International Political Economy Series

Promoting Good Governance, Development and Accountability

Implementation and the WTO

Susan Brown-Shafii

International Political Economy Series

General Editor: **Timothy M. Shaw**, Professor and Director, Institute of International Relations, The University of the West Indies, Trinidad & Tobago

Titles include:

Lucian M. Ashworth and David Long (*editors*)
NEW PERSPECTIVES ON INTERNATIONAL FUNCTIONALISM

Susan Brown-Shafii
PROMOTING GOOD GOVERNANCE, DEVELOPMENT AND ACCOUNTABILITY
Implementation and the WTO

Eugénia da Conceição-Heldt
NEGOTIATING TRADE LIBERALIZATION AT THE WTO
Domestic Politics and Bargaining Dynamics

Robert W. Cox (*editor*)
THE NEW REALISM
Perspectives on Multilateralism and World Order

Frederick Deyo (*editor*)
GLOBAL CAPITAL, LOCAL LABOUR

Stephen Gill (*editor*)
GLOBALIZATION, DEMOCRATIZATION AND MULTILATERALISM

Björn Hettne, András Inotai and Osvaldo Sunkel (*editors*)
GLOBALISM AND THE NEW REGIONALISM

Christopher C. Meyerson
DOMESTIC POLITICS AND INTERNATIONAL RELATIONS IN US–JAPAN TRADE POLICYMAKING
The GATT Uruguay Round Agriculture Negotiations

Isidro Morales
POST-NAFTA NORTH AMERICA

Manuela Moschella
GOVERNING RISK
The IMF and Global Financial Crises

Volker Rittberger and Martin Nettesheim (*editors*)
AUTHORITY IN THE GLOBAL POLITICAL ECONOMY

Justin Robertson (*editor*)
POWER AND POLITICS AFTER FINANCIAL CRISES
Rethinking Foreign Opportunism in Emerging Markets

Michael G. Schechter (*editor*)
FUTURE MULTILATERALISM
The Political and Social Framework

Michael G. Schechter (*editor*)
INNOVATION IN MULTILATERALISM

Ben Thirkell-White
THE IMF AND THE POLITICS OF FINANCIAL GLOBALIZATION
From the Asian Crisis to a New International Financial Architecture?

Thomas G. Weiss (*editor*)
BEYOND UN SUBCONTRACTING
Task Sharing with Regional Security Arrangements and Service-Providing NGOs

Robert Wolfe
FARM WARS
The Political Economy of Agriculture and the International Trade Regime

International Political Economy Series
Series Standing Order ISBN 978–0–333–71708–0 hardcover
Series Standing Order ISBN 978–0–333–71110–1 paperback
(outside North America only)

You can receive future titles in this series as they are published by placing a standing order. Please contact your bookseller or, in case of difficulty, write to us at the address below with your name and address, the title of the series and one of the ISBNs quoted above.

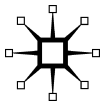
Customer Services Department, Macmillan Distribution Ltd, Houndmills, Basingstoke, Hampshire RG21 6XS, England

Promoting Good Governance, Development and Accountability

Implementation and the WTO

Susan Brown-Shafii
Scientific Coordinator and Senior Research Fellow,
World Trade Institute, University of Bern, Switzerland

palgrave
macmillan



First published 2011 by
PALGRAVE MACMILLAN

Palgrave Macmillan in the UK is an imprint of Macmillan Publishers Limited, registered in England, company number 785998, of Houndmills, Basingstoke, Hampshire RG21 6XS.

Palgrave Macmillan in the US is a division of St Martin's Press LLC, 175 Fifth Avenue, New York, NY 10010.

Palgrave Macmillan is the global academic imprint of the above companies and has companies and representatives throughout the world.

ISBN: 978–0–230–54525–0

This book is printed on paper suitable for recycling and made from fully managed and sustained forest sources. Logging, pulping and manufacturing processes are expected to conform to the environmental regulations of the country of origin.

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication Data

Brown-Shafii, Susan, 1959–
Promoting good governance, development and accountability : implementation and the wto / Susan Brown-Shafii.
p. cm.
Includes index.
ISBN 978–0–230–54525–0 (hardback)
1. Government purchasing – Corrupt practices. 2. World Trade Organization – Rules and practice. 3. Civil service ethics. I. Title.

JF1525.P85B77 2011
382'.92—dc22 2011004884

10 9 8 7 6 5 4 3 2 1
20 19 18 17 16 15 14 13 12 11

Printed and bound in Great Britain by
CPI Antony Rowe, Chippenham and Eastbourne

This book is dedicated to Ata

Contents

Part II Moving the International Regulatory Process Ahead: Accountability in Converging and Competing Systems of Authority

Part III Pulling It all Together: How Far Might the GPA Procedures Go?

Acronyms

BIC	Brazil, India, and China
BISD	Basic Instruments and Selected Documents
BRIC countries	Brazil, Russia, India and China
CARIFORUM–EC–EPA	Agreement between EC and CARICOM/ Dominican Republic
CIDA	Canadian International Development Agency
CIGI	Centre for International Governance Innovation
CSO	Civil society organization
CSR	Corporate Social Responsibility
DAC	(OECD) Development Assistance Committee
DDA	Doha Development Agenda
DFID	(UK) Department for International Development
DG	Director-General (of the WTO)
DSB	Dispute Settlement Body
DSU	(WTO) Dispute Settlement Understanding
EC	European Community
EITI	Extractive Industries Transparency Initiative
EPA	Economic Partnership Agreement
EU	European Union
FCPA	(US) Foreign Corrupt Practices Act
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GPA	Government Procurement Agreement
GVC	Global Value Chain
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce
IDB	Inter-American Development Bank
IFI	International Financial Institution
ILO	International Labor Office
IMF	International Monetary Fund
IO	*International Organization* (an academic journal)

IPE	International Political Economy
IR	International Relations
ISO	International Organization for Standardization
ITC	International Trade Centre
ITO	International Trade Organization
IWG	Informal Working Group on Negotiations
LDCs	Least-developed countries
MCA	Millenium Challenge Account
MDGs	Millenium Development Goals
MeTA	Medicines Transparency Alliance
MFN	Most-favoured nation
MNC	Multinational corporation
MSI	Multi-stakeholder initiative
MTN	Multilateral Trade Negotiations
NGO	Non-governmental organization
NIEO	New International Economic Order
NPM	New Public Management
NTBs	Non-tariff barriers to trade
OAS	Organization of American States
ODA	Official Development Assistance
ODI	Overseas Development Institute
OEEC	Organization for European Economic Cooperation
OECD	Organization for Economic Cooperation and Development
OPEC	Organization of Petroleum Exporting Countries
PPPs	Public Private Partnerships
PRSP	Poverty Reduction Strategy Paper
PSP	Principal Supplier Principle
S&D	Special and Differential Treatment
SIDA	Swedish International Development Agency
TI	Transparency International
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNCITRAL	UN Commission on International Trade Law
UNCTAD	UN Conference on Trade and Development
UNDP	United Nations Development Programme
UNODC	UN Office of Drugs and Crime
USTR	US Trade Representative

WGTGP	Working Group on Transparency in Government Procurement
WHO	World Health Organization
WP	Working Party
WTI	World Trade Institute, University of Bern
WTO	World Trade Organization

Preface and Acknowledgements

This book had a gestation period longer than that of an elephant! Part I reflects revised research initially completed at the London School of Economics and Political Science in 1998. At the time, I was encouraged to publish this research with the proviso, *inter alia*, that any revisions 'elaborate on the position of developing countries (under the GPA) and the more distinctive significance of government procurement for the process of development ... since it deserves the wider readership that would ensue'. Feeling overwhelmed by the intellectual challenge this then presented, I was pleased to file the project deep in a drawer. I wanted to start thinking about something – *any*thing – other than public procurement.

Fast-forward to 2004, when the World Trade Institute (WTI) in Bern, Switzerland was awarded funding from the Swiss National Science Foundation in a competitive process for a multi-year research project to develop a National Center of Competence in Research on international trade regulation. The project was premised on the idea that academia should play a key role in identifying, analysing and offering innovative policy and rule-making solutions to key challenges in modern trade diplomacy. Multi-disciplinary in orientation, it involves cooperation between political scientists, lawyers and economists. Scientific advisors include well-known scholars from around the world, as well as accomplished practitioners. I have had the pleasure of working as the scientific assistant to the director of this project since its outset.

Initially my work involved scientific management, *exclusively*. We had an international network of some 50 researchers – 25 of whom were PhD students – and virtually no institutional structures of our own. It was a logistical trial in the early days! Fun, too, because we were trying to facilitate cooperation between disciplines in ways that no one in trade had done to date. With time, however, I realized that being an administrator without personally participating in the research was missing out on the most important intellectual challenges with which we were contending. Rather like a kid confined to the side-lines while all her friends got to play. I decided to dust off my earlier research in the drawer to see if there was anything there that could still be salvaged for publication.

I hadn't been working on my own research for several years; it took a while to catch up with the debates relating to procurement, and even

longer to come up to speed with the IPE debates. A lot had happened, but, for the most part, things remained the same. What had changed – and, dramatically so – was the nature of the IPE debates; the concepts with which researchers were now engaging were issues that were of potentially much greater relevance to the practical institutional challenges surrounding international trade regulation than they had been previously.

Throughout the months when I was revising the draft for publication and completing the new chapters, I had a particularly constructive relationship with the editorial team at Palgrave Macmillan. Perhaps this was a reflection of serendipitously shared backgrounds in academic administration and the complementary fields of expertise that I had with the series editor, Professor Tim Shaw? In any case, I sincerely appreciated the professionalism of Tim, Alexandra Webster, Christina Brian, Renée Takken, Dr Philippa Grand, Hazel Woodbridge and Matthew Hayes.

Dr Richard Laing, a member of the Medicines Transparency Alliance's International Advisory Group, who is employed by the WHO Secretariat's Essential Medicines and Pharmaceutical Policies Department in Geneva, offered me an excellent introduction to the subject of essential medicines – and the role that more effective procurement might play in improving access to them. I appreciate his generosity with his time. Any mistakes I might have made in interpreting what he conveyed or the information to which he referred me are, of course, my own. The same is true for Professor Shaw.

Finally, special thanks are due to Professors Thomas Cottier and Pierre Sauvé, along with my colleagues at the WTI for their contributions to making such a stimulating learning environment possible. I've sometimes felt like a military recruit struggling, intellectually, to keep up with 'Col. Cottier' and the troops, but it's been fun; I've learned a lot! It is a privilege to work for the WTI. I would also convey my thanks to the University of Bern, Thomas Griessen and the Swiss National Science Foundation, and the Ecoscientia Foundation for their generous financial support, as well as our talented support staff, especially Magrit Vetter – without whom the WTI would crumble and collapse – Claudia Badertscher and Christian Steiger, the NCCR's endnotes gurus and Susan Kaplan, our erudite English editor.

More than anything else, I would like to thank my husband, Ata. As is his wont, he was exceedingly patient throughout the period when I was carrying this 'elephant'. I dedicate this book to him with enormous affection.

Susan Brown-Shafii

[T]here is no escaping the imperative of multi-disciplinarity in the understanding of change and outcomes in the international political economy ... In saying goodbye to international relations, I am only suggesting that our times no longer allow us the comfort of separatist specialisation in the social sciences, and that however difficult, the attempt has to be made at synthesis and blending, imperfect as we know the results are bound to be.

Strange, 1996

Introduction

The regulation of public procurement evokes Kafkaesque images. More than a decade of efforts at the national level to introduce commercially oriented practices in this regulatory context – including a myriad of innovative approaches to the cooperative public–private financing of major infrastructure projects, or public outsourcing and extensive experimentation with privatization – have not succeeded in fundamentally altering this reputation. Nor has growing recognition of the strategic importance of procurement systems in public financial management, the development of sophisticated 'impact assessment' tools to evaluate the costs and benefits associated with new and existing regulations, or the introduction of electronic procurement mechanisms. Indeed, the two volumes worth of rules governing the US Federal Government's acquisitions process – notably the mother of rule-intensive domestic regimes – still spread out over a full nine inches of bookshelf space (Schooner, 2001, p. 635)!

The same is equally true at the international level. The WTO and EU procurement regimes – albeit aimed primarily at facilitating trade liberalization – have recently undergone major programmes of simplification.[1] Although the WTO revisions are still provisional, the basic disciplines in both regulatory contexts remain procedurally intensive – or convoluted, depending on your perspective. The bottom-line is? Public procurement is what one experienced observer has termed a 'business process within a political system' (Wittig, 2002, p. 71). Democratic governments plan their budgetary allocations much as a private company might, but, significantly, they are held to formal standards of accountability, or obligations to answer for their purchasing practices and decisions that fundamentally differ from those faced by private entities. Failure to comply with these standards, in turn, can result in sanctions.

Identifying who should be accountable to whom, for what, via what processes and how to enforce sanctions becomes complicated when the standards in question are internationally determined but, as will be seen, the accountability issues remain.

A book that explores issues of accountability in the governance of the public purchasing processes, in view of the above, would not appear to hold much promise as a scintillating read. The term itself is widely contested and has already served as fodder for considerable academic rumination (Grant and Keohane, 2005; Held, 2005; Slaughter, 2000). Many of the accountability-related challenges currently being faced in the international regulation of public procurement, however, parallel those with which the international economic order as a whole is contending. To cite a few prime examples: How might a 'WTO-specific administrative law', designed to foster good governance – and fundamentally serving to apply the rule of law to public officials – function in practice? (Esty, 2007) In what way, if at all, is this affected by the emergence of non-territorially bound economic actors?(Keohane, 2009) More precisely, in that the WTO traditionally represents a classic case of intergovernmentalism, how might such a law align with what Professor Keohane has described as a 'global political economy' in which a 'variety of regulatory and coordinating bodies ... (have) become prominent participants in rule-making'? Additionally, can/should anything be done to promote the multilateralization of the WTO's Government Procurement Agreement (GPA) and, in particular, to encourage developing countries to undertake membership, along with the associated governance-related obligations that come with it? (For further details on the GPA, see the text of this Agreement in Appendix 1.) Does the GPA allow for sufficient 'policy space' or developmentally appropriate domestic policy latitude? (Hoekman, 2005;Ismail, 2005;UNCTAD, 2004)More broadly, how will new issues be brought onto the WTO agenda?[2]

These challenges, furthermore, are essentially political in key respects. Starting with the negotiation of the GATT Anti-Dumping Code in 1967, picking up speed with the agreements on the Tokyo Round Codes in 1979 – including the Code on Government Procurement– and coming to full fruition with the completion of the Uruguay Round in 1995, the institutional 'business' of the WTO has fundamentally changed during the past 40 years. There is an extensive academic literature dealing with this evolutionary process. Largely legal in orientation, it describes a gradual shift from the promotion of trade liberalization, based on the principle of non-discrimination and negative integration, to regulatory harmonization, coupled with the introduction of minimum regulatory

standards and procedures for their enforcement when existing domestic regulations are inadequate or ineffective (Heiskanen, 2004; Howse, 2001; Trachtman and Alvarez, 2002). The primary purpose of the minimum standards – or what Robert Howse has termed 'new era' rules – is to promote fair competition, an eminently political objective (Howse, 2001, p. 365). This book will not engage directly with this literature. Rather, it will examine the international regulation of public procurement as a cutting edge case study of the politics of the regulatory harmonization process as it has evolved and is evolving, building on this and other theoretical work for the purposes of sketching out a first conceptual framework for the empirical enquiry. The idea, in this sense, is to map out a fragmented intellectual and policy terrain for use in others' synthetic work. A terrain that transcends several layers of governance, comprehends the pursuit of overlapping and sometimes conflicting value-related regulatory objectives, is inherently inter-disciplinary in scope, but, in essence, is political. In view of this complexity, the author will not endeavour to integrate the case study into the various conceptual debates in question.

Academic contribution and structure of the book

The detailed case study consists of three parts, each of which makes a distinct contribution to the book's 'value-added' academic component. Part I develops a political foundation for the overall exercise. It consists of an analysis of the regulatory 'methodology' embodied in the GPA, designed to illuminate the political premises and values implicit therein(see Appendix 1). Particular emphasis will be given to the innovative approaches that were developed in the context of these international administrative disciplines over the last 30 years to manage challenges relating to the implementation of the national treatment principle, or positive duty to extend equal treatment to the suppliers of other parties to the Agreement offering products or services to procurement entities covered by the GPA.[3] These include: stringent, procedural 'transparency' obligations; a private actor-initiated bid challenge, or 'court-like' review mechanism; provisions for tightly circumscribed monetary damages; lack of an escape clause or safeguard provisions; a comprehensive ban on cross retaliation in the case of disputes, and; specific reciprocity in the exchange of market access concessions.

Based on the text of the legal agreement in question, the analysis in Part I will pick up where yet another academic debate has waged, this time primarily amongst political scientists and lawyers. This debate

deals with the concept of 'legalization', a term that effectively encompasses the increasing formalization of the WTO/GATT rules on public procurement that is described in this book, and, more broadly, the role international law now plays in the global political economy.[4] Defined in a series of articles in a special issue of *International Organization* seeking to 'unite perspectives developed by political scientists and international legal scholars', this concept was described on the basis of three characteristics, all of which can be present in differing degrees in any set of rules, and, in turn, may vary independently amongst themselves: obligation, precision and the extent to which third parties are delegated responsibilities relating to the interpretation, monitoring and implementation of the rules (Goldstein, Kahler et al., 2000). Although alternative definitions that were more culturally and socially nuanced subsequently entered in to the debate (Finnemore and Toope, 2003) and some of the participants in the aforementioned *IO* special issue have gone on to argue that insights from differing theoretical perspectives are necessary in order to truly understand the complex process of legalization (Abbott and Snidal, 2002b), the Goldstein et al. terminology provides a particularly appropriate platform for this foundational part of the empirical enquiry. This is because of elementary relationships between the three characteristics that it specifically does *not* acknowledge.

The GPA, more explicitly, unquestionably involves a high degree of obligation, precision and delegation. To describe this agreement along such lines, however, fails to capture its most salient political points. Namely, it is the particular combination of obligation, precision and delegation embodied in this agreement that makes the GPA politically compelling from an accountability perspective. Part I of the book will map out the legal relationships in question, providing a brief overview of their negotiating history that shows how the Agreement's transparency disciplines and private actor-initiated, domestic review mechanism reflect what might be described as an evolving understanding of the WTO's principal of non-discrimination, or equality before the law. It will then explain the underlying political implications of these legal mechanisms, specifically in terms of the implicit, horizontal separation of powers that they embody between the domestic legislative entities that would typically adopt the international rules and the executive officials responsible for implementing them, along with the 'due process-like' protections that are effectively provided – again, typically, indirectly – for individual property rights through the Agreement's court-like review mechanism. The political significance of this, as will be shown, lies in the fact GPA's approach to the discipline of the

political authority exercised in the procurement function is consistent with an American logic for the structuring of political authority under a Presidential system of government.

The literature with respect to legalization includes work on the so-called Americanization of European and other systems of law (Kagan, 2001; Kelemen, 2006; Kelemen and Sibbitt, 2004). As described by Kagan, US regulatory policymaking is structured by 'detailed statutes, regulations, analytic criteria, and legal procedures ... (all of which facilitate) legal contestation and judicial review'. Part I of this book will show how key elements of the system he describes as 'adversarial legalism' are being effectively 'exported' in a GPA context via the structure of GPA's legal disciplines. Later chapters of the book, in turn, will return to this issue, arguing that in view of the heterogeneous socio and economic contexts in which the WTO rules must ultimately be applied, it would be difficult to envisage an international regulatory regime broadly harmonized on the basis of anything other than 'adversarial legalism'.

Turning to Part II, the second section of the book will review the manner in which the process of regulatory innovation has continued since the 1994 GPA came into effect. Because the international regulatory debate now clearly transcends the institutional boundaries of the WTO, an important part of this evaluation will consist of an overview of developments in the governance of the procurement function taking place in other institutional fora, including the Multilateral Development Banks, the United Nations, and the OECD.[5] As with Part I, this section of the book will proceed from a historically focused review, this time, of the activities and politically charged context of the WTO's Working Group on Transparency in Government Procurement (hereafter WGTGP). The WGTGP, a political by-product of the difficulties in 'selling' membership in the plurilateral GPA to the developing countries, was established by the Singapore Ministerial Declaration in 1996; it was mandated to develop elements for inclusion in a multilateral agreement on transparency in procurement, 'taking into account national policies' and providing 'careful attention to minimizing the burdens on delegations, especially those with more limited resources ...' (WTO Ministerial Conference, 1996a). The basic idea – at least amongst most existing GPA members– was to move towards the multilateral regulation of procurement along a phased track, one that did not necessarily involve market access concessions in its initial disciplines, and allowed for developmental diversity amongst its membership.[6] As originally proposed by the USA, a key objective of any agreement in this context would have

been to combat the effects of bribery and corruption, or, in other words, governance-related (Dougherty, 1996).

The purpose of Part II, more generally, will be to show how attempts to multilateralize the GPA – and, in particular, the challenge of bringing more developing countries under the Agreement's stringent administrative disciplines – gradually transformed into what effectively amounted to a much broader, value-contingent debate relating, fundamentally, to the proper function of the WTO rules and their interface with other levels of governance. Here again, there are sizable academic literatures, both on the activities of the WGTGP, the broader 'boundaries of the WTO', and even the relationship between the two: (Linarelli, 2003; Rege, 2001;Watermeyer, 2005) and (Charnovitz, 2002; Howse, 2002; Jackson, 2002) and (Abbott, 2001; Nichols, 1996). For the political purposes of this book, however, certain 'lessons' from the WGTGP are particularly significant; they relate to the disparate – and potentially conflicting – objectives any given set of regulatory standards may have, as well as the political dilemmas inherently posed by the extra-national regulation of value-driven public purchasing.[7]

Despite some six years of study, the WGTGP was never able to reach agreement on exactly what constituted transparency in government procurement– and should, therefore, be the objective of any set of rules designed to promote it – and how, if at all, these objectives would be related to the subject of market access, the WTO's traditional regulatory goal (WTO Working Group on Transparency in Government Procurement, 2003). Chapter 3 will show how these questions were tentatively resolved in the context of the formally unrelated – but inextricably linked – activities of the Committee on Government Procurement, meeting informally under the GPA's so-called built-in agenda to renegotiate the existing plurilateral Agreement. Before moving to this discussion, however, it is important to underscore the governance-related nature of many of the previously mentioned developments that were taking place concurrently in other institutional fora. A reflection of major changes evolving in the international political economy, they exercised a significant affect on – and, in turn, were sometimes affected by – the discussions taking place in the WTO context.

The MDGs, procurement and the aid effectiveness agenda

In September 2000, 189 UN member states signed the Millennium Declaration, committing themselves, *inter alia*, to eight mutually reinforcing goals – known as the 'Millennium Development Goals', or

MDGs – to eradicate extreme poverty and its root causes by 2015. The eighth goal established a partnership between signatories to achieve these ends. Two years later, at the UN's International Conference on Financing for Development in Monterrey, Mexico, specific responsibilities for achieving the MDGs – and, in particular, meeting their costs – were agreed. Known as the 'Monterrey consensus', they recognized good governance and the rule of law as essential for sustainable development and identified the fight against corruption at all levels as a priority. Acknowledging that each country has primary responsibility for its own economic and social development, they equally recognized that a substantial increase in Official Development Assistance (hereafter ODA) and other resources was going to be required if developing countries were to achieve the internationally agreed developmental goals and objectives. To the latter end, developed countries committed themselves to provide more and better aid, generous debt relief and greater access to their markets.

As part of the follow-up to Monterrey, an OECD Development Assistance Committee Working Party on Aid Effectiveness and Donor Practices was established the following year. Aid effectiveness has always been central to the case for higher aid (OECD DAC Working Party on Aid Effectiveness, 2005). From the perspective of those who receive it, however, such assistance is rarely an unimpeded good; invariably, it engenders costs:

> The sheer multiplicity of donors, with different outlooks, accounting systems and priorities, has created a landscape of aid that ... can only be described as chaotic. This has ... stretched the administrative capacities of the recipient countries to the breaking point and undermined any pretence of local ownership...The institutional capacities of the receiving countries has been further weakened by the (IFI) pressures to reduce the size and functions of the state ... The situation is exacerbated by the presence of numerous new bodies ... through which aid is disbursed with little or no oversight by ... national institutions. (UNCTAD, 2006)

Here again, there is an extensive academic and policy literature relative to questions of aid effectiveness, generated, in this case, by development scholars and practitioners(Commission for Africa, 2005; Easterly, 2006; Sachs, 2005; Zedillo, Al-Hamad et al., 2001). For the empirically and politically oriented purposes of this book, the fact that aid policies and conditions are rarely consistent from donor to donor is critical. So,

too, is their frequent non-alignment with the development priorities and programmes of recipient countries. Indeed, as will be explored in some detail in later chapters of this book, donor practices have often worked to undermine partners' own systems and institutions. So how does this all relate to procurement?

Over the course of 2003 and 2004, the international development community formally committed to square development assistance with recipient country strategies, harmonize donor policies and procedures, and implement principles of good practice in development cooperation. Central to this effort was to be the use of the good practices to harmonize donor and recipient countries' respective policies and procedures. Shared principles for 'managing for development results' were also evolving at this time.[8] In addition, members of the OECD's Development Assistance Committee had reached agreement in 2001 on a non-binding Recommendation on the Untying of Official Development Assistance to the Least Developed Countries (OECD DAC, 2001).This was subsequently amended in March of 2006 and July 2008 to further promote the reduction of Members' tied aid. One of the areas addressed by much of this work was procurement, an activity that the World Bank and OECD described at the time as:

> a core function of public financial management and service delivery ... [whose improvement has the potential to] make a significant additional contribution to financing achievement of the Millennium Development Goals.[9]

In March 2005, the commitments described above were consolidated in the Paris Declaration, endorsed by 100 donor and recipient countries, along with the Multilateral Development Banks, the UN and the World Bank. The Paris Declaration is a practical 'blueprint' to improve both the quality of aid and its impact on development (OECD DAC, 2007a). A key element of this plan – whose preparations involved extensive, regionally based consultations with civil society and parliamentarians – is its emphasis on 'ownership'. The idea, that is, that the effectiveness of aid is ultimately a factor of each recipient country's determining its own priorities for the pace and sequencing of development reforms.[10] Under the Declaration, a series of partnership 'commitments' were undertaken involving donors' agreement to place greater reliance on recipients' national development strategies, institutions and procedures in return for the latter's pledge to exercise effective, coherent and consultative leadership over each of these activities. Donors and partners, in turn,

agreed to mutual accountability for development results, as well as a series of concrete indicators to measure progress towards achievement of the commitments prior to 2010.

Public procurement reforms featured prominently in the Declaration. Donor and partner countries jointly committed to the strengthening of national procurement systems, using mutually agreed standards – or 'good practices'– derived from the processes described above. Donors, in turn, pledged to support capacity reforms and to progressively rely on reformed partner country systems. In the context of the OECD/DAC Working Party on Aid Effectiveness' Joint Venture for Procurement, a 'common tool' for the partner countries' use in assessing the quality and effectiveness of national procurement systems was developed. Chapter 4 will consider these reforms in some detail, focusing on the harmonization activities that they have entailed. For the introductory purposes of this section, however, the reforms' underlying relationship to the public management function is of primary significance, as is the centrality of enhanced accountability and transparency – key pillars in the foundations of good governance.

Moving then to Part III, the concluding section of the book, the perspective shifts again, definitively, back to the WTO. The focus this time will be on the way in which governance-related issues have recently made a provisional entry into the WTO public procurement disciplines – and, making the link with the on going aid effectiveness and public financial management debates – ideas with respect to how the GPA might evolve so as to reinforce accountability across various levels of governance.

The unresolved challenges faced in extending the membership of the GPA – along with the failure of the WGTGP's phased approach to dealing with them – have been addressed. So, too, was the way in which the policy debates concerned now cross various levels of governance, sometimes resulting in regulatory prescriptions that can be difficult to reconcile, as well as the fact that the recent negotiations taking place within the WTO Committee on Government Procurement were affected by all of these challenges, but technically divorced from them. The purpose of the WTO negotiations, in addition to extending the membership of the GPA, was explicitly to modernize and simplify the Agreement's rules, extend their coverage to a wider spectrum of public entities and to eliminate remaining discriminatory measures (Anderson, 2007). Notwithstanding the centrality of the implicit governance mandate in the activities of the WGTGP, issues of this nature were not included in the Committee's formal mandate. Controversy was not long in arising

amongst the negotiators regarding the question of whether they should be dealt with and, if so, how. Somewhat paradoxically – in view of the role that it had originally envisaged for any potential agreement on transparency in public procurement and the extent to which issues of this nature have featured in its recent FTAs – the USA was initially opposed to the negotiation of such measures. Developments in the international political economy, however, soon intervened. In the fall-out of Enron, Worldcom and other high profile corporate governance and procurement-related scandals, provisions dealing with the issues of bribery and corruption, or 'ethical standards' in the letting of public procurement contracts were ultimately agreed.[11] (For further details, see the text of the Revisions in Appendix 2.) They included:

- Recognition in a revised Preamble of the 'integrality' of the 'integrity and predictability' of government procurement systems to the 'efficient and effective management of public resources, the performance of Parties' economies and the functioning of the multilateral trading system', as well as the importance of 'transparent measures regarding government procurement ... (and) avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention Against Corruption'(WTO Committee on Government Procurement, 2006).
- Substantive obligations requiring procuring entities conducting covered procurement to do so in a 'transparent and impartial manner that ... avoids conflicts of interest and prevents corrupt practices', along with; provisions allowing procuring entities to exclude potential suppliers on grounds such as 'final judgements in respect of serious crimes or other serious offences ... or acts or omissions that adversely reflect upon the commercial integrity of the supplier'.

In keeping with the membership-related negotiating mandate, the provisional revisions embodied significant changes to the GPA provisions dealing with developing countries as well. Negotiated with an eye to making accession more attractive, they consist of a series of transitional measures offering developing countries in the process of accession the possibility of negotiating non-discriminatory price preferences, offsets, the phased-in coverage of specific entities or sectors, and/or higher thresholds (Anderson, 2007). Developing countries may also negotiate delays in the application of any specific obligation in the Agreement– other than, significantly, the duty to offer non-discriminatory treatment to the goods, services and suppliers of all other parties – provided

that they are in the process of completing the implementation of that particular provision.

The fact that such 'special and differential treatment' mechanisms are transitional and likely to be effectively conditioned on the leverage of the parties during the negotiations on coverage is politically noteworthy. As a number of legal commentators have recognized, any obligation to abolish price or other preferences for domestic producers stemming from the acceptance of international procurement disciplines is a highly sensitive political proposition (Arrowsmith, 2002; Rege, 2001). This is true in all countries, irrespective of any reciprocal market access benefits that concessions of this nature might bring, and/or the potential economic benefits stemming from limitations on the discretion of public officials involved in the procurement processes in question. Public procurement is a prime tool for achieving non-economic policy ends, or as one commentator recently put it somewhat more provocatively, 'buying social justice' (McCrudden, 2007).

John Linarelli has explored the relationship between procurement of this nature – that is, value-driven procurement– fairness, and the GPA's market access provisions (Linarelli, 2006). Crediting the WTO Secretariat's Rob Anderson for input with respect to the terminological distinctions, he preceded from the GPA's market access provisions. Embodied in four Annexes to the Agreement, they specify the public entities that are covered by the GPA's rules. Chapter1 will describe these provisions in some detail as part of an overall introduction to the structure and objectives of the Agreement. (See Appendix 1; the Annexes of individual member countries can be found on the WTO website at:http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm, last viewed on 1 April2010.) For the introductory purposes of this chapter, it is sufficient to note that GPA rules do not automatically discipline all of its Members' public procurement. Parties retain the ability to customize the public entity coverage of their commitments; there is, in other words, what is generally known in WTO parlance as a 'positive list' approach to coverage. In consciously deciding to exclude entities from the GPA's administrative disciplines, Members can 'mediate the effects of globalization' on the markets concerned and, to the extent that some level of protection forms part of a legitimate political consensus within the national constitutional system they represent, promote 'fairness' in the process. Linarelli described this as the 'good' story about domestic preferences, contrasting it with the 'bad' story in which politics overrides market-based considerations and there is protection of favoured industries, patronage for political friends, or, in the worst

case, diversion of scarce public resources to socially wasteful contracts. Here the book will take a closer look at the so-called good story, arguing that it is, at heart, a *political* story and contrasting its policy edicts with those of the associated 'bad' story. Emphasis will be placed on the fact that, as suggested above, the availability of the GPA's fairness provisions is effectively conditioned on a member's relative negotiating strength, and not, for example, its domestic development priorities. Reference will also be made, as previously suggested, to the lawyers' and practitioners' ongoing debates over the general question of 'policy space', or the extent to which 'international disciplines, commitments and global market considerations' constrain domestic policy choices (Hoekman, 2005; Ismail, 2005; UNCTAD, 2004).

Finally, Part III will conclude by highlighting the politics surrounding the provisional Agreement's explicit Article II, paragraph 3(e)(i) 'carve out' for 'procurement conducted for the specific purpose of providing international assistance, including development aid'.[12] The provision in question reads,

> Except where provided otherwise in a Party's Appendix ... this Agreement does not apply to procurement conducted for the specific purpose of providing international assistance, including development aid. (WTO Committee on Government Procurement, 2006)

Earlier sections of the book have reviewed the role that the UN's MDGs now play in setting out the development priorities of the international community, along with concrete and time-bound targets for their achievement. The Goals' general relationship to the aid efficiency debate and the various governance-related initiatives it has spawned, in turn, have also been surveyed. In view of the procurement-specific ramifications of these developments – namely, the political commitments that the donor and partner communities have jointly undertaken to the strengthening of national procurement systems, and, more generally, 'mutual accountability' for development results – the GPA 'carve out' would appear to somewhat incongruous.[13] It certainly does not, in any case, seem to work towards cementing a coherent approach to mutual accountability for development results in the context of aid-driven procurement. What might such an approach look like? The book does not offer a definitive answer to this question. Rather it develops an argument that given the different levels of governance crossed by the procurement processes concerned, some form of binding international administrative discipline is imperative if *mutual* accountability is the political

objective. Once again, issues of this nature have been raised by academics, this time in the legal community. Yukins and Schooner, for example, recently recognized the 'interests and priorities of various stakeholders in the procurement process' as a 'critical yet under-explored piece of the…policy puzzle' (Yukins and Schooner, 2007). Others, as suggested earlier in this introduction, have called for expansion of the rights of individuals affected by administrative decisions(Geradin, 2004;Gordon, 2006). Picking up on this line of thinking, the book will conclude with an explanation about why – if the integrity of the procurement process in question is central to the rules' political objectives – any private actor who believes that a procuring entity acted improperly might merit being listened to, and how this is politically consistent with the regulatory 'methodology' embodied in the GPA.

A gambol through the theory; contextualizing the case study

Notwithstanding the multidisciplinary scope of this book and the pragmatic, 'eclectic approach' to theory it intends to adopt (Katzenstein and Sil, 2008), the primary academic audience targeted is one broadly affiliated with mainstream International Political Economy.[14] An audience in this respect, however, that is neither averse to considering the role that the 'social construction of actors, institutions and events can play in international relations' (Hurd, 2008; Reus-Smit, 2004), nor wedded to what has been termed the 'anarchy problematique' (Ashley, 1986); the idea, that is, that anarchy still constitutes the essential organizing principle of the international system.[15] The challenges associated with thinking about extending the GPA's disciplines to a more developmentally diverse group of states, as will be seen, take us into theoretical realms wherein 'domestic values' are not necessarily synonymous with 'interests' (Abbott and Snidal, 2002b;Finnemore and Toope, 2003), and 'actors other than states (may) possess forms of legitimate authority in global society'(Barnett and Sikkink, 2008; Rittberger, Nettesheim et al., 2008). For reasons of this nature, a contextualization of the case study within the relevant IR literatures is important; the remainder of this introductory chapter will be dedicated to this task. In keeping with the 'book as reconnaissance theme', the objective herein is to offer a broad sketch of the most significant 'features' associated with the conceptual terrain to be travelled; in this way, the research is generally situated on existing academic 'maps', however incomplete the overall picture that they convey.

In view of the book's institutional focus on the WTO's procurement disciplines and their linkages across other levels of governance, the GPA and the intergovernmentalism it represents constitute an obvious starting point for this exercise. To this end, Chapter 1, in setting out the history and political objectives of the GPA, situates the development and early days of this agreement within the well-known literature with respect to embedded liberalism (Ruggie, 1982), briefly introducing related debates within the British academic community concerning the consequences of nationalism for the post-war international economic order and the extent to which the affiliated Bretton Woods Institutions remained, in essence, 'impeccably liberal' (Mayall, 1982, 1990). As Professor Mayall explained,

> By supporting a revival of private capital markets, and underpinning the convertibility of major currencies ... they were intended to encourage the freest possible movement of goods and services across international frontiers. This objective ... (was also) promoted by the elimination of physical controls on trade and the reduction of tariffs negotiated within the GATT. (Mayall, 1990)

Questions concerning *which* markets were going to be liberalized under the GATT and *how* such decisions were to be taken are central to one of the primary issues the book addresses; as will be seen in Chapter 3, they are related to the abiding membership 'dilemma' that has plagued the GPA. Herein a concurrent linkage to the broader subject of the developing countries' role in the multilateral trading system – including what one author has termed the 'neglected' origins of embedded liberalism (Helleiner, 2006) – is especially significant. These are topics that have recently received considerable attention by IPE scholars working on trade-related issues, namely in the context of the challenges that have been faced in concluding the Doha Round (Narlikar, 2004; Taylor and Smith, 2007; Wilkinson and Scott, 2008). Before looking at some of the highlights of this work, however, one further element needs to be factored into our rough analytical 'construct': the particular relationship between the developing countries and the GATT/WTO procurement regime. The perspective adopted here will, in large part, be premised on an overview of arguments drawn from the literature with respect to legalization,[16] particularly the comparatively oriented work on the 'Americanization of European and other systems of law' (Kagan, 2001; Kelemen, 2006; Kelemen and Sibbit, 2004). Our theoretical 'contextualization' then concludes with a brief review of relevant

aspects of the debates concerning the rise of private authority beyond the state in an increasingly integrated global economy, especially but not exclusively in contexts wherein public authority is weak or otherwise challenged(Dingwerth, 2008; Murphy and Yates, 2009; Shaw and van der Westhuizen, 2004).

A final caveat is necessary in terms of the latter issue. The fact that the book constitutes a detailed case study concerning the regulation of *government* procurement distinctly colours its approach to private authority. Despite previously mentioned efforts to introduce commercially oriented practices in this regulatory context and the creative ways that have been developed to raise funds for and/or privately subsidize the provision of public goods, the procurement process itself remains, fundamentally, a political exercise.[17] Whether it is regulated at the national, subnational or supranational level of government – and notwithstanding the participation of private actors in the funding or delivery of the goods or services in question – any rules that are implemented herein must take cognizance of this fact. That is, that public decision-making such as that that occurs in the specification and letting of a public contract is inherently a domain in which there is,

> more than one right answer ... [and] some right answers are more beneficial for some groups ... (while others) are more beneficial for other groups'. (Metzger, Aman et al., 2001)

This is where duties of public accountability enter into the analytical 'equation' that we will be assessing. These duties may not entail direct democratic accountability (Grant and Keohane, 2005) wherein a clearly defined constituency is entitled to hold those wielding power on their behalf politically accountable for decisions affecting them via frequent elections and Swiss-style referenda.[18] They can, nonetheless, work to reinforce democratic values, respect for the rule of law in particular.

Globalization, to conclude, may change the duties of the state relative to the provision of public goods but it will not reduce or eliminate them entirely(Stoll, 2008). In terms of the procurement specifically covered by the GPA's disciplines, the WTO rules govern the conduct of domestic tendering processes and are chiefly designed to ensure that they are implemented in a transparent manner that allows for the maintenance of competition. Combined with the Agreement's predominantly 'positive list' approach to coverage – and depending upon how that is applied in the case of any particular acceding country – its procedural obligations do not, *per se*, dictate the substantive or regulatory ends of

a domestic regime. This is an important distinction to which we will return in subsequent chapters.

Legalization, comparative politics and the GPA

The first formal GATT disciplines on public purchasing were not introduced until the conclusion of the Tokyo Round in the late-1970s. To this day, the GPA has relatively few developing country members and it is one of only two plurilateral agreements remaining in the WTO.[19] Indeed, despite the fact that plans for the negotiation of such disciplines had been on the US' original agenda for an ITO and under discussion among the industrialized countries in the OECD from the early 1960s on, public procurement has a convoluted history within the trading system. This is in large part because of its 'proximity to sovereignty', or, more practically, usefulness as a tool for the pursuit of non-economic or value-driven policies, including developmentally related ones. A second issue herein is the GPA's regulatory 'methodology'; as will be seen in the following chapter, *the* major issue of contention in the lengthy OECD discussions that ultimately led the original GATT Tokyo Round Code. An abbreviated review of this approach follows, focusing on the comparative politics it reflects. The purpose of this intellectual 'detour' is to survey the basic political challenges that have been associated with extending the membership of this Agreement.

The elementary legal mechanics of the GPA were described at the outset of this chapter. In sum, they consist of a series of positive, procedural obligations along with a due process-like review mechanism that require officials implementing a covered tendering process to document their actions throughout the procurement, defend decisions when challenged, and, if required, suffer sanctions for failure to meet these obligations (Schooner, Gordon et al., 2008). The 'positive duties' on which the Agreement is premised serve the political function of making public entities *legally accountable* for their purchasing decisions. The way in which they do this – by limiting the administrative discretion of procuring officials and allocating a domestic, court-like entity the authority to make preliminary judgements with respect to compliance with the local application of WTO disciplines – entails an *implicit separation of political powers*.

There were no formal 'checks and balances' of this nature between the executive and legislative arms of government in the more centralized, parliamentary democracies that constituted the majority of the members of the OECD Working Group participating in the discussions

on procurement prior to the Tokyo Round; the prime minister, or executive in the countries in question was generally selected on the basis of his leadership of the party or coalition claiming a parliamentary majority.[20] This generally implied a much more relaxed approach to domestic implementation of the 'legislative will'. In particular, although the role of the public administration in such contexts may technically be to 'apply the law', there is no comparable reason to commit regulatory policies to statute and/or to identify explicit formal procedures for their implementation.[21] Intra-party differences of opinion, if they are too severe, can bring down governments.

The OECD Working Party debate over the 'concept of discrimination' laid bare fundamental differences in the way in which participating countries' nationally biased public procurement policies were implemented. These differences involved the question of how discriminatory procurement policies were generally applied, namely via 'formal' discrimination, in accordance with statute, or 'informally', through the exercise of administrative discretion. They basically pitted the USA with its institutionally 'aberrant' presidential form of government – based on popular sovereignty and characterized by the separation of executive from legislative authority and a further fracturing of political authority across a federal system of government – against virtually all of the other OECD members at the time. This is an historical story that has been recounted by the lawyers (Blank and Marceau, 1996). It explains, in particular, why the GPA includes both minimum, 'positive' standards for the transparency of its members' purchasing procedures, as well as reciprocal commitments amongst its members to non-discrimination in markets covered by its procedural disciplines. The story, however, also has fundamental implications with respect to the locus of accountability under the international rules in question. Implications that, as will be seen in Chapters 3 and 4, potentially affect the development and governance ramifications of GPA membership. We will return to them as well.

For the purposes at hand and as mentioned before, the literature with respect to legalization includes a debate on the so-called Americanization of European and other systems of law (Kagan, 2001; Kelemen, 2006; Kelemen and Sibbit, 2004; Levi-Faur, 2005). As described by Kagan (2001), US regulatory policymaking is structured by 'detailed statutes, regulations, analytic criteria, and legal procedures ... (all of which facilitate) legal contestation and judicial review'. In the last year, Keleman (forthcoming 2011) has completed a major quantitative analysis of the role of law and courts on European governance

(Stone Sweet, 2010). As summarized by Stone Sweet, this research has been dedicated to understanding why the so-called globalization of American law might be happening and documenting the phenomenon through quantitative analyses and qualitative case studies. Keleman's general thesis is that,

> The process of European integration has promoted the spread of adversarial legalism through two linked causal mechanisms, the first stemming from the economic liberalization associated with the Single Market project and the second a product of the fragmentation of power in the EU's institutional design. (Kelemen, 2009)

In terms of the criticism that has been directed at this hypothesis, Kagan's recent work has highlighted a series of 'traditions and interests that are likely to impede and redirect movement towards Americanisation of European law' (Kagan, 2008). He says, for example, that major differences between the national, political and legal cultures on either side of the Atlantic have resulted in Europeans favouring social solidarity and cooperative, bureaucratic policymaking – two traditions that ensure that 'adversarial legalism will not be welcomed into the legal and regulatory systems of European countries'. Kelemen, while agreeing that 'many of the legal norms and institutions that prevail in EU member states discourage the spread of adversarial legalism and ... help (to) explain differences in the degree to which aspects of adversarial legalism do spread', nonetheless contends that a kind of climatic change is under way, one that over time will leave the terrain able to grow 'exotic' non-native species, namely adversarial legalism (Kelemen, 2009).

The argument developed in the first part of this book is consistent with Keleman's thesis that the Americanization of European and other systems of law is a longer term process. In the case of the WTO's procurement policies, this evolutionary process arguably goes all back to the 1960s-vintage OECD Working Group discussions concerning the 'concept of non-discrimination'. Indeed, for the purposes of the international administrative law we will investigate, an initial phase of this process was completed – at least among industrialized countries currently participating in this plurilateral agreement – with the coming into effect of the GPA with its private actor initiated review mechanism in 1994. The puzzle with which this book is concerned, rather, relates to implementation of such an accord among a more developmentally diverse group of states than those taking part in the European *acquis communautaire*, or the body of law accumulated by the European

Union.[22] How, in other words, might a country's relative capacity to apply an international agreement premised on foreign legal and political traditions affect its willingness to accept such disciplines? In turn, given that this Agreement is a WTO accord, targeted primarily at securing market access opportunities, what would a country have to gain from accession if it did not have the supply capacity to profit from any market access opportunities gleaned?

Developing countries' role in the multilateral trading system

As previously suggested, the latter question is aligned with a larger one relating to the overall role of developing countries in the multilateral trading system. There is a fairly extensive – primarily economic and legal – literature addressing the role that the developing countries played in the GATT, the 'interim' international trade regime that ultimately came to complement the Bretton Woods Institutions established to deal with finance, and reconstruction and development, or, that is, the IMF and the World Bank (Hoekman and Kostecki, 2009, Hudec, 1987, Todaro, 1992). One element of this history that has recently received renewed attention – albeit in the IPE and policy debates – is the fact that when the post-war international economic order that ultimately resulted in the GATT was under negotiation, most developing countries remained under colonial rule. As South Africa's Ambassador to the WTO has explained,

> In some cases their interests were spoken for by the developed countries, or 'represented' by their colonizers during the early GATT Rounds. In ... [others] they were satellite regimes of their colonial states, as was the case of Southern Rhodesia[now Zimbabwe] and South Africa. In addition, the developed countries, or the colonial countries, were to regard the GATT as their 'property' and believed that 'they did not have to accommodate the interests of the rest of the world'. (Ismail, 2009)

In terms of the industrialized countries' 'property interests', the GATT itself was only one chapter of the more comprehensive Havana Charter for an International Trade Organization(hereafter ITO). Whereas several developing countries had played prominent roles in the activities of the Preparatory Committee of the United Nations on Trade and Employment, the body that was responsible for negotiations leading to this accord, that had changed when the ambitious regulatory aspirations for the ITO were reduced to those of the GATT; that is, the exchange of tariff concessions.

As suggested at the outset of this theoretical 'survey', questions concerning *which* markets were initially going to be liberalized and *how* such decisions were to be taken were central to this result; they were decided in such a way as to effectively preclude the developing countries from the negotiations. The problem stemmed from the procedures that were to govern the negotiations (Wilkinson and Scott, 2008; Winham, 2008).In order for the GATT not to suffer the same fate before the US Congress as that of the ITO – that is, *not* to be implemented by the elected representatives of the American people – the American delegation had insisted that the rules governing the exchange of tariff concessions should be the same as those employed in their Reciprocal Trade Agreements Act of 1934. This, in sum, implied bilateral negotiations between dominant suppliers over specific tariff lines, or on the basis of so-called the 'principal supplier rule'. The benefits of any concessions were to be subsequently shared among all Contracting Parties on the basis of the MFN principle, but, significantly, they were of little use to the developing countries in that the latter had no supply capacity in the sectors wherein the concessions had been offered.[23]

Recent IPE scholarship has proposed that such self-serving behaviour constituted a dramatic change in the US position with respect to the role that development was going to play in its post-war external trade and financial relations (Helleiner, 2006, 2009).Prior to the US' entry into the Second World War, the Roosevelt administration had been focused on developing a new model for both North–North and North–South economic relations in its relations with Latin America, an experience that, according to Helleiner, had subsequently deeply influenced its early contributions to the Bretton Woods negotiations, putting down the intellectual foundations for the embedded liberalism that was eventually to follow. Citing Lloyd Gardner (1964), David Green (1971) and others, Helleiner says that the South American project – known as the 'Good Neighbor Policy' and initially linked to the Democrat's plans for an Inter-American Bank– was motivated by a quest to detain both the Nazi influence and the appeal of radical economic ideologies; it specifically 'rejected the laissez-faire, export-oriented economic policies of the pre-1930s era in favour of more statist economic policies that would promote industrialization, the growth of an internal market, national ownership, and better social conditions' (Helleiner, 2006).

Three trade rounds were necessary before the international community came close to recognizing that developing Contracting Parties might have been handed an inequitable deal with the GATT. This situation was tacitly acknowledged when the mandate for the Haberler

Report on 'trade trends', especially as concerned the developing countries, was issued in 1957. The results of this exercise were disputed, but there is no question that some of the major issues that were raised – such as the industrialized countries' agricultural trade restrictions and a need to provide the developing countries with policy space – remain central to the WTO's trade and development agenda today. (Wilkinson and Scott, 2008) A subsequent confluence of events – including a Soviet threat to sponsor a competing international trade organization with the participation of the Warsaw Pact Countries, the expansion of UN membership among Southern states and the successful OPEC oil embargo of 1973 – led first to the creation of the UN's Conference on Trade and Development (hereafter UNCTAD) in 1964, and, 10 years later, the movement for a New International Economic Order, both of which sought to contribute to a 'leveling of the playing field' for the developing countries within the international economic order (Taylor and Smith, 2007). At the risk of gross oversimplification, UNCTAD was soon seriously handicapped by internal differences among its membership. Subsequently, the developed countries – the USA somewhat paradoxically leading the charge – had relatively little trouble in effectively torpedoing the NIEO initiative. Nevertheless, the development and equity issues first raised in the Americans' 'Good Neighbor Policies' of the late 1930s/early 1940s regularly resurface, most recently in the debates faced in concluding the Doha Round.

Bringing this discussion full circle and returning to the subject of public procurement, although this issue did not find its way onto the GATT agenda until the Tokyo Round of the 1970s, in many ways the experience of developing countries in this policy context is a text book example of the development-related challenges emanating from the early days of the GATT that we have just reviewed. This remains true despite the fact that we are now talking about the negotiation of 'framework rules' to govern the exchange of concessions with respect to non-tariff market access barriers in a procurement context rather than tariff concessions. In this respect, some of the specific problems that the developing countries have asserted they face – or have faced – in acceding to the GATT/WTO Government Procurement Code/Agreement include: difficulties in assessing the benefits of accession along with the stringency of the demands of the existing members for reciprocal offers, or 'pressure to liberalize'; lack of policy space for the application of domestic social, political or environmental goals; prohibitively high costs associated with the setting up the administrative infrastructure necessary to implement the Agreement and the lack of trained staff

to apply it, and; high threshold values that allegedly foreclose export opportunities in foreign procurement markets that might otherwise be attractive to developing country members (Guimarães de Lima e Silva, 2008). Once again, these are all matters to which we will return in our case study.

Governance and alternative perspectives on authority

The concluding chapters of the book will consider how efforts to extend the GPA's rules to a more developmentally disparate group of states have involved movement toward what has been described as a 'more diffuse regulatory context' (Held and McGrew, 2002). A context, in this sense, that encompasses both a broader spectrum of 'regulatory actors and authorities, as well as alternative – and integrated – mechanisms of governance'. How has this new global regulatory system been conceptualized? Although this is a subject that has been broadly described as one on which there are 'perhaps as many different views as there are scholars interested in the subject' (Pierre and Peters, 2000), two poles have recently been distinguished that, for our purposes, could be said to demarcate *de facto* conceptual boundaries, or what we'll term a regulatory continuum: at one extreme, there is traditional state-led regulation, or an 'old governance model'. At the other, there is a 'new governance model' (K. W. Abbott and Snidal, 2009). A primary feature of the new model is that it is not premised on public authority; states are not the exclusive subjects of rules or disciplines. Indeed, private actors can be either participants in standard setting, or direct objects of global regulations emanating from 'new' processes. Accordingly, 'new regulatory norms' stemming from the latter are typically voluntary rather than legally binding.[24]

Unfortunately for our pragmatic purposes, there is not always a clear-cut distinction between the two categories; governance can come in many permutations, including what have been termed 'hybrid mixes' between the old and new systems (Gale and Haward, 2011 forthcoming). As if this weren't a complicated enough conceptual proposition, one needs, in turn, to take the discussion onto a third plane in order to fully flesh out the range of public and private participants potentially active in the new model. The result is what Abbott and Snidal have termed a 'governance triangle'; states, non-governmental organizations and firms independently occupy each one of the three respective, internal angles of this regulatory construct (K. W. Abbott and Snidal, 2009). To the extent that any one of these parties acts unilaterally or in conjunction with a fellow actor – or actors – of the same type, such

activities occur at what these authors describe as the 'vertices' of the larger governance triangle. When this happens – particularly, at the firm or NGO vertices of the triangle – the resulting regulatory output tends to be relatively unbalanced with respect to representation of competing interests.

