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Trade, Law *and* Development

Vol. 7, No. 1

2015

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Published by

The Registrar, National Law University, Jodhpur

ISSN : 0976-2329 | eISSN : 0975-3346

Chang-fa Lo, *Anti-Corruption Provisions
in the New GPA*
7(1) TRADE L. & DEV. 21 (2015)

MAKING THE ANTI-CORRUPTION PROVISIONS IN THE NEW
GOVERNMENT PROCUREMENT AGREEMENT UNDER THE WTO
OPERABLE

CHANG-FA LO*

Corruption is a serious problem in almost all jurisdictions and has become an issue of global concern. Accordingly, it needs to be addressed at an international level. The anti-corruption provisions in the revised Government Procurement Agreement (“new GPA”) under the WTO, which came into force in April 2014, emphasize on recognizing the importance of preventing corruption. This is reflected in the Preamble coupled with the requirement of prevention of the corrupt practices in the conduct of procurement as provided in Article IV:4. This points to the seriousness of corruption issues and the importance of coping with the problem even under a trade agreement. Although the anti-corruption provisions themselves are either soft or not clear enough, they serve as a good foundation for further development of a workable mechanism to implement the main theme of anti-corruption in connection with government procurement activities. This paper argues that additional mechanisms could be established through treaty interpretation based on the VCLT to ensure that these provisions are made operable in reducing, eliminating or preventing procurement-related corruption. This paper further suggests that the non-binding provision in the Preamble of the new GPA can help interpret the binding provisions in Article IV:4 so as to bring the United Nations Convention against Corruption and the OECD Anti-Corruption Convention under the ambit of operation of the new GPA, thereby allowing a breach of a requirement under the conventions to be considered as a violation of the new GPA. This paper additionally argues that such obligations can be enforced through the domestic challenge procedures established under GPA Article XVIII:1 and through the dispute settlement procedures under GPA Article XX:2 (a).

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I. INTRODUCTION

The issue of corruption is inter-related with many other obstacles at the domestic and international level.¹ It is apparent that the problem spreads across political, social and economic spheres. It also involves concerns regarding public governance, rule of law, human rights and international trade.

The then United Nations Secretary, General Kofi Annan, in the foreword of the United Nations Convention Against Corruption (“UNCAC”) of 2003,² categorically

¹ Anup Shah, *Corruption*, GLOBAL ISSUES (Sept. 4, 2011), <http://www.globalissues.org/article/590/corruption>.

² U.N. GAOR, United Nations Convention Against Corruption, A/58/4, 14 (Oct. 31, 2003),

expressed his concerns over corruption by stating that “[c]orruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.”³ In their Anti-Corruption Action Plan, the G-20 Leaders have articulated similar concerns by asserting that “[c]orruption threatens the integrity of markets, undermines fair competition, distorts resource allocation, destroys public trust, and undermines the rule of law. Corruption is a severe impediment to economic growth, and a significant challenge for developed, emerging and developing countries.”⁴ Moreover, corruption is not merely a cause for concern for developing countries. In a politico-economic union as developed as the European Union (“EU”), four out of five citizens regard corruption as a major problem in their States.⁵

Undoubtedly, corruption continues to be a serious problem of global concern that needs to be addressed at an international level. The Preamble of the UNCAC indicates, in part, that “corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential.” Hence, not only are individual countries adopting various methods to combat corruption, various regional and international communities have also put in efforts to develop schemes and cooperation frameworks to eliminate or, at the very least, prevent the problem. On the date of the publication of the present article, the most prominent achievement in this regard is the enactment of the UNCAC, which has comprehensive requirements in adopting preventive measures, criminalizing related activities, asset recovering, international cooperation and technical assistance, among other things, to fulfil the objects of the endeavour. Beyond the purview of the UNCAC, the revised Government Procurement Agreement (“new GPA”) under the World Trade Organization (“WTO”), which came into force in April 2014, is also a very important development in the combat against corruption.

http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf [“UNCAC”].

³ *Id.* at iii.

⁴ *Annex III: G20 Anti-Corruption Action Plan G20 Agenda for Action on Combating Corruption, Promoting Market Integrity, and Supporting a Clean Business Environment* (Nov. 12, 2010), http://www.oecd.org/daf/anti-bribery/G20_Anti-Corruption_Action_Plan.pdf.

⁵ Migration and Home Affairs, *Corruption*, EUROPEAN COMMISSION (last updated on Apr. 2, 2015), http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/index_en.htm.

The new GPA has drawn attention, primarily, to the perspectives of improving market access and streamlining the procurement procedures.⁶ Notwithstanding the immense importance that may be attributed to the anti-corruption provisions in the new GPA, they are widely ignored, for the most part, in lieu of the “softly” drafted provisions and the lack of stated mechanism of ensuring their compliance.

The anti-corruption provisions in the new GPA emphasize on recognizing the importance of preventing corruption in the Preamble, coupled with the requirement of prevention of the corrupt practices in the conduct of procurement in Article IV:4. The basic substantive anti-corruption elements have already been included in these provisions. This paper is of the view that these provisions serve as a very good foundation for further development of a workable mechanism to implement the main theme of anti-corruption, in connection with government procurement activities. This paper argues that, although the provisions themselves are either soft or not clear enough, there could be additional mechanisms established, by way of treaty interpretation, to ensure that these provisions are made operable in reducing, eliminating or preventing procurement-related corruption.

