

THE WTO REGIME ON
GOVERNMENT
PROCUREMENT:
CHALLENGE AND REFORM

Edited by

SUE ARROWSMITH

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Her main teaching and research interests are in public procurement law, international economic law and Chinese economic law. Her publications include 'Supplier Review as a Mechanism for Securing Compliance with

Government Procurement Rules: A Critical Perspective' (*Public Procurement Law Review*, 5 (2007), 325–51) and 'Forum for Review by Suppliers in Public Procurement: An Analysis and Assessment of the Models in International Instruments' (*Public Procurement Law Review*, 5 (2009), 201–26). She is also a PRC-qualified lawyer, specializing in government procurement and international business law.

FOREWORD

PASCAL LAMY

Director-General, World Trade Organization

Government procurement is gaining ground as part of world trade, and as part of the work of the World Trade Organization (WTO). During, and in the aftermath of, the world economic crisis, much attention has focused on public infrastructure investment and on government policies that potentially limit the rights of foreign suppliers to bid on related contracts. Such policies were a key focus of my 2009 end-of-year Overview of Developments in the International Trading Environment. In that overview, I noted that ‘buy national’ and other restrictive government procurement measures

raise concerns for trade and the international trading system in three main ways. First, they can exclude foreign suppliers from markets in which they could otherwise hope to compete, either by reserving the market completely for domestic suppliers or by introducing administrative complexities that make procurement procedures less easily accessible for foreign suppliers. Second, paradoxically, in some cases they may even raise the costs or impede the operations of domestic companies in the countries implementing the relevant measures, if such companies experience difficulties in sourcing domestically and cannot easily obtain waivers for purchases abroad. Third, as in other economic sectors, the implementation of discriminatory government procurement measures in one country may engender pressures for the adoption of similar measures by other countries.¹

Fortunately, while restrictive government policies relating to public procurement remain a concern for the global trading system and continuing vigilance is warranted, the world has so far avoided a rush to the wholesale adoption of such measures. This is no doubt due, in substantial measure, to the guarantees of non-discrimination and related commitments embodied in the (plurilateral) WTO Agreement on Government Procurement (GPA) in addition to the assurances incorporated

¹ *Overview of Developments in the International Trading Environment: Annual Report by the Director-General* (WT/TPR/OV/12 of 18 November 2009), paragraph 140.

in the pledges of the G-20 Leaders and the good sense of governments worldwide that have sought to avoid a repeat of the mutually destructive proliferation of trade barriers that unnecessarily prolonged and deepened the depression of the 1930s.

In the future, public procurement and related international trade disciplines are likely to be even more important for global economic growth and development than they are at present. Past estimates have indicated that overall government procurement spending accounts for as much as 15–20 per cent of GDP, on average, worldwide, though much of this is not yet covered by current international disciplines. Moreover, infrastructure investment and other public procurement in emerging market economies in Africa, Asia and Latin America is likely to be a major driving force of economic growth in the years to come.

This situation calls for a deepening and broadening of international trade disciplines to ensure that, as far as possible, public infrastructure investment and other aspects of government procurement are carried out in a transparent and non-discriminatory manner that maximizes value for money for governments and taxpayers. Equally important, the disciplines themselves need to be continually updated to reflect developments in procurement methodologies and to ensure the maximum degree of flexibility for Parties consistent with an open international trading regime. Most of all, the membership of the GPA needs to be broadened to encompass emerging actors in this field.

As detailed in this informative book, efforts are under way to address each of these challenges. Ongoing negotiations between the Parties aim to extend coverage and eliminate remaining discriminatory measures. Provisional agreement has been reached on a revised and improved GPA text.² With regard to the membership of the Agreement, as detailed in relevant chapters of the book, work on the accessions of several developing countries is intensifying. Crucially, work on the accession of China is proceeding well, with strong, positive engagement by both China itself and the existing Parties. These developments presage a significant expansion of the membership of the Agreement in the years to come.

On a number of occasions in the recent past I have referred to the concept of *governance*. The idea of governance recognizes that the mere opening of markets – however desirable – is not, by itself, enough to ensure good economic performance. Rather, appropriate laws and institutions

2 GPA/W/297 of 11 December 2006, available at <http://docsonline.wto.org/DDFDocuments/t/PLURI/GPA/W297.doc>.

are also needed, for example to enforce competition, address spillovers such as environmental degradation and ensure the availability of accurate information for consumers.

The GPA is a paradigm example of a trade opening instrument that recognizes the need for governance mechanisms – in this case, the procedural rules of the Agreement that ensure fair and transparent contracting practices and the domestic review or appeal mechanisms that the Agreement requires Parties to put in place. In addition, the revised GPA text contains a new and explicit requirement that procurement be carried out in a manner that avoids conflicts of interest and prevents corrupt practices. This is a significant innovation in WTO rules. Perhaps the treatment of this issue in the revised GPA text will inform broader debates on the role and future of the multilateral trading system.

The foregoing are but some of the aspects of procurement policy and its treatment in the WTO that are addressed in this book. It is clear, from this ambitious survey of developments and emerging challenges, that the WTO Agreement on Government Procurement is in the process of taking on substantially increased importance within the multilateral trading system and as an underpinning of good policy in this sector. Policy issues in this area merit in-depth consideration in the international community not only by responsible government officials but also by businesses, non-governmental organizations and their respective advisers. This book is a serious contribution to such discussion. Academics and students will also welcome it. I congratulate both the editors of this volume and the authors responsible for the individual chapters, and look forward to the enriched debate that the essays in the volume are likely to spawn.

PERSPECTIVE OF THE CHAIRMAN OF THE
WTO COMMITTEE ON GOVERNMENT
PROCUREMENT, NICHOLAS NIGGLI
(SWITZERLAND)

I believe that, in the coming decade, the WTO Agreement on Government Procurement (GPA) will undergo a transition from being an important but relatively obscure plurilateral treaty to becoming a central pillar of the multilateral trading system. This reflects a confluence of factors, including: (i) the growing membership of the Agreement, and the prospect of accession to it by a broad range of developing, transition and other economies in the coming years; (ii) the prospect of a gradual broadening, over time, of the extent of Parties' procurements that are actually covered by the Agreement, in addition to an updating of the Agreement itself to enhance its flexibility, user-friendliness and relevance, for example, to developing countries; and (iii) the role that public infrastructure investment will undoubtedly continue to play as an underpinning of growth in the aftermath of the economic crisis, and the critical importance of such spending being undertaken on the basis of principles of fair and open competition to maximize value for taxpayers.

While the third factor noted above is largely exogenous to the work of the WTO Committee on Government Procurement, the first and second fall directly within its remit, and have been the focus of intensified effort by Parties to the Agreement, in addition to myself as Chairman, and with the support of the Secretariat, in the past few years. On the accession front, already there have been important achievements, and much more is in the offing. As detailed elsewhere in this volume, the accession of Chinese Taipei, as the forty-first WTO Member covered by the Agreement, took effect on 15 July 2009. By the end of 2009, nine other WTO Members (Albania, Armenia, China, Georgia, Jordan, the Kyrgyz Republic, Moldova, Oman and Panama) had applied for accession to the Agreement and submitted relevant documentation. Work on the accession of Armenia is well advanced, and is expected to be completed before the end of 2010. Work on the accession of Jordan is also intensifying, and it is my fond hope that it, too, will become a member of the GPA family by late 2010/early 2011. Most significantly, work on the accession

of China is proceeding well, with full engagement by both China itself and the existing Parties, and I have every confidence that this, too, will come to fruition in due course. These accessions represent, in many ways, the future of the GPA.

Apart from the foregoing accessions on which work has already commenced and is, in some cases, well advanced, five other WTO Members (Croatia, the Former Yugoslav Republic of Macedonia, Mongolia, Saudi Arabia and Ukraine) have provisions in their respective WTO Accession Protocols which call for them to seek GPA accession in due course. It is noteworthy, also, that India has recently become an observer in the Committee on Government Procurement – a position which enables it to better assess its potential interests vis-à-vis the Agreement.¹ Indeed, my sense from my extensive personal contacts with diverse WTO delegations is that a good number of Members of diverse sizes and levels of development from all regions of the world are actively looking at the possibility of seeking GPA accession. This is, in part, spurred by the pending accession processes of China and the other acceding Parties I have mentioned. In many cases, it has also been facilitated by Members' participation in bilateral trade agreements containing government procurement chapters that are largely modelled on the GPA.²

Currently, the ongoing negotiations to expand the coverage of the Agreement and renew the Agreement itself are, if anything, an even more pressing item of business for the Committee than the pending accessions, if only because there is now a real prospect of wrapping up the negotiations, and this is essential to unlocking the future. As is explained in detail in relevant chapters of this book, the negotiations have a threefold purpose: (i) to improve and update the Agreement in the light, *inter alia*, of developments in information technology and procurement methods; (ii) to extend the coverage of the Agreement; and (iii) to eliminate remaining discriminatory measures. Work on renewing the text of the Agreement was largely completed in December 2006; however, under the terms of the agreement struck at that time, the revised text cannot come into force until a mutually satisfactory outcome has also been achieved in the

1 In addition to India, twenty-two other WTO Members, including two developed countries (Australia and New Zealand) in addition to countries from all regions of the developing world, are observers to the Agreement.

2 See the pathbreaking analysis in Robert D. Anderson, Anna Caroline Müller, Kodjo Osei-Lah, Josefita Pardo De León and Philippe Pelletier, 'Government Procurement Provisions in Regional Trade Agreements: A Stepping Stone to GPA Accession?' in this volume, chapter 20.

negotiations to extend the Agreement's coverage. Since having the revised text in place is tremendously important to facilitate the pending accessions, currently a major push is on to wrap up the coverage negotiations and thereby permit the revised text to come into force. The Parties can now see the summit (i.e. the conclusion of the negotiations), but have still to climb it. The final metres are always the hardest.

In this context, and as described elsewhere in this volume, I have put forward a 'Roadmap' for conclusion of all aspects of the current GPA negotiations (covering both the text and the coverage aspects) by the middle of 2011. The Roadmap encompasses four main elements, namely: (i) the coverage negotiations; (ii) remaining work to be done on the text of the Agreement, particularly its Final Provisions; (iii) the process for bringing the revised Agreement into force, and in particular the issue of whether it will be treated as a new WTO Agreement or simply as an amendment to the existing one; and (iv) the future work programme of the Committee. The overriding purpose of the Roadmap is to ensure that all the issues before the Committee in the negotiations receive due attention, in parallel fashion, throughout the year, to facilitate bringing them all together and wrapping up the negotiations by the end of the year or very shortly thereafter. The initial reception given to the Roadmap has been overwhelmingly positive: all GPA Parties have pledged their full and unconditional support. They have also expressed the view that, currently, there is a window of opportunity to conclude the negotiations which will not remain open forever. Thus, it is my hope that, when this book appears in print, the negotiations will have been concluded or will be very close indeed to being concluded, and the revised text will be in the process of coming into force.

The challenges and processes outlined above are plumbed in depth in this excellent and timely volume. In addition, the book delves into historical aspects of the treatment of government procurement in the World Trade Organization and into a range of other issues that are not a principal focus of the current negotiations but that will be important in the future. These include issues concerning the interface of government procurement and the GPA with environmental sustainability and social concerns, in addition to more technical matters such as the evolution of the Agreement in relation to newer contracting practices.

As Chairman of the WTO Committee on Government Procurement, I have benefited tremendously from a close partnership with the WTO Secretariat team supporting the Committee, which is very ably led by one of the co-editors of this book, Robert Anderson. I have also enjoyed

meeting and benefited greatly from the advice of leading academics in the field, among whom the other co-editor, Professor Sue Arrowsmith, is particularly eminent. I have formed the conviction that there is a great need to foster public awareness of, and scholarly debate on, the objectives and modalities of the Agreement on Government Procurement and related negotiating issues, challenges and priorities, in addition to the future potential of the Agreement, which I have hinted at above. For these reasons, I am pleased and honoured to have been invited by the editors to contribute this Chairman's Perspective on the Agreement, and to give my full support to the publication of this book. Needless to say, the perspectives developed herein are the sole responsibility of the authors, and are without prejudice to the interests of Parties to the Agreement or to the prerogatives of the Chairman.

PREFACE

This book grew out of our sense that the World Trade Organization (WTO) regime on government procurement – currently consisting principally of the plurilateral Agreement on Government Procurement (GPA) – is undergoing a far-reaching transition from constituting an important but relatively obscure element of the WTO to becoming a cornerstone of the international trading system. This change is occurring first and foremost as a result of the pending accession to the Agreement of important developing and transition economies such as China, Jordan and Armenia but also as a result of the ongoing effort to modernize the Agreement which is nearing completion and of increased interest in government procurement as a dimension of world trade in light of the recent economic crisis. There is, in our view, a critical need for informed discussion and reflection on these developments in the international community and among international legal scholars, practitioners and students. There is, of course, already a significant body of literature on the GPA as it emerged from the Uruguay Round and on other aspects of the WTO's procurement work, in particular on transparency, and we do not seek to replicate this here. Rather, the aim of the present volume is to explain, and to explore, the most recent developments concerning the WTO regime for government procurement, and to stimulate debate on the challenges that they pose.

Many persons contributed to the production of this book or otherwise provided necessary support. Early versions of some of the papers incorporated in the volume were presented at the conference *Public Procurement – Global Revolution III*, held at the University of Nottingham in June 2006. Subsequent versions and additional papers in the volume were presented at a Symposium held at the WTO in Geneva in February 2010 and at the conference *Public Procurement – Global Revolution IV* in Nottingham in April 2010. We are grateful to all those who made presentations at, or assisted in the organization of, these events.

For their support and encouragement, warm thanks are expressed to Pascal Lamy, Director-General of the WTO; to Nicholas Niggli, Chairman of the WTO Committee on Government Procurement; and to Antony Taubman, Director of the WTO's Intellectual Property Division, which is also responsible for the Organization's work in relation to the GPA. Within the Intellectual Property Division, thanks are due particularly to Kodjo Osei-Lah, Josefita Pardo De León and Philippe Pelletier for their contributions to and help with various chapters, and to Cathy Boyle and Audrey Long for their able assistance. In addition, Anna Caroline Müller, currently an associate at Clifford Chance in Frankfurt and formerly with the Division, not only authored/co-authored three chapters of the book but also helped with the checking of several other chapters. Thanks are also due to Anthony Martin and Helen Swain of the WTO's Information and External Relations Division for their advice and able support.

At the School of Law of the University of Nottingham, thanks are due to everyone in the Public Procurement Research Group. In particular, sincere thanks are owed to Ping Wang, Deputy Director of the Group (and also a participant in various WTO seminars and other events), and to Peter Trepte, Special Professor, for their ongoing encouragement and assistance in relation to this volume; to Sylvia de Mars (now a lecturer at Newcastle University) for her extensive and very effective research assistance; to Lili Jiang (also an author of one of the chapters) and Sandrine Umatoni for their diligent processing of the manuscript; and to Paula Faustino for her very able assistance with the last Global Revolution event.

Sue Arrowsmith would like to express her great appreciation to the sponsors of the Public Procurement Research Group over the last three years – Achilles Information, Bevan Brittan LLP, Addleshaw Goddard LLP and the Chartered Institute of Purchasing and Supply. Their support – both financially and more generally – has been crucial for some of the work that has gone into this volume. She would also like to thank those many persons – too numerous to mention by name – with whom she has had very fruitful discussions on issues related directly or indirectly to this volume.

For helpful and enriching discussions on the topics addressed in the volume, many of which occurred in the context of WTO technical assistance activities in diverse parts of the developing world, Robert Anderson thanks, without implicating, Jonathan Denison Cross, Kamala Dawar, Diane De Marliave, Simon Evenett, Daniel Gordon, Jean Grier, Frederic Jenny, William Kovacic, Steven Schooner, Ping Wang and Christopher

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At Cambridge University Press, we are grateful to Kim Hughes for both her encouragement and her patience; to Richard Woodham and Sarah Roberts for their very able support; and also to Diane Ilott for highly efficient copy-editing.

