GOVERNMENT PROCUREMENT AGREEMENT UNDER WTO: ITS JURISDICTION TO ELIMINATE CRIMINALITY IN PUBLIC PURCHASING

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1. INTRODUCTION:

In the modern time governments allocate a considerable portion of their annual budget to procure work/services/goods to run their affairs as well as to ensure welfare of the citizens. For example, government money is spent on purchasing items ranging from paper-clips to equipments, arms and ammunitions. To bring discipline in government expenditure and to ensure value for money a legal regime has gradually been developed. This is known as "law of public procurement" the underlying purpose of which is to bring efficacy in spending public funds to procure goods/works/services.

Since public procurement involves significant trading and claims a considerable proportion of public fund for that purpose, the framers of "World Trade Organization" (WTO) at the time of its formation negotiated a plurilateral agreement, namely, "Agreement on Government Procurement", thereby to develop a legal regime in order to bring this sector

of trade under the process of free trade as well as to ensure probity and transparency in public purchasing.

Like other sectors of trade public procurement, in general, is infested with corrupt practices.[1] On an average 10 to 15 percent of the total fund allocated for public procurement is siphoned off because of corruption. It is well established principle that the procurement regime cannot attain its underlying object unless and until corruption is eliminated from procurement procedure.[2] Therefore, the procurement regime evolved under WTO, like other developed procurement regimes, has enunciated some machineries to drive out corrupt tenderers/firms at the very early stage of the award procedure.

If this stance of the "Agreement on Government Procurement" against corruption is considered in the larger canvas of WTO in terms of its approach towards criminality in international trade, this is somewhat incongruous with the stance of WTO. This may be noted here that WTO does not squarely address corruption in trade and commerce.

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[1] In simple terms corruption in public purchasing refers to certain circumstances where officials responsible in making final award are influenced by some non-legitimate interests[1] in taking decision which are extraneous to public procurement policy. Transparency International (TI) Source Book defines 'corruption' as involving behaviour '. . .on the part of officials in the public sector, whether politicians or civil servants, in which they improperly and unlawfully enrich themselves, or those close to them, by the misuse of the power entrusted to them.' See Chapter 1 of TI Source Book accessible at http://www.transparency.org. (Visited on 28-03-08). Paragraph 1.15 of the Procurement Guidelines of the World Bank states: 'corrupt practice' means the offering, giving, receiving, or soliciting of any thing of value to influence the action of a public official in the procurement process or in contract execution; [Para 1.15 (A)(I)] and 'fraudulent practice' means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the Borrower, and includes collusive practices among bidders (prior to or after bid submission) designed to establish bid prices at artificial, non-competitive levels and to deprive the Borrower of the benefits of free and open competition. [Para 1.15 (A) (II)]. The factors that induce corrupt acts are referred to as 'non-legitimate interests'. Instances may be the awarding of contract to a firm which has given bribe or or in which the procurement officials or the political executives have vested interests Or which is a patron of the ruling party or is owned by its patrons or which located in a area that voted for the party in power. Non-legitimate interests may also include the situations where the suppliers through collusive practices make sure that the work is spread around or secure higher price or where a firm makes false declaration to obtain the contract or to take any undue benefit in relation to the contract already awarded. For more on the same point see Article 45 of the Directive 2004/18/EC Made by the European Parliament and the Council dated 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; Article 6 and 15 of UNCITRAL Model Law on Procurement of Goods, Construction and Services, with Guide to Enactment (1994) see also SUSAN ROSE-ACKERMAN, 'Causes, Consequences, and Reform' (1999) pp. 103 105; A. Shleifer and R.W. Vishny, "Corruption" (1993) Quarterly Journal of Economics 599.

[2] Corruption distorts the natural pattern of trade transaction and slackens the growth of economy. In his empirical analysis Mauro demonstrates by taking examples of countries like Bangladesh that level of tapism and cumbersome regulation in public administration reduce investment in the economy thereby lowering down its growth: P. Mauro, "Corruption and Growth" (1995) Quarterly Journal of Economics 683; see also John Linarelli; 'Corruption in Developing Countries and in Countries in Transition: Legal and Economic Perspectives' p. 229 published in S. Arrowsmith and A.Davies (eds.), Public Procurement Global Revolution (1998). The World Bank has also recognized this statement while launching the Anti-corruption program: http://www1.worldbank.org/publicsector/anticorrupt/corgrowth.htm visited on 10 April, 2009.

In this context, this article raises a question as to how far this is legally justifiable for "Agreement on Government Procurement" to requires its signatory state parties to fight against corruption in the field of government procurement. To respond the question this article, apart from legal justification to safeguard economic and commercial interests of the stakeholders, has considered organic charter of the WTO and the "Agreement on Government Procurement". The conclusion as reached by the article suggests that there is ample legal as well as commercial justification for "Agreement on Government Procurement" to be used to wipe out criminality in public procurement. But this article notes a causion** to the state parties to keep close surveillance over the application of this non-economic factor for minimising the possibility of its being used for protectionist purpose.

This article in sections 2.1-2.2 presents a short biography of WTO. In sections 3.1-3.4 this article revisits "Agreement on Government Procurement" and underpins the apparent disparity between WTO and "Agreement on Government Procurement" in terms of espousing measures to fight against corruption in trade. This article finally records legal justifications in sections 4.1-4.2 which afford legitimacy to the scope of the "Agreement on Government Procurement" to stop corruption to take place in public procurement.

