operate–Transfer

⁷⁹ See, for instance, the General Notes, para 2, in the coverage annex of Canada.

⁸⁰ GPR.DS1/R, para 4.2. A report issued on 24 April 1992. This was a dispute under the Tokyo Round Agreement on Government Procurement. The panel report was blocked and never adopted.

⁸¹ See, for instance, the US coverage annex, General Notes, para 2 that exclude 'non-contractual agreements or any form of government assistance, including cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives and government provision of goods and services to persons not specifically covered under US annexes to this Agreement'. Para 3 excludes 'the acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, and sale and distribution services for government debt'. These exclusions are not found in the EC General Notes, but they in turn have different exclusions, for instance contracts awarded under international agreements intended for joint implementation by signatory states, acquisition or rental of land, etc. The Revised Text has collected all these various exclusions and included them in Article II, thus binding everybody uniformly.

⁸² See *Guidelines for Infrastructure Development through Build-Operate-Transfer (BOT) Projects*, prepared by the United Nations Industrial Development Organization (UNIDO publication,

projects, and other variations on such arrangements. There are differing opinions on whether they are included in the existing GPA and whether they ought to be covered by it.⁸³

As such type of procurement substitutes more and more for traditional public procurement, it would seem that the importance of bringing it into an open competitive regime increases. One could argue that the question of how the government pays for its public infrastructure project (highway, bridge, tunnel, airport or even telephone network)—whether directly or indirectly by allowing the contractor to collect users fees from the public—should not determine whether or not it is covered by the GPA, and whether or not it ought to be open to foreign competition. On the contrary, because of the size and complexity of such contracts they are of particular interest to foreign firms, and it would seem to be in the best interest of the project to open the competition to experienced firms from all over the world. At least some of the concession agreements are in essence procurement contracts effected by a different means of financing and, as argued by Arrowsmith, could be brought into the GPA without creating practical problems, given the flexible nature of the GPA procedures.⁸⁴ Unfortunately, the new text fails to address this important issue in any way, and leaves us with the same uncertainty as we have today.⁸⁵ One would hope that perhaps this problem will be addressed in the coverage negotiations.

D. Improvement of the Tendering Rules

The provisions of the Revised Text dealing with tendering and related procedures have been significantly restructured in an effort to make them more user-friendly and more consistent with the actual flow of the tendering

Sales No. UNIDO.95.6.E) and *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* (2000) 1, available at <http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2001Guide_PFI.html>.

⁸³ See 'Concessions and BOT Contracts', Note by the Secretariat (20 September 2000), JOB(00)/5657, Working Group on Transparency in Government Procurement' and Arrowsmith (n 1) 101–2. The reason why one may consider concession contracts as outside the scope of the existing GPA is that 'procurement' means the act of obtaining goods or services against consideration, whereas a concession is granted and sometimes sold by the government to a private firm. Some have also taken the view that BOT contracts and concessions should not be covered, expressing the view that concessions generally have a different legal basis, purpose and philosophy from those underlying government procurement.

⁸⁴ Ibid 102.

⁸⁵ Even if our suggestion in Section 4B(2) above (on the definition of 'construction service contracts') is correct, according to which the wording 'the realization by whatever means' in the definition of 'construction services contract' has the effect of including BOT and concession contracts for civil or building works, this does not represent any innovation of the Revised GPA. The same wording can be found today in the coverage annexes of most GPA parties and still most of them maintain that concessions are not included in the scope of the GPA.

processes as conducted by Parties' entities.⁸⁶ The importance of this improvement, however, should not be exaggerated, given that the daily users of the tendering rules (ie the procurement officers and the potential tenderers) do not actually use the GPA rules, but rather the national tendering rules. Since most member states do not adopt the GPA procedures as is into their national laws, but rather adapt their existing tendering rules to the GPA requirements, it is the user-friendliness of *these* rules that is most important. Nevertheless, the fact that the new GPA rules are easier to understand and to navigate through, will make them easier to implement and to monitor.

The tendering rules of the GPA have sometimes been criticized as being too rigid and inflexible, and thus too onerous for procuring entities.⁸⁷ The Revised Text has introduced a few changes of the tendering rules that are aimed at giving more flexibility for procuring entities, in particular for Annexes 2 and 3 entities.⁸⁸ For instance, the Revised Text may have left some room to use a procurement method other than the three basic methods prescribed in the GPA (open tendering, selective tendering and limited tendering) as long as such other method is conducted in a transparent and impartial manner.⁸⁹ There is also more flexibility in relation to timeframes for submissions, which in some cases permits procuring entities to set shorter deadlines.⁹⁰ In general, however, these changes are not very significant, and in essence the revised rules are not so different from the existing ones.

⁸⁶ Anderson (n 6) 9–10.

⁸⁷ See, eg Arrowsmith (n 1) 418–422. Arrowsmith argues mainly against the very detailed nature of the rules, and advocates a move towards general principles instead of detailed rules. This approach has not been adopted by the Revised Text. However, some simplification and additional flexibility has been introduced.

