Coalition Procurement for the Reconstruction of Iraq in the Crosshairs of WTO Law: The Obligations of the United States under the WTO Government Procurement Agreement

By Dirk Pulkowski[*]

Investigating the legality? Ha ha ha! That cracks me up. There is no international law that would prohibit this action by the Defense Department, nor is there any international court that France may appeal to. I of course think that this is the correct decision. Those countries who did not help win the war – who did not pay the price in blood – have no claim to the postwar profits. – Mike, Why I'm Right, Internet Forum[1]

During the Reagan administration, I helped negotiate … the "GATT Government Procurement Code", later incorporated into the World Trade Organization's legal framework. The U.S. was the primary force behind this legal agreement. It was not motivated by altruism, but out of a belief that all signatory governments … and their respective tax payers would benefit from basing practices on economic factors rather than national favoritism. – Gene Tuttle, in response

A. Introduction

Infrastructure in Iraq lies in tatters. Unscrupulous exploitation by Saddam Hussein's dictatorial regime, burdensome economic sanctions and massive destruction during the U.S.-led military operation 'Iraqi Freedom' have turned Iraq into one of the world's most destitute countries. On the UN Human Poverty Index for 2003, Iraq ranks seventy-first out of ninety-six developing nations.[2] The reconstruction of basic infrastructure is but one first step towards development and economic

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[1] http://www.whyimright.net/blog/archives/000114.html.

[2] United Nations Development Programme, Human Development Report 2003, 247; http://www.undp.org/hdr2003/pdf/hdr03_complete.pdf.

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growth. Rebuilding Iraq's infrastructure, however, involves substantial economic interests. After all, the cake to be distributed for rebuilding Iraq is expected to exceed $ 100 billion. Some companies see on the horizon one of the most rewarding business opportunities "undertaken in over 50 years"[3] At the same time, there is a growing suspicion that political or even personal biases of the United States' administration have a bigger role to play than economic reason when it comes to sharing the cake. In December 2003, Deputy Secretary of Defense, Paul Wolfowitz, announced that some of America's trading partners, among them Canada, France, Germany and Russia, would be altogether excluded from competition for major reconstruction projects in Iraq. Public opinion in Europe was quick to brand the United States an international law-breaker. Can one State simply reserve to itself the final word on the Iraqi reconstruction money?

The public-opinion angle aside, from an international-law perspective the story is far from simple. At the outset, it should be recalled that there is no general prohibition of discriminatory treatment in international economic law. Sovereignty, according to the classical concept of international law, includes the right to trade with some States but not with others; to discriminate between friend and foe. Hence, while there is an obvious case of discrimination if a State restricts competition to some trading partners, such discrimination is only exceptionally forbidden. However, the WTO Agreements do away with some of this legal vacuum and prohibit certain forms of unequal treatment among its Members.

Government procurement has traditionally been closely associated with the idea of sovereignty. While the imposition of taxes is about levying money from a people, government procurement and domestic subsidies are about spending the money of the people for the public good. Understandably, taxes, government procurement, and subsidies have long been outside the scope of international law.

In 1948, a first attempt to subject government procurement to the rule of international law failed. The U.S. proposal for an International Trade Organization[4] boldly extended MFN and national treatment obligations to public procurement. Neither the GATT nor any following multilateral agreement adopted in the Uruguay round reflect a similar commitment to creating a level playing field in the government procurement sector. By virtue of Article III:8(a) GATT, the obligation to grant national treatment under Article III GATT does not apply to government procurement. A similar provision was introduced in Article XIII GATS.

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[3] www.iraqprocurement.de/index.htm advertises for a workshop named "Iraq Procurement – Meet the Buyers," which is co-sponsored by large multinationals such as Shell.

[4] *Cf.* Hans-Joachim Prieß, *Das Übereinkommen über das öffentliche Beschaffungswesen*, *in* WTO-HANDBUCH 625 (Hans-Joachim Prieß & Georg M. Berrisch eds. München 2003).

Until today, procurement is not specifically regulated by any multilateral agreement binding on all WTO member States.[5] In the context of the Tokyo round, in 1979, a first Agreement on Government Procurement was concluded; a narrower fore-runner of today's GPA. In the Uruguay round, the 1979 Agreement was replaced by the GPA. The GPA is a plurilateral agreement, currently only binding upon a few WTO member States[6] and open to the accession of others. The cornerstone of the GPA is the non-discrimination requirement in Article III GPA, which may be described as a blend of the traditional GATT principles of national treatment and most-favored nations (MFN) treatment. This article will focus on the question whether the U.S. procurement practice is a violation of Article III GPA.

B. Procurement for Iraq: A Violation of the GPA?

I. Basic Facts

On 10 December 2003, the Department of Defense released a decision titled "Determination and Findings,"[7] which restricts competition for twenty-six high profile Iraqi reconstruction contracts to nationals of certain States. Attachment 1 to the Determination and Findings lists all contracts covered by the decision. The contracts can be roughly grouped in four categories. The major bulk of the contracts relate to the construction services arena (electricity, communications, water supplies, Iraqi military facilities, housing and health). Others are awarded for Program Management Services, the precise content of which is rather opaque (office services, services – security/justice sector, oil sector). A third category concerns the restoration of Iraqi oil services – whether these contracts involve primarily construction services, management services or rather trade in goods (e.g., machinery) is not entirely clear. Finally, contracts for equipping the new Iraqi army will be awarded.

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[5] There is some controversy as to whether a multilateral agreement on government procurement would be desirable. While developed countries point to the economic gains created by a level playing-field, several developing countries oppose such an agreement (*see*, www.cid.harvard.edu/cidtrade /issues/govpro.html). In their support, Oxfam has argued that, for developing countries "in a world marked by stark inequalities in economic power, technical capabilities and financial strengths, a certain differentiation between national and non-national firms may be necessary precisely in order to bring about a degree of operative equality." Oxfam International Briefing Paper, *The Emperor's New Clothes*, *available at*
www.oxfam.org.uk/what_we_do/issues/trade/downloads/bp46_wto.pdf, 15.

[6] Currently, only Austria, Belgium, Canada, Denmark, the EC, Finland, France, Germany, Greece, Hong Kong China, Iceland, Ireland, Israel, Italy, Japan, Korea, Liechtenstein, Luxemburg, the Netherlands, the Netherlands with respect to Aruba, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, the United Kingdom and the United States.

[7] www.rebuilding-iraq.net/pdf/d_f.pdf.

The States whose nationals will be eligible for competition are listed in Attachment 2. The list includes sixty-two States, mostly supporters of the U.S. invasion of Iraq such as Poland and Spain in Europe, and such Arab States that did not object to or supported the U.S. intervention. Contrary to reports circulating in the German press in late January, this restriction to sixty-two coalition States has so far remained in force.[8] However, nothing prevents companies from States other than the "force contributing nations"[9] from competing for other contracts, for example, those awarded by USAID or from engaging as sub-contractors.

According to U.S. law, the Secretary of Defense is bound to issue a written determination and explain the reasons for partly excluding competition.[10] The Deputy Secretary of Defense has invoked the 'public interests exception' of U.S. procurement laws by reference to the national security interests of the United States:

3… The President has made clear that the Coalition's actions to reconstruct Iraq are indispensable for national security and national defense purposes. 4. It is necessary for the protection of the essential security interests of the United States to limit competition for the prime contracts of these procurements to companies from the United State, Iraq, Coalition partners and force contributing nations. Thus, it is clearly in the public interest to limit prime contracts to companies from these countries.

