

## THE PRINCIPLE OF FAIRNESS AS A CORNERSTONE OF A GLOBAL PROCUREMENT LAW

Cristian Iaione

**ABSTRACT.** This chapter advances three main propositions. The first one is that international public procurement law has failed to accomplish its goals while a global public procurement law as a branch of global administrative law is progressively taking shape thanks to the initiatives of multilateral development banks which have stricken a much better compromise between the opposing camps of economic and social considerations. The second proposition is that this new body of global law is coagulating around procedural as well as substantive global administrative law principles, and that the latter are actually driving the lawmaking process of this new branch of global administrative law. The third is that what is happening in the area of government procurement could be a more general lesson on the scope and reach of global administrative law which should be broadened by injecting in it a more substantial view. In other words it might be time to start putting up the substantive pillars of the house.

The discussion of these arguments is articulated into four parts. The first part tries to shed light on the reasons that prevent the procedural approach espoused by an international regulation, such as the Government Procurement Agreement (hereinafter GPA) from representing the paradigm for a globally and universally accepted public procurement regulation. The second part explains the rationale for allowing governments to adopt discriminatory procurement measures aiming at substantive (e.g. social, environmental or local development) goals, such as the price preferences allowed by the World Bank and the UNCITRAL Model Law. The third part focuses more in depth on the regulatory efforts carried out by global development administrations and in particular by multilateral development banks. This model has been indeed more successful because it integrates procedural principles together with substantive considerations and it is building through harmonization and cross-fertilization initiatives an horizontal and a vertical dimension of a global public procurement regulation. The third part presents three case studies that show how multilateral development banks are successfully elaborating sound government contracting regulation and pushing national procurement systems towards a more balanced regulatory framework. The fourth and conclusive part advances the idea that this harmonization and cross-fertilization process is giving birth to a branch of global administrative law where blind procedural principles and economic goals are blended together with social goals and substantive principles (such as fairness and substantial equality) which call for the inclusion of affirmative actions in global administrative law.

## INTRODUCTION : SUBSTANCE VS. FORM IN GLOBAL ADMINISTRATIVE LAW

1. The pressure of economic and political globalization has led to the emergence of a body of administrative law that overcomes the domestic dimension and that, according to the definition forged by Kingsbury, Krisch and Stewart, comprises “the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of **transparency, participation, reasoned decision, and legality**, and by providing effective **review** of the rules and decisions they make. Global administrative bodies include formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international intergovernmental regime, hybrid public-private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance”.<sup>1</sup>

2. Global administrative law approach purports that “much of global governance can be understood as regulation and administration, and that we are witnessing the emergence of a 'global administrative space': a space in which the strict dichotomy between domestic and international has largely broken down, in which administrative functions are performed in often complex interplays between officials and institutions on different levels, and in which regulation may be highly effective despite its predominantly non-binding forms.”<sup>2</sup>

3. According to the global administrative law literature global governance is shaped by global administrations which are subject to and apply legal principles similar to traditional domestic administrative law principles. The expansion of global governance has

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<sup>1</sup> See Benedict Kingsbury, Nico Krisch and Richard Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. (2005) 17.

<sup>2</sup> Nico Krisch and Benedict Kingsbury, *Introduction: Global Governance And Global Administrative Law In The International Legal Order*, 17 EUR. J. INT'L L.

led many administrative and regulatory functions to be performed at a global rather than national level. Global administrative law act take three main different forms: (i) binding decisions of international organizations; (ii) non-binding agreements in intergovernmental networks; (iii) domestic administrative action in the context of global regimes.

4. The large public power exercised by these structures in these actions has triggered the question of their legitimacy and accountability. And therefore to strengthen its legitimacy and accountability the global administrative law scholars have been focusing on the enhancement of procedural principles like transparency, reasoned decision, procedural participation, and judicial and administrative review<sup>3</sup>. Substantive standards, such as the proportionality principle, have also been considered, yet without putting a real attention on them. Other substantive traditional domestic administrative law principles, such as the principles of fairness and justice, are also waiting to be considered as potential building blocks of global administrative law.

5. And for these reasons some scholars address critically the universal applicability of global administrative law in global governance. This is particularly true in areas of regulation, such as government procurement.

6. In the area of government procurement much of the focus of global law scholars has been put on the interplay of WTO government procurement rules and national procurement systems. Less work has been carried out on the procurement regulatory efforts and harmonization and national capacity-building initiatives carried out by global administrations as the multilateral development banks.

7. In the debate over the future of WTO government procurement regulation, namely the Government Procurement Agreement of 1979,<sup>4</sup> the discussion has polarized into two contrasting views: that

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<sup>3</sup> See Benedict Kingsbury, Nico Krisch and Richard Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. (2005) 17.

<sup>4</sup> Later substantially expanded in its coverage in 1994.

of developed countries which advocates the values of transparency and non discrimination and that of developing countries which in their quest for social goals plead for substantive standards like substantial equality, justice and fairness. It is now clear that “[t]he global administrative law demand for transparency in government procurement, and for mechanisms by which unsuccessful foreign bidders could challenge a contract award in local courts or administrative proceedings, is resisted by developing countries.<sup>5</sup>

**8.** As an example McCrudden and Gross have pointed out at the Malaysian government sheer defense of the Bumiputera policy that favors ethnic Malays in government contracting. The Malaysian government sees demands for more transparency in government procurement as a threat to a policy which is the windfall of a social bargain essential for the social stability of Malaysian society and economy in which ethnic Chinese Malaysians have retained a significant economic position, but have not enjoyed full political equality. Government contracting has been a building block of the political patronage system which is accused to be corrupt and inefficient. However Malaysian economy has also enjoyed substantial prosperity. Malaysia has experienced an unprecedented rise in most socio-economic indicators, and has completely recovered from the social turmoil that led to the race riots of the late sixties<sup>6</sup>.

**9.** Developing countries governments insist that the decision to embrace transparency and review falls within the domain of domestic political systems. Developed countries are instead putting pressure on developing countries to uniform their procurement regulation to the principles of transparency and non discrimination in order to foster free trade.

**10.** Adherence to the WTO Government Procurement Agreement is today required to states wishing to join the WTO. Developing countries

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<sup>5</sup> Nico Krisch and Benedict Kingsbury, *Introduction: Global Governance And Global Administrative Law In The International Legal Order*, 17 EUR. J. INT'L L.

<sup>6</sup> Christopher McCrudden and Stuart G. Gross, *WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study*, 17 EUR. J. INT'L L.

have instead opposed negotiations of a 'Transparency in Government Procurement' Agreement in the WTO.

**11.** OECD countries fiercely argue that transparency in procurement increases efficiency in government purchase but also market access for foreign suppliers.<sup>7</sup> However some scholars have demonstrated that improvement in transparency does not necessarily lead to improvement in market access.<sup>8</sup> Corruption has also been proven to increase in competitive procurement markets.<sup>9</sup>

**12.** It is also true that government procurement markets are generally home-biased and such discrimination may impair free trade.<sup>10</sup> Home-biased procurement "may influence trade flows and international specialization" and hinder industrial agglomeration that would otherwise take place.<sup>11</sup> However, sometimes home-biased government procurement rules serve also important social, environmental and local development goals.

**13.** In sum, global public procurement regulation is at a deadlock. In such a situation what are the incentives for developing countries to embrace transparency and review? Should developed countries simply incentivize the diffusion of such principles? Should developing

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<sup>7</sup> See OECD, *TRANSPARENCY IN GOVERNMENT PROCUREMENT: THE BENEFITS OF EFFICIENT GOVERNANCE*, April 14, 2003, at 7-9 available at [http://www.oecd.org/olis/2002doc.nsf/LinkTo/td-tc-wp\(2002\)31-final](http://www.oecd.org/olis/2002doc.nsf/LinkTo/td-tc-wp(2002)31-final), [Last visited June 8, 2008].

<sup>8</sup> S. Evenett and B. Hoekman, *Government Procurement: Market Access, Transparency and Multilateral Trade Rules*, WORLD BANK POLICY RESEARCH WORKING PAPER 3195, (January 2004), at 3, 16-19, available at <http://www.evenett.com/papers.htm> [Last visited May 23, 2008].

<sup>9</sup> M. Celentani & J. Ganuza, *Corruption and Competition in Procurement*, 46 EUROPEAN ECONOMIC REVIEW 1273 (2002).

<sup>10</sup> F. Trionfetti, *Home-biased Government Procurement and International Trade: Descriptive Statistics, Theory and Empirical Evidence*, in PUBLIC PROCUREMENT: GLOBAL REVOLUTION 223-233 (S. Arrowsmith and M. Trybus eds., 2003).

<sup>11</sup> *Id.* at 232-233.

countries seek to maximize gains from adopting transparency and review in order to outweigh their possible losses in social, environmental and local development terms? Or should a global regulator step in and draft of global government contracting regulation that strikes the right balance between these seemingly conflicting values?

**14.** This paper advances three main propositions. The first one is that international public procurement law has failed to accomplish its goals while a global public procurement law as a branch of global administrative law is progressively taking shape thanks to the initiatives of multilateral development banks which have stricken a much better compromise between the opposing camps of economic and social considerations. The second proposition is that this new body of global law is coagulating around procedural as well as substantive global administrative law principles, and that the latter are actually driving the lawmaking process of this new branch of global administrative law. The third is that what is happening in the area of government procurement could be a more general lesson on the scope and reach of global administrative law which should be broadened by injecting in it a more substantial view. In other words it might be time to start putting up the substantive pillars of the house.

**15.** The discussion of these arguments is articulated into four parts. The first part tries to shed light on the reasons that prevent the procedural approach espoused by an international regulation, such as the Government Procurement Agreement (hereinafter GPA) from representing the paradigm for a globally and universally accepted public procurement regulation. The second part explains the rationale for allowing governments to adopt discriminatory procurement measures aiming at substantive (e.g. social, environmental or local development) goals, such as the price preferences allowed by the World Bank and the UNCITRAL Model Law. The third part focuses more in depth on the regulatory efforts carried out by global development administrations and in particular by multilateral development banks. This model has been indeed more successful because it integrates procedural principles together with substantive considerations and it is building through harmonization and cross-fertilization initiatives an horizontal and a vertical dimension of a

global public procurement regulation. The third part presents three case studies that show how multilateral development banks are successfully elaborating sound government contracting regulation and pushing national procurement systems towards a more balanced regulatory framework. The fourth and conclusive part advances the idea that this harmonization and cross-fertilization process is giving birth to a branch of global administrative law where blind procedural principles and economic goals are blended together with social goals and substantive principles (such as fairness and substantial equality) which call for the inclusion of affirmative actions in global administrative law.