2. WORLD TRADE ORGANIZATION(WTO):

2.1 ORIGIN AND DEVELOPMENT:

To the end of the World War II political thinkers had the realisation that economic problem after the First World I was partly responsible for another world war. So the victorian nations had strong political commitment to shape economic institutions so as to avoid another world war. In this context in 1944 the Bretton Woods Conference was held which launched the World Bank and the International Monetary Fund (IMF). Another

complementary institution for trade, namely, International Trade Organization (ITO), was added although it was replaced by General Agreement on Tariffs and Trade (GATT), 1947. These three international economic institutions,[3] commonly referred as "the Bretton Woods System"in the late 1960's were in the forefront for promoting trade liberalization in the post war world.[4]

GATT, it is to be noted, was an international treaty without any effective institutional framework to administer the process of trade liberlization. Hence it proved to be insufficient to support the Bretton Woods system to broaden the periphery of free trade area[5] and this paved the way for a new organization known as "World Trade Organization" (often referred as the missing third leg of Bretton Woods System).

*In early 1990, Canada put forth the first official government-tabled proposal for a new institution, which it called the 'World Trade Organization". Later on, in December, 1991, Mr. Arthur Dunkel, Director General of GATT , submitted a draft which included a proposal for a charter for such organization and some treaties to be annexed thereto. Settlement was reach on the draft in 1993 and this draft after being finalised was signed at a ministerial meeting in Marrakesh, Morocco, on 15 April, 1994 which formally brought into existence the World Trade Organization (WTO) functional from 1 January, 1995.[6]

[3] These three institutions were supported by a number of institutional/regional organization including the Organization for Economic Cooperation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), and some important regional systems: See John H. Jackson world trading system : law and policy of international economic relations 2nd ed. (1997) Pp. 33-35.

[4] Jackson supra note 3, Pp. 7. 35-37. However, this is not historically correct to state that the exponents of the Bretton Woods system introduced the notion of free trade. The concept of free trade finds its origin in the mind of the scholars of sixteenth/seventeenth century: See Jackson supra note 3, p.14.

[5] As a result, several multilateral trade negotiations were held which resulted in several protocols to make the GATT more effective. Two multilateral trade negotiations need particular reference namely, the Tokyo Round (1973) and Uruguay Round (1986). These last mentioned two negotiations made possible to set up the WTO.

[6] For a good survey on the background accounts of the WTO see Jackson Supra note 3, Pp. 35-47.

2.2 SCHEME OF WTO:

*The agreement establishing the WTO signed at Marrakesh (hereinafter referred to as "Marrakesh Agreement") is an umbrella typed treaty. It annexes four very important annexures containing all the negotiated texts of the Uruguay Round. Annex 1 contains "multilateral agreements," and these are mandatory for all WTO member states to adopt.[7] All members are also required to accept Annex 2 (the Dispute Settlement Understanding) and Annex 3 (the Trade Policy Review Mechanism). Annex 4 includes "plurilateral agreements" which do not oblige all WTO members ifso facto unless specifically adopted by them. One such plurilateral agreements is the "Agreement on Government Procurement".[8]

3. GOVERNMENT PROCUREMENT AGREEMENT UNDER WTO:

3.1 ORIGIN:

Though Government is the single largest buyer in the domestic market and it consumes 10-15 percent of the goods/services produced in an economy,[9] this sector of trade has not been prioritised by the policy makers for free trade.[10] However, as it appears from the record, in 1979 the first measure was found to have been taken to limit the restrictive procuring practice by the government and its functionaries in the form of the separate "GATT" Agreement on Government Procurement entered into at the end of the Tokyo round of

[7] This should be noted that Annex 1 is divided into three parts that correspond to the three major basic agreements, namely, goods (GATT 1994 and its related agreements and other texts); services (GATS and its annexes); and trade-related aspects of intellectual property rights.
[8] Jackson supra note 3, P. 48.
[9] Rege, "Transparency in Government Procurement - Issues of Concern and Interest to Developing Countries" 35 *Journal of World Trade* 490 (2001).
[10] The government procurement was largely excluded from the general obligations (MFN under Article I and national treatment under Article III) enshrined by the GATT of 1947 and was made subject to only a soft obligation of "fair and equitable treatment" under Article XVII.[10] This trend has largely been followed in The Multilateral treaties annexed to the Marrakesh Agreement such as GATT and GATS[10] which apply to all WTO members: See the Marrakesh AgreementArt. 2 (2) accessible at [10] http://www.wto.org.

GATT negotiations.[11] This Agreement was afterwards replaced by a new Agreement on Government Procurement (in short "GPA"). This new agreement was concluded as part of the Uruguay Round multilateral trade negotiations on 15 December 1993, and was signed in Marrakesh in April, 1994 and it entered into force in January, 1996.[12] GPA is, at present, the only Agreement administered by the WTO to regulate government procurement.[13]

3.2 EXCLUSIONARY RULE AND PRESCRIPTION OF GPA:

This is so visible from the preamble of the GPA that one of its basic purposes is to foster free trade among the member states and hence GPA adheres to the principle of non-discrimination — MFN and national treatment[14] to be observed by the entities in each stage of the award. Further, in order to make the entire procedure transparent the GPA prescribes detail rules to be observed in awarding contracts by the procuring authority. GPA, amongst others, prescribes some criteria to determine the qualification of the suppliers before they are given access to the award procedure. To put it differently the GPA entails the procuring authorities to exclude the suppliers from participating in the public contracts if they are found to have been engaged in criminal[15] activities. Article VIII (H) of GPA by way of example states the grounds for exclusion of the suppliers. It runs as follows:

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

[11] [11] Annet Blank and Gabrielle Marceau; 'A History of Multilateral Negotiations on Procurement: From ITO to WTO' p. 48 published in Law and Policy in *Public Purchasing: the WTO Agreement on Government Procurement* (1997) edited by B.M.Hoekman and P.C.Mavroidis.

