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**Transcending mercantilism:
Realising the Synergies of International Public Procurement Agreements**

Kamala Dawar¹

Abstract

This paper identifies the regulatory synergies that can be realised between the WTO GPA and the growing number of RTAs with public procurement chapters that include provisions to control corruption. It submits that despite the multiplicity of international procurement agreements being negotiated outside of the WTO GPA, the relationship between the different agreements has more potential to produce a beneficial ‘accumulation’ of global regulatory enhancements than a system-damaging ‘fragmentation.’²

This paper highlights the discernible convergence in the design of international procurement systems, as reflected in both the WTO GPA and leading RTAs. The general principles of these commitments – whether at the regional or plurilateral level - reflect the growing acknowledgement that transparent, competitive and accountable government procurement systems benefit economic development, good governance and effective policy implementation. And this, in and of itself, may encourage inbound FDI and further economic and social development. These developments indicate a widespread understanding that ensuring good government procurement processes has a developmental significance that transcends its magnitude as an aspect of economic activity.³

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² Richard E. Baldwin, 2006. "Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade," *The World Economy*, Blackwell Publishing, vol. 29(11), pages 1451-1518, November. James H. Mathis Regulatory regionalism in the WTO: Are ‘deep integration’ processes compatible with the multilateral trading system?), in S. Lester, B. Mercurio, L. Bartels (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis*, (Cambridge University Press, 2014).

³ See for example, Sue Arrowsmith Robert D. Anderson. *The WTO Regime on Government Procurement: Challenge and Reform* (2011) Cambridge University Press. Anderson R.D. *The WTO Agreement on Government Procurement: an emerging tool of global integration and good governance*. *EBRD Law in Transition online*. October 2010.

1. Introduction

Alongside a convergence in internationally accepted principles for procurement systems, there are nevertheless an increasing number of international agreements being negotiated that include legal provisions to regulate public procurement markets. Any convergence and increased acceptance of certain principles to underpin public procurement systems is evidently not leading in a linear manner to the negotiation of a single multilateral agreement committed to these values. On the contrary, both the number of RTAs including public procurement rules is expanding, as well as the number of signatory and observer parties to the plurilateral WTO GPA. This expansion indicates an appetite for further liberalisation of public procurement markets among governments. Moreover, this is despite the slowdown in the negotiation of broader multilateral trade commitments in the WTO within the framework of the Doha Negotiating Round.

This paper first submits that there is little potential to realise market access synergies between the WTO GPA and in those RTAs with substantive procurement commitments. It argues that due to the strict and conditional nature of reciprocity in market access concessions under both the WTO GPA and RTAs, the fears of trade diversion over trade creation are somewhat misleading. The negotiation of market access concessions is highly bilateral in nature; the MFN clause is applied conditionally on the basis of strict reciprocity. This implies that synergies between plurilateral and bilateral market access commitments are unlikely.

The paper then examines the potential synergies that can emerge from the non-market access regulatory provisions of these agreements. It focuses on the recent and unprecedented incorporation of provisions to promote good governance and control corruption in procurement practises.

The paper contends that these synergies occur not from the operation of the governing MFN provision, but - more importantly - from the non-discriminatory nature of the regulatory policy itself as implemented. While some regulatory processes do not easily lend themselves to open MFN for third parties or multilateral application, those relating corruption control have some characteristics that may well lend themselves to multilateralization – and could be characterised as so-called *global public goods*. This argument underlines the leading contention of this paper: international government procurement agreements operate to promote good government procurement processes, and this has a developmental significance that transcends its magnitude as an aspect of economic activity.

This paper concludes that consequently, the WTO GPA and RTAs with government procurement chapters are more a complement than a hindrance to each other in their mutual efforts to bring good government procurement practices and the dynamic of competition to public procurement markets. Notwithstanding this, to concentrate on RTAs to the exclusion of the WTO GPA would be to forgo tangible benefits.

2. Market Access Synergies

Government procurement negotiations, like most trade negotiations, are designed to promote mutually-agreed upon reductions of trade barriers - through the reciprocity principle and non-discrimination. Reciprocity is the rule by which the negotiating parties manage to maintain a balance and symmetry of treatment by granting the same or equivalent rights and benefits to each other. Generally speaking, there are two main types of reciprocity: open or unconditional, and restrictive or conditional. Open reciprocity does not demand any direct response to an antecedent action. It rather imposes on the receiving side a certain obligation for repayment in the future. This characterises the negotiations followed under the GATT. Restrictive reciprocity on the other hand, places much greater emphasis on a simultaneous exchange of strictly equivalent benefits and or obligations. This latter approach characterises the negotiations followed under both the plurilateral WTO GPA and RTAs.

The principle of MFN serves as a primary defence against trade discrimination. The success of the GATT was that the MFN obligation embodied in GATT Article I.1 has obliged all parties to extend to all other parties, immediately and without discriminatory conditions, the most favourable trade market access concessions it has granted, or may grant to any third party. This is an *unconditional* obligation to offer MFN to all Members without regard to equal participation in the exchange of market access concessions or even when reciprocity is violated. The lack of incentives to reciprocate has been thought to cause a free rider problem, which in turn may have undermined the attractions of expanding WTO multilateral agreements in other trade areas, such as procurement.

2.1 Market Access Reciprocity and MFN under the WTO GPA

In order to avoid the free rider problem, the MFN provisions negotiated within the WTO's plurilateral agreements require only *conditional* treatment. Under all the various plurilateral Codes, including the Government Procurement Code - non-discriminatory treatment was made conditional on an explicitly reciprocal exchange of rights and obligations, including access concessions among members of the agreement. Thus, from the outset, the plurilateral procurement Code was an example of an agreement that places market access concessions on a strictly reciprocal and conditional MFN basis. Despite the obvious limitations of liberalizing markets internationally on a conditional MFN basis, it must be acknowledged that in establishing a plurilateral agreement, the signatory parties were still seeking to promote an expansion of trade that would not otherwise have been acceptable under the GATT, with its non-reciprocal and unconditional non-discrimination requirements.