The actual Iraqi reconstruction contracts will not formally be awarded by the Department of Defense. Formally, it will always be the Coalition Provisional Authority (CPA), the U.S.-led civilian administration in Iraq that will conclude the individual contracts with competitors. When the Department of Defense gets involved or concludes contracts, it acts "on behalf of the CPA."[11]

The contracts will draw from the Iraq Relief and Reconstruction Fund (IRRF). Clearly, the money in the fund was appropriated by Congress and thus is ultimately American taxpayers' money. Yet the IRRF is administered by the Coalition Provisional Authority on behalf of the Republic of Iraq. In the budget for the In-

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[8] *Cf.* the Statement of the spokesman of the Pentagon, Lawrence Di Rita, on January 20, 2004; www.phoenix.de/ereig/exp/18134. This paper was concluded on January 25, 2004.

[9] Determination and Findings, 1.

[10] Deputy Secretary of Defense, Paul Wolfowitz, issued the Determination and Findings pursuant to two U.S. laws (41 U.S.C. 253(c)(7); 10 U.S.C. 2304(c)(7)) that permit the restriction of competition in public procurement procedures in the public interest. Under these laws "[t]he head of the executive agency – determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned." (FAR 6.302-7).

[11] Determination and Findings, 1.

terim Government of Iraq for 2004 the IRRF is designated as a U.S. Government appropriated fund and is classified as an 'off budget' source of finance of the Republic of Iraq.[12]

The set-up is rather complicated. On the one hand, the Department of Defense determines that some States should be excluded from reconstruction projects financed by U.S. taxpayers' money. On the other hand, this money is officially being placed at the disposal of the Coalition Provisional Authority, which also formally awards the procurements contracts. All these factors require closer examination to determine whether the Determination and Findings is in breach of international trade law.

II. National Treatment and Non-Discrimination (Article III GPA)

The rules of the GPA only apply between Parties to the plurilateral Agreement. Both the procuring State and the competitors' State must be Parties to the GPA. Hence, Canada, France and Germany could invoke rights under the GPA against the U.S., but Russia could not.

The principal problem is whether the GPA is *applicable* to the procurement for Iraq at all. Whether the procurement contracts for rebuilding Iraq fall under the scope of the GPA will be examined below in detail. Once this hurdle is taken, it would be relatively simple to detect a breach of the Agreement. According to Article III(1) GPA:

Each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favorable than:
(a) that accorded to domestic products, services and suppliers; and
(b) that accorded to products, services and suppliers of any other Party.

Canadian, French and German suppliers cannot qualify as primary contractors for any of the multi-million dollar deals falling under the Determination and Findings. U.S. domestic suppliers can, and so can suppliers from Denmark, Iceland, Italy, Japan, the Netherlands, Norway, Portugal, Singapore, Spain and the U.K.[13] It is difficult to deny that an openly discriminatory regulation as contained in the Determination and Findings would be in violation of the national-treatment provision of Article III(1)(a) GPA and of the non-discrimination obligation under Article III(1)(b) GPA.

[12] Republic of Iraq, 2004 Budget, *available at* www.cpa-iraq.org/budget/NIDmergedfinal-11Oct.pdf.

[13] Other States listed in Attachment 2 to the Determination and Findings are not Parties to the GPA.

III. The Scope of the GPA (Article I GPA)

The major issue raised by the case, however, is the applicability of the GPA to the procurement contracts regarding the reconstruction of Iraq. According to Article I(1) GPA, the Determination and Findings only falls within the scope of the GPA under three conditions: "This Agreement applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement, as specified in Appendix I." Hence, the Agreement applies to certain measures *[1]* relating to certain types of procurement contracts *[2]* awarded by certain entities *[3]*.

1. Quality of the Measure: "Law, regulation, procedure or practice"

With regard to the quality of measures covered by the GPA, the threshold established by the GPA is low. The broad wording "This Agreement applies to any law, regulation, procedure or practice" can only be understood as a *pars pro toto* formulation in place of a general clause. Reference to any "practice" establishes a saving clause designed to cover all cases where a strictly legal form of State conduct, such as a law, a directive, or an order cannot be proven. The Determination and Findings was issued by the executive branch of government as an exception to U.S. procurement laws.[14] As a legal exception, its scope being limited to certain procurement contracts, it should qualify as a "regulation" within the meaning of Article I(1) GPA.[15]

2. Applicability ratione materiae: *"Regarding any procurement… as specified in Appendix I"*

Not all procurement contracts are automatically included in the scope of the GPA. Every State Party to the GPA has defined the scope *ratione materiae* of its respective obligations separately in Annexes 4 and 5 to Appendix I by including or excluding certain types of contracts (so-called positive list and negative list). Consequently, no two State Parties' obligations under the GPA are identical. The U.S. has excluded certain services from the scope of the GPA. Number 4 of Annex 4 excludes "[a]ll services purchased in support of military forces located overseas". It seems logical

[14] 41 U.S.C. 253(c)(7); 10 U.S.C. 2304(c)(7).

[15] It is noteworthy at this point that, according to the wording of Article I(1) GPA, the GPA applies to "any law, regulation, procedure or practice" without limitation to certain entities listed in Appendix I. The Appendix is only relevant for determining whether the *procurement* activity to which the "law, regulation, procedure or practice" relates is covered by the Agreement. Hence, reference must be made to general international law. Article I(1) GPA must be read as covering, in principle, any *practice by any entity* attributable to the State Party to the GPA regarding *procurement by specific entities.*

to infer that "in accordance with the ordinary meaning to be given to the terms of the treaty in their context,"[16] only the United States military forces are covered by the exception. Otherwise, reference to an "overseas" location would be meaningless. Services contracted to "[e]quip [the] New Iraqi Army,"[17] consequently do not fall under the exception and remain covered by the GPA *ratione materiae*. Moreover, all construction contracts listed in the Determination and Findings fall under the GPA *ratione materiae.* The U.S.-specific Annex 5 incorporates the comprehensive listing of construction services developed by the United Nations Statistical Division.[18]

3. Applicability ratione personae: *"Regarding any procurement by entities covered by this Agreement, as specified in Appendix I"*

Another structural peculiarity of the GPA is its limited personal scope. The Agreement does not apply to procurement by all municipal entities. Instead, each Party has determined the scope *ratione personae* of the Agreement by positively identifying such central government entities, local government entities, and other public entities that it wishes to subject to the obligations under the GPA. Annexes 1-3 to Appendix 1 of the GPA contain a positive list of government entities. Only procurement by these so-called "covered entities" is subject to the disciplines of WTO law. Under the GPA, it does not matter which agency *regulates*; but it does matter which agency *procures*.

a. Is the CPA a Procuring Entity Covered by the Agreement?

One of the key contentious issues is whether procurement for Iraq is "procurement by entities covered by this Agreement" (Article I(1) GPA). Formally it will be the Coalition Provisional Authority (CPA) that selects competitors and awards the contracts. Obviously, the CPA, which only came about in the course of the Iraq conflict, is not part of the positive list of Annexes 1 to 3. This fact has caused Richard Mills, Spokesman of the U.S. Trade Representative, to state that "[p]urchases on behalf of the Coalition Provisional Authority (CPA) are not covered by international trade procurement obligations because the CPA is not an entity subject to these obligations."[19] True enough, *CPA procurement* would not be covered by the GPA. Procurement undertaken by the *Department of Defense,* the *Department of State,*

[16] Vienna Convention on the Law of Treaties , Art. 31(1).

