

## ARTICLES

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

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### ABSTRACT

*The World Trade Organization's (WTO's) plurilateral Agreement on Government Procurement (GPA or "the Agreement") is an important ongoing success story for the Organization. In the spring of 2012, the GPA Parties completed a full revision of the Agreement, with regard to both its text and market access commitments under it. Since then, the revised GPA has entered into force, and its membership has gradually broadened. These developments are of importance not only in themselves, but also for the international trading system and its potential future evolution.*

*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. This Article 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 treatment (MFN) principle in the Agreement; the GPA's continuing strong emphasis on principles of reciprocity in market access concessions; and its*

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*approach to special and differential treatment for developing countries, in all of which it differs from approaches which 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 this Article, 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 permeate 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. Moreover, 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.*

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I. INTRODUCTION

The World Trade Organization (WTO) plurilateral Agreement on Government Procurement (GPA or “Agreement”) is an important, ongoing success story for the WTO. In the spring of 2012, the GPA Parties completed a full revision of the Agreement, with regard to both its text and to market access commitments under it.<sup>1</sup> This represented the successful culmination of more than a decade of work that had been undertaken in the framework of the WTO’s Committee on Government Procurement (“the Committee”).<sup>2</sup> The revised Agreement entered into force on April 6, 2014, only two years following the renegotiation’s conclusion.<sup>3</sup> Of equal importance, the GPA’s plurilateral membership, which, by definition, does not include all WTO Members, has increased very substantially, from twenty-two WTO members covered at the beginning of 1996 to forty-seven at present, and it continues to grow.<sup>4</sup>

The significance of these developments goes beyond the mere context of the GPA.<sup>5</sup> Several points can be noted in this regard. First, from the traditional standpoint of trade liberalization, it has been

1. Revised Agreement on Government Procurement, Mar. 30, 2012, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), 1915 U.N.T.S. 103 [hereinafter 2012 GPA]. The Article also references two prior versions of the GPA, one signed in 1979 and a second revised version signed in 1994. Agreement on Government Procurement, Apr. 12, 1979, General Agreement on Tariffs and Trade, 1235 U.N.T.S. 258 [hereinafter 1979 GPA]; Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), 1915 U.N.T.S. 103 [hereinafter 1994 GPA]; World Trade Organization, Comm. on Gov’t Procurement, *Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement* Apr. 2, 2012, WTO Doc. GPA/113 [hereinafter WTO Doc. GPA/113]. For online access to all WTO Agreements, see *WTO Legal Texts*, WORLD TRADE ORG., [https://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](https://www.wto.org/english/docs_e/legal_e/legal_e.htm) (last visited Nov. 14, 2017).

2. See *Committee on Government Procurement Adopts Revised Agreement*, WORLD TRADE ORG. (Mar. 30, 2012), [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) (last visited Nov. 13, 2017).

3. See *Revised WTO Agreement on Government Procurement Enters into Force*, WORLD TRADE ORG. (Apr. 7, 2014), [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) (last visited Nov. 13, 2017).

4. For an up-to-date list of GPA Parties, see *Agreement on Government Procurement: Parties, Observers and Accessions*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm) (last visited Nov. 13, 2017).

5. See generally 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*, 21 PUB. PROCUREMENT L. REV. 83 (2012) [hereinafter Anderson, *The Conclusion of the Renegotiation*]; Robert D. Anderson et al., Feature Comment, *The WTO’s Revised Government Procurement Agreement: An Important Milestone Toward Greater Market Access and Transparency in Global Public Procurement Markets*, 54 GOV’T CONTRACTOR 1, 1-6 (2012) [hereinafter Anderson et al., *An Important Milestone*].

estimated that including the additional market access provided through the renegotiation, the Agreement now offers an estimated \$1.7 trillion in market access opportunities annually.<sup>6</sup> The GPA therefore constitutes an important modern example of successful and consequential market liberalization within the WTO framework. Indeed, until the more recently concluded WTO Agreement on Trade Facilitation at the WTO's Ninth Ministerial Conference in Bali in 2013, the GPA renegotiation represented arguably the most significant negotiating result to be achieved in the WTO since the Organization was launched in 1994.<sup>7</sup>

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 to take account of modern procurement practices, such as the use of electronic procurement tools.<sup>8</sup> In fact, with the 2012 revision, the Agreement has become an important tool of e-commerce.<sup>9</sup> Other new features include the enhanced emphasis on measures to fight corruption and promote good governance, new transitional measures for developing countries that are adapted to the countries development needs at the time of accession and an overall more flexible approach with regard to the transparency and procedural rules to facilitate all GPA Parties' implementation of the Agreement.<sup>10</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>11</sup> As a result, it has already given the Agreement an important role in guiding policy reforms, particularly in transition economies.<sup>12</sup> This experience points clearly to

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6. See *Government Procurement: Agreement on Government Procurement*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (last visited Nov. 13, 2017).

7. Cf. Anderson, *The Conclusion of the Renegotiation*, *supra* note 5, at 84 (“[I]t has added significant value to the sum of market access commitments by the Parties under the Agreement, in the range of at least US \$80 billion to \$100 billion annually. This represents a very significant achievement for the participating WTO Members and the Organization in the present economic and political environment.”).

