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**World Trade Organization**  
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**THE REVISED WTO AGREEMENT ON GOVERNMENT PROCUREMENT (GPA): KEY DESIGN  
FEATURES AND SIGNIFICANCE FOR GLOBAL TRADE AND DEVELOPMENT**

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## **ABSTRACT**

The WTO's plurilateral Agreement on Government Procurement ("the GPA" or "the Agreement") is an important ongoing success story for the Organization. In March 2012, the GPA Parties completed a comprehensive revision of the Agreement, encompassing both its text and coverage (market access commitments). The revised GPA, the negotiating processes that led to its adoption and coming into force, and the continuing gradual broadening of its membership are of therefore interest for the evolution of the international trading system.

The GPA's successful renegotiation, the continuing growth of its membership and its vitality as an instrument of public policy were not achieved through happenstance. The paper discusses a number of specific design features of the GPA that clearly facilitated the successful conclusion of the renegotiation and that, as such, may in the future be relevant to other areas of global trade liberalization. In addition to the Agreement's plurilateral nature, of particular interest are the approach taken with respect to application of the most-favored-nation (MFN) principle in the Agreement; the GPA's continuing strong emphasis on principles of reciprocity in market access concessions; and its approach to special and differential treatment for developing countries, in all of which it differs from approaches that are widely used in other WTO Agreements.

Apart from the above, the GPA revision is important for the merging of trade and good governance concerns that it exemplifies. As discussed in the paper, the themes of governance and the sound management of public resources that are treated in the revised Agreement were not afterthoughts to the renegotiation; rather, they permeated the revised text and received focused attention from the Parties in their own right. As well, the GPA has direct implications for investment policy and for domestic economic reforms, and is an important tool of e-commerce. And, the revision has made possible very significant synergies between the GPA and other international instruments and activities in reducing barriers to participation and strengthening governance in public procurement markets. For all these reasons, the revised Agreement is likely to have a wider impact than meets the eye, and well merits the support and attention that it has received from the participating WTO Member governments.

### **Key Words:**

Corruption, Developing Country, E-Commerce, International Trade Agreements, MFN, Plurilateral agreements, Public Economics, Public Works, Trade Agreements.

### **JEL classification numbers:**

F1, F5, H5, H57, H72, K2, O1, O24,

# THE REVISED WTO AGREEMENT ON GOVERNMENT PROCUREMENT (GPA): KEY DESIGN FEATURES AND SIGNIFICANCE FOR GLOBAL TRADE AND DEVELOPMENT

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## 1 INTRODUCTION

The WTO's plurilateral Agreement on Government Procurement ("the GPA" or "the Agreement") is an important ongoing success story for the Organization. In March 2012, the GPA Parties completed a comprehensive revision of the Agreement, encompassing both its text and coverage (market access commitments).<sup>2</sup> This represented the culmination of more than ten years' work on the Agreement's renegotiation in the WTO's Committee on Government Procurement ("the Committee").<sup>3</sup> The revised Agreement entered into force on 6 April 2014, only two years following the conclusion of the re-negotiation.<sup>4</sup> Of equal importance, the membership of the plurilateral GPA, to which by definition not all WTO Members are Party, has increased very substantially, from 22 WTO members covered at the beginning of 1996 to 47 at present, and it continues to grow.

The revised GPA, the negotiating processes that led to its adoption and coming into force, and the continuing gradual broadening of its membership are of interest for multiple reasons.<sup>5</sup> First, from the traditional standpoint of trade liberalization, the renegotiation added an estimated \$ 80-100 billion annually to the value of the Parties' market access commitments under the Agreement.<sup>6</sup> With the additional coverage, in total, the Agreement now covers an estimated \$1.7 trillion in procurements annually. The GPA therefore constitutes an important modern example of a successful and consequential market access negotiation within the WTO framework. Indeed, until the agreement reached recently on the new WTO Agreement on Trade Facilitation, at the WTO's Ninth Ministerial Conference, in Bali, the GPA renegotiation represented the largest augmentation of market access commitments to be achieved in the WTO since the Organization was launched in 1994.

To be sure, the outcomes of the renegotiation were not limited to market access gains. As a second important element, the revision effectively modernized the Agreement's text, duly reflecting, for example, the now nearly universal use of electronic procurement tools that were little used at the time the previous version of the Agreement was adopted in 1994 and, therefore, were not well reflected in that version of the Agreement. In fact, with the 2012 revision, the Agreement has become an important tool of e-commerce.<sup>7</sup> The revised GPA text also embodies: (i) greater emphasis on the promotion of "good governance" and the fight against corruption as explicit objectives of the Agreement; (ii) a new approach to transitional measures for developing countries that join the Agreement; and (iii) additional flexibilities for all participating WTO Members.<sup>8</sup> In effect, the text establishes the GPA as a modern instrument embracing and incentivizing the use of best practices in government procurement internationally.<sup>9</sup> Already, it has, as a result, given the Agreement an important role in guiding policy reforms particularly in transition economies.<sup>10</sup> This experience points clearly to a more "holistic" vision of international

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<sup>2</sup> See "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), Paragraph 5 (GPA/113, dated 2 April 2012). The full text of the decision, including the revised text of the Agreement and other elements, is available on the WTO website at [http://www.wto.org/english/tratop\\_e/gproc\\_e/negotiations\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm).

<sup>3</sup> See "Committee on Government Procurement adopts revised Agreement," WTO News item, 30 March 2012, available at [http://www.wto.org/english/news\\_e/news12\\_e/gpro\\_30mar12\\_e.htm](http://www.wto.org/english/news_e/news12_e/gpro_30mar12_e.htm).

<sup>4</sup> See "Revised WTO Agreement on Government Procurement enters into force," WTO News item, 7 April 2014, available at [https://www.wto.org/english/news\\_e/news14\\_e/gpro\\_07apr14\\_e.htm](https://www.wto.org/english/news_e/news14_e/gpro_07apr14_e.htm).

<sup>5</sup> See also Robert D. Anderson, "The Conclusion of the Renegotiation of the WTO Agreement on Government Procurement: What it Means for the Agreement and for the World Economy," (2012) 21 *Public Procurement Law Review*, Issue 3, pp. 83-93; and Robert D. Anderson, Steven Schooner and Collin Swan, "Feature Comment: The WTO's Revised Government Procurement Agreement: An Important Milestone Toward Greater Market Access and Transparency in Global Public Procurement Markets," *The Government Contractor*, Vol. 54, No. 1, January 11, 2012, pp. 1-6.

<sup>6</sup> See, for relevant details, section 2.4.1 below.

<sup>7</sup> See, for discussion, Part 4 below.

<sup>8</sup> See section 2.4.2 below, and references cited therein.

<sup>9</sup> See also Robert D. Anderson, "The WTO Agreement on Government Procurement (GPA): An Emerging Tool of Global Integration and Good Governance," *Law in Transition*, Autumn 2010, pp. 1/8-8/8, available at <http://www.ebrd.com/downloads/research/news/lit102.pdf>.

<sup>10</sup> See section 4 below and, for related commentary, Robert D. Anderson, William E. Kovacic and Anna Caroline Müller, "Promoting Competition and Deterring Corruption in Public Procurement Markets: Synergies with Trade Liberalization," *Public Procurement Law Review*, forthcoming. A previous version of this paper was published as part of the E15 initiative on Strengthening the Global Trade and Investment System for Sustainable Development, E15 Expert Group on Competition Policy and the Trade System, available at

trade law in the 21<sup>st</sup> century, in which market access objectives are effectively complemented by good governance concerns.

As a third integral outcome of the 2012 negotiating package, a set of "Agreed Work Programmes" adopted by the Parties holds significant potential to promote increased transparency and further international convergence around best practices in public procurement. The Programmes address matters such as market access for small and medium-sized enterprises (SMEs) and sustainability considerations in the implementation of public procurement policy in addition to other matters concerning the administration of the Agreement. Indeed, both the Preamble and the operational provisions of the Agreement manifest a clear concern with the efficient and effective management of public resources in addition to explicit trade promotion concerns.<sup>11</sup> The GPA, therefore, goes beyond "classic" market-access based international trade law and directly addresses concerns that are relevant not only to exporters and importers, but also to governments and citizens more generally.

The GPA's successful renegotiation, the continuing growth of its membership and its vitality as an instrument of public policy were not achieved through happenstance. In fact, as will be elaborated in this paper, while much credit is due to the Committee's then Chairman, Mr Nicholas Niggli (a Swiss diplomat) and to the lead negotiators, the GPA also embodies a number of specific design features that clearly facilitated the successful conclusion of the renegotiation. In addition to the Agreement's plurilateral nature, of particular interest are: (i) the "tailored" nature of each Party's market access commitments; (ii) the approach taken with respect to application of the national treatment (NT) and most-favored-nation (MFN) principles in the Agreement; (iii) the GPA's continuing strong emphasis on principles of reciprocity in market access concessions; and (iv) its approach to special and differential treatment for developing countries, in all of which it differs from approaches that are widely used in other WTO Agreements. The elaboration of these features will be an important thrust of the analysis below.<sup>12</sup> At the same time, whether such approaches are widely applicable in other areas of trade policy is a complicated question, and one which we will leave largely to be resolved in other contexts.

The themes of good governance and the sound management of public resources were not afterthoughts to the GPA renegotiation; rather, they permeated the revised text and received focused attention from the Parties in their own right. As well, the Agreement has direct implications for investment policy and for domestic economic reforms. And, the revision has made possible very significant synergies between the GPA and other international instruments and activities in reducing barriers to participation and strengthening governance in public procurement markets. Each of these aspects receives attention in this paper.

The remainder of the paper is structured as follows. Part 2 revisits the origins of the Agreement, the processes involved in the recent renegotiation and the discrete outcomes of the negotiations. Part 3 elaborates on the specific design features of the GPA which, in our view, facilitated its successful re-negotiation. Part 4 reviews the role of the GPA as a comprehensive policy tool integrating good governance and investment promotion elements in international trade law. Part 5 outlines the above-mentioned synergies that we see between the revised GPA and other international instruments and initiatives, and Part 6 provides concluding remarks.

## **2 FROM THE TOKYO ROUND CODE TO THE GPA 2012: IMPLEMENTATION OF A MODERN INTERNATIONAL TREATY REGIME TO SUPPORT OPEN MARKETS AND GOOD GOVERNANCE IN PUBLIC PROCUREMENT**

The revised GPA of 2012 builds upon two previous versions of the Agreement, the initial one forged in the course of the Tokyo Round of multilateral trade negotiations and the second negotiated in parallel to the Uruguay Round. In each succeeding version, the extent of relevant markets covered was increased, and the above-mentioned special design features of the Agreement were elaborated, leading to a continuous improvement of the Agreement over time. This section outlines related developments.

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<http://e15initiative.org/publications/promoting-competition-and-deterring-corruption-in-public-procurement-markets-synergies-with-trade-liberalisation>.

<sup>11</sup> See, generally, Sue Arrowsmith and Robert D. Anderson, eds., *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press and the World Trade Organization, 2011).

<sup>12</sup> See section 3, below.

## 2.1 Origins of the GPA: The Tokyo Round Code<sup>13</sup>

The modern GPA had, as its early forerunner, the Tokyo Round Code on Government Procurement.<sup>14</sup> The Code, which came into force in January 1981, grew out of work undertaken initially in the OECD which identified extensive patterns of discrimination in that organization's members' government procurement activities.<sup>15</sup> As will be discussed below in part 3, such discriminatory practices were effectively excluded from the ambit of the main non-discrimination provisions of the General Agreement on Tariffs and Trade (GATT) and subsequently the General Agreement on Trade in Services (GATS). Moreover, while in some cases, the discrimination was based on explicit statutory mandates; in other cases it was not. A clear conclusion to emerge from the work done in the OECD was that general non-discrimination rules by themselves (as in the GATT and GATS) would not be sufficient to end discriminatory practices in the government procurement field; rather, a more subject-specific agreement also embodying significant procedural and transparency rules would be required.<sup>16</sup> This core insight continues to inform the structure and content of the GPA, up to the present.

The Tokyo Round Code, like the present and the 1994 GPA, nonetheless embodied explicit national treatment and MFN obligations in addition to transparency and related rules. The Code's coverage was significantly more limited than the current GPA, in two key respects: first, it covered only the procurement of goods; and second, it applied to central government entities only. The Code's text itself recognised that it was only a starting point: its Article IX.6 provided for eventual negotiations to extend its coverage of entities and to cover certain services and construction services. While minor modifications were eventually made to the Code itself, leading to a formal amendment in 1988, the expansion of its scope to cover procurement of services in addition to goods and its broadening to cover sub-central in addition to central government purchasing occurred only with the adoption of the Code's successor, namely the 1994 Agreement on Government Procurement (the GPA 1994).

## 2.2 The GPA 1994

The GPA 1994 brought about important changes to both the scope and content of the Agreement. To begin with, as just discussed, its coverage was expanded to include sub-central and other entities, in addition to the procurement of services and construction services. The GPA 1994 also included important new institutional requirements for bid protest or "domestic review" systems<sup>17</sup> to rule on supplier complaints, and strengthened disciplines on "offsets".<sup>18</sup> In the negotiations to broaden the coverage of the new Agreement, the question of reciprocity, i.e. the balance of concessions, emerged as a central element of the discussions.<sup>19</sup> Due to the important changes and greatly enhanced scope of the resulting GPA, it was established as a completely new Agreement, rather than as an amended version of the Tokyo Round Code.

Although the negotiations leading to the 1994 GPA and the Uruguay Round negotiations were formally separate, the main players in both negotiations considered them to be intrinsically linked, and progress on the negotiations on a new GPA was made dependent on progress in the Uruguay Round and vice versa.<sup>20</sup> In order to overcome unresolved questions with regard to coverage in time for the conclusion of the Round, Parties had recourse to the insertion of significant "reciprocity clauses", both sector- and country-specific, as well as negotiated "notes" that limited the application of the non-discrimination principle contained in the Agreement in important ways (see section 3.5 below). While some of these reciprocity clauses and notes were withdrawn in the course of the negotiations, a number remained. As will be explained below, the

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<sup>13</sup> See, for additional detail, Robert D. Anderson and Sue Arrowsmith, "The WTO Regime on Government Procurement: Past, Present and Future," in Sue Arrowsmith and Robert D. Anderson, eds., above note 11, from which this sub-section draws. A useful discussion of the early history of the agreement is provided in Annet Blank and Gabrielle Marceau, "The History of the Government Procurement Negotiations since 1945" (1996) 5 P.P.L.R. 77.