The strictness of the reciprocity principle and conditionality of the GPA MFN obligation is formally set out in the Appendix to the Agreement. The coverage of the agreement is set out for each signatory party in Appendix I, which is itself divided into Annexes concerning the specific coverage of the obligations.⁴ The Annexes

⁴ The Annexes address 1) central government entities covered by the Agreement; 2) covered sub-central government entities; 3) "other" covered entities (e.g. utilities); 4) goods; 5)

typically also contain General Notes in Annex 7, which further qualify the application of the Agreement. The Annexes are negotiated along four basic parameters consisting of: i) the value of procurement – covering only contracts estimated to exceed a certain value threshold, ii) the identity of the procuring entity – covering only those listed by each party in its annexes, iii) the type of goods or services procured – consisting of all goods, apart from some expressly excluded by each party, and only services listed by each party in its annexes; and iv) the origin of the goods or services – including only countries that are GPA parties.⁵

GPA market access negotiations are consequently highly complex. They are constructed on a request-and-offer approach where an initial offer from all the parties is submitted to the GPA Committee. On the basis of those submissions, the parties start bilateral negotiations. Additionally, under the GPA negotiations, not only must the parties decide which services and goods and construction are covered by the obligations, but they must also negotiate which contracting authorities or entities will be included in Annex I-III. Then they must also set the value of the thresholds that will trigger the scope of application of the agreement in each case and category of procurement. The GPA does not include an Annex to limit the application of restrictions to the MFN principle.

In sum, under the GPA the strict reciprocity and conditionality of the MFN clause elicits equivalent compensation and indicates that any market access benefits granted between initial parties will not automatically be extended to the other signatory parties. Derogations from MFN are sometimes accompanied with declarations that they will be withdrawn only when respective signatory has accepted that the other parties have given comparable access to its suppliers. For example, in Canada's General Note 6 to its Appendix 1 Annexes, it states that:

6. This Agreement covers services specified in Annex 5 and construction services specified in Annex 6 with respect to a particular Party only to the extent that such Party has provided reciprocal access to that service.⁶

This use of restrictive reciprocity and conditional MFN is a means to open up foreign markets and secure equality of opportunities in specific markets, while protecting against limitless liberalisation. Indeed, the OECD has estimated that if commitments were to be applied on an unconditional MFN basis among GPA parties, the average level of commitments would be 16% higher than under strict reciprocity.⁷

services coverage; 6) coverage of construction services and 7) General Notes. See: <https://e-gpa.wto.org/report/coverage>

⁵ Arie Reich, 'The New GATT Agreement on Government Procurement: The Pitfalls of Plurilateralism and Strict Reciprocity', 31. *Journal of World Trade*, 1997:125.

⁶ See report generated at <https://e-gpa.wto.org/report/coverage>

⁷ High impacts (more than 25 percentage points) are observed in space transport services and banking services, while there is relatively no impact in construction services. See: Asako Ueno. *Multilateralising Regionalism on Government Procurement*. OECD Trade Policy Paper No. 151. 2014 p. 16.

2.2 Market Access and MFN under RTAs with Public Procurement Provisions

Those RTAs with market access commitments for public procurement follow the same pattern of negotiating on a strictly reciprocal and conditional MFN basis. Research comparing the commitments under the WTO GPA and RTAs tends to conclude that generally, RTAs do not exceed the GPA except in very limited areas.⁸ The stress on strict reciprocity and conditional MFN at both the regional and plurilateral level means that oftentimes, deeper commitments in one sector are counterbalanced by less coverage in other sectors. There are exceptions to this, most notably among certain Latin American countries that are not signatory parties to the GPA.

Under RTAs, signatory parties are also reluctant to grant unconditional MFN treatment in their procurement chapters. This is particularly among WTO GPA parties, as discussed in Section 2.1. Third-party MFN clauses are not found in the government procurement chapters of the OECD member RTAs reviewed.⁹ This is presumably due to concerns about non-reciprocity and free-riding. Third-party MFN clauses stipulate that the preferential treatment granted in one agreement should in some cases be extended to parties in other agreements. They thus tend to limit discrimination among trading partners within RTAs by extending the better treatment of new RTAs to other parties of earlier RTAs.

⁸ Anderson, Robert D., Claudia Locatelli, Anna Caroline Müller and Philippe Pelletier (2014). "The Relationship between Services Trade and Government Procurement Commitments: Insights from Relevant WTO Agreements and Recent RTAs," WTO Working Paper ERSD-2014-21. Available at: http://www.wto.org/english/res_e/reser_e/ersd201421_e.pdf.

⁹ Asako Ueno, 2014. *Op Cit*.

3. Regulatory Synergies: the WTO GPA and RTAs

In the WTO 2011 Annual Report on preferential trade agreements, a survey of over 97 agreements noted that some regulatory activities do not lend themselves to implementation approaches on a preferential basis.¹⁰ For example, if a country establishes a new competition law due to its RTA commitments, the enforcement of this law will not discriminate either in favour or against foreign firms because there is nothing inherently externally preferential in the design of a competition law. The provisions usually involve applying a competition law or setting up a competition authority. The enforcement of competition law improves the contestability of domestic markets for both domestic and foreign firms regardless of whether or not they are covered by an RTA. Transparency requirements to publish all relevant laws and regulations promoting competition will consequently be available to both RTA and non-RTA members.¹¹

There is also a good intuitive case for the proposition that the public procurement provisions related to good governance and corruption control also produce a more dynamic synergy, unlike those related to market access considerations. This section tests this proposition for the RTA and GPA public procurement governance requirements, specifically corruption control.¹²

3.1 The WTO and corruption control

It is widely accepted that corruption is “a plague that seriously undermines development globally, diverting resources that could be harnessed to finance development, damaging the quality of governance institutions, and threatening human security.”¹³ Government procurement processes are particularly vulnerable to corruption partly due to the sheer volume involved. When governments purchase goods or supplies, they interact with the private sector financially, opening up various possibilities for reaping high rewards through corrupt behaviour. Several studies suggest that an average of 10-25 per cent of a public contract’s value may be lost to corruption.¹⁴ Given that government procurement accounts for 15-20% of GDP, it is clear how much damage corruption can do to economic and social wellbeing if such leakage accounts for as much as a quarter of a domestic procurement budget.