8. See discussion *infra* Sections II.D.2, IV.B.2. and sources cited therein.

9. See discussion *infra* Part IV.

10. See *infra* Section II.D.2. and sources cited therein.

11. See Robert D. Anderson, *The WTO Agreement on Government Procurement (GPA): An Emerging Tool of Global Integration and Good Governance*, L. IN TRANSITION ONLINE 1, 7 (2010).

12. These are countries currently in the process of “transition” to market-based economies. See *Understanding the WTO: The Organization: Special Policies*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org5\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org5_e.htm) (last visited Nov. 14, 2017). For further detail on the role of the GPA in guiding policy reforms, see *infra* Part IV. For related commentary, see Robert D. Anderson, William E. Kovacic & Anna Caroline Müller, *Promoting Competition and Deterring Corruption in Public Procurement Markets: Synergies with Trade Liberalization*, 2 PUB. PROCURE-

a more holistic vision of international 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 Work Programmes adopted by the Parties provide a clear path for further exchanges of views among the GPA Parties that promote increased transparency and can serve as a basis for further convergence around internationally accepted best practices in public procurement.<sup>13</sup> 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.<sup>14</sup> 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>15</sup> The GPA, therefore, goes beyond so-called “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. While much credit is due to the Committee’s then-Chairman, Mr. Nicholas Niggli, and the lead negotiators, the GPA contains a number of specific design features that clearly facilitated the successful conclusion of the renegotiation. In addition to the Agreement’s plurilateral nature, these helpful features include: (i) the “tailored” nature of each Party’s market access commitments; (ii) the approach taken with respect to application of the national

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MENT L. REV. 77 (2017). For a previous version of this paper 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, see Robert D. Anderson, William E. Kovacic & Anna Caroline Müller, *Think Piece: Promoting Competition and Deterring Corruption in Public Procurement Markets: Synergies with Trade Liberalisation*, E15 EXPERT GROUP ON COMPETITION POL’Y & THE TRADE SYS. (ICTSD/World Econ. Forum, Geneva, Switzerland Feb. 2016), <http://e15initiative.org/publications/promoting-competition-and-deterring-corruption-in-public-procurement-markets-synergies-with-trade-liberalisation>.

13. See Anderson, *The Conclusion of the Renegotiation*, *supra* note 5, at 87-92.

14. See *Agreement on Government Procurement: Work Programmes*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/gproc\\_e/gpa\\_wk\\_prog\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gpa_wk_prog_e.htm) (last visited Nov. 14, 2017).

15. See generally Sue Arrowsmith & Robert D. Anderson, *The WTO Regime on Government Procurement: Past, Present and Future*, in *THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM* (Sue Arrowsmith & Robert D. Anderson eds., 2011).

treatment (NT) and most-favored-nation treatment (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.<sup>16</sup> At the same time, whether such approaches are widely applicable in other areas of trade policy is a complicated question, and one that this Article leaves 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. The Agreement has direct implications for investment policy and 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 Article.

This Article is structured as follows. Part II revisits the origins of the Agreement, the processes involved in the recent renegotiation, and the discrete outcomes of the negotiations. Part III elaborates on the specific design features of the GPA which facilitated its successful renegotiation. Part IV reviews the role of the GPA as a comprehensive policy tool integrating good governance and investment promotion elements in international trade law. Part V outlines the above-mentioned synergies between the revised GPA and other international instruments and initiatives, and Part VI provides concluding remarks.

## II. 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. Each succeeding version increased the extent of relevant markets covered, and elaborated on the above-mentioned special design features of the Agreement, leading to the Agreement's continuous improvement over time. This section outlines related developments.

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16. See *infra* Part III for further analysis of these features.

A. *Origins of the GPA: The Tokyo Round Code*<sup>17</sup>

The Tokyo Round Code on Government Procurement was the modern GPA's early forerunner.<sup>18</sup> The Code, which was signed in 1979 and came into force in 1981, grew out of work undertaken initially in the Organization for Economic Co-operation and Development (OECD) that identified extensive patterns of discrimination in that organization's members' government procurement activities.<sup>19</sup> As will be discussed below in Part III, 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.<sup>20</sup> Rather, a more subject-specific agreement also embodying significant procedural and transparency rules would be required.<sup>21</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 1994 GPA, nonetheless embodied explicit national treatment and most-favored nation obligations in addition to transparency and related rules.<sup>22</sup> The Code's coverage was significantly more limited than the current GPA in two key respects: it covered only the procurement of goods and it only applied to central government entities.<sup>23</sup> The Code's text itself recognized 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.<sup>24</sup> While minor modifications were eventually made to the Code itself, leading to a formal amend-

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17. See Arrowsmith & Anderson, *supra* note 15, at 4-5, 14. See also, Annet Blank & Gabrielle Marceau, *The History of the Government Procurement Negotiations Since 1945*, 4 PUB. PROCUREMENT L. REV. 77, 79 (1996).

18. See Blank & Marceau, *supra* note 17, at 77-78.

19. See generally ORG. FOR ECON. CO-OPERATION & DEV., GOVERNMENT PURCHASING IN EUROPE, NORTH AMERICA AND JAPAN—REGULATIONS AND PROCEDURES (1966).