#### I. A FAILED INTERANTIONA REGULATION OF PUBLIC PROCUREMENT: THE GPA

**16.** WTO Members did not agree to regulate the topic of public procurement on the multilateral level. Those Members who wished to liberalise this market undertook commitments towards a plurilateral agreement. Government procurement was therefore excluded from the scope of the general principle of national treatment under Art.III:8 of the GATT 1947 (part of the literature as well as GPA Members' practice indicate that it has also been excluded from obligations under the most favored nation (MFN) principle of Art.III of the GATT).<sup>12</sup> Government procurement is also outside the scope of non-discrimination and market access principles under the GATS, in view of the exclusion contained in Art.XIII:1 of the GATS Agreement.

**17.** The GPA shares WTO Agreements main objectives. The main goal of the GPA 1994 is indeed the elimination of trade barriers, in order to foster free trade. <sup>13</sup> Thus, for the purpose of advancing trade liberalisation, the GPA prohibits discrimination against foreign

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<sup>12</sup> SUE ARROWSMITH, *GOVERNMENT PROCUREMENT IN THE WTO* (2003), at 61-63.

<sup>13</sup> SUE ARROWSMITH, *The National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?* in SUE ARROWSMITH and ARWEL DAVIES (eds), *PUBLIC PROCUREMENT: GLOBAL REVOLUTION* (1998), at

suppliers, goods and services and supports this principle with a set of detailed rules governing contracts awards. <sup>14</sup>

**18.** The removal of trade barriers is the means to accomplish the very ultimate goal of "achieving greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade"<sup>15</sup>.

**19.** Now the aforementioned objectives of the GPA contrast sharply with two main goals pursued by many national procurement systems: (a) the best value for money normally achieved through transparent tender procedures; and (b) secondary national policies such as the protection of locally-owned or minorities-owned firms, the development of a certain region of the country and other socioeconomic goals. <sup>16</sup>

**20.** National procurement systems and the GPA 1994 – notwithstanding the divergence of ultimate goals – therefore share the use of transparency although as a tool for achieving different goals.<sup>17</sup> To this extent the GPA establishes a broad set of procedural rules to tendering procedures are carried out with the largest degree of transparency in order to enable foreign providers of goods or services to engage in a truly competitive challenge with their domestic counterparts.

**21.** The GPA 1994 also shares its main principles with other WTO Agreements. In this regard, MFN and national treatment are the basic principles of the GPA, even though the Agreement allows extensive derogation from these principles

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<sup>14</sup> Id. at 13.

<sup>15</sup> As expressed in the preamble of the GPA 1994.

<sup>16</sup> Sue Arrowsmith, *Reviewing the GPA: The Role and Development of the Plurilateral Agreement after Doha*, 5 J.I.E.L. (2002) 766. See also Sue Arrowsmith, *The National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?*, supra note \_\_\_ at 7- 10

<sup>17</sup> Sue Arrowsmith, *Reviewing the GPA*, supra note \_\_\_ at 766.

**22.** A large portion of the efforts of the Agreement, however, seems to be dedicated to fostering transparency in government procurement. The GPA 1994 contains detailed requirements for the conduction of all aspects of tendering procedures in public purchasing: before, during and after they take place. Transparency is stressed to assure that discrimination against products, services and suppliers will not occur.<sup>18</sup>

**23.** One of the major innovations brought by the GPA 1994 is the bid challenge procedures under Art. XX, which establishes that each party to the Agreement shall provide non-discriminatory, timely, transparent and effective domestic procedures in order to enable suppliers to challenge any breaches of the GPA 1994. It therefore provides direct recourse to a local court or impartial and independent review body by any supplier, including foreigners, who wish to file a complaint under the GPA. Although recourse to the WTO dispute settlement body remains available at an intra-governmental level, this feature of the GPA 1994 allows for faster, more effective and much less expensive delivery of a response to claims directly raised by interested suppliers of any nationality.

**24.** However, the aforementioned improvements have not been sufficient to stimulate further accessions to the GPA 1994 by other WTO Members and membership to the Agreement remains rather limited

**25.** Several external factors are named as explaining the limited number of developing countries that are parties to the GPA, whichever its version. Such factors usually lead to discriminatory practices against foreign suppliers in domestic procurement markets, and some of the major factors are briefly mentioned below to provide a broader view on the issue of limited membership.

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<sup>18</sup> R. Anderson, *Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiations*, 16 P.P.L.R. (2007) 255, at 257

**26.** The most obvious factor referred to by the literature is **protectionism**.<sup>19</sup> Governments of countries that do not join the GPA are motivated by lobbies from domestic suppliers seeking to maintain their competitive advantage in the local procurement market. Protectionism allows domestic suppliers to charge more for the goods or services they sell to the government and reduces their incentive to invest in technology, which would enable them to offer products and services for a better quality or price. Protectionism is highly criticised by the literature, institutions and the parties to the GPA, and it is hardly justifiable before the international trading system.

**27.** A second factor fostering discrimination and limiting the willingness of developing countries to join the GPA is **corruption**,<sup>20</sup> which also constitutes one of the main arguments used by GPA members and OECD countries to justify accession to the Agreement. It is commonly argued that transparency initiatives fostered by the GPA reduce the ground for the implementation of discretionary measures by governmental officials and therefore the possibility for the adoption of corrupt practices. This leads to the increase of efficiency in government purchase. In other words, governments can get more value for money, i.e. for the same price they are able to acquire a higher quantity or quality of products and services.

**28.** A third exogenous factor that explains limited membership to the GPA is the **promotion of secondary policies** that focus on social, political or environmental goals rather than on economic purposes. These would include policies for the promotion of business owned by disadvantaged minorities (war veterans, ethnic minorities), small and medium enterprises (SMEs)<sup>21</sup> and the protection of human rights,<sup>22</sup>

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<sup>19</sup> SUE ARROWSMITH, GOVERNMENT PROCUREMENT IN THE WTO (2003), at 23

<sup>20</sup> See J. Linarelli, *Corruption in Developing Countries and in Countries in Transition: Legal and Economic Perspectives*, supra note \_\_\_\_ at 125-137.

<sup>21</sup> SUE ARROWSMITH, GOVERNMENT PROCUREMENT IN THE WTO, supra note \_\_\_\_ at 23.

<sup>22</sup> See the suspended WTO dispute on the Burma/Massachusetts case: Request for Consultations, United States--measures affecting government

among others. However, in many cases the adoption of such policies still remains controversial.<sup>23</sup> Secondary policies have discriminatory effects and potentially conflict with disciplines on transparency.<sup>24</sup> For this reason, their use is limited by the GPA even though the Agreement allows for exceptions, which partially explains why few developing countries have joined the Agreement. The relevance of the adoption of preferential policies for developing countries is recognised by the literature and is a significant factor underlying their opposition to the GPA:

**29.** "[F]or many developing country Members of the WTO, development policy intended for the promotion of domestic industries is an integral part of their economic policy and a preferential treatment of domestic industries in government procurement is still used as an important means for it." <sup>25</sup>

**30.** Malaysia provides a particular example of a developing country that holds a strong position against the submission of its procurement policies to the GPA and which also opposed the outcome of a WTO Multilateral Agreement on Transparency on Government Procurement under the Doha Round. Its opposition results from secondary policies adopted by the country, which grants significant preferences in procurement for the purpose of strengthening the economic power of native Malays or "Bumiputera" and other domestic suppliers, therefore giving rise to a market-

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procurement— constitution of the panel established at the request of the European Communities and Japan (WT/DS88/4, WT/DS95/4, adopted October 21, 1998).

<sup>23</sup> Sue Arrowsmith, *Reviewing the GPA: The Role and Development of the Plurilateral Agreement after Doha*, supra note \_\_\_\_, at 779-780.

<sup>24</sup> SUE ARROWSMITH, GOVERNMENT PROCUREMENT IN THE WTO, supra note \_\_\_ at 24.

<sup>25</sup> M. MATSUSHITA, T. SCHOENBAUM and P. MAVROIDIS, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY (2006), at 744.

dominant minority in the country.<sup>26</sup> Malaysia has been able to resist external pressures for the adoption of procurement reforms due to its relative economic development and the resulting independence from requirements which loans by the World Bank or the IMF would imply.<sup>27</sup>

**31.** Finally, procurement systems existing in the national, bilateral, regional and plurilateral levels do not adopt a uniform approach. Rather, they represent **a patchwork of different rules**, procedures, flexibility, transparency, coverage and non-discrimination principles in general,<sup>28</sup> as a result of the distinct objectives adopted by each system and the negotiations carried out between states. Some countries are more stringent and adopt principles and rules which, although considered to be similar to the GPA 1994, differ in essential issues. An substantial difference between procurement regulations is for example provided by contrasting the World Bank Guidelines and the UNCITRAL Model Law with the GPA 1994 on the issue of price preferences. The formers show some flexibility permitting countries to adopt price preferences in their procurement systems, whereas the latter prohibits such practices. Such differences are, at the end, a result of the goals of each procurement system, which may differ and conflict with each other: national procurement systems, financing institutions and the GPA 1994 have different goals which might not converge so easily.<sup>29</sup>

**32.** The aforementioned exogenous factors might help explaining the reluctance of countries to accede to the GPA. However, exogenous

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<sup>26</sup> Christopher McCrudden and Stuart Gross, *WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: a Malaysian Case Study*, (2006) 17 E.J.I.L. 151, 152, 162-166

<sup>27</sup> Ibid. at 176.

<sup>28</sup> R. Watermeyer, *A Generic and Systemic Approach to Procurement: The Case for an International Standard*, (2005) 14 P.P.L.R. 39, at 40.

<sup>29</sup> Hoekman, *Using International Institutions to Improve Public Procurement*, (1998) 13 *World Bank Research Observer* 265, at 267, underscores the lack of studies on the compatibility of the different national procurement systems with the GPA.

factors do not appear to be the sole reason behind the low adherence of developing countries to the GPA. Before reaching any conclusions, it is also necessary to analyse whether the Agreement itself contributes to the current limited membership, which constitutes the core of this paper. For this purpose, it is necessary to focus on the GPA 1994 itself and to analyse whether and to what extent it has been able to provide enough incentive for non-members—mostly developing countries—to accede to the Agreement, as well as whether and to what extent the revised GPA currently under negotiation has reduced the existing gaps and restraints in a way that stimulates increased membership.

