Article

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Legal Issues in the Promotion of Microtrade: From the Perspective of International Economic Law

Abstract: This article provides a legal analysis of microtrade from the perspective of international economic law with the introduction of the basic concept and the mechanism of microtrade. The article analyzes whether the proposed microtrade scheme complies with relevant rules of international trade under the GATT/WTO system. The article also discusses the facilitation of microtrade through government procurement in the context of Aid for Trade and examines the applicability of the WTO Government Procurement Agreement, which has been recently amended, to microtrade with consideration to potential legal implications.

Keywords: microtrade, economic development, international economic law

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1 Introduction

1.1 Background

Microtrade refers to a new economic and legal system of international trade designed to alleviate the extreme poverty of populations of the least-developed countries (LDCs). The term, "microtrade", is defined as international trade of small quantities of locally-produced products (LPPs) produced on a small scale. Microtrade is a trade-based development device which employs low levels of technology and small capital in places where it is difficult to develop large-scale manufacturing industries due to lack of essential elements, such as a well-educated labor force, organized corporate management, technology and capital,

and stable and efficient government. While a small number of previous developing countries, such as South Korea, achieved economic development through trade-driven development policies, most of LDCs have not escaped extreme poverty, which calls for a new approach to trade-based development policies.

The concept of microtrade was first introduced at the 2007 Society of International Economic Law (SIEL) Inaugural Conference. After the SIEL Conference, the microtrade concept attracted attention in academia, leading to talks at major academic forums in North America and Asia.[1] The first concept paper was published in 2009,[2] and microtrade was also a major theme at the 2011 Law and Development Institute Conference held in Seattle, United States.[3] At the conference, several scholars made presentations on various aspects of microtrade, which have been developed into articles and a treatise subsequently published.[4] A critical mass has indeed begun to form, and attention should be given to the legal aspects of microtrade, particularly from the perspective of international economic law.

This article provides a legal analysis of microtrade from the perspective of international economic law. The rest of the introductory section explains the basic concept and the mechanism of microtrade. Section 2 analyzes whether the proposed legal system of microtrade complies with relevant rules of international trade under the GATT/WTO system. Section 3 discusses facilitation of microtrade

1 The forums include Harvard University Kennedy School of Government (2009), Johns Hopkins University School of Advanced International Studies (2009), Iowa University School of Law (2011), National University of Singapore School of Law (2011), Seoul National University School of Law (2011), and the University of Washington School of Law (2012).

2 Y.S. Lee, *Theoretical Basis and Regulatory Framework for Microtrade: Combining Volunteerism with International Trade towards Poverty Elimination*, 2 The Law and Development Review, no. 2 (2009), 367-399.

3 For details of the conference, see LDI website available at: <http://www.lawanddevelopment.net/2011Conference.php>.

4 Arpita Gupta, *International Microtrade Regime – Structure and Financing*, 1 The Law and Development Review, no. 1 (2012), 3-28; Farid Shirazi, *Virtual Bazaar: A Means of Supporting Microtrade in the Least Developed Countries*, 5 The Law and Development Review, no. 1 (2012), 29-49; Prapanpong Khumon, *Microtrade and the Fair Trade Movement*, 5 The Law and Development Review, no. 1 (2012), 50-79; Andreas Neef et al., *Community-Based Microtrade in Support of Small-Scale Farmers in Thailand and Tanzania*, 5 The Law and Development Review, no. 1 (2012), 80-100; Colin Picker, *A Legal Cultural Analysis of Microtrade*, 5 The Law and Development Review, no. 1 (2012), 101-128; Daein Kim and Joon KooYoo, *Microtrade and Public Procurement: Facilitating "Aid for Trade" through Government Purchasing*, 5 The Law and Development Review, no. 1 (2012), 129-152. The first treatise on microtrade has also been published: Y.S. Lee (ed.), *Microtrade: A New System of International Trade with Volunteerism Towards Poverty Elimination* (London: Routledge, 2013).

through government procurement and the applicability of the amended WTO Agreement on Government Procurement (GPA). Section 4 draws conclusions.

1.2 Necessity for a new approach

While there is a clear consensus in the international community to remove extreme poverty around the world,[5] the economic condition of poor countries, particularly LDCs, remains critical: the average gross national income (GNI) per capita of the LDCs was a mere US$748 in 2011,[6] and the average proportion of the population living under US$1 a day among 22 LDCs was 43.6%.[7] Life expectancy was 60.4 years[8] compared with 79.2 years in developed countries in 2008.[9] The infant mortality rate was 7.8%[10] in 2009 compared with 0.7% in developed countries.[11] Diseases kill millions of people in LDCs every year. As of 2007, 9.6 million people in LDCs were estimated to have been infected by the HIV virus.[12] People in LDCs have also suffered greatly from armed conflicts, and millions of people have been killed or become refugees.

The solution to this human calamity in LDCs is to foster economic development in those countries to build an economy that will meet the essential economic needs of LDC populations.[13] Aid may provide temporary relief, but it is not a long-term solution for the economic problems of the LDCs. Some East Asian countries, including South Korea, Taiwan, Singapore, Hong Kong, and more recently China, have escaped from extreme poverty through successful economic development.[14] Development of manufacturing industries and international trade was essential to break the circle of poverty in all of these

5 This consensus is well reflected in the United Nations' Millennium Development Goals (MDGs) which aim to reduce world poverty at a substantial rate by year 2015. For details of the MDGs, see <http://www.un.org/millenniumgoals>, accessed 10 February 2012.

6 Atlas method (current US$), World Bank World Databank.

7 The covered period is 1990–2003. UN Office of the High Representative for the LDCs, *Selected Economic and Social Indicators for LDCs (2005)*, available at: <www.un.org/special-rep/ohrlls/ldc/2005%20socio-econ%20indicators.pdf>, accessed 10 February 2012.

8 UNCTAD, *Statistical Tables on Least Developed Countries, 2010*, p. 9, Indicators on Demography.

9 OECD, *Health Data 2011*, available at: <www.oecd.org>, accessed 10 February 2012.

10 UNCTAD, *supra* note 8.

11 World Bank, World Databank, OECD members infant mortality rate, available at: <http://databank.worldbank.org>, accessed 19 December 2012.

