

An Evaluation of Soft Law as a Method for Regulating Public Procurement from a Trade Prospective

The aim of the current thesis is to examine the value of soft law as a method for regulating procurement from a trade prospective. It begins with an introduction chapter setting out the research question and relevant methodology. It then comes to the general analysis of soft law concept, providing the definition, working out the framework for later discussion, and examining its advantages and disadvantages from a general international law perspective. Next, it provides an overview of procurement instruments with trade objectives at the WTO multilateral level, at regional level as well as of international instruments regulating procurement with non-trade objectives, focusing on their objectives, approaches and other key features. After that, the thesis applies the general arguments concerning the value of soft law to the area of public procurement. It attempts to outline the possible advantages and disadvantages that soft law could have in the context of public procurement and to identify factors specific to procurement that might be relevant for soft law's influence in that particular context

However, it is not the purpose of this thesis to provide any factual conclusion on the market opening effects of soft approaches owing to the absence of empirical work. The research work is therefore limited and further research to determine the actual influence of current soft law approaches by qualitative or quantitative study is still waiting to be done, and the current work may only take the first step toward setting out a legal and theoretical framework that might be helpful to inform the development of such research.

It is widely recognised that government procurement¹ accounts for a substantial value of commercial activities in most countries, and the size of public procurement market represents considerable opportunities for international trade.² Public procurement, however, tends to favour domestic supplier. Traditionally, public procurement was utilised as a policy tool to achieve industrial, social and environmental objectives³.

¹ There is no agreed definition of government procurement, however the term 'government procurement' or 'public procurement' (these two terms are interchangeable) in this article refers to 'the acquisition by public bodies, such as government departments and municipalities, of various goods and services that they need for their activities. see Arrowsmith, Linarelli and Wallace, Jr, *Regulating Public Procurement: National and International Perspective* (The Hague: Kluwer Law International Ltd, 2000) at pp.1

² According to the recent comprehensive study at standardized quantification of the government procurement market made by OECD, in 1998, for OECD countries as a whole, the share of total public procurement (consumption and investment expenditures) for all levels of government is an estimated 19.96% of GDP or US\$ 4,733 billion, while for non-OECD countries it is 14.48% of GDP or US\$ 816 billion; the value of the worldwide potentially contestable part of the government procurement markets in 1998 is estimated at US\$ 2,083 billion, which is equivalent to 7.1% of world GDP or 30.1% of the global merchandise and commercial services export. See OECD, 'The Size of Government Procurement Markets' available at <<http://www.oecd.org/dataoecd/34/14/1845927.pdf>>

³ Such objectives are often referred to as 'secondary' or 'collateral' objectives, by way of contrast with the 'primary' concern of a procurement of obtaining goods or services on the best possible terms. For

Also, public procurement constitutes a barrier to trade in many countries for illegitimate reasons like corruption, nepotism and political patronage.

In recognition of the value of free trade which leads to more efficient use of world resources and maximum total economic welfare⁴, a lot of efforts have been made towards the liberalisation of public procurement markets. The last decade of the twentieth century has witnessed the start of a ‘global revolution’ in the regulation of public procurement, involving many ambitious programmes of domestic procurement reform as well as the growth of international trade agreements on procurement.⁵ As regards such international initiatives, they are different in terms of their objectives, approaches as well as other key features. Most of international or regional regimes which seeks to open up public procurement market are through formal negotiation and consequential binding agreements, notably, the Agreement on Government Procurement (‘GPA’) under the WTO system, the European Community (‘EC’) procurement directives, the North American Free Trade Agreement (‘NAFTA’). However those liberalising efforts met with limited success in the sense that only a limited number of countries have accepted comprehensive multilateral disciplines on government procurement, leaving the procurement markets of the majority of developing countries unaddressed in the world trading system.

Meanwhile, certain international instruments regulating public procurement can be also found operating on the basis of soft law commitments. The Asian-Pacific Economic Cooperation (‘APEC’) provides a remarkable example for such an approach. The Government Procurement Expert Group (‘GPEG’) within APEC was established in 1995 to consider ways to increase transparency of, and liberalise, government procurement market throughout the Asia-Pacific region.⁶ Pursuant to its 1996 Osaka Action Agenda, the GPEG had developed non-binding principles (NBPs)⁷ on public procurement by 1999. At present, member economies has completed the first round of voluntary reviews and reports against theses NBPs. The principle of transparency included in the original set of NBPs has now been subsumed into the are-specific APEC transparency Standards on Government Procurement.⁸

Like the usual APEC approach, there is a notable flexibility in its procurement regime,

example, governments may reserve contracts to certain disadvantaged groups to promote social equity, give preference in the award of contracts to domestic industry to support employment. See Arrowsmith, Linarelli and Wallace, note 1 at pp. 237

⁴ For general information as to the value of free trade, please refer to the literature on the economics of international trade, such as Krugman and Obstfeld, *International economics: theory and policy* (Addison-Wesley, 2004)

⁵ Arrowsmith, ‘National and International Perspectives on the Regulation of Public Procurement: Harmony or conflict’, In Arrowsmith and Tybus (ed), *Public Procurement: Global Revolution* (London: Kluwer Law International, 1998) at pp.3

⁶ See APEC website www.apec.org

⁷ The APEC GPEG NBPs are Transparency; Value for Money; Open and Effective Competition; Fair Dealing; Accountability and Due Process; an Non-discrimination. *ibid*

⁸ See the Revised APEC Non-binding principles (NBPs) on Government Procurement, available at http://www.apec.org/apec/apec_groups/committees/committee_on_trade/government_procurement.html

and informality has been preserved. Such NBPs are non-binding in the sense that member economies may decide which ones to apply and how to translate these elements into practical measures, taking into account the specific characteristics of their economy.⁹ As a result, it is hardly surprising that such an approach makes much easier for members to agree on what should be included in the Principles compared with binding agreements, and it is also not necessary to set out detailed rules concerning its scope, derogation etc, as is the case with most of binding agreements such as the GPA.¹⁰ Similar soft international instruments aiming at opening up procurement markets includes the South Cone Common Market ('MERCOSUR'), the Common Market for Eastern and Southern Africa ('COMESA') and etc.

