

**Public Services and Procurement**  
**Discussion paper**  
**prepared for Public Services International<sup>1</sup>**  
**August 29 2002**

### **1. Overview and Context**

This paper identifies key issues in public procurement from the perspective of their implications for economic democracy, good governance and accountability and democratic processes. It highlights how the approach to public procurement prescribed by the major institutions of global economic governance -- particularly international trade and investment agreements -- may impede the use of public purchasing to advance public policy goals.

Government procurement is understood to be the purchase of goods or services by governments "for their own consumption".<sup>2</sup> The distinguishing feature of procurement is that the procured goods or services are for the benefit or use of the government that pays for them. It is often difficult, however, to clearly differentiate government procurement from contracts to provide services to the public (or to other governments or organisations).

Government procurement supports jobs in the private enterprises that provide goods and services to government. It does not directly support public sector jobs. Public employees have an important stake, however, in promoting progressive procurement practices. Spending on procurement is a significant portion of most governments' budgets and is therefore an important policy tool. The overall legitimacy and prestige of government can be enhanced by procurement policies which advance publicly determined economic, social, cultural and environmental goals while also addressing concerns about corruption and accountability.

By any measure, government procurement makes up a significant share of national and global economic activity:<sup>3</sup>

- The World Trade Organisation estimates that government procurement, represents 10% to 15% of global GDP.<sup>4</sup> Based on year 2000 figures, this is equivalent to US\$3.1 trillion to US\$4.7 trillion in annual public spending.<sup>5</sup>
- Government procurement by European Union members is estimated at over Euros1,000 billion (US\$870 billion), or 14% of EU GDP.<sup>6</sup>
- In Latin America and the Caribbean, government procurement in 1996 was estimated at US\$131-197 billion.<sup>7</sup>

---

<sup>1</sup> The paper was prepared by Sandra Sorensen (coordinator), Matthew Sanger (principal author), Jim Grieshaber-Otto and Scott Sinclair (contributing authors).

<sup>2</sup> Definition found at the OECD web site: <http://www.oecd.org/ech/act/proc.htm>

<sup>3</sup> Data on government procurement is plagued by definitional problems and is not widely available. No estimates were found for the value of Asian or African government procurement, although some individual country estimates are available.

<sup>4</sup> WTO Secretariat, *Guide to the Uruguay Round Agreements*, The Hague: Kluwer Law International, 1999, p.248.

<sup>5</sup> The World Bank, World Data Profile using latest available data as of February 2002 (<http://devdata.worldbank.org>).

<sup>6</sup> [http://www.europa.eu.int/comm/internal\\_market/en/publproc/general/01-1418.htm](http://www.europa.eu.int/comm/internal_market/en/publproc/general/01-1418.htm)

<sup>7</sup> Inter-American Development Bank, *Government procurement and free trade in the Americas*, p.3 ([http://www.iadb.org/intal/publicaciones/Claro\\_Camblor.pdf](http://www.iadb.org/intal/publicaciones/Claro_Camblor.pdf))

- The share of US government procurement which is subject to WTO trade rules amounted to over US\$215 billion in 1999. <sup>8</sup> (Because a large share is excluded from these rules, total procurement is much higher.)

Public procurement policies have played a key role in the development of industry and infrastructure in the industrialised world. Massive public spending to mobilize industry in the war effort helped to lay the foundation for post-World War II economic expansion in North America and Europe. During the post-war era, national flag-ship companies in highly regulated industries like telecommunications and air transport were nurtured by preferential procurement policies, as well as large public investments. Global engineering firms – including Bechtel and Bombardier, for example – expanded with the help of favourable contracting policies by their home governments.

Privatisation and deregulation policies over the past two decades have altered the composition of goods and services purchased by governments.<sup>9</sup> Goods and construction services for large building and roads projects continue to account for a large share of public procurement spending. Privatisation of national telecommunications systems throughout the industrialised world and much of the developing world has reduced the amount of government procurement in this sector. Other forms of commercialisation have increased public spending on contracted services, such as management of public facilities, delivery of health and social services, and operation of water and electricity systems. This development increasingly blurs the line between government procurement and other contractual arrangements with private service providers.

As new domains of public services are being commercialised, public policies in these areas are potentially exposed to the growing body of international trade rules concerning government procurement.

A new generation of government procurement rules were negotiated during the late-1980s and early-1990s, in the context of regional and international negotiations that shifted the focus of liberalisation beyond merchandise trade and to reducing “non-tariff barriers” to trade. While the coverage of these procurement rules is still relatively limited, negotiations are currently underway in the WTO and in regional trade groups that would dramatically extend their reach to more nations and to more government entities within each signatory country.

The existing international trade rules on government procurement prescribe a model of compulsory competitive tendering which, this discussion paper argues, does not represent the best practice recognized in the private sector and, moreover, unnecessarily restricts the abilities of governments to use public procurement to pursue public policy objectives.

The predominant approach is particularly restrictive for developing countries, in which public procurement typically represents a relatively large share of GDP and is an important instrument of economic, industrial and social policy.

A number of countries in both the developed and developing world have implemented innovative procurement policies which combine safeguards for value for money and transparency with mechanisms to target public purchases in favour of suppliers who most contribute to goals such as affirmative action, local economic development, environmental protection, job creation and respect for human rights.

---

<sup>8</sup> WTO, Committee on Government Procurement, *Statistics for 1999 reported under article XIX.5 of the Agreement: report of the United States*, GPA/40/Add.4 (30 January 2002). Interestingly, the amount reported for 1999 was almost US\$10 billion lower than the 1996 figure.

<sup>9</sup> Note: these trends are based on educated guess not documented data.

Corruption and lack of accountability in public spending is a real problem in both developed and developing nations. Addressing these issues requires public procurement systems which are transparent and which have in-built mechanisms for verifying and auditing the benefits received for a given public expenditure. These safeguards are entirely consistent with the use of selection criteria and procurement practices to advance public priorities. Improving transparency and accountability does not require -- as advocates of radical trade liberalisation would have one believe -- sacrificing the powerful contribution government procurement can make to national development goals. In fact, such safeguards can be used to objectively assess the social and economic benefits resulting from public procurement, as well as ensuring fairness and value for money in public spending.