12 UNCTAD, *supra* note 8, p. 10, Indicators on Health.

13 Lee (2013), *supra* note 4, p. 5.

14 *Id.*, p. 6.

countries and to achieve economic development.[15] While the trade-driven, manufactured-based economic development of these countries has been widely studied, this success has not been replicated in many other developing countries, particularly LDCs.[16]

Various factors, including educated workforce, stable government, efficient administration, entrepreneurship and corporate management, and availability of technology and capital resources (through foreign loans and investment), are cited as having contributed to the successful economic development of the East Asian countries.[17] However, many of these factors, which are necessary to initiate large-scale economic development projects at national level such as development of manufacturing industries and substantial export promotion to yield higher income than attainable by maintaining traditional small-scaled farming in LDCs, are neither present nor expected to be present in a foreseeable future in many LDCs.

Microtrade is introduced as an alternative way to increase income for LDC populations through the international trade of LPPs using low levels of technology and small amounts of capital available in LDCs, without having to engage in large-scaled economic development projects at national level, which may not be feasible in LDCs.

In fact, we can already see examples of microtrade-type transactions today, whereby local shops in developed countries will purchase small quantities of goods directly from communities in developing countries and then sell them on at a higher price, returning the profits to the developing country producers. Oxfam is a good example of a developed country retail store engaging in the microtrade-type transactions.[18]

1.3 Mechanism of microtrade

The economic mechanism and logistical issues of microtrade have already been discussed at length by other literature,[19] so the remainder of this section underscores only the essential elements of microtrade.

The core elements of microtrade are the production of exportable LLPs using the low level of technology and small capital available in LDCs. Examples of

15 *Id.*
16 *Id.*
17 *Id.*, pp. 6-7.
18 *Id.*, pp. 14-15.
19 *Supra* note 4.

LLPs include products of daily use, such as cups, utensils, small household items, ornaments, and art products,[20] which do not require high levels of technology and large capital resources that are unavailable in LDCs. For their ease of storage and transportation, manufactured products are the preferred candidates for LPPs, but certain select agricultural products which may yield higher value per volume can also be considered for LPPs.[21] Because of their low labor costs, LDCs have a comparative advantage in labor-intensive products, and these low-production costs will be reflected in the product's price.[22] According to the International Trade Statistics of the World Trade Organization (WTO), the value of manufactured product exported from LDC countries to North America and EU countries in 2010 was US$9.8 billion and US$11.9 billion, respectively,[23] which indicates that there is a demand in developed countries for manufactured goods from LDCs. International trade of LPPs will enable LPP producers to maximize their income by exporting into the markets of developed countries where consumer prices tend to be higher and consumer purchase power is also stronger, which will lead to larger quantities of LLPs sold at higher prices than those attainable within the LDCs.[24]

The proposed microtrade transactions are distinguished from the existing and rather scattered efforts, such as the present microtrade-type transactions, to promote products from developing countries on small scales, as microtrade aims to reduce poverty in LDCs systematically through global management and coordination. Legal adjustments on a national and international plane might also be necessary as further discussed in the subsequent sections.[25] There are a number of logistical issues associated with microtrade, including identifying consumer demand and matching this demand with supply, financing LPP production and training LDC producers to produce suitable quality LPPs, arranging distribution within developed country markets, and shipping from LDCs to the developed country markets.

Solutions to these problems would be central to the success of microtrade, therefore the system of microtrade includes ways to address these logistical issues,[26] and the existing literature provides discussion on each of these

20 Lee (2013), *supra* note 4, p. 10.

21 Neef et al. introduce certain lychee and vanilla products as examples of such select agricultural products for microtrade. *Id*., pp. 155-176.

22 Lee (2013), *supra* note 4, p. 11.

23 World Trade Organisation, International Trade Statistics 2011, p. 43, table 1.23, text available at: <www.wto.org/english/res_es/statis_es/its2011_e.pdf>, accessed 13 December 2012.

24 Lee (2013), *supra* note 4, pp. 10-13.

25 *Id*., pp. 14-17.

26 *Id*., pp. 19-26.

logistical issues.[27] For instance, the building of a global online database, which is accessible by anyone interested in microtraded products, has been proposed to identify and register consumer demand and supply, as well as to sort out shipping and distribution.[28] Since the material in question is sensitive commercial information, it will have to be collected and supplied with charitable motives with the understanding that this mechanism is more effective than handing out aid if those in need are to improve their living standards.[29] Voluntary contribution and cooperation by individuals and private corporations, sovereign states, international organizations, and NGOs has also been proposed as a way to provide assistance with these logistical issues,[30] notably shipping, by helping to organize a "voluntary shipping network" which may include commercial shippers which can provide services at discounted rates.[31] As for financing, intergovernmental organizations and national governments could step in, and there is also the possibility of retailers advancing capital to LPP producers in return for a set quantity of goods, or commercial lending could be facilitated through microcredit.[32] The relationship and distinction between fair trade and microtrade has been discussed.[33] Government procurement has been suggested as a useful means to promote microtrade,[34] and legal cultural differences have also been raised as a potential issue for microtrade.[35]

Microtrade is an innovative economic and legal system of international trade based on the modern internet technology whose aim is to reduce extreme poverty in LDCs through exportation of LPPs on a global basis. To facilitate microtrade effectively, LPPs should be admitted into the customs of developed countries, preferably without any tariff or quota.[36] Governments will be called upon to provide trade preference for LPPs from LDCs. The subsequent sections examine whether the proposed trade preference is consistent with the current rules of international trade under the GATT/WTO regime and whether facilitation of microtrade through government procurement in the context of Aid for Trade would comply with the current regulatory framework (GPA).

27 *Id*.
28 *Id*.
29 *Id*., p. 20,
30 *Id*., pp. 19-26.
31 *Id*., p. 23.
32 *Id*., pp. 23-25.
33 *Id*., pp. 15-16, 81-106; Khumon (2012), *supra* note 4.
34 Lee (2013), *supra* note 4, pp. 148-153; Kim and KooYoo (2012), *supra* note 4.
35 Lee (2013), *supra* note 4, pp. 107-135; Picker (2012), *supra* note 4.
36 Lee (2013), *supra* note 4, pp. 45-49.

2 Regulatory conformity of microtrade under international trade law

2.1 Microtrade preference as a "measure" subject to WTO regulation

The rules of international trade regulate the actions of governments in international trade which constitute "measures" under GATT/WTO disciplines.[37] The term "measure" is broadly defined so as to cover a wide spectrum of governmental action and omission. The Appellate Body thus opined in *US – Corrosion-Resistant Steel Sunset Review* that:

> 81...In principle, *any act* or *omission* attributable to a WTO Member can be a *measure* of that Member for purposes of dispute settlement proceedings. The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch. (emphasis added)

When gauged from this broad definition of a "measure" under the WTO jurisprudence, therefore, any action taken by a Member's government in the course of implementing microtrade would arguably constitute a measure to the extent it affects the trade interest of other Members. Since microtrade requires trade preference for LPPs from LDCs,[38] including tariff exemption, a specific government "measure" of a Member, which purports to implement the trade preference for microtrade will be subject to the scrutiny of the WTO Agreements, including possible reference to the WTO dispute settlement proceedings.