<sup>14</sup> See Blank and Marceau, *ibid.*

<sup>15</sup> See OECD, *Government Purchasing in Europe, North America and Japan – Regulations and Procedures* (1966).

<sup>16</sup> Anderson and Arrowsmith, above note 13.

<sup>17</sup> See Part 4, below.

<sup>18</sup> "Offsets" in government procurement include mandatory (government-imposed) local content, technology licensing, investment, counter-trade and similar actions or requirements.

<sup>19</sup> See Blank and Marceau, above note 13.

<sup>20</sup> *Ibid.*

flexibility introduced by these mechanisms was an important feature of the negotiation leading to the GPA 2012, as well.

### 2.3 The GPA 2012: the road to the new Agreement

The road to the GPA 2012 had its origins in the GPA 1994: Article XXIV:7(b) of the 1994 Agreement called upon the Parties to undertake negotiations with a view to "improving the Agreement" and "achieving the greatest possible extension of its coverage among all Parties". The negotiations were to commence not later than the end of the third year from the date of entry into force of the Agreement. Article XXIV:7(c) stipulated, further, that the negotiations under subparagraph (b) should seek to eliminate remaining discriminatory measures and practices. An important additional objective of the review, as conceived by the Committee on Government Procurement, was to facilitate accession to the Agreement by additional Parties, notably developing countries.<sup>21</sup>

Preliminary discussions regarding the eventual negotiations commenced as early as the first year of the entry into force of the 1994 Agreement.<sup>22</sup> In the course of its second formal meeting during this period,<sup>23</sup> the Committee agreed to undertake an early review starting in 1997, in view of the negotiating mandate embodied in Article XXIV:7.<sup>24</sup> The elements of the review were to include: expansion of the coverage of the Agreement; elimination of discriminatory measures and practices which distort open procurement; and simplification and improvement of the Agreement, including, where appropriate, adaptation to advances in the area of information technology.<sup>25</sup>

Work on the Agreement's review was formally initiated in February 1997 in consultations among the Parties, and continued with further consultations later that year.<sup>26</sup> Transparency and the monitoring of progress were maintained through an informal Checklist of Issues which was updated regularly. Among the issues considered at this stage of the review process were: (i) non-discrimination in connection with information technology; (ii) improvements in the structure and presentation of the Agreement; and (iii) discriminatory provisions in Appendices to the Agreement.<sup>27</sup>

In 1999 and 2000 the Parties pursued their discussions in informal sessions focusing on the text of the Agreement.<sup>28</sup> In February 2002, the negotiators agreed on a work programme and timetable for the remainder of the negotiations, the main elements of which included modalities for the negotiations, and arrangements for the revision of the text and for the coverage-related aspects of the negotiations, respectively.<sup>29</sup>

Just as the negotiations resulting in the GPA 1994 were not formally part of the Uruguay Round negotiations, the revision of the GPA was never part of the "Doha Round" of negotiations in the WTO. The latter are multilateral rather than plurilateral in scope, and relate to a range of other topics including agriculture, non-agricultural market access (NAMA), services trade and intellectual property issues.<sup>30</sup> However, while the 1994 GPA negotiations in practice benefitted from the coinciding, dynamic Uruguay Round negotiations, the same was not true for the revision of the GPA. Rather, in this case, the formal separation from the Uruguay Round, and the nature of the GPA re-negotiation as a "stand-alone" agenda enabled the negotiation to move forward on its own

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<sup>21</sup> See also Sue Arrowsmith, "Reviewing the GPA: The Role and Development of the Plurilateral Agreement After Doha," *J Int Economic Law*, Dec 2002; 5: 761 – 790.

<sup>22</sup> See, for additional details and background, Anderson and Arrowsmith, above note 13; and Robert D. Anderson and Kodjo Osei-Lah, "The Coverage Negotiations under the Agreement on Government Procurement: Context, Mandate, Process and Prospects," in Arrowsmith and Anderson, eds., above note 11, chapter 6.

<sup>23</sup> Meeting of 4 June 1996 (GPA/8, dated 17 October 1996, paragraphs 21 and 2).

<sup>24</sup> GPA/8, dated 17 October 1996, paragraphs 21 and 22; and WT/L/190, dated 17 October 1996, paragraphs 21 and 22.

<sup>25</sup> GPA/8, dated 17 October 1996, paragraph 22; see also Anderson and Osei-Lah, above note 22.

<sup>26</sup> GPA/19, dated 29 October 1997, paragraph 21.

<sup>27</sup> Ibid.

<sup>28</sup> GPA/30, dated 21 October 1999, paragraphs 21 and 22; GPA/44, dated 2 November 2000, paragraphs 17 and 18.

<sup>29</sup> GPA/73, dated 6 November 2002, paragraph 35, and Attachment.

<sup>30</sup> See, for background, "The Doha Agenda", [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/doha1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm).

track despite slower progress on the much wider Doha negotiation in the period leading up to 2012.<sup>31</sup>

Agreement on most elements of the revised GPA text was reached by the GPA Parties' negotiators in December 2006.<sup>32</sup> To ensure that the market access aspect of the negotiations was not allowed to linger, adoption of the text was made subject to a mutually satisfactory outcome in the parallel negotiations to extend the coverage of the Agreement in addition to agreement on its "Final Provisions" (governing its coming into force). These requirements were formally fulfilled only in March 2012, following the "political conclusion" of the renegotiation in December 2011.

The final details of the GPA market access enhancement package were agreed only at the last minute (in fact, literally on the morning of the day on which the package was "politically adopted" by the GPA Parties' Ministers in December 2011). The package adopted built, however, on a series of actions taken by the Parties throughout the year, pursuant to a "Roadmap" for conclusion of the negotiations that was put forward by the Committee's then Chairman, Nicholas Niggli, initially in 2010 and then, in updated form, in 2011. The Roadmap provided for systematic consideration, in parallel fashion, of all elements of the negotiations, namely: (i) coverage; (ii) the revised text; (iii) the "Future Work Programmes" of the Committee; and (iv) the approach to be followed in bringing the revised agreement into effect. In the background, the Chairman, with the support of the Secretariat, entered into significant discussions with senior officials and, in a few cases, political authorities, in capitals. As the year unfolded, expectations for a successful conclusion and resulting pressure on delegations mounted.<sup>33</sup>

The proposed Work Programmes proved to be an important balancing tool in the negotiations. They responded both to socio-political concerns shared by most or all the GPA Parties and to continuing negotiating interests of at least some of the Parties that could not be fully resolved in the negotiation.<sup>34</sup> As such, they provided at least a partial victory for those Parties with outstanding concerns, in the form of an assurance of the opportunity for continued discussion and the possibility of influencing the future evolution of the Agreement.<sup>35</sup>

A further means of addressing concerns regarding perceived imbalances in coverage offered, namely the above-mentioned possibility to include country-specific derogations and reciprocity notes in Parties' coverage schedules, was also used by some Parties in order to make the conclusion of the re-negotiation possible despite different "levels of ambition". The European Union, in particular, desiring to open up procurement markets to an important degree, saw itself forced to introduce different levels of market access offered to different trading partners, depending on the extent of their own liberalization efforts.<sup>36</sup> While GPA Parties strove to and did, to an extent, reduce such derogations and notes in the course of the negotiations, the flexibility provided by these balancing tools remained essential in reaching a successful outcome to the negotiations.

On 15 December 2011, negotiators reached agreement on all elements of the re-negotiation. This political decision was confirmed, on 30 March 2012, by the formal adoption of the Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement.<sup>37</sup>

Under the terms of the Protocol adopted on 30 March 2012, the revised Agreement was to come into effect upon submission of the required "instruments of acceptance" by two thirds of the

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<sup>31</sup> To be sure, very important negotiating outcomes regarding the Doha Round have been achieved in subsequent years, in particular as a result of the Bali and Nairobi Ministerial Meetings of 2013 and 2015, respectively. See [https://www.wto.org/english/thewto\\_e/minist\\_e/mc9\\_e/balipackage\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc9_e/balipackage_e.htm) and [https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/nairobipackage\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc10_e/nairobipackage_e.htm).

<sup>32</sup> See, for details of the agreement reached, section 2.4.2 below.

<sup>33</sup> See, for a more detailed discussion of the processes and tactics leading to the conclusion of the GPA renegotiation, Robert D. Anderson, Nicholas Niggli and Philippe Pelletier, "Moving the Renegotiation of the WTO Agreement on Government Procurement (GPA) to a Successful Conclusion: Process, Tools Employed and the Roles of Parties, the Chairman and the Secretariat," forthcoming.

<sup>34</sup> See also section 2.4.3 below.

<sup>35</sup> As in the original 1994 Agreement, an eventual further round of negotiations is foreseen in the revised Agreement (see Article XXII:7), with the aims of improving the Agreement, progressively reducing and eliminating discriminatory measures, and achieving the greatest possible extension of its coverage among all Parties.

<sup>36</sup> In fact, the entity coverage offered by European Union in its Appendix I schedules provides for four different levels of coverage for different Parties, based on the other Parties' own level of commitments as perceived by the EU. In the course of the negotiations, these were referred to occasionally as "First Class"; "Business Class"; "Premium Economy"; and "Economy Class" coverage.

<sup>37</sup> GPA/113, dated 2 April 2012.

Parties to the Agreement. In light of the progress made in the submission of acceptances by various Parties, at a separate ministerial-level meeting held on 3 December 2013, on the margins of the WTO's Ninth Ministerial Conference, GPA Parties affirmed their shared objective of bringing a revised version of the Agreement into force as soon as possible, and in any event no later than 31 March 2014.<sup>38</sup> At that time, seven out of the required ten parties had ratified: Liechtenstein; Norway; Canada; Chinese Taipei; the United States; Hong Kong, China; and the European Union. In the course of the meeting, several other Parties indicated that they would submit their acceptances in the following weeks, with the result that the entry into force occurred on 6 April 2014.

To date, all but one of the remaining Parties have formally accepted the revised Agreement. The remaining Party to the GPA 1994 that is still to submit its instrument of acceptance, Switzerland, has made clear that it fully intends to accept, eventually, the revised Agreement; the delay in ratification is occasioned by the necessity and opportunity created for it to undertake internal legal reforms to create, for the first time in Switzerland, a comprehensive and unified set of procurement rules and regulations for both the federal and the cantonal (sub-central) level.

Overall, the GPA renegotiation has demonstrated clearly that the plurilateral nature of the Agreement, allowing like-minded WTO Members to negotiate relatively ambitious market access outcomes, together with the flexibility provided by individually determined market access commitments based on reciprocity, can deliver important outcomes. These outcomes are described further in the following sections.

## 2.4 Outcomes of the renegotiation

As outlined above, the elements of agreement adopted by the GPA Parties on 30 March 2012 concerned the coverage of the GPA, the text of the Agreement and the Future Work Programmes of the WTO body responsible for the Agreement's administration, namely the Committee on Government Procurement. The following provides additional information on each of these three elements, in turn.<sup>39</sup>

### 2.4.1 Expansion of the Parties' market access commitments

The first of the three elements of the renegotiation concerned the successful and flexible expansion of Parties' market access commitments, based on principles of reciprocity. In this regard, it is important to emphasize that the GPA has never provided, or even been envisioned to provide, all-encompassing, universal coverage commitments. On the contrary, the obligations under the Agreement apply only to procurement: (i) by the procuring entities that each Party has listed in Annexes 1 to 3 of its market access schedules (Appendix I Annexes), relating respectively to central government entities, sub-central government entities and other entities such as utilities; (ii) of goods; and (iii) of services and construction services that are specified in lists, found respectively in Annexes 4 to 6 of Appendix I (following the present structure of the Annexes). Furthermore, the GPA applies only to procurement contracts of an estimated value not less than certain threshold values, which are specified in each Party's Appendix I Annexes (see Box 1 below). These different dimensions of coverage have all to be taken into account in a cumulative manner when determining whether specific procurements are covered by the Agreement. In other words, a specific procurement only falls within the ambit of the GPA's rules if the procuring entity is covered, if the service procured is included in the relevant Party's commitments, and if the value of the procurement in question is above the threshold levels indicated in the relevant Party's schedules.<sup>40</sup>

<sup>38</sup> GPA/122 dated 3 December 2013.

<sup>39</sup> See also Anderson, above note 5; Anderson, Schooner and Swan, above note 5; Philippe Pelletier, "La révision de 2012 de l'Accord de l'OMC sur les marchés publics: son contexte et les dimensions de son champ d'application", in John H. Currie and Rene Provost, eds., *The Canadian Yearbook of International Law*, Volume 51, Toronto: University of British Columbia Press; and Robert D. Anderson and Anna Caroline Müller, "The Revised WTO Agreement on Government Procurement as an Emerging Pillar of the Global Economy: Recent Developments," *Trade, Law and Development*, Vol. VII, no. 1, Summer 2015, pp. 42-63.

<sup>40</sup> In practice, the assessment of whether particular procurements are covered by the Agreement has now been substantially facilitated by the so-called "e-GPA" procurement portal that has been created by the Secretariat with the support and guidance of the Committee. The portal is available here: <https://e-gpa.wto.org/>.

### Box 1 The structure of GPA coverage schedules (Appendix I of the Agreement)

For each GPA Party, Appendix I is divided into six Annexes which deal, respectively, with (i) central government entities covered by the Agreement; (ii) covered sub-central government entities; (iii) "other" covered entities (e.g. utilities and SOEs); (iv) coverage of goods; (v) services coverage; (vi) coverage of construction services; and (vii) any general notes.

<b>Annex 1</b>	Central Government Entities
<b>Annex 2</b>	Sub-Central Government Entities
<b>Annex 3</b>	Other Entities
<b>Annex 4</b>	Goods
<b>Annex 5</b>	Services
<b>Annex 6</b>	Construction Services
<b>Annex 7</b>	General Notes

The Annexes also specify the threshold values above which individual procurements are subject to the GPA disciplines. In addition, the Annexes of most Parties contain notes that qualify the application of the Agreement. In principle, all goods are covered if procured by a covered entity and not excluded specifically. Parties are, in principle, free to choose a generic or a list approach and, in the case of the latter, they can freely adopt a positive-list or a negative-list approach. In general, GPA Parties use the United Nations Provisional Central Product Classification (CPC) classification numbers, as defined in *the Services classification List* (MTN.GNS/W/120) for services classifications.