This paper starts from a brief introduction of various types of corruption, including procurement-related corruption. It then discusses the UNCAC and some other international efforts in combating corruption. Among these efforts, it suggests that the UNCAC could be linked with and integrated into the provisions of the new GPA. The paper will further discuss the anti-corruption provisions in the new GPA and their shortages. Finally, an elaboration will be made on the interpretative method of bringing the UNCAC under the ambit of the new GPA and the possible use of challenges and dispute settlement mechanism to ensure GPA parties’ compliance with the UNCAC.

II. TYPES OF PROCUREMENT-RELATED CORRUPTION

A. Types of corruption

Corruption can be broadly understood as “an abuse of (public) power for private gain that hampers the public interest”.⁷ Such a definition can be read together with various

⁶ For instance, the United States Trade Representative has emphasized on the new opportunities for U.S. suppliers by gaining access to quite a number of central and local government entities in many GPA parties. See *Benefits for the United States from the Revised WTO Government Procurement Agreement*, USTR, <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2011/december/benefits-united-states-revised-wto-government-procur>.

⁷ United Nations, *Draft United Nations Manual on Anti-Corruption Policy* 7 (June 2001), <http://www.unodc.org/pdf/crime/gpacpublications/manual.pdf>.

types of corruptive practices so as to understand the essence of the abuse.

There are “grand corruptions”, the expression which describes “corruption that pervades the highest levels of government, engendering major abuses of power.”⁸ In contrast, phrases like “petty corruptions” or “administrative corruptions” connote a lower magnitude of seriousness. They refer to “the exchange of very small amounts of money, and the granting of small favours.”⁹ Another manner of distinguishing between the forms of corruption is active and passive corrupt practices. For instance, an act may constitute “active bribery” which refers to the “the act of offering or paying a bribe”, or “passive bribery,” which refers to “the requesting or receiving of a bribe”.¹⁰

Bribery is the most widely occurring corrupt practice in most jurisdictions. It refers to “the act of conferring a benefit in order to improperly influence an action or decision,” initiated either by an official asking for the same or by a person offering to pay a bribe.¹¹ In addition to bribery, there are certain activities which could be described as “stealing” by virtue of exploiting one’s position of employment. These activities include embezzlement, which implies property being “taken by someone to whom it has been entrusted”, theft (about an official who helps himself to part of a good, the administration of which he is not responsible for) and fraud (about the “use of false or misleading information to induce the owner of property to part with it voluntarily”).¹² There are also extortions which involve “coercion to induce cooperation, such as threats of violence or the exposure of sensitive information”.¹³

There could be “abuse of function or discretion” which often occurs in association with bureaucracies where “there are broad individual discretions and inadequate oversight and accountability structures” or when “decision-making rules are so complex that they neutralize the effectiveness of any accountability mechanisms that do exist.”¹⁴ Favouritism and nepotism also involve abuse of discretion through family, political party or religious groups so as to promote the interests of persons linked to the official.¹⁵

⁸ United Nations, *United Nations Handbook on Practical Anti-corruption Measures for Prosecutors and Investigators*, 23 (Sept. 2004), <http://www.unodc.org/pdf/crime/corruption/Handbook.pdf>.

⁹ *Id.*

¹⁰ *Id.* at 24.

¹¹ *Id.*

¹² *Id.* at 26.

¹³ *Id.*

¹⁴ *Id.* at 28.

¹⁵ *Id.*

There are “creating and exploiting conflicting interests”, which are about the situation where conflicts between the professional responsibilities of an individual and his private interests are created or exploited. Most forms of corruption involve such conflicting interests being created or exploited.¹⁶ There could also be “improper political contributions” to political organizations or individual political participants so as to explicitly or implicitly influence events or policy illicitly when the recipients are elected.¹⁷

Finally, in order to determine the extent and impact of corruption, it becomes necessary to categorise. From the perspective of whether the corruption is constant or sporadic, corruption can be divided into two types, namely systemic corruption (which is embedded in the economic, social and political systems) and sporadic corruption (which occurs irregularly). From the perspective of whether the political system or policy-making is involved, corruption can be divided into three types, namely political corruption (which illegitimately converts collective goods into payoffs), policy-formulation-associated corruption (which uses the formulation of policies and rules to transfer illegitimate economic interest) and individual corruption. It is to be noted here that political and policy corruptions assume the characteristics of systematic corruption and are mostly large in their impacts or economic gains. On the other hand, individual or sporadic corruption can be small or large scale.¹⁸

B. Procurement-related corruptions

There are many corruptions which do not have any connection with government procurement activities. However, government procurements attract a large number of corruptions due to the huge number of procurements being conducted on a regular basis, in almost all jurisdictions, in addition to the possibility of enormous amounts of economic interests involved. In most countries, substantial portions of government budgets are devoted to procuring goods, services and construction works. For instance, in the EU, public expenditure on procurements of goods, services and works accounted for roughly 19% of the EU Gross Domestic Product in 2011.¹⁹ Goods and services produced in the private sector and sold to the government “range from high-tech space-exploration vehicles to standard off-the-shelf pens and pencils.”²⁰ Hence, not only immense economic interests could be involved collectively and separately in

¹⁶ *Id.* at 29.