⁸⁸ Annex 2 lists covered sub-central government entities, such as state agencies in the USA and local municipalities, and Annex 3 lists 'other entities', which are neither central government ministries nor Annex 2 entities. These are mainly entities that carry out public utility functions, such as the provision of electricity, water, public transportation and telecommunication. For the special flexibilities introduced for these entities see Article IX:12, which permits them to use notices inviting suppliers to apply for inclusion on a multi-use list as a notice of intended procurement, on certain conditions, and Article XI:8, which allows them to set a special time frame with the mutual agreement of all the selected suppliers.

⁸⁹ See Article V:4 of the Revised Text which provides: 'A procuring entity shall conduct covered procurement in a transparent and impartial manner that . . . is consistent with this Agreement, using methods *such as* open tendering, selective tendering, and limited tendering' (emphasis added). While the existing GPA does not include any parallel provision, its Article IX:6(b) demands that each notice of proposed procurement contains information on 'whether the procedure is open or selective or will involve negotiation'. This would seem to imply that there are only these options available.

⁹⁰ See, eg Article XI:4(b), which allows to reduce the time-period for tendering to 10 days for procurements of a recurring nature, under certain conditions. The existing GPA, in contrast, allowed a reduction to no less than 24 days in similar circumstances (see Article XI:3(b)). See also Article XI:7 of the Revised Text (discussed above in Section 4B(1)), which allows to lower the time period to 13 days for the purchase of 'commercial goods'. This flexibility has no parallel in the existing GPA.

One interesting improvement of the rules can be found in relation to selective tendering. The existing GPA defines such procedures as ‘those procedures under which...those suppliers invited to do so by the entity may submit a tender’,⁹¹ implying that the procuring entity is free to choose only a limited number of suppliers at its discretion. Such discretion may of course be problematic if the entity is keen on securing that the contract goes to a domestic supplier.⁹² The Revised Text, in contrast, defines them as ‘a procurement method where only suppliers satisfying the conditions for participation are invited by the procuring entity to submit a tender’, implying that there is no such discretion, and that *all* suppliers satisfying the conditions for participation must be invited to submit a tender. This understanding is supported by Article IX:5, which provides that any supplier that meets these conditions must be recognized as a qualified supplier, ‘unless the procuring entity states in the notice of intended procurement any limitation on the number of suppliers that will be permitted to tender and the criteria for selecting the limited number of suppliers’. In other words, the procuring entity can limit the number of suppliers invited to tender within selective procedures only if it states in the notice of intended procurement that there will be such a limitation, and even then such a selection must be done according to predefined (and presumably objective) criteria.⁹³

In contrast to the improvement of the provisions on selective tendering, the Revised Text has not made any significant changes to the conditions on the use of limited tendering.⁹⁴ This type of procedure in essence precludes any type of competition and often allows the procuring entity to choose whichever supplier it wants. Both texts permit the use of limited tendering only in particular circumstances that are enumerated, and the only change in the Revised Text is some clarification of these circumstances. This is quite unfortunate, in view of the evidence on the abuse and excessive use of these procedures by many signatories.⁹⁵ What should have been done is to impose

⁹¹ Existing GPA, Article VII:3.

⁹² The GPA attempts to prevent abuse of such discretion, by providing in Article X:1: ‘To ensure optimum effective international competition under selective tendering procedures, entities shall, for each intended procurement, invite tenders from the 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 the procedure in a fair and non-discriminatory manner’. This, however, is quite an ambiguous standard that is hard to monitor and enforce: How many is the maximum number of suppliers that is ‘consistent with the efficient operation of the procurement system’? If one (foreign) supplier was not invited, along with other domestic suppliers, how do you prove that the selection was unfair or discriminatory?

⁹³ See also Article VII:2(k) of the Revised Text, which repeats this requirement.

⁹⁴ See Article XIII of the Revised Text, in comparison to Article XV of the existing GPA.

⁹⁵ See, eg the Green Paper on ‘Public Procurement in the European Union: Exploring the Way Forward’, Communication by the EC Commission, adopted on 27 November 1997, para 3.15 (‘...contracting authorities use the [limited] procedures much more than they should under the existing strict rules, in particular by claiming extreme urgency where there is none

a requirement whereby a procuring entity which wishes to award a contract through a limited tendering must first advertise its intention to do so through a public notice.⁹⁶ This would test against the market the entity's assumption that no other supplier exists and would generally subject its decision to potential review, should such a supplier decide to file a complaint. A similar requirement has been introduced in the new EU Public Procurement Directive for some of the cases justifying negotiated procedures,⁹⁷ and in the recent amendments to the Remedies Directives it was provided that contracts not advertised properly under the EU procurement rules will be deemed to be ineffective.⁹⁸ This legal sanction was introduced in order to combat illegal direct award of contracts,⁹⁹ and a similar sanction ought to have been introduced by the Revised GPA.