[12] Christopher McCrudden: "International Economic Law and The Pursued 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* p. 13 (1999).

[13] Professor Sue Arrowsmith: "Towards an Agreement on Transparency in Government Procurement: Paper delivered to the Geneva Institute of Graduate Studies, November 1997 pp. 2-3.

[14] See GPA Article III.

[15] See supra note 1.

Having read Article VIII (H) of GPA, as quoted above, this may precisely be said that procurement regime developed under the auspices of WTO authorises the use of its rules against corruption in trade. In this context, this may not be irrelevant to revisit the stance of WTO as far as criminality in international trade is concerned.

3.3 WTO AND CORRUPTION IN INTERNATIONAL TRADE:

After the "Second World War" when the multilateral trading system started to be shaped and, as a result, GATT 1947 was entered into, the parties thereto agreed to eliminate certain tariff and non-tariff barriers to facilitate the intricate multilateral trade negotiation. It has been said that the drafters of GATT addressed primarily five types of barriers to imports: tariffs, quotas, subsidies, state trading and customs procedures[16] the legal regime evolved under GATT/WTO has substantially concentrated on the creating of machineries to eliminate these barriers. On the contrary, incidence of corruption as a major barrier for multilateral trading system has failed to draw attention of the framers of GATT/WTO. Although GATT/WTO was expected to initiate a major round of multilateral trade negotiations, it took no action explicitly aiming at bribery and corruption at the height of the anti-corruption movement in 1970's onward.[17] The State parties surprisingly abstained from addressing the issue of criminality in business during Uruguay Round of Multilateral trade negotiations. However, the WTO after its formation embarked on adopting a multilateral agreement on transparency but so far it is without any concrete result. Therefore, the scholars suggest [18] that while bribery/corruption in international trade has become a reality

[16] Jackson Supra note 3, p. 139.
[17] Kenneth W. Abbott: "RULE-MAKING IN THE WTO: LESSONS FROM THE CASE OF BRIBERY AND CORRUPTION" *Journal of International Economic Law* (2001) p. 278.
[18] Kenneth W. Abbott supra note 17, P. 276; Nichols argues that although globalization has caused the amount of corrupt practices such as transnational bribery to increase, there is, however, no single transnational body that can, by its own acts, criminalize any type of commercial behavior; nor is there a global body to try those whose economic crimes cross borders: Philip M. Nichols, "Regulating Transnational Bribery in Times of Globalization and Fragmentation", *24 THE Yale Journal of International Law*, P. 170; A study by the

rather than exception, WTO, surprisingly enough, unlike other leading international institutions abstains in launching program to drive away corruption from trade and commerce.[19]

3.4 GPA VERSUS WTO--ISSUES/PUZZLES:

This may not be exaggerating to state that WTO from its very inception has demonstrated its disinclination to combat corruption in international trade. Issue of corruption has been a subtle matter for the members of WTO in various summits. The stance of WTO as discussed above towards corruption in international trade may reasonably invoke the readers to raise a question as to whether the GPA being an agreement negotiated under the umbrella of WTO ought to have any authority to require the States becoming parties to the GPA to use criteria in award procedure for government procurement to drive out corrupt firms/tenderers from the procedure. This is the question on which this paper proposes to concentrate its analysis to find out a justifiable answer.

4. THE SCOPE OF GPA TO ACCOMMODATE CRIMINAL ELEMENTS IN EXCLUSIONARY RULES:

*The law of procurement, generally, entails the procuring authority to consider economic and other comparable factors associated with the tender during award procedure.

Organization for Economic Cooperation and Development (OECD) Trade Committee corroborates the fact that no WTO agreement specifically addresses bribery or corruption, and that most WTO rules have been drafted without direct consideration of such issues: Kenneth W. Abbott supra note 17, P. 278.

[19] A number of factors may have been responsible for the inaction on the part of the WTO in taking any square measure combating crime in international business. One significant problem was lack of political willingness. Some members of WTO considered Organization for Economic Cooperation and Development OECD rather than the WTO to be the better place to evolve legal machineries to fight against transnational crime in business. On the Contrary, Non-OECD members were reluctant to press WTO for rule making against corruption for various reasons: One such opposition came from the states the policy-makers of which were at that time infested with corruption. For example, one of the leading voices against WTO action on corruption at the time of the Singapore Ministerial was President Suharto of Indonesia. As a matter of fact, Suharto himself and members of his family were embroiled in criminal proceedings on charges of massive corruption. Further, developing countries had the concern not to open new window in the name of corruption for the international interference into the domestic issues.