In this, the state can play a role in facilitating or coordinating the application of these norms. This role is commonly a politically decisive one irrespective of the level of governance at which these norms are being applied. Abbott and Snidal describe the process as regulation in the 'shadow of the state' (K. W. Abbott and Snidal, 2009), explaining how it has traditionally been the state that oversees domestic commercial activities and intervenes to actively assess and uphold the public interest. In a developing state context or transnational one, power enters into this regulatory equation in ways that we will witness more closely in subsequent chapters. Among the implications are enhanced opportunities for states to 'manage competition' and pursue their shared values through inter-governmental organizations, another area where pioneering research was conducted by Abbott and Snidal (Abbott and Snidal, 1998). All of the above, however, does not change the fundamental accountability-related obligations of any individual democratic state to its constituents. Indeed, as we will see in our descriptive case study of the Medicines Transparency Alliance's preliminary work on the procurement of essential medicines and the contributions that the WHO and the Global Fund have made to this effort in domestic settings wherein market failures are prevalent and regulatory lacunae abound, it just makes these obligations significantly more complicated to reinforce institutionally.[25] Before completing this short theoretical review, however, there is one further concept that needs to be introduced: the global value chain.

A value chain depicts the series of materially or digitally linked functions that enter in to the production of a good or service (Porter, 1990). Eric Thun's entry in a recent IPE textbook (Ravenhill, 2008), quoting Gereffi, Humphrey and Strugeon's seminal 2005 paper, defines a *global* value chain as, 'the sequence of activities through which [capital and] technology ... [are combined in a single location or multiple sites] with material and labour inputs and then assembled, marketed and distributed' (Thun, 2008). This concept ties the business management theory of the value-added production chain to the global organization of industries that has been facilitated by technological and communications developments, as well as trade liberalization and foreign investment (Gibbon, Bair et al., 2008).

Given that global value chain analysis is not considered to be part of the traditional, mainstream IPE toolkit for the analysis of how the global economy is governed, why consider this concept?[26] Apart from having evolved as a key element in firm-level risk management and profit maximization in a globalized economy, this research can help us to understand the so-called disintegration of production that has accompanied the 'integration of trade' (Feenstra, 1998). As a seminal *IDS Bulletin* exploring the relationship between globalization, value chains and development put it:

> In global capitalism economic activity is not only international in scope it is also global in organization. Internationalization refers to the geographic spread of economic activities across national boundaries. As such it is not a new phenomenon. Indeed, it has been a prominent feature of the world economy since at least the 17th century. Globalization is much more recent than internationalization because it implies functional integration between internationally dispersed activities. (Gary Gereffi et al., 2001)

Attributing the latter idea to Peter Dicken (1998), the *Bulletin* goes on to make a link between the 'functional integration between internationally dispersed activities' and the value chain perspective as an effective means of thinking about the forms that this integration takes so as 'problematize the question of governance', or how such chains are 'organized and managed'. This, in turn, naturally leads to the distributional questions surrounding such developments; that is, 'Who are the winners and losers in the globalization process, how and why gains from globalization are spread and how the number of gainers can be increased'. In sum, focusing on the chain or organizational network as the unit of analysis in this way 'raises interesting questions about power, governance and the dynamics of chains'.[27]

Much of the early work on the governance of global value chains dealt specifically with the governance of global *commodity* chains. Bair (2009), a sociologist, has described the theoretical eclecticism that characterizes this research, and developed a detailed 'genealogy' of the commodity chain, including the way in which the term global *value* chain has gradually come to serve as the generic term of choice. In a more recent survey paper with Peter Gibbons and Stefano Ponte on global *value* chain research, she and her colleagues conclude that, 'three main approaches to (GVC) governance can be distilled from this literature: governance as driving, governance as coordination and governance as normalization'(Gibbon, Bair et al., 2008). Theories of

governance as 'driving' explore power relations within inter-firm networks and why they differ in capital intensive as opposed to labour intensive sectors. Those focused on coordination, look exclusively at the relationship between the lead firm of the MNC and its first-tier suppliers; they contend that power is only exercised in certain types of inter-firm relationships wherein, for example, product specifications can easily be codified. Finally, a related subset examines such buyer–producer relationships when product specifications are established within broader normative frameworks such as, for example, the ISO.[28]

On the whole, MNCs, today, tend to be less vertically integrated and more network oriented. As another policy-oriented survey paper put it,

> Better global standards in the realms of business practices and product provision, supply chain coordination and materials management has enabled increased outsourcing in producer driven chains and made it possible and more compelling for firms to forge modular linkages between buyers and sellers in both producer and buyer driven chains. The result has been broad and rapid shifts in chain governance. (Global Value Chain Initiative, 2006)

The paper concludes that in today's interdependent and highly competitive world an understanding of how these processes work is critically important for 'economic actors, firms, workers and policy makers'. One area that has largely gone unexplored in this literature – yet is arguably driving many of the governance-related developments we have explored in this section – is the financialization of lead firms and its consequences for supplier relations, or the rise of what Florence Palpacuer terms a 'financial sphere made of institutional investors and executives of large corporations' at the top of global value chains. As she explains, several empirical studies have focused on the identification of new demands 'global buyers' have made on suppliers (Schmitz and Knorringa, 2000), or large-scale retailers (Abernathy, Dunlop et al., 1999), but these demands have emanated from 'new competitive dynamics on end product markets; pressures from globalized financial markets were not part of the picture' (Palpacuer, 2008). In the aftermath of the financial crisis, one would think that issues of this nature would have been on the top of research agendas focused on issues of power and the functional organization of the 'disintegration' of trade.[29] As we will see in the concluding chapter of the book, they certainly are, when it comes to payment for essential medicines purchased in a pooled procurement arrangement.

Part I
Political Foundations

1
Short History and Objectives of the 1994 WTO Agreement

Definitions are central to the regulation of public procurement, especially given the blurring that has occurred in recent years between public and private entities and their respective areas of activity. This is particularly true in a WTO context where, as has been described, there is generally a positive list approach to entity coverage, and a variety of member practices with respect to the listing of specific entities.[1] Following an overview of the nature of the political challenges that arise in defining procurement – the 'carrot' that goes with the 'stick' of taxation – this chapter will develop a working definition for this public activity. It will then briefly summarize the historical evolution of the WTO procurement disciplines, proceeding from the UN negotiations immediately after the Second World War on this subject in the context of efforts to create an International Trade Organization (ITO), describing the lengthy discussions over the 'concept of discrimination' in public procurement that took place during the 1960s and 1970s in the OECD (Blank et al., 1996) and, ultimately, resulted in the Tokyo Round 'code' on government procurement, and concluding with the coming into force of the 1994 GPA. This 'story' has been well documented (Blank et al., 1996; McCrudden, 2007). As will be seen, however, one cannot appreciate the comparative politics that underlie the GPA's regulatory methodology without revisiting it.

When the post-war, international economic order initially came into being, several of its prime intellectual architects were in the process of nationalizing key sectors of their economies. The First World War, it will be recalled, had destroyed what had been a generally stable, liberal international economic order. It had also contributed to new ideas concerning the proper economic role of the nation state, specifically that a broader, re-distributive economic role for the sovereign might

be appropriate (Gilpin, 1987; Tumlir, 1982). A worldwide depression and another global conflagration intervened before these ideas were of much practical influence. John Keynes' demand management theories were of particular influence in the 'theoretical compromise' that was finally embodied in the GATT 1947 (Caporaso and Levine, 1992). They tied full employment and domestic stability to the issue of national security, the one area where economic liberalism endorsed positive duties for an otherwise negative, or laissez-faire state (Mayall, 1990). The extent of the state's employment-related responsibilities relative to the issue of free trade, however, was contested – especially, but not exclusively between the UK and the USA, the initiators of the ITO negotiations (Ikenberry, 1992).

In a political compromise that has become known as 'embedded liberalism' (Ruggie, 1982), the GATT eventually offered its contracting parties virtually unimpeded 'policy space' for the implementation of domestic policies designed to facilitate national security and stability.[2] Politically speaking, this left the trading system responsible for reconciling the irreconcilable. A liberal economic order, regardless of the level of social aggregation by which it is bound, is theoretically premised on a harmony of interests. A cacophony of competing national perspectives regarding these interests had now effectively been introduced into this otherwise 'de-politicized' institutional environment. As long as tariffs remained the primary barriers to trade and all GATT commercial disciplines were applied provisionally, this political 'iceberg' remained conveniently submerged. With the end of the cold war, the creation of the WTO and its binding dispute settlement procedures in 1995, as well as the developmental diversity of membership that subsequently ensued, the full proportions of this titanic-sized 'beast' began to be revealed.

Before returning specifically to the subject of procurement, it is important to recognize that the so-called harmony of interests on which the multilateral trading system is theoretically premised is a harmony of *individual* interests. The individual is the basis of a liberal society, and the negative, or liberal state is one in which the job of government is generally dictated by a concern for private interests (Berlin, 1969; Smith, 1914). Despite this fact, the post-war economic system that came to be embodied in the GATT 1947, for all practical purposes, did not even acknowledge private interests.[3] Nation states were both the subjects and respondents of the rights and duties arising in this institutional setting (Jackson, 1992). This situation did not change following the creation of the WTO in 1995.

A society's judgements with respect to the proper economic role of the state are directly reflected in its public procurement practices. This is equally true of its state trading practices; that is, when the government acts as a commercial actor, like any other firm. To the extent that there is no international consensus as regards these roles, it is problematic to arrive at a common definition of what constitutes the procurement, and/or state trading that merits coverage by the WTO procurement disciplines: that is, how can you regulate if there is no agreement on what should be regulated?

The remainder of this section of the chapter will describe the distinction that has traditionally been made between procurement and state trading in a GATT/WTO environment, and work out an operational definition of procurement that will be employed throughout the book, proceeding from descriptions of the 'carve-outs' that generally exempt government procurement of goods and services, and state trading 'for consumption in government use' from the fundamental duties of non-discrimination conferred by Articles I and III of GATT 1947, Article VII, paragraph 2 and Article XIII, paragraph 1 of the WTO General Agreement on Trade in Services (hereafter GATS). In so doing, it will also explain how the distinction between procurement and state trading has had a tendency to become blurred in negotiations with respect to GPA coverage, review the way in which privatization is intimately related to this phenomenon, and comment, briefly, on the particular challenges posed by the regulation of public–private partnerships.

As Annexes 4 and 5 of the GPA 1994 cover, respectively, members' procurement of services and construction services, and negotiations for a separate WTO Agreement to govern the procurement of services under the GATS are now recognized as being economically unnecessary when the markets in question are contestable (Sauvé, 2000), this definition will treat the procurement of goods and services as being indistinguishable.

1.1 Definitions

Article III, paragraph 8 of the GATT 1947 generally exempts government entities' procurement-related activities from the national treatment obligations to which GATT Contracting Parties are otherwise obligated:

> The provisions of this Article shall not apply to laws, regulations, or requirements governing the procurement by government agencies of

> products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale. (GATT Secretariat, 1994)

In so doing, it has provided what two WTO Secretariat employees have described as a 'commonly accepted' WTO definition of government, or public procurement (Blank et al., 1996). Technically speaking, neither the Tokyo Round Government Procurement Code, nor any of the subsequent re-negotiated texts of this Agreement – up to and including the provisionally agreed 2006 revisions to this text – contain formal definitions of this concept (see Appendices 1 and 2). According to the aforementioned WTO authors, the 1992 Sonar Mapping System Panel Report addressed this definitional lacuna. It concluded that while there was no formal definition in the Agreement, the following characteristics could be used to provide guidance as to whether a particular transaction should be considered an instance of government procurement: 'payment by government, governmental use of or benefit from the product, government possession and government control over the obtaining of the product'.

Article II, paragraph 2 of the provisional revisions of 2006, while still not offering a definition of public or government procurement, *per se*, took this 'guidance' one step further. It stipulated that 'covered' procurement – the procurement, in other words to which the GPA applies – is 'procurement for governmental purposes':

> (a) of goods, services, or any combination thereof:
> (i) as specified in each Party's Appendix I; and
> (ii) not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale;
> (b) by any contractual means, including purchase; lease; and rental or hire purchase, with or without an option to buy;
> (c) for which the value ... equals or exceeds the relevant threshold specified in Appendix I;
> (d) by a procuring entity;
> (e) that is not otherwise excluded from coverage. (WTO Committee on Government Procurement, 2006)

Paragraph 2 a (ii) of the new provisions specifically addressed the distinction between procurement and state trading. State trading is generally distinguished by a government's or its agent's being involved in

'buying selling and sometimes manufacturing operations for re-sale' (Blank et al., 1996). The state, as previously suggested, acts as a commercial actor much like any other firm. Such activities have been considered to be legally distinct from the realm of public procurement in a GATT/WTO environment. Much like the previously cited Article III 'carve-out' exempting procurement-related activities from the national treatment obligations to which GATT Contracting Parties are otherwise obligated, Article XVII, paragraph 2 of the GATT 1947 specifically exempted state trading enterprises' purchases of 'products for immediate or ultimate consumption in government use and not otherwise for resale or use in the production of goods for sale' from the non-discriminatory duties to which such entities are otherwise subject.[4] The purpose of Article II, paragraph 2 a (ii), would thus appear to be to reinforce a distinction between state trading activities with 'government functions' and those with 'commercial functions'.

Such a distinction was already being explored during the Uruguay Round-vintage negotiations of the GPA 1994. At that time, the US delegation submitted a non-paper to the Informal Working Group on Negotiations (hereafter IWG) that made a distinction between procurement, or state trading activities with a 'government function' and those with 'commercial functions'. The former involve the performance of duties which 'only governments can do', such as making laws, or 'which governments reserve for themselves the right to do, like national defense, [or the] monopoly provision of services which are necessary to existence as a nation', whereas the latter entail the 'performance of duties left entirely to the private sector, where there are no substantial controls exercised by governments on them...other than generally applicable laws such as tax law'. (GATT Committee on Government Procurement, 1989).

A distinction of this nature was of particular importance at that time because of the processes of privatization that were part of the neoliberal economic reforms then being actively espoused by the international financial institutions. The privatization of state-owned entities continues today – albeit at a considerably reduced rate – but it remains contentious in a GPA context. The reason why relates to the strict reciprocity that governs the exchange of market access concessions; any modifications of coverage due to privatization have direct implications as far as maintenance of the balance of benefits under the Agreement. For this reason, the provisional revisions of 2006 introduced an arbitration procedure to facilitate the process of determining what constitutes the elimination of government control, or influence over a previously covered entity (Wang, 2007).

State trading has recently been given a reinvigorated political significance in this otherwise 'legally distinct context' by the fact that several WTO members with large state sectors including, for example, China and Saudi Arabia have undertaken commitments to join the GPA as part of their overall WTO Accession Protocols.

One further procurement-related activity – itself a 'derivative' of public lessons from privatization – remains to be addressed for the purposes of this definitional overview: public–private partnerships (hereafter PPPs). PPPs are a popular mechanism for jointly carrying out and managing infrastructure projects, or delivering public services; they are not explicitly regulated by the GPA, but are at the heart of the blurring that has occurred in recent years between public and private entities and their respective areas of activity.[5] The purpose of a PPP is to enable public bodies to benefit from the design, construction and management skills of private enterprises, as well as their financial acumen (European Parliament, 2004). Similar to public service contracts in fundamental respects, they have recently been subject to widespread regulatory debate in the European Union. Although the European legal debate has yet to be resolved definitively, key political lessons have emerged from this exercise; they are reflected in the previously cited work of the European Parliament, and relate to the importance of transparency of process whenever a public entity is faced with the selection of a private partner, as well as the duties of accountability that the public entity retains to citizens relative to the oversight of that partnership's implementation. Chapter 4 will consider this topic in more detail.

The disciplines embodied in the Government Procurement Agreement, to conclude this definitional section, are designed to govern the activities of an entity procuring goods or services *for government purposes*, wherein these purposes dictate either the kind of competitive environment in which such entities operate, or the extent to which the profit motive is a factor in the entity's management decisions. For this reason, the book will adopt the following operational definition, amalgamating insights from the previously cited definition of Blank and Marceau along with a more politically oriented definition offered by the Friedl Weiss, another legal scholar:

> Government procurement is an activity designed to fulfill the economic functions and powers legally attributed to the state, involving the government or its agent acting as consumer, procuring for its own consumption and not for resale. (Blank et al., 1996; Weiss, 1993)

1.2 The ITO negotiations: exemptions from MFN and national treatment

The complete exclusion of public procurement markets from multilateral policy disciplines was not, in itself, an objective of the participants in the immediate post-war International Trade Organization (hereafter, ITO) negotiations. On the contrary, according to the previously cited WTO authors' paper on the history of the GATT/WTO Agreement, 'The first US draft for an ITO envisaged explicitly that the non-discrimination principles, reflected in the MFN and National Treatment obligations, were to apply to government purchases for governmental use ... and to the awarding of contracts by governments for public works' (Blank et al., 1996). The majority of the other 22 nation states participating in these negotiations, however, held less liberal positions on this issue. From the outset, discussions were plagued by definitional problems. What activities of which government entities were to be subject to any potentially agreed multilateral disciplines? A fundamental problem with which participants had to contend involved the issue of what Blank and Marceau termed 'constitutional differences'. Because of the variety of ways in which participating states organized themselves to discharge the duties associated with governing, it was difficult to come up with a set of multilateral disciplines that would engender consistent obligations across national jurisdictions.

In a book about the Kennedy Round (1963–7), John Evans discussed problems of this nature associated with the separation of executive from legislative authority in the USA, and the US' federal structure of government. In a procurement context, he said, this has meant, 'that the details of ... government procurement practices ... have had to be committed to statute, while in most countries the government officials concerned exercise much wider discretion' (Evans, 1971). As regards the decentralized governmental structures, 'the constitutional rights of individual states in ... [the USA have] created a twilight zone of jurisdiction within which some states have adopted laws or regulations that conflict with the policy and even with the international commitments of the federal government'. In this sense, the negotiating dilemmas faced by the ITO negotiators were compounded by the fact that in order to implement many of the non-discriminatory disciplines proposed at the time, some participating states would have had to alter significant portions of their national – and sub-national – legislation.

What was the ultimate outcome? Ken Dam famously summed it up, saying that the results of the US proposal to extend the duties of MFN

and national treatment to the non-defence-related, public procurement activities of ITO signatories had been dropped because 'an attempt to reach agreement on such a commitment would ... [have led] to exceptions almost as broad as the commitment itself' (Dam, 1970).

1.3 An OEEC/OECD dialogue (1960–1976)

In 1962, Belgium and, later, the United Kingdom brought formal complaints within the newly formed Organization for Economic Cooperation and Development (hereafter, OECD) against the USA's Buy American Act. This was in response to the increased national procurement preference that had been enacted by the Department of Defense for balance of payment reasons in July of 1962 (Pomerantz, 1980). It ultimately led to the OECD's being given a mandate to investigate the general issue of preferences in its member states' government procurement.

In early 1963, it was decided, as a first step, to 'gather information on procedures for government purchasing of supplies by central governments' (Blank et al., 1996). Before the results of this survey had even been fully compiled and published, it was clear that practically all OECD states had some preferred treatment or preference schemes favouring national suppliers, whether formal price preferences, or informal discrimination against foreign suppliers or products.

A Working Party on Government Procurement was accordingly created in the Trade Committee in early 1964. The objective of this body was to 'explore the possibility of elaborating guidelines which would ensure maximum fairness in the field of government procurement through limiting discrimination against the suppliers of foreign products' (Dam, 1970). By 1967, the group had developed and published draft guidelines for its member states' public procurement.

The Americans were highly critical of the new guidelines. Morton Pomerantz, a USTR official at the time, complained that the draft would have required 'the elimination of specifically stated preferences and would not ... [have adequately ensured] open bidding and award procedures by other countries' (Pomerantz, 1980). By way of rejoinder, the US delegation offered an alternative set of guidelines, calling for liberalization premised on the principle of sectoral reciprocity. Their proposal called for the Working Party to continue its efforts by focusing on the heavy electrical equipment sector because of its 'considerable trade importance ... susceptibility to statistical study and its relevance to OECD members as [both] producers and consumers'.

Before 1969 had ended, the American proposal had proven impracticable; discrepancies in the degree of government ownership in the power generation field made it impossible to achieve meaningful reciprocity as regards the potential policy concessions of states participating in the negotiations. The US proposal did, however, provide a useful platform from which subsequent OECD work proceeded; it offered norms that were 'more binding than those that had been envisaged', whilst signalling that the USA might be prepared to take a more active role in the OECD dialogue (Blank et al., 1996).

The Working Party's studies continued, virtually uninterrupted, through 1975. Some of the most difficult questions involved what Pomerantz termed, 'finding a common terminology for the different kinds of procurement processes used by the negotiating countries' (Pomerantz, 1980). Blank and Marceau have described this terminological quest as a debate over the 'concept of discrimination'. The fundamental issue, they say, was what the Japanese delegate at the time termed, the 'dual nature' of discrimination in public procurement markets. It involved the question of how countries' nationally biased public procurement policies were implemented, namely via 'formal' discrimination, in accordance with statute, or 'informally', through the exercise of administrative, or procedural discretion. Incarnated in the dispute over whether public tenders should be made the 'rule' under any potential Code, and selective tendering procedures an exception, having to be justified, this debate was significant from a policy point of view in that each of the competing approaches to discrimination dictated a contrasting approach to multilateral regulation.

By 1970, the fundamental problem that had de-railed the ITO negotiations on public procurement was once again squarely facing OECD negotiators: 'constitutional differences', reflected in contrasting regulatory methodologies, were making it difficult to come up with a set of multilateral disciplines that would engender consistent obligations across national jurisdictions.

Once a restrictive listing of circumstances under which members would be allowed to use single tendering procedures had been agreed, particular controversy continued to surround the issues of publicity in the context of both the tenders and awards procedures, as well as derogations from the Agreement's disciplines. According to Matthew Marks and Harald Malmgren, two senior American delegates, bidders' rights to secrecy were viewed by many participants as a vital element in the functioning of government-industry relations, beyond the appropriate jurisdiction of a set of international ground rules concerning

procurement practices (Marks and Malmgren, 1975). Derogations for development purposes were also highly contentious.

Complete consensus on either of these issues was never reached. On the one hand, the USA continued to hold out for ex-post, or post-award publication of the winning bid in a given tender, whereas the Europeans, in the words of Blank and Marceau, feared that this would 'endanger subsequent competition, result in collusion on the part of suppliers, invite identical bids in new contracts ... and lead to an excessive number of disputes'. Similarly, although there was broad agreement on a US proposal for three main types of derogations, it was not possible to address this issue effectively in a forum in which the 'beneficiaries' of many of these derogations – namely, the developing countries – had no formal standing."

As 1975 came to a close, three main issues, according to Blank and Marceau, still needed to be addressed:

1 the scope of the agreement, that is the list of national entities to which the code was to apply;
2 the minimum dollar-value which would trigger the application of the guidelines;
3 the procedure for the settlement of disputes, including the content of ex-post publicity.

It was decided to suspend the negotiations to 'let capitals reflect on the main outstanding issues'. By this time, the negotiators had effectively succeeded in operationalizing the principles of national treatment and non-discrimination in a procurement context. Most notably, innovative 'transparency procedures' for members' tendering and award practices designed to counter exclusionary practices had been identified, and there was general agreement that a conditional MFN obligation was going to govern the implementation of any eventual agreement (Blank et al., 1996, Messerlin, 1994).

In the autumn of 1975, according to an OECD document cited by Blank and Marceau, the EC countries had 'officially proposed the reopening of the necessary [OECD] negotiations but then Canada, in particular, and also the United States were already resolved to include government purchasing in the upcoming GATT Multilateral Trade Negotiations'. By October 1976, the EC and the other European member states had agreed, 'though somewhat reluctantly', to the establishment of a Multilateral Trade Negotiations (hereafter, MTN) Sub-Group on Government Procurement.

Shortly thereafter, on 8 December 1976, OECD guidelines for member states' public procurement policies, now known officially as the 'OECD Draft instrument on Government Purchasing Policies, Procedures and Practices' were transmitted to the GATT Secretariat. A principle reason for the movement to the broader GATT forum was enable the developing countries to participate in the procurement-related liberalization processes that were evolving (Pomerantz, 1980).

1.4 The Tokyo Round Code (1976–1981)

Not long after the OECD public procurement dialogue was initiated, the issue of government procurement had been raised again in a GATT setting, during the early days of the Kennedy Round (1962–1967). In October 1963, in response to an invitation issued by the Executive Secretary of the GATT,[6] the UK, Japan, the USA and Sweden had submitted lists of non-tariff barriers to trade (hereafter, NTBs) they considered should be the subject of GATT negotiations (Evans, 1971). Government purchasing practices were included in the summary of these lists that the Secretariat subsequently prepared. A similar exercise was initiated shortly thereafter amongst all of the Round's participants. The UK, the EC and Japan all formally complained about the USA's 'Buy American' law, whilst the USA called for 'more open procedures by government procurement agencies of other countries in advertising and awarding contracts'. A multilateral negotiating group on government procurement was accordingly established.

Given what Evans and others have described as the general failure of the Kennedy Round to achieve much in terms of the reduction of NTBs, it is hardly surprising that the negotiating group on government procurement failed to accomplish much. For the purposes of this historical overview, it is sufficient to note that, at least through the 1960s, the political will necessary to develop effective multilateral disciplines for trade in public procurement markets in a GATT setting did not exist.

Following on from the GATT Secretariat's earlier, preliminary efforts to survey the various NTBs employed by its Contracting Parties, a 1975 note by the GATT Secretariat set out the following as factors inhibiting foreign participation in public procurement markets:

(a) the giving of preferences for products of local origin is widespread;
(b) these preferences basically divide into two types - price preferences and non-price preferences, with most countries using a combination of both;

(c) the system of preferences for domestic products has sometimes been placed on a statutory basis of a generally mandatory character;
(d) the preferential treatment applied in the field of government procurement to domestic products appears in many cases to be based on administrative discretion, practice and habit, and;
(e) the use of government procurement as an instrument of government policy is common to both the developed and developing countries (GATT Secretariat, 1975).

This document also summarized the necessary 'elements' for negotiators' consideration in a potential GATT Code on government procurement, describing, in some detail, the work on issues of this nature that had previously been conducted in an OECD setting. The properties that it identified for a potential multilateral Code included:

1 Objectives and principles
2 Definitions
3 Procurement entities
4 Elimination of existing discrimination
5 Exceptions
6 Purchasing procedures
7 Publication of government procurement regulations
8 Reporting, review, complaint and confrontation procedures

As has been mentioned, this institutional 'reconnaissance' was soon followed by the creation of a MTN Negotiating Sub-Group on Government Procurement and the Secretariat's receipt of the OECD 'Draft Instrument'. The task the GATT negotiators were now facing remained essentially the same as that previously confronted by their OECD counterparts: the issues of a potential Code's coverage, thresholds and dispute settlement procedures still needed to be addressed. Nor had controversies surrounding the issue of ex post information been resolved (Blank et al., 1996).

The major new issue on the Sub-Group's agenda, as has also been suggested, involved the matter of 'special and differential treatment' for the developing countries. Indeed, this was the only part of the eventual Tokyo Round Code that did not have an antecedent text at the OECD negotiations (Pomerantz, 1980). In keeping with the prevalent thinking concerning special and differential treatment in the GATT at that time, it was to be governed by the idea that a 'smaller entry fee' would be required for such countries' participation in the Code; developing

countries were, that is, not required to subject as great a percentage of their procurement entities to the disciplines of the Code as were its existing developed country signatories. In this sense, the S & D negotiations arguably fell under the broader umbrella of discussions concerning the Agreement's coverage. Provisions for technical assistance for the least developed countries also formed an important part of the provisions for special and differential treatment that were eventually agreed.

One of the most important 'reinforcements' of the elementary procurement regime that had been negotiated in the OECD came from the procedures for consultation and dispute settlement that were agreed by GATT negotiators in Geneva (Blank et al., 1996). As in other policy areas governed by Tokyo Round Codes, a Committee on Government Procurement was established 'to oversee' the implementation of these measures. The 'self-policing' nature of the OECD Draft was maintained, but new dispute settlement mechanisms were crafted in accordance with GATT practices, and provisions that were being developed in the context of the negotiation of the other Codes (Pomerantz, 1980). In view of the nature of public purchasing, it was assumed that the vast majority of disputes would be resolved during the procurement process, or following bilateral consultations. Those disputes that could not be resolved in this manner were to be referred to the Committee for examination. If, after three months, the Committee had failed to bring about accommodation between the parties, either of the aggrieved parties was given the right to request the establishment of an impartial panel of three to five members.

Public procurement markets constituted the most significant opportunity for trade liberalization that was opened up by the Tokyo Round. The Code that eventually entered into force on 1 January 1981, however, covered only some $33.2 billion worth of opportunities (Anthony and Hagerty, 1981). One experienced observer commented at the time that it was clearly 'only just a beginning' (Winham, 1986).

1.5 Re-negotiations (the 1988 protocol)

Article IX paragraph 6(b) of the Tokyo Round Government Procurement Code states:

> Not later than the end of the third year from the entry into force of this Agreement and periodically thereafter, the Parties thereto shall undertake further negotiations, with a view to broadening and

> improving this Agreement on the basis of mutual reciprocity... In this connection, the Committee shall, at an early stage, explore the possibilities of expanding the coverage of this Agreement to include service contracts. (GATT Ministerial, 1973)

On 1 January 1988, a series of amendments to the Code, representing the first phase of re-negotiations under this Article and designed to improve the functioning of the Agreement, broaden its coverage and start working towards the inclusion of service contracts came into force. Changes to the rules contained in the Agreement included: a lowering of the threshold value for procurement contracts to be covered by the Code from SDR 150,000 to SDR 130,000, extension of the Code to leasing, rental and hire purchase contracts, prohibition of discrimination against locally established firms on the basis of their degree of foreign affiliation, provisions for language assistance to developing country suppliers, and tightened restrictions on tendering procedures and qualification of potential suppliers, preparation of technical specifications, and publication of contract awards (International Chamber of Commerce, 1985). Progress in extending the terms of the Code, including coverage of service contracts, was much less substantial; it was effectively limited to the parties' agreement to set out work programs for further consideration.

1.6 The 1994 Agreement

Further re-negotiation of the Agreement effectively commenced in 1987, during the early stages of – but, technically separate from – the Uruguay Round; it was motivated by consensus that still more of the trade conducted in this context should be brought under GATT disciplines and that the opportunity that the Round presented to do this should not be missed (Otten, 1995; Weiss, 1993).

Three separate issue areas were explicitly recognized for further work in the fore quoted Article IX, paragraph 6(b) of the Tokyo Round Agreement. Blank and Marceau summarized them in terms of the following: 'broadening', or extension of the Agreement's coverage, 'expansion', involving the inclusion of service contracts, and 'improvement', dealing with amelioration of its text. The 1988 Protocol of Amendments, as has been suggested, had stipulated that Parties to the Agreement were, in future, to adopt work programs on 'broadening' and 'expansion'. In October of 1987, before the Protocol had even officially entered into effect, the Committee on Government Procurement's Informal

Working Group on Negotiations (hereafter, IWG) had reached consensus on the required work programmes.

The IWG's program on 'broadening' proved to be particularly significant for the negotiations that followed. It involved two distinct 'stages': the first sought participants' written input on potential 'spheres of application' for any future Agreement, and the second involved the derivation of negotiation 'criteria' from the submissions received. By May of 1988, the Working Group had completed both phases of the plan. The criteria that were identified in the latter stage proved important factors in the remainder of the negotiations in that they established a 'basic structure' for the bargaining processes that followed.

According to two delegates from the European Union who were involved in the IWG activities, three 'categories' of entities whose procurement activities might potentially be subject to an Agreement – A, B and C were identified: 'Category A' consisted of central government organizations, 'Category B' included sub-central entities and 'Category C' was made up of utilities and other miscellaneous organizations (De Graff and King, 1995). It was decided that entities in the first two categories would be the prime subjects of the negotiations, whilst those in the third group could be covered, but it would depend on whether the benefits associated with coverage of a particular entity justified the additional costs it would be likely to engender for the Signatory whose entities were in question.

Thereafter, a quest for 'balanced coverage' governed a 'request-and-offer' negotiations process that essentially involved a bilateral exchange of market access concessions. As outlined by Annet Blank, the GATT Secretariat official then responsible for the servicing of the Procurement Agreement, the term 'balanced coverage' reflected a 'measure of the market access opportunities offered by a given Party to the Agreement' (Blank, 1994). Reciprocal exchanges of such offers were made amongst the Parties on the basis of their relative values, expressed as a percentage of a participant's national GDP; the absolute value of an offer was not a factor in such transactions. The basis for the exchanges, in turn, was either the level of government involved in a particular purchasing activity – that is, Category A, B or C – or a specific industrial sector, for example, the construction-related procurement of large Japanese cities.

The previously cited members of the EU's WTO delegation have argued that the negotiations with respect to coverage, and, indeed, the latest 'round' of re-negotiations in general cannot be understood

without an appreciation of the specific negotiating objectives of the EU and the USA:

> The United States' main negotiating target was to achieve unrestricted access to the strategically important electrical and telecommunications procurement sectors of the European Union ... The European Union, on the other hand [sought] ... unfettered access to state and major city level procurement entities in the US ... the removal of 'Buy American' restrictions attached to federal funding (grants and loans) provided to states and localities ... and comparable access for its suppliers to the US electrical and telecommunications markets. (De Graff et al., 1995)

In any case, differences of opinion between these two parties over the value of the market concessions each was prepared to offer led to a deadlock between them in early 1992. It continued even after a bilateral Memorandum of Understanding was reached between them on 22 April 1993, effectively reducing the remainder of the negotiations over the Agreement's coverage to a bilateral market access debate.

A 1994 study of the respective values of public procurement opportunities in the EU and the USA that was jointly commissioned by these two parties and conducted by the consultancy firm, DeLoitte and Touche, played an important role in the resolution of this debate. It presented what de Graaf and King called, 'reliable estimates, indicative of the scale of procurement opportunities on both sides of the Atlantic', confirming 'rough balance' between the two at the Category A level, a US$82 billion 'credit' in the EU account at the Category B level (US$l00 billion opportunity in the EU versus US$18 billion offered by the USA), and a US$37 billion 'deficit' in the US account at the Category C level (US$40 billion of benefits in the EU versus US$3 billion in the US).

The report was released on 22 March 1994, well after the 15 December 1993 deadline for the completion of all Uruguay Round negotiations. Negotiators thus had less than a month to resolve their bilateral differences, and 'multilateralize the market access results' if they wanted their new Plurilateral Agreement to be signed in Marrakech along with rest of the Uruguay Round accords; for this reason, the 1994 Agreement does not adhere to the 'intra-Agreement GATT norm of MFN' that was established during the Tokyo Round. The market access concessions were ultimately exchanged under the Agreement, in other words, were exchanged on the basis of a strictly conditional variation on the norm of

MFN. During the month before the ministerial meeting in Marrakech, the USA and EU, in any case, managed to resolve their major differences of opinion surrounding the value of each other's respective offers, and began to focus on 'opening access to the markets of the Quad Countries, namely the USA, EU, Canada and Japan' (Hill, 1994).

De Graaf and King summarized the final results of the new Plurilateral Agreement's coverage in the following value terms:

Category A	US$ 50–55 billion in opportunities
Category B	US$ 25 billion
Category C:	
Ports	US$ 1billion
Utilities	US$ 30 billion (De Graff et al., 1995)

1.7 Enhancing credibility; the bid challenge mechanism

The Government Procurement Code, as has been suggested, was designed to be largely self-policing. Article VI, paragraph 5 of 1988 Agreement requires that:

> There shall also be procedures for the hearing and reviewing of complaints arising in connexion with any phase of the procurement process, so as to ensure that, to the greatest extent possible, disputes under this Agreement will be equitably and expeditiously resolved between the suppliers and the entities concerned. (GATT Ministerial, 1973)

Under the terms of this Agreement, however, no criteria were provided for the establishment and operation of such review procedures; Parties to the Agreement were simply obligated to establish some kind of administrative review.

During some of the early meetings of the IWG in late 1988/early 1989, many of the participating delegations were of the opinion that the dispute settlement provisions of the 1988 Agreement, and, in particular, its review provisions, were problematic. A paper submitted by the Canadian delegation to the Committee in mid-June of 1989 touched on several of the arguments that were offered at the time regarding reasons why this issue should be on the agenda of its work programme on Surveillance, Monitoring and Control:

> This gap ... [makes] it difficult for suppliers to be aware of the recourse available to them when they do, or seek to do, business with

> procuring entities in the other Parties' territories. More importantly, it leaves open the possibility that suppliers will be treated differently from one jurisdiction to the other, and potentially within the same jurisdiction. (Federal Government of Canada, 1989)

As has been mentioned, the re-negotiation of the Agreement that paralleled the Uruguay Round was motivated by its parties' recognition that more of the trade conducted in this context should be brought under GATT disciplines. In what was to prove a key agenda-setting move for the surveillance, monitoring and control discussions, the European Community submitted a 'non-paper' on 15 June 1989 that argued that a satisfactory broadening of the Agreement had to be achieved in such a way that it would be accompanied by a high degree of 'credibility'. To this end, it proposed guidelines for a non-discriminatory and independent national system of review, designed to ensure 'mutual confidence between parties and potential suppliers and purchasers'. The proposed review system was based on public purchasing review procedures contained in the EC's 1992 Remedies Directive; its fundamental objectives were to ensure that the Agreement's principles of non-discrimination were respected in an efficient and timely manner; that administrative errors in implementing these principles could be corrected when identified; and, that if such mistakes could not be amended, commercially satisfactory remedies would be available to the injured party. The following rules formed the basis of the EC proposal:

> Review procedures should be made available, under non-discriminatory procedural conditions, to any person having or having had an interest in obtaining a particular award procedure in the field of public supplies and who has been or risks being harmed by an alleged infringement;
>
> Such review procedures would concern any aspect of the procurement procedure, including the decision to award the contract;
>
> Before starting an official review procedure, a supplier would be encouraged to seek a solution to his complaint with the awarding entity;
>
> Impartial and independent review bodies with no interest in the outcome of the procurement would have responsibility for receiving complaints and for taking decisions.

The review bodies, after receiving a complaint, would investigate the case and determine the appropriate remedy, which could

include:

(a) temporary suspension of the proposed award procedure;
(b) setting aside illegal decisions including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedures;
(c) repeating the procedure for the award of the tender concerned, and;
(d) awarding damages. (European Community, 1989)

The key objective of the Community's proposed review system was improved efficiency in the resolution of supplier complaints. The EC defined efficiency in this context in terms of the extent to which suppliers have an opportunity to resolve their complaints informally with the relevant purchasing entity, that is, before formal international dispute settlement mechanisms are set in operation. Such an approach could be described as consistent with the aims of the negotiators of the original Code who had endeavoured to institutionalize procedures for the resolution of government purchasing-related disputes during the procurement process. It is also reflected in the structure of the Tokyo Round Code, and all succeeding versions of the Agreement. Supplier-initiated information and review provisions are contained in Article VI of the 1981 and the 1988 Agreements, and Articles XVIII – XX of the 1994 Agreement (see Appendix 1). Formal state-to-state dispute settlement procedures, on the other hand, are defined in Article VII of the Code and 1988 Agreements, and Article XXII of the 1994 Agreement, combined with the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

1.8 Damages

Although the new bid challenge mechanism did not represent a departure from the established, 'phased approach' to the resolution of government procurement disputes, it did introduce an important additional consideration to this process: damages or measures to compensate individuals harmed by the illegal behaviour of institutions of the state. GPA Members, however, could limit their liability to the amount of loss a potential supplier had incurred in 'tender

preparation or protest'. Article XX, paragraph 7 of the Agreement states:

> Challenge procedures shall provide for
>
> (c) correction of the breach of the Agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest. (WTO Ministerial Conference, 1996b)

1.9 Further re-negotiations

Article XXIV, paragraph 7(b) of the Agreement that was signed in Marrakech on 14 April 1994, included yet another provision for further re-negotiation:

> Not later than the end of the third year from the entry into force of this Agreement and periodically thereafter, the Parties thereto shall undertake further negotiations, with a view to improving the Agreement and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity, having regard to the provisions of Article V relating to developing countries. (WTO Ministerial Conference, 1996b)

In addition, the sub-paragraph that followed committed the Parties to avoid:

> introducing or prolonging discriminatory measures and practices which distort open procurement and shaI1, in the context of negotiations under sub-paragraph (b), seek to eliminate those which remain on the entry into force of the Agreement.

The 1994 Agreement entered into force on 1 January 1996. Its signatories included: the EC, the USA, Japan, Canada, Austria, Finland, Sweden, Norway, Switzerland, Israel and Korea.

Whereas the Tokyo Round Agreement covered procurement estimated to be worth approximately US$ 33 billion per annum (Otten, 1995), estimates for the volume of trade covered by the 1994 Agreement are in the neighbourhood of some US$350 billion per annum (De Graff et al., 1995). At the time, the total size of procurement markets internationally was estimated to be well over US$ 1,000 billion (De Graff et al., 1995).

2

The GPA's International Administrative Disciplines: Distilling the Underlying Political Structures

The preceding chapter traced the institutional evolution of the GPA's formalized procedural disciplines to contain discrimination in covered public procurement markets, mapping the progression of the WTO rules from their OECD origins and concluding with what has been described as a 'synergistic transatlantic process' between rules developed primarily in a European or North American regional context and those stemming from negotiations within the WTO regime itself (Woolcock, 2006). As suggested at the outset of Chapter 1, the USA was virtually the sole proponent of including provisions on government procurement in the ITO. This perspective gradually changed – especially among the industrialized countries in Europe as the process of European integration progressed and, specifically, the economic costs of non-integration were recognized (Cecchini, Catinat et al., 1988) – although the extent of public ownership in economically strategic sectors has routinely played a countervailing role.

The 1960s-vintage OECD Working Party debate over the 'concept of discrimination' laid bare fundamental differences in the way in which participating countries' nationally biased public procurement policies were implemented. These differences basically pitted the USA with its institutionally aberrant presidential form of government – based on popular sovereignty and characterized by the separation of executive from legislative authority and a further fracturing of political authority across a federal system of government – against virtually all of the other OECD members at the time. The essential differences involved

the question of how discriminatory procurement policies were generally applied, namely via 'formal' discrimination, in accordance with statute, or 'informally', through the exercise of administrative discretion. Incarnated in the dispute over whether public tenders should be made the 'rule' under any potential multilateral disciplines, and selective tendering procedures an exception, having to be justified, this debate was significant from a rule-making point of view in that each of the competing approaches to discrimination dictated a contrasting approach to international regulation and liberalization. Once again, this is an historical story that has been told (Blank et al., 1996). It explains, in particular, why the GPA includes both minimum, 'positive' standards for the transparency of its members' purchasing procedures, as well as reciprocal commitments amongst its members to non-discrimination in markets covered by its procedural disciplines. The story, however, has fundamental implications with respect to the locus of accountability under the international rules in question. Because *they* have not been explored, it, too, must be briefly re-visited.

Formal discrimination is a product of legislation; statutory instruments define both the parameters of the particular policy that is to be applied, and, along with detailed regulations and procedures, dictate how it is to be implemented. An example of this would be the previously mentioned US Buy American Act, the Depression-era law that privileges the bids of certain domestic suppliers – such as minority-owned businesses – by granting them explicit margins of preference in federal public procurements. The reason why discrimination in US public procurement markets is typically a product of legislation relates fundamentally to the way in which political authority is distributed in its political system. The risks of oversimplification notwithstanding, political authority in the USA is divided within different branches of the various federal and sub-federal governmental entities to stimulate intra-governmental competition for its use, and, in so doing, to make it difficult for 'factions', or special interests to capture the legislative process (Madison, Hamilton et al., 1987). A legalized political community is engendered as a result in that this separation of political powers is realized through law; there can be no political division of labour such as that existing between the branches of American government without a definitive way of allocating the rights and duties of authority, and a neutral entity for resolving differences of opinion regarding this distribution. Indeed, for the political purposes of this book, the key difference between the USA and the unitary, parliamentary democracies that made up a significant percentage of the OECD's membership at the time

that the international public procurement rules under consideration were originally agreed is reflected in the characters of their respective law-making institutions. In the USA, government is 'by law' and representative assemblies are viewed as a kind of 'second-best' democratic institution, whereas in more centralized states, parliament has typically been the *primary agent* of democracy; indeed, consultative parliaments originally acted as a de facto 'check' on the otherwise absolute powers of the monarch.[1] With devolution of hereditary rulers' executive and legislative powers to these representative assemblies and the gradual extension of the franchise, they became instruments of democracy in their own rights (Birch, 1977; Cole, Laski et al., 1989; Hadley, 1923).

Notwithstanding the way in which economic integration has tended to blur these distinctions since the original OECD discussions on public procurement, they are central to any understanding of the locus of the political authority that any international administrative law might be designed to constrain, including that embodied in disciplines designed to ensure fair process by the officials conducting public tendering procedures. More will be said about these differences shortly – and, in particular, their implications with respect to the subject of political and legal accountability. For now, bringing the discussion back to the specific context of the history of the GATT procurement regime, because political authority is shared in the USA, politics there tends to be characterized by a relatively higher degree of political uncertainty, along with an inescapable obligation for its participants to compromise; as a result, those who are on top of the political structures at any given moment routinely attempt to introduce new institutions to insulate themselves from future democratic control by others (Moe and Caldwell, 1994). Despite the public sector reforms designed to make public procurement more 'commercial' that have prevailed in recent years and were described at the outset of this book, a prevalent method of doing this is to narrow the discretion of bureaucrats and future authorities by specifying in great detail precisely what they are to do through detailed administrative procedures and rules. The result in a regulatory context is a key manifestation of what has previously been described as 'adversarial legalism': US regulatory policymaking is generally structured by 'detailed statutes, regulations, analytic criteria, and legal procedures' (Kagan, 2001).

By contrast, there was no formal, or constitutionally sanctioned rivalry between the executive and legislative arms of government in the more centralized states that constituted the majority of OECD members prior to the Tokyo Round; indeed, the prime minister in the countries in question was generally selected on the basis of his leadership of the

party or coalition claiming a parliamentary majority. This implied a much more relaxed approach to executive and administrative implementation of the 'legislative will'.[2] In particular, although the role of the public administration in such contexts may technically be to 'apply the law', there is no comparable reason to commit regulatory policies to statute and/or to identify explicit formal procedures for their implementation.[3] Intra-party differences of opinion, if they are too severe, can bring down governments. Checking discrimination in public procurement markets in political contexts of this nature is thus largely a matter of introducing international procedures, or positive disciplines to ensure 'greater transparency' in the public tendering process (Hoekman and Mavroidis, 1995; Winham, 1986). The purpose of such procedures – also known as 'transparency obligations' – is to ensure that the tendering process is procedurally fair and predictable; they provide standards for the assessment of the non-discriminatory treatment member states are obligated to extend to foreign suppliers and foreign-produced goods and services (Messerlin, 1994). In terms of the existing GPA, the 'transparency procedures' include rules governing the following:

> technical specifications of the items goods or services to be subject to the tender (Art. VI); the choice between various tendering procedures (Art. VII); the qualifications of suppliers (Art. VIII); the invitation to participate for an intended procurement (Art. IX); the selection procedure (Art. X); the time limits for tendering and delivery (Art. XI); the tender documentation (Art. XII); the submission, receipt and opening of tenders and awarding of contracts (Art. XIII); the negotiation which could accompany the tender (Art. XIV); the specific-rules for 'limited tenders', that is, tenders where the contracting entity contacts one or a few suppliers individually (Art. XV); and the content of the notice of award of the contracts (Art. XVIII). (WTO Ministerial Conference, 1996b)

Article II also requires that the value of contracts shall include 'all forms of remuneration, including any premia, fees, commissions and interest receivable', while Article XVII outlines the rules covering suppliers from 'non parties' to the Agreement, and Article XIX details reporting requirements that participants are obligated to respect.

Formal discrimination, on the other hand, is prohibited by Article III, paragraph 1 of the GPA. It reads:

> With respect to all laws, regulations, procedures and practices regarding government procurement covered by this agreement, the Parties

> shall provide immediately and unconditionally to the products, services and suppliers and service providers of other Parties offering products or services of the Parties, treatment no less favourable than: (a) that accorded to domestic products, services, suppliers and service providers; and (b) that accorded to products, services, suppliers and services providers of any other art. (WTO Ministerial Conference, 1996b)

Is should be recalled, however, that this ban is a contingent one. As was suggested earlier in this section and alluded to in the introductory chapter's discussion of the issue of 'policy space' under the Agreement, formal discrimination is only prohibited for those entities whose procurement is 'covered', or subject to the rules. [4] (The Schedules of individual member countries – defining this coverage - can be found on the WTO website at: http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm, last viewed on 1 April 2010.)

What then might all this imply in terms of accountability under the Agreement? In view of the disputed nature of this concept, what *kind* of accountability are we even talking about in a GPA context? In order to appreciate the basic accountability issues at work herein, it is necessary to take yet another, still closer look at how the GPA rules work politically. The purpose of this exercise is to identify what might be described as the political mechanics underlying the Agreement. Once these conceptual 'building blocks' have been identified, the chapter will conclude by evaluating them relative to major accountability arrangements, or what one author has characterized as accountability 'regimes'(Mashaw, 2006b). Here, it is probably appropriate to recall, too, that this book does not aspire to a full-fledged exploration of any of the conceptual issues in question. The idea, rather, is to sketch out the contours of a convoluted empirical terrain, using public procurement as a case study of the politics of the regulatory harmonization process. The purpose of the exercise, to reiterate, is primarily to highlight particularly salient political questions for use in others' synthetic work.

2.1 Genesis of the bid challenge system: a new role for private actors

In June 1991, the USA informed the GATT Committee on Government Procurement that it had held bilateral consultations with Norway under the provisions of Article VII, paragraph 4 of the 1988 Protocol (to the Tokyo Round Code) concerning the latter's purchase of an electronic toll collection system for the City of Trondheim. Following the failure of the two parties to reconcile their differences through consultation, a panel

was established to examine the facts surrounding the procurement in question. The results of this panel ultimately had a significant impact on the structure of the GPA's administrative disciplines, specifically in terms of what was then referred to as their 'credibility', or the lack of uniformity in terms of the way in which they were being applied domestically by parties to the Agreement. The preceding chapter described the physical evolution of the bid challenge mechanism that was to emerge from this dispute and the Uruguay Round-vintage re-negotiations of the Tokyo Round Code that were then in the process of getting underway. It did not, however, illuminate the political relevance and purpose of the international administrative disciplines in question. To this end, a brief summary of the facts and conclusions of the Trondheim case follows.

> In March 1991, the Norwegian Public Roads Administration announced that the toll ring planned for the City of Trondheim would be based on an electronic and mainly unmanned toll collection system, forming part of an integrated payment system for the city, and that a contract had been concluded with a Norwegian company, Micro Design A.S. (Micro Design), relating to parts of this system. This contract was characterized as a 'research and development" contract ... No tender notice was issued for the contract...and no tenders or offers were invited from companies other than Micro Design. (GATT Panel Report, 1992)

Contending that 'since research and development was not a product and the contract was for research and development', Norway argued that under the provisions of Article V: 16(e), only that part of the procurement relating to prototypes was covered by the Code.

The US position was that,

> [S]ince in its view the procurement was for products and not for research and development, and the contract value exceeded the threshold, the totality of the procurement fell within the scope of the Agreement pursuant to the provisions of Article I. Whether or not the supplier awarded the contract had to create new equipment incorporating and integrating new technologies was not relevant to a determination of coverage by the Agreement.

Most significantly, the USA asked that the GATT Panel,

> [F]ind that Norway had violated its obligations under the Agreement ... recommend that Norway take the necessary measures to bring its

> practices into compliance with the Agreement... and negotiate a mutually satisfactory solution with the US that took into account the lost opportunities in the procurement of US companies.

The formal Article VII enforcement mechanism in the 1998 Protocol to the Code – just like that contained in Article XXIII of the GATT 1947 and the Article XXII dispute settlement provisions in today's GPA – sought to resolve differences of opinion between parties by making an assessment of the facts of a situation as they related to the application of the Code, and recommending the termination of any measures found to be inconsistent with the Agreement. A key issue for the panel in the Trondheim case, given the US request that Norway negotiate a mutually satisfactory solution that took into account the 'lost opportunities' in the procurement of US companies, thus involved the question of whether there were reasons that would justify disparities between the practices of a dispute settlement panel under the Code and one under the GATT (1947) itself. The USA, in other words, was asking for an institutional remedy that the GATT was not structured to provide. According to the aforementioned official panel report, the adjudicative body concluded:

> [B]ecause benefits accruing under the Agreement were primarily in respect of events [the opportunity to bid], rather than in respect of trade flows, and because government procurement by its very nature left considerable latitude for entities to act inconsistently with obligations under the Agreement in respect of those events even without rules or procedures inconsistent with those required by the Agreement, standard panel recommendations requiring an offending Party to bring its rules and practices into conformity would, in many cases, not by themselves constitute a sufficient remedy and would not provide a sufficient deterrent effect.

Although the panel ultimately concluded that it would not be appropriate for it to recommend that Norway negotiate the kind of mutually satisfactory solution that the USA had requested, it did note that 'Considerable trade damage could be caused ... by an administrative decision without there necessarily being any GATT inconsistent legislation'.

The Trondheim case underscores the fact that GATT dispute settlement mechanisms, including the provisions contained in both the Code and the GPA, are targeted at containing discrimination that is

effected through formal legislation; they are designed to safeguard the rights of states party to the treaty. Rights, in other words, that arise from the formal duties that signatories assume not to discriminate in the application of either their external trade policies, or internal 'laws, regulations, procedures and practices' that affect imported goods, or services. When parties undertake positive 'duties of result' – like the transparency obligations designed to contain informal discrimination in public tendering processes – a breach of these obligations impinges upon private actor, or individual interests.