We record our sincere thanks to the authors/co-authors of all the chapters of the book, who freely gave of their time and insights and whose contributions made the book possible.

Most of all, we express our appreciation to our spouses and children for their support and encouragement, without which this project could not have been completed. This book is for them.

DISCLAIMER

The opinions and conclusions contained in the contributions to this volume are the sole responsibility of the individual authors and should not be attributed to the organizations with which they are affiliated. All errors and omissions are the full responsibility of the authors. This includes contributions prepared by professionals from the WTO Secretariat. None of the chapters purports to reflect the opinions or views of the Members of the WTO or of its Secretariat. Any citation of chapters in this volume should ascribe authorship to the individuals who have written the contributions and not to the WTO. Nothing in this book is intended to provide a legal interpretation of the WTO Agreements. In addition, none of the terminology used in any of the chapters has any implications for the sovereignty of any of the WTO's Members. Lastly, it should be noted that the various chapters included in the volume were finalized in the spring of 2010 and do not reflect subsequent developments.

PART I

The WTO regime on government procurement

The WTO regime on government procurement: past, present and future

ROBERT D. ANDERSON AND SUE ARROWSMITH

1. Introduction to the chapter

Government procurement – the purchase of goods, construction services and other services required by government bodies – accounts for a substantial proportion of GDP,¹ and it is well recognized that discrimination in this area (intentional or otherwise), as well as other practices, creates significant barriers to trade.² Thus government procurement is of great potential interest for international trade regimes, including the WTO. However, dealing with government procurement was not generally a priority in the early phase of the multilateral trading system, nor in early regional and bilateral free trade agreements. Rather, the initial efforts of those responsible for negotiating these arrangements tended to focus on more conventional trade barriers, such as tariffs and quotas, both because these were perceived as more important (and their removal a necessary initial step for access to government markets in any case) and because of the particular sensitivity of government procurement.³ As other trade

1 For an analysis see D. Audet, 'Government Procurement: A Synthesis Report', *OECD Journal on Budgeting*, 2 (2002), 149.

2 Although not all discriminatory practices affect trade. On the economic issues see F. Trionfetti, 'The Economics of Opening Up Public Procurement', chapter 12 in S. Arrowsmith and M. Trybus (eds.), *Public Procurement: The Continuing Revolution* (The Hague: Kluwer Law International, 2002) and on markets in which foreign participation occurs through a local presence S. Evenett and B. Hoekman, 'Government Procurement of Services and Multilateral Disciplines', chapter 6 in P. Sauvé and R. Stern (eds.), *GATS 2000: New Directions in Services Trade Liberalization* (Washington: Brookings Institution Press, 2000), p. 143.

3 Factors here include the potential for using government procurement to promote personal and political interests and the value of procurement from a political perspective for supporting social and development policies (for example, because of hidden costs). As other trade barriers diminish, addressing government procurement can also become more

barriers have diminished, however, the WTO, in common with many other regimes, has increasingly turned its attention to opening up public markets: this is evidenced clearly by chapter 20 of this volume which examines procurement provisions in regional trade agreements notified to the WTO since 2000. Most recently, the importance of government procurement has been enhanced by the increased importance of public infrastructure investment and other procurement activities as an aspect of world economic activity in the context of the recent economic crisis and as a consequence of continuing high growth and, consequently, infrastructure demand in emerging economies such as China and India. Also relevant is an increasing recognition, both in scholarly writing and in public policy formulation, of the role of governance mechanisms – i.e. the rules and institutions that establish the framework for the operation of markets – as an underpinning of long-run economic growth and prosperity.⁴ Studies by economists such as Robert Wade have long identified corruption and clientism in public procurement policies as barriers to efficient and sustainable development.⁵

There have already been efforts to deal with government procurement within the WTO at a multilateral level and some of these efforts are continuing, as elaborated below. However, in contrast with many other areas of WTO work, there has been relatively little progress in addressing the issue at the multilateral level. As explained further below, government procurement remains substantially outside the scope of the main disciplines of the multilateral trade agreements (e.g. those of the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS)) and efforts so far to extend existing agreements or develop a new one are stalled or moving slowly.

In stark contrast is the position of the Agreement on Government Procurement (GPA), which is a plurilateral Agreement of the WTO regulating the government markets of those WTO Members that have chosen to become Parties to it.⁶ The current GPA came into force in the

problematic politically as it remains one of the few tools left to government to protect national industry.

4 See for background, Anderson and Osei-Lah, chapter 2 of this volume, section 4.2.2.

5 See e.g. R. Wade, 'The System of Administrative and Political Corruption: Canal Irrigation in South India', *Journal of Development Studies*, 18 (1982), 287, and more generally, R. Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton University Press, 2003).

6 In the WTO, a plurilateral agreement is an agreement whose members comprise less than the full membership of the Organization. Currently, the GPA covers forty-one WTO Members (see, for details, section 6.2 below).

mid-1990s with its roots in the modest Tokyo Round Code on Procurement just over thirty years ago, as we explain in section 3 below. Since its first incarnation in the Tokyo Round, the Agreement has continually expanded in its scope and developed in its content in a significant way. It now seems poised on the threshold of a further deepening of disciplines, as well as of an expansion of membership that will extend its scope beyond the traditional developed country Parties.

The present volume focuses on the challenges that exist in seeking to develop effective disciplines on procurement within the WTO and on current and potential efforts to address these challenges. In this chapter, we will outline the past development and current state of play of the WTO regime on government procurement, setting the scene for the remaining essays in this volume, and highlighting some of the key issues emerging from the essays and from our own study of these subjects. As one of the current authors has previously stated, 'The increasing interest in GPA membership, combined with the difficulties of progressing the multilateral initiatives, suggests that the GPA will remain the most important instrument for developing meaningful participation in WTO procurement disciplines.'⁷ Given that this is likely to remain the case, at least in the medium term, inevitably most of the focus of the volume and also of this introductory chapter is on the GPA. However, multilateral agreements and initiatives remain relevant both because they have some current, if limited, application to procurement and because the potential for a multilateral agreement cannot necessarily be ruled out in the longer term. In section 2 we thus outline briefly the current position of government procurement under the WTO's multilateral rules and the initiatives that have taken place to extend the multilateral rules in this area. The remaining sections of this chapter are then devoted to a consideration of the GPA.

2. Government procurement and the multilateral rules of the WTO

2.1. *Application of the multilateral agreements to government procurement*⁸

So far as concerns the multilateral rules of the WTO, as we have noted above these have little significance for government procurement

7 S. Arrowsmith, 'Reviewing the GPA: The Role and Development of the Plurilateral Agreement after Doha', *Journal of International Economic Law*, 5 (2002), 761.

8 See further S. Arrowsmith, *Government Procurement in the WTO* (The Hague: Kluwer Law International, 2003), chapter 3; M. Dischendorfer, 'The Existence and Development of Multilateral Rules on Government Procurement under the Framework of the WTO', *Public Procurement Law Review*, 9 (2000), 1.

at present. In particular, whilst GATT and GATS both contain general obligations on national treatment and most favoured nation (MFN), government procurement is excluded from these obligations.

First, the key national treatment obligation in GATT Article III does not apply to procurement. This requires, generally, that internal measures should not be applied so as to afford protection to domestic production (Article III.1). This general obligation is then elaborated in later provisions of Article III, one of which is Article III.4. This provides that in measures relating to 'internal sale, offering for sale, purchase, transportation, distribution or use', the products of any WTO Member imported into any other Member State shall be accorded treatment no less favourable than that accorded to like products of national origin. Without a specific exclusion this would include measures relating to government procurement – and a similar national treatment provision in the original draft of these rules expressly stated that the measures covered did include laws and regulations governing procurement of supplies by government agencies.⁹ However, ultimately national treatment was expressly excluded by Article III.8 of the GATT: this states that Article III is not to 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 resale'. The position with respect to the MFN obligation of GATT, as stated in GATT Article I, has been slightly more contentious, but the view of many scholars is that this, also, does not apply to government procurement.¹⁰

The GATS likewise exempts procurement from its most significant obligations, doing so very clearly in respect of both MFN and national treatment. Thus Article XIII.1 provides that both Articles II (MFN) and XVII (national treatment), as well as Article XVI on market access, shall not apply to 'laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial resale'.

Thus in general under both GATT and GATS governments remain free to discriminate in favour of national industry and to choose their own procurement procedures and policies, no matter what obstacles these

9 Except for military purchases. See generally Arrowsmith, note 8 above, pp. 32–4.

10 See Arrowsmith, note 8 above, at pp. 61–3, and works cited there; Dischendorfer, note 8 above, pp. 15–17. Cf. A. Reich, 'The New GATT Agreement on Government Procurement: The Pitfalls of Plurilateralism and Strict Reciprocity', *Journal of World Trade*, 31 (1997), 125 at 144.

might create for suppliers from other WTO Members in participating in government contracts.

In light, in particular, of the current importance of the development agenda in the WTO,¹¹ it is also pertinent to mention that the WTO's multilateral rules impose few controls over the practice of tying aid, whereby donors to developing countries require the recipients to spend aid given on goods and services from the donor country. Whilst, in the view of La Chimia as set out in chapter 13 of this volume, this practice may be viewed as potentially distorting trade contrary to the basic principles of WTO rules as well as reducing the effectiveness of the aid given, both the initial tying of aid and the procurement of aid-funded goods under discriminatory rules are largely outside the scope of WTO rules because of a combination of the wording of the MFN and non-discrimination rules and the government procurements exclusions referred to above.¹²

The multilateral agreements *are*, however, relevant to government procurement in at least two respects.¹³ First, these agreements at least oblige governments to publish their general measures on government procurement, such as laws and regulations, under general provisions on publication of government measures found in GATT Article X and GATS Article III.¹⁴ Second, the rules may have some potential role in controlling the procurement of state trading companies, which traditionally have been considered to present a problem of discrimination in procurement similar to that presented by public bodies in general. This is a complex issue that is considered further by Wang in chapter 8 of the present volume.

2.2. Multilateral initiatives to expand WTO disciplines in government procurement

The fact that government procurement remains largely uncontrolled at present under the WTO's key multilateral agreements, combined with the increasing attention to this subject as described in section 1 above, means that it is not surprising that subsequent to the Uruguay Round there have

11 See further chapter 11 of this volume.

12 Chapter 13 of this volume, section 2.3; A. La Chimia and S. Arrowsmith, 'Addressing Tied-Aid: Towards a More Development Oriented WTO?', *Journal of International Economic Law*, 12 (2009), 707.

13 The WTO Agreement on Subsidies and Countervailing Measures is also potentially relevant in affecting the use of government procurement to subsidize national industry (for example, through contracts under which an excessive price is paid): see Arrowsmith, note 8 above, pp. 85–7.

14 See further Arrowsmith, note 8 above, pp. 75–6 and 84.

been two significant initiatives to address this subject at the multilateral level in the WTO. So far, however, these have made little progress.

The broader of these initiatives, although not the first in time, is an initiative to develop an agreement on transparency in government procurement, which was launched at the Singapore Ministerial Conference in 1996.¹⁵ This Conference set up a Working Group on Transparency in Government Procurement (Transparency Working Group) ‘to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement’.¹⁶ The Conference did not confer any actual negotiating mandate but it was later agreed at the Fourth Ministerial at Doha in 2001, which launched the current Doha Round of WTO trade negotiations, that negotiations on procurement would begin after the Fifth Ministerial ‘on the basis of a decision to be taken, by explicit consensus, at that session on the modalities of negotiations’.¹⁷ However, that Fifth Ministerial meeting at Cancún ended without any decision formally to start negotiations on government procurement: whilst a number of WTO Members, especially the European Union (EU), considered negotiations on this to be important to the WTO package as a whole, several other WTO Members were strongly opposed to starting any such negotiations – and, indeed, disagreement on this issue (and on the fate of the other ‘Singapore’ issues)¹⁸ is generally believed to have been one factor

15 See further S. Arrowsmith, ‘Towards a Multilateral Agreement on Transparency in Government Procurement’, *International and Comparative Law Quarterly*, 47 (1998), 793; Arrowsmith, ‘Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the World Trade Organization’, *Journal of World Trade*, 37 (2003), 283; Dischendorfer, note 8 above; K. Abbott, ‘Rule-making in the WTO: Lessons from the Case of Bribery and Corruption’, *Journal of International Economic Law*, 4 (2001), 275; V. Rege, ‘Transparency in Government Procurement – Issues of Concern and Interest to Developing Countries’, *Journal of World Trade*, 35 (2001), 489; J. Linarelli, ‘The WTO Transparency Agenda: Law, Economics and International Relations Theory’, chapter 13 in Arrowsmith and Trybus, note 2 above; H.-J. Priess and C. Pitschas, ‘The WTO General Council Decision of August 1, 2004: A Note on the Decision Not to Launch Negotiations on Transparency in Government Procurement during the Doha Round’, *Public Procurement Law Review*, 14 (2005), NA1; V. Mosoti, ‘The WTO Agreement on Government Procurement: A Necessary Evil in the Legal Strategy for Development in the Poor World?’, *University of Pennsylvania Journal of International Economic Law*, 25 (2004), 593.

16 WTO, Ministerial Declaration, Ministerial Conference First Session, 13 December 1996 (WT/MIN(96)/DEC) (‘Singapore Declaration’).

17 WTO, Ministerial Declaration, Ministerial Conference Fourth Session, 14 November 2001 (WT/MIN(01)/DEC/W/1) (‘Doha Declaration’), paragraph 26.

18 The four original ‘Singapore issues’ (so designated since work on them was launched at the First WTO Ministerial Conference, in Singapore) were: (i) the relationship

underlying the overall failure of the Fifth Ministerial Conference. Following that Conference, the general negotiations were put back on track with the adoption of a General Council decision of 1 August 2004 which established a framework for continuing negotiations. However, as part of this agreement it was decided to drop, for the time being, any continuing work in a multilateral format towards negotiations on transparency in government procurement (and on the separate 'Singapore' issues of trade and investment, and competition policy). The terms of the General Council's decision state that no further work towards negotiations on this matter will take place in the WTO 'during the Doha Round' – thereby leaving the door open to a resumption of work subsequent to the conclusion of the Round.¹⁹

The prospect of concluding any significant agreement on transparency in government procurement on a multilateral basis is thus clearly ruled out, at least in the short term. However, it is possible that some countries will try to move forward on this issue again once the Doha Round negotiations have been completed. A key issue to be addressed if progress is to be made with this particular initiative is the precise role and purpose of an agreement on transparency.²⁰ The concept of transparency refers generally to openness, and there is a general consensus on the type of procurement rules that can be regarded as implementing transparency in procurement, as discussed further in section 4 below. However, transparency is generally understood as a means to an end rather than an end in itself, and is supportive of multiple objectives in public procurement. In the context of the GPA, as we will see below, transparent procedures were originally included in the Agreement mainly to support the GPA's non-discrimination rules; but transparency rules can also play an important role in supporting, in particular, the objectives of value for money and integrity in public procurement.²¹ In the period leading up to the Cancún Conference, a major effort was made to make clear that an agreement on transparency in government procurement would not entail rules

between trade and investment; (ii) the interaction between trade and competition policy; (iii) transparency in government procurement; and (iv) 'trade facilitation', or possible ways of simplifying trade procedures.

19 See *Decision Adopted by the General Council on 1 August 2004*, available at www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm.