20. Arrowsmith & Anderson, *supra* note 15, at 15.

21. *Id.*

22. Blank & Marceau, *supra* note 17, at 97.

23. *Id.* at 99.

24. 1979 GPA, *supra* note 1, art. IX.

ment in 1988,<sup>25</sup> 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).

B. *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.<sup>26</sup> The GPA 1994 also included important new institutional requirements for bid protest or "domestic review" systems to rule on supplier complaints,<sup>27</sup> and strengthened disciplines on "offsets."<sup>28</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>29</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 were formally separate from the Uruguay Round negotiations, the main players in both negotiations considered them to be intrinsically linked.<sup>30</sup> The progress on the negotiations on a new GPA was dependent on progress in the Uruguay Round and vice versa.<sup>31</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,"<sup>32</sup> both sector- and country-specific, as well as negotiated "notes"<sup>33</sup> that limited the application of the non-discrimination principle contained in the Agreement in important ways. While some of

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25. See *Government Procurement: Agreement on Government Procurement*, *supra* note 6.

26. *Id.*

27. See *infra* Section IV.A.1.

28. "Offsets" in government procurement include mandatory (government-imposed) local content, technology licensing, investment, counter-trade and similar actions or requirements. For a legal definition in the context of the 2012 GPA, see 2012 GPA, *supra* note 1, art. I(1).

29. See Blank & Marceau, *supra* note 17, at 102-03.

30. *Id.* at 114-15.

31. *Id.*

32. See 1994 GPA, *supra* note 1, app. I.

33. *Id.*

these reciprocity clauses and notes were withdrawn in the course of the negotiations, a number remained. As will be explained below, the flexibility these mechanisms introduced was an important feature of the negotiation leading to the GPA 2012.

C. *The Road to the New Agreement: The GPA 2012*

The renegotiation and adoption of a revised Agreement was clearly foreseen already in the GPA 1994: Article XXIV.7(b) of the 1994 Agreement provided a mandate for the Committee to serve as a forum for negotiations with a view to “improving the Agreement” and “achieving the greatest possible extension of its coverage among all Parties.”<sup>34</sup> The negotiations were to commence not later than the end of the third year from the date of entry into force of the Agreement and to “seek to eliminate remaining discriminatory measures and practices”.<sup>35</sup> The Committee on Government Procurement also expressed, soon after the start of the renegotiation, its desire to facilitate accession to the Agreement by additional Parties, notably developing countries.<sup>36</sup>

Preliminary discussions regarding the eventual negotiations commenced as early as the first year of the entry into force of the 1994 Agreement.<sup>37</sup> At its 1996 formal annual meeting,<sup>38</sup> the Committee agreed to undertake an early review starting in 1997, in view of the negotiating mandate embodied in Article XXIV.7 (b) and (c) of the Agreement.<sup>39</sup> The review would cover: “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>40</sup>

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34. *Id.* at art. XXIV.

35. *Id.* at art. XXIV.

36. See Sue Arrowsmith, *Reviewing the GPA: The Role and Development of the Plurilateral Agreement After Doha*, 5 J. INT'L ECON L. 761-790 (2002); see also, e.g., Rep. of the Comm. on Gov't Procurement, ¶ 23, WTO Doc. GPA/8 (1996) [hereinafter WTO Doc. GPA/8]; Rep. of the Comm. on Gov't Procurement, ¶ 21, WTO Doc. GPA/19 (1997) [hereinafter WTO Doc. GPA/19].

37. See Anderson & Arrowsmith, *supra* note 15, at 21; Robert D. Anderson & Kodjo Osei-Lah, *The Coverage Negotiations Under the Agreement on Government Procurement: Context, Mandate, Process and Prospects*, in THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM, *supra* note 15, at 149-74.

38. WTO Doc. GPA/8, *supra* note 36, ¶¶ 2, 21.

39. *Id.* ¶¶ 21-22; Rep. of the Comm. on Gov't Procurement, ¶¶ 21-22, WTO Doc. WT/L/190 (1996).

40. WTO Doc. GPA/8, *supra* note 36, ¶ 21; see generally Anderson & Osei-Lah, *supra* note 37.

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>41</sup> An informal Checklist of Issues was kept up to date in order to monitor progress in the negotiations.<sup>42</sup> 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>43</sup>

In 1999 and 2000 consultations regarding the revision of the text continued in informal sessions.<sup>44</sup> In February 2002, the Chairman of the Committee proposed a "Timetable and Work Programme for the Negotiations under Article XXIV:7 of the Agreement", which was agreed by the Committee.<sup>45</sup>

Just as the plurilateral 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 multilateral Doha Round of negotiations in the WTO.<sup>46</sup> However, while the 1994 GPA negotiations benefitted from the coinciding, dynamic Uruguay Round negotiations, the same was not needed for the 2012 revision of the GPA. That the GPA renegotiation was a stand-alone agenda enabled it to move forward on its own parallel track distinct from the much wider Doha Round of negotiations.<sup>47</sup>

The GPA Parties' negotiators reached agreement on most elements of the revised GPA text in December 2006.<sup>48</sup> To ensure that the market access aspect of the negotiations was not allowed to linger, it was agreed that the text could only be adopted if any outstanding (final) provisions were agreed upon, and a mutually satisfactory outcome in the coverage

41. WTO Doc. GPA/19, *supra* note 36, ¶ 19.

42. See Anderson & Arrowsmith, *supra* note 15, at 21.

43. WTO Doc. GPA/19, *supra* note 36, ¶ 21.

44. Rep. of the Comm. on Gov't Procurement, at 4-5, WTO Doc. GPA/30 (1999); Rep. of the Comm. on Gov't Procurement, at 4-5, WTO Doc. GPA/44 (2000).

