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Dr Narelle McGlusky
Inquiry Secretary
Joint Select Committee on Government Procurement
Department of the House of Representatives
PO Box 6021
Canberra ACT 2600

31 March 2017

[By Electronic Submission]

Dear Dr McGlusky

Inquiry into the Commonwealth Procurement Framework

We refer to your email to Professor Cassimatis of 22 February 2017 inviting a submission on the implementation of the recent changes to the Commonwealth Procurement Rules. Thank you for giving us this opportunity to address these important changes to the rules. We note in particular the importance of these rules in light of Australia's planned accession to the plurilateral World Trade Organisation Government Procurement Agreement ("WTO GPA"), the revised terms of which entered into force for its parties in April 2014.

Professor Cassimatis has expertise in the fields of public international law and administrative law. Ms Bosse, Mr Fraser and Mr Pattanasri are LLB students who have completed courses on *Administrative Law*, *Public International Law.* Ms Bosse also has particular expertise in the field of government procurement. Ms Bosse, Mr Fraser and Mr Pattanasri conducted, under the supervision of Professor Cassimatis, the initial research on which this submission has been based.

Our submission will principally focus on paragraphs (d) and (e) of the committee's terms of reference, namely:

"(d) the extent to which … [the Commonwealth Procurement Rules that came into force on 1 March 2017 ("CPR17")] and any related instrument and rules can be affected by trade agreements and other World Trade Organization (WTO) agreements, including:

(e) (i) existing trade agreements Australia has entered into, and

(ii) trade agreements that the Commonwealth Government is currently negotiating, including the WTO Agreement on Government Procurement …"

We will focus in particular on clauses 10.10, 10.18, 10.30, 10.31 and 10.37 of CPR17 (the "new clauses"). Should you require any further information, please do not hesitate to contact Professor Cassimatis at a.cassimatis@law.uq.edu.au.

Yours sincerely

Ms Jocelyn Bosse Professor Anthony E Cassimatis Mr Angus Fraser Mr Thanaphol Pattanasri

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I. Executive Summary

Government procurement is a significant aspect of the Australian economy. It provides an opportunity to achieve government policy objectives through strategic use of public funds. Indeed, several of the new clauses of CPR17 have introduced or expanded upon such policy objectives. The new clauses have the potential to provide more efficient and transparent tools for implementation of government policy.

Rule 10.10 introduces a requirement for tenderers to comply with any relevant Australian standards. The implementation of this rule should ensure that any relevant Australian standards are clearly and explicitly set out in the qualification and evaluation criteria published by the procuring entity.

Rule 10.18 introduces three new evaluation criteria for the award of procurement contracts. To ensure compliance with the WTO GPA, tender documents published by a purchasing authority must clearly set out the specific evaluation criteria that will be used to assess bids (such as price, technical quality, environmental impacts, labour regulations etc.) as well as the weight in percentage terms allocated to each aspect.

Ethical employment practices could be evaluated based on compliance with fundamental principles and rights declared by the International Labour Organization (ILO).

From the perspective of procurement officials the main challenge with social and environmental policies is the necessity to justify their application. When drafting technical specifications, procuring entities must ensure that there is a clear link between the specification, such as environmental certifications, and the subject matter of the contract.

Rule 10.30 requires Commonwealth officials to consider the economic benefit of procurement to the Australian economy. The apparent breadth of this policy consideration is limited by Rule 10.31, which stipulates that the context for this policy is provided by, inter alia, the relevant international agreements to which Australia is a party. Notwithstanding Rule 2.14 which provides generally that officials undertaking procurement are not required to refer directly to international agreements, Rule 10.31 appears to require officials to consider such agreements in order to comply with Rule 10.30.

The WTO GPA embodies three general principles:

1. non-discrimination; comprising
   a. most favoured nation (MFN); and,
   b. national treatment.
2. transparency; and,
3. procedural fairness.