This prescription of law is essential to attain its prime objectives, i.e., best value for money. It is not, however, rare to find the procuring authorities employing secondary policy[20] during award procedure in order to attain somewhat different objectives other than achieving "value for money" as envisaged by legal regime for procurement.[21] Consideration of non-price factors, such as criminal criteria to keep corrupt firms out of the award procedure to ensure, amongst other, integrity in the whole procedure is also viewed as a means to implement secondary policy through procurement and almost all principal procurement regimes[22] have authorized the procuring entities to follow this pattern.

*In this context, Section 4.1 proposes to consider the compatibility of criminal criteria in qualification of suppliers with the procurement laws introduced by the GPA. It then is followed by Section 4.2 which pays attention to the rationales that justify the GPA to embark on regulating corruption in the procurement sector.

4.1 COMPATIBILITY OF CRIMINAL CRITERIA IN AWARD PROCEDURE:

*The goal of the WTO is the trade liberalization[23] which has well been reflected on the GPA. It is stated vividly in Preamble to the GPA that it aims at achieving greater liberalization and expansion of world trade. In order to attain liberalized procurement market it requires the procuring entities to eliminate protectionist practices and to maintain

[20] It refers to the measures of the procuring entities to obtain non-procuring objectives not technically connected with the contract to be awarded: Peter Kunzlik; 'Environmental Issues in international Procurement' p.200 published in 'Public Procurement: Global Revolution. Edited by S. Arrowsmith and A. Davies.

[21] Secondary policies have been employed to attain seven overlapping goals: Christopher McCrudden; International Economic Law and The Pursued 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), Pp. 8-10.

[22] For European approach see Article 45 of the Directive 2004/18/EC Made by the European Parliament and the Council dated 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts accessible at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0018:EN:NOT visited on 27 January, 2009; for United Nations approach see Articles 6 and 15 of the UNCITRAL Model Law on Procurement of Goods, Construction and Services, with Guide to Enactment (1994) accessible at http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf visited on 20.01.2009; for procurement regimes under World Bank see the Procurement Guidelines introducing procedures to govern procurement of goods and civil works in projects financed by World Bank, i.e., The International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The full text is accessible at http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060840~menuPK:93977~pagePK:84269~piPK:60001558~theSitePK:84266~isCURL:Y,00.html visited on 20.01.2009

[23] McCrudden supra Note 12, p 5.

transparency and objectivity in procedure of public purchasing.[24] GPA, hence, requires the procuring entities to consider economic and technical criteria in awarding public contracts.[25] To put it differently, GPA restricts the practices of selective purchasing to raise secondary concerns in the context of government purchase.[26] Use of criteria based on issues like social, industrial, environmental, to name a few only, other than pure economic and technical factors to award public contracts is referred as "secondary criteria". The application of such criteria in procurement is tend to be discriminatory, either de jure or de facto, and so caught by Article III of GPA.[27]

Now in the context of above interpretation of the GPA, a question may reasonably arise as to whether GPA, as put it by McCrudden,[28] adheres to 'purity principle' (i.e. to minimize the use of secondary criteria as much as possible in procurement procedure). In agreement with Crudden, Arrowsmith states that GPA does not follow any such principle[29] and hence the procuring authority may maneuver their power to attain secondary objectives. But this does not grant unfettered right. Such measures, in order to survive, are to comply with certain criteria, both substantive and procedural,[30] to get their negative ramification at a negligible state. [31]

[24] See the Preamble to the GPA and Arts. III, IX, XII, XVII-XIX, XXIV (6).
[25] See Article XIII.4 of GPA.
[26] One view on this point suggests that measures of the procuring entities to implement secondary concerns is not admissible in the procurement regime under GPA: Peter Kunzlik supra note 20 p.200. Such restrictive view has also been taken by Priess and Pitschas: see H-J. Priess and C. Pitschas, "Secondary Criteria and Their Compatibility with EC and WTO Procurement – The Case of the German Scientology Declaration" (2000) 9 Public Procurement Law Review, Pp. 190-92.
[27] Professor Sue Arrowsmith: "Government Procurement in the Wto" First edition (2003) publisher Kluwer Law Intl,Sec. 13.2.
[28] McCrudden supra Note 12, P. 30.
[29] Arrowsmith supra Note 27, Sec. 13.3
[30] Measures to raise secondary policies may survive where these are implemented through what is called 'process and production methods': (Peter Kunzlik supra note 20 p.200; or where they are covered by GPA Article XXIII Exceptions or Appendix I excluded list: (Christopher McCrudden; 'Social Policy Issues in Public Procurement: A Legal Overview' published in 'Public Procurement: Global Revolution' edited by Susan L Arrowsmith and A. Davies P. 224-225; McCrudden supra Note 12, pp. 8-10, 21-22); or where the value of the contract is below the threshold: (McCrudden supra Note 12, P. 29) etc. Further, these measures shall have to be in compliance with the non-discrimination principle of the GPA Art. III.
[31] There are several reasons why GPA limits the use of procurement power for raising secondary policies. For example, (a) it allows the national entities to make discrimination in favour of the local suppliers which is prohibited by GPA Article 3: (H-J. Priess and C. Pitschas, "Secondary Criteria and Their Compatibility with EC and WTO Procurement – The Case of the German Scientology Declaration" (2000) 9 Public Procurement Law Review 196 pp. 190-91); (b) it affects transparency affording the entities ample opportunity to hide their discriminatory practices (Arrowsmith supra Note 27, Sec. 13. p 3-4); (c) Lack of objectivity and transparency result in driving the foreign suppliers out of the market which will undermine the fair and competitive trade practice—essential to achieve the goals of the GPA; (d) irrespective of the apparent intention of the authorities to use secondary policies for non-protectionist purposes, it often becomes protectionist. Foreign suppliers may find it difficult while complying with the secondary policies. The absence of transparency as Crudden puts '. . . contributes to the risk that those awarding the contract will succumb to protectionist pressures.'

