TOWARDS A MULTILATERAL AGREEMENT ON TRANSPARENCY IN GOVERNMENT PROCUREMENT

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I. INTRODUCTION

GOVERNMENTS have traditionally tended to place procurement contracts with domestic industry and this may distort the natural patterns of international trade, creating inefficiencies in the global economy. As global, regional and bilateral initiatives have met with increasing success in reducing trade barriers such as quantitative restrictions and tariffs, greater attention is now being focused on the remaining barriers, including closed government procurement.

Government procurement was largely excluded from the original General Agreement on Tariffs and Trade (GATT) and its 1994 successor, and has also been largely omitted from the 1995 General Agreement on Trade in Services (GATS).[1] In 1979, however, efforts to tackle this issue at the global level[2] finally bore some fruit in the form of the separate "GATT" Agreement on Government Procurement, concluded at the end of the Tokyo Round.[3] This Agreement sought to remove discrimination in major federal/central government supplies contracts, as well as to achieve

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1. GATT Art.III(8) excluding the GATT national treatment obligation and GATS Art.XIII(2), which excludes application of most of the GATS obligations. There is debate over whether an MFN obligation applies to procurement under GATT: see Reich, "The New GATT Agreement on Government Procurement: The Pitfalls of Plurilateralism and Strict Reciprocity" (1997) 31 *J. World Trade* 125. The transparency obligations of Art.III of GATS do, however, apply to government procurement, including an obligation to publish general measures on services procurement. It is less clear whether the obligation to publish general trade measures which exists under Art.X of GATT is aptly worded to cover procurement.

2. There are also numerous bilateral and several regional agreements. The major regional agreements, which take a similar approach to the GPA, are those of the EC, EEA, North American Free Trade Agreement and Central European Free Trade Area. Work on public procurement is currently being undertaken in the context of the initiative to create a Free Trade Area for the Americas, within MERCOSUR and within the Asia Pacific Economic Co-operation Forum (as to which see *infra* n.29).

3. This was never actually part of the GATT itself. On this agreement see further Jones, "The GATT—MTN System and the European Community as International Frameworks for the Regulation of Economic Activity: the Removal of Barriers to Trade in Government Procurement" (1984) 8 *Maryland J.Int. Law and Trade* 53; Bourgeois, "The Tokyo Round Agreements on Technical Barriers and on Government Procurement in International and EEC Perspective" (1982) 19 C.M.L.Rev. 5.

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transparency in contract award procedures. In 1993, at the end of the Uruguay Round, a new Agreement on Government Procurement (GPA) was concluded, which became one of the plurilateral (optional) agreements administered by the World Trade Organization (WTO).[4] The new agreement is very similar to the old in its aims and approach, but with much wider coverage, extending to procurement of services and construction and also to sub-federal government and some State enterprises.

The success of efforts to tackle closed government procurement has, however, been limited, not least by the fact that the Agreements have attracted few participants: so far the new GPA has only 24 signatories out of more than 130 WTO member States. As will be explained below, there are a number of reasons why the GPA has not proved attractive, and the WTO has recently determined that a new approach is required. Thus at the 1996 Ministerial Conference at Singapore a Working Group on Transparency in Government Procurement was set up. Its mandate is to conduct a study on transparency in government procurement practices and on the basis of this study, to "develop elements for inclusion in an appropriate agreement". It is expected that any such agreement will contain much more limited obligations than the GPA, and that it will be applied on a multilateral basis.

The main challenge for policy-makers is to develop an agreement which is effective in improving market access but at the same time avoids the problems afflicting the current GPA which have discouraged accession to that Agreement. The aim of this article is to suggest how such a new agreement can usefully be constructed. This task is not as difficult as it might

4. The GPA is contained in Annex IV to the Agreement Establishing a World Trade Organization. See generally Hoekman and Mavroidis (Eds), *Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement* (1997); de Graaf and Trepte, "The Revised GATT Procurement Agreement" (1994) 3 *Public Procurement L.Rev.* CS70; *de Graaf and King, "Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round" (1995) 29 Int.Lawyer* 435; Hoekman and Mavroidis, "The WTO's Agreement on Government Procurement: Expanding Disciplines, Declining Membership?" (1995) 4 *Public Procurement L.Rev.* 63; Brown and Pouncey, "Expanding the International Market for Public Procurement: The WTO's Agreement on Government Procurement" [1993] 3 *Int. Trade Law and Regulation* 69; Arrowsmith, "The World Trade Organisation Agreement on Government Procurement: Obstacles and Opportunities" (1997) 1 *Malaysian J. Law and Society* 15; Low, Mattoo and Subramaniam, "Government Procurement in Services" (1996) 20 *World Competition* 5; Blank and Marceau, "The History of the Government Procurement Negotiations since 1995" (1996) 5 *Public Procurement L.Rev.* 77; Reich, *op. cit. supra* n.1; Davies, "Remedies for Enforcing the WTO Agreement on Government Procurement from the Perspective of the European Community—a Critical View" (1997) 20 *World Competition* 113; Footer, "Remedies Under the New GATT Agreement on Government Procurement" (1995) 4 *Public Procurement L.Rev.* 80: Schede, "The 'Trondheim' Provision in the WTO Agreement on Government Procurement: Does this 'Major Revision' Live up to the Needs of the Private Sector?" (1996) 5 *Public Procurement L.Rev.* 161.

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first appear. It will be argued that a simple and flexible agreement, which leaves the detail of contract award procedures to the discretion of signatory States, is capable of achieving significant benefits without imposing costs which could limit support for the agreement.

The next part of the article will briefly introduce the GPA and explain why it has failed to attract a wider membership, since an appreciation of the problems of the existing GPA is essential in constructing a new approach. Part III then outlines how an agreement limited to transparency could contribute to opening up procurement whilst avoiding some of the problems of the GPA itself. Finally, bearing in mind the considerations identified in Parts II and III, Part IV will make specific recommendations concerning the nature and contents of any transparency agreement.

II. THE AGREEMENT ON GOVERNMENT PROCUREMENT (GPA)

A. The Aims and Approach of the GPA

As indicated above, the existing GPA is one of the plurilateral agreements administered by the WTO. The current signatories are Aruba, Canada, Hong Kong, Israel, Japan, Liechtenstein, Norway, Switzerland, the United States and the European Union and its member States. Singapore has completed accession negotiations, whilst Panama and Taiwan are currently negotiating accession (although the latter cannot become a party until it becomes a member of the WTO).

The aim of the GPA, as stated in the preamble, is to establish a multilateral framework for government procurement "with a view to achieving greater liberalisation and expansion of world trade and improving the international framework for the conduct of world trade". This has been sought through two fundamental principles of non-discrimination and transparency.