The WTO legal framework embodies several underlying principles of relevance to the prevention of corruption, most notably: non-discrimination, transparency, predictability and limitations to arbitrary unilateral action. WTO disciplines can generally be seen to contribute positively towards anti-corruption efforts through

¹⁰ WTO Annual Report 2011. Found at:

www.wto.org/english/res_e/booksp_e/anrep_e/anrep11_e.pdf

¹¹ Dawar, Kamala and Holmes, Peter (2011) *Competition Policy*. In: Preferential Trade Agreement Policies for Development: A Handbook. World Bank.

¹² This article defines corruption as the abuse of power for private gain.

¹³ The Busan Partnership for Effective Development Cooperation, Article 33.

<http://www.oecd.org/dac/effectiveness/49650173.pdf>

¹⁴ UNDOC. Guidebook on anti-corruption in public procurement and the management of public finances Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption.

Members enforcing their WTO non-discrimination obligations and thereby reducing the opportunities and motivations for corruption in international transactions. For although discrimination might not be a corrupt practice per se, the awarding of government procurement contracts on the basis of whether a bribe has been paid rather than on the merits of the bid, is clearly contrary to the spirit as well as the requirements of non-discrimination.

Promoting a more transparent regulatory environment and open administrative practices can also affect corruption. For not only will firms better know their regulatory rights and obligations, but transparency changes the *ex ante* risks of conducting corruption practices and increases accountability after the event. Both serve to make corruption less rewarding. In sum, a more transparent, predictable and less arbitrary international regulatory environment will also operate to reduce corruption in the domestic economic arena.

However, these provisions are only indirectly relevant. Yet corruption directly - and negatively - affects markets. It operates as a hidden surcharge and is equivalent to a tariff on goods and services. It forges clandestine monopolies or oligopolies that reduce market contestability, distort competition and perniciously manipulate the decision making processes through which goods or services are chosen. Yet for fear of the political rather than economic ramifications perhaps, until the adoption of the Revised WTO GPA the relevance of the WTO Dispute Settlement Body (DSB) to directly address corruption was limited by the lack of explicit reference to corruption commitments. This omission reflected an all pervasive conservatism towards cooperation in corruption control at the government level.

This section submits that the Revised WTO text represents an important watershed in international corruption control. Its signatory parties have abandoned previous legal caution and have incorporated provisions that explicitly recognize the need to stop corrupt practices from undermining procurement practices and furthermore, obligate the parties to prevent such practices.

3.2 The WTO GPA and Corruption Control

The Revised WTO GPA includes immediate reference to corruption control and other good governance issues in its preamble. The preamble indent six incorporates the principles and standards set out in international corruption control instruments and as discussed in Section 4, it contains a specific reference to the United Nations Convention against Corruption (UNCAC):

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

While the preamble does not contain any obligations that bind the WTO GPA parties, the General Rule of Interpretation contained in Article 31.2 of the Vienna Convention on the Law of Treaties (VCLT) stipulates that for the purposes of the interpretation of a treaty, the context comprises of the text including its preamble and annexes, and (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.¹⁵

This unprecedented preambular reference to corruption control in the WTO signals that the parties are ready to formally recognise the importance of the objectives of UNCAC and prevent corruption in the context of government procurement. The WTO dispute settlement body has also confirmed that the language in the preamble reflects the intentions of negotiators of the *WTO Agreement*, adding colour, texture and shading to any interpretation of the agreements.¹⁶ Consequently, any interpretation of WTO GPA provisions must be appropriately read with the anti-corruption perspective embodied in preamble indent six.

Of more legal significance are the general principles of the agreement set out under Article IV.4. These now include much stronger good governance and corruption control provisions for the conduct of procurement:

Article IV.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*.

[emphasis added]

Pursuant to Article IV.4(c) and in the light of the objective and purpose of the preamble, GPA parties are provided with the legal possibility to hold one another to account for a corrupt measure that nullifies or impairs the benefits that it can legitimately expect under its procurement schedules. The enforcement of Article IV.4(c) can be sought both in the WTO by parties to the WTO GPA see Section 3.3. In addition to this, under the WTO GPA, private parties are also provided with a right to redress a corrupt tender at the domestic level.

¹⁵ The 1969 Vienna Convention on the Law of Treaties, available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>

¹⁶ *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R. para. 153.

3.3 WTO GPA Article XVIII Domestic Review Procedures

The obligation to provide domestic recourse to private parties through a bid challenge mechanism that is mandatory for the WTO GPA parties, pursuant to Article XVIII.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 the supplier has, or has had, an interest.