45. Rep. of the Comm. on Gov't Procurement, at 6-8, WTO Doc. GPA/73 (2002). See also Anderson & Osei-Lah, *supra* note 37 at 163.

46. See *Understanding the WTO: The Doha Agenda*, WORLD TRADE ORG., [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) (last visited Nov. 14, 2017).

47. 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 World Trade Organization, Ministerial Declaration of 7 December 2013, ¶ 1.4, WTO Doc. WT/Min(13)/Dec (2013); World Trade Organization, Ministerial Declaration of 21 December 2015, ¶ 23, WTO Doc. WT/Min(15)/Dec (2015).

48. See discussion *infra* Section II.D.2.

negotiations would also be found.<sup>49</sup> All these elements formally came together in March 2012, after the political conclusion of the renegotiation had been reached in December 2011.<sup>50</sup>

Final details of the coverage negotiations were still being hashed out on the morning of the day on which the decision to that effect was taken by the GPA Parties' Ministers in December 2011.<sup>51</sup> Procedurally important for the successful conclusion of the negotiations was a "Roadmap" that had been proposed by Committee Chairman Niggli in 2010 and updated in line with progress achieved in 2011.<sup>52</sup> The Roadmap guided the Committee in its parallel discussions on the various aspects of the renegotiations, including market access, the final provisions of the revised text, a number of "Future Work Programmes"<sup>53</sup>; and the approach to be followed in bringing the revised agreement into effect.<sup>54</sup> The proposed Work Programmes responded 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 and were therefore recognized as topics to be addressed as part of the continued work of the Committee.<sup>55</sup>

As a further means of addressing concerns regarding perceived imbalances in coverage offered, some Parties used the possibility under

49. See Rep. of the Comm. on Gov't Procurement, ¶ 20, WTO Doc. GPA/89 (2006); see also Robert D. Anderson, *Making Law in 'New' WTO Subject Areas*, in *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, 275, 285 (Gabrielle Marceau ed., 2015).

50. See Rep. of the Comm. on Gov't Procurement, ¶ 6, WTO Doc. GPA/116 (2012) [hereinafter WTO Doc. GPA/116].

51. *Historic Deal Reached on Government Procurement*, WORLD TRADE ORG. (Dec. 15, 2011), [https://www.wto.org/english/news\\_e/news11\\_e/gpro\\_15dec11\\_e.htm](https://www.wto.org/english/news_e/news11_e/gpro_15dec11_e.htm); see also Robert D. Anderson & Anna Caroline Müller, *The Revised WTO Agreement on Government Procurement as an Emerging Pillar of the World Trading System: Recent Developments*, 7(1) TRADE, L. & DEV. 42 (2015); Robert D. Anderson, *The Conclusion of the Renegotiation of the World Trade Organization Agreement on Government Procurement: What it Means for the Agreement and for the World Economy*, 12 Pub. Procurement L. Rev. 83, 85 (2012).

52. See Anderson, *The Conclusion of the Renegotiation*, *supra* note 5, at 85.

53. See WTO Doc. GPA/116, *supra* note 50, ¶ 6.

54. See Anderson, *The Conclusion of the Renegotiation*, *supra* note 5 (detailing the processes and tactics leading to the conclusion of the GPA renegotiation).

55. See *infra* Section II.D.3; see also Anderson & Müller, *supra* note 51, at 63. As in the original 1994 Agreement, an eventual further round of negotiations is foreseen in the revised Agreement. See 2012 GPA, *supra* note 1, art. XXII.7 (implying aims of improving the Agreement, progressively reducing and eliminating discriminatory measures, and achieving the greatest possible extension of its coverage among all Parties).

the GPA to introduce country-specific derogations and reciprocity notes in Parties' coverage schedules to take account of and adapt to different "levels of ambition."<sup>56</sup> The European Union (EU), 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>57</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.

Under the terms of the Protocol, politically agreed upon on December 15, 2011,<sup>58</sup> and formally adopted on March 30, 2012,<sup>59</sup> the revised Agreement was to come into effect upon submission of the required "instruments of acceptance" by two thirds of the Parties to the Agreement.<sup>60</sup> In light of the progress made in the submission of acceptances by various Parties, at a separate ministerial-level meeting held on December 3, 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 March 31, 2014.<sup>61</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.<sup>62</sup> During the meeting, several other Parties indicated that

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56. See Anderson & Müller, *supra* note 51, at 50.

