

Work of UNCITRAL on government procurement: purpose, objectives, and complementarity with the work of the WTO

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## **I. Introduction**

The United Nations Commission on International Trade Law (“UNCITRAL”) is the main legal body of the United Nations system in the field of international trade law, with a general mandate to further the progressive harmonization and unification of the law of international trade, through the issue of conventions and model laws, cooperation with other international organizations, and technical assistance.<sup>2</sup>

Although both UNCITRAL and the WTO have mandates addressing the rules governing international trade, their scope is rather different. The WTO addresses State-to-State relations, whereas UNCITRAL's texts relate mainly to private law commercial transactions (including tangential aspects of administrative or constitutional law) in individual States. As regards procurement, the GPA addresses the harmonization of procurement law with the express aim of opening up markets to international competition by preventing States parties from discriminating against suppliers from other States parties, and applying rules of transparency and open competition in procurement. UNCITRAL seeks to facilitate international trade through the harmonization of national law on procurement based on the main principles of transparency and competition (but it is arguably less demanding as regards international competition and more flexible on the protection of national suppliers). This chapter will examine the similarities between the texts, reflecting that the principles underlying good procurement practice are fundamental to both of them, and concludes that the texts are largely consistent for good reason: there is no reason to follow different approaches whether the primary aim is trade liberalisation or achieving best value for money in national procurement.<sup>3</sup>

## **II. Background to the Model Law and the WTO’s Government Procurement Agreement**

UNCITRAL issued a Model Law on Procurement of Goods, Construction and Services in 1994 (the “Model Law”).<sup>4</sup> UNCITRAL records that approaching 30 States have enacted

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<sup>2</sup> For further information on UNCITRAL’s mandate, see <http://www.uncitral.org/uncitral/en/about/origin.html>. All websites referenced in this Chapter were accessed on 3 February 2010.

<sup>3</sup> See, further, E. Nwogwugwu, “Towards the Harmonisation of International Procurement Policies and Practices” (2005) 14 P.P.L.R. 131; and S. Schooner and C. Yukins, “Incrementalism: eroding the impediments to a global public procurement market” (2007) 23 Georgetown Journal of International Law 529.

<sup>4</sup> See Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 and corrigendum (A/49/17 and Corr.1), annex I. The full text is available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/1994Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html). The Model Law is accompanied by a Guide to Enactment, which contains background and explanatory information (both a general explanation of the Model Law and an article-by-article commentary), aimed at assisting executive branches of

legislation based on the Model Law,<sup>5</sup> though this list probably understates the use of the text: first, because there is no obligation, unlike in the case of treaties or conventions, to notify the United Nations when the text is used, and, secondly, because the principles of the Model Law and its procedures have informed procurement reform even when the resulting legislation does not closely match the text itself.

The Model Law is a template available to national governments seeking to introduce or reform procurement legislation for their domestic economies. It is intended to provide all the essential procedures and principles for conducting various types of procurement proceedings in a national system, with a view to the achievement of value for money for the taxpayer, and avoiding abuse or corruption. In this regard, and in the UNCITRAL context, the Model Law is an example of a harmonization text: that is, one that can be flexibly implemented to accord with local circumstances, while preserving the desired outcomes, rather than a unification text such as a treaty or convention (in which the opportunities for derogations are limited).

UNCITRAL's work on the Model Law was undertaken in response to the fact that in a number of countries the existing legislation governing procurement was perceived to be inadequate or outdated, resulting in inefficiency and ineffectiveness in the procurement process, abuse, and the failure of the public purchaser to obtain adequate value in return for the expenditure of public funds.<sup>6</sup> The link between this activity and the overall mandate of UNCITRAL was explained thus: "the Model Law may help to remedy disadvantages that stem from the fact that inadequate procurement legislation at the national level creates obstacles to international trade, a significant amount of which is linked to procurement. Disparities among and uncertainty about national legal regimes governing procurement may contribute to limiting the extent to which Governments can access the competitive price and quality benefits available through procurement on an international basis. At the same time, the ability and willingness of suppliers and contractors to sell to foreign Governments is hampered by the inadequate or divergent state of national procurement legislation in many countries."<sup>7</sup>

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Governments and to parliaments in using the Model Law and reforming their procurement systems. See generally: S. Arrowsmith (ed), *Reform of the UNCITRAL Model Law on Procurement*, West, London, 2009, passim; R. Hunja, "The UNCITRAL Model Law on Procurement of Goods, Construction and Services and its Impact on Procurement Reform", ch.5 in S. Arrowsmith and A. Davies (eds.), *Public Procurement: Global Revolution* (Kluwer Law International: London 1999); J. Myers, "UNCITRAL Model Law on Procurement" (1993) 21 *International Business Lawyer* 179; A. Beviglia-Zampetti, "The UNCITRAL Model Law on Procurement of Goods, Construction and Services", ch.15 in B. Hoekman and P. Mavroidis (eds.), *Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement* (University of Michigan Press: Ann Arbor 1997); S. Arrowsmith "Public Procurement: an Appraisal of the UNCITRAL Model Law as a Global Standard" (2004) 53 *ICQL* 17.

<sup>5</sup> Afghanistan, Albania, Azerbaijan, Bangladesh, Croatia, Estonia, Gambia, Ghana, Guyana, Kazakhstan, Kenya, Kyrgyzstan, Madagascar, Malawi, Mauritius, Moldova, Mongolia, Nepal, Nigeria, Poland, Romania, Rwanda, Slovakia, Tanzania, Uganda, Uzbekistan and Zambia. See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/1994Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html).

<sup>6</sup> See the *Guide to Enactment, History and purpose of UNCITRAL Model Law on Procurement of Goods, Construction and Services, Introduction*, paragraph 3.

<sup>7</sup> *Guide to Enactment, History and purpose of UNCITRAL Model Law on Procurement of Goods, Construction and Services, Introduction*, paragraph 4.

The need for the Model Law was considered to be most acute in developing countries and countries in transition.<sup>8</sup>

The WTO's initial text on government procurement was negotiated in the Tokyo Round of trade negotiations, as part of the attempt to address the trade-restrictive effects of discriminatory procurement policies and to fill gaps in the trading system, and culminated in the 1979 Agreement on Government Procurement that entered into force in 1981, and an amended version came into effect in 1988. This agreement included an undertaking to continue negotiations to expand its limited coverage (in terms of both entities and types of procurement). The negotiations continued through the WTO Committee on Government Procurement, culminating in the 1994 Government Procurement Agreement (GPA).<sup>9</sup> The GPA aims to achieve greater liberalization and expansion of world trade and to improve the international framework for the conduct of world trade.<sup>10</sup> It is a plurilateral agreement between 28 members,<sup>11</sup> whose purpose is described by the WTO as to open up as much of public procurement as possible to international competition, through making laws, regulations, procedures and practices regarding government procurement more transparent and ensuring that governments do not protect domestic products or suppliers, or discriminate against foreign products or suppliers.<sup>12</sup>

### III. Purposes and scope of the GPA and the Model Law – harmony or discord?<sup>13</sup>

Although the Model Law was negotiated through an intergovernmental body, it is not an international agreement (unlike the GPA, in the broad sense of being an agreement between States). Indeed, the Model Law is expressly subject to any international agreements entered into by the enacting State.<sup>14</sup> Although commentators have noted this distinction between the Model Law and other international or regional trade agreements on procurement,<sup>15</sup> it is commonly noted that the tools available for implementing the

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<sup>8</sup> See the *Guide to Enactment, History and purpose of UNCITRAL Model Law on Procurement of Goods, Construction and Services, Introduction*, paragraph 3: "In those countries, a substantial portion of all procurement is engaged in by the public sector. Much of such procurement is in connection with projects that are part of the essential process of economic and social development. Those countries in particular suffer from a shortage of public funds to be used for procurement. It is thus critical that procurement be carried out in the most advantageous way possible. The utility of the Model Law is enhanced in States whose economic systems are in transition, since reform of the public procurement system is a cornerstone of the law reforms being undertaken to increase the market orientation of the economy."

<sup>9</sup> For further detail of the negotiations and history of the GPA, see S. Arrowsmith, *Government Procurement in the WTO* (The Hague: Kluwer Law International, Studies in Transnational Economic Law, vol. 16, 2003), Chapter 2, Section 2.2.

<sup>10</sup> First Recital to the GPA, available at [http://www.wto.org/english/docs\\_e/legal\\_e/gpr-94\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm).

<sup>11</sup> In the sense that not all WTO members are signatories to and bound by the agreement. Information based on the list of Parties at [http://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm#parties](http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties).

<sup>12</sup> See the Brief Introduction to the GPA contained at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm10\\_e.htm#govt](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm#govt).