[Emphasis added]

The bid review mechanism offers an essential tool through which domestic suppliers can self-police the procurement tendering system. It fulfills many important functions including: due process, a right to be heard, accountability of procurement officials and agencies and an opportunity to view the procurement file. All in all, a strong bid challenge mechanism improves the reputation of the procurement process and reduces barriers to entry caused by poor perception of the process.¹⁷

Yet there are various limitations to the use of domestic review mechanisms to control corruption. If the domestic context has weak rule of law or fragile governance structures, it will *prima facie*, undermine the operation of an independent and enforceable bid challenge mechanism. Other obstacles arise from different domestic legal systems and traditions. For example, the OECD has pronounced a relatively high degree of professionalism and enforcement in the UK procurement system, which gives effect to the EC procurement regime in four separate regulations. The Courts have all the necessary powers to grant interim or final injunctions. The basis for awarding damages is left for the Court to decide and may, for example, relate to tendering costs, lost opportunity or lost profit.

Nevertheless, as seen in the case of *Honeywell v Meydan Group* demonstrates, English public policy has developed in a manner that might not be wholly conducive to corruption control in procurement contracts.¹⁸ In this dispute, the Court held that a contract *tainted by illegality* with regard to performance – such as a contract to commit fraud - is against English public policy and is consequently not enforceable. However, the Court also held that a contract induced by bribery is not necessarily

¹⁷ D. Gordon, “Constructing a Bid Protest System: The Choices that Every Procurement Challenge System Must Make” (2006) 35 *Public Contracts Law Journal* 427. Nicholas, Caroline (2009): “Remedies for breaches of procurement rules and the UNCITRAL Model Law on Procurement” in: *Public Procurement Law Journal*, No. 4, pp. 151–159.

¹⁸ *Honeywell* ([2014] EWHC 1344 TCC)

contrary to English public policy. That is, in seeking to avoid providing a tactical shelter for parties wishing to avoid enforcement by separating the corruption - which it was said tainted the underlying contract - from the arbitral proceedings themselves, which were not impugned, the Court nevertheless *de facto* recognized the legality of a procurement contract that was won through a bribe.

The experience of investment tribunals is also instructive. Investment arbitrators are getting close to recognizing a defense to State BIT liability that, in effect, obligates investors to avoid involvement in public corruption in the course of making a treaty-protected investment. The difficulty in these cases is that for public relations reasons, the parties often prefer to resolve such disputes without a tribunal. In the Siemens AG and Argentina case, for example, the tribunal did not have an opportunity to rule on the legal consequences of the well-supported bribery allegations. This wrongdoing emerged when Siemens was initially awarded \$218 million for Argentina's expropriation of its investment. However, following convincing allegations of Siemens's bribery of Argentine officials to procure the investment, both parties announced that they were discontinuing their ICSID proceedings, and abandoned both the annulment and revision processes. Siemens agreed to decline its initial \$218m award. This was probably motivated at least in part by the broader public relations costs of having the allegations of corruption remain in the public eye. As a result, it was left unclear as to whether investments procured by fraud do or do not fall within the scope of protected investments of the applicable BIT, or whether the tribunal would have either declined jurisdiction or refused to recognize the corrupt party's substantive treaty-based rights.

Nevertheless, if a privately brought procurement case alleging corruption seems unlikely to be resolved at the domestic level, the parties to the WTO GPA also have the right to bring any matter relating to covered procurement to the WTO's State-to-State dispute settlement mechanism.

3.3 State-to-State Dispute Settlement in the WTO GPA

Although the WTO GPA is a plurilateral agreement, standing outside the WTO Covered Agreements, if a WTO GPA party considers that another WTO GPA party is not in compliance with the obligations of the agreement, the general WTO dispute settlement mechanism is also applicable to the WTO GPA, pursuant to Article XX.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").

[Emphasis added]

The WTO GPA therefore incorporates by reference the provisions of the WTO DSU, notably Article 3.3 which provides for:

The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

The WTO GPA Article XX.2 sets out two binding legal avenues for any WTO Member to hold another to account for a restrictive measure that nullifies or impairs the benefits it can legitimately expect under the WTO GPA. Most common is the violation claim. This arises if a government measure is in direct breach of an existing legal obligation under the WTO and another Member government considers that any benefit accruing to it directly or indirectly under the WTO *is being nullified or impaired* or that the attainment of any objective of the agreement *is being impeded* if it is the result of the failure of another member government to carry out its obligations under the Agreement.

As of the Revised text of the WTO GPA, nullification and impairment of benefits now includes the failure of another government to carry out its obligations to conduct the procurement contracts scheduled under its Annexes in a transparent and impartial manner that prevents corrupt practices, pursuant to Article IV.4(c). Whereas in the GPA 1994, transparency was *desirable* to achieve liberalization and non-discrimination, the Revised GPA goes much further, in recognizing *the importance of transparent measures to avoid conflicts of interests and corrupt practices*. Under GPA 1994 there were two grounds upon which procuring entities may exclude tenderers: bankruptcy and false declarations. The Revised GPA text added four more grounds for exclusion: deficiencies in prior contracts, serious crimes, professional misconduct and failure to pay taxes have been added to bolster its governance provisions.

The standard assumptions of State responsibility, upon which the specific obligations of States exist, are the general concepts of attribution, breach, excuses, and consequences.¹⁹ These have been developed over the past decades by the International Law Commission (ILC) and were codified in the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts. Under the general rule of international law, it is stipulated that only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State.²⁰

¹⁹ J. Crawford. Oxford Public International Law. OUP 2015.

²⁰ I. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford, Clarendon Press, 1983), pp. 132–166;

The interpretation of governmental action under the WTO does not normally depart from the ILC's 2001 codification.²¹ In the *Japan-Film Case*, the Panel raised the issue of State responsibility with regard to acts of individuals and private corporations, noting that Panels have been faced with making sometimes difficult judgments as to the extent to which what appears on the face to be private actions may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions. It concluded that it becomes difficult to establish bright line rules with regard to attribution, and this required approaching the issue on a case-by-case basis.²² There have, however, been few occasions for any explicit reference to the general principles of international law because the issue of attribution in the WTO is mostly uncontested: Panels oftentimes examine government measures or instruments that are unquestionably attributed to the State, either by action or omission. Consequently, there is no need for any explicit reference to the general principles of international law.