Negotiations on government procurement rules will gain prominence as the post-Doha round of WTO negotiations proceeds and as new regional trade agreements take shape, especially in the Americas and in Asia. Public service advocates need to ensure that these rules do not further compromise the ability of governments to use public resources to tackle public priorities such as alleviating poverty, regional development, environmental protection, and reducing gender and racial disparities.

Having set this general context, the next section of this paper surveys the approach to public procurement in existing trade agreements and in negotiations currently underway, with an emphasis on the model established in the WTO Agreement on Government Procurement and the government procurement chapter of the North American Free Trade Agreement. The third section examines how this compulsory competitive tendering model restricts the public policy capacities of national and subnational governments. The fourth and final section proposes options for PSI and its members to intervene at the international and national levels.

## ***2. Government procurement in the new generation of international trade agreements***

The first international trade agreements to include procurement rules covering services were the North American Free Trade Agreement, concluded in 1992, and the WTO Agreement on Government Procurement (AGP), which was part of the Uruguay Round negotiations concluded in 1994.

Trade liberalisation is commonly understood to be about reducing tariffs and other “at-the-border” impediments to the flow of goods across national borders. The Uruguay Round (1986-1994) of multilateral trade negotiations, however, shifted the focus of liberalisation to reducing so-called “non-tariff barriers” to trade. (Non-tariff barriers include a potentially limitless range of government legislation, policies, regulations, administrative practices and other measures that may arguably limit access by foreign producers and providers to a national market, or impinge on their competitive opportunities once they are established in the country.)

This broadened agenda was enthusiastically adopted in the negotiations which resulted in the North American Free Trade Agreement (NAFTA) in 1992. In addition to rules on government procurement, NAFTA and the Uruguay Round negotiations produced groundbreaking trade agreements in the areas of trade in services, investment and intellectual property. These agreements extended trade rules into areas of national policy and regulation previously considered beyond the reach of trade negotiators. Significantly, the NAFTA and Uruguay Round agreements included new provisions for enforcing these rules.

NAFTA incorporated a highly controversial investor-to-state dispute mechanism which permits private companies to directly challenge government investment measures, instead of requiring them to initiate challenges through their national governments, and which provides for monetary compensation. Other disputes, including those regarding the NAFTA govern-

ment procurement rules, must be initiated by national governments and may be settled by awarding trade compensation, not monetary awards.

The Uruguay Round agreements replaced the former GATT dispute system, which had relied on diplomacy to settle differences between members, with a highly legalistic dispute settlement process which is enforceable through trade sanctions. The WTO Dispute Settlement Understanding (DSU) has been called the “central pillar of the multilateral trading systems and in many ways the WTO’s most individual contribution to the stability of the global economy.”<sup>10</sup> It replaces the former GATT system with a faster and more structured process and, most significantly, makes it impossible for the country losing a dispute to block the adoption of a trade panel ruling, which typically requires the losing country to change the disputed measure or face punitive trade sanctions.

These effective enforcement mechanisms, as well as their greater reach, give the NAFTA procurement rules and the AGP a significance never attained by the GATT procurement rules.

The AGP is one of four “plurilateral” agreements, in which participation is optional for WTO members. Of the 140 WTO members, 26 are signatories to the AGP, including the United States, Japan, Canada and the 15 members of the European Union. An additional seven countries are currently negotiating accession to the AGP, and 24 more have observer status on the WTO committee that oversees the AGP. Virtually all of these prospective members are developing countries or former communist countries. (With its recent accession to the WTO, China has become an observer to the AGP and has committed to negotiating full membership.)

The 1994 AGP is considerably wider in scope than the original 1981 Agreement on Government Procurement that it replaced. Whereas the original AGP dealt only with procurement of goods by central government bodies, the 1994 AGP covers procurement of goods and services, including construction services, by sub-national level government bodies and state enterprises as well as by central government bodies. These changes increased the value of procurement covered by the AGP ten-fold, to approximately US\$300 billion annually.<sup>11</sup>

The 1994 AGP is “clearly the most important of the four plurilateral agreements,” according to the WTO Secretariat, “because of its very substantial coverage, because it takes trade liberalisation into an important area which is specifically excluded from the coverage of the GATT, and because it seems likely that its membership, at present confined mainly to developed countries, will grow in the years to come.”<sup>12</sup>

In addition to the AGP and NAFTA there are a number of minor trade agreements that include procurement rules. These include the Group of Three Accord between Mexico, Colombia and Venezuela, and in Mexico’s bilateral agreements with Bolivia and Costa-Rica.<sup>13</sup> The procurement rules in these agreements resemble those in NAFTA and the AGP.

There are negotiations underway in a variety of settings that will extend the coverage of existing procurement agreements and lead to new agreements containing procurement rules.

---

<sup>10</sup> Former WTO Director-General Renato Ruggiero, cited in WTO, *Trading into the Future*, (2<sup>nd</sup> ed revised April 1999) , p.38. (available on-line at [www.wto.org](http://www.wto.org)).

<sup>11</sup> WTO Secretariat, Overview of the Agreement on Government Procurement, [www.wto.org/english/tratop\\_e/grproc\\_e](http://www.wto.org/english/tratop_e/grproc_e).

<sup>12</sup> *Guide to the Uruguay Round Agreements* op cit., pp.247-8.

<sup>13</sup> FTAA Working Group on Government Procurement, *Government Procurement Rules in Integration Arrangements in the Americas*, (<http://alca-ftaa.iadb.org/eng/gpdoc1/gp1ecov.htm> ) January 1997.