The package of additions to market access adopted in the conclusion has been valued by the WTO Secretariat as being worth in the range of \$80-100 billion annually.<sup>41</sup> It comprises:

- Coverage by the Parties of (at a minimum) more than 600 additional central, local and other government agencies under the Agreement. This included, as one Party's (Canada's) contribution, the coverage under the Agreement, for the first time, of that Party's sub-central level of government (i.e. its provinces and territories) - a contribution that has been valued, by itself, in the tens of billions of dollars;<sup>42</sup>
- The coverage by three Parties, for the first time, of build-operate-transfer contracts, a form of public-private partnership and another significant addition to coverage;<sup>43</sup>
- Coverage of additional services by almost all of the Parties, especially in the area of telecommunications services;
- Some improvements in the coverage of goods;
- The coverage by all Parties, for the first time, of the full range of construction services, subject to relevant thresholds; and
- Downward adjustments in the thresholds applied under the Agreement by a few Parties, notably Israel, Japan, Korea and the Netherlands with respect to Aruba.

In addition to the above-noted specific additions to coverage which are incorporated in the Parties' coverage schedules ("Appendix I Annexes") to the revised Agreement, aspects of the Future Work Programmes also bear, potentially, on coverage issues. These include the agreed

<sup>41</sup> See Report by the Director-General to the Eighth Ministerial Conference of the WTO, WT/MIN(11)/5, 18 November 2011, p. 3, available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min11\\_e/min11\\_5\\_e.pdf](http://www.wto.org/english/thewto_e/minist_e/min11_e/min11_5_e.pdf). It should be noted that not all of this additional coverage will necessarily be available to each of the GPA Parties, due to Party-specific derogations that may apply.

<sup>42</sup> See, for background, David Collins, "Canada's Sub-Central Government Entities and the Agreement on Government Procurement: Past and Present," in Arrowsmith and Anderson, eds., above note 11, chapter 7, pp. 175-196.

<sup>43</sup> The Parties concerned are the European Union, Japan and Korea.

Work Programmes on SMEs, restrictions and exclusions to the coverage of the Agreement, and the role of safety standards in international government procurement markets (see section 2.4.3 below).

#### 2.4.2 The revised GPA text

As the second major outcome to the renegotiation, the text of the Agreement, and in particular its procedural and transparency rules setting out minimum standards for public procurement in each of the GPA Parties' internal procurement market, was modernized and its governance elements strengthened in important ways. The revised GPA text crystallizes current best practices in government procurement agreed upon by and acceptable to all GPA Parties and, as will be explained further in section 5 below, was at the same time harmonized with other applicable international instruments.

In order to ensure that its aims of creating open and transparent procurement markets are achieved in practice, and to ensure that its guarantees of national treatment and non-discrimination are not subverted, the GPA incorporates detailed requirements regarding aspects of the procurement process. The latter include matters such as: (i) notices; (ii) conditions for participation; (iii) qualification of suppliers; (iv) technical specifications and tender documentation; (v) time periods for tendering and delivery; (vi) the use of negotiation and limited tendering (vii) electronic auctions; and (viii) treatment of tenders, and awarding of contracts.<sup>44</sup> In general, these provisions are intended to ensure that the parties' procurements are carried out in a transparent and competitive manner that avoids discrimination against the suppliers of other parties and thereby ensures that market access commitments are not nullified. Inherently, these provisions extend "beyond-the-border" and are designed to have a direct impact on internal procurement market regulation in Parties' economies.

The revised GPA text is based on the same principles and contains many of the same elements as the existing Agreement. It, nonetheless, improves on the existing text in multiple ways. For example, the revised text reflects significant changes to the wording of the various provisions of the Agreement to streamline them and make the text easier to understand. It contains an extensive list of defined terms.<sup>45</sup> In contrast, the 1994 text left open the meaning of most terms, thus potentially creating ambiguities. The provisions of the revised text have also been re-ordered in order to follow typical procurement processes more organically. Overall, the language of relevant provisions has been simplified and overly complicated provisions have been shortened.<sup>46</sup>

A further aspect that was emphasized and engendered some changes to the GPA text was the desire to enhance flexibility for Parties in the implementation of their procurement systems, where this does not jeopardize the Agreement's goals. The GPA needs to accommodate a variety of national procurement systems. While the foregoing was also true for the 1994 text, the need for flexibility was felt to be more acute in regard to the 2012 text and is recognized explicitly in the Preamble to the revised Agreement which observes, in its fourth recital, that "the procedural commitments under this Agreement should be sufficiently flexible to accommodate the specific circumstances of each Party."

To achieve this goal, multiple new flexibility mechanisms have been introduced. First of all, certain exceptions that several Parties had included in their Appendix I Annexes to the 1994 Agreement have now been codified in the revised text, thereby ensuring flexibility with regard to specific areas of concern.<sup>47</sup> Second, references to the methods of open tendering, selective tendering and limited tendering are no longer treated as exhaustive under the revised Agreement, whose Article IV:4 makes clear that procurement is to be conducted using methods "such as" those specified.<sup>48</sup> Third, the new provisions dealing with qualification of suppliers now allow for the optional use of so-called multi-use lists to rationalize qualification processes.<sup>49</sup> Additional flexibility is also provided for sub-central and other entities, who are, in some respects, required to comply with less stringent requirements than central government entities.<sup>50</sup> Furthermore, the provisions on technical specifications have been modified to expressly allow for technical specifications to

<sup>44</sup> See, generally, revised text, Articles VI-XV.

<sup>45</sup> Revised text, Article I Definitions.

<sup>46</sup> Anderson and Arrowsmith, above note 13.

<sup>47</sup> See revised text, Article I:3.

<sup>48</sup> See revised text, Article IV:4(a).

<sup>49</sup> See revised text, Article IX:7.

<sup>50</sup> See revised text, Articles VII:1 and 5, IX:12 and XI:8.

promote the conservation of natural resources or protect the environment, thus ensuring due scope to address a common policy concern.<sup>51</sup>

The revised text also updates the Agreement to take into account developments in current government procurement practice, notably the use of electronic tools. The minimum time periods stipulated by the Agreement have been adapted to modern practice in that shorter notice periods are permissible when electronic tools are used.<sup>52</sup> The text sets out related requirements regarding the general availability and interoperability of the information technology systems and software used in Parties' procurements; the availability of mechanisms to ensure the integrity of requests for participation and tenders; and the maintenance of data to ensure the traceability of the conduct of covered procurement by electronic means. Shorter time periods have equally been allowed for recurring contracts, states of urgency and where the goods and services being procured are available on the commercial marketplace.<sup>53</sup>

Another important feature of the revised text, looked at in greater depth in Part 3 below, concerns its improved transitional measures for developing countries.<sup>54</sup> The importance of these provisions derives not only from their relevance for development, but to GPA Parties' professed desire to encourage accessions to the Agreement by other WTO Members, including developing and transition economies.<sup>55</sup> The increment in the total value of market access opportunities secured by the Agreement that could result from future accessions to it has been estimated to be in the range \$US 440-1,127 billion annually.<sup>56</sup>

In the revised Agreement, a new range of specific transitional measures have been provided for developing countries that accede to it, subject to conditions that are noted below. The specific measures that are potentially available include: (i) price preferences; (ii) offsets;<sup>57</sup> (iii) phased-in addition of specific entities and sectors; and (iv) thresholds that are initially set higher than their permanent level. Provision has also been made for delaying the application of any specific obligation contained in the Agreement, other than the requirement to provide equivalent treatment to the goods, services and suppliers of all other Parties to the Agreement, for a period of five years following accession to the Agreement for LDCs, or up to three years for other developing countries. These periods can be extended by decision of the Committee, on request by the country concerned. Furthermore, technical assistance and capacity building (upon request by the developing country in question) is foreseen in relation to developing countries' accession to or implementation of the Agreement.

Another important element of the revised GPA text consists in a specific new requirement for participating governments and their relevant procuring entities to conduct their procurements in ways that *avoid conflicts of interest and prevent corrupt practices*.<sup>58</sup> The significance of this new substantive provision is reinforced by new language, in the Preamble to the Agreement, recognizing the GPA's significance for good governance and the fight against corruption. Together, these elements signal a belief on the part of the Parties that the GPA, while first and foremost an international trade agreement, is directly relevant to the global struggle for good governance.<sup>59</sup>

The explicit reference to corruption issues in the revised GPA constitutes a unique feature of the revised GPA and an innovation in the broader context of the WTO and among the other WTO

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<sup>51</sup> See revised text, Article X:6.

<sup>52</sup> See revised text, Article X:5.

<sup>53</sup> See revised text, Articles XI:4(b) and (c), and 7.

<sup>54</sup> See Anna Caroline Müller, "Special and Differential Treatment and Other Special Measures for Developing Countries under the Agreement on Government Procurement: The Current Text and New Provisions," in Arrowsmith and Anderson, eds., above note 10, chapter 11. Whether particular WTO Members have the status of 'developing countries' is not strictly defined in WTO law. Rather, this is largely left to 'self-declaration' and negotiation.

<sup>55</sup> See revised text, Preamble, 8<sup>th</sup> recital.

<sup>56</sup> See Robert D. Anderson, Anna Caroline Müller, Kodjo Osei-Lah and Philippe Pelletier, "Assessing the Value of Future Accessions to the WTO Agreement on Government Procurement (GPA): Some New Data Sources, Provisional Estimates, and An Evaluative Framework for Individual WTO Members Considering Accession" (2012) 21 P.P.L.R., Issue 4. An early version of the article was circulated as WTO Staff Working Paper ERSD-2011-15, 6 October 2011, available at [http://www.wto.org/english/res\\_e/reser\\_e/ersd201115\\_e.htm](http://www.wto.org/english/res_e/reser_e/ersd201115_e.htm).

<sup>57</sup> Recall the definition in note 18, above.

<sup>58</sup> Revised text, Article IV:4.

<sup>59</sup> Anderson, above note 9; see also related discussion, below.

Agreements.<sup>60</sup> It reinforces the GPA's place among other international instruments in shaping an international standard of best practices in government procurement. The important feature of the GPA's provisions in this regard is that, at least to the extent that they have been integrated in the operative parts of the Agreement, they are fully enforceable under WTO dispute settlement rules. In this regard, the GPA has an important contribution to make to improving governance internationally.<sup>61</sup>

#### **2.4.3 The new Work Programmes of the Committee on Government Procurement: looking to the future**

As noted above, a further important element of the 2011-2012 negotiating package, without which the overall agreement would likely not have been reached, consists in the "Agreed Work Programmes" of the Committee. A number of these Work Programmes are the subject of specific proposed Committee Decisions that are annexed to the Protocol of Amendment adopted on 30 March 2012. They include:

- A Work Programme to consider best practices with respect to measures and policies that the Parties use to support the participation of small and medium-size enterprises (SMEs) in government procurement;<sup>62</sup>
- A Work Programme to enable Parties to improve procedures followed in the collection and reporting of statistical data relating to the Agreement;<sup>63</sup>
- A Work Programme to promote the use of sustainable procurement practices, consistent with the Agreement;<sup>64</sup>
- A Work Programme to address restrictions and exclusions in Parties' coverage commitments under the Agreement;<sup>65</sup> and
- A Work Programme on safety standards in international procurement.<sup>66</sup>

In addition to the above-noted Work Programmes whose initiation is foreseen following the coming into force of the revised Agreement, a further attachment to the Protocol of Amendment calls for the initiation of additional work programmes, at a time to be determined, on the following subjects: (a) a review of the use, transparency and the legal frameworks of public-private partnerships, and their relationship to covered procurement; (b) the advantages and disadvantages of developing common nomenclature for goods and services; and (c) the advantages and disadvantages of developing standardized notices.<sup>67</sup> Yet another attachment implements a new process for electronic notification to the Committee of changes to national laws and regulations.<sup>68</sup>

The Work Programmes are integral to the outcome of the negotiations and, arguably, provided an essential ingredient for the conclusion that has been reached. They respond both to socio-political concerns shared by all Parties and to continuing negotiating interests of at least some of the Parties which could not be fully resolved in the negotiation. As such, they provide at least a partial victory for those Parties, in the form of an assurance of the opportunity for continued discussion and the possibility of influencing the future evolution of the Agreement.<sup>69</sup>

For example, most or all GPA Parties are interested in promoting access to government procurement processes by small and medium-size enterprises; nonetheless, approaches to promoting such access differ and can be a source of concern from a market access point of view.

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<sup>60</sup> See Sue Arrowsmith, "The Revised Agreement on Government Procurement: Changes to the Procedural Rules and Other Transparency Provisions," in Arrowsmith and Anderson, eds., above note 11; see also Anderson, Schooner and Swan, above note 5.

<sup>61</sup> See, for further discussion, Part 4 below.

<sup>62</sup> See *Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement*, 30 March 2012, GPA/113 dated 2 April 2012, Annex 5.

<sup>63</sup> *Ibid*, Annex 6.

<sup>64</sup> *Ibid*, Annex 7.

<sup>65</sup> *Ibid*, Annex 8.

<sup>66</sup> *Ibid*, Annex 9.

<sup>67</sup> *Ibid*, Annex 4.

<sup>68</sup> *Ibid*, Annex 3.

<sup>69</sup> As in the original 1994 Agreement, an eventual further round of negotiations is foreseen in the revised Agreement (see Article XXII:7), with the aims of improving the Agreement, progressively reducing and eliminating discriminatory measures, and achieving the greatest possible extension of its coverage among all Parties.

In fact, the market access implications of the longstanding US "set-aside" programme for small businesses were cited as a concern by the European Union early in the GPA renegotiation. There are, moreover, conflicting views on the efficacy and cost-effectiveness of set-asides and other programmes to promote SME participation in procurement processes, even from the standpoint of some of the governments implementing such programmes.<sup>70</sup> The Committee's Work Programme on this issue provides an important opportunity for governments to consider these issues in a context that could, at least potentially, influence the future evolution of related policies at the national level.

Similarly, the issue of sustainability in public procurement practices is one of widespread interest. While in some jurisdictions this is viewed as being principally a matter of measures to promote "green procurement", in other jurisdictions, it encompasses social policy considerations (even labour rights), as well.<sup>71</sup> While there is no doubt a common interest among the GPA Parties to promote at least elements of these interests through their respective procurement systems, there is also, at least for some Parties, a concern that the promotion of such interests not become a disguised tool of protectionism. The Work Programme on this issue provides a valuable forum for reflection on these issues.

Restrictions and exclusions from Parties' coverage commitments under the Agreement are of obvious concern from a market access standpoint, and the implications of safety standards in international procurement as implemented by some Parties have also, in the past, been a focus of concern. Again, the various work programmes that have been initiated on these topics provide an opportunity for all interested Parties to carry forward their concerns regarding these issues, without prejudice to specific outcomes of the discussions.