¹⁷ *Id.*

¹⁸ U4 Anti-Corruption Resource Centre, *Glossary*, <http://www.u4.no/glossary/>.

¹⁹ Lucian Cernat & Zornitsa Kutlina-Dimitrova, *International Public Procurement: From Scant Facts to Hard Data*, 2 (Apr. 2015), http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153347.pdf.

²⁰ Murray Weidenbaum, *The Contrast between Government and Business Power Is Striking*, FEE (March 1, 2004), <http://fee.org/freeman/detail/the-awesome-powers-of-government>.

procurement activities, a very wide range of business activities is also affected.

Government procurement includes three main stages: the pre-bidding stage (deciding to contract and defining the contract characteristics), the bidding stage (the tendering process and contract awarding) and the post-bidding stage (implementing and monitoring the contract).²¹ There are many “opportunities” for government officials to exercise their discretion or to abuse their power and to engage in irregular activities in any one of these stages.

Procurement related corrupt practices commonly involve petty or administrative corruptions. However, if a procurement project is enormous in size, it may involve very high level officials in the government machinery engaging in irregularities, especially at the pre-bidding and bidding stages. It is also possible for a potential bidder to make a “political contribution” in the hope that such a bidder will be rewarded in the procurement-related decisions later on. This is more likely to become a political, policy-formulation or systemic corruption in government procurement. Bribery is a common form of corruption in government procurement activities, especially at the bidding and post-bidding stages. Abuse of discretion is often associated with taking bribes at the bidding and post-bidding stages in procurement activities.

Another way of classifying procurement-related corruption was provided in the EU Anti-Corruption Report of 2014, as “bid rigging (in the form of bid suppression, complementary offers, bid rotation and sub-contracting), when the contract is ‘promised’ to one supplier with or without the consent of public officials; kickbacks (bribes); conflicts of interest; and other irregularities, such as the failure of public officials to follow the required procedures.”²² This categorization is also helpful in understanding the commonly practiced corruptions in relation to government procurement.

III. INTERNATIONAL EFFORTS IN FIGHTING AGAINST CORRUPTION

²¹ PwC and Ecorys, *Identifying and Reducing Corruption in Public Procurement in the EU – Development of a Methodology to Estimate the Direct Costs of Corruption and other Elements for an EU-evaluation Mechanism in the Area of Anti-Corruption*, 45 (June 30, 2013), http://ec.europa.eu/anti_fraud/documents/anti-fraud-policy/research-and-studies/identifying_reducing_corruption_in_public_procurement_en.pdf.

²² European Commission, *EU Anti-Corruption Report – Report from the Commission to the Council and the European Parliament*, 27 (Feb. 5, 2014), http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf.

A. *The UNCAC and its public procurement provisions*

The most important international effort in combating corruptions is the enactment of the UNCAC which sets out to “promote and strengthen measures to prevent and combat corruption more efficiently and effectively”; to “promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery”; and to “promote integrity, accountability and proper management of public affairs and public property.”²³

The UNCAC requires State Parties to develop and implement or maintain preventive anti-corruption policies and practices;²⁴ to ensure the existence of a body or bodies to prevent corruption by implementing the preventive anti-corruption policies and to oversee and coordinate the implementation of those policies;²⁵ and to promote integrity, honesty and responsibility among its public officials.²⁶

The other requirements under the UNCAC include the State Parties’ obligation to enhance transparency in its public administration;²⁷ to prevent corruption involving the private sector;²⁸ to promote the active participation of individuals and groups outside the public sector in the prevention of and the fight against corruption;²⁹ to prevent money-laundering;³⁰ to establish offences of bribery by national public officials and foreign public officials and officials of public international organizations as criminal activities;³¹ and the criminalization of embezzlement, misappropriation or other diversion of property by a public official.³²

The UNCAC also requires State Parties “to consider” adopting such legislation, to establish as criminal offences, of trading in influence,³³ of abuse of functions,³⁴ of illicit enrichment which refers to a significant increase in the assets of a public official that he cannot reasonably explain in relation to his lawful income,³⁵ of bribery in the

²³ UNCAC, *supra* note 2, art. 1.

²⁴ UNCAC, *supra* note 2, art. 5.

²⁵ UNCAC, *supra* note 2, art. 6.

²⁶ UNCAC, *supra* note 2, art. 8.

²⁷ UNCAC, *supra* note 2, art. 10.

²⁸ UNCAC, *supra* note 2, art. 12.

²⁹ UNCAC, *supra* note 2, art. 13.

³⁰ UNCAC, *supra* note 2, art.14.

³¹ UNCAC, *supra* note 2, art.15, 16.

³² UNCAC, *supra* note 2, art. 17.

³³ UNCAC, *supra* note 2, art. 18.

³⁴ UNCAC, *supra* note 2, art. 19.