To buttress the stance of Arrosmith certain aspects of GPA may seem appropriate to be raised. Article VIII (H) of the GPA, in precise terms, authorizes the procuring entities to consider some non-procurement elements, namely, what is broadly referred to as 'professional integrity',[32] and if any supplier is found having lack of professional integrity, it is submitted, GPA empowers the entities to exclude the alleged supplier from participating in the procurement procedure[33]. A number of factors explain the rationales of accommodating criminal criteria in the award procedure within the context of the GPA. These are stated below:

***4.1.1 PROBITY IN GOVERNMENT PROCUREMENT:**

*In the first place, one of the principle objectives of almost all procurement regimes is to ensure probity in public purchasing.[34] This is often considered to have two aspects[35] - (I) prevention of actual crime and (II) ensuring apparent integrity in the award procedure of public contracts. To illustrate the first aspect this may be said that any illegal and/or unfair practice on the part of the suppliers, either in collaboration with co-tenderers** or procurement officials, to have a favourable decision in awarding contract would subject the alleged suppliers to be excluded from the award procedure.[36] The second aspect relates to the securing apparent fairness and integrity in award procedure, for example, by making sure that the officials involved in the procuring procedure do not have any personal interest

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(McCrudden supra Note 12, p. 12); (e) use of non-procuring criteria compromises with the efficiency of the products or services to be procured both in terms of the quality and cost. Purchasing quality products or services, on one hand, and raising of secondary concerns through procurement procedure, on the other hand, are two different concepts and hard to achieve simultaneously (McCrudden supra Note above, p. 20) etc.

[32] Although Article VIII (H)of the GPA does not employ the expression "professional integrity", it is argued by Arrosmith that bankruptcy and making false declarations, as named in the said Article of GPA, reflect a supplier's lack of professional integrity in a broader sense covering reliability, honesty, moral reputation etc: See Arrowsmith supra Note 27 section 9.2.2.2.

[33] See A. Davies; ' Tackling Private Anticompetitive Behaviour in Public Contract Awards under the WTO'S Agreement on Government Procurement' World Competition 21(5) (1998), Pp. 60-61, who suggests this ground for exclusion "can operate punitively against unacceptable or criminal business conduct, independently of the firm's ability to perform the contract".

[34] Susan L. Arrowsmith, John Linarelli and Don Wallace, 'Regulating Public Procurement National and International Perspectives' Ed. 2000, P. 27.

[35] Arrowsmith, Linarelli and Wallace supra note 33, P. 32.

[36] Because the supplier may not be said to have professional integrity as envisaged in Article VIII (h) of GPA.

in the competing firms. Both of these aspects of probity have had due attention in the GPA. it appears that GPA Article VIII (H) have been inserted to stop incidence of corruption in the award procedure and it acts as a deterrent for the corrupt firms in the manner that if their conducts fall within its purview, they will be kept out of the award procedure.

*Furthermore, to ensure efficiency in the award procedure is another prime objective of all procurement regimes. Systematic corruption, it is submitted reduces the efficiency of the award procedure and impairs the benefits that flow from the transaction. Hence corrupt practices need to be regulated by the GPA.[37]

4.1.2 OPTIMAL VALUE FOR MONEY:

Further, another prime objective of the GPA, like all procurement regimes, is to attain optimal value for money and for that end it requires the entities to consider economic and technical criteria in awarding contracts.[38] This paper though does not dispute the statement that the attainment of the best value for money is, to a certain extent, sacrificed in order to pursue some secondary goals, such as probity,[39] submits that exclusionary rule as envisaged in GPA Article VIII (H) often facilitates attaining the maximum value of the money spent.[40]

4.1.3 DEBARRING TENDERERS PRACTICING ANTI-SOCIAL FUNCTIONS:

[37] Arrowsmith, Linarelli and Wallace supra note 33, P. 219.
[38] Article XIII(4) of GPA.
[39] Arrowsmith, Linarelli and Wallace supra note 33, P. 31.
[40] Some example may be taken to elaborate the proposition. Collusive practices on the part of the suppliers, it is submitted, are covered by GPA Article VIII (H). Such conducts among the suppliers to manipulate the bidding process by submitting mutually agreed tender may preclude the entities from obtaining the benefit of fair and competitive tendering and hence attaining the best value for money: (See Davies supra Note 32, P. 62). Again, in consultancy services corrupt choice of consultants may lead to poor advice which in turn cause loss of money and other resources.[40] Further, for the proper completion of the contract the financial ability and professional reliability of the supplier is of prime importance. Selection of a supplier which has been bankrupt may turn the project to be performed under the contract into a total failing event causing considerable financial loss to the procuring authority.[40] These are but a few of several instances which re-enforce the averment that application of criminal criteria to determine which of the firms shall be debarred from competing for the public contract afford the entities additional means in attaining optimal value for money.

