

SYMPOSIUM ON THE REVISED WTO AGREEMENT ON GOVERNMENT PROCUREMENT

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GPA Institutional Provisions: Domestic Review Procedures & WTO Dispute Settlement

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GPA Enforcement Mechanisms

The GPA has two enforcement mechanisms:

- Article XX, which refers to the standard WTO Dispute Settlement process
- Article XVIII, which is unique to the GPA and requires acceding parties to have “domestic review procedures”

Dispute Settlement Procedures

The WTO's standard dispute settlement process has been invoked in connection with the GPA, but only a handful of times

It allows for government-to-government dispute settlement

For example, the U.S. could assert that the Republic of Korea had failed to meet one of its commitments under the GPA (which was one of the actual disputes)

Dispute Settlement Procedures

There are reasons that the standard dispute settlement procedures have rarely been invoked in connection with the WTO:

- Procedures are relatively slow, which is unsuitable to procurements, which by their nature need to move relatively quickly
- The real party in interest may not be the government, but rather the unhappy tenderer, who often would prefer to pursue its own case, without dealing with its government

Domestic Review Procedures

The Article XVIII requirement for domestic review procedures reflects international consensus on the need to have a way for dissatisfied bidders to challenge their treatment

- The U.S. has had a “bid protest” process since the 1920s
- The E.U.’s Remedies Directive also requires such a process
- UNCITRAL’s Model Procurement Law, Chapter VIII, provides for “Challenge Proceedings”

Domestic Review Procedures: Who May Bring a Challenge

GPA Article XVIII says that *suppliers* must have the right to bring a challenge

Note that *suppliers* as the litigants are the distinguishing feature of bid protests, and are the key distinction between the GPA's domestic review procedures vs. the standard WTO government-to-government dispute settlement procedures

Domestic Review Procedures: The Forum

Article XVIII provides that the domestic review forum may be *administrative or judicial*

This accommodates the variation of practice around the world

This, however, has implications for other provisions in Article XVIII

Domestic Review Procedures: Overall Requirements

GPA Article XVIII says that the domestic review procedures must be:

- Timely
- Effective
- Transparent
- Non-discriminatory

Domestic Review Procedures: Overall Requirements

In fact, the meaning of only one of those terms seems clear:

“Non-discriminatory” presumably means that suppliers from a party to the GPA must not be treated worse than domestic or other parties’ suppliers in the review procedures

Domestic Review Procedures: “Timely”

“Timeliness” could have two different aspects:

- How long the supplier has to file a complaint
- How long the forum has to decide the complaint

Domestic Review Procedures: “Timely”

Article XVIII provides that the supplier must be given a minimum of 10 days to file a complaint, counting from when the basis of complaint was known or should have been known (this has become the international best practice – compare the EU standstill requirement)

Article XVIII does not set a time limit for when the forum needs to decide the complaint – presumably because the forum could be judicial, and many states view it as inappropriate to dictate how long a judge has to decide a case

Domestic Review Procedures: “Effective”

There is no international consensus or best practice regarding what makes a procurement complaint forum “effective,” so it is not surprising that Article XVIII does not define the term

The EU Remedies Directive also uses the term “effective” quite a bit, without a definition

The UNCITRAL Model Procurement Law Guide to Enactment (page 297) sets out a useful list of the elements of an “effective” challenge (=domestic review) mechanism

Domestic Review Procedures: ‘Effective’

Article XVIII requires the possibility of a stay or suspension of the procurement during the review

Article XVIII also requires the possibility of corrective action or compensation, if a violation of the GPA commitments is found, though the amount of compensation may be limited

Article XVIII also has some procedural requirements that apply if the review body’s decision is not subject to judicial review (but that situation may be rare)

Domestic Review Procedures: Transparent

It is not clear what the requirement for transparency entails

Where the review body's decision is subject to judicial review, there may be no specific transparency requirement in Article XVIII

- There is a reference to transparency in the proceedings, but that does not apply if the decision is subject to judicial review – and in fact complaint proceedings are often closed to protect non-public information

Importance of the GPA Domestic Review Procedures Requirement

Notwithstanding the lack of binding detail in Article XVIII (which, again, reflects the need to accommodate varying practices among the acceding parties), the GPA's requirement for domestic review procedures has made an important contribution to strengthening best procurement practices

The inclusion of the term “effective,” while undefined in Article XVIII, provides a useful basis for the parties to review the meaningfulness of domestic review procedures in parties negotiating for accession to the GPA