So far as discrimination is concerned, Article III of the GPA applies basic national treatment rules to covered procurement.[5] Thus governments cannot exclude non-domestic firms, or give domestic firms (or products or services) any form of preference, such as price preferences. Governments also cannot insist that foreign providers form joint ventures with local undertakings, or, as a general rule, require "offsets"—for

5. This requires signatories to give products and services of the other parties treatment no less favourable than that given to domestic products and services, and to their suppliers and service providers provided that they are offering goods or services originating from GPA parties. Art.III(2)(a) also prohibits discrimination between domestic providers themselves on the basis of foreign affiliation or ownership and Art.III(2)(b) prohibits discrimination against a domestic firm on the basis of the country of production of the goods or services which it supplies, provided again that the country of production is party to the GPA. (This is probably not covered by the rule in Art.III(1) which appears to apply only to products and services supplied by firms from other signatory States, not domestic firms.)

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example, require that successful foreign providers use local materials or employ local labour or local subcontractors on the contract.[6]

Article III(1) also lays down a most-favoured-nation (MFN) rule, that other signatories' products and services, and providers from other GPA parties offering products or services of other GPA parties, shall receive treatment no less favourable than that accorded to providers and products/services of any other signatory. However, the MFN principle refers only to the treatment of providers and products/services to which the Agreement applies; it has *not* been applied in determining coverage of the Agreement itself. This position has arisen because many signatories have been unwilling to offer for coverage all entities and contracts. For example, whilst the European Community has been willing to open up the markets of all sub-federal entities, this was difficult for some States. Problems have also arisen in the area of services, where there was a wide divergence in the type of services that signatories were willing to submit to competition. Given this divergence, MFN coverage based on what each signatory State was able to offer was unacceptable because of imbalances between States. On the other hand, to define coverage on the basis of the minimum common denominator would have produced a very limited agreement. Thus, it was decided that each signatory should effectively negotiate with each other signatory, to come to a satisfactory agreement based on "reciprocity". The result is that the GPA has the appearance of a series of bilateral agreements based around a common structure of principles and award procedures, rather than a multilateral arrangement.

In addition to non-discrimination, the second fundamental principle of the GPA is transparency. A transparent procurement process has been usefully defined as one "characterised by clear rules and by means to verify that those rules were followed".[7] It is also generally accepted as a feature of transparent procurement that both (i) the rules to be applied in conducting procurements and (ii) information on specific procurement opportunities are made clearly known to affected parties. Transparency in this sense is employed in support of a number of different objectives of public procurement, in both domestic and international systems.

First, one of its main effects can be to ensure that procurement decisions are based only on considerations regarded as "legitimate" within the system. Thus under the GPA one of the main concerns is to prevent discrimination, and transparency supports this goal by making it more difficult to conceal prohibited discriminatory decisions. For example, where (as under the GPA[8]) contract award criteria are required to be stated publicly

6. GPA Arts.III and XVI.

7. Westring and Jadoun, *Public Procurement: Manual for Central and Eastern Europe*, p.6.

8. GPA Art.XII(2)(h).

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in advance, it is more difficult to award a contract to a favoured national supplier. In domestic systems and in the procedures of international institutions such as the World Bank,[9] transparency is used in a similar way to support the various objectives of the system such as obtaining best value for money and preventing corruption.

Second, transparency supports the goals of procurement systems by encouraging and facilitating participation by suppliers. Publicity for procurement opportunities, the application of clear and accessible rules, and the assurance that these rules will be adhered to all mean that suppliers are more willing and able to bid. There is less risk that their participation will prove wasteful, either because decisions are in fact taken according to irrelevant and unexpected criteria (such as national favouritism or personal interest), or simply because the rules of the game are not clear. (For example, if qualification criteria are not clear in advance, firms without the desired qualifications may waste their time in bidding.) From the perspective of opening international markets, difficulties of obtaining information are disproportionately greater for foreign suppliers. They are also more likely to have doubts over whether a fair procedure will be applied where the system is non-transparent: in particular, suppliers may fear that non-transparent preferences will be given to national firms and products. So far as the GPA is concerned, reducing these deterrents to international participation is an important function of transparency, which is separate from and additional to its function of supporting non-discrimination rules.

The GPA contains detailed rules to ensure that procurement procedures are transparent, which can be summarised briefly in four categories.

1. Publicity for the rules of the award procedure

First, the GPA requires publicity to be given both to general rules on procurement and to the procedures which will be applied to particular procurement contracts.

On the first issue, Article XIX(1) requires GPA parties to publish promptly any "law, regulation, judicial decision, administrative ruling of general application, and any procedure (including standard contract clauses)" in the publications listed in Appendix IV, "in such a manner as to enable other Parties and suppliers or service providers to become acquainted with them".[10] It also states that parties should be prepared to

9. See the International Bank for Reconstruction and Development (World Bank), *Guidelines: Procurement under IBRD Loans and IDA Credits* (Jan. 1995, as revised), para. 2. Transparency is also stated as an objective in the preamble to the UNCITRAL Model Law on Procurement of Goods, Construction and Services, which is designed as a model for reform of national systems.

10. Similar obligations probably apply to all WTO members under GATT and GATS: see *supra* n.1.

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explain their procurement procedures to any other party on request whilst Article XVIII(2) requires that they should also provide on request an explanation of their procurement practices and procedures to GPA suppliers and service providers.

On the second issue, there are various provisions concerning publicity for rules to be applied to specific procurement. For example, entities are required to state in the invitation to participate details of technical and economic requirements (Article XI(6)); to state in the tender documentation all non-price award criteria (Article XII(2)(h)); and to state in advance where the procuring entity reserves a right to enter into negotiations with firms (Article XIV(1)(a)). Provision of such information both enables potential bidders to act in an appropriate way and facilitates the monitoring of the procedure to prevent entities applying prohibited criteria.

2. *Publicity for procurement opportunities*

The GPA also requires publicity for procurement opportunities through an "invitation to participate" (Article IX) in certain named publications, set out in Appendix II to the Agreement. For example, for the EU member States the relevant publication is the *Official Journal of the European Communities*, for Japan *Kanpo*, and for the United States *Commerce Business Daily*. There are also rules on the form and content of notices, and a requirement for a summary in English, French or Spanish. Where participation in procurements is limited to those on qualification lists the existence of lists and relevant details must be published annually in publications referred to in Appendix III (Article IX(9)).