2.2 Values, domestic review and damages

As previously mentioned, the Government Procurement Code, like all the Tokyo Round Codes, had been designed to be largely self-policing; it had included provisions calling for the domestic 'hearing and reviewing' of supplier complaints arising under the Agreement, but, significantly, no legal criteria were provided for the establishment and operation of such review procedures. In the wake of the Trondheim case, how did the GPA 1994 negotiators set about remedying these tenuous legal commitments?

Here again the book embarks upon a terrain wherein considerable academic work has been completed. Much of this work has been conducted by legal scholars; most of it stems from study of the processes of EU economic integration, and, in particular, the role that individuals have played as agents of decentralized enforcement within the European Community's supranational legal order (Chalmers, 2006; Stein, 1981; Weiler, 1995). Subsequent to the signing of the Single European Act in 1987 – accompanied by the introduction of qualified majority voting as a decision-making procedure – political scientists have been active participants in the evolving debates as well, focusing especially on issues surrounding the 'input and output' legitimacy of European institutions and decision-making processes (Joerges, 1996; Moravcsik, 2002; Scharpf, 2007). Many of these debates have taken place in the context of discussions relating to a possible European Constitution. The EU's ambitious integrative ends notwithstanding, this research offers particularly useful insights for our purposes concerning the 'nuts and bolts' of the legal mechanisms that facilitate deeper integration. Building blocks that – combined with insights from some of the constitutionally oriented European and WTO literature (Howse and Nicolaïdis, 2003; Nicolaïdis and Howse, 2001; Weiler, 1991), as well as materials from an ongoing legal debate relating to the emergence of an

international administrative law (Kingsbury, Krisch et al., 2005) – will enable us to proceed from a politically appropriate starting point in looking at questions relating to the basic accountability issues at work in this context.

The first chapter of the book described the 'cacophony' of competing perspectives on the proper economic role of the state that prevailed at the time that the liberal post-war economic order was initially agreed, referring to the way in which public procurement can directly manifest fundamental societal beliefs. Public procurement that is used to pursue social, or value-related ends of this nature is typically categorized as procurement for 'secondary', or non-economic purposes. Many procurement regimes, however, are targeted primarily at promoting good governance, the other major general category of procurement objectives. A seminal paper by a well-known American procurement expert, lamenting the difficulty of articulating *any* objectives for a procurement system – along with their inherent tendency to conflict once identified – singled out nine specific goals frequently identified for government procurement systems: '1) competition; 2) integrity; 3) transparency; 4) efficiency; 5) customer satisfaction; 6) best value; 7) wealth distribution; 8) risk avoidance; and; 9) uniformity' (Schooner, 2002). Schooner emphasized that his list was not exhaustive; for our purposes, however, it is entirely adequate in that it provides a clear indication of the number of different policy permutations theoretically possible amongst any collection of national systems, and suggests the difficulty of reconciling those regimes under any system of international regulatory rules!

Theoretically speaking, each of the national economic systems represented in the WTO reflects different conceptions of property and other social values, including economic justice. These values dictate what is produced and how, the way in which the advantages of social cooperation are distributed, along with what percentage is set aside for savings and the provision of public goods; in so doing, they effectively define the legitimate economic functions of government (Rawls, 1999). Legitimacy, in turn, implying that members of the social community in question have a moral duty to adhere to its legal and normative precepts even if those requirements are contrary to their individual interests (Scharpf, 2001). The manner in which governments organize themselves to fulfil, or implement these economic functions is equally a reflection of fundamental social choices.[5] The OECD uses the term 'public financial management' to describe such activities; public procurement, as we learned in the introductory chapter's discussion of aid

efficiency, is a 'core function of public financial management and service delivery'. [6]

As a political process, government procurement is an exercise of administrative authority. In constitutionally governed, democratic states, administrative authority is normally exercised under the constraints of administrative law, part of the public law that establishes and regulates the institutions of the state. A key function of law of this nature is to regulate the relationship between the individual and the state. A standard legal text offers the following definition:

> Administrative law relates to the organization, composition, functions and procedures of public authorities and special statutory tribunals, their impact on the citizen and the legal restraints and liabilities to which they are subject. (De Smith and Brazier, 1994)

A more politically oriented definition brings out issues of political empowerment, along with the requirement that any such powers be exercised in accordance with the 'rule of law' (Lane, 1996). The latter, much like the concept of accountability, has been the focus of considerable academic discussion and is widely recognized as yet another 'essentially contested concept' (Shklar and Hoffmann, 1998; Waldron, 2002). It is also frequently cited as a condition *sine qua non* for development (Stephenson, 2008), and, especially, a functioning market economy (Carothers, 1998). The rule of law, as summarized by Lane, is commonly associated with: an exclusion of arbitrary powers; equality before the law; the existence of citizen rights and liberties against the state and; predictability of administrative process, including fair hearings, a duty to provide reasons, remedies, public liability in tort, compensation, procedural openness and legal review.

Government officials are the 'respondents' (Gewirth, 1984) of administrative law – or parties that are bound by its correlative duties – and, yet, enjoy privileged positions in association with its application. Accordingly, if administrative law is to achieve any of its objectives, it cannot be implemented in a biased manner, and must allow an affected party or parties the opportunity to be heard. Lawyers describe public obligations of this nature in terms of 'standards of natural justice', 'procedural fairness' or procedural 'due process', duties that, in a word, obligate public officials exercising political discretion to act 'judicially' (De Smith et al., 1994; Corwin, 1948). Definitional ambiguities notwithstanding, a more political way of putting this would be that officials are obligated to act in a manner that is broadly consistent with the rule of law.

So far, the political concepts that have been introduced in this section have all related to government at the national level. How are they manifested in the international governance of public procurement markets that is taking place in a WTO context? In what way do they relate to the previously introduced enforcement-related challenges that GPA 1994 negotiators faced prior to the introduction of the Agreement's bid challenge mechanism? First, as a point of clarification, scholars of administrative law frequently make a distinction between substantive and procedural administrative law (Cassese, 2005). The former deals with the regulation of specific policy areas – such as a public procurement regime designed to promote the wealth redistribution previously described as common goal of domestic procurement systems, or any other substantive goal – whereas the latter involves the general, procedural duties of fairness, or the standards of natural justice with which public administrators themselves must comply when developing regulation or implementing the law. This distinction has also been described in terms of general versus specific administrative law (Lane, 1996).

The regulatory goals of the GPA are modest relative to those of many domestic procurement regimes. Historically speaking, this is a reflection of the WTO's traditional focus on trade liberalization. In more political terms, however, it is related to the fact that there is no shared vision of the political 'good' amongst WTO members. Although the issue of value-driven procurement played a role in the failure of the WTO's Working Group on Transparency in Government Procurement (McCrudden and Gross, 2006) and is one of the major reasons why many developing countries have not been interested in joining the GPA, it has not, to date, posed insurmountable problems for rule-making in the plurilateral GPA context. The remainder of this chapter will address some of the reasons why this might be the case, in particular, the fact that the GPA effectively constitutes an instance of general international administrative law; it will conclude with a discussion of the basic accountability issues lying at the heart of the GPA.

2.3 The GPA, good governance and development

Up until the 2006 revision of this Agreement, the objectives of the GPA were effectively confined to the facilitation of legally secure market access opportunities amongst its member states (Arrowsmith, 2002). Here already, however, we can start to see the way in which such objectives generally have had a way of becoming entwined with one another,

the means, in particular, convoluting with the ends (Schooner et al., 2008). In this sense, the GPA's traditional market access goals are commonly viewed as being premised on three basic legal 'principles', or rules, laws or doctrines that are widely adhered to: national treatment, non-discrimination and transparency at every step of the national tendering process (Messerlin, 1994). Non-discrimination – including both most favoured nation and national treatment principles – is often described as a means to the end of promoting the 'widest possible competition between enterprises participating in public procurement procedures' (Caroli Casavola, 2006). Although the economic welfare effects of such competition, in turn, can be difficult to disentangle and even negative under certain conditions (Evenett and Hoekman, 2006), there is little dispute that competition in public procurement markets helps to ensure that governments receive 'best value', or an ideal mix between the quality and cost of the goods and services that they purchase (Schooner, 2002). The development community, as we will see shortly, describes this as 'effective procurement' (OECD, 2005).

Competition in public procurement markets is also facilitated by transparency, the other major legal pillar on which the GPA is premised. Transparency promotes efficiency in procurement to the extent that it provides stakeholders with the ability to monitor expenditures of public funds, along with affiliated incentives for officials to conduct procurement efficiently (Linarelli, 2006). The flip side of this – and here we see how the intermediate goals of policy can even be in conflict – relates to the fact that suppliers are divided on whether transparency is good for business: the procedural requirements that are commonly employed as a means to this end complicate and lengthen public transactions; they may also contribute to the revelation of commercial secrets. (Schooner, 2002). By making the purchasing process more open, however, such disciplines can encourage greater participation, especially by small and medium-sized enterprises (Evenett and Hoekman, 2005). This generally has the positive effect of making procurement more competitive. Last but not least, transparency is also a means to the end of non-discrimination, the third and final legal principle on which the GPA is premised; itself, as has been described, another means to the end of enhanced competition, albeit one that involves competition from *non-national* supplying entities.

More generally – and here we can pick up on some of the politically oriented lessons from the WTO's Working Group on Transparency in Government Procurement introduced at the outset of the book, as well as others emanating from the aid effectiveness debate – transparency

and competition are also positively linked with good governance and, indirectly, development and/or economic growth. A key lesson from the latter debate is that development depends in large part on the efficiency, integrity, and effectiveness with which the state raises, manages, and expends public resources (OECD DAC Working Party on Aid Effectiveness, 2007). To the extent that enhanced competition in public procurement promotes effectiveness in the use of public resources, it can free funds for alternative ends, including development-related ones such as the construction of infrastructure, or improved public health (OECD DAC, 2006; OECD DAC, 2008b). In discouraging overt corruption, competition also encourages better resource allocation, potentially contributing to the improved political legitimacy of those who practice it (Yukins, 2007).

A related 'lesson' concerns the importance of political ownership in this context (OECD DAC Working Party on Aid Effectiveness, 2005). Anticipating the previously cited work by John Rawls and Fritz Scharpf by a generation, Joan Robinson said that the rules that are reflected in any economic system are premised on ideologies, or values that condition individual citizens' willingness to conform to them (Robinson, 1962). Accordingly, if development processes are to be sustainable, each country must be responsible for defining its own economic priorities and development programme, including those with respect to its public procurement processes and objectives.

Corruption – or, broadly, the abuse of public office for private, or individual gain – is commonly described as a symptom of *poor* governance (Kaminski and Kaminski, 2001). A product, in part, of unaccountable public power, its link with procurement reforms is indirect.[7] Procurement reforms, in particular, do not address corruption, *per se*, but rather seek to promote good governance and the achievement of national political priorities, including development-related ones (Watermeyer, 2005). Herein it is important to recognize, too, that corruption is a ubiquitous phenomenon; in particular, it is not confined to the developing world, although the greater the governance challenges faced, the more likely it is that corruption will be endemic (Schooner, 2006).

Reflecting these premises, Article 9 of the UN's Convention Against Corruption – a legally binding treaty that embodies the principles of the development community's good governance agenda – is dedicated to public procurement and the management of public finances. It prescribes 'transparency, competition and objective criteria in decision-making' as means to the end of *preventing* corruption in procurement.[8] Motivated by its parties' quest to provide a 'set of [universal] benchmarks

for effective anti-corruption strategies', the UNCAC rules are fundamentally targeted at promoting and securing 'integrity' in procurement whilst not undermining parties' quest for 'allocative efficiency', or value for money; they seek to ensure ethical conduct on the parts of the individual public authorities involved in public purchasing processes. The principle, that is to say, that procurement decisions should be taken in a manner that is fair, transparent, free from bias or discrimination, and unaffected by self-interest or personal gain (UNCAC, 2008).

Questions of compliance with these provisions are addressed in paragraph 1(d) of Article 9: Parties are obligated to establish an 'effective system of domestic review, including an effective system of appeal, to ensure injured suppliers legal recourse and remedies'. In addition, Article 15 of the treaty – although generally applicable to public sector governance and not limited to a procurement context – requires parties to adopt legislative and other measures criminalizing both the intentional bribery of national public officials, as well as the solicitation of such bribes by these officials. Article 26, in turn, stipulates that parties must adopt appropriate sanctions and procedures to enforce the criminal measures that it adopts or maintains in conformity with Article 15.

A significant percentage of the GPA's current members have signed the UNCAC.[9] The same is true of the WTO's membership as a whole, although a few key members of the latter group have yet to ratify this instrument. An important caveat, however, lies with the fact that the Convention currently includes no implementation review mechanism. Recently a group of business and civil society representatives consisting of members of the UN's Global Compact, the International Chamber of Commerce, Transparency International and the World Economic Forum formally expressed their concern to the UN Secretary General regarding this legal lacunae (UN Global Compact, International. et al., 2009). As this is a subject that directly relates to both the issues of authority and accountability, albeit in non-traditional forms it is one to which the book will return in its concluding section.

For now, as suggested earlier, the 2006 revisions to the GPA – recognizing the central role of the integrity and predictability of government procurement systems to the 'efficient and effective management of public resources', and specifically referring to the UNCAC – introduced provisions designed to promote integrity in members' public procurement processes(see Appendix 2). Some were hortatory, or merely advisory, but, significantly, commitment to the integrity of members' covered procurement processes was recognized as a general principle of

the Agreement. The relevant provision of the GPA, Article V, paragraph 4, reads,

> A procuring entity shall conduct covered procurement in a transparent and impartial manner that:
> (a) is consistent with this Agreement, using methods such as open tendering, selective tendering, and limited tendering;
> (b) avoids conflicts of interest; and
> (c) prevents corrupt practices. (WTO Committee on Government Procurement, 2006)

The GPA's means to the end of promoting integrity in its members' covered procurement processes in this sense involve a combination of enhanced competition – a product of the non-discrimination ensured by its transparency procedures and private actor-initiated enforcement mechanism – transparency and predictability of process, along with demand side commitments to impartiality, or equal treatment for all involved.

These means – as the Preface to the Agreement specifically recognizes – are consistent with the relevant provisions of the UNCAC. At the same time, they are decidedly coloured by the GPA's underlying market access objectives, and, specifically, the formalized transparency procedures upon which it is constructed.[10] The fact that the scope of the procurement that is covered by these disciplines is limited by the principle of reciprocity is another important factor in this respect; as will be seen, it contributes both to the legitimacy and potential developmental compatibility of these international commitments.

2.4 The accountability link

Transparency in a WTO procurement context has been described as vessel that can be filled with anything" (Linarelli, 2003). This, as we have seen, relates fundamentally to the fact that it has been primarily a 'means' rather than an 'end' of the multilateral procurement regime. In sum, however, it can be said that the principle encompasses the idea that procurement decisions should be based on considerations regarded as 'legitimate' within the system, clear and accessible rules, along with institutional means to verify that those rules were followed (Arrowsmith, 1998; Westring and Jadoun, 1996).

Transparency functions within a GPA context by establishing bidder's rights. Typically indirect in any given domestic jurisdiction,[11] such rights introduce limitations on the administrative powers of parties to the Agreement, obligating the officials implementing a covered tendering process to document their actions throughout the procurement, defend decisions when challenged, and, if required, suffer sanctions for failure to meet these obligations (Schooner et al., 2008). Bidder's rights, in more political terms, might thus be described as a way of holding public entities *accountable* for their decisions. Operating after the fact, accountability mechanisms discipline the exercise of political power – in this case, the exercise of administrative authority in the context of covered procurement – exposing actions to view, and judging and sanctioning them if they involve the abuse or misuse of political power (Grant et al., 2005).

A right without a remedy, as some lawyers are fond of saying, is no right at all.[12] Assuming this line of thinking, the processes of international accountability in a GPA context would be more accurately described as a product of the Agreement's transparency procedures *combined* with its private actor-initiated review mechanism, including the latter's provisions for sanctions, or 'damages'. Earlier sections of this chapter introduced the problems exposed in the Trondheim Panel case stemming from the fact that the original GATT Government Procurement Code, like all the Tokyo Round Codes, had been designed to be largely self-policing. Although the Code had included provisions calling for the domestic 'hearing and reviewing' of supplier complaints arising under the Agreement, no legal criteria had been provided for the establishment and operation of such procedures. Accordingly, suppliers could never be certain that timely and effective institutionalized avenues of appeal would be open to them in any given GPA member state should they feel that bidding opportunities in covered sectors had not been respected. While they could always appeal to their governments to take up their complaints before the trading system's formal state-to-state dispute settlement body, this did not offer remedies immediate enough to be 'meaningful'. The existing system of enforcement was designed to safeguard the rights of states party to the treaty, not those of private actors affected by it.

Treaties, like other laws, are enforceable in courts only if they impose duties sufficiently well-specified to be judiciable. Treaty-engendered 'aspirations', on the other hand, are for the political branches of government to assess. Lawyers describe this distinction in terms of a difference

between judicial and political 'questions' (Vasquez, 1995). In a seminal paper dealing with this subject, Vasquez observed that treaties engendering political questions leave parties 'considerable discretion concerning the manner of bringing about the desired objective', thus:

> [T]hat such treaties are not judicially enforceable is neither surprising nor troubling. The role of the courts in our governmental system is to enforce the rights of individuals. If a treaty does not impose an obligation on the defendant to treat the plaintiff in a given way, it does not give the plaintiff a correlative right to be so treated.

The indirect 'private rights' that flow from the GPA's positive transparency procedures – coupled with the national 'court-like' avenues in which they can be invoked by injured suppliers – are, in this sense, a means to the end of effectively judicializing the rights and obligations that arise from this Agreement. Such rights serve the legal purpose of clarifying the obligations stemming from the formal duty of non-discrimination that parties to the Agreement have assumed. In so doing, they ensure consistent administrative processes, or uniform domestic application of the Agreement (GATT Committee on Government Procurement, 1990).

Predictable individual rights equally function the political purpose of guaranteeing a minimum level of official accountability for all administrative decisions covered by the Agreement. But what *kind* of accountability is engendered? As discussed earlier in this chapter, there are a variety of different accountability arrangements, each of which has distinctive characteristics with respect to the policing of behaviours, whether they be public or social. This is reflected in:

> Who is liable or accountable to whom; what they are liable ... for; through what processes accountability is to be ensured; by what standards ... behavior is to be judged; and what the potential effects are of finding that those standards have been breached. (Mashaw, 2006a)

The answers to these and similar questions permit the grouping of such arrangements – or what Mashaw termed accountability 'regimes' – into various categories (deLeon, 2003; Grant et al., 2005; Romzek and Dubnick, 1987). Organizing accountability relationships in this way facilitates an appreciation of the duties they intrinsically involve, along with an understanding of how such arrangements can interrelate – or

not. Typologies typically focus either on the *means* and *ends* of the accountability regime, or the respective *parties* to a relationship. DeLeon, for example, follows the former approach, building a framework on whether the goals of the accountability relationship are certain or uncertain, and if, in turn, means to these ends are clear.[13]

Typologies that focus on the parties to the accountability arrangement, on the other hand, consider the goals and duties it creates in terms of the parties that are bound by them; that is, the subjects and respondents of the obligations in question. In this sense, Mashaw identifies three categories of accountability regimes, each of which has distinct institutional ramifications: those associated with public governance; those involving accountability in the marketplace, and; those engendering non-governmental, or social discipline. Accountability relations in a public domain generally involve obligations between representative or administrative authorities, on the one hand, and citizens, bureaucratic superiors or parties affected by the formers' actions on the other. Market accountability entails duties between parties to a commercial exchange, or the suppliers of labour *vis-à-vis* employers or capital. Finally, relations premised on social accountability govern intercourse between groups in society such as families or professional communities; relatively fluid by comparison with the other regimes, they often entail reciprocal obligations.

Recognizing the inherent limitations of any simplified framework of this nature along with the myriad of possible inter-linkages between the respective categories, since the respondents of the international administrative law at issue herein are states and the discussion thus far has focused on public obligations, the remainder of this chapter will briefly consider the nature of the public governance obligations under the GPA. Before proceeding with this discussion, however, the fact that subsequent chapters of the book will return to the issue of social and market accountability must be introduced, specifically because lacunae in this respect are arguably at the heart of the good governance and development debate described earlier in *this* chapter. In order to understand these shortcomings – in particular relative to their implications for the GPA's membership dilemmas and the trading system's emerging challenges with respect to the coordination of multiple sources of regulatory authority (Dunoff, 2008) – one cannot proceed without a thorough appreciation of the comparative politics that underlie the Agreement's regulatory methodology.

Returning then to the GPA's public governance obligations, the previously mentioned framework outlined by Romzek and Dubnick offers

useful insights on the evolving nature of the duties of accountability stemming from the GPA. This is true even though the obligations in question are international and the framework, itself, was conceptualized with a national context in mind. Making a distinction between whether means to accountability are 'internal or external', and 'tight or loose', Romzek and Dubnick contended that there are basically four types of formal or public accountability relationships: bureaucratic, legal, professional and political. Within a bureaucratic system, control is internally exercised and duties are based on hierarchical relationships; where legal accountability prevails, obligations are legally or contractually delimited; in a professional system, relations are controlled by deference to expertise, and; in a political system, respondents are duty-bound to their constituents' varying expectations.[14]

The GPA's rules, as we have seen, effectively operate to allocate political responsibility for their application. This responsibility ultimately involves the judicial branch of a party's government, or, at least, an administrative authority that is independent of the procuring entity, acting on the basis of 'court-like' procedures. The relevant GPA provision, Article XVIII, paragraph 6, reads:

> A review body that is not a court shall either be subject to judicial review or have procedures that provide that:
> (a) the procuring entity shall respond in writing to the challenge and disclose all relevant documents to the review body;
> (b) the participants to the proceedings ('participants') shall have the right to be heard prior to a decision of the review body being made on the challenge;
> (c) the participants shall have the right to be represented and accompanied;
> (d) the participants shall have access to all proceedings;
> (e) the participants shall, have the right to request that the proceedings take place in public and that witnesses may be presented; and
> (f) decisions or recommendations relating to supplier challenges shall be provided, in a timely fashion, in writing, with an explanation of the basis for each decision or recommendation. (WTO Committee on Government Procurement 2006)

In terms of the affiliated accountability relationships, these procedures replace and/or augment existing lines of domestic accountability with the more 'external', legalized ones of the international regime.

Earlier sections of this chapter described the evolution of the GPA's procedural disciplines, explaining that different regulatory approaches were necessitated by the locus of political authority in respective GPA member states. Within members wherein there is no presidential-style separation of powers, domestic lines of administrative accountability have generally been, in a related manner, less adversarial, or more 'bureaucratic'.[15] Since the executive is often the leader of the party that controls membership in the parliament, relations between these two branches of government tend to be relatively de-politicized, or in any case, less antagonistic than in sovereign entities in which there is an institutional division of labour between the law making and implementation processes. This has important implications as regards the application of the law. There is, in particular, no reason to structure the exercise of executive discretion through the specification of formal, detailed administrative procedures such as those embodied in the GPA's international transparency disciplines.

The legalization of the accountability obligations engendered by the GPA, in this sense, might thus be described as fundamentally a means to the end of making them more externally credible.[16] As suggested in the preceding paragraph, however, this is not the extent of the international political discipline that the rules engender; there is another important constraint on the exercise of political power at work in this context. Accountability disciplines always 'operate after the fact'. They must be distinguished from 'checks and balances' that work to *prevent* action that supersedes the boundaries of legitimate authority by dividing it amongst different institutional actors (Grant et al., 2005). The following – and concluding section in this chapter – will sketch the specific separation of powers that is implicit in the GPA's structure.

2.5 Unitary versus popular sovereignty

The GPA's transparency disciplines, in structuring the exercise of executive discretion, work to ensure that political authority is wielded in a manner that is both legally accountable and consistent with the rule of law. At the same time, they are also an implicit reflection of a political premise that that authority is not unlimited. For reasons that we have touched on, the very existence of procedural disciplines of this nature would suggest that the executive authority that is exercised in the administrative processes covered by GPA rules is shared with other branches of government. This, in turn, presupposes a certain way of thinking about political authority; the remaining paragraphs of this

chapter will briefly outline the elementary political relationships concerned. Part II of the book will then expand the analytical perspective, considering the implications of these additional constraints on the exercise of political power for the international regulatory context in question.

Sovereign states have been recognized as the legal 'building blocks' of international politics since the Westphalian settlement of 1648. Within such entities, there are a variety of ways in which political power is formally structured. The traditional Western approach can still be seen in the unitary state of today. European states organized in this manner evolved from a reconciliation of the Catholic Church's absolute and transnational claims to political authority, with the overlapping local jurisdictions of what were known in medieval parlance as 'other associations', or other holders of political authority such as kings and their vassals (Bull, 2002). The unequivocal authority that had been exercised by the Church was, itself, a derivative of longstanding Roman practices (Figgis, 1989). In contexts of this nature, hereditary monarchs were ultimately able to consolidate their authority on the basis of the security they could offer propertied interests within their realms (Hadley, 1972). 'Other associations', the precursors of today's representative parliaments, initially played a consultative role. They could not 'second guess' a sovereign entity, but were able to influence his exercise of authority, especially on questions of finance (Hadley, 1923). In time, they became national governing bodies in their own right, gradually moving closer to the 'perfect' or consensual sovereign described by Hobbes as an alternative to the 'brutal state of nature'.[17] Political power in the unitary state remained formally concentrated in the hands of a sole national authority, however, up until the era of international legal cooperation (Friedmann, 1966) that commenced after the Second World War.[18]

Democratic political systems in which authority is divided – either horizontally across different branches of government, vertically amongst a hierarchy of constituencies, or through some combination of each – were originally a response to unitary state notions of sovereignty, and frequently a revolutionary one. The American revolt against British colonial rule provides a good illustration of the nature of the political premises from which they proceeded: As with the European unitary states, national security was an important issue in the consolidation of US sovereign authority (Deudney, 1996). Significantly, however, the American republic was not a sovereign entity whose existence necessarily precluded the continuation of the separate political entities that had agreed to its creation.[19] Furthermore, the notion of consent on which it

was premised was ultimately instrumental in a more literal way; it held, in particular, that there were certain inalienable individual rights prior to organized government (Corwin, 1955). Grounded on the doctrine of natural rights and tied to the rise of the market economy, these beliefs effectively altered the basis of political association. The idea, in sum, was that if individuals possessed certain fundamental rights, their willingness to subject themselves to political authority had to be a matter of conscious consent; government that proceeds from the recognition of rights prior to the state is, inherently, limited government.

Earlier sections of the book and this chapter introduced the idea that the key difference between the USA and the unitary, parliamentary democracies that made up a significant percentage of the OECD's membership at the time that the international public procurement rules were originally agreed is reflected in the characters of their respective law-making institutions, referring to the fact that in the USA representative assemblies have been viewed as a kind of 'second-best' democratic institution, rather than the *primary agent* of democracy.[20] At the founding of the US republic, a system of checks and balances was introduced to contain the problem of 'faction', or 'citizens ... who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community' (Madison et al., 1987). The basic political idea was that representative power was controlled by being dispersed, and law was to govern its allocation and exercise (Kenyon, 1979). At the time, James Harrington, one of the participants in the Constitutional Congress, described the system as that of a 'government by law' as opposed to one virtuous men (Corwin, 1955).

How then, to conclude, does the separation of powers implicit in the GPA affect the political authority exercised in members' covered procurement processes? Somewhat paradoxically, even though the Agreement is premised on a vision of political authority that intrinsically presumes that that authority is not unlimited, its regulatory methodology would not appear to be inconsistent with that of unitary state notions of sovereignty, at least as the latter have evolved in today's legally and economically interdependent world. In this respect, the nature of the damages available under the provisions of Article XX is particularly significant. The relevant provision, paragraph 7 (c), reads:

> Challenge procedures shall provide for correction of the breach of the Agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest.

Here the fact that a member's financial liability for injury to individual supplier, or private actor interests 'may be limited to [the latter's] costs for tender preparation or protest' suggests that the purposes of review under this Agreement can be interpreted as being *either* to safeguard the specific individual rights exercised, or affected by participation in the letting or a government contract, *or* to protect the more general interests of the collective in fair administrative processes. The objective of review in unitary states is most commonly to correct representative failures, and, thereby, maintain the vitality of the self-governing national community, whereas in popular sovereigns, on the other hand, the rights of the individual are privileged over those of the collective, and review is undertaken primarily to safeguard the former from the latter (Brewer-Carias, 1989). In this sense, although the GPA effectively restructures the political authority exercised in members' covered procurement processes, its regulatory methodology is arguably consistent with the political logic in both of the two types of democratic states that have been under discussion.

Part II

Moving the International Regulatory Process Ahead: Accountability in Converging and Competing Systems of Authority

3
Addressing the WTO Membership Challenge

The proceeding chapters have touched on several reasons why the GPA might have remained plurilateral, along with the associated, history of ongoing efforts to promote procurement reforms across different levels of government *and governance*. Many of the lessons to be derived from these activities suggest contradictory paths of action, or are at least difficult to reconcile, especially across levels of governance. For example, the IFIs' early 'liberal-rationalistic approaches' to containing the problem of corruption – including but not limited to unethical conduct in public procurement – have proven some merit in terms of promoting more efficient use of public funds, but, by failing to address the social and historical contingency of the institutions and norms they seek to reform, may miss a deeper set of political challenges relating to the locus and legitimacy of authority in a given society (Bukovansky, 2006).

Similarly, despite extensive efforts to promote better coordination amongst different regulatory systems, the challenge of legal 'fragmentation' – across different supranational regimes and national jurisdictions, and even between various levels of government within national jurisdictions – has proven persistent (Arrowsmith, 2004; Yukins et al., 2007). A major factor here is that the objectives of the various regimes, although often generally aligned, can vary considerably depending on the institutional context or mandate concerned (Caroli Casavola, 2006). Values, too, may be implicated, especially at the sub-national level (McCrudden, 2007). Other lessons, finally, appear to transcend the realms of procurement regulation altogether, namely those stemming from efforts to introduce reforms in institutional contexts where there is no formal economy and/or property rights, suggesting that solutions are non-linear in nature and require context-specific, longer term remedies, lexically prior to technical support for the installation

of rule-based public management (Erickson, 2006; Schick, 1998). Can these disparate 'prescriptions' be reconciled into a more globally consistent remedy? Is such a 'remedy' even appropriate? Might the GPA, in particular, be able to do more to promote the harmonization of the disparate regimes, or at least ensure that they are not working at cross-purposes?

The purpose of this section is to look at these questions more closely via the optic of political science. In view of the amount of work that has been conducted in this area over the past decade – initially by legal scholars, working on the so-called trade and questions (Alvarez, 2002), and, most recently, within the development community as the WTO debate has transcended its original institutional boundaries and the donor community has expanded to include the strategically important emerging economies – an exhaustive recital of the lessons concerned will not be provided.[1] Furthermore, in keeping with the objectives outlined in the introductory chapter, the book makes no pretext at offering a thorough overview of the 'state of the art' from a political perspective. The goal is simply to survey the institutionally disjointed empirical terrain, so as to develop a synthesis of especially salient political lessons. Many of these lessons, as will be seen, relate to the subject of authority.[2] Authority, in particular, in what has recently been termed a 'heterarchical' order, or a social system in which legal hierarchy is not the exclusive ordering principle (Rittberger, Huckel et al., 2008).Throughout the remainder of the book, an effort will be made to link the lessons concerned back to the concept of accountability, the primary underlying theme uniting this book. The concluding section will ponder how the legalized disciplines of the GPA might need to be modified in order for them to more effectively interface with other systems of governance so as to ensure the Agreement's regulatory role in the more complex political economic environment that is emerging.

3.1 Lessons from the WGTGP Study Group and two dilemmas: value-driven procurement and competing regulatory models

The study activities of the WTO Working Group on Transparency in Government Procurement that proceeded from the Singapore Ministerial began to reveal regulatory challenges relating to 'policy space' – or domestic latitude with respect to policy choices – before the latter had even been baptized as such in the context of the Doha Round. This is because procurement remains one of the few meaningful policy

tools available to governments to foster domestic industry development, or, more topically, to achieve other public ends such as the promotion of economic stability in world wreaked by financial insecurity. Its use for 'secondary' purposes, as we saw earlier, is what one knowledgeable observer has termed the 'good' story about discriminatory, or preferential public purchasing (Linarelli, 2006). Governments, to employ more political terms, can exercise the little economic sovereignty that remains to them today in this context, making choices with respect to, *inter alia*, small-scale industry development, that of certain geographic regions, minority employment, or climate-friendly technologies. Such politically motivated decisions may come at the expense of economic efficiency, but they are especially important when implementing a development policy (Malhotra, 2003).

The 'bad' story about less than fully competitive procurement relates to the fact that it is, to borrow a bit of OECD terminology, one of the public sector activities 'most susceptible' to bribery and corruption (OECD DAC, 2003). Policy space, in this sense, is frequently abused for private gains. A primary motivation for some WTO members' wishing to undertake negotiations on transparency, it will be recalled, was to combat the effects of bribery and corruption; that is, it was governance-oriented (Dougherty, 1996). Questions as to whether the development of such politically motivated rules was properly within the organizational mandate of the WTO, however, were not initially obvious at that time; they became the focus of a broader legal debate relative to the issue of trade and corruption, one of the earliest so-called *trade and* debates (Nichols, 1996). Political scientists, as was mentioned at the outset of the book, have been relatively inactive in this debate (Dupont and Elsig, 2009). For now, suffice it to say that there were strong legal and economic arguments for considering corruption – including corruption in public procurement markets – to be a trade issue. The reasons why were thoroughly explored by Philip Nichols in the above-cited paper; they have been summarized by Abbott and Snidal in terms of the following:

- Bribery operates like a non-tariff barrier to trade in goods and services;
- Corruption impinges upon the functioning of national markets, acting much like a domestic or export subsidy and encouraging participation in economically inefficient transactions. Corruption also skews tax and regulatory decisions;
- Corruption is deleterious to economic growth;

- Corruption undermines national social structures, particularly in countries wherein the political system is already unstable, and
- Corruption erodes political support for market-oriented reforms, and, thereby, constitutes a threat to the international economic order. (Abbott and Snidal, 2002a)

The contention surrounding the WTO's corruption, or governance-related activities was not limited to the question of whether they should be on the organization's agenda. Once the WGTGP had been established, there was little consensus relating to what its broader objectives should be, starting with how to define transparency in government procurement. In retrospect, as we have witnessed, a major problem was that transparency in a WTO public procurement context had evolved into more of a regulatory means, rather than an end (Arrowsmith, 2003; Schooner, 2002). A means, most contentiously, to the end of market access.

The WGTGP's mandate obligated it to take national policies and development priorities into account in its study of transparency in the procurement context, stating specifically that any negotiations would not limit member countries' latitude to give preferences to domestic supplies and suppliers (WTO Ministerial Conference, 1996a). In the eyes of most developing countries participating in the study, this effectively meant that the methods and procedures that could be used in procuring goods and services under any Agreement would remain exclusively within the realm of national legislation, regulations and practices (Rege, 2001). Extensive debate ensued over the question of whether multilaterally agreed rules and criteria should govern the application of the relevant nationally determined procurement practices and procedures, and what conditions would pertain to the applicability of any rules (World Trade Organization, 2000). A key subset of the developing country participants – consisting of India, Malaysia, Pakistan and Egypt – furthermore, thought that any multilateral disciplines should not be legally binding (Arrowsmith, 2003). Such positions were diametrically opposed to those of the USA and the EU, both of whom had originally viewed the potential Transparency Agreement as an interim mechanism, designed to promote the gradual liberalization of public procurement markets, and based on a series of binding, normative, procedural commitments.

These questions were never formally resolved by the Study Group. Many of the choices they entail are fundamentally political in nature.

Some were addressed in the subsequent re-negotiation of the GPA, starting with those relating to developing countries' (provisional) latitude to give preferences to domestic supplies and suppliers, or to apply other measures such as offsets (see Appendix 2). We will return to them shortly in that the temporary 'policy space' that was agreed arguably represents the kind of measure that would characterize a more flexible – and politically legitimate – WTO regime. The issue of integrity in the procurement process, as we have seen, also belongs to this category.[3] Never formally mentioned as an objective of the negotiations, it became an important item on the WTO Committee on Government Procurement agenda nonetheless, benefiting from the considerable complementary work that had been completed in other less legalized, institutional fora, notably the OECD and the World Bank. Lastly, there were the dilemmas relating to whether the methods and procedures that could be used in procuring goods and services under any Agreement would remain exclusively within the realm of national legislation, regulations and practices, and what conditions might pertain to the applicability of any rules. Linked to the issue of 'policy space' – as well as the ever-present spectre of market access – such questions merit a closer look because of their direct relationship to the comparative politics that underlie any regulatory system, that is, the so-called political-administrative interface (Sutton, 2008).

3.1.1 Accommodating the 'political-administrative interface'

Transparency, as we saw in the preceding chapter, plays a pivotal role in both the GPA and most domestic regimes in promoting good governance of the procurement function. Although there is variation amongst regimes, procedural transparency obligations are often central to ensuring accountability – and, especially, legal accountability – for the accomplishment of the regulatory objectives of any given regime.[4] Such an approach is embodied, for example, in the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on the Procurement of Goods, Construction and Services. This non-binding, or 'soft law' instrument was developed to serve as a model, or 'framework' for states to use in the evaluation and modernization of their domestic procurement laws and practices, or the establishment of procurement legislation where none existed. [5] It has been described as a possible 'global standard' by one knowledgeable observer (Arrowsmith, 2004). Currently under review, the Model Law has been used as the basis for domestic procurement reforms in many transition economies and African States.[6] Structurally speaking, it is both procedurally based

and flexible. The procedural disciplines – much like those in the GPA, although considerably broader in scope – are designed to constrain the discretion of procuring officials and, in so doing, to ensure transparency of process. Although they allow for certain differences in regulatory policy stemming from local circumstances and traditions (Arrowsmith, 2004), the rules of the Model Law and their regulatory 'modus operandi' were very much on the minds of many of the developing countries participating in the activities of the WGTGP (Watermeyer, 2005).

In permitting states to align their commitments to their particular national context, soft law provides for 'flexibility in implementation', a key advantage it holds over hard law (Abbott and Snidal, 2000). One measure of the Model Law's flexibility can be seen in its approach to remedies and enforcement. Out of respect for what Arrowsmith terms 'established constitutional arrangements', the Law presently contains only very weak review provisions. Some would argue that this legal lacuna has seriously detracted from the overall effectiveness of the rules (Gordon, 2006). For this reason, it is an issue that has featured prominently in the ongoing review. More generally, legal flexibility can equally be seen in the Model Law's approach to procurement for secondary purposes. In line with UNCITRAL's general mandate to promote international trade – and consistent with the World Bank's procurement guidelines, another set of widely applied, procedurally based international norms – the Model Law views non-discrimination and competition as primary objectives for all domestic regimes; the rules thus generally permit suppliers to participate in procurement proceedings without regard to nationality. At the same time, provisions that enable Enacting States to shield a limited number of strategic sectors of their economies from the rigors of foreign competition are equally embodied in these disciplines (UNCITRAL, 1994b). So as to maintain transparency, however, such restrictions must be based on grounds embodied in formal law or regulations. The use of preferences is, in addition, privileged as a means to the end of discouraging but not excluding foreign competition. Significantly, the Model Law provides little guidance concerning the actual use of procurement for secondary ends.

These 'flexibilities' notwithstanding, the Model Law's procedural intensity – like that of the GPA – embodies political presumptions concerning the proper discipline of administrative authority, or the 'political-administrative interface'. In particular, its legalized approach to securing transparency of process – and, thereby, official accountability for good governance of the procurement function – could be said to reflect an implicit horizontal separation of powers. As we discovered

in the preceding chapter, this is because if the administrative authority exercised in this context were not shared with other branches of the domestic government, there would be no reason to specify the transparency-related duties of the executive officials concerned in such a formal manner; in most democratic states, the professional civil servants involved would be ultimately accountable to a minister who was, him or herself part of the parliamentary majority.[7] Accountability, in other words, would be bureaucratic in nature rather than legal (Romzek et al., 1987).

The formalistic approach embodied in the Model Law has also been described as a 'conservative approach' to the discipline of the public authority that is exercised in procurement processes (Linarelli, 2006). It is premised on the idea that procurement reform is not just about drafting and promulgating legislation but, rather, also on developing capacities to conduct transparent and efficient procurement processes. Many of the participants in the WGTGP – and particularly the more powerful ones – saw the use of disciplines premised on this regulatory model as a step backward (Watermeyer, 2005). It was, in particular, difficult to align the rules' prescriptive disciplines with the more modern 'framework' systems countries like China and South Africa had adopted. This was also true in places like the Caribbean where NPM-style procurement reforms were emerging (Rose, 2008). In addition, due to the capacity constraints that the procedural rules, themselves, sought to remedy, any reforms they generated would be time-consuming and politically expensive to realize.[8] What would any reform-minded developing country stand to gain in accepting a binding, minimalist and multilateral variation on the Model Law as opposed to implementing a similar regime unilaterally, in accordance with its own domestic capacities and development priorities?

3.1.2 Value-driven procurement

Questions of this nature were further complicated by their inevitable association with the issue of market access. In the minds of many developing country delegates participating in the activities of the WGTGP, binding procedural disciplines such as those the Group was considering could not be dissociated from the issue of market access and/or GPA membership – especially given that key members of the Working Party had explicitly acknowledged their intentions to use any potential Transparency Agreement as an interim mechanism to promote the gradual liberalization of public procurement markets. Other than the limited meaningful market access gains that most developing countries

would have had to reap from membership in the GPA and the immediate administrative costs associated with implementation of its disciplines, this was politically problematic because of the potential impact such disciplines could have had on members' use of procurement for secondary purposes. In this sense, the fact that the GPA is targeted at eliminating all discrimination in public procurement, including preferential procurement was a critical stumbling block (McCrudden et al., 2006).

As we saw at the outset of this chapter, this issue was ultimately addressed in the recent re-negotiation of the GPA. The answer that has provisionally emerged is reflected in the provisions of Article 4 of the GPA revisions permitting developing countries in the process of accession to negotiate time-bound 'transitional' price preferences, offsets, the phased-in coverage of specific entities or sectors, and/or higher thresholds (see Appendix 2). Somewhat like the UNCITRAL Model Law, the revised Agreement, however, offers little guidance on how these 'policy space' related provisions are to be applied: The availability of the 'transitional measures' is conditioned on the 'development needs' of an individual country and the agreement of the existing Parties. In turn, the delayed obligations are extended to LDCs for five years and any other developing country for no more than three, provided, again, that the existing Parties are in agreement. Whether they will be successful in encouraging a wider membership in the Agreement remains an open question. For now, the GPA remains a plurilateral agreement with a minority of developing country members.[9]

3.2 Expanding the institutional-perspective: supply-side disciplines to counter the problem of enforcement and the emergence of new acountability issues

The UNICITRAL Model Law wasn't the only soft law, or legal arrangements involving relatively less formalized commitments influencing the international regulatory debate. Many of the 'legal' activities in question addressed procurement as part of a broader governance-oriented agenda that began to emerge in the 1990s in the development community and was initially spearheaded by the World Bank and the NGO, Transparency International (OECD DAC, 2003). Conceptually indebted to the OECD DAC's efforts to develop a broader, more 'human' strategy for development assistance that would reverse the declining bilateral aid flows that had followed the end of the Cold War and the failures of Structural Adjustment Programs (Fraser and Whitfield, 2009), this

new approach entailed stepped-up efforts to secure aid-related funds from corruption. In terms of procurement, it was initially reflected in the 1996 OECD Recommendation on Anti-Corruption Proposals for Bilateral Aid Procurement. This non-binding instrument manifested OECD members' collective commitment to combating the problem of corruption in bilateral aid-funded procurement and embodied a call for their implementation of anti-corruption provisions in their relevant domestic law 'in cooperation with recipient countries and the international development institutions' (OECD DAC, 1997). Combined with concurrent activities within the OECD targeting bribery and corruption, *per se*, and in other international fora such as the World Bank with its nascent efforts to tighten up its loan guidelines (OECD DAC, 1997), it constituted an important initial step in an international legal harmonization of aid policies and practices that continues today.

In recent years, debate in this policy context has come to embody the realization that such efforts are only useful if accompanied by systemic and sustained institutional reforms in recipient countries. Programmes of this nature, in turn, need to be supported by donor initiatives that are consistent with recipient countries' development priorities rather than indirectly undermining them. Such an approach is a precondition for recipient governments' assuming 'ownership' of their development processes; it cannot happen without the respective parties assuming 'mutual accountability', or shared responsibility for the necessary reforms.[10] These principles, as we saw in the introductory chapter, are embodied in the Paris Declaration, a summary of the donor and recipient communities' joint aid-related aspirations. The following chapter will focus on the procurement-aid nexus, contrasting the issues of social and market accountability it has raised with the legal accountability that is engendered by the GPA. It will succeed an overview of the professional accountability engendered by the compliance mechanisms of instruments like the OECD's Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions at the end of this chapter; they offer a relatively structured form of social accountability and thus sit at the cross roads between formal and informal instruments of accountability. (For further details on the OECD's Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions, see the text of this Agreement in Appendix 3.)

Returning to a more explicitly trade-related context, OECD work that was trade-related, or motivated by a quest to contribute to a more internationally stable and fair business environment proceeded from

the adoption of a Recommendation on Bribery in international business transactions in May 1994.[11] It has been described as basically a 'shopping list' of potential 'supply-side instruments', or measures designed to constrain the offering of bribes to public officials within in a commercial context (Pieth, 2000). Unlike the previously described governance-oriented work evolving in other institutional fora, this Recommendation did not target the corrupt behaviour of the foreign officials themselves; that is, the demand side of the equation. What Abbott and Snidal have termed 'sovereignty costs', or public resistance to restrictions on 'policy space' were too high at the time (Abbott et al., 2002a). Furthermore, as the OECD disciplines subsequently evolved, they were specifically limited to activities of a sufficiently large scale to constitute 'grand', or economically relevant corruption. Their goal was to facilitate a level playing field, not a series of interminable discussions amongst the countries adopting them as to whether a particular payment did or did not constitute a case of corruption.[12]

Within two years, agreement on an instrument derived from the so-called shopping list had been reached: the non-binding 1996 Recommendation on the tax deductibility of bribes to foreign public officials. This instrument basically encouraged member countries to re-examine their tax legislation, regulations and practices so as to ensure that they did not offer any indirect support of bribery; despite the fact that it was non-binding, it was an important manifestation that the tides were changing in the overall fight against bribery. States that had previously viewed bribery as simply a cost of doing business in the international economy were beginning to recognize the extent to which their own firms' opportunities could be constrained by this surreptitious market access barrier (Pieth, 2002). Soon thereafter, in May of 1997, another non-binding Recommendation was adopted that would have important governance-related implications itself: the Revised Recommendation on Bribery in international business transactions. Effectively incorporating the disciplines of both the Recommendation banning the tax deductibility of bribes and the Recommendation on Anti-Corruption Proposals for Aid-funded Procurement, this agreement also introduced a follow-up procedure to enable members to monitor their progress in implementing its legal disciplines (Pieth, 2000). In this sense, although the disciplines it consolidated were not legally enforceable, they constituted a significant enough step in that direction in that members were subsequently motivated to seek legal clarity in this context. Before the year was up, a binding Convention on Bribery in international

business transactions – incorporating the innovative follow-up procedures, but focused exclusively on criminalization and the provision of effective sanctions – had been agreed: the OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions.[13] (see Appendix 3). The official commentaries to this instrument specifically recognized procurement as a 'public function', or one in which the bribery of foreign public officials was to be criminalized and effective sanctions made available (OECD Directorate for Financial Fiscal and Enterprise Affairs, 1998). In retrospect, informed observers have argued that this final shift from 'soft' to relatively 'harder' law was a defensive move, at least for key member states. These states had been concerned that only their own behaviour would be constrained by the non-binding disciplines – not that of their trading partners who might be inclined to profit from the remaining ambiguities (Abbott et al., 2002a).

A few words are in order herewith respect to the issue of enforcement – and, specifically, governance-related innovations in this context. The Convention introduced legally binding disciplines indirectly covering – at the time – over 70 per cent of the world's exports, but its follow -p procedures have had systemic implications that extend well beyond an OECD context (Pieth, 2000). Legally linked with those in Article 12 of the Revised Recommendation, they have served as a model for similar 'compliance mechanisms' in many international anti-corruption initiatives, including ones that are not confined to the so-called supply side of the equation.[14] The procedures in question are not punitive. Sanctions remain a matter for the domestic law of the individual member country concerned and, indeed, can vary significantly depending on the legal culture of the jurisdiction concerned and/or whether an individual or corporate entity has committed an alleged violation. The Convention's requirement is simply that they be 'functionally equivalent', or, more precisely, 'effective, proportionate, and dissuasive' as well as comparable to those applied domestically (OECD Directorate for Financial Fiscal and Enterprise Affairs, 1998). Sanctions provided for in the context of procurement provide a good illustration of how they work. Article 3, paragraph 4 of this instrument suggests that: 'Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official'. The Commentaries to the Convention, in turn, elaborate a possible minimum standard for such penalties, stating that they might include the 'temporary or permanent' debarment of enterprises determined to

have bribed foreign public officials, but only 'to the extent that a Member applies procurement sanctions to enterprises determined to have bribed domestic public officials' (OECD Directorate for Financial Fiscal and Enterprise Affairs, 1998).

The general idea embodied in the follow-up mechanism is to provide customized professional input to members on a sustained and structured basis so as to assist them in their efforts to implement and enforce both the Convention and Revised Recommendation 'consistently, effectively and fairly'. [15] Designed to foster a 'dialogue between professionals', they basically entail scheduled information exchange – including with the public – and the sharing of best practices. The process itself is phased; it proceeds from a national self assessment of the country's relevant laws and practices, including those dealing with public procurement. This is followed by an OECD analysis of these measures to assess whether they are in compliance with the standards established by the OECD instruments.[16] An interim report is then developed by the Secretariat and examiners from two other member states. After discussion of this document in the Working Group, a second phase is dedicated to enforcement; it proceeds from visits to the country concerned by members of the OECD Secretariat and the expert examiners. Another interim report is prepared, this time focusing on the way in which the legislation implementing the Convention and Revised Recommendation is being enforced, allowing for national differences with respect to governmental, economic, and geographic organization. After it is discussed in the wider Working Group, a final report is prepared summarizing the shortcomings identified, and outlining effective approaches to implementation and enforcement for the country concerned (US Department of Commerce, 2004). This report is then made publicly available via the OECD website.

The political significance of a 'peer review process' of this nature – variations of which are seen, *inter alia*, in an Organization of American States and Council of Europe context – lies in the fact that it engenders a kind of inter-governmental professional accountability for treaty compliance. Viewed in terms of the accountability 'regimes' specified by Jerry Mashaw and outlined in the preceding chapter, this lies in clear contrast to the more bureaucratic and/or legal accountability that is typically associated with what he called 'public governance' accountability regimes (Mashaw, 2006b). Indeed, professional accountability is described by Mashaw as a relatively structured form of social accountability rather than as type of public accountability. How does

this differ from the more formal, public governance accountability regimes that have thus far been the focus of this book? Professional accountability is premised on an assumption that authority has been allocated on the basis of technical expertise or special skills. Prevalent in public contexts in which the issues involved are highly technical and/or complex, it embodies mechanisms of official control that are largely internalized – to the norms or standards of a profession – rather than externally imposed (Mashaw, 2006b; Romzek et al., 1987). Such disciplines tend to be extremely powerful; they are, in the words of Mashaw, 'the home of cultures and sub-cultures'. For reasons of this nature, an important caveat is in order: because of the relatively greater amount of discretion authorities in such contexts typically enjoy, there is often a need for their activities to be legally harnessed, especially to the extent that they involve regulatory discretion. Mashaw describes this process as a 'policing of the outer boundaries of power'.

Turning back to procurement and specifically that governed by the OECD Code, the international professional accountability engendered by the follow-up mechanism, in this sense, presupposes well-trained public officials who are thoroughly familiar with modern procurement practices and procedures for the award and management of public contracts. These officials, in turn, should be part of a transparent domestic procurement regime and subject to stringent criminal disciplines to discourage unethical official conduct. They should also be subject to adequate administrative and political oversight.[17] Amongst the majority of OECD member states, most of these conditions are met. The challenge rather lies in inculcating, or reinforcing a domestic culture of integrity (OECD, 2009). The institutional mechanisms for constraining it, in other words, generally exist.

Outside of an OECD or industrialized country context, enforcement-related cooperation based on an international variation on professional accountability is more complicated to organize and implement, certainly when cooperating states are at differing levels of development. These challenges are likely to be compounded when political-administrative interfaces rest uneasily, and/or local political support for enforcement fluctuates within cooperating entities (Low and De Gramont, 2000). In terms of procurement, more specifically, modern domestic procurement regimes and/or the accompanying administrative capacity to implement them fairly and effectively cannot necessarily be assumed. The so-called outer boundaries of administrative power, in turn, may not be adequately constrained. In an OAS context, for example, the

provisions of the Inter-American Convention Against Corruption dealing with domestic regimes are all subject to 'progressive development', or a development-linked process of introduction (Low et al., 2000). They include, *inter alia*, the criminalization of 'the improper use of information by government officials ... and attempts by any person, directly or indirectly to obtain illicit benefits for himself or any other person'.[18] Similarly, Low and De Gramont described the preventative measures that the Convention encourages its members to introduce into domestic law as the 'softest measures in the legal hierarchy of the Convention'. Many of these potentially relate to procurement, some – such as Article 3, paragraph 5 – directly.

In view of the above and as has been mentioned, it is not surprising that much of the procurement-related work coming out of the aid effectiveness debate has involved initiatives designed to strengthen national procurement systems, including the institutional capacity of domestic authorities to implement the local regime in a manner that is both effective and fair (OECD, 2009). The political story being recounted here, however, does not end with 'technical assistance'. Earlier sections of the book, in describing the historical evolution of the rules embodied in any economic system, referred to the way in which ideologies, or values condition individual citizens' willingness to conform to the social disciplines of an economic order (Robinson, 1962). These values, to reiterate, dictate what is produced and how, the way in which the advantages of social cooperation are distributed, along with what percentage is set aside for savings and the provision of public goods; in so doing, they effectively define the legitimate economic functions of government (Rawls, 1999).