From the international law perspective, the variety of forms of the international commitment have been adopted in the international legal system owing to an ever-growing number of trans-national problems, among which soft law is playing increasingly important and varied roles.¹¹ The focus of my thesis is to evaluate soft law as a means to regulate public procurement from a trade perspective. However, before looking at the use of soft law in public procurement, it is helpful to provide for a definition of 'soft law' to set out the scope of the subject matter for the purpose of the thesis. In order to work out a definition for soft law, it is important to specify the meaning of 'hard law' in advance as the concept 'soft law' owes its existence to the comparison with the term 'hard law'. 'Hard law' in this thesis refers to legally binding rules that create definitive rights or obligations, and enforceable through violation avoidance measures, dispute settlement procedures etc. Accordingly, 'Soft law' is defined as rules of conduct that are formulated in instruments which lack certain core elements of hard law, but nevertheless not devoid of all the legal effects of hard law, and that are aimed at and may have practical effects comparable to hard law.

On the one hand, 'law' in the context of soft law implies that it must establish rules of a normative nature, prescribing or inviting its participants to adopt or abstain from certain behaviours, which is very different from political statements only expressing a certain view or instruments merely providing information.¹² On the other hand, soft law is distinguished from hard law because of the lack of certain legal features of the latter such as legally binding force, precision, and enforceability. Soft law is 'soft' in the sense that it either adopts a non-binding form, or contains vague and ambiguous provisions embodying merely programmatical, hortatory, aspirational, or promotional obligations. Many international obligations couched in legally binding form lack

⁹ Transparency Principal see APEC website
<http://www.apecsec.org.sg/apec/documents_reports/government_procurement_experts_group/2003.html#I>

¹⁰ Arrowsmith, 'The APEC Document on Principles of Transparency in Government Procurement', (1998) *Public Procurement Law Review* CS38 at pp.CS40

¹¹ Shelton, 'Introduction: Law, Non-law and the Problem of 'soft law'', In Shelton (eds) *Commitment and Compliance: the Role of Non-binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000) at pp.17

¹² See L. Senden, 'Soft Law in European Community Law' (Oxford and Portland Oregon, 2004) at pp.112

significant levels of precision or enforceability and are thereby soft law under the above definition. Nevertheless, in many cases, soft law performs legal functions comparable to hard law.

Largely based on Abbott *et al's* legalization framework¹³ but with slight adaptations, this chapter will examine the concept of soft law in the following four dimensions¹⁴:

1. *bindingness*, referring to whether states are legally bound by obligations;
2. *precision*, referring to the degree of ambiguity of the language defining parties' obligations in legislative text;
3. *discretion*, referring to the degree of discretion states have in negotiating and implementing their obligations;
4. *enforceability*, referring to the degree to which the degree to which member states have delegated the power to third party to implement rules.

States make choices of varying degrees in each dimension and different combinations across these four dimensions in response to their interests, needs as well as different characteristics of subject matters. Accordingly, the realm of soft law begins once legal instruments are weakened along one or more of the dimensions of bindingness, precision, discretion and enforceability, and comes in many varieties. Again, it is emphasized that it involves a matter of degree and graduation with regard to the dimensions of precision, discretion and enforceability, but it is not the case for the dimension of bindingness. The choice is binary in terms of the issue of bindingness.

As Baxter stated, 'provisions of treaties may create little or no obligation, although inserted in a form of instrument which presumptively creates rights and duties, while on the other hand, instruments of lesser dignity may influence or control the conduct of States or individuals to a certain degree, even though their norm are not technically binding'.¹⁵ The distinction between hard law and soft law is neither purely a matter of being legally binding or not, nor is there such a specified point somewhere between the 'hard' and 'soft' pole on each of the other three dimensions, from which hard law ends and soft law begins. The line between hard and soft law becomes increasingly blurred. In treaties, thousands of 'empty formulae' can be found while such agreements in a non-legal form as the Final Helsinki Act 'create something less than strict legal obligations but are not lacking in legal influence or impact'.¹⁶

Next, the role of soft law has also been discussed. Opinion is divided over whether the soft law phenomenon plays a positive role in the contemporary international system. States do not just happen to arrive in soft-law instruments, instead soft law approaches

¹³ See Abbot, K., R. Keohane, A. Moravcsik, A-M. Slaughter, D. Snidal, 'The Concept of Legalization' (2000), 3 *International Organization* 401-419

¹⁴ I am deeply indebted to Mr Happold for his valuable contributions in developing the above template for discussing the concept of soft law

¹⁵ Baxter, 'International Law in 'Her Infinite Variety'' (1980) 29 *International and Comparative Law Quarterly* at pp. 565

¹⁶ Baxter, 'International Law in 'Her Infinite Variety'' (1980) 29 *International and Comparative Law Quarterly* at pp. 559

are deliberately chosen. It is especially true when hard law instruments have been expressly rejected or proven to be unachievable, but the subject matter still demands at least a degree of international regulation. In many cases, there is a sufficient community of interest among states for them to wish to formulate some sort of restraint on their actions, which inspires the formulation of certain instruments, but at the same time will be counterbalanced by the divergent interests of different states.¹⁷

In particular, with regard to the value of soft law serving as a second best to hard law, it has been emphasised that soft law has been repeatedly resorted to as a method to overcome the deadlock in the international negotiation process and to avoid costs of having no agreement at all. Among all the four dimensions of soft law, soft law in terms of the non-bindingness has been argued as the first and foremost means to foster compromises where there are substantive disagreements.

Furthermore, soft law can be regarded as 'intermediate step' towards the formation of hard law. Taking the non-binding rules as an example, they have the potential to harden into binding rules by providing a basis for later treaty negotiations as well as the psychological element, i.e. *opinio juris* for customary international law. Some authors attribute the significance of non-binding instruments exclusively to their later transformation into hard law and assert that this transformation is a major goal of the formulation of non-binding rules.¹⁸ However it could be argued that non-binding instruments do not play merely a preliminary role, and assume functions that go well beyond that of being an intermediate step to the formation of later treaties. Not all non-binding instruments necessarily become legally binding; not all of them are intended to do so. Even if soft law does not harden, it still performs important legal functions and plays an indispensable role given the structure of the international system.¹⁹