**33.** Part of the literature considers that the benefits of acceding to the GPA 1994 would, in the long run, exceed the costs, since the adoption of non-discrimination and transparency rules would increase competition in tendering procedures, and therefore reduce government expenditure.<sup>30</sup> As a consequence, political rather than economic reasons would underlie rejection of the Agreement by non-parties.<sup>31</sup> This statement has to be viewed with prudence. Even if it is not easy to quantify and balance the costs and benefits of accession to the GPA, the calculations have to be done on a country-by-country basis. A cross-country comparative analysis is also desirable in order to infer the potential gains, mainly in terms of market access, from accession in comparison to other parties to the Agreement, therefore providing data for a fair negotiation with a balanced outcome for the parties. For this reason, although exogenous factors do play a role in keeping a huge number of countries (also developed ones) outside the Agreement, there is certainly room for improving the latter in such a way that it attracts further countries to accession.

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<sup>30</sup> I. Choi, *The Long and Winding Road to the Government Procurement Agreement: Korea's Accession Experience*, in (W. MARTIN AND M. PANGESTU eds), *OPTIONS FOR GLOBAL TRADE REFORM: A VIEW FROM THE ASIA-PACIFIC* (2003), at 254

<sup>31</sup> *Ibid.*

**34.** One argument raised by non-parties to the GPA 1994 to justify their lack of interest on the Agreement is that joining would incur **high negotiation costs**. As pointed out by Choi in a case study on the Korean accession to the GPA 1994,<sup>32</sup> there are two types of costs involved in this accession: the first are the administrative costs related to the accession process itself, namely capacity-building costs and also costs to initiate the necessary national reforms. They include the costs of obtaining the necessary information on the GPA 1994, collecting data and studying the impact of the Agreement on the domestic system (from the economic and institutional perspectives), training the staff, negotiating the Agreement itself and bringing the domestic institutions and regulations into conformity to the GPA 1994.<sup>33</sup> The second type of costs is composed by the social and economic costs resulting from accession.<sup>34</sup> They represent, on the one hand, eventual welfare losses resulting from accession to the Agreement, losses of procurement markets by domestic companies and resulting unemployment and the creation of safety nets necessary to minimise the effects of such losses. On the other hand, these costs are also associated with the maintenance of procedural requirements to assure the minimum level of transparency and due process, as well as statistical data as required by the Agreement.<sup>35</sup> The Korean case demonstrates that countries have to bear significant costs before, during and after the conclusion of the accession process, and developing countries with a small economy usually have other priorities on which to spend their scarce financial resources.<sup>36</sup> A report by OECD recognised that such costs may be too high for developing countries to bear them by themselves, and that support

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32 Ibid.

33 Ibid.

34 Ibid.

35 Ibid.

36 Ibid.

with building local capacity as well as technical assistance is needed.  
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**35.** The GPA 1994 covers the entities, products and services listed by each party in its respective Annexes of Appendix I.<sup>38</sup> While the coverage of goods is usually expressed by a negative list, meaning that all goods are subject to the GPA 1994 except if otherwise established in the Annexes of the parties, the coverage of services usually follows a positive list approach,<sup>39</sup> where only the services and construction services listed on each of the parties' Annexes can be subject to the GPA 1994.

**36. Thresholds are too high for developing countries** In order to assess if a procurement contract is subject to its rules it is necessary to examine also the minimum threshold values listed in the parties' Annexes, which have to be fulfilled for the purpose of subjecting a procurement contract to the rules of the GPA 1994. Below the minimum threshold, procurement contracts by parties of the GPA 1994 are outside the scope of the Agreement. The minimum threshold values agreed by the parties, although they might vary individually and allow for exceptions, have been generally set, for the supply of both goods and services at: (a) SDR 130,000 for central government entities (Annex 1); (b) SDR 200,000 for sub-central government entities (Annex 2); (c) SDR 400,000 for other government entities and enterprises covered (Annex 3); and d) SDR 5 million for construction services (Annex 5) procured by any entities covered by the three Annexes to the Agreement, which can reach the even higher level of SDR 15 million as it is the case of Korea and Japan. The determination of threshold levels is far from being simple. If set at a

<sup>37</sup> OECD, Transparency in Government procurement: the benefits of efficient governance, TD/TC/WP(2002)31/REV2, April 14, 2003, p.12.

<sup>38</sup> Appendix 1 to the GPA 1994 is divided in five Annexes, namely, Annex 1--Covered Central Government Entities; Annex 2--Covered Sub Central Government Entities; Annex 3--Other Government Entities and Enterprises Covered such as Utilities; Annex 4--Services Covered; and Annex 5--Construction Services covered.

<sup>39</sup> United States, however, adopt a negative list approach for services (although not for construction services).

level that is too low, it substantially increases the administrative costs for the governments in conducting tendering procedures and reduces the economic efficiency resulting from the adoption of non-discriminatory measures. On the other hand, if the threshold is set at a substantially higher level, it leaves a considerable portion of procurement markets outside the scope of the GPA 1994, therefore reducing market access to foreign suppliers. Developing countries have claimed lower thresholds for allowing the increase of their export opportunities in foreign procurement markets. In the absence of studies on this issue, it is unclear whether the current thresholds actually allow these countries to compete abroad or forecloses their market access.

**37.** A further disincentive to access the GPA lies in the **derogations from MFN and national treatment principles**. Government procurement has been explicitly excluded from general non-discrimination obligations under the GATS (Art.III), as well as from the incidence of the national treatment principle under the GATT. Although the GATT is silent on whether government procurement has also been excluded from the MFN principle, the predominant view indicates that the answer to this question is affirmative.<sup>40</sup>

**38.** With regard to government procurement, national treatment and MFN principles apply only to the Members of the GPA. However, both principles are subject to unilateral derogations by any of the parties to the GPA 1994 in their respective Schedules. This gives leeway for the use of discriminatory measures under the GPA and therefore it reduces the efficiency of its rules and the achievement of its major goal of opening up market access, but also reduces the incentive for accession to the Agreement by third countries.

**39.** The General Notes in Appendix I of the GPA 1994 allow the parties to establish derogations to the obligations under the National Treatment and MFN principles by also excluding, totally or partially,

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<sup>40</sup> ARROWSMITH, GOVERNMENT PROCUREMENT IN THE WTO supra note \_\_\_\_, at 61-63; Trepte, *The Agreement on Government Procurement*, in MACRORY ET AL. (EDS), THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS (2005) at 1126

other economic sectors and entities based on secondary policies that they want to pursue on the national level.

**40.** With reference to derogation from the National Treatment obligation, the United States, for example, excludes small and minority businesses from the application of the GPA 1994.<sup>41</sup> Other countries that included derogations in the GPA 1994 for the promotion of domestic SMEs are South Korea<sup>42</sup> and Canada<sup>43</sup>.

**41.** On the other hand, derogations from the MFN principle have a severe impact on coverage of the GPA. The negotiations on coverage by the parties result in Schedules where no common rules or patterns apply. The exemption from the MFN principle leads to concessions based on reciprocity and Schedules therefore represent a patchwork of bilateral agreements rather than a result of plurilateral negotiations.<sup>44</sup> Reciprocity limits the benefits of concessions only to the parties that are able to make offers of interest to others. The size of procurement markets also reduced in the majority of developing countries. While the latest study for 106 countries in 1998 indicates that OECD countries account for 86 per cent of the world's contestable procurement market,<sup>45</sup> only six developing countries have procurement markets exceeding \$10 billion, and about half of

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<sup>41</sup> United States, General Notes, para.1. The Small Business Act, a legislation enacted by the United States to protect and promote small business, requires that procurement contracts below a certain threshold be reserved exclusively for small business, unless two or more of them are not able to offer competitive market prices and quality products or services. E. Lukács, *The Economic Role of SMEs in World Economy, Especially in Europe*, (2005) 4 EUROPEAN INTEGRATION STUDIES 9.

<sup>42</sup> Korea, Notes to Annex 1, 2 and 3.

<sup>43</sup> Canada, General Notes, para.1.

<sup>44</sup> According to Arrowsmith, "account also needs to be taken of the fact that, as mentioned, many of the concessions made under the GPA itself between the parties have not been made on a MFN basis to other GPA parties". See ARROWSMITH, *GOVERNMENT PROCUREMENT IN THE WTO*, supra note \_\_\_\_ 2003), at 68.

<sup>45</sup> OECD, *THE SIZE OF GOVERNMENT PROCUREMENT MARKETS*, (2002) at 34.

the developing countries covered by the study have procurement markets that do not exceed \$1 billion.<sup>46</sup> The impossibility or incapacity for a party to offer something to another on a reciprocal basis might probably result in its exclusion from the incidence of the Agreement for a given economic sector. This might promote an artificial competitive advantage for another party which was able to obtain access to the procurement market of interest, leading to trade diversion.

**42.** The possibility of extensive departure from the MFN principle under the GPA 1994 hinders and inhibits a major goal of the WTO, namely, widespread trade liberalisation. A problem with the adoption of reciprocity in the sphere of a plurilateral agreement such as the GPA 1994 is that it is not part of the multilateral rounds of negotiations of the WTO. Therefore, in theory, it does not allow acceding countries to trade concessions in the Agreement for concessions in other WTO Agreements, unless their accession is being negotiated concomitantly with the development of a multilateral round.

**43.** Small economies depend on the MFN principle to benefit from such liberalisation, and the conditional MFN under the GPA leads to an approach whereby countries will liberalise their procurement markets only to countries that can offer equivalent concessions. As summarised by a commentator:

"[F]or a small open economy, MFN is a fundamental feature of any rules-based trading system as all member countries are automatically able to enjoy the benefits of liberalization undertaken in any member country, whether implemented autonomously or as part of a negotiated outcome. This approach is a powerful force for ensuring that small economies benefit from liberalization."<sup>47</sup>

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<sup>46</sup> Evenett and Hoekman, *International Cooperation and the Reform of Public Procurement Policies*, Working Paper (August 2005), available at <http://www.evenett.com/papers.htm> [Last Visited May 23, 2008], at 6.

<sup>47</sup> D. WALKER, *Government Procurement: a Small Open Economy Perspective*, in (B. HOEKMAN AND P. MAVROIDIS eds.), *LAW AND POLICY IN PUBLIC PURCHASING* (1997), at 182

**44.** Considering that developing countries have heretofore not been able to make offers of interest for developed countries parties to the Agreement and that negotiations for accession are ultimately based on sectoral reciprocity which undermines any possibility of significant gains by developing countries since they cannot offer equivalent concessions due to the size of their procurement markets<sup>48</sup>. A possible solution could be to rest on the extension of all concessions made under the GPA by developed countries for developing countries on a MFN basis, without requiring an equivalent obligation from the latter.