<sup>13</sup> This and the following section draw on the work of S. Arrowsmith and C. Nicholas, *The UNCITRAL Model Law on Procurement: Past, Present, and Future*, Chapter I in S. Arrowsmith (ed), *Reform of the UNCITRAL Model Law on Procurement*, West, London, 2009, pp 6.-14.

<sup>14</sup> See Article 3.

<sup>15</sup> Such as the European Union (Procurement Directives 2004/17/EC and 2004/18/EC, available at [http://ec.europa.eu/internal\\_market/publicprocurement/legislation\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm)), the 2003 draft Free Trade Area of the Americas Agreement, available at [http://www.ftaa-alca.org/ftaadrafts\\_e.asp](http://www.ftaa-alca.org/ftaadrafts_e.asp)), the North American Free Trade Agreement, available at <http://www.nafta-sec-alena.org/en/view.aspx?conID=590>, the APEC Government

objectives of national and international texts on procurement are similar, even if the motivations behind them differ.<sup>16</sup> Trepte considers three “abstracted” models of procurement.<sup>17</sup> The first is an “economic” model, based on maximising value for money for the purchaser.<sup>18</sup> The second is a “social” model, based on the economic model, but allowing for social or other economic or political objectives to be accommodated in the system. The third is an “international” model, in which national governments are required to follow internationally agreed principles and procedures, which generally restrict them from national policies that would conflict with the international trade objectives of the international agreement concerned. Trepte concludes that not all objectives under each model are mutually exclusive, and that each procurement system includes some features of each model. Thus the Model Law is an example of a mainly economic system that allows limited social or political objectives (and is intended to promote international trade), whereas the GPA is an example of an international system that also allows limited national policies to be followed for essentially developmental reasons,<sup>19</sup> which may appear not to be compatible with the notion of free trade under the text, and which are considered further in section III.D below.

There are also some differences in scope between the two texts, in the sense of which procurement and which procuring entities are covered.<sup>20</sup> Article 1 of the Model Law provides that the law applies to “all procurement by procuring entities”, subject to a limited set of exemptions, the most significant of which is defence procurement.<sup>21</sup> There are various options provided in the text to define the concept of the “procuring entity”, reflecting different notions of the extent of the public sector that may be found among States, making it clear that the law is intended to address public and not private sector procurement.<sup>22</sup> By contrast with other international procurement texts (including the

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Procurement Experts Group, Non-binding Principles on Government Procurement: Transparency, available at [http://www.apcsec.org.sg/committee/gov\\_non\\_binding.html](http://www.apcsec.org.sg/committee/gov_non_binding.html), and the COMESA Procurement Regulations (2009, not published at the time of writing).

<sup>16</sup> For a detailed discussion of these issues, see S. Arrowsmith, *Government Procurement in the WTO*, footnote 8 above, Chapter 7, Section 7.3, pp. 172-179, P. Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (OUP: Oxford 2004). In essence, achieving value for money, a primary objective of the Model Law, is not generally considered to be an objective of the GPA, which is a trade liberalization instrument. However, governments will always be motivated by economic objectives, of which maximizing value for money in purchasing is one of the most important, and by other considerations, and there is no one-size-fits-all categorization of their motives.

<sup>17</sup> P. Trepte, previous footnote, pp. 63-66.

<sup>18</sup> Explained by Trepte as a model based on the concept of “allocative efficiency”, applying the economic notion of perfect competition, in *Regulating Procurement*, see footnote 15 above, Part I and p. 386.

<sup>19</sup> P. Trepte, see footnote 15 above, Section 6.2., pp. 368-379.

<sup>20</sup> Both texts focus on the part of the procurement process to award the procurement contract, rather than the post-contract administration phase.

<sup>21</sup> The 1994 provisions limit exclusions of the scope of the Model Law to cases provided for either by the Law itself or by regulation, so as to avoid non-transparent or ad hoc exclusions, and the accompanying Guide to Enactment emphasises that the aims of the Model Law will be enhanced by as wide a coverage as possible. Even where sectors of the market are excluded, article 1(3) allows for complete or partial application of the Model Law for a particular procurement process, at the option of the procuring entity. However, it is proposed to remove the blanket exemption for defence procurement, as part of the current programme to reform the Model Law, work that is nearing completion at the time of writing (February 2010), details of which can be found at [http://www.uncitral.org/uncitral/en/commission/working\\_groups/1/Procurement.html](http://www.uncitral.org/uncitral/en/commission/working_groups/1/Procurement.html). As regards the question of defence procurement, see documents A/64/17, paras. 40, 48 and 100-103, and A/CN.9/668, paras. 17 and 59, drawing on A/CN.9/WG.I/WP.66 (paras. 54-55), available as above.

<sup>22</sup> Alternatives to assist enacting States in defining the scope include references to all “governmental departments,

GPA), there is no general threshold below which the procuring entity is generally excused from compliance with the Model Law's provisions (though there is a limited number of thresholds below which certain exemptions, such as from advertising requirements, do apply).<sup>23</sup>

As is elaborated further in chapter xx, the GPA, on the other hand, applies to “any law, regulation, procedure or practice regarding any procurement by entities covered by [the GPA]”:<sup>24</sup> accordingly, it does not automatically apply to all public procurement within the jurisdiction of each signatory. “Coverage” means to which procuring entities (central and regional or local government, and some other entities, such as public utilities), and which goods, construction and services the signatory has agreed to include within the GPA (as part of its accession negotiations).<sup>25</sup> The GPA only applies to procurement above certain threshold values, and many signatories have the same or similar thresholds.<sup>26</sup>

Notwithstanding the similarities described above, it is sometimes queried whether the different scope, ambitions and provisions of the GPA and the Model Law involve some incompatibility, or whether their purpose and outcome, and the work in procurement of their custodian organizations, the WTO and UNCITRAL, are in fact complementary and mutually reinforcing. This Chapter will explore these issues, and concludes that there is indeed a high degree of synergy in procurement under the two texts, supported by active cooperation between the WTO and UNCITRAL during the reform process that both are currently ongoing.<sup>27</sup>

Some of the current Parties to the GPA enacted procurement legislation based on the Model Law, but many of them have since amended their law prior to the European Union

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agencies, organs and other units within the enacting State”, explained in the Guide to Enactment as referring to provincial, local or other governmental sub-divisions of the enacting State, as well as to the central government; and to entities or enterprises that are not considered part of the government, if the government has an interest in requiring those entities to conduct procurement in accordance with the Model Law. See the *Guide to Enactment, Section II, Article-by-Article remarks, Article 2. Definitions*, paragraph 2.

<sup>23</sup> See, for example, Article 8 on domestic procurement, and Article 21 on request for quotations procurement.

<sup>24</sup> GPA, article 1.1.

<sup>25</sup> The coverage for each signatory is set out in its Appendix I Annexes, with Annexes 1-3 relating to the procuring entities, and annexes 4 and 5 relating to covered services and construction services (almost all goods are automatically covered). See, further, [http://www.wto.org/english/tratop\\_e/gproc\\_e/gpa\\_overview\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gpa_overview_e.htm).

<sup>26</sup> For details of the thresholds, see [http://www.wto.org/english/tratop\\_e/gproc\\_e/thresh\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/thresh_e.htm).

<sup>27</sup> For details of UNCITRAL's reform programme, see footnote 21 above. The elements of the reform are designed to reflect new practices, in particular regarding electronic procurement and related aspects of e-commerce, and to take account of the experience gained in the use of the Model Law as a basis for law reform. Although the UNCITRAL Working Group concerned was given a flexible mandate to identify the issues to be addressed in its considerations, it will not depart from the basic principles of the Model Law, nor the flexible, non-prescriptive approach in the original text. As regards the GPA, a commitment to further negotiations was included in the text (Article XXIV:7(b) and (c)) when it was adopted in 1994, the purposes of which were to improve and update the Agreement for reasons similar to those in UNCITRAL, to extend coverage, to eliminate remaining discriminatory measures, and to facilitate accession to the GPA. For further detail, and the provisionally agreed revised GPA text (of 11 December 2006), see [http://www.wto.org/english/tratop\\_e/gproc\\_e/negotiations\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm) (referred to in this Chapter as the revised GPA). This Chapter will refer to the 1994 texts of the GPA and Model Law as they are the texts currently in force, but will draw attention to the main revisions where appropriate.

(EU) Procurement Directives<sup>28</sup> being transposed into national laws or prior to joining the EU. Some observers to the GPA (including some seeking accession) have based their procurement laws on the UNCITRAL text.<sup>29</sup>

Both UNCITRAL and the WTO engage in technical assistance in support of their published texts. UNCITRAL engages in outreach activities to promote familiarization with UNCITRAL texts and their use; undertakes law reform assessments to assist governments and other authorities in assessing their needs for law reform in the commercial field; assists in drafting national legislation to implement UNCITRAL texts and in their implantation, in conjunction with other international development agencies, provides advice and assistance on the use of its texts. The GPA includes provisions on technical assistance, including the establishment of information centres giving information on procurement practices and procedures in developed countries,<sup>30</sup> and the WTO secretariat engages in technical co-operation activities such as holding regional workshops and workshops on accession. Thus the questions of compatibility and complementarity are not merely academic issues, but involve an assessment of whether systems can function well and observe the requirements of both regimes at the same time.