As noted above, the WTO GPA does not, however, prohibit policy considerations extending beyond economic considerations to be taken into account in procurement provided certain conditions are satisfied. Transparency requirements require these policy considerations to be set out in detail. Weighting of the evaluation criteria need to be specified. For example, the United Nations Sustainable Procurement Guidelines recommend 10-15% weightings for evaluation criteria related to sustainable procurement.[1]

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[1] United Nations Environment Programme – Division of Technology, Industry and Economics, Sustainable Procurement Guidelines Users' Guide (May 2009) Greening the Blue, 7. http://www.greeningtheblue.org/sites/default/files/toner-user-guide_0.pdf.

Under the WTO GPA, there are three general ways in which policy considerations other than price can be justified. First, the revisions made to the original WTO GPA provide additional textual support, for example, for technical specifications designed "to promote the conservation of natural resources or protect the environment". Secondly, it is open to prospective parties to the WTO GPA in their accession negotiations to secure agreements regarding national, local or other preferences for specified forms of procurement. These preferential procurement agreements are then set out in the schedules negotiated with the existing parties to the WTO GPA. Thirdly, the exception provisions contained in Article III of the WTO GPA provide protection for certain forms of preferential measures in procurement, for example, related to national security and national defence purposes; exceptions for measures necessary to protect public morals, order or safety; and measures necessary to protect human, animal or plant life or health. Exceptions also exist for measures relating to goods or services of persons with disabilities or philanthropic institutions.

There are four main areas of non-price related procurement policy within Australia:

1. Commonwealth Indigenous Procurement Policy;
2. Workplace Gender Equality Procurement Principles and User Guide;
3. Australian Industry Participation (AIP) National Framework; and
4. Building Code 2013 incorporating the Supporting Guidelines for Commonwealth Funding Entities.

Some of these areas of policy will require inclusion within Australia's accession schedules. Other areas of non-price related policy would appear to be justifiable as being non-discriminatory and thus being consistent with the general principles set out in Article IV of the WTO GPA or being within the exceptions set out in Article III.

Parties to the WTO GPA are obliged to put in place an independent domestic review system through which a supplier may challenge a breach of the agreement. The WTO Dispute Settlement Mechanism (DSM) handles disputes at an international level.

If judicial review under Australian law of procurement decisions is available to international suppliers, this would appear to be sufficient to ensure compliance with the WTO GPA rules regarding independent domestic review. Judicial review of procurement decisions made under CPR17 appears available notwithstanding schedule 1, clause (hf) of the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("ADJR Act") which excludes judicial review of decisions under sections 15, 23 and 85 of the Public Governance, Performance and Accountability Act 2013 (Cth). Review remains available potentially under section 75(v) of the Commonwealth Constitution and under section 39B of the Judiciary Act. CPR17, having been made under section 105B of the Public Governance, Performance and Accountability Act, and having been declared by section 105B(2) to be a non-disallowable statutory instrument, review of certain decisions made under CPR17 may also remain reviewable under the ADJR Act.

In addition to the WTO GPA, Australia has entered into various free trade agreements that include provisions in relation to government procurement. In some cases, these agreements have been modelled on the WTO GPA and thus CPR17 and procurement occurring under it will be consistent with the requirements under these free trade agreements. In addition, where the parties to these agreements are also parties to the WTO GPA, the negotiation of accession schedules with Australia by these States would appear to avoid the possibility of any inconsistency as under the law of treaties, a later treaty takes prevails as between parties to successive treaties.

Rule 10.37 of CPR17 dealing with contract management requires Australian procuring entities to make reasonable enquiries regarding compliance with Australian and international standards. The WTO GPA provides broader scope for non-price related policies derived from international standards.

II. THE COMMONWEALTH PROCUREMENT FRAMEWORK

Government procurement holds substantial economic importance: it accounts for 15-20% of GDP in most OECD countries, and the Australian Government awarded 69,236 procurement contracts with a total value of $59,447 million in the 2014-2015 financial year.[2]

The WTO GPA opens government procurement markets between its members and aims to ensure transnational tender processes are transparent and non-discriminatory.[3] As the custodian of public resources, government procurement authorities can be distinguished from private entities engaging in procurement.[4] According to Corvaglia:

> "… public procurement, even if oriented towards maximizing efficiency and achieving the best 'value for money', has a much broader regulatory scope than private procurement. … Governmental procuring authorities are not neutral economic actors and they buy goods and services on the market on behalf of the national community they represent. It is generally argued that their purchasing decisions (and their spending of taxpayers' money) should necessarily be oriented towards reflecting the 'common good' and 'public interest' of their community. … It would not be acceptable for governments, in the awarding of public contracts, to allow practices that would violate the basic policies regulating their own communities, such as environmental commitments or labour rights.
>
> … [T]he instrumental use of public procurement not only strengthens the efficiency and coherence of broader national environmental and social public policies, but also increases the enforceability of voluntary business practices in the context of corporate social responsibility (CSR). … In this regulatory perspective, public procurement becomes an effective way of providing to private actors concrete market-based incentives, in terms of access to public contracts, to adopt social and sustainable criteria and avoid the 'compliance gap' typical of CSR initiatives."[5]

Under Art XXII.4 of WTO GPA, parties to the Agreement must ensure that all laws, regulations and administrative procedures, as well as rules, procedures and practices applied by procuring entities, are in conformity with the WTO GPA.

CPR17 is the main Commonwealth Instrument for ensuring that Commonwealth procurement conforms with Australia's international procurement obligations. CPR17 is made under s 105B(1) of the *Public Governance, Performance and Accountability Act 2013 (Cth)*. Pursuant to s 105B(2), CPR17 is a "legislative instrument". Senator Cormann observed that:

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[2] Australian Government Department of Finance, Statistics on Australian Government Procurement Contracts (17 November 2016) <https://www.finance.gov.au/procurement/statistics-on-commonwealth-purchasing-contracts/>.

[3] Department of Foreign Affairs and Trade, WTO Agreement on Government Procurement (GPA) <http://dfat.gov.au/international-relations/international-organisations/wto/Pages/wto-agreement-on-government-procurement.aspx>.

[4] See generally, Christopher McCrudden, Buying Social Justice – Equality, Government Procurement and Legal Change, Oxford University Press, Oxford, 2007, especially Chapter 15.

[5] Maria Anna Corvaglia, 'Public Procurement and Private Standards: Ensuring Sustainability Under the WTO Agreement on Government Procurement' (2016) 19(3) *Journal of International Economic Law* 607, 611-612.

> "[t]hese are the Commonwealth procurement rules which come into effect on 1 March 2017, and the government will give effect to them formally through the relevant legislative instruments as a non-disallowable instrument."[6]

The status of CPR17 as a legislative instrument is significant in terms of the legal obligations under Australian law to abide by the rules contained in the instrument.[7] Australia's international obligations regarding government procurement also apply in respect of qualifying State and Territory procurement. Questions have been raised regarding measures taken to implement government procurement obligations at the State and Territory level.[8]

[6] Commonwealth, *Parliamentary Debates*, Senate, 29 November 2016, 3656 (Mathias Cormann)

[7] See generally the High Court's decision in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

[8] See Nicholas Seddon, Government Contracts – Federal, State and Local, 5th ed, Federation Press, Sydney, 2013, 56.

III. Consideration of CPR17

A. Clauses 10.10, 10.18, 10.30, 10.31 and 10.37

10. Additional rules

…

10.10 Where an Australian standard is applicable for goods or services being procured, tender responses must demonstrate the capability to meet the Australian standard, and contracts must contain evidence of the applicable standards (see paragraph 10.37).

…

10.18 Officials must make reasonable enquiries that the procurement is carried out considering relevant regulations and/or regulatory frameworks, including but not limited to tenderers' practices regarding:

a. labour regulations, including ethical employment practices;
b. occupational, health and safety; and
c. environmental impacts.

…

10.30 In addition to the considerations at paragraph 4.4, for procurements above $4 million, Commonwealth officials are required to consider the economic benefit of the procurement to the Australian economy.

10.31 The policy operates within the context of relevant national and international agreements and procurement policies to which Australia is a signatory, including free trade agreements and the Australia and New Zealand Government Procurement Agreement.

…

10.37 Where applying a standard (Australian, or in its absence, international) for goods or services, relevant entities must make reasonable enquiries to determine compliance with that standard:

a. this includes gathering evidence of relevant certifications; and
b. periodic auditing of compliance by an independent assessor.