- The AGP includes a built-in requirement for regular reviews to improve its rules and extend their coverage. The WTO Working Group on Government Procurement has been conducting an ongoing review, in informal meetings, since 1997. One of the objectives of this review is to expand membership in the Agreement by making it more accessible to non-Parties.<sup>14</sup>
- The WTO General Agreement on Trade in Services (GATS) mandates negotiations on government procurement in services<sup>15</sup>. So far, these negotiations have consisted mainly of exchanges of information among members of the WTO Working Party on GATS Rules.<sup>16</sup>
- Work to prepare a new WTO Agreement on Transparency in Government Procurement has been underway since 1996. WTO members decided at the Doha Ministerial Meeting in November 2001 that this work would continue with a view to launching negotiations at the next WTO ministerial meeting in late 2003. While this agreement would not prohibit preferences for local suppliers, or other forms of targeting, it could include detailed requirements for publishing information on all aspects of the procurement process and for informing other WTO members of all laws, regulations and other measures related to procurement. Unlike the AGP, an Agreement on Transparency in Government Procurement would not be optional; it would be part of the “single undertaking” which is binding on all WTO members. Some see these negotiations as a stepping stone to a mandatory agreement that includes prohibitions on local preferences and other forms of targeting.
- Members of the Asia Pacific Economic Cooperation (APEC) forum have committed (without entering into any legally binding agreement) to conclude an agreement on trade liberalisation, including liberalisation of public procurement, by 2010 for developed countries and 2020 for developing countries. Work on government procurement has focused on exchanging information about national policies and systems, developing a set of “Non-Binding Principles on Government Procurement,” and discussing how best to implement these principles in national procurement systems.<sup>17</sup>
- The negotiations for a Free Trade Area of the Americas (FTAA), which are scheduled to conclude by 2005, include talks on government procurement. A draft text on government procurement rules was prepared for a meeting of hemispheric trade ministers in April 2001. While this draft includes detailed rules resembling those contained in NAFTA and the AGP, it is far from being agreed by all FTAA countries.<sup>18</sup>
- Discussions of government procurement rules are also taking place within several smaller regional trade blocs in the Americas. These include Mercosur, the Andean Community, the Central American Common Market, CARICOM.<sup>19</sup>

<sup>14</sup> Regular reviews are mandated by AGP article XXIV:7(b). Recent meetings of the working group are summarized in the annual *Report (2001) of the Working Group on Government Procurement GPA/58* (11 October 2001).

<sup>15</sup> GATS Article XIII:2.

<sup>16</sup> Information on the progress of negotiations is available from the WTO web site gateway for government procurement issues: [http://www.wto.org/english/tratop\\_e/gproc\\_e/](http://www.wto.org/english/tratop_e/gproc_e/).

<sup>17</sup> [www.apecsec.org.sg/committee/gov\\_procure\\_upd.html](http://www.apecsec.org.sg/committee/gov_procure_upd.html)

<sup>18</sup> [http://alca-ftaa.iadb.org/eng/nggp\\_e.htm](http://alca-ftaa.iadb.org/eng/nggp_e.htm)

<sup>19</sup> **Mercosur:** Argentina, Brazil, Paraguay and Uruguay; **Andean Community:** Bolivia, Colombia, Ecuador, Peru, Venezuela; **Central American Common Market:** Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua; **CARICOM:** Bahamas, Barbados, Belize, Guyana, Jamaica, Suriname, Trinidad and Tobago.

### **3. Procurement rules in the WTO Agreement on Government Procurement (and in NAFTA)**

The stated objectives of the AGP and NAFTA procurement rules are to prevent preferences for domestic suppliers and to ensure a transparent procurement process.<sup>20</sup> National treatment and non-discrimination are therefore the pillars of both procurement agreements, as they are for agreements concerning trade in goods and services.

These principles are applied in a manner that goes far beyond prohibiting explicit preferences for domestic suppliers, however. The procurement rules attempt to prevent any de facto preference that could be provided through technical aspects of the procurement process, such as the valuation of contracts or setting out the specifications for the tendered good or service. They also prescribe in detail how all aspects of the tendering process are to be conducted to ensure equal access for foreign suppliers. Finally, they prohibit “offsets” which are conditions intended to encourage local development through local content, technology transfer, investment or similar requirements.

These operational rules set out a very specific model for conducting procurement which maximizes competition through regular re-tendering with the aim of selecting the lowest cost qualified tender. This section summarizes these rules, and discusses some implications for public services.

#### ***What is government procurement?***

Surprisingly, no positive definition of procurement is provided in either the AGP or NAFTA. The GATT and GATS agreements do include definitions, for the purpose of exempting government procurement from certain rules in those agreements. Both agreements define it as procurement by government agencies of products (in the GATT) or services (in the GATS) “purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods (or supply of services) for commercial sale.”<sup>21</sup>

This definition is a primary reference for understanding the scope of the AGP and NAFTA rules, although what constitutes procurement “for governmental purposes” is an ongoing matter of debate within the WTO. It is sometimes difficult in practice to define whether a good or service is purchased only for governmental purposes. For instance the WTO Working Group on Government Procurement has recently discussed whether the AGP should apply to “build-own-transfer” contracts and concessions of public works.<sup>22</sup>

These definitional discussions could bring more high-value public contracts within the purview of procurement rules.

#### ***Scope and coverage***

For most countries the AGP applies to procurement by sub-national level governments and state enterprises as well by national government bodies. NAFTA specifies that government procurement does not include “government provision of goods and services to persons or state, provincial and regional governments”, applying only to procurement by national bodies and state enterprises.<sup>23</sup> In both agreements, the procurement rules apply only to purchases over certain threshold values.

---

<sup>20</sup> AGP: preamble

<sup>21</sup> GATT, III:8(a); GATS:XIII:1

<sup>22</sup> *Report (2001) of the Working Group on Government Procurement GPA/58* (11 October 2001).

<sup>23</sup> NAFTA 1001:5(a)

Thresholds for Government Procurement (US\$)		
Entities	WTO AGP	NAFTA
Central government bodies		
- goods & services	\$186,000	\$50,000
- construction	\$7,143,000	\$6,500,000
Sub-central governments		
- goods & services	\$507,000	N/a
- construction	\$7,143,000	N/a
State enterprises		
- goods & services	\$571,000	\$250,000
- construction	\$7,143,000	\$8,000,000

In both the AGP and NAFTA each signatory country specifies which government entities are subject to the procurement rules. In separate annexes, each country lists the central government entities, sub-central government entities and state enterprises that are covered by the agreements.

Both the AGP and NAFTA also have general exceptions that mirror those found in the GATT and other WTO agreements. These exceptions relate to government measures:

- Necessary to protect public morals, order or safety;
- Necessary to protect human, animal or plant life or health;
- Necessary to protect intellectual property.