[17] Number 26 of Attachment 1 to the Determination and Findings.

[18] Division 51 of the Central Product Classification (CPC); for details, *see* http://unstats.un.org/unsd/cr.

[19] Statement by Richard Mills, December 10, 2003, Press Release Nr. 20508, *available at* www.ustr.gov.

or the *Executive Office of the President,*[20] however, is subject to the international obligations under the GPA. These agencies are listed as a covered entity in Annex 1. Thus, the key question is whether procurement formally undertaken by the CPA is attributable under international law to one of the Departments or the President's office. In other words, can it be said that the Department of Defense, the Department of State, or the Executive Office of the President procure through the CPA?

One possible starting point of the inquiry is Article I(3) of the GPA, which stipulates:

Where entities, in the context of procurement covered under this Agreement, require enterprises not included in Appendix I to award contracts in accordance with particular requirements, Article III shall apply mutatis mutandis to such requirements.

Article I(3) GPA, on its face, is only concerned with the scenario of a government agency requiring *enterprises,* i.e. private businesses, to discriminate between different contractors. It may be quite a stretch to subsume the Coalition Provisional Authority under the term "enterprise". It is submitted, however, that the interpretation of the very terms of Article I(3) GPA is not a central issue of the case.[21] For Article I(3) GPA is merely a narrow restatement of a broader principle of international law. The provision clarifies what would be true under international law anyway, namely that procurement does not fall outside the scope of the GPA only because Parties sign a contract under a different letter-head. A purely formal approach to determining the procuring entity would open the door to evasiveness and abuse all too easily. The only WTO panel report on the GPA, the ruling in *Korea – Government Procurement* regarding the construction of Inchon International Airport, confirms this reading of Article I(3) GPA. The panel, without even discussing Article I(3) GPA, concluded "that entities that are not listed in Annex 1 to the GPA whether in the Annex list or through a Note to the Annex, can, nevertheless, be covered under the GPA,"[22] provided that a sufficiently close connection with a covered entity can be established.

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[20] The Executive Office of the President is made up of White House offices and agencies, including the National Security Council and the Office of Management and Budget.

[21] David Palmeter and Niall P. Meagher, by contrast, appear to be of the view that the issue is essentially one of interpreting the term "require". In substance, however, their brief sketch of the problem does not differ from the approach proposed in this paper; *Cf.* ASIL Insights: Iraq Reconstruction Contracts, December 2003.

[22] *Korea – Measures Affecting Government Procurement,* Report of the Panel, WT/DS163/R, para. 7.58.

b. Application mutatis mutandis *of the Rules of Attribution?*

What are then the relevant rules of international law concerning the attribution of conduct of one agency, the CPA, to another agency, such as the Department of Defense? Since, under international law, obligations are rarely limited to certain municipal entities to the exclusion of others,[23] the reservoir of international case law on attribution of conduct of one agency to another agency is not abundant. One possible approach would be an application *mutatis mutandis* of the rules of attribution of the conduct of private actors *to a State*, that is the customary law rules of attribution that the International Law Commission has attempted to codify in 2001 in its draft Articles on State responsibility.[24] WTO panels have been confronted with such issues of attribution in evaluating whether a trade-restricting measure constitutes a breach of one of the Agreements although it was formally adopted by private individuals. In *Canada – Dairy,* for example, the U.S. and New Zealand seized a panel to decide on whether certain benefits conferred on domestic dairy producers constituted subsidies within the meaning of the Agriculture Agreement.[25] The crucial point was whether benefits granted by entities formally run by the dairy industry were attributable to the State of Canada. The panel considered these entities government agents by virtue of both their empowerment by Canadian law to exercise State functions and the considerable level of factual government control.[26] This ruling came as no surprise given the famous judgments of the European Court of

[23] Under general international law – and under the other agreements within the WTO framework – a State is responsible for all conduct by any of its entities (Article 4(1) of the draft Articles on State responsibility, Report of the International Law Commission, Fifty-third session (2001), General Assembly Official Records, Fifty-sixth session (A/56/10). International law does not recognize municipal distinctions between branches of government or government agencies. One of the earliest statements of this principle of international law is Umpire Lieber's award in the *Moses* case, a decision of a Mexico-United States Mixed Claims Commission: "An officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority" (MOORE, INTERNATIONAL ARBITRATIONS, vol. III, 3127, 3129 (1871); *Cf.* later on the rulings: CLAIMS OF ITALIAN NATIONALS RESIDENT IN PERU, UNRIAA, vol. XV, 399 (1901) (*Chiessa* claim); 401 (*Sessarego* claim); 404 (*Sanguinetti* claim); 407 (*Vercelli* claim); 408 (*Queirolo* claim); 409 (*Roggero* claim); 411 (*Miglia* claim); SALVADOR COMMERCIAL COMPANY., vol. XV, 455, 477 (1902); FINNISH SHIPOWNERS, UNRIAA, vol. III, 1479, 1501 (1934).

[24] Articles 4 – 11 of the draft Articles on State responsibility, *International Law Commission, Report on the work of its fifty-third session, Official Records of the General Assembly,* Fifty-Sixth Session, Supplement No. 10 (A/56/10).

[25] 9.1(a) of the Agriculture Agreement contains a special prohibition of subsidies, which is *lex specialis* vis-à-vis the provisions of the SCM Agreement.

[26] *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products,* Report of the Panel, WT/DS103/R.

Justice in the comparable cases of *Buy Irish,*[27] regarding the free movement of goods, and *Walrave and Koch*[28] and *Bosman,*[29] regarding the free movement of persons.

Applying *mutatis mutandis* to the relationship between two State entities, the customary international law would be modified as follows:

The conduct of an entity that is not covered by the GPA is considered an act of a covered entity if this entity is empowered by law to exercise elements of the covered entity's governmental authority.[30]

And:

The conduct of an entity that is not covered by the GPA is considered an act of a covered entity if this entity is in fact acting on the instructions of, or under the direction or control of, the covered entity in carrying out the conduct.[31]

In the *Korea – Government Procurement* dispute, the U.S. had in fact suggested that those customary rules be applied to determine the relationship between two municipal agencies.[32]

Such an analogy with the customary international law of attribution, while convincing at first glance, meets with considerable systematic concerns upon a second look. The rules of attribution just cited are grounded on the rationale that no State can evade its comprehensive obligations under public international law by exercising State functions through individuals – either by formal empowerment or by virtue of a factual control relationship. Since a State bears the comprehensive international responsibility for all State conduct, any transfer of State authority to private actors is a potential evasion of responsibility, which the rules of attribution prevent. In this vein, the European Court reasoned that a "government cannot rely on the fact that the [buy Irish] campaign was conducted by a private company in order to es-

[27] 249/81, 1982 E.C.J. 4005.

[28] 36/74, 1974 E.C.J. 1405.

[29] C-415/93, 1995 E.C.J. I-4921.