If a procurement corruption case were to be examined under the WTO DSM as a direct violation of Article IV.4(c), it is likely that reference to the ILC Draft Articles on attribution would be extensive. The commentary to the 2001 Draft Articles specifies that the underlying principle that operates as a 'corollary' to the general rule is that the only conduct to be attributed to the State at the international level is that of its organs and agents.²³ Nevertheless, Article 11 of the 2001 ILC Draft also notes that the conduct of an individual or a group of individuals may exceptionally be attributed to the State in *de facto* situations where the individual was acting on behalf of the State, acting on the instructions of, or under the direction or control of, that State in carrying out the conduct', or to the extent that the State acknowledges and adopts the conduct in question as its own. The ILC's 2001 draft also indicates that according to international practice the conduct of government or other public officials acting in their official capacity is attributable to the State

... even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.²⁴

²¹ See Villalpando, S.M. Attribution of Conduct to the State: How the Rules of State Responsibility May Be Applied within The WTO Dispute Settlement System. *Journal of International Economic Law* (2002) pp393-420.

²² Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, adopted on 31 March 1998 (WT/DS44/R), para 10.16.

²³ Commentary to Part One, Chapter II, para 3 (ILC Report (2001), para 81).

²⁴ ILC 2001 Draft Articles on State Responsibility, set out under the provisions of Article 7 Excess of authority or contravention of instructions, that "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions. The Commentary to the 2001 Draft Articles further notes that [...] "International responsibility is incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State."

This implies that the acts of public officials requesting or accepting bribes might be covered by WTO GPA obligations, while the payment of bribes by private enterprises would not. In this sense, governmental co-ordination or blessing of corruption or omission to prevent corruption in government procurement processes in any form could be construed to bring it within the ambit of WTO GPA Article IV.4 disciplines and consequently actionable under the WTO DSM.

3.3.1 The non-violation nullification and impairment of benefits claim (NVNI)

This legal avenue recognises that measures or developments could arise that while not a direct legal violation of any promise or market access commitment, nevertheless have the effect of nullifying or impairing the market-access benefits that a country could reasonably have anticipated from the negotiated outcome of a trade agreement.²⁵ The purpose for this ‘rather unusual remedy’ is to encourage parties to make concessions; contracting parties must be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement.²⁶

The non-violation clause and its’ associated remedies are set out under WTO DSU Article 26. This provision stipulates that along with the rules and procedures of the DSU, two clauses are included in Article 26.1(a) requiring that non-violation claims require a detailed justification and affirming that if a non-violating measures nullifies or impairs benefits, a government has no obligation to remove the offending measure, rather make a ‘mutually satisfactory adjustment.’

The use of this unusual provision has been infrequent. Panels have noted with reference to Article XXIII:1(b) that:

“...WTO Members have approached this remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement... The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules.”²⁷

Another more practical reason for its infrequent use may be due to the difficulty in demonstrating a non-violation case. Various panels have established that the burden of proof falls on the complaining party,²⁸ along with the three-element requirement for a non-violation case under Article XXIII.1(b).²⁹ Normally, non-violation cases

²⁵ GATT Dispute: *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* (“*EEC – Oilseeds*”) Panel Report. Adopted 25 January 1990, BISD 37s/86 para 185.

²⁶ *EEC – Oilseeds Ibid*, para. 144.

²⁷ Panel Report *Japan – Film*, Para. 10.36.

²⁸ *Japan - Film*, At Paragraph 10.41, citing: *EEC - Oilseeds*, para 142-152 and *Australian Subsidy on Ammonium Sulphate*, BISD II/188, 192-193.

²⁹ See Panel Report *Japan – Film*, para. 10.32; and Panel Report *EC – Asbestos*, para. 8.278

will involve an examination as to whether there is: (1) an application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit due to the application of the measure that could not have been reasonably expected by the exporting Member.”³⁰ In *Japan-Film*, the Panel Report’s interpretation of a ‘measure’ was broad, for it:

... need not necessarily have a substantially binding or compulsory nature for it to entail a likelihood of compliance by private actors in a way so as to nullify or impair legitimately expected benefits within the purview of Article XXIII.1(b).

This interpretation is logical: for if the requirement was a binding measure, it would *a priori* fall under the purview of Article XXIII.1(a) as a violation or direct breach of a rule. The Panel then sought to clarify that non-binding actions containing sufficient encouragement or dissuasion, can potentially have adverse effects on the conditions of market access. The Panel nevertheless confirmed existing GATT jurisprudence³¹ by stipulating that these measures must be in some sense existing. The Panel found that in order for expectations of a benefit to be legitimate, the challenged measures must not have been reasonably anticipated at the time the tariff concession was negotiated.³²

The Panel Report of the *Korea – Measures Affecting Government Procurement dispute*³³ also examined a non-violation claim, but under the 1996 GPA Article XXII:2 non-violation nullification or impairment provision. The US claimed that certain procurement practices of the Korean Airport Construction Authority (KOACA), and other entities concerned with the procurement of airport construction in Korea were inconsistent with Korea’s obligations under the WTO GPA. The US contended that KOACA and the other entities fell within the scope of Korea’s entities specified in Annex 1 of Appendix I of the GPA, yet the US was unable to bid for this contract and was also excluded from pursuing a claim in the domestic bid challenge mechanism.

³⁰ DS163 Korea, Republic of — Measures Affecting Government Procurement. WT/DS163/7 6 November 2000, Para 7.86.