Also excluded are any measures related to goods or services of handicapped persons, or philanthropic institutions or of prison labour.<sup>24</sup>

Under NAFTA, the procurement rules apply on a “negative list” basis to purchases by covered entities of all goods and all services – that is, purchases are covered unless they are specifically exempted. Only a small number of goods purchased for defense purposes -- including specialty metals, naval vessels and buses – are specifically exempted in this way.<sup>25</sup> However there is also a broad exception for any procurement related to national security and national defense purposes.<sup>26</sup>

A broader range of services is excluded from the NAFTA procurement rules. Each country is able to list excluded services, using a detailed classification system. Canada, Mexico and the United States have each excluded all classes of research and development; all classes of utilities; and most kinds of transportation services. Canada and Mexico have both also excluded all financial services. Only Canada has excluded all classes of health and social services.<sup>27</sup>

The AGP applies to purchases by covered entities of all goods above the relevant thresholds. Each country is able to list excluded goods in their annexes to the agreement. In this respect it follows the same “negative list” approach as does NAFTA.<sup>28</sup>

Regarding services, the AGP allows each government to choose its method of specifying coverage. All signatory countries other than the U.S. have chosen to follow a “positive list” approach, in which only procurements of listed services are covered by the agreement. For instance, the services annexes for the EU and Canada both include “sewage and refuse disposal, sanitation and related services”, indicating that contracts for these services are cov-

<sup>24</sup> AGP XXIII:2; NAFTA 1018:2

<sup>25</sup> NAFTA Annex 1001.1b-1.

<sup>26</sup> NAFTA: 1018.1

<sup>27</sup> NAFTA Annex 1001.1b-2

<sup>28</sup> Each signatory government’s annexes are available on-line at:  
[http://www.wto.org/english/tratop\\_e/gproc\\_e/loose\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/loose_e.htm)

ered by the procurement rules.<sup>29</sup> Access is provided to suppliers of another Party for procurement of all listed services for which that Party provides reciprocal access.

### National Treatment and Non-discrimination

Article III of the AGP and Article 1003 of NAFTA are virtually identical. Both require governments to ensure that “all laws, regulations, procedures and practices regarding government procurement” treat foreign products, services and suppliers as favourably as their domestic counterparts, and as favourably as the products, services and suppliers of any other country which is a signatory to the respective agreement.<sup>30</sup>

These principles – which correspond to the GATS national treatment and most-favoured nation principles– are reinforced by a generic prohibition against discriminatory treatment. Governments are required to ensure that all laws, regulations, procedures, and practices, “shall not treat a locally-established supplier less favourably than another locally-established supplier on the basis of foreign affiliation or ownership” and “shall not discriminate against locally-established suppliers on the basis of the country of production of the good or service being supplied.”<sup>31</sup>

### Technical Specifications

Technical specifications are the characteristics required of the goods or services to be procured. These specifications include requirements for goods and services regarding, “quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for their production and requirements relating to conformity assessment procedures.”<sup>32</sup> Both the AGP and NAFTA require governments to ensure that such specifications “shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.”<sup>33</sup>

Both agreements also specify that, where appropriate, technical specifications shall “be in terms of performance rather than design or descriptive characteristics”; and that they be based on international standards, where such standards exist.<sup>34</sup>

### Tendering Procedures

The AGP and NAFTA provide for three types of tendering processes: open tendering, in which all interested suppliers may submit a tender; selective tendering, in which suppliers are invited to submit a tender; and limited tendering, in which a government entity directly contacts individual suppliers regarding a planned procurement.

Limited tendering is permitted only under very specific circumstances in which it is not practical to seek alternative suppliers -- such as cases of extreme urgency, or for purchases of works of art that can be provided only by a particular supplier.<sup>35</sup>

Selective tendering processes can be used as long as they meet conditions set out in the AGP and NAFTA. These conditions include inviting the maximum number of domestic and

---

<sup>29</sup> *ibid*, Annex 4 for Canada and the European Union.

<sup>30</sup> AGP III:1; NAFTA 1003:1

<sup>31</sup> AGP III:2; NAFTA 1003:2

<sup>32</sup> AGP VI:1

<sup>33</sup> AGP VI:1; NAFTA 1007:1 is very similar: “Each Party shall ensure that its entities do not prepare, adopt or apply any technical specifications with the purpose of or the effect of creating unnecessary obstacles to international trade.”

<sup>34</sup> AGP VI:2; NAFTA 1007:2

<sup>35</sup> AGP:XV; NAFTA 1016.

international suppliers to tender, “consistent with the efficient operation of the procurement system” and permitting any supplier that requests to submit a tender.<sup>36</sup>

Most of the tendering procedures pertain to open tendering processes, which are the preferred norm. Both the AGP and NAFTA set out in detail how the procurement process should be administered to ensure transparency and to prevent preferential treatment for domestic goods, services or suppliers. These rules specify how governments determine which suppliers are qualified; how they advertise; how they select suppliers invited to submit a tender; what documentation they require; how they set time limits for submission of tenders; in what form tenders are received; how receipt is acknowledged and on what basis contracts are awarded.

The following excerpts from the AGP illustrate the detailed requirements set out for government procurement.

Article VII Qualification of Suppliers: “(b) any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm’s capability to fulfill the contract in questions. Any conditions for participation ... shall be no less favourable to suppliers of other Parties than to domestic suppliers and shall not discriminate among suppliers of other Parties. The financial, commercial and technical capacity of a supplier shall be judged on the basis both of that supplier’s global business activity as well as of its activity in the territory of the procuring entity, taking due account of the legal relationship between the supply entities.”<sup>37</sup>

Article IX Invitation to Participate Regarding Intended Procurement: “6. Each notice of proposed procurement ... shall contain the following information:

- a) the nature and quantity, including any options for further procurement and, if possible, an estimate of the timing when such options may be exercised; in the case of recurring contracts the nature and quantity and, if possible, an estimate of the timing of the subsequent tender notices for the products and services to be procured;
- b) whether the procedure is open or selective or will involve negotiation;
- c) any date for starting delivery or completion of delivery of goods or services...”<sup>38</sup>

Article XI Time-limits for Tendering and Delivery: “1. Any prescribed time-limit shall be adequate to allow suppliers of other Parties as well as domestic suppliers to prepare and submit tenders before the closing of the tendering procedures.”<sup>39</sup>

One of the most significant requirements of the competitive tendering model concerns the awarding of contracts. Both the AGP and NAFTA stipulate that an entity must award the contract to “either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous.”<sup>40</sup>

### Prohibition of Offsets

Offsets in public procurement are conditions used to encourage local development or improve a nation’s balance of payments account by requiring a supplier from another country to

---

<sup>36</sup> AGP:X; NAFTA 1011.

