The WTO Agreement on Government Procurement – A Means of Furtherance of Human Rights?

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Abstract

This article addresses the WTO-compatibility of selective purchasing by governments. It focuses on two major issues: in the first place, it examines whether, under the non-discrimination provision (Art. III) of the WTO Agreement on Government Procurement (GPA), products or services may be distinguished on the basis of how they have been made. Alternatively, the question is raised if selective purchasing laws should be accorded the possibility of justification under Art. XXIII GPA: after an analysis of the WTO Appellate Body report on *Shrimps/Turtles*, the article turns to the problem whether the principles of state sovereignty and of free trade as a promoter of international peace can be advanced to exclude selective purchasing laws from the scope of Art. XXIII GPA. Finally, some problems of the application of Art. XXIII GPA to selective purchasing laws are briefly presented.

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A. Introduction: The Problem of "Selective Purchasing Laws" in Government Procurement, Exemplified by the Myanmar Legislation of the US State of Massachusetts

The notion of "government procurement" is used when a state entity purchases goods or services for governmental use,[1] *i.e.* in the public interest. Examples range from government investment into public health and education across measures improving the infrastructure and utilities to defense expenses. A country's central government purchases normally amount to some 10 percent[2] of its gross domestic product (GDP), and this number is higher if the expenses made by regional governments, municipalities and public enterprises are likewise taken into account.[3] In order to minimize the public spending of financial resources, governments are obliged to invite "tenders" (or "bids") by those private firms interested in supplying the government with the needed goods or services. The result is competition among the possible suppliers for the award of the contract.

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1 Cf. the definition of government procurement established by the (non-adopted) 1992 Panel report on *United States - Procurement of a Sonar Mapping System*, quoted in WTO document S/WPGR/W/29 of 31 March 1999, p. 3: "payment by government, governmental use of or benefit from the product, government possession and government control over the obtaining of the product.".

2 Cf. *Hoekman*, Introduction and Overview, in: Hoekman/Mavroidis (eds), Law and Policy in Public Purchasing : the WTO Agreement on Government Procurement (1997), p. 1 (1). The WTO gives an estimate of 10-15 percent of GDP, cf. "Overview of the Agreement on Government Procurement", available from http://www.wto.org/wto/english/tratop_e/gproc_e/over_e.htm (access date: 3/5/2001).

3 *Hoekman*, (fn. 2), p. 1.

However, since the governmental purchases are carried out with the taxpayers' (and voters'!) money, state entities often feel inclined to take into account not only avoidance of costs but also other objectives such as certain non-economic goals or the promotion of specific industries.[4] In fact, many Western European countries, the USA and Canada have a well-established tradition of using government procurement at the domestic level as a means of furtherance of social objectives.[5]

One of the means employed in order to promote those objectives is "selective purchasing". This term describes the government practice of conditioning private firms' access to government contracts on the fulfillment of certain criteria by those companies. A famous example was the 1996 Massachusetts legislation, restricting state agencies from the award of government contracts to firms doing business in or with Myanmar.[6] This was realized by the establishment of a list containing persons doing business with Myanmar.[7] Most government agencies were precluded from procuring goods or services from persons on that list, unless the procurement was essential and there was no "comparable low bid or offer" by a company not on the list. Such a "comparable low" bid was affirmed in the case of offers that were up to 10 percent more expensive than the one submitted by the person on the list. This selection of offers did not apply to news agencies working in Myanmar and to the procurement of medicine. Finally, the law did not affect previously existing government contracts but only their renewals or new conclusions.

Given the above-mentioned legislation, the question arises whether the latter is in conformity with the non-discrimination requirements of WTO law. It is obvious that, by limiting state agencies' possibilities to procure goods or services from companies doing business with countries that violate human rights – such as Myanmar[8] – these companies' goods or services are not treated as favorably as the

4 *Hoekman*, ibidem, mentions small and medium-sized firms in this context.

5 *McCrudden*, International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement, Journal of International Economic Law (1999), p. 3 (8, 9, footnote 23), where he mentions, *inter alia*, the EC Commission's encouragement of the EU Member States to "use their procurement powers to pursue" certain social policy goals. *Nota bene*, however, that according to the relevant EC procurement directives the criteria for qualifying as a tenderer as well as for awarding the contract are in principle of a purely economic nature. The scope of possible non-economic criteria is controversial, cf. infra, under D.II.3.b). The Commission's above-mentioned position can obviously only be interpreted as seeking to promote social policy objectives within the limits set by those directives.

6 An Act Regulating Contracts with Companies Doing Business with or in Burma (Myanmar), ch. 130, 1996 Session Laws, Mass. Gen Laws Ann., ch. 7, 223 (West 1997). In June 2000 this act was declared void for constitutional reasons by the US Supreme Court. Before, the EC and Japan had requested the establishment of a WTO Panel to examine the compatibility of the Myanmar legislation with the GPA. However, after the introduction of internal US court proceedings, the Panel was suspended in February 1999. The authority for its re-establishment finally lapsed one year later, according to Art. 12:12 DSU.

7 The following details of this legislation are taken from: *McCrudden*, (fn. 5), p. 6.

goods or services of other companies. However, the following contribution will not focus on the specific problems posed by the Massachusetts Burma legislation, but it will deal more generally with laws that make public purchasing dependent on the respect by producers of certain production methods.

B. A Brief Historical Overview of the Handling of Government Procurement Disciplines on the International Plane

The 1946 US proposal for the establishment of an "International Trade Organization" (ITO) contained, *inter alia*, the suggestion to subject public procurement to the Most Favored Nation (MFN) and National Treatment (NT) obligations.[9] However, most delegations were extremely reluctant to include procurement in a legally binding agreement. As to MFN, the UK delegation pointed out the Commonwealth States' unwillingness to depart from their practice of according preferences to tenders from Commonwealth countries.[10] Opposition to NT was even greater: hardly any delegation was ready to sacrifice its country's "Buy National" laws[11] for binding international disciplines.[12] Consequently, it was finally agreed not to subject government procurement to the MFN or NT clauses,[13] but instead to include, under the "State-Trading"[14] provision, a vague obligation to accord to imports for public procurement "fair and equitable treatment".[15] After the failure of the ITO[16] this solution was carried over into the text of Art. XVII:2 (State-Trading) of the GATT 1947. Article III:8 (a) GATT explicitly exempts public pro-

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8 Cf. Neue Zürcher Zeitung of 29 May 2000, p. 7 ("Burma – seit zehn Jahren Pattsituation zwischen Junta und Suu Kyi").

9 The MFN and NT obligations were contained in Articles 8 and 9 of the US "Suggested Charter" for an ITO, quoted by *Blank/Marceau*, A History of Multilateral Negotiations on Procurement: From ITO to WTO, in: Hoekman/Mavroidis, (fn. 2), p. 31 (32).

10 *Blank/Marceau*, (fn. 9), p. 33.

11 *I.e.* laws promoting discrimination of foreign goods or services in order to boost domestic industries.

12 *Blank/Marceau*, (fn. 9), p. 35.

13 Idem, pp. 35-37, with a detailed description of the delegates' decision making process at the different stages of the ITO negotiations, *i.e.* the New York, Geneva and Havana meetings in the course of 1947.

14 Whereas in government procurement, state entities purchase goods or services for their own, immediate or ultimate consumption, *i.e.* never for resale, but in fulfillment of a public function, the same entities engage in "state-trading" if they buy goods or services just like any private firm, *i.e.* with the possible perspective of resale for the purpose of economic gains; cf. Art. XVII:2 GATT.

15 Art. 29 of the Havana Charter, quoted by *Blank/Marceau*, (fn. 9), p. 37.

16 The reason for this failure was that, after the elections of 1950, the new majority in the US Congress opposed to the signing of the Havana Charter, which was considered to be too protectionist, cf. *Carreau/Juillard*, Droit international économique, 4ième édition, 1998, p. 51, no. 113.

curement from the NT obligation, whereas Art. I GATT does not mention procurement at all.[17] The reason for the delegates' rejection of the original US proposal could be seen in the special character of public procurement: it is firmly associated with the notion of state sovereignty. Collecting taxes is a traditional prerogative of any sovereign power, and these powers have always claimed the right to decide how to spend these taxes, considering them to be their own property.[18] As a result, the GATT 1947 did not effectively prevent the Contracting Parties from practising discriminatory procurement rules in favor of domestic (or certain foreign) businesses *vis-à-vis* (other) foreign companies.

The first international agreement dealing specifically with government procurement was the 1979 Tokyo Round Agreement on Government Procurement (AGP), which in a large degree referred to preparatory works carried out by the OECD between 1962 and 1975.[19] Since the negotiations of the GATT 1947, it was especially the OECD Members that had become increasingly concerned about discriminatory procurement rules as obstacles to international trade.[20] This concern enhanced their readiness to subject procurement to certain international disciplines. Article II constituted the AGP's most important step toward rule-oriented procurement: it stipulated each Party's obligation not to treat products and suppliers of any other Party less favorably than their own (NT obligation) or than other foreign Parties' products and suppliers (MFN obligation). The value of this requirement was nevertheless limited by the fact that Art. II did not encompass services. Another weak point was the AGP's membership: it was almost exclusively the industrialized OECD countries that signed the Agreement, developing countries were convinced the AGP would cause them more disadvantages than benefits.[21] In order to further improve international procurement disciplines, a new agreement was thus negotiated in parallel with the Uruguay Round: the plurilateral WTO Agreement on Government Procurement (GPA) was signed on 15 April 1994 and entered into force on 1 January 1996.[22]

17 Cf. *Blank/Marceau*, (fn. 9), on p. 37, who argue *ex contrario* that, in spite of the contrary will of delegations at the time of negotiations, the non-mentioning of procurement in Art. I GATT could support the view that government procurement does remain subject to MFN obligations.

18 On the "intimate relationship" between sovereignty and government procurement cf. *Carrier*, Sovereignty under the Agreement on Government Procurement, in: Minnesota Journal of Global Trade 1997, p. 67 (68-69). This author is equally referred to by *McCrudden*, (fn. 5), p. 12, footnote 31.

19 For details see *Blank/Marceau*, (fn. 9), pp. 37-41.

20 Idem, p. 37.

21 Idem, p. 42, with a detailed description of the 1986 amendments to the AGP.

22 Cf. Art. XXIV:1 GPA 1994.

C. The Characteristic Features of the GPA 1994[23]

The GPA has 27 Parties, all of which are likewise WTO Members.[24] Parties to the GPA are, *inter alia*, the European Communities (EC) and all of their Member States, the USA, Japan and Canada.[25] This small number of Members represents one of the Agreement's major shortcomings: the large procurement markets of the People's Republic of China and Russia are not subject to its disciplines,[26] neither are the markets of almost all developing countries. The GPA can be described as pursuing two major objectives: "non-discrimination" and "transparency". As to the former, Parties are required to respect the MFN and NT obligations[27] as to imports for the purpose of public procurement. An important extension compared to the AGP is the fact that the above-mentioned obligations apply also to services[28] and to procurement not only by central, but also by non-central government agencies.[29] This has resulted in a coverage of public procurement that is, *ad valorem*, about 13 times higher than the coverage under the Tokyo Round AGP.[30]

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23 Official Journal of the European Communities (OJ) L 336, 23.12.1994, p. 273 *et seq*. The text of the GPA 1994 is also available from the following website: http://www.wto.org/english/docs_e/legal_e/final_e.htm (access date: 3/5/2001); articles quoted here without citation of a specific agreement are provisions of the GPA 1994. The following description does not claim to be exhaustive, the author limits the presentation to those provisions that he considers to be the most important ones.

24 Art. XXIV:2 makes GPA accession dependent on prior WTO membership; since the GPA is not one of the WTO multilateral but one of the plurilateral agreements, membership is voluntary, as opposed to mandatory membership of WTO Members in all multilateral agreements, cf. Art. II:2, 3 WTO Agreement.

25 An exhaustive list of parties and observers can be visited at http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm (access date: 3/5/2001).

26 This is due to the fact that neither one of those states is a WTO Member, cf. Art. XXIV GPA.

27 Art. III:1 and 2, according to which MFN and NT disciplines apply not only to the treatment of domestic and foreign (NT) or different foreign (MFN) goods, suppliers and services, but likewise to the treatment of different locally established suppliers who must not be discriminated against either on the basis of the degree of foreign affiliation or ownership, Art. III:2 (a), or on the basis of the country of production of the supplied goods/services, Art. III:2 (b). Another important provision in this context is Art. VI, which seeks to avoid discrimination against and among foreign tenderers by requiring, *inter alia*, technical specifications prescribed by procuring entities not to create unnessecary obstacles to international trade, Art. VI:1 and, if appropriate, to be based on international standards, Art. VI:2 (b).

28 Art. III:1 (a), (b).

29 Art. I, scope and coverage ("[...] any law, regulation, procedure or practice regarding any procurement by entities covered [...]"), refers to Appendix I, under which each Party submits a list of those state entities it is willing to subject to the GPA: central (Annex 1), non-central (Annex II) and others, *e.g.* public utilities (Annex III as a catch-all category).

30 This number is based on calculations by the EC Commission, cf. Grünbuch (green paper) "Das öffentliche Auftragswesen in der Europäischen Union", KOM(96) 583, p. 1 (58).

However, important limitations apply:

First, whereas the GPA covers in principle all goods, unless a Party specifies otherwise in an Annex (negative list approach), the Agreement, and consequently its MFN and NT obligations, applies only to those services that a Party has expressly mentioned in Annexes 4 and 5 to the GPA (positive list approach).[31]

Secondly, even if a good or service is in principle covered, the actual procurement process might still fall outside the scope of the GPA if the value of the demanded goods or service is inferior to certain thresholds. The latter may be determined unilaterally by each Party in the cases of sub-central government agencies (Annex 2), public utility entities (Annex 3) and construction services procured by central governments (Annex 1).[32] This freedom of the Parties has resulted in considerable differences in their commitments.[33] In order to ensure reciprocity, each Member may, as far as services procurement (including construction) is concerned, stipulate that the generally applicable threshold is not valid with respect to a Party that itself imposes higher thresholds for the respective services.[34]

Finally, there is another important limitation concerning the non-discrimination requirement: even if the above-mentioned limitations do not apply, *i.e.* the goods/services in question are in principle covered by the negative/positive list, the procurement value is above the general threshold and a specific, higher threshold does not apply or is in fact inferior to the procurement value, in other words in case the GPA should actually be applied, it is still possible that one Party does not respect the non-discrimination principle. It is for this case that most Parties have explicitly stipulated in "General Notes" at the end of their Annexes the possibility not to apply the non-discrimination principle in return *vis-à-vis* the Member violating Art. III.[35] This derogation is to be distinguished from the above-mentioned one concerning services: the latter may be applied against states

31 Cf. *Hoekman/Mavroidis*, Basic Elements of the Agreement on Government Procurement, in: Hoekman/Mavroidis (eds), (fn. 2), p. 13 (16).