57. 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 informally as "First Class," "Business Class," "Premium Economy," and "Economy Class" coverage. See e.g. *Entities*, ¶ 2 to Annex I of *Appendix I of the European Union to the Revised GPA*, WORLD TRADE ORG., <https://e-gpa.wto.org/en/Annex/Details?Agreement=GPA113&Party=EuropeanUnion&AnnexNo=1&ContentCulture=en&AdvancedSearch=False> (last visited Nov. 14, 2017). See also European Commission Press Release IP/11/1556, *Successful Conclusion of the WTO's Government Procurement Negotiation: EU Succeeds in Gaining More Market Access* (Dec. 15, 2011).

58. *Historic Deal Reached on Government Procurement*, *supra* note 51.

59. 2012 GPA, *supra* note 1, ¶ 1.

60. *Id.* art. XXII.11.

61. World Trade Organization, Comm. on Gov't Procurement, Declaration on the Ministerial-Level Meeting of 3 December 2013, ¶ 1, WTO Doc. GPA/122 (2013) [hereinafter GPA/122].

62. See Press Release, World Trade Org, Ministers Greet Progress on Ratification of Revised Agreement on Government Procurement (Dec. 4, 2013), [https://www.wto.org/english/news\\_e/news13\\_e/gpro\\_04dec13\\_e.htm](https://www.wto.org/english/news_e/news13_e/gpro_04dec13_e.htm) (last visited Nov. 14, 2017); WTO Doc. GPA/122, *supra* note 61, ¶ 1.

they would submit their acceptances in the following weeks.<sup>63</sup> The Protocol entered into force on April 6, 2014.

To date, all but one of the remaining Parties have formally accepted the revised Agreement.<sup>64</sup> The remaining Party to the GPA 1994 that has yet to submit its instrument of acceptance, Switzerland, has made clear that it fully intends to eventually accept the revised Agreement.<sup>65</sup> 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.<sup>66</sup>

Overall, the GPA renegotiation has clearly demonstrated that the plurilateral nature of the Agreement, which allows 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.

#### D. *Outcomes of the Renegotiation*

As outlined above, the elements of agreement adopted by the GPA Parties on March 30, 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 section provides additional information on each of these three elements.<sup>67</sup>

##### 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 commit-

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63. *Id.*

64. *See* Rep. of the Comm. on Gov't Procurement, §2.1, WTO Doc. GPA/145 (2017).

65. *See id.*

66. *See* *Revision des Beschaffungsrechts* [Revision of the Procurement Law], BESCHAFFUNGSKONFERENZ DES BUNDES BKB [Procurement Conference of the Federal Government BKB], <https://www.bkb.admin.ch/bkb/de/home/oeffentliches-beschaffungswesen/revision-des-beschaffungsrechts.html> (last visited Nov. 14, 2017).

67. For further information, see generally Anderson, *The Conclusion of the Renegotiation*, *supra* note 5; Anderson et al., *An Important Milestone*, *supra* 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* [*The 2012 Revision of the WTO Agreement on Government Procurement: Its Context and the Scope of its Application*], 51 CAN. Y.B. INT'L L. 99 (2014); *see* Anderson & Müller, *supra* note 51.

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ments, 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. As set out in its Article II, the Agreement applies only to procurement “as specified in each Party’s annexes to Appendix I” of the Agreement.<sup>68</sup> In other words, in order to be covered, a procurement must (i) be carried out by a procuring entity that each Party has listed in Annexes 1 to 3 of its market access schedules (Appendix I Annexes); (ii) concern a good or a service or construction service found respectively in Annexes 4 to 6 of Appendix I, and (iii) be of an estimated value not less than certain threshold values, which are specified in each Party’s Annexes 1 to 3 to Appendix I.<sup>69</sup>

BOX 1.

THE STRUCTURE OF GPA COVERAGE SCHEDULES (APPENDIX I OF THE AGREEMENT)

For each GPA Party, Appendix I is divided into seven 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.	
Annex 1	Central Government Entities
Annex 2	Sub-Central Government Entities
Annex 3	Other Entities
Annex 4	Goods
Annex 5	Services
Annex 6	Construction Services
Annex 7	General Notes

68. See 2012 GPA, *supra* note 1, art. II.

69. 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. See Integrated Government Procurement Market Access Information (e-GPA) Portal, WORLD TRADE ORG., <https://e-gpa.wto.org/> (last visited Nov. 14, 2017).

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 free to choose a generic or a list approach and, in the case of the latter, they can 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.

Reproduced from Robert D. Anderson, Anna Caroline Müller & Phillipe Pelletier, *Regional Trade Agreements and Procurement Rules: Facilitators or Hindrances?* 12 (Eur. U. Inst. Working Paper, RSCAS No. 81, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2707219##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2707219##) (last visited Nov. 14, 2017).

The additional market access provided in the renegotiation has been estimated by the WTO Secretariat as equivalent to \$100 billion of commercial opportunities each year.<sup>70</sup> Parties have:

- added more than 600 additional central, local and other government agencies, including Canada's sub-central level of government (i.e. its provinces and territories);<sup>71</sup>
- for the first time, included build-operate-transfer contracts, a form of public-private partnership and another significant addition to coverage (three Parties);<sup>72</sup>
- covered some additional services, especially telecommunications services (almost all Parties);<sup>73</sup>
- made improvements in the coverage of goods;<sup>74</sup>

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70. World Trade Organization, Eighth WTO Ministerial Conference: Report by the Director-General, WTO Doc. WT/MIN(11)/5, at 6 (2011), [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.