As microtrade expects preferential treatment by a WTO Member of LPPs imported from LDC Members, other Members (i.e. developed Members and other non-LDC developing Members) whose products will not be qualified for such treatment may raise legal challenges if their trade interests are negatively affected. A wide range of issues and claims can be raised depending upon how the microtrade preference is structured and implemented. For example, a Member's government may undertake to waive tariffs and/or other charges applicable to microtraded products. It may also waive or alleviate relevant procedural requirements that are otherwise applicable to importation and distribution of such products. These measures would then raise a question as to their consistency with WTO disciplines. Of course, the discussions in this section

37 *See* Simon Lester, *A Framework for Thinking about the "Discretion" in the Mandatory/Discretionary Distinction*, 14 Journal of International Economic Law, no. 2 (2011), 369-402, at 373.
38 Lee (2013), *supra* note 4, pp. 45-49.

do not claim to exhaust all possible legal issues and claims: rather, this section only attempts to address key legal issues that are apparently related to the core concept of microtrade – namely the Most-Favored-Nation (MFN) principle, enabling clause, and government procurement, as further discussed below.

2.2 Microtrade and the MFN principle[39]

GATT Article 1 requires non-discriminatory treatment of imported "like products",[40] regardless of their origin. Article I:1, thus, provides in pertinent part:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and *with respect to all matters referred to in paragraphs 2 and 4 of Article III*,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties. (emphasis added)

As noted above, the microtrade preference is limited to LPPs from LDCs. This limitation potentially runs counter to the MFN requirement for two differentiations. First, the preference potentially excludes the like products that are mass-produced, since LPP is defined as LPPs produced on a small scale.[41] This exclusion is necessary, because the objective of microtrade is to lift the LDC populations from extreme poverty by allowing exportation of small quantities of

39 The analysis under this subsection is based on the author's previous legal analysis of microtrade and augments the latter. *Id*., pp. 45-49.

40 According to the Appellate Body, the term "like product" is not confined to the situation where products at issue are identical. *See Philippines-Taxes on Distilled Spirits*, WT/DS396/AB/R, WT/DS/403/AB/R (21 December 2011), para. 121. Likewise, the Appellate Body also opines that any significant physical difference will not necessarily be considered sufficient to disqualify a product from being considered "like." *See id*., at 122. Instead, according to the Appellate Body, "a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products". *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (5 April 2001), para. 99. Therefore, even if different raw materials are used to produce products, as long as the final products are not affected by this difference in raw materials, they can still be regarded as "like products" within the meaning of Article III:2...*See Philippines-Taxes on Distilled Spirits*, at 125.

41 Lee (2013), *supra* note 4, p. 10.

LPPs, and not to promote large-scale industrial development in LDCs: developed countries may find it difficult to justify trade preference in the latter case where the position of their own domestic producers can be threatened by the large quantities of products imported into their own markets. The other differentiation is that the preference is limited to LDCs in consideration of their particular economic difficulties. As such, non-LDC countries – that is, non-LDC developing countries and developed ones – are excluded from the coverage of microtrade. Consequently, products from these countries are not eligible to claim benefit under the microtrade scheme.

To the extent that differential treatment is accorded on these two fronts, a claim of MFN violation seems to be a strong possibility. In particular, excluded developing countries are likely to lodge complaints, as they may encounter losing market shares in the microtrade scheme, even if they also struggle, though not at the same level as the LDCs, to survive in the global trade regime. The critical question then becomes whether an exception can be found for this likely MFN violation.

2.3 Microtrade and Enabling Clause

The MFN discussion above, thus, leads to the Enabling Clause and the Generalized System of Preference (GSPs) that emanates from the clause. The GSP scheme provides that lower tariff rates for imports from developing countries under certain criteria are an approved regulatory exception to the MFN requirement and are arguably applicable to the microtrade preference as well.[42] Various GSP schemes have been implemented, such as the EU's "Everything-but-Arms" (EBA) scheme[43] that offers quota-free and tariff-free treatment for imports from LDCs. The microtrade preference may also qualify as a GSP scheme approved under the current WTO rules, and it is, thus, necessary to examine whether the microtrade preference meets the legal conditions for the GSP.

42 GSPs are approved as an exception to the MFN principle under the "Enabling Clause". GATT, Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979 (L/4903).

43 The EBA scheme by the European Union is an exemplary trade concession scheme for LDCs. It is an initiative of the European Union which allows all imports to the Union from the LDCs to be admitted duty free and quota free, with the exception of armaments. The EBA scheme is incorporated into the GSP Council Regulation (EC) No 2501/2001.

The rules authorizing GSPs under the GATT/WTO disciplines are the GATT Enabling Clause[44] and the 1971 GSP Decision.[45] The Enabling Clause adopts the requirements for GSPs as described in the latter.[46] The preamble of the 1971 GSP Decision describes a GSP as a "generalized, non-discriminatory, nonreciprocal preferential tariff treatment in the markets of developed countries for products originating in developing countries".[47] Recent WTO jurisprudence has interpreted the elements described in the preamble of the 1971 Decision, "generalized", "non-discriminatory", and "nonreciprocal" as binding requirements for GSPs.[48] The two differentiations cited in the above section of MFN discussion, therefore, need to meet the regulatory threshold of the GSP.

First, the product limitation to LPPs is a generalized product classification rather than a specialized one by the product origin.[49] WTO's Appellate Body declared some of the conditionalities associated with GSPs as inconsistent with WTO requirements,[50] but GSP schemes have been applied to select products without challenge. The product selection under the microtrade preference is distinguished from the product selections in the other GSP schemes in that the preference based on LPPs will depend on the manner in which the product is produced with the exclusion of mass-produced products at industrial facilities. This requires further consideration as discussed below. The second differentiation limiting the beneficiaries of the microtrade preference to LDCs will be consistent with GSP requirements, since paragraph 2(d) of the Enabling Clause specifically authorizes special treatment to LDCs among developing countries.

The discussion of the product limitation to LPPs requires the examination of processes and production methods (PPMs). The potential controversy is over whether products may be treated differently because of the way in which they have been produced even if the production method used does not leave a trace

44 *Supra* note 42.

45 The Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24) (L/3545).

46 Enabling Clause, *supra* note 42, para. 2(a), footnote 3.

47 *Supra* note 45.