[30] Article 5 of the draft Articles *mutatis mutandis.*

[31] Article 8 of the draft Articles *mutatis mutandis.*

[32] *Korea – Measures Affecting Government Procurement,* Report of the Panel, WT/DS163/R, para. 7.53.

cape any liability it may have under the provisions of the treaty."[33] Under the GPA, the situation is slightly different. Here States have exercised a legitimate option to subject only certain agencies to the obligations of the GPA, while other entities have remained legitimately outside the scope of international regulation. Since a State has no comprehensive responsibility under this Agreement for all State conduct, procurement through a non-listed entity is not *per se* suspicious of evasion.

c. A Matter of Treaty Interpretation: Can the CPA be Equated with a Federal Agency?

Whether procurement by the CPA is covered is not so much a matter of attribution than of treaty interpretation "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[34] The question is whether, in accordance with the ordinary meaning of the GPA and its Annexes, procurement by the CPA can be considered procurement by the 'Department of Defense,' the 'Department of State,' or the 'Executive Office of the President' by virtue of their listing in Annex 1. The scope of the GPA could thus be extended to cover the CPA in two scenarios. First, the object and purpose of the treaty would require that CPA procurement be covered if the CPA could be considered a dependent outpost, a branch office so-to-speak, of a listed entity. To this end, a close connection with a listed entity would have to be proven. Second, the principle of effective interpretation[35] would require that the U.S. cannot circumvent its obligations under the GPA by formally engaging the CPA in purchases that would normally be undertaken by one of the listed entities. For this second option, a case must be made that the procurement contracts for Iraq are in substance contracts of the Pentagon, the State Department, or the President's Office. Both cases merit closer examination.

The first avenue for covering GPA procurement requires a sufficiently close connection between the CPA and one of the listed entities to equate one with the other. Naturally, the existence of a control relationship can play a significant role in an-

[33] 249/81, 1982 E.C.J. 4005, para. 15.

[34] Vienna Convention on the Law of Treaties, Art. 31(1).

[35] There is some controversy on the systematic foundation and the actual content of the principle of effective interpretation. Taking the Vienna Convention on the Law of Treaties as a starting points, the effectiveness principle (or the maxim *ut res magis valeat quam pereat)* are reflected either in the duty to interpret "in the light of [a treaty's] object and purpose" or in the notion of good faith. The notion of good faith seems to be the more convincing solution. For the principle of effective interpretation as understood here precludes a State from frustrating the obligations assumed by invoking a formal circumvention of the conditions under which the norm would apply. *Cf.*, SIR I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 115 (Manchester, 2nd ed. 1984); SIR R. JENNINGS & SIR A. WATTS, OPPENHEIM'S INTERNATIONAL LAW 1280 (London 9th ed. 1992).

swering this question. As the panel in *Korea – Government Procurement* stated, "the issue of 'control' of one entity over another can be a relevant criterion among others for determining coverage of the GPA."[36] Other factors identified by the panel in the *Sonar Mapping System* case,[37] include the use of funds of a covered entity and arrangements pursuant to which the selection of a contractor is subject to final approval by a covered entity. Yet, it is not easy to apply the criteria proposed by the panels to the CPA. For the status of the Provisional Authority is most ambiguous. It may be characterized as a hybrid governing body for Iraq. On the one hand it is the principal administrative device of the occupying power, foremost of the U.S. On the other hand it functions as an Iraqi interim government with the blessing of the United Nations Security Council.

The linkages between the U.S. and the CPA are numerous. The Coalition Provisional Authority is a direct successor to the U.S. military command that established itself as the first administration for Iraq. L. Paul Bremer III, who has headed the CPA since May 2003, was appointed by the U.S. President, George W. Bush, as the "President's special envoy to Iraq." Most of the senior CPA officials are Americans. In practice, the multi-State character of the coalition is only marginally reflected in the CPA's composition. How American the CPA is, is mirrored even by trivia such as its web-site, which is registered as a ".gov" U.S. government domain and which the U.S. government actively uses to disseminate American government information in and about Iraq. If the question were asked whether the acts of the CPA are attributable to the United States under the customary international law of State responsibility, the answer would most likely be 'yes'.

It is less easy, however, to establish a close connection between the CPA and one of the federal agencies. Operationally, the CPA has strong links with the Department of Defense. The strongest indication for the existence of a close link to the Pentagon is the Determination and Findings itself. Obviously, when issuing the regulation the Department of Defense must have assumed that the CPA would implement it. Moreover, the Determination and Findings is stored on the web server of the CPA, which suggests that the CPA intends to adhere to it. Other connections between the CPA and the Pentagon include extensive cross-linking of their respective websites, the fact that CPA press conference transcripts bear a Pentagon letter-head, and that they are stored on the Pentagon's "dod.mil" domain. Several functions of the CPA are exercised by U.S. military officials. The officials referred to as contacts of the

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[36] *Korea – Measures Affecting Government Procurement,* Report of the Panel, WT/DS163/R, para. 7.57.

[37] *United States – Procurement of a Sonar Mapping System,* Report of the Panel, GPR.DS1/R, para. 4.09 – 4.11. The decision was handed down under the 1979 Agreement, which was negotiated in the context of the Tokyo round.

"Ministry of Finance" of Iraq, for example, are affiliated with the U.S. Central Command. Yet, the CPA is by no means identical with the U.S. military command. The command over the military operation is essentially in the hands of the Combined Joint Task Force Seven, headed by General Ricardo S. Sanchez.[38]

The distinction between the U.S. military and the CPA is exemplified by the fact that Ambassador Bremer was appointed to head the civilian administration as a representative of the United States as a whole – the President's special envoy – rather than as the Pentagon's man in Iraq. To the New York Times, in fact, the "choice of Bremer, a civilian, is a victory for the State Department over the Pentagon."[39] Hence, despite strong operational links with the Department of Defense, when it comes to policy decisions the CPA can be expected to coordinate both with the President and the Department of State. Since both the Department of State and the Executive Office of the President are covered entities too one could argue that the CPA is a joint Iraqi outpost of all three agencies combined.

A number of other factors, however, suggest that the Coalition Provisional Authority cannot be treated simply as a branch office of three U.S. federal government agencies. The CPA clearly exercises functions distinctive of an interim government of Iraq. The CPA is so to speak the official international interim government before an effective national interim government is formed. The International Community, through Security Council Resolutions 1483 and 1511, has practically acknowledged that the CPA should administer Iraq for the time being. The Council recognizes that the CPA legitimately exercises important functions of a government and vests the CPA with far-reaching competence. In Resolution 1483, the Security Council "[c]alls upon the Authority … to promote the welfare of the Iraqi people through the effective administration of the territory."[40] Until government is handed over to the Iraqis, the Security Council has bestowed on the CPA the authority to disburse at its discretion the funds in the Development Fund for Iraq[41] as well as all operational responsibility for the Oil-For-Food Programme.[42]

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[38] *Cf.*, www.cjtf7.army.mil.

[39] Steven R. Weisman, *Aftereffects: Postwar Planning; U.S. Set to Name Civilian to Oversee Iraq*, New York Times, May 2, 2003.

[40] S/Res/1483 (2003), para. 4. Critical of a potentially dominant influence of the Coalition, the Security Council underlines the territorial sovereignty of the Iraqi people, which it deems to be embodied by the Governing Council (S/Res/1511 (2003), para. 4), an Assembly of twenty-five senior representatives of Iraqi population groups.[40] As a political guideline, it requests the CPA to "return governing responsibilities and authorities to the people of Iraq as soon as possible" (S/Res/1511 (2003), para. 6).

[41] S/Res/1483 (2003), para. 13.

[42] S/Res/1483 (2003), para. 16.