…

B. Rule 10.10

Although the WTO GPA expresses a preference for international standards[9] the use of national standards for procurement policy purposes is readily defensible under the WTO GPA. National standards are, for example, expressly referred to in Article X of the WTO GPA. Various parties to the WTO GPA have relied on national standards in relation to social policy provisions applicable to procurement. According to Professor McCrudden:

> "…there are extensive provisions at the United States federal government level attaching social policy provisions to government contracts, and fairly extensive use of social policy requirements in the procurement regimes of the Member States of the European Community. Although exemption was gained by the United States and Canada for the minority and small business set-aside schemes, no similar exemption was negotiated by either the United States, the EC, or Canada for those programmes under which contractors must satisfy certain procedural and

[9] See Article X.2(b) of the WTO GPA.

substantive requirements relating to racial and gender equality before the award of the contract and during the carrying out of the contract … such as Executive Order 11246 in the United States and similar programmes operated by both the federal and some provincial governments in Canada."[10]

C. Rule 10.18

Government procurement has been used to advance so-called "horizontal policies" such as support for gender equality, Aboriginal and Torres Strait Islander businesses, small-to-medium enterprises, local industry, and protection of the environment.[11]

Sustainable procurement as a broad concept first emerged following the Rio Conference in 1992. The Commonwealth Department of the Environment and Energy (then known as the Department of Sustainability, Environment, Water, Population and Communities) released a Sustainable Procurement Guide in 2013. It defined sustainable procurement to include the environmental and social impacts from procurement, which aligned with Australian Government obligations to spend public money efficiently, effectively, economically and ethically.

Senator Cormann has observed that:

> "[w]here one of these areas of regulation is not applicable or alternatively other forms of significant regulation apply, then officials would use their judgement to make the appropriate inquiries. Inquiries by officials must amount to a reasonable effort. The rule does not require comprehensive compliance auditing that would add materially to the cost for taxpayers. The purpose is to ensure that there is sufficient evidence to give officials sufficient confidence in the veracity of any representations made."[12]

Evaluation criteria are used to evaluate and compare the bids received which meet the minimum specifications (ie compliant bids). In sustainable procurement, it is essential to indicate that the contract will be awarded to the offer that provides "best value for money" – the term used if criteria other than just the price will be assessed when comparing bids. Evaluation criteria evaluate the performance of a bid both in terms of economic criteria such as price, along with environmental impact and social issues like labour regulations.

As with all phases of the tendering process, the tender documents published by the purchasing authority must clearly set out the various evaluation criteria that will be used to evaluate bids (such as price, technical quality, environmental quality, labour requirements, etc.) as well as the weight in percentage terms allocated to each aspect. In sustainable procurement, evaluation criteria can be used to encourage higher levels of sustainability performance than those demanded in the specifications, without risking significant increases in cost.

1. Labour Regulations and Ethical Employment Practices

In tabling the new rules, Senator Cormann confirmed that the application of Rule 10.18 extends beyond any applicable Australian rules to regulatory frameworks applied in other jurisdictions,

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[10] McCrudden, note 4 above, 487-488.

[11] See, for example, the Commonwealth Indigenous Procurement Policy (IPP) and the Workplace Gender Equality Procurement Principles and User Guide (3 November 2016) <http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/policy-framework/procurement-policies/principles/>.

[12] Commonwealth, *Parliamentary Debates*, Senate, 29 November 2016, 3653 (Mathias Cormann)

where relevant. During the parliamentary debate, Senator Xenophon gave the hypothetical example of a "company that has child labourers overseas or is pouring toxins into a river" as being a target for the new paragraph.[13]

Whether a State is permitted under the WTO GPA to use its procurement policies to attempt to alter employment practices in other States raises difficult questions.[14] The strongest case for seeking to use procurement policies to address foreign labour practices arises in respect of core labour standards identified by the ILO. In 1998, the International Labour Organization solemnly declared that by virtue of membership of the ILO, the more than 170 States members of the ILO were obliged to respect the following rights:

> "Freedom of association and the effective recognition of the right to collective bargaining;
> The elimination of all forms of forced or compulsory labour;
> The effective abolition of child labour; and
> The elimination of discrimination in respect of employment and occupation."[15]

2. Occupational Health and Safety

Under the WTO GPA State can readily rely on procurement policies to seek to ensure compliance with its national laws on occupational health and safety. Difficulties arise, however, in attempting to use procurement to ensure compliance with such standards in other States. Unlike the position with core labour rights for which universal standards appear to exist, occupational health and safety standards do not appear to be universally accepted.