#### **IV. The objectives of the Model Law and of the GPA**

Each text contains statements of its objectives.

The Model Law has five main objectives, which are set out in its Preamble:<sup>31</sup>

- “(a) Maximizing economy and efficiency in procurement;
- (b) Fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;
- (c) Promoting competition among suppliers and contractors for the supply of the goods, construction or services to be procured;
- (d) Providing for the fair and equitable treatment of all suppliers and contractors;
- (e) Promoting the integrity of, and fairness and public confidence in, the procurement process; and
- (f) Achieving transparency in the procedures relating to procurement”.

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<sup>28</sup> Essentially, the European parties to the GPA..

<sup>29</sup> Information based on the list of Parties and Observers at [http://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm#parties\\_](http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties_).

<sup>30</sup> Article V:8-11

<sup>31</sup> The Guide to Enactment notes that, in States in which it is not the practice to include preambles, the statement of objectives should be incorporated in the body of the provisions of the Law. See the *Guide to Enactment, Section II, Article-by-Article remarks, Preamble*.

There is no hierarchy among these objectives in the Preamble. However, the Guide to Enactment comments that the objectives of the Model Law “are considered essential for fostering economy and efficiency in procurement and for curbing abuses,”<sup>32</sup> indicating that the latter two objectives are the ultimate ends, and the remainder in the Preamble can be considered as means to those ends.<sup>33</sup> The Guide to Enactment continues that the statement of these objectives does not itself create substantive rights or obligations for procuring entities or for contractors or suppliers,<sup>34</sup> and so it is in complying with the principles and procedures set out in the text that achievement of the objectives is ensured. The objectives are largely self-explanatory, though it is worth noting that “economy and efficiency” involve both achieving value for money in what is purchased, and administrative efficiency in the process, and the notion of “integrity” encompasses more than the prevention of corruption and abuse: it includes personnel involved in procurement acting ethically and fairly.<sup>35</sup>

Other commonly cited procurement objectives are accountability and uniformity: accountability meaning that compliance with the rules and regulations of the system are seen to be achieved (which can be considered, consequently, to be an aspect of transparency and integrity),<sup>36</sup> and uniformity meaning the standardization of procedures and processes, and ultimately, of outcome.<sup>37</sup>

The main means of achieving these objectives in the procurement process is, as the Guide notes, by application of transparency, competition and objectivity.<sup>38</sup> These basic principles also underlie another important text that has relatively recently arrived in the procurement world: the 2003 United Nations Convention against Corruption (UNCAC),<sup>39</sup> which makes provision for procurement as part of its “Preventive Measures” Chapter. The Chapter includes an article setting mandatory minimum standards for procurement, requiring systems to be based on “transparency, competition

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<sup>32</sup> See the *Guide to Enactment, Section I, Main features of the Model Law, Objectives*, paragraph 8.

<sup>33</sup> Indeed, it can be argued that the ultimate aim is to maximize the utility of the purchaser, the government, which is a political as well as an economic question: see, for example, P. Trepte, *Regulating Procurement*, footnote 15 above, p. 69. This Chapter focuses on the economic and legal issues.

<sup>34</sup> See the *Guide to Enactment, Section II, Article-by-Article remarks, Preamble*.

<sup>35</sup> For further detail of anti-corruption and integrity, see S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (Kluwer Law International: London 2000), pp.37-38 (also cited by Arrowsmith, footnote 12, above).

<sup>36</sup> However, it can be argued that providing for accountability can involve a difficult balance, in procurement as in other decision-making. Procurement officials may require detailed rules to guide (and protect) them when making decisions, but if they simply follow the rules, and are judged merely on whether they have done so, the objective of accountability is defeated.

<sup>37</sup> For a more detailed discussion of these and other procurement objectives, such as customer satisfaction and wealth distribution, see “*Desiderata: Objectives for a System of Government Contract Law*”, Schooner, *Public Procurement Law Review*, Vol. 11, Pp. 103, 2002, also available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=304620](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304620).

<sup>38</sup> *Guide to Enactment, Section I, Main features of the Model Law, Objectives*, paragraph 8.

<sup>39</sup> The text of UNCAC is available at <http://www.unodc.org/unodc/en/treaties/CAC/index.html>. UNCAC entered into force on 14 December 2005, following the ratification of its text by 30 signatories. The objectives of UNCAC are to promote, facilitate and support: (i) measures to prevent and combat corruption more efficiently and effectively, (ii) international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery, and (iii) integrity, accountability, and proper management of public affairs and property.

and objective criteria in decision-making”, which are “effective, inter alia, in preventing corruption”.<sup>40</sup>

The GPA is described as having two “cornerstone principles”: non-discrimination and transparency, implemented through “an agreed framework of rights and obligations among its Parties with respect to their national laws, regulations, procedures and practices in the area of government procurement”.<sup>41</sup>

This Chapter will therefore consider the main principles of procurement under the Model Law: transparency, competition, and objectivity, and the additional principle underlying the GPA, non-discrimination, discussing how those principles are reflected in the Model Law and the GPA texts, and the procedures each contains.

#### **IV.A Transparency**

The concept of transparency in the context of procurement is considered to involve three main elements: first, publicity, both of procurement opportunities and of the disclosure of the rules that will be followed in the procurement process; secondly, the visible conduct of procurement according to prescribed rules and procedures that limit the discretion of officials;<sup>42</sup> and, finally, the provision of a system for monitoring and enforcing the applicable rules.<sup>43</sup> The main aim of transparency is to ensure that the rules are followed and, conversely, that non-compliance (perhaps involving abuse, corruption or discrimination) can be both identified and addressed. In other words, transparency facilitates the achievement of other objectives of a procurement system.

These elements of transparency are key features of both the Model Law and the GPA.

Under the Model Law, transparency provisions regarding the dissemination of information include requirements for all procurement-related texts to be made promptly

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<sup>40</sup> See UNCAC, Article 9, Public procurement and the management of public finances. Article 9(1) addresses procurement, and articles 9(2) and 9(3) address the management of public finances. UNCAC’s other provisions also have procurement implications, notably those addressing preventive measures (preventive measures include anti-corruption policies, practices and bodies (Articles 5 and 6), codes of conduct for public officials (Article 8), and public reporting (Article 10). UNCAC was negotiated following studies indicating that procurement processes are vulnerable to corruption, collusion, fraud and manipulation (“[p]ublic procurement has been identified as the government activity most vulnerable to corruption”, Integrity in Public Procurement: Good Practice from A to Z (Organisation for Economic Co-operation and Development (OECD), 2007), available at [http://www.oecd.org/document/60/0,3343,en\\_2649\\_34135\\_38561148\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/60/0,3343,en_2649_34135_38561148_1_1_1_1,00.html))

<sup>41</sup> These cornerstone principles are set out in two of the Recitals of the GPA : “Recognizing that laws, regulations, procedures and practices regarding government procurement should not be prepared, adopted or applied to foreign or domestic products and services and to foreign or domestic suppliers so as to afford protection to domestic products or services or domestic suppliers and should not discriminate among foreign products or services or among foreign suppliers;” and “Recognizing that it is desirable to provide transparency of laws, regulations, procedures and practices regarding government procurement.” See, further, [http://www.wto.org/english/tratop\\_e/gproc\\_e/gpa\\_overview\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gpa_overview_e.htm)

<sup>42</sup> That is, the rules both ensure that the procedures are followed and limit the possibilities for abuse to favour particular suppliers.