The CPA's mission statement reflects its hybrid nature. It perceives itself as the administration of the occupying power ("pursuant … to the laws and usages of war"[43]) and as an international interim administration ("pursuant … to the relevant U.N. Security Council resolutions, including Resolution 1483 (2003)"). Its mission is to "exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration."[44] As regards the relationship between the military and the CPA, the mission statement outlines a model of cooperation rather than of subordination. "As the Commander of Coalition Forces, the Commander of U.S. Central Command shall directly *support* the CPA by deterring hostilities, maintaining Iraq's territorial integrity and security; … and assisting in carrying out Coalition policy generally."[45] If the mission statement can be taken at face value, it is the CPA that can boss the military to some extent, rather than *vice versa*.

Another indicator that may make CPA procurement look like procurement of one of the federal agencies would be the use of funds of one of the covered agencies. The reconstruction contracts in question however, are financed by funds appropriated directly by Congress for the "security, rehabilitation and reconstruction"[46] of Iraq and paid into the Iraq Relief and Reconstruction Fund. This fund is now included in the 2004 budget of the Republic of Iraq as an 'off budget' source of finance and administered by the CPA.[47] Once more, the equation of CPA with a covered entity is not easy to make.

Finally, a functional argument can be advanced against holding the U.S. accountable under the GPA for procurement by the Coalition Authority. One indication of a factual integration of the CPA within a listed entity would be the exercise of typical functions of that entity with respect to the concrete procurement project. The construction of a new U.S. embassy in Baghdad, for example, may be a function of the State Department, the purchase of SUVs for patrolling the streets of Tikrit a function of the Department of Defense. All contracts covered by the Determination and Findings, however, relate to the reconstruction of the Republic of Iraq – its infrastructure, oil industry and institutions. The reconstruction of Iraq is predominantly a task of the Iraqi government. Therefore, if one maintains that the CPA acts

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[43] Coalition Provisional Authority Regulation Number 1, CPA/REG/16May2003/01.

[44] *Id.*

[45] *Id.* emphasis added.

[46] For a summary of the Conference Report, http://rpc.senate.gov/_files/ACF1EE.pdf.

[47] Republic of Iraq, 2004 Budget, www.cpa-iraq.org/budget/NIDmergedfinal-11Oct.pdf.

both as an outpost of U.S. agencies in one respect and as an interim government in another, procurement activity is linked to its role as an interim government.

In the end, it all boils down to one overarching question: Do we accept that the CPA, despite its close links to U.S. federal agencies, is the interim government of Iraq?[48] If the answer is in the affirmative, and I believe it should be, the functional independence of the CPA must be respected by international trade law. While the CPA may be run by American soldiers in the civilian coat of an interim government, the CPA is nonetheless more than a mere *de facto* annex to a U.S. federal agency. And the latter would be required to open the door to the application of the WTO Agreement on Government Procurement.[49]

For similar reasons, the second avenue for holding the U.S. accountable for Coalition procurement is not very promising. Having recourse to the principle of effective interpretation, the GPA must be interpreted in such a way that no "entity listed in a signatory's Schedule could escape the Agreement's disciplines by commissioning another agency … to procure on its behalf."[50] The U.S. would, therefore, be responsible under the GPA if the conclusion is justified that the United States attempts to *escape* its obligations under the GPA by engaging the CPA in procurement in lieu of the Department of Defense. Since the contracts covered by the Determination and Findings essentially relate to 'nation building,' however, they cannot be qualified as the exercise of typical functions of the Department of Defense (c.f. *supra*). Consequently, it would be difficult to demonstrate that the U.S. is avoiding its obligations under international law by procuring through the CPA *in the Pentagon's place*.[51]

If the CPA cannot be equated with one of the federal agencies, one puzzle remains. How can the Pentagon issue a decision on procurement practice that binds the CPA? There are two basic answers. If one emphasizes the nature of the CPA as an Iraqi interim government, there are good grounds for assuming that the Determination does not bind the CPA at all, since the CPA is not formally subject to the U.S. legal system. If the stress is on the CPA's factual integration within the U.S. agencies one could assume that CPA executives ultimately answer to one of the agen-

[48] Accepting the role of the CPA as a factual interim government, it should be noted, is without prejudice to the question of its legitimacy or the legality of the Coalition's occupation of Iraq.

[49] This does not preclude that the U.S. may continue to be internationally responsible for the CPA's conduct, *Cf.*, *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections,* 1992 I.C.J. 240.

[50] *Korea – Measures Affecting Government Procurement,* Report of the Panel, WT/DS163/R, para. 7.59.

[51] Whether, in reality, avoiding the GPA was a motivation behind placing the authority to procure in the hands of the CPA, or merely a pleasant side-effect, can only be answered by the U.S. government itself.

cies. The most honest reply is to admit that the formal "bindingness" is no decisive factor in assessing whether the CPA will adhere to Wolfowitz's decision. Whether the Determination is considered a legal regulation, a military command, or merely the donor's earmarking of funds worth $ 18.6 billion, it can certainly be expected that the CPA will faithfully implement the decision.

4. Territorial Scope of the GPA: Is Procurement in Iraq Covered at All?

The regulatory scope of international agreements is generally limited to a State's territory, if not by virtue of an explicit provision then impliedly as a consequence of treaty interpretation "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[52] On the international plane, a State's jurisdiction requires a link to the subject-matter of regulation, which is traditionally mediated by territory or nationality. Extra-territorial jurisdiction based on the effects principle has gained some acceptance in cartel law and criminal law, but it still requires a special justification. The European Court of Human Rights in its *Bankovic* judgment accordingly ruled that "[a]s to the 'ordinary meaning' … the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial."[53]

The GPA does not contain a specific provision delimitating its territorial scope. The Parties, however, have added a "Note" concerning the territorial application of the Agreement:

The terms "country" or "countries" as used in this Agreement, including the Appendices, are to be understood to include any separate customs territory Party to this Agreement.

By implication it follows that the scope of the GPA, similarly to the GATT,[54] is territorially restricted to the customs territory of a Party. Compared to the GATT, how-

[52] Vienna Convention on the Law of Treaties, Art. 31(1).

[53] Bankovic and others v. Belgium and 16 other contracting States, E.C.H.R., Application Nr. 52207/99, para. 59.

[54] The question of exterritorial application is rarely a contentious issue in WTO disputes. The GATT, e.g., is applicable "to the metropolitan customs territories of the contracting parties and to any other customs territories in respect to which this Agreement has been accepted…" (Article XXIV:1 GATT). To take the concrete example of the MFN provision of Article I GATT, a member State is barred from enacting regulations or engaging into practices that lead to preferential treatment of nationals of one member States vis-à-vis nationals of other member States *on its customs territory*. With the exception of few borderline cases (in the *Turkey – Textiles* case (Report of the Panel of May 31, 1999, WT/DS34/R), Turkey argued that the imposition of quantitative restrictions was justified because Turkey was working towards acceding to the European Free Trade Area) it is relatively easy to determine whether conduct falls within the

ever, the GPA raises an additional problem. Which acts need to occur on a Party's customs territory? Does Article I(1) GPA require a "double territorial link"? Article I(1) GPA opens the door to the specific obligations under the Agreement under two conditions: *(1)*there must be a law, regulation, procedure, or practice by a Party to the Agreement, *(2)* which relates to a procurement undertaken by an entity of that Party. The question arises whether both acts – the regulation *and* the actual procurement – require a territorial link to the United States. While such territorial link can clearly be established with respect to the first act (the Determination and Findings), the second act (the performance of the procurement contracts) occurs in Iraq.