Applying such insights to the governance challenges faced today in this context would suggest that if development processes are to be sustainable and truly 'owned' by those that must ultimately implement them, each country must be responsible for defining its own economic priorities and development programme (Whitfield and Fraser, 2009a), including those relating to its public procurement programme. Policy space, in this sense, is a political imperative. But what if, as is invariably asked, states fail to use their sovereignty to promote the economic welfare of their citizens?[19] Does this constitute adequate grounds for assuming that they are not fit to exercise their economic sovereignty in this way? (Jackson, 1990). The following section will look at the ways in which these questions have played out in the aid efficiency debates that are broadly relevant to the public procurement function. It will focus on the particular challenges of accountability in states

at diverging levels in the process of democratization and respect for the rule of law. The concluding chapter will then link these findings back the central question of the book: that is, the extent to which the GPA and/or other international regulatory regimes might be able to reinforce various forms of accountability across different levels of governance.

4
Towards an International Regulatory Framework?

4.1 Political lessons from the aid effectiveness debate: appreciating the institutional imperatives of ownership and mutual accountability

Thus far, to the extent that the book has ventured into development-oriented issues or debates, the exercise has been driven by the presence of clear-cut trade-related linkages, ultimately to the regulation of public procurement. As we have seen, the OECD work on bribery and corruption that proceeded from the 1996 Recommendation on Anti-Corruption Proposals for Bilateral Aid Procurement was largely the outcome of a quest to contribute to a more internationally stable and fair business environment. Its result – tightly constrained to the so-called supply-side of the regulatory equation and limited to 'grand', or economically significant corruption – was a legally binding treaty amongst OECD members criminalizing the bribery of foreign public officials in international business transactions, and providing for an innovative peer-review monitoring system to reinforce professional accountability for the effective application of these rules at the domestic level (see Appendix 3).

Earlier sections of the book have referred to the broader governance-oriented agenda that emerged in the international community as a result of efforts to finance and achieve the MDGs, showing how, *inter alia*, this influenced the development of new rules with respect to ethical procurement in the 2006 GPA Revisions (see Appendix 2). Rules that, in turn, specifically referenced the disciplines of the UN's Convention Against Corruption, a binding international instrument governing both the supply *and demand* sides of the corruption 'equation'.[1] This was clearly an important development in terms of the extension of the

rule of law to the public officials whose activities are covered by the WTO accord.[2] At the same time, because of the inexorable link between these disciplines and market access – and, in particular, the fact that a limited number of WTO member states have decided to accept them – their overall benefits with respect to good governance of the public procurement function internationally are relatively limited. Aid-funded procurement, furthermore, is generally excluded from GPA disciplines under the revised Agreement's Article II, paragraph 3(e)(i) 'carve out' for 'procurement conducted for the specific purpose of providing international assistance, including development aid'.[3] Is this where our evolving regulatory 'story' comes to an end?

The answer, in a word is 'no'; rather, it is arguably where the next chapter could begin: to the extent, in any case, that the past might be an indicator for the future. Regulatory innovation in this context, as we have witnessed, has frequently come from outside of the WTO's institutional boundaries (Woolcock, 2006). It has been largely incremental and tied to the overall pace of market integration, both at the regional and multilateral levels.[4] Notwithstanding the clear intellectual risks of assuming that this will continue to be the case, the book will now turn to two accountability-related developments tied to the aid effectiveness debate that would appear to be well-aligned to contribute to the next phase of international rule-making on procurement.

The fact that these developments originate in the aid community – an environment that until fairly recently was completely divorced from the trade community – merits comment.[5] For the political purposes of this book, it is significant that trade and aid are two mechanisms through which external political entities can influence the economic development of a country (Page, 2007). As described by Ms Page, the former involves influence that is exerted primarily through the commercial activities of domestic private actors, while the latter sees the promotion of change through public initiatives, public procurement or partnerships with the private sector being prime means to this end.[6] The potential linkages between aid and the governance questions that have been at the heart of this book are thus very direct.

Our earlier discussions of aid focused on ODA-related aspects of the so-called global partnership for development, goal 8 under the Millenium Declaration. Goal 8 calls on the industrialized countries, *inter alia*, to provide more generous aid, enhanced debt relief and improved access to their markets. Terms for its realization were fleshed out in the Paris Declaration on Aid Effectiveness of 2005. From a political perspective, it has been said that the Declaration set out conditions to 'govern

what has become an effort to re-legitimize aid' (Fraser et al., 2009). We did not look at this previously in any detail other than to observe that donors' aid policies and conditions have been rarely consistent, or 'harmonized' and that they are seldom aligned with the development priorities and programmes of recipient countries. The remedy envisaged under the Declaration involves cultivation of recipient 'ownership' of the latter strategies and the manner in which they are implemented; a series of 'partnership commitments' between donors and recipients are the prime means to this end. They involve donors' agreement to place greater reliance on recipients' national development goals, institutions and procedures in return for the latter's pledge to exercise effective, coherent and consultative leadership over each of these activities. Mutual accountability for development results is then shared.

Although there are a variety of perspectives on the term (UNCTAD, 2008), 'ownership', in essence, is about the role of the state in its own development process; that is, its control over its own social and economic destiny. David Williams and others have described the political questions and tensions evoked in this context in terms of the principle of sovereignty (Whitfield et al., 2009a; Williams, 2000). Here, again, the book enters another terrain in which there is considerable existing academic work, including by political scientists (Biersteker and Weber, 1996; Krasner, 1999). We will engage with these debates, but only to the extent that it is necessary to provide a foundation for the final empirically oriented discussion. It is not, in particular, our intention to contribute to the burgeoning literature concerning the evolution of political authority.

Black's Law Dictionary defines Westphalian sovereignty in terms of 'supreme dominion, authority or rule' (Garner and Black, 2004). More politically, a sovereign entity of the latter nature is a self-governing, territorially bound political structure in which domestic authorities are traditionally the sole arbiters of legitimate behaviour (Krasner, 1999). Earlier sections of this book have examined the historical evolution of the Westphalian sovereign state, specifically in terms of the popular sovereignty that is arguably reflected in the structure of the GPA's disciplines. Popular sovereignty, as we saw, refers to the basis of political association; the grounds, in other words, for the exercise of legitimate political authority. It describes the relationship between a sovereign entity and its own citizens *as individuals,* and implies that this relationship is premised on the consent of those who are governed.[7] Picking up on some of the issues explored by Grant and Keohane in their seminal paper on accountability in world politics, principles of this nature also

underlie the obligations of accountability that a democratically elected sovereign has to its citizens, along with the institutional mechanisms that are necessary to realize them (Grant et al., 2005).

In a series of papers that pre-dates the Paris Declaration, David Williams showed how the promotion of economic development and an ability to provide for the material well-being of the populace became leading duties of the sovereign state during the latter half of the twentieth century (Williams, 2000; Williams, 2003). In an aid context, recipient states' failure to fulfil this obligation contributed to the international donor community's introduction of a series of generalized development and economic policy conditionalities that had the effect of seriously impinging upon recipients' sovereign authority – at times, by-passing it entirely.[8] Following the failure of the structural adjustment programmes in the 1990s, political conditionality increasingly featured in this donor 'tool kit'; an approach that was reinforced as poverty reduction emerged as the international community's collective justification for such assistance.[9] Broadly targeted at promoting democracy and good governance, donors' political conditions essentially addressed all the structures and processes that can affect the use of resources available for the public good within a country, seeking, *inter alia*: non-discriminatory laws; fair, effective and timely judicial processes; universal safeguards for human rights; public accountability; transparent public services; devolution of public authority and resources to local levels, and; meaningful opportunities for citizen participation in public decision-making (Weiss, 2000).

The evolution of political conditionality since the end of the cold war and the Neoliberal heyday that continued through the mid-1990s is a considerably more complex story than we can present here; for our purposes, it is sufficient to note that the development community has learned that an effective and legitimate state is essential for both sustainable economic growth and poverty reduction (OECD DAC, 2007b). It is particularly important to recognize linkages between poverty alleviation, democracy and the rule of law. Without the latter, the benefits of economic development are unlikely to be shared widely amongst the citizenry of a country (Linder, Bächtiger et al., 2008). Democracy and the rule of law, in this sense, ensure that people benefit from development not just countries (Sen, 1999). The rule of law, in particular, is what the development economist, Deepak Nayyar termed a 'foundation' (Nayyar, 2007). A fair legal system, he said, applied 'consistently to everyone … defends people from the abuse of power by state and non-state actors … [and empowers them] to assert their rights'. But how, if at all, does this relate to the regulation of public procurement

in a WTO context? In what way, in turn, might issues of accountability be involved? Before proceeding with our final review of social and market accountability mechanisms that have emerged in this regulatory context, we need to delve just a bit deeper into two of the political issues that the aid effectiveness debate has raised: ownership and mutual accountability.

4.2 Jointly agreed commitments and mutual accountability as means to the end of re-legitimizing aid

The Paris Declaration has been described as an attempt to re-legitimize aid. The key political 'problem' that the principle of ownership was designed to address was the fact that donors' conditionality had proven ineffectual in ensuring that recipients made good use of the foreign aid they received. In order to appreciate the essential political challenges in this context, it is important to understand that even though a quest to contribute to economic development and/or poverty reduction has not always been the primary motivation underlying donors' willingness to supply aid (Lancaster, 2007; Whitfield and Fraser, 2009b), their concern about the way in which tax payers' contributions ultimately get disbursed is genuine.[10] The issue involved here is fundamentally one of accountability: Democratic donor states commonly have obligations of what we have been calling 'public governance accountability' (Mashaw, 2006a) for judicious use of any funds allocated as development assistance. Depending upon the national jurisdiction in question and as suggested in the preceding section, these duties can be of an administrative, political and/or legal nature. Criminal sanctions to promote compliance – including disciplines to sanction unethical official conduct relative to procurement – commonly feature in these 'accountability regimes'.[11] Such obligations clearly cannot be taken lightly; they underlie, *inter alia*, the myriad of reporting requirements imposed on aid recipients. As the OECD Secretariat recently put it, 'First and foremost, donor agencies and partner country governments should be accountable to their constituencies at home' (OECD DAC, 2009b).

But this is only one aspect of a considerably more complicated political proposition. Jacqueline Best has explained the dysfunction of the IMF's traditional structural adjustment policies in terms of an increasing lack of legitimacy of the expert standards on which the policies were premised, suggesting that other technically oriented, or 'de-politicized'

inter-governmental organizations are likely to be confronted with similar challenges to their authority (Best, 2007). The problem with such conditionality, in her view, was that recipients had little motivation to comply with economic conditions that had proven to be ineffectual in achieving development – and, worse still, extremely costly from a social point of view. 'Legitimacy dilemmas' of this nature have intensified as the IMF has moved to apply political, or institutional conditions to its financing packages, while effectively maintaining an expertise-based rationale for these politically intrusive measures.

The Paris Declaration's approach to the setting of standards to govern development aid and its implementation, as suggested above, reflects a premise that governments will be better motivated to make good use of any foreign assistance they receive if they determine their own development priorities. The basic idea is that recipient countries work out indigenous development strategies that donors, in turn, support with funds channeled through the recipient's existing budget, 'stepping back' from the kind of intervention involved in externally imposed conditionality (Fraser et al., 2009). Significantly, although each of the respective parties remains first and foremost accountable to its domestic constituencies, both have equally assumed concurrent duties of mutual accountability for development results *vis-à-vis* one another. The content of these duties is context, or even sector-specific. There is not, in particular, an international 'system' to provide for, or secure such accountability; it is a voluntary, collaborative exchange in which, as one group of observers recently put it, 'success is about creating and sustaining a "logic of participation" rather than a "logic of compliance"' (Droop, Isenman et al., 2008).

One of the primary objectives of mutual accountability is to create a more balanced partnership between donors and recipient governments, through shared values and commitments (Steer, Wathne et al., 2009). The latter, over time, provide 'social norms' or 'collective standards of behavior' that work to strengthen incentives for cooperation. In concrete terms, such commitments are frequently translated into what we have described as 'soft law'; that is, codes of conduct or voluntary standards.[12] Because they affect the dynamics of power relations between the respective parties at an elementary level, measures of this nature must be premised on trust (Hyden, 2008). Even though equality between the stakeholders in any particular arrangement need not necessarily result, cooperation on the basis of such standards can lead to dramatic social changes, certainly in the longer term. Paraphrasing Professor Hyden, both mutual accountability – and the ownership on which it must

ultimately be premised – are, in this sense, 'political objectives to be attained, not established facts'.

One final ongoing political development merits specific attention in this context; the 'silent revolution' that is currently underway in the aid community (Manning, 2006; Woods, 2008). What is the 'silent revolution'? The term was coined by Ngaire Woods to describe the increasingly active role that 'emerging donors', or non-OECD DAC members are now playing in the provision of international development assistance.[13] Whereas members of the OECD's DAC have routinely provided as much as 95 per cent of all development aid, 'emerging donors' are in the process of scaling up their contributions – albeit from a low base (OECD DAC, 2009a). From our accountability vantage point, the significance of this development relates in large part to the fact that 'emerging donors' do not view good governance, *per se*, as an underlying precondition for sustainable development. In particular, political conditionality and the partnership approach to better governance embodied in the Paris Declaration do not generally feature in the development assistance provided by these states. Indeed, some, like China, have historically 'packaged' their aid in a contrasting language of non-intervention and respect for recipients' domestic sovereignty (Strauss, 2009, Woods, 2008). In this way, they offer alternatives to the beneficiaries of such assistance that are, themselves, reinforcing the previously described changes in underlying power relationships being unleashed in the wake of the Paris Declaration.

In a related vein, several of the non-OECD DAC economies – most notably China and India – are combining their aid with strategically targeted trade and investment. This, it will be recalled, represents the second of the two broad avenues through which external political entities can influence the economic development of a country (Page, 2007). While some have questioned the political intent of this engagement, suggesting that it may be motivated by a modern-day mercantilism and/or embody 'geopolitical conditionality'(Woods, 2008), its concurrent potential to reinforce the market access, or trade targets of MDG 8 cannot be ignored. China, for example, has committed to zero-tariff treatment for most China-bound exports from all the 39 least developed countries with which it has diplomatic relations (Manning, 2006).

4.3 Taking the regulation of public procurement beyond the Paris Declaration: building blocks for the next step?

If the mutual accountability that underlies the political bargain reflected in the Paris Declaration remains an 'objective to be obtained',

while both donors and recipients maintain pre-eminent obligations of accountability to their respective domestic constituencies, where does this leave us? In particular, with respect to the procurement reforms that have been the focus of our study, and relative to the major political economic changes that are evidently underway in the multilateral development assistance regime?

Earlier sections of the book have referred to the cooperative efforts of the OECD DAC Working Party on Aid Effectiveness' Joint Venture for Procurement (hereafter JV) to develop a benchmarking tool for evaluating the domestic procurement systems of aid recipients. The JV, it should be recalled, was established to fulfil the Paris Declaration's commitments to strengthen national procurement systems, support capacity development and use local country systems (OECD DAC, 2008). In keeping with the Declaration's partnership approach, the methodology, itself, was conceived for the dual purposes of offering a foundation on which recipient countries could build capacity development plans and donors, in turn, might subsequently introduce more harmonized assistance programs, premised upon the latter. Procurement capacity development plans, for their part, basically specify a country's procurement objectives, the entities or agencies that are to be given responsibilities for achieving them, the associated budget and instruments required, as well as a time line for the reform process (OECD DAC, 2008). The implementation of these plans – either at the level of the domestic system as a whole or within individual procuring agencies – is then monitored on a periodic basis via structured performance assessment systems that have also been developed under the oversight of the JV.

Picking up on the earlier work of the OECD DAC/World Bank Round Table to develop general principles for more effective procurement, the JV adopted a holistic approach to reform, taking procurement as one element within the broader context of public financial management and the delivery of essential services (OECD DAC, 2006). Procurement reforms were viewed as being central to the overall effectiveness of development expenditures and assistance; they offered a 'vehicle' for accessing the goods and services that constituted the inputs for efforts to achieve the MDGs (Nordic+ Procurement Group, 2005). To the extent that procurement contributed to the development of stable and dependable markets, it also had the potential to stimulate private sector growth (OECD DAC, 2006). Effective procurement, in this sense, constituted considerably more than 'mere processes or procedures'.

The JV's benchmarking tool was designed to provide a standardized assessment of the comparative strengths and weaknesses of a national procurement system so as to identify areas, or 'gaps' wherein capacity

development was appropriate.[14] The scheme consists of four categories for assessment, or 'pillars': A domestic system's legislative and regulatory framework; its institutional framework and management capacity; procurement operations and market practices, and; overall integrity. The legal and regulatory framework serves as the 'starting point' for an analysis, offering the 'legal basis for ensuring the rights of participants and establishing their responsibilities' (OECD DAC, 2006).

Within each pillar, there are a series of baseline and sub-indicators against which systems are evaluated; the former constitute the 'core components' of any system. Different systems for weighting scores under the indicators and sub-indicators have been introduced, both within individual recipient jurisdictions and by the OECD and the World Bank. They generally reflect domestic priorities for reform, or, in the case of the World Bank, minimum standards for participation in a pilot project for the use of country systems for procurement in Bank-funded projects (Pallas and Wood, 2009). For our purposes, it is particularly significant that there are diverging perspectives on how these processes should be conducted and whether – in the case of the World Bank – a secondary evaluation is required before employment of country systems can be contemplated. Pallas, for instance, describes how the international business community and certain civil society actors including the ILO and Transparency International have been highly critical of the World Bank's latest standards governing the stringency of assessments, as well as the role that stakeholders have generally been granted in their development and approval.

4.4 Capacity development; a more facilitative role for donors?

Questions concerning the proper manner in which to evaluate the results of an assessment point to the eminently political nature of such an exercise, as well as, arguably, that of the entire capacity development process. Participants in development partnerships, as the UNDP has explained, invariably bring:

> ideological and political preconceptions to the table … [A]lthough stated objectives are often more or less shared, they are based on misperceptions, vested interests and power differences that hamper … balanced relationship[s]. (United Nations Development Program, 2008)

This is an issue that features prominently in yet another, predominantly policy-oriented literature that intersects the scope of our enquiry: the work of the development scholars and practitioners on capacity development (Swedish International Development Agency, 2006; UK Department for International Development, 2006; United Nations Development Program, 2009; World Bank, 2006). This literature proceeds from a distinction between the concepts of capacity *building* and capacity *development*; once again for our necessarily selective purposes, the fact that it has recently started to embody lessons stemming from a small group of donors' efforts to apply political economy analysis to the underlying causes of 'weak state capacity and poor governance' is especially relevant (Unsworth, 2009). Capacity development is defined as a locally driven, longer-term process that builds on existing domestic capabilities, and takes into consideration social factors such as geography, economic history and culture.[15] Building on the seminal work of Douglass North, the UNDP terms the latter capabilities and factors the 'enabling environment'; it includes 'all the rules, laws, policies, power relations and social norms that govern civic engagement' (North, 1990; United Nations Development Program, 2008; United Nations Development Program, 2009).

Capacity building, on the other hand, is a technically oriented activity; it is premised on what Sue Unsworth terms 'a pre-occupation with why these formal institutions are not working as they do in OECD countries, and how to make them work better' (Unsworth, 2009). In these terms, procurement could well qualify as the quintessential technical endeavour. Taking a broader, capacity development perspective, however, it is clear that the technical activities it entails cannot be conducted in institutional isolation. Indeed, every setting for procurement reform is socially unique and, as various experiences in applying the JV's benchmarking tool have now shown, getting the legal or regulatory framework in place is only the beginning (OECD DAC, 2008). Development partners must contend with the other, more convoluted 'pillars' of a system; that is, it's 'enabling environment'.

Are there *concrete*, politically oriented lessons that can be derived from experiences with the JV methodology? So-called early results from a series of 22 pilot studies undertaken in three regions – Africa. Latin America and Asia – testing the application of the JV's benchmarking tool and its subsequent use as a basis for capacity development all re-enforced the importance of ownership as a condition *sine qua non* for sustainable reforms. Indeed, an OECD collection of lessons from these exercises described country ownership as the 'core

objective of the JV methodology' and a 'key to procurement capacity development'.[16]

A related lesson is that political leaders, in particular, must be committed to change. Such commitment needs to be both authentic and sustained. It should also extend to high-level authorities whose responsibilities are not confined to the immediate institutional context targeted for reform; procurement is a core public function, but it is not the only one. Successful coordination amongst the leadership of public service reforms, in this sense, is of critical importance. This is one of the most formidable challenges to positive reform. Change invariably comes at the expense of the existing distribution of authority within domestic social institutions. As political economy analysis is beginning to show, it can fundamentally threaten existing power constellations, irrespective of whether they are formal or informal (Hyden, 2008).

This points to an associated lesson concerning the need to work within existing fora, and, specifically, to enlist the concurrent commitment of the procurement authorities who will be immediately affected by any reforms (OECD DAC, 2008a; United Nations Development Program, 2009). These are the officials who will ultimately be tasked with implementing the capacity development programmes and procedures derived from the assessment. They are equally the primary source of information necessary for a successful assessment. Inevitably, the changing power dynamics unleashed by pending reforms tend to breed distrust amongst those they will affect. Making sure that these individuals understand the purpose of an evaluation is, therefore, a critical first step. To the extent that a reform program is part of a wider public service reform initiative, introducing the devolution of public authority and resources to local levels, the relationships in question are likely to be further strained. Regional and local autonomy increases local authority and responsibility thereby introducing more interests into an already complicated political equation (OECD DAC, 2008). The professional credibility of those involved in conducting an assessment – and contributing to the development of strategies for capacity development derived from its results – is a critical factor in this respect, especially in view of the fact that the JV tool was not designed to assess sub-national agencies. Optimally, local officials and procuring entities should be directly involved in any reform process from the outset. Transparency can thereby work to facilitate shared understanding and to discourage what the OECD describes as 'defensive participation'.

Participating states in the pilot projects were at various levels in the process of democratization and respect for the rule of law. Nevertheless,

a derivative lesson from the above concerns the need to generally mobilize a system's stakeholders, again from the outset of any capacity development initiative. In addition to the political and administrative authorities cited in the preceding paragraph, this audience commonly includes, among others, parliamentary bodies, non-governmental organizations, business entities, as well as members of the donor community. Stakeholder involvement can, in particular, help to promote 'buy-in and commitment to the procurement reform agenda, thereby building a coalition for change'. It can also serve to 'identify and correct mistakes or misunderstandings'. The OECD describes consultation of this nature as a process of 'validation'; the forum for such activities frequently consists of a series of multi-stakeholder workshops.[17] Here, again, a first objective for such gatherings is to ensure an understanding of the purpose of the reforms. The opportunity costs associated with ineffective procurement are essential to convey in this respect. As we saw in Chapter 2, a central lesson from the development community's overall aid effectiveness debate was that development depends in large part on the efficiency, integrity, and effectiveness with which the state raises, manages, and expends public resources (OECD DAC Working Party on Aid Effectiveness, 2007). More efficient, effective and ethical procurement directly contributes to effectiveness in the use of public resources; it can free significant sums for alternative public ends, including developmental ones such as the construction of infrastructure or improved public health (OECD DAC, 2006; OECD DAC, 2008b).

Finally, in preparing for the formulation of appropriate capacity development strategies, it may be useful to pursue an understanding of the 'root causes' of the so-called capacity gaps identified through the JV analysis (OECD DAC, 2008a). Previous sections of our discussion on capacity development have introduced the prevalence of differing perspectives on the outcome of an assessment, inferring that stakeholders' outlooks are an inherently politicized matter. Certain interests, however, are of pre-eminent significance in this context. Good procurement, for example, will not happen in the absence of properly functioning markets (OECD DAC, 2006). The presence or quality of anti-trust and/or fair competition authorities is thus likely to be a critical factor in determining the ultimate impact of procurement reforms (Søreide, 2007). The role that can be played by an informed civil society in the enforcement of a regime merits emphasis as well. As the ultimate beneficiaries of effective procurement, citizens are frequently the first to know when integrity and efficiency of process have been compromised. They cannot mobilize effectively in response, however, without

being fully aware of any rights they may have under the local procurement regime. Moreover, these private actors must believe that their active involvement will yield constructive results. Civil society tends to be weak in African countries where power is distributed informally, for instance (Hyden, 2008). More generally, strengthening it to demand accountability is not a straightforward technical exercise (Bano, 2008; Unsworth, 2009; Wiktorowicz, 2002). In both of these respects, building effective social control mechanisms and competitive domestic markets are longer-term – but essential – capacity building processes. This speaks to the importance of a reform programme's being an inclusive exercise. An overall objective should be to *work to collectively* understand a system's weaknesses, or context-specific constraints to more effective use of public money (OECD DAC, 2008a). Over time, the shared understandings that result can reinforce what has been termed a 'logic of participation' (Droop et al., 2008), ultimately strengthening incentives for ongoing cooperation.

4.5 Multi-stakeholder initiatives: the Medicines Transparency Alliance as a 'gap-checking' placeholder?

It seems, then, that we are back where we started at the outset of this section, albeit 'equipped', this time, with a slightly better understanding of what might be required in order to promote a more genuine form of 'mutual accountability'. Can the international donor community do anything to legitimately promote the shared values and commitments on which this hybrid form of accountability must ultimately be premised? Ever at the risk of oversimplification, the answer is relatively clear-cut: not without contending with the issue of power (Girvan, 2007; Hyden, 2008). In terms of the particular public decisions that are played out in a government procurement context, this might imply things like contributing to the *em*powerment of local officials and procuring entities, as well as a system's stakeholder community via context-specific efforts to ensure that detailed information about the planned reforms and the strategies they entail. It could equally involve intellectual empowerment of the leadership of the public service reforms through the securing of knowledge transfer between any external technical experts brought in to facilitate capacity development and them (OECD DAC, 2008). Equally if not more important, the prevailing business or market culture needs to be addressed. To the extent that informal norms and discretion govern public decision-making, it is difficult for

market mechanisms to function and, therefore, relatively risky to do business.[18] This, in a procurement context, suggests that the reform of tendering procedures and procurement rules, *per se*, is not going to lead to more effective processes (Søreide, 2007). Can the donor community do anything to cultivate the development of a viable local market and reliable pricing mechanisms in particular?

Elements of an answer may be visible in the context of a DFID-inspired programme that was originally designed to apply the principles of the Extractive Industries Transparency Initiative (hereafter EITI) to the public procurement of essential medicines, the Medicines Transparency Alliance, or MeTA (UK Department for International Development, 2006). Recently described as a '*sequel* multi-stakeholder initiative' by two well-informed observers (Koechlin and Calland, 2009) and broadly aimed at achieving the MDG target on access to essential medicines, this project constitutes an effort to 'level the playing field' amongst the governmental, corporate and civil society actors involved in and/or affected by the various public decisions associated with the procurement of medicines; it centres on decisions affecting medicines' quality and registration, availability, price and promotion (Medicines Transparency Alliance, 2009c). More will be said shortly about what, in particular, constitutes the 'levelling of a playing field' in this context. For now, suffice it to say that as in the original, 'first generation' multi-stakeholder initiatives (hereafter MSIs), the MeTA implicitly addresses power relations among its parties. Stakeholder relations are not necessarily set on an equal footing, but representative members do enjoy an undisputed right to participate in decision-making processes under the initiative, including technical support for civil society's active participation in these processes where appropriate (Medicines Transparency Alliance, 2009d). The MeTA differs from the EITI in that its objective is not confined to enhancing transparency in the relevant supply chains (Koechlin et al., 2009). Rather, as explained by Koechlin and Calland, it is targeted at achieving a specific socio-economic outcome: improved access to affordable medicines. The remainder of this chapter will be devoted to an overview of the MeTA, focusing on the ways in which it is working to promote social and market accountability in the procurement of medicines via a checking of governance gaps tied to nascent civil societies and ineffective price mechanisms in the countries in which it is currently being piloted. It will proceed from a short introduction to the principles embodied in the EITI; that is, the ideas on which the MeTA is premised. The following and concluding section will address the possible implications of this type of regulatory gap-filling – along with the

overall accountability agenda that we have explored – for the governance of public procurement in a WTO context.

The EITI is a product of the activities of a UK-based alliance of NGOs, the Publish What You Pay coalition, spearheaded by the NGO, Global Witness (Williams, 2004). Launched as a 'global transparency standard', the objective of this multi-stakeholder initiative is basically to support resource-rich country government efforts to require accurate, public reporting on all types of extractive industry state income.[19] Developmentally motivated and supported by a Resolution adopted by the UN General Assembly in 2008 (UN General Assembly, 2008), the EITI seeks to counter the so-called resource curse – or the well-documented negative relationship between resource endowment and development – by working to ensure that a greater percentage of the proceeds from mining and energy industries are accessible for developmental ends.[20] Conceptually, the Initiative is premised on a series of 12 principles recognizing, *inter alia*, that the 'management of natural resource wealth for the benefit of a country's citizens is in the domain of sovereign governments ... (and should be) exercised in the interests of their national development' (EITI International Advisory Group, 2006).

The EITI is implemented via a voluntary agreement between a participating country and the Oslo-based EITI Secretariat. Once a country adheres, all extractive companies operating within its jurisdiction are obligated to report; information concerning taxes, royalties and any other resource-derived payments must be disclosed (US Senate Committee on Foreign Relations, 2008). In addition to the developmental ends set out above, this serves the trade – or more accurately – investment-related purpose of working to level the playing field between all of the corporate entities established in the local extractive sector. Corporate entities, that is to say, that are subject to OECD and other applicable supply-side disciplines criminalizing the Bribery of Foreign Public Officials in International Business Transactions, and any other foreign participants in these markets that may not be. The 'devil', of course, resides in the details associated with the way in which the reporting obligations are applied. At present, the 'jury is still out' as regards the effectiveness of this approach to securing administrative transparency and accountability. For our purposes, however, this is not a barrier to describing the distinctive characteristic of the EITI model: the so-called shadow of hierarchy, or the privileged role of the public partner under such arrangements. MSIs premised on this model involve intensified cooperation between the public and private sectors, along with a re-juggling of participants' traditional roles, but, specifically, they do not entail the delegation of

public duties to private entities (Koechlin et al., 2009). Such partnerships must therefore be distinguished from the PPPs commonly used for carrying out and managing infrastructure projects and/or delivering public services that were introduced in Chapter 1. Another way of putting this might be that they remain under the 'ownership' of the participating government, albeit an ownership that they themselves work to redefine.

In a similar manner, participation in the MeTA is targeted at re-aligning the dynamics of the relationships between the various parties involved in facilitating access to essential medicines in a national setting; it proceeds from a formal Memorandum of Understanding between a participating country government and the MeTA International Secretariat. Each country is led by a multi-stakeholder Council in which all major constituencies are represented, including the public partner; it is the primary policy and decision-making body. The public partner is also asked to participate in an International Advisory Group, an expert body that regularly reviews progress in the pilot countries, assesses project-wide trends and develops recommendation for the improvement of the initiative. Currently in the midst of a two-year-long pilot phase, the Alliance is being implemented in seven countries: Ghana, Jordan, Kyrgyzstan, Peru, the Philippines, Uganda and Zambia. The tangible challenges participants face, as summarized by the Secretariat are that, 'Medicine costs are too high, the right medicines are not in pharmacies, distribution systems are inefficient, counterfeit drugs permeate local markets, and the most effective and cheapest medicines are not always ethically promoted or rationally prescribed' (Medicines Transparency Alliance, 2009b). The basic idea is to improve the flow of information relating to these various aspects of the pharmaceutical supply chain so as to contribute to a more balanced and competitive regulatory and market environment. A core principle of the Alliance, in this respect, is that more transparent systems and better supply chain management will lead to improved access (Medicines Transparency Alliance, 2009e). The multi-stakeholder approach for achieving these ends, similarly, is seen as a means to the promotion of accountability – a subject to which we will return at the conclusion of this introduction.

What are essential medicines? Essential medicines constitute the most cost effective treatment for any given condition (Hogerzeil, 2004). As described by the World Health Organization they are those, more precisely, that:

> satisfy the priority health care needs of the population. They are selected with due regard to disease prevalence, evidence on efficacy

> and safety, and comparative cost effectiveness. Essential medicines are intended to be available within the context of functioning health systems at all times, in adequate amounts, in the appropriate dosage forms, with assured quality, and at a price the individual and the community can afford. The implementation of the concept of essential medicines is intended to be flexible and adaptable to many different situations; exactly which medicines are regarded as essential remains a national responsibility. (WHO Expert Committee on the Selection and Use of Essential Medicines, 2002)

Until fairly recently, the WHO maintained that roughly a third of the world's population lacked regular access to essential medicines (MDG Gap Task Force, 2008; World Health Organization, 2004). Similarly, that in the poorer parts of Africa and South-East Asia, up to 50 per cent of the population lacked such access. The overall situation has not changed dramatically. What has evolved, however, is a better understanding of the situation in individual countries following the implementation of the WHO/Health Action International surveys of medicine prices, availability and affordability.[21] The product of a 2001 WHO Resolution calling for the development of a standardized method for the measurement of medicine prices, data from the surveys permitted a subsequent analysis of the price, availability and relative affordability of a series of essential medicines in each of the WHO's six administrative regions, and within World Bank income groups (Cameron, Ewen et al., 2009). Results showed major disparities in the availability of medicines across countries, considerable variation in prices between them, as well as prices that were typically much higher than so-called international reference prices, or external standards for the evaluation of local prices (MDG Gap Task Force, 2008). At the same time, they also demonstrated that several countries had made meaningful progress towards ensuring access to some essential medicines – and, in particular, treatments for HIV/AIDS, malaria and tuberculosis, the diseases specifically targeted under MDG 6. This, in turn, suggested that important opportunities existed to improve both availability and affordability, as well as to reduce prices in all of the regions studied and at all levels of country development (Cameron et al., 2009).

From our public procurement perspective, the fact that the funding for medicines in developed and developing countries typically comes from different sources is especially significant. Sixty per cent of pharmaceutical expenditures are currently incurred by the public sector in developed countries whereas less than a third of such costs are met by

developing country governments (MDG Gap Task Force, 2009). Because public sector health facilities generally offer medicines at no charge or locally affordable costs, they are of critical importance to the provision of essential medicines, especially for the poor. In addition, where progress has been made, improved procurement efficiency through programmes such as national or regional pooled purchasing, and the provision of sustainable and equitable financing have been recognized as key factors (UK Department for International Development, 2007). For reasons of this nature, another core principle of the MeTA is that governments are responsible for providing access to health care, including access to essential medicines (Medicines Transparency Alliance, 2009e).

As regards the medicines that are actually being purchased, generic drugs are generally substantially cheaper than brand-name drugs, especially when procured in bulk (Cameron et al., 2009; Foster, Laing et al., 2006). Although the MeTA has no policy advocating the use of quality-assured generic medicines, *per se*, their use constitutes a common strategy for enhancing the affordability of essential medicines. For example, legal provisions to promote generic substitution in the private procurement on pharmaceuticals exist in 86 per cent of developed countries and some 72 per cent of developing countries (MDG Gap Task Force, 2008). Where generic equivalents are not available, pharmaceutical companies' application of differential pricing practices in developing countries can also, according the Task Force, make an important contribution to improved access. The objective herein is to adjust prices to the purchasing power of governments and/or households.

When governments do not or cannot supply essential medicines, those who need them must buy them from the relatively much more expensive private sector. This presents particular problems in the context of chronic, non-communicable diseases; ailments of this nature require ongoing treatment that is often much less affordable than a one-time expenditure to treat an acute illness (Cameron et al., 2009; Mendis, Fukino et al., 2007). Such problems are exacerbated by the fact that many countries continue to apply value added taxes and import tariffs to the relevant medicines (Olcay and Laing, 2005). To say nothing of the fact that the medicines required may not be physically available, or, if they are, either of substandard quality or even fake.

4.5.1 The complex set of intertwined variables in the medicines supply chain

Transparency with respect to medicine prices and their respective components is a particular focus of the MeTA. This is not an issue, however,

that any given national MeTA Council can look at in isolation. Quality differences between individual products as well as their local patent statuses are an essential element of all supply decisions. Moreover, standards for assessing the quality of products must be both high and consistent. Nor can policies and practices concerning rational or guideline-based treatment, as well as the ethical use or promotion of medicines be divorced from such considerations. Where the use of quality-assured generic medicines is concerned, for example, education of both health-care workers and consumers in the rational use of medicines may be a necessary precondition for a locally successful generic substitution policy (World Health Organization and Health Action International, 2008). In turn – and bringing the subject closer to the specific issue of prices – positive incentives to overcome the opportunity costs of local pharmacies' dispensing low-priced generics may also facilitate access to essential medicines, along with programmes to spark competition in medicine prices such as rural pharmacy initiatives (Waning, Maddix et al., 2009). In sum, as is recognized in the WHO definition of essential medicines, each country has a very different context in terms of its local pharmaceutical industry, health system and stakeholder community. Accordingly, the focus of the multi-stakeholder dialogue in each MeTA pilot country is ultimately dictated by the specific, locally defined needs and priorities of these entities.

Only three of the seven pilot countries have formally identified procurement as an area for work during their pilot phases – Peru, Jordan and Kyrgyzstan (Medicines Transparency Alliance, 2009b). Because the MeTA's structures and operational methodologies are still being refined, there is not much to report yet in terms of specific progress on this topic, *per se*. The focus during the pilot phase – concluded on 30 September 2010 – has been on process and, specifically, providing each pilot country with a solid basis from which to proceed with a well-ordered – and balanced – multi-stakeholder dialogue. 'Laying the foundations for an effective multi-stakeholder process', as the annual report recently explained, 'has not been easy'. Nor has it been a straightforward exercise to start thinking about a core set of data for every multi-stakeholder group to jointly discuss and analyse, as well as a 'tool box' of mechanisms that can ultimately be used to measure a group's progress against its self-defined objectives. This is not to say, however, that the activities undertaken thus far have not been of relevance for the accountability questions we have been pondering throughout the book. The remainder of this section will sketch these key, preliminary linkages.

In keeping with our earlier discussions concerning the lessons from the capacity development debates, the ultimate success of MeTA activities is likely to be premised on shared understandings of local supply constraints, along with mutually agreed priorities for remedial action; the stakeholder councils are the fora in which such consenses will be hammered out. Getting the right representatives to participate in them has been one of the major challenges of the pilot phase. Indeed, the 'initial composition of many of the national multi-stakeholder groups has shifted' and it is expected that such shifts will continue as the groups mature and their understanding of the underlying problems improves.[22] Technical cooperation to support the active participation of the civil society partners in this process – as well as the Alliance, more generally – has been important as well: especially in countries wherein there has been no tradition of activism or limited freedom for such groups to operate. To date, two international workshops in the Philippines and Uganda – pilot countries with relatively strong civil society traditions – have supported CSOs' participation in the MeTA. The international Secretariat sees this as a strategically important agenda and is actively behind it; several of the individual pilot country work plans include plans for comprehensive local programmes to augment the capacity of civil society to engage with national policy processes and a separate budget is available to support these activities in each country (Medicines Transparency Alliance, 2009f; Medicines Transparency Alliance, 2009h; Medicines Transparency Alliance, 2009i).

Systems for facilitating the disclosure of the country-specific data that will serve as the basis for multi-stakeholder exchange have recently begun to evolve as well. The idea is to complete a series of baseline assessments of things such as the national pharmaceutical situation and/or the degree of local community access to essential medicines to use as starting points for establishing future priorities and evaluating outcomes and impact after the pilot phase (Medicines Transparency Alliance, 2009g). The development of such mechanisms – including rules for their application – has been described by one expert member of MeTA's International Advisory Group as possibly the biggest challenge the Initiative may face (Medicines Transparency Alliance, 2009b). For now, as described in the Annual Report, the immediate objective is establish a core set of data for every multi-stakeholder group to consider, including contributions from each of the respective stakeholders such as information on drug budgets and regulatory issues from the participating governmental entities and price-related input from the private sector. Eventually, the plan is for the International Secretariat to

support participating states in the preparation of 'public friendly information' based on the data concerned for use in broader civil society campaigns, designed to promote the involvement of other stakeholders in the demand for health care reforms.

4.5.2 Social accountability, ownership and the pharmaceutical supply chain

Earlier sections of this book have addressed the legal accountability that is engendered by the GPA's transparency procedures and judicialized enforcement mechanism as well as the professional accountability stemming from the 'peer review processes' associated with the OECD's Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions and other soft law mechanisms such as the OAS' Inter-American Convention Against Corruption. The MeTA is currently being piloted in environments wherein authority, on the whole, is relatively much more informal than amongst the OECD donor states, democracy and the respect for the rule of law varies and may not be firmly established, and pharmaceutical supply markets are generally inefficient and risk ridden for foreign participants. Is it even meaningful to talk about accountability in such contexts? According to the promotional materials for the Alliance, one of its primary purposes is specifically to cultivate this ethic. Transparency in the context of the MeTA, in this sense, is explicitly described as a means to the end of 'opening up a space for greater accountability' (World Health Organization and M.T. Alliance, 2008). But what *kind* of accountability? Can anything be said at present with respect to how related processes would work to establish accountability? Most importantly, what might this imply for our underlying story concerning the administrative activities specifically involved in procurement?

Once again insights from Jerry Mashaw's conceptual framework of accountability – or 'grammar for governance' – are helpful in developing an appreciation of the elementary questions at hand. Developed with an eye on the particular problems generated by the outsourcing or contracting out of governmental functions to private actors, the framework is also arguably useful for starting to think about the accountability-related challenges presented by states at diverging levels in the process of democratization and respect for the rule of law. Mashaw, it will be recalled, distinguished three general types of accountability 'regimes', each of which has distinct institutional ramifications: those associated with public governance; those involving accountability in the marketplace, and; those engendering non-governmental, or social discipline

(Mashaw, 2006b). In his discussion of 'market accountability', Mashaw referred to the fact that public accountability is effectively a condition precedent for market accountability, or as he put it, there is an implicit assumption that 'market actors always operate in a world structured by public accountability regimes'. Regulation, in this sense, serves the purpose of making the competitive process operate effectively, specifically by 'eliminating force and fraud, and limiting negative externalities'. In 'restructuring' market accountability in this way, it leaves the latter intact as a decentralized mechanism for controlling the responsiveness of market actors to consumers.

Such an 'assumption' clearly does not hold in the case of the MeTA pharmaceutical supply markets. Outside of the states in which there has been improvement in access to essential medicines – that is, primarily the countries that have benefited from international efforts to augment access to essential medicines for the treatment of HIV/AIDs, malaria and tuberculosis – there is clearly *inadequate* public accountability in the pharmaceutical markets concerned. Regulatory lacunae, in a word, abound. This suggests that market accountability mechanisms generally cannot function to ensure the responsiveness of producers to consumers. As a compounded consequence, market failures and a variety of other systemic inefficiencies result in price distortions, quality shortcomings, and the irrational utilization of medicines (Medicines Transparency Alliance, 2009d).

The idea behind the Alliance's 'opening up of a space for greater accountability' is linked to Mashaw's third type of accountability regime: social accountability. Here we enter a domain that is naturally more aligned with informal systems of authority. As we saw in earlier sections of the book, relations premised on social accountability are relatively fluid by comparison with the other accountability regimes; implicitly normative, they govern intercourse between groups in society such as families or professional communities and are often premised on reciprocal obligations. Although they may be legally harnessed when regulatory activities are involved, any constraints tend to be what Mashaw terms 'large and loose'. An example in this respect might be the formal Memoranda of Understandings signed between the respective MeTA pilot countries and the International Secretariat establishing the broad parameters of the partnership between them for the application of this Initiative. Such agreements typically serve to 'police the outer boundaries of power'; in this, they explicitly manifest the political commitment of the governments concerned towards participation in this multi-stakeholder initiative, setting out the reciprocal obligations of the respective parties.

Social accountability commonly entails reciprocal obligations to internally generated community norms rather than 'externally imposed legal rules or market structures'. The multi-stakeholder fora establish a new public platform for informed local debate concerning the selection, regulation, procurement, sale and distribution of essential medicines. Debate, in other words, to establish the 'community norms' in question specifically with respect to essential medicines in the particular national jurisdiction concerned. As has been described, the participants in the multi-stakeholder process in which they are generated are selected in such a way so as to 'optimise the power balance within the MeTA Councils'. Moreover, the International Secretariat has worked to ensure that all of them are 'properly empowered in proportion to the other(s)... sitting around the table' (Medicines Transparency Alliance, 2009a). In broad terms, the sharing of information within such a context is designed to lead to shared understanding of the national challenges and, ultimately, the ownership of proposed remedies. It is hoped that members will assume collective responsibility – or social accountability – for the policies they have mutually determined. This, in theory, offers the possibility of cultivating the all-important 'logic of participation' (Droop et al., 2008), or collective standards of behaviour introduced at the outset of this chapter.

Essential medicines are a public good. It is thus absolutely essential to safeguard the legitimacy of any decisions with respect to their selection, regulation, procurement, sale and distribution. On the one hand, this is where the representativeness of the multi-stakeholder body comes in to play, along with the fairness and inclusiveness of the processes by which it operates. The efforts that have been made during the pilot phase to get a balanced representation of interests in the respective multi-stakeholder fora have received considerable attention in our discussion of this multi-stakeholder initiative, as have the attempts to ensure the equity of the processes by which they operate; they are essential for socially sustainable decision-making. but also a means to the end of legitimacy (Hemmati, 2002). On the other hand – and looking to the outcome of the processes concerned – this is ultimately where a structured mechanism to facilitate public review might enter into the picture. Our summary of the activities in the various participating countries during the pilot phase described the International Secretariat's ultimate plans to support the development of 'public friendly information' based on the data concerned for use in broader civil society campaigns, designed to promote the involvement of other stakeholders in the demand for health care reforms. The idea is to 'develop an outlet that might not

otherwise exist for social demand for change' (Medicines Transparency Alliance, 2009b). Although a structured review process has never explicitly been proposed – and would undoubtedly be premature as long as the building of trust between the participating stakeholders remains an unfulfilled objective – the availability of such a mechanism could eventually be of considerable importance in states in which the level of the development of democracy and the rule of law is such that public accountability avenues are generally not available to private actors to defend their interests from the abuse of power by state actors.

4.5.3 Squaring the circle: a final link to our evolving regulatory story

Deriving lessons for procurement reform from the MeTA would undoubtedly be a premature exercise at this point. The project is still in its pilot phase; our discussion has focused on what the Initiative is designed to do and why – not on any empirical evidence with respect to what has been accomplished and anything it might teach us. At the same time, if we proceed from the politically oriented knowledge gleaned from the OECD DAC Working Party on Aid Effectiveness' Joint Venture for Procurement as well as the work of the development community on capacity development, the preliminary 'case study' does offer encouragement for continued pursuit of a particular way of working to address the exceedingly complex regulatory challenges that are currently faced in this context. The idea, that is, of sector-specific mechanisms to reinforce social accountability as a means to end of filling governance lacunae caused by locally underdeveloped public and/or market accountability mechanisms.

To sum up, the broad premise here would be something like: every setting for procurement reform is socially unique. Good procurement requires properly functioning markets and the presence of quality antitrust or competition authorities; the reform of tendering procedures and procurement rules, in isolation, however, will not lead to more effective processes (Søreide, 2007). What the OECD termed the other 'pillars' of a system equally require attention. Because of the unique character of the so-called enabling environment of each national jurisdiction, local ownership is fundamental to procurement capacity development (OECD DAC, 2008). Reforms, furthermore, must be premised on high-level political commitment to change. Stakeholder involvement, too, is a condition *sine qua non* for the former as power relations amongst those affected by the reforms are implicitly involved. In the absence of functional public accountability regimes, reliance on a variation of social

accountability to fulfil this role may offer a politically viable interim alternative, especially in settings where the rule of law and democracy are relatively underdeveloped and/or authority relations are informal. Ring-fencing the 'delegated' regulatory powers by law may be useful to 'police their outer boundaries'.

Part III

Pulling It all Together: How Far Might the GPA Procedures Go?

Conclusion

The purpose of this book has been to serve as a politically oriented 'reconnaissance', looking both down and across different institutional and disciplinary contexts to examine the question of the extent to which one WTO Agreement might be used to promote good governance, development and accountability, as well as trade liberalization. The Agreement in question is the plurilateral 1994 Government Procurement Agreement, including the revisions that were provisionally adopted in December of 2006. (For further details, see the texts of these Agreements in, respectively, Appendices 1 and 2.) Along with the liberal multilateral trading system of which it is a part, the current legal text of the GPA served as a foundation from which the exercise proceeded; the initial chapter was dedicated to a review of the history and political objectives of this Agreement. That story, as we saw, is one that has previously been well-documented (Blank et al., 1996; Woolcock, 2006). We could not escape re-telling it, however, because one cannot appreciate the comparative politics underlying the Agreement without a solid grasp of this technical infrastructure.

The GPA, the rule of law and due process

Why was the Government Procurement Agreement selected? We described government procurement as a political process that was basically an application of administrative authority. In constitutionally governed, democratic states, such authority is typically exercised under the constraints of administrative law, part of the public law that establishes and regulates, in particular, the relationship between the individual and the state. The following was offered as a standard legal

definition:

> Administrative law relates to the organization, composition, functions and procedures of public authorities and special statutory tribunals, their impact on the citizen and the legal restraints and liabilities to which they are subject. (De Smith et al., 1994)

A more politically oriented definition brings out issues of political empowerment, along with the requirement that any such powers be exercised in accordance with the 'rule of law' (Lane, 1996). The latter is frequently cited as a condition *sine qua non* for development (Stephenson, 2008), and, especially, a functioning market economy (Carothers, 1998). The rule of law, as summarized by Lane, is commonly associated with: an exclusion of arbitrary powers; equality before the law; the existence of citizen rights and liberties against the state and; predictability of administrative process, including fair hearings, a duty to provide reasons, remedies, public liability in tort, compensation, procedural openness and legal review.

Recent legal and political science debates, largely focusing on WTO decision-*making* processes, have speculated, *inter alia*, about what a 'WTO-specific administrative law' might be able to do to build public confidence in the trading system and generally enhance the legitimacy of this institution (Esty, 2007; Grant et al., 2005; Kingsbury et al., 2005; Woods and Narlikar, 2001). While these debates have certainly raised a number of relevant issues for our purposes, their key feature from our perspective lies in what has been described as an emerging 'consensus ... that the issue of inadequate external accountability is a major obstacle to legitimacy' (Elsig, 2007). Our purpose, in this sense, has been to look at avenues for enhancing such accountability in the context of the GPA – along with development and good governance, two intimately interlinked political objectives when it comes to the discipline of public procurement across various levels of governance.

We continued with a discussion of the political purposes of the international administrative law embodied in the GPA, proceeding from a broad distinction between general and specific administrative law (Lane, 1996). We argued that the rules of the GPA basically constituted an international example of the former. Whereas the latter deals with the regulation of specific policy areas – such as a public procurement regime designed to promote a value-related objective like 'economic recovery' or minority employment – the former involves the general rules and restraints that all branches of the public administration must

adhere to when making and implementing official decisions; it includes the possibility of private actor-initiated review.

On the whole, the regulatory goals of the GPA are modest relative to those of many domestic procurement regimes. Historically speaking, this is a reflection of the WTO's traditional focus on trade liberalization. In more political terms, however, it is related to the fact that there has been no shared vision of the political 'good' amongst WTO members. Theoretically speaking, each of the national economic systems represented in the WTO reflects different conceptions of property and other social values, including economic justice. These values dictate what is produced and how, the way in which the advantages of social cooperation are distributed, along with what percentage is set aside for savings and the provision of public goods; in so doing, they effectively define the legitimate economic functions of government (Rawls, 1999). Legitimacy, in turn, infers that members of the social community in question have a moral duty to adhere to its legal and normative precepts even if those requirements are contrary to their individual interests (Scharpf, 2001). The manner in which governments organize themselves to fulfill, or implement these economic functions is equally a reflection of fundamental social choices, as are the structures that a society introduces to take fundamental political decisions relating to them (Howse et al., 2003). The OECD uses the term 'public financial management' to describe the former activities; public procurement is a 'core function of public financial management and service delivery' (OECD DAC, 2008b).

In the context of the GPA, regulatory objectives are notoriously difficult to disentangle. They have had a way of becoming entwined with one another, the means, in particular, convoluting with the ends (Schooner et al., 2008). For example, the aid effectiveness debate has shown that transparency and competition – two primary goals of the WTO Agreement – are positively linked with good governance and, indirectly, development and/or economic growth. Development, in turn, depends in large part on the efficiency, integrity, and effectiveness with which the state raises, manages, and expends public resources (OECD DAC Working Party on Aid Effectiveness, 2007). To the extent that enhanced competition in public procurement promotes effectiveness in the use of public resources, it can free funds for alternative ends, including development-related ones such as the construction of infrastructure, or improved public health (OECD DAC, 2006; OECD DAC, 2008b). In discouraging overt corruption, competition also encourages better resource allocation, potentially contributing to the improved political legitimacy of those who practice it (Yukins, 2007).

The GPA, transparency and legal accountability

One of the key principles of the GPA, transparency, is fundamentally linked to legal accountability. The book offered a lengthy illustration of how transparency functions in a GPA context to establish bidder's rights. Typically indirect in any given domestic jurisdiction – that is, the product of national implementing legislation – such rights introduce limitations on the administrative authority of parties to the Agreement, obligating the officials implementing a covered tendering process to document their actions throughout the procurement, defend decisions when challenged, and, if required, suffer sanctions for failure to meet these obligations (Schooner et al., 2008). Bidder's rights, in more political terms, were thus described as a way of holding public entities *accountable* for their decisions. Operating after the fact, they discipline the exercise of political power – in this case, the exercise of administrative authority in the context of covered procurement – exposing actions to view, and judging and sanctioning them if they involve the abuse or misuse of political power (Grant et al., 2005).