3. *Provisions limiting the discretion of procuring entities*

The GPA also contains many detailed rules that confine and structure the discretion of procuring entities. This facilitates the monitoring of the procurement process to ensure that application of irrelevant criteria are not "disguised" under the exercise of a broad discretion. For example, entities are normally required to use formal competitive tendering procedures to award contracts, as defined in Article VII, with negotiations being allowed only if provided for in advance (Article XIV, which also lays down rules for the fair and transparent conduct of such negotiations). Tenders under open and selective procedures must be received and opened under "procedures and conditions guaranteeing the regularity of the openings" (Article XIII(2)). Further, as noted above, discretion in the award process must be limited in advance by stating in the contract docu-

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mentation the non-price criteria that will be considered (Article XIII(4)), as must the discretion in deciding which suppliers to admit, through a requirement that any technical and economic requirements for participation must be stated in the invitation to participate. Many other examples could be given.

4. Monitoring and enforcement

The features of transparency already described above obviously assist interested parties in verifying compliance with rules, but there are also other specific provisions concerned with this aspect of transparency. They include, in particular, requirements to publish contract award notices (Article XVIII(1)); an obligation to give information to participating firms about contract award decisions (Article XVIII(3)); a requirement to give rejected firms information about decisions, such as why they failed to qualify or why their tender was not accepted (Article XVIII(3)); a requirement to provide information on specific procurements and awards to other GPA parties (Article XIX and Article XXII); a requirement to keep a record of every use of limited tendering procedures (Article XV); and a requirement to provide annually certain statistical information on procurement to the WTO Committee on Government Procurement.

As for enforcement of the GPA rules, the general inter-governmental dispute-resolution mechanism of the WTO applies, subject to certain special rules for procurement cases such as shorter time limits for panel decisions.[11] In addition, Article XX of the GPA requires all signatories to provide for national challenge procedures for aggrieved suppliers.[12] These must be available before an impartial and independent review body, and must meet certain other minimum standards set out in Article XX.

B. Reasons for Limited Participation in the GPA

As explained, there are currently only 24 signatories to the GPA, and in formulating a transparency agreement which will be acceptable to most WTO members, it is obviously important to consider the reasons for this limited participation. A number of factors can be identified.

First, and most obviously, governments may eschew the Agreement because they do not wish to relinquish the possibility of using procurement to support national industry against foreign competition—a possibility which is generally precluded by the GPA's national treatment rule. It is in fact now accepted by many governments that protectionist procurement policies are frequently detrimental to national welfare, as well as to global welfare, in their actual outcomes: often the costs of these policies in

11. See further Footer and Davies, both *op. cit. supra* n.4.
12. *Ibid.*

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terms of reduced value for money in procurement, diversion of national resources to less efficient industries and the disincentive to efficiency in the national economy outweigh any benefits.[13] Nevertheless, political pressures to support non-competitive industries may make it difficult for governments to resist such policies or to adhere to international agreements that would curtail their freedom in this respect.[14] It has been suggested that these political difficulties may be particularly acute in developing countries, where, due to the nature of their economies, discriminatory government procurement is more likely to have a real impact on trade levels.[15]

The GPA does, in fact, provide some scope for signatories to implement industrial procurement policies. First, Article V(1) states generally that parties should take into account various industrial needs of developing countries. Article V(3) provides expressly that these considerations should be taken into account in negotiating their entity coverage, whilst Article V(4) also allows developing countries to agree on accession for exclusions from the national treatment principle for certain entities, products and services[16] (which arguably could include exemptions for price preferences as well as more complete exemptions). Article XVI(2) also expressly permits developing countries to negotiate at the time of accession for the use of offsets as a condition of participation, although not as contract award criteria. Second, whilst for developed nations there are no specific provisions to allow industrial development to be taken into account, there is flexibility in deciding which entities and contracts a State will submit to GPA disciplines, and it is also possible to negotiate more specific derogations that would allow States to pursue industrial policies.

13. There is an extensive literature on this subject, most recently and usefully summarised by Trionfetti, "*The Government Procurement Agreement and International Trade: Theory and Empirical Evidence*" (1997; paper written for the WTO). The likelihood that costs will outweigh benefits even with policies which economic theory suggests could be beneficial is exacerbated by the problems of successful policy implementation, due to inadequate skills and information on the part of government

14. The nature of the interests involved means that pressures from producers in existing protected industries are likely to be more significant than pressures from the more diversified and less organised groups which would benefit from removal of protectionist measures, namely taxpayers, consumers and potential participants in industries in which national resources would otherwise be employed.

15. Trionfetti, *op. cit. supra* n.13 (who finds the hypothesis supported by the empirical evidence). This is because in these economies existing domestic supply markets are less likely to be able to meet government demand. It should also be pointed out that even when discriminatory procurement does not have trade effects because private supply already exceeds government demand industry will lobby for protectionist policies since such policies effect a transfer of income from the government to the private sector in the form payments above equilibrium market price.

16. And see also Art.V(5). There is also special provision for exclusion of entities, products or services covered by regional or global arrangements.

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Under the existing GPA some States have excluded specific products and entities for these reasons, and some have also included derogations focused on particular existing industrial and social programmes, as is explained further below. The inherent flexibility of the Agreement seems to allow for any type of derogation, including for price preferences.

Given this flexibility, why have more countries not sought accession? This is probably because the ability to take advantage of the Agreement's flexibility to retain industrial possibilities depends on the outcome of accession negotiations, and the prospects of negotiating successful derogations may seem low. This is especially so in the case of national policies driven by political considerations which appear to trade partners to produce limited economic benefits. Negotiations are, of course, exacerbated by the complex character of the GPA as, effectively, a series of "bilateral" arrangements. Further, the Agreement in any cases envisages that the continuation of discriminatory practices is a temporary phenomenon and that States should seek to eliminate them in due course.[17]

Another significant reason for the reluctance of some States to accede to the GPA is that this would also curtail their freedom to use public procurement in support of social goals, such as regional development or support of disadvantaged social groups. The effect of many policies of this kind is to exclude foreign firms or foreign products/services or to place them at a disadvantage compared with the favoured national group, and this may infringe the national treatment rule. Even when the policies are not discriminatory they may be inconsistent with the GPA award procedures.[18] Of course, the possibility exists of negotiating derogations for social as well as industrial programmes, and these have been incorporated by some GPA signatories to take account of existing social programmes.[19] Again, however, the extent of acceptable derogations will depend on the outcome of negotiations. States may be deterred from negotiating if they feel that there is only a limited prospect of their own programmes being accepted, and GPA parties may, in particular, be unwilling to accept derogations where the policies are not truly effective.