20 See further Arrowsmith (2003), note 15 above.

21 See S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (The Hague: Kluwer Law International, 2000), chapter 2; P. Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford University Press, 2004), *passim*.

on non-discrimination or market access; nonetheless, some WTO Members continued to have apprehensions that a transparency agreement was envisaged as a first step towards non-discrimination rules, an objective that they opposed. Rules on transparency were also defended as supportive of the 'good governance' objectives of public procurement referred to above. However, not all WTO Members were supportive of this approach either – some, indeed, considered it to be a departure from the WTO's traditional market-opening agenda.²² This lack of clarity has impeded both the commitment to negotiations on transparency and concrete progress in deciding what precise obligations might be included in any transparency agreement.²³

The second initiative on government procurement that has been undertaken at the multilateral level subsequent to the Uruguay Round is that which is called for under GATS Article XIII.2. Recognizing that the exclusion of government procurement was a major gap in the multilateral system but also that this gap could not realistically be filled in the Uruguay Round itself, this provision required negotiations on government procurement of services to commence by 1997. These, along with negotiations on subsidies and safeguards, were to be conducted in the Working Party on GATS Rules.²⁴ It might be felt that there is an anomaly in pursuing negotiations on procurement of services and not procurement of goods, especially given that it tends to be easier to open up markets in the latter before dealing with the former; but this resulted simply from the historical fact that there was an opportunity to insert such a provision for services during the Uruguay Round. Pursuant to this mandate, the European Union has put forward detailed proposals for negotiations that parallel the main elements of the GPA at least in some respects (while obviously focusing on the procurement of services as compared to goods);²⁵ however, other WTO Members have shown a reluctance to engage in negotiations on this topic. Recently, the discussions in the

22 It is noteworthy, in this regard, that the revised text of the GPA on which provisional agreement was reached in December 2006 explicitly embraces good governance in addition to traditional market-opening objectives, as well as including a new substantive obligation on the avoidance of corrupt practices. See further section 5.2 below.

23 Arrowsmith (2003), note 15 above.

24 The government procurement mandate was first taken up at the meeting of 8 December 1995: see Working Party on GATS Rules, *Report of the Meeting of 8 December 1995* (S/WPGR/M/3).

25 See, in particular, *Communication from the European Communities* (document S/WPGR/W/54 of 20 June 2006).

Working Group have focused on a range of topics, including the approach to be taken up in informal technical discussions on the subject.²⁶

2.3. The future for multilateral rules and government procurement

Since current initiatives for a multilateral agreement on transparency have stalled and progress on the GATS mandate for negotiations has been limited, whilst the GPA is rapidly gaining momentum, it is clear that the focus of government procurement work in the GPA for the short to medium term will be on the plurilateral approach. Given the past opposition of some WTO Members to multilateral initiatives on procurement, as well as the lack of interest on the part of others, it may be that even in the longer term the GPA, possibly with a much-expanded membership, will remain the main forum for regulating procurement within the WTO. On the other hand, the potential benefits of a multilateral approach to these issues should not be forgotten, in particular in bringing within a regulatory framework states that have been unable to introduce desired reforms in this area because of vested interests or other political difficulties. In some cases, these may be the very states that would benefit most from regulation in this field.

Two key points seem worth bearing in mind in the future pursuit of any multilateral agenda on this topic. One is the need for a clear vision from the outset of detailed negotiations of the precise objectives that regulation will serve: the absence of such a vision appears to have been an obstacle to progress in the work on transparency. A second point is that possible multilateral rules need not seek to replicate the role of the GPA: it could be more useful to focus on developing a different and more limited agreement that would primarily serve those states that are unwilling or unable to accede to the GPA in the near future. In this regard, the potential benefits of 'soft law' approaches to the subject – for example, constructing an agreement that might not be enforceable through the WTO's dispute settlement mechanism or through the kind of supplier remedies system found in the current GPA²⁷ – are reviewed by Jiang in chapter 23 of the present volume.

For the present, however, the focus of the work in the WTO and of the resources of the WTO and its Members is very likely to remain with

²⁶ See *Annual Report of the Working Party on GATS Rules to the Council for Trade in Services* (S/WPGR/19 of 2 October 2009).

²⁷ On this system see further section 4.2 below.

the GPA. Indeed, interest in this approach appears to be intensifying.²⁸ Accordingly, it is to this aspect of the WTO's work that we now turn, and give the greatest prominence in this book.

3. The WTO Agreement on Government Procurement: an increasing role and the challenges ahead

In contrast with the progress in developing initiatives at multilateral level, as we have mentioned, the GPA now seems poised for an increasingly important role within the WTO and as an instrument of international economic law.²⁹ This is indicated by the increasing importance of public procurement regulation, as outlined in section 1, combined with (i) the gradually growing membership of the Agreement, and the prospect of eventual accession to the Agreement by major developing countries; and (ii) the ongoing modernization of the Agreement, which is intended (among other purposes) to facilitate future accessions.³⁰

This situation entails significant challenges for policymakers and for those responsible for implementation of the Agreement – including Parties' representatives in the Agreement on Government Procurement; government officials at the national level, in both the existing Parties and WTO Members acceding to the GPA; the WTO Secretariat; the supplier community; and all who advise and help to represent this broad range of actors. A minimum requirement for the GPA to fulfil its mission is the completion of the current negotiations under Article XXIV.7 of the Agreement, which will put in place an improved and simplified text, and will also expand the range of Parties' procurements that are subject to the Agreement. Beyond this, a host of other challenges beckon. These include: (i) the carrying forward of pending accessions to the Agreement (doubtless a multi-year process in some cases); (ii) providing the assistance that

28 As detailed below, a good number of WTO Members, including developing and major emerging market economies such as China, are now negotiating their accession to the GPA. It is noteworthy, as well, that in February 2010 India became an observer to the GPA, a role that it had not previously sought.

29 Mr Pascal Lamy, Director-General of the WTO, has noted that 'Currently, the GPA appears to be in the process of taking on relatively greater importance in the constellation of the WTO Agreements.' Pascal Lamy, 'Keynote Remarks' (Symposium on the WTO Agreement on Government Procurement: Developmental and Trade Significance, Changing Context and Future Prospects, 11–12 February 2010), available at www.wto.org/english/news_e/sppl_e/sppl147_e.htm.

30 See, for supporting details, section 6.2 below and chapter 2 of this volume on accessions and section 5 below, and references cited therein.

is needed to ensure that acceding countries reap the benefits of accession; (iii) completing the work to which the Parties have pledged themselves to develop arbitration procedures and indicative criteria concerning the de-listing of covered entities that are no longer subject to government control; and (iv) an expected eventual new round of amendments to deal with pending issues that have only been touched upon, or have not been addressed at all, in the current review of the Agreement. The latter might include, for example, coverage of public–private partnerships and of arrangements between public sector bodies, social considerations, the treatment of tied aid under the Agreement, and the application of the Agreement to ‘two-stage’ or ‘framework’ agreements. A number of these topics are the subject of detailed reflections in designated chapters of this book as well as being highlighted in the analysis below.

In contemplating these issues, it is appropriate to look back, if only briefly, on the origins of the present Agreement on Government Procurement, in the negotiations leading to the Tokyo Round Procurement Code. Such a glance back is encouraging, in that it shows how far the legal framework for international trade in relation to public procurement markets has come in a time span of little more than three decades. Indeed, in thinking about the issues broached in this book, we believe that it is important to measure progress not only in terms of how far current efforts may fall short of an abstract ideal, but in terms of how far the global community has come, in a relatively short space of time, in putting in place an international legal framework that is at least capable of wrestling with these issues and serving as a basis for further substantive policy development and market opening.

The remainder of the chapter is organized as follows. Section 4 briefly reviews the origins of the current (1994) GPA and outlines the approach of that instrument to regulating public procurement. Section 5 then examines the review of the Agreement that has taken place over the last few years and highlights the main changes that are envisaged in a new text of the Agreement which was agreed in 2006 (although it is not yet formally adopted). Section 6 then examines the challenges presently facing the Agreement, including with respect to accessions; with respect to conclusion of the current negotiations on the new text discussed in section 5; and on coverage of the Agreement. Section 7 delves into the further set of challenges which will, we believe, require further reflection and policy action in the future. These include issues concerning the implementation of the Agreement; issues concerning future accessions to the Agreement; and issues concerning the future evolution of the Agreement.

Throughout, references are made to relevant chapters of this book that further illuminate the respective issues. Section 8 provides brief concluding remarks.

4. The past: the origins and key principles of the 1994 Agreement on Government Procurement and the process leading to the current review

4.1. *The Tokyo Round Code: establishing the basic framework of non-discrimination and transparency*

Although government procurement formed part of the original agenda for the negotiations concerning an International Trade Organization in the aftermath of the Second World War, it was, as we have seen, largely excluded from the application of the crucial non-discrimination provisions of both the GATT and GATS.³¹ It was not until 1979 – more than thirty years later – that the first plurilateral agreement on government procurement, namely the 1979 Tokyo Round Government Procurement Code,³² was concluded. The original signatories to the Tokyo Round Code, which built upon extensive preparatory work that was undertaken in the Organization for Economic Cooperation and Development (OECD),³³ were Austria; Canada; the then European Community and its then six Member States (Belgium, France, West Germany, Italy, Luxembourg and the Netherlands); Finland; Hong Kong, China; Japan; Norway; Singapore; Switzerland; and the United States. Subsequently, the Code also became applicable to Greece, Portugal and Spain upon their accession to the European Community, and Israel joined the Agreement in 1983.

The Tokyo Round Code, which came into force in January 1981, established a basic approach that is found also in the current (1994) GPA, but was much more limited than the current Agreement in several respects.

Thus coverage was very limited, with the Code being limited to the procurement of goods (reflecting the fact that the Tokyo Round as a whole was concerned only with trade in goods). The Code also applied

31 See M. Pomeranz, 'Towards a New International Order in Government Procurement', *Law and Policy in International Business*, 11 (1979), 1263; Arrowsmith, note 8 above, chapter 2.

32 See, for additional background, A. Blank and G. Marceau, 'The History of Government Procurement Negotiations since 1945', *Public Procurement Law Review*, 5 (1996), 77.

33 Arrowsmith, note 8 above, pp. 31–4.

only to central government entities and – like the current Agreement – to contracts above certain financial thresholds. However, it was recognized that this was only a starting point and Article IX.6 expressly provided for negotiations to begin within three years for extending entity coverage and for including construction and other services.

As regards the approach to opening up access to covered procurement, the Code, like the current Agreement, contained basic national treatment and MFN obligations (Article II of the Code). Thus, for covered procurement states were prohibited from, for example, reserving procurement for national firms or offering price preferences in their favour. These non-discrimination obligations were supplemented with requirements to follow specified transparent procurement procedures and to comply with certain other transparency requirements. As mentioned above, transparency is a tool that can be used to achieve a number of goals in government procurement, but in the context of the Tokyo Round Code its function was to support the non-discrimination obligations by ensuring that discrimination could be detected and monitored.³⁴ This approach had its foundations in the work of the OECD which had discovered that whilst some of its Member States had overtly discriminatory policies set out in transparent rules, this was not so with many states,³⁵ meaning that non-discrimination rules alone might not be effective to end discrimination and, moreover, could have an unequal impact between states.

As Arrowsmith has elaborated elsewhere,³⁶ the concept of transparency in government procurement – whether supporting open markets, integrity or other procurement goals such as accountability and value for money – can be seen to have four main aspects, namely (i) ensuring adequate publicity for contract opportunities; (ii) ensuring public availability and knowledge of the rules governing award procedures; (iii) providing the basis for a rules-based procurement system, by limiting the discretionary power of procurement authorities; and (iv) providing opportunities for interested parties (including, but not limited to, interested suppliers) to enforce and verify that the rules have been followed. The transparency rules of the Code and its successor agreements

34 See OECD, *Draft Instrument on Government Policies, Procedures and Practices* (1975). The preamble to the Tokyo Round Agreement mentions only the liberalization and expansion of trade and improving the framework for the conduct of world trade, and prevention of discrimination in its substantive objectives, as well as the need for transparency.

35 OECD, *Government Purchasing in Europe, North America and Japan: Regulations and Procedures* (1966).

36 In the context of the GPA see Arrowsmith, note 8 above, p. 170.

reflect all these aspects of transparency to a greater or lesser extent. Thus they support the non-discrimination rules by providing information on opportunities for foreign suppliers as well as domestic ones; by ensuring – through rule-based decision-making, with the applicable rules and criteria being disclosed in advance – that discriminatory decision-making cannot be concealed; and by supporting verification and enforcement by interested foreign suppliers and other relevant parties. The rules also provide for other requirements that support foreign access to markets, such as minimum time limits for making requests to tender and for tendering, and rules preventing technical specifications from being drafted in such a way as to limit access to the market.

Specific procedural obligations that were included in the Code in this respect were based on those already developed earlier in OECD discussions. They included, for example:

- Rules on technical specifications (Article IV);
- A general requirement to advertise procurements and to hold a competition using either an open procedure, under which any supplier may bid, or selective tendering, in which only selected suppliers may bid (Article V), with the possibility of single tendering (or direct award – now referred to as limited tendering) only in exceptional cases specified in the Agreement, such as certain cases of urgency;
- A requirement to award the contract to the most advantageous tender in accordance with pre-disclosed criteria (Article V.14(f)); and
- Obligations to provide information on decisions to participating suppliers (Article VI.2–4).

Such obligations remain at the core of the transparency rules of today's GPA, as outlined in section 5 below.

As noted above, the Tokyo Round Code on procurement already provided for further negotiations with the aim of extending coverage and negotiations commenced in 1983, culminating in amendments to the Code in a 1987 Protocol.³⁷ However, whilst the intention had been to focus on expanding coverage, in the end the negotiations concentrated on tightening up the non-discrimination and transparency provisions of the Code, resulting in a number of changes,³⁸ such as a new prohibition

37 Protocol Amending the Agreement on Government Procurement, BISD 14th Suppl. p. 12.

38 For a full summary see Arrowsmith, note 8 above, pp. 36–7; A. Reich, *International Public Procurement Law: The Evolution of International Regimes on Public Purchasing* (London: Kluwer Law International, 1999), pp. 136–40.

on discrimination on grounds of foreign ownership and affiliation, and longer minimum time limits. The only expansion to coverage was a slight reduction in some thresholds.

4.2. *The 1994 GPA: expanded coverage, supplier challenge and adjustments to the procedural rules*

A substantial expansion of coverage was, however, eventually achieved some years later in the negotiations leading to the adoption of the current Agreement on Government Procurement (i.e. the 1994 GPA).³⁹ These negotiations were held in parallel to and at the time of the broader Uruguay Round negotiations that were brought to a conclusion at Marrakesh in 1994 and that led to the establishment of the World Trade Organization in 1995. The successful conclusion of these ambitious negotiations on government procurement represented a huge step forward in the coverage of international trade disciplines in this area, providing the foundations on which to build a truly broad and global regime for the future.

Thus the GPA 1994 applies, in principle, not only to entities of central government but also to the huge markets of sub-central government (provincial and local), as well as a variety of other entities that are considered subject to potential governmental influence in their purchasing. As is elaborated in chapter 6 by Anderson and Osei-Lah, precise entities covered for each state are subject to negotiation and set out in a series of Annexes – Annex 1 for each Party listing the covered central government entities, Annex 2 listing mainly provincial and local entities and Annex 3 listing other covered entities, such as utilities and state enterprise in other fields. The Agreement also applies to services and construction services in addition to goods, although the precise scope of coverage of services varies between Parties. The importance of these extensions to the Agreement cannot be underestimated: by one estimate, the coverage offered under the original 1994 Agreement represented a tenfold increase over that available under the Tokyo Round Code.⁴⁰

39 On the changes and expansion in 1994 see also A. Brown and C. Pouncey, 'Expanding the International Market for Public Procurement: The WTO's Agreement on Government Procurement', *International Trade Law and Regulation*, 1 (1995), 69; G. de Graaf and M. King, 'Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round', *International Lawyer*, 29 (1995), 435.

40 See WTO, 'General Overview of WTO Work on Government Procurement', available at www.wto.org/english/tratop_e/gproc_e/overview_e.htm.