32 In case of central government entities, a common minimum threshold of 130,000 Special Drawing Rights (SDR) applies to goods and non-construction services; cf. the table of thresholds in Annexes 1, 2 and 3, published by *Hoekman/Mavroidis*, (fn. 31), p. 15. According to http://www.wto.org/english/tratop_e/gproc_e/thresh_e.htm one SDR equals $US 1,37 (website visited on 5 March 2001).

33 Cf. for instance the threshold for construction services procured by sub-central governments, which is fixed at 5,000,000 SDR by most Parties, but amounts to 15,000,000 SDR in the cases of Japan and the Republic of Korea.

34 Cf. *McCrudden*, (fn. 5), p. 14; *Hoekman/Mavroidis*, (fn. 31), p. 16 and footnote 7 on p. 14, listing those countries having made use of this derogation (Canada, Finland, Republic of Korea, Switzerland, USA) and giving the example of the US threshold for construction services of 5,000,000 SDR in general, but of 15,000,000 SDR as to tenders from the Republic of Korea (given the Korean general threshold for those services of 15,000,000 SDR, see supra, fn. 33).

35 Cf. *Hoekman/Mavroidis*, (fn. 31), p. 16 ("[...] derogation from the non-discrimination requirement [...]").

using higher thresholds, *i.e.* against a legitimate practice, whereas the former applies only to violations of the non-discrimination provision.

What is the relationship between the above-mentioned requirement of non-discrimination of goods and services and the market access provisions of the GATT and the GATS? The answer is given by Art. III:3, which reads:

> "The provisions of paragraphs 1 and 2 shall not apply to customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, other import regulations and formalities, and measures affecting trade in services other than laws, regulations, procedures and practices regarding government procurement covered by this Agreement."

This means that the MFN/NT clauses of the GPA do not concern the question of access of the goods or services to the country of the procuring entity. Consequently, before asking if the Party in question has actually accorded equal tendering opportunities to or between foreign goods or services, it has to be examined whether those goods or services can claim market access at all. This issue is to be decided according to GATT/GATS rules,[36] and it is only after this question has been answered in the affirmative that one can proceed to the issue of equal treatment of suppliers on the procurement market.

Transparency is the decisive element governing the tendering procedure. Arts. VII to XVI lay down rules to ensure open access to procurement and equal treatment of foreign bidders. Before the tendering procedure actually begins, Parties have to make an invitation to participate.[37] This tender notice has to be published in order to inform all possibly interested suppliers of the procurement opportunity and about all relevant aspects of the specific procurement.

As to the actual tendering, the GPA admits three different kinds of procedures:[38] "open" procedures, in which all interested suppliers may participate, "selective" procedures, under which only those suppliers who have been pre-selected may take part in the bidding, and "limited" tendering procedures, where each potential supplier is contacted individually by the procuring entity.

The strict conditions imposed by the GPA[39] for the legality of limited tendering procedures make clear that the drafters of the Agreement wanted to keep this possibility limited to some clearly defined exceptions.

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36 It is the GATS that may pose problems here: as opposed to the GATT, which, in principle, prohibits any trade barriers other than tariffs – cf. Art. XI:1 GATT –, the GATS makes market access dependent on a Member's explicit inclusion of the service in question in its Schedule of Specific Commitments, cf. Art. XVI:1 GATS.

37 For details see Art. IX.

38 Cf. Art. VII:3 (a)-(c).

39 For details see Art. XV.

The purpose of selective tendering is to speed up procedures.[40] In order to exclude abuses, Art. IX:9 stipulates the Parties' obligation to publish the above-mentioned lists annually, along with the conditions to be met by suppliers interested in their inscription on those lists as well as the period of validity of the lists. Article X:1 underlines that selective tendering is not intended for protectionist abuses by requiring the procuring entity to invite tenders from the maximum number of domestic suppliers and of those of other Parties. Finally, the decisive requirement imposed by Art. VIII (b) applies also to selective tendering:[41] conditions for participation may not go beyond those essential to ensure the firm's capability to fulfill the contract in question and shall have no discriminatory effects.

Another important provision enhancing transparency concerns the requirements for the tender documentation: the latter shall contain all the information bidders need in order to be able to submit responsive tenders, *inter alia* the conditions for awarding the contract, especially any non-price factors that the procuring entity wishes to consider in the evaluation of the tenders.[42]

Consequently, only those tenders fulfilling the criteria set forth in the tender documentation may be considered for the award of the contract;[43] in case one tenderer has been determined to be fully capable of undertaking the contract and his bid is either the lowest one or the most advantageous one in terms of specific evaluation criteria in the tender documentation or the notices, the procuring entity is obliged to award the contract to that supplier.[44]

As follows from the above-mentioned provisions, public procurement actually consists of two different, subsequent procedures: the qualification of suppliers, Art. VIII, and then, once all qualified bidders have been separated from the unqualified ones, the procedure of awarding the contract to one of those qualified tenderers, Art. XIII:4.

The importance that is ascribed to transparency is once more made obvious by the requirement that the Parties provide certain information even after the award of the contract: Art. XVIII:1 specifies which information must in any case be published,[45] and Art. XVIII:2 imposes on each Party an obligation to disclose further information on request from a supplier of a Party.[46]

40 *Hoekman/Mavroidis*, (fn. 31), p. 17.

41 Cf. Art. VII:3 (b), referring to "other relevant provisions of this Agreement", under which Art. VIII (b) may be subsumed.

42 Cf. Art. XII:2 (h).

43 Art. XIII:4 (a).

44 Art. XIII:4 (b), with the exception that, in the public interest, the state agency decides not to issue the contract.

45 *E.g.* the name and address of the winning tenderer, Art. XVIII:1 (d).

46 *E.g.* the reasons why the requesting tenderer's bid was not selected as well as the advantages of the winning tender, Art. XVIII:2 (c). This approach is criticized for being less favorable for the individual

In order to make the GPA more attractive for developing countries, Art. V calls on the Parties to respect the particular needs of those states, especially the promotion of domestic industries[47] and consequently provides for the possibility of negotiated exceptions from the NT clause between a developing country and a developed Party.[48]

As far as enforcement of the GPA obligations is concerned, there are two possible ways:

First, the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) is, in general, applicable with the possibilities of violation and non-violation complaints.[49]

An important derogation is the prohibition of cross retaliation,[50] which can be explained by the fact that only a few WTO Members are at the same time Parties to the GPA.

The second possibility of enforcement are the GPA "Challenge Procedures", which have been called "the most innovative aspect"[51] of the Agreement. Article XX obliges Parties to allow suppliers to invoke GPA rules before domestic courts of the importing country.[52] However, the European Court of Justice (ECJ) has recently rejected a "direct effect" of WTO law.[53]

Finally, Art. XXIII provides for an exhaustive[54] list of exceptions that may justify certain violations of the Agreement. Paragraph 2 of this stipulation shows almost the same wording as the introductory clause ("chapeau") of Art. XX GATT, and the individual grounds of justification in Art. XXIII are very similar to those in Art. XX GATT.[55]

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than, *e.g.*, WTO antidumping or subsidies law that requires a motivated decision even without prior request by the person affected by the decision, cf. *Hoekman/Mavroidis*, (fn. 31), p. 19.

47 Art. V:1 (b).

48 Art. V:4; *nota bene* that this possibility does not, according to the text of that provision, apply to the MFN obligation.

49 Art. XXII:1, 2.

50 Cf. Art. XXII:7, referring mainly to the GATT, GATS and TRIPS Agreements.

51 *Hoekman/Mavroidis*, (fn. 31), p. 20.

52 For details see Art. XX:2-8, providing, *inter alia*, for rapid interim measures, paragraph 7 (a).

53 ECJ, Case C-149/96, *Portugal v. Council* (1999), ECR I-8395 (8439, no. 47). Cf. the commentary by Berrich, in: Europäisches Wirtschafts- & Steuerrecht 3, März 2000, p. 89 *et seq*.

54 *Hoekman/Mavroidis*, (fn. 31), p. 22.

55 Art. XX GATT contains a longer list of exceptions; on the other hand, the GPA does not only mention "public morals", but additionally "public [...] order or safety".

D. Do Selective Purchasing Laws Violate the Non-Discrimination Principle of Art. III GPA?

I. A Formal or a Factual Approach to the Notion of Non-Discrimination?

A law that subjects participation in tendering procedures to the potential suppliers' abstention from the use of production methods that do not respect certain human rights could be in contravention of the GPA's general national treatment and non-discrimination rule in Art. III:1.[56] Products or services offered by the targeted companies cannot physically be distinguished from like products or services of other businesses, and in spite of this physical equality, the former are treated less favorably than the latter.

Obviously, it could be argued at this point that, since it is one of the GPA's objectives to ensure equal competitive opportunities among domestic and foreign suppliers,[57] there is no Art. III violation: the legislation in question imposes its human rights conditions not only on (certain) foreign wares or services, but equally on domestic ones: it thereby provides for equal competitive opportunities among all suppliers, no matter which country they come from.[58]

That reasoning cannot be denied from a purely formal point of view. However, this should not prevent from considering the possibility that the actual effects of such a legislation might hit suppliers from certain countries harder than those from other states: in its 1997 report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*,[59] the Appellate Body interpreted Art. II:1 GATS (MFN) as prohibiting not only formal, but also *de facto* discrimination.[60] In EC law, the ECJ has, for a long time past, recognized that the EC Treaty prohibits indirect discrimination, unless there is an objective reason that justifies the factually unequal treatment.[61] There is no reason why this principle should

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56 This provision was also mentioned by the EC in its Request for the Establishment of a Panel in the Myanmar case, cf. WTO document WT/DS88/3; due to the specific circumstances of the case, the EC had equally recourse to paragraph 2 of that article.

57 Cf. the second consideration of the GPA's preamble, which recognizes the need to prevent public procurement laws and practices from affording protection to domestic industries.

58 This argument is put forward in a recent publication by *Howse/Regan*, The Product/Process Distinction – An Illusory Basis for Disciplining Unilateralism in Trade Policy, on pp. 9,10 with respect to Art. III GATT and the "Tuna/Dolphin" Disputes. This document could until recently be visited at http://www.wto.org/wto/research/research.htm. For the time being, it is unfortunately not available: due to the changes of the WTO website, the webpage on "Research and Analysis" has not yet been re-established. Hoping that this will change soon, the author has decided to still indicate this source.

59 WTO document WT/DS27/AB/R; report of 9 September 1997.

60 Ibidem, at nos. 233 and 234 (p. 102). *McCrudden*, (fn. 5), p. 35, mentions that Appellate Body report in this context.

61 Cf. for instance Case 96/80, *Jenkins v. Kingsgate (Clothing Productions) Ltd.* (1981) ECR 911, at nos. 13, 14. *In casu*, part time workers received lower hourly pay than their full time working colleagues for the same work, but it was established that part time workers were typically and mostly women, where-

not equally apply to Art. III GPA. It is clear from the wording of Art. II:1 GATS that the purpose of this provision is, just like the objective of Art. III GPA, the furtherance of equal competitive opportunities. Consequently, if it were established that companies of certain GPA Members are, for instance for historical or geographical reasons, much more engaged in business with a human rights violating country than others (and consequently much more exposed to the possibility of using human rights violating production methods), there would be sufficient reason for affirming *de facto* discrimination of suppliers by the former class of Members. This, however, depends on the facts of each individual case.

II. The Distinction between Physically Like Products

The more serious problem with Art. III is the fact that selective purchasing laws of the kind under consideration make a distinction between products or services that are physically alike. A garment made by forced laborers cannot, by its physical features, be distinguished from a garment made by remunerated workers. As opposed to Arts. I, III GATT, II, XVII GATS and 2.1 TBT Agreement, Art. III GPA does not explicitly mention "like" products or services, but it is self-evident from the nature of non-discrimination and the objective of Art. III that only "like" products and services are to be treated equally: as mentioned above, the aim of the provision is the promotion of equal competitive opportunities. Only those products/services compete with each other that the procuring entity can use for the same purpose. And discrimination can obviously only occur in the case of unequal treatment of something that is equal or "like". There is no reason to prohibit differential treatment of unlike products or services.

Consequently, the decisive question here is to know what "like" in the context of Art. III means. This issue arises not only under the GPA but likewise under the non-discrimination provisions of the GATT, the GATS and the TBT Agreement: just like Art. III GPA, Arts. I, III GATT and Arts. II, XVII GATS do not define the meaning of "like".

1. "Likeness" under the GATT

Unlike under the GPA, panel jurisprudence on the GATT like product-problem exists: The famous (un-adopted) 1991 Panel report on *US Restrictions on Imports of Tuna (Tuna/Dolphin I)*[62] held that Art. III GATT was not applicable to internal laws that differentiate between physically alike products with different production processes which however leave no trace on the product ("non-product-related

as full time workers were usually men. This led the ECJ to affirm indirect discrimination based on the sex of the worker.

62 GATT document DS 21/R of 3 September 1991, available in 30 International Legal Materials (I.L.M.) 1991, 1594 *et seq.*

PPMs[63]"). According to the Panel, the laws or internal charges covered by Art. III are only those that affect a product as such, in other words its physical properties, but not its production method if the latter has not left any trace on the product itself.[64] As a consequence of this ruling, all trade measures expressing a WTO Member's concern about non-product-related PPMs rather than about physical properties of products are to be tested against Art. XI GATT instead of Art. III GATT.[65] Given the narrow range of the exceptions under Art. XI:2 GATT, this implies a quasi general GATT-illegality of such measures. Whereas regulations based on physical differences of products may be in line with GATT, provided they do not cause competitive advantages for goods from certain Members (Art. III GATT), measures that differentiate on the basis of non-product-related PPMs are not even given the chance of proving their non-discriminatory character.[66] In most cases, the qualification of a measure as a quantitative restriction means at the same time its qualification as something illegal, except in the rare cases of Art. XI:2 GATT.

In addition to this, the "Tuna/Dolphin I" Panel explicitly stated that, even if Art. III GATT were applicable, the measure under consideration would not meet its requirements, because Art. III GATT called for the comparison of the treatment of two products.[67] In other words, the Panel was of the opinion that under GATT law products with the same physical properties must not be treated differently, even if their methods of production were different from another.