Furthermore, it is also argued that the public authorities, in an effort to making maximum use of the tax-payer's money, should not associate themselves with firms involved in anti-social or unethical practices. A firm, for instance, may be able to submit lower bids because it constantly employs slave labour to manufacture the product to be procured. Slavery and slave labour are forbidden in international law.[41] This form of labour is also illegal under the laws of all civilized nations. So it is not illegitimate for GPA to authorize the public purchasers to exclude firms involved in anti-social or illegal operation from public contract.[42]

This may be noted that although under international law slavery/force labour is strictly forbidden, across the world some form of unfree labour, such as, peonage, debt bondage, indenture, chattel slavery etc. are allowed to prevailed. These may be termed as disguise slavery. This is not an assumption, rather a staggering truth. Siddharth Kara has calculated the number of slaves in the world by type, and determined the number of debt bondage slaves to be 18.1 million at the end of 2006. He has updated this number for the end of 2009 to be 18.4 million.[43]

In final analysis it appears that the criminal criteria for the exclusion of the suppliers as embodied in GPA Article VIII (H) though fall under secondary policy in the context of contract award criteria in public procurement are well suited with, and accommodated in, the scheme of the GPA. These rules help in promoting measures to fight against the infiltration of corruption in public purchasing and securing probity in procedure which,

[41] According to Article 4 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10th December , 1948; Article 8 of the International Covenant on Civil and Political Rights of 1966, adopted by General Assembly Resolution 2200A (XXI); See also the United Nations Supplementary Convention on the Abolition of Slavery, 1956 which prohibits slavery and servitude.

[42] Procuring authority may dissociate itself from illegal and outlawed activities in exercise of its power to raise secondary policy: Priess and Pitschas supra Note 26, pp. 175, 194; McCrudden supra Note 12, pp. 10-11.

[43] ^ Kara, Siddharth (January 2009). Sex Trafficking - Inside the Business of Modern Slavery. Columbia University Press. ISBN 978-0231139601.

amongst other, the provision on transparency of the GPA aims at achieving. Therefore, it may not be appropriate to say that said type of exclusionary criteria are presumptively illegitimate although these are to be kept under constant surveillance for protectionist effect.[44]

4.2 AUTHORITY OF GPA IN COMBATING CORRUPTION IN PUBLIC PURCHASING:

*In comparison with other prime procurement regimes[45] this may not be incorrect to state that GPA is relatively imprecise in providing rules to keep away the corrupt suppliers. This imprecision on the part of GPA seems to be linked with another debateable issue within the WTO, i.e. Whether or not WTO should be involved in instituting measures to fight against corruption in international trade and commerce.[46] By providing exclusionary rule in the form of Article VIII (H) the GPA seems to take a cautious stance to get round of this subtle issue.

However, corruption phenomenon has already assumed transnational form and staggering truth is that public procurement of almost all countries is more or less infested with corruption. Incursion of criminality in such an alarming rate in government purchase calls for wider and concerted international initiatives to fight against it. In this context, it may be apposite at this final part to explore the information readily available to assess if it is within the legal framework of the procurement regime enunciated by the GPA to deal with corruption to stop its penetration in public purchasing.

[44] McCrudden supra Note 12, p. 12).
[45] The procurement regimes developed under European Union, World Bank and United Nations have generated much legal texts to address corruption in public procurement. See Supra note 22.
[46] See para 3.3 above.

It is recommended that to determine whether a given issue falls within the jurisdiction of an international body, four criteria are to be considered. If these conditions are satisfied, then the body is held to be eligible to deal with the issue.[47] These are - (I) the issue must be within the legal authority of the Organization, (II) the issue must be substantial, (III) the Organization must be able to enforce any requirement that it makes of its members with respect to the issue and (IV) the issue must require international coordination. Each of these criteria will be considered in the context of the GPA to have a reply of the question raised in this work.

4.2.1 THE ISSUE MUST BE WITHIN THE LEGAL AUTHORITY OF THE ORGANIZATION:[48]

The rules of WTO for government procurement stems from the GPA which is administered by a Committee on Government Procurement (Committee).[49] The GPA, on the simple reading of its Preamble, appears to have proposed to develop an effective multilateral framework for conducting government procurement in its member states facilitating liberalization and expansion of trade across the world. It is submitted that the unfair and corrupt practices of the parties to the public purchasing pose a real threat to its efficient operation and hence tend to undermine and distort the process of attaining the fundamental goal of the GPA, i.e. a liberalized procurement market. Following factors may be cited to strengthen this argument.

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[47] Paul Taylor, A Conceptual Typology of International Organization, in FRAMEWORKS FOR INTERNATIONAL CO-OPERATION 12, 12 (A.J.R. Groom & Paul Taylor eds., 1990); In his empirical work Nichols, using this model of four criteria, concludes that WTO should be regarded as an appropriate forum for promulgating rules to regulate corruption, in particular, transnational bribery that plagues international trade and commerce: Philip M. Nichols; 'Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority' New York University Journal of International Law and Politics Vol. 28 SUMMER (1996) No. 4, Pp. 783-4.

[48] The venerable principle of international law is that to determine the scope and jurisdiction of an international body the appropriate task is to examine the terms and conditions of its constituent document drafted by the founding members: Nichols supra note 47, P. 723. As per this view, as far as the procurement regime under the WTO is concerned, the appropriate instrument would be the GPA read with Marrakesh Agreement.