It should also be mentioned that, given the complex structure of GPA coverage and the need for bilateral discussions, the cost of accession nego-

17. GPA Art.XXIV(7)(c).

18. On this see Arrowsmith, "Public Procurement as a Tool of Policy and the Impact of Market Liberalisation" (1995) 111 L.Q.R. 237; Kunzlik, "Environmental Issues in International Public Procurement" and McCrudden, "Social Issues in Public Procurement: A Legal Overview", both in Arrowsmith and Davies (Eds), *Public Procurement: Global Revolution* (1998).

19. Thus, the US, for example, has a derogation for federal and sub-federal small business set-asides and set-asides aimed at women and minority groups, as well as for sub-federal programmes to promote the development of distressed areas and to support disabled veterans. Canada also has derogations for small business and minority set-aside programmes, as have Japan and Korea for some small business support policies.

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tiations is obviously not confined to the context of negotiating derogations, but is a more general deterrent to GPA accession.

Accession may also involve costs to States in actually implementing the Agreement's detailed requirements.

First, this will often require amendments to existing national legislation or administrative rules, and programmes will be needed to publicise and monitor the new procedures and to train purchasing officers. Whilst many countries' existing rules are broadly similar to those of the GPA, numerous minor adjustments are inevitable. The costs of this may be high since many of the GPA rules are quite complex and difficult to apply (for example, with the rules on aggregation of smaller contracts for the purpose of deciding whether contracts fall above the relevant threshold for coverage[20]).

In addition, GPA procedures will involve costs if these are less effective than a State's existing procedures in promoting efficient purchasing. The GPA rules are designed for countries with marked differences in political and administrative conditions concerning, for example, the extent of training and professionalism of purchasing officers or the effectiveness of internal control systems. For States with relatively advanced procurement systems based on private sector best practice, which operate by monitoring outcomes rather than compliance with bureaucratic rules, a formal and transparent system such as the GPA may be seen to inhibit best practice.[21] However, for most States, including many developed countries, the state of public procurement infrastructure is probably such that the procedures of the GPA are not considered unduly rigid.

Another problem related to the efficiency of the procedures is that they may become outdated. For example, rapid developments in the use of information technology in purchasing are currently creating some problems.[22] The importance of accommodating such developments is recognised in the Agreement itself, which expressly requires the parties to consult regularly on this matter through the Committee on Government Procurement.[23] However, once detailed procedures are embodied in an

20. GPA Art.II, in particular Art.II(4).

21. On this point see e.g. Kelman, *Procurement and Public Management* (1990). An approach to procurement which depends on the training of personnel and benchmarking to best practice standards rather than the regulation of discretion by detailed rules has been instituted recently in the UK: see White Paper, *Setting New Standards: A Strategy for Government Procurement* (1994) Cm.2840.

22. On this see Haagsma, "Information Technology Issues in International Public Procurement", in Arrowsmith and Davies, *op. cit. supra* n.18. The Australian government has not, however, seen the existing GPA procedures as a bar to its own policies for information technology in public procurement: Department of Foreign Affairs and Trade (Australia), *World Trade Organisation Agreement on Government Procurement: Review of Membership Implications* (1996), chap.6, at 6.2.

23. GPA Art.XXIV(8).

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international agreement, amendment becomes difficult and time consuming.

In addition, there are some specific provisions of the GPA which are regarded by States as imposing disproportionate burdens. One is the rule that a summary of information on procurement opportunities must be published in one of the WTO's official languages, widely regarded as unjustified given the low thresholds that often apply. Another is that relating to the provision of detailed statistical information.[24] The WTO's Committee on Government Procurement is undertaking a general review of the GPA with a view to simplification, but, as with information technology issues, suitable amendments may be difficult to agree in practice.

Another problematic aspect of the GPA for many countries is the requirement to implement national challenge procedures.[25] One concern is the cost of putting in place a review mechanism. However, this ought not to be a serious problem, since there is considerable flexibility over the nature of the review body. A more serious issue is the potential cost to purchasers and other suppliers if the procedures are invoked to disrupt specific procurements. Again, however, such problems can generally be dealt with by ensuring that review procedures are required to be implemented quickly and are speedily resolved—although it is true that some States may be constrained by constitutional considerations, such as a requirement that an appeal to the courts should always be available. Perhaps more difficult to deal with is the possibility that the "hard", or judicialised, approach to enforcement of the GPA may deter some States by removing flexibility in the way that the GPA's obligations are applied. This may be a particular concern in those States where political and personal interests have a strong influence over government procurement.

Finally, there will almost inevitably be a reluctance to join the GPA from countries in which politicians and government officers use procurement to reward political supporters or for personal or family gain. It is not a stated objective of the GPA to tackle corruption or to implement best value purchasing, but the Agreement's requirements of transparency make it much more difficult to make contract decisions for personal or political reasons.

III. THE CONTRIBUTION OF A TRANSPARENCY AGREEMENT ON GOVERNMENT PROCUREMENT

THE potential contribution to market opening that can be made by a transparency agreement depends on two things: the extent to which such

24. This has been highlighted e.g. in the Australian report by the Department of Foreign Affairs and Trade cited *supra* n.22.

25. The costs of challenge procedures were identified as a concern in *ibid.*

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an agreement can contribute to improved market access, and whether it is likely to be accepted on a wider basis than the GPA.

As to the first, we have seen that the current GPA seeks to achieve its objectives in two ways: through rules on non-discrimination, and by detailed requirements on transparency. As explained, the latter both support the non-discrimination rule, and also fulfil other market opening functions by ensuring that procurement is carried out according to clear and well-publicised rules, and that information is available on opportunities. The mandate of the WTO Singapore Working Group, on the other hand, refers only to transparency and its work has been directed "not at the overt use of procurement practices for protective purposes but at the transparency of the procedures".[26] In other words, the transparency rules which it implements will be concerned with practical improvements to international market access where States *choose* to admit foreign industry to their markets, and such an agreement will support non-discrimination policies only to the extent that States themselves choose to apply such policies.

Under this approach, transparency can only facilitate international competition to the extent that there is procurement open to foreign industry on which the agreement can "bite", and the significance of the Agreement will thus depend on the extent and nature of discriminatory policies maintained by signatories. Foreign industry may have meaningful opportunities where national industry benefits from small price preferences or offsets but not where procurements are barred to foreign industry, whether for economic or security reasons or because, for example, large parts of the national requirement are set aside for national social groups. Opportunities in public procurement are also affected by general market access barriers such as tariffs. In reality, however, significant opportunities do exist in many markets. A recent report by the Australian government, for example, suggested that among the existing GPA signatories significant barriers to Australia as a non-GPA State existed only in the United States.[27] Thus, whilst there be some lack of reciprocity in the exist-

26. Kulacoglu (secretary to the WTO Committee on Government Procurement), "Developments within the WTO since the Singapore Ministerial Conference", paper delivered to the conference Public Procurement: Global Revolution, University of Wales Aberystwyth, 11–12 Sept. 1997. It should be noted, however, that apart from the work in the transparency working group, there is a requirement under Art.XIII(2) of GATS for more general multilateral negotiations on services procurement, which is being pursued through a Working Party on GATS Rules which is examining a number of matters relating to the GATS Agreement. There is no corresponding provision in GATT, but any multilateral rules agreed for services will certainly be applied in practice to goods also. The GATS mandate is not confined to transparency, and may result in national treatment commitments. Since this article is focused on the transparency agreement the possibilities for developing future commitments on national treatment are not considered. However Part IV deals briefly with the contribution that a transparency agreement might make to the gradual removal of discriminatory policies.