The Panel in *Tuna/Dolphin II*[68] reiterated that Art. III GATT calls for a comparison of the treatment of products as such and not of the policies[69] of the affected countries.[70]

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63 "PPMs" is the abbreviation for "process and production methods".

64 I.L.M. 1991, 1594 (1617, no. 5.11). Those PPMs that do leave traces on the product are usually referred to as "product-related". Due to their influence on the physical property of the final product, those PPMs are, in application of *Tuna/Dolphin I*, encompassed by Art. III GATT.

65 Arts. III and XI GATT are mutually exclusive: in case a trade measure does not come within the scope of Art. III GATT, Art. XI GATT is automatically applicable, cf. *Schoenbaum*, International Trade and Protection of the Environment: The Continuing Search for Reconciliation, in: American Journal of International Law, Vol. 91, April 1997, No. 2, p. 268 (273).

66 This difference between the two provisions is also outlined by the "Tuna/Dolphin I" Panel in 30 I.L.M. 1991, 1594 (1617, no. 5.9). For an example of the harsh criticism of the „*Tuna/Dolphin*" decisions see *Howse/Regan*, (fn. 58), pp. 4-8, who argue that from an ordinary language reading of Art. III GATT and its explanatory note (Ad Art. III) it can be established that process-based measures do come within the scope of that article. These authors also quote several GATT panels to prove their point of view, pp. 5, 6.

67 30 I.L.M. 1991, 1594 (1618, no. 5.15).

68 Panel report (unadopted) on *U.S. Restrictions on Imports of Tuna* of June 1994, available in 33 I.L.M. 1994, 839 *et seq*.

69 In other words, non-product-related PPMs were not considered to be a valid criterion of distinction.

70 33 I.L.M. 1994, 839 (889, no. 5.8, last paragraph).

2. "Likeness" under the TBT Agreement

As to the TBT Agreement,[71] its Annex 1 defines "technical regulations" as laying down certain standards ("characteristics") with which products circulating in a WTO Member have to conform, cf. Art. 2.2 TBT Agreement. The product characteristics thus serve as a basis for differential treatment between products that do and those that do not possess them. Annex 1 equates those characteristics with "their related processes and production methods", which consequently may likewise be the reason for differential treatment between products produced in a certain way and others produced in a different way.

The text of Annex 1 thus requires a link between the product characteristics and the PPMs. It is this requirement that is usually put forward in favor of the view that only those PPMs may serve as a basis for differential treatment that leave a physical trace on the final product.[72] As follows from the terms of the Annex, PPMs are not considered as being part of the product characteristics, but something apart.[73] Consequently, the characteristics of a product under the TBT Agreement are made up only by the product's physical features. This again means that PPMs "related" to those physical properties can only be PPMs that leave their trace on the product. With respect for the wording of the Annex, this interpretation appears to be the only one possible.

The approach taken under the TBT Agreement and by the "Tuna/Dolphin" Panels of distinguishing between the physical properties of a product on the one hand and its PPMs on the other hand is based on the fear of protectionism: a country might otherwise prohibit the importation of goods, arguing that those have not been produced in conformity with certain PPMs which have been determined unilaterally by the importing country. The reason for the import restriction might be protectionist pressure put on the government by strong lobbies (those domestic industries that have to compete with the imported goods). Making non-product-related PPMs a basis for differential treatment of physically like products contains an important threat to the WTO's main purpose, the liberalization of world trade: There is an enormous variety of different PPMs all over the world that are due to different stages of industrialization, but also to different national preferences. All those different PPMs might theoretically serve as an excuse for a government to restrict access of foreign, competitive products that might endanger domestic, less competitive production. The great fear among liberal trade lawyers is that the

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71 According to Art. 1.4 TBT, this Agreement is not applicable to public procurement. The provision refers explicitly to the GPA, which is thus *lex specialis* in the field of public procurement.

72 Cf. for example, *Völker*, The Agreement on Technical Barriers to Trade, in: Bourgeois/Berrod/Gippini/Fournier (eds), The Uruguay Round Results. A European Lawyers' Perspective, 1995, p. 281 (286/287); *Quick*, The Agreement on the Technical Barriers to Trade in the Context of the Trade and Environment Discussion, in: op. cit., p. 311 (320).

73 Annex 1 TBT Agreement reads: "[...] product characteristics *or* their related" PPMs (emphasis added).

recognition of non-product-related PPMs as a criterion of distinction may have "dam breaking" effects. As *Smith* puts it:

> "Today we will use trade to dictate to the rest of the world how many parts per million of benzene is permissible, tomorrow it will be how many hours in the day the worker can work, next, it will be the per capita number of schools a country must have. Surely, these seemingly innocent and laudable goals will sooner or later be hijacked by protectionist interests [...] We will have opened a Pandora's box of protectionism."[74]

Contrary to this, the distinction that is exclusively based on physical properties has the merit of being very clear and limited. Transparency and predictability of government action is important for the willingness of industries to engage in import/export business, and a distinction between physically different products is of course a lot more transparent than one based on all kinds of non-visible PPMs.

On the other hand, can products made by Burmese farmers who are forced to work without pay and to render large parts of their harvest[75] be really considered to be "like" products that have been made by workers who produce on a voluntary basis and against remuneration? Does the practice of procuring those slave labor products and thereby the furtherance of those work methods not cause any moral doubts, especially when the procuring entity is a democratically elected government (or one of its sub agencies)? Is it really true that products cannot be characterized by their production methods, as the TBT Agreement proposes?

3. "Likeness" under the GPA

If the "Tuna/Dolphin" assessment of trade measures based on non-product-related PPMs was equally valid in the GPA context, selective purchasing laws that treat physically like products or services differently because of their different production methods would constitute an infringement of Art. III:1.

If, on the other hand, the GPA recognized the furtherance of non-economic, social policy goals as one of its objectives, the differential treatment of production methods that respect or do not respect these goals could not be a violation of the GPA.

This doubt about the applicability of the "Tuna/Dolphin I and II" concept of "likeness" arises because of the European and North American tradition to consider government procurement as a means for the achievement of social policy objectives.[76] Canada, the US and the EU Member States are at the same time the principal signatories of the GPA.

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74 *Smith*, quoted by *Quick*, (fn. 72), p. 324, footnote 36.

75 Cf. Neue Zürcher Zeitung, (fn. 8), p. 7, third column.

76 *McCrudden*, (fn. 5), pp. 7 and 37.

a) Textual Interpretation

According to Art. 31:1 of the 1969 Vienna Convention of the Law of Treaties,[77] a treaty is to be interpreted according to its "terms", regard being had for their context and for the treaty's object and purpose. The wording of Art. III does not give any explicit definition of "likeness". Consequently, one has to consider the context, *i.e.* the other GPA provisions that might hint at possible interpretations of the Agreement.

(1) The "Conduct" of World Trade

The first paragraph of the preamble mentions as one objective the achievement of greater liberalization of world trade and the improvement of the international framework for the *conduct* of world trade (emphasis added). Whereas the first goal (liberalization) is clear, the second one, as to the conduct of world trade, is ambiguous: It could, on the one hand, hint at the Parties' intention to subject their trade action to certain moral requirements, which would certainly encompass a differentiation between PPMs that respect and those that do not respect basic human rights. This conclusion is, however, not compelling, as the wording might simply indicate the Parties' readiness to let their procurement activities be guided by the principles of non-discrimination and transparency mentioned in the following paragraphs of the preamble. The latter interpretation is supported by the fact that the GPA refers to the protection of "public morals" only as an exception under Art. XXIII:2, whereas the importance of the before-mentioned two principles as general rules can be traced throughout the whole Agreement. They serve the aim of improving competitive opportunities for the greatest possible number of bidders from all over the world. Transparency of tendering procedures is especially important to foreign bidders who are not familiar with the procurement practices of other countries. As a result, the term "conduct" can probably not be seen as a hint at the GPA's openness to social policy objectives.

(2) The Obligation To "Facilitate Increased Imports" from Developing Countries

The preamble's fifth paragraph as well as Art. V stipulate preferential treatment of developing countries; Article V:2 even provides for an obligation ("shall") of developed Parties to facilitate increased imports from developing countries. Given the fact that it is the latter that – often due to the lack of financial ressources – fre-

77 Art. 3:2 DSU stipulates that the WTO dispute settlement system, "in accordance with customary rules of interpretation of public international law", serves as a means of interpretation of the WTO Agreements. In its report on *US Standards for Reformulated and Conventional Gasoline* – hereinafter *US Gasoline* – (WTO document WT/DS2/AB/R, text to footnotes 34, 35, p. 17) of 29 April 1996 the Appellate Body characterized the Vienna Convention as being one of these "customary rules of interpretation".

quently do not respect non-economic goals such as basic labor rights or environmental standards, can it be implied from the above-mentioned obligation that the GPA's scope is strictly limited to purely economic criteria? This conclusion seems to be too far-reaching. The purpose of Art. V:2 might simply be to enhance the developed countries' readiness in general to award government contracts to suppliers from developing countries, without limiting their sovereign right to choose in the specific case, in respect of the specific circumstances. The terms "facilitate increased imports" are so general that an implication of the above-mentioned kind would not correspond to their ordinary meaning. In addition to that, it would simply be wrong to assert that it is always developing countries that do not respect non-economic goals. For instance, as to environmental standards, it is established that the main emittents of greenhouse gases depleting the ozone layer are not developing countries but the US and the Member States of the EU.

(3) The Awarding Criteria: "Factors Other than Price"

One provision that at first sight seems to be clearly in favor of a "social" approach is Art. XII:2 (h), which stipulates that the tender documentation has to contain the criteria for awarding the contract, "including any factors other than price that are to be considered in the evaluation of tenders [...]". Could these factors "other than price" be a hint at the respect for non-economic considerations? Since this provision mentions the awarding criteria, the answer can be found in Art. XIII:4 (b), that lays down the conditions for the determination of the tenderer to whom the procuring entity is obliged to award the contract: it is that bidder who is not only capable of undertaking the contract, but whose tender is either the lowest or the most advantageous in terms of the specific evaluation criteria set forth, *inter alia*, in the tender documentation. These specific evaluation criteria are the ones demanded for by Art. XII:2 (h). The use of the term "advantageous" makes it probable that only economic considerations are meant here. This view is supported by a comparison of the awarding criteria under the relevant EC procurement law:[78] Member States may choose, in the adoption of criteria for the award of contracts, between the condition of the lowest tender on the one hand and the one that is economically most profitable on the other hand.[79]

(4) Technical Specifications Laying down Processes and Production Methods

One scholar[80] has pointed out Art. VI:1, which stipulates that technical specifications laying down the characteristics of the products or services or the processes

78 For more details see infra, fn. 92, 93 and the accompanying text.

79 *Rust*, GWB-Vergaberecht und soziale Standards, EuZW 1999, Heft 15, p. 453 (455, left column).

and methods for their production, shall not create unnecessary obstacles to international trade. In other words, if procuring entities may use the description of certain production methods as a criterion to determine which exact product or service shall be the object of the tendering, this means that products or services may be distinguished (and treated differently) on the basis of these production methods.

McCrudden points out two possible weaknesses of that approach:[81] First, the sole purpose of the provision might just be the prevention of discrimination through the state's choosing of specific production methods that are only available to certain tenderers. In addition, *McCrudden* hints at the difficulty of interpreting a provision on technical specifications as including social criteria.

These two objections are founded on the same problem as the interpretation of Art. V:2 above: it seems doubtful whether the terms' ordinary meaning supports such a far-reaching conclusion.

However, the interpretation proposed by *Kunzlik* seems closer to the wording of Art. VI:1 than the above-discussed construction of Art. V:2. The latter depends on a factual assessment, namely that it is usually developing countries that do not respect certain social policy goals. This is a decisive element of the above argument, but it is nowhere mentioned in the text of Art. V:2. It can even be contested on the basis of contrary evidence.[82] On the other hand, it follows directly from the terms of Art. VI:1 that PPMs in general (*i.e.* without any distinction between product-related and non-product-related ones) are considered as a means of description of the wanted product/service and may thus serve as a basis of distinction.

This textual interpretation appears to be supported by a comparison of Art. VI:1 with the famous and disputed[83] definition of "technical regulation" in Annex 1 to the TBT Agreement: whereas the latter uses the terms of "product characteristics or *their related* processes and production methods" (emphasis added), Art. VI:1 qualifies PPMs in general to be valid distinction criteria (the terms "and their related" are not used). Considering that most[84] commentators agree that Annex 1 TBT Agreement is to be interpreted narrowly because of the requirement of a direct

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80 *Kunzlik*, Environmental Issues in Public Procurement, paper presented to Conference on "Public Procurement: Global Revolution", Aberystwyth, Wales, UK, 11 September 1997, quoted by *McCrudden*, (fn. 5), p. 36, footnote 170. This paper has been published under the title "Environmental Issues in International Public Procurement", in: Arrowsmith/Davies (eds), Public Procurement: Global Revolution (1998).

81 *McCrudden*, (fn. 5), p. 36/37, quoting *Trepte* and *Benedict* as the sources of this criticism.

82 See supra, the discussion of Art. V:2.

83 On this dispute see *Völker*, (fn. 72), pp. 285-287. See also *Quick*, (fn. 72), especially on pp. 319-326.

84 This is *Quick's* (fn. 72) evaluation, p. 319.

relation between the PPMs and the product characteristics,[85] it could be argued that the different wording of Art. VI:1, which appears to cover any PPMs, whether leaving a physical trace on the product or not, is the result of a deliberate choice of a different approach.

On the other hand, it is puzzling that the very same provision (Art. VI) that might serve as the basis of a less economic approach refers, in its paragraph 2 (b), to a footnote which again uses the TBT Agreement's Annex 1 definition to define the notion of "technical regulations", differentiating between a product's or service's characteristics on the one and their related PPMs on the other hand.[86] How is this footnote to be understood?

First, it should be noted that, while Art. VI:1 is about technical "specifications", Art. VI:2 (b) and the footnote deal, just like the TBT Annex 1, with technical "regulations". Is there a difference between those two notions? There should be, for otherwise it would make no sense to again define technical specification/regulation in an extra footnote to Art. VI:2, just after having given a definition in Art. VI:1. According to Art. VI:2, the "specifications" in the sense of paragraph 1 shall be based on the "regulation" in the sense of paragraph 2. The specifications serve the aim of indicating to the interested bidders which kind of product or service the state entity intends to procure. In order to avoid that a state entity sets up arbitrary criteria, namely in the pursuit of protectionist goals, there have to be some pre-existing standards against which the respective specifications can be tested. These standards should, if possible, be international ones, otherwise they may be national technical regulations or standards,[87] Art. VI:2 (b). Those national "technical regulations" as defined in footnote 3 to Art. VI thus concern, just like the "technical specifications", the description of products or services, but in the context of Art. VI they equally serve as a model for the setting up of technical specifications.