## 2.5 The continuing growth of the Agreement's membership

As a further sign of the success of the GPA's approach, the Agreement's membership has grown significantly over the past two decades. The GPA's predecessor, the Tokyo Round Government Procurement "Code", covered a total of nineteen countries, ten of which were EU Member states. In 1996, when the GPA 1994 came into force, it covered 21 WTO members. Currently, the Agreement binds 47 WTO members which formally constitute nineteen 'Parties' (the EU and its 28 member states are formally counted as a single Party).<sup>72</sup> Ukraine and Moldova are the latest WTO Members to have become GPA Parties, in 2016, following Montenegro and New Zealand in 2015.

All WTO members are eligible to accede to the GPA. For most WTO Members, furthermore, participation in the GPA is entirely optional, as they have no pre-existing commitment to join the Agreement. In such cases, the decision to seek accession is one that can be taken squarely on its own merits, based on an assessment of potential benefits and costs in the light of each Member's circumstances. Increasingly, however, newly acceding WTO Members take on commitments, at the time of their accession to the Organization, to eventually seek GPA accession.<sup>73</sup> Procedurally, accession to the GPA can only occur after a country has acceded to the WTO as a whole, and GPA accession negotiations are dealt with separately from WTO accession.

There are two formal requirements in any accession to the GPA. First, the acceding WTO Member must reach agreement with the existing Parties on the range of its procurements to be governed by the Agreement.<sup>74</sup> This includes consideration of the full range of matters addressed in the GPA schedules, i.e., the coverage of procuring entities at the central and sub-central government levels; the coverage of "other entities" such as public utilities and/or state-owned enterprises; the coverage of goods, services and construction services or public works, the

<sup>70</sup> See John Linarelli, "The Limited Case for Permitting SME Procurement Preferences in the WTO Agreement on Government Procurement," in Arrowsmith and Anderson, eds., above note 11, chapter 15.

<sup>71</sup> See also Anderson, Schooner and Swan, above note 5.

<sup>72</sup> The nineteen Parties currently are Armenia; Canada; the European Union with its currently 28 member States; Hong Kong, China; Iceland; Israel; Japan; Korea; Liechtenstein; Moldova; Montenegro; the Netherlands with respect to Aruba; New Zealand; Norway; Singapore; Switzerland; Chinese Taipei; Ukraine; and the United States.

<sup>73</sup> For further analysis of the interaction between WTO accession and GPA accession, see Robert D. Anderson and Anna Caroline Müller, "WTO Accession and Accession to the Agreement on Government Procurement (GPA): – What is the relationship? Why Should WTO Accession Candidates also Consider GPA Accession? What are the Pros and Cons?" in Osakwe, Chiedu and Uri Dadush, eds., *WTO Accessions and Trade Multilateralism: Case Studies and Lessons* (Geneva and Cambridge, World Trade Organization and Cambridge University Press, 2015).

<sup>74</sup> See the revised GPA, Article XXII:2.

thresholds applicable in each case; and any exceptions or exclusions that will apply. Second, each Party must ensure the conformity of its laws, regulations and administrative procedures, in addition to the rules, procedures and practices applied by its procuring entities, with the Agreement's provisions.<sup>75</sup> Typically, this is assessed through replies to a "Checklist of Issues" on legislative and institutional features of the candidate's procurement system, in addition to a follow-up question and answer process.

All signs indicate that the GPA's membership will continue to grow, over time. Currently, nine other WTO Members (Albania, Australia, China, Georgia, Jordan, Kyrgyz Republic, Oman, the Russian Federation and Tajikistan) have applied for accession to the Agreement. The majority of these are actively pursuing related negotiations. Six other WTO Members (Afghanistan, Kazakhstan, Mongolia, Saudi Arabia, Seychelles and the former Yugoslav Republic of Macedonia) have undertaken commitments, in their WTO accession protocols, to eventually seek accession.<sup>76</sup>

Strikingly, new candidates for accession to the Agreement increasingly describe their interest in GPA accession with reference not only to the accessing, by their suppliers, of GPA covered procurements (i.e., traditional mercantilist motivations) but also, at least in part, as a means of improving governance and strengthening competition in their own procurement markets. In a major development for the Agreement, in 2016, Ukraine and Moldova became full Parties to the GPA.<sup>77</sup> Statements made by the responsible senior official, Ukraine's Deputy Minister of the Economy and Trade, cite Ukraine's desire for strengthened competition and an explicit, legally binding commitment to good governance in its public procurement markets as key underlying motivations (see, for further discussion, Part 4, below).

The GPA's renegotiation and the continuing gradual expansion of its membership have occurred/are occurring at a time when the Agreement is, in any case, gaining importance as an element of the legal framework for global trade. This reflects phenomena such as: (i) the huge and escalating infrastructure investment needs of major emerging economies in the present era; (ii) wide acknowledgement of the need for parallel investments in infrastructure renewal in major developed economies, particularly the US;<sup>78</sup> and (iii) widespread temptations on the part of governments to implement measures that potentially restrict access to their public procurement markets, and the role of the GPA as the main tool available to exporting economies to maintain open markets in this context. The text of the Agreement is used as a template for government procurement chapters in preferential trade agreements, worldwide (see related discussion, below). In addition, and in part as a consequence of the recent renegotiation, the GPA is now extensively harmonized with other important international instruments in this area, notably the UNCITRAL Model Law on Procurement, and is increasingly taken into account in the procurement rules and guidelines of international donor organizations such as the World Bank. For all these reasons, the revised GPA stands poised to emerge as a pillar of the WTO system and the global economy of the present era.<sup>79</sup>

### 3 KEY DESIGN FEATURES UNDERLYING THE GPA'S SUCCESS

As outlined in the introduction to this paper, in our view, the GPA's successful renegotiation, the continuing growth of its membership and its vitality as an instrument of public policy were not achieved through happenstance. Rather, in addition to the leadership exercised by the then Chairman of the Committee on Government Procurement, Mr Niggli, and key negotiators, it arose, at least in part, from specific design features of the Agreement. This section of the paper elaborates on these design features, also drawing contrasts with other elements of the WTO Agreements. These matters are important for two reasons. First, a sound understanding of them is a prerequisite to understanding the "mechanics" of the GPA, i.e. to understanding how the

<sup>75</sup> See the revised GPA, Article XXII:4.

<sup>76</sup> See, for up to date information, [https://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm).

<sup>77</sup> See *WTO News Item*, "Ukraine and the Republic of Moldova Welcomed to WTO Procurement Pact," 22 June 2016, available at: [https://www.wto.org/english/news\\_e/news16\\_e/gpro\\_22jun16\\_e.htm](https://www.wto.org/english/news_e/news16_e/gpro_22jun16_e.htm), and related discussion, below.

<sup>78</sup> See, e.g., Larry Summers, "The Next President Should Make Infrastructure Spending a Priority," *Washington Post*, 11 September 2016, available here: [https://www.washingtonpost.com/opinions/whoever-wins-the-presidential-election-must-make-infrastructure-spending-a-priority/2016/09/11/406ef0ee-76c2-11e6-b786-19d0cb1ed06c\\_story.html?utm\\_term=.beef54d51751](https://www.washingtonpost.com/opinions/whoever-wins-the-presidential-election-must-make-infrastructure-spending-a-priority/2016/09/11/406ef0ee-76c2-11e6-b786-19d0cb1ed06c_story.html?utm_term=.beef54d51751).

<sup>79</sup> See also Robert D. Anderson and Anna Caroline Müller, "The Revised WTO Agreement on Government Procurement as an Emerging Pillar of the Global Economy: Recent Developments," *Trade, Law and Development*, Vol. VII, no. 1, Summer 2015, pp. 42-63.

Agreement works. Second, the design features of the GPA might, in some circumstances, prove useful in other areas of work of the WTO, or in international economic law generally.

### 3.1 The plurilateral nature of the Agreement

A first important feature of the GPA is its plurilateral nature. To be sure, the GPA has a firm place in the multilateral trading system embodied in the WTO Agreements, by virtue of its incorporation in Annex 4 of the Marrakesh Agreement. It is, moreover, built around the same core principles of non-discrimination and transparency that underlie all the WTO Agreements. It is, nonetheless, a plurilateral Agreement, meaning that not all WTO Members are Party to it. As explained above, currently, the GPA binds 47 (out of 164) WTO members, which formally constitute nineteen "Parties" to the GPA (the EU and its 28 member states being counted as a single Party).

The plurilateral nature of the GPA conveys important advantages in terms of the ability to conclude successful trade negotiations. First, an important degree of like-mindedness underpins all aspects of the Committee's work. This is not to deny that some Parties are undoubtedly more or less ambitious than others with respect e.g., to the Agreement's coverage. Fundamentally, however, the Parties to the Agreement are convinced of the benefits that they thereby enjoy and desirous of ensuring a successful future for the Agreement. This, in itself, is hugely beneficial in enabling progress and makes the GPA Committee a highly active and efficient WTO body. Second, the still limited number of Parties to the Agreement, as compared to the wider WTO Membership, makes work easier from a technical point of view. Third, as a practical matter, and reflecting its formal separation from the wider Doha negotiation in addition to its plurilateral nature, progress in the GPA negotiations is less prone to "hostage-taking" and/or tactical delays than aspects of the work of the organization.<sup>80</sup>

### 3.2 Complementarity with the GPA Parties' commitments under the General Agreement on Trade in Services (GATS) and the General Agreement on Tariffs and Trade (GATT)

The GPA complements and reinforces the effectiveness of the Parties' commitments under the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS) in important ways. This follows from the legal structure and scope of the Agreement, their relation to important exclusions from the ambit of the GATT and the GATS, and the nature of the underlying trade flows facilitated by the various agreements.<sup>81</sup>

More specifically, both the GATT and the GATS contain general exclusions from their core provisions relating to most-favoured nation-treatment (MFN), national treatment and (in the case of the GATS) market access commitments for the purchase of goods/services by governments for governmental purposes, i.e. not with a view to commercial resale or with a view to use in the supply of good or services for commercial sale.<sup>82</sup> The exclusion of government procurement from these provisions reflects a pragmatic acceptance, at the time that the GATT and the GATS were negotiated, that not all participating governments were ready to commit to binding disciplines on their national procurement policies.<sup>83</sup> In the case of the GATS, this acceptance is qualified by Paragraph 2 of Article XIII of the Agreement which states that "(t)here shall be multilateral

<sup>80</sup> It must be acknowledged that this aspect of the benefits of plurilateralism may not always hold true. Where other negotiations are proceeding well, linkages to them could potentially facilitate progress. As pointed out above, arguably, this was the case during the negotiation of the GPA 1994 when progress in the much wider Uruguay Round multilateral negotiations was used to leverage a conclusion to the GPA negotiation itself.

<sup>81</sup> See also Robert D. Anderson, Claudia Locatelli, Anna Caroline Mueller and Philippe Pelletier, "The Relationship between Services Trade and Government Procurement Commitments: Insights from Relevant WTO Agreements and Recent RTAs." *WTO Staff Working Paper ERSD-2014-21*, Geneva, 2014, available at: [http://www.wto.org/english/res\\_e/reser\\_e/ersd201421\\_e.htm](http://www.wto.org/english/res_e/reser_e/ersd201421_e.htm); and Robert D. Anderson and Anna Caroline Müller, "Market access for the government procurement of services: comparing recent PTAs with WTO achievements," in Juan Marchetti and Martin Roy, eds., *Opening markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations* (Cambridge University Press and the World Trade Organization, 2008, chapter 12, pp. 435-474.

<sup>82</sup> See GATT, Article III:8(a) and the GATS, Article XIII. For a detailed analysis of these provisions see Sue Arrowsmith, *Government Procurement in the WTO* (The Hague, Kluwer Law International, 2003), Chapter 3.2 pp. 49-76 with regard to GATT and Chapter 3.4 pp. 78-85 with regard to GATS. For a discussion of a recent interpretation of Article III:8(a) of the GATT, see Anna Caroline Müller, "WTO Appellate Body Decisions on the Government Procurement Exception to GATT", 22 *Public Procurement Law Review* (2013), Issue 6, pp. NA 147-153.

<sup>83</sup> WTO, *A Handbook on the GATS Agreement* (Cambridge University Press, 2005). See also Blank and Marceau, above note 13, and Arrowsmith, above note 82, Chapter 2.2 at pp. 31 et seq.

negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement". However, notwithstanding efforts by the European Union (formerly the European Communities), the majority of WTO Members have not engaged on this issue and, to date, focused negotiations have not ensued.<sup>84</sup> No similar mandate to "fill the gap" is contained in the GATT.

The GPA, for its part, "mirrors" the language used in the GATT and GATS exclusions on government procurement in defining its scope of application. Article II:1-2 of the revised text of the GPA provides the following definition of its general scope of application:

"Application of Agreement
1. This Agreement applies to <b>any measure regarding covered procurement</b> , whether or not it is conducted exclusively or partially by electronic means.
2. For the purposes of this Agreement, covered procurement means procurement <b>for governmental purposes</b> :
(a) of <b>goods, services, or any combination</b> thereof:
(i) as <b>specified in each Party's annexes to Appendix I</b> ; and
(ii) <b>not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale</b> ;
(b) by any contractual means, including: purchase; lease; and rental or hire purchase, with or without an option to buy;
(c) for which the value, as estimated in accordance with paragraphs 6 through 8, equals or exceeds the relevant <b>threshold</b> specified in a Party's annexes to Appendix I, at the time of publication of a notice in accordance with Article VII;
(d) by a <b>procuring entity</b> ; and
(e) that is <b>not otherwise excluded</b> from coverage in paragraph 3 or a Party's annexes to Appendix I." (Emphasis added.)

In other words, the GPA's general scope of coverage is couched in the same terms as the exclusions contained in GATT and GATS: it is intended to apply to procurement for governmental purposes of goods and services not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale. The GPA is designed to cover what is excluded from other Agreements, and vice versa.

Further highlighting the complementarity of GPA and GATT/GATS commitments, the GPA deals only with government procurement policies as such, and not with customs duties, other import charges and formalities or other laws and policies that can affect the ability of commercial enterprises, particularly foreign enterprises, to sell goods or services to governments. Such measures are regulated, if at all, under GATT and the GATS. This is made clear in Article IV:7 of the revised text, which states as follows:

" Measures Not Specific to Procurement

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 affecting trade in services other than measures governing covered procurement."

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<sup>84</sup> It should be noted that certain disciplines on procurement form part of the WTO Understanding on Commitments in Financial Services, which is available as an optional scheduling instrument to interested Members. See Patrick A. Low, Aaditya Mattoo and Arvind Subramanian, "Government Procurement in Services", in Bernard M. Hoekman and Petros C. Mavroidis, eds., *Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement* (Ann Arbor: University of Michigan Press, 1997), chapter 12, pp. 225-242.