<sup>43</sup> See S. Arrowsmith (ed), *Reform of the UNCITRAL Model Law on Procurement*, footnote 12 above, p. 7 and its footnote 11, citing S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed, Sweet & Maxwell, London 2005) at 3.9.

and publicly accessible, the publication of contract award notices, the wide publication of invitations to participate<sup>44</sup> and conditions of participation,<sup>45</sup> the determination of evaluation criteria at the outset of the procurement, and their publication in the solicitation documents,<sup>46</sup> the disclosure to all participants of significant further information provided during the procurement to any one participant, and the publication of the deadline for submission of tenders and a public tender opening.<sup>47</sup> Further, certain information regarding the conduct of a particular procurement must be made publicly available ex post facto, and participants are entitled to broader information, all of which must be included in a record of the procurement.<sup>48</sup>

A critical feature in this regard is the requirement for the publication of all pertinent information that suppliers would need to participate (or to decide whether or not to participate) at the beginning of the process, i.e. in the invitation to participate or solicitation documents or their equivalent. For example, the Model Law requires solicitation documents in open tendering proceedings to contain at a minimum the following information: the means and form of communications in the procurement; instructions for submitting tenders (including language, submission deadline and length of validity); details of the items to be procured (including quality characteristics and technical specifications), the time frame for supply; evaluation and qualification criteria; whether alternatives to the characteristics of the items will be permitted; whether suppliers can submit tenders for part only of the procurement; how to express and formulate the tender price including currency; whether tender securities will be required and whether withdrawal of tenders without forfeiture of tender security is permitted; how further information of clarification can be obtained (with details of the procuring entity's contact point) and whether meetings of suppliers are envisaged; procedures for tender opening, details of governing law, the fact of the right to challenge procurement decisions, any reservation of a right to reject all tenders and other formalities and requirements. In addition, unless there has been an open pre-qualification phase, the solicitation documents must include all supplier qualification requirements.<sup>49</sup>

The Model Law also sets out requirements for non-discriminatory methods of communication,<sup>50</sup> requires the express prior reservation of the right to reject all tenders

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<sup>44</sup> See Articles 5, 14 and 24.

<sup>45</sup> See Articles 6, 7, 25 and 27, among others.

<sup>46</sup> See Articles 34 and 39, among others.

<sup>47</sup> See Articles 28, 30 and 33.

<sup>48</sup> See Article 11. The Guide to Enactment comments that "one of the principal mechanisms for promoting adherence to the procedures set forth in the Model Law and for facilitating the accountability of the procuring entity to supervisory bodies in Government, to suppliers and contractors, and to the public at large is the requirement set forth in article 11 that the procuring entity maintain a record of the key decisions and actions taken by the procuring entity during the course of the procurement proceedings. Article 11 [of the Model Law] provides rules as to which specific actions and decisions are to be reflected in the record. It also establishes rules as to which portions of the record are, at least under the Model Law, to be made available to the general public, and which portions of the record are to be disclosed only to suppliers and contractors" (*Guide to Enactment, Section II, Article-by-Article remarks*, para. 34).

<sup>49</sup> See Articles 27 and 38.

<sup>50</sup> See Article 9.

or other bids, stipulates the manner of entry into force of the procurement contract, and regulates the language of documents for the procurement.<sup>51</sup>

The publication requirements are supported by a general condition that the procuring entity must conduct procurement by means of open tendering (or its equivalent for services procurement)<sup>52</sup> unless another method can be justified,<sup>53</sup> by mandated procedures for each procurement method in Chapters III, IV and V of the Model Law, and by provisions in Chapter VI permitting suppliers or contractors that claim to have suffered loss or damage due to non-compliance with the rules and procedures to challenge the non-compliant actions or decisions.<sup>54</sup> The remedies that can be granted in the so-called review proceedings focus on corrective action (and are likely to include the possibility of setting aside procurement contracts in the revised Model Law), with limited financial compensation in appropriate circumstances.<sup>55</sup>

The GPA follows a similar path. There is a general requirement to publish laws, regulations, judicial decisions, administrative rulings of general application and any procedures regarding procurement covered by the GPA in prescribed publications,<sup>56</sup> such as the requirement to publish an invitation to participate, prior to the procurement.<sup>57</sup> In addition, each signatory is required to provide statistics on its procurement covered by the GPA to the other signatories (through the Committee on Government Procurement).<sup>58, 59</sup>

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<sup>51</sup> See Articles 12, 17, 13 and 36.

<sup>52</sup> See Article 18.

<sup>53</sup> Open tendering, called simply “tendering” in the Model Law, is mandated as the rule for normal circumstances in the procurement of goods or construction under the Model Law, because it is considered to be the method that maximises transparency, competition and objectivity. Key features of tendering include the unrestricted solicitation of participation by suppliers or contractors; comprehensive description and specification in solicitation documents; full disclosure to suppliers or contractors of evaluation criteria (i.e., price alone, or a combination of price and some other technical or economic criteria); strict prohibition against negotiations between the procuring entity and suppliers or contractors; public opening of tenders at the deadline for submission of tenders; and disclosure of any formalities required for entry into force of the procurement contract. Under the 1994 text, the procurement of services is undertaken using different methods from the procurement of goods and construction, using tendering when it is feasible to formulate detailed specifications and tendering is considered “appropriate”, but otherwise using a similar method, whose evaluation criteria allow the procuring entity to add weight to the qualifications and expertise of the service providers in the evaluation process. The proposed revisions to the Model Law noted above will preserve the primacy of the tendering method, and the requirement for recorded justification for the use of any other procurement method. The methods themselves are being streamlined, notably as regards services, but the principles enshrined in them remain. For details of the proposed revisions, see footnote 21 above.

The review provisions a

The provisions in the Model Law are limited to general guidance and leave considerable scope to the enacting State in implementing the Model Law. For example, the Model Law does not address the question of the independence of the administrative review body, does not address the form of the relief to be given (which may include orders or recommendations), and there are no provisions creating a right to judicial review, though article 57 allows enacting States that operate judicial review to include procurement review within the relevant courts’ jurisdiction. These review provisions have been criticised as being insufficiently rigorous, are being significantly strengthened in the reform programme of the Model Law, notably to remove their optional nature, to ensure the independence of the review bodies and to remove all the previous exemptions from the scope of the review process. For further details, see footnote 21 above.

<sup>55</sup> See Article 54.

<sup>56</sup> See Article XIX:1, and the list of publications in Appendix IV.

<sup>57</sup> See Article IX:3, 7, 9, which sets out the requirements applicable to various levels of government. The list of publications is in Appendix II.

<sup>58</sup> The Committee on Government Procurement comprises the parties and observers to the GPA, and administers the GPA.

The GPA rules on procurement methods and procedures,<sup>60</sup> while less detailed than those of the Model Law,<sup>61</sup> follow the same principles. The Agreement allows the use of open, selective and limited tendering procedures, and provides the essential procedures to follow. There are minimum deadlines that must be allowed for the submission of tenders, long enough to allow all suppliers, domestic and foreign, to prepare and submit tenders (though they can be reduced in cases of urgency),<sup>62</sup> the tender documents must set out all necessary information to enable potential suppliers to submit responsive tenders (such as economic and technical requirements, financial guarantees and the criteria for awarding the contract and procedural information such as the closing date and time for receipt of tenders),<sup>63</sup> the crafting of technical specifications is regulated in a manner similar to that of the Model Law, with additional requirements that they be in terms of performance rather than design, and be based on international standards, where they exist, or otherwise on national technical regulations, recognized national standards, or building codes.<sup>64</sup> Also, as in the Model Law, there are procedural rules for submission, receipt and opening of tenders,<sup>65</sup> and procedures requiring the award of the contract to the lowest-priced or most advantageous tender as per the criteria in the tender documents.<sup>66</sup>

Under the GPA, procuring entities may engage in negotiations with suppliers after the submission of tenders, provided this possibility is indicated in the initial tender notice or it appears from the tender evaluation that no one tender is the most advantageous. In either case, there are safeguards to ensure that such negotiations do not discriminate between suppliers.<sup>67</sup>

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<sup>59</sup> See Article XIX:5.

<sup>60</sup> See Articles VII to XVI.

<sup>61</sup> As an international agreement with the objective of opening procurement markets to international competition, to borrow an analogy from the accounting world, the text focuses on the principles required to achieve that objective, rather than setting out detailed rules and procedures that are minimum standards for procurement legislation at the national level, an analysis applied, inter alia, by S. Schooner, see [http://www.unescap.org/tid/projects/procure\\_s3a\\_schooner.pdf](http://www.unescap.org/tid/projects/procure_s3a_schooner.pdf) (a further system is a consequentialist one – that is, one that focuses on the outcome of the system, rather than its contents). For a more detailed discussion of the procurement context, see S. Arrowsmith, *Government Procurement in the WTO*, footnote 8 above, p.174. The Model Law, a principles-based text with rules to implement them, is not a complete text on procurement: “It a framework law, to be supplemented by procurement regulations to fill in the procedural details for the procedures authorized by the Model Law ... [it addresses] the procedures to be used by procuring entities in selecting the supplier or contractor with whom to enter into a given procurement contract, and consequently it does not address the supporting administrative structure, or other legal questions that might be found in other bodies of law (administrative, contract and judicial-procedure law).” The text “assumes that the enacting State has in place, or will put into place, the proper institutional and bureaucratic structures and human resources necessary to operate the type of procurement procedures provided for in the Model Law,” noting later in the text the importance of adequate training of personnel (*Guide to Enactment, Section I, Main features of the Model Law, A framework law to be supplemented by procurement regulations*, paragraph 12). For a summary of the principles- and rules-based systems and their impact in accounting, see, for example, Schipper, K., “*Principles-based accounting standards*”, in *Accounting Horizons* Vol. 17 No. 1, March 2003, pp. 61-72.