A right without a remedy, as some lawyers are fond of saying, is no right at all (Grey, 1979). Proceeding with this line of thinking, the processes of international accountability in a GPA context were described as a product of the Agreement's transparency procedures *combined* with its private actor-initiated review mechanism, including the latter's provisions for sanctions, or 'damages'. In terms of the particular stakeholder interests the GPA's court-like review mechanism was designed to safeguard, we suggested that the fact that a member's financial liability for injury to individual supplier, or private actor interests 'may be limited to [the latter's] costs for tender preparation or protest' could be interpreted as being *either* to safeguard the specific individual rights exercised, or affected by participation in the letting or a government contract, *or* to protect the more general interests of the collective in fair administrative processes. Here, we recalled how the objective of review in unitary states is most commonly to correct representative failures, and, thereby, to maintain the vitality of the self-governing national community, whereas in popular sovereigns, on the other hand, the rights of the individual are privileged over those of the collective, and review is undertaken primarily to safeguard the former from the latter (Brewer-Carias, 1989). In this sense, although the GPA effectively restructures the political authority exercised in members' covered procurement processes, its regulatory methodology is arguably consistent with the political logic in both of the two types of democratic states.

The GPA's transparency disciplines, in structuring the exercise of executive discretion, work to ensure that political authority is wielded in a manner that is both legally accountable and consistent with the rule of law. In operating in this way, we showed that they are also an implicit reflection of a political premise that that authority is not unlimited. Procedural disciplines of this nature, more precisely, suggest that the executive authority that is exercised in the administrative processes covered by GPA rules is shared with other branches of government. There is, in other words, an implicit separation of political powers embodied in the rules' structure. The reason why was linked to the procedures' very existence. We showed how they had evolved as a means of accommodating differences in the way in which public authority can be organized in tendering processes, tracing the progression of the 1960's vintage OECD Working Party debate over the 'concept of discrimination' (Blank et al., 1996; Evans, 1971); 'Checks and balances', of this nature, 'are mechanisms designed to *prevent* action that oversteps legitimate boundaries by requiring the cooperation of actors with different institutional interests to produce an authoritative decision' (Grant et al., 2005).

Problematic political-administrative interfaces

The procedurally intensive 'regulatory methodology' of the GPA is mirrored in the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on the Procurement of Goods, Construction and Services, as well as the World Bank's procurement guidelines. Developed to serve as a model, or 'framework' for states to use in the evaluation and modernization of their domestic procurement laws and practices, we argued that the rules of the Model Law reflect a separation of powers similar to the one embodied in the GPA. During the period when the possibility of an Agreement on Transparency in Government Procurement was under study in the WTO, the rules of the Model Law and their regulatory 'modus operandi' were very much on the minds of many of the developing countries participating in the activities of the WGTGP (Watermeyer, 2005). As described by Watermeyer, many of the participants – and particularly the more powerful ones – saw the use of disciplines premised on this regulatory model as a step backward. It was, in particular, difficult to align the rules' prescriptive disciplines with the more modern 'framework' systems countries like China and South Africa had adopted. This was also true in places such as the Caribbean where New Public Management-style procurement reforms were emerging (Rose, 2008). In addition, due to the capacity constraints

that the procedural rules, themselves, sought to remedy, any reforms they generated were likely to be time-consuming and politically expensive to realize.

Globally, the broader governance-oriented agenda that began to emerge in the 1990s in the development community brought to the fore the procurement-aid nexus, along with the complimentary issues of social and market accountability it ultimately raised. Conceptually indebted to the OECD DAC's efforts to develop a broader, more 'human' strategy for development assistance that would reverse the declining bilateral aid flows that had followed the end of the Cold War and the failures of Structural Adjustment Programs (Fraser et al., 2009), it entailed stepped up efforts to secure aid-related funds from corruption. We initially looked at the 1996 OECD Recommendation on Anti-Corruption Proposals for Bilateral Aid Procurement, along with concurrent 'trade-related' activities within that institution targeting bribery and corruption, *per se* (OECD DAC, 1997). Accompanied by efforts in other international fora such as the World Bank to tighten up its loan guidelines, they constituted an important initial step in an international legal harmonization of aid policies and practices that continues today. From an accountability perspective, the so-called supply side initiatives led to interesting innovations with respect to professional accountability, a particular form of social accountability. A prime example here would be the peer review mechanism embodied in the OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions. (For more detail, see the text of this Agreement in Appendix 3.)

Then we shifted gears to engage directly with the broader governance-oriented agenda that emerged in the international community as a result of efforts to finance and achieve the MDGs. This influenced the development of new, politically motivated rules with respect to ethical procurement in the 2006 GPA Revisions (see Appendix 2). Rules that, in turn, specifically referenced the disciplines of the UN's binding Convention Against Corruption, an international instrument governing both the supply *and demand* sides of the corruption 'equation'. This was described as a potentially important development in terms of the extension of the rule of law to the public officials whose activities are covered by the WTO accord, but, at the same time, one whose impact was clearly limited by the inexorable link between these disciplines and market access. The fact that aid-funded procurement was generally excluded from GPA disciplines under the revised Agreement's Article II, paragraph 3(e)(i) 'carve out' for 'procurement conducted for the specific

purpose of providing international assistance, including development aid' led us to conclude this section by querying whether this might not be where our evolving regulatory 'story' would come to an end.[1]

Recalling again, however, how regulatory innovation in this context has frequently come from outside of the WTO's institutional boundaries in the past (Woolcock, 2006), the remainder of the book explored ways in which ownership and accountability-related developments originating in the aid community – an environment that until fairly recently has been completely divorced from the trade community – appeared to be well-aligned to contribute to the next phase of international rule-making on procurement. It was basically a study of converging debates under a series of different institutional contexts: The first might be described as an emerging recognition of the limits to technocratic approaches to the challenges of development. We traced the evolution of procurement capacity *building* from the Monterey Consensus – recognizing good governance and the rule of law as essential for sustainable development and identifying the fight against corruption at all levels as a priority – to today's more comprehensive, locally driven capacity *development* practices. The need to deal with the convoluted contours of each system's so-called enabling environment has presented the development assistance community with a set of socially and politically oriented challenges that technical specialists typically would not have the skill sets to address.

The second series of questions broadly surrounds accountability relative to financing for the MDGs. Herein the discussion centred on the issue of 'mutual accountability', a slightly awkward concept in the relatively legalized context in which we have been operating that seeks to bind participants through partnerships involving 'shared objectives and commitments' (Steer et al., 2009). Sanctions for non-compliance, in turn, are typically 'social, political, reputational and relational'. Summed up by one observer as 'an objective to be obtained' (Hyden, 2008), mutual accountability relative to procurement reforms involves a 'reciprocal' exchange between donors and recipients concerning the use of national systems to manage and implement aid-funded projects. The idea in theory entails 'incentivizing institutional reforms, increasing local ownership and facilitating donor harmonization' (Pallas et al., 2009). Despite the best of intentions, we saw, however, how 'misperceptions, vested interests and power differences' (United Nations Development Program, 2008) invariably have precluded the balanced relationships that must underlie this type of exchange. In concluding, we also speculated about the stepped up role of 'emerging donors'

(Manning, 2006; Woods, 2008), or non-OECD DAC lenders on the political dynamics of aid relationships in this context.

Finally, possibilities for a more balanced domestic rule-making and application partnership in procurement were explored in a sectoral context via a descriptive case study of the Medicines Transparency Alliance, a multi-stakeholder initiative broadly targeted at improving access to affordable medicines. The initiative was only in the final stages of a pilot phase in seven countries, but it was far enough along for us to identify several accountability-related threads that merited further exploration: specifically in situations where authority, on the whole, is relatively more informal than amongst the OECD donor states, democracy and the respect for the rule of law varies and may not be firmly established, and pharmaceutical supply markets are generally inefficient and risk ridden for foreign participants. The main accountability issues here involved inadequate public accountability, or regulatory lacunae that basically make it impossible for market accountability mechanisms to function so as to ensure the responsiveness of producers to consumers. As a compounded consequence, market failures and a variety of other systemic inefficiencies result in price distortions, quality shortcomings, and the irrational utilization of medicines (Medicines Transparency Alliance, 2009d).

The idea behind the Alliance's 'opening up of a space for greater accountability', in turn, was linked to social accountability. As we saw in earlier sections of the book, relations premised on social accountability are relatively fluid by comparison with the other accountability regimes; implicitly normative, they govern intercourse between groups in society such as families or professional communities and are often premised on reciprocal obligations. MeTA's multi-stakeholder fora establish new public platforms for informed local debate concerning the selection, regulation, procurement, sale and distribution of essential medicines. Debate, that is, to establish the 'community norms' in question specifically with respect to essential medicines in the particular national jurisdiction concerned. Participants in the multi-stakeholder process in which they are generated are selected in such a way so as to 'optimise the power balance within the MeTA Councils', while the International Secretariat works to ensure that all of them are 'properly empowered in proportion to the other[s]' (Medicines Transparency Alliance, 2009a). Information exchange within such a context is designed to lead to shared understandings of the national challenges and, ultimately, domestic ownership of any proposed remedies.

Reconsidering the role of the GPA in securing accountability, better governance and development

This review of the international regulation of public procurement as a case study of the politics of the regulatory harmonization process has covered a sizeable terrain, institutionally as well as intellectually. In concluding, it is therefore important to recall, once again, that the purpose of the exercise has been to serve as an intellectual 'scouting exercise'. Our objective has been to identify the primary accountability-related parameters of the international regulatory process in this particular policy context for use in others' politically oriented conceptual work. In this sense, our aspirations at this point of the exercise are modest. Can a WTO Agreement be used to promote good governance, development and accountability? The answer in view of the ground that we have covered would appear to be yes, it clearly can, although the way in which this transpires will always be a product of the GPA's fundamental market access aspirations. First and foremost, therefore, because of the way in which the Agreement works – specifically through legal accountability – it makes no sense for a country to take on such obligations when it does not have institutional and human capacity to comply with them. Any derivative benefits that might come from accession are conditioned on a member's ability to credibly ensure such accountability. One promising interim avenue for further exploration could involve participation in regional arrangements wherein there may be the opportunity to take on progressive transparency obligations, combined with systems of peer-initiated review.

From the point of view of development, it is exceedingly important that countries in the process of accession be allowed to set locally appropriate timetables for the coverage of individual sectors, specifically on the basis of their own social and developmental priorities. The fact that the 'special and differential treatment' provisions of the GPA Revisions are transitional and likely to be effectively conditioned on the leverage of the parties during the negotiations on coverage risks sacrificing development on the altar of non-discrimination. Procurement remains one of the few meaningful policy tools available to governments to foster domestic industry development. Its use for 'secondary' purposes, as we saw earlier, is what one knowledgeable observer has termed the 'good' story about discriminatory, or preferential public purchasing (Linarelli, 2006). Such politically motivated decisions may come at the expense

of economic efficiency, but they are especially important when implementing a development policy (Malhotra, 2003).

The 'bad' story about less than fully competitive procurement relates to the fact that it is, to borrow a bit of OECD terminology, one of the public sector activities 'most susceptible' to bribery and corruption (OECD DAC, 2003). Policy space, in this sense, is frequently abused for private gains. A primary motivation for some WTO members' wishing to undertake negotiations on transparency, it should be recalled, was to combat the effects of bribery and corruption; that is, it was governance-oriented (Dougherty, 1996). Good governance and development and/or economic growth are benefits that the aid effectiveness debate has linked with transparency and competition – two of the primary goals of the GPA.

To protect the potential developmental benefits of membership, consideration should also be given to expansion of the rights of private actors affected by domestic administrative decisions. The GPA's rules, as we have seen, effectively operate to allocate political responsibility for their application. This responsibility ultimately involves the judicial branch of a party's government, or, at least, an administrative authority that is independent of the procuring entity, acting on the basis of 'court-like' procedures. The GPA's transparency disciplines, in structuring the exercise of executive discretion, work to ensure that political authority is wielded in a manner that is both legally accountable and consistent with the rule of law. Under the provisions of Article XX of the GPA 1994, suppliers or corporate entities who believe that they have been unfairly treated in a covered tendering procedure are given standing to invoke the matter before a domestic court or independent review body. If the case cannot be satisfactorily resolved at this level, the ultimate remedy involves recourse to the WTO DSB, albeit with the involvement of the relevant member states.

Democracy and the rule of law ensure that people benefit from development not just countries (Sen, 1999). A fair legal system, according to the development economist Deepak Nayyar, applied 'consistently to everyone … defends people from the abuse of power by state and non-state actors … [and empowers them] to assert their rights' (Nayyar, 2007). Yukins and Schooner recently recognized the 'interests and priorities of various stakeholders in the procurement process' as a 'critical yet under-explored piece of the … policy puzzle' (Yukins et al., 2007). Others have called for the expansion of the rights of individuals affected by administrative decisions (Geradin, 2004; Gordon, 2006). If the integrity of the

procurement process is central to the rules' political objectives, any private actor who believes that a procuring entity acted improperly potentially merits being listened to. This is politically consistent with the regulatory 'methodology' embodied in the GPA; it could also reinforce Agreement's ends with respect to good governance, accountability and development.

Appendix 1
Agreement on Government Procurement

Parties to this Agreement (hereinafter referred to as 'Parties'),

Recognizing the need for an effective multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement with a view to achieving greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade;

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

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

Recognizing the need to establish international procedures on notification, consultation, surveillance and dispute settlement with a view to ensuring a fair, prompt and effective enforcement of the international provisions on government procurement and to maintain the balance of rights and obligations at the highest possible level;

Recognizing the need to take into account the development, financial and trade needs of developing countries, in particular the least-developed countries;

Desiring, in accordance with paragraph 6(b) of Article IX of the Agreement on Government Procurement done on 12 April 1979, as amended on 2 February 1987, to broaden and improve the Agreement on the basis of mutual reciprocity and to expand the coverage of the Agreement to include service contracts;

Desiring to encourage acceptance of and accession to this Agreement by governments not party to it;
Having undertaken further negotiations in pursuance of these objectives;

Hereby agree as follows:

Article I

Scope and Coverage

1 This Agreement applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement, as specified in Appendix I.[1]
2 This Agreement applies to procurement by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of products and services.
3 Where entities, in the context of procurement covered under this Agreement, require enterprises not included in Appendix I to award contracts in accordance with particular requirements, Article III shall apply *mutatis mutandis* to such requirements.
4 This Agreement applies to any procurement contract of a value of not less than the relevant threshold specified in Appendix I.

Article II

Valuation of Contracts

1 The following provisions shall apply in determining the value of contracts[2] for purposes of implementing this Agreement.
2 Valuation shall take into account all forms of remuneration, including any premiums, fees, commissions and interest receivable.
3 The selection of the valuation method by the entity shall not be used, nor shall any procurement requirement be divided, with the intention of avoiding the application of this Agreement.
4 If an individual requirement for a procurement results in the award of more than one contract, or in contracts being awarded in separate parts, the basis for valuation shall be either:
   (a) the actual value of similar recurring contracts concluded over the previous fiscal year or 12 months adjusted, where possible, for anticipated changes in quantity and value over the subsequent 12 months; or

(b) the estimated value of recurring contracts in the fiscal year or 12 months subsequent to the initial contract.

5 In cases of contracts for the lease, rental or hire purchase of products or services, or in the case of contracts which do not specify a total price, the basis for valuation shall be:
   (a) in the case of fixed-term contracts, where their term is 12 months or less, the total contract value for their duration, or, where their term exceeds 12 months, their total value including the estimated residual value;
   (b) in the case of contracts for an indefinite period, the monthly instalment multiplied by 48.

   If there is any doubt, the second basis for valuation, namely (b), is to be used.

6 In cases where an intended procurement specifies the need for option clauses, the basis for valuation shall be the total value of the maximum permissible procurement, inclusive of optional purchases.

Article III

National Treatment and Non-discrimination

1 With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than:
   (a) that accorded to domestic products, services and suppliers; and
   (b) that accorded to products, services and suppliers of any other Party.

2 With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall ensure:
   (a) that its entities shall not treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation or ownership; and
   (b) that its entities shall not discriminate against locally established suppliers on the basis of the country of production of the good or service being supplied, provided that the country of production is a Party to the Agreement in accordance with the provisions of Article IV.

3 The provisions of paragraphs 1 and 2 shall not apply to customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, other import

regulations and formalities, and measures affecting trade in services other than laws, regulations, procedures and practices regarding government procurement covered by this Agreement.

Article IV

Rules of Origin

1 A Party shall not apply rules of origin to products or services imported or supplied for purposes of government procurement covered by this Agreement from other Parties, which are different from the rules of origin applied in the normal course of trade and at the time of the transaction in question to imports or supplies of the same products or services from the same Parties.

2 Following the conclusion of the work programme for the harmonization of rules of origin for goods to be undertaken under the Agreement on Rules of Origin in Annex 1A of the Agreement Establishing the World Trade Organization (hereinafter referred to as 'WTO Agreement') and negotiations regarding trade in services, Parties shall take the results of that work programme and those negotiations into account in amending paragraph 1 as appropriate.

Article V

Special and Differential Treatment for Developing Countries

Objectives

1 Parties shall, in the implementation and administration of this Agreement, through the provisions set out in this Article, duly take into account the development, financial and trade needs of developing countries, in particular least-developed countries, in their need to:

(a) safeguard their balance-of-payments position and ensure a level of reserves adequate for the implementation of programmes of economic development;

(b) promote the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backward areas; and economic development of other sectors of the economy;

(c) support industrial units so long as they are wholly or substantially dependent on government procurement; and

(d) encourage their economic development through regional or global arrangements among developing countries presented to

the Ministerial Conference of the World Trade Organization (hereinafter referred to as the 'WTO') and not disapproved by it.

2 Consistently with the provisions of this Agreement, each Party shall, in the preparation and application of laws, regulations and procedures affecting government procurement, facilitate increased imports from developing countries, bearing in mind the special problems of least-developed countries and of those countries at low stages of economic development.

Coverage

3 With a view to ensuring that developing countries are able to adhere to this Agreement on terms consistent with their development, financial and trade needs, the objectives listed in paragraph 1 shall be duly taken into account in the course of negotiations with respect to the procurement of developing countries to be covered by the provisions of this Agreement. Developed countries, in the preparation of their coverage lists under the provisions of this Agreement, shall endeavour to include entities procuring products and services of export interest to developing countries.

Agreed Exclusions

4 A developing country may negotiate with other participants in negotiations under this Agreement mutually acceptable exclusions from the rules on national treatment with respect to certain entities, products or services that are included in its coverage lists, having regard to the particular circumstances of each case. In such negotiations, the considerations mentioned in subparagraphs 1(a) through 1(c) shall be duly taken into account. A developing country participating in regional or global arrangements among developing countries referred to in subparagraph 1(d) may also negotiate exclusions to its lists, having regard to the particular circumstances of each case, taking into account, *inter alia*, the provisions on government procurement provided for in the regional or global arrangements concerned and, in particular, products or services which may be subject to common industrial development programmes.

5 After entry into force of this Agreement, a developing country Party may modify its coverage lists in accordance with the provisions for modification of such lists contained in paragraph 6 of Article XXIV, having regard to its development, financial and trade needs, or may request the Committee on Government Procurement (hereinafter

referred to as 'the Committee') to grant exclusions from the rules on national treatment for certain entities, products or services that are included in its coverage lists, having regard to the particular circumstances of each case and taking duly into account the provisions of subparagraphs 1(a) through 1(c). After entry into force of this Agreement, a developing country Party may also request the Committee to grant exclusions for certain entities, products or services that are included in its coverage lists in the light of its participation in regional or global arrangements among developing countries, having regard to the particular circumstances of each case and taking duly into account the provisions of subparagraph 1(d). Each request to the Committee by a developing country Party relating to modification of a list shall be accompanied by documentation relevant to the request or by such information as may be necessary for consideration of the matter.

6 Paragraphs 4 and 5 shall apply *mutatis mutandis* to developing countries acceding to this Agreement after its entry into force.

7 Such agreed exclusions as mentioned in paragraphs 4, 5 and 6 shall be subject to review in accordance with the provisions of paragraph 14 below.

Technical Assistance for Developing Country Parties

8 Each developed country Party shall, upon request, provide all technical assistance which it may deem appropriate to developing country Parties in resolving their problems in the field of government procurement.

9 This assistance, which shall be provided on the basis of non-discrimination among developing country Parties, shall relate, *inter alia*, to:
- the solution of particular technical problems relating to the award of a specific contract; and
- any other problem which the Party making the request and another Party agree to deal with in the context of this assistance.

10 Technical assistance referred to in paragraphs 8 and 9 would include translation of qualification documentation and tenders made by suppliers of developing country Parties into an official language of the WTO designated by the entity, unless developed country Parties deem translation to be burdensome, and in that case explanation shall be given to developing country Parties upon their request addressed either to the developed country Parties or to their entities.

Information Centres

11 Developed country Parties shall establish, individually or jointly, information centres to respond to reasonable requests from developing country Parties for information relating to, *inter alia*, laws, regulations, procedures and practices regarding government procurement, notices about intended procurements which have been published, addresses of the entities covered by this Agreement, and the nature and volume of products or services procured or to be procured, including available information about future tenders. The Committee may also set up an information centre.

Special Treatment for Least-Developed Countries

12 Having regard to paragraph 6 of the Decision of the CONTRACTING PARTIES to GATT 1947 of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (BISD 26S/203–205), special treatment shall be granted to least-developed country Parties and to the suppliers in those Parties with respect to products or services originating in those Parties, in the context of any general or specific measures in favour of developing country Parties. A Party may also grant the benefits of this Agreement to suppliers in least-developed countries which are not Parties, with respect to products or services originating in those countries.

13 Each developed country Party shall, upon request, provide assistance which it may deem appropriate to potential tenderers in least-developed countries in submitting their tenders and selecting the products or services which are likely to be of interest to its entities as well as to suppliers in least-developed countries, and likewise assist them to comply with technical regulations and standards relating to products or services which are the subject of the intended procurement.

Review

14 The Committee shall review annually the operation and effectiveness of this Article and, after each three years of its operation on the basis of reports to be submitted by Parties, shall carry out a major review in order to evaluate its effects. As part of the three-yearly reviews and with a view to achieving the maximum implementation of the provisions of this Agreement, including in particular Article III, and having regard to the development, financial and trade situation of the developing countries concerned, the Committee shall examine whether exclusions provided for in

accordance with the provisions of paragraphs 4 through 6 of this Article shall be modified or extended.

15 In the course of further rounds of negotiations in accordance with the provisions of paragraph 7 of Article XXIV, each developing country Party shall give consideration to the possibility of enlarging its coverage lists, having regard to its economic, financial and trade situation.

Article VI

Technical Specifications

1 Technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities, shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

2 Technical specifications prescribed by procuring entities shall, where appropriate:
   (a) be in terms of performance rather than design or descriptive characteristics; and
   (b) be based on international standards, where such exist; otherwise, on national technical regulations,[3] recognized national standards,[4] or building codes.

3 There shall be no requirement or reference to a particular trademark or trade name, patent, design or type, specific origin, producer or supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as 'or equivalent' are included in the tender documentation.

4 Entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement.

Article VII

Tendering Procedures

1 Each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner and are consistent with the provisions contained in Articles II through XVI.

2 Entities shall not provide to any supplier information with regard to a specific procurement in a manner which would have the effect of precluding competition.
3 For the purposes of this Agreement:
   (a) Open tendering procedures are those procedures under which all interested suppliers may submit a tender.
   (b) Selective tendering procedures are those procedures under which, consistent with paragraph 3 of Article X and other relevant provisions of this Agreement, those suppliers invited to do so by the entity may submit a tender.
   (c) Limited tendering procedures are those procedures where the entity contacts suppliers individually, only under the conditions specified in Article XV.

Article VIII

Qualification of Suppliers

In the process of qualifying suppliers, entities shall not discriminate among suppliers of other Parties or between domestic suppliers and suppliers of other Parties. Qualification procedures shall be consistent with the following:

(a) any conditions for participation in tendering procedures shall be published in adequate time to enable interested suppliers to initiate and, to the extent that it is compatible with efficient operation of the procurement process, complete the qualification procedures;
(b) any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question. Any conditions for participation required from suppliers, including financial guarantees, technical qualifications and information necessary for establishing the financial, commercial and technical capacity of suppliers, as well as the verification of qualifications, shall be no less favourable to suppliers of other Parties than to domestic suppliers and shall not discriminate among suppliers of other Parties. The financial, commercial and technical capacity of a supplier shall be judged on the basis both of that supplier's global business activity as well as of its activity in the territory of the procuring entity, taking due account of the legal relationship between the supply organizations;
(c) the process of, and the time required for, qualifying suppliers shall not be used in order to keep suppliers of other Parties off a suppliers'

list or from being considered for a particular intended procurement. Entities shall recognize as qualified suppliers such domestic suppliers or suppliers of other Parties who meet the conditions for participation in a particular intended procurement. Suppliers requesting to participate in a particular intended procurement who may not yet be qualified shall also be considered, provided there is sufficient time to complete the qualification procedure;

(d) entities maintaining permanent lists of qualified suppliers shall ensure that suppliers may apply for qualification at any time; and that all qualified suppliers so requesting are included in the lists within a reasonably short time;

(e) if, after publication of the notice under paragraph 1 of Article IX, a supplier not yet qualified requests to participate in an intended procurement, the entity shall promptly start procedures for qualification;

(f) any supplier having requested to become a qualified supplier shall be advised by the entities concerned of the decision in this regard. Qualified suppliers included on permanent lists by entities shall also be notified of the termination of any such lists or of their removal from them;

(g) each Party shall ensure that:
  (i) each entity and its constituent parts follow a single qualification procedure, except in cases of duly substantiated need for a different procedure; and
  (ii) efforts be made to minimize differences in qualification procedures between entities.

(h) nothing in subparagraphs (a) through (g) shall preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations, provided that such an action is consistent with the national treatment and non-discrimination provisions of this Agreement.

Article IX

Invitation to Participate Regarding Intended Procurement

1 In accordance with paragraphs 2 and 3, entities shall publish an invitation to participate for all cases of intended procurement, except as otherwise provided for in Article XV (limited tendering). The notice shall be published in the appropriate publication listed in Appendix II.

2 The invitation to participate may take the form of a notice of proposed procurement, as provided for in paragraph 6.

3 Entities in Annexes 2 and 3 may use a notice of planned procurement, as provided for in paragraph 7, or a notice regarding a qualification system, as provided for in paragraph 9, as an invitation to participate.
4 Entities which use a notice of planned procurement as an invitation to participate shall subsequently invite all suppliers who have expressed an interest to confirm their interest on the basis of information which shall include at least the information referred to in paragraph 6.
5 Entities which use a notice regarding a qualification system as an invitation to participate shall provide, subject to the considerations referred to in paragraph 4 of Article XVIII and in a timely manner, information which allows all those who have expressed an interest to have a meaningful opportunity to assess their interest in participating in the procurement. This information shall include the information contained in the notices referred to in paragraphs 6 and 8, to the extent such information is available. Information provided to one interested supplier shall be provided in a non-discriminatory manner to the other interested suppliers.
6 Each notice of proposed procurement, referred to in paragraph 2, shall contain the following information:
   (a) the nature and quantity, including any options for further procurement and, if possible, an estimate of the timing when such options may be exercised; in the case of recurring contracts the nature and quantity and, if possible, an estimate of the timing of the subsequent tender notices for the products or services to be procured;
   (b) whether the procedure is open or selective or will involve negotiation;
   (c) any date for starting delivery or completion of delivery of goods or services;
   (d) the address and final date for submitting an application to be invited to tender or for qualifying for the suppliers' lists, or for receiving tenders, as well as the language or languages in which they must be submitted;
   (e) the address of the entity awarding the contract and providing any information necessary for obtaining specifications and other documents;
   (f) any economic and technical requirements, financial guarantees and information required from suppliers;
   (g) the amount and terms of payment of any sum payable for the tender documentation; and

(h) whether the entity is inviting offers for purchase, lease, rental or hire purchase, or more than one of these methods.

7 Each notice of planned procurement referred to in paragraph 3 shall contain as much of the information referred to in paragraph as is available. It shall in any case include the information referred to in paragraph 8 and:

(a) a statement that interested suppliers should express their interest in the procurement to the entity;

(b) a contact point with the entity from which further information may be obtained.

8 For each case of intended procurement, the entity shall publish a summary notice in one of the official languages of the WTO. The notice shall contain at least the following information:

(a) the subject matter of the contract;

(b) the time-limits set for the submission of tenders or an application to be invited to tender; and

(c) the addresses from which documents relating to the contracts may be requested.

9 In the case of selective tendering procedures, entities maintaining permanent lists of qualified suppliers shall publish annually in one of the publications listed in Appendix III a notice of the following:

(a) the enumeration of the lists maintained, including their headings, in relation to the products or services or categories of products or services to be procured through the lists;

(b) the conditions to be fulfilled by suppliers with a view to their inscription on those lists and the methods according to which each of those conditions will be verified by the entity concerned; and

(c) the period of validity of the lists, and the formalities for their renewal.

When such a notice is used as an invitation to participate in accordance with paragraph 3, the notice shall, in addition, include the following information:

(d) the nature of the products or services concerned;

(e) a statement that the notice constitutes an invitation to participate.

However, when the duration of the qualification system is three years or less, and if the duration of the system is made clear in the notice and it is also made clear that further notices will not be published, it shall be sufficient to publish the notice once only, at the beginning

of the system. Such a system shall not be used in a manner which circumvents the provisions of this Agreement.

10 If, after publication of an invitation to participate in any case of intended procurement, but before the time set for opening or receipt of tenders as specified in the notices or the tender documentation, it becomes necessary to amend or re-issue the notice, the amendment or the re-issued notice shall be given the same circulation as the original documents upon which the amendment is based. Any significant information given to one supplier with respect to a particular intended procurement shall be given simultaneously to all other suppliers concerned in adequate time to permit the suppliers to consider such information and to respond to it.

11 Entities shall make clear, in the notices referred to in this Article or in the publication in which the notices appear, that the procurement is covered by the Agreement.

Article X

Selection Procedures

1 To ensure optimum effective international competition under selective tendering procedures, entities shall, for each intended procurement, invite tenders from the maximum number of domestic suppliers and suppliers of other Parties, consistent with the efficient operation of the procurement system. They shall select the suppliers to participate in the procedure in a fair and non-discriminatory manner.

2 Entities maintaining permanent lists of qualified suppliers may select suppliers to be invited to tender from among those listed. Any selection shall allow for equitable opportunities for suppliers on the lists.

3 Suppliers requesting to participate in a particular intended procurement shall be permitted to submit a tender and be considered, provided, in the case of those not yet qualified, there is sufficient time to complete the qualification procedure under Articles VIII and IX. The number of additional suppliers permitted to participate shall be limited only by the efficient operation of the procurement system.

4 Requests to participate in selective tendering procedures may be submitted by telex, telegram or facsimile.

Article XI

Time-limits for Tendering and Delivery

General

1 (a) Any prescribed time-limit shall be adequate to allow suppliers of other Parties as well as domestic suppliers to prepare and submit tenders before the closing of the tendering procedures. In determining any such time-limit, entities shall, consistent with their own reasonable needs, take into account such factors as the complexity of the intended procurement, the extent of subcontracting anticipated and the normal time for transmitting tenders by mail from foreign as well as domestic points.

(b) Each Party shall ensure that its entities shall take due account of publication delays when setting the final date for receipt of tenders or of applications to be invited to tender.

Deadlines

2 Except in so far as provided in paragraph 3,

(a) in open procedures, the period for the receipt of tenders shall not be less than 40 days from the date of publication referred to in paragraph 1 of Article IX;

(b) in selective procedures not involving the use of a permanent list of qualified suppliers, the period for submitting an application to be invited to tender shall not be less than 25 days from the date of publication referred to in paragraph 1 of Article IX; the period for receipt of tenders shall in no case be less than 40 days from the date of issuance of the invitation to tender;

(c) in selective procedures involving the use of a permanent list of qualified suppliers, the period for receipt of tenders shall not be less than 40 days from the date of the initial issuance of invitations to tender, whether or not the date of initial issuance of invitations to tender coincides with the date of the publication referred to in paragraph 1 of Article IX.

3 The periods referred to in paragraph 2 may be reduced in the circumstances set out below:

(a) if a separate notice has been published 40 days and not more than 12 months in advance and the notice contains at least:

(i) as much of the information referred to in paragraph 6 of Article IX as is available;

(ii) the information referred to in paragraph 8 of Article IX;

(iii) a statement that interested suppliers should express their interest in the procurement to the entity; and

(iv) a contact point with the entity from which further information may be obtained, the 40-day limit for receipt of tenders may be replaced by a period sufficiently long to enable responsive tendering, which, as a general rule, shall not be less than 24 days, but in any case not less than 10 days;

(b) in the case of the second or subsequent publications dealing with contracts of a recurring nature within the meaning of paragraph 6 of Article IX, the 40-day limit for receipt of tenders may be reduced to not less than 24 days;

(c) where a state of urgency duly substantiated by the entity renders impracticable the periods in question, the periods specified in paragraph 2 may be reduced but shall in no case be less than 10 days from the date of the publication referred to in paragraph 1 of Article IX; or

(d) the period referred to in paragraph 2(c) may, for procurements by entities listed in Annexes 2 and 3, be fixed by mutual agreement between the entity and the selected suppliers. In the absence of agreement, the entity may fix periods which shall be sufficiently long to enable responsive tendering and shall in any case not be less than 10 days.

4 Consistent with the entity's own reasonable needs, any delivery date shall take into account such factors as the complexity of the intended procurement, the extent of subcontracting anticipated and the realistic time required for production, de-stocking and transport of goods from the points of supply or for supply of services.

Article XII

Tender Documentation

1 If, in tendering procedures, an entity allows tenders to be submitted in several languages, one of those languages shall be one of the official languages of the WTO.

2 Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders, including information required to be published in the notice of intended procurement, except for paragraph 6(g) of Article IX, and the following:

(a) the address of the entity to which tenders should be sent;

(b) the address where requests for supplementary information should be sent;

(c) the language or languages in which tenders and tendering documents must be submitted;
(d) the closing date and time for receipt of tenders and the length of time during which any tender should be open for acceptance;
(e) the persons authorized to be present at the opening of tenders and the date, time and place of this opening;
(f) any economic and technical requirement, financial guarantees and information or documents required from suppliers;
(g) a complete description of the products or services required or of any requirements including technical specifications, conformity certification to be fulfilled, necessary plans, drawings and instructional materials;
(h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders and the cost elements to be included in evaluating tender prices, such as transport, insurance and inspection costs, and in the case of products or services of other Parties, customs duties and other import charges, taxes and currency of payment;
(i) the terms of payment;
(j) any other terms or conditions;
(k) in accordance with Article XVII the terms and conditions, if any, under which tenders from countries not Parties to this Agreement, but which apply the procedures of that Article, will be entertained.

Forwarding of Tender Documentation by the Entities

3 (a) In open procedures, entities shall forward the tender documentation at the request of any supplier participating in the procedure, and shall reply promptly to any reasonable request for explanations relating thereto.
(b) In selective procedures, entities shall forward the tender documentation at the request of any supplier requesting to participate, and shall reply promptly to any reasonable request for explanations relating thereto.
(c) Entities shall reply promptly to any reasonable request for relevant information submitted by a supplier participating in the tendering procedure, on condition that such information does not give that supplier an advantage over its competitors in the procedure for the award of the contract.

Article XIII

Submission, Receipt and Opening of Tenders and Awarding of Contracts

1 The submission, receipt and opening of tenders and awarding of contracts shall be consistent with the following:

(a) tenders shall normally be submitted in writing directly or by mail. If tenders by telex, telegram or facsimile are permitted, the tender made thereby must include all the information necessary for the evaluation of the tender, in particular the definitive price proposed by the tenderer and a statement that the tenderer agrees to all the terms, conditions and provisions of the invitation to tender. The tender must be confirmed promptly by letter or by the despatch of a signed copy of the telex, telegram or facsimile. Tenders presented by telephone shall not be permitted. The content of the telex, telegram or facsimile shall prevail where there is a difference or conflict between that content and any documentation received after the time-limit; and

(b) the opportunities that may be given to tenderers to correct unintentional errors of form between the opening of tenders and the awarding of the contract shall not be permitted to give rise to any discriminatory practice.

Receipt of Tenders

2 A supplier shall not be penalized if a tender is received in the office designated in the tender documentation after the time specified because of delay due solely to mishandling on the part of the entity. Tenders may also be considered in other exceptional circumstances if the procedures of the entity concerned so provide.

Opening of Tenders

3 All tenders solicited under open or selective procedures by entities shall be received and opened under procedures and conditions guaranteeing the regularity of the openings. The receipt and opening of tenders shall also be consistent with the national treatment and non-discrimination provisions of this Agreement. Information on the opening of tenders shall remain with the entity concerned at the disposal of the government authorities responsible for the entity in order that it may be used if required under the procedures of Articles XVIII, XIX, XX and XXII.

Award of Contracts

4 (a) To be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and be from a supplier which complies with the conditions for participation. If an entity has received a tender abnormally lower than other tenders submitted, it may enquire with the tenderer to ensure that it can comply with the conditions of participation and be capable of fulfilling the terms of the contract.

(b) Unless in the public interest an entity decides not to issue the contract, the entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender, whether for domestic products or services, or products or services of other Parties, is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous.

(c) Awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.

Option Clauses

5 Option clauses shall not be used in a manner which circumvents the provisions of the Agreement.

Article XIV

Negotiation

1 A Party may provide for entities to conduct negotiations:

(a) in the context of procurements in which they have indicated such intent, namely in the notice referred to in paragraph 2 of Article IX (the invitation to suppliers to participate in the procedure for the proposed procurement); or

(b) when it appears from evaluation that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation.

2 Negotiations shall primarily be used to identify the strengths and weaknesses in tenders.

3 Entities shall treat tenders in confidence. In particular, they shall not provide information intended to assist particular participants to bring their tenders up to the level of other participants.

4 Entities shall not, in the course of negotiations, discriminate between different suppliers. In particular, they shall ensure that:
   (a) any elimination of participants is carried out in accordance with the criteria set forth in the notices and tender documentation;
   (b) all modifications to the criteria and to the technical requirements are transmitted in writing to all remaining participants in the negotiations;
   (c) all remaining participants are afforded an opportunity to submit new or amended submissions on the basis of the revised requirements; and
   (d) when negotiations are concluded, all participants remaining in the negotiations shall be permitted to submit final tenders in accordance with a common deadline.

Article XV

Limited Tendering

1 The provisions of Articles VII through XIV governing open and selective tendering procedures need not apply in the following conditions, provided that limited tendering is not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among suppliers of other Parties or protection to domestic producers or suppliers:
   (a) in the absence of tenders in response to an open or selective tender, or when the tenders submitted have been collusive, or not in conformity with the essential requirements in the tender, or from suppliers who do not comply with the conditions for participation provided for in accordance with this Agreement, on condition, however, that the requirements of the initial tender are not substantially modified in the contract as awarded;
   (b) when, for works of art or for reasons connected with protection of exclusive rights, such as patents or copyrights, or in the absence of competition for technical reasons, the products or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;
   (c) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the entity, the products or services could not be obtained in time by means of open or selective tendering procedures;
   (d) for additional deliveries by the original supplier which are intended either as parts replacement for existing supplies, or

installations, or as the extension of existing supplies, services, or installations where a change of supplier would compel the entity to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services[5];

(e) when an entity procures prototypes or a first product or service which are developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. When such contracts have been fulfilled, subsequent procurements of products or services shall be subject to Articles VII through XIV[6];

(f) when additional construction services which were not included in the initial contract but which were within the objectives of the original tender documentation have, through unforeseeable circumstances, become necessary to complete the construction services described therein, and the entity needs to award contracts for the additional construction services to the contractor carrying out the construction services concerned since the separation of the additional construction services from the initial contract would be difficult for technical or economic reasons and cause significant inconvenience to the entity. However, the total value of contracts awarded for the additional construction services may not exceed 50 per cent of the amount of the main contract;

(g) for new construction services consisting of the repetition of similar construction services which conform to a basic project for which an initial contract was awarded in accordance with Articles VII through XIV and for which the entity has indicated in the notice of intended procurement concerning the initial construction service, that limited tendering procedures might be used in awarding contracts for such new construction services;

(h) for products purchased on a commodity market;

(i) for purchases made under exceptionally advantageous conditions which only arise in the very short term. This provision is intended to cover unusual disposals by firms which are not normally suppliers, or disposal of assets of businesses in liquidation or receivership. It is not intended to cover routine purchases from regular suppliers;

(j) in the case of contracts awarded to the winner of a design contest provided that the contest has been organized in a manner which is consistent with the principles of this Agreement, notably as

regards the publication, in the sense of Article IX, of an invitation to suitably qualified suppliers, to participate in such a contest which shall be judged by an independent jury with a view to design contracts being awarded to the winners.

2 Entities shall prepare a report in writing on each contract awarded under the provisions of paragraph 1. Each report shall contain the name of the procuring entity, value and kind of goods or services procured, country of origin, and a statement of the conditions in this Article which prevailed. This report shall remain with the entities concerned at the disposal of the government authorities responsible for the entity in order that it may be used if required under the procedures of Articles XVIII, XIX, XX and XXII.

Article XVI

Offsets

1 Entities shall not, in the qualification and selection of suppliers, products or services, or in the evaluation of tenders and award of contracts, impose, seek or consider offsets.[7]

2 Nevertheless, having regard to general policy considerations, including those relating to development, a developing country may at the time of accession negotiate conditions for the use of offsets, such as requirements for the incorporation of domestic content. Such requirements shall be used only for qualification to participate in the procurement process and not as criteria for awarding contracts. Conditions shall be objective, clearly defined and non-discriminatory. They shall be set forth in the country's Appendix I and may include precise limitations on the imposition of offsets in any contract subject to this Agreement. The existence of such conditions shall be notified to the Committee and included in the notice of intended procurement and other documentation.

Article XVII

Transparency

1 Each Party shall encourage entities to indicate the terms and conditions, including any deviations from competitive tendering procedures or access to challenge procedures, under which tenders will be entertained from suppliers situated in countries not Parties to this Agreement but which, with a view to creating transparency in their own contract awards, nevertheless:

(a) specify their contracts in accordance with Article VI (technical specifications);
(b) publish the procurement notices referred to in Article IX, including, in the version of the notice referred to in paragraph 8 of Article IX (summary of the notice of intended procurement) which is published in an official language of the WTO, an indication of the terms and conditions under which tenders shall be entertained from suppliers situated in countries Parties to this Agreement;
(c) are willing to ensure that their procurement regulations shall not normally change during a procurement and, in the event that such change proves unavoidable, to ensure the availability of a satisfactory means of redress.

2 Governments not Parties to the Agreement which comply with the conditions specified in paragraphs 1(a) through 1(c), shall be entitled if they so inform the Parties to participate in the Committee as observers.

Article XVIII

Information and Review as Regards Obligations of Entities

1 Entities shall publish a notice in the appropriate publication listed in Appendix II not later than 72 days after the award of each contract under Articles XIII through XV. These notices shall contain:
(a) the nature and quantity of products or services in the contract award;
(b) the name and address of the entity awarding the contract;
(c) the date of award;
(d) the name and address of winning tenderer;
(e) the value of the winning award or the highest and lowest offer taken into account in the award of the contract;
(f) where appropriate, means of identifying the notice issued under paragraph 1 of Article IX or justification according to Article XV for the use of such procedure; and
(g) the type of procedure used.

2 Each entity shall, on request from a supplier of a Party, promptly provide:
(a) an explanation of its procurement practices and procedures;
(b) pertinent information concerning the reasons why the supplier's application to qualify was rejected, why its existing qualification was brought to an end and why it was not selected; and

(c) to an unsuccessful tenderer, pertinent information concerning the reasons why its tender was not selected and on the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer.

3 Entities shall promptly inform participating suppliers of decisions on contract awards and, upon request, in writing.

4 However, entities may decide that certain information on the contract award, contained in paragraphs 1 and 2(c), be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises, public or private, or might prejudice fair competition between suppliers.

Article XIX

Information and Review as Regards Obligations of Parties

1 Each Party shall promptly publish any law, regulation, judicial decision, administrative ruling of general application, and any procedure (including standard contract clauses) regarding government procurement covered by this Agreement, in the appropriate publications listed in Appendix IV and in such a manner as to enable other Parties and suppliers to become acquainted with them. Each Party shall be prepared, upon request, to explain to any other Party its government procurement procedures.

2 The government of an unsuccessful tenderer which is a Party to this Agreement may seek, without prejudice to the provisions under Article XXII, such additional information on the contract award as may be necessary to ensure that the procurement was made fairly and impartially. To this end, the procuring government shall provide information on both the characteristics and relative advantages of the winning tender and the contract price. Normally this latter information may be disclosed by the government of the unsuccessful tenderer provided it exercises this right with discretion. In cases where release of this information would prejudice competition in future tenders, this information shall not be disclosed except after consultation with and agreement of the Party which gave the information to the government of the unsuccessful tenderer.

3 Available information concerning procurement by covered entities and their individual contract awards shall be provided, upon request, to any other Party.

4 Confidential information provided to any Party which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises, public or private, or might prejudice fair competition between suppliers shall not be revealed without formal authorization from the party providing the information.

5 Each Party shall collect and provide to the Committee on an annual basis statistics on its procurements covered by this Agreement. Such reports shall contain the following information with respect to contracts awarded by all procurement entities covered under this Agreement:

(a) for entities in Annex 1, statistics on the estimated value of contracts awarded, both above and below the threshold value, on a global basis and broken down by entities; for entities in Annexes 2 and 3, statistics on the estimated value of contracts awarded above the threshold value on a global basis and broken down by categories of entities;

(b) for entities in Annex 1, statistics on the number and total value of contracts awarded above the threshold value, broken down by entities and categories of products and services according to uniform classification systems; for entities in Annexes 2 and 3, statistics on the estimated value of contracts awarded above the threshold value broken down by categories of entities and categories of products and services;

(c) for entities in Annex 1, statistics, broken down by entity and by categories of products and services, on the number and total value of contracts awarded under each of the cases of Article XV; for categories of entities in Annexes 2 and 3, statistics on the total value of contracts awarded above the threshold value under each of the cases of Article XV; and

(d) for entities in Annex 1, statistics, broken down by entities, on the number and total value of contracts awarded under derogations to the Agreement contained in the relevant Annexes; for categories of entities in Annexes 2 and 3, statistics on the total value of contracts awarded under derogations to the Agreement contained in the relevant Annexes.

To the extent that such information is available, each Party shall provide statistics on the country of origin of products and services purchased by its entities. With a view to ensuring that such statistics are comparable, the Committee shall provide guidance on methods to be used. With a view to ensuring effective monitoring of procurement covered by this Agreement, the Committee may decide unanimously

to modify the requirements of subparagraphs (a) through (d) as regards the nature and the extent of statistical information to be provided and the breakdowns and classifications to be used.

Article XX

Challenge Procedures

Consultations

1 In the event of a complaint by a supplier that there has been a breach of this Agreement in the context of a procurement, each Party shall encourage the supplier to seek resolution of its complaint in consultation with the procuring entity. In such instances the procuring entity shall accord impartial and timely consideration to any such complaint, in a manner that is not prejudicial to obtaining corrective measures under the challenge system.

Challenge

2 Each Party shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest.

3 Each Party shall provide its challenge procedures in writing and make them generally available.

4 Each Party shall ensure that documentation relating to all aspects of the process concerning procurements covered by this Agreement shall be retained for three years.

5 The interested supplier may be required to initiate a challenge procedure and notify the procuring entity within specified time-limits from the time when the basis of the complaint is known or reasonably should have been known, but in no case within a period of less than 10 days.

6 Challenges shall be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment. A review body which is not a court shall either be subject to judicial review or shall have procedures which provide that:
   (a) participants can be heard before an opinion is given or a decision is reached;
   (b) participants can be represented and accompanied;
   (c) participants shall have access to all proceedings;
   (d) proceedings can take place in public;

(e) opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions;
(f) witnesses can be presented;
(g) documents are disclosed to the review body.

7 Challenge procedures shall provide for:
(a) rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities. Such action may result in suspension of the procurement process. However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied. In such circumstances, just cause for not acting shall be provided in writing;
(b) an assessment and a possibility for a decision on the justification of the challenge;
(c) correction of the breach of the Agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest.

8 With a view to the preservation of the commercial and other interests involved, the challenge procedure shall normally be completed in a timely fashion.

Article XXI

Institutions

1 A Committee on Government Procurement composed of representatives from each of the Parties shall be established. This Committee shall elect its own Chairman and Vice-Chairman and shall meet as necessary but not less than once a year for the purpose of affording Parties the opportunity to consult on any matters relating to the operation of this Agreement or the furtherance of its objectives, and to carry out such other responsibilities as may be assigned to it by the Parties.

2 The Committee may establish working parties or other subsidiary bodies which shall carry out such functions as may be given to them by the Committee.

Article XXII

Consultations and Dispute Settlement

1 The provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes under the WTO Agreement

(hereinafter referred to as the 'Dispute Settlement Understanding') shall be applicable except as otherwise specifically provided below.

2 If any Party considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the attainment of any objective of this Agreement is being impeded as the result of the failure of another Party or Parties to carry out its obligations under this Agreement, or the application by another Party or Parties of any measure, whether or not it conflicts with the provisions of this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter, make written representations or proposals to the other Party or Parties which it considers to be concerned. Such action shall be promptly notified to the Dispute Settlement Body established under the Dispute Settlement Understanding (hereinafter referred to as 'DSB'), as specified below. Any Party thus approached shall give sympathetic consideration to the representations or proposals made to it.

3 The DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, make recommendations or give rulings on the matter, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under this Agreement or consultations regarding remedies when withdrawal of measures found to be in contravention of the Agreement is not possible, provided that only Members of the WTO Party to this Agreement shall participate in decisions or actions taken by the DSB with respect to disputes under this Agreement.

4 Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days of the establishment of the panel:

To examine, in the light of the relevant provisions of this Agreement and of (name of any other covered Agreement cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in this Agreement.

In the case of a dispute in which provisions both of this Agreement and of one or more other Agreements listed in Appendix 1 of the Dispute Settlement Understanding are invoked by one of the parties to the dispute, paragraph 3 shall apply only to those parts of the panel report concerning the interpretation and application of this Agreement.

5 Panels established by the DSB to examine disputes under this Agreement shall include persons qualified in the area of government procurement.
6 Every effort shall be made to accelerate the proceedings to the greatest extent possible. Notwithstanding the provisions of paragraphs 8 and 9 of Article 12 of the Dispute Settlement Understanding, the panel shall attempt to provide its final report to the parties to the dispute not later than four months, and in case of delay not later than seven months, after the date on which the composition and terms of reference of the panel are agreed. Consequently, every effort shall be made to reduce also the periods foreseen in paragraph 1 of Article 20 and paragraph 4 of Article 21 of the Dispute Settlement Understanding by two months. Moreover, notwithstanding the provisions of paragraph 5 of Article 21 of the Dispute Settlement Understanding, the panel shall attempt to issue its decision, in case of a disagreement as to the existence or consistency with a covered Agreement of measures taken to comply with the recommendations and rulings, within 60 days.
7 Notwithstanding paragraph 2 of Article 22 of the Dispute Settlement Understanding, any dispute arising under any Agreement listed in Appendix 1 to the Dispute Settlement Understanding other than this Agreement shall not result in the suspension of concessions or other obligations under this Agreement, and any dispute arising under this Agreement shall not result in the suspension of concessions or other obligations under any other Agreement listed in the said Appendix 1.

Article XXIII

Exceptions to the Agreement

1 Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.
2 Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in

this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour.

Article XXIV

Final Provisions

1 Acceptance and Entry into Force
This Agreement shall enter into force on 1 January 1996 for those governments[8] whose agreed coverage is contained in Annexes 1 through 5 of Appendix I of this Agreement and which have, by signature, accepted the Agreement on 15 April 1994 or have, by that date, signed the Agreement subject to ratification and subsequently ratified the Agreement before 1 January 1996.

2 Accession
Any government which is a Member of the WTO, or prior to the date of entry into force of the WTO Agreement which is a contracting party to GATT 1947, and which is not a Party to this Agreement may accede to this Agreement on terms to be agreed between that government and the Parties. Accession shall take place by deposit with the Director-General of the WTO of an instrument of accession which states the terms so agreed. The Agreement shall enter into force for an acceding government on the 30th day following the date of its accession to the Agreement.

3 Transitional Arrangements
   (a) Hong Kong and Korea may delay application of the provisions of this Agreement, except Articles XXI and XXII, to a date not later than 1 January 1997. The commencement date of their application of the provisions, if prior to 1 January 1997, shall be notified to the Director-General of the WTO 30 days in advance.
   (b) During the period between the date of entry into force of this Agreement and the date of its application by Hong Kong, the rights and obligations between Hong Kong and all other Parties to this Agreement which were on 15 April 1994 Parties to the Agreement on Government Procurement done at Geneva on 12 April 1979 as amended on 2 February 1987 (the '1988 Agreement') shall be governed by the substantive[9] provisions of the 1988 Agreement, including its Annexes as modified or rectified, which provisions are incorporated herein by reference

for that purpose and shall remain in force until 31 December 1996.

(c) Between Parties to this Agreement which are also Parties to the 1988 Agreement, the rights and obligations of this Agreement shall supersede those under the 1988 Agreement.

(d) Article XXII shall not enter into force until the date of entry into force of the WTO Agreement. Until such time, the provisions of Article VII of the 1988 Agreement shall apply to consultations and dispute settlement under this Agreement, which provisions are hereby incorporated in the Agreement by reference for that purpose. These provisions shall be applied under the auspices of the Committee under this Agreement.

(e) Prior to the date of entry into force of the WTO Agreement, references to WTO bodies shall be construed as referring to the corresponding GATT body and references to the Director-General of the WTO and to the WTO Secretariat shall be construed as references to, respectively, the Director-General to the CONTRACTING PARTIES to GATT 1947 and to the GATT Secretariat.