**45.** The coverage of the GPA, which is to a large extent based on a **positive list approach**, can represent an additional inhibitor for the accession of developing countries to the Agreement.<sup>49</sup> The scope of coverage is narrower than if the negative list approach were adopted. Furthermore, only the sectors that are of interest to other parties, mostly developed countries, and that were subject to extensive negotiations are included. There is a huge possibility that they do not represent major sectors of export interest for developing countries. Adding to this, from the perspective of a small economy the positive list approach makes it more difficult to convince developed countries to include sectors or entities of interest to them, since developing countries have a limited bargaining power and therefore find themselves at disadvantage during negotiations.<sup>50</sup> The derogations from the MFN principle allowed by the Agreement, leading to negotiations based on strict reciprocity where the liberalisation obtained by one party does not reach all the others, is a determinant factor of difficulty for developing countries to obtain gains from negotiations based on the positive list approach.

**46. Special and differential treatment.** The Preamble of the GPA 1994 recognises "the need to take into account the development,

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<sup>48</sup> Ibid. at 183.

<sup>49</sup> ARROWSMITH, *GOVERNMENT PROCUREMENT IN THE WTO*, supra note \_\_\_\_\_, at 112.

<sup>50</sup> Walker, *Government Procurement: a Small Open Economy Perspective*, supra note \_\_\_\_\_, at 179

financial and trade needs of developing countries, in particular the least-developed countries", which Art. V of the GPA 1994 tries to implement to a certain extent. Art.V.1 informs that parties shall take the aforementioned needs of developing countries into account in their purpose of safeguarding the balance of payments position of such countries and ensures an adequate level of reserves for the implementation of economic development programmes; promoting domestic industries; supporting industrial units dependent on government procurement; encouraging the economic development of those countries through regional or global arrangements among developing countries. Although Art. V uses the mandatory term shall rather than its optional should, it does not indicate how to implement the Agreement taking such objectives into account. Article V.2 shows how these provisions shall be enforced by the parties to the Agreement, who shall facilitate in their laws, regulations and procedures affecting government procurement increasing imports from developing countries. There are currently no studies on the degree of implementation of this provision by developed countries, but the literature shares the view that the majority of the provisions on special and differential treatment (S&DT) contained in WTO Agreements lack effectiveness and are not enforceable even if, as in the above case, the actions to be adopted in order to achieve enforceability are described in a legal provision in the Agreement.<sup>51</sup> Art. V. 3., which determines that the objectives targeted in Art.V.1. be also taken into account during negotiations with respect to the procurement of developing countries that will be covered by the Agreement. It also determines that developed countries shall

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<sup>51</sup> For analysis of the traditional approach see E. Kessie, *Enforceability of the Legal Provisions Relating to Special and Differential Treatment Under the WTO Agreements*, 3 JOURNAL OF WORLD INTELLECTUAL PROPERTY 955-976, (2000). For alternative approach of S&DT see B. Hoekman, C. Michalopoulos and L. Winters, *More Favourable and Differential Treatment of Developing Countries: Toward a new approach in the World Trade Organization*, WORLD BANK POLICY RESEARCH WORKING PAPER 3107 (2003) available at <http://www.ictsd.org/issarea/S&DT/resources/> [Last Visited June 9, 2008]; T. Cottier, *From Progressive Liberalization to Progressive Regulation in WTO Law*, 9 JOURNAL OF INTERNATIONAL ECONOMIC LAW 779,-821 (2006).

endeavour to include in their lists entities procuring products and services of export interest to developing countries. While the first sentence of Art.V.3 does not appear to be enforceable due to the absence of clarification on how to take developing countries' interests into account during negotiations, the second sentence has the same effect by not calling for a mandatory action by developed countries and relying upon the good will of the parties to the Agreement for the implementation of such provisions. Furthermore, although the purpose of Art.V.3. is to "make membership more beneficial to developing countries", Arrowsmith calls attention to the fact that this Article does not indicate that reciprocity should not be applied by developed countries in their negotiations of coverage with developing countries, a provision that would be highly desirable if Art.V. 3. were to reach the goal of encouraging wider membership to the Agreement.<sup>52</sup> Article V.4 enables developing countries to negotiate mutually acceptable exclusions from the rules on national treatment with respect to entities, products and services included in their coverage lists taking their special needs (that is, financial, development and trade needs) into account, also when these countries are part of a regional or global arrangement with other developing countries. However, this paragraph also lacks enforceability by itself, with the consequence that in practice enforcement is more dependent on the leverage of the parties during negotiations on coverage. Furthermore, this provision refers to exclusions from national treatment but does not mention any special treatment in regards to the MFN principle, which leaves developing countries in disadvantage during negotiations due to the fact that they cannot claim exclusion from the MFN principle under the argument of special and differential treatment afforded by Art. V of the GPA 1994. Art.V.5 of the GPA provides that, based on its special needs and upon request to the Committee on Government Procurement, a developing country party can be excluded from national treatment (the provision remains silent on MFN). Under the argument of special needs, it also allows the modification on coverage by developing countries anytime after the Agreement enters

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<sup>52</sup> ARROWSMITH, GOVERNMENT PROCUREMENT IN THE WTO, supra note \_\_\_\_\_, at 113.

in force. Since both rights are subject to a decision by the Committee on Government Procurement and the modification on coverage entitle other parties to claim compensatory adjustments (Art. XXIV:6 of the GPA 1994), uncertainty remains as to the extent to which special needs of developing countries would be taken into account by the Committee and by other parties to the Agreement. The low level of enforceability of the provisions of Art.V has not promoted the increase in membership to the GPA 1994 by developing countries.<sup>53</sup>

**47.** Another provision on exclusive rights of developing countries is the use of offsets<sup>54</sup> in Art. XVI of the GPA 1994. Although offsets are dealt with in a separate Article, they are no doubt an expression of special and differential treatment and should also be referred to in Art. V of the Agreement. Offsets allow developing countries to adopt certain exceptional measures that conflict with the scope of the GPA, for the purpose of improving their balance of payments accounts and encouraging local development. This is a relevant instrument to be used to facilitate accession by developing countries GPA 1994. However, where this is certainly a positive contribution, it has not been able, by itself, to induce more developing countries to join the Agreement. the contents and extension of offsets have to be negotiated with other parties during the accession process. This makes an acceptable outcome for developing countries difficult to achieve, as a result of the opposite interests involved, as well as the absence of a balance of bargaining power between the parties involved in the negotiation. Parties to the GPA 1994 might also fear that extensive offsets conferred to a developing country might be claimed by others even if they do not have the same special needs.

**48.** In sum the GPA is **a bargain only for developed countries.** although developing countries could benefit from enhanced efficiency

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<sup>53</sup> According to Arrowsmith, "[s]o far Article V has not had any significant effect in inducing developing countries to join the GPA". *Id.* at 114.

<sup>54</sup> Offsets in government procurement are defined as "measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements". See footnote 7 of Art. XVI of the GPA 1994.

by joining the Agreement, in terms of access to foreign procurement markets they did not obtain significant gains. Rather, developed countries were the main beneficiaries of increased market access resulting from a growth of membership to the Agreement.<sup>55</sup> It was argued that the size of the country's economy plays a role in terms of supply for the domestic market: the larger it is, the higher the probability of specialisation and, as a consequence, of achieving an efficient scale of production, thus enabling them to procure a significant share of goods domestically without a need to look for foreign suppliers.<sup>56</sup> On the other hand, developing countries with small economies procure much more than developed countries in international markets,<sup>57</sup> since the former cannot efficiently produce most of the necessary resources domestically. This suggests that, in terms of market access, developed countries, rather than developing countries, might benefit more from increasing membership to the Agreement.

## II. THE CASE FOR PRICE PREFERENCES

**49.** The potential gains argued do not seem appealing or certain enough to encourage developing countries to accede to the GPA 1994 nor to the revised GPA. The main reason lies in the importance of discriminatory procurement policies for developing countries.

**50.** The rationales for the perpetuation of such discriminatory policies are several.

**51.** First there is a public choice explanation of the problem. It is true that the adoption of discriminatory policies and in particular price preferences do not generate significant improvements in social welfare due to the increase in prices resulting in terms of distributional consequences. However, even small price preferences might represent substantial profit gains concentrated in the domestic

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<sup>55</sup> Hoekman, *Operation of the Agreement on Government Procurement, 1983- 1992*, in *LAW AND POLICY IN PUBLIC PURCHASING* (Hoekman and Mavroidis eds, 1997), at 93

<sup>56</sup> *Id.* at 98.

<sup>57</sup> *Id.* at 101-102

firms that benefit from them, while taxpayers will have higher but diffused losses.<sup>58</sup> This framework would be likely to be reversed in the case of accession to the GPA, resulting in the strong and organised opposition by domestic companies before their respective governments against such accession.<sup>59</sup> This makes the introduction of procurement reforms politically sensitive and difficult to achieve, even though the countries' net economic gains could be maximised by GPA non-discriminatory transparency rules.<sup>60</sup>

**52.** But it is not all about economics. Three rationales lying in the structural differences between developing and developed countries justify, from an economic point of view, the developing countries' choice to discriminate against foreign competition in procurement contracts<sup>61</sup>.

**53.** First, governments procure considerably more manufactured goods and services in comparison to agricultural goods. Due to developing countries' comparative advantage in producing agricultural goods and developed countries specialisation in the production of the former, the government demand in developing countries with small economies leads to an increased domestic production of manufactured goods and services. This creates a larger scope for lobbies and resistance to the liberalisation of the local procurement market by domestic groups in developing countries, which do not have such a high level of political interference in developed countries because their economic sectors already produce goods that governments buy the most.

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<sup>58</sup> G. Deltas and S. Evenett, *Quantitative Estimates of the Effects of Preference Policies*, in *LAW AND POLICY IN PUBLIC PURCHASING* 73 (Hoekman and Mavroidis eds, 1997), at 79-84.

<sup>59</sup> *Id.* at 82-83.

<sup>60</sup> Mattoo, *The Government Procurement Agreement: Implications of Economic Theory*, 19 *THE WORLD ECONOMY* 695, 699-708 (1996).

<sup>61</sup> Trionfetti, *Discriminatory Public Procurement and International Trade*, 23 *THE WORLD ECONOMY* 57, 70 (2000).

**54.** A second reason for discrimination by developing countries in government procurement is the small size of their market when compared to the market of developed countries. A huge procurement market allows for an increase of production, which leads to a decrease in average total costs therefore producing economies of scale. Developing countries, on the other hand, produce fewer products for a higher cost, and cannot compete with suppliers from developed countries in terms of price. Discrimination is then used by developing countries' governments in order to artificially increase the size of the domestic market for domestic suppliers and protect them from the cost disadvantage they face as a result of the size of their domestic procurement market.