48 WTO, *European Communities – Conditions for the Granting of Tariff Preferences for Developing Countries*, Report of the Panel, WT/DS246/R (1 December 2003), para. 7.38; WTO, *Report of the Appellate Body*, WT/DS246/AB/R (7 April 2004), paras. 142-147. *See also* Lorand Bartels, *The WTO Enabling Clause and Positive Conditionality in the European Community's GST Program*, 6 Journal of International Economic Law, no. 2 (2003), 507-532.

49 The term, "classification" is used in a generic sense and does not mean product classifications under Harmonized System Code (HS Code).

50 WTO, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (7 April 2004), para. 173.

in the final product, that is, a product classified under LPP may be identical to the one mass-produced, or the physical characteristics of the two products remain identical (like products).[51] The WTO jurisprudence has generally defined "products" in terms of the characteristics of the item in question, and not in terms of the PPM used to make them.[52]

However, the Appellate Body's decision in *U.S. – Shrimp* suggests that certain restrictions based on the method of production may be permitted when justified under Article XX of the GATT 1994. The *U.S. – Shrimp* concerned the manner in which fishermen harvested shrimps. In the dispute, certain production methods, involving the use of fishing nets and shrimp trawl vessels, resulted in a high rate of incidental killing of sea turtles, as turtles can be trapped and drowned by the nets used to harvest shrimp.[53] The United States aimed to reduce the killing of turtles by imposing an import ban on shrimp harvested by methods which may lead to the incidental killing of sea turtles.[54] In order to avoid the ban, exporters were required to demonstrate the use of turtle excluder devices (TEDs) which limit the incidental catch of endangered sea turtles.[55] The Appellate Body viewed the U.S. measure as directly connected to the policy of conservation of sea turtles. The measure was, thus, considered to be provisionally justified under Article XX(g) of the GATT 1994, although the decision ultimately found the measure inconsistent with the WTO rules for being unequally administered to different exporters.[56]

The Appellate Body's decision in the dispute can be summarized as that it is not necessarily a GATT violation to impose a government policy-related PPM on

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51 Retrieved from the WTO website, <http://www.wto.org/english/tratop_e/envir_e/envt_rules_gatt_e.htm>.

52 *See, e.g.*, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Panel Report, WT/DS381/R, 15 September 2011, paras. 7.219-7.216. *See also id.*, para. 4.244, reporting Mexico's argument that: "The obligations in the WTO Agreements must not be interpreted so as to allow a WTO Member to condition access to its domestic market based on compliance with that Member's unilateral policy relating to actions outside its territory including unincorporated process and production methods. The only circumstances where such actions should be permitted are where they can be justified under one of the specific exceptions to the WTO obligations."

53 *See United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, WT/DS58/R (6 November 1998), para. 2.3.

54 *See id.*, paras. 1.1, 7.12, 7.16. 7.48, 7.50.

55 A TED is a trapdoor installed inside a trawling net which directs sea turtles and other unintentionally caught large objects out of the net, <http://www.wto.org/english/tratop_e/envir_e/envt_rules_gatt_e.htm>.

56 *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, Report of the Appellate Body, WT/DS58/AB/R (12 October 1998), para. 187.

exporting Members where it qualifies under Article XX exceptions.[57] Remedying poverty in LDCs, which is the core purpose of microtrade, is not one of the stated exceptions under Article XX, and the Appellate Body did not specifically approve the extension of PPM-related distinction beyond Article XX exceptions.[58] However, if environmental protection is regarded, under Article XX jurisprudence, as constituting an appropriate consideration factor by an importing Member when it takes into account the condition prevailing on the exporting country, arguably a similar analysis can be applied to the situation where an importing Member takes into account exceptional economic conditions of an

57 Id., para. 121. The paragraphs states:

121. The consequences of the interpretative approach adopted by the Panel are apparent in its findings. The Panel formulated a broad standard and a test for appraising measures sought to be justified under the chapeau; it is a standard or a test that finds no basis either in the text of the chapeau or in that of either of the two specific exceptions claimed by the United States. The Panel, in effect, constructed an a priori test that purports to define a category of measures which, ratione materiae, fall outside the justifying protection of Article XX's chapeau. In the present case, the Panel found that the United States measure at stake fell within that class of excluded measures, because Section 609 conditions access to the domestic shrimp market of the United States on the adoption by exporting countries of certain conservation policies prescribed by the United States. It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a)–(j) of Article XX. Paragraphs (a)–(j) comprise measures that are recognized as exceptions to substantive obligations established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure a priori incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.

See also Arthur E. Appleton, *Shrimp/Turtle: Untangling the Nets*, 2 Journal of International Economic Law (1999), 477, 492, stating that under the ruling, measures based on non-product-related PPMs can satisfy Article XX(g); Howard F. Chang, *Toward a Greener GATT: Environmental Trade Measures and the Shrimp-Turtle Case*, 74 South Carolina Law Review (2000), 31, 38, stating that consistent with the plain language of Article XX, the Appellate Body's opinion allows for import bans designed to change the policies of other governments; Petros C. Mavroidis, *Trade and Environment after the "Shrimps-Turtles" Litigation*, 34 Journal of World Trade (2000), at 73, 87, stating that unilateral environmental measures are not WTO inconsistent; Scott C. Owen, *Might A Future Tuna Embargo Withstand A WTO Challenge in Light of the Recent Shrimp-Turtle Ruling?*, 23 Houston Journal of International Law (2000), 123, concluding that it might withstand WTO challenge.

58 *Id.*

exporting country such as the dire economic situation in LDCs in contrast to that of other countries. Such dire economic situation, if left unaddressed, may lead to further degradation of the living condition of those living in LDCs. An importing Member's attempt to help improve the dire economic situation of the LDCs may be argued to fall under the "public moral" exception under paragraph (a) of Article XX to the extent it relates to the protection of basic human rights of those in extreme poverty. GATT Article XXXVII also requires the developed countries to give active consideration to the adoption of other measures designed to provide greater scope for the development of imports from less-developed contracting parties and collaborate in appropriate international action to this end.[59] The measures to implement microtrade through trade preference would qualify under the measures stipulated in the Article.

The cited rationale arguably supports the proposition that, depending upon how importing Members formulate specific elements of microtrade scheme, an MFN violation of microtrade can be justified in the general architecture of the GATT 1994 and the WTO Agreements. In this regard, it should also be noted that arguments have been made to the effect that sometimes developed Members have apparently relied on the PPMs as a way to establish non-tariff trade barriers against products from developing Members.[60] When applied in the context of microtrade, however, the PPM concept could in fact operate as a rationale to facilitate the exports from the LDCs to guarantee a minimum level of participation in the international trade.