4 Reservations

Reservations may not be entered in respect of any of the provisions of this Agreement.

5 National Legislation

(a) Each government accepting or acceding to this Agreement shall ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures, and the rules, procedures and practices applied by the entities contained in its lists annexed hereto, with the provisions of this Agreement.

(b) Each Party shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

6 Rectifications or Modifications

(a) Rectifications, transfers of an entity from one Annex to another or, in exceptional cases, other modifications relating to Appendices I through IV shall be notified to the Committee, along with information as to the likely consequences of the change for the mutually agreed coverage provided in this Agreement. If the rectifications, transfers or other modifications are of a purely formal or minor nature, they shall become effective provided there is no objection within 30 days. In

other cases, the Chairman of the Committee shall promptly convene a meeting of the Committee. The Committee shall consider the proposal and any claim for compensatory adjustments, with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage provided in this Agreement prior to such notification. In the event of agreement not being reached, the matter may be pursued in accordance with the provisions contained in Article XXII.

(b) Where a Party wishes, in exercise of its rights, to withdraw an entity from Appendix I on the grounds that government control or influence over it has been effectively eliminated, that Party shall notify the Committee. Such modification shall become effective the day after the end of the following meeting of the Committee, provided that the meeting is no sooner than 30 days from the date of notification and no objection has been made. In the event of an objection, the matter may be pursued in accordance with the procedures on consultations and dispute settlement contained in Article XXII. In considering the proposed modification to Appendix I and any consequential compensatory adjustment, allowance shall be made for the market-opening effects of the removal of government control or influence.

7 Reviews, Negotiations and Future Work

(a) The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall annually inform the General Council of the WTO of developments during the periods covered by such reviews.

(b) Not later than the end of the third year from the date of entry into force of this Agreement and periodically thereafter, the Parties thereto shall undertake further negotiations, with a view to improving this Agreement and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity, having regard to the provisions of Article V relating to developing countries.

(c) Parties shall seek to avoid introducing or prolonging discriminatory measures and practices which distort open procurement and shall, in the context of negotiations under subparagraph (b), seek to eliminate those which remain on the date of entry into force of this Agreement.

8 Information Technology
With a view to ensuring that the Agreement does not constitute an unnecessary obstacle to technical progress, Parties shall consult regularly in the Committee regarding developments in the use of information technology in government procurement and shall, if necessary, negotiate modifications to the Agreement. These consultations shall in particular aim to ensure that the use of information technology promotes the aims of open, non-discriminatory and efficient government procurement through transparent procedures, that contracts covered under the Agreement are clearly identified and that all available information relating to a particular contract can be identified. When a Party intends to innovate, it shall endeavour to take into account the views expressed by other Parties regarding any potential problems.

9 Amendments
Parties may amend this Agreement having regard, inter alia, to the experience gained in its implementation. Such an amendment, once the Parties have concurred in accordance with the procedures established by the Committee, shall not enter into force for any Party until it has been accepted by such Party.

10 Withdrawal
(a) Any Party may withdraw from this Agreement. The withdrawal shall take effect upon the expiration of 60 days from the date on which written notice of withdrawal is received by the Director-General of the WTO. Any Party may upon such notification request an immediate meeting of the Committee.
(b) If a Party to this Agreement does not become a Member of the WTO within one year of the date of entry into force of the WTO Agreement or ceases to be a Member of the WTO, it shall cease to be a Party to this Agreement with effect from the same date.

11 Non-application of this Agreement between Particular Parties
This Agreement shall not apply as between any two Parties if either of the Parties, at the time either accepts or accedes to this Agreement, does not consent to such application.

12 Notes, Appendices and Annexes
The Notes, Appendices and Annexes to this Agreement constitute an integral part thereof.

13 Secretariat
This Agreement shall be serviced by the WTO Secretariat.

14 Deposit

This Agreement shall be deposited with the Director-General of the WTO, who shall promptly furnish to each Party a certified true copy of this Agreement, of each rectification or modification thereto pursuant to paragraph 6 and of each amendment thereto pursuant to paragraph 9, and a notification of each acceptance thereof or accession thereto pursuant to paragraphs 1 and 2 and of each withdrawal therefrom pursuant to paragraph 10 of this Article.

15 Registration

This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Done at Marrakesh this fifteenth day of April one thousand nine hundred and ninety-four in a single copy, in the English, French and Spanish languages, each text being authentic, except as otherwise specified with respect to the Appendices hereto.

Notes

The terms 'country' or 'countries' as used in this Agreement, including the Appendices, are to be understood to include any separate customs territory Party to this Agreement. In the case of a separate customs territory Party to this Agreement, where an expression in this Agreement is qualified by the term 'national', such expression shall be read as pertaining to that customs territory, unless otherwise specified.

Article 1, paragraph 1

Having regard to general policy considerations relating to tied aid, including the objective of developing countries with respect to the untying of such aid, this Agreement does not apply to procurement made in furtherance of tied aid to developing countries so long as it is practised by Parties.

Appendix 2
Revision of the Agreement on Government Procurement as at 8 December 2006

Prepared by the Secretariat

This document contains the text of the revision of the 1994 Agreement on Government Procurement which was referred to by the Chairman of the Committee on Government Procurement in the formal meeting of the Committee on the afternoon of Friday, 8 December 2006.[1]

Contents

Preamble

Parties to this Agreement (hereinafter referred to as 'Parties'),

Recognizing the need for an effective multilateral framework for government procurement, with a view to achieving greater liberalization and expansion of, and improving the framework for, the conduct of international trade;

Recognizing that measures regarding government procurement should not be prepared, adopted or applied so as to afford protection to domestic suppliers, goods, or services, or to discriminate among foreign suppliers, goods, or services;

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

Recognizing that the procedural commitments under this Agreement should be sufficiently flexible to accommodate the specific circumstances of each Party;

Recognizing the need to take into account the development, financial, and trade needs of developing countries, in particular the least-developed countries;

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

Recognizing the importance of using, and encouraging the use of, electronic means for procurement covered by this Agreement;

Desiring to encourage acceptance of and accession to this Agreement by WTO Members not party to it;

Having undertaken further negotiations in pursuance of these objectives;

Hereby *agree* as follows:

Article I: Definitions

For purposes of this Agreement:

(a) **commercial goods and services** means goods and services of a type generally sold or offered for sale in the commercial marketplace to, and customarily purchased by, non-governmental buyers for non-governmental purposes;

(b) **construction services contract** means a contract that has as its objective the realization by whatever means of civil or building works, based on Division 51 of the Provisional UN Central Product Classification (CPC);

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

(d) **days** means calendar days;

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

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

(g) **limited tendering** means a procurement method where the procuring entity contacts a supplier or suppliers of its choice;

(h) **measure** means any law, regulation, procedure, administrative guidance or practice, or any action of a procuring entity relating to a covered procurement;

(i) **multi-use list** means a list of suppliers that a procuring entity has determined satisfy the conditions for participation in that list, and that the procuring entity intends to use more than once;

(j) **notice of intended procurement** means a notice published by a procuring entity inviting interested suppliers to submit a request for participation, a tender, or both;

(k) **offsets** means any condition or undertaking that encourages local development or improves a Party's balance-of-payments accounts, such as the use of domestic content, the licensing of

technology, investment, counter-trade, and similar actions or requirements;

(l) **pen tendering** means a procurement method where all interested suppliers may submit a tender;

(m) **person** means a natural person or a juridical person;

(n) **procuring entity** means an entity covered under Annex 1, 2, or 3 of Appendix I of each Party;

(o) **qualified supplier** means a supplier that a procuring entity recognizes as having satisfied the conditions for participation;

(p) **selective tendering** means a procurement method where only suppliers satisfying the conditions for participation are invited by the procuring entity to submit a tender;

(q) **services** includes construction services, unless otherwise specified;

(r) **standard** means a document approved by a recognized body, that provides, for common and repeated use, rules, guidelines, or characteristics for goods or services, or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking, or labelling requirements as they apply to a good, service, process, or production method;

(s) **supplier** means a person or group of persons that provides or could provide goods or services;

(t) **technical specification** means a tendering requirement that:

(i) lays down the characteristics of goods or services to be procured, including quality, performance, safety, and dimensions, or the processes and methods for their production or provision; or

(ii) addresses terminology, symbols, packaging, marking, or labelling requirements, as they apply to a good or service.

Article II: Scope and Coverage

Application of Agreement

1 This Agreement applies to any measure regarding covered procurement, whether or not it is conducted exclusively or partially by electronic means.

2 For the purposes of this Agreement, covered procurement means procurement for governmental purposes:

(a) of goods, services, or any combination thereof:

(i) as specified in each Party's Appendix I; and

(ii) not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale;

(b) by any contractual means, including purchase; lease; and rental or hire purchase, with or without an option to buy;

(c) for which the value, as estimated in accordance with paragraphs 6 through 8, equals or exceeds the relevant threshold specified in Appendix I, at the time of publication of a notice in accordance with Article VII;

(d) by a procuring entity; and

(e) that is not otherwise excluded from coverage in paragraph 3 or in a Party's Appendix I.

3 Except where provided otherwise in a Party's Appendix I, this Agreement does not apply to:

(a) the acquisition or rental of land, existing buildings, or other immovable property or the rights thereon;

(b) non-contractual agreements or any form of assistance that a Party provides, including cooperative agreements, grants, loans, equity infusions, guarantees, and fiscal incentives;

(c) the procurement or acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, or services related to the sale, redemption and distribution of public debt, including loans and government bonds, notes and other securities;

(d) public employment contracts;

(e) procurement conducted:

(i) for the specific purpose of providing international assistance, including development aid;

(ii) under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation by the signatory countries of a project; or

(iii) under the particular procedure or condition of an international organization, or funded by international grants, loans, or other assistance where the applicable procedure or condition would be inconsistent with this Agreement.

4 Each Party shall specify the following information in its Appendix I annexes[2]:

(a) in Annex 1, the central government entities whose procurement is covered by this Agreement;

(b) in Annex 2, the sub-central government entities whose procurement is covered by this Agreement;
(c) in Annex 3, all other entities whose procurement is covered by this Agreement;
(d) in Annex 4, the services covered by this Agreement;
(e) in Annex 5, the construction services covered by this Agreement; and
(f) in Annex 6, any General Notes applicable to the annexes of the Party.

5 Where a procuring entity, in the context of covered procurement, requires persons not listed in Appendix I to procure in accordance with particular requirements, Article V shall apply *mutatis mutandis* to such requirements.

Valuation

6 In estimating the value of a procurement for the purpose of ascertaining whether it is a covered procurement, a procuring entity shall:
(a) neither divide a procurement into separate procurements nor select or use a particular valuation method for estimating the value of a procurement with the intention of totally or partially excluding it from the application of this Agreement; and
(b) include the estimated maximum total value of the procurement over its entire duration, whether awarded to one or more suppliers, taking into account all forms of remuneration, including:
(i) premiums, fees, commissions, and interest; and
(ii) where the procurement provides for the possibility of option clauses, the estimated maximum total value of the procurement, inclusive of optional purchases.

7 Where an individual requirement for a procurement results in the award of more than one contract, or in the award of contracts in separate parts (hereafter referred to as 'recurring procurements'), the calculation of the estimated maximum total value shall be based on:
(a) the value of recurring procurements of the same type of good or service awarded during the preceding 12 months or the procuring entity's preceding fiscal year, adjusted where possible to take into account anticipated changes in the quantity or value of the good or service being procured over the subsequent 12 months; or

(b) the estimated value of recurring procurements of the same type of good or service to be awarded during the 12 months subsequent to the initial contract award or the procuring entity's fiscal year.

8 In the case of procurement by lease, rental, or hire purchase of goods or services, or procurement for which a total price is not specified, the basis for valuation shall be:

(a) in the case of a fixed-term contract:

(i) where the term of the contract is 12 months or less, the total estimated maximum value for its duration, or

(ii) where the term of the contract exceeds 12 months, the total estimated maximum value, including any estimated residual value;

(b) where the contract is for an indefinite period, the estimated monthly instalment multiplied by 48; and

(c) where is it not certain whether the contract is to be a fixed-term contract, subparagraph (b) shall be used.

Article III: Exceptions to the Agreement

1 Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition, or war materials, or to procurement indispensable for national security or for national defence purposes.

2 Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures:

(a) necessary to protect public morals, order, or safety;

(b) necessary to protect human, animal or plant life or health;

(c) necessary to protect intellectual property; or

(d) relating to goods or services of persons with disabilities, philanthropic institutions, or prison labour.

Article IV: Developing Countries

1 In negotiations on accession to, and in the implementation and administration of, this Agreement, the Parties shall give special

consideration to the development, financial, and trade needs and circumstances of developing countries and least-developed countries (collectively referred to hereafter as 'developing countries', unless specifically identified otherwise), recognizing that these may differ significantly from country to country. As provided for in this Article and upon request, the Parties shall accord special and differential treatment to:

(a) least-developed countries; and

(b) any other developing country, where and to the extent that this special and differential treatment meets its development needs.

2 Upon accession by a developing country to this Agreement, each Party shall provide immediately to the goods, services, and suppliers of that country the most favourable coverage that the Party provides under Appendix I to any other Party to this Agreement, subject to any terms negotiated between that Party and the developing country in order to maintain an appropriate balance of opportunities under this Agreement.

3 Based on its development needs, and with the agreement of the Parties, a developing country may adopt or retain one or more of the following transitional measures, during a transition period and in accordance with a schedule, set out in an Annex to its Appendix I, and in a manner that does not discriminate among the Parties:

(a) a price preference programme, provided that the programme:

(i) provides a preference only for the part of the tender incorporating goods or services originating in the developing country applying the preference or goods or services originating in other developing countries in respect of which the developing country applying the preference has an obligation to provide national treatment under a preferential agreement; and

(ii) is transparent, and the preference and its application in the procurement are clearly described in the notice of intended procurement;

(b) an offset, provided that any requirement for, or consideration of, the imposition of the offset is clearly stated in the notice of intended procurement;

(c) the phased-in addition of specific entities or sectors; and

(d) a threshold that is higher than its permanent threshold.

4 In negotiations on accession to this Agreement, the Parties may agree to the delay of the application of any specific obligation in this Agreement, other than Article V:1(b), by an acceding developing

country while that country completes its implementation of the obligation. The implementation period shall be for:

(a) a least-developed country, five years after its accession to this Agreement; and

(b) any other developing country, only the period necessary to implement the specific obligation, but not to exceed three years.

5 Any developing country that has been permitted a period in which to implement an obligation under paragraph 4 shall list in an Annex to its Appendix I the implementation period, the specific obligation subject to the implementation period, and any interim obligation with which it agrees to comply during the implementation period.

6 After this Agreement has entered into force for a developing country, the Committee, on request of the developing country, may:

(a) extend the transition period for a measure permitted under paragraph 3 or the implementation period permitted under paragraph 4; or

(b) approve the application of a new transitional measure permitted under paragraph 3, in special circumstances that were unforeseen during the accession process.

7 A developing country benefiting from a transitional measure provided for in paragraphs 3 or 6, or an implementation period provided for in paragraph 4, or any extension thereof under paragraph 6 shall take such steps during the transition period or implementation period as may be necessary to ensure that it is in compliance with this Agreement at the end of any such period. The developing country shall promptly notify the Committee of such steps.

8 The Parties shall give due consideration to any request by a developing country for technical cooperation and capacity building in relation to that country's accession to, or implementation of, this Agreement.

9 The Committee may develop procedures for the implementation of this Article. Such procedures may include provisions for voting on decisions relating to requests under paragraph 6.

10 The Committee shall review the operation and effectiveness of this Article every five years.

Article V: General Principles

National Treatment and Non-Discrimination

1 With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and

unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to:

(a) domestic goods, services, and suppliers; and
(b) goods, services, and suppliers of any other Party.

2 With respect to any measure regarding covered procurement, a Party, including its procuring entities, shall not:

(a) treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation or ownership; nor
(b) discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of any other Party.

Use of Electronic Means

3 When conducting covered procurement by electronic means, a procuring entity shall:

(a) ensure that the procurement is conducted using information technology systems and software, including those related to authentication and encryption of information, that are generally available and interoperable with other generally available information technology systems and software; and
(b) maintain mechanisms that ensure the integrity of requests for participation and tenders, including establishment of the time of receipt and the prevention of inappropriate access.

Conduct of Procurement

4 A procuring entity shall conduct covered procurement in a transparent and impartial manner that:

(a) is consistent with this Agreement, using methods such as open tendering, selective tendering, and limited tendering;
(b) avoids conflicts of interest; and
(c) prevents corrupt practices.

Rules of Origin

5 For purposes of covered procurement, no Party may apply rules of origin to goods or services imported from or supplied by another Party that are different from the rules of origin the Party applies at the same time in the normal course of trade to imports or supplies of the same goods or services from the same Party.

Offsets

6 With regard to covered procurement, a Party, including its procuring entities, shall not seek, take account of, impose, or enforce offsets.

Measures Not Specific to Procurement

7 The provisions of paragraphs 1 and 2 shall not apply to customs duties and charges of any kind imposed on, or in connection with, importation, the method of levying such duties and charges, other import regulations or formalities, and measures affecting trade in services other than measures governing covered procurement.

Article VI: Information on the Procurement System

1 Each Party shall:
   (a) promptly publish any law, regulation, judicial decision, administrative ruling of general application, standard contract clauses mandated by law or regulation and incorporated by reference in notices and tender documentation, and procedure regarding covered procurement, and any modifications thereof, in an officially designated electronic or paper medium that is widely disseminated and remains readily accessible to the public; and
   (b) provide an explanation thereof to any Party, on request.
2 Each Party shall list:
   (a) in Appendix II, the electronic or paper media in which the Party publishes the information regarding the Party's procurement system as required by paragraph 1;
   (b) in Appendix III, the electronic or paper media in which the Party publishes the notices required by Articles VII, IX:7, and XVI:2; and
   (c) in Appendix IV, the website address or addresses where the Party publishes:
      (i) its procurement statistics pursuant to Article XVI:5, as a substitute for the submission of the data required under Article XVI:4;
      (ii) its notices concerning awarded contracts pursuant to Article XVI:6, as a substitute for the report required under Article XVI:4.
3 Each Party shall promptly notify the Committee of any modification to the Party's information listed in Appendix II, III, or IV.

Article VII: Notices

Notice of Intended Procurement

1 For each covered procurement, except in the circumstances described in Article III, a procuring entity shall publish a notice of intended procurement in the appropriate paper or electronic medium listed in Appendix III. Such medium shall be widely disseminated and such notices shall remain readily accessible to the public, at least, until expiration of the time period indicated in the notice. The notices shall:
   (a) for procuring entities in Annex 1, be accessible by electronic means free of charge, for at least any minimum period of time specified in Appendix III, through a single point of access; and
   (b) for procuring entities in Annexes 2 and 3, where accessible by electronic means, be provided, at least, through links in a gateway electronic site that is accessible free of charge.

   Parties, including their procuring entities in Annexes 2 and 3, are encouraged to publish their notices by electronic means free of charge through a single point of access.

2 Except as otherwise provided in this Agreement, each notice of intended procurement shall include:
   (a) the name and address of the procuring entity and other information necessary to contact the procuring entity and obtain all relevant documents relating to the procurement, and their cost and terms of payment, if any;
   (b) a description of the procurement, including the nature and the quantity of the goods or services to be procured or, where the quantity is not known, the estimated quantity;
   (c) for recurring contracts, if possible, an estimate of the timing of subsequent notices of intended procurement;
   (d) a description of any options;
   (e) the time-frame for delivery of goods or services or the duration of the contract;
   (f) the procurement method that will be used and whether it will involve negotiation or electronic auction;
   (g) where applicable, the address and any final date for the submission of requests for participation in the procurement;
   (h) the address and the final date for the submission of tenders;
   (i) the language or languages in which tenders or requests for participation must be submitted, if other than an official language of the Party of the procuring entity;

(j) a list and brief description of any conditions for participation of suppliers, including any requirements for specific documents or certifications to be provided by suppliers in connection therewith, unless such requirements are included in tender documentation that is made available to all interested suppliers at the same time as the notice of intended procurement;

(k) where, pursuant to Article IX, a procuring entity intends to select a limited number of qualified suppliers to be invited to tender, the criteria that will be used to select them and, where applicable, any limitation on the number of suppliers that will be permitted to tender; and

(l) an indication that the procurement is covered by this Agreement.

Summary Notice

3 For each case of intended procurement, a procuring entity shall publish a summary notice that is readily accessible, at the same time as the publication of the notice of intended procurement, in one of the WTO languages. The notice shall contain at least the following information:

(a) the subject-matter of the procurement;

(b) the final date for the submission of tenders or, where applicable, any final date for the submission of requests for participation in the procurement or for inclusion on a multi-use list; and

(c) the address from which documents relating to the procurement may be requested.

Notice of Planned Procurement

4 Procuring entities are encouraged to publish in the appropriate paper or electronic medium listed in Appendix III as early as possible in each fiscal year a notice regarding their future procurement plans. The notice should include the subject-matter of the procurement and the planned date of the publication of the notice of intended procurement.

5 A procuring entity in Annex 2 or 3 may use a notice of planned procurement as a notice of intended procurement provided that it includes as much of the information in paragraph 2 as is available and a statement that interested suppliers should express their interest in the procurement to the entity.

Article VIII: Conditions for Participation

1 A procuring entity shall limit any conditions for participation in a procurement to those that are essential to ensure that a supplier has the legal, commercial, technical, and financial abilities to undertake the relevant procurement.
2 In assessing whether a supplier satisfies the conditions for participation, a procuring entity:
   (a) shall evaluate the financial, commercial, and technical abilities of a supplier on the basis of that supplier's business activities both inside and outside the territory of the Party of the procuring entity;
   (b) shall base its determination on the conditions that the procuring entity has specified in advance in notices or tender documentation;
   (c) may not impose the condition that, in order for a supplier to participate in a procurement, the supplier has previously been awarded one or more contracts by a procuring entity of a given Party; and
   (d) may require relevant prior experience where essential to meet the requirements of the procurement.
3 Where there is supporting evidence, a Party, including its procuring entities, may exclude a supplier on grounds such as:
   (a) bankruptcy;
   (b) false declarations;
   (c) significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts;
   (d) final judgments in respect of serious crimes or other serious offences;
   (e) professional misconduct or acts or omissions that adversely reflect upon the commercial integrity of the supplier; or
   (f) failure to pay taxes.

Article IX: Qualification of Suppliers

Registration Systems and Qualification Procedures

1 A Party, including its procuring entities, may maintain a supplier registration system where interested suppliers are required to register and provide certain information.
2 Each Party shall ensure that:
   (a) its procuring entities make efforts to minimize differences in their qualification procedures; and

(b) where its procuring entities maintain registration systems, the entities make efforts to minimize differences in their registration systems.

3 A Party, including its procuring entities, shall not adopt or apply any registration system or qualification procedure with the purpose or the effect of creating unnecessary obstacles to the participation of foreign suppliers in its procurement.

Selective Tendering

4 Where a procuring entity intends to use selective tendering, the entity shall:
   (a) in the notice of intended procurement include at least the information in Article VII:2(a), (b), (f), (g), (j), (k), and (l) and invite suppliers to submit a request for participation; and
   (b) by the commencement of the time-period for tendering, provide at least the information in Article VII:2 (c), (d), (e), (h), and (i) to the qualified suppliers that it notifies in accordance with Article XI:3(b).

5 A procuring entity shall recognize as a qualified supplier any domestic supplier and any supplier of another Party that meets the conditions for participation in a particular procurement, unless the procuring entity states in the notice of intended procurement any limitation on the number of suppliers that will be permitted to tender and the criteria for selecting the limited number of suppliers.

6 Where the tender documentation is not made publicly available from the date of publication of the notice referred to in paragraph 4, a procuring entity shall ensure that those documents are made available at the same time to all the qualified suppliers selected in accordance with paragraph 5.

Multi-Use Lists

7 A procuring entity may maintain a multi-use list of suppliers, provided that a notice inviting interested suppliers to apply for inclusion on the list is:
   (a) published annually; and
   (b) where published by electronic means, made available continuously, in the appropriate medium listed in Appendix III.

8 The notice provided for in paragraph 7 shall include:
   (a) a description of the goods or services, or categories thereof, for which the list may be used;

(b) the conditions for participation to be satisfied by suppliers and the methods that the procuring entity will use to verify a supplier's satisfaction of the conditions;
(c) the name and address of the procuring entity and other information necessary to contact the entity and obtain all relevant documents relating to the list;
(d) the period of validity of the list and the means for its renewal or termination, or where the period of validity is not provided, an indication of the method by which notice will be given of the termination of use of the list; and
(e) an indication that the list may be used for procurement covered by this Agreement.

9 Notwithstanding paragraph 7, where a multi-use list will be valid for three years or less, a procuring entity may publish the notice referred to in paragraph 7 only once, at the beginning of the period of validity of the list, provided that the notice:
(a) states the period of validity and that further notices will not be published; and
(b) is published by electronic means and is made available continuously during the period of its validity.

10 A procuring entity shall allow suppliers to apply at any time for inclusion on a multi-use list and shall include on the list all qualified suppliers within a reasonably short time.

11 Where a supplier that is not included on a multi-use list submits a request for participation in a procurement based on a multi-use list and all required documents relating thereto, within the time-period provided for in Article XI:2, a procuring entity shall examine the request. The procuring entity may not exclude the supplier from consideration in respect of the procurement on the grounds that the entity has insufficient time to examine the request, unless, in exceptional cases, due to the complexity of the procurement, the entity is not able to complete the examination of the request within the time-period allowed for the submission of tenders.

Annexes 2 and 3 Entities

12 A procuring entity listed in Annex 2 or 3 may use a notice inviting suppliers to apply for inclusion on a multi-use list as a notice of intended procurement, provided that:
(a) the notice is published in accordance with paragraph 7 and includes the information in paragraph 8, as much of the information in Article VII:2 as is available, and a statement that it

constitutes a notice of intended procurement or that only the suppliers on the multi-use list will receive further notices of procurement covered by the multi-use list;

(b) the entity promptly provides to suppliers that have expressed an interest to the entity in a given procurement, sufficient information to permit them to assess their interest in the procurement, including all remaining information required in Article VII:2, to the extent such information is available; and

(c) a supplier having applied for inclusion on a multi-use list in accordance with paragraph 10 may be allowed to tender in a given procurement, where there is sufficient time for the procuring entity to examine whether it satisfies the conditions for participation.

Information on Procuring Entity Decisions

13 A procuring entity shall promptly inform any supplier that submits a request for participation or application for inclusion on a multi-use list of the procuring entity's decision with respect to the request.

14 Where a procuring entity rejects a supplier's request for participation or application for inclusion on a multi-use list, ceases to recognize a supplier as qualified, or removes a supplier from a multi-use list, the entity shall promptly inform the supplier and, on request of the supplier, promptly provide the supplier with a written explanation of the reasons for its decision.

Article X: Technical Specifications and Tender Documentation

Technical Specifications

1 A procuring entity shall not prepare, adopt, or apply any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of creating unnecessary obstacles to international trade.

2 In prescribing the technical specifications for the goods or services being procured, a procuring entity shall, where appropriate:

(a) specify the technical specification in terms of performance and functional requirements, rather than design or descriptive characteristics; and

(b) base the technical specification on international standards, where such exist; otherwise, on national technical regulations, recognized national standards, or building codes.

3 Where design or descriptive characteristics are used in the technical specifications, a procuring entity should indicate, where appropriate, that it will consider tenders of equivalent goods or services that demonstrably fulfil the requirements of the procurement by including words such as 'or equivalent' in the tender documentation.
4 A procuring entity shall not prescribe technical specifications that require or refer to a particular trademark or trade name, patent, copyright, design, type, specific origin, producer, or supplier, unless there is no other sufficiently precise or intelligible way of describing the procurement requirements and provided that, in such cases, the entity includes words such as 'or equivalent' in the tender documentation.
5 A procuring entity shall not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in the procurement.
6 For greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt, or apply technical specifications to promote the conservation of natural resources or protect the environment.

Tender Documentation

7 A procuring entity shall provide to suppliers tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders. Unless already provided in the notice of intended procurement, such documentation shall include a complete description of:
   (a) the procurement, including the nature and the quantity of the goods or services to be procured or, where the quantity is not known, the estimated quantity and any requirements to be fulfilled, including any technical specifications, conformity assessment certification, plans, drawings, or instructional materials;
   (b) any conditions for participation of suppliers, including a list of information and documents that suppliers are required to submit in connection therewith;
   (c) all evaluation criteria to be considered in the awarding of the contract, and, except where price is the sole criterion, the relative importance of such criteria;
   (d) where the procuring entity will conduct the procurement by electronic means, any authentication and encryption requirements

or other requirements related to the receipt of information by electronic means;

(e) where the procuring entity will hold an electronic auction, the rules, including identification of the elements of the tender related to the evaluation criteria, on which the auction will be conducted;

(f) where there will be a public opening of tenders, the date, time, and place for the opening and, where appropriate, the persons authorized to be present;

(g) any other terms or conditions, including terms of payment and any limitation on the means by which tenders may be submitted, e.g., paper or electronic means; and

(h) any dates for the delivery of goods or the supply of services.

8 In establishing any delivery date for the goods or services being procured, a procuring entity shall take into account such factors as the complexity of the procurement, the extent of subcontracting anticipated and the realistic time required for production, de-stocking and transport of goods from the point of supply or for supply of services.

9 The evaluation criteria set out in the notice or tender documentation may include, among others, price and other cost factors, quality, technical merit, environmental characteristics, and terms of delivery.

10 A procuring entity shall promptly:

(a) make available tender documentation to ensure that interested suppliers have sufficient time to submit responsive tenders;

(b) provide, on request, the tender documentation to any interested supplier; and

(c) reply to any reasonable request for relevant information by any interested or participating supplier, provided that such information does not give that supplier an advantage over other suppliers.

Modifications

11 Where, prior to the award of a contract, a procuring entity modifies the criteria or technical requirements set out in a notice or tender documentation provided to participating suppliers, or amends or reissues a notice or tender documentation, it shall transmit in writing all such modifications or amended or re-issued notice or tender documentation:

(a) to all suppliers that are participating at the time the information is amended, if known, and in all other cases, in the same manner as the original information; and

(b) in adequate time to allow such suppliers to modify and re-submit amended tenders, as appropriate.

Article XI: Time-Periods

General

1 A procuring entity shall, consistent with its own reasonable needs, provide sufficient time for suppliers to prepare and submit requests for participation and responsive tenders, taking into account such factors as:
   (a) the nature and complexity of the procurement;
   (b) the extent of subcontracting anticipated; and
   (c) the time for transmitting tenders from foreign as well as domestic points where electronic means are not used.

   Such time-periods, including any extension of the time-periods, shall be common for all interested or participating suppliers.

Deadlines

2 A procuring entity that uses selective tendering shall establish that the final date for the submission of requests for participation shall not, in principle, be less than 25 days from the date of publication of the notice of intended procurement. Where a state of urgency duly substantiated by the procuring entity renders this time-period impracticable, the time-period may be reduced to not less than 10 days.

3 Except as provided for in paragraphs 4 and 5, a procuring entity shall establish that the final date for the submission of tenders shall not be less than 40 days from the date on which:
   (a) in the case of open tendering, the notice of intended procurement is published; or
   (b) in the case of selective tendering, the entity notifies suppliers that they will be invited to submit tenders, whether or not it uses a multi-use list.

4 A procuring entity may reduce the time-period for tendering set out in paragraph 3 to not less than 10 days where:
   (a) the procuring entity published a notice of planned procurement under Article VII:4 at least 40 days and not more than 12 months in advance of the publication of the notice of intended procurement, and the notice of planned procurement contains:
      (i) a description of the procurement;
      (ii) the approximate final dates for the submission of tenders or requests for participation;

(iii) a statement that interested suppliers should express their interest in the procurement to the procuring entity;
(iv) the address from which documents relating to the procurement may be obtained; and
(v) as much of the information that is required under Article VII:2 for the notice of intended procurement, as is available;

(b) the procuring entity, for procurements of a recurring nature, indicates in an initial notice of intended procurement that subsequent notices will provide time periods for tendering based on this paragraph; or
(c) a state of urgency duly substantiated by the procuring entity renders such time-period impracticable.

5 A procuring entity may reduce the time-period for tendering set out in paragraph 3 by five days for each one of the following circumstances:
(a) the notice of intended procurement is published by electronic means;
(b) all the tender documentation is made available by electronic means from the date of the publication of the notice of intended procurement; and
(c) the tenders can be received by electronic means by the procuring entity.

6 The use of paragraph 5, in conjunction with paragraph 4, shall in no case result in the reduction of the time-period for tendering set out in paragraph 3 to less than 10 days from the date on which the notice of intended procurement is published.

7 Notwithstanding any other time-period in this Article, where a procuring entity purchases commercial goods or services, it may reduce the time-period for tendering set out in paragraph 3 to not less than 13 days, provided that it publishes by electronic means, at the same time, both the notice of intended procurement and the tender documentation. Where the entity also accepts tenders for commercial goods and services by electronic means, it may reduce the time period set out in paragraph 3 to not less than 10 days.

8 Where a procuring entity in Annex 2 or 3 has selected all or a limited number of qualified suppliers, the time-period for tendering may be fixed by mutual agreement between the procuring entity and the selected suppliers. In the absence of agreement, the period shall not be less than 10 days.

Article XI: Negotiation

1 A Party may provide for its procuring entities to conduct negotiations:
   (a) in the context of procurements in which they have indicated such intent in the notice of intended procurement required under Article VII:2; or
   (b) where it appears from the evaluation that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set out in the notice or tender documentation.
2 A procuring entity shall:
   (a) ensure that any elimination of suppliers participating in negotiations is carried out in accordance with the evaluation criteria set out in the notice or tender documentation; and
   (b) where negotiations are concluded, provide a common deadline for the remaining participating suppliers to submit any new or revised tenders.

Article XIII: Limited Tendering

1 Provided that it does not use this provision for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of the other Parties or protects domestic suppliers, a procuring entity may use limited tendering and may choose not to apply Articles VII through IX, X (paragraphs 7 through 11), XI, XII, XIV, and XV only under the following circumstances:
   (a) provided that the requirements of the tender documentation are not substantially modified where:
      (i) no tenders were submitted or no suppliers requested participation;
      (ii) no tenders that conform to the essential requirements of the tender documentation were submitted;
      (iii) no suppliers satisfied the conditions for participation; or
      (iv) the tenders submitted have been collusive;
   (b) where the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute goods or services exist for any of the following reasons:
      (i) the requirement is for a work of art;
      (ii) the protection of patents, copyrights or other exclusive rights; or
      (iii) due to an absence of competition for technical reasons;

(c) for additional deliveries by the original supplier of goods and services that were not included in the initial procurement where:
  (i) a change of supplier for such additional goods and services can not be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services, or installations procured under the initial procurement; and
  (ii) such separation would cause significant inconvenience or substantial duplication of costs to the procuring entity;

(d) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering or selective tendering;

(e) for goods purchased on a commodity market;

(f) where a procuring entity procures a prototype or a first good or service that is developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. Original development of a first good or service may include limited production or supply in order to incorporate the results of field testing and to demonstrate that the good or service is suitable for production or supply in quantity to acceptable quality standards, but does not include quantity production, or supply to establish commercial viability, or to recover research and development costs;

(g) for purchases made under exceptionally advantageous conditions that only arise in the very short term in the case of unusual disposals such as those arising from liquidation, receivership, or bankruptcy, but not for routine purchases from regular suppliers; and

(h) where a contract is awarded to a winner of a design contest provided that:
  (i) the contest has been organized in a manner that is consistent with the principles of this Agreement, in particular relating to the publication of a notice of intended procurement; and
  (ii) the participants are judged by an independent jury with a view to a design contract being awarded to a winner.

2 A procuring entity shall prepare a report in writing on each contract awarded under paragraph 1. Each such report shall include the name of the procuring entity, the value and kind of goods or

services procured, and a statement indicating the circumstances and conditions described in paragraph 1 that justified the use of limited tendering.

Article XIV: Electronic Auctions

Where a procuring entity intends to conduct a covered procurement using an electronic auction, the entity shall provide each participant, before commencing the electronic auction, with:

(a) the automatic evaluation method, including the mathematical formula, that is based on the evaluation criteria set out in the tender documentation and that will be used in the automatic ranking or re-ranking during the auction;
(b) the results of any initial evaluation of the elements of its tender where the contract is to be awarded on the basis of the most advantageous tender; and
(c) any other relevant information relating to the conduct of the auction.

Article XV: Treatment of Tenders and Contract Awards

Treatment of Tenders

1 A procuring entity shall receive, open, and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process, and the confidentiality of tenders.
2 A procuring entity shall not penalize any supplier whose tender is received after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the procuring entity.
3 When a procuring entity provides suppliers with opportunities to correct unintentional errors of form between the opening of tenders and the awarding of the contract, the procuring entity shall provide the same opportunities to all participating suppliers.

Awarding of Contracts

4 To be considered for award, a tender must be in writing and must, at the time of opening, comply with the essential requirements of the notices and tender documentation and be from a supplier that satisfies the conditions for participation.
5 Unless a procuring entity determines that it is not in the public interest to award a contract, it shall award the contract to the supplier that the entity has determined to be fully capable of undertaking

the contract and, based solely on the evaluation criteria specified in the notices and tender documentation, has submitted:
(a) the most advantageous tender; or
(b) where price is the sole criterion, the lowest price.

6 Where a procuring entity receives a tender with a price that is abnormally lower than the prices in other tenders submitted, it may verify with the supplier that it can comply with the conditions of participation and is capable of fulfilling the terms of the contract.

7 A procuring entity shall not use option clauses, cancel a procurement, or modify awarded contracts in a manner that circumvents the obligations of this Agreement.

Article XVI: Transparency of Procurement Information

Information Provided to Suppliers

1 A procuring entity shall promptly inform participating suppliers of the entity's contract award decisions and, on request, in writing. Subject to Article XVII, a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons that the entity did not select its tender and the relative advantages of the successful supplier's tender.

Publication of Award Information

2 Not later than 72 days after the award of each contract covered by this Agreement, a procuring entity shall publish a notice in the appropriate paper or electronic medium listed in Appendix III. Where only an electronic medium is used, the information shall remain readily accessible for a reasonable period of time. The notice shall include at least the following information:
(a) a description of the goods or services procured;
(b) the name and address of the procuring entity;
(c) the name and address of the successful supplier;
(d) the value of the successful tender or the highest and lowest offers taken into account in the award of the contract;
(e) the date of award; and
(f) the type of procurement method used, and in cases where limited tendering was used pursuant to Article XIII, a description of the circumstances justifying the use of limited tendering.

Maintenance of Documentation, Reports, and Electronic Traceability

3 Each procuring entity shall, for a period of at least three years from the award of the contract maintain:
   (a) documentation and reports of tendering procedures and contract awards relating to covered procurement, including the reports required under Article XIII; and
   (b) data that ensure the appropriate traceability of the conduct of covered procurement by electronic means.

Collection and Report of Statistics

4 Each Party shall collect and report to the Committee statistics on its contracts covered by this Agreement. Each report shall cover one year and be submitted within two years of the end of the reporting period, and shall contain:
   (a) for Annex 1 procuring entities:
      (i) the number and total value, for all such entities, of contracts covered by this Agreement;
      (ii) the number and total value of all contracts covered by this Agreement awarded by such entities, broken down by categories of goods and services according to an internationally recognized uniform classification system; and
      (iii) the number and total value of contracts covered by this Agreement awarded by each such entity under limited tendering;
   (b) for Annex 2 and 3 procuring entities, the number and total value of contracts covered by this Agreement awarded by all such entities, broken down by Annex; and
   (c) estimates for the information required under subparagraphs (a) and (b), with an explanation of the methodology used to develop the estimates, where it is not feasible to provide the data.

5 Where a Party publishes its statistics on an official website, the Party may substitute a notification of the website address for the submission of the data under paragraph 4, with any instructions necessary to access and use such statistics, in accordance with the requirements of paragraph 4.

6 Where a Party requires notices concerning awarded contracts, pursuant to paragraph 2, to be published electronically and where such notices are accessible to the public through a single database in a form permitting analysis of the covered contracts, the Party may

substitute a notification of the website address for the submission of the data under paragraph 4, with any instructions necessary to access and use such data.

Article XVII: Disclosure of Information

Provision of Information to Parties

1 On request of any other Party, a Party shall provide promptly any information necessary to determine whether a procurement was conducted fairly, impartially and in accordance with this Agreement, including information on the characteristics and relative advantages of the successful tender. In cases where release of the information would prejudice competition in future tenders, the Party that receives that information shall not disclose it to any supplier, except after consultation with, and agreement of, the Party that provided the information.

Non-Disclosure of Information

2 Notwithstanding any other provision of this Agreement, a Party, including its procuring entities, may not provide information to a particular supplier that might prejudice fair competition between suppliers.

3 Nothing in this Agreement shall be construed to require a Party, including its procuring entities, authorities, and review bodies, to release confidential information under this Agreement where release:

(a) would impede law enforcement;
(b) might prejudice fair competition between suppliers;
(c) would prejudice the legitimate commercial interests of particular persons, including the protection of intellectual property; or
(d) would otherwise be contrary to the public interest.

Article XVIII: Domestic Review Procedures for Supplier Challenges

1 Each Party shall provide a timely, effective, transparent, and non-discriminatory administrative or judicial review procedure through which a supplier may challenge:

(a) a breach of the Agreement; or

(b) where the supplier does not have a right to challenge directly a breach of the Agreement under the domestic law of a Party, a failure to comply with a Party's measures implementing this Agreement,arising in the context of a covered procurement, in which it has, or has had, an interest. The procedural rules for all challenges shall be in writing and made generally available.

2 In the event of a complaint by a supplier, arising in the context of covered procurement in which the supplier has, or has had, an interest, that there has been a breach of this Agreement or, where the supplier does not have a right to challenge directly a breach of this Agreement under the domestic law of a Party, a failure to comply with a Party's measures implementing this Agreement, each Party shall encourage the procuring entity and supplier to seek resolution of the complaint through consultations. The procuring entity shall accord impartial and timely consideration to any such complaint in a manner that is not prejudicial to the supplier's participation in ongoing or future procurement or right to seek corrective measures under the administrative or judicial review procedure.

3 Each supplier shall be allowed a sufficient period of time to prepare and submit a challenge, which in no case shall be less than 10 days from the time when the basis of the challenge became known or reasonably should have become known to the supplier.

4 Each Party shall establish or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of a covered procurement.

5 Where a body other than an authority referred to in paragraph 4 initially reviews a challenge, the Party shall ensure that the supplier may appeal the initial decision to an impartial administrative or judicial authority that is independent of the procuring entity whose procurement is the subject of the challenge.

6 A review body that is not a court shall either be subject to judicial review or have procedures that provide that:

(a) the procuring entity shall respond in writing to the challenge and disclose all relevant documents to the review body;

(b) the participants to the proceedings ("participants") shall have the right to be heard prior to a decision of the review body being made on the challenge;

(c) the participants shall have the right to be represented and accompanied;

(d) the participants shall have access to all proceedings;

(e) the participants shall, have the right to request that the proceedings take place in public and that witnesses may be presented; and

(f) decisions or recommendations relating to supplier challenges shall be provided, in a timely fashion, in writing, with an explanation of the basis for each decision or recommendation.

7 Each Party shall adopt or maintain procedures that provide for:

(a) rapid interim measures to preserve the supplier's opportunity to participate in the procurement. Such interim measures may result in suspension of the procurement process. The procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether such measures should be applied. Just cause for not acting shall be provided in writing; and

(b) where a review body has determined that there has been a breach of this Agreement or, where the supplier does not have a right to challenge directly a breach of this Agreement under the domestic law of a Party, a failure by a procuring entity to comply with a Party's measures implementing this Agreement, corrective action or compensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both.

Article XIX: Modifications and Rectifications to Coverage

Notification of Proposed Modification

1 A Party shall notify the Committee of any proposed rectification, transfer of an entity from one Annex to another, withdrawal of an entity, or other modification (referred to generally in this Article as 'modification') of Appendix I. The Party proposing the modification ('modifying Party') shall include in the notification:

(a) for any proposed withdrawal of an entity from Appendix I in exercise of its rights on the grounds that government control or influence over the entity's covered procurement has been effectively eliminated, evidence of such elimination; or

(b) for any other proposed modification, information as to the likely consequences of the change for the mutually agreed coverage provided in this Agreement.

Objection to Notification

2 Any Party whose rights under this Agreement may be affected by a proposed modification notified under paragraph 1 may notify the Committee of any objection to the proposed modification. Such objections shall be made within 45 days from the date of the circulation to the Parties of the notification, and shall set out reasons for the objection.

Consultations

3 The modifying Party and any Party making an objection ('objecting Party') shall make every attempt to resolve the objection through consultations. In such consultations, the modifying and objecting Parties shall consider the proposed modification:

(a) in the case of a notification under paragraph 1(a), in accordance with any indicative criteria adopted pursuant to paragraph 8 indicating the effective elimination of government control or influence over an entity's covered procurement; and

(b) in the case of a notification under paragraph 1(b), in accordance with any criteria adopted pursuant to paragraph 8 relating to the level of compensatory adjustments to be offered for modifications, with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage provided in this Agreement.

Revised Modification

4 Where the modifying Party and any objecting Party resolve the objection through consultations, and the modifying Party revises its proposed modification as a result of those consultations, the modifying Party shall notify the Committee in accordance with paragraph 1, and any such revised modification shall only be effective after fulfilling the requirements of this Article.

Implementation of Modifications

5 A proposed modification shall become effective only where:

(a) no Party submits to the Committee a written objection to the proposed modification within 45 days from the date of circulation of the notification of the proposed modification under paragraph 1;

(b) all objecting Parties have notified the Committee that they withdraw their objections to the proposed modification; or

(c) 150 days from the date of circulation of the notification of the proposed modification under paragraph 1 have elapsed, and the modifying Party has informed the Committee of its intention to implement the modification.

Withdrawal of Substantially Equivalent Coverage

6 Where a modification becomes effective pursuant to paragraph 5(c), any objecting Party may withdraw substantially equivalent coverage. Notwithstanding Article V:1(b), a withdrawal pursuant to this paragraph may be implemented solely with respect to the modifying Party. Any objecting Party shall inform the Committee of any such withdrawal at least 30 days before the withdrawal becomes effective. A withdrawal pursuant to this paragraph shall be consistent with any criteria relating to the level of compensatory adjustment adopted by the Committee pursuant to paragraph 8.

Arbitration Procedures to Facilitate Resolution of Objections

7 Where the Committee has adopted arbitration procedures to facilitate the resolution of objections pursuant to paragraph 8, a modifying or any objecting Party may invoke the arbitration procedures within 120 days of circulation of the notification of the proposed modification.

(a) Where no Party has invoked the arbitration procedures within the time-period:

(i) notwithstanding paragraph 5(c), the proposed modification shall become effective where 130 days from the date of circulation of the notification of the proposed modification under paragraph 1 have elapsed, and the modifying Party has informed the Committee of its intention to implement the modification; and

(ii) no objecting Party may withdraw coverage pursuant to paragraph 6.

(b) Where a modifying Party or objecting Party has invoked the arbitration procedures:

(i) notwithstanding paragraph 5(c), the proposed modification shall not become effective before the completion of the arbitration procedures;

(ii) any objecting Party that intends to enforce a right to compensation, or to withdraw substantially equivalent coverage pursuant to paragraph 6, shall participate in the arbitration proceedings;

(iii) a modifying Party should comply with the results of the arbitration procedures in making any modification effective pursuant to paragraph 5(c); and

(iv) where a modifying Party does not comply with the results of the arbitration procedures in making any modification effective pursuant to paragraph 5(c), any objecting Party may withdraw substantially equivalent coverage pursuant to paragraph 6, provided that any such withdrawal is consistent with the result of the arbitration procedures.

Committee Responsibilities

8 The Committee shall adopt:

(a) arbitration procedures to facilitate resolution of objections under paragraph 2:

(b) indicative criteria that demonstrate the effective elimination of government control or influence over an entity's covered procurement; and

(c) criteria that indicate how to determine the level of compensatory adjustment to be offered for modifications made pursuant to paragraph 1(b) and substantially equivalent coverage under paragraph 6.

Article XX: Consultations and Dispute Settlement

1 Each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for, consultation regarding such representations as may be made by another Party with respect to any matter affecting the operation of this Agreement.

2 Where any Party considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the attainment of any objective of this Agreement is being impeded as the result of:

(a) the failure of another Party or Parties to carry out its obligations under this Agreement; or

(b) the application by another Party or Parties of any measure, whether or not it conflicts with the provisions of this Agreement,

it may with a view to reaching a mutually satisfactory solution to the matter, have recourse to the provisions of the Understanding on

Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as 'the Dispute Settlement Understanding').

3 The Dispute Settlement Understanding applies to consultations and the settlement of disputes under this Agreement, with the exception that, notwithstanding paragraph 3 of Article 22 of the Dispute Settlement Understanding, any dispute arising under any Agreement listed in Appendix 1 to the Dispute Settlement Understanding other than this Agreement shall not result in the suspension of concessions or other obligations under this Agreement, and any dispute arising under this Agreement shall not result in the suspension of concessions or other obligations under any other Agreement listed in Appendix 1 of the Dispute Settlement Understanding.

Article XXI: Institutions

Committee on Government Procurement

1 A Committee on Government Procurement composed of representatives from each of the Parties shall be established. This Committee shall elect its own Chairman and shall meet as necessary, but not less than once a year, for the purpose of affording Parties the opportunity to consult on any matters relating to the operation of this Agreement or the furtherance of its objectives, and to carry out such other responsibilities as may be assigned to it by the Parties.

2 The Committee may establish working parties or other subsidiary bodies that shall carry out such functions as may be given to them by the Committee.

3 The Committee shall annually:

(a) review the implementation and operation of this Agreement; and

(b) inform the General Council of the WTO of developments relating to the implementation and operation of this Agreement.

Observers

4 Any WTO Member that is not a Party to this Agreement shall be entitled to participate in the Committee as an observer upon submission of a written notice to the Secretariat. Any WTO observer may submit a written request to the Secretariat to participate in the Committee as an observer, and may be accorded observer status by the Committee.

Article XXII: Final Provisions

Acceptance and Entry into Force

1 This Agreement shall enter into force on [] for those WTO Members whose agreed coverage is set out in Annexes 1 through 6 of Appendix I, and that have, by signature, accepted this Agreement on [], or have, by or on that date, signed this Agreement subject to ratification and have subsequently ratified this Agreement before [].

Transitional Arrangements

2 Between the Parties to this Agreement that are also Parties to the Agreement on Government Procurement dated 15 April 1994 ('1994 Agreement'), the 1994 Agreement shall cease to apply on the date of entry into force of this Agreement for those Parties. When all Parties to the 1994 Agreement have accepted this Agreement, the 1994 Agreement shall be terminated.[3]

3 The provisions of Articles XVIII and XX of this Agreement shall apply to covered procurement that has commenced after the entry into force of this Agreement.[4]

Provisional Application

4 A Party to the 1994 Agreement may, notwithstanding its commitments in the 1994 Agreement, maintain or adopt any measure that is consistent with the provisions of this Agreement.[5]

Accession

5 Any Member of the WTO may accede to this Agreement on terms to be agreed between that Member and the Parties. Accession shall take place by deposit with the Director-General of the WTO of an instrument of accession that states the terms so agreed. This Agreement shall enter into force for an acceding Member on the 30th day following the deposit of its instrument of accession the date of its accession to this Agreement.[6]

Reservations

6 No Party may enter any reservation in respect of any provisions of this Agreement.

National Legislation

7 Each Party shall ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures, and the rules, procedures, and

practices applied by its procuring entities, with the provisions of this Agreement.

8 Each Party shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

9 The Parties shall seek to avoid introducing or continuing discriminatory measures and practices that distort open procurement.

Future Work

10 Not later than the end of [...] from the date of entry into force of this Agreement, and periodically thereafter, the Parties thereto shall undertake further negotiations, with a view to improving the Agreement and achieving the greatest possible extension of its coverage among all Parties, taking into consideration the needs of developing countries.[7]

11 The Parties shall, in the context of the negotiations referred to in paragraph 10, seek to eliminate discriminatory measures which remain on the date of entry into force of this Agreement.[8]

12 Following the conclusion of the work programme for the harmonization of rules of origin for goods being undertaken under the Agreement on Rules of Origin in Annex 1A of the Agreement Establishing the World Trade Organization and negotiations regarding trade in services, the Parties shall take the results of that work programme and those negotiations into account in amending Article V:5, as appropriate.

13 Not later than the end of the third year from the date of entry into force of this Agreement, the Committee shall undertake further work to consider the advantages and disadvantages of developing common nomenclature for goods and services and standardized notices

14 Beginning two years after entry into force of this Agreement, the Committee shall regularly assess the effective use of Articles XVI:4 and 5.

15 Not later than the end of the fifth year from the date of entry into force of this Agreement, the Committee shall examine the applicability of Article XX:2(b).

Amendments

16 The Parties may amend this Agreement having regard, *inter alia*, to the experience gained in its implementation. Such an amendment, once the Parties have concurred in accordance with the procedures

established by the Committee, shall take effect for the Parties that have accepted them upon acceptance by [] of the Parties and thereafter for each other Party upon acceptance by it.[9]

17 Amendments to provisions of this Agreement of a nature that would alter the rights and obligations of the Parties, shall take effect for the Parties that have accepted them upon acceptance by [ ] of the Parties and thereafter for each other Party upon acceptance by it. The Committee may decide by a [...] majority of the Parties that any amendment made effective under paragraph 16 is of such a nature that any Party which has not accepted it within a specified period shall be free to withdraw from this Agreement or to remain with the consent of the Committee.[10]

18 Amendments to provisions of this Agreement of a nature that would not alter the rights and obligations of the Parties shall take effect for all Parties upon acceptance by [...] of the Parties.[11]

Withdrawal

19 Any Party may withdraw from this Agreement. The withdrawal shall take effect upon the expiration of 60 days from the date the Director-General of the WTO receives written notice of the withdrawal. Any Party may upon such notification request an immediate meeting of the Committee.