³⁵ UNCAC, *supra* note 2, art. 20.

private sector,³⁶ of embezzlement of property in the private sector,³⁷ of laundering of proceeds of crime,³⁸ and of concealment.³⁹

State Parties are further required to adopt legislative measures to establish as criminal offences of obstruction of justice,⁴⁰ and to establish liability of legal persons.⁴¹ They are also required to take measures to enable freezing, seizure and confiscation.⁴²

State Parties of the UNCAC are required to engage in international cooperation,⁴³ and to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.⁴⁴

Concerning public procurement, Article 9.1 of the UNCAC specifically requires State Parties to “take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption” to address the following issues:

- “(a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;*
- (b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;*
- (c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;*
- (d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;*
- (e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.”⁴⁵*

³⁶ UNCAC, *supra* note 2, art. 21.

³⁷ UNCAC, *supra* note 2, art. 22.

³⁸ UNCAC, *supra* note 2, art. 23.

³⁹ UNCAC, *supra* note 2, art. 24.

⁴⁰ UNCAC, *supra* note 2, art. 25.

⁴¹ UNCAC, *supra* note 2, art. 26.

⁴² UNCAC, *supra* note 2, art. 31.

⁴³ UNCAC, *supra* note 2, art. 43.

⁴⁴ UNCAC, *supra* note 2, art. 46.

⁴⁵ UNCAC, *supra* note 2, art. 9.1.

Most requirements provided in Article 9.1 of the UNCAC can be found in the new GPA, with the exception of the measures to regulate matters regarding personnel responsible for procurement such as declaration of interest in particular public procurements, screening procedures and training requirements, as provided in subparagraph (e). It may be noted that such an addition would be beneficial to the GPA.

B. The OECD Anti-Bribery Convention

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention),⁴⁶ adopted in 1997 and entered into force in February 1999, requires its Parties to establish a specific criminal offence for bribery, which would include offering, promising or giving any undue pecuniary or other advantage to foreign public officials in the conduct of international business.⁴⁷

This convention is “the first and only international anti-corruption instrument focused on the ‘supply side’ of the bribery transaction”.⁴⁸ There could be different sources of ‘supply side’ in corrupt practices associated with public procurement. Domestic bidders and potential bidders could be tempted to bribe the procuring officials so as to get advantages over their competitors. Foreign bidders or potential bidders could also engage in bribing procuring officials in the hope that they will be able to enter the procurement market or even to secure a specific project. The OECD Anti-Bribery Convention requires the home country (the exporting/supplying country) to prohibit its suppliers from offering, promising or giving any undue pecuniary or other advantage to officials in the host country (the importing/procuring country) by criminalizing such corrupt practices so as to cut off the source of corruptions coming from abroad.

C. The failed “Transparency of Government Procurement Agreement”

Traditionally, in the area of trade rules, transparency has been relied on for the purpose of removing barriers arising from the non-transparent laws, regulations and government measures and of enabling traders to conduct international trade in a more efficient manner. An illustration in this regard would be the role played by non-

⁴⁶ *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD (2011), http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

⁴⁷ UNCAC, *supra* note 2, art. 1.

⁴⁸ *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, *supra* note 46.

transparent import procedures which can be considered as having the potential of leading to quantitative restrictions in imports.⁴⁹ As opposed to the line with the traditional idea of treating transparency, the WTO has tried to establish a multilateral agreement on transparency in government procurement so as to enhance “the predictability and reviewability of their national procurement procedures, and subject them to the WTO dispute settlement mechanism” with the hope that corruptions, in relation to government procurement activities, will be effectively reduced.⁵⁰ Nonetheless, the efforts of fighting against corruptions through establishing comprehensive transparency rules for government procurement were not successful.⁵¹

At the Singapore Ministerial Conference of 1996, ministers agreed to “establish a working group to conduct a study on transparency in government procurement practices, taking into account national policies and, based on this study, to develop elements for inclusion in an appropriate agreement.”⁵² Further, at the Doha Ministerial Conference of 2001, ministers had considered the enactment of a multilateral agreement on transparency in government procurement and agreed to have the negotiations take place after the Fifth Ministerial Conference.⁵³ It should be noted, however, that at the Fifth Ministerial Conference of 2003 in Cancún, Members were not able to agree on launching negotiations.⁵⁴ Ministers referred the whole agenda to the General Council, which, in 2004, decided that these issues “will not form part of the Doha Work Programme and therefore no work towards negotiations will take place”.⁵⁵

Notwithstanding the failure to establish a multilateral agreement on transparency in government procurement, the new GPA actually revives the corruption-combating efforts under the WTO, but only at a plurilateral level, the extent of application to

⁴⁹ European Commission, *Alcoholic beverages - Non-transparent import procedures, restrictions*, http://madb.europa.eu/madb/barriers_details.htm?barrier_id=095252&version=3.

⁵⁰ Krista Nadakavukaren Schefer, *Will the WTO Finally Tackle Corruption in Public Purchasing? The Revised Agreement on Government Procurement*, ASIL (Apr. 15, 2013), http://www.asil.org/insights/volume/17/issue/11/will-wto-finally-tackle-corruption-public-purchasing-revised-agreement#_ednref6.