27. See *supra* n.22. In the US the Trade Agreements Act 1979, s.2512 provides for the total

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ence of such opportunities between States, it cannot be doubted that the extent of opportunities that do exist makes pursuit of a transparency agreement worthwhile. In addition, the development of a multilateral transparency agreement is an important first step in engaging all WTO members in a dialogue on public procurement issues, which could lead to further liberalisation measures.

As to the second issue raised at the start of this section, the likelihood that a transparency agreement will be widely accepted, this will depend on the exact nature of its transparency rules, but a few general points can be made concerning the potential attraction of—or opposition to—such an agreement.

First, and most obviously, an agreement limited to transparency may be more acceptable to governments wishing to use procurement for economic and social policies, and to interest groups affected by those policies, as complex, and possibly unsuccessful, negotiations will not be necessary to obtain exemption from national treatment rules. However, it cannot be assumed that transparency rules will attract no opposition: groups that feel that their interests may be prejudiced by the improved foreign access resulting from greater access to information and a more stable purchasing environment might oppose a transparency agreement. Ironically, however, removing privileges through transparency measures may attract less opposition than a direct attack on national preferences since the impact of this approach may be less obvious to affected parties—that is, less transparent! Resistance to transparency measures may also come from governments that seek to conceal national preferences or other procurement policies behind a non-transparent system—for example, in order to prevent retaliation by other States.[28] The impact of a transparency agreement will also depend on whether any rules which it contains on award procedures, for example on award and qualification criteria, are sufficiently flexible to accommodate the social and economic policies that States wish to implement. Obviously this will depend on the precise nature of the agreement, and these concerns need to be borne in mind in devising an agreement.

The possibility for States to continue with discriminatory policies also raises the question of reciprocity. However, as with a number of other WTO agreements, it appears likely that States may be prepared to accept transparency rules without reciprocal national treatment obligations. This

exclusion of non-GPA signatories from procurement subject to the GPA, subject to a possible waiver for States with transparent and competitive procedures "equivalent" to those of the GPA plus effective anti-corruption measures. Many more countries might be prepared to accept a transparency agreement if the US were prepared to introduce a waiver for all States complying with that agreement, without imposing any further conditions.

28. Another point to consider is that lack of transparency may also serve as a smokescreen for corruption, and transparency rules may be resisted for this reason by interested parties.

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is especially likely if a transparency agreement is seen as a first step to tackling other barriers in public procurement—for example, if it is accompanied by obligations to enter into future negotiations for removing discriminatory measures. It is also more likely if discriminatory policies which do exist are shown to be effective in achieving legitimate social and economic objectives, an issue considered further in Part IV *infra*.

Another reason identified above for the limited success of the GPA was the bureaucratic burden of adapting national rules to the GPA's award procedures and remedies system. The extent to which these concerns may deter States from adhering to a transparency agreement will, of course, depend on the nature of the agreement itself, and again need to be carefully considered in formulating any new agreement. It will be suggested below that for a number of other reasons, as well as the need to obtain support for the agreement, the emphasis should be on clarity and simplicity.

Finally, it was suggested that another consideration that may have played a part in the limited membership of the GPA is the burden of negotiations for accession. This can also be avoided with a transparency agreement, which should apply the same simple disciplines to all signatories (or all WTO members).

IV. THE SCOPE AND CONTENTS OF A TRANSPARENCY AGREEMENT

IN the light of the points highlighted above, a strong argument can be made that the rules on coverage and the procedural obligations of any transparency agreement should be kept simple and general, but, however, that these limited obligations should be made mandatory and binding, and backed up by significant provisions on enforcement and verification. This approach should lead to significantly enhanced transparency, but will at the same time avoid many of the complexities of the GPA which have deterred States from signing that agreement.[29] This argument can now be

29. It is expected that any WTO transparency agreement will take the form of a legally binding treaty consisting of general rules applicable to all signatories, unless they are given specific derogations. This approach will be assumed in the following analysis. This is different from the approach of the Asia Pacific Economic Co-operation Forum (APEC), which has recently produced a document on transparency in government procurement for use within APEC, which is non-binding. Further, both the general principles of transparency stated in the document, and the specific rules and procedures for giving effect to the principles are stated to be optional. Obviously this approach makes agreement on the contents of the transparency document easier to obtain. However, it is most unlikely that this non-binding and flexible approach, which is a characteristic of APEC in general, would be adopted by the WTO, and it is the author's understanding from conversations with WTO Working Group delegates that discussions are proceeding on the basis that any agreement will be binding and general. On APEC see further APEC Government Procurement Experts Group, *Non-binding Principles on Government Procurement: Transparency* (Sept. 1997), approved by the meeting of APEC Ministers in Vancouver in Nov. 1995. The text is available on the Internet on the APEC Secretariat website (http://www.apecsec.org.sg) under "1997 CIT Annual Report to Ministers". On APEC's procurement programme in general see

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developed further by considering in turn the issues which need to be dealt with in any transparency agreement.

A. Coverage of the Transparency Agreement

The coverage of the GPA is extremely complex: it varies between States in terms of entities covered, types of contract covered (especially in relation to services), thresholds and derogations. Further, because of the wide variation there is no MFN obligation relating to coverage, and most countries have included reciprocity-based exceptions. These variations are accounted for by the fact that the requirements of the GPA are rigorous, so that industrial and social policies can generally be pursued only under exemptions or derogations.

The transparency agreement, on the other hand, will not limit these policies nor, it is argued below, should it impose specific and detailed procedural requirements. If this approach is adopted, there should be no difficulty in subjecting a wide range of government procurement to the new agreement, or in providing uniform coverage for all signatories. Such an approach can ensure that the agreement itself is transparent and its scope well understood, and can eliminate any need for complex accession negotiations.