However, it is worth emphasizing that the unachievability of hard law should not be regarded as the only reason for choosing soft law because it does not explain why states would prefer soft law to hard law even if the latter could be achieved in many cases. Certain circumstances have been identified under which soft law could be regarded as a better alternative to hard law: first of all, soft law can be utilised as a method to reduce negotiating costs; secondly, soft law may be more appropriate to regulate extremely sensitive subject matters; thirdly, soft law can offer better options to address uncertainty and complexity; fourthly, soft law may be deliberately opted for in order to attract wider participation; and lastly, soft law form may sometimes be chosen for technical reasons. Despite many advantages soft law can better offer than hard law, the disadvantages of soft law have also been mentioned. Firstly, soft law

¹⁷ See Handl, G.F., W. M. Reisman, B. Simma, P. M. Duputy, C. Chinkin and R. D. L. Vega, 'A Hard Look at Soft Law' (1988) 82 *Am. Soc'y Int'l L. Proc.* 371 at pp. 386

¹⁸ See Chinkin, C.M. 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *Int'l & Comp. L. Q.* 850, at pp.856

¹⁹ Handl, G.F., W. M. Reisman, B. Simma, P. M. Duputy, C. Chinkin and R. D. L. Vega, 'A Hard Look at Soft Law' (1988) 82 *Am. Soc'y Int'l L. Proc.* 371 at pp. 375

may lack the function of hard law of being served to strengthen the credibility of commitment; secondly, soft law may raise the transaction costs of subsequent interactions.

After defining the concept of soft law and examining its advantages and disadvantages from a general international law perspective, these general arguments concerning the value of soft law in terms of its four dimensions will be applied to the area of public procurement respectively. The application of soft law in terms of its non-binding form has been done as the following paragraphs, which can demonstrate the general approach used also for examining the other three dimensions – vagueness, discretion and enforceability.

The first dimension of soft law discussed in the current thesis is non-bindingness, and that is to say, that laws can be soft in the sense that they are not legally binding. As has been previously examined, soft law in terms of non-bindingness can play an important role in serving as a second best to hard law when a binding form is unachievable in a short run; or even as a better alternative to hard law under certain circumstances. It has generally been argued that soft regulation is better than nothing in the case that a binding form has been expressly rejected or proven to be unachievable, but the subject matter still demands at least a degree of international regulation. Further, soft law in terms of non-bindingness can provide states with good opportunities to know more about the subject matter and build up more confidence and consensus, which may contribute to the final conclusion of legally binding rules in the future.

This general argument can be applied to the particular area of public procurement and the APEC NBPs furnishes a good example. As previously mentioned, it is widely recognised that domestic discriminatory procurement practice poses a significant barrier to trade, and there is an urgent need for a degree of international regulation. However, because of the limited membership of the GPA and the failure of including the issue of transparency in government procurement inside the Doha Work Programme, public procurement in many countries especially developing countries is currently left undressed for any hard law international regulation. The APEC NBPs is the only international procurement instrument which subjects public procurement in major developing countries such as China and Indonesia to a certain degree of international regulation. The APEC is also unique in that it is the only inter-governmental grouping in the world committed to reducing trade barriers and to increasing investment without treaty obligations required of its participants.²⁰ Accordingly, unlike the GPA, the EC procurement rules, and the NAFTA Chapter 10,

²⁰ See information about APEC available at its official website, http://www.apec.org/apec/about_apec.html

the APEC NBPs has explicitly denied any intention to create legally binding obligations for its member economies by its very nature.

The APEC member economies are expected to comply with the NBPs and submit their voluntary reviews and reports against these principles. It is proclaimed that those NBPs 'have contributed to the successful promotion of transparency and the liberalization of government procurement markets across member economies'²¹. Although there is still a lack of empirical research on the precise impact that the NBPs have on the APEC member economies, the soft regulation it provides is surely better than no regulations at all for the member economies of the APEC NBPs which are yet to undertake any legally binding commitment under the GPA or regional procurement regimes.

This is also the case with the COMESA directives. As far back as 1998, the study conducted by the COMESA Secretariat showed that public procurement laws of the member countries tended to restrict trade. As the economies of COMESA members become more integrated and trade more liberalised, the need to modernise and harmonise procurements laws within the COMESA region becomes greater by the day. However, in the face of major difficulties in the procurement area such as deficiencies in procurement practices and weak institutional capacities, it has been recognised that hard law obligations could not easily be obtained in the short run. The COMESA Public Procurement Reform Project ('the PPRP') funded by the African Development Bank was carried out from 2002 to 2004. Among its achievements, the COMESA procurement directives of a non-binding nature were adopted in 2003, which filled an important gap in its regional integration process. The COMESA members are encouraged to develop single and comprehensive national procurement laws following the directives.

Moreover, different from the APEC experience, the liberalising effort on procurement within the COMESA did not end with PPRP and finish with the achievement of non-binding directives. The public procurement reform initiative is now a permanent programme of COMESA with the formation of the Technical Committee of Procurement Experts. One of the immediate challenges now facing the technical committee is to develop and seek agreement on a regional public procurement agreement, which is expected to be a legally binding instrument.²²

With the introduction of PPRP especially the procurement directives, the COMESA

²¹ See Government Procurement Experts' Group at <http://www.apec.org/apec/apec_groups/committees/committee_on_trade/government_procurement.html>

²² Karangizi, *Government Procurement in COMESA* (8-10 June 2004) (Paper Presented to the WTO Workshop in Accra, Ghana) at pp.9

has been witnessing some progress in liberalising the procurement. A significant number of member states have adopted new procurement legislation or reformed their old ones according to the COMESA directives in spite of its non-binding nature. However, there is still a large gap between the directives objective and output to date, mainly due to lack of capacity at member state level.²³ A number of COMESA countries which have recently been through some political disturbances of one form or another, are still struggling to gain stability in economic fundamentals,²⁴ which may affect the pace of procurement reform as well as the rapid establishment of a binding regional procurement regime. At present, the non-binding directives arguably serve as an intermediate step towards the final realisation of legally binding regional agreement by means of building capacity, generating consensus and promoting confidence in the area of procurement.

With regard to the value of soft law serving as a second best to hard law, it has been emphasised that soft law has been repeatedly resorted to as a method to overcome the deadlock in the international negotiation process and to avoid the costs of having no agreement at all. Among all the four dimensions of soft law, soft law in terms of the non-bindingness has been argued as the first and foremost means to foster compromises where there are substantive disagreements. The negotiating history of the OECD instruments combating foreign bribery in international business transactions provides an illustration of this argument.