⁵¹ *Working Group on Transparency in Government Procurement*, WTO https://www.wto.org/english/tratop_e/gproc_e/gptran_e.htm.

⁵² WTO Ministerial Conference, Singapore, *Ministerial Declaration*, ¶ 126, WT/MIN(96)/DEC (Dec. 18, 1996).

⁵³ WTO Ministerial Conference, Fourth Session, Doha, *Ministerial Declaration*, ¶ 126, WT/MIN(01)/DEC/1, (Nov. 20, 2001).

⁵⁴ WTO Ministerial Conference, Cancún, *Ministerial Statement*, ¶¶ 4-6, WT/MIN(03)/20 (Sept. 23, 2003).

⁵⁵ Decision adopted by the General Council on 1st August 2004, ¶ 1(g), WT/L/579 (Aug. 2, 2004).

WTO Members under which, is narrower than the intended multilateral agreement on transparency in government procurement.

IV. THE ANTI-CORRUPTION PROVISIONS IN THE NEW GPA AND THE SHORTAGES

A. Anti-corruption provision in the GPA Preamble

As mentioned in the introduction of this paper, there are two parts in the new GPA which have explicit inclusion of anti-corruption provisions – the Preamble and Article IV:4.

The Preamble states that GPA Parties recognize “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.”⁵⁶

There are a number of aspects of the Preamble which can be further elaborated on, based on its plain text. First, the paragraph specifically emphasises on three aspects: transparent measures regarding government procurement; carrying out procurements in a transparent and impartial manner; and avoiding conflicts of interest and corrupt practices. Further, the four principles of transparency, impartiality, avoidance of conflicts of interest, and avoidance of corrupt practices can also be clearly identified in these provisions.

Second, these four principles are to be fulfilled “in accordance with applicable international instruments, such as the United Nations Convention against Corruption.”⁵⁷ The UNCAC is only an example of applicable international instruments cited by the new GPA. Since there is no qualification on the meaning and the application of the term “applicable” in the new GPA, the term can certainly be interpreted so as to mean that whenever an instrument of international nature is fighting against corruptions, it would come within the ambit of the phrase “international instruments” as indicated here. The author is of the view that the phrase should not be restricted to those instruments to which all GPA Parties are members, as it would be against the plain meaning of the term. In other words, other anti-corruption related international instruments, such as the OECD Anti-Bribery Convention which is enacted for fighting against corruptions, should also fall within

⁵⁶ Agreement on Government Procurement, Preamble, Apr. 6, 2014, 1869 U.N.T.S. 508 [“GPA”].

⁵⁷ *Id.*

the scope of “applicable international instruments”.

Third, the four principles of transparency, impartiality, avoidance of conflicts of interest, and avoidance of corrupt practices are to be applied in “carrying out procurements”. In other words, they should be applied at all stages of government procurement measures – the pre-bidding, bidding and post-bidding stages.

Fourth, in view of the fact that the term “corrupt practices” is used in a general way, bid rigging, kickbacks, or bribes, and all other irregularities, including failure to follow the required procedures, can be included. In other words, the anti-corruption provision in the Preamble is designed to cover all kinds of corruption mentioned above, as long as they are procurement-related.

B. Anti-corruption provision in GPA Article IV:4

Article IV:4 of the new GPA further specifies the application of principles of transparency, impartiality, avoidance of conflicts of interest and avoiding corrupt practices. It states:

“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.”

Article IV:4 can be differentiated from the provision in the Preamble in three principal ways. First, the Preamble merely recognizes the importance of transparency, impartiality, avoidance of conflicts of interest and corrupt practice, whereas Article IV requires Parties to observe these principles. Second, the Preamble is linked to the UNCAC and other international instruments, whereas Article IV does not provide for anything with respect to the UNCAC, or any other international instruments, for that matter. Third, Article IV indicates that being consistent with the new GPA itself is an important part of fulfilling the transparency and impartiality requirements, whereas the Preamble does not have any such requirement of consistency.

Notwithstanding these differences, the essential principles of transparency, impartiality, avoiding conflicts of interest and preventing corrupt practices in the Preamble and in Article IV:4 are akin.

C. Shortages in the anti-corruption provisions in the new GPA

The first shortcoming is that the GPA in itself is a plurilateral agreement. As a consequence, its provisions are only applied to procurement measures and activities of the GPA Parties.⁵⁸ This is a limitation which cannot be overcome by merely making the anti-corruption provisions in the new GPA operable. However, if the new GPA can effectively assist the fight against corruptions, “good peer examples” can be set for non-GPA Parties to also improve their situations.

Also, the GPA sets various thresholds for application. It only applies to the covered government procurement activities exceeding the respective thresholds. Government procurements of smaller scales are not covered. Accordingly, the four principles of transparency, impartiality, avoidance of conflicts of interest, and avoidance of corrupt practices are not applicable to the small procurement projects. However, it should also be a reasonable expectation that an improvement in the fight against grand or systemic corruptions in bigger government procurements as required by the new GPA would have spill-over effects in the reduction or elimination of sporadic corruptions in smaller procurement projects.