2.4 Microtrade and government procurement

Once the possibility of the MFN violation claim is cleared, the microtrade's basic scheme of providing preferential treatment to the LPPs from LDCs can now be legitimately implemented. The preferential treatment, being for instance duty-free, quota-free, will certainly improve the market access of the eligible products from the LDCs to the markets of developed countries. These measures of preferential treatment, however, do not necessarily guarantee the actual distribution and ultimate sales of these products in the markets of importing developing Members, which is the objective of microtrade so as to ensure profit generation and poverty relief of the LDCs. Duty-free and quota-free simply eliminates importation barriers and does not necessarily guarantee sales and profit

59 GATT Article XXXVII, para. 3(b).

60 For example, the requirement of TEDs by the United States in the Shrimp Case can also be considered an example of PPM as a non-tariff trade barrier.

generation, and the fundamental objective of the microtrade scheme may be either undermined or compromised.

One of the possible solutions to this problem may be found in the government procurement scheme. Through this scheme, an importing Member undertakes to purchase LPPs from LDCs via government procurement procedure. This scheme may be applied generally or only to certain LPPs or certain LDCs. Or, this scheme may be combined with various other measures of microtrade. In any event, the introduction of the government procurement scheme will be able to ensure the ultimate distribution and sales of LPPs from LDCs at a minimum level and provide tangible benefits to those impoverished countries. With this in mind, the next section examines legal issues, in detail, to be raised by the application of government procurement in the context of microtrade.

3 Facilitation of microtrade through government procurement in the context of Aid for Trade and applicability of GPA

3.1 Microtrade and Aid for Trade

The concept of microtrade offers a useful means to materialize "Aid for Trade," a key objective of the current Doha Round negotiations and any succeeding future multilateral negotiations for that matter.[61] The WTO initiative on Aid for Trade aims to help developing countries, and particularly LDCs, which face a range of supply-side and trade-related infrastructure obstacles constraining their ability to engage in international trade, by mobilizing resources to address the trade-related constraints identified by developing countries including LDCs.[62] There seems to be a consensus that mere tariff reduction, to be offered by tariff-free,

61 World Trade Organization, *Ministerial Declaration*, WT/MIN(05)/DEC (22 December 2005) (6th Ministerial Conference in Hong Kong), para. 57; Committee on Trade and Development, *Aid-for-Trade Work Programme 2012–2013: "Deepening Coherence"*, WT/COMTD/AFT/W/30 (15 November 2011), at 3; Based on the Hong Kong Ministerial Declaration, the WTO Director-General established a task force to provide recommendations "on how to operationalize Aid for Trade" and "on how Aid for Trade might contribute most effectively to the development dimension of the DDA," and the Task Force produced its report in July 2006. *See* WTO, *Aid for Trade Task Force*, WT/AFT/1 (27 July 2006), at 1.

62 WTO, *Aid for Trade*, available at: <http://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm>.

quota-free market access, will not be sufficient to address the dire situation of the LDCs and thus to achieve the fundamental objectives of Aid for Trade.[63] Beyond this trade preference, a practical and effective scheme to implement microtrade would contribute to achieving the objectives of Aid for Trade by ensuring that the LDCs participate in the global trade in a meaningful manner and break away from the present trap.[64,65]

One plausible way to facilitate microtrade in the context of "Aid for Trade" would be to apply government procurement mechanisms for microtrade. Specifically, the governmental entities of the importing Members – particularly developed country Members – may operate as a conduit between exporters from the LDCs and their domestic market consumers through their respective procurement mechanisms as well as purchasing for government use.[66] In fact, this scheme has been contemplated, though indirectly, in the reports commissioned

63 The fact that mere provision of preferential treatment (such as GSP) is not enough to address the fundamental problems of the LDCs can be evidenced by the historical statistics: the LDCs' export share in the global trade shrank from 3.06% in 1954 to 0.42% in 1998. *See* Bijit Bora, Lucian Cernat and Alessandro Turrini, *Duty and Quota-Free Access for LDCs: Further Evidence from CGE Modelling*, Policy Issues in International Trade and Commodities Study Series No. 14 (New York, Geneva: United Nations, 2002), p. 3. This reality stems from the fact that, even with the preferential tariff treatment, the LDCs do not have sufficient capacity to participate in the global trade – such as "information, policies, procedures, and infrastructure". *See* WTO, *Aid for Trade: Is It Working?* available at: <http://www.wto.org/english/res_e/booksp_e/a4t_oecd_e.pdf>, accessed 30 March 2013, at 1; *See* WTO and OECD, *Aid for Trade at a Glance 2011: Showing Results*, 2011, available at: <http://www.wto.org/english/res_e/publications_e/aid4trade11_e.pdf>, accessed 30 March 2013, p. 21.

64 It has been observed that although the Uruguay Round Agreements significantly helped liberalize global trade in general, they failed to provide meaningful benefit to the LDCs. *See* Bora, Cernat and Turrini (2002), *supra* note 63, p. 2.

65 *See* David Laborde, *Looking for a Meaningful Duty Free Quota Free Market Access Initiative in the Doha Development Agenda*, ICTSD Programme on Competitiveness and Sustainable Development, Issue Paper No. 4 (December 2008). WTO Director-General Pacal Lamy also underscored the importance of devising other ways to facilitate the LDCs' participation in the global trade, such as introducing an LDCs-only trade finance system, in addition to the provision of mere preferential tariff treatment. *See* WTO, *Lamy Lauds $200 Billion Mobilized in Aid for Trade Funding*, Director General Speech (16 January 2013), available at: <http://www.wto.org/english/news_e/sppl_e/sppl262_e.htm> (visited on 30 March 2013).

66 For instance, the government agency of an importing developed country Member can purchase products from certain LDCs as a government procurement project and then release them in the domestic stream of commerce. Specific forms of achieving this formula can be addressed in a prospective bilateral arrangement between an exporting LDC and an importing developed country Member, as envisioned in Article V of the amended GPA.

by the WTO in the recent discussions of Aid for Trade.[67] Recent academic research also advocates the application of government procurement to implement Aid for Trade in the global trading regime.[68] While previous discussions on government procurement within the framework of Aid for Trade have largely been focused on building up the capacity of the LDCs (i.e. how to enhance the government procurement capacity of the exporting LDCs),[69] this new line of ideas addresses government procurement from a different angle – using

67 One of the recommendations provided by the WTO's Aid for Trade Task Force to operationalize the Aid for Trade reads as follows:

A National Aid-for-Trade Committee could be established, where necessary, to ensure trade mainstreaming in national development strategies, determine country needs, set priorities, *assist in matching "demand" and "response"*, and help in evaluation. Tasks could include identifying co-financing or leveraging funds from other larger funds, as well as assessing adjustment needs and brokering financing for such programmes. Recipient countries could request agencies to perform a coordinating role. (emphasis added)

See WTO, *Aid for Trade Task Force*, WT/AFT/1 (27 July 2006), p. 6.