<sup>62</sup> See Article XI:2.

<sup>63</sup> See Article XII.

<sup>64</sup> See Article VI.

<sup>65</sup> See Article XIII:1-3.

<sup>66</sup> See Article XIII:4.

<sup>67</sup> See Article XIV. This provision is to be contrasted with the strict prohibition of negotiations after tenders or other offers have been received under the Model Law (see, for example, Article 35).

In addition to the normal WTO State-to-State dispute settlement mechanism, the GPA sets out mandatory requirements for the establishment of a domestic bid challenge system, giving suppliers a right of recourse to an independent domestic tribunal for alleged breaches of the GPA,<sup>68</sup> including either judicial review or compliance with the procedures prescribed by the GPA.<sup>69</sup> The main aim of the provisions is to ensure corrective action, including interim measures where necessary, and some financial compensation may be available in the alternative or in addition.<sup>70</sup>

The above provisions codify recognised good practices in the area of government procurement:<sup>71</sup> in the context of the Model Law, they aim to ensure value for money, to prevent corruption, and to support or implement the other objectives in its Preamble. In the context of the GPA, they also aim to implement non-discrimination: in other words, to ensure that access to covered procurement is open and that an equal opportunity is given to both domestic and foreign suppliers and their products and services. The Model Law, as a general statement of principle, prohibits discrimination between suppliers on the basis of nationality, though envisages exemptions.<sup>72</sup>

Thus, while there are differences in the circumstances in which the procuring entity may, for example, choose to use a procurement method in which it is possible to limit the participation of suppliers in the procurement process, or dispense with some transparency provisions, those circumstances are set out clearly in the texts, for all to see. The ability under the GPA to engage in post-tender negotiations subject to transparency and other safeguards, as noted above. These differences reflect the extent of discretion available to the procuring entity in particular circumstances,<sup>73</sup> rather than a different commitment to transparency itself.

#### **IV. B Competition**

As noted above, open tendering under the Model Law is the method widely recognized as the most effective in promoting transparency, competition and objectivity, because the procurement is “open” to all potential suppliers and because those suppliers are presumed

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<sup>68</sup> See Article XX.

<sup>69</sup> See Article XX: 6(a)-(g).

<sup>70</sup> For further detail of available remedies, see Article XX:7 (a)-(c).

<sup>71</sup> The working methods of UNCITRAL seek to distil best practice through the contributions of members and observers at its sessions. See, further, [http://www.uncitral.org/uncitral/en/about/origin\\_faq.html](http://www.uncitral.org/uncitral/en/about/origin_faq.html).

<sup>72</sup> See Article 8, and the further discussion in the section on non-discrimination, below.

<sup>73</sup> A discussion of the notion of discretion in procurement and its interaction with avoiding corruption and achieving value for money is beyond the scope of this Chapter, but see, for example, S. Arrowsmith, J. Linarelli and D. Wallace, footnote 34 above, chapter 2, section III; and M. Dischendorfer, “*The UNCITRAL Model Law on Procurement: How Does it Reconcile the Theoretical Goal of Total Objectivity with the Practical Requirement for some Degree of Subjectivity*” (2003) 12 P.P.L.R. 100; Integrity in Public Procurement: Good Practice from A to Z (Organisation for Economic Co-operation and Development (OECD), 2007), available at [http://www.oecd.org/document/60/0,3343,en\\_2649\\_34135\\_38561148\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/60/0,3343,en_2649_34135_38561148_1_1_1_1,00.html), “Bribery in Public Procurement: Methods, Actors and Counter-Measures” (OECD, 2007) at [http://www.oecd.org/document/60/0,3343,en\\_2649\\_37447\\_38446908\\_1\\_1\\_1\\_37447,00.html](http://www.oecd.org/document/60/0,3343,en_2649_37447_38446908_1_1_1_37447,00.html), and Transparency International’s “Handbook for Curbing Corruption in Public Procurement” available <http://www.transparency.org/>. The additional discretion available under the GPA is an interesting feature, given that value for money is generally considered to be a lesser consideration under an international text (whose main objective is trade liberalisation), as compared with national system objectives.

to engage in a rigorous contest for the scarce resource at issue (an opportunity to sell to the government).<sup>74</sup> However, there are few explicit references to the notion of competition in the text of both the Model Law and the GPA – competition is implicit in the procedures they mandate.

Open tendering is “open” in that, as described above, the solicitation is unrestricted and there is no discretion to limit participation.<sup>75</sup> In restricted tendering,<sup>76</sup> and in the principal method for services under the Model Law, the procuring entity may dispense with such open solicitation in three main circumstances: first, where there is a limited number of possible suppliers (with the caveat that all possible suppliers are invited to participate), secondly where there are so many possible suppliers that open proceedings would be disproportionately costly (with the caveat that sufficient suppliers are invited to participate to ensure effective competition), and thirdly (for services procurement only) where there are exceptional confidentiality considerations (again, with the effective competition caveat).<sup>77</sup>

Under the GPA’s open procedure, all interested suppliers may submit a tender.<sup>78</sup> Under selective tendering, as the name implies, the procuring entity invites suppliers to submit a tender,<sup>79</sup> though they are required to invite tenders from the maximum number of domestic and foreign suppliers, and to choose those to invite in a fair and non-discriminatory manner.<sup>80</sup> Under limited tendering procedures, the procuring entity invites individual potential suppliers, but the GPA circumscribes the situations in which this method can be used.<sup>81</sup> The conditions for use of this method are similar to those for alternative procurement methods under the Model Law.<sup>82</sup>

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<sup>74</sup> A concept described by Trepte as “contestability”. *Regulating Procurement*, footnote 15 above, p. 394.

<sup>75</sup> The Model Law does not contain a definition of “open” procurement, or of open solicitation, but it is generally considered to involve both the public advertisement of the procurement, and an open invitation to participate. In addition, the procuring entity must consider all tenders submitted, in the broad sense of establishing whether the supplier concerned is qualified and its tender responsive.

<sup>76</sup> Restricted tendering is an “alternative” procurement method, but contains all the features of tendering save a restricted solicitation as described in the first two circumstances above.

<sup>77</sup> In one other alternative method (request for proposals), the procuring entity is required to issue an advertisement, but is not required to consider all responses; and there is no public advertisement requirement in competitive negotiation, request for proposals and single source procurement (with one very limited exception).

<sup>78</sup> See Article VII:3(a).

<sup>79</sup> See Articles VII:3(b) and X. The ability to choose suppliers in this manner is not permitted in open tendering under the Model Law, but is permitted in restricted tendering and some other procurement methods. The difference between the Model Law and the GPA in this respect is that, under the Model Law, the use of a procurement method other than tendering requires justification, whereas the use of selected tendering under the GPA does not.

<sup>80</sup> See Article X:1. The procuring entity may also select from among suppliers on a list of qualified suppliers, again subject to safeguards (See Articles X.2 and VIII). The safeguards include that any conditions for participation in tendering procedures must be limited to those that are essential to ensure the suppliers’ capability to fulfil the contract, and may not have a discriminatory effect; mandatory publication of lists of qualified suppliers, the period of validity of those lists and the conditions that need to be met for inclusion in the lists (See Article IX:9).

<sup>81</sup> See Article VII:3(c). Examples of when this method can be used include the absence of tenders in response to an open tender or selective tender, or cases of collusion, when the product or service can be supplied only by a particular supplier, or for reasons of extreme urgency brought about by events unforeseeable by the procuring entity (see Article XV).

<sup>82</sup> See Chapter II of the Model Law.

Thus both texts contemplate open and restricted solicitation of potential suppliers. However, the fact that the number of participants is limited does not mean that competition must be absent: it will take place between, in all probability, a lesser number of suppliers, and may be just as fierce as in an open procurement. Indeed, it is sometimes observed that procurement that is not conducted openly should be even more rigorous in ensuring that competition is in fact effective (for example by avoiding collusion).<sup>83</sup>

The choice of procurement method under the Model Law is predicated on the notion of maximising competition. However, it was noted during the current reform programme that the 1994 Model Law and accompanying Guide to Enactment contained relatively few references to this concept when making this choice (as compared with the provisions on tendering and the type of solicitation, both of which stress the need to ensure effective competition).<sup>84</sup> The Guide states simply that “[f]or the exceptional circumstances in which tendering is not appropriate or feasible ..., the Model Law offers alternative methods of procurement”, and continues to explain the exceptional circumstances that justify the use of a procurement method other than tendering: where it is not feasible for the procuring entity to formulate specifications to the degree of precision or finality required for tendering proceedings, two-stage tendering, request for proposals, and competitive negotiation are available; and competitive negotiations is also available in urgent and emergency procurement. There is also a choice of procurement methods available where negotiations are appropriate, for certain specialised procurement such as research and development and defence procurement,<sup>85</sup> and for procurements that have previously failed.<sup>86, 87</sup> Consequently, the 1994 provisions were highly flexible in according States a choice of procurement methods that could be enacted for particular circumstances.<sup>88</sup> In addition, where enacting States enacted most or all of the procurement methods in the Model Law, procuring entities would have a choice of

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<sup>83</sup> The concept of economic competition in procurement is explored in **Chapter \*\* of** this work, entitled “Ensuring integrity and competition in public procurement markets: a dual challenge for good governance”, Section III.