A further crucial innovation in the 1994 GPA was the introduction of a system of challenge procedures. This has substantially enhanced the fourth dimension of transparency referred to above, namely the possibility for enforcing the rules. The system is set out in Article XX of the 1994 GPA, which requires Parties to make provision for suppliers to challenge violations before an independent review body in the state concerned. Article XX sets out minimum standards concerning the nature of the review body and the procedure for hearing the challenge, and also requires certain specified remedies to be available, namely interim measures, damages (though these may be limited to costs) and correction of violations.⁴¹ The Tokyo Round procurement Code provided in Article VI.5 for a form of complaints system but did not require the reviewing authority to be independent or even separate from the procuring entity, did not provide rules to govern the hearing and did not even require any redress to be available. The current bid challenge requirements of Article XX of the 1994 GPA are discussed in detail by Zhang in chapter 17 of this volume, which considers how states may construct a system of compliant procedures, in particular based on the UNCITRAL Model Law on procurement. Chapter 18 (Priess and Friton) considers how the EU experience of supplier remedies might assist those designing such a system, whilst chapter 19 (Gao) looks at the experience of implementing the GPA challenge procedure requirements in Hong Kong, China.

So far as the rules on non-discrimination and transparency are concerned, we have seen that these had been the focus of negotiations in relation to the Tokyo Code between 1983 and 1987, and that the outcome of those negotiations provided the major part of the rules contained in the 1994 GPA. However, the 1994 Agreement did introduce some changes. In contrast with the changes in 1987, these changes to the procedural rules introduced in 1994 were largely (although not wholly) concerned with making the procedural rules of the Agreement more flexible in certain respects, in particular as regards their application to the new types of entities – those outside central government – that had been brought within the new Agreement in 1994 for the first time. The rules of the Code were regarded as too stringent in certain respects for these entities, in particular since many of these entities were subject to less stringent rules

41 For further detail and analysis see Arrowsmith, note 8 above, chapter 14; Reich, note 38 above, pp. 307–12; A. Davies, 'Remedies for Enforcing the WTO Agreement on Government Procurement from the Perspective of the European Community: A Critical Analysis', *World Competition*, 20 (1997), 113; M. Footer, 'Remedies under the New GATT Agreement on Government Procurement', *Public Procurement Law Review*, 4 (1995), 80.

under regional arrangements that already existed between some of the GPA Parties, such as the EU Member States. For example, the 1994 Agreement allows for flexible methods for advertising contracts for Annex 2 and Annex 3 entities and introduced the possibility of negotiations on procurement (applying to all entities and dealt with by Article XIV of the 1994 GPA).

In summary, the main substantive obligations embodied in the current (1994) GPA⁴² now comprise the following:

- Guarantees of national treatment and non-discrimination for the goods, services and suppliers of Parties to the Agreement with respect to procurement of covered goods, services and construction services as set out in each Party's schedules ('Appendix I') and subject to various exceptions and exclusions that are noted therein;
- Minimum standards regarding national procurement processes, which, as we have seen, are intended to ensure that the Parties' procurements are carried out in a transparent and competitive manner that does not discriminate against the suppliers of other Parties. Aspects of the procurement process that are addressed include: (i) the use of technical specifications; (ii) allowable tendering procedures – which, as under the Tokyo Round Code, consists of open tendering, selective tendering and (in specified cases) limited tendering; (iii) rules on qualification of suppliers, including use of permanent lists of qualified suppliers; (iv) invitations to participate in intended procurements; (v) procedures for selecting suppliers to tender when selective tendering is used; (vi) time limits for tendering and delivery; (vii) tender documentation; (viii) submission, receipt and opening of tenders, and the awarding of contracts (including the requirement noted earlier of awarding to the lowest tender or (using pre-disclosed criteria) to the most advantageous tender; and (ix) negotiations by entities with suppliers;
- Additional requirements regarding transparency of procurement-related information (e.g. relevant statutes and regulations);

42 For a detailed analysis see Arrowsmith, note 8 above; and Reich, note 38 above. For a summary see D. Wallace and S. Sahayadachny, 'Opening Government Procurement Markets', chapter 19 in M. Mendoza, P. Low and B. Kotschwar (eds.), *Trade Rules in the Making* (Washington: Brookings Institution Press, 1999); B. Hoekman and P. Mavroidis, 'Basic Elements of the Agreement on Government Procurement', chapter 1 in B. Hoekman and P. Mavroidis (eds.), *Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement* (Ann Arbor: University of Michigan Press, 1997).

- Procedures dealing with modifications and rectifications of Parties' coverage commitments;
- Requirements regarding the availability and nature of bid challenge (i.e. domestic review) procedures which must be put in place by all Parties to the Agreement;
- The application of the WTO Dispute Settlement Understanding in this area; and
- A 'built-in agenda' for improvement of the Agreement, extension of coverage and elimination of remaining discriminatory measures applied by Parties.

As elaborated below and in chapter 10, the foregoing elements also form the main substantive obligations foreseen in the revised text of the Agreement that was provisionally agreed in December 2006.

5. The review of the GPA and the revised text

5.1. Introduction

Despite the very considerable expansion and improvement of the government procurement disciplines that was embodied in the 1994 GPA, it was recognized even in the Uruguay Round, however, that work in the field was far from complete.

First, much remained to be done to expand the coverage of the GPA. Article XXIV.7(b) of the 1994 Agreement thus called on the Parties, not later than the end of the third year from the date of entry into force of the Agreement (and also 'periodically' thereafter), to undertake negotiations with a view to 'achieving the greatest possible extension of its coverage among all Parties'. In this respect, Article XXIV.7(c) specifically directs Parties to avoid introducing or prolonging discriminatory measures and practices which distort open procurement and further stipulates that the negotiations under subparagraph (b) shall seek to eliminate remaining discriminatory measures and practices. This provision refers, *inter alia*, to the fact that the market-opening commitments under the current GPA do not always apply on an MFN basis, in particular because some concessions are limited by the Parties to those Parties who themselves offer reciprocal concessions of the same type. These issues are explored more fully in chapter 6 by Anderson and Osei-Lah, dealing with coverage of the Agreement.

Second, it was already foreseen that the Agreement would need modifying to address issues relating to use of information technology in procurement. Thus GPA Article XXIV.8 provided specifically for the parties to consult regularly in the Committee on Government Procurement regarding the use of information technology in government procurement and, in this connection, to negotiate modifications if necessary. Article XXIV.7(b) referred to above also acknowledged the need for the subsequent negotiations to consider the need for 'improving' the Agreement more generally.

Recognizing the importance of building on the work already done and of the need to deal promptly with the information technology issue, as early as the first year of entry into force of the Agreement Parties commenced discussion regarding the future negotiations. At its second formal meeting during this time, the Committee agreed to undertake an early review starting in 1997 with a view to implementation of the negotiating mandate embodied in Article XXIV.7.⁴³ The elements of the review were to include: expansion of the coverage of the Agreement; elimination of discriminatory measures and practices which distort open procurement; and simplification and improvement of the Agreement, including, where appropriate, adaptation to advances in the area of information technology.⁴⁴ In this way, the Committee effectively combined the requirements for the main elements of the negotiating mandate in Article XXIV.7 with that set out in Article XXIV.8 regarding adaptation of the Agreement to information technology. An important additional objective of the review, as conceived by the Committee, was to facilitate accession to the Agreement by additional Parties, notably developing countries.⁴⁵ It is important to note that these negotiations under the GPA are *not* part of the Doha Round of negotiations in the WTO, which are multilateral rather than plurilateral in nature, and which relate to a range of other topics, including agriculture, non-agricultural market access (NAMA), services trade and intellectual property issues.⁴⁶

Work on the procurement negotiations gathered steam in 1997. Transparency was ensured and progress monitored through an informal Checklist of Issues which was regularly updated. Among the early

43 GPA/8, dated 17 October 1996, paragraphs 21 and 22; and WT/L/190, dated 17 October 1996, paragraphs 21 and 22.

44 GPA/8, dated 17 October 1996, paragraph 22. 45 See also Arrowsmith, note 7 above.

46 See, for background, 'The Doha Agenda', available at www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm.

issues discussed were: non-discrimination in connection with information technology; improvements in the structure and presentation of the Agreement; and discriminatory provisions in Appendices to the Agreement.⁴⁷

By June 2003, a draft consolidated text reflecting the status of the negotiations on text-related issues had emerged.⁴⁸ At this time, the negotiators also agreed to defer substantive negotiations on coverage until after the Cancún Ministerial Conference, which was scheduled to take place in September 2003.⁴⁹ Subsequently, on 16 July 2004, Parties adopted modalities for this aspect of the negotiations – ‘Modalities for the Negotiations on Extension of Coverage and Elimination of Discriminatory Measures and Practices’ – which took account of the issue of pending modifications.⁵⁰ The Committee held a first session on the coverage-related aspects in October of that year.⁵¹

In December 2006, negotiators for the Parties to the 1994 WTO Agreement on Government Procurement (GPA) (the ‘GPA 1994’ or ‘existing Agreement’) reached provisional agreement on the text of a revised Agreement (the ‘provisionally agreed revised Agreement’ or ‘revised text’) to replace and supersede the existing Agreement.⁵²

It is important to note that, under the agreement struck in 2006, the revised GPA text cannot come into force until a conclusion has been reached in the parallel negotiations on the coverage of the Agreement.⁵³ Work on the coverage-related aspects of the GPA negotiations is ongoing. As of the time of writing of this chapter (June 2010), it is not certain when this aspect of the negotiations (i.e. the negotiations on coverage) will be completed. Nonetheless, as described in the next section of this chapter and in more detail in chapter 6 on the GPA coverage negotiations by Anderson and Osei-Lah, in early 2010 a major effort commenced to

47 See also Anderson and Osei-Lah, chapter 6 of the present volume, on coverage negotiations.

48 GPA/75, dated 15 July 2003, paragraph 26.

49 GPA/75, dated 15 July 2003, paragraph 27.

50 GPA/79, dated 19 July 2004; see also GPA/82, dated 26 November 2004, paragraph 23.

51 GPA/M/24, dated 8 December 2004, paragraph 3.

52 *Report (2006) of the WTO Committee on Government Procurement to the General Council* (GPA/89, 11 December 2006), paragraph 20. The provisionally agreed text itself is available in WTO document GPA/W/297. To access the document, go to the following link (on the WTO website) and search for GPA/W/297: www.wto.org/english/tratop_e/gproc_e/gp-gpa_e.htm.

53 *Report (2006) of the WTO Committee on Government Procurement to the General Council* (GPA/89, 11 December 2006), paragraph 20.

conclude the negotiations by early in 2011 – thereby (it is hoped) making possible the coming into force of the revised text in 2011.

5.2. *The main elements of the revised text*

The revised text is in no sense a radical revision of the Agreement. Thus it is based to a large extent on the same principles and carries over the main elements of the existing (1994) Agreement. However, the revised text looks rather different as it has been rewritten in order to simplify its structure and to clarify and streamline the wording, making it more user-friendly. In addition, it expands and improves on the existing Agreement in a number of ways.⁵⁴ We can outline these latter changes in five distinct groups.

(i) The objectives and principles of the Agreement

A first, potentially significant, change concerns the stated objectives of the GPA. The Tokyo Round Code and 1994 GPA are instruments directed at trade liberalization and their primary focus has been to eliminate discrimination in government procurement: following on from a general reference to the need for a framework to liberalize and expand trade, this focus is expressly referred to in the relevant preambles. Thus the second preamble to the 1994 GPA, for example, states:

Recognizing that laws, regulations, procedures and practices regarding government procurement should not be prepared, adopted or applied to foreign or domestic products and services and to foreign or domestic suppliers so as to afford protection to domestic products or services or domestic suppliers and should not discriminate among foreign products or services or among foreign suppliers . . .

To eliminate such protection and discrimination, the Tokyo Round Code and GPA adopted, as we have seen, both rules that prohibit discrimination and transparency rules that allow interested persons to detect discrimination and to make a complaint when this occurs. This need for transparency is also referred to in the preamble, immediately following the above provision on protection and discrimination:

⁵⁴ See R. D. Anderson, 'Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiations', *Public Procurement Law Review*, 16 (2007), 255; A. Reich, 'The New Text of the Agreement on Government Procurement: An Analysis and Assessment', *Journal of International Economic Law*, 12 (2010), 989.

Recognizing that it is desirable to provide transparency of laws, regulations, procedures and practices regarding government procurement . . .

It seems from this and also from the history of the provisions, which were based on work done by the OECD focused on preventing discrimination in procurement systems not previously governed by formal rules, that the transparency rules were conceived primarily as a means to prevent the protection and discrimination referred to above. No other substantive objectives of the Agreements are referred to in the preambles.

Nonetheless, as we have already mentioned, transparency is a tool that is also used to achieve other key procurement objectives in national and international instruments. Most notably it is a key tool to promote value for money for governments (equal treatment of foreign supplies and products/services is to a large extent one aspect of this but there are also many other aspects); to ensure integrity in the procurement system and, in particular, to prevent corrupt behaviour; and, in some countries, to provide accountability to the public.⁵⁵ These can in turn have an impact on trade. For example, the award of contracts for corrupt motives may deter foreign suppliers (as well as domestic suppliers) from participating and reduce the volume of work available for foreign suppliers. To be sure, there is no indication in the preamble that this was a concern of the 1994 GPA transparency rules. This is also borne out by the content of the rules themselves – for example, the absence of the kinds of provisions on conflict of interest that are found in national systems and of specific anti-corruption measures. This does not, however, mean that the GPA has no impact on these matters – for example, rules that limit discretion in accordance with rules and criteria disclosed in advance allow for monitoring not only to detect discrimination but also to detect corrupt motives in a procurement. Indeed, as commentators have often pointed out, one of the important *de facto* benefits of GPA accession can be to improve value for money in procurement and help advance national anti-corruption objectives; this point is emphasized, for example, in the various chapters on accession in Part II of this volume.⁵⁶ Nonetheless, overall it does not appear that these were among the main objectives of the GPA.

The situation is different, however, in the revised GPA. In this document two relevant new provisions have been added to the preamble. The first of these (now the third recital) states:

⁵⁵ See the works cited in note 21 above.

⁵⁶ See, in particular, chapter 3 by Wang on China, chapter 4 by Chakravarthy and Dawar on India and chapter 5 by Lo on Chinese Taipei.

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

In addition, the sixth recital now states:

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

Article 9(1) of the Convention referred to requires each State Party to take necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria, that are effective, *inter alia*, in preventing corruption and also to address conflicts of interest. The Convention appears to have provided significant impetus for the treatment of this subject in the GPA.

Thus the GPA now pursues not only the objective of non-discrimination but also best value for money (the 'efficient and effective management of public resources') and the avoidance of corruption and conflicts of interest – and moreover, these objectives are pursued in their own right and not merely as ancillary to trade objectives; and it appears that support of these objectives can now be seen as one function of the GPA's transparency rules. However, it is worth pointing out that, so far as value for money is concerned, the reference is limited to the value of integrity and predictability in the system as a means to achieve this objective – which it can do by, in particular, encouraging suppliers to participate. It does not go so far as to suggest that the GPA goes beyond this to lay down for Parties the most appropriate way to achieve value for money within a transparent environment – for example, by regulating in more detail the kinds of procurement methods that are suitable for different types of procurement (even if that could ever be done in an instrument designed for a diverse group of countries). In this respect, the revised text, like its predecessor, continues to leave broad discretion to Parties to define the specific content of their procurement systems so long as they are consistent with the minimum standards that are defined in the Agreement.

The recognition of integrity objectives by the revised GPA has been included in parallel with the addition of one specific new obligation of substance in the text of the Agreement: this is Article V.4 of the revised text,

which requires that procuring entities shall conduct covered procurement in a transparent and impartial manner that avoids conflicts of interest and prevents corrupt practices. The implications of this substantive provision are discussed further in chapter 10, section 2. As Anderson *et al.* have pointed out, the new provision represents a significant innovation not merely for the GPA but for WTO law in general, in that, until now, WTO Agreements have generally not referred explicitly to corruption issues.⁵⁷

Although this appears to be the only explicit new provision added with reference to the new objectives stated in the preamble, the recognition of these objectives is important as a matter of principle and also because recognition of these new objectives could have an impact on how specific rules are interpreted. Reich has suggested, for example, that in light of these new objectives the rules on supplier review procedures, which we have seen were introduced in 1994 and which are now found in Article XVII of the revised text, must be interpreted as applying to all suppliers and not merely (as is arguably the case to a large extent under the 1994 GPA)⁵⁸ to foreign suppliers.⁵⁹ These new objectives could also affect the Parties' future approach in adding to or amending the transparency rules.