³¹ Panel Report *US — Wool Shirts And Blouses*, where the panel ruled on a measure that was revoked after the interim review but before issuance of the final report to the parties; Panel Report *EEC — Measure On Animal Feed Proteins*, where the panel ruled on a discontinued measure, but one that had terminated after the terms of reference of the panel had already been agreed; Panel Report *United States — Prohibitions On Imports Of Tuna And Tuna Products From Canada*, Para. 4.3, Where the panel ruled on the GATT consistency of a withdrawn measure but only in light of the two parties’ agreement to this procedure; Panel Report *EEC — Restrictions On Imports Of Apples From Chile*, where the panel ruled on a measure which had terminated before agreement on the panel’s terms of reference but where the terms of reference specifically included the terminated measure and, given its seasonal nature, there remained the prospect of its reintroduction.

³² Panel Report *Japan — Film*, paras. 10.57-10.59

³³ *DS163 Korea, Republic of — Measures Affecting Government Procurement*. WT/DS163/7 6 November 2000.

The Panel assessed that the claim was based on the frustration of reasonably expected benefits from alleged promises made during “negotiations” rather than nullification or impairment of actual concessions made. The Panel therefore found that the concept of non-violation could be extended to other contexts within the framework of principles of international law, such as those under Article 48 of the VCLT which is generally applicable to the performance of treaties and treaty negotiation – error in treaty formation.³⁴

Following the inclusion of provisions to obligate the parties to prevent corrupt practices in the conduct of procurement, government omission to prevent corruption from occurring within the covered procurements can no longer be reasonably anticipated under the WTO GPA. Indeed, both the Panels in both the *Japan — Film* and *EEC — Oilseeds* concluded that a specific measure could not be considered foreseeable solely because it was consistent with or a continuation of a past general government policy. That is, just because a procurement system was liable to corruption in the past, does not make it foreseeable under the WTO GPA.

In *Japan — Film*, the Panel interpreted “nullification and impairment” to be akin to “upsetting the competitive relationship” between domestic and imported products and that any Complainant “must show a clear correlation between the measures and the adverse effect on the relevant competitive relationships.”³⁵ It is clear that a corrupt procurement tender will upset competitive relationships directly and it is therefore conceivable that the WTO DSU will develop corruption control jurisprudence that do reflect some of the minimal 'norms' that are commonly shared. This avenue for enforcing the corruption control mechanisms included in the Revised WTO GPA conforms with Roessler’s conceptualization that non-violation nullification and impairment provisions are:

... probably best seen as a *clausula rebus sic stantibus* similar to that in Article 62 of the Vienna Convention on the Law of Treaties, according to which States may terminate or withdraw from a treaty in the event of 'a fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of the treaty, and which was not foreseen by the parties.'³⁶

Non-violation claims have so far remained exceptional in complaining Members’ Panel submissions. Staiger and Sykes have sought to account for the limited role of the non-violation claim. They note that the infrequent use of the provision is not compelled by treaty text and moreover that it is also difficult to identify the limits to

³⁴ Under the VCLT Article 48. ERROR 1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty. 2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error. 3. An error relating only to the wording of the text of a treaty does not affect its validity; Article 79 then applies.

³⁵ Panel Report *Japan — Film*, paras. 10.57-10.59

³⁶ F. Roessler. Should principles of competition policy be incorporated into WTO law through non-violation complaints? *Journal of International Economic Law* (1999) 2 (3): pp413-421.

non-violation claims in the case law. Staiger and Sykes do not see an undue burden in the provision's requirement for a detailed justification. Their analysis is applicable to WTO GPA corruption control measures. For as with the *Korea – Measures Affecting Government Procurement* dispute, the complaining party could point to the state of affairs at the time of negotiations, which was the expectation of market access, and to the fact that some recent corrupt measure not readily foreseen *ex ante*, due to a change in government perhaps without a corruption control agenda, has significantly reduced market access relative to that state of affairs. Staiger and Sykes cannot see an obvious rationale why the non-violation remedy should be viewed as “exceptional.” They point to the possible relationship between non-violation cases and the distinction in international law between good faith and bad faith performance of treaty obligations.³⁷

In *Korea — Measures Affecting Government Procurement*, the Panel commenced by stating that ‘the non-violation remedy as it has developed in GATT/WTO jurisprudence should not be viewed in isolation from general principles of customary international law.’³⁸ The Panel explained this ‘non-violation remedy’ as the basic premise is that Members should not take actions, even those consistent with the letter of the treaty, which might serve to undermine the reasonable expectations of negotiating partners.

.... In our view, this is a further development of the principle of *pacta sunt servanda* ... [which] is expressed in Article 26 of the Vienna Convention.³⁹

The Panel however made a clear distinction between non violation nullification and impairment, and good faith. It noted that while the overall burden of proof is on the complainant, this does not introduce a new requirement to affirmatively prove actual bad faith on the part of another Member. Rather, the affirmative proof should be that measures have been taken that frustrate the object and purpose of the treaty and the reasonably expected benefits that flow therefrom.

The good faith principle implies that States must take the necessary measures to comply with the object and purpose of any treaty that it becomes a party to. And, moreover, Article 3 of the ILC's 2001 Draft Articles further stipulates that a State cannot rely on its internal law as an excuse for not performing its international obligations.⁴⁰ The use of good faith in corruption control in procurement processes has clearly not been strong enough to prevent such practices through dispute settlement. As Mitchell has argued, perhaps the principle of *pacta sunt servanda* has not be used so as to avoid overwhelming WTO provisions that appear to be based on

³⁷ Staiger, Robert W. and Sykes, Alan O., Non-Violations (May 11, 2012). Available at SSRN: <http://ssrn.com/abstract=1983448> o

³⁸ This merged the categories of ‘general principles of law’ and ‘customary international law’ as reflected in ss 38(1)(c) and 38(1)(b) of the *Statute of the International Court of Justice* respectively.