**55.** A third reason arises from globalisation, which creates manufacturing concentration in countries where economies of scale lead to monopolistic competitive sectors in procurement.<sup>62</sup> In order to overcome the structural disadvantage of its domestic sectors, governments from developing countries increase discrimination, which is considered to be the most effective way of countering agglomeration forces abroad.<sup>63</sup>

**56.** Last, there is a further reason why price preferences policies, such as those allowed by the World Bank and the UNCITRAL Model Law, are preferable from an economic and legal standpoint. They would indeed increase transparency by avoiding the adoption of selective and limited tendering procedures by governmental authorities as a means of protection or an instrument for corruption. Price preferences do imply a discriminatory effect but, unlike selective and limited tendering, they are at least **quantifiable**, thus providing a more transparent mechanism against any possible abuse in the implementation of tendering procedures by governmental authorities. This would not only promote transparency but would also allow for a further reduction of price preferences granted through future negotiations.

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<sup>62</sup> Id.

<sup>63</sup> Id.

### III. DEVELOPING HARMONIZATION AND CROSS-FERTILIZATION OF GLOBAL PUBLIC PROCUREMENT LAW

**57.** Price preferences seem to be the key to the success of the development community efforts to forge a regulatory framework for public procurement that can be universally accepted, horizontally, within the development community, and, vertically, at the country-level.

**58.** The role of development institutions in public procurement is generally two-fold. The first involves a situation where, as a **condition for funding** a project, the aid institution requires that the borrowing country apply its procurement rules in procuring for the project. Such a requirement for the use of the donor's own procurement rules and practices is often justified by the realities of poor systems of public administration and governance in many aid-dependent countries, which may not fulfil some of the donor's own development assistance objectives such as good value for money, honesty and transparency, free competition etc., as well as ensuring that the funds are being channelled towards the project(s) for which they were disbursed. This requirement, however, often gives rise to a multiplicity of procurement rules, which inhibits effective aid delivery, leading to problems such as the need for local procurement officers (who, more often than not lack the skills and training) to understand and appropriately apply these differing rules to different projects, according to the source of funding, as well as to carry out other procurements under their national procurement laws.

**59.** The second dimension is the situation where the aid institution is involved in **procurement reform projects**, usually as part of an overall public sector capacity building initiative within the recipient country. This often involves a requirement that the recipient country adopts a 'model' legislative framework based on either the donor's own national or institutional procurement system or a globally recognised model such as the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Procurement of Goods, Construction

and Services and its Guide to Enactment.<sup>64</sup> The requirement for the use of the national procurement framework of the donor country as a template within the recipient country is often associated with tied aid: a practice, which requires that the funds provided to the recipient are spent to benefit the donor country's industry as a condition for the provision of aid. This has a distressing effect: the development of a procurement system which lacks transparency, accountability, local input and is unsuitable for the realities of the recipient state.<sup>65</sup>

**60.** In recognition of the pivotal role of public procurement in achieving the goals of their public sector change-management agenda, several development institutions<sup>66</sup> have laid down strict

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<sup>64</sup> The text is available on the Official Records of the General Assembly, Forty-ninth Session, Supplement No.17 and corrigendum (A/49/17 and Corr.1), Annex I, available at [www.uncitral.org](http://www.uncitral.org)

<sup>65</sup> L. Mistelis, *Is Harmonisation a Necessary Evil? The future of Harmonisation and New Sources of International Trade Law*, in FOUNDATIONS AND PERSPECTIVES OF INTERNATIONAL TRADE LAW (Ian Fletcher, Marise Cremona, Loukas Mistelis, eds., 2001) at 45.

<sup>66</sup> Development institutions handle more than 60,000 projects around the world, financed either through loans or grants, with some countries having as many as 800 donor-funded activities each year, hosting more than 1,000 donor missions and preparing over 2,400 progress reports. These institutions include multilateral development banks ("MDBs"), which consist of the International Bank for Reconstruction and Development ("IBRD", also known as the World Bank), the International Financial Corporation ("IFC"), the International Development Agency ("IDA"), and the regional development banks comprising of: the African Development Bank ("AfDB"), Asian Development Bank ("ADB"), Inter-American Development Bank ("IMD"), European Bank for Reconstruction and Development ("EBRD"); international organisations such as the European Union, the OECD and the Organisation of Petroleum Exporting Countries ("OPEC"); individual governments providing aid through their national aid institutions, such as; the United States Agency for International Development ("USAID"), the Japan Bank of International Cooperation ("JBIC"), the United Kingdom's Department for International Development ("DFID"), the Canadian International Development Agency, etc.; and other international organisations which are involved in development-

procurement policies and procedures to be applied by borrowing countries in projects, which they are funding. This practice has led to a proliferation of procurement rules and practices, often using different terminologies relating to similar processes and objectives, within the field of development assistance. The management of different donor procedures bears a high cost for borrower countries, especially the poorest and most aid-dependent. For example, meeting multiple donor requirements employs a significant proportion of borrower countries' administrative capacity; it impairs ownership over the countries own development plans and weakens capacity for effective public management. A recent study of the Organisation for Economic Cooperation and Development ("OECD") has identified difficulties encountered by borrower countries in complying with donor procedures as the second biggest impediment to effective aid delivery, indicating that harmonisation of procurement guidelines and practices will not only reduce transaction costs for borrower countries but also enhance the donor agencies' common focus on capacity building.<sup>67</sup>

**61.** An OECD study proposes two possible solutions to this problem: an alignment of the donor procedures and practices by means of co-operation among donors (in other words working towards a global harmonisation agenda) or an alignment with the national procedures of each recipient country.<sup>68</sup> The current harmonisation agenda suggests a focus on both proposals, with conscious efforts being made by donor institutions to address this issue by identifying good practices in procurement for the harmonisation and alignment of internationally accepted procurement practices and standards.

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oriented procurement; such as the United Nations through the United Nations Development Programme and the WTO.

<sup>67</sup> OECD-Development Assistance Committee Guidelines and Reference Series, Harmonizing Donor Practices for Effective Aid Delivery (2003), pp.13-15; available at: [www.oecd.org/docs](http://www.oecd.org/docs)

<sup>68</sup> OECD-DAC, The Mali Donors' Public Procurement Procedures: Towards Harmonisation with the National Law (July 2000) (Report Summary, p.3) available at: [www.oecd.org/dataoecd/34/46/2488727.pdf](http://www.oecd.org/dataoecd/34/46/2488727.pdf)

**62.** Most multilateral and bilateral donors, as well as partner countries, are currently working to harmonize their operational policies, procedures, and practices and align them with country owned development frameworks.

**63.** The heads of multilateral and bilateral development institutions and representatives of the IMF, other multilateral financial institutions, and partner countries gathered in Rome, on February 24-25, 2003, have committed "to harmonise the operational policies, procedures, and practices of our institutions with those of partner country systems to improve the effectiveness of development assistance, and thereby contribute to meeting the Millennium Development Goals (MDGs)".<sup>69</sup>

**64.** This global exercise is aimed at identifying those elements that all agree are good practices, backed by individual efforts by each institution or country to align their policies and procedures to these good practices, with a strong focus on building national capacities in recipient countries. These efforts cover a broad range of activities: from country strategies, analytic work, technical assistance and operations, to regional and global programmes. The next sections offer a closer examination of these efforts in the field of procurement and traces the progress made.

#### **IV. THE HORIZONTAL DIMENSION OF GLOBAL PUBLIC PROCUREMENT LAW**

##### ***IV.1 THE GLOBAL PARADIGMS***

##### ***(A) THE WORLD BANK PROCUREMENT GUIDELINES***

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<sup>69</sup> Rome Declaration on Harmonisation adopted at the High-Level Forum on Harmonisation, February 25, 2003, Rome, Italy, by Ministers, Heads of Aid Agencies and other Senior Officials representing 28 aid recipient countries and more than 40 multilateral and bilateral development institutions; available at: [www1.worldbank.org/harmonisation/romehlf/Documents/RomeDeclaration.pdf](http://www1.worldbank.org/harmonisation/romehlf/Documents/RomeDeclaration.pdf)

**65.** The World Bank's 'Procurement' and 'Consultancy' Guidelines<sup>70</sup>, employed in the award of goods and works contracts and contracts for consultancy services respectively for World Bank funded projects are probably the most influential model of global procurement regulation. These have provided a model for many of the other institutions. For example, the procurement rules of the OPEC and Japan's Overseas Economic Co-operation rules for aid-funded projects were heavily influenced by the World Bank's model,<sup>71</sup> which consists of an International Competitive Bidding ("ICB") method in awarding most goods and works contracts.<sup>72</sup>

**66.** This involves a formal tendering process where the opportunity to bid for the contract is offered to firms from any member countries (through an advertisement placed in the United Nations' Development Forum Business Edition and local press), setting clear specifications, the submission of bids to a common set deadline and a public opening of bids. Post tender negotiations are forbidden. The bank generally uses its "quality and cost-based selection"<sup>73</sup> process, which involves considerations of both the technical and price aspects of proposals submitted by the bidders in procuring for consultancy services.

**67.** The bank also uses a method based mainly on quality: the "quality based selection"<sup>74</sup>; where for instance, innovation is important or where the methods of carrying out the work may differ widely so that direct comparison of proposals is difficult.

**68.** Other methods employed by the bank, which are also based on competitive bidding procedures, are applied where appropriate; for

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<sup>70</sup> Procurement under IBRD Loans and IDA Credits (May 2004) and the Selection and Employment of Consultants by World Bank Borrowers (May 2004).

<sup>71</sup> G. WESTRING & G. JADOUN, PUBLIC PROCUREMENT MANUAL FOR CENTRAL AND EASTERN EUROPE (1996).

<sup>72</sup> Procurement Guidelines, Paragraph 1.3.

<sup>73</sup> Consultancy Guidelines, Part II.