71. For further discussion see David Collins, *Canada's Sub-Central Government Entities and the Agreement on Government Procurement: Past and Present*, in *THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM* 175.

72. The Parties concerned are the European Union, Japan and Korea. See 2012 GPA, *supra* note 1, app. I.

73. See *id.*

74. See *id.*

- included the full range of construction services, subject to relevant thresholds;<sup>75</sup> and
- lowered some of the thresholds applied under the Agreement, notably those applied by Israel, Japan, Korea and the Netherlands with respect to Aruba.<sup>76</sup>

## 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.<sup>77</sup> The revised GPA text crystallizes current best practices in government procurement that are agreed upon by and acceptable to all GPA Parties and 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>78</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 basic principles and many of the elements of the 1994 Agreement have been maintained in the 2012 Agreement. Yet, the revised

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75. *See id.*

76. *See id.*, *Thresholds Indicated in Annexes 1, 2 and 3 of Appendix I to the Revised GPA*, WORLD TRADE ORG., <https://e-gpa.wto.org/en/ThresholdNotification/FrontPage> (last visited Nov. 14, 2017).

77. *See Anderson, The Conclusion of the Renegotiation*, *supra* note 5, at 85.

78. 2012 GPA, *supra* note 1, arts. VI-XV.

text contains various improvements. For example, the revised text significantly streamlined various provisions of the Agreement. To make the text easier to understand it contains an extensive list of defined terms.<sup>79</sup> In contrast, the 1994 text left open the meaning of most terms, thus potentially creating ambiguities.<sup>80</sup> The provisions of the revised text have also been re-ordered to follow typical procurement processes more organically. Overall, the language of relevant provisions has been simplified and overly complicated provisions have been shortened.

A further aspect that was emphasized and that 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. The Preamble observes that "the procedural commitments under this Agreement should be sufficiently flexible to accommodate the specific circumstances of each Party."<sup>81</sup>

To achieve this goal, multiple new flexibility mechanisms were introduced. First, certain exceptions that several Parties included in their Appendix I Annexes to the 1994 Agreement are codified in the revised text, thereby ensuring flexibility with regard to specific areas of concern.<sup>82</sup> Second, references to the methods of open tendering, selective tendering and limited tendering are no longer treated as exhaustive under the revised Agreement because Article IV:4 makes clear that procurement is to be conducted using methods "such as" those specified.<sup>83</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>84</sup> Additional flexibility is also provided for sub-central and other entities that are, in some respects, required to comply with less stringent requirements than central

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79. *Id.* art. I.

80. See 1994 GPA, *supra* note 1; see also Sue Arrowsmith, *The Revised Agreement on Government Procurement: Changes to the Procedural Rules and Other Transparency Provisions*, in *THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM*, *supra* note 15, at 285, 297.

81. See 2012 GPA, *supra* note 1, pmb. ("Recognizing that the procedural commitments under this Agreement should be sufficiently flexible to accommodate the specific circumstances of each Party . . .").

82. See *id.* art. II.3.

83. See *id.* art. IV.4(a).

84. See *id.* art. IX.7.

government entities.<sup>85</sup> Furthermore, the provisions on technical specifications are modified to expressly authorize procuring entities to use specifications “to promote the conservation of natural resources or protect the environment,” thus ensuring due scope to address a common policy concern.<sup>86</sup>

The revised text also takes into account modern procurement practices, such as the use of electronic tools, and addresses questions of availability and interoperability of different systems and software;<sup>87</sup> the availability of mechanisms to ensure the integrity of requests for participation and tenders;<sup>88</sup> and the maintenance of data to ensure the traceability of the conduct of covered procurement by electronic means.<sup>89</sup> The minimum time periods stipulated by the Agreement have been adapted to modern practice and shorter notice periods are now permissible when electronic tools are used.<sup>90</sup> Shorter time periods have also been allowed for recurring contracts, states of urgency and where the goods and services being procured are available on the commercial marketplace.<sup>91</sup>

Another important feature of the revised text, examined in greater depth in Part III below, concerns its improved transitional measures for developing countries.<sup>92</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>93</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 \$440 billion - \$1,127 trillion annually.<sup>94</sup>

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85. *Id.* arts. VII.1.5, IX.12, XI.8.

86. *Id.* art. X.6.

87. *See id.* art. IV.3(a).

88. *See id.* art. IV.3(b).

89. *Id.* art. XVI.3(b).

90. *Id.* art. XI.5.

91. *See id.* art. XI.4(b)-(c), XI.7.

92. For an in-depth discussion, 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 THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM, *supra* note 15, at 339. 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.

93. *See* 2012 GPA, *supra* note 1, pmb. (“*Desiring* to encourage acceptance of and accession to this Agreement by WTO Members not party to it . . .”).