The Revised Text has introduced much stronger wording in relation to the conditions for participation in a procurement, so as to ensure that these are completely neutral and non-discriminatory; such conditions must be limited to 'those that are essential to ensure that a supplier has the legal, commercial, technical and financial abilities to undertake the relevant procurement'.¹⁰⁰ Unlike the existing GPA that speaks about conditions that are essential to ensure the firm's capability to 'fulfil the contract in question'—which could be understood to include the fulfilment of contractual obligations that are effectively discriminatory (for instance, to employ local personnel)¹⁰¹—the Revised Text relates to 'the relevant

and where the urgency has arisen owing to factors for which they are responsible, or by wrongly claiming that there is only one supplier or contractor capable of performing the contract'. See also the U.S. Trade Representative, 'National Trade Estimate 1997', Report on Canada 3.

⁹⁶ As was proposed in Reich (n 2) 325.

⁹⁷ See Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJL 134/114 (30 April 2004) Articles 30–31.

⁹⁸ Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, O.J. L 335/31, Article 2d. The consequences of a contract being considered 'ineffective' is something that the Directive leaves for the national law of each Member State to determine. Such law may provide for the retroactive cancellation of all contractual obligations or it may limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States are required to provide for other effective and dissuasive penalties against the entity that awarded a contract illegally, such as fines or shortening of the duration of the contract.

⁹⁹ *Ibid*, recital (13) of the Preamble to the Directive.

¹⁰⁰ Article VIII:1 of the Revised Text.

¹⁰¹ It could of course be argued that such requirements are prohibited as violating the national treatment and non-discrimination obligation of GPA Art. III, as Arrowsmith has argued (Arrowsmith (n 1) 239). But it is not entirely clear if this is a valid argument, since *de jure* all suppliers, domestic as foreign ones, are all subjected to the same requirement. Of course, *de facto*, the requirement may place the foreign supplier at a disadvantage, since it is precluded from using its own workforce to perform the project.

procurement', thus precluding the possibility of distorting competition by using contractual obligations that are protectionist.¹⁰² The Revised Text also makes it very clear that when assessing whether a supplier satisfies the conditions for participation, a procuring entity cannot limit itself solely to the supplier's business activities inside the country of the procuring entity—a limitation that would grant an unfair advantage to domestic contractors.¹⁰³ Likewise, it may not restrict participation to suppliers that have previously been awarded one or more contracts by a *domestic* government agency.¹⁰⁴

Finally, the Revised Text has introduced provisions that will improve access to information on procurement opportunities for the benefit of both domestic and foreign suppliers. For instance, it requires that a summary notice on the procurement is published in one of the WTO languages (English, French or Spanish) at the same time as the full notice on intended procurement (which is in the local language) is published.¹⁰⁵ It also encourages the use of electronic means of publication (such as the Internet). The electronic medium may be used to publicize procurement systems and their applicable laws and regulations (Article VI:1), procurement notices (Article VII:1(a)), contract award information (Article XVI:2) and multi-use lists (Article IX:7). If the electronic medium is used, procuring entities are allowed to shorten time periods for tendering, and the more extensive the use, the more the time period can be abbreviated.¹⁰⁶

IV. SUBSTANTIVE RULES: OFFSETS AND ENVIRONMENTAL AWARD CRITERIA

A. Promotion of secondary policy objectives

One of the critiques levelled against the existing GPA is that it may put into question the use of environmental requirements or award criteria, as well as other so-called secondary policy objectives, such as promotion of human

¹⁰² The term 'procurement' is more limited in its scope than the term 'contract'. It relates only to the procurement itself and not to any additional contractual obligations. However, this wording may also preclude the use of other types of secondary policy objectives in public procurement, such as environmental goals, workers' rights and human rights promotion, etc. See discussion below, in Section IVA.

¹⁰³ Revised Text, Article VIII:2(a).

¹⁰⁴ Ibid Article VIII:2(c).

¹⁰⁵ Ibid Article VII:3.

¹⁰⁶ Article XI:5 of the Revised Text provides that a procuring entity may reduce the time-period for tendering by 5 days for each one of the following circumstances: (i) the notice of intended procurement is published by electronic means; (ii) all the tender documentation is made available by electronic means from the date of the publication of the notice of intended procurement and (iii) the tenders can be received by electronic means by the procuring entity. Thus, the total reduction can be 15 days, as long as the time-period for tendering is no less than 10 days from the date on which the notice of intended procurement is published (ibid Article XI:6).

rights and labour conditions.¹⁰⁷ Article VIII(b) of the GPA provides that any conditions for participation in tendering procedures ‘shall be limited to those which are essential to ensure the firm’s capability to fulfil the contract in question’. This has raised the question whether such secondary policy requirements that are not essential to fulfilment of the contract are permitted under the GPA. Take for instance a tender for the supply of coal to a government-owned power station, which limits participation to such suppliers that abide by certain environment-friendly standards of production. Since the contract is for the *supply* of coal, not for its production, this would not seem to be a condition for participation that is essential for the firm’s capability to fulfil the contract; a firm that pollutes in the course of its coal production could supply the coal just as well as the firm that does not. The same would apply to a condition of participation related to labour standards in the supplier’s plant or to accessibility for the disabled.