In 1989, The U.S firstly brought the issue of foreign bribery to the OECD with the aim to level the playing field for its exporting industries in international business transactions, as it was the only country outlawing extraterritorial bribery before the OECD initiatives on combating bribery came in. Other OECD member states were, however, not genuinely interested in negotiating a multilateral anti-bribery agreement. Many member states such as Germany, France, Japan and Spain openly opposed any anti-bribery intervention. Various reasons were claimed by these countries in order to oppose anti-corruption intervention, for instance, the German and French representatives objected on the grounds that laws criminalising bribery of foreign officials were extraterritorial; and another argument raised by Germany was that bribery is a very insidious practice which may pose difficulty in the discovery and proof, but as George, Lacey, and Birmele pointed out, the real reason behind the resistance of France and Germany was to protect their domestic laws which made certain bribes tax deductible.²⁵ Indeed, it was a reality that firms from other OECD

²³ Karangizi, *Government Procurement in COMESA* (8-10 June 2004) (Paper Presented to the WTO Workshop in Accra, Ghana) at pp.13

²⁴ Karangizi, *Government Procurement in COMESA* (8-10 June 2004) (Paper Presented to the WTO Workshop in Accra, Ghana) at pp.11

²⁵ See B. C. George, K.A. Lacey, and J. Birmele, 'The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes toward Corruption in Business Transactions' (2000) 37 *Am. Bus. L. J.* 485 at pp.496

members face commercial incentives to conduct foreign bribery and their governments face political incentives to support them.

Initially, the U.S. made a strong push towards a legally binding convention, requiring all OECD members to adopt relevant legislations equivalent to its Foreign Corrupt Practice Act ('FCPA')²⁶. As negotiations proceeded, however, the very states that had overtly opposed any regulation on the issue turned to supporting a binding treaty, with the true intention of using the high negotiating costs of binding treaty to impede the conclusion of any agreement.²⁷ In response to this, the U.S took a gradualist approach to achieve its ultimate aim of concluding a binding convention through a series of non-binding Recommendations. Consequently, the OECD anti-bribery initiatives resulted in the first Recommendation on Bribery in International Transactions adopted in 1994 ('the 1994 Recommendation')²⁸; and a second Recommendation on the Tax Deductibility of Bribes to Foreign Officials in 1996²⁹; and then the above Recommendations were revised and incorporated in 1997 as the Revised Recommendation of the Council on Combating Bribery in International Business Transactions ('the Revised Recommendation')³⁰.

Although all of these Recommendations were far from binding in nature, they were used effectively to build up consensus for the later passage of the Convention. They allowed time for member states to consider not only commercial unfairness to the U.S. firms and global economic efficiency but also democracy and good governance around the world. Eventually, the Convention on anti-bribery, a hard law instrument in terms of its legally binding form, was adopted in 1997 by not only all OECD states but also several non-OECD states.³¹

The value of soft law for being an effective device for overcoming deadlock during negotiations deserves special attention in the area of public procurement. Public procurement has always been a controversial issue during international trade negotiations, and it is not surprising that negotiating parties may find themselves stuck in substantial disagreement on many aspects of the issue. Different legal

²⁶ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, tit. I. 91 Stat. 1494. Available at <<http://www.usdoj.gov/criminal/fraud/fcpa.html>>

²⁷ See B. C. George, K.A. Lacey, and J. Birmele, 'The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes toward Corruption in Business Transactions' (2000) 37 Am. Bus. L. J. 485 at pp.490

²⁸ See OECD Council Recommendation C(94)75/FINAL on Bribery in International Business Transactions, May 27, 1994. available at <http://www.oecd.org/document/21/0,2340,en_2649_34855_2017813_1_1_1_1,00.html>

²⁹ See OECD Council Recommendation C(96)27/FINAL on Tax Deductibility of Bribes to Foreign Public Officials, April 11, 1996. available at <http://www.oecd.org/document/46/0,2340,en_2649_34855_2048174_1_1_1_1,00.html>

³⁰ The 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions ('the Revised Recommendation'). Available at <http://www.oecd.org/document/32/0,2340,en_2649_34859_2048160_1_1_1_1,00.html>

³¹ Nevertheless, it should be noted that this Convention is still a kind of compromise of different aspects of 'soft law' or 'hard law': it is hard law in term of legally binding form, and it is soft law in terms of its vague content and broad discretion in implementation. See **Section 5.2.2.1.**

traditions and values across states further complicate the negotiation. It has proven more difficult to negotiate a government procurement agreement at multilateral level. The firm resistance the negotiation of a proposed transparency agreement in procurement has met with at the WTO shows such difficulty.

At the 1996 Singapore Ministerial Conference, public procurement was identified as one of the four new areas for future trade negotiations³², and a Working Group on Transparency in Government Procurement ('the WGTGP') was consequently set up to conduct studies on this area.³³ At the Fourth Ministerial Conference in Doha in 2001, the WTO member agreed that negotiations regarding a multilateral agreement on transparency in government procurement would be launched at the Fifth Ministerial meeting, subject to consensus on the modalities of negotiations.³⁴ However, the 2003 Cancun Ministerial Conference ended in deadlock by failing to produce a consensus as to whether negotiations should be started over the Singapore issues within the context of the Doha Work Programme. In the end, the General Council Decision of 1 August 2004 finally concluded that the issue of transparency in government procurement would not be taken forward in the Doha Work Programme, and therefore no work towards negotiations on this issue would be done within the WTO during the Doha Round.³⁵

The failure to commence negotiating the proposed transparency agreement was mainly due to substantial disagreements among the WTO members over the interpretation of the mandate on government procurement in this Declaration, over the role and purpose of the WGTGP, as well as over the specific elements of a potential multilateral transparency agreement in procurement.³⁶ Following the Doha mandate, the WGTGP studied transparency-related provisions in existing international instruments and in national procedures and practices, and identified twelve key issues for the possible contents of the proposed transparency agreement. The opinions of

³² These issues are the so-called Singapore issues, including trade and competition; trade and investment; transparency in government procurement and trade facilitation.

³³ See Singapore Ministerial Declaration, adopted on 13 December 1996, WT/MIN(96)/Dec, para. 21. available at <http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm>

³⁴ WTO, Ministerial Declaration, Ministerial Conference Fifth Session, 14 November 2001, WT/MIN(01)/DEC/1, para. 20-26. available at <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>

Negotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers. We commit ourselves to ensuring adequate technical assistance and support for capacity building both during the negotiations and after their conclusion.