20 Where a Party to this Agreement ceases to be a Member of the WTO, it shall cease to be a Party to this Agreement with effect from the same date on which the Party ceases to be a Member of the WTO.

Non-application of this Agreement between Particular Parties

21 This Agreement shall not apply as between any two Parties where either Party, at the time it accepts or accedes to this Agreement, does not consent to such application.

Appendices

22 The Appendices to this Agreement constitute an integral part thereof.

Secretariat

23 This Agreement shall be serviced by the WTO Secretariat.

Deposit

24 This Agreement shall be deposited with the Director-General of the WTO, who shall promptly furnish to each Party a certified

true copy of this Agreement, of each rectification or modification thereto pursuant to Article XIX and of each amendment thereto pursuant to paragraph 16, and a notification of each accession thereto pursuant to paragraph 5 and of each withdrawal therefrom pursuant to paragraph 19.

Registration

25 This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Done at [] this [] day of [] in a single copy in the English, French and Spanish languages, each text being authentic, except as otherwise specified with respect to the Appendices hereto.

[(Draft decision)]

Arrangement for the period of co-existence of the 1994 Agreement on Government

Procurement and the [2007] Agreement on Government Procurement[12]

The Committee on Government Procurement,

Noting that not all Parties to the Agreement on Government Procurement dated 15 April 1994 (hereinafter referred to as the '1994 Agreement') may become a Party to the Agreement on Government Procurement done on [...2007] (hereinafter referred to as the '2007 Agreement') as of its date of entry into force,

Considering that, during the period of co-existence of the 1994 Agreement and the 2007 Agreement, a Party to the 1994 Agreement which has become a Party to the 2007 Agreement should have the right to act in accordance with the provisions of the 2007 Agreement notwithstanding any inconsistency with the provisions of the 1994 Agreement, *vis-à-vis* Parties to the 1994 Agreement that are not Parties to the 2007 Agreement,

Considering moreover that, during that period of co-existence, a Party to the 1994 Agreement which has become a Party to the 2007 Agreement should not be under a legal obligation to extend the benefits accorded solely under the 2007 Agreement to the Parties of the 1994 Agreement which have not yet become Parties to the 2007 Agreement.

Decides as follows:

1 A Party to the 1994 Agreement that is a Party to the 2007 Agreement may maintain or adopt any measure consistent with the provisions of the 2007 Agreement, notwithstanding the provisions of the 1994

Agreement, *vis-à-vis* a Party to the 1994 Agreement that is not a Party to the 2007 Agreement until the entry into force for that Party to the 2007 Agreement.

2 A Party to the 1994 Agreement that is a Party to the 2007 Agreement is not under any obligation to accord to goods, services and suppliers of any other Party to the 1994 Agreement that has not yet become a Party to the 2007 Agreement the benefits accorded solely as a result of the commitments or other obligations assumed under the 2007 Agreement.
3 The provisions of Articles XX and XXII of the 1994 Agreement shall not apply in respect of measures referred to in paragraph 1.
4 This Decision shall enter into force on the date of entry into force of the 2007 Agreement.

Proposed Decision of the Committee on Government Procurement

Decision of [day/month/year]

The Committee on Government Procurement,

Noting that the Parties to the GPA have completed negotiations on [the non-market-access-related provisions of] a new Government Procurement Agreement (hereinafter referred to as the '2007 Agreement');

Desiring to ensure the effective operation of Article XIX:1(a) of the 2007 Agreement where a Party proposes the withdrawal of an entity from Appendix I in exercise of its rights, and to enhance the predictability of the Agreement;

Noting that Article XIX:8 of the 2007 Agreement requires that the Committee develop arbitration procedures to facilitate resolution of objections, indicative criteria that demonstrate the effective elimination of government control or influence over an entity's covered procurement, and criteria that indicate how to determine the level of compensatory adjustment to be offered for modifications of coverage under Article XIX of the 2007 Agreement;

Recognizing the extensive work already undertaken by the Committee on the development of arbitration procedures to facilitate resolution of objections and indicative criteria, but also that further work is needed,

Decides as follows:

The Committee shall:

1 complete the development of arbitration procedures and indicative criteria, with the aim of adopting them by the entry into force of the 2007 Agreement; and

2 develop criteria that indicate how to determine the level of compensatory adjustment to be offered for modifications of coverage under Article XIX of the 2007 Agreement, with the aim of adopting the criteria within 18 months of entry into force of the 2007 Agreement.

The arbitration procedures shall not become effective until the adoption of the indicative criteria.

Appendix 3

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Negotiating Conference on 21 November 1997

Preamble

The Parties,

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Having regard to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organization for Economic Cooperation and Development (OECD) on 23 May 1997, C(97)123/FINAL, which, *inter alia*, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalisation of such bribery in an effective and coordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country;

Welcoming other recent developments which further advance international understanding and cooperation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organization,

the Organization of American States, the Council of Europe and the European Union;

Welcoming the efforts of companies, business organisations and trade unions as well as other non-governmental organizations to combat bribery;

Recognizing the role of governments in the prevention of solicitation of bribes from individuals and enterprises in international business transactions;

Recognizing that achieving progress in this field requires not only efforts on a national level but also multilateral cooperation, monitoring and follow-up;

Recognizing that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence;

Have agreed as follows:

Article 1

The Offence of Bribery of Foreign Public Officials

1 Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

2 Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

3 The offences set out in paragraphs 1 and 2 above are hereinafter referred to as 'bribery of a foreign public official'.

4 For the purpose of this Convention:

(a) 'foreign public official' means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function

for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;

(b) 'foreign country' includes all levels and subdivisions of government, from national to local;

(c) 'act or refrain from acting in relation to the performance of official duties' includes any use of the public official's position, whether or not within the official's authorised competence.

Article 2

Responsibility of Legal Persons

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

Article 3

Sanctions

1 The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.

2 In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.

3 Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.

4 Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

Article 4

Jurisdiction

1 Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.
2 Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.
3 When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.
4 Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

Article 5

Enforcement

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

Article 6

Statute of Limitations

Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

Article 7

Money Laundering

Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a

foreign public official, without regard to the place where the bribery occurred.

Article 8

Accounting

1 In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.
2 Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

Article 9

Mutual Legal Assistance

1 Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.
2 Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.
3 A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

Article 10

Extradition

1 Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them.
2 If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official.
3 Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.
4 Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention.

Article 11

Responsible Authorities

For the purposes of Article 4, paragraph 3, on consultation, Article 9, on mutual legal assistance and Article 10, on extradition, each Party shall notify to the Secretary-General of the OECD an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication for these matters for that Party, without prejudice to other arrangements between Parties.

Article 12

Monitoring and Follow-up

The Parties shall cooperate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this

shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body.

Article 13

Signature and Accession

1 Until its entry into force, this Convention shall be open for signature by OECD Members and by Non-Members which have been invited to become full participants in its Working Group on Bribery in International Business Transactions.
2 Subsequent to its entry into force, this Convention shall be open to accession by any non-signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery in International Business Transactions or any successor to its functions. For each such non-signatory, the Convention shall enter into force on the sixtieth day following the date of deposit of its instrument of accession.

Article 14

Ratification and Depositary

1 This Convention is subject to acceptance, approval or ratification by the Signatories, in accordance with their respective laws.
2 Instruments of acceptance, approval, ratification or accession shall be deposited with the Secretary-General of the OECD, who shall serve as Depositary of this Convention.

Article 15

Entry into Force

1 This Convention shall enter into force on the sixtieth day following the date upon which five of the ten countries which have the ten largest export shares set out in DAFFE/IME/BR(97)18/FINAL (annexed), and which represent by themselves at least sixty per cent of the combined total exports of those ten countries, have deposited their instruments of acceptance, approval, or ratification. For each signatory depositing its instrument after such entry into force, the

Convention shall enter into force on the sixtieth day after deposit of its instrument.

2 If, after 31 December 1998, the Convention has not entered into force under paragraph 1 above, any signatory which has deposited its instrument of acceptance, approval or ratification may declare in writing to the Depositary its readiness to accept entry into force of this Convention under this paragraph 2. The Convention shall enter into force for such a signatory on the sixtieth day following the date upon which such declarations have been deposited by at least two signatories. For each signatory depositing its declaration after such entry into force, the Convention shall enter into force on the sixtieth day following the date of deposit.

Article 16

Amendment

Any Party may propose the amendment of this Convention. A proposed amendment shall be submitted to the Depositary which shall communicate it to the other Parties at least sixty days before convening a meeting of the Parties to consider the proposed amendment. An amendment adopted by consensus of the Parties, or by such other means as the Parties may determine by consensus, shall enter into force sixty days after the deposit of an instrument of ratification, acceptance or approval by all of the Parties, or in such other circumstances as may be specified by the Parties at the time of adoption of the amendment.

Article 17

Withdrawal

A Party may withdraw from this Convention by submitting written notification to the Depositary. Such withdrawal shall be effective one year after the date of the receipt of the notification. After withdrawal, cooperation shall continue between the Parties and the Party which has withdrawn on all requests for assistance or extradition made before the effective date of withdrawal which remain pending.

Notes

Introduction

1. The World Bank's 'Procurement Guidelines,' last revised in 2006, were again under revision in 2010 as was the UNCITRAL Model Law. We will re-visit both of these regimes in subsequent chapters.
2. Reference is made here, more precisely, to the resistance that the WTO's developing country members have demonstrated to negotiation of the so-called Singapore issues, including transparency in government procurement. For more detail, see the discussion in Chapter 3.
3. For a thorough discussion of the WTO's fundamental principles of equal treatment, including the most-favoured nation principle as well as national treatment, see Th. Cottier and M. Oesch's *International trade regulation: law and policy in the WTO, European Union and Switzerland*, pp. 346–381 and 382–427.
4. Some lawyers have dealt with this issue as a matter of the 'juridification' or 'judicialization' of politics. See, for example, R. Hirschl's, 'The Judicialization of Politics', in K. E. Whittington, R. D. Kelemen et al. (eds), *The Oxford handbook of law and politics* (Oxford: Oxford University Press, 2008) and G. Teubner, 'Juridification – Concepts, Aspects, Limits, Solutions', in G. Teubner (ed.), *Juridification of social spheres: a comparative analysis in the areas of labor, corporate, antitrust, and social welfare law* (New York: Walter de Gruyter and Co., 1987).
5. Legal scholars describe this process of expansion in terms of what they call the 'internationalization' of public procurement regulation. See the discussion in H. Caroli Casavola, 'Internationalizing public procurement law: conflicting global standards for public procurement', *Global Jurist Advances*, vol. 6 (2006), available at <http://www.bepress.com/gj/advances/vol6/iss3/art7>, 06/09/07.
6. The negotiating objectives of WGTGP – and, indeed, the very definition of 'transparency in government procurement' itself – were the object of considerable controversy, particularly but not exclusively between key developed country GPA members and India, Pakistan, Malaysia and Egypt. See the discussion in S. Arrowsmith, 'Transparency in government procurement: the objectives of regulation and the boundaries of the World Trade Organization', *Journal of World Trade*, vol. 37 (2003).
7. See C. R. Yukins and S. L. Schooner, *Incrementalism: eroding the impediments to a global public procurement market*, Working Paper No. 320 (Geo Washington University Law School Working Paper, 2007) and S. Arrowsmith, 'Reviewing the GPA: the role and development of the plurilateral agreement after Doha', *Journal of International Economic Law*, vol. 5 (2002).
8. These activities are described in detail in the previously-cited OECD publication, *Harmonization, alignment, results: report on progress, challenges and opportunities* (2005), p. 570.
9. See the discussion in the preamble to the OECD DAC's *Harmonising Donor Practices for Effective Aid Delivery – Volume 3: Strengthening Procurement Capacities in Developing Countries*, (2006), p. 1.

10. Priorities of this nature are typically embodied in countries' World Bank/IMF Poverty Reduction Strategies. Later sections of the book will look at the PRS process in more detail and, in particular, its relationship to the national budgeting process and the issue of domestic accountability.
11. Author's interview with Swiss delegate to the WTO in Berne, Switzerland on 2 February 2007.
12. In a note to Article I, paragraph 1 of the GPA 1994, procurement 'made in furtherance of tied aid to developing countries' was specifically excluded from the Agreement (see Appendix 1).
13. This would seem to be particularly true for those donor countries that have taken on obligations – albeit non-binding ones – under the OECD Recommendation on the Untying of Official Development Assistance to the Least Developed Countries.
14. Borrowing from the summary Catherine Weaver recently offered of the 'idea of analytical eclecticism', the research to be conducted herein will be driven by the question of whether a WTO Agreement can be used to promote good governance, development and accountability, not any particular research theory or method. See C. Weaver's, 'IPE's split brain', *New Political Economy*, vol. 14 (2009). A few additional words to acknowledge the intellectual 'risks' posed by such an approach are probably in order as well. As outlined by Katzenstein and Sil in their article in the *Oxford handbook of international relations*, they may include, *inter alia*, an inapplicability of research communities' internal standards for use in assessing contributions to progress in the state of knowledge; the fact that differing levels of 'fluency' in these communities' 'analytical languages' can lead to 'conceptual muddiness', as well as; associated dangers that undue amounts of time invested in reading beyond one's own research tradition will remain unrewarded if there is a failure to make any meaningful academic contribution. See P. J. Katzenstein and R. Sil's, 'Eclectic Theorizing in the Study and Practice of International Relations', in C. Reus-Smit and D. Snidal (eds), *The Oxford handbook of international relations* (Oxford: Oxford University Press, 2008), citing J. Johnson's, 'How conceptual problems migrate: rational choice, interpretation, and the hazards of pluralism', *Annual Review of Political Science*, vol. 5 (2002), and S. K. Sanderson's 'Eclecticism and its alternatives', *Current Perspectives in Social Theory: A Research Annual*, vol. 8 (1987). As an unabashed practitioner, I am motivated by curiosity and a genuine desire to understand whether there is anything that the multilateral trading system can do to promote good governance, development and accountability in government procurement. If this research makes only a minor 'academic contribution', or is found 'conceptually muddy' by those prepared to devote their careers to the study of a 'single theoretical language', I will not despair. At the same time – naively, perhaps – I would hope that this book would pique the interest of at least a few of these individuals. The real world challenges with which it engages badly need the input of more creative minds!
15. Acknowledging what some would describe as growing disparities in the ways in which the 'mainstream' has been delimited over the course of IPE's now nearly 40-year'modern' history, as well as the recent debates sparked by B.J. Cohen's history of IPE (2008), the audience I seek, more particularly, is one that is both intellectually curious and flexible enough to recognize the potential

policy-related usefulness of quantitative analysis techniques, yet, at the same time, equally concerned about the possible practical applications of the research it is conducting. To the extent that development issues are involved, this audience would generally privilege issues of 'justice and fairness under globalization' rather than the 'anti-foundationalist theories associated with postmodernism'. See, for example, C. Weaver's 'IPE's split brain', *New Political Economy*, vol. 14 (2009) and B. J. Cohen's 'The way forward', *New Political Economy*, vol. 14 (2009). The quote concerning development is taken from R. Higgott and M. Watson's, 'All at sea in a barbed wire canoe: Professor Cohen's transatlantic voyage in IPE', *Review of International Political Economy*, vol. 15 (2008).

16. The IPE literature's widely explored reasons for this 'formalization' of politics. Many of them revolve around the idea of international law's reinforcing the credibility of state commitment – for example, by increasing the reputational and/or financial costs of failing to respect a ratified treaty. See A. T. Guzmán, *How international law works: a rational choice theory* (New York: Oxford University Press, 2008); R. O. Keohane, 'International institutions: two approaches', *International Studies Quarterly*, vol. 32 (1988). The early work on issues of this nature was conducted by the regime theorists, for the most part in the 1980s (Keohane, 1984; Young, 1979 and Axelrod, 1984). An overview of the early IR and legal literature is offered in H. H. Koh's, 'Review: why do nations obey international law?', *The Yale Law Journal*, vol. 106 (1997). Until the late 1990s, rational choice theorists predominated in these debates; material interests, or what Keohane (1997) termed the 'instrumentalist logic' was viewed as the primary motivation for state behaviour. This has gradually changed and, today, legalization is recognized as an indissociable product of both 'values and interests' (Abbott and Snidal, 2002b and Simmons, 2010). A good, recent overview of the distinction between the theoretical camps – as well as their practical implications for international governance is provided by G. C. Shaffer and M. A. Pollack's, 'Hard vs. soft law: alternatives, complements, and antagonists in international governance', in the *Minnesota Law Review*, vol. 94 (2010), No. 3, pp. 706–799.
17. Privatization of public services including, *inter alia*, communications, water supply and energy combined with trade liberalization – in some cases under the WTO – entail public policy choices that have been particularly controversial in this respect. See P.T. Stoll's, 'Global Public Goods: the Governance Dimension', in V. Rittberger, M. Nettesheim et al. (eds), *Authority in the global political economy,* (Basingstoke, England: Palgrave Macmillan, 2008) In terms of the financing of these goods and services, other types of 'non-state international transfers' – such as migrant remittances used to co-finance collective, 'philanthropic' projects – are becoming increasingly prominent. For further details, including examples of additional types of such 'transfers' see the recent discussion in: S. S. Brown's, 'Non-state transnational transfers: types and characteristics', *International Studies Review*, vol. 11 (2009). Unlike privatization, the political implications of the latter are not well understood at this time. It is clear, however, that financial facilities of this nature can enable their providers to by-pass local governments providing public goods or, at least, significantly influence them. This, in turn, potentially has implications for local democratic processes. The GPA's approach to privatization and PPPs are reviewed in Chapter1 of the book.

18. There is a burgeoning IR literature on the subject of accountability, much of it motivated by legitimacy concerns tied to non-state actors' standard setting, including within networked confines. Materials derived from practical European experiences in terms of these processes offer especially useful insights for our purposes, notwithstanding the ambitious guiding principles at the core of the European integration strategy and the relatively modest differences between levels of development among EU members. See, for example, Y. Papadopoulos', 'Problems of democratic accountability in network and multilevel governance', *European Law Journal*, vol. 13 (2007); M. Blagescu and R. Lloyd's 'Accountability of Transnational Actors: Is There Scope for Cross-sector Principles?', in A. Peters, L. Koechlin et al. (eds), *Non-state actors as standard setters*(Cambridge: Cambridge University Press, 2009); M. Bovens, 'Analysing and assessing accountability: a conceptual framework', in *European Law Journal*, vol. 13(2007) and, more generally, A. M. Slaughter's, *Agencies on the loose? holding government networks accountable* (Oxford University Press, 2000). For a discussion of the need for caution in drawing institutional analogies of this nature, see J. Pelkmans and J. Sun's, 'Towards a European Regulatory Strategy: Lessons from "Learning-By-Doing" ', in OECD Secretariat (ed.), *Regulatory co-operation for an interdependent world* (OECD Publications, 1993). On the early development of harmonization – incorporating private standards – in a European context, see J. Pelkmans', 'The new approach to technical harmonization and standardization', *Journal of Common Market Studies*, vol. 25 (1987).
19. A current listing of these members – along with WTO members that have observer status and/or are seeking accession – may be found on the WTO website at: http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm# parties last visited on 27 July 2010.
20. A primary exception in this respect might be the Swiss Confederation, one of the 18 participants in the original Organization for European Economic Cooperation that was involved in the distribution of Marshall Plan Funds and the early promotion of European Economic integration; it was superseded by the OECD in 1961. Although Switzerland is officially a confederal government, that government is much like a republican government in which political power is highly decentralized. Within the Federal Council, Switzerland's highest executive authority, power is shared among seven Federal Counsellors; they take turns serving as president for one-year terms, a role that is largely titular. Another institutionalized check and balance would be the right of referendum that is retained by Swiss citizens; similar to an executive veto, it enables voters to voice disagreement with Parliamentary decisions *after* they've been taken. See the discussions in 'The Executive: Federal Council and Departments or The Swiss Government' and 'A Unique Political System or Swiss Democracy and The Swiss Confederation: a Brief Guide', both available at: www.bk.admin.ch/dokumentation/02070/02480/04712/index.html?lang=en last visited on 1 September 2010.
21. For a discussion of the respective roles of law in the Continental and Anglo-American Administrative Law traditions, see section 6 of B. Guy Peters and Jon Pierre's *Handbook of public administration* (London: Sage Publications, 2003).

22. Although beyond the scope of this book, it might be argued that the beginnings of a European response to this question can be seen in the provisions of the CARIFORUM-EC EPA dealing with public procurement. The only EPA to include procurement provisions, it does not, unlike the GPA, provide for non-discrimination and national treatment for potential suppliers based *outside* the CARIFORUM countries. The Agreement does, however, offer non-discrimination and national treatment for foreign companies operating through a locally registered subsidiary. In turn, its coverage is limited to Central Government entities and the thresholds are very high so as to provide 'policy space' for development objectives. See the discussion in Margaret Rose's, 'Developing Caribbean Procurement Law: An Overview of the Legal Context for Public Procurement Reform in the Caribbean Region', unpublished paper for the *Procurement Law Intensive*, 2008. On file with the author.
23. Wilkinson later went on to explain that since the '(Gatt specifically) sought to stimulate the United States of America's post-war economic growth while at the same time offering a measure of assistance in the reconstruction of the USA's (largely) European Allies ... the first round of negotiations targeted market access in manufactured, semi-manufactured and capital goods: precisely the areas in which the USA had a competitive advantage and surplus productive capacity and precisely those goods that were necessary for European reconstruction'. See R. Wilkinson, 'The problematic of trade and development beyond the Doha Round', *The Journal of International Trade and Diplomacy*, vol. 3 (2009). Subsequent paragraphs on the immediate post-war experiences of the developing countries in the trading system rely heavily on these two texts.
24. Herein a footnote in Abbott and Snidal's paper, 'Strengthening International Regulation' (2009) – itself citing John Ruggie's seminal *AJIL* paper, 'Business and Human Rights: The Evolving International Agenda' (2007) – mentions that the 'Voluntary Principles on Security and Human Rights have been incorporated into binding agreements between multinational investors and host governments'.

    It might also be appropriate to add here that, for definitional purposes, when this book uses the term 'global regulations' to describe output from 'new governance model', or combinations between the old and new systems, this is meant to encompass the full panoply of such initiatives, including, for example: certification schemes like that of the Forestry Stewardship Council; standard setting or monitoring activities that operate 'under the shadow of government' such as the Extractive Industries Transparency Initiative or even learning initiatives like the UN's Global Compact.
25. For more information on these organizations' recent contributions – including those of additional IGOs such as WIPO with its WIPO GOLD and PATENTSCOPE databases and UNAIDS – see the materials from 16 July 2010 'WHO-WIPO-WTO Technical Symposium on Access to Medicines', held at the WTO Secretariat in Geneva, Switzerland at: www.wto.org, last accessed on 11 September 2010.
26. As explained by P. Gibbon and S. Ponte, 'Global value chains: from governance to governmentality?', *Economy and Society*, vol. 37 (2008), a mainstream

IPE perspective would be chiefly concerned with the 'power and effectiveness of institutions such as the WTO and the IFIs *vis-à-vis* regional and national governance systems' along with the means by which such governance is exercised and what the relative benefits and costs are for those affected.

27. This is a time-constrained presentation of an exceedingly complex phenomenon. Readers with a desire for a more thorough introduction to global value chains and their analysis may wish to take a look at G. Aboni's 'Primer on Global Value Chains and International Production Networks' in UNESCAP's *Linking greater Mekong subregion enterprises to international markets: the role of global value chains, international production networks and enterprise clusters*, 2007, available at www.unescap.org last accessed 11 September 2010 or E. Thun's aforementioned chapter, 'The Globalization of Production' in John Ravenhill's edited text, *Global political economy*, 2nd edn (Oxford: Oxford University Press, 2008).
28. For more information on how this process works, see the detailed discussion in the Routledge Global Institutions text on the ISO: C. Murphy and J. Yates', *The international organization for standardization: global governance through voluntary consensus* (London: Routledge, 2009).
29. In concluding this theoretical 'jaunt', one is left to wonder if perhaps we might not be left, once again, back where we once were, institutionally speaking. That is to say when John Maynard Keynes – at the end of the *First* World War – famously observed that resolving the 'economic problem' was not the 'permanent problem of the human race'. Increasingly, he said, '...man will be faced with his real permanent problem – how to use his freedom from pressing economic cares, how to occupy the leisure, which science and compound interest will have won for him, to live wisely and agreeably and well...'. See 'Economic Possibilities for our Grandchildren' in Keynes' *Essays in persuasion* (London: Macmillan, 1931).

1 Short History and Objectives of the 1994 WTO Agreement

1. The problems posed by definitions - or, more precisely, the *lack* of 'general definitions' with respect to covered entities and procurement in the GPA, along with its possible implications for developing countries with sizeable state sectors - was recently explored at length by Ping Wang in an article entitled, 'Coverage of the WTO's agreement on government procurement: challenges of integrating China and other countries with a large state sector into the global trading system'. See *Journal of International Economic Law*, Vol. 10, No. 4, September 2007.
2. This 'theoretical compromise' in question was effected through the myriad of exceptions built into the GATT's commercial policy disciplines. As Victoria and Gerard Curzon-Price explained, '[T]he vital m.f.n. rule...was most forcefully formulated, [but] it was followed by a blanket exception for all preferential agreements which existed prior to GATT's establishment. Another exception...permitted countries to form customs unions and free trade areas. In addition, while quantitative restrictions were firmly

prohibited in Article XI (with the exception of the loophole for agricultural products), they were immediately reintroduced in Article XII as suitable measures for safeguarding the balance of payment ... [Similarly, if] a domestic producer were threatened with injury due to import competition, in turn due to past tariff concessions, a contracting party could take emergency action according to Article XIX ... Finally, a general escape clause was to be found in Article XXV, which permitted the "waiver" of any GATT obligation in "exceptional circumstances not elsewhere provided for in this Agreement" '. See 'The Multilateral Trading System of the 1960s' in A. Shonfield's *International economic relations of the western world 1959–1971* (1976[AQ: Please provide publisher's details]).

3. Article X, paragraph 3(b) of the GATT 1947, however, obligates contracting parties to create court-like entities for the review of 'administrative action relating to customs matters'. Unlike the GPA 1994, it does not include provisions for damages. See the discussion in Chapter 2.
4. Article XVII, paragraph 2, more precisely, requires that state trading entities 'shall accord to the trade of the other contracting parties fair and equitable treatment'. John Jackson described this as an 'MFN-like requirement', but it has never been questioned or raised as an object of complaint in a GATT or WTO dispute. See J. H. Jackson, *World trade and the law of GATT: a legal analysis of the general agreement on tariffs and trade* (Indianapolis: Bobbs-Merrill Co., 1969).
5. If, more precisely, an entity covered by a GPA member's schedules intends to establish a contract involving a PPP, it must proceed in accordance with the GPA's relevant procedures, for example, with respect to notices and technical specifications.
6. Subsequent to a 23 March 1965 decision by the GATT Contracting Parties, the title of the head of the GATT Secretariat was changed from Executive Secretary to Director General. See BISD 13S/19. Geneva: July 1965.

2 The GPA's International Administrative Disciplines: Distilling the Underlying Political Structures

1. This expression, according to Edwards Corwin, was that of James Harrington. See the discussion in *The 'higher law' background of American constitutional law*. (Ithaca: Cornell University Press, 1955).
2. As suggested previously, this may not be the case if the policies in question are driven by regional or bilateral integration. Indeed, the procedurally intensive procurement rules that evolved from the lengthy OECD discussions described earlier in this paper served as a model for the regional agreements that emerged in Europe and North America during the 1970s. These later developments, however, did not affect the genesis of the original OECD rules. See S. Woolcock, 'The Interaction between Levels of Rule-making in Public Procurement', in S. Woolcock (ed.), *Trade and investment rule-making: the role of regional and bilateral agreements* (Tokyo: United Nations University Press, 2006).
3. For a discussion of the respective roles of law in the Continental and Anglo-American Administrative Law traditions, see section 6 of B. Guy Peters and

Jon Pierre's *Handbook of public administration* (London: Sage Publications, 2003).

4. Herein, mention should be made of a debate amongst the lawyers relating to whether the duties of non-discrimination the GPA engenders under Article III are negative or positive. That is, whether parties to the Agreement are bound *not* to discriminate between the goods and services of various suppliers participating in covered tenders on the basis of their nationality, or if they are *positively obligated* to ensure that the behaviour of their covered administrative entities is in conformity with the Agreement's non-discriminatory principles. Although the wording of the legal text would appear to be consistent with the latter, or 'obligations of result' (the Parties *shall* provide…), states party to the GPA have assumed what are 'traditionally understood' to be negative duties. See the discussion in B. Hoekman and P. Mavroidis, *The WTO's Agreement on Government Procurement: Expanding Disciplines, Declining Membership?*, Working Paper No. 1112 (CEPR, 1995).
5. So, too, of course, are the structures that a society introduces to take fundamental political decisions of this nature, another area in which considerable research has recently been undertaken by political scientists. For a discussion of the challenges associated with maintaining the legitimacy of decisions taken in an extra-national context, see: R. Howse and K. Nicolaidis, 'Enhancing WTO legitimacy: constitutionalization or global subsidiarity?', *Governance*, vol. 16 (2003).
6. 'Public financial management' generally involves: 'all components of a country's budget process – both upstream (including strategic planning, medium-term expenditure framework, annual budgeting) and downstream (including revenue management, procurement, control, accounting, reporting, monitoring and evaluation, audit and oversight)'. See the discussion in OECD DAC, *Report on the Use of Country Systems in Public Financial Management* (OECD, 2008b), available at <http://www.oecd.org/dataoecd/29/20/41085468.pdf> (4 September 2008) p. 8.
7. Robert Klitgaard has described corruption on the basis of the following formula: 'c= m+d-a', or corruption is equal to monopoly power plus discretion minus accountability. See R. Klitgaard, 'International cooperation against corruption', *Finance and Development* vol. 35 (1997).
8. For more information on the background and purpose of the UN's CAC, see: http://www.u4.no/themes/uncac/ last visited at 5 October 2008. The text of the UNCAC itself is at: http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf
9. A listing of current parties to this treaty may be found on the UNODC website at: http://www.unodc.org/unodc/en/treaties/CAC/signatories.html, accessed on 2 October 2008.
10. The WTO Secretariat has recently suggested that the GPA – because it is 'consistent with and reinforces the objectives of national reforms aimed at promoting competition, transparency and enhanced value for money in national procurement regimes' – should not be seen 'solely in terms of facilitating international market access'. The WTO's work 'also reinforces the values and objectives of other important international instruments and work in this area such as the United Nations Convention Against Corruption, the UNCITRAL Model Law on Procurement, relevant guidelines of the World

Bank and the OECD's work on prevention of corruption'. See the discussion in R. D. Anderson, 'Renewing the WTO agreement on government procurement: progress to date and ongoing negotiations', *Public Procurement Law Review* (2007)[AQ: Please provide volume number]. Herein, it is interesting to note, too, how the GPA diverges from both the UNCAC and the OECD's Anti-bribery Convention, specifically in not mandating parties' adoption of legislative and other measures criminalizing both the intentional bribery of national public officials, as well as the solicitation of such bribes by these officials.

11. This is because the treaty in question is not, as the lawyers would say, 'self-executing'; national implementing legislation is required in order to accept the treaty's obligations as binding and to apply them. See the discussion in J. H. Jackson, 'Status of treaties in domestic legal systems: a policy analysis', *American Journal of International Law*, vol. 86 (1992a). and C. M. Vasquez, 'The four doctrines of self-executing treaties', *American Journal of International Law*, vol. 89 (1995).
12. Also known as the 'Bentham-Austin-Kelston position', this view was quoted and discussed in Thomas Grey's 'Constitutionalism: An Analytic Framework' in J. R. E. Pennock and J. W. Chapman (eds), *Constitutionalism* (NY: New York University Press, 1979).
13. In describing the origins of her thinking on the schema, deLeon credits the work of James Thompson, a well-known organizational theorist. See the discussion in L. deLeon, 'On Acting Responsibly in a Disorderly World: Individual Ethics and Administrative Responsibility', in B. G. Peters and J. Pierre (eds), *Handbook of public administration* (London: Sage Publications, 2003), p. 470.
14. See the discussion in B. S. Romzek and M. J. Dubnick, 'Accountability in the public sector: lessons from the challenger tragedy', *Public Administration Review*, vol. 47 (1987), p. 230.
15. Some countries, adherents to the so-called school of 'New Public Management', have lines of official accountability that are more 'professional' in nature. See the discussion in J.-E. Lane, *The public sector: concepts, models and approaches*, 3rd edn (London: Sage, 2000). New Zealand's public procurement regime is a prime example in this respect.
16. It bears mention here that the credibility of these disciplines, in turn, is reinforced by the Agreement's damages provisions, as well as the ultimate possibility of state-led complaint to the WTO's Dispute Settlement Body. We will return to this issue shortly.
17. C. B. MacPherson has termed the Hobbesian notion of sovereignty's being a conscious institutional creation as a 'logical hypothesis', designed to rationalize the democratic imperfections of the early sovereign entities. The reality was that such entities were the products of conquest; that is, war, rather than consent, provided the basis for state formation. See p. 20 in C. B. Macpherson, *The political theory of possessive individualism: Hobbes to Locke* (Oxford University Press, 1979).
18. Many European states whose historical development is generally consistent with the unitary state notions of sovereignty now possess written constitutions that recognize individual rights that are 'prior to government', or participate in supranational legal orders like the Council of Europe

with, *inter alia*, its European Convention on Human Rights. What is significant here, however, is the fact that the existence of such rights has not changed the basic notions of sovereignty on which these states and their institutions are built. Unitary states have assumed the duties that their written constitutions entail and have grown more liberal in the process of doing so, but this has not changed the basis on which their power is exercised. There remains, in other words, a fundamental difference between a nation state that is growing more liberal and one that is based on popular sovereignty.

19. Initially, the authority of the *con*federal government was only legitimate to the extent that it enabled cooperating sub-federal entities to achieve their independent ends. See the discussion in Chapter 7 of M. Jensen, *The Articles of confederation: an interpretation of the social-constitutional history of the American Revolution 1774–1781* (Madison: University of Wisconsin Press, 1970).
20. In view of the nature of the USA's social contract, direct democracy that would have been theoretically optimal in a popular sovereign – but entirely impractical in a republic of its size.

3 Addressing the WTO Membership Challenge

1. Ngaire Woods has described the new players as 'emerging donors'. Her paper, 'Whose aid? Whose influence? China, emerging donors and the silent revolution in development assistance' refers to the fact that the aid of the emerging economies, unlike that of many established donors is 'strongly supported' by investment and trade policies. See *International Affairs*, vol. 84, iss. 6 (2008).
2. Here, it is the author's contention that the fact that the state – or, more particularly, its procuring administrative entities – is the subject of the regulatory rules in question offers an unusually good point of departure for the study of authority – including what Jeffrey Dunoff has termed 'changing patterns of authority'. See J. L. Dunoff, 'The WTO Constitution, Judicial Power and Changing Patterns of Authority', in V. Rittberger, M. Nettesheim et al. (eds), *Authority in the global political economy* (Basingstoke: Palgrave Macmillan, 2008).
3. See, in particular, Article IV of the Provisional revisions to the GPA (dealing with developing countries) as well as Articles V and VIII (paragraph 3) and 5 (relating to the principle of integrity and its application) in WTO Committee on Government Procurement, *Revision of the Agreement on Government Procurement as at 8 December 2006 - Prepared by the Secretariat* (11 December 2006), WTO Doc GPA/W/297.
4. The principles of New Public Management, once widely espoused by the World Bank, offer a major alternative to this regulatory 'methodology'. NPM endeavours to introduce private sector management techniques into the public management function, empowering public authorities to exercise broad discretion within a results-oriented framework. For an interesting introduction to the political challenges this is still posing in the Caribbean States, see the discussion in P. Sutton, *Public Sector Reform in*

the Commonwealth Caribbean: A Review of Recent Experiences, Working Paper No. 6 (Centre for International Governance Innovation, 2008).

5. In the special issue of *International Organization* dealing with the legalization of international politics cited at the outset of this book, 'soft law' was defined by Abbott and Snidal as legal arrangements that entail a weakening of the 'obligation, precision and delegation' commonly associated with hard law. See the discussion in K. W. Abbott and D. Snidal, 'Hard and soft law in international governance', *International Organization*, vol. 54 (2000). A discussion of the legal objectives of the Model Law may be found in the Guidelines that have been developed for its implementation. See UNCITRAL, *UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment* (1994), available at <http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf> (19 February 2009).
6. According to the UNCITRAL Secretariat, the following have adopted domestic procurement regimes based on or largely inspired by the Model Law: Afghanistan (2006), Albania, Azerbaijan, Croatia, Estonia, Gambia (2001), Kazakhstan, Kenya, Kyrgyzstan, Malawi (2003), Mauritius, Moldova, Mongolia, Nigeria (2007), Poland, Romania, Slovakia, Tanzania, Uganda, and Uzbekistan. See: www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html, accessed on 15 March 2009.
7. Paul Sutton has described such contexts in terms of the 'Westminister–Whitehall' model for the 'political-administrative interface'. See the discussion in P. Sutton, *Public Sector Reform in the Commonwealth Caribbean: A Review of Recent Experiences*, Working Paper No. 6 (Centre for International Governance Innovation, 2008).
8. Robert Anderson and Christopher Yukins have recently characterized the main costs of *GPA* accession in terms of the direct costs of 'preparing an offer and negotiating with existing Parties ... costs related to the implementation of GPA requirements ... and challenges and costs relating to the adjustment of domestic firms to competition from foreign entities based in other GPA Parties'. See R. D. Anderson and C. R. Yukins, *International Public Procurement Developments in 2008; Public Procurement in a World Economic Crisis*, Working Paper No. 458 (George Washington University Law School Public Law and Legal Theory Working Paper, 2009). There are important differences between the UNCITRAL Model Law and the GPA such as the fact that there is no need to negotiate accession to the former, but some of the costs of associated with implementation are similar.
9. Current membership, as of January 2009, includes: Canada; the European Communities, including its 27 member States; Hong Kong, China; Iceland; Israel; Japan; Korea; Liechtenstein; the Kingdom of the Netherlands with respect to Aruba; Norway; Singapore; Switzerland; and the United States. See WTO Committee on Government Procurement, *Annual Report* (9 December 2008), available at <http://docsonline.wto.org/DDFDocuments/t/PLURI/GPA/95.doc> (28 February 2010).
10. The question of what properly constitutes 'ownership', however, has been the subject of heated debate. See the discussion in Lindsay Whitfield and Alastair Fraser's 'Introduction: Aid and Sovereignty' in *The politics of aid: African strategies for dealing with donors* (Oxford: Oxford University Press, 2009a).

11. The first OECD policy statement on corruption was actually contained in the Guidelines for Multinational Enterprises adopted in the 1980s. The motivation for this instrument, unlike those that followed in the OECD context, was not trade-related; it sought to reduce the adverse effect of MNEs on the recently decolonized nations of the South. See the discussion in M. Pieth, 'Taking Stock: Making the OECD Convention on Anti-Corruption Work' (2000), available at <http://www.oas.org/juridico/english/pieth2000.htm>, available on the Transparency International website, accessed on 4 April 2009.
12. In this context, Pieth provides an interesting discussion of the principle of 'functional equivalence' that was adopted in developing the rules that ultimately came to be embodied in the binding OECD Convention on Bribery in International Business Transactions. Unlike the harmonization that is reflected in the GPA, the Code focuses on the overall effects of a particular legal system; it is premised on the idea that each system has an underlying logic that cannot be violated without undermining its ability to achieve legal ends. The Convention therefore basically demands only that each of its signatories takes bribery to be a serious offence, treating it at least as seriously as domestic corruption and respecting the country's own sanctioning culture. See the discussion in Mark Pieth's *Taking Stock: Making the OECD Convention on Anti-Corruption Work*, unpublished manuscript available at http://www.oas.org/juridico/english/pieth2000.htm, last accessed 3 April 2009.
13. Here, it should be mentioned that the Commentaries to the Convention specifically recognize procurement as a 'public function', or one in which the bribery of foreign public official is to be criminalized and effective sanctions made available. See the commentary on Article 1, paragraph 4 in OECD, *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (1997), available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf> (28 February 2010).
14. These procedures were, themselves, 'borrowed' from the approaches that had evolved in other institutional contexts, particularly those of the Financial Action Task Force on Money Laundering and the Chemical Action Task Force. See the discussion in Mark Pieth's *Taking Stock: Making the OECD Convention on Anti-Corruption Work*, unpublished manuscript available at http://www.oas.org/juridico/english/pieth2000.htm, last accessed 3 April 2009.
15. These terms were employed by Stanley Morris, the former head of the US delegation to the Financial Action Task Force. Its mutual evaluation system, as we have seen, had served as a model for that of the OECD Convention on Anti-bribery. See the discussion in S. E. Morris, 'Mutual evaluation systems: an approach to ensuring progress in implementing international agreements', *American University International Law Review*, vol. 15 (2000), pp. 768–779.
16. The discussion of the monitoring procedures that follows borrows heavily from Mark Pieth's *Taking Stock: Making the OECD Convention on Anti-Corruption Work*, unpublished manuscript available at http://www.oas.org/juridico/english/pieth2000.htm, last accessed 3 April 2009. It should also be mentioned that the assessment process being described looks at compliance

with the provisions of the Revised Recommendation as well as the binding Convention. See the Commentary on Article 12 of the Convention in OECD, *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (1997), available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf> (28 February 2010).

17. This section borrows heavily from S. L. Schooner, *A Conversation About Malversation: The Post-Millennial US Experience Combating Corruption in Public Procurement*, paper presented at the International Conference on Public Procurement: Global Revolution III, University of Nottingham (June 2006). This paper includes a good review of the challenges of applying professional approaches to accountability in a domestic procurement context.
18. Attention should be draw to the fact that these disciplines, in covering the demand side of corruption as well as the supply side, are more stringent and politically invasive than those embodied in the OECD instruments that have been under discussion. Demand side disciplines are, however, embodied in the UN Convention Against Corruption. In terms of the comparison between the OAS and the OECD instruments, the former have objectives targeted at the promotion of a minimum degree of legal harmonization, an end that is only shared with the OECD instruments in the broadest of political terms. As this raises political issues not linked to the subject of accountability, it is a subject with which the book will not engage.
19. Williams (2001), as cited in L. Whitfield and A. Fraser, 'Introduction: Aid and Sovereignty', in L. Whitfield (ed.), *The politics of aid* (Oxford, UK: Oxford University Press, 2009a).

4 Towards an International Regulatory Framework?

1. An important reason why the GPA Revisions mentioned the UNCAC as opposed to the OECD Convention was due to the former's universal character. Interview with Patrick LeDuc, Swiss Delegate to the WTO, Bern, Switzerland, 2 February 2007.
2. The fact that the 2006 Revisions remain provisional is an important caveat here. Technically, they will stay this way until the coverage negotiations that are currently underway have been completed. See the discussion in R. D. Anderson, 'Renewing the WTO agreement on government procurement: progress to date and ongoing negotiations', *Public Procurement Law Review* vol. 16, no. 4 (2007) pp. 255–273.
3. Legal scholars have recently started to evaluate the nature of this exception. See the discussion in A. La Chimia and S. Arrowsmith, 'Addressing tied aid: towards a more development-oriented WTO?', *J Int Economic Law*, vol. 12 (2009).
4. A recent article by Christopher Yukins described key trends that are contributing to this process. See C. R. Yukins and S. L. Schooner, *Incrementalism: eroding the impediments to a global public procurement market*, Working Paper No. 320 (Geo Washington University Law School Working Paper, 2007).
5. Herein it should be mentioned that from a trade perspective, the interaction between these two domains has largely taken place within the context of the aid for trade initiative, an exercise aimed at building participants' physical capacity to trade. Materials on this campaign may be found on

the WTO website at: http://www.wto.org/english/tratop_e/devel_e/a4t_e/global_review09_e.htm The focus of this initiative has largely been on trade facilitation; it will not be addressed in this book.

6. In the context of procurement these activities are inextricably entwined: Public procurement, as recently explained by a guide for the management of risk associated with the use of national systems, 'has an important impact on the private sector ... serving as the main commercial vehicle for government/private sector relationships ...' See Nordic+ Procurement Group, *Implementing the Joint Procurement Policy and Promoting the Use of Reliable Country Procurement Systems: A Guide for Program Directors, Managers and Officers* (2005), available at <http://www.amg.um.dk/NR/rdonlyres/C5BEDAFE-0585-404C-9663-DC18A845898A/0/JointProcurementPolicyGuideNovember2005.pdf> (16 October 2009). Indeed, the guide concludes that countries that award contracts on a non-competitive basis are likely to achieve investment levels '5% less than others and lose about one-half a percent of GDP growth per year.'
7. There are traditionally two ways of understanding 'popular sovereignty': The first views states' ultimate responsibility in terms of duties to the people as individuals whereas the second privileges the rights of a self-identifying group to govern itself as a separate political entity. We will focus on the former. See the discussion in J. S. Barkin and B. Cronin, 'The state and the nation: changing norms and the rules of sovereignty in international relations', *International Organization*, vol. 48 (1994).
8. An example of the latter would be the World Bank's so-called SWAps, or sector-wide assistance programs. They provide parallel administrative structures that effectively by-pass those of the aid-recipient country completely. See the discussion in J. M. M. Akech, 'Development partners and governance of public procurement in Kenya: enhancing democracy in the administration of aid', *New York University Journal of International Law and Politics*, vol. 37 (2005).
9. This section draws extensively from the discussion in A. Fraser, 'Aid Recipient Sovereignty in Historical Perspective', in L. Whitfield (ed.), *The politics of aid* (Oxford: Oxford University Press, 2009), A. Fraser and L. Whitfield, 'Understanding Contemporary Aid Relationships', in L. Whitfield (ed.), *The politics of aid: African strategies for dealing with donors* (Oxford: Oxford University Press, 2009).
10. Summarizing Lancaster's Foreign Aid (2007), Whitfield and Frazer report that donors commonly give aid for many purposes in addition to development, including: diplomatic, commercial, humanitarian and cultural ends. See L. Whitfield and A. Fraser, 'Negotiating Aid', in L. Whitfield (ed.), *The politics of aid: African strategies for dealing with donors* (Oxford: Oxford University Press, 2009b).
11. To the extent that the country in question is a signatory to the UN's Convention Against Corruption, such disciplines must, under Article 9 of this binding instrument, be embodied in its domestic legislation.
12. Subsequent sections of this chapter will take a closer look at the evolving role of such measures in the regulation of the public procurement of medicines via the Medicines Transparency Alliance. See below, pp. 102–113.
13. Key emerging donors include China, the United Arab Emirates, Saudi Arabia, Korea, Venezuela, India, Kuwait and Brazil. See the discussion in

N. Woods, 'Whose aid? Whose influence? China, emerging donors and the silent revolution in development assistance', *International Affairs*, vol. 84 (2008). It should be mentioned herein that reliable statistics concerning the volume of aid from these countries is not always available, particularly for China and India. See the discussion in R. Manning, 'Will "emerging donors" change the face of international co-operation?', *Development Policy Review*, vol. 24 (2006).

14. This section draws extensively from the OECD report, 'Harmonising Donor Practices for Effective Aid Delivery - Volume 3: Strengthening Procurement Capacities in Developing Countries', (2006).
15. This definition draws heavily on the UNDP definition as well as the discussion in Unsworth's 'What's Politics Got to Do With It?' See United Nations Development Program, *Capacity Development: A UNDP Primer* (2009), available at <http://content.undp.org/go/cms-service/download/asset/?asset_id=2099298> (2 November 2009), S. Unsworth, 'What's politics got to do with it? Why donors find it so hard to come to terms with politics, and why this matters', *Journal of International Development*, vol. 21 (2009).
16. Entitled 'Compendium of Country Examples and Lessons Learned from Applying the Methodology for Assessment of National Procurement Systems', the OECD collection in question offers a good overview of the preliminary results from the pilot studies. The discussion of these lessons that follows draws heavily from this text. See OECD DAC, 'Compendium of country examples and lessons learned from applying the methodology for assessment of national procurement systems: volume 1 sharing experiences', *OECD Journal on Development*, vol. 9 (2008).
17. More precisely, the appropriate approach to such consultation is, as might be surmised, context specific. It depends on things like whether the assessment is a 'self-assessment' or involves the formal input of external or donor experts, the level of technical competence of a given stakeholder community as well as their previous level of involvement with the political and administrative authorities concerned. See Ibid.
18. As developed in the EITI's International Advisory Group Report of 2006 and cited in Koechlin and Calland. See, respectively, L. Koechlin and R. Calland, 'Standard Setting at the Cutting Edge: an Evidence-Based Typology for Multi-stakeholder Initiatives', in A. Peters, L. Koechlin et al. (eds), *Non-state actors as standard setters* (Cambridge: Cambridge University Press, 2009), EITI International Advisory Group, *Final Report of EITI International Advisory Group* (2006), available at <http://eitransparency.org/UserFiles/File/iaggeneral/iagfinalreport.pdf> (14 December 2009).
19. This terminology, according to Dilan Ölcer, was that of Tony Blair in a speech at the first EITI plenary conference in London in 2003. See D. Ölcer, *Extracting the Maximum from the EITI*, Working Paper No. 276 (OECD Development Centre, 2009). The full speech by Mr. Blair is available at http://collections.europarchive.org/tna/20070701080507/http://www.dfid.gov.uk/pubs/files/eitidraftreportspeech.pdf (12 January 2010).
20. There is an extensive, empirically backed literature on the 'resource curse', or what T.L. Karl termed the 'paradox of plenty'. As summarized by Ölcer, it illustrates a relationship between resource endowments and negative economic growth and corruption, a heightened risk for conflict and civil war, and fragile democratic institutions. See Ibid., OECD Working Paper No. 276.

Other sources include: T. L. Karl, *The paradox of plenty: oil booms and petro-states* (Berkeley; London: University of California Press, 1997), J. D. Sachs and A. M. Warner, 'Natural resource abundance and economic growth', *National Bureau of Economic Research Working Paper Series*, vol. No. 5398 (1995), M. L. Ross, 'Does oil hinder democracy?', *World Politics*, vol. 53 (2001), M. Humphreys, 'Natural resources, conflict, and conflict resolution: uncovering the mechanisms', *Journal of Conflict Resolution*, vol. 49 (2005).

21. For more information on the surveys and methodology, see: www.haiweb.org/medicineprices The discussion of the analysis of this data that follows draws heavily on A. Cameron, M. Ewen et al., 'Medicine prices, availability, and affordability in 36 developing and middle-income countries: a secondary analysis', *The Lancet*, vol. 373 (2009). An introduction to the subject of essential medicines - and the role that more effective procurement might play in improving access to them – was offered to the author by the WHO's Dr. Richard Laing, a member of MeTA's International Advisory Group. The interview took place in Geneva, Switzerland on 10 December 2009.
22. The discussion of MeTA structures and methodologies that follows draws heavily on the organization's first annual report as well as a document that it recently published on implementing its pilot phase. See, respectively: Medicines Transparency Alliance, *Laying the Foundations: Annual Review 2008–2009* (2009b), available at <http://www.medicinestransparency.org/uploads/media/MeTA_Annual_Review.pdf> (8 December 2009), Medicines Transparency Alliance, *Medicines Transparency Alliance: Implementing our pilot phase* (2009d), available at <http://www.medicinestransparency.org/uploads/media/briefing_implementing_our_pilot_phase.pdf> (12 January 2010).

Conclusion

1. Legal scholars have recently started to evaluate the nature of this exception. See the discussion in A. La Chimia and S. Arrowsmith, 'Addressing tied aid: towards a more development-oriented WTO?', *J Int Economic Law*, vol. 12 (2009).

Appendix 1: Agreement on Government Procurement

The Appendices to the Book's Appendix 1 are lengthy, country-specific and subject to change. Therefore see: www.wto.org/english/tratop_e/gproc_e/appendices_e.htm

1. For each Party, Appendix I is divided into five Annexes:
   – Annex 1 contains central government entities.
   – Annex 2 contains sub-central government entities.
   – Annex 3 contains all other entities that procure in accordance with the provisions of this Agreement.
   – Annex 4 specifies services, whether listed positively or negatively, covered by this Agreement.
   – Annex 5 specifies covered construction services.

   Relevant thresholds are specified in each Party's Annexes.
2. This Agreement shall apply to any procurement contract for which the contract value is estimated to equal or exceed the threshold at the time of publication of the notice in accordance with Article IX.

3. For the purpose of this Agreement, a technical regulation is a document which lays down characteristics of a product or a service or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, service, process or production method.
4. For the purpose of this Agreement, a standard is a document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or services or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, service, process or production method.
5. It is the understanding that "existing equipment" includes software to the extent that the initial procurement of the software was covered by the Agreement.
6. Original development of a first product or service may include limited production or supply in order to incorporate the results of field testing and to demonstrate that the product or service is suitable for production or supply in quantity to acceptable quality standards. It does not extend to quantity production or supply to establish commercial viability or to recover research and development costs.
7. Offsets in government procurement are 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.
8. For the purpose of this Agreement, the term "government" is deemed to include the competent authorities of the European Communities.
9. All provisions of the 1988 Agreement except the Preamble, Article VII and Article IX other than paragraphs 5(a) and (b) and paragraph 10.

Appendix 2: Revision of the Agreement on Government Procurement as at 8 December 2006

The Notes for the Revisions to the GPA are only contained in a subsequent version of the Revisions that was posted on the WTO website at the end of 2010. The associated Appendices were still under negotiation as of February 2011.

1. See paragraphs 20–21 of the Committee's Report to the General Council (GPA/89 of 11 December 2006).
2. Negotiators' Note: The Parties are still considering whether to add a specific Annex on goods to Appendix I.
3. Negotiators' Note: The Parties are still considering the need for and the content of this paragraph.
4. Negotiators' Note: The Parties are still considering the need for and the content of this paragraph.