While one may dispute this reading of the agreement, the Revised GPA proposes to clarify the situation in order to avoid any doubts. The new text has included an explicit permission to use technical specifications aimed at the protection of the environment.¹⁰⁸ This provision should be read together with the definition of the term ‘technical specifications’ in Article I(t), which includes specifications not only in relation to the product itself but also to the processes and methods of its production—aspects that often are the target of environmental regulations. However, there is no specific mention of other secondary objectives, such as promotion of human rights or core labour rights. Given the potential of these important causes to be abused for political purposes, the drafters may have preferred to omit such express permission.¹⁰⁹

¹⁰⁷ Arrowsmith (n 1) Ch. 13; Kunzlik, ‘Environmental Issues in International Procurement’, in Arrowsmith and Davies (eds) *Public Procurement: Global Revolution* (Kluwer Law International, 1998) Ch. 11; Christopher McCrudden, ‘Social Policy Issues in Public Procurement: A Legal Overview’, *ibid* Ch. 12; Christopher McCrudden, ‘International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of “Selective Purchasing” Laws under the WTO Procurement Agreement’ 2 (1999) *J Int’l Econ L* 3 and Christopher McCrudden, *Buying Social Justice* (Oxford University Press, 2007).

¹⁰⁸ Article X:6 provides: ‘a Party, including its procuring entities, may... prepare, adopt, or apply technical specifications to promote the conservation of natural resources or protect the environment’. The provision starts with the words ‘For greater certainty’, which may be aimed to reject the critique against the GPA by refusing to admit that there was a problem in the existing text. In other words: environmental specifications are permitted under the existing GPA, too, and this new provision only comes to clarify the situation in order to avoid doubts.

¹⁰⁹ Arie Reich, ‘The Threat of Politicization of the WTO’ (2005) 26 *U Pa JInt’l Econ L* 779–814. One significant case in the field of public procurement that demonstrates the problematic potential of such a permission is the Myanmar case, *United States—Measures Affecting Government Procurement* (DS88—DS95). This was a complaint submitted by the EC in June 1997 against the United States, in respect of an Act enacted by the Commonwealth of Massachusetts on 25 June 1996, entitled ‘Act regulating State Contracts with companies

One may, however, wonder whether even in relation to environmental goals what has been done is enough. This new provision only relates to technical specifications, and not to conditions to participate or to the award criteria. The problematic provision on conditions for participation has been retained and is actually more restrictive than the existing one. It provides that such conditions must be limited to those that are ‘essential to ensure that a supplier has the legal, commercial, technical and financial abilities to undertake the relevant procurement’¹¹⁰—not ‘the contract’ (which may include contractual obligations in relation to secondary objectives) but ‘the relevant procurement’, and only ‘legal, technical and financial abilities’, and not an environment-friendly record or respect for workers’ rights.

The same is true in relation to award criteria: both the existing GPA and the Revised Text require procuring entities to award the contract either to the lowest bidder or, where this has been specified in the notices, to ‘the most advantageous tender’.¹¹¹ While it is clear from the text that this should be assessed based on the evaluation criteria specified in the procurement notices, an argument could perhaps still be made that, similar to the criteria of the lowest price, it is the advantage to the procuring entity that should be taken into account, and not other extraneous advantages, such as those of the society at large. To avoid such arguments, it could have been helpful to clarify that not only technical specifications but also conditions of participation and evaluation and award criteria should be aimed at the protection of the environment.

B. Offsets

Another issue that is related to secondary objectives of procurement is offsets. These are often used by procuring governments as an industrial policy tool to promote local development and improve the balance of payments. The Revised Text defines offsets to mean ‘any condition or undertaking that encourages local development or improves a Party’s balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar actions or requirements’. Like the existing GPA, the Revised Text also prohibits the use of offsets, except for

doing Business with Burma (Myanmar)’. The Act provides, in essence, that public authorities of the Commonwealth of Massachusetts are not allowed to procure goods or services from any persons who do business with Burma, because of the human rights abuses of the Myanmar regime. Note that the embargo was aimed not directly at Myanmar, but at companies from any country which were claimed to have done business with Myanmar, based on the theory that this may somehow help to improve the human rights situation in Myanmar. The case never reached a panel, but eventually the Massachusetts act was struck down by the US Supreme Court.

¹¹⁰ Article VIII:1 of the Revised Text.