<sup>37</sup> The analogous article in NAFTA reads differently but includes the requirement that conditions for participation “be limited to those that are essential to ensure the fulfillment of the contract in question” (NAFTA 1009:2(b))

<sup>38</sup> The analogous article in NAFTA is very similar (NAFTA 1010:2)

<sup>39</sup> NAFTA article 1012:1(a) is materially identical.

<sup>40</sup> AGP: XIII:4(b); and NAFTA 1015:4(c).

achieve a specified level of local content or investment; to license its technology; to import products or services from the procuring nation; or similar requirements.

Both the AGP and NAFTA prohibit governments from seeking or imposing offsets as a condition of any covered procurement contract.<sup>41</sup> It should be noted that such offsets are prohibited even if they do not discriminate between foreign and domestic suppliers. For covered procurements, this prohibition prevents governments from negotiating with either domestic or foreign suppliers to leverage economic, local development, and other related benefits from major public purchases.

The AGP allows developing countries to negotiate at time of accession conditions for use of offsets, e.g. requirements for domestic content. Offsets can only be used to determine qualification to participate in procurement process, not as criteria for awarding contracts.<sup>42</sup>

### Bid Challenges and Dispute Settlement

The AGP and NAFTA both require signatory governments to maintain an independent court, tribunal or review body to settle foreign suppliers' complaints concerning the awarding of particular contracts. Both agreements require that these bodies operate transparently and expeditiously. If a complaint is upheld, the review tribunal can require that a procurement be retendered, or that compensation be provided to the complainant.<sup>43</sup>

Complaints regarding a signatory government's adherence to its commitments are dealt with through the formal dispute settlement procedures set out in NAFTA (chapter 20) and the WTO Dispute Settlement Understanding. Unlike disputes under other WTO agreements, government procurement disputes cannot result in cross-retaliation. Any trade compensation must pertain only to access to government procurement; a government cannot retaliate by suspending access to other forms of trade.<sup>44</sup>

To date there have been only 3 disputes under the 1994 AGP:

- the European Communities negotiated a solution to their 1997 complaint against Japan in the purchase of a navigation satellite;
- in 1997, the EC and Japan challenged a Massachusetts state law which prohibited contracts with companies with business in Burma (these proceedings were suspended in 1999 when a US court found constitutional defects in the Massachusetts law); and
- the EC, US and Japan challenged a Korean government decision regarding procurement in the construction of Incheon Airport, but a panel report issued in May 2000 ruled that the procurement was not covered by the AGP.

### Not "Best Practice": Compulsory tendering and private sector procurement

An important criticism of procurement rules in trade agreements is that the public sector is being pressured to adopt outdated and inefficient procurement rules that the private sector rejects in their own purchasing practices.

Many procurement professionals view compulsory tendering procedures as out of step with up-to-date "best practices" in the private sector. Procurement rules in trade agreements are detailed and mechanical, designed to increase the pool of bidders in hopes of receiving best value. By contrast, today's best procurement practices are flexible and focus on developing longer-term relationships with fewer, reliable suppliers who understand the operations

---

<sup>41</sup> AGP XVI:1; NAFTA 1006

<sup>42</sup> AGP XVI.2

<sup>43</sup> AGP XX; NAFTA 1017.

<sup>44</sup> AGP XXII:7.

of the purchaser, can adapt to changing needs and meet them cost-effectively.

While open competitive tendering may result in best value in certain circumstances, few private sector purchasers openly tender all purchases. Open competitive tendering works reasonably well for the purchase of standardized goods where the quality of the goods can usually be readily verified upon delivery. Even in such cases, however, there is usually an optimum number of bids (effective competition) beyond which the increased administrative costs to the purchaser of reviewing bids do not result in any further price reductions.<sup>45</sup>

By contrast, when an entity purchases specialized software or consulting services, for example, it is difficult to evaluate quality at the time of delivery. It is in the ongoing relationship with the supplier that value is created. Consequently, the more specialized the product or service provided, the greater the investment of the purchaser in the ongoing relationship with the supplier and the greater the disruption involved in compulsory re-tendering.<sup>46</sup> Article XV of the AGP does provide for limited tendering, but only in certain circumstances and under strict conditions.

The administrative costs associated with compulsory tendering, minimum time-limits before closing tenders, processing a large number of bids, reporting requirements, administrative review of complaints from unsuccessful bidders and other aspects of procurement rules in trade agreements are significant, especially for smaller jurisdictions. Developing country and local governments in developed countries have objected to this increased administrative burden and costs, especially since the rules are viewed as designed primarily to benefit foreign suppliers not public sector purchasers.

### ***How the compulsory competitive tendering model restricts public policy***

The procurement model prescribed in international trade agreements restricts the ability of governments to use public purchasing policies to advance a number of public policy priorities.

#### Local accountability

The national treatment and non-discrimination rules prevent governments from favouring community based, not-for-profit organisations when contracting for health and social services.

The basic focus of service delivery in the human services is on local organizations meeting local needs. Preferences for community-based providers are inconsistent with coverage under compulsory tendering rules. Coverage therefore could increase pressure on governments to shift health care and other social service delivery from non-profit, community-based organizations to the commercial sector.

Social service and health ministries typically offer many forms of financial assistance and contracts exclusively, or preferentially, to the non-profit sector. While these preferences are not explicitly inconsistent with procurement provisions, they might still be exposed to challenge. Preferences for non-profit service providers could be challenged as de facto discrimination if those preferences had the effect of excluding for-profit service providers located in other jurisdictions. Such challenges would likely succeed when, as is often the case, local

---

<sup>45</sup> Article X of the AGP recognizes that “to ensure effective international competition under selective tendering procedures, entities shall, for each intended procurement, invite tenders from the maximum number of domestic suppliers and suppliers of other Parties, consistent with the efficient operation of the procurement system.”

<sup>46</sup> Companies such as Toyota pioneered procurement practices that rely on heavily on long-term relationships with a small number of qualified suppliers. Alternate suppliers are maintained for each product or service to keep prices competitive.

suppliers are predominantly not-for-profit, while out-of-jurisdiction suppliers wishing to penetrate new markets are predominantly for-profit.

### Continuity in human services

The competitive tendering model frequently undermines the continuity of delivery in such vital services as health care, education, childcare and other social services. The compulsory re-tendering of contracts when they expire is particularly inappropriate in these human services.