Consequently, the provision can only make sense if the terms "technical specification" in Art. VI:1 and "technical regulation" in Art. VI:2 and footnote 3 cover the same kind of PPMs. This of course means that either the proposed large interpretation of Art. VI:1 has to be narrowed down to product-related PPMs or that footnote 3 to Art. VI:2 has to be given a wider scope. The latter approach seems, however, difficult to reconcile with the express wording of footnote 3 to Art. VI, which clearly distinguishes between product characteristics on the one hand and PPMs on the other hand. Even if one followed the opinion that products or ser-

85 *Völker*, (fn. 72), p. 286/287. This interpretation means that under the TBT Agreement only those PPMs may serve as a basis of product distinction (and thus unequal treatment) that leave a physical trace on the product.

86 Art. VI:2 (b), footnote 3.

87 The difference between technical regulations and standards is that compliance with the former is mandatory, whereas compliance with the latter is not, cf. footnotes 3 and 4 to Art. VI.

vices are not only characterized by their physical properties, the terms of the footnote still remain problematic: they prevent the subsumption of the PPMs under the term "characteristics", because PPMs are mentioned separately. If PPMs are subsumed under that separate term, it follows that the "characteristics" can logically only consist of the physical properties of the product/service. Then it seems difficult to establish the necessary relation between the physical features and non-product-related PPMs.

Consequently, the terms of the footnote to Art. VI suggest a narrow interpretation of Art. VI:1 rather than a wide approach to that footnote. This would mean that the drafters of the Agreement would have intended to differentiate between product-related and non-product-related PPMs. However, why did they not, in Art. VI:1, make their choice explicit, instead of referring to "processes and methods for their production" in general? Does the wording of Art. VI:1 indicate careless drafting? Or does the limitation of footnote 3 to product-related PPMs mean that the same limitation has to be read into the terms of Art. VI:1? There being no unequivocal answer on the basis of the text, Art. VI:1 seems to be a weak basis for a definite answer concerning the issue of "likeness" under the GPA.

(5) The Firm's "Capability" To Fulfill the Contract

It might even be argued, as it was the case in the EC's Request for Establishment of a Panel[88] in the Myanmar dispute that Arts. VIII (b) and XIII :4 (b) actually prohibit a less economic approach: according to these provisions, the qualification as a participant in the tendering and the award of the contract may not be subjected to conditions other than those essential to ensure the bidder's capability to fulfill the contract in question. At first sight, this seems to be a truly economic point of view, because the terms "capability to fulfill the contract" are right away associated with a firm's technical ability to furnish products of the physical composition demanded by the procuring state.

However, what happens if the latter intends to procure a product that has been produced in conformity with certain labor norms, and a bidder is not capable to furnish such a product, because his production methods do not respect these labor norms?

When examining a firm's capability to fulfill a contract, one has to ask first which good exactly is wanted. If the requirement that the product be based on certain non-product-related PPMs is, in line with the above-discussed interpretation of Art. VI:1, considered as a distinction criterion between products, then the procuring entity is obliged to make that specification in the tender documentation according to Art. XII:1 (g), which requires "a complete description of the *products*

88 WTO document WT/DS88/3, p. 1.

or *services* required" (emphasis added). As a consequence, a firm's incapability to fulfill this requirement would mean its incapability to furnish the demanded product and would lead to the exclusion of the respective tenderer.

The same would be true for the awarding decision, Art. XIII:4 (b). If a firm is incapable of making a product or offering a service in accordance with certain PPMs, as explicitly required in the tender documentation, it should not expect to be awarded the contract.

In other words, Arts. VIII (b) and XIII:4 (b) cannot necessarily be regarded as automatically forbidding the respect for social objectives; on the contrary, their interpretation in this respect depends on the construction of Art. VI:1 as discussed above. In case one considers non-product-related PPMs as distinction criteria between products, a product that corresponds only physically to the product described in the tender documentation is just not the product demanded for by the procuring entity. And a firm that cannot furnish the demanded product is definitely not capable of fulfilling the contract, Arts. VIII (b), XIII:4 (b).[89]

Summing up, it can be established as a provisional result that the GPA, from its pure wording, does not necessarily prohibit a social objective approach, but that on the other hand, there is no GPA provision that unequivocally commands such an approach either.

b) The Parties' Intention: the EC Position toward Social Policy Objectives in Public Procurement

Looking at the handling of public procurement by the GPA Parties on the internal side, *i.e.* within the EU, the US, *et cetera,* could give some indications as to their intentions when negotiating the GPA.

However, as far as the EC[90] is concerned, its standpoint as to the furtherance of non-economic criteria is far from definite. On the one hand, on the internal side, the EC Commission clearly favors a non-economic approach: In a 1998 Communication on government procurement, the EU Member States are "encouraged" to use their procurement capacities to pursue certain social objectives such as the promotion of equal opportunities for men and women.[91]

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89 As to the requirement of the bidders' capability to fulfill the contract see *McCrudden*, (fn. 5), pp. 30-32, who proposes, as one of various solutions, to address the PPMs issue only after awarding the contract. According to that approach, firms not respecting certain PPMs would not *a priori* be excluded from participation in the tendering procedures, but would afterwards, by contractual terms, be required to assure respect for those PPMs. This proposal is based on the "Tuna/Dolphin" definition of physical likeness of products, as all bidders furnishing products that are physically like the one demanded by the state entity may participate in the tendering, no regard being had, in this phase, for the respective PPMs.

90 This article does not cover the internal procurement regimes of the other GPA Members.

The substantive EC law is less determined, though: each of the three most important procurement directives circumscribes in a very detailed manner the (economic) criteria for the qualification as a bidder and for the award of the contract.[92] They also expressly provide for the possibility of the procuring entity requiring the respect for employment protection provisions and working conditions.[93] It is disputed among scholars whether these latter provisions, which constitute an exception from purely economic qualification and award criteria, are to be understood as being exhaustive[94] or not.[95]

The ECJ's jurisprudence does not help clear up things entirely either: In its "most important"[96] decision[97] concerning the coupling of public procurement and social standards, the Court rendered an ambiguous ruling: on the one hand, it stated that it followed from the EC substantive law[98] that the procuring entity may assess the qualification as supplier only on the basis of criteria that relate to the economic, financial and technical capacity of the bidders.[99] On the other hand, the ECJ pointed out that the respective substantial EC law was not exhaustive, so the EU Member States were still free to maintain certain substantive or procedural provisions in their national procurement laws.[100] If this statement as such is not yet very clear, the ECJ, a bit further, expressly reflected on the possibility of using, as qualification criterion, the requirement to hire unemployed persons. After expressly observing that this criterion "has nothing to do" with the economic capacity of the bidders,[101] the ECJ merely subjected this social criterion to the general obligations resulting from the EC Treaty, such as the economic freedoms,[102] but it did not conclude that it was *per se* inadmissible. On the contrary,

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91 Communication from the Commission: Public Procurement in the European Union, EC document COM/98/0143 final, para. 4.4 *in fine*, available from: http://simap.eu.int/EN/pub/src/welcome.htm (access date: 3/5/2001).

92 Council Directive 93/37/EEC (The Public Works Directive: OJ L 199, 9.8.1993, p. 54) in Arts. 18-32; Council Directive 93/38/EEC (The Utilities Directives: OJ L 199, 9.8.1993, p. 84) in Arts. 30-37; Council Directive 92/50/EEC (The Public Services Directives: OJ L 209, 24.7.1992, p. 1) in Arts. 29-37.

93 Dir. 93/37/EEC in Art. 23:2; Dir. 93/38/EEC in Art. 29:2; Dir. 92/50/EEC in Art. 28:2.

94 In this sense *Rittner*, Die 'sozialen Belange' i.S. der EG- Kommission und das inländische Vergaberecht, EuZW 1999, Heft 22, p. 679, right column.

95 *Rust*, (fn. 79), p. 455, left column, expresses the view that, apart from those "social" criteria expressly mentioned in the directives, others may be used as qualification requirements. She stresses that, for awarding purposes, the criteria have to be purely economic ones (p. 454, left column, with reference in footnote 15 to the divergent standpoints in the German literature).

96 This is *Rust's* (fn. 79) assessment, p. 455, right column.

97 ECJ, Case 31/87, *Gebroeders Beentjes BV v. State of the Netherlands* (1988), ECR 4635.

98 The then valid Council Directive 71/305 of 26 July 1971, OJ L 185, p. 5.

99 ECJ, (fn. 97), no. 17.

100 Idem, no. 20.

101 Idem, no. 28.

the Court then stated explicitly that the before-mentioned qualification criterion is not *per se* a violation of the relevant procurement directive.[103] Finally, the ECJ summarized its point of view, saying that there is no violation of the relevant EC procurement directive as long as there is no direct or indirect discrimination of bidders from other Member States.[104]

To conclude, the ECJ seems to have taken the view that, even though the relevant EC directives do not expressly allow for social qualification criteria,[105] the latter are nevertheless admitted on the condition that they do not cause (in)direct discrimination of foreign EU bidders.

It could be argued that the above-mentioned ruling concerned exclusively the specific criterion of hiring unemployed; however, the condition that the Court formulated (*i.e.* no discrimination) is so general that any social criterion may be tested against it. In addition to that, if the ECJ takes this approach with respect to one criterion (capacity to hire jobless people) that is nowhere mentioned in the relevant EC directive, why should the same principle not apply to other social objectives?

Returning to the EC Commission's point of view, it is striking to see its contrary approach to the social objective issue in the field of external relations. In fact, the same authority that encourages the EU Member States to use their procurement powers in order to promote certain social objectives inside the Union motivates its Request for WTO Consultations in the Myanmar case *inter alia* with the choice of political instead of economic considerations by the legislation at issue.[106]

To briefly sum it up, the EC's position toward the handling of public procurement does not seem to be free of contradictions. One cannot help but have the impression that the EC supports a social approach only as long as this is in its own interest, *i.e.* when it serves one of the objectives of the EC Treaty. In case of negative repercussions on EC companies, however, the Commission apparently turns its convictions by 180 degrees.

This makes clear that the EC's handling of public procurement cannot be used in support of the view that the Parties to the GPA intended a less economic approach than under multilateral WTO law.

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102 Idem, nos. 29, 30.

103 Idem, no. 31.

104 Idem, no. 37, third hyphen. In a September 26, 2000 judgment (Case C-225/98, *EC-Commission v. French Republic*, at nos. 50-53), the ECJ confirmed this interpretation. The judgment has not yet been reported, but it is available (in German) in EuZW 2000, Vol. 24, p. 755 with a commentary by *Seidel*, p. 762.

105 Except for the one mentioned in this text to fn. 93.

106 EC Commission, Request for Consultations by the European Communities, WTO document WT/DS88/1, GPA/D2/1, p. 1.

c) May the Furtherance of Human Rights Be Considered as Being a Purpose of the GPA?

According to Art. 31:1 of the Vienna Convention, the terms of a treaty must be interpreted in their context as well as in the light of the treaty's object and purpose. The above interpretation still has to be completed by some considerations about the purpose of public procurement. As the decisive question is to know whether the like product notion of the GATT, the GATS and the TBT Agreement applies also to the GPA, it is of some importance to investigate into the differences between the GPA on the one side and the other WTO Agreements on the other side.

(1) The Nature of Public Procurement as Opposed to Multilateral WTO Law

Contrary to the GATT, GATS or the TBT Agreement, the consumer under the GPA is not an individual or a private juridical person, but a state entity.[107] The TBT Agreement, for instance, addresses the situation in which a state limits its citizens' choice of imported products by certain safety provisions. Under GATT, it is again the state that, by subjecting imports to tariffs, influences indirectly the consumers' choices. In public procurement, however, the state does not decide which goods or services others may use, but chooses the products for its own consumption. As to that choice, may the state be as free as an individual or a private firm?

The purpose of trade liberalization as promoted by the WTO Agreements consists, *inter alia*, of enlarging the individual consumer's choice between a whole range of goods or services. The idea is to gradually diminish the states' possibilities of influencing their citizens' consumption preferences and of transferring this "sovereignty" of choice from the state to the individual. In choosing, the latter shall then only be subject to his own personal preferences and not to the ones of his government, which might be entirely different.

It is difficult to transfer this idea without any alterations to public procurement. Of course, by imposing the goals of transparency and non-discrimination, the GPA lays an important emphasis on the interests of the individual, just like the other WTO Agreements. But this individualist approach has to be interpreted in conjunction with the particularity that the consumer (*i.e.* the procuring state entity) is not an individual that acts only for itself but represents its citizens, whose money (taxes) it uses in order to buy the goods or services in question.

The GPA's goal of increased competition for the award of public contracts, which is promoted by the transparency and non-discrimination requirements, has to be reconciled with the expectation of the respective state's citizens that their state rep-

107 Cf. *McCrudden*, (fn. 5), p. 33.

resents their commonly shared values and ideas. Contrary to an individual, a state does not exist naturally but is created for the sake of a peaceful living together of individuals. Certain powers originally vested within every individual are rendered to a government, which is then expected to represent the interests of all its citizens. Consequently, a procuring state entity may not, as opposed to an individual, determine its criteria of choice according to one-sided preferences, but has to have regards for the whole range of preferences of its citizens. An individual is free to determine the price of a product as the only valid criterion of choice; he might as well do the opposite and decide freely to buy only goods that have been produced in a certain way, *e.g.* renounce the purchase of furs from animals caught in cruel leg-hold traps. This kind of unbalanced decision-making, which is perfectly in order for an individual, must not be taken over by a state which is supposed to represent all of its citizens and their respective values and convictions.

In other words, the sovereignty of choice, the freedom to purchase according to own preferences, as promoted by the multilateral WTO Agreements, should be handled differently in public procurement: a state entity must not exclusively rely on qualification and award criteria that mirror only a part of the commonly shared values of its citizens. It should have regards for all of those common values. Otherwise it would not satisfy the representative function of a democratically elected government, especially if one considers that public procurement is ultimately carried out in the interest of the public,[108] *i.e.* of all citizens. The one-sided preference of certain purchase criteria would constitute a preferential treatment of some citizens over others who support different values.