¹¹¹ GPA (n 3) Article XIII:4(b) and Revised GPA (n 6) Article XV:5.

developing countries. The prohibition is now found more logically in the provision on National Treatment (Article V:6) and is absolute, with no apparent exceptions. Nevertheless, the exception for developing countries has been retained and can now be found in the provision on S&D treatment (Article V:3(b)). This provision includes offsets among the transitional measures that a developing country may retain, based on its development needs, and with the agreement of the Parties, as a transitional measure, during a transition period. The only condition on the use of offset requirements is that such a requirement is clearly stated in the notice of intended procurement. This may actually amount to a certain relaxation of the rules, since several other conditions on the use of offsets, found in the existing GPA, have been dropped. Among them are the requirements that offsets should be used only for qualification to participate in the procurement process and not as criteria for awarding contracts and that the conditions shall be objective and clearly defined.¹¹²

V. LEGAL REMEDIES: DOMESTIC REVIEW PROCEDURES

One of the most important innovations of the Uruguay Round GPA in relation to the previous Tokyo Round GPA was the introduction of domestic review procedures, which could be invoked by the suppliers themselves in order to challenge problematic decisions of procuring entities. Such procedures are no doubt the most effective means of enforcement of the procurement rules. They enable the citizens themselves—the suppliers that deal with the government's procuring agencies, sometimes on a daily basis—to police compliance with the provisions of the GPA. They are the ones that the regime is meant to benefit, they are in the best position to detect violations, and they usually have the incentive to challenge them.

However, the GPA provisions for domestic review procedures suffer from several shortcomings that have been detected and highlighted in the literature.¹¹³ These include the possibility of entrusting the initial challenge to a non-judicial review body; ambiguity on the extent of the corrective powers of the review bodies, and, in particular, whether the review body must have the

¹¹² See Article XVI:2 of the existing GPA (n 3). In other words, a procuring entity may not invite foreign suppliers to offer as high of an offset obligation as they can, and then award the contract to the one that offered the highest obligation. However, it is possible that, in practice, even under the new text, these conditions on how to retain offsets will be imposed on the developing country in the negotiations on its special treatment package with the other GPA parties. This can be learnt from the example of Israel's special permission to use offsets, found in its Note on Offsets, in Appendix 1 of Israel. It imposed an original condition not found in the text according to which 'suppliers will not be required to purchase goods that are not offered on competitive terms, including price or quality, or to take any action which is not justified from a commercial standpoint'. See discussion in Reich (n 2) 306–7.

¹¹³ See Reich (n 2) 307–12, 335–40 and Arrowsmith (n 1) 398–401.

authority to set aside a signed contract the award of which violates the Agreement; the lack of a requirement to postpone contract signature for a minimum time period after notification of the award in order to allow an effective bid challenge¹¹⁴ and severe limitations on the power to award damages (compensation can be limited to costs for tender preparation or protest only). These shortcomings have seriously undermined the effectiveness of the domestic review procedures, and they have, therefore, not been used as much as would have been expected. In many countries, suppliers prefer not to pursue a challenge, even when a clear infringement has occurred, because they do not trust the system or for fear of jeopardizing future business.¹¹⁵

Unfortunately, none of these shortcomings have been corrected in the Revised GPA.¹¹⁶ On the contrary, the new text has introduced a few changes that may actually undermine the review procedures even further. In fact, instead of amending the GPA at its weakest points, the new text has actually further weakened most of those very same points. For instance, while the GPA made allowance for non-judicial review bodies, as a permitted substitute for courts, at least it made provision to ensure the independence and impartiality of those bodies. The existing agreement requires such a body to be 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*'.¹¹⁷ This wording has been omitted from the Revised GPA, which only provides that the body must be 'independent of its procuring entities'.¹¹⁸ Not 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. Needless to say, there are huge financial stakes

¹¹⁴ Similar to the requirement of a standstill period introduced by the amended Remedies Directive in the EC, above n 98, Article 2a. According to this provision, 'a contract may not be concluded following the decision to award a contract... before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers'.

¹¹⁵ This has been confirmed in various studies. One survey is reported in United Kingdom Department of Trade and Industry, *Public Procurement Review*, paras 103-4 (1994), reprinted in Arrowsmith and others (n 47) 759-60.

¹¹⁶ There is perhaps one small change that can be seen as an improvement, but even this is questionable. In Article XVIII:7(b), when setting out the Review Body's powers to award compensation, the Revised text says that these may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, *or both*. The express authorization to award both these types of compensation is an innovation, but because it is stated in the alternative language it is not clear whether this is meant to leave room to the signatory Member State who has to implement the GPA, or to empower the Review Body to exercise its discretion. For a discussion of this problem, see Reich (n 2) 310-11 and 337.

¹¹⁷ GPA (n 3) Article XX:6 (emphasis added).

¹¹⁸ Revised GPA (n 6) Article XVIII:4.

involved in public procurement, and in order to ensure the impartiality, integrity and credibility of procurement challenge procedures these should be entrusted to judicial authorities whose integrity is beyond any doubt.¹¹⁹ A provision requiring proper professional background (experience and knowledge of procurement procedures and of law in general) and high moral calibre would also be helpful.¹²⁰

Furthermore, under the existing GPA it is clear that Parties have to provide 'non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge *alleged breaches of the Agreement*' (Article XX:2). In other words, parties must provide procedures where the provisions of the GPA itself can be invoked and enforced. Under the Revised GPA, however, allowance is made for Parties to deny challenges based directly on the GPA itself. Instead, challenges can be limited to failures to comply with a Party's measures implementing the Agreement.¹²¹ Thus, if such implementing measures (laws, regulations or internal directives) are lacking in relation to the GPA text, aggrieved suppliers will be unable to invoke and to enforce the original binding provisions of the GPA. All that can be done, in such a case, is to hope that a government of one of the GPA parties will agree to challenge the non-compliant implementation through the inter-governmental mechanism of dispute resolution (a WTO panel). Such challenges are rare,¹²² and even if a government can be convinced to pursue one, it will