A comparison to the GATT practice may suggest that such a "double territorial link" is necessary. Generally, GATT obligations are triggered when there is *trade between two customs territories* one being the respondent State's. Hence, there will be no violation of the GATT without a territorial link to the subject-matter. By virtue of the structure of GATT obligations, there will always be double territoriality: with respect to the challenged regulation or practice and with respect to the subject matter to which the regulation refers. It is doubtful, however, whether this finding with regard to the GATT can be applied *mutatis mutandis* to the GPA. In fact, there are strong grounds for holding that only the first act – the discriminatory "law, regulation, procedure or practice" – must occur within U.S. customs territory to trigger the application of the GPA. For it is the discriminatory regulation or practice that distorts the level playing field among international competitors, irrespective of where the effect of the discrimination materializes in a concrete procurement contract. By focusing on the discriminatory act rather than on the subject-matter to be regulated, the GPA has a structural similarity with the Agreement on Subsidies and Countervailing Duties (SCM), rather than with the GATT. In the *Foreign Sales Corporations* (FSC) case,[55] the Panel was faced with a U.S. regulation granting tax credits to companies incorporated abroad. The E.C. challenged the measure under the SCM Agreement. The panel was faced with the question whether tax credits *relating to economic processes abroad* constitute an export subsidy. The panel found in favor of the E.C., thus rejecting the U.S. argument that economic processes outside the customs territory are by definition not regarded as export activities.[56] Leaving the

territorial scope of GATT or not. Preferential laws normally apply on a State's own territory, and preferential customs practices relate to trade on a State's customs territory.

[55] United States – Tax Treatment for "Foreign Sales Corporations", Report of the Panel, WT/DS108/R, 8 October 1999.

[56] The issue in the *FSC* case was, however, not primarily one of the territorial scope of the SCM Agreement. Rather, the U.S. invoked a 1981 understanding by the GATT council regarding Article XVI:4 GATT, pursuant to which "economic processes (including transactions involving exported goods)… should not be regarded as export activities in terms of GATT Article XVI:4…", C*f.*,

technicalities of the WTO subsidies code aside, what counted for the panel (and, subsequently, the Appellate Body) was not primarily the territoriality of the economic process that was regulated, but rather the territoriality of the regulation as such. To the same effect, it could be argued that the GPA applies whenever a Party regulates on its territory, irrespective of whether the regulation relates to economic processes (procurement) abroad. Hence, the GPA would be applicable to any law, regulation, procedure or practice in a Party's customs territory relating to procurement by a covered entity, irrespective of where the actual procurement contracts are awarded and performed.[57]

A last question arises in the context of procurement for Iraq. If a "double territorial link" to the U.S. is necessary (which I have argued it is not), can such a territorial link be established through occupied territory? The intricacies of whether the U.S. presence in Iraq constitutes an occupation within the meaning of international law, and if yes, whether it is a U.S. occupation or an occupation by a multi-State coalition, cannot be addressed in this paper. Let us assume, therefore, for the sake of argument that the U.S. is *de facto* occupying Iraq. Is the U.S. bound to respect the obligations under the GPA with respect to procurement for occupied territory? The WTO regime contains no specific provision regarding occupied territory. In the early years of the GATT, an interpretative note exempted occupied territories from the scope of the GATT: "Territories for which the contracting parties have international responsibility do not include areas under military occupation."[58] The note was deleted in the course of the 1954/55 review session. It seems difficult to infer *e contrario* that occupied territories are therefore now covered. Rather, the answer must be found in an interpretation of the WTO Agreements.

The European Court of Human Rights in its *Bankovic* judgment stated *obiter dicendi*[59] that the exercise of authority in occupied territory may constitute the exercise of "jurisdiction" and, therefore, trigger the application of the European Convention.[60] It could be contemplated that the GPA too is to apply in occupied territories. How-

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www.ustr.gov/releases/1998/07/98-67.pdf. The Understanding was intended to clarify primarily that the European practice of territorial taxation was in conformity with the GATT.

[57] Naturally, the performance of the procurement contracts will, in most cases, occur on the Party's territory. For only in exceptional cases will an entity listed in one of the Annexes engage in procurement for projects outside the Party's territory.

[58] Quoted in Guide to GATT Law and Practice, Vol. II, Analytical Index (1995) 919.

[59] Thus trying to reconcile its ruling in *Bankovic* with the earlier rulings in the *Loizidou* and *Cyprus* cases.

[60] Bankovic and others v. Belgium and 16 other contracting States, E.C.H.R., Application Nr. 52207/99, para. 60.

ever, the more convincing position is not to apply the WTO obligations in occupied territories. In what Moshe Hirsch called "the practical-trade approach"[61] as opposed to "the political-sovereignty approach," the GPA applies to *customs territories* rather than to territory under a State's jurisdiction. To clarify this point, the Notes to the GPA state that "'country' or 'countries' as used in this Agreement … are to be understood to include any separate customs territory Party to this Agreement." The conclusion under the GPA is, thus, easier to draw than under other treaties. There may be controversy as to whether the U.S. is exercising *jurisdiction* in Iraq. By exercising jurisdiction in Iraq, the U.S. may be bound to respect international human rights obligations in Iraq (e.g., under the ICCPR); by virtue of U.S. exercise of jurisdiction, by contrast, Iraq does not transform into U.S. customs territory.

C. Exceptions to the GPA

I. The Exception of "Government Assistance"

Even if one considers CPA procurement to fall under the GPA *ratione personae* (which I have argued it does not) and territorially (which I have argued it does), such procurement would still be excluded from the GPA if it qualifies as a measure of "government assistance". The United States has attached to Appendix I of the Agreement a list of qualifications of the obligations undertaken – the so-called "General Notes." Note 2 excludes from the scope of GPA coverage "any form of government assistance, including cooperative agreements, grants, loans, equity infusions … to persons or governmental authorities not specifically covered under U.S. annexes to this agreement."

Palmeter and Meagher, in their analysis for ASIL insights, imply that the term "government assistance" should be understood as assistance *between* governments. They suggest that at least some of the contracts may constitute a measure of assistance of the U.S. government to the Iraqi government. These contracts would thus be excluded from the scope of the GPA.[62] Yet, there are two strong arguments against such an interpretation of "government assistance". First, the term government assistance should be interpreted as referring to assistance *within* the government, typically support provided by the federal government to a State or local government. This follows from the wording of the Note. The Note is concerned with assistance "to persons or governmental authorities *not specifically covered* under U.S.

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[61] Moshe Hirsch, '*Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip*', 26 FORDHAM INT'L. L. J. 572 (2003).

[62] David Palmeter and Niall P. Meagher, ASIL Insights: Iraq Reconstruction Contracts, December 2003.

annexes to this agreement." It can be inferred that the Note refers only to such entities that the U.S. could choose to list in the Annexes. This is true only for U.S. municipal agencies. Second, the function of the exception is to clarify that 'assistance' does not constitute 'procurement'. By assisting, funding, or otherwise supporting a construction project, an *assisting* government agency cannot be deemed a *procuring* agency. For the purposes of the Iraqi reconstruction contracts, all that follows from the Note is that the Department of Defense does not 'procure' by providing logistical and financial support to the CPA. Yet, no one objects to the Pentagon's logistical support. At issue is the lawfulness of the Pentagon's attempt to influence the CPA's selection of competitors. Such direct influence on the selection process can no longer be perceived as mere intra-government assistance.