These advantages will be further enhanced if entity coverage can be defined through a broad definition of entities covered, rather than by reference to specific lists. For example, the agreement could be stated to apply to the State, to regional/provincial government, to local authorities and to any entities funded or controlled by these bodies. However, it would be useful to develop lists of a purely illustrative nature for each State.[30] As is currently planned for the lists of entities covered by the GPA, it would be useful if such lists, which will change regularly, were available on the Internet.

As for the type of transactions covered, there are good reasons for applying the agreement to *all* procurement by the covered entities. This is because, in view of the limited and flexible nature of the procedural obligations proposed below, there is no need to limit coverage to transactions above certain thresholds,[31] nor are specific derogations required for procurements which are unsuitable for tendering for reasons such as national security. Of course, the concept of "procurement" is itself open to some

Arrowsmith, "Public Procurement within the Asia Pacific Economic Co-operation Forum" (1996) 5 *Public Procurement L.Rev.* CS71.

30. This is the approach adopted in e.g. the European procurement directives

31. The GPA thresholds are set primarily to identify those of cross-border interest, but inevitably general thresholds are a blunt instrument for doing this, especially since profitability does not always depend on contract size. Some overseas firms may well be interested in smaller contracts, and, indeed, the absence of detailed obligations on smaller contracts is a complaint frequently made about the EC regime within Europe.

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interpretation, but a detailed definition is probably not necessary since there is likely to be broad consensus over its scope. There is, however, one subject which should be dealt with explicitly, and that is the question of privately financed projects whereby the contractor is remunerated by payment from the public, as with toll roads or bridges. There is debate in some procurement systems over whether such projects are "procurement" in the normal sense, and in particular how far they should be subject to ordinary national rules on public procurement. Certainly the complexity and other features of such projects mean that detailed tendering rules, including, possibly, those of the GPA, may not be suitable. However, they present some of the most significant opportunities for international participation, and the flexible rules advocated below for inclusion in a transparency agreement appear suitable for these kind of projects. Thus a transparency agreement should be expressly applied to projects of this kind.

It must be stressed, however, that these recommendations on coverage are closely linked with the suggestions made below concerning the limited nature of the procedural obligations which the agreement should contain. If it should be decided to impose more prescriptive requirements concerning, for example, types of tendering procedures, it *would* be necessary to give a more precise definition of covered transactions and to deal with questions such as threshold limits (including aggregation rules). This would produce a much more complex agreement, and one which would be more burdensome to negotiate and to apply in national systems. One of the many attractions of the limited approach to procedural obligations which is set out below is, in fact, that it enables the WTO to avoid these kinds of problems with coverage, thus making any agreement more palatable to potential participants.

B. Publication of Rules Governing Procurement Procedures

We may now turn to consider more closely the substantive obligations which it might be sought to include in a transparency agreement.

First, an obligation which will almost certainly apply, and which seems likely to be non-contentious, is to publish general measures relating to government procurement. Indeed, this is probably in any case already required under the GATT and GATS.[32] The additional GPA requirement to provide such information on request, as well as publishing it, would also be useful to include in a transparency agreement, and could be supplemented by an obligation to establish specific enquiry points, information on which should be notified to the WTO (as, for example, under the WTO Agreement on Technical Barriers to Trade[33]). It would also be

32. See *supra* n.1.
33. Agreement on Technical Barriers to Trade, Art.10.

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very helpful to require parties to establish Internet sites for basic information (although at present these would be need to be supplemented by other media since some suppliers, especially in developing countries, may not have Internet access), and to require them to notify the references to their national procurement legislation and Internet sites to the WTO itself, which could make this basic information available through its own information systems.

In addition to the publication of general measures, another matter which must be considered is how far the agreement should regulate the provision of information on specific procurements. Of particular importance, given the deterrent effect to participation of the fear of discriminatory practices, is the position where participation in any procurement is limited or affected by the nationality or affiliation of the supplier, or the origin of goods or services—for example, by preferences or offsets. It seems desirable that this information should always be made available to potential bidders for a specific procurement. In the case of advertised procurements this would need to be stated in the advertisement, and where limited firms are invited to bid, it would need to be made clear to invitees. In many cases this information may be available in national procurement laws or other general measures, but even in these cases a strong argument can be made that the purchaser should draw it to the specific attention of firms participating in affected procurement procedures.[34] It also seems highly desirable to insist that rules on these matters should not be changed during the course of the award procedure.[35]

It is also likely that a transparency agreement will want to require additional information to be provided on the rules applicable to particular procurements. The GPA itself requires procuring entities to publicise matters such as the award and qualification criteria to be used. A transparency agreement clearly ought to contain similar requirements, as well as an obligation to state in advance what is the broad nature of the contract award procedure to be used in the procurement.[36]

C. *Publicity for Procurement Opportunities*

The question of advance information on the rules to govern procurements is relatively non-contentious, but the issue of publicising contract opportunities is perhaps likely to create more difficulty for negotiators. Publicity for procurement opportunities is widely considered an important feature

34. This is required under Art.XVI of the GPA for those exceptional cases where offsets are permitted; and see also Art.XVII concerning transparency and observer status.

35. This is a requirement that is also stated in GPA Art.XVII.

36. It is submitted that it should be permitted to change these provided that adequate and equal notice is given to all participants—the position which, it is submitted, applies in any case under the GPA.

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of transparency, and it might be suggested by some negotiators that specific requirements concerning publication of contracts, along the lines of those in the GPA, should be included in a transparency agreement. It can be noted that publication is referred to in Article XVII of the current GPA, which provides for countries to obtain observer status if they comply with certain "transparency" conditions.[37] One of these is to publish the publicity notices referred to in Article IX of the GPA, which includes detailed rules on, for example, the place of publication, the contents of notices and a requirement for a summary in English, Spanish or French.

There will, however, be significant problems with including publication requirements that are as detailed as those for GPA signatories. This would necessitate a complex set of rules dealing with a number of matters, such as the threshold of contracts to be publicised (including aggregation rules to avoid contract splitting) and any exceptions (including the circumstances in which limited (single-source) tendering is permitted). Defining the publicity obligations might also lead States to seek exemption from coverage for certain sensitive entities, and it might be difficult to agree on what the minimum content of notices should be. Thus States would be faced with implementation and compliance costs, and the need to enter into complex negotiations, which are some of the factors limiting the success of the present GPA. It would also be necessary for signatories to agree for each State the appropriate publications for advertising contracts. For some countries, which do not have any official publication channels, this might be quite difficult and a number of sources may need to be included. Eventually, such problems might be solved by use of the Internet, but it is too early to require this as many procuring entities and suppliers, especially in developing countries, do not have access. The specific requirement to summarise notices in the international languages is also burdensome and, if no international tenders are expected, does not maintain an appropriate balance between value for money and efficiency.