¹¹⁹ On the importance of judicial independence and how it can be ensured, see AJ Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72 *Southern California L R* 353. See also T Broude, 'Judges Shalt Thou Make Thee in All Thy Gates': Reforming Judicial Office in the WTO Dispute Settlement System' (June, 2005) 6 *Free University Amsterdam J Intl Comp L (The Griffin's View)*. The central components of judicial independence relate to issues such as: the method of appointment of judicial decision makers, their qualification or selection standards for office, their complete independence from any stakeholders, their tenure and method of dismissal, and the existence of a supervision mechanism over their independence and integrity.

¹²⁰ For example, when Canada established its Procurement Review Board, pursuant to its obligations under the Canada-US Free Trade Agreement, the implementing legislation required that the members of the Board must have knowledge and experience related to public sector procurement (The Procurement Review Board Regulations, SOR/89-41, *Can. Gaz.* Part II, vol. 123, Extra, p. 8, s. 7(4)). Similarly, the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement, above note 35, provides that dispute settlement panels shall be composed of 'well-qualified... individuals', and that they shall be selected 'with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience' (Articles 8:1 and 8:2). The standards for members of the WTO Appellate Body are of course higher: 'persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government' (*ibid.*, Article 17:3).

¹²¹ Revised GPA (n 6) Article XVIII:1.

¹²² Since the inception of the GPA in 1995, only three disputes relating to the GPA have gone through the full panel procedure. See <http://www.wto.org/english/tratop_e/gproc_e/disput_e.htm>.

be too late for the supplier that discovered it in the course of a given procurement.¹²³ This, then, is potentially a very problematic retreat from the existing situation that may further undermine the domestic review procedures.¹²⁴

Likewise, the revised provisions on interim measures have also been weakened. While the existing provision requires ‘rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities’,¹²⁵ in the Revised Text there is no mention of such correction, and the only legitimate objective of interim measures is ‘to preserve the supplier’s opportunity (not even ‘equal opportunity’) to participate in the procurement’.¹²⁶ Thus, an aggrieved supplier will not have the elementary right to demand correction of a breach anymore. This right has been substituted by an ambiguous right to have an opportunity to participate in the procurement preserved. The latter can hardly be considered to include the former, since in the existing GPA the wording includes both phrases as separate issues (*‘to correct breaches of the Agreement and to preserve commercial opportunities’*).

Finally, the revised text has omitted the elementary right of a complaining supplier to obtain an assessment and decision on the justification of the challenge. By omitting this language (‘Challenge procedures shall provide for . . . an assessment and a possibility for a decision on the justification of the challenge’¹²⁷), and substituting it with a conditional formula (‘where a review body has determined that there has been a breach of this Agreement etc.’¹²⁸), the drafters have exempted the review body from the elementary duty of examining the merits of the complaint and making a finding on whether a violation of the rules has occurred.¹²⁹ It may also (perhaps unintentionally) have created a loophole which could enable domestic review bodies to evade the need to grant any corrective measures simply by not making decisions on the substance of the challenge.

VI. MODIFICATION AND RECTIFICATION OF COVERAGE

While the text of the GPA that has been tentatively agreed does not in itself deal with entity coverage of the agreement (an issue left to the coverage

¹²³ WTO Panel procedures can take up to a year or more to conclude, and even when a party prevails, the losing party is only ordered to amend its actions from now and onwards, not to compensate or make good for past breaches.

¹²⁴ It is not entirely clear why this change has been introduced, but one could guess that it has to do with the legal situation in some party or parties that prevent direct invocation of international law. This, however, could be rectified by appropriate legislative amendments. So at the end of the day, it would seem to boil down to a lack of political will.

¹²⁵ GPA (n 3) Article XX:7(a).

¹²⁶ Revised GPA (n 6) Article XVIII:7(a).

¹²⁷ GPA (n 3) Article XX:7(b).

¹²⁸ Revised GPA (n 6) Article XVIII:7(b).

¹²⁹ A duty that exists under the existing GPA—see Reich (n 2) 310 and Arrowsmith (n 166) 396.

annexes of each party that currently are still under renegotiation), it does deal with the *procedures* that govern modifications of these annexes. Such modifications may be necessary as a result of reorganization of government agencies and responsibilities, including privatization, but they may also stem from protectionist pressures aimed to exclude certain procurement activities from foreign competition. This has been a problematic and contentious issue ever since the first GPA was concluded following the Tokyo Round, considering the importance that parties ascribe to the maintenance of a comparable level of mutually agreed coverage.