(ii) Textual rules on coverage

For the most part, coverage of the GPA for the procurement of each Party is established in the Parties' Annexes that list the entities, types of procurement and thresholds covered (as is elaborated further in chapter 6 of this volume). However, the general text of the GPA contains some general rules affecting the subject of coverage – for example, defining particular concepts and establishing procedures for modifying the Annexes – some of which have been amended during the revision of the text.

A number of the changes to the GPA text that are embodied in the provisionally agreed revised text of 2006 have implications for coverage and market access, either directly or indirectly. As an example, the revised text incorporates for the first time a set of definitions in Article I; in this regard, more specifically, there are now agreed common definitions for commercial goods and services and for a construction services contract. Another example of coverage-related aspects in the revised text is the definition of covered procurement in Article II.2, which has been clarified and now draws on relevant language in other WTO multilateral agreements.⁶⁰

⁵⁷ Anderson, Kovacic and Müller, chapter 22 of the present volume.

⁵⁸ See Arrowsmith, note 8 above, pp. 391–2. ⁵⁹ Reich, note 54 above, pp. 997–8.

⁶⁰ See, in particular, GATT Articles III.8(a) and XVII.2, and GATS Article XIII.1.

Another change is the regrouping of a number of fairly common derogations in various Parties' annexes to Appendix I in the text of the Agreement (Article II.3). Such standard exceptions include areas such as rental or acquisition of land or immovable property; non-contractual agreements or any form of assistance by a Party; procurement or acquisition of fiscal agency or depository services; and public employment contracts. Other common exclusions regrouped here include procurement in relation to international assistance, development aid, international agreements or joint projects, and procurement subject to third party rules arising from funding or other obligations.

There have also been revisions to 1994 GPA Article XXIV.6, dealing with the situation in which a Party wishes to make a modification to its Annexes – for example, removing an entity from the Annexes and hence from GPA coverage.⁶¹ These rules are now found in Article XIX of the revised text.⁶² The most significant new provision is one that requires the Committee on Government Procurement to adopt criteria and procedures for dealing with modifications.

This has been promoted by, in particular, the fact that there have been considerable difficulties in the practical operation of the withdrawal rules in Article XXIV.6 of the 1994 GPA in the situation in which Parties seek to withdraw entities from the GPA under Article XXIV.6(b) on the basis that they are no longer subject to governmental control and influence. This possibility is specifically envisaged by the withdrawal provisions, since once governmental control and influence is removed it can be presumed that the entity will procure on a commercial basis without discrimination, thus removing the main rationale for regulation under the GPA. In practice, however, a number of situations have arisen in which a Party has sought to remove an entity on this basis and other Parties are not convinced that the entity has indeed been freed of government influence and/or control. At present there are no criteria for determining the existence of governmental influence or control. It is also not clear what procedure, if any, is available for resolving disputes on this matter.⁶³ The combination of these two factors has made it difficult to deal with such issues and several such situations are still outstanding under the 1994 Agreement.⁶⁴

61 On these provisions see Arrowsmith, note 8 above, pp. 126–9.

62 For analysis of these changes see Reich, note 54 above, pp. 1017–21.

63 On the possible application of the DSU see Arrowsmith, note 8 above, pp. 126–9.

64 See *Report (2009) of the WTO Committee on Government Procurement to the General Council* (GPA/103, 12 November 2009).

The issue is significant since many existing Parties are engaged in privatizing and/or liberalizing various entities in the GPA. Furthermore, the EU's directive on utilities procurement has recently introduced a mechanism for exempting from the EU's internal procurement rules certain utilities operating in competitive markets as those markets become truly competitive, and will wish to exclude these entities also from the GPA. The issue is also a potentially important one in the context of accessions, since a number of the states negotiating accession or likely to do so have a significant number of state enterprises. As Wang has argued, not only is it necessary for the GPA to include adequate mechanisms for dealing with such entities when these states accede, but the absence of such mechanisms could also affect those states' willingness to subject such enterprises to the GPA in the first place.⁶⁵

The new provisions require the Committee on Government Procurement to adopt arbitration procedures to facilitate resolution of Parties' formal objections to proposed modifications by other Parties (Article XIX.8(a) of the revised text).⁶⁶ The Committee is also required to adopt indicative criteria that demonstrate the effective elimination of governmental control or influence; these should help prevent disputes arising and provide a basis for resolving them should they do so (Article XIX.8(b)).⁶⁷ The Committee is in addition required to adopt criteria on other matters related to modifications. One is how compensatory adjustments are to be determined for modifications that are made for reasons other than the fact that governmental control and influence over the entity has been eliminated (Article XIX.8(c)) – it is implied that such compensatory adjustments may be made since in such cases removal of the entity will sometimes mean reduced GPA coverage and thus reduced access to markets for other Parties. As we note later below, the speedy completion of this work envisaged in the new text is an important item for the Committee's agenda given its practical importance.

(iii) Special and differential treatment

A third and important area of change arose out of the negotiations' objective referred to earlier of promoting accessions to the Agreement

65 P. Wang, 'Coverage of the WTO's Agreement on Government Procurement: Challenges of Integrating China and other Countries with a Large State Sector into the Global Trading System', *Journal of International Economic Law*, 10 (2007), 887.

66 And see Article XIX.7 on the consequences of these arbitration procedures.

67 Article XIX.3(a) requires the Parties to consider these criteria adopted by the Committee in their consultations.

from developing countries. In the new Agreement the transitional measures ('special and differential treatment') that are available to developing countries that become Parties to the Agreement have been more clearly spelled out. This is a significant aspect of the renegotiation.

The transitional measures that will potentially be available to acceding Parties, subject to negotiations with the existing Parties, include: (i) price preferences; (ii) offsets; (iii) phased-in addition of specific entities and sectors; and (iv) thresholds that are initially set higher than their permanent level (see the provisionally agreed revised GPA, Article IV). Provision has also been made for delaying the application of any specific obligation contained in the Agreement, other than the requirement to provide equivalent treatment to the goods, services and suppliers of all other Parties to the Agreement, for a period of five years following accession to the Agreement for Least Developed Countries (LDCs) or up to three years for other developing countries.

These changes and their implications are all examined in detail by Müller in chapter 11 of this volume.

(iv) Transparency and procedural rules

Fourth, alongside the addition of a specific provision on corruption and conflict of interest that has already been outlined under (i) above, the revised agreement makes a number of other changes and additions to the procedural rules governing contract award procedures and the other transparency provisions (for example, information provisions) of the GPA. These changes are the subject of a detailed analysis in chapter 10 of this volume by Arrowsmith and comprise, in particular, the following.

First, as expressly envisaged in the negotiating mandate, the new text contains provisions that take account of the use of electronic tools in public procurement. One issue of note is the fact that the text makes it very clear that electronic tools can be used for various processes and decisions on a par with more traditional means of communication, removing some elements of uncertainty in the current text (including by defining the concept of 'written' or 'in writing' to cover electronic communications that serve the same functions as traditional written text: Article 1(f)). At the same time the text includes controls over the electronic means used to control electronic communications, including to prevent their use operating as barriers to trade – thus Article V.3(a) requires entities to use generally available information technology systems and software and to ensure their interoperability with other generally available systems

and software. The revised text also reduces the minimum timescales that apply to procurements under the GPA when electronic means are used, in recognition of the fact that electronic tools can reduce the time needed for action, and also to encourage their use. Finally, the text contains explicit recognition of the possibility of using electronic auctions in the procurement process and also regulates the manner in which auctions are operated. These changes are analysed further in section 4 of chapter 10.

Second, the revised text includes some revisions and clarifications to the rules on conditions of participation, which are set out in Article VIII of the revised text. In particular, reflecting explicit provisions in many other national and international rules, Article VIII.3 now states expressly that suppliers may be excluded for 'significant or persistent' deficiencies in past performance, serious crimes or other offences (where there has been a final judgment), professional misconduct or acts or omissions that adversely reflect on commercial integrity or failure to pay taxes. These provisions are examined further in section 5 of chapter 10.

Third, the new text includes enhanced transparency rules for selecting firms to tender in selective tendering procedures, requiring disclosure of information on any limits on the numbers of suppliers that will be permitted to participate and the criteria for making the selection to be notified to participants in advance (Article IX.5 and Article VII.2). This issue is considered further in section 6 of chapter 10.

Fourth, the revised text contains shorter timescales for some phases of procurement procedures in certain types of procurement. As already mentioned, some reductions of time periods apply when electronic means are used in the process. Shorter timescales also apply for requests to participate in selective tendering procedures to take account of urgency, and in procurements for commercial (off-the-shelf) goods and services. These new flexibilities are explained further in section 7 of chapter 10.

Fifth, the revised text has added an important new provision to control the making of changes to a concluded contract in a manner that undermines the application of the Agreement. For example, a significant increase in the price of a contract after it is concluded without any corresponding increase in the supplier's contractual obligations can clearly undermine the competitive process carried out under the GPA and, moreover, is open to deliberate abuse for the purpose of favouring particular suppliers. Section 9 of chapter 10 explains this innovation.

Sixth, influenced by the increasing importance of environmental considerations in government procurement policy and the potential importance of government procurement in the overall efforts to address

pressing environmental problems such as climate change, the revised text gives explicit recognition for the first time to the possibility of including such considerations in government procurement. This is provided for both in Article X.6 of the revised text in the context of technical specifications, which states that Parties and entities may prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment; and Article X.9 providing that evaluation criteria may include 'environmental characteristics'. The precise impact of these provisions – including the extent to which they extend the flexibility available under the Agreement or merely confirm existing possibilities – is far from clear; but at the very least they do provide an explicit acknowledgement of the potential of procurement in this area and we would expect them to have some impact on the future interpretation of the Agreement in this area. This complex and rather controversial subject is analysed further in section 10 of chapter 10.

Seventh, we can note that some small changes are made to the rules on permanent lists of qualified suppliers – which are called 'multi-use lists' under the revised text; and that the revised text also introduces a new concept of a 'supplier registration system'. These issues are considered in section 11 of chapter 10.

In addition, there is a potentially interesting change to the general principle on procurement methods: instead of requiring use of one of the three methods of procurement stated in the current text, namely open tendering, selective tendering and limited tendering, the revised text states that an entity shall conduct procurement in a manner that is consistent with the Agreement using methods *such as* open tendering, selective tendering and limited tendering. This seems to contemplate use of other methods of procurement provided that these are consistent with the Agreement's more specific rules. However, the implications of this change are not clear since, as chapter 10 explains in section 3, it is not easy to envisage a method of procurement that would comply with these specific rules but would not fall within the definitions given for open tendering, selective tendering and limited tendering.

Finally, there has been significant modification of the Parties' obligations to collect and report statistics of covered procurement undertaken which are currently set out under Article XIX.5 of the 1994 Agreement. These obligations have been substantially simplified and reduced in scope, in particular by reducing the level of detail of statistics required from Annex 1 and Annex 2 entities, dropping the current requirement to provide information on origin and allowing use of estimates. The issue

of statistics under the Agreement is discussed further in section 12 of chapter 10.

(v) Challenge procedures

Some changes have also been made in the revised text to the wording of the rules on challenge procedures.

First, rather than simply stating that challenge procedures are available for 'a breach of the Agreement' as under the 1994 GPA (Article XX.2 of the 1994 GPA), the revised text now indicates expressly that where the *domestic* law of a Party does not afford to suppliers the right to invoke directly a breach of the GPA, the obligation to provide challenge procedures applies to failure to comply with the Party's *measures implementing the Agreement*: Article XVIII.1 of the revised text. This makes it very clear that, in the latter case, suppliers cannot enforce the GPA directly under international law but that their legal rights are dependent on the GPA rules being incorporated into domestic law first. This seems merely to serve as a useful clarification of the position which already applies, but is less clearly spelt out, under the 1994 text.⁶⁸ Should appropriate implementing measures not exist, it is available to other Parties to pursue the issue pursuant to the intergovernmental dispute settlement mechanism.⁶⁹

Second, a substantive change appears to be introduced to the provisions on independence of the review body. The 1994 GPA states in its Article XX.6 that review is required before a 'court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment'. The revised text, however, in Article XVIII.5, simply requires a review (or appeal therefrom) to be available before 'an impartial administrative or judicial authority that is independent of the procuring entity whose procurement is the subject of the challenge'. Zhang suggests in chapter 17 that these changes may operate to reduce the requirements of independence of the entity and of its individual members⁷⁰ (a change which she suggests, however, may make GPA accession easier for some states).

As was mentioned at point (i) above, given the recognition in the new preamble of new objectives of integrity and of efficient and effective

68 Arrowsmith, note 8 above, pp. 43–6. Cf. the view of Reich, note 54 above, at pp. 1016–17, who considers that this changes the position and also criticizes this change.

69 On its application to government procurement see Arrowsmith, note 8 above, chapter 14, and the literature cited there.

70 And see also Reich, note 54 above, at pp. 1015–16.

management of resources, it can be argued that the supplier review provisions must be interpreted as applying to all suppliers and not merely to foreign suppliers, even if (which is not entirely clear) the latter is the case under the current text. However, this is of limited significance since rarely will a state choose to give rights only to foreign suppliers.

6. The present: the increased importance of the Agreement in the current economic environment, the prospects for expansion of the GPA's membership and ongoing efforts to conclude the renegotiation of the Agreement

6.1. Introduction

In this section we outline some of the current challenges facing the GPA Parties, and work under way to address those challenges. These include challenges with respect to pending accessions (section 6.2 below); completing the ongoing renegotiations of the text and coverage, building on the work described above (section 6.3); and related technical assistance and capacity-building activities (section 6.4). Attention is also given to the impact that the recent economic crisis has had in elevating the significance of the GPA as an element of the WTO framework, and to related monitoring and surveillance activities in the Committee on Government Procurement (section 6.5).

6.2. Pending accessions to the Agreement

As we have mentioned, the GPA is a plurilateral agreement, meaning that not all Members of the WTO are bound by it. Currently, forty-one WTO Members are covered by the Agreement. These are: Canada; the European Union, including its twenty-seven Member States; Hong Kong, China; Iceland; Israel; Japan; Korea; Liechtenstein; the Kingdom of the Netherlands with respect to Aruba; Norway; Singapore; Switzerland; Chinese Taipei and the United States. The accession of Chinese Taipei took effect only on 15 July 2009, bringing under the disciplines of the Agreement additional procurement opportunities that have been valued at in excess of \$20 billion annually.⁷¹

⁷¹ See 'Ambassador Ron Kirk Applauds Taiwan's Accession to the WTO Agreement on Government Procurement', USTR press release, available at www.ustr.gov/about-us/press-office/press-releases/2009/july/.

As detailed in chapter 2 of this volume on pending accessions to the Agreement by Anderson and Osei-Lah, by the end of 2009 nine other WTO Members (Albania, Armenia, China, Georgia, Jordan, the Kyrgyz Republic, Moldova, Oman and Panama) had applied for accession to the Agreement and submitted relevant documentation. Work on the accession of Armenia is well advanced, and is expected to be completed before the end of 2010. In addition, a further five Members (Croatia, the Former Yugoslav Republic of Macedonia (FYROM), Mongolia, Saudi Arabia and Ukraine) have provisions in their respective WTO Accession Protocols which call for them eventually to seek GPA accession. Overall, there is a clear trend for new countries that join the WTO to be asked to make, as one of their accession commitments, a promise to seek GPA accession.