Thus a more sensible and realistic approach is to eschew centrally agreed publication requirements and merely to require States (i) to establish their own rules on publicity for contracts and (ii) to publish these rules. If thought appropriate, the text of such an obligation could make reference to the need for publicity "where possible", or some similar phrase. It may also be desirable to lay down some broad standards for publication, concerned with timeliness, and cost and accessibility of the media used. (An agreement on transparency which has been adopted within APEC, for example, states that publication should occur "in a timely manner through readily accessible, widely available media at no or reasonable cost".[38]) This kind of flexible approach would avoid the prob-

37. In fact it is the practice to give observer status without insisting on compliance with these conditions.

38. APEC transparency agreement, *supra* n.29, at para.3.

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lems referred to above such as negotiation and implementation costs, and would not limit the discretion of States to adopt the strategy that they feel achieves the best balance between value for money and efficient procurement.

To enhance the value of such rules, it would also be useful to require States to file with the WTO details of the main publications in which contract advertisements are placed, and any subsequent changes. These could be made available by the WTO, along with other general information on procurement in each State, as suggested earlier. This would ensure that such information is more accessible than if it had to be extracted by suppliers themselves from the details of national measures.

Even if this flexible approach is endorsed as the general strategy, there could still be room for some prescription. For example, specific rules could be adopted requiring that particularly large projects should be advertised in international languages and international publications, such as the United Nations' *Development Business*.

D. Rules Limiting the Discretion of Procuring Entities

It was suggested above that for publicity the focus should be on requiring States to drawn up and publicise their own rules, rather than prescribing the content of those rules. The same approach should also be adopted with other aspects of contract award procedures, such as exemptions from competition, the conduct of qualification procedures and the tendering procedures to be used.

In this respect, it is relevant, first, to point out that one key purpose of the detailed GPA procedures is to support the GPA's national treatment rules. Since, however, national treatment is likely to be permitted under the transparency agreement, such provisions lose some of their purpose. Whilst they may help to deter discrimination where the policy of the awarding State prohibits it, the danger of abuse by procuring entities is much less likely where States have the option of allowing overt discrimination.

Detailed and prescriptive rules can also help reduce corruption and other illegitimate influences that may act as trade barriers, but here it should be remembered that even with very precise and detailed rules it is impossible to prevent abuse by entities determined to act in an unlawful manner. For example, contracts can easily be awarded to a favoured bidder who bids a very low price, and the price raised later. (The GPA itself provides no detailed rules to deal with this problem.) Very strict rules that attempt to make the process foolproof—for example, by prohibiting negotiations with suppliers altogether—are likely to hamper the possibilities for effective procurement and their costs thus to outweigh any benefits.

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More significantly, detailed rules do enhance predictability in decision-making and confidence in the fair treatment of bids. However, this can be equally secured by a requirement to publicise the key elements of the award procedure that the entity has decided itself to apply, such as the type of procedure to be used and the contract award criteria, as suggested above. A valuable contribution can be made by an agreement which is limited to ensuring predictability, rather than being concerned with the content of the rules applied. Finally, the importance of prescribing detailed rules is minimised by the fact that most States do appear to have procurement rules based on similar principles of competition and transparency, even though they differ in detail.[39]

To set against the limited benefits of prescriptive rules, there are significant arguments *against* a prescriptive approach, some of which have already been touched on. First, unless they are very precise, detailed rules may lead to uncertainty over important issues. An example is the debate under the present GPA as to how far the rules on qualification and award criteria limit States from pursuing non-discriminatory social and environmental policies.[40] Second, such rules may deliberately, or accidentally, limit States' discretion to pursue policies of their choice, and to manage procurement in the optimum way for national conditions.[41] Third, to be sufficiently precise and to prevent avoidance the rules need to be quite complex. (The rules in the GPA on valuation of contracts and aggregation to prevent contract splitting are good examples.) Fourth, as noted in Part III, detailed rules can easily become outdated, and multilateral rules are peculiarly difficult to alter. Finally, detailed rules are burdensome for States to incorporate into national systems, especially if they need to be adjusted to existing national award procedures. It was suggested in Part III of this article that all these problems with detailed rules have contributed to States' reluctance to sign the GPA.

On the basis of these arguments, it is suggested that, as with publicity, the transparency agreement should merely require that States adopt their own rules to govern most issues,[42] and that these rules should be pub-

39. The author was informed by Aaditya Mattoo of the WTO that this has been the experience of the Intellectual Property and Services Division of the WTO in collecting information on services procurement in connection with current GATS negotiations.

40. See the works cited *supra* n.18.

41. The appropriate balance between transparency and discretion varies greatly between procurement systems.

42. This is the approach in the APEC document in transparency referred to *supra* n.29. The general principles laid down in the APEC agreement are concerned with: the general availability of information (paras.3–4); publication of general rules and practices (paras.5–6); transparency of opportunities (paras.7–8); provision of information to allow preparation of responsive offers (paras.9–10); application of transparent bid criteria (paras.13–14); provision of information on contract awards (paras.13–14); and availability of a complaints procedure (para.15). These are supplemented by examples of possible "practices" for putting these basic principles into effect: e.g. that early advice should be available for complex procurements and that an adequate and reasonable time should be allowed for

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lished.[43] Such an approach appears capable of achieving most of the benefits of detailed rules, but at a fraction of the cost.

E. Verification and Enforcement

Perhaps the most contentious area of all for any transparency agreement is likely to be that of verification and enforcement.

A first issue is whether and how the WTO's dispute-settlement mechanism (DSM) should be applied. In general, the application of this mechanism, even in the more judicialised form which has applied since the inception of the WTO, may not be particularly contentious, especially in the absence of an effective mechanism under the DSM for affecting or redressing breaches in specific procurement awards.[44] However, its application will still be very useful for dealing with systematic non-compliance and with disputes between States on interpretation of the transparency agreement. The mechanism should, however, be applied *only* to breaches of the transparency agreement's provisions, and not to breaches of national rules (on use of competition, tendering procedures, etc.) laid down pursuant to the agreement. This would not be useful in view of the limited remedies available under the DSM and of the difficulty for panel members in interpreting domestic provisions.

Provision of challenge procedures is likely to prove much more controversial. Concerns over their costs in terms of interference with specific procurements and of operating a complaints mechanism should not prove an insurmountable obstacle, if a flexible approach is taken. Costs of running a complaints system, for example, can be minimised by allowing States to set up a cheap and informal tribunal system, whilst interference with the process can be limited by a speedy procedure and by limiting the possibilities for suspending or interfering with procurement decisions to exceptional cases and focusing on compensation. More significant, however, may be concerns that a "hard" remedies system effectively fetters government discretion in a sensitive area where it may feel an imperative public or political interest in not adhering to the agreed rules. The extent of this problem will, of course, depend on the nature of obligations under

preparing and submitting bids. The main departure from this non-prescriptive approach is a suggestion that open tendering should be the preferred method (para.8). It is submitted that such a provision should not be included in any WTO agreement, since for reasons of efficient procurement many developed States find that it is better to use more selective or restricted tendering as the norm. As indicated *supra* n.29, it will be more difficult to obtain agreement in the context of the WTO agreement than the APEC document, because of the non-binding and flexible nature of the latter.