The existing GPA deals with this issue in two paragraphs as part of its final provisions.¹³⁰ It requires the modifying party to notify the WTO Committee on Government Procurement (of which all the GPA parties are members), on its intention to modify its coverage list. These paragraphs distinguish between three situations: (i) where the modifications are of ‘a purely formal or minor nature’ (for instance, when an entity changes its name). In such case, they shall become effective provided there is no objection within 30 days; (ii) where the modifications are not purely formal or minor. In such case, the Chairman of the Committee shall promptly convene a meeting of the Committee in order to consider the proposal and any claim for compensatory adjustments, ‘with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage’. ‘Compensatory adjustment’ means that the modifying state should offer to add other procurement opportunities instead of those taken off the lists and (iii) where a party wants to withdraw an entity on the grounds that government control or influence over it has been effectively eliminated. Here, the rationale of the withdrawal is that the entity no longer has any reason to practice domestic preference policies and is now likely to be guided only by the objective of cost-effectiveness. Therefore, there is arguably no point in subjecting it to the rules of the GPA anymore. In such case, the withdrawal becomes effective provided that no objections have been filed with the Committee.

Whenever there is a disagreement between parties on any of these matters that cannot be resolved within the Committee (mainly relevant to situations (ii) or (iii)), the existing GPA refers the parties to the dispute settlement procedures of the agreement (Article XXII). It does not, however, clarify who should initiate these procedures and what criteria a WTO panel should use in order to resolve such a disagreement—which is more economic than legal in its nature, unlike most other cases brought before panels.¹³¹ That is

¹³⁰ GPA (n 3) Article XXIV:6.

¹³¹ Cf. Arrowsmith (n 1) 127, who concludes that therefore there must be a right under the existing GPA to withdraw entities, because ‘it can hardly be envisaged that panels will determine whether or not a particular modification is appropriate, since the GPA contains no criteria for judging this’.

probably the reason why dispute settlement procedures have never been used in this context, even though there have been numerous disagreements on proposed modifications, many of which were never resolved.¹³²

The Revised Text makes an attempt to improve the situation and to prevent the many standstills that are brought about under the current system. It has abandoned the distinction between modifications of a 'purely formal or minor nature' and 'other cases', which is not entirely clear-cut, and instead requires a modifying party to submit information as to the likely consequences of all types of changes.¹³³ Instead of referring the parties to the panel procedures, it creates a special arbitration procedure to facilitate resolution of objections to coverage modifications. It authorizes the Committee on Government Procurement to adopt such procedures, and to formulate the indicative criteria that demonstrate the effective elimination of government control or influence over an entity's covered procurement.¹³⁴ The Committee is also authorized to formulate criteria that indicate how to determine the level of compensatory adjustment that a state must offer for modifications that are not a result of elimination of government influence, as well as how to determine 'substantially equivalent coverage' that an objecting Party may withdraw if satisfactory compensation has not been granted.¹³⁵ On the one hand, the new text enables a party to bring into effect its proposed modification of coverage, even in the face of objections from other parties,¹³⁶ but on the other hand, it also permits objecting states to maintain a balance of concessions with the modifying state by withdrawing 'substantially equivalent coverage'.¹³⁷ Such withdrawal may be implemented solely with respect to the modifying Party, notwithstanding the general MFN obligation of the GPA.¹³⁸ This, of course, will create some deterrence against

¹³² See, for instance, the annual reports of the Committee on Government Procurement for 2007 (GPA/92, 13 December 2007) and 2005–06 (GPA/89, 11 December 2006). They report on several disagreements in relation to modifications, some of which were resolved by negotiations, others which remain outstanding for a long time (GPA/92, pp. 2–3; and GPA/89, p. 4) without any of the parties taking any action.

¹³³ Revised GPA (n 6) Article XIX:1(b). The only exception is for privatized entities, where the modifying party is required to submit evidence of the elimination of government control or influence (*ibid*, subpara (a)).

¹³⁴ *Ibid* Article XIX:8(a).

¹³⁵ *Ibid* Article XIX:8(b) and (c).

¹³⁶ *Ibid* Article XIX:5(c) (where arbitration procedures have not yet been adopted by the Committee—after 150 days), Article XIX:7(a) (where arbitration procedures have been adopted, but have not been invoked by any party—after 130 days) and Article XIX:7(b)(i) (where arbitration procedures have been invoked—after they have been completed).

¹³⁷ *Ibid* Article XIX:6 (where the Committee has not yet adopted arbitration procedures) and Article XIX:7(b)(iv) (where arbitration has been invoked, but the modifying party fails to comply with the results of the arbitration procedures). It should be pointed out, that where arbitration procedures have been adopted by the Committee, but none of the parties have invoked them, objecting parties are precluded from withdrawing equivalent coverage (Article XIX:7(a)(ii)), even though the modification has been implemented.

¹³⁸ *Ibid* Article XIX:6.