94. *See* Robert D. Anderson, Anna Caroline Müller, Kodjo Osei-Lah & Philippe Pelletier, *Assessing the Value of Future Accessions to the WTO Agreement on Government Procurement: Some New Data*

The revised Agreement provides developing countries that accede to it with a new range of specific transitional measures, subject to conditions that are noted below. The specific measures that are potentially available include: (i) price preferences; (ii) offsets;<sup>95</sup> (iii) phased-in addition of specific entities and sectors; and (iv) thresholds that are initially set higher than their permanent level.<sup>96</sup> 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 Least Developed Countries (LDCs), or up to three years for other developing countries.<sup>97</sup> These periods can be extended by decision of the Committee, on request by the country concerned.<sup>98</sup> 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.<sup>99</sup>

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>100</sup> This new substantive provision's significance is reinforced by new language in the Preamble to the Agreement, recognizing the GPA's significance for good governance and the fight against corruption.<sup>101</sup> Together, these elements can be seen as signaling a belief on the part of the Parties that the GPA, while first and foremost an international trade agreement, is

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*Sources, Provisional Estimates, and an Evaluative Framework for WTO Members Considering Accession*, 21 PUB. PROCUREMENT L. REV. 113, 116 (2012). For an earlier version of the article circulated as a WTO Staff Working Paper, see Robert D. Anderson, Anna Caroline Müller, Kodjo Osei-Lah & 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* (WTO Staff Working Paper No. ERSD-2011-15, 2011), [https://www.wto.org/english/res\\_e/reser\\_e/ersd201115\\_e.htm](https://www.wto.org/english/res_e/reser_e/ersd201115_e.htm) (last visited Nov. 14, 2017).

95. See *supra* note 28 and accompanying text for the definition of "offsets."

96. See 2012 GPA, *supra* note 1, art. V.3.

97. See *id.* art. V.4.

98. See *id.* art. V.6.

99. See *id.* art. V.8.

100. *Id.* art. IV.4.

101. *Id.* pmb1. ("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. . . .").

directly relevant to the global struggle for good governance. 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 Agreements.<sup>102</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 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 in improving governance internationally.<sup>103</sup>

### 3. Looking to the Future: The New Work Programmes of the Committee on Government Procurement

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 "Work Programmes"<sup>104</sup> 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 March 30, 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>105</sup>
- A Work Programme to enable Parties to improve procedures followed in the collection and reporting of statistical data relating to the Agreement;<sup>106</sup>
- A Work Programme to promote the use of sustainable procurement practices, consistent with the Agreement;<sup>107</sup>
- A Work Programme to address restrictions and exclusions in Parties' coverage commitments under the Agreement;<sup>108</sup> and

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102. See Arrowsmith, *supra* note 80, at 285; see also Anderson et al., *An Important Milestone*, *supra* note 5, at 3.

103. See *infra* Part IV for further discussion.

104. See WTO Doc. GPA/113, *supra* note 1, ¶ 1(b)(ii).

105. See *id.* Annex C.

106. See *id.* Annex D.

107. See *id.* Annex E.

108. See *id.* Annex F.

- A Work Programme on safety standards in international procurement.<sup>109</sup>

In addition to the above-noted Work Programmes, which were automatically initiated with the entry into force of the revised Agreement in 2014, and are currently under consideration, a further attachment to the Protocol of Amendment lists additional work programs that may be initiated in the future regarding: (a) 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>110</sup> Furthermore, a new process for electronic notification of changes to national laws and regulations is established.<sup>111</sup>

The Work Programmes were integral to the outcome of the negotiations and, arguably, provided an essential ingredient for the conclusion that has been reached. They allowed Parties to address issues of concern without having to come to final conclusions or establishing binding rules in the renegotiation process.

For example, most GPA Parties recognize the importance of integrating small- and medium-size enterprises in procurement markets; nonetheless, there are different ways of promoting their market access. In fact, the market access implications of the longstanding US “set-aside” program for small businesses were cited as a concern by the EU early in the GPA renegotiation,<sup>112</sup> and some question the efficacy and cost-effectiveness of set-asides and other programs to promote SME participation in procurement processes.<sup>113</sup> The Committee’s work may help in providing further transparency and facilitate discussion among Parties that may, at least potentially, inform related policy-making at the national level.

Similarly, the issue of sustainability in public procurement practices is highly topical, especially in light of newer developments such as the

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109. *See id.* Annex G.

110. *See id.* Annex B.

111. *See id.* Annex A.

112. *See generally* European Parliament Directorate Gen. for Res., Survey, *Public Procurement Experiences in the EU and the US After the 1994 Government Procurement Agreement* (Econ. Working Series, Paper No. 28, 1997), [http://www.europarl.europa.eu/RegData/etudes/etudes/join/1997/166744/DG-4ECON\\_ET\(1997\)166744\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/1997/166744/DG-4ECON_ET(1997)166744_EN.pdf) (last visited Nov. 14, 2017).

113. *See* John Linarelli, *The Limited Case for Permitting SME Procurement Preferences in the WTO Agreement on Government Procurement*, in *THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM*, *supra* note 15, at 444, 450.

Paris Agreement reached among the Parties to the United National Framework Agreement on Climate Change.<sup>114</sup> However, views on what is understood by sustainability and whether it encompasses social policy considerations in addition to environmental concerns differ among jurisdictions.<sup>115</sup> The relevant Work Programme mandates the Committee to address, inter alia, “the ways in which sustainable procurement can be practiced in a manner consistent with Parties’ international trade obligations.”<sup>116</sup> It provides a valuable forum for discussion in this regard.