5. Negotiators' Note: The Parties are still considering the need for and the content of this paragraph.
6. Negotiators' Note: The Parties are still considering this paragraph.
7. Negotiators' Note: The Parties shall review the content of this paragraph before the end of the negotiations.
8. Negotiators' Note: The Parties shall review the content of this paragraph before the end of the negotiations.
9. Negotiators' Note: The Parties are still considering the need for and the content of this paragraph.
10. Negotiators' Note: The Parties are still considering the need for and the content of this paragraph.
11. Negotiators' Note: The Parties are still considering the need for and the content of this paragraph.
12. Negotiators' Note: The Parties are still considering the content of this Decision. Some Parties question the need for this Decision.

Appendix 3: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

There are also a series of "Commentaries" on the OECD Convention mentioned in the Convention; they are available on the OECD website. See www.oecd.org/dataoecd/4/18/38028044.pdf

References

K. W. Abbott and D. Snidal, 'Strengthening international regulation through transnational new governance: overcoming the orchestration deficit', *Vanderbilt Journal of Transnational Law*, vol. 42 (2009).

K. W. Abbott and D. Snidal, 'International Action on Bribery and Corruption: Why the Dog Didn't Bark in the WTO', in D. L. M. Kennedy and J. D. Southwick (eds), *The political economy of international trade law: essays in honour of Robert E. Hudec* (Cambridge: Cambridge University Press, 2002a), pp. xiii, 696 p.

K. W. Abbott and D. Snidal, 'Values and interests: international legalization in the fight against corruption', *The Journal of Legal Studies*, vol. 31 (2002b).

K. W. Abbott, 'Rule-making in the WTO: lessons from the case of bribery and corruption', *J Int Economic Law*, vol. 4 (2001), pp. 275–296.

K. W. Abbott and D. Snidal, 'Why states act through formal international organizations', *Journal of Conflict Resolution*, vol. 42 (1998), pp. 3–32.

K. W. Abbott and D. Snidal, 'Hard and soft law in international governance', *International Organization*, vol. 54 (2000), pp. 421–456.

K. W. Abbott and D. Snidal, 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State', in W. Mattli and N. Woods (eds), *The politics of global regulation* (Princeton: Princeton University Press, 2009).

F. H. Abernathy, J. T. Dunlop, J. H. Hammond and D. Weil, *A stitch in time lean retailing and the transformation of manufacturing – lessons from the apparel and textile industries* (New York: Oxford University Press, 1999).

J. M. M. Akech, 'Development partners and governance of public procurement in Kenya: enhancing democracy in the administration of aid', *New York University Journal of International Law and Politics*, vol. 37, no. 4 (2005), pp. 829–868.

J. E. Alvarez, 'Symposium: the boundaries of the WTO', *The American Journal of International Law*, vol. 96 (2002), p. 1.

R. D. Anderson, 'Renewing the WTO agreement on government procurement: progress to date and ongoing negotiations', *Public Procurement Law Review* (2007).

R. D. Anderson and C. R. Yukins, *International Public Procurement Developments in 2008; Public Procurement in a World Economic Crisis*, Working Paper No. 458 (George Washington University Law School Public Law and Legal Theory Working Paper, 2009)

D. V. Anthony and C. K. Hagerty, 'Cautious optimism as a guide to foreign government procurement', *Public Contract Law Journal*, vol. 12 (1981), p. 1.

S. Arrowsmith, 'Towards a multilateral agreement on transparency in government procurement', *International & Comparative Law Quarterly*, vol. 47 (1998), pp. 793–816.

S. Arrowsmith, 'Reviewing the GPA: the role and development of the plurilateral agreement after Doha', *J Int Economic Law*, vol. 5 (2002), pp. 761–790.

S. Arrowsmith, 'Transparency in government procurement: the objectives of regulation and the boundaries of the World Trade Organization', *Journal of World Trade*, vol. 37 (2003), pp. 283–303.

S. Arrowsmith, 'Public procurement: an appraisal of the Uncitral Model; law as a global standard', *International & Comparative Law Quarterly*, vol. 53 (2004), pp. 17–46.
R. K. Ashley, 'The Poverty of Neorealism', in R. O. Keohane (ed.), *Neorealism and its critics* (New York: Columbia University Press, 1986), p. 378p.
R. M. Axelrod, *The evolution of cooperation* (New York: Basic Books, 1984).
J. Bair, 'Global Commodity Chains: Genealogy and Review', in J. Bair (ed.), *Frontiers of commodity chain research* (Stanford, CA: Stanford University Press, 2009), pp. 1–34.
M. Bano, 'Dangerous correlations: aid's impact on NGOs' performance and ability to mobilize members in Pakistan', *World Development*, vol. 36 (2008), pp. 2297–2313.
J. S. Barkin and B. Cronin, 'The state and the nation: changing norms and the rules of sovereignty in international relations', *International Organization*, vol. 48, no. 1 (1994), pp. 107–130.
M. Barnett and K. Sikkink, 'From International Relations to Global Society', in C. Reus-Smit and D. Snidal (eds), *The Oxford handbook of international relations* (Oxford; New York: Oxford University Press, 2008), pp. xiii, 772 p.
I. Berlin, *Four essays on liberty* (Oxford University Press New York, 1969).
J. Best, 'Legitimacy dilemmas: the IMF's pursuit of country ownership', *Third World Quarterly*, vol. 28 (2007), pp. 469–488.
T. J. Biersteker and C. Weber, *State sovereignty as social construct* (Cambridge: Cambridge University Press, 1996).
A. H. Birch, *Representative and responsible government: an essay on the British constitution* (Allen & Unwin, 1977).
A. Blank, *Interview with the author at the (then) GATT Secretariat*, in (Geneva, Switzerland, 1994).
A. Blank and G. Marceau, 'The history of government procurement negotiations since 1945', *Public Procurement Law Review*, vol. 4 (1996), pp. 77–147.
A. R. Brewer-Carias, *Judicial review in comparative law* (Cambridge: Cambridge University Press, 1989).
M. Bovens, 'Analysing and assessing accountability: a conceptual framework', *European Law Journal*, vol. 13 (2007), pp. 447–468.
S. S. Brown, 'Non-state transnational transfers: types and characteristics', *International Studies Review*, vol. 11 (2009), pp. 402–450.
M. Bukovansky, 'The hollowness of anti-corruption discourse', *Review of International Political Economy*, vol. 13 (2006), pp. 181–209.
H. Bull, *The anarchical society: a study of order in world politics*, 3rd edn (Basingstoke: Palgrave, 2002).
A. Cameron, M. Ewen, D. Ross-Degnan, D. Ball and R. Laing, 'Medicine prices, availability, and affordability in 36 developing and middle-income countries: a secondary analysis', *The Lancet*, vol. 373 (2009).
J. A. Caporaso and D. P. Levine, *Theories of political economy* (New York: Cambridge University Press, 1992).
H. Caroli Casavola, 'Internationalizing Public Procurement Law: Conflicting Global Standards for Public Procurement', *Global Jurist Advances*, vol. 6, iss. 3 (2006), available at <http://www.bepress.com/gj/advances/vol6/iss3/art7> (06/09/07).
T. Carothers, 'The rule of law revival', *Foreign Affairs*, vol. 77 (1998), pp. 95–106.

S. Cassese, 'Global standards for national administrative procedure', *Law and Contemporary Problems* vol. 68 (2005).
P. Cecchini, M. Catinat and A. Jacquemin, *The European challenge: 1992: the benefits of a single market* (Aldershot: Wildwood House, 1988).
D. Chalmers, *European Union law: text and materials* (Cambridge: Cambridge University Press, 2006).
S. Charnovitz, 'Triangulating the World Trade Organization', *The American Journal of International Law*, vol. 96 (2002), pp. 29–55.
B. J. Cohen, *International political economy: an intellectual history* (Princeton; Oxford: Princeton University Press, 2008).
B. J. Cohen, 'The way forward', *New Political Economy*, vol. 14 (2009), pp. 395–400.
G. D. H. Cole, J. N. Figgis, H. J. Laski and P. Q. Hirst, *The pluralist theory of the state: selected writings* (London; New York: Routledge, 1989).
Commission for Africa, *Our common interest: the Commission for Africa: an argument* (London: Penguin, 2005).
E. S. Corwin, *The 'higher law' background of American constitutional law* (Ithaca, NY: Great Seal Books, 1995).
T. Cottier and M. Oesch, *International trade regulation: law and policy in the WTO, the European Union and Switzerland* (Berne: Staempfli, 2005).
K. W. Dam, *The GATT: law and international economic organization* (Chicago; London: University of Chicago Press, 1970).
G. De Graff and M. King, 'Towards a more global government procurement market: the expansion of the GATT Government Agreement in the context of the Uruguay Round', *Int'l Lawyer* (1995), p. 435.
A. T. Guzmán, *How international law works: a rational choice theory* (New York: Oxford University Press, 2008).
S. A. De Smith and R. Brazier, *Constitutional and administrative law*, 7th edn by Rodney Brazier (London: Penguin, 1994).
L. deLeon, 'On Acting Responsibly in a Disorderly World: Individual Ethics and Administrative Responsibility', in B. G. Peters and J. Pierre (eds), *Handbook of public administration* (London: Sage Publications, 2003).
D. Deudney, 'Binding Sovereigns: Authorities, Structures, and Geopolitics in Philiadelphian Systems', in T. J. Biersteker (ed.), *State sovereignty as social construct* (Cambridge; New York [etc.]: Cambridge Univ. Press, 1996), pp. XIII, 298 p.
P. Dicken, *Global shift: transforming the world economy*, 3rd edn (New York: Guilford Press, 1998)
K. Dingwerth, 'Private transnational governance and the developing world: a comparative perspective', *International Studies Quarterly*, vol. 52 (2008), pp. 628–630.
C. Dougherty, 'US Proposes Interim WTO Pocurement Deal to Combat Corruption', *Inside US Trade* (1996, 22 March), available at http://insidetrade.com/Inside-US-Trade/Inside-U.S.-Trade-03/22/1996/us-proposes-interim-wto-procurement-deal-to-combat-corruption/menu-id-710.html, last viewed 1 February 2011.
J. Droop, P. Isenman and B. Mlalazi, *Paris declaration on aid effectiveness: study of existing mechanisms to promote mutual accountability (MA) between donors and partner countries at the international level* (Oxford Policy Management,

2008), available at <http://www.aideffectiveness.org/web/images/pdf2/International%20Mutual%20Accountability%20Final%20Report%2012%20March%202008.pdf> (9 September 2009).

J. L. Dunoff, 'The WTO Constitution, Judicial Power and Changing Patterns of Authority', in V. Rittberger, M. Nettesheim and C. Huckel (eds), *Authority in the global political economy* (Basingstoke: Palgrave Macmillan, 2008), pp. xiii, 344 p.

C. Dupont and M. Elsig, *Trade-And? The World Trade Organization's Fuzzy Borders: A Framework Paper*, Paper presented at the Trade-And? The World Trade Organization's Fuzzy Borders, Graduate Institute of International and Development Studies, Geneva, Switzerland (January 2009).

W. R. Easterly, *The white man's burden: why the West's efforts to aid the rest have done so much ill and so little good* (Oxford: Oxford University Press, 2006).

E. Edwards, *Liberty against government: the rise; flowering and decline of a famous juridical concept* (Baton Rouge: Louisiana State University Press, 1948).

EITI International Advisory Group, *Final Report of EITI International Advisory Group* (2006), available at <http://eitransparency.org/UserFiles/File/iaggeneral/iagfinalreport.pdf> (14 December 2009).

M. Elsig, 'The World Trade Organization's legitimacy crisis: what does the beast look like?', *Journal of World Trade*, vol. 41 (2007).

M. a. R. H. Erickson, *Research on Corruption and its Control: the State of the Art* (2006), available at <http://www.csis.org/media/csis/pubs/060303_whartonworkshop.pdf> (29 January 2009).

D. C. Esty, 'Good governance at the World Trade Organization: building a foundation of administrative law', *J Int Economic Law*, vol. 10 (2007), pp. 509–527.

European Community, *Non-paper of the European community*, Government Procurement IWG Negotiating Group (1989).

European Parliament, *Report on public-private partnerships and community law on public procurement and concessions* (2004).

J. W. Evans, *The Kennedy round in American trade policy: the twilight of the GATT?* (Cambridge, Mass.: Harvard University Press, 1971).

S. J. Evenett and B. M. Hoekman, 'Government procurement: market access, transparency, and multilateral trade rules', *European Journal of Political Economy*, vol. 21 (2005), pp. 163–183.

S. J. Evenett and B. M. Hoekman, *The WTO and government procurement* (Cheltenham: Edward Elgar, 2006).

Federal Government of Canada, *Canadian submission on bid protest mechanism*, GATT Government Procurement Agreement Informal Working Group on Negotiations (M. o. F. A. a. Trade, 1989).

R. C. Feenstra, 'Integration of trade and disintegration of production in the global economy', *The Journal of Economic Perspectives*, vol. 12 (1998).

J. N. Figgis, 'The Great Leviathan', in G. D. H. Cole, J. N. Figgis and H. J. Laski (eds), *The pluralist theory of the state: selected writings of G.D. H. Cole, J.N. Figgis and H.J. Laski* (London: Routledge, 1989), p. [240]p.

M. J. Finnemore and S. Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics', *International Organization*, vol. 55 (2003), pp. 743–758.

S. Foster, R. Laing, B. Melgaard, and M. Zaffran, 'Ensuring Supplies of Appropriate Drugs and Vaccines', in D. T. Jamison, J. G. Breman et al. (eds), *Disease control*

priorities in developing countries, 2nd ed. (New York: Oxford University Press, 2006).
A. Fraser and L. Whitfield, 'Understanding Contemporary Aid Relationships', in L. Whitfield (ed.), *The politics of aid: African strategies for dealing with donors* (Oxford: Oxford University Press, 2009), pp. xx, 401 p.
W. G. Friedmann, *The changing structure of international law*, 2nd edn (1966).
F. P. Gale and M. Haward, *Global commodity governance: state responses to sustainable forest and fisheries certification* (Palgrave Macmillan, 2011 forthcoming).
B. A. Garner and H. C. L. d. Black, *Black's law dictionary*, 8th ed. edn (St Paul, MN: Thomson/West, 2004).
J. H. Gary Gereffi, Raphael Kaplinsky and Tim Sturgeon, 'Introduction: globalisation, value chains and development', *IDS Bulletin*, vol. 32 (2001).
I. W. G. o. N. GATT Committee on Government Procurement, *Broadening: Submission by the United States* (13 June 1989).
I. W. G. o. N. GATT Committee on Government Procurement, *Communication from Switzerland* (18 January 1990).
GATT Ministerial, *Tokyo Round Code on Government Procurement* (1973).
GATT Panel Report, *Tendering procedures on Trondheim toll ring project* (1992).
GATT Secretariat, *Government Procurement: Note by the Secretariat* (5 August 1975).
GATT Secretariat, 'The General Agreement on Tariffs and Trade (GATT 1947)', in *The results of the Uruguay Round of multilateral trade negotiations: the legal texts* (Geneva: GATT Secretariat, 1994), pp. viii, 558 p.
D. Geradin, 'The development of European regulatory agencies: what the EU should learn from American experience', *Columbia Journal of European Law*, vol. 11 (2004), pp. 1–75.
G. Gereffi, J. Humphrey and T. Sturgeon, 'The governance of global value chains', *Review of International Political Economy*, vol. 12 (2005).
A. Gewirth, 'Are There Any Absolute Rights?', in J. Waldron (ed.), *Theories of rights* (Oxford: Oxford University Press, 1984), p. 209.
P. Gibbon, J. Bair and S. Ponte, 'Governing global value chains: an introduction', *Economy and Society*, vol. 37 (2008).
R. Gilpin, *The political economy of international relations* (Princeton, NJ: Princeton Univ. Press, 1987).
N. Girvan, *Power Imbalances and Development Knowledge*, Working Paper No. (North-South Institute, 2007).
Global Value Chain Initiative, 'Concepts and Tools' (2006), available at <http://www.globalvaluechains.org/concepts.html>.
J. Goldstein, M. Kahler, R. Keohane and A. M. Slaughter, 'Legalization and world politics (special issue)', *International Organization*, vol. 54 (2000), pp. 385–399.
D. I. Gordon, *Constructing a Bid Protest Process:Choices Every Procurement Challenge System Must Make*, Working Paper No. 200 (Geo Washington University Law School Working Paper, 2006).
R. W. Grant and R. O. Keohane, 'Accountability and abuses of power in world politics', *American Political Science Review*, vol. 99 (2005), pp. 29–43.
T. Grey, 'Constitutionalism: An Analytic Framework', in J. R. e. Pennock (ed.), *Constitutionalism* ([S.l.]: New York University Press, 1979).
V. Guimarães de Lima e Silva, 'The revision of the WTO Agreement on government procurement: to what extent might it contribute to the expansion of current membership?', *Public Procurement Law Review*, vol. 17 (2008).

T. Guzmán's, *How international law works: a rational choice theory* (New York: Oxford University Press, 2008).
A. T. Hadley, *Economic problems of democracy* (Cambridge: At the University Press, 1923).
A. T. Hadley, *Undercurrents in American politics* (New York: Johnson Reprint Co, 1972).
V. Heiskanen, 'The regulatory philosophy of international trade law', *Journal of World Trade*, vol. 38 (2004), pp. 1–36.
D. Held, 'Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective', in D. Held and M. Koenig-Archibugi (eds), *Global governance and public accountability* (Oxford: Blackwell, 2005), pp. 240–267.
D. Held and A. G. McGrew, 'The Great Globalization Debate: An Introduction', in D. Held and A. G. McGrew (eds), *The global transformations reader* (Cambridge: Polity Press, 2002).
E. Helleiner, 'Reinterpreting Bretton Woods: international development and the neglected origins of embedded liberalism', *Development and Change*, vol. 37 (2006), pp. 943–967.
E. Helleiner, 'The development mandate of international institutions: where did it come from?', *Studies in Comparative International Development*, vol. 44 (2009).
M. Hemmati, *Multi-stakeholder processes for governance and sustainability: beyond deadlock and conflict* (London: Earthscan, 2002).
R. Higgott and M. Watson, 'All at sea in a barbed wire canoe: Professor Cohen's transatlantic voyage in IPE', *Review of International Political Economy*, vol. 15 (2008), pp. 1–17.
A. Hill, 'US, EU in procurement talks', *Financial Times*, 11 January 1994.
R. Hirschl, 'The Judicialization of Politics', in K. E. Whittington, R. D. Kelemen and G. A. Caldeira (eds), *The Oxford handbook of law and politics* (Oxford; New York: Oxford University Press, 2008), pp. 119–141.
B. Hoekman, 'Operationalizing the concept of policy space in the WTO: beyond special and differential treatment', *J Int Economic Law*, vol. 8 (2005), pp. 405–424.
B. Hoekman and M. M. Kostecki, *The political economy of the world trading system: the WTO and beyond*, 3rd edn (Oxford: Oxford University Press, 2009).
B. Hoekman and P. Mavroidis, *The WTO's Agreement on Government Procurement: Expanding Disciplines, Declining Membership?*, Working Paper No. 1112 (CEPR, 1995).
H. Hogerzeil, 'The concept of essential medicines: lessons for rich countries', *British Medical Journal*, vol. 329 (2004), pp. 1169–72.
R. Howse, 'The Legitimacy of the World Trade Organization', in J.-M. Coicaud and V. Heiskanen (eds), *The legitimacy of international organizations* (New York: United Nations University Press, 2001), pp. 355–407.
R. Howse, 'From politics to technocracy - and back again: the fate of the multilateral trading system', *American Journal of International Law*, vol. 96 (2002), pp. 94–117.
R. Howse and K. Nicolaidis, 'Enhancing WTO legitimacy: constitutionalization or global subsidiarity?', *Governance*, vol. 16 (2003), pp. 73–94.
R. E. Hudec, *Developing countries in the GATT legal system* (Aldershot: Gower for the Trade Policy Research Centre, 1987).

M. Humphreys, 'Natural resources, conflict, and conflict resolution: uncovering the mechanisms', *Journal of Conflict Resolution*, vol. 49 (2005).
I. Hurd, 'Constructivism', in C. Reus-Smit and D. Snidal (eds), *The Oxford handbook of international relations* (Oxford; New York: Oxford University Press, 2008), pp. xiii, 772 p.
G. Hyden, 'After the Paris Declaration: taking on the issue of power', *Development Policy Review*, vol. 26 (2008), pp. 259–274.
G. J. Ikenberry, 'A world economy restored: expert consensus and the Anglo-American postwar settlement', *International Organization*, vol. 46 (1992), pp. 289–321.
International Chamber of Commerce, *Policy and Program Department No. 103 - 4/26* (1985).
F. Ismail, 'A development perspective on the WTO July 2004 general council decision', *J Int Economic Law*, vol. 8 (2005), pp. 377–404.
F. Ismail, *Reforming the World Trade Organization: Developing Countries in the Doha Round*, Working Paper No. (Friedrich Ebert Stiftund and Consumers Unity and Trust Society International, 2009).
J. H. Jackson, *World trade and the law of GATT: a legal analysis of the general agreement on tariffs and trade* (Indianapolis: Bobbs-Merrill Co., 1969).
J. H. Jackson, *The world trading system: law and policy of international economic relations* (London: The MIT Press, 1992).
J. H. Jackson, 'Afterward: the linkage problem – comments on five texts', *American Journal of International Law*, vol. 96 (2002), pp. 118–125.
R. H. Jackson, *Quasi-states: sovereignty, international relations and the third world* (Cambridge: Cambridge University Press, 1990).
M. Jensen, *The Articles of confederation: an interpretation of the social-constitutional history of the American Revolution 1774–1781* (Madison: University of Wisconsin Press, 1970).
C. Joerges, 'Taking the law seriously: on political science and the role of law in the process of European integration', *European Law Journal*, vol. 2 (1996).
R. Kagan, 'The "Non-Americanisation" of European law', *European Political Science*, vol. 7 (2008).
R. A. Kagan, *Adversarial legalism: the American way of law* (Harvard University Press, 2001).
A. Z. Kaminski and B. Kaminski, *Governance and Corruption in Transition: The Challenge of Subverting Corruption* (2001), available at <http://www.unece.org/ead/sem/sem2001/papers/Kaminski.pdf> (26 September 2008).
T. L. Karl, *The paradox of plenty: oil booms and petrostates* (Berkeley; London: University of California Press, 1997).
P. J. Katzenstein and R. Sil, 'Eclectic Theorizing in the Study and Practice of International Relations', in C. Reus-Smit and D. Snidal (eds), *The Oxford handbook of international relations* (Oxford; New York: Oxford University Press, 2008), pp. xiii, 772 p.
R. D. Kelemen, 'Suing for Europe: adversarial legalism and European governance', *Comparative Political Studies*, vol. 39 (2006), pp. 101–127.
R. D. Kelemen, 'The Rise of Adversarial Legalism in Europe', *SSRN eLibrary* (2009).
R. D. Kelemen and E. C. Sibbitt, 'The globalization of American law', *International Organization*, vol. 58 (2004), pp. 103–136.

C. Kenyon, 'Constitutionalism in Revolutionary America', in J. R. e. Pennock (ed.), *Constitutionalism* ([S.l.]: New York U P, 1979).
R. O. Keohane, *After hegemony: cooperation and discord in the world political economy* (Princeton, NJ: Princeton University Press, 1984).
R. O. Keohane, 'International institutions: two approaches', *International Studies Quarterly*, vol. 32 (1988).
R. O. Keohane, 'International relations and international law: two optics', *Harvard International Law Journal*, vol. 38 (1997), no. 2, pp. 487–499.
R. O. Keohane, 'The old IPE and the new', *Review of International Political Economy*, vol. 16 (2009), pp. 34–46.
B. Kingsbury, N. Krisch and R. B. Stewart, 'The emergence of global administrative law', *Law and Contemporary Problems* (2005).
R. Klitgaard, 'International cooperation against corruption', *Finance and Development*, vol. 35 (1997).
L. Koechlin and R. Calland, 'Standard Setting at the Cutting Edge: an Evidence-based Typology for Multi-stakeholder Initiatives', in A. Peters, L. Koechlin, T. Förster and G. Fenner Zinker-nagel (eds), *Non-state actors as standard setters* (Cambridge: Cambridge University Press, 2009).
S. D. Krasner, *Sovereignty: organized hypocrisy* (Princeton, NJ; Chichester: Princeton University Press, 1999).
A. La Chimia and S. Arrowsmith, 'Addressing tied aid: towards a more development-oriented WTO?', in *J Int Economic Law*, vol. 12, no. 3 (2009), pp. 707–747.
C. Lancaster, *Foreign aid: diplomacy, development, domestic politics* (Chicago, Il; London: University of Chicago Press, 2007).
J.-E. Lane, *Constitutions and political theory* (Manchester: Manchester University Press, 1996).
J.-E. Lane, *The public sector: concepts, models and approaches, 3rd edn* (London: Sage, 2000).
D. Levi-Faur, 'The political economy of legal globalization: juridification, adversarial legalism, and responsive regulation. a comment', *International Organization*, vol. 59 (2005), pp. 451–462.
J. Linarelli, 'The WTO transparency agenda: law, economics and international relations theory', in S. Arrowsmith and M. Trybus (eds), *Public procurement: the continuing revolution* (The Hague: Kluwer Law International, 2003).
J. Linarelli, 'The WTO agreement on government procurement and the UNCITRAL model procurement law: a view from outside the region', *Asian Journal of WTO and Health Law and Policy*, vol. 1 (2006), pp. 317–341.
W. Linder, A. Bächtiger and G. Lutz, *Democratisation, rule of law and development* (Governance Division, 2008).
L. A. Low and J. De Gramont, 'The inter-american convention against corruption: overview and status at three years since its inception', *American University International Law Review*, vol. 15 (2000), pp. 768–779.
C. B. Macpherson, *The political theory of possessive individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1979).
J. Madison, A. Hamilton J. Jay and I. Kramnick, *The federalist papers* (Harmondsworth: Penguin, 1987).
K. Malhotra, *Making global trade work for people*, vol. 2 (New York: UNDP, 2003).

R. Manning, 'Will "Emerging Donors" change the face of international co-operation?', *Development Policy Review*, vol. 24 (2006), pp. 371–385.

M. J. Marks and H. B. Malmgren, 'Negotiating nontariff distortions to trade', *Georgetown Journal of International Law*, vol. 7 (1975), p. 327.

J. L. Mashaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance', iss. No 116 (2006a), available at <http://ssrn.com/paper=924879 >.

J. L. Mashaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance', in M. D. Dowdle (ed.), *Public accountability: designs, dilemmas and experiences* (Cambridge: Cambridge University Press, 2006b), pp. 115–156.

J. Mayall, 'The Liberal Economy', in J. Mayall (ed.), *The Community of states: a study in international political theory* (London: Allen & Unwin, 1982).

J. Mayall, *Nationalism and international society* (Cambridge: Cambridge University Press, 1990).

C. McCrudden, *Buying social justice* (Oxford: Oxford University Press, 2007).

C. McCrudden and S. G. Gross, 'WTO government procurement rules and the local dynamics of procurement policies: a Malaysian case study', *Eur J Int Law*, vol. 17 (2006), pp. 151–185.

MDG Gap Task Force, *Delivering on the Global Partnership for Achieving the Millenium Development Goals* (2008), available at <http://www.un.org/esa/policy/mdggap/mdgreport08_engw.pdf> (10 January 2010).

MDG Gap Task Force, *Strengthening the Global Partnership for Development in a Time of Crisis* (2009), available at <http://www.un.org/esa/policy/mdggap/mdg8report_engw.pdf> (11 January 2010).

Medicines Transparency Alliance, *Aide-Memoire for 8 April 2009 Meeting of the International Advisory Group* (2009a), available at <http://www.medicinestransparency.org/fileadmin/uploads/Documents/Aide-Memoire-IAGApril2009_final.pdf> (5 February 2010).

Medicines Transparency Alliance, *Laying the Foundations: Annual Review 2008–2009* (2009b), available at <http://www.medicinestransparency.org/uploads/media/MeTA_Annual_Review.pdf> (8 December 2009).

Medicines Transparency Alliance, *Leveling the Playing Field* (2009c), available at <http://www.medicinestransparency.org/uploads/media/Levelling_the_playing_field_final_report_June2009_01.pdf> (20 November 2009).

Medicines Transparency Alliance, *Medicines Transparency Alliance: Implementing our pilot phase* (2009d), available at <http://www.medicinestransparency.org/uploads/media/briefing_implementing_our_pilot_phase.pdf> (12 January 2010).

Medicines Transparency Alliance, *MeTA Core Principles* (2009e), available at <http://www.medicinestransparency.org/uploads/media/MeTA_Core_principles.pdf> (11 January 2010).

Medicines Transparency Alliance, *MeTA National Workplan: Ghana* (2009f), available at <http://www.medicinestransparency.org/fileadmin/uploads/Documents/MeTA-Ghana-workplan.pdf> (27 January 2010).

Medicines Transparency Alliance, *MeTA tools to collect and disclose data on medicines* (2009g), available at <http://www.medicinestransparency.org/news-events/article/view/meta-tools-to-collect-and-disclose-data-on-medicines/> (4 February 2010).

Medicines Transparency Alliance, *MeTA Uganda Workplan* (2009h), available at <http://www.medicinestransparency.org/fileadmin/uploads/Documents/MeTA-Uganda-workplan.pdf> (27 January 2010).

Medicines Transparency Alliance, *The Role of the MeTA Secretariat* (M. Secretariat, 2009i), available at <http://www.slideshare.net/MeTApresents/the-role-of-the-meta-secretariat-presentation> (27 January 2010).

S. Mendis, K. Fukino, A. Cameron, R. Laing, A. Filipe, O. Khatib, J. Leowski and M. Ewan, 'The availability and affordability of selected essential medicines for chronic diseases in six low and middle-income countries', *Bulletin of the World Health Organization*, vol. 85 (2007).

P. Messerlin, 'Agreement on Government Procurement', *The New World Trading System: Readings* (Paris: OECD, 1994).

G. E. Metzger, A. C. J. Aman, C. F. Sabel, L. M. Salamon, E. S. Savas and E. D. Sclar, 'Redefining the public sector: accountability and democracy in the era of privatization', *Fordham Urban Law Journal*, vol. 18 (2001).

T. M. Moe and M. Caldwell, 'The institutional foundations of democratic government: a comparison of presidential and parliamentary systems', *Journal of Institutional and Theoretical Economics*, vol. 150 (1994), pp. 171–195.

A. Moravcsik, 'Reassessing Legitimacy in the European Union', *Journal of Common Market Studies*, vol. 40 (2002), pp. 603–624.

S. E. Morris, 'Mutual evaluation systems: an approach to ensuring progress in implementing international agreements', *American University International Law Review*, vol. 15 (2000), pp. 768–779.

C. Murphy and J. Yates, *The international organization for standardization (ISO): global governance through voluntary consensus*, vol. 32 (London; New York: Routledge, 2009).

A. Narlikar, 'Developing Countries and the WTO', in B. Hocking and S. McGuire (eds), *Trade politics: international, domestic and regional perspectives*, 2nd edn (London: Routledge, 2004).

D. Nayyar, 'Development through Globalization?', in G. Mavrotas (ed.), *Advancing development: core themes in global economics: studies in development economics and policy* (New York: Palgrave, 2007).

P. M. Nichols, 'Corruption in the World Trade Organization: discerning the limits of the World Trade Organization's authority', *New York University Journal of International Law & Politics*, vol. 28 (1996).

K. Nicolaïdis and R. Howse, *The federal vision: legitimacy and levels of governance in the United States and the European Union* (Oxford; New York: Oxford University Press, 2001).

Nordic+Procurement Group, *Implementing the Joint Procurement Policy and Promoting the Use of Reliable Country Procurement Systems: A Guide for Program Directors, Managers and Officers* (2005), available at <http://www.amg.um.dk/NR/rdonlyres/C5BEDAFE-0585-404C-9663-DC18A845898A/0/JointProcurementPolicyGuideNovember2005.pdf> (16 October 2009).

D. C. North, *Institutions, institutional change and economic performance* (Cambridge: Cambridge University Press, 1990).

OECD, *Fighting Corruption and Promoting Integrity in Public Procurement* (Paris: OECD, 2005).

OECD, *Integrity in Public Procurement: Tools for Implementation* (P. G. a. T. D. Directorate, 2009), available at <http://www.oecd.publicgovernanceforum.

org/downloads/documents/GOV-PGC-GF-4_Toolkit_ENG.pdf> (23 July 2009).

OECD DAC, *Recommendation on Anti-Corruption Proposals for Aid-Funded Procurement: Follow-up report* (May 1997), available at <http://www.oecd.org/document/30/0,2340,en_2649_34855_2394526_1_1_1_1,00.html> (3 April 2009).

OECD DAC, *Recommendation on Untying Official Development Assistance to the Least Developed Countries* (25 April 2001), in references, available at www.oecd.org/dac/untiedaid

OECD DAC, *Synthesis of Lessons Learned in Fighting Corruption* (D. N. o. Governance, 2003), available at <http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN016841.pdf> (2 February 2009).

OECD DAC, *Harmonising Donor Practices for Effective Aid Delivery – Volume 3: Strengthening Procurement Capacities in Developing Countries* (Paris: OECD, 2006).

OECD DAC, *The Paris Declaration* (1 November 2007a), available at <http://www.oecd.org/document/18/0,3343,en_2649_15577209_35401554_1_1_1_1,00.html#book_1> (28 February 2010).

OECD DAC, *Policy Paper and Principles on Anti-Corruption: Setting an Agenda for Collective Action:* (2007b), available at <http://www.oecd.org/dataoecd/2/42/39618679.pdf> (21 July 2009).

OECD DAC, *Procurement Capacity Assessment and Strategy Formulation in Malawi: A Case Study* (W. P. o. A. Effectiveness, 2008a), available at <http://www.oecd.org/dataoecd/6/1/40496436.pdf> (12 November 2009).

OECD DAC, *Report on the Use of Country Systems in Public Financial Management* (OECD, 2008b), available at <http://www.oecd.org/dataoecd/29/20/41085468.pdf> (4 September 2008).

OECD DAC, *Recommendation on Untying Official Development Assistance to the Least Developed Countries* (25 April 2001), available at <http://webdomino1.oecd.org/horizontal/oecdacts.nsf/Display/A2B869686974EC13C125729B004B79E6?OpenDocument> (29 October 2007).

OECD DAC, 'Compendium of country examples and lessons learned from applying the methodology for assessment of national procurement systems: volume 1 sharing experiences', *OECD Journal on Development*, vol. 9 (2008).

OECD DAC, *Managing Aid: Practices of DAC Member Countries* (2009a), available at <http://www.oecd.org/dataoecd/58/29/42903202.pdf> (26 September 2009).

OECD DAC, *Mutual Accountability; Issues Brief* (2009b), available at <http://www.oecd.org/dataoecd/32/19/43408716.pdf> (3 December 2009).

OECD DAC Working Party on Aid Effectiveness, *Harmonization, Alignment, Results: Report on Progress, Challenges and Opportunities* (2005).

OECD DAC Working Party on Aid Effectiveness, *Overview on Aid Harmonization and Alignment* (2007), available at <http://www.aidharmonization.org/ah-overview/secondary-pages/editable?key=104> (28 February 2010).

OECD Directorate for Financial Fiscal and Enterprise Affairs, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents* (W. G. o. B. i. I. B. T. C. o. I. I. a. M. Enterprises, 1998), available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf> (11 June 2009).

M. Olcay and R. Laing, *Pharmaceutical Tariffs: What is their effect on prices, protection of local industry and revenue generation?* (WHO, 2005), available at <http://www.who.int/intellectualproperty/studies/TariffsOnEssentialMedicines.pdf> (12 January 2010).

D. Ölcer, 'Extracting the Maximum from the EITI', Working Paper No. 276 (Paris: OECD Development Centre, 2009), available at www.oecd.org/dataoecd/56/60/42342311.pdf, last viewed 3 February 2011.

A. Otten, 'Improving the Playing Field for Exports: The Agreements on Intellectual Property, Investment Measures and Government Procurement', in T. Cottier (ed.), *GATT-Uruguay round: nine papers* (Bern: Verlag Staempli, 1995), pp. 67–90.

S. Page, 'Bringling Aid and Trade Together', in S. Page (ed.), *Trade and aid: partners or rivals in development policy?* (Cameron May, 2007).

C. L. Pallas and J. Wood, 'The World Bank's use of country systems for procurement: a good idea gone bad?', *Development Policy Review*, vol. 27 (2009), pp. 215–230.

F. Palpacuer, 'Bringing the social context back in: governance and wealth distribution in global commodity chains', *Economy and Society*, vol. 37 (2008), pp. 393–419.

J. Pelkmans, 'The new approach to technical harmonization and standardization', *JCMS: Journal of Common Market Studies*, vol. 25 (1987), pp. 249–269.

J. Pierre and B. G. Peters, *Governance, politics and the state* (Basingstoke: Macmillan, 2000).

M. Pieth, 'Taking Stock: Making the OECD Convention on Anti-Corruption Work' (2000), available at <http://www.oas.org/juridico/english/pieth2000.htm>.

M. Pieth, 'International Efforts to Combat Corruption', in B. Huber (ed.), *Combating corruption in the European Union* (Trier, 2002).

M. Pomerantz, 'Toward a new international order in government procurement', *Law and Policy in International Business*, vol. 11 (1980).

M. E. Porter, *The competitive advantage of nations* (New York: Free Press, 1990).

J. Ravenhill, *Global political economy*, 2nd edn (Oxford; New York: Oxford University Press, 2008).

J. Rawls, *A theory of justice*, Rev. edn (Cambridge, MA; London: Belknap, 1999).

V. Rege, 'Transparency in government procurement: issues of concern and interest to developing countries', *Journal of World Trade*, vol. 35 (2001), pp. 489–515.

C. Reus-Smit, *The politics of international law* (Cambridge: Cambridge University Press, 2004).

V. Rittberger, M. Nettesheim and C. Huckel, 'Inclusive Global Institutions for a Global Political Economy', in V. Rittberger and M. Nettesheim (eds), *Authority in the global political economy* (Palgrave Macmillan, 2008).

V. Rittberger, M. Nettesheim and C. Huckel, *Authority in the global political economy* (Basingstoke: Palgrave Macmillan, 2008).

J. Robinson, *Economic philosophy* (C. A. Watts & Co.: London, 1962).

B. S. Romzek and M. J. Dubnick, 'Accountability in the public sector: lessons from the challenger tragedy ', *Public Administration Review*, vol. 47 (1987).

M. Rose, *Developing Caribbean Procurement Law: An Overview of the Legal Context for Public Procurement Reform in the Caribbean Region*, in (Procurement Law Intensive, 2008).

M. L. Ross, 'Does oil hinder democracy?', *World Politics*, vol. 53 (2001).
J. Ruggie, 'International regimes, transactions, and change: embedded liberalism in the postwar economic order', *International Organization*, vol. 36 (1982).
J. D. Sachs, *The end of poverty: economic possibilities for our time* (New York: Penguin Press, 2005).
J. D. Sachs and A. M. Warner, 'Natural resource abundance and economic growth', *National Bureau of Economic Research Working Paper Series*, vol. No. 5398 (1995).
P. Sauvé, *GATS 2000 new directions in services trade liberalization* (Washington, DC: The Brookings Institution, 2000).
F. W. Scharpf, 'Legitimacy and Regulatory Competition', in K. Nicolaidis and R. Howse (eds), *The federal vision: legitimacy and levels of governance in the United States and the European Union* (New York: Oxford University Press, 2001).
F. W. Scharpf, *Reflections on Multilevel Legitimacy* (Max Planck Institute for the Study of Societies Working Paper No. 3, Cologne, 2007).
A. Schick, 'Why most developing countries should not try New Zealand's reforms', *World Bank Research Observer*, vol. 13 (1998).
H. Schmitz and P. Knorringa, 'Learning from global buyers', *Journal of Development Studies*, vol. 37 (2000), pp. 177–205.
S. L. Schooner, 'Fear of oversight: the fundamental failure of business-like government', *American University Law Review*, vol. 50 (2001), pp. 627–723.
S. L. Schooner, 'Desiderata: objectives for a system of government contract law', *Public Procurement Law Review* vol. 11 (2002), pp. 103–112.
S. L. Schooner, *A Conversation About Malversation: the Post-Millennial U.S. Experience Combating Corruption in Public Procurement*, paper presented at the International Conference on Public Procurement: Global Revolution III, University of Nottingham (June 2006).
S. L. Schooner, D. I. Gordon and J. L. Clark, *Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations*, Working Paper No. (SSRN, 2008).
A. Sen, *Development as freedom* (Oxford: Oxford University Press, 1999).
G. C. Shaffer and M. A. Pollack, 'Hard vs. soft law: alternatives, complements, and antagonists in international governance', *Minnesota Law Review*, vol. 94 (2010), pp. 706–799.
T. M. Shaw and J. van der Westhuizen, 'Towards a Political Economy of Trade in Africa: States, Companies and Civil Societies', in B. Hocking and S. McGuire (eds), *Trade politics: international, domestic and regional perspectives*, 2nd edn (London: Routledge, 2004), p. xvii.
J. N. Shklar and S. Hoffmann, *Political thought and political thinkers* (Chicago: University of Chicago Press, 1998).
B. A. Simmons, 'Treaty compliance and violation', *Annual Review of Political Science*, vol. 13 (2010), pp. 273–296.
A. M. Slaughter, *Agencies on the loose? Holding government networks accountable* (Oxford University Press, 2000).
A. Smith, *Wealth of nations* (London: J.M. Dent and Sons, 1914).
T. Søreide, *Competition and corruption: What can the donor community do?,* U4 Anti-corruption Resource Centre Brief, available at: www.U4.no/themes/private-sector Last visited on 1 February 2011.
L. Steer, C. Wathne and R. Driscoll, *Mutual Accountability at the Country Level: A Concept and Emerging Good Practice Paper* (Overseas Development Institute,

2009), available at <http://www.oecd.org/dataoecd/58/32/43235053.pdf> (9 September 2009).
E. Stein, 'Lawyers, judges and the making of a transnational constitution', *American Journal of International Law*, vol. 75 (1981).
M. Stephenson, *Rule of Law as a Goal of Development Policy*, available at <*http://go.worldbank.org/AQ875YH880*> (15 September 2008).
P.-T. Stoll, 'Global Public Goods: the Governance Dimension', in V. Rittberger, M. Nettesheim and C. Huckel (eds), *Authority in the global political economy* (Basingstoke: New York: Palgrave Macmillan, 2008), pp. xiii, 344 p.
A. Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance', *Living Reviews in EU Governance* (2010), available at <http://works.bepress.com/alec_stone_sweet/37>.
S. Strange, *The retreat of the state: the diffusion of power in the world economy* (Cambridge: Cambridge University Press, 1996).
J. C. Strauss, 'The past in the present: historical and rhetorical lineages in China's relations with Africa', *The China Quarterly*, vol. 199 (2009), pp. 777–795.
P. Sutton, *Public Sector Reform in the Commonwealth Caribbean: A Review of Recent Experiences*, Working Paper No. 6 (Centre for International Governance Innovation, 2008).
Swedish International Development Agency, *Power Analysis – Experiences and Challenges* (D. f. D. a. S. Development, June 2006), available at <http://www.sida.se/Svenska/Om-oss/Publikationer/Visa-publikation/?iframesrc=http://www2.sida.se/sida/jsp/sida.jsp%3Fd=118%26a=24300&searchWords=concept%20Note> (12 November 2009).
I. Taylor and K. Smith, *United Nations conference on trade and development (UNCTAD)*, vol. 15 (London; New York: Routledge, 2007).
G. Teubner, 'Juridification - Concepts, Aspects, Limits, Solutions', in G. Teubner (ed.), *Juridification of social spheres: a comparative analysis in the areas of labor, corporate, antitrust, and social welfare law* (New York: Walter de Gruyter and Co., 1987).
E. Thun, 'The Globalization of Production', in J. Ravenhill (ed.), *Global political economy*, 2nd edn (Oxford; New York: Oxford University Press, 2008), pp. 346–372.
M. P. Todaro, *Economics for a developing world : an introduction to principles, problems, and policies for development*, 3rd edn (London; New York: Longman, 1992).
J. P. Trachtman and J. E. Alvarez, 'Institutional linkage: transcending "trade and..."', *The American Journal of International Law*, vol. 96 (2002), pp. 77–93.
J. Tumlir, 'Evolution of the Concept of International Economic Order 1914 - 80', in F. Cairncross (ed.), *Changing perceptions of economic policy: essays in honour of the seventieth birthday of Sir Alec Cairncross* (London: Methuen, 1982).
UK Department for International Development, *Eliminating World Poverty: Making Governance Work for the Poor* (2006), available at <http://www.dfid.gov.uk/Documents/publications/whitepaper2006/whitepaper-printer-friendly.pdf> (2 November 2009).
UK Department for International Development, *Towards a Medicines Transparency Alliance* (2007), available at <http://www.dfidhealthrc.org/MeTA/documents/MeTA%20overview%201Mar07.pdf> (12 January 2010).

UN General Assembly, *Strengthening transparency in industries* (2008), UN Doc A/RES/62/274

UN Global Compact, T. International Chamber of Commerce and World Economic Forum, *Implementation Review of the UN Convention against Corruption*, in UN Secretary General (ed.) (2009).

UNCAC, *UNCAC: implementing procurement-related aspects* (2008), UN Doc CAC/COSP/2008/CRP.2.

UNCITRAL, *Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services*, A/CN.9/403 cong. (1994), available at <http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf> (24 March 2009).

UNCTAD, *Sao Paulo Consensus* (25 June 2004), UN Doc TD7410.

UNCTAD, *Doubling Aid: Making the 'Big Push' Work* (2006).

UNCTAD, *The least developed countries report: Growth, Poverty and the Terms of Development Partnership* (2008).

United Nations Development Program, *Capacity Development Practice Note* (C. D. Group, 2008), available at <http://content.undp.org/go/cms-service/download/asset/?asset_id=1654154> (2 November 2009).

United Nations Development Program, *Capacity Development: A UNDP Primer* (2009), available at <http://content.undp.org/go/cms-service/download/asset/?asset_id=2099298> (2 November 2009).

S. Unsworth, 'What's politics got to do with it?: Why donors find it so hard to come to terms with politics, and why this matters', *Journal of International Development*, vol. 21 (2009), pp. 883–894.

US Department of Commerce, *Addressing the Challenges of International Bribery and Fair Competition* (I. T. Administration, 2004), available at <http://www.ita.doc.gov/media/Publications/pdf/bribery2004.pdf> (11 June 2009).

US Senate Committee on Foreign Relations, *The Petroleum and Poverty Paradox: Assessing US and International Efforts to Fight the Resource Curse* (2008), available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_senate_committee_prints&docid=f:44727.pdf> (14 December 2009).

C. M. Vasquez, 'The four doctrines of self-executing treaties', *American Journal of International Law*, vol. 89 (1995).

J. Waldron, 'Is the rule of law an essentially contested concept (in Florida)?', *Law and Philosophy*, vol. 21 (2002), pp. 137–164.

P. Wang, 'Coverage of the WTO's agreement on government procurement: challenges of integrating China and other countries with a large state sector into the global trading system', *J Int Economic Law*, vol. 10 (2007), pp. 887–920.

B. Waning, J. Maddix, Y. Tripodis, R. Laing, H. Leufkens and M. Gokhale, 'Towards equitable access to medicines for the rural poor: analyses of insurance claims reveal rural pharmacy initiative triggers price competition in Kyrgyzstan', *International Journal for Equity in Health*, vol. 8 (2009).

R. Watermeyer, *Project Synthesis Report: Unpacking Transparency in Government Procurement – Rethinking WTO Government Procurement Agreements*, available at <http://www.cuts-international.org/pdf/synthesis-report.pdf> (27/08/07).

C. Weaver, 'IPE's split brain', *New Political Economy*, vol. 14 no. 3 (2009), pp. 337–346.

J. Weiler, 'The transformation of Europe', *Yale Law Journal*, vol. 100 (1991).

J. H. H. Weiler, 'Does Europe need a constitution? Demos, Telos and the German Maastricht decision', *European Law Journal*, vol. 1 (1995).
F. Weiss, *Public procurement in European community law* (London; Atlantic Highlands, NJ: Athlone Press, 1993).
T. G. Weiss, 'Governance, good governance and global governance: conceptual and actual challenges', *Third World Quarterly*, vol. 21 (2000), pp. 795–814.
G. Westring and G. Jadoun, *Public procurement manual for Central and Eastern Europe* (S. a. I. I. T. Centre, 1996).
L. Whitfield and A. Fraser, 'Introduction: Aid and Sovereignty', in L. Whitfield (ed.), *The politics of aid* (Oxford: Oxford University Press, 2009a).
L. Whitfield and A. Fraser, 'Negotiating Aid', in L. Whitfield (ed.), *The politics of aid: African strategies for dealing with donors* (Oxford: Oxford University Press, 2009b).
WHO Expert Committee on the Selection and Use of Essential Medicines, *The Selection and Use of Essential Medicines; Report of the WHO Expert Committee* (2002), available at <http://apps.who.int/medicinedocs/pdf/s4875e/s4875e.pdf> (10 January 2010).
Q. Wiktorowicz, 'The political limits to nongovernmental organizations in Jordan', *World Development*, vol. 30 (2002), pp. 77–93.
R. Wilkinson, 'The problematic of trade and development beyond the Doha round', *The Journal of International Trade and Diplomacy*, vol. 3 (2009).
R. Wilkinson and J. Scott, 'Developing country participation in the GATT: a reassessment', *World Trade Review*, vol. 7 (2008), pp. 473–510.
C. A. Williams, 'Civil society initiatives and "soft law" in the oil and gas industry', *Journal of International Law and Politics*, vol. 36 (2004), pp. 457–502.
D. Williams, 'Aid and sovereignty: quasi-states and the international financial institutions', *Review of International Studies*, vol. 26 (2000), pp. 557–573.
D. Williams, 'Managing sovereignty: the World Bank and development in sub-Saharan Africa', *Mondes en développment*, vol. 31 (2003).
G. R. Winham, *International trade and the Tokyo Round negotiation* (Princeton, NJ: Princeton University Press, 1986).
G. R. Winham, 'The Evolution of the Global Trade Regime', in J. Ravenhill (ed.), *Global political economy*, 2nd edn (Oxford; New York: Oxford University Press, 2008).
W. Wittig, 'Public procurement and the development agenda', *Public Procurement Law Review,* vol. 3 (2002), pp. 71–83.
N. Woods, 'Whose aid? Whose influence? China, emerging donors and the silent revolution in development assistance', *International Affairs*, vol. 84 (2008), pp. 1205–1221.
N. Woods and A. Narlikar, 'Governance and the limits of accountability: the WTO, the IMF, and the World Bank', *International Social Science Journal*, vol. 53 (2001), pp. 569–583.
S. Woolcock, 'The Interaction between Levels of Rule-making in Public Procurement', in S. Woolcock (ed.), *Trade and investment rule-making: the role of regional and bilateral agreements* (Tokyo: United Nations University Press, 2006), pp. xvii, 265 p.
World Bank, *Understanding Socio-economic and Political Factors to Impact Policy Change*, Report No. 36442 - GLB (Social Development Department, 2006), available at <http://siteresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/244362–1164107274725/3182370–1164107324437/

Socio-Eoconomic-CSA-ESW-wb.pdf?resourceurlname=Socio-Eoconomic-CSA-ESW-wb.pdf> (12 November 2009).

World Health Organization, *WHO Medicines Strategy - 2004 - 2007: Countries at the Core* (2004), available at <http://apps.who.int/medicinedocs/pdf/s5571e/s5571e.pdf> (10 January 2010).

World Health Organization and M. T. Alliance, *Common statement about WHO Good Governance for Medicines programme and DFID Medicines Transparency Alliance* (2008), available at <http://www.medicinestransparency.org/uploads/media/CommonStatementMETA-GGMRev8_01.pdf> (4 February 2010).

World Health Organization and Health Action International, *Medicine Pricing Matters* (2008), available at <http://www.haiweb.org/medicineprices/28012009/MPM-Issue-4.pdf> (20 January 2010).

World Trade Organization, *Report on the Meeting of 7 June 2000: Note by the Secretariat*, WT/WGTGP/M/10 cong. (W. G. o. T. i. G. Procurement, 1 August 2000), available at <http://docsonline.wto.org/DDFDocuments/t/WT/WGTGP/W32.doc> (20 February 2009).

WTO Committee on Government Procurement, *Revision of the Agreement on Government Procurement as at 8 December 2006 - Prepared by the Secretariat* (11 December 2006), WTO Doc GPA/W/297.

WTO Ministerial Conference, *Singapore Ministerial Declaration* (18 December 1996a), WTO Doc WT/MIN(96)/DEC.

WTO Ministerial Conference, *WTO Agreement on Government Procurement* (entered into force 1 January 1996b), WTO Doc LT/UR/A-4/PLURI/2.

WTO Working Group on Transparency in Government Procurement, *Report to the General Council* (15 July 2003), WTO Doc WT/WGTGP/7.

O. R. Young, *Compliance and public authority: a theory with international applications* (Baltimore: Published for Resources for the Future by the Johns Hopkins University Press, 1979).

C. R. Yukins, *Integrating Integrity and Procurement: The United Nations Convention Against Corruption and the UNCITRAL Model Procurement Law*, Working Paper No.(SSRN, 2007).

C. R. Yukins and S. L. Schooner, *Incrementalism: Eroding the Impediments to a Global Public Procurement Market*, Working Paper No. 320 (Geo Washington University Law School Working Paper, 2007).

E. Zedillo, A. Y. Al-Hamad D. Bryer, M. Chinery-Hesse, J. Delors, R. Grynspan, A. Y. Livshits, A. M. Osman, R. Rubin, M. Singh and M. Son, *Report of the high level panel on financing for development (Zedillo Report)* (High Level Panel on Financing for Development, 2001).

Index