<sup>74</sup> Ibid., Part III, paragraphs 3.1-3.4.

example in situations where the disadvantages of deviating from the ICB process are not significant. They include, by order of preference: limited international bidding which is "essentially ICB by direct invitation without open advertisement"<sup>75</sup>; the national competitive bidding which is used to procure goods or which, by their nature or scope are unlikely to attract foreign competition"<sup>76</sup>; international and national shopping which involves the use of requests for quotations from potential bidders<sup>77</sup>; direct contracting involving the use of a single contractor<sup>78</sup>; force account which involves the use of the borrower's own personnel and equipment.<sup>79</sup>

**69.** One strong criticism of the bank's requisite for competitive bidding is the high costs and bureaucracy associated with it.<sup>80</sup> The bank's 'domestic preferences' rules, which are designed to promote the development of industry within less developed countries is significant here. According to clause 2.55 on Domestic Preferences «at the request of the Borrower, and under conditions to be agreed under the Loan Agreement and set forth in the bidding documents, a margin of preference may be provided in the evaluation of bids for:

(a) goods manufactured in the country of the Borrower when comparing bids offering such goods with those offering goods manufactured abroad; and

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<sup>75</sup> Procurement Guidelines, Part III, paragraph 3.2.

<sup>76</sup> Ibid., paragraph 3.3.

<sup>77</sup> Ibid., paragraph 3.5.

<sup>78</sup> Ibid., paragraph 3.6.

<sup>79</sup> Ibid., paragraph 3.8.

<sup>80</sup> T. Tucker, *A Critical Analysis of the Procurement Procedures of the World Bank*, in PUBLIC PROCUREMENT: GLOBAL REVOLUTION 139-157 (S. Arrowsmith and A. Davies eds., 1998). See also R. Hunja, *Recent Revisions To The World Bank's Procurement And Consultants Selection Guidelines*, 2 P.P.L.R. 1997, 6, 217-226.

(b) works in member countries below a specified threshold of GNP<sup>81</sup> per capita, when comparing bids from eligible domestic Contractors with those from foreign firms.»

70. If domestic preferences are allowed, the methods and stages set forth in Appendix 2 to the World Bank Guidelines shall be followed in the evaluation and comparison of bids. The rules set forth in Appendix 2 allow a margin of preference, as approved by the bank, to domestically manufactured goods and a margin of preference of 7.5 per cent to domestic contractors<sup>82</sup> subject to approval of the bank. The bank's standard bidding documents provide details for the application of the Guidelines and produce standard terms and conditions for use in projects funded by the bank. <sup>83</sup>

**(B) THE UNCITRAL MODEL.**

71. The United National Commission on International Trade Law (UNCITRAL), within its mandate to further the progressive harmonisation and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade. Mindful of the significant role government purchasing plays in international trade, especially with the potential for discriminatory government procurement practices to place significant barriers to international trade, UNCITRAL's work also

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<sup>81</sup> Gross national product as defined annually by the Bank.

<sup>82</sup> Procurement Guidelines, Appendix 2.

<sup>83</sup> The basic documents used by the bank are: the recently updated May 2004 documents consisting of: Consultant: Standard Request for Proposal; Standard Bidding Documents (SBD): Procurement of Goods; SBD: Procurement of Works, SBD: Procurement of Works Smaller Contracts; SBD: Procurement of Health Sector Goods; SBD: Supply and Installation of Plant and Equipment; and Standard Pre-qualification Documents Procurement of Works. Others are: Standard Bid Evaluation Form: Procurement of Goods or Works (April 1996), Standard Procurement Document: Pre-qualification Document for Procurement of Works and Users' Guide (Nov 2002). All other documents are available at: [www.worldbank.org/projects/procurement/index](http://www.worldbank.org/projects/procurement/index) of standard bidding and proposal documents).

extends to the area of public procurement and infrastructure development. In particular, the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "Model Law"), and its accompanying Guide to Enactment,<sup>84</sup> which are intended to serve as a model for states for procurement legislation and to promote procedures aimed at achieving competition, transparency, fairness, economy and efficiency in the procurement process, has influenced public procurement legislation in over 30 countries,<sup>85</sup> resulting in widespread harmonisation of procurement rules and procedures. The Secretariat's work on issues regarding public procurement has been carried out in close co-operation with organisations having experience and expertise in the area, such as the World Bank, and has also taken into account negotiations held under the auspices of the World Trade Organisation and other international and regional organisations.

At its thirty-sixth session held in Vienna in 2003,<sup>86</sup> strong support for inclusion of further work on public procurement in its work programme of the Commission, so as to allow novel issues and practices that have arisen since the adoption in 1994 of the Model Law was expressed.<sup>87</sup> Documents presented by the Secretariat during the Session set out current activities of other organisations in the area of public procurement and presented information on practical experiences in the implementation of the Model Law,

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<sup>84</sup> L. Mistelis, *Is Harmonisation a Necessary Evil? The future of Harmonisation and New Sources of International Trade Law*, supra note \_\_\_\_\_, at \_\_\_\_\_

<sup>85</sup> See R. Hunja, *The UNCITRAL Model Law on Procurement of Goods, Construction and Services and its Impact on Procurement Reform*, in *PUBLIC PROCUREMENT: GLOBAL REVOLUTION*, supra note \_\_\_\_\_, at 107-108; M. Lemke, *The Experience of Centralised Enforcement in Poland* in *PUBLIC PROCUREMENT: THE CONTINUING REVOLUTION*, at 106 (S. Arrowsmith and M. Trybus eds., 2003).

<sup>86</sup> See Official Records of the General Assembly, Thirty-sixth Session, Supplement No.17 (Doc A/58/17), available at [www.uncitral.org](http://www.uncitral.org), (Commission Sessions/36th session, 30 June-11 July 2003, Vienna).

<sup>87</sup> *Ibid.*, paragraph 229.

entailing a revision of the Model Law. The Commission noted that consistency with other international and regional public procurement regimes in use should, while respecting the basic policies and principles underlying the Model Law, increase the use of the Model Law, and thereby further the aim of harmonization.<sup>88</sup>

Article 34(4)(d) of the UNCITRAL model law leaves some leeway for domestic preference in the evaluation of the bids. If States enacting national procurement regulations decide to adopt price preferences, «in evaluating and comparing tenders a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors or for the benefit of tenders for domestically produced goods or for the benefit of domestic suppliers of services. The margin of preference shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings».

Article 39(2) applies a similar rule to the procurement of services.

The provisions set forth by articles 34(4)(d) and 39(2) of the Model Law on the use of the "margin of preference" technique in favor of local suppliers and contractors put in the hands of the enacting State a mechanism for balancing the objectives of international participation in procurement proceedings and fostering national industrial capacity, without resorting to purely domestic procurement. The margin of preference permits the procuring entity to select the lowest-priced tender or, in the case of services, the proposal of a local supplier or contractor when the difference in price between that tender or proposal and the overall lowest-priced tender or proposal falls within the range of the margin of preference. It allows the procuring entity to favor local suppliers and contractors that are capable of approaching internationally competitive prices, and it does so without simply excluding foreign competition. It is important not to allow total insulation from foreign competition so as not to perpetuate

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<sup>88</sup> Possible Future Work in the Area of Public Procurement, Doc. A/CN.9/553; Current Activities of International Organizations in the Area of Public Procurement: Possible Future Work, Docs. A/CN.9/539 and A/CN.9/539/Add.1, also available [www.uncitral.org](http://www.uncitral.org).

lower levels of economy, efficiency and competitiveness of the concerned sectors of national industry. In the UNCITRAL's view the margin of preference could be a preferable means of fostering the competitiveness of local suppliers and contractors, not only as effective and economic providers for the procurement needs of the procuring entity, but also as a source of competitive exports.

#### **IV.2 A REGIONAL PARADIGM: THE EBRD GUIDELINES**

**72.** In order to consider financing transactions involving concession or similar contracts awarded to private parties, EBRD requires that «award of concessions by a public sector entity should follow a formal competitive tender process designed to achieve the policy objectives of **economy, efficiency, transparency** and **accountability** specified in the Bank's PPR<sup>89</sup> for public sector procurement. This would normally include **a formal initial notification** of the opportunity to potentially interested firms, a pre-qualification process, and a structured approach to requesting and evaluating proposals. However, the process may involve **greater flexibility at earlier stages** of the tender process and more negotiation at later stages than is typically envisaged in the PPR for the procurement of goods and works»<sup>90</sup>.

**73.** The Bank sets out in more detail what it would consider as «**acceptable** competitive tendering procedures». The key elements, which make a competitive selection process acceptable to the Bank, include the following:

- (i) appointment of **experienced advisers**<sup>91</sup>;

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<sup>89</sup> EBRD Procurement Policies and Rules ([www.ebrd.com/about/policies/procure/ppr.pdf](http://www.ebrd.com/about/policies/procure/ppr.pdf)).

<sup>90</sup> EBRD financing of private parties to concessions (<http://www.ebrd.com/oppo/procure/guide/concess.pdf>).

<sup>91</sup> Experience should cover the technical, legal, and financial issues likely to arise in what will often be a complex evaluation and to ensure that the selection process and communication with tenderers is handled to the highest professional standards.

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- (ii) public invitation to *pre-selection* proceedings<sup>92</sup>;
- (iii) published clear *pre-qualification criteria*<sup>93</sup>;
- (iv) issuance of a *clear request for proposals*<sup>94</sup>;
- (v) a structured approach to evaluation of the proposals and subsequent *negotiation with the best rated tenderer*;
- (vi) *public disclosure* of the key terms of the contract which has then been negotiated and of any other important elements of the proposal<sup>95</sup>.

**74.** In the event of procedures that are less competitive than the above standard, the Bank has established a stricter scrutiny process according to which it will finance Concessionaires only if “it is reasonably assured, by thorough due diligence and a review of evidence” that the so-called “Core Criteria” justifying the exception have been met. The Core Criteria require that: (a) the process for selecting the Concessionaire has demonstrated sufficient **fairness, transparency** and **competition**; (b) the process was free of corruption

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<sup>92</sup> should be made public in a manner that reaches as wide as possible an audience of potential tenderers and which contains sufficient information to stimulate potential tenderers’ interest and to allow them to judge whether they are likely to be qualified.

<sup>93</sup> These are designed to narrow the range of tenderers to those qualified for what may be highly complex and sophisticated performance undertakings. The number of tenderers pre-qualified should balance the objective of ensuring strong competition through a reasonable number of tenderers with that of giving well qualified tenderers a reasonable chance of success (given that bid costs typically substantially exceed those required on standard public sector procurement contracts, pre-qualifying too many tenderers may affect bid quality).

<sup>94</sup> It has to be a clear statement on what is required of tenderers in substance, on procedures for submitting proposals, and on the evaluation criteria.

<sup>95</sup> Public disclosure is subject to reasonable confidentiality concerns in respect of information that is proprietary to the tenderer or has been provided in commercial confidence.

and in compliance with all applicable laws and regulations; and (c) the outcome in terms of the Concession Agreement itself is **fair** and **reasonable** in terms of price, quality and risk sharing in relation to market practice.