³⁵ In 1st August 2004, the WTO General Council passed a historic package of framework and agreements agreed on a set of actions (the 'July Package'). See Decision Adopted by the General Council on 1 August 2004 1 (g) para. 2. General Council-Doha Work Programme-Draft General Council Decision of 31 July 2004, WT/GC/W/533 Available at <http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm>

³⁶ For detailed information, see World Trade Organization, 'Report on the Meeting of 29 May 2002' (2002) WT/WGTGP/M/14. 13 August 2002; World Trade Organization, 'Report on the Meeting of 10-11 October 2002' (2003) WT/WGTGP/M/15. 9 January 2003; World Trade Organization, 'Work of the Working Group on the Matters Related to the Items I-V of the List of the Issues Raised and Points Made' (2002) WT/WGTGP/W/32. 23 May 2002

member states were, however, divided almost over each of these twelve issues.³⁷

It can be seen that most of major disagreements among member states involve the four dimensions of soft law. There were heated arguments over whether the agreement should take the non-binding form; whether its content should be principle-oriented; whether a significant discretion should be given in implementing the rules on a specific issue and even more discretion should be given to developing countries; and whether the WTO Dispute Settlement Mechanism should be applicable to the agreement and domestic review procedures should be made available for aggrieved parties under the agreement.³⁸ In particular, disagreements over the issues of its binding nature and its challenge procedure were regarded as the two major obstacles on the road to the proposed transparency agreement.³⁹ Arguably, disagreement over most of the above issues would likely be resolved if negotiating parties could agree on the non-binding form for the agreement. If the proposed transparency agreement was agreed to be of a non-binding nature, there would be no need for the WTO dispute settlement procedure to be applied; and the non-bindingness itself would leave member states a broad discretion in implementation; and also it would be much easier for negotiating parties to agree on the precise content of the agreement.

Behind the disagreements over specific aspects of the agreement among the WTO members, it showed the difficulty to reconcile the opposite positions held by developed and developing countries: on the one hand, developed countries were keen to obtain a greater share of the developing countries' procurement market; developing countries wanted to preserve their current procurement policies on the other.⁴⁰ Although the negotiations of the proposed transparency agreement were agreed to be limited only to the transparency aspects of procurement explicitly excluding the issue of market access, a number of developing countries still shared the fear that a multilateral transparency agreement would only be a first and tactical measure to be taken to eventually address questions of market access which only serve the export interests of the developed industries.⁴¹

It has been recognised that the real reason behind the strong resistance towards the

³⁷ For detailed information, see World Trade Organization, 'Report on the Meeting of 29 May 2002' (2002) WT/WGTGP/M/14. 13 August 2002; World Trade Organization, 'Report on the Meeting of 10-11 October 2002' (2003) WT/WGTGP/M/15. 9 January 2003; World Trade Organization, 'Work of the Working Group on the Matters Related to the Items I-V of the List of the Issues Raised and Points Made' (2002) WT/WGTGP/W/32. 23 May 2002

³⁸ For detailed discussion, see Section 3.1.3.

³⁹ See Priess and Pitschas, 'World Trade Organization: the Proposed WTO Agreement on Transparency in Government Procurement – Doha and Beyond', P.P.L.R. 2002, 2, NA13-18 at pp.14-15

⁴⁰ Rege, 'Transparency in Government Procurement' (2001) 35 *Journal of World Trade* 489 at pp.499

⁴¹ Decker and Priess 'The WTO General Council Decision of 1 August 2004 – a Note on the Decision not to Launch Negotiations on Transparency in Government Procurement during the Doha Round' (2004) Public Procurement Law Review 2004, NAY.14 at pp.17 The reason behind this attitude can be understood by previous discussing their response to the existing GPA

proposed transparency agreement was the fact that many members especially developing country members wanted to retain the freedom to use procurement to promote secondary objectives. Developing countries feared that they would suffer if foreign companies were put into direct competition with their unprotected domestic industries. This concern can be well addressed by resorting to soft law in term of non-bindingness. The non-binding nature of the agreement can provide member states with a learning opportunities to know about the real consequences of a transparency agreement in procurement, while allowing them to maintain substantial control if adverse circumstances arise.

Even for countries which opposed the very idea of having agreement in procurement, they were more likely to accept the proposed transparency agreement if they were ensured to retain absolute freedom to respond in the case of its future development to a full-blown binding agreement. Meanwhile, as for developed countries aimed at gradual liberalisation of developing countries' procurement market, the non-binding transparency agreement would be a good opportunity to allow developing countries to learn more about the subject, to build up confidence, and to gain real benefits, which would often lower the perceived costs of subsequent moves to a binding instrument with market access commitment.

Nevertheless, no matter whether through an intermediate soft law agreement or not, a binding agreement with market access commitment in procurement is deemed to be politically much more difficult to be achieved at the WTO multilateral level than ones at regional level such as the EC or the NAFTA. Unlike the EC with comparatively similar minded members, the WTO has a vast number of member states which are at different levels of development and with diversified economic, political and legal conditions. Developing country members may be politically less motivated to enter into a multilateral procurement agreement owing to its less competitive national industries. On the one hand, national industries with vested interests under discriminatory procurement policies will be active in lobbying their government to block a multilateral procurement agreement, and this opposing voice tends to be louder than that in developed countries as they are more vulnerable to foreign competition. On the other hand, compared with its counterpart in developed countries, export industries of developing countries may have less incentive to support the agreement in domestic political market, because of their little interests in the procurement market of developed countries.

Moreover, the negotiation of a multilateral procurement agreement at the WTO will be inevitably much more complicated than that of the NAFTA Chapter 10, even though the latter also involves the participation of a developing country member. There is certainly no comparison between the negotiations among the 150 WTO

members and those among only 3 parties of the NAFTA, neither between the developing country member of NAFTA, Mexico with those of the WTO such as Niger and Zambia in terms of their readiness for international regulation in procurement.