Of the WTO Members mentioned above, China's accession involves the greatest stakes for the system and raises the most complex issues for Parties' negotiators. Work on the accession of China is, nonetheless, proceeding actively, with China showing significant commitment and the existing Parties to the Agreement also being fully engaged. China's application, together with its initial GPA coverage offer, was submitted to the WTO Secretariat at the end of 2007 and was circulated to the existing GPA Parties early in 2008.⁷² Since then, China's offer has been discussed in several informal sessions of the Committee and many bilateral meetings. China has also submitted its replies to the 'Checklist of Issues for Provision of Information Relating to Accession to the Agreement on Government Procurement' – an important step in the assessment of an accession candidate's procurement legislation and practices. Most recently, China submitted to the Committee on Government Procurement a 'progress report' on its accession and committed itself to provide a revised (and enriched) coverage offer in 2010. Parties have expressed appreciation for this commitment, while also making clear that a key requirement for China to meet in order to join the Agreement will be to agree on an eventual level of coverage that is comparable to that of other Parties to the Agreement.⁷³ The issue of China's accession is considered further by Wang in chapter 3 of this volume.

Jordan has been negotiating its accession over a period of years. In the course of the annual meeting of the Committee on Government

72 GPA/95 of 9 December 2008, paragraph 13.

73 *Report (2009) of the WTO Agreement on Government Procurement* (GPA/103, 12 November 2009), paragraph 17.

Procurement that took place in December 2009, renewed hopes were expressed that agreement on the terms of Jordan's accession could be concluded without significant further delay. Clearly, Jordan's accession, when it takes place, will also be a significant milestone for the GPA, as it will bring within it an important and dynamic developing economy from the Arab and Middle Eastern region.

Work on the accessions of other GPA accession candidates and WTO Members with accession commitments is at a less advanced stage. However, the WTO Committee on Government Procurement has signalled a clear intention to keep all of the pending accessions and accession commitments under active review. A question that remains to be answered is whether, when the accessions of China and other current accession candidates are close to being concluded, other major developing/transition WTO Members (e.g., Brazil, India, Mexico and South Africa) might consider joining the Agreement.⁷⁴ While this would seem to be contrary to currently held positions at least in some cases, such Members might also see potential commercial opportunities in their participation in the Agreement and might not want to be foreclosed from markets to which China has access (via the GPA).

In addition to its obvious significance in broadening the membership of the GPA over time, the accession of major developing and transition economies such as China and (as called for in their WTO accession commitments) Saudi Arabia and Ukraine can be expected to involve important conceptual and practical challenges for the Parties. For example, a key issue in the accession negotiations of China and very likely also those of Saudi Arabia, Ukraine and others will be the treatment of state-owned enterprises – a subject to which we will return in section 7 below, and which is examined by Wang in chapter 8 of this volume. Another looming set of issues concerns the treatment of social policies under the Agreement. In addition, the accession of major developing countries might, in itself, lead to the eventual revisiting of the treatment of tied aid under the Agreement. These are also subjects which we will expand on in section 7 below and which are addressed more fully later in the volume. In these and other respects, pending and future accessions may be expected to transform what has, until now, been largely a developed countries' club

74 In an important development, India became an observer to the Committee on Government Procurement in February 2010. Press reports have indicated that India is looking seriously at the pros and cons of GPA accession. See 'Foreign Firms Could Get Access to Government Contracts', *Financial Express* (India), 3 November 2009.

into an arrangement in which development-related issues and concerns will be increasingly central.

6.3. *Work under way to conclude the ongoing negotiations on the text and coverage of the Agreement*

As already noted, both the text and coverage of the GPA are the subject of ongoing negotiations in the WTO. The purpose of these negotiations is threefold: (i) to improve and update the Agreement in the light, *inter alia*, of developments in information technology and procurement methods; (ii) to extend the coverage of the Agreement; and (iii) to eliminate remaining discriminatory measures.

The basis for these negotiations is provided in Article XXIV.7(b) and (c) of the Agreement. As we have already mentioned, Article XXIV.7(b) calls on the Parties to undertake further negotiations, with a view to achieving the greatest possible extension of its coverage among all Parties, and Article XXIV.7(c) directs Parties to avoid introducing or prolonging discriminatory measures and practices which distort open procurement and stipulates that the negotiations under subparagraph (b) shall seek to eliminate remaining discriminatory measures and practices. The present negotiations are also intended to facilitate accession to the Agreement by additional Parties, notably developing countries. The Agreement in December 2006 on the revised text, discussed in sections 4–5 above, was an important milestone in this respect although, as we have seen, that text is still provisional.

Until recently there were few signs of significant movement towards overall conclusion of the coverage negotiations. Indeed, public reports indicated that there was a gap in aspirations between major Parties in the negotiations and little progress towards overall convergence through mid-2009.⁷⁵ However, beginning in late 2009 and coming through more forcefully in early 2010, there have been signs of renewed energy and possibilities for a successful conclusion of the negotiations. The Chairman of the Committee on Government Procurement, Mr Nicholas Niggli, has put forward a ‘Roadmap’ for conclusion of the negotiations by the middle of 2011, encompassing not only the coverage negotiations themselves but also the finalization of the revised GPA text, the process for bringing

75 ‘US, EU Spar Over WTO Government Procurement Pact, Miss Deadline’, *Inside US Trade*, 21 December 2007.

it into effect, and the future work programme of the Committee.⁷⁶ GPA Parties have expressed strong support for the Roadmap. In addition, hope has been expressed that revised offers in the negotiations from Canada and the United States that have been circulated pursuant to a bilateral agreement between the two countries could provide a springboard for broader forward movement.⁷⁷ Hence, as this chapter is finalized (June 2010), there are renewed prospects for a successful conclusion to the negotiations. This would, in turn, permit the coming into force of the revised GPA text. It might also facilitate future accessions to the extent that these are made easier by the additional flexibilities and more specific and concrete provisions on special and differential treatment that the new text embodies.⁷⁸

These negotiations for expanded coverage are discussed in detail in chapter 6 of this volume by Anderson and Osei-Lah, and the particular position of Canada by Collins in chapter 7.

6.4. *Technical assistance and capacity building*

Concurrently with the above-noted developments regarding accession to the Agreement, there has been an intensification of the WTO Secretariat's technical assistance programme in the area of government procurement. This programme consists of two main types of activities: (i) regional workshops, to which all WTO Members and observers in a particular region are invited, and which are organized for all regions of the developing world/ the economies in transition according to a two-year cycle; and (ii) national workshops, which are organized for individual WTO Members/observers with particular needs, on specific request by those Members/observers to the Secretariat (demands for such events are growing). Periodically, the Secretariat also organizes workshops in Geneva to which a range of GPA observers and other WTO Members or observers from diverse regions may be invited. Typically, regional and Geneva workshops are of three days in duration, while national workshops normally are a day and a half or two days in duration, although they can be longer depending on the needs of the host country.

76 See, for related details, chapter 6 of this volume by Anderson and Osei-Lah on coverage negotiations.

77 See 'GPA Signatories Hope US–Canada Deal Triggers Stalled Market Access Talks', *Inside US Trade*, 19 February 2010, and, for additional details, Part IV below.

78 See again chapter 6 of this volume by Anderson and Osei-Lah.

The broad objectives of the Secretariat's regional and Geneva workshops are: (i) to raise participants' awareness of key concepts and developments in the area of government procurement, particularly concerning the WTO Agreement on Government Procurement; and (ii) to enhance awareness of the potential benefits for them of participating in the Agreement. The workshops also aim to facilitate policy-making on the subject of government procurement at the domestic and regional level (including, where relevant, accession to the GPA).

Recent WTO technical assistance activities in the area of government procurement have given rise to certain insights. To begin with, there appears to be growing awareness among participating countries of the importance of procurement policies as an aspect of governance with major implications for development and the welfare of citizens. In this context, there is a keen interest in most regions not only to gain a deeper understanding of the GPA as an international instrument, but also to reflect on its relationship to related national policies, reform processes and strategic choices. Second, whereas in the past, only a limited number of WTO Members would have been viewed as being potentially ready to negotiate GPA accession, more recently a larger and growing number of Members and observers have implemented reforms to their national legislation and procurement policies that make them potentially ready, either now or a later stage, to consider accession to the Agreement.⁷⁹ Discussions in the Secretariat's technical assistance activities have also highlighted the importance of adequate competition (antitrust) rules as a counterpart to the opening of procurement markets, in order to ensure that the benefits of liberalization are not eroded by collusive practices (see, in this regard, chapter 22 of this book by Anderson, Kovacic and Müller).

6.5. The enhanced importance of the GPA in the context of the economic crisis

In the past year or so, the importance of the GPA as an element of the WTO system has also been reinforced by developments related to the economic crisis and related stimulus measures. The downturn of 2008–9 triggered increased emphasis on public infrastructure spending around the globe.

⁷⁹ WTO Secretariat Technical Assistance Activities Relevant to the Agreement on Government Procurement (GPA/W/308, dated 6 October 2009); and see again chapter 6 of this volume by Anderson and Osei-Lah.

The size of fiscal stimulus packages in OECD countries to date has been estimated at around 3.5% of collective GDP in these countries.⁸⁰ Of course, only a portion of this is accounted for by infrastructure spending. Regarding the latter, it has been estimated that, in 2009, governments around the world have spent around 2.9% of world GDP on infrastructure, up from 2.2% in 2008.⁸¹

Together with the current emphasis on infrastructure spending as an element of economic stimulus, there has been something of a worldwide trend towards the introduction of 'buy-national' policies and requirements relating to public procurement. The website of the 'Global Trade Alert' ('GTA'), an independent organization that monitors trade policy developments internationally, currently lists thirty-one actual or proposed such measures, in countries including Australia, Botswana, Brazil, Canada, China, France, India, Kazakhstan, Korea, Spain, Ukraine and the United States.⁸²

The potential adverse effects of buy-national measures in relation to public procurement policies for the international trading system were profiled in the December 2009 report by the WTO's Director-General to the Trade Policy Review Body (the WTO body that monitors general developments in trade policy at the multilateral level). As the report pointed out, such measures raise concerns for trade and the international trading system in three main ways. First, they can exclude foreign suppliers from markets in which they might otherwise hope to compete, either by reserving the market completely for domestic suppliers or by introducing administrative complexities that make procurement procedures less easily accessible to foreign suppliers. Second, paradoxically, in some cases buy-national requirements may also raise the costs or impede the operations of domestic companies in the countries implementing the relevant measures, if such companies experience difficulties in sourcing domestically and cannot easily obtain waivers for purchases abroad. Third, as in

80 WTO, *Overview of Developments in the International Trading Environment*, Annual report by the Director-General, WT/TPR/OV/12 dated 18 November 2009, available at www.wto.org/english/news_e/news09_e/wt_tpr_ov_12_a_e.doc.

81 A. E. Feldman, 'Infrastructure Spending to Surge in 2009', available at <http://blog.aefeldman.com/2009/01/13/>.

82 See www.globaltradealert.org/measure?tid=All&tid.1=All&tid.3=2205. Of course, it is important not to draw strong conclusions without more detailed study of these measures, particularly given the inclusion of proposed, in addition to actual, measures in the GTA data set.

other economic sectors, the implementation of discriminatory government procurement measures in one country may engender pressures for the adoption of similar measures by other countries.⁸³

In this context, in 2009 increased attention was given in the WTO Committee on Government Procurement, which administers the GPA, to the monitoring of public procurement policy developments related to the economic crisis and related stimulus measures.⁸⁴ A key focus was on the US stimulus legislation, the American Recovery and Reinvestment Act of 2009 (Pub. Law 111-5). This legislation, which is examined in further detail by Linarelli in chapter 25 of this volume and by Schwartz in chapter 26, introduced two new 'Buy American' requirements, one relating to the procurement of iron, steel and manufactured goods for construction and related projects concerning public buildings and works (section 1605 of the legislation), and the other involving the procurement of specified items of clothing or equipment for the Department of Homeland Security (section 604). In both cases, the stimulus legislation addressed the potential for conflict with US international trade commitments by including a further provision stipulating that 'This section shall be applied in a manner consistent with United States obligations under international agreements' (see section 604(k) and section 1605(d) of the legislation). Subsequently, related interim implementing measures were issued. A timely notification on this topic was provided by the United States to the WTO Committee on Government Procurement,⁸⁵ and was the subject of significant discussion in the Committee during the year.⁸⁶ Overall, the framing of these measures and the discussions that took place in the WTO Committee would seem to have illustrated both the value of international instruments and bodies such as the WTO Agreement on Government Procurement and the Committee and the important efforts that have been made by Parties to the Agreement to ensure that the rules are honoured.⁸⁷ Of course, the protections afforded by the Agreement accrue only to the parties to the Agreement and not to non-Parties. Further, as Schwartz emphasizes in his analysis of the US response to the recent crisis: 'The ability to invoke existing trade regimes . . . may be an

83 WTO, note 80 above, p. 42.

84 *Report (2009) of the WTO Committee on Government Procurement to the General Council* (GPA/103, 12 November 2009), paragraph 7.

85 See GPA/98 of 24 April 2009.

86 *Report (2009) of the WTO Committee on Government Procurement to the General Council* (GPA/103, 12 November 2009), paragraph 7.

87 See also WTO, note 80 above, p. 42.

important device to maintain the hard-won gains of trade liberalisation, that are the product of a more deliberative legislative process [than occurs in times of crisis],⁸⁸ thus enabling states to resist detrimental changes to their considered procurement policy that may otherwise be made in response to crisis situations.

Another point to note concerning infrastructure spending in a time of crisis relates to the stress that can be placed on national procurement systems when such spending is quickly ramped up. Indeed, various reports have cited an increased risk of corruption or other abuses in procurement systems around the globe.⁸⁹ The risks for good procurement practices may be even greater where the responsible authorities are required to implement buy-national requirements. In this context, it has been argued that, *particularly* in times of crisis, countries are wise to focus their procurement systems on human capital upgrading, value for money and the integrity of purchasing mechanisms, and not on trade protectionism.⁹⁰ To the extent that this is the case, it further highlights the utility of an agreed body of rules reflecting best practices and binding commitments to non-discrimination in public procurement in a time of economic crisis.

On the other hand, we should also note that an argument is made by Linarelli in chapter 25 of this volume that WTO commitments may also need some limited degree of modification by the introduction of narrow and tailored safeguard provisions. This, he argues, would preserve the fundamental benefits of open markets yet at the same time ensure that states are able to use investment as an effective stimulus to counteract the effects of recession.

7. The future: challenges facing the GPA Parties

7.1. Introduction

Having considered the past evolution of the GPA and the issues being confronted by the Parties currently, especially with regard to pending accessions and efforts to conclude the renegotiation of the Agreement,

88 Chapter 26 of the present volume, section 4.

89 See e.g. 'Cost of Fraud in Global Stimulus Spending Estimated at \$500 Billion', available at www.assetrecovery.org/kc/node/b8f7d4b1-647e-11de-bacd-a7d8a60b2a36.0;jsessionid=3B734478F2F1A77EFEB3543FB67739D4.

90 S. L. Schooner and C. R. Yukins, 'Public Procurement: Focus on People, Value for Money and Systemic Integrity, Not Protectionism', George Washington University Law School Legal Studies Research Paper No. 460, 2009.

this section of the chapter will now highlight the key challenges that the Parties to the GPA are likely to face in the near future as we perceive them. These challenges are grouped in three broad clusters: (i) issues concerning the implementation of the Agreement (section 7.2); (ii) issues concerning future accessions to the Agreement (section 7.3); and (iii) issues concerning the future evolution of the Agreement, including its scope and coverage (section 7.4).

Many of these issues, it will be seen, involve the effective continuation of work that has already commenced during the recent period of activity under, and development of, the GPA. Some of them concern ‘unfinished business’ amongst the existing GPA Parties. Others arise in whole or in part from the need to adapt the GPA to its potentially changing membership, as developing countries and countries with a large state sector become increasingly interested in accession. Arising as they do as a result of progress towards expansion of the Agreement, these are challenges to be welcomed, even if they are not always easy ones to overcome.

7.2. Issues concerning the implementation of the Agreement

7.2.1. Monitoring and surveillance

As noted in section 6.5 above, as a result of the threat posed by the global economic crisis, beginning in 2009 there has been an increased emphasis on monitoring and surveillance activities in the WTO Committee on Government Procurement, which administers the GPA, notably (though not exclusively) with respect to the US stimulus legislation. While the US stimulus legislation is obviously intended as a temporary measure, it is likely that the monitoring of implementation measures will continue to be an important focus of the Committee, particularly as new Parties accede to the Agreement and/or as governments continue to emphasize public infrastructure spending as an element of growth and development strategies.