<sup>84</sup> See, for example, the commentary to article 48, *Guide to Enactment, Section II, Article-by-Article remarks, Article 48*, para. 5), in which it is noted that the use of a best and final offer as a way of maximising competition in one type of request for proposals proceedings.

<sup>85</sup> Recalling that defence procurement was generally excluded from coverage under the Model Law (see Article 3), but that this exclusion is proposed to be reversed under the revised text: see footnote 21 above.

<sup>86</sup> See articles 19 and 22 of the 1994 text.

<sup>87</sup> All the alternative methods involve competition in the sense that it is described at the beginning of this section (save, of course, single-source procurement).

<sup>88</sup> The Guide to Enactment notes that the Model Law does not assign a hierarchy to two-stage tendering, request for proposals and competitive negotiations, which are all available in the same defined set of circumstances. Accordingly, it notes, “an enacting State ... may choose not to incorporate all of them into its procurement law. While each of those three methods shares the common feature of providing the procuring entity with an opportunity to negotiate with suppliers and contractors with a view to settling upon technical specifications and contractual terms, they employ different procedures for selecting a supplier or contractor.” (*Guide to Enactment, Section I, Main features of the Model Law, Two-stage tendering, request for proposals, competitive negotiation*, para 18). The Guide continues that “In deciding which of the three methods to enact, a decisive criterion for the enacting State might be that, from the standpoint of transparency, competition and objectivity in the selection process, two-stage tendering and request for proposals are likely to offer more than competitive negotiation, with its high degree of flexibility and possibly higher risk of corruption. At least one of the three methods should be enacted, since the cases in question might otherwise only be dealt with through the least competitive of the procurement methods, single-source procurement.” (*Guide to Enactment, Section II, Article-by-Article remarks, Article 19, Conditions for use of two-stage tendering, request for proposals or competitive negotiation*, para 1.)

procurement methods in relatively common circumstances, with little guidance upon how to choose between them.

Accordingly, the proposed revisions to the Model Law make express reference to maximising competition in the choice of method of procurement and type of solicitation, to reflect “the thrust of the 1994 Model Law – to encourage competition in order to guarantee efficiency and value for money”.<sup>89</sup> In furtherance of this notion, where the revised Model Law discusses limitations on participation in the procurement, the provisions will require the procuring entity to take steps to ensure effective competition, applying that requirement in a broader range of situations as compared with the 1994 text.<sup>90</sup> For example, single-source procurement is used in defence, urgent and emergency procurement, though the Model Law also provides for a highly flexible, unstructured method called “competitive negotiations” for these circumstances. The rule and guidance will be that single-source procurement is not available unless there are justifications for using it rather than competitive negotiations: that is, emergency situations where there is no time for any negotiations, or where there is genuinely only one supplier.<sup>91</sup>

The GPA does not refer expressly to competition in its recitals, and the concept is normally considered to be an aspect of non-discrimination in the context of procurement at the international level: that is, the aim is to ensure that the playing field is truly level as regards domestic and foreign suppliers, rather than to promote competition per se. In this regard, ensuring non-discrimination facilitates competition: providing foreign suppliers with full information on the procurement and its governing rules, and treating them equally with domestic suppliers, is what enables and encourages them to compete. However, various of the GPA rules we have seen above in fact require competition. For example, the limited tendering can be used only where it is not being undertaken “with a view to avoiding maximum possible competition”,<sup>92</sup> and the provisions on selective tendering are expressly subject to the aim of ensuring “optimum effective international competition”.<sup>93</sup> In addition, the rules on technical specifications and tendering procedures prevent actions on the part of procuring entities that “would have the effect of precluding competition” such as seeking advice on preparing specifications from an entity that might have a commercial interest in the procurement,<sup>94</sup> or providing information to a supplier.<sup>95</sup> Finally, provisions addressing the provision of information on contract awards and other matters are qualified only by public interest issues, the protection of legitimate commercial interests, and the protection of fair competition.<sup>96</sup>

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<sup>89</sup> See document A/CN.9/668, paras. 41-43, available as footnote 21 above.

<sup>90</sup> See, for example, the following reports of the Working Group: generally, A/CN.9/623, para.56; regarding electronic reverse auctions, A/CN.9/632, paras. 78-86 and A/CN.9/640, paras. 58 and 68; regarding framework agreements, A/CN.9/648, para 41; regarding request for quotations, A/CN.9/668, para. 204; regarding request for proposals, A/CN.9/672, paras. 204-205; available as footnote 21 above.

<sup>91</sup> See, for example, document A/CN.9/687, para 129, available as footnote 21 above.

<sup>92</sup> See Article XV:1.

<sup>93</sup> See Article X:1.

<sup>94</sup> See Article VI:4.

<sup>95</sup> See Article VII:2.

<sup>96</sup> See, for example, Article XVII:4.

It can be said, therefore, that both the Model Law and the GPA in fact place a high regard on competition: the rules and procedures under the Model Law are designed, among other things, to give effect to the objective of competition set out in its Preamble. The philosophy behind the GPA is, in essence, to enable competition in procurement: in addition to the rules and procedures set out above, the non-discrimination provisions and the attempts to increase coverage through ongoing negotiations aim to open procurement markets to international competition.

#### **IV. C Objectivity**

The Guide to Enactment accompanying the Model Law stresses the importance of objectivity in the procurement process: “the procedures and safeguards in the Model Law are designed to promote transparency and objectivity in the procurement proceedings and thereby to reduce corruption.”<sup>97</sup> Essentially, it is submitted, objectivity is another of the principles of a procurement system that transparency is intended to facilitate, and objectivity also facilitates other objectives such as avoiding corruption and promoting participation by suppliers.<sup>98</sup>

The Model Law contains few provisions that expressly refer to objectivity, those present include rules on the description of the procurement (including technical specifications) requiring that the description refers to “the relevant objective technical and quality characteristics” of the subject-matter.<sup>99</sup> As the Guide to Enactment explains, these stipulations stress the principles of clarity, completeness and objectivity, not only to ensure an accurate, objective and comprehensible description, but also to “encourage participation by suppliers and contractors in procurement proceedings, enable suppliers and contractors to formulate tenders, proposals, offers and quotations that meet the needs of the procuring entity, and enable suppliers and contractors to forecast the risks and costs of their participation in procurement proceedings and of the performance of the contracts to be concluded, and thus to offer their most advantageous prices and other terms and conditions. Furthermore, properly prepared descriptions in solicitation documents enable tenders to be evaluated and compared on a common basis, which is one of the essential requirements of the tendering method.”<sup>100</sup> A similar point is made in the commentary to the provisions governing the contents of solicitation documents,<sup>101</sup> and in the provisions requiring the procuring entity to reject tenders where an inducement is offered.<sup>102</sup>

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<sup>97</sup> See *Guide to Enactment, Section II, Article-by-Article remarks, Article 15*, Inducements from suppliers or contractors, para. 1.

<sup>98</sup> The extent to which objectivity in procurement is achievable and desirable in procurement is, like discretion, an issue that touches on whether open and transparent competition will guarantee best value for money, and is beyond the scope of this Chapter. For a discussion of these issues, see S. Arrowsmith, J. Linarelli and D. Wallace, footnote 34 above, pp. 73-86; and S. Kelman, *Remaking Public Procurement, Working Paper No. 3*, 2004, available at <http://www.innovations.harvard.edu/cache/documents/7131.pdf>, revisiting some of the issues considered in his earlier work, *Procurement and Public Management* (AEI: Washington DC 1990).

<sup>99</sup> See Article 16(2).

<sup>100</sup> See *Guide to Enactment, Section II, Article-by-Article remarks, Article 16*, Rules concerning description of goods, construction or services.

<sup>101</sup> See Article 27, the guidance to which notes that the provisions are “included to make the tender evaluation stage as objective, transparent and efficient as possible, by the provision of full information to all.”

<sup>102</sup> See Article 15, the guidance to which is noted in footnote 96 above.