However, the state cannot be expected to have regards for any existing value whatsoever. If a state favors certain values, they must be commonly shared in order to guarantee that the state does not favor some of its citizens. As to public procurement, which is based on taxpayers' contributions, it is obvious that it is the common wish of taxpayers to avoid higher taxes. Consequently, the question who can offer the economically most advantageous products to the government expresses a common concern and may be regarded as a valid criterion in public procurement. Apart from this economic criterion, are there any others that are commonly shared? Since the GPA is in principle open to every country in the world, its qualification and award criteria must not focus on the common values of certain countries only (*e.g.* of the industrialized states), but needs to be based on values that are shared around the world.

In other words, if non-product-related PPMs should be valid qualification or award criteria, they would have to be based on internationally agreed standards that are binding for every country. The reason for this is similar to the situation within a state: just like a national government *vis-à-vis* its citizens, the WTO may

108 Cf. supra: text after fn. 1 (governments procure goods or services in order to improve the infrastructure, the public health service, or their state's defense capabilities).

only favor those values (through the determination of certain PPMs) that are common to its Members. This makes clear that the criteria alluded to by *Smith* [109] (*e.g.* the daily permissible working hours or the *per capita* number of schools in a country) cannot be used as GPA qualification or award criteria, because there is no internationally binding norm in this respect.

It is the principle of national sovereignty that is often put forward in favor of the GATT's product/process distinction.[110] It is true that the less favorable treatment of products not produced according to a certain method may constitute an interference with the producing country's sovereignty.[111] However, if it is made sure that only those products are treated less favorably that have been produced in violation of internationally binding standards, the respective country's sovereignty is not touched: every state is legally bound to respect those standards as binding, the principle of sovereignty cannot be used to circumvent this obligation. Otherwise it would be useless to agree on internationally binding standards.

Considering the enormous variety of different societal and traditional values and convictions, it becomes obvious that the number of non-product-related PPMs that may serve as distinction criteria between products can only be a limited one. In the field of human rights, only those that are internationally binding fall within this category. A state can be legally bound either by the undertaking of a treaty obligation or by means of customary international law.[112]

(2) Which Human Rights/Labor Rights Are To Be Promoted?

It is disputed which human rights have acquired the status of customary international law:[113] contrary to some commentators, the majority view is that not all of the rights recognized by the Universal Declaration of Human Rights have attained that status, but only a limited number of civil and political rights as listed in the Restatement (Third) of the Foreign Relations Law of the United States. These grant protection from:[114]

- genocide,
- slavery or slave trade,

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109 Cf. supra, fn. 74.

110 Cf. only *Quick*, (fn. 72), p. 325.

111 Ibidem.

112 *Alston*, Labor Rights Provisions in US Trade Law: 'Aggressive Unilateralism'?, in: Human Rights Quarterly 15 (1993), p. 1 (12), quoting *Meron* in footnote 62 to his text.

113 Cf. idem, presenting the opposing opinions on pp. 12, 13 and in footnotes 64, 65 to his contribution.

114 The following list is taken from *Alston*, (fn. 112), p. 13, footnote 65 to his text.

- the murder or causing the disappearance of individuals,
- torture or other cruel, inhuman, or degrading treatment or punishment,
- prolonged arbitrary detention,
- systematic racial discrimination, or
- a consistent pattern of gross violations of internationally recognized human rights.

As to the specific field of labor rights, only an older group of ILO Conventions on freedom of association, on forced labor and on equality of opportunity and treatment are generally acknowledged to constitute a basic minimum core in human rights terms.[115]

These fundamental labor rights were made the object of the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up. In No. 2 of the Declaration, the International Labour Conference stipulates that all ILO Members,[116] even if they have not yet ratified the Convention in question,

> "have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith [...] the principles concerning the fundamental rights which are the subject of those Conventions, [...]".

This is followed by an enumeration of Conventions, namely on the freedom of association (incl. the right to collective bargaining) as well as the prohibition of forced labor, child labor and discrimination as to employment and occupation.

However, it follows from several parts of the Declaration that the latter does not follow a binding, but a promotional approach: Number 3 (b) speaks of assistance by the ILO for its Members to respect the fundamental labor rights. Number 4 stipulates that, in order to render the Declaration effective, a "promotional" follow-up is to be established as an integral part of the Declaration. In other words, coercive enforcement measures were not intended. This follows equally from No. 1 of the Annex to the Declaration, which states that the encouragement of Members to respect fundamental labor rights "is of a strictly promotional nature".

It follows from the principle of sovereignty of nations that under WTO law those standards that are not part of the above-mentioned internationally binding norms must not be enforced against countries for which the respective standard is not compulsory.[117] The ILO's promotional approach to the above-mentioned core

115 Idem, p. 30, listing seven conventions.

116 *Nota bene* that for example Myanmar is a Member of the ILO.

117 Cf. the excellent contribution by *Alston,* (fn. 112), in which he criticizes the US practice of applying labor standards to countries that have never accepted them (without those standards being recognized as internationally binding) and the incoherence of invoking, as justification of trade sanctions, inter-

labor rights makes clear that the latter cannot be considered to be part of binding customary international law. However, in the case of slave labor, the right to protection from slavery or from inhuman treatment or prolonged arbitrary detention[118] could apply as recognized parts of customary international law. As to labor standards, *Alston*[119] states the remaining possibility of considering them as part of (binding) general international law in the form of "general principles of law recognized by civilized nations", as laid down in Art. 38:1 c) of the Statute of the International Court of Justice. However, the same author admits that possibility only for the Conventions on Forced Labour and Freedom of Association,[120] but not for those conventions concerning the hours of work, minimum age and minimum wage.[121] This supports the view that protection from forced labor and the right of free association are internationally recognized values which should not be ignored when it comes to deciding which product or service a government should purchase. The issues of minimum age, wage or hours of work must, on the contrary, not be made a criterion of distinction, because there is apparently no international consensus as to any standards in these areas. Here, differences have to be accepted as the results of different traditions and cultures.

(3) Country-Based Sanctions vs. Process-Based Sanctions

Article III prohibits unequal treatment on the basis of nationality. Even if, under the proposed concept of likeness, certain PPMs may be used to distinguish between physically like products, may the respective national legislation refer expressly to one certain country, as it was the case in the above-mentioned Massachusetts legislation? The issue is highly controversial. *Howse* and *Regan* have recently taken the position of rejecting country-based restrictions as *prima facie* violations of Arts. I, III or XI GATT[122] and as economically inefficient.[123]

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national instruments that the US itself has not ratified. *Alston* reveals a disquieting double standard of the US understanding of compliance with international labor norms, depending on whether compliance by the US itself or by other countries is at stake.

118 See supra, text after fn. 114.

119 *Alston*, (fn. 112), p. 13.

120 *Alston*, idem, p. 30, quotes the following Conventions: Right of Association (Agriculture) Convention, 1921 (No. 11); Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); and Abolition of Forced Labour Convention, 1956 (No. 105).

121 Idem, p. 13, referring to the low number of ratifications of those latter conventions, as opposed to the higher ratification rate of the conventions enumerated under fn. 120.

122 *Howse/Regan*, (fn. 58), pp. 18 *et seq.*

123 Idem, p. 19.

The opposite position (favoring country-based restrictions) is advocated by *Chang*,[124] who draws the reader's attention to the possible inefficiency of neutral, process-based restrictions: an exporting country A, violating certain standards, might just decide to split up its production methods according to the destination of the goods: it could comply with certain production standards when producing goods for an importing country B that attaches some importance to those standards, and it could at the same time continue violating these production standards when producing goods for other countries that are less conscious as to those production methods. If, in this situation, the importing country B introduces process-based sanctions, there will be no reason for the exclusion of the products coming from A, because those specific goods would actually have been produced in accordance with the PPMs at issue. On the other hand, in the case of country-based restrictions, B could block any product from A, regardless of its specific PPM, as long as A continues to produce any goods at all in a manner non-consistent with the PPM in question.

It would clearly go beyond the extent of this contribution to reflect in detail on the problem of efficiency of trade sanctions. This article seeks, *inter alia*, to explore the legal possibilities of adopting a definition of likeness that is apt to the field of government procurement. The dispute about country- or process-based trade measures would have to be considered from a legal as well as from a factual (efficiency) perspective.

It is true that country-based measures are easier to enforce. It is much simpler to restrict the access to one's own market of any product coming from a certain state than to try to investigate into the actual production method of each product.

On the other hand, purely process-based measures might serve as a means of encouragement for those companies that are willing to swim against the current and comply with certain PPMs. Country-based measures are at a time too far-reaching and not far-reaching enough: they apply to all products from the targeted state, including those made by firms that do respect the PPMs at issue. On the other hand, they do not apply to products from other countries that have equally been produced in violation of the same PPMs: what is the justification for sanctioning products from Myanmar, but not also from the People's Republic of China, where the situation of workers is not much better in some respects?[125]

From a strictly legal point of view, country-based trade measures result in a double discrimination: the products from the targeted country (*e.g.* Myanmar) are treated less favorably than products from other countries (*e.g.* the PR China) that

124 *Chang*, An Economic Analysis of Trade Measures to Protect the Global Environment, quoted by *Howse/Regan*, (fn. 58), p. 20, footnote 36 to their contribution.

125 Cf. Neue Zürcher Zeitung of 17 July 2000, p. 4 ("Kashgar – gefährdete uigurische Oase"), which mentions the use of forced labor camps in the Chinese province of Xinjiang and refers to information disclosed by Amnesty International.

are produced in the same way, and the products from the targeted country that have actually been manufactured in respect of certain PPMs are treated less favorably than those from other countries produced in the same manner (*i.e.* in accordance with basic human/labor rights).

(4) The Desirability of Sanctions "per se"

Apart from the problem of country- or process-based measures, the desirability of sanctions *per se* would have to be discussed as well. Here again, the question of efficiency arises. The supporters of sanctions are usually confronted with the argument that these measures do not constitute an optimal intervention, because they are not applied directly at the source. Instead, the negotiation of an international agreement or the adoption of a domestic regulation is favored.[126] In international environmental law, where a lot of treaties are not of compulsory, but only of declaratory character ("soft law"), this point is not without merit. Since there is no binding standard, there is, at least from a legal point of view, no definite right or wrong, either.

When it comes to the violations of internationally binding human or labor rights, though, a definite right or wrong does exist. Negotiations will, if they are to lead to a success, always imply a sacrifice on both sides. As a matter of principle, why should someone who is definitely wrong be offered any concessions by someone who is definitely right? In addition to that, negotiations presuppose the readiness of the negotiators to engage in certain changes. During the 56th Session of the UN Commission on Human Rights, the Commission's Special Rapporteur on the Situation of Human Rights in Myanmar reported in detail on the forced labor practice in that country.[127] The reaction of the Leader of the Myanmar Observer Delegation was a simple denial of the existence of slave labor in Myanmar:

> "The practice of the use of forced labour is non-existent in Myanmar. Such malpractices are not allowed; nor condoned in our country."[128]

It is hard to imagine how, in case of such uncooperative behavior, negotiations may lead to a satisfying result. Economic sanctions, as disputed and limited as they may be,[129] seem to present a more effective remedy.

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126 *E.g.* see only *Quick*, (fn. 72), pp. 325, 326. For the area of international environmental law, cf. *Petersmann*, International Trade Law and International Environmental Law. Prevention and Settlement of International Environmental Disputes in GATT, Journal of World Trade 27, No. 1, 1993, pp. 43 *et seq*.

127 Statement of Judge *Rajsoomer Lallah* of 30 March 2000 to the 56th Session of the Commission on Human Rights, 20 March-28 April 2000.

128 Statement of *U Mya Than* on the submission of the report by Mr. *Lallah*, p. 1. I am grateful to *Sunny Kwon* for providing me with the documents quoted in fn. 127 and 128.

(5) The Commitment of Governments to the Respect of Human Rights

The above-described approach (non-product-related PPMs as distinction criteria if they correspond to internationally binding standards) results in a like product notion that differs from the one under multilateral WTO law. It is not the objective of this contribution to discuss the justification of the product/process distinction in general, but exclusively in the context of the GPA. As shown above, the "consumer" in public procurement is less free in his choice of goods/services than the consumer under, *e.g.*, GATT and GATS law. Commonly shared non-economic values should be taken into account when determining who can qualify as a bidder. In other words, certain non-product-related PPMs[130] should, in the field of government procurement, serve as distinction criteria for products or services.

It is true that this approach does not correspond to the text of footnote 3 to Art. VI:2 (b), which seems to encompass only product-related PPMs.[131] However, as already discussed, the terms of Art. VI are not without ambiguity, due to the different wording of paragraph 1 on the one hand and footnote 3 to paragraph 2 on the other hand. Moreover, if one adopted the like product/service definition that seems to follow from the wording of footnote 3, governments would in principle[132] be required to treat products made by slave labor as favorably as products made by legally paid workers. Considering that the former products will usually be cheaper than the latter, governments would, from a strictly economic point of view, generally be bound to opt for the slave labor products. Through this practice, governments of democratic states that are supposed to be based on the rule of law and the respect of human rights would even encourage the violation of basic labor rights in countries like Myanmar that are in desperate need of foreign contracts and currency. This again would infringe the respective governments' commitments to the respect of human rights.

The EU, for instance, is, according to Art. 6:1 TEU, founded on the principles of liberty, democracy, the respect of human rights and fundamental freedoms as well as the rule of law. It has to respect the fundamental rights, as expressly provided for in Art. 6:2 TEU.

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129 The success of sanctions depends on several factors, *e.g.* the size and political/economic power of the targeted state as well as the willingness of a great number of countries to participate in the sanctioning, cf. *Howse/Trebilcock*, The Free Trade-Fair Trade Debate: Trade, Labor and the Environment, in: Bhandari/Sykes (eds), Economic Dimensions in International Law: Comparative and Empirical Perspectives, 1997, p. 186 (205), referring to a study by *Hufbauer/Schott/Elliot*, who make out an overall success rate by sanctions of 34 percent, and concluding (206): "Overall, the evidence suggests that trade sanctions are of limited but real effectiveness, [...]".

130 See supra, the discussion after fn. 112.

131 See supra, the discussion of Art. VI after fn. 86.

132 Unless they can justify the differential treatment of physically like products under Art. XXIII, see infra.

Public entities in Germany, to give another example, are bound in their action by the basic rights enumerated in the Grundgesetz, Art. 1:3 GG. These basic rights, especially the one concerning life, personal liberty and integrity (Art. 2:2 GG), are not reserved for German citizens but granted to "everybody". Their observance by German state entities is limited to the territory on which these entities may take sovereign action, *i.e.* the territory of Germany. However, this does not mean that German authorities are free as to human rights abroad: their action, *e.g.* the awarding of a state contract, always takes place within the German borders. This action has repercussions on the human rights situation abroad. Since German authorities must not violate those basic rights granted to "everybody", it follows that any action, taken within the German borders, which violates these basic rights, is illegal, whether its consequences occur inside or outside the Federal Republic.