68 In fact, important suggestions have already been made by some scholars that government procurement can be a useful tool in materializing the basic idea of microtrade in particular and Aid for Trade in general. *See generally* Dae-In Kim and Joon Koo Yoo (2012), *supra* note 4, 128.

69 The topic of government procurement has been discussed in the context of Aid for Trade. But these discussions mainly focus on the reform of the procurement system of the recipient countries and how the donor countries should rely upon it. For instance, the WTO's Aid for Trade Task Force suggested:

Using a country's own institutions and systems, where these provide assurance that aid will be used for agreed purposes, increases aid effectiveness by strengthening the partner country's sustainable capacity to develop, implement and account for its policies to its citizens and parliament. Country systems and procedures typically include, but are not restricted to, national arrangements and procedures for public financial management, accounting, auditing, *procurement*, results frameworks and monitoring. (emphasis added)

See id., at 13, reiterating the Paris Convention on Aid Effectiveness. The Task Force also stated in the pertinent part that: Partner countries and donors jointly commit to:

- Commit sufficient resources to support and sustain medium and long-term procurement reforms and capacity development.
- Share feedback at the country level on recommended approaches so they can be improved over time.

Donors commit to:

- Progressively rely on partner country systems for procurement when the country has implemented mutually agreed standards and processes.

See id., at 15. (emphasis added, footnotes omitted)

But this is not sufficient to address the concern of the LDCs, because the procurement reform on the part of the recipient does not guarantee the market access to the importing Member, the core objective of the Aid for Trade, and duty-free, quota-free market access.

government procurement in importing developed country Member to promote exports from LDCs.

This is arguably an important development with respect to Aid for Trade, because the prospective application of government procurement from this angle could ensure a minimum amount of purchase of LDC products by the importing Member in a more reliable and stable manner,[70] so that real trade benefits can be delivered to the LDCs. Direct coordination between the exporters (or governmental entities) from LDCs and the procuring agencies of importing Members could also streamline and organize importation procedures, which can assist the LDC exporters in complying with a web of complex requirements associated with importation.[71]

Many export products of LDCs are subject to ever increasing importation regulation. Even if a market access is guaranteed as a result of a duty-free, quota-free market access formula, products from LDCs can still be effectively excluded from the importing market by, for instance, increasingly complex TBT (Technical Barriers to Trade) and SPS (Santitary and Pytosanitary) requirements of importing countries. In this regard, the government procurement scheme to promote microtrade on the part of the importing Members may well offer the long-awaited tangible benefits to the exporting LDCs. The consideration of this scheme would then directly implicate the GPA, one of the plurilateral agreements of the WTO, to the extent that it involves procurement of goods by the government entities of WTO Members, as long as those entities are listed in the Annexes submitted by the Member.[72] Such being the case, an analysis of key provisions of the GPA is necessary to see if the promotion of microtrade through government procurement can be undertaken in compliance with the current regulatory framework.

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70 In achieving the objective of Aid for Trade, the WTO's Aid for Trade Task Force also underscored the importance of strengthening coordination between the "demand" countries and "donor" countries, through such joint entities as "National Aid for Trade Committee." *See* WTO, *Aid for Trade Task Force*, WT/AFT/1 (27 July 2006), at section F.5. Such coordination does envisage the participation of the central government, local governments, and private sectors of both demand countries and donor countries. *See id*. If the goal of such joint entities is to provide tangible benefit to the LDCs in terms of gaining market access in a stable and predictable manner, the donor countries' agreed purchase of certain designated export products of LDCs may well be one of viable options. As a matter of fact, one recent report jointly commissioned by the WTO and the OECD also indicates that a donor country can ease the burden of the LDCs by various domestic measures of its own including government procurement. *See* WTO & OECD, *Aid for Trade at a Glance 2011: Showing Results*, 2011, available at: <http://www.wto.org/english/res_e/publications_e/aid4trade11_e.pdf>, accessed 30 March 2013, at 83.

71 *See id*.

72 *See* Article I.1 of the GPA.

3.2 Microtrade through government procurement and GPA

The GPA is an agreement to regulate governmental purchase of goods and services for governmental purposes.[73] It should be noted that as a plurilateral agreement, this agreement is binding only upon the parties to the agreement.[74] Not surprisingly, most of the parties to GPA are developed country Members and only a few are developing country Members.[75] As of April 2013, 15 Members are parties to the GPA, which include Armenia, Canada, EU (with 27 Member countries), Hong Kong, Iceland, Israel, Japan, Korea, Liechtenstein, the Netherlands (with respect to Aruba), Norway, Singapore, Switzerland, Chinese Taipei, and the United States.[76] China and other countries are currently negotiating accession to the agreement.[77] The GPA provisions will affect how microtrade may be implemented through government procurement in these countries, including most important trading developed countries such as the United States, EU, Canada, and Japan.

A note should also be made that this issue needs to be examined in accordance with the amended GPA as agreed upon among the 42 countries in the eighth WTO Ministerial Conference in December 2011.[78] This amendment was

73 *See* the Preamble of the amended GPA. At the same time, as the term "government procurement" is not defined in the GPA or any other covered agreement for that matter, arguably it can be understood and interpreted as parties to the GPA so desire, as long as certain goods and services are purchased for governmental purposes. Formulating an ODA policy and implementing Aid for Trade on a national level would arguably constitute a governmental purpose. Thus, using the government procurement scheme for the implementation of microtrade can also come within the ambit of the GPA.

74 *See* paragraph 2 of Article XXIV of the GPA. The GPA also uses the term "parties" or "a party" throughout the agreement, as opposed to "Members" or "a Member."

75 *See* South Centre, Government Procurement in Economic Partnership Agreements and FTAs, *Policy Brief* No. 15 (December 2008), available at: <http://www.southcentre.org/index.php?option=com_content&view=article&id=975%3Agovernment-procurement-in-economic-partnership-agreements-and-ftas&Itemid=335&lang=en>, p. 2.