It is also the Guide that addresses the importance of objectivity in deciding which procurement methods to enact and use (noting that “from the standpoint of transparency, competition and objectivity in the selection process, two-stage tendering and request for proposals are likely to offer more than competitive negotiation, with its high degree of flexibility and possibly higher risk of corruption.”)<sup>103</sup> In addition, when considering the basis of the award of the procurement contract, the Guide considers the extent to which evaluation criteria can be objective. It notes that “requiring that the non-price criteria should be objective and quantifiable to the extent practicable, and that they be given a relative weight in the evaluation procedure or be expressed in monetary terms, is aimed at enabling tenders to be evaluated objectively and compared on a common basis.”<sup>104</sup> Many other provisions are included for the same reason.<sup>105</sup> Indeed, when considering revisions to the provisions on evaluation criteria, the Working Group stressed that: “objectivity was critical and support for flexibility should be given subject to the publication of objective and predetermined criteria, so as to prevent any form of manipulation. It was emphasized that the Model Law should not be drafted in such a way that it could be used to justify manipulation.”<sup>106</sup>

The GPA also implements the principle of objectivity in a similar way: like the Model Law, the word “objective” hardly features in the text, and the GPA is not accompanied by a Guide to Enactment that explains its motivations.<sup>107</sup> However, the principle of objectivity is implemented through requirements to disclose all criteria for participation or qualification of suppliers, the award criteria and so on. The rules on technical specifications are drafted with the express intention of ensuring that procuring entities do not discriminate against and among foreign goods and suppliers through the technical characteristics of products and services that they specify;<sup>108</sup> and require specifications to be drafted in terms of performance rather than design, and to be based on international standards, where they exist, or otherwise on national technical regulations, recognized national standards, or building codes. As in the Model Law, these features are designed to enable an objective comparison of tenders ultimately received: in essence, objectivity is a manner of demonstrating how the cornerstone principle of non-discrimination, discussed in the next section, is applied in practice.

#### **IV. D Non-discrimination**

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<sup>103</sup> See *Guide to Enactment, Section II, Article-by-Article remarks, Article 19*, Conditions for use of two-stage tendering, request for proposals or competitive negotiation, para 1, and footnote 87 above.

<sup>104</sup> See *Guide to Enactment, Section II, Article-by-Article remarks, Article 34*, Examination, evaluation and comparison of tenders, para.4. The commentary to Article 34 also notes that price-based awards of contracts are the most objective, and that of non-price criteria, those relating to socio-economic considerations listed in article 34(4)(c)(iii) (described in the section on “Non-discrimination”) are sometimes “less objective and more discretionary” than those relating to the procurement and even than margins of preference.

<sup>105</sup> Such as article 27(s) on conversion of tender prices to a single currency, commitments outside the procurement contract (article 27 (v)) and other mandatory requirements of the solicitation documents or their equivalent.

<sup>106</sup> See A/CN.9/648, para 80, available as footnote 21 above.

<sup>107</sup> In Article XVI:2, it is stated that conditions for offsets “shall be objective, clearly defined and non-discriminatory”.

<sup>108</sup> See Article VI.

The discussion of transparency, competition and objectivity above shows that both the GPA and the Model Law seek to ensure the equal treatment of all those that participate in procurement governed by their provisions, as a way of implementing the objectives of the regime, but both texts allow some sectors of the economy to be excluded from their ambit (those not “covered” in the case of the GPA,<sup>109</sup> and defence procurement and, if desired by the enacting State, other sectors in the case of the Model Law).<sup>110</sup>

As noted above, “non-discrimination” is one of the two cornerstone principles of the GPA, implementing national treatment in that suppliers in all signatory countries will be treated no less favourably than domestic suppliers, and in that there can be no less favourable treatment of a supplier because of foreign affiliation or ownership, or because its goods and services are of foreign origin.<sup>111</sup>

Thus, the use of offsets (measures to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements) are explicitly prohibited in the GPA.<sup>112</sup> However, developing countries may negotiate (at the time of their accession) the use of offsets as qualification criteria (those used to identify suppliers qualified to participate in the procurement process), but offsets may not be used as evaluation or award criteria.<sup>113</sup>

The position under the Model Law appears rather different. The Model Law does not include “non-discrimination” in its objectives stated in the preamble. Rather, it talks of “fair and equitable treatment”. Under the Model Law, enacting States can restrict foreign participation, “with a view in particular to protecting certain vital economic sectors of their national industrial capacity against deleterious effects of unbridled foreign competition”, i.e. procuring entities can engage in domestic-only procurement, provided that the restriction to domestic suppliers is based only on grounds specified in the procurement regulations or is authorized by other laws.<sup>114</sup> The procuring entity can also

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<sup>109</sup> That is, those not contained in each signatory’s Annexes 1 to 3 of Appendix I to the GPA. There is thus transparency about what is covered, and what is not.

<sup>110</sup> For further detail about the revisions that will circumscribe these exemptions under the Model Law, see footnote 21 above.

<sup>111</sup> Recital 2, which states that “Recognizing that laws, regulations, procedures and practices regarding government procurement should not be prepared, adopted or applied to foreign or domestic products and services and to foreign or domestic suppliers so as to afford protection to domestic products or services or domestic suppliers and should not discriminate among foreign products or services or among foreign suppliers; ...” The provisions require signatories to accord treatment to foreign suppliers “no less favourable” than they give to their domestic products, services and suppliers (Article III:1(a)). Further, signatories may not discriminate among goods, services and suppliers of other signatories (Article III:1(b)), and they are required to ensure that domestic suppliers are not treated differently on the basis of a greater or lesser degree of foreign affiliation or ownership or because their goods or services are produced in the territory of another signatory (Article III:2).

<sup>112</sup> Article V.

<sup>113</sup> Article XVI.

<sup>114</sup> See Article 8, and in particular article 8(1) of the text for the caveat described, which is aimed at promoting transparency and preventing arbitrary and excessive restriction of foreign participation, and the discussion in the *Guide to Enactment, Introduction, Section F. Provisions on international participation in procurement proceedings*, paras. 24-27.

engage in domestic-only procurement where the purchase is of such a low value that it is unlikely to be of interest to foreign suppliers.<sup>115</sup>

The Model Law also provides for the use of “margins of preference” in favour of local suppliers and contractors.<sup>116</sup> The margin of preference (known elsewhere as a price preference) permits the procuring entity to select the lowest-priced local tender or its services equivalent when the difference in price between that tender and the overall lowest-priced tender falls within the range of the margin of preference. This mechanism, the Guide notes, is considered to be less destructive of competition and international participation than simply excluding foreign competition, because it allows suppliers that are approaching internationally competitive levels to compete.<sup>117</sup> The Guide to Enactment indicates that total insulation from foreign competition would perpetuate lower levels of economy, efficiency and competitiveness, and would not operate to give a source of competitive exports.<sup>118</sup>

In addition, the Model Law allows the procuring entity to “consider” the effect that acceptance of a tender would have on a lengthy list of domestic policy issues, ranging from the balance of payments position, to counter-trade arrangements and development of particular sectors of the economy.<sup>119</sup>

Although the Model Law does include a general statement of non-discrimination (that the procuring entity may not use any “criterion, requirement or procedure with respect to the qualifications of suppliers that discriminates against or among [them] on the basis of nationality, or that is not objectively justifiable”),<sup>120</sup> the above provisions indicate why the notion of “fair and equitable treatment” can be considered to be a more accurate statement of the Model Law’s objectives. In this regard, it is to be recalled that the Model Law is a template for national legislation, and not an international trade agreement per se. Indeed, the Guide to Enactment text referred to above expressly notes that the combination of the articles providing that international agreements of the enacting State take precedence over its procurement law where they conflict, and the reference to “nationality” rather than domestic suppliers, enables the types of commitment under the GPA to be accommodated.<sup>121</sup>

The Model Law’s approach is, it is submitted, simply realistic: it recognizes that governments can and do use procurement to achieve their other socio-economic policy goals, and that it would not be appropriate for UNCITRAL to interfere in such decisions.

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<sup>115</sup> This provision is one of the rare financial thresholds in the Model Law text. It should therefore be considered in the light of the general financial thresholds applicable in the GPA, which are generally found in the Appendix 1 Annexes of each signatory.

<sup>116</sup> See articles 34(4)(d) and 39(2). The Model Law also provides in article 6(5) that a margin of preference can be used when considering suppliers’ qualifications.

<sup>117</sup> Though there is emerging information querying the effectiveness of margins of preference in some circumstances (studies on file with the author).

<sup>118</sup> See *Guide to Enactment, Introduction, Section F. Provisions on international participation in procurement proceedings*, para. 26.

<sup>119</sup> See Articles 34(4)(c)(iii) and article 39(1)(d).

<sup>120</sup> See Article 8.

<sup>121</sup> See *Guide to Enactment, Introduction, Section F. Provisions on international participation in procurement proceedings*, para. 25.