An enhanced focus on monitoring in the GPA context reflects the maturing of the Agreement as a trade regime, and is consistent with efforts to strengthen surveillance mechanisms that are being made across the WTO.⁹¹ As we have seen, such monitoring is important to ensure that

⁹¹ See P. Lamy, “Stress Test” of the Multilateral Trading System Still to Come’, Report to the General Council on 26 May 2009, available at www.wto.org/english/news_e/news09_e/tnc_chair_report_26may09_e.htm.

the benefits of the Agreement are not eroded in times of political and economic pressure. In the future, monitoring activities in the Committee on Government Procurement could focus not only on crisis-related measures but also on such matters as compliance with procedural rules, and the design and functioning of Parties' domestic review systems. Comparative and analytical work on these issues by the Committee on Government Procurement could provide an important basis for further strengthening of the GPA regime over time, and could also be a source of guidance for WTO Members acceding to the Agreement. A legal basis for an expanded programme of monitoring is provided in Article XXIV.7(a) of the GPA 1994, which provides that 'The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof.'⁹² While this review has normally been carried out relatively quickly in the context of an annual 'housekeeping' meeting of the Committee in which the Committee's annual report to the General Council is reviewed and adopted, it could take on a deeper and wider focus over time.

7.2.2. Modifications to coverage

As noted in section 5.2 above, in the course of developing the revised GPA text, it was agreed that Parties will develop a set of arbitration procedures and indicative criteria for resolving differences in regard to proposed modifications to coverage. While currently the GPA text does not impose a deadline for completing the planned procedures and criteria, it will be important to move ahead on this quickly.

As we mentioned in section 5.2, a number of such modifications are awaiting the agreement of Parties, demonstrating the immediate importance of this issue between the current Parties. As we have noted above, however, the ability to come to a speedy conclusion regarding requests for de-listing of entities may become more important with the eventual accession of countries such as China to the Agreement. Further, the development of satisfactory procedures for this could even assist the current negotiations in this respect, giving the Parties confidence that these issues can be dealt with adequately if such entities are listed in the Agreement during the negotiations.

92 This requirement is carried over in Article XXI.3 of the revised GPA text (GPA/297 of 11 December 2006).

7.2.3. Statistics

Currently, there is a dearth of easily accessible and reliable statistics on the significance of government procurement activities, and particularly of procurement activities covered by the GPA.⁹³ An effort is, however, under way to address this problem in the WTO Committee on Government Procurement, notably by creating an informal sub-body of the Committee on Statistics and Methodological Issues. In addition, in 2009 several Parties submitted statistical reports that have been outstanding for a number of years. As we mentioned in section 5.2 above, and as is elaborated in chapter 10 of this volume,⁹⁴ Parties' obligations on statistics have been amended in the recent revision to the GPA text and are intended to be helpful in this regard, by facilitating the use of national websites and other electronic tools to fulfil GPA requirements relating to the provision of statistical reports.⁹⁵ Continued progress on these matters will be helpful both from the standpoint of accession-related work (in giving acceding WTO Members a better sense of the market access benefits that await them) and to facilitate a better appreciation of the importance of the Agreement overall.

7.3. *Issues concerning future accessions to the Agreement*

7.3.1. Application of the provisions on special and differential treatment in accession negotiations

A first challenge for the GPA relating to future accessions, which is of particular importance in view of the Parties' desire to attract key developing countries to the Agreement, is to ensure that the new provisions on special and differential treatment (SDT provisions) in the revised GPA text – which are being followed even before the revised text comes into force⁹⁶ – are applied effectively in practice. These new provisions, which Müller discusses in chapter 11 of this volume, signal the existing Parties' clear willingness to countenance a flexible approach to developing countries' accession negotiations. They lay down certain expectations for both

93 The best available source of statistical information on global government procurement markets is a 2002 OECD study that uses 1998 data. See OECD, *The Size of Government Procurement Markets*, available at www.oecd.org/dataoecd/34/14/1845927.pdf.

94 See section 12 of that chapter.

95 See the provisionally agreed revised GPA text (GPA/W/297), Article XVI.5 and 6.

96 See Anderson and Osei-Lah in chapter 6 of this volume on accessions.

current Parties and those negotiating accession in relation to, first, the existence of this flexibility in negotiation and, second, the precise way in which flexibility will generally be offered, including through transition periods. In both respects they are a very important step forward.

However, it is actually the case that flexibility has always been available under the current Agreement, since the freedom for states in negotiating coverage arrangements is not constrained by any specific provisions in the text of the GPA 1994 (and nor, still, by the revised text). Indeed, this is indicated by the application of the provisions even before their formal entry into force, mentioned above. It might also be argued that even in their formal state in the revised text these SDT provisions might not be legally binding, or at least not enforceable, because of their general and discretionary nature. Whether they will have any real impact in attracting developing countries to the Agreement may thus depend to a very large extent on the way in which they are approached in practice by the current Parties to afford real flexibility in meeting the genuine economic needs of developing countries, and also those countries' political concerns (in the sense that political constraints may present obstacles to making concessions). Conversely, of course, it is to be hoped that developing countries, in turn, will make real efforts to make appropriate concessions within the SDT framework. In this respect, the early experiences in negotiating accessions under the guidance of these provisions will be important in setting the tone for future negotiations and in convincing developing countries that might be interested in the Agreement that it is worth commencing the accession process.

7.3.2. The treatment of the procurement of state trading companies in the GPA accession process

A second important challenge to highlight in the context of future accessions which – like SDT issues – arises from the changing character of the GPA membership is whether and to what extent the purchasing of state trading companies, including state-owned enterprises, should come under GPA disciplines. This is an important issue in the GPA. First, it is of current importance in the context of the accession of China. Further, it will, undoubtedly, also be an issue in the eventual accessions of countries such as Ukraine and Saudi Arabia, both of which made GPA accession commitments when they joined the WTO, as well as in the accessions of all other countries with a large state sector. According to Ping Wang, the importance of the issue is further magnified by the fact that state trading enterprises are not adequately dealt with by the existing

multilateral agreements.⁹⁷ From this perspective, the GPA – in light of the potential accession of some of the important state trading countries – actually presents the most promising forum for addressing some of the trade issues associated with state enterprises.

Wang has also drawn attention to the conceptual conundrums surrounding this issue:

The most significant technical difficulty in enlisting Chinese state enterprises is arguably the evaluation of the current status, i.e. identifying the extent to which procurement of Chinese state enterprises is de jure and de facto influenced by central as well as local governments; the extent to which such enterprises are shielded from competition due to regulatory and other barriers to market entry; the overall value of state enterprises' procurement and what proportion of such procurement is open to foreign suppliers.⁹⁸

As he points out, there are also other difficulties to address, such as the position when procurement is removed from a listed entity to a non-listed entity, or the common case in which new entities, which are not listed in the GPA, are set up to carry out major new projects.⁹⁹

State trading companies are not uncommon in existing GPA Parties: many of these enterprises are included in GPA coverage and there are some provisions to address the issues that they raise. These include the recent provision made for setting up arbitration procedures and criteria to deal with de-listing of entities that have been removed from state influence or control, considered in section 5.2, and also section 7.2.2 above. However, it remains the case that the nature and scale of the 'state enterprise issue' is somewhat different in the context of the current Parties to the Agreement – who, inevitably, have been largely responsible for shaping the Agreement's focus and current form – than it is in relation to some of the potential accession countries. Ensuring appropriate coverage of these state enterprises and providing an appropriate structure for doing this in negotiation, as well as in ongoing implementation by new Parties, represents an important challenge.

This challenge for the GPA is highlighted and further analysed in two chapters in this volume by Ping Wang – chapter 3, which deals with the accession of China, and chapter 8, which deals specifically with state

97 See chapter 8 of this volume on state trading enterprises.

98 P. Wang, 'China's Accession to the WTO Government Procurement Agreement: Challenges and the Way Forward', *Journal of International Economic Law*, 12 (2009), 680.

99 Wang, note 65 above.

trading companies.¹⁰⁰ In the latter chapter Wang argues for a principled approach to this issue, whereby general rules and criteria are applied to identify which entities should be regulated by the GPA and are used as a starting point in the negotiations.¹⁰¹ Whilst this might be difficult to achieve, and it is not clear whether it is realistic in the short to medium term, what is clear is that the GPA Parties need to give focused attention to these issues in the years to come in order to achieve expansion and appropriate coverage for some of the potential new Parties to the GPA.

7.3.3. Social policies

A concern of some WTO Members in relation to GPA accession has been that accession may conflict with particular social policies that are implemented at least partly through their procurement regimes.¹⁰² Examples of such policies include preferences granted to Bumiputera (indigenous Malays) in Malaysia¹⁰³ and – as analysed in chapter 16 of this volume by Bolton and Quinot – initiatives related to Black Economic Empowerment in South Africa. In both cases, the relevant policies were adopted for the purpose of remedying long-standing social concerns.

The barriers that such policies are perceived to pose in relation to GPA accession should not, however, be exaggerated. As Arrowsmith has noted: ‘GPA coverage is very flexible. Parties can use this flexibility both to apply policies that do not fit with GPA rules, and to avoid any uncertainty over the status of particular policies that have been adopted.’¹⁰⁴ As well as suggesting a flexible interpretation of the GPA’s procedural and other rules,¹⁰⁵ she notes that the relevant ‘flexibilities’ may include outright

100 And see also related comments in Anderson and Osei-Lah in chapter 2 of this volume, section 5.

101 Chapter 8 of this volume, section 5.

102 On this subject see generally S. Arrowsmith, ‘Horizontal Policies in Public Procurement: A Taxonomy’, *Journal of Public Procurement*, 10 (2010), 149; C. McCrudden, *Buying Social Justice: Equality, Government Procurement and Legal Change* (Oxford University Press, 2007); and on compatibility with the GPA, Arrowsmith, note 8 above, chapter 13, and McCrudden, above, Part IV.

103 For background see C. McCrudden, note 102 above, chapter 9. See also C. McCrudden and S. Gross, ‘WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study’, *European Journal of International Law*, 17 (2006), 151.

104 Arrowsmith, note 8 above, pp. 348–9. A similar conclusion is reached by McCrudden, note 102 above, who observes that ‘the GPA [is] capable of being interpreted to give significant legal space’ to linkages of the sort that may be desired by developing countries to advance social objectives (p. 573).

105 Arrowsmith, note 8 above, chapter 13 *passim*.

exclusions of particular products, services and entities from GPA coverage and explicit authorization of policies that might otherwise be at variance with GPA principles. Indeed, the schedules of Canada, Korea and the United States all contain provisions that establish or provide specific authorization for programmes aimed at supporting small, medium-sized and/or minority enterprises. For these reasons, the existence of such policies – even if they cannot be accommodated within the general GPA principles and procedures – does not pose an insurmountable barrier to GPA accession. It does, nevertheless, pose a challenge to some extent, given that achieving legal certainty over or – where needed – authorization for these policies will depend on the willingness of existing Parties to agree to the coverage proposed by acceding states.

A comprehensive discussion of this complex subject is outside the scope of this general chapter.¹⁰⁶ However, it is at least worth noting here that it may be useful that further consideration be given to this issue in order to dispel possible misunderstandings and/or to improve the way in which such policies are dealt with within the GPA.

7.4. Issues concerning the future evolution of the Agreement

7.4.1. Introduction

Following the precedent of the 1994 Agreement, a commitment to further review of the Agreement with a view to improving it is built into the revised GPA text.¹⁰⁷ In addition to other matters that may arise, a number of issues can already be identified as potentially meriting consideration by Parties in a possible new round of amendments. As discussed below, four such issues are: (i) the applicability of the Agreement to various types of public–private partnerships; (ii) its application to arrangements between public sector bodies; (iii) the treatment of tied aid; and (iv) its application to two-stage or ‘framework’ agreements. These will be discussed in turn.

7.4.2. Public–private partnerships

The 1994 GPA applies to ‘any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement’ (GPA Article I.1). GPA Article I.2 then further states:

106 For proposals on addressing this subject by one of the present authors see Arrowsmith, note 8 above, pp. 353–7.

107 See GPA/W/297, Article XXII.10.

This Agreement applies to procurement by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of products or services.

Apart from this, the 1994 Agreement does not elaborate on what transactions are considered as procurement. This leaves uncertain how far the Agreement applies to some types of arrangement that are of potential importance for international trade. The revised text applies to 'any measure regarding covered procurement' (Article II.1 of the revised text) and, as we have seen in section 5.2, the concept of 'covered procurement' is further defined in Article II.2 and addresses some issues not covered by the current text. Nevertheless, some key areas of uncertainty in the 1994 Agreement remain unaddressed.

One such area is public–private partnerships. This concept has no specific legal meaning under the GPA (though it has such a meaning in some national legal systems) but is useful to designate, in a broad sense, the growing phenomenon of private involvement in the provision of public infrastructure and services.¹⁰⁸ Such involvement has increasingly taken a variety of forms that differ from the traditional arrangements whereby the public sector simply makes payments to the contractor for services or infrastructure provided under a contract. At the risk of oversimplification – since such arrangements come in numerous and varied forms – a few key types can be identified that raise issues under the GPA. While the issue of public–private partnerships – and, particularly, the variant of such arrangements known as 'public works concessions' – has been touched upon in informal discussions in the Committee on Government Procurement, there has been no conclusive discussion on this issue which, accordingly, is not explicitly addressed in the provisionally agreed revised GPA text.

As noted, one important example of public–private partnerships is the concession-type arrangement, whereby responsibility for providing and operating infrastructure is entrusted to a private contractor and

108 See generally, for example, M. Bult-Spiering and G. de Wulf, *Strategic Issues in Public–Private Partnerships: An International Perspective* (Oxford: Blackwell Publishing, 2006); C. Tvarnø, 'Public Private Partnership in the European Union', in R. Nielsen and S. Treumer (eds.), *The New EU Public Procurement Directives* (Copenhagen: Djøf, 2005), pp. 183–94. On the concept and its application in the UK, for example, see P. Badcoe (ed.), *Public Private Partnerships and PFI* (London: Sweet & Maxwell, looseleaf), chapter 1 'Public Private Partnerships: A History and Introduction' and chapter 2 'Economic Issues: The Rationale for PPPs, Economic Appraisal and Risk Transfer'.

the contractor is remunerated in whole or in part from payments by public users – for example, a toll road or tramway system. These are the arrangements often referred to as Build-Operate-Transfer (BOT), or variations on this (such as Build-Own-Operate), according to the particular approach adopted. Some or all of the arrangements of this kind have often been excluded from general domestic legislation on government procurement contracts, being instead subject to a special regime as regards both their procurement and administration.¹⁰⁹ Reflecting this approach, UNCITRAL, also, has adopted a special set of provisions for these kinds of arrangements that is separate from its Model Law on Procurement of Goods, Construction and Services.¹¹⁰ Another type of non-traditional arrangement is one where provision of infrastructure or services is tied into a broader transaction – for example, where as part of a regeneration project a contractor provides public infrastructure for the use of the public authority and also undertakes to build commercial premises for its own profit on land provided to the contractor by the authority as part of the arrangement.¹¹¹ The provision of infrastructure and services is also increasingly carried out by the formation of joint venture companies in which both public and private partners hold shares,

109 For example, they are excluded from the EU procurement directives (although subject to transparency and competition obligations under Treaty obligations): for recent analysis see Tværnø, note 108 above; U. Neergaard, 'Public Service Concessions and Related Concepts: The Increased Pressure from Community Law on Member States' Use of Concessions', *Public Procurement Law Review*, 16 (2007), 387. This different treatment is based on the approach of French law, on which the original directives were largely based.