The same reasoning applies to Art. 1:1 GG, which stipulates:

> "Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt."
> (Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.)

By procuring slave labor products, a state entity encourages the setting up of forced labor camps in the respective countries and is consequently far from respecting and protecting the dignity of man.

(6) Conclusion as to the Question of the GPA Objectives

May the above considerations lead to the conclusion that the furtherance of human rights is, beside transparency and non-discrimination, one of the objectives of the GPA? Would it not go too far to deduce this objective from the above-discussed representative function of governments and their commitments to human rights?[133] While the objectives of transparency and non-discrimination are explicitly mentioned in the GPA, this is not the case as to the promotion of human rights.

On the other hand, even if one considers the furtherance of human rights as being outside the purpose of the Agreement, one cannot deny that the GPA is, just like any other treaty, subject to the requirements of public international law. As the Appellate Body stated in its 1996 report on *US Standards for Reformulated and Conventional Gasoline*, "[...] the General Agreement is not to be read in clinical isolation from public international law."[134] This applies likewise to the GPA. Governments have committed themselves to the respect of a limited number of

133 I am grateful to *Kai Schollendorf* for pointing out the latter.

134 WTO document WT/DS2/AB/R of 29 April 1996, p. 17 (text to footnotes 34 and 35 of that document).

basic human and labor rights.[135] These rights might not be perfectly respected in Western countries, and one might be tempted to say that Western governments should first of all mind their own business. However, it is in countries like Myanmar and the PR China that these rights are constantly violated on a large scale. If those political and labor rights referred to above are to be rendered effective, it is not sufficient for Western governments to make solemn promises about their commitments to human rights and at the same time to facilitate the procuring of slave labor products by maintaining a purely materialistic definition of "likeness".

To conclude, it may be conceded that it is difficult to consider the promotion of human rights as being one of the objectives of the GPA. However, this Agreement does not stand in isolation from the nature of public procurement in general. The omission of any reference to the furtherance of certain social objectives cannot alter the fact that governments which represent their electorates are expected to have regards for the commonly shared values of their citizens and have, in addition to that, made internationally binding commitments as to the respect of certain basic human and labor rights. Consequently, those rights must not be ignored by governments when engaging in procurement with the money collected from their citizens. This human rights-friendly approach may be realized in two ways: either by the proposed definition of "likeness" or by seeking justification under Art. XXIII. This latter approach would accept the "Tuna/Dolphin" definition of physical likeness, affirm a violation of the non-discrimination requirement of Art. III by selective purchasing laws and then try to justify this discrimination through Art. XXIII:2.

135 See supra: the political rights listed in the Third US Restatement as well as the ILO Conventions on Forced Labour and Freedom of Association.

E. The Alternative: Justification of Discriminatory Procurement Practices under Art. XXIII GPA

I. What Difference Does It Make?

Article XXIII:2[136] reads as follows:

> Article XXIII
>
> Exceptions to the Agreement
>
> "[...] 2. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour."

The difference of the justificatory approach is the following: if one decides to consider products bearing the same physical properties as always being "like", selective purchasing laws of the kind described above would constitute an infringement of the non-discrimination provision in Art. III. This violation would have to be justified under Art. XXIII:2, which again entails a reversal of the burden of proof: the one invoking the exception has to prove that the requirements of Art. XXIII:2 are all met. Considering the multitude of elements of that provision, and considering the strict handling by earlier GATT and WTO panels and by the Appellate Body of the almost identical Art. XX GATT, this surely constitutes a considerable challenge.

If, on the other hand, a government's distinction between products respecting and others not respecting certain basic human or labor rights is considered legal to begin with, it would be the exporting country that has to establish the illegality of the distinction in the specific case.

II. Applicability of Arts. XXIII GPA/XX GATT to Coercive Measures?

Selective purchasing laws that make the access to a country's procurement market dependent on the respect of certain production methods may be considered as intentionally imposing pressure on other states to change their domestic production methods. Under traditional public international law, each state has the sov-

136 Paragraph 1 concerns the specific case of a national security exception, dealing with the procurement of, *inter alia*, arms, ammunition or war materials. The parallel under GATT law is Art. XXI. For the examination of human rights-based procurement practices this provision is irrelevant.

ereign right to adopt its own domestic laws. Article 2:7 of the UN Charter makes plain that the interference by one state with domestic policy issues of another state is not permitted by the Charter.[137] Consequently, the first problem under the justificatory approach is to know whether Art. XXIII GPA may be applied to coercive measures like selective purchasing.

As to the justification of unilaterally adopted measures that are intended to make foreign countries change certain domestic policies, the "Tuna/Dolphin" Panels[138] and the Appellate Body in the "Shrimps/Turtles" dispute[139] have provided for a rich GATT (Art. XX) jurisprudence, from which important conclusions may equally be drawn for selective procurement practices.[140]

1. The "Tuna/Dolphin" Panels

While the Panel in *Tuna/Dolphin I* denied the applicability of Art. XX GATT to "extrajurisdictional" measures,[141] the Panel in *Tuna/Dolphin II* stated that Art. XX GATT may in fact apply to such extraterritorial measures,[142] but only if they are not taken so as to force other GATT Parties to change their domestic policies.[143] In other words, both Panels excluded an entire class of measures from the scope of application of Art. XX GATT: *Tuna/Dolphin I* excluded all measures with an intended effect outside the jurisdiction of the GATT Party taking the measure, and *Tuna/Dolphin II* expressed the opinion that, even though GATT Parties may adopt legislation designed to protect the environment outside their territories, they must not *enforce* this legislation against other Parties' opposition.[144]

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137 Art. 2:7 UN Charter reads: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state [...]". The UN Charter can be visited at: http://www.un.org/aboutun/charter/index.html (3/5/2001).

138 See supra, under D.II.1.

139 *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WTO document WT/DS58/AB/R of 12 October 1998 (hereinafter referred to as *Shrimps/Turtles*).

140 *Nota bene* that reports by panels or the Appellate Body do not create binding precedents, not even when adopted by the DSB. They have legal effect *inter partes* only. Art. IX:2 (1) WTO Agreement stipulates that the exclusive authority to adopt generally binding interpretations of the WTO Agreements belongs to the Ministerial Conference and the General Council. The reports may, however, be used as guidelines for later reports. In practice, both panels and the Appellate Body refer frequently to interpretations adopted in earlier cases.

141 30 I.L.M. 1991, 1594 (1620, no. 5.27 as to Art. XX (b); 1621, no. 5.32 as to Art. XX [g]). Cf. *Petersmann* (fn. 126), p. 69, footnote 50: "The term 'extrajurisdictional application' is misleading in so far as the import restrictions were applied within the jurisdiction of the United States to products imported into the United States." Both "Tuna/Dolphin" cases concerned a US import restriction on certain tuna.

142 33 I.L.M. 1994, 839 (891, no. 5.16).

143 Idem, 894, no. 5.26 as to Art. XX (g); 897, 898, nos. 5.38 and 5.39 as to Art. XX (b).

144 On this differentiation between the adoption of "extraterritorial" domestic laws on the one hand and their "extrajurisdictional" enforcement on the other hand see *Cheyne*, Environmental Unilateralism

As a result it may be stated that, if the "Tuna/Dolphin" decisions were transferred to Art. XXIII GPA, selective purchasing laws of the kind under scrutiny here would have to be considered as falling outside the scope of that provision and thus as being non-justifiable: They are intended to influence the respect for human rights outside the jurisdiction of the legislating country (*Tuna/Dolphin I*), and they may also, by means of economic pressure, force other countries to change their domestic human rights practice (*Tuna/Dolphin II*).

2. The Appellate Body in "Shrimps/Turtles"[145]

The Appellate Body, when discussing Art. XX GATT and its applicability to import restrictions that make market access of foreign goods dependent on the compliance by the exporting state with certain standards in the importing state, reversed[146] the earlier Panel decision.[147] The Panel had ruled that those kinds of import restrictions belonged to a category of measures that fall *ratione materiae* outside the scope of Art. XX GATT.[148] The Appellate Body's response seems at first sight unambiguous: after observing that conditioning access to a Member's domestic market on the compliance by the exporting state with certain policies unilaterally prescribed by the importing Member constitutes a "common aspect" of measures falling within the scope of Art. XX GATT,[149] the Appellate Body concluded that the categorical exclusion of such measures from the scope of that provision would render

> "most, if not all, of the specific exceptions of Art. XX inutile, a result abhorrent to the principles of interpretation we are bound to apply".[150]

In other words, the Appellate Body seems to have endorsed the applicability of Art. XX GATT to unilateral, coercive measures (in the case of selective purchasing, this would mean the applicability of Art. XXIII GPA). Their definite justification would then obviously depend on their respect for the various conditions spelled out in Art. XX GATT or Art. XXIII GPA.

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and the WTO/GATT System, in: Georgia Journal of International and Comparative Law, volume 24, no. 3 (1995), p. 433 (452, 453) and *Schoenbaum* (fn. 65), p. 280.

145 This case concerned a US import restriction on shrimp from foreign countries: US shrimpers were required to adopt a certain fishing technique to avoid the accidental taking and killing of sea turtles. A US law made access of foreign shrimp to the US market dependent on the adoption by the respective exporting state of a sea turtle protection program comparable to the one of the US. For details of this legislation, see *Shrimps/Turtles*, (fn. 139), nos. 3-8.

146 *Shrimps/Turtles*, no. 125 (stating an "error in legal interpretation").

147 *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WTO document WT/DS58/R of 15 May 1998.

148 Idem, nos. 7.50 and 7.62.

149 *Shrimps/Turtles*, no. 124.

150 Idem.

A bit further down its line of argumentation, however, the Appellate Body expresses itself in a way that may cast some doubt on this latter statement. In analyzing the Panel's approach of the chapeau, the Appellate Body says:

> "Perhaps the most conspicuous flaw in this measure's application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO. Section 609, in its application, is, in effect, an economic embargo which requires *all other exporting Members*, if they wish to exercise their GATT rights, to adopt *essentially the same* policy [...] as that applied to, and enforced on, United States domestic shrimp trawlers."[151] (emphasis in the original).

How is this statement to be understood? Does it not reverse what the Appellate Body has said before, namely by outlawing measures showing a "coercive effect"? A bit later, the same point seems to be made:

> "It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members."[152] (emphasis in the original).

How can this be reconciled with the quotation made above?[153] An interpretation of these decisive parts of the appellate ruling should start by determining those elements which the Appellate Body intended to stress in a particular way by putting them in *italics*. It can be observed that there are two different points that are stressed (and which lead to opposite results, as will be shown): on the one hand, the Appellate Body puts some weight on the term "require". If this is to be considered the Appellate Body's point of concern, it is clear that it is the coercive character of a measure in general that should be regarded as outlawed.

On the other hand, the Appellate Body stresses the terms "essentially the same" and "without". This again could mean that coercive measures ("require") are beyond any possibility of justification only if they serve to enforce the same standards as applied domestically "without" having regard for already existing standards abroad, which are not the same but might serve the overall policy goal just as effectively. Consequently, coercive measures would be WTO-conform if they were flexible enough both in design and in application to respect foreign stan-

151 *Shrimps/Turtles*, (fn. 139), no. 165.

152 Idem, no. 168.

153 See supra, text to fn. 150.

dards: coercion would only be exercised if those foreign standards were not apt to promote the policy goal at stake (be it the environment, be it human rights).

The latter interpretation is clearly supported by the manner in which the Appellate Body *italicized* the used terms. If it had wanted to outlaw coercion in general, why would it have stressed the words "same" and "without"? The italicizing of "require" would have been completely sufficient.

This view is in line with the further argumentation of the Appellate Body, which considered that the critical point about the application of the domestic law in question was its lack of flexibility: The law itself required US authorities, when assessing the comparability of foreign protection schemes with the domestic one, to take into account not only the US method of avoiding accidental killings of sea turtles, but also other methods existing abroad. In practice, however, as criticized by the Appellate Body, US authorities just checked whether there was a regulatory program requiring the same turtle protection method as adopted in the US.[154] This underlines that the critical issue was not the coercive character of the US measure in general, but its inflexibility as to the determination when coercion should be exercised and when it should not. In addition to that, the Appellate Body considered the regulatory scheme itself as justified under Art. XX GATT.[155] However, it was the scheme itself that contained the import ban. Would the Appellate Body have endorsed this legislation if it had wanted to exclude coercive measures in general from Art. XX GATT?

Another advantage of this interpretation is that a contradiction with the earlier statement[156] is avoided: the justification of coercive measures must not categorically be denied, but be made dependent on the specific circumstances of each case, on the measure's general design as well as on its actual application. This approach is also supported by the function of the chapeau: to exclude abuses[157] of the exceptions, *i.e.* inflexible, exaggerated applications. A categorical exclusion of the whole class of coercive measures, as equally advocated by the "Tuna/Dolphin II" Panel,[158] would empty Art. XX GATT of its purpose: how could the policy goals enumerated in Art. XX GATT/XXIII GPA be effectively promoted if one allowed just the adoption of extraterritorial laws, without at the same time equally providing for a possibility of enforcing them?[159]

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154 *Shrimps/Turtles*, no. 166.

155 Cf. idem, nos. 145 and 146.

156 Text to fn. 149 and 150.

157 Cf. *US Gasoline*, (fn. 77), text to footnote 44 (p. 22).

158 See supra, under E II.1.

159 Cf. the opposite conclusion by *Schoenbaum*, (fn. 65), p. 280: "Thus, the Tuna/Dolphin II panel's conclusion is essentially correct, and Article XX has *extraterritorial*, but not *extrajurisdictional* effect." (emphasis in the original). Cf. also supra, the text to fn. 144.

It could still be argued that the Appellate Body's differentiation between different standards a Member may take inside and outside its own territory[160] might be a sign that the Appellate Body based its reasoning on the principle of non-intervention. But under the proposed interpretation it is in no way intended to abolish that principle. The intention is to restrict its scope: coercion may be WTO-conform if the foreign country itself does not dispose of laws that are apt to efficiently protect the policy objective at stake.[161] Since the burden of proof lies with the Member invoking the justification, it is the latter that will have to prove the inaptitude of the foreign legislation. In case the foreign standards cannot be shown to be insufficient, it is the principle of non-intervention that prevails: a coercive measure would then be deemed not to be principally directed at the promotion of the Art. XX GATT policy objective but rather at the enforcement of the own domestic legislative scheme. This is a motivation that does not deserve justification under Arts. XX GATT/XXIII GPA.