The third shortage is the nature of the provisions. The text of the new GPA is considered as only including “a general admonition to procuring entities to conduct their procurement in a transparent and impartial manner so as to avoid conflicts of interest and prevent corrupt practices.”⁵⁹ In the view of this paper, the nature of “admonition” of the text should only refer to the provision in the Preamble because the provisions in Article IV:4 include mandatory requirements imposed on the Parties. Nevertheless, since Article IV:4 is only a general provision and since there is no explicit implementing mechanism in the new GPA, this paragraph could eventually become an “admonition” if it is not given with certain operable mechanisms.

The author considers that it is possible to overcome the “admonition” problem of these provisions through treaty interpretation and through appropriate application of dispute settlement provisions, as elaborated in the following part.

V. MAKING THE ANTI-CORRUPTION PROVISIONS USEFUL AND OPERABLE

As explained above, there are two main problems with the anti-corruption provisions in the new GPA: First, the Preamble does link to the UNCAC and other relevant treaties, but the provision here is not mandatory. Second, the provisions in Article

⁵⁸ The GPA consists of 15 parties, which include 43 WTO members (counting the European Union and its 28 member states). There are three Parties, whose approvals of the new GPA are pending.

⁵⁹ Jean Heilman Grier, *Anti-corruption Provisions for Procurement in TTIP – The TTIP Procurement Chapter should incorporate strong anti-corruption provisions*, PERSPECTIVES ON TRADE (Feb. 5, 2014), <http://trade.djaghe.com/?p=416#sthash.L528hDqK.dpuf>.

IV:4 of the new GPA are mandatory, but they do not have any implementing mechanism to support the performance of the obligations under the UNCAC and such international instruments. These two issues are addressed below from various perspectives.

A. Relying on the Preamble to link to UNCAC and OECD Anti-Bribery Convention through treaty interpretation

Concerning the nature of the Preamble, some authors consider the preambular provisions as non-binding.⁶⁰ Some others consider them to be supplementary to the main text of a treaty, having the ability to fill gaps in a treaty.⁶¹ It is understandable that the preamble of a treaty is not part of the legally binding text or the main operative part of the treaty. However, from the perspective of treaty interpretation, the specific provision in the Preamble of the new GPA, together with Article IV:4, “goes beyond the symbolic” when explicit inclusion of preventing corrupt practices and direct reference to the UNCAC are present in the new GPA.⁶²

When treaty drafters have come to an agreement to include paragraphs in the preamble of a treaty, they must have some meanings in mind to be given to the treaty. There are two ways to make the preambular provisions meaningful and to bring them under the operation of the main text of a treaty. The first way is to consider a relevant provision in the preamble as the context of an interpreted provision in the main text of the treaty. The interpretative value of the preamble as a context is confirmed by Article 31.2 of the Vienna Convention on the Law of Treaties (VCLT), which provides in part that “[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes”. The context is brought into the process of treaty interpretation under VCLT Article 31.1, which reads that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Treaty interpreters are required to take the context into consideration when they are conducting the holistic exercise of treaty interpretation.

For the new GPA, the Preamble indicates that the carrying-out of procurements in a transparent and impartial manner, and the avoidance of conflict of interests and

⁶⁰ For instance, it is stated that “[w]hile the preambular provisions are not binding as such, the operative provisions are binding at the outset.” See Geir Ulfstein & Christina Voigt, *Rethinking the Legal Form and Principles of a New Climate Agreement*, TOWARD A NEW CLIMATE AGREEMENT 186 (Todd Cherry, Joe Hovi & David M. McEvoy eds., 2014).

⁶¹ ILO Office of the Legal Adviser, *Manual for drafting ILO instruments*, http://learning.itcilo.org/ilo/jur/en/2_1_2_1.htm.

⁶² Krista Nadakavukaren Schefer, *supra* note 50.

corrupt practices should be “in accordance with applicable international instruments, such as the United Nations Convention against Corruption”.⁶³ Hence, when understanding the meaning of Article IV:4 of the new GPA, this preambular provision serves as a context so that the requirements provided in the UNCAC should be taken into account. This can support the interpretation that Article IV:4 of the new GPA should be understood to include the element of being “in accordance with applicable international instruments, such as the United Nations Convention against Corruption”.⁶⁴

The second way is to rely on the preambular provisions to understand the “object and purpose” of a treaty and, hence, to interpret treaty provisions “in the light of such object and purpose” under VCLT Article 31.1. The preamble serving as a basis for identifying the “object and purpose” in treaty interpretation is also confirmed by the WTO Appellate Body (“AB”). In the AB report on *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (“US – Shrimp”),⁶⁵ the AB stated that “[a]s this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994.” Also in the AB report on *US – Measures Affecting the Production and Sale of Clove Cigarettes* (“US – Clove Cigarettes”),⁶⁶ it is stated that “[t]he preamble of the TBT Agreement is part of the context of Article 2.1 and also sheds light on the object and purpose of the Agreement.”