In other words, international suppliers need to take into account two different sets of regulations when importing goods or services purchased by governments: their ability to bid on government contracts and offer internationally sourced goods and services (dependent on rules and legislation governing government procurement, as regulated by the GPA) and their general competitiveness in supplying such goods and services (dependent, to a large extent, on general market access rules and conditions governed by the GATT and GATS).

WTO Members that become Parties to the GPA can benefit from important potential synergies between their commitments under the various WTO Agreements. In fact, the market access commitments made under the GPA are likely to bear importantly on the benefits flowing from participation in the GATT and the GATS, and vice versa. Market access provided under the GATT and the GATS has, for example, an important impact on suppliers' ability to compete in government procurement markets if and to the extent that the goods or services supplied to the government are sourced internationally. Conversely, the ability to supply government procurement markets can be an important determinant of the general competitiveness of foreign companies selling in goods and services markets, given that in many cases, the government may be their single largest customer.

The interface between coverage commitments under GATS and the GPA, as the two agreements which allow for limitations in the scope of application of their rules through coverage schedules, illustrates this point effectively. Possible interactions between coverage commitments under the GPA and GATS are illustrated in Figure 1.<sup>85</sup>

**Figure 1 Illustration of the interaction between GPA and GATS commitments**

GPA commitments on services procurement?	GATS commitments on the relevant services?	Commercial result
Yes	Modes 1 and 2 only	Limited ability to compete in procurement markets, notwithstanding that the relevant service is covered
Yes	All modes	Full ability to compete in procurement markets of interest
No	Modes 1 and 2 only	Negative effects of exclusion from procurement markets are reinforced by limited GATS commitments
No	All modes	Notwithstanding GATS rights in respect of all modes, commercial effectiveness/the competitiveness of relevant enterprises may be affected by exclusion from procurement markets.

*Note: The underlying assumption is that the respective GATS commitments are free of commercially significant limitations on market access or national treatment.*

In practice, the economic relationship between regular trade in goods and services and government procurement markets depends not only on the legal commitments made under GATT and GATS, but also on the *applied* tariffs and regulations. If a WTO Member liberalizes autonomously (e.g., the applied tariffs are below the bound tariffs, or an existing subsidy scheme is extended to foreign-established companies despite national treatment limitations under the GATS) then what ultimately matters is the actual prevailing situation. Similarly, if procurement markets are opened beyond the commitments made under the GPA in practice, this market opening, and not the GPA commitments will determine the economic effect on goods and services trade. Nevertheless, the commitments made under the relevant agreements remain important as they provide legal security and stability.

As a related observation, the revised GPA recognizes that in government procurement, no strict separation is warranted between the procurement of goods and the procurement of services, in establishing relevant regulatory frameworks. Rather, the purchase of goods and of services is often linked. This is reflected in Article II:2(a) of the revised GPA text, which specifies that the GPA's rules apply to covered procurement of "goods, services, or any combination thereof". Not only does the GPA apply to both goods and services, it also reflects the fact that procurement of goods and services is in practice also made jointly, or, to rephrase the wording of the provision, in "combination". Similarly, the non-discrimination provisions of the GPA go beyond those of GATT and GATS and that provides non-discriminatory treatment not only for goods, services but also for their suppliers as in government procurement, preventing discrimination based on the origin of the supplier is as important as preventing discrimination based on the origin of goods and/or services.

<sup>85</sup> See also Anderson and Müller, 2008, above note 81.

In this regard, the GPA is arguably "ahead of the curve" in reflecting the modern realities of trade, in which the boundaries between goods and services trade are increasingly blurred.<sup>86</sup>

A conclusion to be drawn from this important relationship between international trade in goods and services generally and the legally enforceable government procurement market liberalization achieved through the GPA is that the GPA has an important role to play in increasing and re-balancing international trade flows. The integration of emerging economies into the GPA has the potential to allow GPA Parties to access an entirely new, to date untapped market for their goods, services and suppliers.

### **3.3 The role of the GPA in ensuring non-discriminatory treatment of foreign direct investment (FDI) in addition to cross-border trade in government procurement markets**

Importantly, the protections afforded by the GPA against discriminatory treatment in government procurement markets extend to foreign direct investment (FDI) related to government procurement in addition to conventional cross-border trade. First, no discrimination is allowed against locally established suppliers on the basis of "foreign affiliation or ownership".<sup>87</sup> As a second step, no discrimination is allowed based on the origin of goods and services offered by these suppliers.<sup>88</sup> As such, the GPA is clearly aimed at encouraging and protecting foreign direct investment in addition to trade as such.

The protection afforded by the GPA to FDI as opposed to conventional trade in relation to government procurement markets is vital to its relevance and success. Much evidence indicates that participation by "foreign" suppliers in national government procurement markets is more likely to occur as a result of local establishment than it is through actual cross-border bidding. For example, a recent intra-EU study indicates that in procurement markets, international participation in the form of "direct" cross-border delivery of goods in services is relatively low, while "indirect" cross-border trade through affiliates established in the receiving country is significantly more likely.<sup>89</sup>

The GPA, unlike e.g. the GATT, also does not distinguish between border measures and internal measures – it is concerned with procurement regulation as such. The GPA, grouping both MFN and national treatment in a single article, refers to "any measure regarding covered procurement" for both national and MFN treatment. And indeed, while a distinction between border measures and internal measures is perfectly logical to goods crossing borders and being sold domestically as a second step, the same is not relevant for government procurement rules, which are inherently "internal" measures. In this way, the GPA transcends the classic paradigm of trade vs. investment policy and integrates both elements harmoniously in order to achieve economic efficiency outcomes.

### **3.4 Limitation of the Agreement's application to "covered" procurements, and ability to define coverage flexibly for each Party**

As outlined above, the GPA's rules and requirements apply only to procurements that are "covered" by the Agreement. This, in itself, enables Parties to exclude from application of the Agreement elements of their procurements that are deemed sensitive for policy or political reasons. This significance of this important limitation is reinforced by the scope provided to Parties to define coverage with regard to different dimensions of coverage in tailor-made ways.

More concretely, as already noted (see section 2.4.1 above), the market access commitments in the GPA are defined by detailed schedules that are incorporated in Appendix I to the Agreement and that are set out individually for each Party. This means that GPA Parties have not provided all-pervasive coverage of the Agreement in their schedules, but reserve policy space with regard to non-covered procurement.<sup>90</sup> Individual exclusions and restrictions can be made in regard to specific parts of the procurement market in which Parties would like to derogate from the

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<sup>86</sup> See, e.g. Andrea Ariu, Holger Breinlich, Gregory Corcos and Giordano Mion (2016), "The Interconnections Between Services and Goods Trade at the Firm-Level", available at: [https://www.cesifo-group.de/dms/ifodoc/docs/Akad\\_Conf/CFP\\_CONF/CFP\\_CONF\\_2016/ge16\\_Whalley/Papers/ge16\\_Mion.pdf](https://www.cesifo-group.de/dms/ifodoc/docs/Akad_Conf/CFP_CONF/CFP_CONF_2016/ge16_Whalley/Papers/ge16_Mion.pdf).

<sup>87</sup> Article IV:2(a) of the revised GPA.

<sup>88</sup> Article IV:2(b) of the revised GPA.

<sup>89</sup> See European Commission (undated), "EU procurement legislation: delivering results". Available at: [http://ec.europa.eu/internal\\_market/publicprocurement/docs/modernising\\_rules/executive-summary\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/executive-summary_en.pdf).

<sup>90</sup> In this regard, the GPA approach is similar to that taken under the GATS Agreement.

procedural and transparency rules of the GPA.<sup>91</sup> Systemically, this creates a highly flexible and adaptable system of market access commitments in which the particularities in structure of procurement markets in different economies can be reflected.

The significance of the foregoing is reinforced by several other features of Parties' coverage commitments under the GPA, discussed below.

### **3.5 Restricted application of the National Treatment (NT) and Most-Favored-Nation Treatment (MFN) principles under the GPA, and reciprocity of Parties' coverage<sup>92</sup>**

The inherent flexibility of the GPA as a market access tool is linked to particular features of its wording with respect to the application of both the National Treatment (NT) and Most-Favored-Nation Treatment (MFN) principles. The GPA's main non-discrimination provision, contained in Article IV:1 of the revised text and encompassing both aspects, provides as follows:

"Non-Discrimination

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**.

Specific implications of this wording are discussed below.

#### **3.5.1 Maintaining the incentive to join: limiting the benefit of the NT and MFN principles to the Agreement's Parties**

The GPA – unlike, for example, the WTO's Information Technology Agreement – extends the market access benefits provided by virtue of its national treatment clause *only* to the Agreement's Parties. In other words, the GPA is a "closed" plurilateral Agreement whose benefits are not automatically multilateralized and made available freely to the wider WTO Membership. This important feature limits the scope for free-riding and, thereby, provides an essential incentive for other WTO Members eventually to consider joining the Agreement.

The incentive to join the Agreement, moreover, grows with enhanced market access commitments by the GPA Parties – as brought about by each accession to it and by the periodic re-negotiation of the Agreement. It is, in this context, not surprising that the re-negotiation concluded in 2012 has sparked renewed interest in GPA accession among the wider WTO membership. Certainly, the recent accession of an advanced economy such as New Zealand, as well as the current accession negotiations undertaken by Australia, testify to the attractiveness of the Agreement in that respect. In this sense, clearly, the limited application of the GPA's NT and MFN rules is an important fulcrum of the Agreement's success.

In making these observations, we are *not* suggesting that the GPA's approach is workable in all contexts or superior to "open" plurilateral agreements "across the board". It may well be that, in addressing certain other subject-matter in the domain of trade policy, an "open" approach to non-discrimination rules is more feasible and/or preferable. For example, in relation to "public good" aspects of trade policy such as trade facilitation, there may be no or little concern about eroding the incentive for the conduct being promoted (i.e., efficient and responsive administration of customs and related procedures) by extending benefits even to non-participants in the agreement. This might also be the case in relation to certain "new" subjects in the WTO framework, for example competition or investment policy. In subject-areas where free riding is a concern, however, the GPA's approach merits consideration.

<sup>91</sup> By way of example, several Parties – but not all – create exceptions for set-asides aimed at small and medium or minority-owned businesses.

<sup>92</sup> See, for an insightful and broadly parallel analysis, Kamala Dawar, "Transcending Mercantilism: Identifying the Positive Externalities from International Public Procurement Agreements," *Public Procurement Law Review*, 2016, no. 5, pp. 181-196.

### 3.5.2 Freedom to conclude regional trade agreements (RTAs) with non-Parties

The limitation in application of the MFN principle under the GPA to the treatment of the goods, services and suppliers of other Parties to the Agreement has another important consequence: it enables the GPA Parties to freely conclude RTAs with non-GPA Parties without repercussions for their coverage commitments under the GPA. This is the case even in the absence of an explicit exception for RTAs, in the GPA, from the MFN principle. Reflecting this situation, GPA Parties have entered into numerous regional and/or bilateral agreements that extend the reach of the GPA's principles to non-Parties to the GPA itself. Our research suggests, moreover, that such agreements have served broadly to extend the reach of the GPA's principles, creating little in the way of conflicts or "spaghetti bowl" effects.<sup>93</sup>

### 3.5.3 The role of "reciprocity" in conditioning the GPA Parties' coverage commitments

As already noted, the GPA limits the scope of application of its non-discrimination provisions to "covered procurement" – i.e., purchases of goods and services by governments that are reflected in the various Parties' "coverage" or market access schedules. This makes possible the tailoring of each Parties' commitments to reflect the structure of national procurement systems in addition to particular sensitivities that may apply. A further important consequence is to permit the application, even to other GPA Parties, of restrictions on coverage that are deemed necessary to maintain "reciprocity" in Parties' commitments.<sup>94</sup> Indeed, the role of reciprocity as an overall guideline for the negotiation of market access commitments is specifically referenced in the Agreement.<sup>95</sup>

The concept of reciprocity has been applied in different ways, even under the GPA. As pointed out by Arrowsmith:

"Sometimes purely "formal" criteria are used, based on whether the trading partner has opened up the 'equivalent' type of market in its own economy.... An alternative – or additional – approach is to consider the actual economic impact of concessions, notably how far the parties' markets are of *export interest* to each other."<sup>96</sup>

The role of reciprocity under the GPA can be criticized as limiting, unnecessarily, the scope for beneficial changes to take place between jurisdictions.<sup>97</sup> On the other hand, it reflects the pragmatic structure of the GPA. In both the negotiations concluded in 2012 and the earlier negotiations to establish the 1994 GPA, the ability of Parties to impose reciprocity-based derogations from coverage was crucial to the reaching of the overall agreement, including the above-referenced significant expansion of the underlying market access commitments.<sup>98</sup>

#### 3.5.3.1 A further application of reciprocity principles: the new Arbitration Procedures of the Committee on Government Procurement

The above preferences of GPA Parties to maintain flexibility in designing their market access commitments, on the one hand, and reciprocity of commitments on the other are also reflected in the Agreement's provisions regarding the modification of Parties' schedules (or "Appendix I Annexes") under the Agreement. Article XIX of the revised Agreement sets out a procedure that permits Parties to notify changes to their schedules, on the basis of: (i) evidence of the elimination of government control or influence over an entity's covered procurement; or (ii) information as to the likely consequences of the change for the mutually agreed coverage provided for in the Agreement (see Article XIV:1(a) and (b)). No further action is needed if no other Party objects to the proposed modification within 45 days (under the GPA 1994, the objection period was 30 days).

Unlike the GPA 1994, the revised Agreement also provides for the possibility for the modifying Party to implement the modification notwithstanding an objection, provided it is ready to accept the withdrawal of substantially equivalent coverage by the objecting Party. In a recent development further showing the effectiveness of the operation of the GPA and its Committee, the

<sup>93</sup> See Part 5.2 , below, and references cited therein.

<sup>94</sup> Generally, such restrictions are not considered to violate the Agreement since, by definition, they do not involve the treatment of "covered" procurement.

<sup>95</sup> See the revised GPA, Article XXII:7.

<sup>96</sup> Arrowsmith, above note 82, p. 109.

<sup>97</sup> Arrowsmith, above note 82, p. 110.

<sup>98</sup> See, with respect to the negotiations concluded in 2012, footnote 37 above and accompanying text.