110 Such arrangements are not expressly excluded from the general Model Law on procurement but its application to concessions is left open in the absence of any definitions. However, a separate set of provisions covering award of contracts, administration of contracts and related matters has been adopted: UNCITRAL, *Legislative Guide on Privately Financed Infrastructure Projects* (2001) (section III of the Guide, 'Selection of the Concessionaire', deals with the award of contracts); and UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects, based on the Guide. Both are available at www.uncitral.org. See B. de Cazalet and J. Crothers, 'Presentation of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects', *Revue de droit des affaires internationales/International Business Law Journal*, 6 (2001), 699; D. Wallace, 'UNCITRAL Draft Legislative Guide on Privately Financed Infrastructure: Achievement and Prospects', *Tulane Journal of International and Comparative Law*, 8 (2000), 286.

111 On these kinds of arrangements and the legal problems they have created in EU law see, for example, the very useful paper by the Procurement Lawyers Association, 'EU Public Procurement and Land Development Agreements after the ECJ's Judgment in *Jean Auroux v. Commune de Roanne* (C-220/05)', August 2009, available at www.procurementlawyers.org.

with work being contracted out to the private sector partner.¹¹² When these latter arrangements do not go beyond the simple provision of the services or infrastructure they are often no different in substance from traditional contractual procurements, although they differ in form.

Since the GPA does not deal in explicit terms with such arrangements, the application of the GPA to the choice of supplier is probably to be resolved by reference to the general definition of procurement,¹¹³ and also for some countries (although not most) by reference to certain country-specific definitions of procurement contained in the Parties' Annexes. It is not clear whether a panel might interpret the general definition to refer to the notion of procurement (or similar) as defined in the relevant Party's own legal system or (which seems, in fact, more likely)¹¹⁴ would fashion a common definition to be applied for all Parties. The latter approach would have the advantage of securing more equal coverage between the Parties but the disadvantage of being potentially more intrusive if the Agreement is interpreted to catch arrangements outside the scope of a country's traditional procurement law, possibly in a manner that was not foreseen. Further, if a common definition applies, it is not clear how far it will be considered to cover the various transactions referred to above – although in the case of joint ventures coverage of the choice of partner might in some cases be precluded by the fact that the Agreement covers only contractual procurement. Clearly Parties may differ both in their views on the suitability of GPA procedures for these kinds of transactions (although an argument can be made that they are in fact suitable and sufficiently flexible to apply)¹¹⁵ and their willingness to open up these transactions to other Parties' suppliers.

Given the growing practical importance of these arrangements in general and the significance of infrastructure procurement in times of recession, the coverage of these public–private partnerships may be a significant subject for the GPA in future. Arguably it is better to resolve the question of the Agreement's application by explicit agreement reflected in general

112 By way of illustration again in the EU context see *Commission Interpretative Communication on the Application of Community Law on Public Procurement and Concessions to Institutionalised Public–Private Partnerships (IPPP)*, C (2007) 6661 of 5 February 2008.

113 If such transactions are not procurement under the GPA the question might then arise as to whether they are outside the government procurement exemptions of GATT and GATS and hence subject to non-discrimination rules – although not transparency requirements – for all WTO Members.

114 Support for a uniform interpretation of GPA concepts is found in the *Report of the Panel on Value Added Tax and Threshold* (1984) BISD 31st Suppl. 247.

115 Arrowsmith, note 8 above, pp. 102–3.

definitions and/or the Annexes on coverage rather than, as might occur, through the dispute settlement mechanism.

7.4.3. Arrangements between public sector bodies

Another issue relating to coverage is how far the GPA applies to various types of arrangements between two or more *public* bodies. As services and infrastructure may be provided through a variety of arrangements between public and private sector, so also may the needs of public authorities be met by various forms for cooperation with, or acquisition from, other public sector bodies. This can take numerous forms, ranging from the supply of goods and services by a subsidiary of the acquiring entity, through acquisition from a joint entity set up and operated by a number of bodies to supply them all, through to acquisitions from totally separate public bodies (including central purchasing agencies) or state enterprises. The coverage of the Agreement in this respect is relevant for determining the scope of the available market for current GPA Parties, as well as being potentially important in the context of new accessions. This is particularly so for accessions of countries with a large state sector and in which state enterprises may constitute a significant element of the supply side of the economy. In other words, the subject of state enterprises is important not only from the perspective of regulating their activity on the demand side, as we have highlighted at section 7.3 above, but also from the perspective of their role as suppliers to government.

As with public–private partnerships, it seems that the scope of the Agreement must be determined by an interpretation of the GPA’s general concept of ‘procurement’, combined with consideration of country-specific provisions found in the Annexes of some – but far from most – of the current Parties. However, it is again not clear how far the general concept of government procurement embraces such arrangements.

This issue of arrangements between public sector bodies is examined further in chapter 9 by Cavallo Perin, Casalini and Wang, who explain the nature of the phenomenon and the complex problems to which this subject has given rise in EU law, as well as considering the extent to which the EU’s experience might provide insights for the GPA in addressing the issue. Again, it is arguably most appropriate for this issue to be addressed in explicit terms through a clarification of the concept of procurement and/or through specific definitions/concessions in the Annexes, and this may thus also be a fruitful area of future discussion in any review of the GPA.

7.4.4. The treatment of tied aid

A further issue of coverage that is relevant to the GPA Parties' ambitions to attract more developing countries to the Agreement, and more generally to the WTO's development agenda, is that of tied aid – that is, aid granted (in practice to a developing country) on condition that the goods or services procured with the aid funding are purchased from the donor. In the view of a number of scholars who have examined the effects of this practice, as discussed by La Chimia in chapter 13 of this volume, tied aid constitutes a protectionist practice that is contrary to the underlying principles of free trade embodied in the WTO Agreements. However, it remains largely unregulated under the WTO's multilateral agreements and is also largely outside the scope of GPA disciplines, both under the 1994 text and under the revised text of the Agreement.¹¹⁶ Although the subject of tied aid was raised briefly in the review of the GPA that led to the revised text,¹¹⁷ there was no substantial discussion of the subject and no significant changes were made to the current exclusions.

The subject of tied aid is examined by La Chimia in chapter 13 of the present volume. In that chapter the author suggests that using the GPA to obtain commitments to untie aid would both substantially enhance the effectiveness of aid and promote trade by and between developing countries, and serve to increase the interest of developing countries in acceding to the GPA. Given the potential value of the Agreement for developing countries and also the importance of ensuring that the Agreement offers benefits of sufficient interest to those countries, both to secure accessions and to maximize its benefits for all acceding Parties, this is also a subject that may be timely for consideration in the context of the next GPA review.

7.4.5. Application of the Agreement to two-stage or 'framework' agreements

A two-stage or 'framework' agreement is an arrangement used to procure products or services over a period of time, when the procuring entity does

116 See La Chimia and Arrowsmith, note 12 above; La Chimia, chapter 13 of this volume, and references cited therein.

117 A Norwegian proposal for deleting the general exclusion for tied aid was noted at a meeting of the Committee on Government Procurement in 2003 and the minutes record that there was 'a preliminary exchange of views': Committee on Government Procurement, *Minutes of the Meeting Held on 6 February 2003*, GPA/M/20, 8 May 2003, paragraph 82. Minutes of future meetings do not refer to any further discussions.

not know the exact quantities, nature or timing of its requirements over the time period.¹¹⁸ A 'framework' is set up with one or more suppliers to establish the terms of future procurements (such as price and delivery times) and the procuring entity then places orders under the terms of the framework when the need for a product or service arises. Framework agreements are often used to purchase commodities such as stationery or spare parts and for simple services such as vehicle or building maintenance. They seek the optimum balance between limiting transaction costs and securing the value for money and integrity of the procurement process that is obtained from competition. They do so by providing a method to limit transaction costs and delay when placing individual orders (since the entity may have recourse to suppliers and contract terms already set by the framework) whilst at the same time providing for competition and transparency through a competition between suppliers at the stage of selection for the framework and/or at the ordering stage.¹¹⁹ They are also a valuable tool for ensuring security of supply (when there is more than one supplier on the framework) and for procuring in emergency situations,¹²⁰ as well as for distributing work to a wide pool of suppliers, including small and medium-sized enterprises (which can result from using a framework involving more than one supplier rather than a single large contract).

It should be noted that the terminology of framework agreements is used here to describe such arrangements as it is the one adopted by UNCITRAL in its discussions on this subject¹²¹ (it is also used with a precise legal meaning in the EU procurement directives).¹²² However,

118 See generally S. Arrowsmith and C. Nicholas, 'Regulating Framework Agreements under the UNCITRAL Model Law on Procurement', chapter 2 in S. Arrowsmith (ed.), *Procurement Regulation for the 21st Century: Reform of the UNCITRAL Model Law on Public Procurement* (Eagan: West, 2009), and other references cited therein; M. M. Lintyhorst and J. Telgen, 'Public Purchasing Future: Buying from Multiple Suppliers', chapter 21 in G. Piga and K. V. Thai (eds.), *Advancing Public Procurement: Practices, Innovation and Knowledge-Sharing* (Boca Raton: PrAcademics Press, 2007).

119 On different types of frameworks and the justifications for them see S. Arrowsmith, 'Framework Purchasing and Qualification Lists under the European Procurement Directives', *Public Procurement Law Review*, 8 (1999), 115 at 117–226.

120 On this see, for example, J. I. Schwartz, 'Katrina's Lessons for Ongoing US Procurement Reform Efforts', *Public Procurement Law Review*, 15 (2006), 362; and also chapter 26 by Schwartz in the present volume.

121 On this and for the likely recommendations of the relevant UNCITRAL Working Group see Arrowsmith and Nicholas, note 118 above.

122 On the directive that applies to most public sector contracts see Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 on the coordination

frameworks in this broad sense and their different variations are known by many different terms in the states that use them, including, *inter alia*, indefinite delivery / indefinite quantity (ID/IQ) or task-order contracts, and ‘requirements contracts’ (in the US),¹²³ periodic (or recurrent) purchase arrangements, periodic supply vehicles and umbrella contracts.

Framework arrangements in the broad sense above are used by many of the current GPA Parties,¹²⁴ as well as in many other developed and developing countries,¹²⁵ and in fact account for a significant proportion of overall procurement activity in major jurisdictions. While capable of generating important transactional efficiencies and other benefits as described above, framework agreements can, however, also pose significant challenges with respect to the maintenance of competition, accountability and – of particular concern in the GPA context – non-discriminatory procurement processes.¹²⁶ For example, there are inherent difficulties in policing the placement of many small orders (which, whilst individually of low value, may together represent a significant amount of work), and the natural tendency of those operating the arrangements on a day-to-day basis may be to favour convenience in immediate transactions to the detriment of the larger ‘value for money’ picture.

The current position in respect of the GPA is that neither the 1994 text nor the revised Agreement contains any explicit rules on these types of arrangements. Thus, in the case of contracts that are covered by the GPA in the first place, the possibility for using frameworks is determined by the general procedural rules of the GPA. The rules in the Agreement on open and selective tendering arguably do, in fact, easily accommodate many types of frameworks, including frameworks involving more than one supplier that effectively involve a two-stage award process (using

of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114, in particular Article 1(5) and Article 32. For analysis see S. Arrowsmith, ‘Methods for Purchasing Ongoing Requirements: The System of Framework Agreements and Dynamic Purchasing Systems under the EC Directives and UK Procurement Regulations’, chapter 3 in Arrowsmith, note 118 above.

123 See D. Gordon and J. Kang, ‘Task-Order Contracting in the US Federal System: The Current System and its Historical Context’, chapter 5 in Arrowsmith, note 118 above.

124 For example, on the US approach see Gordon and Kang, note 123 above; and on the current EU system, Arrowsmith, note 122 above.

125 On the position in Africa see S. Karangizi, ‘Framework Arrangements in Public Procurement: A Perspective from Africa’, chapter 6 in Arrowsmith, note 118 above.

126 See, for example, Arrowsmith and Nicholas, note 118 above; C. R. Yukins, ‘Are IDIQs Inefficient? Sharing Lessons with European Framework Contracting’, *Public Contract Law Journal*, 37 (2008), 545.

the pre-stated award criteria first to choose the framework suppliers and then to choose between the framework suppliers when placing a specific order).¹²⁷ On the other hand, to the extent that frameworks are operated in a manner that does not comply with the GPA's specific rules, they may be precluded. Here a number of uncertainties arise. To give just one example, is it possible to set up an arrangement involving several suppliers and, for security of supply reasons, to place orders under the agreement by rotation, given that the GPA requires the award to be based on the most advantageous tender or lowest price? Further, some uncertainties arise over the extent to which the GPA applies in principle to frameworks – for example, how far can it be argued that the relevant value of contracts for the purpose of the agreement is the value of individual orders rather than the value of the framework as a whole? Clearly this is a hugely important question in the context of frameworks. One interesting question that also arises in this context, raised in chapter 10 of this volume dealing with the new procedural rules,¹²⁸ is whether frameworks might be accommodated under the provisions of the revised text that allow procurement methods other than the stated methods of open, selective and limited tendering – but, as mentioned there, in the view of Arrowsmith it is not clear how far all the detailed rules governing those methods need to be applied to 'other' methods.

The above are merely a few examples of many that could be given regarding the difficulties in applying the GPA to frameworks. Given this uncertainty for Parties and also the inherent tendency of frameworks to undermine core procurement principles if left unregulated, work on this subject clearly might be warranted in the planned eventual review of the revised GPA text. Explicit rules to clarify the possibility for using frameworks could provide greater legal certainty for Parties and their procuring entities whilst at the same time ensuring that suppliers are aware of the limits within which such arrangements must be operated, which could enhance the policing of such arrangements. Explicit rules could also deal in an appropriate manner with any difficulties that might arise from applying the present rules to frameworks, both by providing for entities appropriate flexibility that might not currently exist and by including any special controls that might be needed in the particular context of frameworks (for example, regarding information to be given to suppliers in the advertisement of the framework on which entities will

127 Arrowsmith, note 8 above, pp. 272–5.

128 See chapter 10 of this volume, section 3.

use the framework), as well as resolving in an acceptable manner issues such as application of GPA thresholds to these agreements.

8. Concluding remarks

We have seen in this chapter that the plurilateral Agreement on Government Procurement is not the only dimension of work on government procurement in the WTO. Another important potential opportunity for advancing the opening of procurement markets is provided by the negotiations on services procurement that are called for in Article XIII.2 of the General Agreement on Trade in Services. Furthermore, as discussed at the beginning of this chapter, the multilateral work on transparency in government procurement that was initiated at the Singapore Ministerial Conference in 1996 but which was put on hold in the 2004 General Council 'July package' also has the potential to contribute to improved governance and assist with reform processes in WTO Members that are not yet ready for participation in the GPA. The possibility of a resumption of this work following the conclusion of the Doha Round was left open in the terms of the General Council's July package. Still, the prospects for rapid progress on either of these fronts seem limited. WTO Members other than the European Union have shown, to date, a reluctance to engage in full-fledged negotiations on services procurement and there is, as yet, no explicit demand for reinstatement of the multilateral work on transparency.

On the other hand, as we have explained, the WTO Agreement on Government Procurement seems poised for an increasingly important role as an instrument of global economic governance. We have suggested that this entails a number of significant challenges for both the present and the future for policymakers and for those responsible for implementation of the Agreement – including Parties' representatives in the Agreement on Government Procurement, national government officials of the Parties and potential Parties, the WTO Secretariat and the supplier community. Whilst interested parties have already made significant progress with developing and improving the GPA, including through agreement in principle by the Parties on a revised text of the Agreement, there are clearly further matters that require reflection and policy action.

The challenges that have been enumerated reflect a confluence of developments that has increased the importance of the GPA within the constellation of the WTO Agreements in recent years. These include the

increased importance of public infrastructure investment in the context of the recent economic crisis; the gradually growing membership of the Agreement itself and the prospect of accession to the Agreement by major developing countries and countries with a large state sector; the ongoing modernization of the Agreement, which is intended (among other purposes) to facilitate further accessions; and increasing recognition of the role of governance mechanisms as an underpinning of long-run economic growth and prosperity. These developments, along with the challenges we have noted, in turn reflect the maturing of the GPA, the role that it is already playing and the potential that it has to contribute further to world trade and development. We hope that the essays in this book will contribute to addressing the challenges and realizing this potential.