43. It is not suggested that all the details of these rules should be provided to the WTO; rather, it is sufficient for these cases that the measures setting out the rules are themselves notified as already recommended above.

44. On this absence of effective redress see the articles by Davies and Schede, both *op. cit. supra* n.4.

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the transparency agreement, and may be less of a concern under a transparency agreement than under the more restrictive GPA.

Some form of complaints system is probably essential for ensuring confidence in the procurement system, and for providing a method of policing and verification on a day-to-day basis. This is a key issue since, in contrast with many areas of trade law (such as tariffs), it is in the application of the rules in individual cases rather than the existence of general governmental measures that many problems arise. In the absence of systematic central monitoring, which is not feasible within the WTO at present, suppliers are in the best position to judge whether rules are being followed. The key feature of such a system should be the provision of a complaints authority which (as under the GPA) is independent of the procuring entity itself, although not necessarily independent of the administration; and such a body should at least have the power to make *recommendations* for action to redress the breach—although to make the challenge provisions acceptable to many States it may be necessary to provide that these measures should not necessarily be enforceable. The procedure before such a complaints body could also be more informal than required under the relatively judicial procedure laid down by the GPA: for example, it could be limited to a written procedure. It is, however, important that, as under the existing GPA rules, the details of the complaints procedure should be made available, and reasons given for the decision. Finally, whilst the DSM should be concerned only with breaches of the transparency agreement, complaints procedures should certainly apply in addition to these breaches to violations of the national procurement rules. This is essential to secure the predictability which is the main aim of the transparency agreement's own requirements for publishing and formulating procurement rules, even if the content of those rules is left to WTO members themselves.

It also seems important that any verification and enforcement system should be supported by information obligations; but these could be much more limited than under the GPA. In particular, rules on contract award notices and on record keeping and statistics do not seem essential, especially since most States will take time to develop effective statistical mechanisms in any case. However, reasons for procurement decisions should be made available to affected bidders and to other governments on request.

Whether a national review system of this kind will prove possible to agree in practice remains to be seen.[45] However, it seems crucial for the

45. National complaints procedures are referred to in the APEC transparency document (see *supra* n.29) but this is unsurprising in view of the flexible and non-binding nature of that document.

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success and credibility of any transparency agreement that provision for review of some sort should be included.

F. Control and Review of Discriminatory Measures

Finally, it is relevant to consider briefly whether a transparency agreement should seek to impose any control at all over discriminatory procurement practices. Whilst it seems clear that the agreement will not prohibit discriminatory procurement practices in the first instance, since this question is outside the Working Party mandate, for many countries elimination of these practices is still high on the agenda. As explained earlier, it is in fact a widespread view that some of these policies may have adverse trade effects without producing real social or economic benefits. This raises the question of whether an agreement limited solely to transparency has any contribution at all to make to this issue. In fact, it has already been suggested above that procuring entities should be required under the transparency agreement to make clear in advance the extent to which foreign participation is permitted in particular procurements, ensuring that non-domestic firms or those offering non-domestic products or services can make a sensible decision on whether to participate. It will also effectively require States to give some attention to developing a sensible policy, since the fact of publication of the policy will lead to greater accountability. Should the agreement go further than this, however?

One possibility is to require not merely that procuring entities should state preferential policies in advance of particular procurements, but that such policies should always be set out in procurement laws, or at least in general published rules or guidelines. This would enhance accountability even further, and encourage the development of policies in a consistent and coherent manner. It would also improve transparency by providing more accessible information to affected firms, and thus its inclusion in a transparency agreement may be justified.

Another option is to make provision for States to assess and review their own policies on a periodic basis, to determine whether such policies are achieving their objectives and whether they should be continued. It may even be possible to include in the agreement some substantive criteria for the operation of these policies, in terms not of their content but on matters such as monitoring and measurability of results. Provision could even be made for accountability to other WTO members by, for example, requiring States to produce periodic reports on their discriminatory policies, and even setting up a working party to consider such reports.

Such measures would prove very useful in achieving the gradual removal of discriminatory procurement policies, but without affecting the freedom of States to use procurement to realise genuine social or economic goals. However, in view of the political difficulties of eliminating

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preferences, inclusion of such measures in a transparency agreement might prove difficult.

V. CONCLUSIONS

IT has been argued that the best way forward in developing a WTO transparency agreement is to push for a simple and flexible agreement, although one containing binding and mandatory provisions. Such an agreement will enable the benefits of transparency to be substantially realised, but will not involve the problems of the current GPA, which have made that agreement both burdensome to apply, and difficult to sell to other WTO members. On this basis the new agreement should require publication of general procurement rules; insist on a statement in advance of rules and criteria for specific procurements; provide for publicity for contract opportunities; and require the development and publication of more detailed national rules for regulating procedures. The DSM should be available to enforce the obligation to implement such procedures, whilst States should be required to develop independent national review mechanisms for enforcing the procedures which they implement on a day to day basis. Admittedly, agreement on this latter issue may be difficult to obtain, but the effort should be made since provision for proper monitoring and verification is a crucial aspect of transparency. It has also been suggested that it would be useful to include measures for monitoring the operation of economic and social policies in procurement where these have a discriminatory effect, with a view to the gradual elimination of those policies that do not achieve real benefits.

On the other hand, this article has sought to argue that the transparency agreement should *not* seek to define in any detail the content of national procurement procedures, thus eliminating the need for complex rules on coverage as well as keeping the procedural aspects of the agreement simple and straightforward. As a result, it will be possible to avoid inflicting heavy implementation and compliance costs and to allow States the freedom to choose the most suitable procedures for their own procurement environment. It will certainly be tempting for countries that have already subjected themselves to detailed procurement disciplines under the GPA or under regional and bilateral arrangements, to negotiate for similar, if more simplified, obligations within the context of a transparency agreement. This temptation should, however, be resisted, since it will undermine international support for such an agreement without holding out the prospect of enhanced benefits.

If a more straightforward approach is adopted, on the other hand, there is a strong chance that an agreement can be developed which is useful in practice and but also enjoys the support of most WTO members, thus opening up the possibility for a first truly "multilateral" instrument on government procurement.

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