Some commentators consider that the cost to the government overall (though higher prices paid for procurement) exceeds the benefit of using procurement to achieve other socio-economic goals, others that there may be circumstances, notably for the purposes of capacity-building in developing countries, in which deviating from the economically ideal case in an individual procurement may be beneficial.<sup>122</sup> Thus the Model Law does not seek to prohibit such action, but to regulate it in an effective way: that is, by granting flexibility to enacting States to apply socio-economic factors in procurement, provided that the application is transparent.

Commonly noted features of the above provisions of the Model Law include that (a) their use is not restricted to developing countries (though the Guide text indicates that that was the original intention); (b) transparency provisions are absent as regards the lengthy list of domestic policy issues that might be taken into account when evaluating tenders and the use of margins of preference as qualification criteria; and (c) these application of these provisions is on a procurement-by-procurement basis, rather than generally within the procurement system. Noting the concerns about lack of transparency in the 1994 provisions, the revisions recommended during the current reform programme will ensure that all socio-economic policy factors applied as qualification criteria are fully disclosed at the outset, that all such factors to be used as evaluation criteria must be authorized by procurement regulations or other laws, and must also be disclosed and where possible quantified at the outset. Similarly, only such authorized factors can be used to justify purely domestic procurement. The aims are to avoid ad hoc measures, to ensure that they reflect a country's needs, and to allow for their costs and benefits to be assessed. Again, the Guide will stress that such measures are intended to be temporary, and that a country's needs should be considered on a case-by-case basis (reflecting the state of development as a whole, and the needs relating to a particular procurement).

The GPA, recognizing “the need to take into account the development, financial and trade needs of developing countries, in particular the least-developed countries”,<sup>123</sup> also allows special and differential treatment in order to meet the specific development objectives of such countries.<sup>124</sup> First, as noted above, the development objectives of developing countries are to be taken into account when they negotiate coverage as part of the accession process. Secondly, provisions for technical assistance and other the provision of information are included in the GPA, and, thirdly, there is further special treatment for least-developed countries based on other WTO commitments, among other things to encourage suppliers from those countries to participate in procurement.<sup>125</sup>

The revised GPA contains amendments the 1994 provisions on transitional measures for developing countries. In addition to preserving special measures during the accession negotiations, under certain conditions, developing countries are able to use price preferences and offsets, to phase in specific entities or sectors, and to maintain higher application thresholds than permanent thresholds. Offsets and price preferences are

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<sup>122</sup> See S. Schooner, *Desiderata*, footnote 36 above, especially the text introducing and footnotes 28-30; P. Trepte, *Regulating Procurement*, footnote 15 above, Part I and p. 387.

<sup>123</sup> See Recital 5.

<sup>124</sup> See Article V:1.

<sup>125</sup> Articles V:3, 5-7, V:8-11, V:12 and 13.

subject to transparency provisions (to be stated in the notice of the procurement), and all the measures are given for a period of limited duration (itself reviewable). These measures will not be applied automatically, but will reflect the needs of the developing country itself.<sup>126</sup>

It is in this area of non-discrimination that the Model Law and GPA are considered to diverge most significantly, reflecting their different status as texts for national and international systems. However, as the above analysis makes clear, the differences in the treatment of socio-economic policy goals in the two texts are not differences of principle. The principle is equal treatment to all covered procurement and suppliers, with very limited exemptions, supported by transparency provisions. The exemptions in both texts are permitted as part of the drive to enable suppliers in developing countries to compete on a par with those in developed countries at the appropriate time. In addition, the Model Law is drafted to allow for the limitations on the freedom a national government might ordinarily have to use procurement as a means to achieve its other socio-economic policy goals that membership of a trade body, such as the GPA, might entail.

## **V. Revisions to the UNCITRAL Model Law to harmonise further with the GPA**

In addition to the general objective of harmonisation with the GPA,<sup>127</sup> the UNCITRAL Working Group on procurement has made specific amendments to ensure greater consistency between that text and the revised UNCITRAL Model Law at a more detailed level. For example, the definition of public procurement in article 2 of the draft revised text will follow the references to leasing, hire-purchasing and so forth set out in article I.2 of the GPA and article XV:5(a) of the draft revised GPA).<sup>128</sup>

The references to the “lowest evaluated tender” the 1994 text of the Model Law to denote the successful tender (where the award is made on the basis of a combination of price and other criteria), will be amended to refer to the “most advantageous tender” (the phrase used in article XIII:4(b) of the GPA and article XV:5(a) of the draft revised GPA).<sup>129</sup> A time-frame for submission of tenders will be included to ensure suppliers have adequate time for their preparation, drawing on article XI:2 of the GPA.<sup>130</sup>

As regards publication of procurement-related information, article 6 of the draft revised Model Law provides for the mandatory publication of a broader range of procurement-related texts and rulings, and the optional publication of planned and possible forthcoming procurement and opportunities, which aligns the provisions with those of articles XIV and XIX of the GPA.<sup>131</sup> New provisions addressing the estimated value of the procurement (for threshold purposes, such as regarding request for quotations procedures and domestic procurement) will be included as article 12 of the draft revised Model Law, drawing on those in articles II:2 and II:3, and II:6 of the GPA and draft

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<sup>126</sup> Article IV of the revised GPA.

<sup>127</sup> See, for example, A/CN.9/575, paragraph 67, available as footnote 21 above..

<sup>128</sup> See A/CN.9/668, para 273.

<sup>129</sup> See A/CN.9/687, paragraphs 153-155.

<sup>130</sup> See A/CN.9/690, paragraph 129.

<sup>131</sup> See A/CN.590, paragraph 57 as regards the mandatory publication of information.

revised GPA respectively.<sup>132</sup> The description of the subject-matter in article 10 of the draft revised Model Law will be drawn on the substance of the provisions of article VI:3 of the GPA as regards the use of trade descriptions and facilitating output or performance specifications.<sup>133</sup>

The draft revised Model Law will contain consolidated provisions on confidentiality in article 22 and as regards the record of the procurement (article 23), drawing on the provisions on exceptions from disclosure contained in article XVIII:4 of the GPA.<sup>134</sup> As regards electronic reverse auctions, the Working Group has agreed both to permit the technique as a phase in other procurement methods as per article I(e) of the draft revised GPA, and also as a stand-alone procurement method (they will also provide more detail than the GPA).<sup>135</sup> During its discussions on auctions, the Working Group also decided to include provisions on an enquiry mechanism for suspected abnormally low tenders (those whose price is so low there is considered to be a performance risk), which are found in article 18, which follows the thrust of article XIII:4 of the GPA.<sup>136</sup>

Finally, when considering review procedures (the challenge mechanism under the Model Law), the Working Group decided to adopt both the requirement for an independent review body and an optional peer review system, and to follow the formulation for financial compensation in challenge procedures set out in article XX:7(c) of the GPA and article XVIII:7(b) of the draft revised GPA.<sup>137</sup>

## **VI. Conclusions**

It is clear that the work of UNCITRAL and the WTO in procurement shares many similarities: both organizations are seeking to ensure that a defined set of rules govern procurement as widely as possible. Although there remain some differences in the text (largely reflecting drafting considerations, such as in the approach to providing for electronic procurement, with a few differences more significant in scope (but which are not of a fundamental nature). For example, the UNCITRAL Model Law treats the second stage of framework agreements as the award of procurement contracts that include all the normal procedural safeguards, and does not address suppliers' lists, in contrast to the GPA, which is not considered to extend to the second stage of framework agreements<sup>138</sup> and does provide for suppliers' lists.

In pursuing their common aims, each organisation will in fact assist the harmonization of procurement rules, which will in turn (through improving predictability and certainty) encourage commercial entities to operate in foreign markets and so can only enhance the

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<sup>132</sup> See A/CN.9/687, paragraph 63.

<sup>133</sup> See A/CN.9/668, paragraph 78.

<sup>134</sup> See A/64/17, paragraphs 250-266.

<sup>135</sup> See A/CN.9/575, paragraphs 60-62, 66 and 67.

<sup>136</sup> See A/CN.9/575, paragraph 79.

<sup>137</sup> See A/CN.9/664, paragraphs 28 and 59, A/CN.9/668, paragraph 264, and A/CN.9/690, paragraph 72, and Chapter VIII of draft revised Model Law.

<sup>138</sup> See WTO Committee on Government Procurement, "Review of National Implementing Legislation: United States", Sec. V (GPA/5 (01-2999) (15 June 2001), available at <http://docsonline.wto.org/DDFDocuments/t/PLURI?GPA/50.doc>.

opportunities for international trade. Both organizations also promote a core set of principles in procurement: transparency, competition, objectivity and non-discrimination. Although the relative prominence of these principles in each system varies, as does the manner in which the objectives and motivations behind the system are declared, it can be concluded that it is indeed the same principles that underpin the rules set out in the texts. Potential users of the Model Law can be assured that basing their procurement legislation on the Model Law will not involve any incompatibility with the requirements of the GPA, and the current reforms to both texts will serve to strengthen this position.