The investment in “human capital” - i.e. training, decent and equitable wages, and adequate working conditions – is a key determinant of quality of health and social services. Stable employment relationships encourage investment in human resources, while frequent re-tendering discourages it. Least-cost tendering may also encourage price competition on the basis of reduced wages and reduced quality of service. Moreover, without enforceable “successor rights,” frequent re-tendering can also discourage unionization, which is one of the most effective means to develop a highly-trained, motivated and secure workforce.

Competitive tendering can also lead to significant instability and inefficiency. A British Columbia Commission of Inquiry into public services called into question the competitive tendering in social services. The Commission report highlights that “[t]his service delivery model assumes that the marketplace will develop a range of agencies, individuals or companies which will compete with each other and thereby provide a high quality of service at competitive rates. The commission found that both service providers and government contract managers question the appropriateness of this model for the purchase and delivery of community social services.”<sup>47</sup> This system is “built around the annual renewal, renegotiation or re-tendering of contracts.” While understandably derived from the annual budget process, “the instability that year-by-year contracting for services creates for agencies, employees and clients ... creates significant human resource management and planning problems within the sector.”<sup>48</sup>

Although some procurement codes contain certain exceptions for limited tendering and long-term contractual arrangements, the general practice is to enforce compulsory re-tendering of contracts when they expire. This can disrupt continuity of care, which is especially important to vulnerable groups such as children, victims of violence, the physically disabled, the elderly and the mentally challenged.

For many human services, negotiated, longer-term contractual relationships offer citizens greater continuity of care, while fostering the development of collaborative relationships between governments and contracted social service providers that supports critical investment in human capital and quality service delivery.

### Corporate responsibility

Public procurement can be a powerful method of encouraging private sector suppliers to respect human rights or to meet other important criteria. Such policies might include, for example, preferences for companies that implement a fair wage policy or avoid the use of exploitative child labour. Or, as in the international campaign against apartheid, public institutions might exclude suppliers that do business with regimes that systematically violate human rights.

Such conditions, however, may come into conflict with procurement rules. A prominent recent case was the EU challenge of the Massachusetts state procurement law that required that suppliers have no dealings with Burma. The EU was concerned that the law would pre-

---

<sup>47</sup> The Report of the Commission of Inquiry into the Public Service and Public Sector, 1993, Judi Korb-in, Commissioner, Vol. 2, Final Report, Province of British Columbia, Canada, p. E7.

<sup>48</sup> Ibid., p. E9.

vent European companies doing business with Burma from bidding on government contracts in Massachusetts. It argued that the law violated the most-favoured nation rule of the AGP (article III.1(b)) and conflicted with the prohibition against conditions for the qualification of suppliers that are not essential to ensure the firm's ability to perform the contract (article VIII.b).

The case was suspended before the trade tribunal could decide these charges. Human rights lawyers argue that the AGP can accommodate conditions such as those set out in the Massachusetts state law, if they are carefully drafted. They also maintain that the exception for measures "necessary to protect public morals, order or safety" (article XXIII.2) should be interpreted to include international norms regarding respect for human rights.<sup>49</sup> But it is far from clear whether a WTO dispute settlement panel would concur.

Hundreds of local governments and public institutions have adopted selective purchasing policies based on a range of human rights and other criteria. For instance, students in many North American universities and colleges have campaigned to stop their institutions from purchasing clothing produced by sweatshop suppliers. These cases could lead to other challenges that would test whether such policies violate the AGP.

### Local economic development

In many jurisdictions, public procurement is used as a tool for developing the local economy. To maximize the local impact of public spending, preferences are often given in the form of bid adjustments for local goods, services and suppliers, typically as a percentage discount on the bid.

An alternative approach is to make procurement contracts conditional on fulfilling requirements (known as offsets or performance requirements) for local content, local employment, technology transfer, investment, or other local economic benefits. An example is the South African "Targeted Procurement" policy, which specifies targets for use of local labour, businesses and resources in public contracts.<sup>50</sup>

Bid adjustments are contrary to the non-discrimination provisions of procurement rules. Even though offsets (or performance requirements) can be applied in a non-discriminatory manner, they are explicitly prohibited by NAFTA and the WTO Agreement on Government Procurement.<sup>51</sup>

Another means of favouring local economic development is to improve access for small businesses by encouraging joint ventures or by dividing a large procurement contract into a number of smaller contracts. This allows businesses with limited capacity to tender. These practices can come into conflict with rules about the valuation of procurement contracts. They require that, in assessing whether or not a procurement is subject to the AGP, the value of any multiple or recurring contracts for a single requirement must be combined. While this would not prevent dividing of contracts to favour small businesses, a government entity may have to administer them collectively as if they were a single large contract that exceeds AGP thresholds and is therefore subject to the procurement rules.

### Affirmative Action

Public procurement policies can also contribute to redressing social and racial discrimination by targeting businesses operated by particular racial or ethnic groups. The Government of

---

<sup>49</sup> Robert Howse and Makau Mutua, *Protecting Human Rights in a Global Economy: challenges for the World Trade Organisation*, Montréal: International Centre for Human Rights and Democratic Development, p.18.

<sup>50</sup> RB Watermeyer, An Introduction to Targeted Procurement, [www.targetedprocurement.com](http://www.targetedprocurement.com) .

<sup>51</sup> Local employment requirements are permitted.

Nunavut, a territory in northern Canada, adjusts the bids on procurement contracts to favour Inuit-owned businesses and the use of Inuit labour.

The South African Targeted Procurement policy uses a different approach. It specifies targets for Black-owned businesses and use of Black labour in the contract requirements. This approach dramatically increased the share of Public Works contracts held by black-owned businesses from only 2.5% in 1995 to over 30% in 2000.<sup>52</sup>

Such conditions are at odds with procurement rules in international trade agreements as they are almost certain to be seen to constitute de facto discrimination against foreign firms. Moreover, the salutary effect of such policies may also be diminished since these conditions cannot be combined with preferences and offsets for local businesses, which may be better positioned to employ members of disadvantaged groups.

#### Environmental responsibility:

Public procurement can be a powerful instrument for reducing environmental damage. For instance, all but two of the United States have laws directing state agencies to purchase recycled materials.<sup>53</sup> Procurement policies can also reward firms that adopt innovative technologies, such as chlorine-free paper production, solar power, non-toxic cleaning compounds and the adoption of energy-efficient technology and practices.