As a better alternative to hard law

As previously pointed out, the value of soft law is far beyond simply providing a certain degree of regulation or serving as a method to overcome deadlock during negotiations or an intermediate step towards the later formation of hard law where hard law is temporarily unachievable. In general, Chapter 2 identified certain circumstances under which soft law could be regarded as a better alternative to hard law: first of all, soft law can be utilised as a method to reduce negotiating costs; secondly, soft law may be more appropriate to regulate extremely sensitive subject matters; thirdly, soft law can offer better options to address uncertainty and complexity; fourthly, soft law may be deliberately opted for in order to attract wider participation; and lastly, the soft law form may sometimes be chosen for technical reasons. All the arguments listed above can generally apply to the area of public procurement and the first four are particularly relevant with regard to international procurement law.

As far as negotiating costs are concerned, every agreement entails some negotiating costs – delegates from different countries sitting together, exchanging ideas on the subject matter, restricting the scope of negotiation, bargaining for different interests, drafting the legislative text and so forth. Generally speaking, the negotiating costs of international treaties are higher than those of non-binding agreements, as states are normally more cautious in negotiating and drafting legally binding agreements owing to its higher costs of violation. In particular, those negotiating costs tend to be especially high where subject matters are sensitive or complex, and public procurement is exactly an area that is generally sensitive and often complex for international regulation.

The lengthy and heated negotiating history of the GPA can demonstrate the high negotiating costs that a legally binding multilateral procurement agreement may possibly entail. The GPA was developed based on a provision in the old GATT Government Procurement Agreement calling for periodically broadening and improving the agreement.⁴² The old GATT procurement agreement entered into force in 1981, the negotiations were officially reopened only three years after the entry into force of the agreement, leading to the conclusion of its protocol of Amendments in

⁴² Art.IX:6(b) of the old GATT Public Procurement Agreement provides that ‘not later than the third year from the entry into force of this Agreement and periodically thereafter, the Parties thereto shall undertake further negotiations, with a view to broadening and improving this Agreement on the mutual reciprocity...’

1986.⁴³ The major achievement of this amendment lay in the area of improving the rules of the agreement, and from 1987 to 1995, the negotiations continued to accomplish a totally new government procurement agreement or today's GPA.⁴⁴

The negotiation for the GPA was a time-consuming and complicated process and the negotiations on the coverage are illustrative on this point. As have been discussed, it has been a long tradition for many governments to utilise public procurement as a policy tool to promote secondary objectives, and states only want to subject certain types of procurement to international regulation, which could be quite different according to their own particular considerations. It was recognised that the coverage of the old GATT procurement agreement could hardly be expanded with a significant increase should a uniform approach be taken. Given up a uniform coverage, member states were, in fact, conducting item-for-item bilateral negotiations between each other, in relation to types of covered contracts, types of regulated entities and thresholds. The principle of reciprocity further complicated this exercise – member states would extend bilateral market access concessions to the third member state only if comparable access is accorded to their own industry by the third state. This tit-for-tat negotiation ended up with most states having a detailed and complicated list of derogations to different members. It has been argued that the GPA is more like a series of bilateral agreements under the multilateral framework of the GPA rather than a multilateral agreement.

The GPA negotiations were eventually completed in 1993 and the GPA was signed in 1994, at the same time with other Uruguay Round agreements. Similar to the old GATT agreement, the GPA members are committed to conduct further negotiations by virtue of its Art. XXIV.⁴⁵ As a matter of fact, bilateral negotiations continued right after 1993 between member states due to member states' continued dissatisfaction with coverage, and the result of these negotiations have sometimes incorporated into the GPA coverage.⁴⁶ Due to the complexity of the issue, legal or economic specialists were often consulted to facilitate negotiations. Most famously, the US and the EU commissioned Deloitte Touche to prepare a report examining the dollar value of their respective procurement opportunities in some important areas such as sub-federal procurement in order to ensure a general equivalence between their offers.⁴⁷

⁴³ For detailed information, see Blank and Marceau, 'the History of the Government Procurement Negotiations since 1945' (1996) 4 Public Procurement Law Review 77 at pp.94-99

⁴⁴ See Blank and Marceau, 'the History of the Government Procurement Negotiations since 1945' (1996) 4 Public Procurement Law Review 77 at pp.77-147

⁴⁵ Art.XXIV:7(b) reads as the following: 'No later than the end of the third year from the date of entry into force of this Agreement and periodically thereafter, the Parties thereto shall undertake further negotiations, with a view to improving this Agreement and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity, having regard to the provisions of Article V relating to developing countries'.

⁴⁶ Arrowsmith, *Government Procurement in the WTO* (Kluwer Law International Ltd, 2002) at pp.107-108

⁴⁷ *Study of Public Procurement Opportunities, European Union, Government of the United States* (1994)

The continued negotiations to expand the GPA coverage have been carried out for years. Mostly recently, in December 2006, states reached a provisional agreement on the text of a new procurement agreement to supersede the current GPA, the adoption of which is still subject to requirements for a final legal check and more significantly, a satisfactory outcome in ongoing coverage negotiations.⁴⁸ Although the details of ongoing negotiations on coverage are still confidential to the parties at the moment, it seems still difficult and time-consuming for parties to reach an agreement on coverage. Based on the publicly disclosed information, the EU has been highly disappointed by its alleged low level of ambition reflected in other major parties' offers.⁴⁹ The EC warned that its revised offer might end up with a reduced coverage compared to its current one under the GPA, unless other parties' offers are substantially improved.⁵⁰ It remains to be seen how this disagreement will be resolved and whether the negotiation on coverage can be completed in the first half of 2007 as originally expected.

It has been argued that soft law normally entails less negotiating costs than hard law. The choice of soft law in terms of non-bindingness can significantly reduce negotiating costs compared with that of binding agreement, which is also the case with an agreement on procurement. Taking the APEC NBPs as an example, the Osaka Action Agenda adopted in the 1995 Leaders' meeting firstly included the objectives of liberalising the procurement markets of member economies, and in the same year the Government Procurement Experts' Group ('the GPEG') was established for this purpose. The GPEG developed a set of non-binding principles on government procurement, which were endorsed by the APEC leaders at their Auckland meeting in 1999.

The clearly declared non-binding nature of these NBPs made the negotiation process comparatively simple and speedy, albeit with its large and highly diversified membership. It was much easier for parties to agree on the content of the NBPs, as parties enjoy substantial freedom in practice to depart from any of these principles where they feel it is necessary. Furthermore, there was no need for parties to negotiate and draft detailed rules concerning its scope in terms of types of entities and contracts covered, derogations for security reasons or secondary objectives etc, as is the case with most binding agreements. This freedom in coverage avoided the problem of reciprocity and thus the occurrence of intensive arguing, bargaining and intricate negotiating for equivalence between their offers.