3. Environmental Impacts

Government procurement decisions can have an important influence on the fulfilment of environmental objectives, namely, where preference is given to environmentally-friendly goods and services. Green public procurement (GPP) is where government bodies "use their purchasing power actively to encourage the production and use of environmentally friendly goods and services."[16] Thus, GPP involves environmental considerations like the use of renewable resources, energy efficiency, and the reduction of greenhouse gas emissions in the provision of goods and services.[17] Procurement of goods may involve considerations of waste disposal and other end-of-life management costs.

Environmentally harmful public purchases will place significant burdens upon future governments, which must respond to the negative consequences of climate change and environmental degradation. For that reason, modern procurement rules have redefined the "value for money" calculation so that it looks beyond the low upfront costs of unsustainable goods and services, and

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[13] Commonwealth, *Parliamentary Debates*, Senate, 29 November 2016, 3654 (Nicholas Xenophon)
[14] McCrudden, note 4 above, 494-495.
[15] For a critique and defence of the 1998 declaration see Philip Alston, 'Core Labour Standards' and the Transformation of the International Labour Rights Regime, 15 *European Journal of International Law* 457-521 (2004) and Brian A Langille, Core Labour Rights - The True Story (Reply to Alston), 16 *European Journal of International Law* 409-437 (2005).
[16] WTO Secretariat, Harnessing trade for sustainable development and a green economy (2011) World Trade Organization, 12 <https://www.wto.org/english/res_e/publications_e/brochure_rio_20_e.pdf>.
[17] UN Department of Economic and Social Affairs, Public Procurement as a tool for promoting more Sustainable Consumption and Production patterns (August 2008) 5 Sustainable Development Innovation Briefs <https://sustainabledevelopment.un.org/content/documents/no5.pdf>.

includes the higher whole-of-life costs like maintenance and disposal.[18] It is argued that the price-quality ratio can include environmental objectives as an element of 'quality' under technical specifications or evaluation criteria for the award of procurement contracts.[19]

The EU has been a particular proponent of using procurement to promote "collateral" objectives.[20] It has promulgated two directives that outline rules for sustainable procurement.[21] The European experience indicates that by incorporating sustainability requirements in tender specifications or award criteria, States are able to enforce higher standards of environmental protection and likely still comply with the WTO GPA.[22]

4. Concluding observations on Rule 10.18

The current practice under the WTO GPA includes allowing for social measures via derogations in a party's coverage schedules in Appendix I to the Agreement, pursuant to Article II. Examples include:

Canada – Annex 7

> Art 2. Exception for set asides for small and minority owned businesses.
> Art 3. Exception for any measure with respect to Aboriginal peoples. The GPA does not affect existing aboriginal or treaty rights of any of the Aboriginal peoples of Canada under section 35 of the Constitution Act, 1982.

New Zealand – Annex 7

> Art 3. Exception for measures it deems necessary to accord more favourable treatment to Māori in fulfilment of its obligations under the Treaty of Waitangi.

United States – Annex 7

> Art 1. Exception for any set aside on behalf of a small- or minority-owned business. A set-aside may include any form of preference, such as the exclusive right to provide a good or service, or any price preference.

There is undoubtedly scope for the Australian Government to negotiate the option for more favourable treatment of Aboriginal and Torres Strait Islanders under the WTO GPA, with the caveat that "such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Members or as a disguised restriction on trade in goods and services."