Table 1. Scorecard: Findings according to the key components of the Revised Text compared to the existing GPA

Component	Grade
Efforts to Attract Developing Countries (15%)	B
Amendments to Transparency and Procedural Rules: (25%)	
Preamble: Promotion of integrity of government procurement systems, avoidance of corruption and conflict of interests	A
Simplified, user-friendly text and cleared definitions	A–
Greater flexibility and improvements in the tendering procedures	B
Introduction of electronic tendering and auction	A
Amendments to Substantive Rules: (25%)	
Prohibition of offsets	B
Environmental specifications, conditions and award criteria	A–
Non-inclusion of concession contracts	C
Legal Remedies—Domestic Review Procedures (25%)	
Independence of non-judicial review bodies	F
Option to deny challenges based directly on the GPA	F
Provisions on interim measures	F
Assessment and decision on the justification of the challenge	F
Procedures for Modification of Coverage (10%)	B+
Final Grade (Average of the Above):	B–

unilateral modifications that are objectionable to other parties. On the other hand, withdrawal is likely to further exacerbate the problem of the unclear and uneven coverage of the GPA as a result of the many derogations and conditions found already in the coverage annexes.

The advantage of the new text, thus, is that it will introduce more order and clarity in the maintenance of balanced coverage annexes, in particular after the Committee uses its new mandate to formulate criteria for government influence and for compensatory adjustments, and adopts arbitration procedures. Disagreements on modifications are more likely to be resolved by arbitration or negotiation and not be ‘left in the air’ because none of the parties wants to take such matters to a panel. The text also appears to have answered a question that remained unclear under the existing GPA, namely whether the withdrawal of an entity on the grounds that government influence has been eliminated entitles the other parties to compensation.¹³⁹ It is quite clear from the Revised Text that they are not, and that such compensation is only due in other types of modifications.¹⁴⁰ However, some other

¹³⁹ Under the existing GPA it would seem that such compensation may be applicable, since it is mentioned in Article XXIV:6(b) that deals with such withdrawal: ‘In considering the proposed modification to Appendix I *and any consequential compensatory adjustment...*’. However, if the entity in question is no longer likely to discriminate against foreign suppliers, it is not clear why compensation is due.

¹⁴⁰ See Article XIX:3 of the Revised GPA: Subpara (a) that deals with withdrawal of an entity on the grounds that government control or influence has been eliminated does not mention any compensatory adjustments. This is only mentioned in subpara (b) that deals with the other types of modifications.

problems with the existing GPA have not been solved, in particular, that the duty of notification only applies if coverage annexes need to be modified. If, on the other hand, a party transfers an important procurement function from a covered entity to an uncovered entity, the annexes need not be modified and there is no obligation in the text to notify the Committee of the change, even though it may have serious negative effects on other parties' legitimate expectations.¹⁴¹ This should have been resolved in the Revised Text.

VII. CONCLUSION: THE SCORECARD OF THE REVISED GPA

Table 1 summarizes the findings of this article in the form of a scorecard, according to the key components of the Revised Text compared to the existing GPA.¹⁴² The assessment of each component is graded on a scale from A (excellent) to F (failure, meaning regress in relation to the existing GPA); a score of B indicates a worthwhile achievement with some notable flaws as well, while a score of C indicates a very modest or no improvement at all. Unlike Anderson, who sees the Revised Text as 'a substantial improvement over the existing Agreement',¹⁴³ my own assessment of the Revised Text is more reserved. This assessment is based on the finding that while the text has been redrafted, rearranged and simplified, in essence there have been only a few significant changes. The provision that was in most need of improvement—namely the one on domestic review procedures, that is, legal remedies—is the most disappointing: not only has it not been improved, but also it has actually been weakened, possibly resulting in legal remedies even less effective than previously. The revision has also missed an opportunity to bring the growing business of public concession contracts under the umbrella of the GPA, an amendment that could have promoted much international trade and contributed significantly to the efficient and effective management of public resources. These shortcomings are probably not the result of an oversight of the legal drafters, but of political constraints. Nevertheless, the result in this regard is disappointing. On the positive side one can note the simplification and streamlining of the provisions on tendering procedures and, in particular, the introduction of provisions on electronic tendering and electronic auction. If there is anything that may one day bring about a real change in the deep-rooted patterns of domestic purchasing by government entities, it is the Internet and the use of it for the purpose of

¹⁴¹ See Arrowsmith (n 1) 121. While this may arguably be the subject of a non-violation complaint under the GPA's panel procedure, this is often a difficult cause of action. Also, in the absence of a duty of notification, the affected parties are often not aware of the change and its negative consequences.

¹⁴² The idea of a scorecard draws inspiration from Jeffrey Schott, *The Uruguay Round: An Assessment* (1994) 8.

¹⁴³ Anderson (n 6) 260.

publicizing, soliciting and submitting tenders for government contracts. If the new GPA can be successful in attracting more signatories, both developing countries and others, and, in particular, a super-economy like China that has already started its accession procedures to the GPA,¹⁴⁴ this would also be an important development. Now it remains to be seen whether the coverage negotiations can come to a successful conclusion, so as to bring about a significant expansion of coverage and to get rid of the many derogations and strict reciprocity requirements.

¹⁴⁴ Robert D Anderson, 'China's Accession to the WTO Agreement on Government Procurement: Procedural Considerations, Potential Benefits and Challenges, and Implementation of the Ongoing Re-Negotiation of the Agreement' (2008) 4 PPLR 161-74.