⁴⁸ *Annual Report (2006) of the WTO Committee on Government Procurement to the General Council (GPA/89)*.

The text of provisional agreement can be found in document GPA/W/297, available at <www.wto.org>

⁴⁹ See R.D. Anderson, 'The WTO Agreement on Government Procurement: Update on Ongoing Negotiations and Related Developments', prepared for presentation at a seminar at the School of Law of the University of Nottingham, 22 March 2007 at pp.6

⁵⁰ See 'EU Warns It Could Pull Back GPA Commitments Over SME Treatment' *Inside US Trade*, 2 March 2007

The second argument in favour of choosing soft law rather than hard law is that the former may be more appropriate to address subject matters that are extremely sensitive. As for the issue of sensitive subject matter, public procurement, as a whole, has been widely recognised as a sensitive area for international regulation. Governments are often reluctant to liberalise this area, as public procurement has been widely used as a policy tool to achieve secondary objectives. Certain kinds of procurement are, because of the very nature of the procured product, particularly sensitive such as defence procurement. Defence procurement is highly sensitive in the sense that it may be closely connected with national sovereignty and security.

The protection of national security interests is widely considered as one of legitimate reasons to exempt certain defence procurements from international regulation. Most of international procurement agreements explicitly exclude their application to defence procurements that are closely related to national security interests. Code of Conduct on Defence Procurement of the EC Member States Participating in the European Defence Agency ('the Code') is the only procurement regime addressing defence procurements linked with national security interests. The Code was adopted with the aim to promote competition in the segment of defence procurement derogated from the EC procurement rules. Art.296 of the EC treaty provides a general exemption for defence procurement closely related to the essential interests of member national security. However, the extensive use of this exemption clause by EC member states has led to a situation that the majority of the defence contracts are currently exempted from the EC procurement rules and the European defence market remains fragmented.

It is widely agreed that defence procurement closely related to national security interests is too politically sensitive an area for any hard law international regulation. Legally binding rules such as the EC treaty or directives are theoretically inappropriate or politically infeasible to regulate such procurements. Meanwhile, it is also undesirable to leave them completely unaddressed, especially in the case of member states' extensive use of derogation from the hard law rules. Consequently, the non-binding Code was brought in to fill the gap, providing a certain degree of soft law regulation.

Soft law in terms of non-bindingness is argued to be a more appropriate means to regulate highly sensitive areas such as defence procurement closely linked with national security interests. However, it is worth mentioning that the highly sensitive subject matter in procurement is not limited to defence procurement sector. The procurement of certain types of civil goods or services can also be very sensitive due to their important impact on national economy. In the context of the EC, the ECJ's

judgement in *Campus Oil* case⁵¹ upheld an Irish measure requiring all importers of refined petroleum products to purchase a certain proportion of their requirements of petroleum products from a refinery situated in the national territory. This restrictive measure was justified on the ground of public security: the measure was directed at ensuring a minimum supply of petroleum products at all times rather than purely economic reason, because of the importance of their exceptional importance as an energy source for a country's existence since - 'not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them'.⁵²

The third argument concerns the value of soft law in its adaptation to uncertainty. It has been argued that soft law can offer a number of attractive alternatives for dealing with uncertainty. Public procurement is a complicated and fast-evolving area for international regulation. The emergence of electronic procurement and new procurement strategies is illustrative on this point. Along with the fast development of e-commerce in the last decade, new information technology has increasingly been used to increase government procurement efficiency. The use of internet helps streamlining the traditional tendering process: the procuring entity may advertise contracts and communicate with providers electronically, which makes the tendering process easier, faster and less expensive. Also, the application of electronic commerce in procurement develops more novel procurement methods such as electronic reverse auctions⁵³.

However, a number of procurement instruments were adopted many years before the emergence of e-commerce, and therefore to a large extent failed to accommodate modern electronic procurement. The old EC procurement directives provide good illustrations. From their adoption in 1990s till the recent passage of the new procurement, it had been unclear whether or how far procuring entities or suppliers could require communicating electronically in many actions. The detailed nature of the EC rules limited the ability of regulated entities to exploit e-commerce. It was argued by Arrowsmith that, although a sensible interpretation of the rules could largely help accommodating many e-procurement practices, the old directives did present some significant obstacles to e-commerce.⁵⁴ This legal uncertainty remained until the adoption of new directives in 2004 which include explicit authorisation of electronic communications for many actions⁵⁵ as well as reduce minimum time limits

⁵¹ Case 72/83, *Campus Oil* [1984] E.C.R. 2727, ECJ

⁵² See Judgement of the Court of 10 July 1983, Summary, para.7 Case 72/83, *Campus Oil* [1984] E.C.R. 2727, ECJ

⁵³ Electronic reverse auctions refer to tendering procedures in which all tenderer post their tenders electronically, and can view information on other tenders and then amend their tenders through electronic means to beat others.

⁵⁴ For a systematic analysis, see Arrowsmith, 'E-commerce Policy and the EC Procurement Rules: the Chasm between Rhetoric and Reality', (2001) 38 *Common Market Law Review* 1447-1477

⁵⁵ The new directives provide that all communication and information exchange may be made by various means,

for key phases when electronic means are used⁵⁶. Similar situation can also be found in the context of the GPA, and new flexibilities have been built into its newly-revised provisional text in recognition of the important role of electronic means in procurement.⁵⁷ The evolving nature of public procurement area can also be reflected by the emergence of new procurement methods such as public private partnership⁵⁸ and framework procurement⁵⁹.

International public procurement law needs to adapt to the changing industrial landscape and modern technological tools. It can be seen that hard law international procurement instruments solve the inherent uncertainty in public procurement mainly by either delegating the power to a third party for reasonable interpretation of the agreed rules, or constantly issuing legislative amendments. However, the former solution may involve significant sovereign costs, whilst the latter may experience considerable delays in legislative action. In contrast, soft law can offer a number of better alternatives to address the issue of uncertainty. The more ambiguous the legal rules are or the more discretion member states possesses in implementing them, the stronger capability they will have in the face of rapidly changing environment.