This latter approach was the one followed by the Appellate Body: criticizing the rigid US application of the law in question, it stated:

> "The resulting situation is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles. This suggests to us that the measure, in its application, is more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers, even though many of those Members may be differently situated."[162]

Finally, this proposed interpretation of *Shrimps/Turtles* is equally advocated by the Committee on International Trade Law (ITLC) of the International Law Association (ILA) in its 2000 Conference Report.[163] In the section on "Trade-Related Environmental Measures" (TREMS), the ITLC states that:

> "The recent Appellate Body report on *Shrimps-Turtles* marks a substantial departure from previous GATT case-law in the field of environmental protection. In a nutshell, the Appellate Body report holds for the proposition that, contrary to the decision in *Tuna-Dolphin*, WTO Members can adopt unilateral environmental policies to the extent that the letter of Art. XX GATT is respected. Further, the Appellate Body understands Art. XX GATT as imposing a « balancing » test between on the one hand, the revealed national preference to protect the environment, and on the other, trade liberalization."[164]

160 See supra, text to fn. 152.

161 This policy objective has to be one that is internationally recognized, as basic human rights or, like in *Shrimps/Turtles*, the protection of endangered species. Cf. the discussion under E.III.1.c), infra.

162 *Shrimps/Turtles*, no. 169.

163 Fourth Report of the ITLC to the 69th Conference of the ILA in London (25-29 July 2000), available at: http://www.ila-hq.org/committees.html#ITL (access date: 3/5/2001).

The reference to unilateral measures "contrary" to *Tuna/Dolphin* indicates the ITLC's understanding of the Appellate report: trade measures producing repercussions abroad must not automatically and categorically be excluded from the scope of Art. XX GATT.

Transferring this Art. XX GATT jurisprudence to the GPA, it can be stated that WTO Members must be given the chance to show that coercive measures taken by them (like selective purchasing laws) are justified under Art. XXIII:2. The actual justification depends on the measure's respect of the disciplines contained in that provision. There is no such thing like entire classes of measures that fall outside the scope of Art. XXIII because of their coercive nature. On the contrary, each measure, in its design and its application, has to pass a "balancing test" examining whether a reasonable equilibrium has been found between one Member's right of invoking the exception and the other Members' right of market access for their goods and services.

3. Comment on the Applicability of Arts. XXIII GPA/XX GATT to Coercive Measures

There are two main arguments which may be advanced against the possibility of justifying coercive trade measures: the principle of sovereignty and the concept of international trade as a promoter of peace between nations.[165]

a) Sovereignty

When discussing trade measures conditioning market access, it is usually the sovereignty of the exporting country that is put forward against such practices.[166] But is it not equally the importing state's sovereignty that is at stake? Is it not part of state sovereignty to decide which goods/services are to be purchased and which are not wanted? Of course this sovereign right has been limited by Art. III GPA, commanding equal treatment of equal things. But the existence of the exception under Art. XXIII GPA shows that the importing Members' sovereignty has not been abolished. This sovereignty is exercised effectively by means of selective purchasing laws. If Art. III may be considered as a possibility to limit a Member's sovereignty, it should equally be made sure that the same Member is given the chance to defend any non-abusive exercise of its sovereignty. To exclude the entire class of coercive measures *ratione materiae* from a possible justification would mean to favor one-sidedly the sovereignty of the exporting state to the detriment of the sovereignty of the importing state.

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164 Idem, p. 11, no. 26.

165 Cf. *Kant*, "Zum ewigen Frieden", reprinted in 1996 by Reclam; see infra, under 3.b).

166 Cf. supra, under E.II. (concerning Art. 2:7 UN Charter).

In addition to that, it is striking that especially non-democratic states criticize as a violation of their sovereignty any foreign reaction relating to their non-respect of human rights. This position is, at least from a standpoint focusing on individual self-determination, ill-founded: sovereignty must not be considered a warrant for a government to commit, without being bothered by other states, severe human rights violations in order to stay in power. Sovereignty should be inalienably linked with the expressed will of the governed individuals: only those governments should be able to invoke "their" sovereignty that have been chosen to be representatives of their peoples in democratic elections. Sovereignty should be regarded as originating in the individuals and not in any government whatsoever. On the condition that no commonly agreed-upon basic individual rights are violated, a people confers its sovereignty on a government for a limited period of time. A government that exercises power without having been authorized to do so by the electorate has never been vested with the "sovereignty" it claims on the international plane.

The approach of considering sovereignty as originating not in a state's government but in its citizens is founded on the conviction of human dignity, which excludes all violations of basic human rights, even if approved of by a majority. It is only this approach that may prevent abuses of power by the respective governments. The "Tuna/Dolphin" Panels, by categorically excluding from the scope of justification measures with coercive effects, adopted the same inflexible and ill-founded principle of non-intervention as it has always been fiercely defended by dictatorships fearing the end of their illegitimate powers.[167]

Finally, this rigid understanding of non-intervention seems to be contrary to the spirit of the WTO Agreements that are, in their objectives, centered around the welfare of the individual, as made clear by the preamble to the WTO Agreement, where the Parties recognize that

> "[...] their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, [...]"

The importance of individual rights is likewise underlined in the preamble of the TRIPS Agreement, recognizing that

> "intellectual property rights are private rights;".

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167 *Nota bene* that *Tuna/Dolphin* did not concern human rights but environmental protection. However, just like human dignity should limit government power, state sovereignty should not be an excuse for polluting the global commons. Cf. *Petersmann,* (fn. 126), p. 75, who proposes to interpret Art. XX GATT as covering unilateral measures if these are necessary to protect the domestic environment against injury "caused by pollution of the global commons or by other kinds of transnational pollution.".

An agreement that lays so much emphasis on the individual cannot be interpreted seperately from internationally binding human rights law. The WTO has been created for the purpose of trade liberalization, but this cannot mean that it constitutes a closed system which need not be concerned about human rights. On the contrary, human rights may be seen as becoming an essential element in WTO law.[168]

b) Free Trade as a Promoter of Peace between Nations

The German philosopher *Immanuel Kant* expressed, at the end of the 18th century, the conviction that wars are incompatible with the spirit of trade ("Handelsgeist"), which is, according to *Kant*, an expression of the ever-prevailing wish of human beings to accumulate wealth: in the long term, it is the mutual self-interest ("wechselseitiger Eigennutz"), deeply rooted in human nature, that will motivate governments to avoid the interruption of mutually beneficial trade relations through war.[169] If, however, governments do not act accordingly to this long-term self-interest but give in to short-term protectionist desires, the result will be mutual distrust between the affected countries and maybe even war: In a 1944 speech *Harry Hawkins*, at that time Director of the Office of Economic Affairs of the US Department of State, said:

> "Trade conflict breeds noncooperation, suspicion, bitterness. Nations which are economic enemies are not likely to remain political friends for long."[170]

The positive impact of free trade on the relations between nations has thus been recognized for a long time past. As the economist *Paul Samuelson* put it:

> "[...] there is essentially only one argument for free trade or freer trade, but it is an exceedingly powerful one, namely: Free trade promotes a mutually profitable division of labor, greatly enhances the potential real national product of all nations, and makes possible higher standards of living all over the globe."[171]

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168 Cf. *Petersmann*, "Human Rights and International Economic Law in the 21st Century - Need for Clarifying their Interrelationships" (to be published in: Journal of International Economic Law vol. 4, no. 1, 2001), who advocates, as a consequence of the universal recognition of human rights (p. 1), the promotion of "maximum equal liberty for the personal development of every individual" (p. 1) through the WTO and who considers economic liberties as "a necessary complement of human rights" (idem).

169 Cf. *Kant*, (fn. 165), p. 33 under 3, stressing that governments' motive power to do so will not be morality but pure self-interest. I am grateful to my colleague, *Stéphane Bloetzer*, for advising me on this.

170 *Hawkins*, quoted by *Jackson*, The World Trading System, 2nd edition 1997, p. 13, footnote 15.

171 *Samuelson*, quoted by *Jackson*, (fn. 170), p. 12, footnote 10. *Nota bene* that it is *David Ricardo's* Theory of Comparative Advantage (in his book "The Principles of Political Economy", published in 1817) that continues to be the basis of contemporary international trade theory.

The absence of free trade during the 1930ies has even been blamed for the outbreak of World War II: the above-quoted statement by *Hawkins* was obviously motivated by the fresh impression of that war, and *Jackson* refers to a

> "[...] view that the mistakes made concerning economic policy during the interwar period (1920 to 1940) were a major cause of the disasters that led to World War II."[172]

With respect to human rights-based selective purchasing, it is crucial to decide whether these positive results of free(r) trade should lead to the conclusion that selective purchasing is counterproductive to the peaceful coexistence of nations and should thus not merit the possibility of justification under Art. XXIII.

As can be inferred from the above-quoted statements, the reason for trade liberalization is its positive impact on individual welfare. Economic cooperation instead of confrontation is considered the optimal way of achieving a mutually beneficial division of labor. This approach makes sense as long as the result is indeed positive for all parties involved. In case of products that may be purchased by governments at very low prices because they have been manufactured by slave labor or by means of other severe human rights violations, the result looks considerably different: there still is a positive economic impact for the purchasing government or the selling private firm, but this advantage is based on production methods that do not show any respect for human dignity. Here, the great advantage of trade liberalization, the promotion of international peace, is just not realised: what is the use of, and especially, the moral justification for the maintenance of "good" economic relations with a government that does not respect its own citizens? Can a situation where there is no war between nations, but where the citizens of one country are treated by their own government as if they were enemies, be called "international peace", which deserves protection from any attempts of change? Can the government practice of purchasing *e.g.* slave labor products (because they are the least expensive) be considered as being *"mutually profitable"* or as making possible *"higher standards of living all over the globe"*, as *Samuelson*[173] puts it? The actual result of procurement practices that are sensitive only to economic considerations will be the cementation of human rights violations, because the responsible governments will not feel the slightest incentive to cease their practices.[174] On the contrary, they will rather feel encouraged to produce goods in a way that secures low prices and thus high competitiveness on the procurement markets, the financial advantage of which will be felt in other countries, but will be paid by domestic citizens. Should this situation be simply accepted by referring to the pos-

172 *Jackson*, p. 36, footnote 40, citing *Cooper* and naming especially the Great Depression and the harsh reparations policy toward Germany.

173 See supra, text to fn. 171 (emphasis in above quotation added).

174 As to the question of alternative methods of forcing foreign governments to respect human rights, see infra, under E.III.2.

sible mutual distrust on the inter-state level (as a consequence of sanctions)? Or does this not give rise to the uneasy feeling that democratic societies hide behind this mutual distrust formula to continue profitting from low prices?

It is submitted that trade liberalization is, in this specific case, unable to ensure the global improvement of living conditions for which it is generally (and rightly so) praised. The relation with a human rights violating country cannot be considered as the optimal realisation of international peace that would merit absolute protection from selective purchasing. The Myanmar legislation, for example, cannot be seen as a threat to international *peace* and *mutual* welfare, because those latter do simply not exist. The fact that selective purchasing affects negatively the economic freedom of some firms willing to submit tenders justifies its subjection to detailed scrutiny under Art. XXIII. It does not, however, justify its exclusion from any possibility of justification. Since it is the very own objective of liberal international trade to improve the individual well-being on a global scale, it cannot ignore severe violations of individual freedoms by demanding WTO Members to respect those violations like they respect domestic policies of democratic countries.

Finally, it is beyond serious doubt that sanctions will lead to a deterioration of the relation toward the human rights violating government. Despite this fact, it seems not very probable that a government will risk war for the sole reason of economic sanctions. Neither Myanmar nor the Iraq have sought to shake off the sanctions imposed on them by means of military action. The risk of aggravating things through a military defeat is usually considered to outweigh economic hardship caused by sanctions. If governments do wage war, like Serbia, it is often for predominant political reasons, either to reunite public opinion against a common enemy or to conquer foreign territory to satisfy nationalist feelings among the domestic population. As to the causes of World War II, it is true that the economic crisis did have its part, but the importance of other reasons should not be underestimated.[175] Would *Hitler* have been possible without the Versailles Treaty and without the deeply rooted rejection by most Germans of the Republic and its representatives, who were blamed for the military defeat in World War I? The US, the UK and France were likewise hit by the Great Depression, but they, being stable democracies not oppressed by the political and especially psychological consequences of a military defeat, did not succumb to anti-democratic ideologies. Finally, it is undisputed that Hitler did not wage war against any country because

175 Cf. *Schöllgen*, Geschichte der Weltpolitik von Hitler bis Gorbatschow: 1941-1991, (1996), who, on pp. 12, 13, explains the importance of the mainly political concern that was predominant in Germany after 1919 and that helped Hitler accede to power: the Versailles Treaty, which hurt economic realities much less than patriotic feelings, allotting large parts of the national territory to the surrounding states; taking away all the colonies that were, at that time, considered a symbol of equality with France and Britain, and thus an object of enormous pride; and limiting the military to 100,000 men only, with the prohibition to station any forces in the Rhineland, *i.e.* on the own territory.

of economic pressure on Germany. Even the strict reparations policy, which did weigh heavily on the economy, did not incite German public opinion to favor a new war.[176]

Summing up this latter issue, the positive role of free trade for bringing peoples together is undisputable. This is also illustrated by the success of the EC Treaty: war among EU Members appears completely unimaginable today. On the other hand, it does not seem probable, either, that a human rights violating government will actually opt for a military aggression if hit by sanctions under selective purchasing practices. In addition to that, those sanctions would be human rights-specific and therefore not comparable in their scope to the general imposition of prohibitive tariffs on all kinds of products even from democratic countries during the Great Depression.

As a result, it may be stated that neither the concept of sovereignty nor the positive role of free trade for international peace represent valid reasons for an exclusion, *ratione materiae*, of coercive procurement practices from Art. XXIII GPA.

Consequently, the next (and final) step in this discussion concerns the actual justification of selective purchasing under Art. XXIII.[177]

III. The Application of Art. XXIII:2 GPA to Selective Purchasing Laws

Since Art. XXIII:2 GPA shows the same structure as Art. XX GATT (*i.e.* an introductory clause/chapeau and individual exceptions), the Appellate Body's "two-tiered analysis"[178] of Art. XX GATT is equally valid in the GPA context: first it has to be checked if the selective purchasing law in question falls, in its general design, under one of the exceptions listed in Art. XXIII; then the specific application of that law is to be tested against the chapeau.