[49] Art. XXI of the GPA read with Art. IV (8) of the Marrakesh Agreement.

(a) *In a corrupt economy the capability of the suppliers to provide goods or services is assessed on the basis of transaction of bribes and the suppliers who are reluctant to offer any bribe or unable to do it, either because they have limited funds or they have legal restraint, are driven out of the market.[50] Two examples may be cited: (I) During the regime of Saddam Hussein Australia was the main supplier of wheat to Iraq. Australia retained the (wheat market of Iraq and enjoyed monopoly over the same. it happened not because of competitiveness of Australian wheat, rather because of bribery. Iraq suspended business dealings with Australian wheat Board (AWB) following allegations in October 2005 that AWB had provided $222 million in kickbacks to the former regime of Saddam Hussein to secure sales of wheat.[51](II) The "Oil-for-Food" Programme, established by the United Nations in 1995 (under UN Security Council Resolution 986) was intended to allow Iraq to sell oil on the world market in exchange for food, medicine, and other humanitarian needs for ordinary Iraqi citizens. As the programme ended in 2003, there were revelations of corruption involving the funds. It was reported that contracts to supply Iraq humanitarian goods through the Oil-for-Food Programme were given to companies and individuals based on their willingness to kickback a certain percentage of the contract profits to the Iraqi regime. Companies that sold commodities via the Oil-for-Food Programme were overcharging by up to 10%, with part of the overcharged amount being diverted into private bank accounts for Saddam Hussein and other regime officials.[52]

[50] As Nichols states, US companies had failed to win several contracts worth about $45 billion during 1994-96 because of the operation of the Foreign Corrupt Practices Act of 1977 which prohibits illicit payment by US businesses: See Nichols supra Note 47, pp. 769-70.
[51] en.wikipedia.org/wiki/Oil-for-Food_Programme visited on 9 April, 2009.
[52] IBID.

(b) Bribery creates de facto monopoly. Bureaucrats establish road blocks to keep the amount of bribe higher.[53] Sometimes offers of a higher bribe do not serve the purpose as the procuring officials prefer to take bribes from those whom they trust. Again, the firms possessing small capital or otherwise unable to pay bribes are excluded from this taxonomy. It is argued[54] that de facto monopoly, like monopoly, operates as trade barriers preventing the firms from entering into the market which are not part of the monopoly.[55]

(c) Pervasive or systematic Corruption distorts decision making process.[56] In a corrupt market, decision is made not on the basis of such criteria but for the optimal interest of the bureaucrats.

Aforesaid contentions reaffirm the proposition that corruption forfeits the benefits of liberalized market.[57] It is, therefore, legitimate for the GPA to deal with corruption prevailing in the public procurement sector.

4.2.2 CORRUPTION IS A SIGNIFICANT ISSUE:

Corruption is an age old issue and is a global phenomenon and in some parts of the world corruption is so deep rooted and pervasive that it becomes part of social norms and hence in some societies incidence of corruption is viewed as a rule, not as an exception. The corollary of this trend is that there is hardly any country in the world which can escape the

[53] John Linarelli supra note 2, P. 129.
[54] Nichols supra Note 47, pp. 770-71.
[55] On this issue see also SUSAN ROSE-ACKERMAN supra note 1, P. 101; shleifer and Vishny supra Note 1, P. 615.
[56] GPA Article XIII (4) requires the entities to consider economic factors, such as, price, quality, relevant technical aspects of the products/services etc. while taking final decision.
[57] Nichols supra Note 47, pp. 771-73; Linareli supra Note 2, pp. 129-30; Shleifer and Vishny supra Note 1, p. 104.

incidence of corruption in the public procurement.[58] Nichols in his scholarly article comes to the findings that one-fifth of total world trade transactions is** (are) likely to involve corrupt practices and this issue is magnified because of the harms it inflicts on the world trade.[59]

Keeping in constant view the magnitude of corruption and its negative impact leading procurement regimes developed, namely, under European Union, United Nations, World Bank, [60] have by default provisions to militate against unfair and corrupt practices in awarding public contracts. The World Bank, for instance, realizing the magnitude of danger corruption is likely to inflict on international trade, from 1996 onward has taken extensive programs, including amendment of Procurement Guidelines and launching anti-corruption program,[61] to stop massive infiltration of corruption in public sector, particularly, in public procurement.

* Foregoing facts may limit the room for cynicism as to whether or not corruption is a substantial issue in international trade and commerce. Incidence of corruption is wide spread and, if unregulated, is capable to inflict multidimensional negative impact on the trade sector of an economy.[62] Hence this may be said that the second criteria i.e. corruption is a significant issue in international trade and commerce, survives.

[58] Linarelli supra Note 2 , p. 126; SUSAN ROSE-ACKERMAN supra note 1, P. 91.
[59] Nichols supra Note 47, pp. 776-77.
[60] See supra note 22.
[61] See http://www1.worldbank.org/publicsector/anticorrupt/ visited on 17th August. 2008.
[62] See supra note 2 above.