³⁹ DS163 Korea, Republic of — Measures Affecting Government Procurement. WT/DS163/7 6 November 2000, para 7.93.

⁴⁰ Following the Alabama arbitration, See Crawford J. Oxford Public International Law (<http://opil.oupilaw.com>). (c) Oxford University Press, 2015.

concepts similar to those underlying the principle of good faith, such as non-violation complaints.⁴¹ The existence or persistence of corrupt practices that are tolerated or deliberately ignored by a government could be interpreted as violations of WTO NVNI obligations that reach far beyond bad faith.

Effective enforcement of the WTO GPA anti-corruption provisions requires that a complaining party whose benefits under these rules have been nullified or impaired by another Member. In turn, this requires that a given rule impart specific benefits on member countries, and that parties can identify the behaviour(s) of other countries that impair those benefits. This also requires enough specificity to quantify the value amount by which the benefit is impaired. A complaint must be accompanied by evidence that one or more transactions with certain values were lost by nationals of the complaining country to bribe-paying nationals of the offending country. The confidentiality of Panel hearings, obligated by DSU Article 14, could serve to encourage participants to be more forthcoming with making sensitive accusations and revealing sensitive information.

If the assertion is proven and the evidence found credible, the Panel would recommend that the offending member bring its practices into conformity with the requirements of the WTO GPA; if the offending party failed to do so, the complainant would be authorized to revoke concessions made to the offending country in an amount equal to the value of the transaction that was lost to corruption on the part of a public official.⁴²

⁴¹ Mitchell, Andrew D. "Good Faith in WTO Dispute Settlement" (2006) 7(2) *Melbourne Journal of International Law* 339.

⁴² Pursuant to WTO GPA Article XX.3, cross-retaliation under another of the WTO Covered Agreements is not permitted.

4. RTAs, Corruption Control and synergies with the WTO GPA

An increasing number of references to both corruption control and good governance are evident in the more recent RTAs with procurement chapters. The OECD analysis of 47 RTAs with public procurement chapters, notes that the corruption control measures introduced in the revised GPA, such as anti-corruption measures are also covered by nearly half of the RTAs reviewed.⁴³ This paper is based on the contention that the positive synergies that occur between the WTO GPA and RTAs occur not from the operation of the governing MFN provision, but rather from the non-discriminatory nature of the regulatory policy itself. Provisions promoting corruption control, whether at the regional or plurilateral level, have characteristics that lend well to multilateralization – and could be characterised as so-called *global public goods*. This supports the intuitive case that the public procurement provisions related to governance offer a dynamic synergy that transcends the significance of market access considerations.

A noteworthy example of such a synergy is the trade agreement between Canada and the EU, who are also both parties to the WTO GPA. They have chosen to incorporate Article IV WTO GPA into the CETA procurement chapter verbatim.⁴⁴ Compare this to the earliest RTA procurement chapters, such as in the NAFTA. This agreement included comprehensive procurement provisions regulating how a tender should be made and how the qualifications of suppliers should be designed, yet makes no explicit mention of the need to prevent corruption, integrity, conflicts of interest or promote good governance in procurement matters. The one relevant provision, which is actually much closer to a good faith obligation, is provided under Article 1.4: No Party may prepare, design or otherwise structure any procurement contract in order to avoid the obligations of this Chapter.

A later agreement, the EU-Ukraine DCFTA Chapter 8 on public procurement, includes one single provision under Article 151.5 to require that all contracts shall be awarded through transparent and impartial award procedures that prevent corruptive practices. This impartiality shall be ensured especially through the non-discriminatory description of the subject-matter of the contract, equal access for all economic operators, appropriate time limits and a transparent and objective approach.

At the other end of the spectrum is the TPP procurement chapter. Here, Conditions for Participation set out under Article 15.8(4) note that if there is supporting material, a Party, including its procuring entities, may exclude a supplier on grounds such as: false declarations; significant or persistent deficiencies in the performance of any

⁴³ See: Asako Ueno. *Multilateralising Regionalism on Government Procurement*. OECD Trade Policy Paper No. 151. 2014; Anderson, Robert D. and Pardo de Leon, Josefita and Pelletier, Philippe and Osei-Lah, Kodjo and Müller, Anna Caroline, "Government Procurement Provisions in Regional Trade Agreements: A Stepping Stone to GPA Accession?" Prepared for publication in Arrowsmith and Anderson, eds. *The WTO Regime on Government Procurement: Recent Developments and Challenges Ahead* (2011).

⁴⁴ CETA Article IV Conduct of Procurement 4. A procuring entity shall conduct covered procurement in a transparent and impartial manner that: (a) is consistent with this Chapter, using methods such as open tendering, selective tendering and limited tendering; (b) avoids conflicts of interest; and prevents corrupt practices.

substantive requirement or obligation under a prior contract or contracts; or failure to pay taxes. While this may appear minimal it is complemented by Chapter 26, which exclusively and comprehensively covers transparency and anti-corruption. Chapter 26 includes an obligation for all parties to ratify or accede to the UNCAC and to maintain measures to establish a comprehensive list of corruption matters that affect international trade to be considered as criminal offences under its law. Additionally, Article 26.9 on the Application and Enforcement of Anti-Corruption Laws also requires that no Party shall fail to effectively enforce its anti-corruption laws through a sustained or recurring course of action or *inaction*. This introduces an avenue for bringing both violation as well as non-violation nullification and impairment cases against corrupt procurement systems and individuals, as discussed in Section 3.

There is a paucity of data to reveal how far regional commitments are implemented or, unlike the WTO DSM, how disputes are resolved in general. Nevertheless, both RTA and GPA agreements with corruption control provisions affect each other positively, resulting in a convergence of procurement procedures between RTAs and the GPA. This suggests a possibility for the further creation of network governance producing effective synergies to control corruption - despite it being created preferentially among the specific parties to each of the agreements.