Parties to the Agreement have adopted novel Arbitration Procedures to resolve any disputes that may occur in this respect and make the provisions, simultaneously providing for flexibility and reciprocity, even more effective.<sup>99</sup>

Under the new Procedures, the modifying Party maintains the right to implement desired changes where it is prepared to accept the withdrawal of substantially equivalent coverage, even where the arbitrators have found that: (i) government control or influence has not been eliminated; or (ii) that the mutually agreed coverage is affected by the change (see Article XIX:7(b)(iv)). Significantly, Parties were able to agree on the specifics of these Procedures, which include modern elements such as enhanced third-Party rights and a preference for open, rather than closed hearings, in June 2016, i.e. two years after the entry into force of the revised Agreement. This highlights the pragmatism and results orientation of the Committee as emphasized above.

### 3.6 The GPA's distinct approach to special and differential treatment (S&D) for developing countries

The strong emphasis on flexible but reciprocal market opening of the GPA Parties is also visible in the innovative approach taken to special and differential treatment under the Agreement. As mentioned earlier, the transitional measures ("special and differential treatment" or "S&D") that are potentially available to such countries, subject to negotiations, under the revised Agreement include: (i) price preferences; (ii) offsets; (iii) phased-in addition of specific entities and sectors; and (iv) thresholds that are initially set higher than their permanent level. Provision has also been made, in the revised text, for delaying the application of any specific obligation contained in the Agreement, other than the requirement to provide equivalent treatment to the goods, services and suppliers of all other Parties to the Agreement, for a period of five years following accession to the Agreement for Least Developed Countries (LDCs) or up to three years for other developing countries. These periods can be extended by decision of the Committee, on request by the country concerned.<sup>100</sup>

The above-outlined approach to S&D under the revised GPA is subject to three important conditions. First, the transitional measures noted above are not available "automatically" but are to be awarded on the basis of the specific developmental needs of acceding Parties, subject to negotiation with the other Parties. Second, such transitional measures as may be awarded are clearly intended to be time-bound. Third, rather than providing for S&D on a "non-reciprocal" basis (i.e. without regard to the preservation of a balance of market access opportunities), the relevant provisions of the revised GPA stipulate that *the market access opportunities that will be made available to acceding Parties are "subject to any terms negotiated between [other Parties] and the developing country in order to maintain an appropriate balance of opportunities under this Agreement"*. In other words, the possibility of maintaining reciprocity is maintained. Arguably, this approach represents an alternative paradigm for S&D in international trade negotiations that avoids some or all of the problems concerning past approaches that have been highlighted by academic critics.<sup>101</sup> More specifically, it creates the possibility of incentivizing developing country acceding Members to engage in gradual market liberalization, using the negotiated timetable as "roadmap for development".<sup>102</sup>

<sup>99</sup> See GPA/139 dated 23 June 2016.

<sup>100</sup> See, for elaboration, Müller, above note 54.

<sup>101</sup> See Kyle Bagwell and Robert W. Staiger, "Can the Doha Round be a Development Round? Setting a Place at the Table," in Robert C. Feenstra and Alan M. Taylor, eds., *Globalization in an Age of Crisis: Multilateral Economic Cooperation in the Twenty-First Century* (University of Chicago Press for the National Bureau of Economic Research, 2014), pp. 91-124; and Robert D. Anderson, "Reflections on Bagwell and Staiger in Light of the Revised WTO Agreement on Government Procurement," in Feenstra and Taylor, eds., *ibid.*, pp. 124-130. The core of Bagwell and Staiger's criticism of conventional S&D is that it eliminates or weakens developing countries' incentive to engage in the systematic opening of their own markets which is needed to improve their own competitiveness and living standards.

<sup>102</sup> Nicholas Niggli and Kodjo Osei-Lah, "Infrastructure Provision and Africa's Trade and Development Prospects: Potential Role and Relevance of The WTO Agreement on Government Procurement (GPA)", *WTO Secretariat Working Paper ERSD-2014-20*, 3 November 2014, available at: [http://www.wto.org/english/res\\_e/reser\\_e/ersd201420\\_e.pdf](http://www.wto.org/english/res_e/reser_e/ersd201420_e.pdf).

### 3.7 The GPA as a self-renewing instrument

As noted in Part I, an important feature of the GPA is the built-in mandate for improvement of the Agreement that it contains. Its Article XXII:7 provides that:

"Not later than the end of three years from the date of entry into force of the Protocol Amending the Agreement on Government Procurement, adopted on 30 March 2012, and periodically thereafter, the Parties shall undertake further negotiations, with a view to improving this Agreement, progressively reducing and eliminating discriminatory measures, and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity, taking into consideration the needs of developing countries."

Given that the entry into force of the revised GPA occurred in 2014, a mere two years after the conclusion of the renegotiation, those future negotiations are to be initiated not later than the end of 2017. Again, this was a conscious choice of the Parties to ensure that the past history of the GPA as a successfully evolving instrument is carried forward in the future. They not only inserted the above-mentioned obligation to undertake further negotiations, but at the same time identified concrete further steps to facilitate those negotiations in the form of the Work Programmes set out in Article XXII:8 and in the decision on the adoption of the results of the re-negotiation.<sup>103</sup>

### 3.8 Summary observations

This section of the paper has outlined a number of specific "design features" of the GPA which, in our view, have been important underpinnings of its success. In addition to the Agreement's plurilateral nature, and its complementarity with GATT and GATS, of particular interest are: (i) the "tailored" nature of each Party's market access commitments; (ii) the approach taken with respect to application of the national treatment (NT) and most-favored-nation (MFN) principles in the Agreement; (iii) the GPA's continuing strong emphasis on principles of reciprocity in market access concessions; and (iv) its approach to special and differential treatment for developing countries, in all of which it differs from approaches that are widely used in other WTO Agreements. Whether such approaches are widely applicable in other areas of trade policy is a more complicated question, and one which we leave largely to be resolved in other contexts.

## 4 THE POLICY SIGNIFICANCE OF THE GPA: TOWARD A MERGING OF MARKET OPENNESS, INTERNAL POLICY REFORM AND GOOD GOVERNANCE CONCERNS

As explained above, while the GPA is first and foremost an international trade agreement, its importance goes well beyond the securing of market access per se. Minimally, it reflects an emerging awareness that realizing the benefits of trade liberalization depends not merely on market opening, but on the existence of rules and institutions that support healthy competition. Indeed, a clear incentive for countries to join the GPA, which is perhaps less important from the standpoint of trade negotiators but may be at least as significant from an economic welfare standpoint, relates to the possibility of realizing enhanced competition (including international competition) and improved governance in the acceding country's own procurement markets, and the potential this entails for achieving better value for money for governments and citizens in their own national procurements. In that sense, accession to the GPA can catalyse and reinforce broader reforms that improve overall governance, and ultimately strengthen not only the economy, but also the legitimacy of governments.

The revised GPA, whose re-negotiation was completed, very much, in the aftermath of the recent global economic crisis, shows a clear awareness of the risks involved in market opening without adequate attention to rules and institutions. As stated by Pascal Lamy, then Director-General of the Organization, in a Symposium on the revised GPA:

"The economic crisis has reminded us that markets require adequate governance mechanisms, if they are to function properly. ... the mere removal of obstacles to trade may not, by itself, ensure optimal performance if rules are not in place to ensure fair procedures, appropriate transparency of markets, and responsible competitive behaviour

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<sup>103</sup> See section 2.4.3 , above.

that is environmentally sustainable. It is time to recognize that such rules are an essential counterpart to market opening."<sup>104</sup>

In the same Symposium, the role of the GPA as an emerging standard of best practices in government procurement was succinctly described as follows:

"The GPA is a paradigm example of a trade opening instrument that also recognises the need for governance mechanisms – in this case, the procedural rules that Parties to the Agreement must follow to ensure fair and transparent contracting practices and the domestic review or bid challenge mechanisms that the Agreement requires all Parties to put in place."<sup>105</sup>

Indications are that, in some cases, countries are now seeking to join the GPA, at least in part, precisely for reasons of supporting economic reforms with a view to improving governance and strengthening competition in their own procurement markets. As set out above, in a major development for the Agreement, in 2016, Ukraine and Moldova completed the process of becoming Parties to the GPA.<sup>106</sup> Statements made by the responsible senior official, Ukraine's Deputy Minister of the Economy and Trade, cite Ukraine's desire for strengthened competition and an explicit, legally binding commitment to good governance in its public procurement markets as key underlying motivations (see Box 2). Similar motivations have been cited with respect to the recent accessions to the Agreement by Moldova.

### Box 2 Ukraine's accession to the GPA

- On 11 November 2015, the WTO's Committee on Government Procurement agreed to invite Ukraine to join the GPA on the basis of terms that had been negotiated between Ukraine and the Agreement's existing parties. Ukraine ratified the revised GPA on 18 April this year and officially became a party to the government procurement pact on 18 May.
- As a result of Ukraine's accession, Ukraine's suppliers have the right to bid on GPA-covered contracts for goods, services, and public works in the European Union, the United States, and other WTO members that are bound by the Agreement. Conversely, suppliers from those WTO members (47 in all) will have legal rights to bid on contracts in Ukraine, thereby enhancing competition in Ukraine's own procurement markets.
- Maxim Nefyodov, Ukraine's Deputy Minister of the Economy and Trade, told the Committee that participation in the GPA would strengthen competition and good governance in the area of public procurement, assist in its fight against corruption, and increase the transparency of government procurement practices.

Source: WTO.<sup>107</sup>

A possible objection concerning these additional aspects of the asserted benefits of GPA accession – i.e. the promotion of competition and good governance – is that countries can achieve these benefits on their own, without joining the GPA, and, therefore, that they should not be counted as "benefits resulting from GPA accession". Indeed, this objection has often been voiced in the framework of WTO technical assistance and outreach activities. A possible answer to this objection is that indeed, at least in theory, there is nothing to prevent WTO Members from, on their own initiative, eliminating barriers to competition, including international competition, and eradicating corrupt practices from their procurement systems. Moreover, even where countries take the step of joining the GPA, ongoing attention will certainly be needed to these issues at the national level. The real question is whether the GPA accession process, and continuing participation in the Agreement, can catalyse and/or reinforce the necessary domestic reforms, and

<sup>104</sup> Pascal Lamy, "Remarks to a Symposium on 'The WTO Agreement on Government Procurement: Developmental and Trade Significance, Changing Context and Future Prospects,'" Centre William Rappard, Geneva, 11 February 2010, available at: [http://www.wto.org/english/news\\_e/sppl\\_e/sppl147\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl147_e.htm). See also Pascal Lamy, "New Procurement Pact to Bolster Trade," *Business Daily*, Posted Tuesday, 16 February 2010, available at: <http://www.businessdailyafrica.com/Opinion-and-Analysis/-/539548/862654/-/4m8ebx/-/index.html>.

<sup>105</sup> Lamy, *ibid.*

<sup>106</sup> See *WTO News Item*, "Ukraine and the Republic of Moldova welcomed to WTO procurement pact," 22 June 2016, available at: [https://www.wto.org/english/news\\_e/news16\\_e/qpro\\_22jun16\\_e.htm](https://www.wto.org/english/news_e/news16_e/qpro_22jun16_e.htm).

<sup>107</sup> *Ibid.* See also *WTO News Item*, "Ukraine to join WTO's Government Procurement Agreement", 11 November 2015, available at [https://www.wto.org/english/news\\_e/news15\\_e/qpro\\_11nov15\\_e.htm](https://www.wto.org/english/news_e/news15_e/qpro_11nov15_e.htm).

introduce a degree of ongoing monitoring that helps in maintaining a "cleaner" and more competitive procurement system.<sup>108</sup>

In our view, the answer to this question - i.e. whether GPA accession can assist countries in realizing the benefits of pro-competitive, transparency-enhancing internal reforms - is almost certainly "yes".<sup>109</sup> The experience of many countries suggests that participation in international agreements can facilitate or make possible domestic reforms and market opening - whether in public procurement or other economic sectors - that countries would find difficult to achieve through unilateral action alone. It does this in part by providing an inducement (the expected export market gains discussed above) that can compensate, at least partially, for the political "pain" that market opening can entail.<sup>110</sup> This mechanism is by no means limited to the public procurement field; rather, it is analogous to the general role of the WTO in empowering countries to implement market-opening reforms that are in any case to their own benefit, by providing the added incentive of access to foreign markets.<sup>111</sup> This mechanism may, indeed, have particular significance in the field of public procurement given the political significance which is attached to procurement policy in many countries.

To be clear: GPA participation is not at all a "cure-all". The hard work of procurement reform must still be done, and leadership is required. Much evidence indicates that public financial management reforms, even when based on international best practices, will not "take root" unless they are accompanied by a sustained effort to engage stakeholders in addressing the problems that are most critical to them.<sup>112</sup> Sound procurement design, institution-building and the training and professionalization of procurement officials are all critical to success. Our initial point here is simply that the process of GPA accession can provide a useful context in which reformers can carry out their essential work, pointing to the international recognition and trade benefits expected to ensue.

Beyond this general mechanism, moreover, there are specific ways in which GPA accession can assist countries in realizing the benefits of a competitive procurement system (again, we say "assist" rather than "ensure"). Indeed, as we shall now discuss, the Agreement has now become an important benchmark for national procurement reforms with regard to particular challenges faced by many countries worldwide. It provides answers to governments seeking to achieve good governance in procurement markets by fighting not only corruption but also supplier collusion. It is, as well, a paradigm example of how trade agreements can support inclusive trade and an overall inclusive economy, through its good governance elements generally and by incentivizing electronic commerce. Each of these aspects will now be discussed, in turn.

#### **4.1 The GPA as a tool of good governance: not an afterthought but an essential thrust of the Agreement**

Two very serious "governance" challenges bear on the performance of public procurement markets: (i) ensuring integrity in the procurement process (preventing corruption on the part of public officials) and (ii) promoting effective competition among suppliers.<sup>113</sup> Typically, these challenges are viewed as separate and distinct problems: the former (corruption) is treated first and foremost as a principal-agent problem in which the official (the "agent") enriches himself/herself at the expense of the government or the public (the "principal"); while the latter (promoting competition) involves preventing collusive practices among potential suppliers and

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<sup>108</sup> See also Robert D. Anderson, Anna Caroline Müller, Kodjo Osei-Lah and Philippe Pelletier, above note 56.

<sup>109</sup> See also Bernard Hoekman, "Using International Institutions To Improve Public Procurement," *The World Bank Research Observer* (13.2), 1998, pp. 249-269.

<sup>110</sup> See, to cite just two current examples from the public procurement field, Inbom Choi, "The Long and Winding Road to the Government Procurement Agreement: Korea's Accession Experience," in Will Martin and Mari Pangestu, eds., *Options for Global Trade Reform: A View from the Asia-Pacific* (Cambridge: Cambridge University Press, 2003), chapter 11, pp. 249-69; and Changfa Lo, "The benefits for developing countries of accession to the Agreement on Government Procurement: the case of Chinese Taipei," in Arrowsmith and Anderson, eds., above note 11, chapter 5, pp. 140-148.