The EBRD guidelines identify several indicators to determine whether the Core Criteria are met. Two are the most relevant here:

- the first is linked to the transparency of the process «The Contracting Authority has defined the opportunity and ***made it known broadly enough*** to attract the attention of potentially interested and qualified firms»; and that «The process will be considered unacceptable if due diligence reveals any ***evidence of discrimination*** by the Contracting Authority against a company that made an offer, whether solicited or unsolicited, on the basis of irrelevant or contrived criteria».

- the second is more concerned with projects' fairness considerations and thereby with their political acceptability « The general public must be assured that the process has been open in terms of public scrutiny and adherence to appropriate public administrative procedures. In order to help assure itself that the process has been transparent, the Bank determines through due diligence whether the project was announced to local administrative and elected bodies concerned; whether such bodies had the opportunity to review and, possibly, approve the concession agreement; and to what extent the project and contracting process were the subject of public information and (if appropriate) consultation. There may be other meaningful evidence showing public and political debate on and support for the project. In carrying out its due diligence, the Bank may also review press reports and seek out the opinions of politicians, including politicians from significant opposition parties».

#### ***IV.3 THE HARMONIZATION PROCESS: THE MDBS' MASTER BIDDING DOCUMENTS***

**75.** The work of the MDBs and other International Financial Institutions' ("IFIs") on harmonisation dates back to the 1990s,

commencing with informal meetings amongst the heads of procurement ("HOP") on common procurement concerns. In February 1998, HOP commenced regular, structured meetings where they agreed "to continue the harmonisation of standard bidding documents, anti-corruption provisions, and other procurement related issues" and to prepare the first master bidding document ("MBD"), through the creation of a Technical Working Group on Procurement (later referred to as the "Harmonisation Working Group"), consisting of representatives of the banks. In 1999, the HOP agreed on and started using the first MDB on procurement of goods, which was later updated for continued use in 2002. In October 2002, the HOPs agreed on a harmonised pre-qualification document for civil works contracts. The Working Group has since produced procurement documents, which include a harmonised standard bidding document for procurement of works and a "request for proposal" document on consulting services, which have been agreed on by the HOPs.<sup>96</sup> Perhaps the most successful outcome of the MDBs harmonisation exercise so far, has been the agreed MBD for procurement of goods and its consequent publication and use as standard bidding documents ("SBD") by four MDBs: the ABD, AfDB, IDB and the World Bank.<sup>97</sup>

**76.** Following a series of meetings by the HOP in 2002, where individual MDBs procurement policies and practices were compared and analysed at length, it was agreed that MDBs have advanced significantly in being "substantially harmonised" and that the remaining differences will require decisions to be taken by other stakeholders.<sup>98</sup>

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<sup>96</sup> All of these documents are available at [www.worldbank.org/projects/procurements](http://www.worldbank.org/projects/procurements).

<sup>97</sup> Rodolfo C. Hernandez, *Report on the Progress of Work by Heads of Procurement* (November 2002), Presentation made at the High Level Forum on Harmonisation; available at: [www.aidharmonisation.org](http://www.aidharmonisation.org).

<sup>98</sup> Several of these 'differences' relate to policy provisions covered within the constitutive instruments of individual MDBs, which can only be deliberated upon by the MBD's 'owners' or sponsors.

All the drafted MBDs contain provisions allowing a margin of preference<sup>99</sup>.

## V. THE VERTICAL DIMENSION OF GLOBAL PUBLIC PROCUREMENT

### V.1 CROSS-FERTILIZATION THROUGH CPARS.

The MDB's harmonisation process has also involved co-operation with their member countries, resulting in country "pilot projects" by the ADB and the World Bank in Asia, the AfDB and World Bank in Africa, and the IDB and World Bank in the Americas, aimed at implementing, amongst other things, national procurement reforms to ensure good governance and local capacity as well as use of common documents and procedures for national competitive bidding. There have also been joint country procurement assessment reports ("CPARs") by these institutions in each of the three regions.<sup>100</sup> Steps have also been taken to harmonise their e-procurement activities, with the creation of the MDB's E-Procurement Working Group at the beginning of 2003, resulting in a joint approach to providing technical advice and support to their member countries in developing their e-GP strategies and solutions by the ABD, IDB and World Bank. A single website has also been created,<sup>101</sup> as an indication of their commitment to this effort and to ensure that their collaborative effort in this area will continue to be maximised.

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<sup>99</sup> See for instance clause 33.1 of the MBD for Procurement of Works which leaves to the procuring entities the possibility to foresee in the Bid Data Sheet the applicability of a margin of preference.

<sup>100</sup> Details of these joint country-level harmonisation and joint procurement efforts are available in, World Bank-OECD/DAC Task Force on Donor Practices: Harmonisation of Operational Policies, Procedures and Practices: Second Progress Report (March 2002) available at: [www.oecd.org](http://www.oecd.org)

<sup>101</sup> Available at: [www.mdb-egp.org](http://www.mdb-egp.org).

At the Rome High Level Forum, several of the participating donors provided details of their action plans on programmes which are focused on changes in how they do business at the country level by promoting harmonisation,<sup>102</sup> especially through the use of common country procurement assessment tools such as the use of common Country Procurement Assessment Report ("CPAR" which consists of common instructions and joint execution) and Sector Wide Approach ("SWAP" which consists of common minimum requirements for local procurement) and the joint preparation of periodic country reports. The implementation phase of these Action Plans is well under way with significant progress made so far.

In Bangladesh for instance,<sup>103</sup> a new Procurement Regulation to be applied by all public entities, was introduced in 2003, which takes into account the harmonisation efforts of the MDBs and their minimum requirements for local procurement. MDBs and bilateral donors are encouraged to use the Government's new regulations for local procurement and international procurement. Standard bidding documents for goods and works, and request for proposals for consultants services are completed in accordance with the new regulation, with a computerised procurement management information system is expected to be established to monitor and enforce compliance with new procurement regulations. Other improvements in the area of procurement include: guidelines for management of procurement process; publication of contract award; simplification of advertisement procedure; establishment of a public procurement website and electronic tendering; a procurement bulletin; a sequestering evaluation committee; de-layering of procurement approval process and delegation of powers; procurement post review; appeal procedures and code of conduct.

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<sup>102</sup> See App.II for a copy of the NordicPlus Group (Denmark, Finland, Ireland, Norway, Sweden, the Netherlands, and the UK)'s Joint Action Plans For Effective Aid Delivery Through Harmonisation and Alignment of Donor Practices.

<sup>103</sup> Information available on the Rome HLF website at [www.aidharmonisation.org/ah-cla/ah-browser/index-abridged?area\\_list=-proc&master=master](http://www.aidharmonisation.org/ah-cla/ah-browser/index-abridged?area_list=-proc&master=master).

In the Niger, the implementation of the Comprehensive Action Plan of the World Bank, Canada, the EC, France, UNDP, the UN and the Niger Government has led to a set of initiated actions by the Government to improve public resource management and create conditions that facilitate harmonisation of donor practices by adopting a new Procurement Code and programme for procurement reform. Proposed areas of future work are likely to include bidding documents for national competitive bidding ("NCB"), upper limit thresholds for national competitive bidding, post/prior document review limits, and eligibility criteria for state owned enterprises ("SOE").

In Vietnam, donor efforts<sup>104</sup> are currently focused on supporting the implementation of the recently completed Public Procurement Action Plan.<sup>105</sup> The following new Procurement Decrees have been issued: Decree 66/2003/ND-CP of June 12, 2003 on public procurement regulation (66CP) and Decree 61/2003/ND-CP of June 6, 2003 on mandate, function and organisation of Ministry of Planning and Investment (61-CP). Other successes include: common bidding documents for NCB with the adoption of SBDs for procurement of goods and civil works; common upper limit thresholds for ICB/NCB; common assessment of thresholds for prior/post reviews; eligibility of dependent state owned enterprises and common procurement arrangements for pooled funding in SWAPs; progress work in the establishment of a new procurement Management Department with improved capacity (Procurement Evaluation Office); CPAR implementation successfully transforming public procurement of goods and civil works; and the approval of a grant from the International Development Association (IDA) to help the Government prepare revised implementation rules and regulations for the procurement bulletin and additional standardised procurement documents/procedures. In addition, the Like-Minded-Donor-Group, comprising of a group of about nine bilateral donors, led by DFID is providing support on producing guidelines for harmonised

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<sup>104</sup> Comprising of the ADB, Canada, Denmark, Netherlands, Norway, Sweden, UK and the World Bank.

<sup>105</sup> Available on Rome HLF website at: [www.aidharmonisation.org/download/247856/HAP-2004-Final\\_Version.xls](http://www.aidharmonisation.org/download/247856/HAP-2004-Final_Version.xls).

procurement procedures and has completed an analysis of the current procurement framework, identifying areas for further improvement. The group has also made further progress on the glossary of development terms.

## **V.2 PUBLIC PROCUREMENT CAPACITY BUILDING AT THE COUNTRY LEVEL.**

**77.** In other instances, MDBs sponsor capacity-building projects at the country level and finance the design and implementation of a national government procurement regulation consistent with the global public procurement principles.

**78.** In 2007, the Inter-American Development Bank (hereinafter "IDB") in collaboration with the local Barbadian bank system, gave input to a process of modernization of the national public procurement system. The need for such modernization originates from the lack of efficiency in procurement system that makes hard an effective and productive use of government resources.

**79.** Currently the public procurement system in Barbados Government represents a subdivision of financial management with specific objectives and needs. Even if it is not considered as a proper separate function, it is regulated at two different levels: central government and statutory bodies.

**80.** At the central level, public procurement subsystem includes four specific sections - the centralized purchasing system, the centralized tendering system, the Barbados Drugs Services and the line Ministries and department.

**81.** The Central Purchasing Department – CPD - represents the main nucleus of the whole system and it acts as the government's purchasing agent. That means for instance, that it is responsible for all the acquisitions with authorized suppliers and the distributions of goods and services. The CPD is controlled by the Chief Supply Officer, which presides also the Tenders Committee. The existing procedure in procurement system is rather detailed. The using of contracts in purchasing of goods and services depends on the value of goods and services order. In some cases, when the value of orders is about Barbadian 20.000\$, these contracts are formalized by the Solicitor

General or a legal officer appointed by the same Solicitor General.  
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**82.** Above a certain value (Barbadian 100.000\$), the tendering process is conducted by the Tenders Committee and required the participation of the CPD. In some cases, the Ministry of Finance can authorize line Ministries to bypass CPD and carry out their own purchasing.