There is no State practice or case law on the meaning of this exception to the U.S. commitments *in the context of the GPA*. An identical clause was inserted, however, in Chapter Ten of NAFTA on government procurement. In the NAFTA context, the ruling of the ICSID Tribunal in *ADF Group Inc. v. U.S.* confirms the restrictive interpretation proposed above. The Tribunal found that "by granting Federal-aid funds to [the assisted entity…] to enable the latter to construct the Springfield Interchange Project […] the U.S. Department of Transportation did not constitute itself as the procuring entity in that Project, and did not itself engage in procurement."[63] The involvement of the federal agency, however, would no longer amount to mere government assistance if "the Commonwealth of Virginia was 'forced' to adopt the [discriminatory] Buy America measure."[64] In the *ADF* case, the complainant was unable to prove that the U.S. Department of Transportation had exerted any influence regarding the adoption of the Buy America policy. Rather, the Tribunal concluded, "Virginia chose on its own to undertake and implement"[65] the highway construction project. By contrast, the Pentagon's involvement in the procurement for Iraq extends to direct influence on the selection process. Consequently, the Pentagon has stepped over the red line of mere government assistance within the meaning of General Note 2.

II. The Exception of "Tied Aid to Developing Countries"

Moreover, tied foreign aid is exempted from the scope of the GPA. In the "Notes" to the GPA, the Parties have added an authoritative interpretation, which forms an integral part of the GPA. The note reads:

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[63] ADF Group Inc. v. United States of America, ARB(AF)/00/1, Award of January 9, 2003, para. 170.

[64] *Id.,* at para. 173.

[65] *Id.,* at para. 173.

Having regard to general policy considerations relating to tied aid, including the objective of developing countries with respect to the untying of such aid, this Agreement does not apply to procurement made in furtherance of tied aid to developing countries so long as it is practiced by Parties.

The heavy-handed wording of the Note reflects a difficult political compromise between the interests of developed countries' domestic economies and the interests of effective development assistance. On the one hand, governments in developed countries face enormous domestic pressure to combine foreign aid with providing business opportunities for local suppliers. "If our taxpayer's money is given away to a developing country, why should our businesses not have the first draw," the popular argument runs. On the other hand, development theory is unequivocal that "the practice of tying the granting of aid, directly or indirectly … reduces its effectiveness. It is generally recognized that the untying of aid is an important factor in a coherent pro-poor development policy."[66] Accountability and transparency of aid management are harder to uphold if foreign aid is subjected to policy considerations of the Donor State. The prospects of untying aid to developing countries were a major item on the agenda of the Monterrey International Conference on Financing for Development. In WTO's Committee on Government Procurement, Norway, traditionally a precursor in development-friendly politics, has suggested the deletion of the "tied aid" exception.[67]

Nonetheless, restricting the use of development assistance funds to competitors from certain States is still common international practice. The Note takes account of this practice and excludes procurement made "in furtherance of tied aid to developing countries" from the scope of the obligations under the GPA. Tied aid is a broad term that is likely to cover some of the contracts to be awarded. Development theory has never found consensus on the meaning of foreign aid.[68] One problem is, however, whether the Unites States *assists* the Republic of Iraq on its path to development, in contrast to *imposing* political and economic structures on the Iraqi people without its consent (but not necessarily against its will).[69] Whether the U.S.-led

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[66] http://europa.eu.int/eur-lex/en/com/cnc/2002/com2002_0639en01.pdf; cf. also OECD Observer, Policy Brief: "Untying Aid to the least Developed Countries", July 2001.

[67] *Cf.*, Minutes of the Meeting Held on 6 February 2003, GPA/M/20, para. 82.

[68] H. SCHOECK, ENTWICKLUNGSHILFE (München 1972).

[69] In a paradigm case of development aid, the principal policy decisions regarding the political and economic development would remain in the hands of the assisted State, Iraq. According to the Declaration on the Establishment of a New International Economic Order "[e]very country has the right to adopt the economic and social system that it deems to be the most appropriate for its own development…" (United Nations General Assembly Resolution 3201, May 1, 1974, para. 4(d), reprinted in 68 AJIL 798 (1974)). An all too textual understanding of the term development aid, however, seems inap-

reconstruction is "good aid" from a development theory perspective is one question, whether it counts as "tied aid" within the meaning of the GPA is quite another. Therefore, it may make sense to adopt an autonomous definition of tied aid for purposes of the GPA. Tied aid could, for example, be defined as every spending of taxpayers' money to the benefit of another sovereign without receiving a *quid pro quo* in return. The starting point of this tentative definition is that States may wish to exclude procurement activities from which the procuring State receives no immediate benefit for the public good. At least contracts concerning the health sector, public housing, the education sector, and infrastructure – classical areas of development cooperation – should qualify as foreign aid. Moreover, with a bit of generosity, expenditures for the reform of Iraq's political institutions, including the establishment of an independent judicial system and a functioning police, may count as foreign aid – despite the ideological twist of these projects, which help implant Western-style political structures in Iraq.

With regard to other contracts the question is more controversial. Can the costs of regime change be qualified as development aid? First, it is doubtful whether contracts regarding "program management services" can be considered foreign aid. These management service providers will be charged essentially with overseeing the rebuilding of Iraq. One possible approach would distinguish as follows: Expenditures for management services can only be considered foreign aid if the service providers answer to the Iraqi government. If the service companies are installed, in contrast, in order to direct the rebuilding of Iraq according to U.S. policies, they exercise typical functions of the occupying power. And the rationale of supervision by the occupying power is not compatible with that of foreign assistance. A second issue that can only be flagged in the context of this paper is the most explosive one. It could be argued that the U.S. cannot invoke the foreign aid exception to the extent that it has an obligation under international law to rebuild Iraq. If the U.S. invasion in Iraq was unlawful under international law the U.S. would be "under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed," or "to compensate for the damage caused."[70] The existence of a legal obligation is not compatible with the concept of foreign aid. Foreign aid is, by definition, outside the sphere of legal duties – whether it is grounded on altruism, on a moral duty or rather on political expedi-

propriate for the case of Iraq. Since, currently, no Iraqi government can take charge of Iraq's development policy, there will necessarily be an element of outside imposition. Nonetheless, it would appear contradictory to qualify the construction of a water pipe as "aid" only after an Iraqi government has been established.

[70] Articles 35 and 36, draft Articles on State responsibility, *International Law Commission, Report on the work of its fifty-third session, Official Records of the General Assembly,* Fifty-Sixth Session, Supplement No. 10 (A/56/10).

ency. It can be safely predicted, however, that no WTO panel will venture to stir up this hornet's nest.

III. The National Security Exception

The Spokesman to the U.S. Trade Representative,[71] commenting on the Determination and Findings, has already sketched a last escape option, should a WTO panel find that CPA purchases fall under the GPA in principle. The exclusion of contractors from certain States, it has been argued, is "necessary for the protection of the essential security interests of the United States."[72] At first glance, the argument may appear slightly absurd. Why would a Canadian competitor pose a greater threat to U.S. security than say, a Saudi-Arabian competitor? Nonetheless, the question cannot be brushed aside too lightly, since many authors affirm that the security exception is of a self-judging character and only subject to limited (if any) judicial review.