176 Cf. *Jäckel*, Das deutsche Jahrhundert, 1996, pp. 186/187: "Die Deutschen, wenn man sie überhaupt so pauschal zusammenfassen kann, wollten nach allem, was wir wissen, in den dreißiger Jahren keinen Krieg. Die Erinnerung an den letzten war noch zu frisch."

177 Since this article does not focus in detail on any specific procurement legislation but discusses the problem in general terms, an analysis of Art. XXIII is necessarily limited to some common remarks. As the Appellate Body reports on *US Gasoline* and *Shrimps/Turtles* show, the ultimate assessment of a measure's compatibility with Art. XX GATT depends largely on its specific regulatory design and on its application to the individual case.

178 See *US Gasoline*, (fn. 77), text to footnote 43 (p. 22): "The analysis is, in other words, two-tiered: first, provisional justification [...] of the measure under XX (g); second, further appraisal of the same measure under the introductory clauses of Article XX. The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied."

1. Does Selective Purchasing Fall under One of the Exceptions in Art. XXIII:2?

Human rights-based selective purchasing laws could fall under three of the exceptions mentioned in Art. XXIII, namely as measures

a) "relating to the products or services of prison labour",

b) or "necessary to protect human, [...] life or health",

c) or "necessary to protect public morals, order or safety".

In the following, the most important problems of applying these exceptions to selective purchasing are briefly outlined.

a) Products or Services of "Prison Labour"

Can this exception be applied to cases of slave labor, or was it just intended to cover the products of regular prisoners? In other words, was the provision created out of humanitarian concern or rather out of the fear of unfair competition? In *Tuna/Dolphin II*, the EC argued as follows:[179]

> "[...] Likewise, the exception in paragraph (e) on the products of prison labour was not intended to combat prison labour practices in other contracting parties. There was very little that was humanitarian about this type of provision on prison labour, as was clear from the terms of the commercial treaty concluded in 1936 between the United States and Switzerland and cited by the United States. This treaty permitted trade restrictions for humanitarian reasons *in addition* to those relating to the products of prison labour. Many, if not all, contracting parties operated systems of prison labour, not necessarily forced or hard labour. Contracting parties simply wanted to be able, if necessary, to protect themselves against the 'unfair competition' resulting from the low-cost labour employed in the production of prison goods."[180] (emphasis in the original)

This would obviously exclude the application of the prison labor exception to human rights-related measures. The Panel in its report did not address the issue. Is it possible to argue that the universality of human rights leads to an obligation of WTO Members to interpret this exception as incorporating humanitarian considerations, even if that was not the intention of the GATT 1947 Contracting Parties? On the one hand, this seems to be contrary to the *in dubio mitius* traditional rule of treaty interpretation, according to which, in case of doubt, the inter-

179 The EC's argumentation concerned Art. XX (e) GATT, which admits exceptions (from GATT disciplines) "relating to the products of prison labour".

180 33 I.L.M. 1994, 839 (861, no. 3.35).

preter has to choose that alternative which takes away as little as possible of the Parties' sovereignty. On the other hand, the GPA was agreed upon in 1994, when the Parties' attitude toward the relationship between human rights and sovereignty might have been significantly different, as shown by the fact that a majority of the GPA Parties was (in their function as NATO allies) ready to wage war against sovereign Serbia in order to stop severe human rights violations occurring in Kosovo.

b) The Protection of "Human Life or Health"

This time it is the "Tuna/Dolphin I" Panel that illustrates the problem with this exception.[181] Referring to the drafting history of that provision, it stated:

> "[...] Thus, the record indicates that the concerns of the drafters of Art. XX (b) focused on the use of *sanitary* measures to safeguard life or health of humans, [...]"[182] (emphasis added).

Again, the exception might not have been created in 1947 with a human rights objective. The same considerations as above (prison labor) apply. In addition to that, does the reference to Art. XX (b) GATT in the preamble of the SPS Agreement mean that Art. XX (b) GATT deals exclusively with sanitary measures and does not cover human rights objectives?[183] And would the same reasoning apply to the identical exception under Art. XXIII GPA, which is not mentioned in the SPS preamble?

c) The Protection of "Public Morals, Order or Safety"

There exists some literature on this exception. As to the almost identical provision under Art. XX GATT, both a narrow and a wide interpretation have been proposed: the narrow one would restrict the applicability of the provision to the "core" meaning of morals, *i.e.* the import prohibition of obscene, indecent and pornographic movies and literature.[184] The wide approach would also apply this exception to trade measures seeking to protect internationally binding human rights norms.[185] As to the GPA, *McCrudden* has advocated the incorporation of

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181 The Panel's statement concerned Art. XX (b) GATT, which admits exceptions "necessary to protect human,[...] life or health;".

182 I.L.M. 1991, 1594 (1620, no. 5.26 *in fine).*

183 This part of the preamble reads: "Desiring therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary [...] measures, in particular the provisions of Article XX (b);".

184 In this sense *Feddersen*, Focussing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX (a) and 'Conventional' Rules of Interpretation, Minnesota Journal of Global Trade 1998, p. 75 (115).

human rights concerns into the public order exception that is wider than the term public morals and encompasses "basic values of a domestic legal system", be they moral, political or economic in nature.[186]

Considering that the GPA is part of international law, it is submitted that the Parties' obligation to have respect for internationally binding human rights is to be realized through a human rights-friendly interpretation of Art. XXIII GPA.[187] The universality of human rights leads to the conclusion that the latter make up those global values which form the international public order. The linkage between qualifying conditions for participation (in tendering procedures) and the promotion of internationally recognized rights (instead of purely regional values) serves as a safeguard against protectionist abuse. Obviously, it cannot be excluded that a procurement law, even if aimed at the furtherance of global values, may factually impose a higher burden of compliance on foreign bidders: possibly domestic competitors have already been complying with certain production requirements for a long time, whereas foreign tenderers might make expensive adjustments only later and in order to be able to take part in the bidding. If this possibility of factual discrimination is to be completely excluded, the promotion of any values by any government is rendered illusive and must be abandoned. This leads to the issue of how the function of the state is to be understood: should the latter be neutral with respect to any values whatsoever, or should it promote certain values that have been agreed upon by the international community, with the risk of possibly placing foreign bidders at a disadvantage?

It is submitted that Art. XXIII GPA is construed in a way that may serve both interests. People around the globe share certain values, which they expect to be promoted by their governments that are supposed to represent them. Therefore, human rights-based selective purchasing laws should in principle be covered by the public morals or public order exception. However, these laws have to be closely scrutinized, making sure that liberal trade is not restricted in an abusive way: The chapeau provides for safeguards as to the implementation of the measure. If Art. XXIII is correctly applied, possible protectionist abuses, even if just factual, can be made evident. A total exclusion of the risk of abuse is impossible, but this is the price a society based on a multitude of sometimes conflicting values has to pay.

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185 In that sense *Charnovitz*, The Moral Exception in Trade Policy, Virginia Journal of International Law 1998, p. 689 (742: "[...] the WTO should use international human rights law to ascribe meaning to the vague terms of article XX (a). Thus, the moral exception could validate trade actions based on international norms while rejecting trade actions based on nationalistic aims.").

186 *McCrudden*, (fn. 5), p. 39/40 (above quotation from p. 40), who points out the danger of "de-legalization" (p. 41) of international trade relations and proposes, like *Charnovitz*, to base public order exceptions on internationally binding human rights, p. 41.

187 Reference is made to the argumentation under D.II.3.c) (6).

2. The Necessity Requirement

According to a long established panel jurisprudence, a measure can only be considered "necessary" if there are no alternative measures consistent with the GATT or less inconsistent with it.[188] As to selective purchasing laws, the question arises whether the furtherance of human rights cannot be realized through alternative means. This concerns the desirability of sanctions *per se*.[189] As the WTO is an instrument to realize individual economic freedom, any measures that avoid the limitation of that freedom might be preferable to selective purchasing, which severely limits the freedom of those firms that wish to submit a tender but are excluded because of their relations with human rights violating governments. Would it not be feasible to protect human rights abroad without limiting the economic freedoms of individual traders? For instance through making development aid dependent on the respect of human rights, or by suspending the participation of human rights infringing governments in certain international fora?[190]

That approach is focused on the personal freedom of those traders hit by selective purchasing. However, the personal freedom of traders is not the only liberty at stake here. The larger part of a population (*i.e.* those people who are not affected by governmental procurement practices because they are not engaged in that business) might be opposed to the purchase of products produced in a manner violating basic human rights, especially when this purchase is carried out by their own government that has been elected to represent the electorate and their values. Those are, however, not only "Western" values, but internationally binding ones that are based on the dignity of man. As to those basic human rights, there exists today, in "Western" societies, a broad consensus that they must absolutely be respected. Selective purchasing is the expression of this deep conviction of a majority of citizens in Western countries. They are not only concerned about the human rights situation abroad, but equally about their personal contribution to its improvement. It is this wish to personally do something about it that may lead a majority of a population to reject the purchase of goods produced in violation of those basic freedoms that are considered, of course in their country, as an absolute minimum of human existence. This wish of a personal contribution is not satisfied by the reference to alternative means. It is much rather satisfied if the political representatives refrain from purchasing goods produced in violation of international standards. Alternative means may respect the freedom to trade of the tenderers; they ignore the wish of the large "non-trading" part of the population not to engage in business that is considered immoral. Consequently, the personal freedom to trade is confronted with the personal freedom to decide independently of

188 See, *e.g.*, report of the Panel in *United States - Standards for Reformulated and Conventional Gasoline*, in: 35 I.L.M. 1996, 274 (297, nos. 6.21 and 6.25).

189 See supra, under D.II.3.c) (4).

190 I am grateful to Professor *Ernst-Ulrich Petersmann* for drawing my attention to this point.

economic considerations, *i.e.* the general personal freedom ("allgemeine Handlungsfreiheit"). How is this clash of interests and rights to be addressed? Any reference to majority opinions should be avoided, because inalienable personal freedoms must not depend on majorities. Is the wish to exclude certain products from a market less legitimate than the wish to trade those products, because sanctions might eventually not lead to the actual cessation of human rights violations abroad? On the other hand, the personal freedom to trade has to meet certain ethical requirements that exclude the utilization of inhumane production methods abroad for the economic well-being at home. This leads to the question whether there is any ranking of these conflicting freedoms. It seems obvious that the right to life, health and physical freedom should prevail over economic liberty. But is this still true when, as in the case of selective purchasing, a waiver of the right to free trade does not necessarily improve the situation of the oppressed people abroad but just serves as an appeasement of domestic public opinion's bad conscience?

In response to this, it is submitted that human dignity limits the exercise of economic freedom to humane production methods, the non-respect of which constitutes an abuse of personal economic liberty that does not deserve any protection. Since human dignity is an absolute value, this is true independently of the actual success rate of sanctions.

3. The Chapeau – the Application of the Measure

The ultimate justification of selective purchasing laws would depend on their actual implementation in each individual case. As already stated, the examination of the conditions contained in the chapeau – arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade – is only possible in the presence of a concrete measure. Here, the Appellate Body reports *US Gasoline* and *Shrimps/Turtles* provide for some important guidelines as to the interpretation of these elements. One of the arising problems may be the choice of the target state: it seems probable that a procurement practice that excludes only products from certain countries but not from others, where the same human rights are violated, would not pass WTO scrutiny. For example, the banning of products from Myanmar (or of industries with Myanmar contacts) would seem to be an arbitrary discrimination *vis-à-vis* certain products from the PR China, where worker rights are equally infringed.[191]

[191] See supra, fn. 125.

F. Conclusion

Summing up, this contribution attempts to show why, at least in the area of government procurement, a departure from the traditional definition of "like" product or service could be considered. Instead of only distinguishing products/services according to their physical properties, the nature of public procurement, *i.e.* the need for a democratically elected government to respect all of the commonly shared values of its citizens, commands the regard for those commonly shared values when it comes to deciding which company can qualify as a tenderer. In this respect, the consumer under the GPA is less free in his purchase decision than the consumer under multilateral WTO law, who does not decide on behalf of a multitude of others.

Alternatively, it should at least be admitted to justify selective purchasing laws under Art. XXIII. The justificatory approach has the practical advantage of offering a product distinction that is easier to handle: products are only unlike if they are physically different. However, the problem of determining whether certain PPMs violate basic human or labor rights would remain: only those restrictions could be justified that are based on the violation through certain PPMs of internationally recognized and binding standards. In the extreme case of forced labor as practised in Myanmar this distinction would not present much of a problem. But how would certain forms of child labor have to be assessed, which exploit the cheap working power of minors, but might at the same time be their only chance of survival? Would this fall under the internationally outlawed practice of slavery, or would it just be a difference in minimum age and minimum wage, where no international consensus exists? The justificatory approach does not avoid this enormous practical difficulty of drawing a line between internationally recognized standards and those representing certain national preferences only.

The above-presented approach of re-defining "likeness" has a principle advantage: If it is assumed that governments, as representatives of their electorates, should in their procurement decisions regard all values commonly shared by the peoples they represent, it is difficult to explain why a procurement decision that does respect these values is considered illegal under the GPA and can only be saved under the exception of Art. XXIII.

As to the question posed in the title of this contribution, the answer is "yes, but ...". The proposed departure from the traditional "like product" notion or at least the possibility of justification under Art. XXIII would enable governments to encourage human rights-respecting production processes abroad. On the other hand, the danger of protectionism is evident. Therefore, the distinction of products or services according to their PPMs must not be made on the basis of local values. The invoked human rights must be internationally recognized to prevent the abuse of, for instance, certain Western labor standards *vis-à-vis* competitive

products from developing countries. The same reasoning applies to Art. XXIII: only such coercive measures may be justified that serve the promotion of internationally recognized standards. Neither the principle of state sovereignty nor the function of liberal trade as a promoter of peace between nations can be advanced to exclude, *ratione materiae*, selective purchasing laws from the scope of Art. XXIII: Only those governments that respect the fundamental rights of their own citizens should be admitted to rely on the principle of non-intervention. If, under "Western" circumstances, free trade can be considered a promoter of peace, the same is not necessarily true for the purchase by Western governments of products or services produced in disregard of basic human rights: the "peaceful" relations that free trade is praised to establish do exist, but only toward the respective humane rights-violating governments that will feel encouraged to continue their inhuman practices. In other words, the major purpose of peace, i.e. the well-being of the individual, is just not attained by the strict rejection of any sanctions.

Finally, when examining the necessity of selective purchasing, the economic freedom of traders should be considered as being limited by human dignity.