<sup>111</sup> See, e.g. Jackson, John H. *The World Trading System: Law and Policy of International Economic Relations* (Cambridge, Mass.: MIT Press 2d ed., 2000).

<sup>112</sup> Matt Andrews, *The Limits of Institutional Reform in Development: Changing Rules for Realistic Solutions* (Cambridge University Press: 2013).

<sup>113</sup> See Robert D. Anderson, William E. Kovacic, and Anna Caroline Müller, "Ensuring integrity and competition in public procurement markets: a dual challenge for good governance," in Arrowsmith and Anderson, eds., above note 11, chapter 22, pp. 3-58.

removing barriers that unnecessarily impede participation in relevant markets.<sup>114</sup> The two problems, nonetheless, often overlap, for example where public officials are paid to turn a blind eye to collusive tendering schemes or to release information that facilitates collusion (e.g., the universe of potential bidders or the bids themselves).

Corruption and collusion, in addition to being a direct drain on public treasuries, often leads to undesirable final outcomes with wide-reaching consequences on the intended beneficiaries: roads may be of poor quality, food procurement may not offer optimal nutrition, or school buildings may be deficient in terms of safety standards, among other things. Furthermore, corruption and collusion in procurement markets reduce opportunities and incentives for private sector companies to participate and compete in procurement markets. Start-ups may not be able to enter markets in which incumbents have put in place corrupt or collusive schemes, and public confidence in governments is diminished. As discussed below, the GPA, while being first and foremost a trade instrument, is an important tool in addressing both challenges.

#### 4.1.1 The GPA's role in supporting the global struggle against corruption

Regarding corruption issues, participation in the GPA can change perspectives and shift the dynamics of procurement systems in important respects:

- First, as noted, by requiring all participating countries to establish independent "domestic review systems" (complaint review mechanisms to which both foreign and domestic suppliers may apply for correction of procedural errors), the GPA puts in place a powerful mechanism for ensuring compliance with applicable rules and "shaking up" established ways of doing business. The effect of this institutional change is reinforced by the fact that foreign suppliers coming from other GPA parties are likely to have stronger incentives and fewer inhibitions than domestic players to report collusion and/or corruption, as they are less subject to ongoing scrutiny and social or other pressures;
- Second, the GPA establishes additional external oversight by making national procurement systems subject to scrutiny in the WTO Committee on Government Procurement and through the WTO's binding dispute settlement system. This additional scrutiny is undertaken in an institutionalised fashion by GPA parties and the WTO's dispute settlement function at the international level, thus helping to break vicious cycles; and
- Third, GPA participation signals to both domestic suppliers and the outside world that an acceding country is intent on conforming to international best practices as embodied in the GPA — potentially challenging entrenched expectations in relevant societies with regard to corruption.<sup>115</sup>

Beyond the foregoing, the revised GPA incorporates a new substantive provision regarding the "conduct of procurement." That provision (Article V:4) reads, in relevant parts, as follows:

"Conduct of Procurement

4. A procuring entity shall conduct covered procurement in a transparent and impartial manner that: ...

(b) avoids conflicts of interest; and

(c) prevents corrupt practices."<sup>116</sup>

Insight into the intended purpose of this provision is provided by related language in the preamble to the revised Agreement that recognises its shared purpose with other international instruments and initiatives in deterring corrupt practices. For example, a new recital to the preamble recognises "that the integrity and predictability of government procurement systems are integral to the efficient and effective management of public resources [and] the performance of the Parties' economies" in addition to the functioning of the multilateral trading system.<sup>117</sup> A further new recital recognises "the importance of transparent measures regarding government procurement, of carrying out procurements in a transparent and impartial manner and of avoiding

<sup>114</sup> See, for further development and clarification, Frédéric Jenny, "Competition and Anti-Corruption Considerations in Public Procurement," in OECD, *Fighting Corruption and Promoting Integrity in Public Procurement* (Paris, 2005), chapter 3, pp. 29-35.

<sup>115</sup> Anderson, Kovacic and Müller, above note 10.

<sup>116</sup> WTO, Agreement on Government Procurement, Article V:4.

<sup>117</sup> WTO, Agreement on Government Procurement, Preamble, Third Recital.

conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention against Corruption."<sup>118</sup>

While it is self-evident that the inclusion of this language in the revised GPA will not, by itself, ensure full integrity in all subscribing procurement systems, the language is another important lever that can help to promote compliance and galvanise related institutional efforts, thereby helping countries to grapple with both principal-agent and collective action problems related to corruption and collusion. In effect, the language in Article V:4(b) and (c) creates a new treaty-based obligation for GPA Parties to conduct their procurements in ways that avoid conflicts of interest and corrupt practices. This, it is suggested, can be an important "hook" for efforts to eradicate corruption on the part of both governmental and non-governmental authorities.

In summarizing these developments, Arrowsmith comments as follows:

"... transparency rules similar to those of the GPA are included in many procurement systems with the specific aim of addressing corruption. Further, the fact that such rules are included in the GPA can have an impact in preventing corruption in Parties to the Agreement and the fact that GPA accession can help states implement such rules against domestic vested interests and lock them into their systems means that in practice the GPA can assist states in addressing the problem of corruption. Reducing corruption can itself enhance the GPA's unarguable objective of liberalization of markets. Nevertheless, up to now, addressing conflicts of interest and corruption was not per se an objective of the GPA, even as a means of promoting market access, but merely one consequence of it. The new provision and recital, however, recognize not only that conflicts of interest and corruption may impact upon access to markets but also suggest that the GPA aims to address corruption quite apart from any impact on market access – in particular, to ensure more efficient and effective management of resources and to improve the general functioning of Parties' economies."<sup>119</sup>

#### 4.1.2 The GPA's role in deterring inter-supplier collusion

At the same time, the GPA plays an equally important role in helping to deter and prevent the related and equally serious problem of *inter-supplier collusion*.<sup>120</sup> Much evidence shows that such collusion, also known as bid rigging, price fixing and collusive tendering, imposes heavy costs in most or even all countries' procurement systems. While all markets are potentially susceptible to collusive practices, there is evidence that public procurement markets may be uniquely prone to such practices. The large number of cartel cases related to procurement markets that have been prosecuted in recent years shows that suppliers view public bodies as attractive targets for collusive schemes. Sanchez Graells notes that while "anecdotal evidence shows that collusion ... is pervasive in almost all economic sectors where procurement takes place, [it] maybe has a special relevance in markets where the public buyer is the main or sole buyer, such as roads and other public works, healthcare markets, education, environmental protection, or defence markets."<sup>121</sup> Relatedly, Heimler observes that despite the inherent instability of cartels with many participants, those detected in public procurement provide evidence that even bid rigging schemes with up to 100 members can operate successfully over years.<sup>122</sup>

Governmental (state) measures that limit the possibilities for beneficial trade and competition are often a key factor in facilitating inter-supplier collusion. Such measures include: (i) "buy national" measures that exclude foreign-based or affiliated suppliers in many circumstances; (ii) more general restrictions on market participation, such as burdensome licensing requirements; and (iii) the use by procuring agencies of proprietary or other standards

<sup>118</sup> WTO, Agreement on Government Procurement, Preamble, Sixth Recital.

<sup>119</sup> Sue Arrowsmith, "The Revised Agreement on Government Procurement: changes to the procedural rules and other transparency provisions," in Arrowsmith and Anderson, eds., above note 10, Chapter 10. See, for a similar perspective, Dawar, above note 92.

<sup>120</sup> See, for elaboration, Anderson, Kovacic and Müller, above note 10.

<sup>121</sup> Albert Sanchez Graells, "Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement," Published in Eds. G. Racca and C. Yukins, *Integrity and Efficiency in Sustainable Public Contracts* (Brussels, Bruylant, 2014).

<sup>122</sup> Alberto Heimler, "Cartels in Public Procurement," *Journal of Competition Law & Economics*, 11-23 (2012).

that unnecessarily exclude alternative suppliers.<sup>123</sup> Such measures are an important example of state measures and practices that directly limit competition and (potentially) facilitate private anti-competitive conduct (i.e., collusion). Collusion flourishes, in other words, in markets that are closed to external competition.

Clearly, the enactment and vigorous enforcement of competition law has a vital role to play in combatting the threat of inter-supplier collusion.<sup>124</sup> Much experience suggests, though, that this role, while necessary, is not sufficient to eliminate the problem.<sup>125</sup> Trade liberalization can play, in this regard, an important complementary role.

The pro-competitive impact of the trade liberalisation in government procurement markets does not arise from explicit rules to combat bid rigging. Rather, the GPA addresses the challenge of combatting collusion through different channels:<sup>126</sup>

- First, as explained earlier, the Agreement provides a vehicle for the progressive opening of parties' markets to international competition through market access or "coverage" commitments. Suppliers from other GPA parties cannot be arbitrarily excluded from procurement markets. This makes collusion more difficult by increasing both the number and the *diversity* of potential competitors for individual procurements and thereby addressing key underlying conditions that are known to facilitate collusion;
- Second, the GPA's transparency provisions ensure that the information necessary to participate in particular procurements and to prepare responsive tenders is not shared only with "the usual suspects" (a procuring entity's preferred suppliers). This helps to broaden the set of potential suppliers;
- Third, the Agreement promotes "open" approaches to procurement design and discourages or makes more difficult practices such as the "wiring" of technical specifications to favour particular brands or suppliers.
- Fourth, the domestic review procedures required by the GPA enhance supplier confidence that contracts will ultimately be awarded on the basis of product quality and competitive pricing, rather than patronage or cronyism – thereby encouraging participation from a broader range of potential suppliers; and
- Fifth, the WTO Dispute Settlement Understanding (DSU) represents an essential complement to ensure that participating governments honour their commitments and do not arbitrarily exclude potential competitors from the other GPA parties.

In all the above respects, participation in the GPA or similar regional accords is powerfully complementary to both competition law enforcement in the deterrence and prevention of collusion, and the measures needed to fight corruption.

#### **4.2 The GPA as a tool for promoting an inclusive global economy**

Apart from its overall welfare-enhancing role in increasing good governance and the achievement of value for money in procurement markets, the GPA has an important role in achieving distributive welfare and in achieving the commitment to 'leave no one behind' as a key feature of the discussions on the post-2015 agenda and the United Nations' Sustainable Development Goals (SDGs). It has the potential to open up significant economic opportunities for under-represented social groups, including youths and women, which are often operating through small and medium sized enterprises (SMEs) in the important market segment that procurement markets represent. Two aspects are important in this regard: (i) the GPA's general thrust to make procurement markets accessible on a fair and non-discriminatory basis, and (ii) the role of the GPA in facilitating e-commerce and the use of electronic tools.

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<sup>123</sup> Robert D. Anderson and William E. Kovacic, "Competition Policy and International Trade Liberalization: Essential Complements to Ensure Good Performance in Public Procurement Markets", *Public Procurement Law Review*, issue 2, pp. 67-101 (2009); see also Anderson, Kovacic and Müller, above note 9.

<sup>124</sup> See Eleanor M. Fox and Deborah Healey, "When the State Harms Competition – The Role for Competition Law," *Antitrust Law Journal*, vol. 79, no. 3, pp. 769-820 (2014).

<sup>125</sup> See Anderson and Kovacic, above note 123.

<sup>126</sup> See Anderson, Kovacic and Müller, above note 10.

#### 4.2.1 Unlocking procurement markets for disadvantaged groups through fair procedures and non-discrimination

The GPA's procedural and transparency rules can be an important tool for ensuring access to markets by previously-excluded groups. Unreformed procurement systems favour incumbent firms (their competitors) through well-established communication channels and cronyism. The GPA's transparency and procedural requirements, in contrast, are designed to open markets: they help create transparent and fair procurement systems, and thereby can ensure that businesses entering the market are not kept in the dark about information relating to procurement opportunities: they get a fair chance to compete.<sup>127</sup>

Further to the above, corrupt and collusive practices that can be counteracted through the GPA and related good governance measures unfairly and disproportionately impact on underrepresented groups, preventing them from winning contracts. Such groups are less likely to have the economic means and channels to pay bribes, or to successfully negotiate a market share for themselves in a collusive scheme among incumbent competitors. The GPA's in-built requirement for domestic review of procurement decisions provides disadvantaged groups with important fora to voice concerns and address remaining unfair practices that put them at a disadvantage.

Interestingly, these good governance benefits the GPA creates will not only concern formally GPA-covered procurement open to international competition. Rather, as GPA accession facilitates overall reform, the procurement system as a whole can be expected to provide better and more inclusive opportunities, even when procurements are not "covered" and/or contested through bids by foreign suppliers.

Furthermore, as set out above, the revised GPA's novel approach to special and differential treatment and the flexibilities provided in determining market access commitments also support its use as tool to catalyse progressive market participation through targeted transitional measures. Subject to relevant negotiations, disadvantaged groups can benefit from offset or price preference programmes to favour their inclusion, and non-covered procurement can be set aside for them, with full "graduation" and market liberalization as ultimate goal.

#### 4.2.2 The GPA as an e-commerce facilitator

An important current focus of policy work in the WTO, undertaken with a view to possible future negotiations, concerns the promotion and facilitation of e-commerce.<sup>128</sup> The rationale behind this work is summarized succinctly by the following words of Roberto Azevêdo, Director-General of the WTO:

"By reducing the trade costs associated with physical distance, e-commerce allows businesses to access the global marketplace, reach a broader network of buyers and participate in international trade. Broader dissemination of such technologies means that the trade opportunities generated by e-commerce are also available to businesses in developing countries, with some of them making significant headway in recent years."<sup>129</sup>

The GPA shows that this is not simply a possibility for the future; rather, the encouragement and facilitation of e-commerce is already a key thrust of the GPA itself. As set out above, an important aspect of the modernization of the GPA was to equip the GPA for and integrate e-procurement methods in the revised text. In that vein, the preamble to the revised text expressly recognizes "the importance of using, and encouraging use of, electronic means for procurement covered by [the Agreement]."

The revised GPA text takes a three-fold approach with regard to e-procurement. First of all, provisions of the GPA that were based on the idea that communication would take place in paper form were revised to be "technologically neutral". This means that provisions not mentioning e-procurement specifically are generally understood to apply to both traditional forms of

<sup>127</sup> See also Pascal Lamy (2012), "Opening government procurement to women's enterprises", *International Trade Forum*, available at: <http://www.intracen.org/Opening-government-procurement-to-womens-enterprises/>.