The national security exception, contained almost verbatim in most of the Agreements in the WTO framework has been heavily featured as a subject of academic debate – and it has so far been totally irrelevant in dispute practice. No panel was ever seized to decide on the interpretation of the exception. Article XXIII(1) GPA provides:

Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes.

The peculiarity of the security exceptions contained in WTO Agreements is its subjective wording. Conduct by Parties to the GPA falls outside the scope of the Agreement when that Party *considers* that conduct necessary for the protection of its security interests. The International Court of Justice, in its *Nicaragua* judgment contrasted the wording of the security exception under the GATT with the security exception contained in a Treaty of Friendship, Commerce and Navigation in force between the U.S. and Nicaragua, pursuant to which "the present treaty shall not preclude the application of measures… necessary to protect [a Party's] national security interests."[73] The Court inferred from the objective wording of the Friendship Treaty "[t]hat the Court has jurisdiction to determine whether measures taken

[71] Statement by Richard Mills, December 10, 2003, Press Release Nr. 20508, *available at* www.ustr.gov.

[72] Determination and Findings, para. 3.

[73] Case concerning military and paramilitary activities in and against Nicaragua, Merits, 1986 I.C.J.115-116.

by one of the Parties fall within such an exception," which "is also clear *a contrario* from the fact that the text of Article XXI of the Treaty does not employ the wording which was already found in Article XXI of the General Agreement on Tariffs and Trade."[74] Whatever the right interpretation of the security exceptions in the WTO Agreements is, the subjective character of the exception cannot be brushed aside easily.

Essentially three approaches to dealing with the exception have been suggested. At the one extreme, developed countries have asserted that the exception was completely self-defining and not subject to any judicial review.[75] This approach has, above all, the advantage of being faithful to the discretionary language of the text. Moreover, authors have pointed out that the "tension regarding jurisdiction" is an important incentive to resolving disputes concerning national security concerns by diplomatic, rather than judicial, means.[76]

At the other extreme, Wesley Cann advocates a far-reaching reviewability of the exception by WTO panels. Cann points to the inherent dangers of a fully self-judging exception, which, in effect, makes it "impossible for a nation to violate"[77] the Agreement. Such a self-judging exception would vest powerful States with a tool for "supposedly security-based economic coercion"[78] "by which one nation could impose its social, political, or economic ideology on another."[79] Cann attempts to prevent the vacuum created by a self-judging exception by formulating criteria that would allow international institutions to define what constitutes a national security interest.

Between these extremes, various authors have argued in different shades of grey for a limited judicial review of the security exception. Hannes Schloemann and Stefan Ohlhoff have suggested an essentially textual interpretation of the exception that retains a self-defining element while, at the same time, permitting review by

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[74] *Id.*

[75] *Cf.*, the Minutes of Meeting by the GATT Council, cited in Wesley A. Cann, *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 YALE J INT'L L 413, note 9 (2001).

[76] Peter Lindsay, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*, 52 DUKE L. J. 1277 (2003). The author analyses how diplomatic means have lead to the successful extra-judicial resolution of a number of disputes in which Article XXI GATT was invoked, *id.* at 1302 – 1310.

[77] Cann, *supra* note 73, at 414.

[78] *Id.* at 419.

[79] *Id.* at 414.

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WTO panels.[80] According to their interpretation, WTO Members (or: Parties, in the context of the GPA) may determine freely what they consider "essential security interests," and which measures they deem necessary for their protection. WTO panels, however, may apply a good faith test "sorting out cases of clear unreasonableness, without otherwise interfering with the state's definitional prerogative."[81] To this end, a Member is under an obligation to provide the information necessary for the panel to make the findings within its competence.[82] According to Berrisch, the existence of "essential security interests" is even subject to full panel review. The discretion of Members, in his view, is limited to the question of proportionality – that is, the determination whether a measure was in fact necessary for the protection of interests whose very existence the State is fully required to prove.[83]

The extensive debate on the security exception can only be sketched in this paper. Applying a good faith test, which would require that the measure taken must appear at least somewhat reasonable and understandable from an objective point of view, seems the most balanced and practical option. It takes account of States' interests to avoid presenting a detailed case on what is a national security matter, while maintaining a certain level of transparency and accountability. Following this approach, the U.S. cannot simply assert that national security interests are concerned. Rather, it would have to communicate why its security is at stake. Moreover, the U.S. would be required to present a reasonable and understandable argument why the participation of Canadian, French and German competitors as primary contractors may affect its security interests. The "reputational costs"[84] of presenting such a prima-facie case of reasonableness against its own political partners are considerable. The prospect of arguing such a case before a panel is likely to deter the U.S. from relying too heavily on the security exception.

D. Conclusion

What at first glance looks like a flagrant breach of international trade law, appears, upon a second look, to be within the bounds of the legally permissible. While we

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[80] Hannes L. Schloemann & Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence,* 93 ASIL 424, 444 (1999).

[81] *Id*. at 445.

[82] *Id*. at 448.

[83] Georg M. Berrisch, *Das allgemeine Zoll- und Handelsabkommen*, *in* WTO-HANDBUCH 287 (Hans-Joachim Prieß & Georg M. Berrisch eds. München 2003).

[84] *Cf*., Warren F. Schwartz & Alan O Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEG. STUD. 179, 193 (2002).

are faced with a clear case of discrimination against some trading partners, there are strong grounds for holding that international economic law in its current state contains no prohibition of such conduct. Compared to the rather comprehensive multilateral agreements in the WTO framework, such as the GATT, the Government Procurement Agreement defers to the sovereignty of its Parties much more strongly. Procurement for Iraq falls outside the scope of WTO law due to two structural particularities of the GPA, which highlight the cumbersome political compromise underlying the Agreement. First, the State Parties to the GPA could not agree to subjecting procurement by all State entities to the procurement standards of international law. Instead, only few entities are covered by express enumeration. Coalition procurement falls outside the scope of the GPA because the Coalition Provisional Authority, having grown into an interim government for Iraq, cannot be considered a mere dependent outpost of the Pentagon, the President's Office, or the State Department. Second, the State Parties reserved to themselves numerous unilateral and multilateral exceptions. There is a strong prospect that a WTO panel would consider that some of the contracts fall under the exception of "tied aid to developing countries".

Given the restricted reach of the GPA, the far-reaching avenues of redress[85] it offers are of lesser value to disadvantaged competitors from Canada, France, and Germany. With regard to the Pentagon's Determination and Findings, competitors from Canada, France, and Germany are probably well advised to address the discrimination on the political plane. In the meantime economic reason has returned through the back-door. German companies, for example, have successfully engaged in Iraq as subcontractors to U.S. firms.[86] It is safe to conclude that the Determination and Findings was intended to deal a political blow rather than to inflict economic harm. The Bush administration has taught its restive partners in Europe and North America a lesson in political retribution in the '*divide et impera*' political style that has become characteristic of the second Bush administration. And it has done so on the razor's edge of the legally permissible; on the lawful side to be precise.

[85] Article XX(2) GPA requires the U.S. to provide effective procedures enabling such competitors to directly challenge breaches of the GPA. In addition to individual challenge procedures, Article XXII GPA opens the door to State-to-State Dispute Settlement.

[86] Siemens, e.g., was contracted to provide mobile phone technology in Northern Iraq, *available at* http://www.spiegel.de/wirtschaft/0,1518,druck-282055,00.html.