Furthermore, soft law in terms of non-bindingness is often relatively easily adapted to changing circumstances. Non-binding rules can be amended more quickly and easily than binding ones to accommodate changing reality. More importantly, the non-binding nature of a procurement instrument can avoid a situation in which member states are locked into rigid rules with the change of circumstances. The APEC NBPs are suggestive on this point. It is explicated stated that NBPs, economies are free to decide which principles to apply and whether to translate an element of a principle into a practical measure. Member economies, in practice, have absolute discretion to depart from the principles. Therefore, unlike binding instruments like the GPA or the EC rules, the APEC NBPs are, in no way, affecting states' ability to exploit information technology in procurement or to utilise new procurement

including post, fax, electronic means, telephone, or a combination of those means, according to the choice of the procuring entity, and also the directives' references to 'written' or 'in writing' can include electronic communications. See the Public Sector Directives Art. 42(1) & Art.1(12); and the Utilities Directives Art.48(1) & Art.1(11).

⁵⁶ For example, the time-limits for the receipt of tenders and for the receipt of the request to participate can be reduced by 7 days when notices are sent electronically, and time-limits for tendering can be reduced by 5 days when documents are made available electronically. See the Public Sector Directives Art. 38(5)(6); and the Utilities Directives Art.45(5)(6)

⁵⁷ The text of provisional agreement can be found in document GPA/W/297, available at <www.wto.org>

⁵⁸ Public Private Partnership refers to a form of cooperation between public and private sector for the purpose of delivering a project or service traditionally provided by the public sector. Under contract, the management of the project or the provision of the service is entrusted to the private sector, which will get paid by government, third party users or a combination of both.

⁵⁹ Framework procurements are repeat purchases for a comprehensive range of products and services to meet every conceivable procurement need. They can either incorporate a contractual commitment to purchase a particular volume or value of goods or services, or specify the terms and conditions for future contracts but without contractual commitment on either side for the provision of any particular quantity.

strategies.

The fourth argument involves the value of soft law to attract wider participation. As discussed early, in many cases, obligations defined too ‘hardly’ might deter an important number of the concerned governments from participating. This is the case with certain procurement agreements such as the GPA. The GPA’s generally hard approach especially its binding form and application of WTO DSU may largely explain its limited membership – only 37 out of 150 WTO members have subscribed to it until now. However, it should be noted that hard or soft feature of an agreement is only one of many factors influencing states’ decision whether to join, though important. In contrast to the GPA, an even harder regime, the EC procurement regime, received wide participation in the context of EC. This can be partly explained by the EC’s similarly minded members, and the fact that the procurement rules form an integral part of the EC agreement and thus mandatory for all EC member states. Some EC members might probably face no choice but to accept the procurement rules for the sake of benefits the EC membership could bring in other sectors. In the case of the GPA, it is a so-called plurilateral agreement outside ‘the single undertaking’ for WTO membership. States in principle have free choice over whether to sign the GPA when acceding to the WTO. However the role of the GPA has been changing gradually - a commitment to GPA accession now is often requested for all prospective new WTO members as a condition of WTO accession.⁶⁰

Although it is not always true that hard law deters participation, a soft formula has often been intentionally chosen to achieve its wider participation. The APEC NBPs and the UNICITRAL model law in public procurements provide illustrations in the area of procurement. As has been mentioned in the previous section, the non-binding APEC NBPs attract the participation of states which are unwilling to join the GPA or the proposed transparency agreement. As far as the UNCITRAL Model Law in procurement is concerned, it was designed to serve as a universal Model for use by all states with diversified situations when establishing or revising their own domestic legislation in procurement. The non-binding form was therefore chosen in order to achieve its widest possible application.

Finally, it has been argued that non-binding soft law may sometimes be preferable to non-binding hard law only for technical reasons – in some cases, it is chosen only for avoiding time-consuming and complex treaty approval and ratification formalities, typically involving legislative authorisation. This general argument can also apply in negotiating a procurement agreement.

⁶⁰ See previous discussion at **Section 4.1.4.3**.

Disadvantages of Non-bindingness

Despite many advantages soft law can better offer than hard law, the disadvantages of soft law have also been mentioned. Firstly, soft law may lack the function of hard law of being served to strengthen the credibility of commitment; secondly, soft law may raise the transaction costs of subsequent interactions. Both of the above arguments can be applied in the area of public procurement. The first argument mainly concerns the dimension of soft law being non-binding, and the second one is mainly concerned with soft law in the sense of low level of precision and enforceability, which will be discussed in the following sections

With regard to soft law in terms of non-bindingness, it has been argued that legally binding form of agreements can, in many cases, increase the credibility of member states' commitments for internal purpose. Compared with non-binding soft law, binding agreements make a difference in legal consequence of non-compliance. The law of responsibility fixes consequences for the violations of binding obligations, whilst there are no similar legal consequences in the case of violating non-binding soft obligations. Consequently, the legal consequences flowing from binding obligations induce conforming behaviours by making the choice of non-compliance more costly.

This function of binding form can be used for internal purpose – to resist domestic negative political pressure and to bind government themselves or their successors in the future. This is particularly relevant in the area of procurement. It is envisaged that member states' compliance with procurement agreement may be challenged by significant political influence from lobbyists representing interests of certain categories of national industries which are beneficiaries of previous discriminatory procurement policies, or even from public officials who have illegitimate interests in corrupt procurement practices. As a result, the choice of legally binding form for a procurement agreement may be a good way to resist domestic negative political influence against compliance.

Meanwhile, the binding form can also be used to enhance the credibility of commitments for external purpose. Because of their high cost of violation, hard law legally binding commitments can give member states some assurance of each other's compliance. This kind of assurance tends to be quite important for a procurement agreement with reciprocal market access commitments and non-simultaneous performances such as the GPA and the EC. In the area of procurement, despite evident benefits of market liberalisation, most countries are reluctant to do so unilaterally due to political difficulties. As a result, many procurement agreements, like the majority of trade agreements, are reached on the basis of the principle of reciprocity. Under such arrangements, strong opposition from domestic vested interests can be

overwhelmed by supports from specific export-oriented domestic industries which will benefit from more liberalised foreign procurement markets. The action of entering into a hard law binding agreement can assure parties to a procurement agreement complying with their obligations that others will also comply.