Green purchasing policies such as these may come into conflict with procurement rules in international trade agreements. For example, although no WTO case has been initiated, Canadian pulp and paper companies have alleged that purchasing preferences for paper with recycled content are WTO-inconsistent. The Canadian firms allege that such policies systematically discriminate against Canadian exports that rely on virgin timber, while favouring suppliers with ready access to recycled paper sources. The AGP requires that technical specifications for a product or service refer to its performance, not the design or descriptive characteristics.<sup>54</sup> This could be interpreted to prohibit criteria based on how a product is produced, mirroring the GATT prohibition against discrimination based on process and production methods.

Preferences for locally produced foods (based on environmental criteria such as bioregionalism or reduction of fossil fuel consumption) would almost certainly be inconsistent with international procurement rules. Even preferences for organically grown produce might be exposed to charges of de facto discrimination if they could be argued to favour local producers.

#### **Conclusion: options for PSI members**

Governments need the flexibility to choose from a wide range of policy tools to advance their social, economic and environmental priorities. Public procurement policies are a potentially powerful instrument which is in danger of being hobbled by international trade negotiations.

In new negotiations on government procurement, governments should resist signing onto the model of trade rules set out in the WTO Agreement on Government Procurement and in NAFTA. They should instead demand greater flexibility to target public purchases to achieve public policy objectives. National development goals should take precedence over securing access for international suppliers.

---

<sup>52</sup> Tami Sokutu (Department of Public Works, South Africa), *Integrating Public Sector Procurement and Transparency: the South African Experience*, paper presented at the conference of the International Public Procurement Association, Hong Kong, 2000 ([www.ippa.org.hk](http://www.ippa.org.hk))

<sup>53</sup> Rachel's Environment & Health Weekly #694 (April 27 2000) [www.rachel.org](http://www.rachel.org)

<sup>54</sup> AGP VI.2(a).

The compulsory competitive tendering model has been imposed as an answer to the need to reduce corruption and improve accountability in government procurement. Yet, other approaches can be equally effective without being as onerous on governments or as restrictive for public policy. For instance, the South African government Targeted Procurement policy, shows that all deliverables of a procurement, including its social and economic objectives, can be subjected to measurement, evaluation and auditing. Systematic approaches such as this combine rigorous accountability systems with an expanded sense of value for money. Citizens want to know, not only that public monies are not wasted, but also that they are spent so as to best improve their societies. Such innovative approaches should be encouraged by the international community, not impeded by international trade rules.

PSI members can work to maintain flexibility in their governments' procurement policies by:

- Building links with public procurement professionals, who are familiar with the policies and priorities influencing procurement by national and sub-national governments.
- Championing transparency and accountability measures domestically, which improve the integrity of procurement practices and can also provide protection for public sector workers (e.g. whistleblower legislation).
- Encourage participation by national procurement specialists in international exchange and dialogue, e.g. through the International Public Procurement Association.
- Monitor preparations for the WTO negotiations on Transparency in Government Procurement, to ensure that any eventual agreement (which is meant to apply to all WTO members) allows for greater flexibility than does the existing WTO Agreement on Government Procurement.
- Oppose negotiations to extend to GATS rules to include government procurement of services.
- Encourage all developing nations negotiating accession to the AGP to seek significant "special and differential" provisions regarding implementation of their commitments.
- Oppose further extending the AGP rules in the ongoing review conducted by the WTO Working Group on Government Procurement. Instead the Working Group should introduce greater flexibility in the AGP rules, which would help to make it more accessible to other nations.

## **APPENDICES**

1. WTO Agreement on Government Procurement: signatories, governments negotiating accession, and observers
2. Summary Table of Government Procurement Rules in the AGP and NAFTA

## **The WTO Agreement on Government Procurement**

### **Parties to the Agreement:**

Austria, Belgium, Canada, Denmark, European Communities, Finland, France, Germany, Greece, Hong Kong China, Iceland, Ireland, Israel, Italy, Japan, Korea, Liechtenstein, Luxembourg, Netherlands, Netherlands with respect to Aruba, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, United Kingdom, United States

### **Countries negotiating accession to the Agreement:**

Bulgaria, Estonia, Jordan, Kyrgyz Republic, Latvia, Panama, Chinese Taipei

### **Observers:**

Argentina, Australia, Bulgaria, Cameroon, Czech Republic, Chile, Colombia, Croatia, Estonia, Georgia, Jordan, Kyrgyz Republic, Latvia, Lithuania, Malta, Moldova, Mongolia, Oman, Panama, Poland, Slovak Republic, Slovenia, Turkey

## **Comparative Table of Procurement Rules in the WTO Agreement on Government Procurement and in the North American Trade Agreement**

### 1. General features

WTO – AGP	NAFTA
Optional agreement with 26 signatories, including 15 EU nations. <sup>55</sup>	NAFTA – United States, Mexico and Canada; entered into force January 1, 1994
Entered into force January 1, 1996.	- procurement rules (chapter 10) similar to AGP, with some significant differences
For most nations applies to procurement by sub-national as well as national bodies.	EU – 15 member nations - procurement rules in directives ....

### 2.1 Scope and coverage

WTO – AGP	NAFTA
Covers procurement by national and sub-national government bodies and government enterprises listed in individual country annexes.	Covers procurement by national government bodies and government enterprises listed in individual country annexes.
Negative list approach for goods and construction services: rules apply to all goods not specifically exempted.	Negative list approach for services as well as goods and construction
Positive list approach for services: rules apply only to services specified in individual country annexes.	Lower thresholds:
Thresholds: <sup>56</sup>	- goods: US\$50,000
- goods: SDR 130,000	- services: US\$50,000
- services: SDR 130,000	- construction: US\$7,500,000
- construction: SDR 5,000,000	

### 2.2 Sub-national government bodies

WTO – AGP	NAFTA
Covers procurement by provincial, state and local government bodies and government enterprises, where specified in country annexes. <sup>57</sup>	No sub-national coverage.
Higher thresholds (which vary by country).	Commitment to negotiate extension of procurement rules to state and provincial government bodies.