5. Network Governance, Corruption Control and Global Public Goods

Public goods are non-rivalrous and non-excludable because they can be enjoyed without depriving or excluding others. Providing clean air and a healthy environment is a public good because it is enjoyed by all without reservation. Corruption control is also non-excludable because those contributing to prevent corruption cannot exclude non-contributors from the positive outcomes, and it is non-rivalrous because one individual's enjoyment from corruption free governance will not detract from anyone else's ability to do so. The benefits of preventing corruption, typically in lowering transaction costs and facilitating more effective decision-making by economic agent are largely non-rivalous and non-excludable.

The non-rivalrous and non-excludable nature of corruption control leads to the free-rider problem. Oftentimes, governments are not prepared to pay the cost of something that others may be expected to benefit from; instead, they hope that someone else will pay for it and they will benefit for free. Domestic efforts to control corruption also face obstacles because corruption appears to occur more in national governments. For unlike international regimes, State's have a monopoly over coercion as well as various services and administrative functions, including the public procurement of goods and services related to these functions. The difficulty with this is that as a consequence of State sovereignty, there is little supranational authority capable of effectively controlling corruption at the domestic level. A prisoner's dilemma situation has prevailed whereby individual governments face a stronger incentive to continue to undermine efforts to cooperate in the control of corruption because of potentially high costs within their own jurisdictions, despite the widespread acknowledgement that all are better off without the scourge of corruption.

In such a context, coordinated trans-national efforts to control corruption face substantial commitment, monitoring, and enforcement problems. Each individual government, or regional or international agreement faces its own shortcomings in addressing corruption. The WTO GPA, at the forefront of strengthening corruption control measures, faces a limited membership, with selective coverage of their procurement markets, which tend to reflect developed economies and a dispute settlement mechanism, which while binding, does not provide for third party enforcement of the agreement. It requires a complaining party to bring a case, which re-introduces the prisoner's dilemma to corruption control enforcement.

Nevertheless, the text of the WTO GPA is widely referenced, including in many regional agreements it provides a guiding template for the procurement chapters. The Revised WTO GPA text is further complemented by the first ever global agreement against corruption – the UNCAC – which it references in the WTO GPA preamble. The UNCAC sets out various mandatory provisions to address corruption in procurement and in public service generally, yet it does not have a binding dispute settlement mechanism to enforce the treaty. It is however, a widely accepted set of principles among both developed and developing countries, holding membership of 140 parties and 178 signatories.⁴⁵

⁴⁵ As of January 1 2015, See: www.unodc.org/unodc/en/treaties/CAC/signatories.html

Also widely referenced is the 2011 UNCITRAL Model Law, which reflects international best practice and is designed to be appropriate for all States in assisting them in formulating a modern procurement law. While it provides domestic government purchasers discretion over what to purchase and how to conduct the procurement, this discretion is subject to safeguards consistent with other international standards again, most notably those imposed by the United Nations Convention Against Corruption (UNCAC). That is, all procedures are subject to rigorous transparency mechanisms and requirements to promote competition and objectivity and all decisions and actions taken in the procurement process can be challenged by potential suppliers.⁴⁶

Somewhat surprisingly, however, UNCITRAL contains no textual reference to corruption control, although this is implicit from the substance of the text. Article 21 provides for the exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest. Moreover, Article 26 stipulates that a code of conduct for officers or employees of procuring entities shall be enacted and shall address, *inter alia*, the prevention of conflicts of interest in procurement and, where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declarations of interest in particular procurements and screening procedures.

A network of organisations, agreements and anti-corruption initiatives is emerging and operating as a web to produce global public goods controlling corruption in procurement processes. This network operates through a complex web of soft and hard laws, referencing each other at the bilateral, regional, plurilateral and international level.⁴⁷ UNCITRAL Recital 4 calls for closer cooperation and coordination with other international organs and organizations active in the field of procurement law reform, and drafting history indicates that UNCAC Article 9 had a significant influence in the drafting of UNCITRAL's Model Law. It calls for an independent domestic review mechanism to monitor conflicts of interest of public procurement officials. UNCITRAL Model Law implicitly provides the structured system of rules that UNCAC Article 9 demands. Meanwhile, the WTO GPA references UNCAC in the preamble and incorporates binding provisions to prevent corruption in Article IV. This provides a hard law framework importing soft law convention. It loosens the cautious restraints that are so often applied in anti-corruption contexts, as in the UNCITRAL framework. That is, while each individual element in the network has specific advantages and deficiencies in preventing corruption, together they operate as a tightening noose, which is stronger than the sum of its individual parts.

⁴⁶ UNCITRAL Model Law Article 64.

⁴⁷ For example: The OECD's Anti-Bribery Convention and related work; World Bank's Anti-Corruption Knowledge Resource Centre; The UN Magnet - Management & Governance Network; UN Centre for International Crime Prevention; UNDP for Accountability and Transparency (PACT); Transparency International's Global Coalition Against Corruption, See for example: www.transparency.org/whoweare/organisation/

6. Conclusions

Despite the on-going concern expressed at the proliferation of RTAs agreements and their potential to undermine multilateral efforts to regulate international trade, the governance provisions in the government procurement chapters' in these agreements have notable synergies in their regulatory enhancements.

Traditionally procurement reform and anti-corruption initiatives have followed separate tracks despite their obviously common purpose of ensuring sound government structures and practices. More latterly however, this more sophisticated web of regulatory instruments and tools are operating to generate global public goods and integrate sound procurement practices into a broader anti-corruption initiative, which ultimately is potentially enforceable through the WTO GPA provisions in the dispute settlement mechanism of the WTO itself. This confirms the contention that international public procurement agreements hold a development significance that transcends its market access objectives.

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