76 *See* WTO Committee on Government Procurement, *General Overview of WTO Work on Government Procurement*, at section C (Parties and Observes to the Agreement), available at: <http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm>, accessed 19 April 2013.

77 *See id*. at section D (Accession to the Agreement). As of April 2013, nine countries including China are negotiating accession to the GPA.

78 *See* WTO Committee on Government Procurement, *Adoption of the Results of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement, Following Their Verification and Review, As Required by the Ministerial Decision of 15 December 2011*, GPA/112, para. 5 (Action Taken by the Parties to the WTO Agreement on Government Procurement at a Formal Meeting of the Committee, at the Level of Geneva Heads of Delegations, on 30 March 2012), GPA/113 (2 April 2012) [hereinafter "*Adoption of the Amended GPA*"], at 1; WTO Committee on Government Procurement, *The Re-Negotiation of the Agreement on Government Procurement*, at Introduction,

the culmination of the ten-year negotiations among the GPA parties and largely expanded the scope of the government contracts to be covered by the GPA, which is supposed to facilitate the access of business entities to the government procurement markets of the 42 party states.[79] It is also expected that the accession of other countries, including China, to the GPA will be expedited as a result of the revision.[80] As of April 2013, the amended GPA has not entered into force yet, but it is expected to become effective in the near future.[81] As such, the foregoing discussions are based on the provisions of the amended GPA.[82]

The amended GPA underscores the wide breadth of its coverage. It, thus, provides the definition of a measure under the GPA as "any law, regulation, procedure, administrative guidance or practice, or any action of a procuring entity relating to a covered procurement."[83] The amended GPA clarifies the GPA's three core principles: that is, transparency in the procurement process, non-discrimination among parties, and procedural fairness.[84] The revised GPA also underscores the importance of providing enhanced special and differential (S&D) treatment for developing countries.[85] The S&D treatment is mainly to encourage developing countries to consider joining the GPA and facilitate their

available at: <http://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm>, accessed 19 April 2013; WTO, *Historic Deal Reached on Government Procurement*, 2011 News Items, available on the WTO's website at: <http://www.wto.org/english/news_e/news11_e/gpro_15dec11_e.htm>, accessed 19 April 2013.

79 *See id*., WTO Committee on Government Procurement, *The Re-Negotiation of the Agreement on Government Procurement (GPA)*; WTO, *Historic Deal Reached on Government Procurement*.

80 *Id*.

81 The revised GPA will enter into force for those parties that have accepted it on the 30th day following such deposit by two-thirds of the parties to the current GPA. *See Adoption of the Amended GPA*, at *Protocol Amending the Agreement on Government Procurement*, para. 3. As the two-thirds of the present 15 Members are only 10 Members, the entry into force can be expected in the reasonably foreseeable future. In the recent Trade Negotiation Committee held on 11 April 2013, WTO Director-General Pacal Lamy predicted that the entry into force can be completed before the 9th Ministerial Conference to be held in Bali, Indonesia in December 2013. *See* WTO Trade Negotiations Committee, *Lamy Says Change in Mind-Set Needed for Bali to Succeed* (11 April 2013), available at: <http://www.wto.org/english/news_e/news13_e/tnc_infstat_11apr13_e.htm>, accessed 19 April 2013.

82 *See Adoption of the Amended GPA*, at *Annex to Protocol Amending the Agreement on Government Procurement* [hereinafter "*Amended GPA Text*"].

83 *See Amended GPA Text*, at Article I, Item (i).

84 *See* WTO Committee on Government Procurement, *Committee on Government Procurement Adopts Revised Agreement* (30 March 2012), available at: <http://www.wto.org/english/news_e/news12_e/gpro_30mar12_e.htm>, accessed 19 April 2013; *see also Amended GPA Text*, at Articles IV, XVI, and XVII.

85 *See Amended GPA Text*, at Preamble and Article V.

respective accession to the agreement, including "improved transitional measures."[86]

Among various provisions of the amended GPA, Articles II, IV, and V are particularly relevant to the implementation of microtrade through government procurement scheme as further discussed below. Again, other provisions may be implicated depending upon specific schemes of microtrade as adopted by respective importing Members, but following provisions seem to require immediate attention in this respect.

3.2.1 Article II – exception for ODA projects

Article II of the GPA excludes government procurement conducted for the purpose of providing international assistance and aid (i.e. ODA) from the scope and coverage of the GPA. It, thus, provides in pertinent part:

> Article II: Scope and Coverage
>
> 3. Except where provided otherwise in a Party's annexes to Appendix I, this Agreement does not apply to:
>
> (e) procurement conducted:
>
> (i) for the specific purpose of providing international assistance, including development aid;

It should be noted that this provision did not exist in the original GPA. This noteworthy inclusion would support the proposition that the amended GPA is premised upon the notion that broader S&D is one of the underlying themes of the recent revision.[87] In fact, in the broader context of the objectives of ODA, a procurement to support Aid for Trade through microtrade should arguably be considered a specific means of providing ODA to the LDCs.[88] Should this rationale prevail, then the application of the GPA obligations may be exempted

86 *See* WTO Committee on Government Procurement, *Ministerial Meeting of the Committee on Government Procurement (15 December 2011) – Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement*, GPA/112 (16 December 2011) [hereinafter "*Decision to Amend GPA*"], para. 3; *see also Amended GPA Text*, at Article V, paras. 3-7.

87 *See Decision to Amend GPA*, *supra* note 86, paras. 3, 8.

88 If the Aid for Trade project is pursued in the context of the Official Development Assistance ("ODA"), which is composed of grants and loans to LDCs, there is no reason not to consider the direct purchase by governmental entities of importing Member. *See* WTO, *Aid for Trade: Q&A*, at 1; *See* WTO, *Aid for Trade: Is It Working?*, available at: <http://www.wto.org/english/res_e/booksp_e/a4t_oecd_e.pdf>, 30 March 2013, at 1. In fact, one of the three specific ways of the ODA is called "disbursement" which involve "purchase" of goods and services for the beneficiary LDCs. *See id (Aid for Trade: Q&A)*.

for importing developed country Members, who are parties to the GPA, with respect to certain eligible microtrade products purchased through their government procurement schemes.

3.2.2 Article IV – MFN obligation

Even if microtrade were not to be considered for the specific purpose of providing international assistance under Article II, Article IV of the amended GPA may provide regulatory cover for government procurement for microtrade. Paragraph 1 of Article IV sets forth national treatment and MFN treatment obligations for the parties to the GPA. The article, thus, reads in pertinent part:

> 1. With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to:
>
> (a) domestic goods, services and suppliers; and
> (b) goods, services and suppliers of any other Party.