**83.** The Barbados Drugs Services is responsible for all the procurements of drugs establishing, in such a sense, the rules, the terms and the conditions of the inherent procedures. The Drug Tenders Committee, nominated within the Ministry of Health, deals with all drug procurement procedures based both on a tendering process and on the reimbursements to public pharmacies, apparently more or less in equal proportions<sup>107</sup>.

**84.** Barbadian public procurement system is subjected to several rules and regulations, in particular, the Financial Administration and Audit (Financial) rules, 1971; the Financial Administration and Audit (Supplies) rules, 1971, and the Financial Administration and Audit (Drug service) rules, 1980.

**85.** These rules and regulations help the system to work but, at the same time, they are not enough to cover key aspects of modern procurement.

**86.** In particular, there are not specific and detailed procedural guidelines; there is not a mechanism for the settlement of disputes or any other mechanism to support the development of procurement policy legislation and regulations.

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<sup>106</sup> According to the rule 4 of the financial administration and audit (Supplies) rules of 1971, this provision do not apply when suppliers are subject to warranties or guarantees or when supplies are to be received and examined for defects before payment is made.

<sup>107</sup> When a bidding process takes place, tenders are invited from approved suppliers for a one year period. To be approved, supplier must have a local representation. Concerning the procurement done by statutory bodies, as indicated above, they generally have their own procurement procedures included in their own statutes.

**87.** Moreover, the legal framework is lacking. In particular, there are not specific rules and standards that make clear and sure the responsibility of different players. There is no rules assuring regional or international trade obligations. There are not provisions concerning penalties or sanctions for the violations of procurement rules. No legal standards support the decentralization of procurement activities or consider the use of standard bidding documents. No rules guarantee the public accessibility to procurement information, including qualifications requirements for suppliers and contractors, methods of procurement, and conditions for theirs use. No rules consider green procurement in procurement activities.

**88.** The procurement operations framework is insufficient, that means that: there is no the functional and normative instruments to guarantee an unit control on public procurement in the whole country; there is no established framework for the collection and maintenance of procurement statistics. There are no adequate tools or modern technologies for the improvement of CPD and Tenders Committee activities, method and knowledge. Governmental bodies, ministries and departments, have insufficient and inadequate procurement capacity and sometime they procure good and services ignoring CPD authority. There is no functional unit among different Statutory Bodies each of them operates according to a proper and specific practice.

**89.** At the same time, there are not institutional framework in the sense that there are no organizational structure or job descriptions to carry out the procurement functions, there is no specific career stream in procurement or regular civil servants execute the functions, most of them without a background in procurement. There is no a professional code of conduct specific to public procurement staff and activities; or even, focus on training and development of procurement professionals and a sustainable training program for public procurement process.

**90.** Lastly, there are inadequate technological infrastructures. The current system is almost obsolete and lacks an updated strategic plan providing guidance on how to deal with the transitioning of personnel into the new functions and procedures; an IT procurement strategic plan, lack of instruments to process, report and disseminate information, insufficient computer equipment to support the

procurement functions and procedures; public information about the name of the winning bidder or the amount of contract award and a standardization and automation which creates bottlenecks in the purchasing process.

**91.** All these inefficient aspects represent a daily challenge for the Barbados Government. That is why in order to achieve its purposes and procedures efficiency, National Government in public procurement sector has set the shift towards a more competitive economy that may assure a certain improvement of public procurement system and enhance further project implementation<sup>108</sup>.

**92.** In such a sense, the project's purpose is the development of competitiveness that may make possible the reversion of the balance of payments deterioration and associated international reserve loss, the extensive changes in international economic environment which Barbados faces following the WTO changes and other impending changes in trade relations and the need to achieve full readiness to implement the Caricom Single market and economy including the harmonization of Government procurement regime.

**93.** At the same time, the banks cooperate to the improvement and the efficiency purposes. In particular, they want to overcome the institutional and capacity weakness through a program that, in guaranteeing facilities and small operations, may contribute to improve the quality and efficiency of policies and public management. The proposed project qualifies as an Institutional Development Sector Facility (IDSF) since it complies with the criteria for this type of instrument.

**94.** The program strategy is support by 4 main focal points, which help to create the basis of the harmonization of public procurement system and of the creation of a regional regime for Government procurement. In that sense, the program sides with CARICOM and CSME Government Procurement regime's purposes.

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<sup>108</sup> Government activity in public procurement sector will be

**95.** These 4 main focal points consists in: the creation within the Ministry of Finance of a central regulatory and normative body that will supervise procurement operations. This new entity will priory assure procurement activity in accordance with international best practices, in order to secure the harmonization of the whole procurement system both at national and international level especially relate to CSME Government Procurement regime.; the centralization of the common goods an services procurement through the Central Purchasing Department, which will generate a considerable economy of scale; the decentralization of the specific goods and services procurement carried out by Ministries and Department, which will eliminate he system's bottlenecks; the standardization of the procurement process carried out by all public entities, including the Statutory Bodies, which will increase transparency and allow to capture all entities in the system.

**96.** The main objective in Barbados government policy related to public procurement sector is the achievement of high levels in modernizing public procurement regime and its procedures, competitiveness, transparency and integrity. To such end, it is possible distinguish several activities that Barbados Government sets for assuring public procurement regime efficiency.

**97.** The first activity wants to establish the best practices in public procurement. To such an end Barbados Government is about to adopt a policy to strengthen public procurement regulatory framework. This policy will define a clear guidance to all procuring entities operating in the State, including statutory bodies, while implementing a system that captures both conventional and innovative types of procurement (PPP/PPI)

**98.** According to these objectives, government activity will be support by detailed procurement regulations establishing new rules about bid documents and standards for proposal documents, new tools to guarantee efficiency within the system; and it will interested by a new procurement legislation.

**99.** The second activity Barbados Government is about to carry out concerns the provision of the necessary support and tools to all stakeholders operating and involving in public procurement market

operations. According to this plan, government activity create a new entity within the authority of the Ministry of Finance, the PPU – Procurement Policy Unit which has the aim to supervise under its responsibility public procurement and to balance procurement operations with national financial resources<sup>109</sup>. At the same time government objectives affect on one side the strengthening, by supporting it, of the CPD activities and operations by supporting and providing modern and advance means and tools to such end; on the other, to strengthen all the governmental entities involved in procurement operation such as the Ministries, the Tenders and Special Tenders Committee, Statutory Bodies, supplier community and other related entities, by sustaining public procurement regulations.

**100.** The third activity, help Barbados government to undertake and implement a career stream in public procurement within the civil service and to establish a sustainable, on going training in public procurement. PPU and CPD organizational structure and job descriptions developed with a specific attention to the staffing of PPU in accordance with the profiles developed and CPD strengthened in accordance with the newly developed profiles. Strategic plan in career stream and relevant human resource manual developed through which personnel handling public procurement shall be accredited and identified as procurement specialists within the civil service.

**101.** Permanent training program implemented and related material prepared which will train a minimum of 1.000 public officials of all levels in public procurement.

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<sup>109</sup> The PPU play a fundamental role in the definition of the new public procurement regime. At the end of public procurement project, the PPU will provide advices to all procuring entities, draft amendments to the legislative and regulatory framework and implementing regulations, provide procurement information and monitor of public procurement, reporting on procurement to other parts of government, develop and support implementation of initiatives for improvements of the public procurement system; and provide implementing tools and documents to support capacity development of implementing staff. P. 7.

**102.** Lastly, the new public procurement sector will be enforcing by the adoption of a technological communication system among all Barbadian sub system. That means, the implementation of technological infrastructures both software and hardware system; the development of an e-tendering system inclusive of training of procuring entity personnel for the full use of the system; and, in order to simplify the procurement process an efficient automation of the public procurement procedure system will assist operators (CPD, the Solicitor General's office and the Accountant General's office) in all phases - from requirements to budget accounting information.

**103.** The implementation of the public procurement plan<sup>110</sup> needs of the participations both of Government as the borrower player and the Ministry of Finance as the executing agency. The execution of that plan will be assisted by the creation of the PCU - Program Coordination Unit that will act under the Ministry of Finance's authority. The PCU will lead by the PC - Program Coordinator, which will have the control and the responsibility of the management program and of the technological leadership. The PC will be the mean through which all parties in procurement sector (executing agency, the Bank, and other parties) will communicate.

## **VI. CONCLUSIONS: A FARI GLOBAL PUBLIC PROCUREMENT LAW AS A MODEL FOR A FAIR GAL?**

**104.** This paper has built on an argument that is increasingly becoming popular in international trade law studies thanks to the work of those scholars who argue that "the WTO is, effectively, stuck in a time warp, unable to break free of the ideological straight jacket

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<sup>110</sup> About the cost of the whole operation, the program is estimate at US \$ 5.07 million. Of this amount, the Bank would finance US \$ 4.07 million as a reimbursable loan, while the GOB would provide US \$ 1 million as local counterpart. The operation does not qualify as a poverty-reduction loan. The program will have an execution period of 36 months and a disbursement period of 42 months. P. 9.

of neo-liberalism to which it is committed".<sup>111</sup> "It is becoming the last and best spokesperson" for "the increasingly discredited neo-liberal approach to development."<sup>112</sup>

**105.** This argument applies perfectly to the WTO regulation of public procurement. The GPA has indeed failed to accomplish its task to provide a universally accepted regulation of public procurement centered upon an uncompromised version of the principle of transparency and free competition.

**106.** The World Bank and all the other development institutions have been more successful in imposing on the global stage a model of public procurement regulation based on a more balanced compromise between social and economic values.

**107.** The development community's public procurement policy seems to gain the stand of a global regulation. It indeed shows to project its *vis expansiva* in both a vertical and an horizontal dimension. It is universally accepted at the global level. It is becoming a model for national procurement systems.

**108.** The secret of this success raises the question of whether also the more general Global Administrative Law should start exploring the fertility of substantive principles such as the fairness and the substantial equality principle which might call for affirmative actions also at the global level.

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<sup>111</sup> McCrudden, *Social Policy Choices and the International and National Law of Government Procurement: South Africa as a Case Study*, paper presented at the NYU-UCT GAL Conference, Cape Town, 18-20 March 2008.

<sup>112</sup> Robert Howse and Brian Langille, *The World Trade Organization and labour rights: man bites dog*, in *SOCIAL ISSUES, GLOBALISATION AND INTERNATIONAL INSTITUTIONS: LABOUR RIGHTS AND THE EU, ILO, OECD AND WTO* at 157-231 (Virginia A. Leary and Daniel Warner eds., 2005). See also ROBERT HOWSE, *THE WTO SYSTEM : LAW, POLITICS & LEGITIMACY* (2007).