<sup>55</sup> Parties to the AGP are: Austria, Belgium, Canada, Denmark, European Communities, Finland, France, Germany, Greece, Hong Kong China, Iceland, Ireland, Israel, Italy, Japan, Korea, Liechtenstein, Luxembourg, Netherlands, Netherlands with respect to Aruba, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, United Kingdom, United States. Nations negotiating accession: Bulgaria, Estonia, Jordan, Kyrgyz Republic, Latvia, Panama, Chinese Taipei.

<sup>56</sup> SDRs are IMF Special Drawing Rights. Major currency equivalents established for the 2002-2003 period are: SDR 130,000: US\$169,000, and Euro 162,000; SDR 5,000,000: US\$6,481,000 and Euro 6,424,028. (Sources: WTO, GPA/W/168/add.5, GPA/W/168/add.6). ( Higher thresholds are applied to procurement by sub-national bodies and by government enterprises.

<sup>57</sup> Canada is the only country to have made no commitments for procurement by sub-national bodies. Other country commitments are subject to significant exceptions, e.g. for US Small Business Set Asides.

## 2.3 Government enterprises

WTO – AGP	NAFTA
<p>Covers government enterprises listed in individual country annexes.</p> <p>Higher thresholds (vary by country).</p>	<p>Covers federal government enterprises listed in individual country schedules.</p> <p>Higher thresholds:</p> <ul style="list-style-type: none"> <li>- goods: US\$250,000</li> <li>- services: US\$250,000</li> <li>- construction: US\$8,000,000</li> </ul>

## 2.4 Valuation of contracts

WTO – AGP	NAFTA
<p>Prohibits selecting methods of valuation of contracts, or dividing procurement requirements, with the intention of avoiding procurement rules (by limiting value of a contract under threshold amounts).</p> <p>Includes requirement to combine value of recurring contracts over an annual period.</p>	<p>Similar to AGP.</p>

## 2.5 General exceptions

WTO – AGP	NAFTA
<p>Procurement rules do not apply to measures necessary to:</p> <ul style="list-style-type: none"> <li>- protect national security or defense;</li> <li>- public morals, order or safety;</li> <li>- human, animal or plant life or health or intellectual property; or</li> <li>- relating to products or services of handicapped persons, philanthropic institutions or of prison labour.</li> </ul> <p>(Provided that these measures are not unfairly discriminatory or a disguised restriction on trade.)</p>	<p>Similar to AGP.</p>

## 2.6 Special and differential treatment

WTO – AGP	NAFTA
<p>Hong Kong and Korea were permitted to delay implementation by a year. Other developing countries can negotiate differential treatment at the time of accession.</p>	<p>Not covered.</p>

## 3.1 National treatment, non-discrimination and most-favoured-nation

WTO – AGP	NAFTA
<p>Requires governments to ensure that “all laws, regulations, procedures and practices regarding government procurement” treat foreign products, services and suppliers as favourably as their domestic counterparts, and as favourably as the products, services and suppliers of any other country which is a signatory to the AGP.</p>	<p>Similar to AGP.</p>

### 3.2 Offsets

WTO – AGP	NAFTA
<p>Prohibits the use of offsets in the selection of suppliers and in the evaluation of tenders.</p> <p>(Developing countries may negotiate conditions for use of offsets, but only for selection of suppliers and not for evaluation of tenders.)</p>	<p>Prohibits the use of offsets in the selection of suppliers and in the evaluation of tenders.</p>

### 3.3 Technical specifications

WTO – AGP	NAFTA
<p>Requires that technical specifications for the goods or services to be procured “shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.”</p> <p>Technical specifications shall “be in terms of performance rather than design or descriptive characteristics”; and that they be based on international standards, where such standards exist.</p>	<p>Similar to AGP.</p>

### 4.1 Tendering procedures

WTO – AGP	NAFTA
<p>Provides for three kinds of tendering processes: open, selective and limited.</p> <p>Sets out detailed rules for the non-discriminatory application of open and selective tendering procedures. Sets out conditions for use of limited tendering procedures. (Most salient examples are summarized below)</p>	<p>Similar to AGP.</p>

### 4.2 Qualification of suppliers

WTO – AGP	NAFTA
<p>Conditions for participation in procurement process “shall be limited to those which are essential to ensure the firm’s capability to fulfill the contract in question” and must not favour domestic suppliers.</p>	<p>Similar to AGP.</p>

### 4.3 Selection procedures

WTO – AGP	NAFTA
<p>Entities shall invite tenderers from the maximum number of domestic suppliers and suppliers of other Parties which is consistent with the efficient operation of the procurement system. Suppliers must be selected in a fair and non-discriminatory way.</p>	<p>Similar to AGP.</p>

#### 4.4 Submission, receipt and opening of tenders and awarding of contracts

WTO – AGP	NAFTA
<p>Includes rules requiring transparency and regularity of evaluation process.</p> <p>An entity is obliged to award a procurement contract to the tenderer who has been determined to be fully capable of performing the contract and whose tender is either the lowest or, in terms of the specific evaluation criteria contained in the tender documentation, the most advantageous.</p>	Similar to AGP.

#### 4.5 Negotiations with suppliers

WTO – AGP	NAFTA
<p>Procuring entities may conduct negotiations with suppliers only when they have indicated an intent to do so in the tender, or when it appears from the evaluation that no tender is obviously the most advantageous.</p>	Similar to AGP.

#### 4.6 Limited tendering

WTO – AGP	NAFTA
<p>Limited tendering is permitted only under specific conditions, and provided that it is not intended to avoid maximum possible competition, does not discriminate between suppliers of other Parties, and does not protect domestic producers or suppliers.</p>	Similar to AGP.

#### 5.1 Bid challenges

WTO – AGP	NAFTA
<p>Members are required to non-discriminatory, transparent, timely and effective procedures for a supplier to challenge a procurement decision.</p> <p>Challenges shall be heard by a court or an impartial and independent review body with no interest in the outcome of the procurement.</p>	Similar to AGP.

#### 5.2 Dispute settlement

WTO – AGP	NAFTA
<p>A country which considers that benefits due to it under the AGP have been nullified or impaired can initiate a complaint through the WTO Dispute Settlement Understanding. WTO panels can enforce their decisions, but cross-retaliation is not permitted.</p>	<p>NAFTA dispute settlement procedure applies, permitting cross-retaliation (i.e. withdrawal of benefits in a sector other than the one affected by the non-conforming measure).</p>