The microtrade scheme involving the purchase of products from the LDCs through a government procurement procedure could arguably constitute more favorable treatment to the products and suppliers of the LDCs than that accorded to products and suppliers from other exporting Members (for instance, China), which is at the outset inconsistent with the MFN requirement under Article IV. However, a subsequent paragraph of Article IV sets forth limitations on the application of this provision. Paragraph 7 of the article, thus, provides that:

> 7. Paragraphs 1 and 2 shall not apply to: customs duties and charges of any kind imposed on, or in connection with, importation; the method of levying such duties and charges; other import regulations or formalities and measures; other import regulations or formalities and measures affecting trade in services other than measures governing covered procurement.

Paragraph 7 of Article IV provides that the MFN obligation in paragraph 1 does not apply to the imposition of duties and charges or methods of levying such duties and charges. Nor does it apply to other import regulations or formalities. A government purchasing scheme to be adopted by an importing Member may not fall under imposition of duties and charges. However, an argument can be made that the microtrade scheme would still constitute special import regulations and formalities adopted by an importing Member for particular types of

products and suppliers, if the scheme were to be tailored as a preference based on import conditions such as tariff waiver. The provision does not qualify the term "import regulations and formalities"; so, arguably all types of import regulations and formalities may fall under the term. Thus, developed country Members participating in microtrade may indeed try to devise and formulate their government purchasing scheme in a way that satisfies the term "import regulations and formalities," so that they may resort to paragraph 7 of Article IV of the amended GPA as an exception to the general MFN obligation under paragraph 1. If so, microtrade could stay out of the reach of the MFN obligation of the GPA, and effective legal frameworks for microtrade can be devised and adopted by participating Members.

3.2.3 Article V – broader S&D treatment

The amended GPA provides yet another avenue for a party and a developing country Member to devise a special bilateral scheme. Article V of the amended GPA provides in paragraph 2 that:

> 2. Upon accession by a developing country to this Agreement, each Party shall provide immediately to the goods, services and suppliers of that country the most favourable coverage that the Party provides under its annexes to Appendix I to any other Party to this Agreement, *subject to any terms negotiated between the Party and the developing country in order to maintain an appropriate balance of opportunities* under this Agreement. (emphasis added in italic)

The provision sets forth immediate application of the MFN benefit to a newly acceding developing country. But at the same time, this provision also allows an existing party and a newly acceding developing country to enter into a bilateral arrangement that may derogate from the MFN principle.[89] Such derogation may provide a basis for according preferential treatment to certain developing countries (i.e. LDCs) within the GPA framework. Put differently, a bilateral arrangement between an LDC and an importing developed country Member can be adopted under the amended GPA so as to address various bilateral issues, including the establishment of a government procurement mechanism by the importing developed Member to promote microtrade.

Paragraph 1 of Article V of the amended GPA also sets forth broader S&D treatment by stipulating that:

89 Paragraph 2 of Article V stipulates that "the most favorable coverage" can be "subject to any terms" of a bilateral arrangement.

> 1. In negotiations on accession to, and in the implementation and administration of, this Agreement, the Parties shall give special consideration to the development, financial and trade needs and circumstances of developing countries and least developed countries (collectively referred to hereinafter as "developing countries", unless specifically identified otherwise), recognizing that these may differ significantly from country to country. *As provided for in this Article and on request, the Parties shall accord special and differential treatment* to:
>
> (a) least developed countries; and
> (b) any other developing country, where and to the extent that this special and differential treatment meets its development needs. (emphasis added in italic).

A persuasive argument can be made that this provision stands for the proposition that the amended GPA should be interpreted and applied in a way that takes into account the unique difficulties of the developing country Members, particularly the LDCs.[90] This paragraph imposes an affirmative obligation to accord S&D treatment on the GPA parties (the parties shall accord special and differential treatment...) "on request" from developing country Members or LDCs. This broad S&D provision should support the implementation and administration of the concept of microtrade to the extent the GPA is applicable.[91] The S&D provision may arguably allow developed countries to facilitate microtrade more directly, by purchasing products from the LDCs and putting them for sale in their markets for the consumers through a government procurement system on the terms preferential to LDCs.[92]

4 Conclusions

As the concept of microtrade is a novel one, controversies concerning the consistency of the microtrade scheme with the current WTO Agreements or

90 Paragraph 1 of Article V states that "special consideration to the ... circumstances of the developing countries and least developed countries" should be given "in the implementation and administration of the Agreement." As "implementation and administration" of the GPA arguably covers the entire spectrum of the government procurement issues, an a plausible argument can be made that the necessary special consideration permeates all aspects of the GPA.

91 Again, attention should be given to the phrase in Article V of the amended GPA that special consideration of developing countries and LDCs should be given "in the implementation and administration of the Agreement." As the term "implementation" or "administration" is such a broad one, the extent to which microtrade is applied in the form of government procurement may also fall under such implementation or administration and consequently can be covered by the obligation stipulated in Article V of the amended GPA.

92 Arguably, this is one way of implementing and administering certain aspects of government procurement within the meaning of Article V of the amended GPA.

jurisprudence may arise. To the extent that microtrade attempts to provide effective and meaningful assistance to LDCs on preferential terms, those Members which are left outside the scope of microtrade may raise legal challenges under GATT/WTO rules, including the GPA when microtrade is implemented through government procurement.

Through clarification of certain key terms at the WTO level and appropriate adjustment of domestic importation systems of participating Members, many of the legal issues could be resolved and potential regulatory inconsistencies can be avoided. The preceding analysis indicates that the proposed microtrade scheme is largely consistent with GATT/WTO rules, including GATT Article I stipulating the MFN requirement and the stated exceptions such as GSPs.

The government procurement mechanism may also offer a reliable and effective scheme to implement microtrade in the context of Aid for Trade. The provisions of the amended GPA may not be applicable to microtrade at all, if microtrade is considered to be for the specific purpose of providing international assistance under the amended Article II, or they may collectively be interpreted to support, rather than hinder, the implementation and administration of microtrade using government procurement under amended GPA Articles IV and V.[93] There is a possibility that other GPA provisions may also be implicated depending upon the specific formation and implementation of microtrade, but from an overview of the general scheme of the amended GPA, it seems clear that microtrade can be devised to avoid conflict with the GPA provisions. The preceding analysis concludes that the implementation of microtrade in the context of Aid for Trade may be supported by the provisions of the amended GPA to the extent that they are applicable.

93 *See* the preceding discussions on Articles II, IV, and V of the amended GPA.