Adding colour and texture, as well as shedding light on the object and purpose of Article IV:4 of the GPA would mean that a procuring entity shall conduct a covered procurement in a transparent and impartial manner which is consistent with the GPA, using methods such as open tendering, selective tendering and limited tendering; which avoids conflicts of interest; and which prevents corrupt practices, “in accordance with applicable international instruments, such as the United Nations Convention against Corruption”.⁶⁷

Thus Article IV:4 of the new GPA needs to be understood in line with the Preamble, which in turn requires GPA Parties to avoid conflicts of interest and to prevent corrupt practices “in accordance with applicable international instruments, such as the

⁶³ GPA, *supra* note 56, Preamble.

⁶⁴ *Id.*

⁶⁵ Appellate Body Report, *United States – Import Prohibition on Certain Shrimp and Shrimp Products*, ¶ 153, WT/DS58/AB/R (Oct. 12, 1998).

⁶⁶ Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 189, WT/DS406/AB/R (Apr. 4, 2012).

⁶⁷ GPA, *supra* note 56, Preamble.

United Nations Convention against Corruption”.⁶⁸

B. Incorporating the substantive obligations of UNCAC and OECD Anti-Bribery Convention into the new GPA

Since Article IV:4 of the new GPA should be understood to include the obligations of the Parties to avoid conflicts of interest and to prevent corrupt practices “in accordance with applicable international instruments, such as the United Nations Convention against Corruption”, the next step is to identify the substantive elements to be made “in line with”.

According to the above explanations of the UNCAC and the OECD Anti-Bribery Convention, the types of violation of Article IV:4 of the new GPA, which should be interpreted to incorporate these two conventions, should include the following:

(i) If a GPA Party fails to develop and implement or maintain preventive anti-corruption policies and practices as provided in Article 5 of the UNCAC, it should be considered as having violated GPA Article IV:4.

(ii) If a GPA Party fails to establish a body responsible for preventing corruption by implementing the preventive anti-corruption policies and overseeing and coordinating the implementation of those policies as provided by Article 6 of the UNCAC, it should be considered as having violated GPA Article IV:4.

(iii) If a GPA Party fails to take appropriate measure to promote integrity, honesty and responsibility among its public officials as required by Article 8, it should be considered as having violated GPA Article IV:4.

(iv) If a GPA Party fails to enhance transparency in its public administration,⁶⁹ to prevent corruption involving the private sector,⁷⁰ to promote the active participation of individuals and groups outside the public sector in the prevention of and the fight against corruption,⁷¹ to prevent money-laundering,⁷² it should be considered as in breach of GPA Article IV:4.

(v) Concerning criminalizing certain irregularities, if a GPA Party fails to establish as criminal offences of bribery of national public officials;⁷³ of bribery of foreign public officials and officials of public international organizations;⁷⁴ of embezzlement, misappropriation or other diversion of property by a public official;⁷⁵

⁶⁸ *Id.*

⁶⁹ UNCAC, *supra* note 2, art. 10.

⁷⁰ UNCAC, *supra* note 2, art. 12.

⁷¹ UNCAC, *supra* note 2, art. 13.

⁷² UNCAC, *supra* note 2, art. 14.

⁷³ UNCAC, *supra* note 2, art. 15.

⁷⁴ UNCAC, *supra* note 2, art. 16.

⁷⁵ UNCAC, *supra* note 2, art. 17.

to establish as criminal offences of obstruction of justice;⁷⁶ to establish liability of legal persons;⁷⁷ and to enable freezing, seizure and confiscation;⁷⁸ it should be considered as having violated GPA Article IV:4.

(vi) There are some irregularities which the UNCAC requires State Parties “to consider” adopting such legislation, to establish as criminal offences. They include trading in influence,⁷⁹ abuse of functions,⁸⁰ illicit enrichment,⁸¹ bribery in the private sector,⁸² embezzlement of property in the private sector,⁸³ laundering of proceeds of crime,⁸⁴ and concealment.⁸⁵ If a GPA Party has never “considered” criminalizing such activities, it should be deemed as having breached GPA Article IV:4. Of course, whether or not a GPA Party has “considered” these legislations is a factual issue. A good faith consideration of establishing such criminal offences by GPA Parties is needed for the purpose of discharging their obligations.

(vii) As indicated above, Article 9.1 of the UNCAC is specifically provided for the prevention of corruption in public procurement. A very important element in this article which is not found in the new GPA is to adopt “measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.” If a GPA Party fails to adopt measures to regulate matters regarding personnel responsible for procurement, it should be considered as having breached the obligations under GPA Article IV:4.

(viii) From the “supply side” of the source of corrupt practices in public procurement, if a GPA Party (the exporting/supplying country) fails to prohibit its suppliers of goods and services from offering, promising or giving any undue pecuniary or other advantage to officials in the host country (the procuring country) by criminalizing such corrupt practices in government procurement, the exporting/supplying country should be considered as having breached Article IV:4 of the new GPA. This is very different from the situations listed above, in which only host countries (i.e., the importing/procuring countries) could be charged with a violation of their obligations.

C. Incorporating cooperation requirement into the new GPA

Similar to the GPA of 1994, the new GPA does not have provisions requiring its

⁷⁶ UNCAC, *supra* note 2, art. 25.

⁷⁷ UNCAC, *supra* note 2, art. 26.

⁷⁸ UNCAC, *supra* note 2, art. 31.