4.2.3 ENFORCEMENT OF RULES TO REGULATE CORRUPTION:

GPA Article XXII provides for a disputes settlement mechanism[63] and any party to it, considering that the benefits accruing to it under this Agreement is nullified or impaired or impeded in any way by the failure of any other party to fulfil its obligation in accordance with this Agreement, may initiate proceedings as per Dispute Settlement Understanding (DSU) Annex 2 to the Marrakesh Agreement.[64] There must be two conditions to invoke this rule - there must be an infringement of the rules of the GPA and it must impair the benefit of other party which is measurable with specificity. If, for example, a party to the GPA fails to criminalize certain conducts as envisaged in GPA Article VIII (H) allowing the entities to keep out the suppliers alleged to be associated with such activities and a supplier of any other GPA party fails to be awarded a public contract which relates to the non-fulfilment of the said obligation, this may constitute a valid ground for the DSU to take its course. If there is no mutually agreed settlement and if the complaint is proven, the Panel/Appellate body would make ruling asking the offending party to bring its regulation in conformity with the rules of GPA and the complainant party, in case the offending party fails to comply with the ruling, may be authorised to suspend any concession afforded to the offending state under the GPA.[65] It is, therefore, conceivable that the regulations to combat corruption in public purchasing promulgated by the GPA can be enforced within its framework and this satisfies the third criteria to ascertain scope of GPA to deal with corruption.

[63] see Art. 3 (3) of the Marrakesh Agreement.
[64] GPA Art. XXII (1)-(2); for nullification of benefits see DSU Art. 3 (8); Debra P. Steger and Susan M. Hainsworth; 'WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT: THE FIRST THREE YEARS' Journal of International Economic Law Vol. 1(1998) p. 217.
[65] DSU Arts. 19 and 22 read with GPA Art. XXII(7).

4.2.4COMBATING CORRUPTION REQUIRES INTERNATIONAL COORDINATION:

As has been stated before, corruption is endemic. It does no longer relate to a geographical area or region. Implementation of the concept of trade liberalization, which tends to make the national border insignificant for the free movement of goods/services across the world, facilitates, though not deliberately, the exportation of corruption along with the goods/services to the desired economy. This is not unlikely that the perpetrators can commit a crime in relation to a public contract without having their physical presence in the host country or leave the host country after the alleged commission is accomplished. In the absence of an international commercial judicial body it is the home state that has the legal authority to commit the alleged suppliers to justice and it is almost impossible to let them face trial if the home state has no legal mechanism.[66] On the contrary, in certain circumstances, particularly in transitional and developing economy, where rule of law yet to achieve its optimal standard, considerable reluctance is traced in the state machineries to bring its own bureaucrats or political executives to stand trial or to impose sanction on the firms (in which they have vested interests) for their alleged criminal conducts concerning public contracts.[67]

The limitation of the individual states to punish the perpetrators becomes acute when the offending businesses emerge from industrial or developed economies which operate certain development programs in the host country.[68]

[66] The Foreign Corrupt Practices Act of 1977 of USA is one of the very few examples of national legislations which empowers the appropriate authorities of US administration to punish the businesses having US nationality which have committed an offence in a host country: see more on this issue in Philip M. Nichol ssupra note 18, p. 257.

[67] A number of proceedings were commenced in 2003 onwards by the then Government against Sheikh Hasina, the present Prime Minister of Bangladesh, for illegality committed in government procurement during her earlier tenure from 1996-2001; but as soon as Sheikh Hasina assumed her present office, those proceedings are in the process of withdrawal. If in the next term Bangladesh Nationalist Party (BNP) form government, the proceedings pending against Begum Khalida Zia, present Chairperson of BNP, for alleged corruption in public procurement may have the same fate.

[68] Rege supra Note 9 , pp. 500-1.

Therefore, it necessitates concerted efforts based on international coordination to regulate corruption phenomenon across the world. The parties to the GPA, it is stated, are committed[69] to work in a concerted manner in the framework of the WTO to eliminate trade barriers which has also been reflected on the Preamble of the GPA.[70] One of such barriers that tends to impede the expansion of free trade, as is seen above, is the incidence of corruption. The GPA is a potential forum to arrange effective coordination among its member States[71] and can oblige them, by bringing their national laws in conformity with the GPA,[72] to cooperate with one another in outlawing unfair and corrupt practices in public purchasing and bringing the perpetrators of crime to face judicial proceedings.

5. CONCLUSION:

The existence and incursion of corruption in public purchasing being a significant event ought not to be ignored. Its persistent negative effect is likely to impair the campaign of the GPA to pursue the economies to open up their procurement markets for greater liberalization of world trade. GPA being an international agreement and co-campaigner of trade liberalization is in an appropriate strategic position to develop framework to be followed, and, provide effective coordination of programs to be launched, by its members in fight against endemic phenomenon of corruption, particularly, in government procurement.

[69] as per Article III (1) of the Marrakesh Agreement read with the Preamble.
[70] This has been shown in paras 4.2.1 and 4.2.2 above that existence of corruption in the public purchasing detracts the procurers and providers from the prescribed course of business and this deviation has distorting impact on the natural growth of the trade transactions. As recommended by Arrowsmith the third objectives set forth by the award procedure of the GPA is the elimination of unjustified trade restrictions: Arrowsmith supra Note 27, Sec. 7.2.3.
[71] This coordination may be had through the proper functioning of the Committee set up under GPA Art. XXI read with Art. XXIV (7).
[72] See GPA Art. XXIV (5) read with DSU Art. 19 and GPA Arts. XXII (3) and XXIV (9).