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[18] 2008 UN Sustainable Innovation Brief. https://sustainabledevelopment.un.org/content/documents/no5.pdf

[19] WTO Secretariat, *Harnessing trade for sustainable development and a green economy* (2011) World Trade Organization, 12 <https://www.wto.org/english/res_e/publications_e/brochure_rio_20_e.pdf>.

[20] Luca Tosoni, 'Impact of the Revised WTO Government Procurement Agreement' (2013) 1 *European Procurement and Public Private Partnership Law Review* 41, 41.

[21] European Parliament and Council Directive 2004/17/EC on the coordination of procurement procedures of entities operating in the water, energy, transport and postal services sectors, [2004] OJ L 134/1; European Parliament and Council Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [2004] OJ L 134/114.

[22] Luca Tosoni, 'Impact of the Revised WTO Government Procurement Agreement' (2013) 1 *European Procurement and Public Private Partnership Law Review* 41, 45.

D. Rules 10.30 and 10.31

Rule 10.30 requires Commonwealth officials to consider the economic benefit of procurement to the Australian economy. This vague policy appears to be limited by Rule 10.31, which stipulates that the context for this policy is provided by, inter alia, the relevant international agreements to which Australia is a party. It therefore appears necessary when applying this policy that officials have regard to the various international instruments to which Australia is a party in order to ensure compliance with those instruments. Recourse to international instruments in this context would involve treating Rules 10.30 and 10.31 as exceptions to Rule 2.14, which provides generally that officials undertaking procurement are not required to refer directly to international agreements.

E. Rule 10.37

Rule 10.37 of CPR17 dealing with contract management requires Australian procuring entities to make reasonable enquiries regarding compliance with Australian and international standards. Professor McCrudden identifies difficulties related to the use of socio-economic considerations as contract conditions (ie after contracts have been awarded) as opposed to conditions attached to the selection of a tenderer.[23]

IV. Remedies in relation to Procurement

The WTO GPA and other international agreements that include procurement obligations require independent judicial or administrative review in respect of procurement decisions. The potential remedies required by these agreements appear to include the power to suspend contracts already awarded in order to preserve a supplier's opportunity to participate in a procurement.[24]

Administrative law remedies under Australian law appear best adapted to provide this form of relief. Further, the statutory foundation of CPR17 supports the potential for judicial review of procurement decisions that are inconsistent with the requirements of CPR17. The High Court's decision in *Project Blue Sky* case sets out the relevant principles.[25] Judicial review, however, under the ADJR Act is restricted by the reference in Schedule 1 of the Act to sections 15, 23 and 85 of the Public Governance, Performance and Accountability Act 2013. Review under section 75 of the Constitution and section 39B of the Judiciary Act 1903 (Cth) is not affected by the first schedule to the ADJR Act.

[23] McCrudden, note 4 above, 488-491.
[24] See, for example, WTO GPA, Article XVIII.7. For a discussion of the relevant issues, see Seddon, note 8 above, 55; and Anthony E Cassimatis, Government Procurement Following the Australia US Free Trade Agreement (2008) 30 *Sydney Law Review* 412.
[25] (1998) 194 CLR 355.

V. Other International Agreements

In addition to the WTO GPA, Australia has entered into various free trade agreements that include provisions in relation to government procurement. These agreements have generally been modelled on the WTO GPA and thus CPR17 and procurement occurring under the rules set out in CPR17 will not raise any difficulties under these free trade agreements.

In addition, where the parties to these agreements are also parties to the WTO GPA, the negotiation of accession schedules with Australia by these States would appear to avoid the possibility of any inconsistency as under the law of treaties, a later treaty prevails as between parties to successive treaties. Thus, in relation to New Zealand, which became a party to the WTO GPA in 2015, the WTO GPA and the accession schedule negotiated between Australia and New Zealand, once concluded, will supersede any contrary provisions in earlier treaties containing procurement obligations. This is by virtue of the rule regarding successive treaties on the same subject matter set out in Article 30(3) of the Vienna Convention on the Law of Treaties 1969.[26]

[26] The relevant provisions of Article 30 of the Vienna Convention are set out below:

> "3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
> 4. When the parties to the later treaty do not include all the parties to the earlier one:
> (a) as between States parties to both treaties the same rule applies as in paragraph 3 …"