<sup>128</sup> See [https://www.wto.org/english/tratop\\_e/ecom\\_e/ecom\\_e.htm](https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm).

<sup>129</sup> See Roberto Azevedo, "Facilitating E-Commerce Can Stimulate Growth and Development," available at: [https://www.wto.org/english/news\\_e/news16\\_e/ecom\\_05jul16\\_e.htm](https://www.wto.org/english/news_e/news16_e/ecom_05jul16_e.htm).

procurement and e-procurement in the same way. In particular, a new provision in Article I(g) defines "in writing" or "written" as meaning "any worded or numbered expression that can be read, reproduced and later communicated", and expressly states that this "may include electronically transmitted and stored information". As Arrowsmith states, "this effectively ensures that where the GPA requires an action or decision in written form it can be done electronically provided that the electronic form meets the purpose of the requirement for writing".<sup>130</sup>

Second, the revised GPA text actively encourages the use of electronic means in several of its provisions by expressly mentioning that their use is allowed and/or desired. In this regard, the GPA mostly adopts a "permissive" approach, which means that the use of electronic means is not made mandatory.<sup>131</sup> In taking one step further, the GPA then goes on to create incentives for the use of electronic means by providing Parties using them with more flexibility and easier fulfilment of their obligations under the Agreement.<sup>132</sup> This approach recognizes the transparency benefits resulting from the use of electronic means of communication in the publication of all three types of information required to be made publically available under the Agreement, namely (i) general information on the procurement system;<sup>133</sup> (ii) information on procurement opportunities and processes,<sup>134</sup> and (iii) post-award publication of statistical and other information.<sup>135</sup>

Third, the GPA's provisions on e-procurement also seek to ensure that the use of electronic means does not create barriers to international trade and competition and that their use is made transparent, thus upholding the general principles of openness, transparency and non-discrimination. For example, the revised text sets out related requirements regarding the general availability and interoperability of the information technology systems and software used;<sup>136</sup> the availability of mechanisms to ensure the integrity of requests for participation and tenders;<sup>137</sup> the publication of information on how electronic auctions are conducted,<sup>138</sup> and maintenance of data to ensure the traceability of the conduct of covered procurement by electronic means.<sup>139</sup> These provisions stipulate mandatory requirements applicable *if* and to the extent electronic means are used, but leave the basic decision as to whether or not to use them up to national legislators and procuring entities.<sup>140</sup>

### 4.3 Summary observations

As explained above, while the GPA is first and foremost an international trade agreement, its importance goes beyond the securing of market access per se. In fact, it is directly supportive of good governance objectives, in the sense of both the prevention of corruption and the deterrence of inter-supplier collusion. It can, we believe, serve as a tool of inclusiveness, by enabling participation by previously excluded groups and reducing the scope for cronyism in relevant markets. Minimally, it reflects an awareness that realizing the benefits of trade liberalization depends not merely on market opening, but on the existence of rules and institutions that support healthy competition.

## 5 SYNERGIES BETWEEN THE GPA AND OTHER RELEVANT INTERNATIONAL INSTRUMENTS

As mentioned briefly in the introduction to this paper, the GPA's renegotiation has also made possible very significant synergies between the Agreement and other international instruments and initiatives. The latter include both multilateral initiatives and mandates such as

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<sup>130</sup> See Arrowsmith, above note 82, p. 297.

<sup>131</sup> See e.g. Article XIV, which does not make the use of electronic auctions mandatory, but provides rules for situations in which the procuring entity intends to conduct a covered procurement using an electronic auction. The only exception to this rule is Article VII:1 (a), stipulating that notices of intended procurement issued by covered central government entities *shall* "be accessible by electronic means free of charge through a single point of access, for at least a minimum period of time [...]".

<sup>132</sup> See e.g. revised text, Article XI:5, providing for the optional reduction of time-frames for tendering if and to the extent that electronic means are used.

<sup>133</sup> See Article VI:1(a) read in conjunction with Articles VI:2(a),

<sup>134</sup> See Article VI:2(b), read in conjunction with Articles VII, IX:7 and XVI:2.

<sup>135</sup> See Articles VI:2(c) read in conjunction with Articles XVI:5 and 6.

<sup>136</sup> See Article IV:3(a).

<sup>137</sup> See Article IV:3(b).

<sup>138</sup> See Article X:7(e) and Article XIV.

<sup>139</sup> See Article XVI:3(b).

<sup>140</sup> See also Articles IX:7(b) and 9(b), X:7(d), XIV, XVI:2.

the United Nations Convention Against Corruption and the UNCITRAL Model Law and regional trade agreements. These synergies are the focus of this section.

### 5.1 Synergies with other global instruments and initiatives

A further important dimension of the policy impact of the GPA concerns the synergies that it generates and benefits from with other international instruments and initiatives. A first area of interface which is flagged explicitly in the preamble to the revised GPA concerns the United Nations Convention Against Corruption, adopted by the General Assembly in 2003. As stated in a Foreword written by former Secretary-General Kofi Annan, the Convention:

"... introduces a comprehensive set of standards, measures and rules that all countries can apply in order to strengthen their legal and regulatory regimes to fight corruption. It calls for preventive measures and the criminalization of the most prevalent forms of corruption in both public and private sectors."<sup>141</sup>

Importantly, the Convention evinces a specific interest in the field of public procurement. Its Article 9 mandates that:

"1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption."<sup>142</sup>

Not surprisingly, therefore, the revised GPA, in its own Preamble, refers specifically to the Convention:

*"Recognizing* the importance of transparent measures regarding government procurement, of carrying out procurements in a transparent and impartial manner and of avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention Against Corruption;"<sup>143</sup>

Indeed, from our perspective, the revised GPA should be seen as one of the key practical tools through which participating governments (and UN Member states) give effect to the goals set and commitments made with respect to public procurement in the Convention. It is noteworthy, further, that a number of the specific measures enumerated in Article 9 of the Convention as examples of ways in which states can fight corruption in the public procurement sector are incorporated, with greater specificity, in the revised GPA. For example, sub-paragraph (a) of Article 9:1 of the Convention refers to

"(a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;"

The GPA, as we have seen, carries this requirement forward with more detailed and specific timelines and requirements.<sup>144</sup>

Similarly, the Convention refers to

"(d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;"

The GPA, for its part, embraces this requirement and incorporates specific standards to ensure the effectiveness of such systems.<sup>145</sup>

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<sup>141</sup> "Foreword" to the United Nations Convention Against Corruption (New York: 2004); available here: [https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf) .

<sup>142</sup> United Nations Convention Against Corruption, *ibid.*, Article 9.

<sup>143</sup> Revised GPA, Preamble, 6<sup>th</sup> recital.

<sup>144</sup> See revised WTO Agreement on Government Procurement, especially Articles VI, VII, X and XI.

<sup>145</sup> See revised WTO Agreement on Government Procurement, Article XVIII.

Another very significant area of synergy with the revised GPA concerns the UNCITRAL Model Law on Public Procurement.<sup>146</sup> The Model Law is an important practical tool to which countries (especially but not only developing and transition economies) look to for guidance in the area of public procurement policy and, especially, the development of relevant legislation. Unlike the GPA, the Model Law does not directly facilitate trade and does not have treaty status. Still, it plays an important complementary role, in that many countries use the Model Law as a basis for implementing national legislation that is intended to be GPA-compatible. Happily, then, not only were the GPA and the Model Law re-negotiated in parallel but, through deliberate efforts and cross-fertilization between the relevant negotiators and Secretariat, the instruments have been substantially harmonized.<sup>147</sup>

Another important example of potential synergies that have been created between the GPA and other relevant international instruments concerns the new World Bank Procurement Framework. As recorded in the 2015 Annual Report of the WTO Committee on Government Procurement:

"... in the course of the Committee's informal sessions in September 2015, the Secretariat updated the Committee on its ongoing discussions with the World Bank, aimed at achieving greater synergies in the work of the WTO and the World Bank on government procurement issues. A new procurement framework was approved by the Bank's Executive Board in July 2015. The new framework refers to GPA accession as a path by which the World Bank's client countries can put into place legislation that the World Bank may deem to be acceptable for its own purposes at least in some respects, and subject to appropriate safeguards. This is expected to improve coherence and yield important new synergies with the GPA."<sup>148</sup>

Apart from the above-noted developments, the WTO Secretariat works closely with the European Bank for Reconstruction and Development (EBRD) in capacity building and policy support activities across the EBRD's catchment area. This collaboration has been a key factor in supporting the GPA accessions and/or ratifications of the revised GPA of new Parties (e.g., Armenia, Moldova, Montenegro and Ukraine) in the region. Increasingly, the Secretariat is also cooperating or seeking to cooperate with other regional development banks, including the African Development Bank and the Asian Development Bank.

A further global initiative that will, we believe, entail important synergies with the GPA concerns the UN's Sustainable Development Goals. While the Goals do not specifically reference public procurement policy, they attach great importance e.g. to measures such as the improvement of public health delivery systems and the building of resilient infrastructure as underpinnings of global development, prosperity and poverty alleviation. These are all areas that have an important interface with public procurement systems, and are also at risk for corruption and supplier collusion problems. As such, adherence to the norms and requirements of the GPA can play an important role in ensuring the success of the Goals.

## 5.2 Synergies with relevant regional trade agreements

A further very important example of positive synergies between the GPA and other international instruments concerns the government procurement chapters that are found in many recent regional and bilateral trade agreements. In related research undertaken with other colleagues and looking at 250 such agreements implemented up until 2015, we find that around 27% of the agreements examined contains detailed chapters or provisions on government procurement, including market access commitments.<sup>149</sup> These comprise 12 RTAs between GPA Parties; 36 agreements between GPA Parties and non-GPA Parties; and 20 RTAs between non-GPA Parties. Altogether, these RTAs cover around 75 WTO Members, mainly originating from the following geographical regions: Latin America (South, Central and the Caribbean), North America, Europe, and a number of Asian WTO Members (including, e.g. Australia, Japan, Korea,

<sup>146</sup> UNCITRAL Model Law on Public Procurement, available at: <http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf> ; and, for instructive commentary, Nicholas, above note 122.

<sup>147</sup> Caroline Nicholas, "The 2011 UNCITRAL Model Law on Public Procurement," (2012) 21 P.P.L.R. 3, pp. NA111 et seq.

<sup>148</sup> *Report (2015) of the Committee on Government Procurement* (GPA/134 dated 16 November 2015), paragraph 3.38.

<sup>149</sup> The trend in this regard is rising, and significantly higher percentages can be found if only recently concluded RTAs are taken into account.

New Zealand and Singapore). It also comprises one Member from Africa (i.e. Morocco), one from the Commonwealth of Independent States (CIS) (i.e. Ukraine) and two countries from the Middle East (Oman and Bahrain). An important related finding is that the provisions of such agreements tend to track very closely the provisions of the GPA itself (whether the 1994 or the 2012 Agreement).<sup>150</sup>

Further to the above, the approach used to schedule government procurement commitments in such RTAs often closely follows the structure of the GPA market access schedules. Additionally, while some RTAs provide for government procurement commitments that are deeper than those of the GPA in particular respects (e.g. additional services sectors or lower thresholds), this is by no means true generally when all dimensions of coverage are considered. Overall, the market access opportunities created by government procurement chapters in RTAs generally are significantly less than those available under the revised GPA. Furthermore, RTA chapters on government procurement do not generally contain MFN clauses, so that market access commitments made by GPA Parties are not extended to RTA partners. This preserves an important incentive for eventual GPA accession by relevant WTO Members.<sup>151</sup> As a result, we conclude that government procurement chapters in RTAs generally introduce relatively little in the way of "spaghetti-bowl" effects and are, overall, favorable to the proliferation of procurement reforms, open markets and common rules.

## 6 CONCLUDING REMARKS

The conclusion of the GPA renegotiation in March 2012 represented an important success for the international trading system. As detailed in this paper, the conclusion comprised: (i) a significant expansion of the Parties' market access commitments under the Agreement; (ii) agreement that a previously-negotiated revised text of the Agreement can now come into force; and (iii) agreement on a set of Future Work Programmes relating to the administration and possible further evolution of the Agreement, which will encompass key issues of interest from the standpoint of the evolution of global procurement policy. Apart from the renegotiation, the GPA's vitality has also been manifested by continuing growth in its membership, from 22 WTO members covered in 1996 to 47 at present. All signs are that it will continue to grow.

As discussed in this paper, the GPA's successful renegotiation, the continuing growth of its membership and its vitality as an instrument of public policy were not achieved through happenstance. In fact, the GPA embodies a number of specific design features that clearly facilitated the successful conclusion of the renegotiation and that, as such, may in the future be relevant to other areas of global trade liberalization. In addition to the Agreement's plurilateral nature, of particular interest are the approach taken with respect to application of the most-favored-nation (MFN) principle in the Agreement; the GPA's continuing strong emphasis on principles of reciprocity in market access concessions; and its approach to special and differential treatment for developing countries, in all of which it differs from approaches that are widely used in other WTO Agreements. While the applicability of these approaches in other areas of trade liberalization would need to be evaluated on a case-by-case basis and is not presumed, the success achieved in the GPA renegotiation suggests that they at least merit consideration.

Apart from the above specific design features, the GPA revision is important for the merging of trade and good governance concerns that it exemplifies. As we have discussed, the themes of governance and the sound management of public resources that are treated in the revised Agreement were not afterthoughts to the renegotiation; rather, they permeated the revised text and received focused attention from the Parties in their own right. As well, the GPA has direct implications for investment policy and for domestic economic reforms, and is an important tool of e-commerce. And, the revision has made possible very significant synergies between the GPA and other international instruments and activities in reducing barriers to participation and strengthening governance in public procurement markets. For all these reasons, the revised Agreement is likely to have a wider impact than meets the eye, and well merits the support and attention that it has received from the participating WTO Member governments.

<sup>150</sup> Robert D. Anderson, Anna Caroline Müller and P. Pelletier, "Regional Trade Agreements and Procurement Rules: Facilitators or Hindrances?" (Paper prepared for inclusion in a forthcoming volume edited by Aris Georgopoulos, Bernard Hoekman and Petros Mavroidis; Preliminary version available from: [#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2707219#)); see also R.D. Anderson, A.C. Müller, K. Osei-Lah, J. Pardo de Leon and P. Pelletier, "Government Procurement Provisions in Regional Trade Agreements: a Stepping Stone To GPA Accession?" in Arrowsmith and Anderson, eds., above note 11, pp. 561–656.

<sup>151</sup> See Anderson, Müller and Pelletier, *ibid.*