⁷⁹ UNCAC, *supra* note 2, art. 18.

⁸⁰ UNCAC, *supra* note 2, art. 19.

⁸¹ UNCAC, *supra* note 2, art. 20.

⁸² UNCAC, *supra* note 2, art. 21.

⁸³ UNCAC, *supra* note 2, art. 22.

⁸⁴ UNCAC, *supra* note 2, art. 23.

⁸⁵ UNCAC, *supra* note 2, art. 24.

Parties to cooperate with each other in the fights against corruption. In the current context, because of the anti-corruption provisions in the new GPA, things can be improved.

Through incorporating the obligations under the UNCAC, GPA Parties are also expected to engage in international cooperation concerning the fighting against and prevention of procurement-related corruptions, as required by Article 43 of the UNCAC, and to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences related to government procurements pursuant to Article 46 of the UNCAC.

Such cooperation can be conducted within the Committee of Government Procurement established under Article XXI of the GPA. It can also be conducted outside the GPA. The cooperation will definitely assist the enforcement of the anti-corruption legislations and policies which are required to exist under the UNCAC.

D. Relying on challenge procedure to enforce the UNCAC under the new GPA

Challenge procedures are domestic procedures required by the GPA to allow suppliers to challenge irregularities which could affect their interests in procurement. Article XVIII:1 of the new GPA provides, in part, that:

“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...”*

According to the reproduced provision, one of the reasons to permit a supplier to challenge the procurement procedure is a breach of the GPA. As argued above, when there is a non-conformance with the UNCAC or the OECD Anti-Bribery Convention by a GPA Party, it should be interpreted to have violated GPA Article IV:4. Hence, when there is a violation of any one of these conventions, the affected supplier can make a challenge against the violation through domestic challenge procedures established under Article XVIII:1 of the new GPA. The challenge procedures can thus help enforce the obligations under the UNCAC and the OECD Anti-Bribery Convention, which are brought into the operation of the GPA through its Preamble and Article IV:4.

E. *Relying on dispute settlement procedure to enforce the UNCAC under the new GPA*

There are two types of complaint under the dispute settlement provisions in the new GPA, namely, the violation complaint and the non-violation complaint. Article XX:2 reads:

“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 (the Dispute Settlement Understanding).”*

Sub-paragraph (a) of Article XX:2 pertains to a violation complaint. There must be a failure to carry out an obligation under the GPA so as to establish a case under the Dispute Settlement Understanding. There has been GATT jurisprudence that nullification or impairment is “presumed” to exist whenever a violation has been established.⁸⁶ The presumption is codified under the WTO in Article 3.8 of the Dispute Settlement Understanding.⁸⁷

Sub-paragraph (b) deals with a non-violation complaint. There can be no breach of any provision of the GPA for the purpose of successfully bringing a complaint under this provision. However, it would be difficult to prove that a benefit accruing to the complaining party, directly or indirectly, under the GPA is being nullified or impaired.

If there were no preambular provisions to refer to the UNCAC and the OECD Anti-Corruption Convention, a GPA Party will have to choose non-violation complaint in order to challenge another GPA Party for a corrupt practice associated with government procurement occurred there. It would, however, be difficult for the complaining Party to overcome the burden of proving that a benefit accruing to it

⁸⁶ Uruguayan Recourse to Article XXIII, (Nov. 15, 1962), GATT Doc. L/1923-11S/95 at ¶ 15.

⁸⁷ Article 3.8 of the Dispute Settlement Understanding: “In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.”

under the GPA is being nullified or impaired. However, since these conventions are brought into the operation of the new GPA, a Party can challenge a corrupt practice in government procurement activities of a GPA Party based on violation complaint and enjoy the presumption that the complained party has nullified or impaired the benefit accruing to the complaining party.

Based on the violation complaint, not only can actual corruptions in government procurement be challenged under the dispute settlement procedure, a lack of mechanism in preventing corruption as required by the UNCAC and the OECD Anti-Corruption Convention in a GPA Party can also be challenged.

VI. CONCLUDING REMARKS

This paper concludes that the fact that the new GPA includes anti-corruption provisions shows the seriousness of corruption issues and the importance of coping with the problem; that the new GPA deserves immense recognition concerning the inclusion of anti-corruption provisions; that the non-binding provision in the Preamble of the new GPA can help interpret the binding provisions in Article IV:4 so as to bring the UNCAC and the OECD Anti-Corruption Convention into the ambit of operation of the GPA and hence a breach of a requirement under the conventions can also be considered as a violation of the GPA; and that such obligations can be enforced through the domestic challenge procedures established under GPA Article XVIII:1 and through the dispute settlement procedures under GPA Article XX:2 (a).

The new GPA and international anti-corruption conventions, including the UNCAC and the OECD Anti-Corruption Convention, are mutually supportive in their operations. On the one hand, the contents of these conventions can be incorporated into the operation of the new GPA through treaty interpretation. On the other hand, the new GPA, especially its dispute settlement procedure, can be used to enforce these conventions. It can be expected that if the anti-corruption provisions can work well under the new GPA, an exemplary case can be set for other countries to improve their anti-corruption efforts.