In line with traditional trade liberalization objectives pursued through the Agreement, any remaining restrictions and exclusions from Parties’ coverage commitments under the Agreement are a further topic for discussion, and the trade implications of safety standards in international procurement as implemented by some Parties have also, in the past, been a focus of concern. Relevant work programs allow Parties to discuss these issues without prejudice to specific outcomes.

#### E. *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 decades. The GPA’s predecessor, the Tokyo Round Government Procurement “Code,” covered a total of nineteen countries, ten of which were EU Member States.<sup>117</sup> In 1996, when the GPA 1994 came into force, it covered twenty-one WTO members.<sup>118</sup> Currently, the Agreement binds forty-seven WTO members, which count formally as nineteen “Parties” (the EU and its twenty-eight Member States are formally counted as one Party).<sup>119</sup> Ukraine and Moldova are the latest WTO Members to have become GPA Parties, in 2016,<sup>120</sup> following Montenegro and New

114. See Paris Agreement, 2015, C.N.92.2016.TREATIES-XXVII.7.d (Depository Notification), [http://unfccc.int/files/essential\\_background/convention/application/pdf/english\\_paris\\_agreement.pdf](http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf).

115. See Committee on Government Procurement, *Key take-aways from the Committee’s Symposium on Sustainable Procurement*, WTO Doc. GPA/W/341 (May 30, 2017).

116. WTO Doc. GPA/113, *supra* note 1, Annex E, ¶ 2(d).

117. See Blank & Marceau, *supra* note 17, at 102.

118. See *Agreement on Government Procurement: Parties, Observers and Accessions*, *supra* note 4.

119. 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. See *Agreement on Government Procurement: Parties, Observers and Accessions*, *supra* note 4.

120. *Id.*

Zealand in 2015.<sup>121</sup>

All WTO members are eligible to accede to the GPA.<sup>122</sup> For most WTO Members, participation in the GPA is entirely optional, as they have no pre-existing commitment to join the Agreement.<sup>123</sup> In such cases, the decision to seek accession can be based on a stand-alone assessment of potential benefits and costs of the Agreement in the light of each Member's economic situation. Increasingly, however, newly acceding WTO Members take on commitments, at the time of their accession to the WTO, to eventually seek GPA accession.<sup>124</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.<sup>125</sup>

There are two formal requirements for 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>126</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 thresholds applicable in each case; and any exceptions or exclusions that will apply. Second, each Party must ensure its laws, regulations and administrative procedures, in addition to the rules, procedures and practices applied by its procuring entities, conform with the Agreement's provisions.<sup>127</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.<sup>128</sup>

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121. *Id.*

122. *See* 2012 GPA, *supra* note 1, art. XXII.2.

123. For further analysis of the interaction between WTO accession and GPA accession, see Robert D. Anderson & Anna Caroline Müller, *WTO Accession and Accession to the Agreement on Government Procurement: What is the Relationship? Why Should WTO Acceding Governments Also Consider GPA Accession?*, in *WTO ACCESSIONS AND TRADE MULTILATERALISM: CASE STUDIES AND LESSONS FROM THE WTO AT TWENTY* 674, 682 (Uri Dadush & Chiedu Osakwe eds., 2015).

124. *Id.*

125. *Id.*

126. *See* 2012 GPA, *supra* note 1, art. XXII.2.

127. *See id.* art. XXII.4.

128. *See* Committee on Government Procurement, *Checklist of Issues for Provision of Information Relating to Accession to the Revised Agreement on Government Procurement*, WTO Doc. GPA/132 (2015).

All signs indicate that the GPA's membership will continue to grow over time. Currently, ten other WTO Members (Albania, Australia, China, Georgia, Jordan, Kyrgyz Republic, Oman, the Russian Federation, Tajikistan, and the former Yugoslav Republic of Macedonia) have applied for accession to the Agreement. The majority of these are actively pursuing related negotiations.<sup>129</sup> Five other WTO Members (Afghanistan, Kazakhstan, Mongolia, Saudi Arabia, and Seychelles) have undertaken commitments in their WTO accession protocols to eventually seek accession.<sup>130</sup>

Strikingly, new candidates for accession to the Agreement increasingly base their interest in GPA accession on their suppliers' access to GPA covered procurements (i.e., traditional mercantilist motivations), but also as a means of improving governance and strengthening competition in their own procurement markets.<sup>131</sup> In a major development for the Agreement, in 2016, Ukraine and Moldova became full Parties to the GPA.<sup>132</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.<sup>133</sup>

Thus, the entry into force of the revised Agreement, and the growth and diversification of the GPA's membership are an expression of the enhanced role government procurement and the GPA are playing in the global economy. Both emerging and established economies are increasingly aware of the need to build and renew infrastructure in order to foster economic growth and prosperity. At the same time, budgetary pressures accentuate the vital role an efficient procurement system can play in meeting those needs. In this regard, the GPA is the main tool to maintain open and competitive markets despite widespread temptations on the part of governments to implement measures that potentially restrict access to their public procurement markets. The GPA also serves as a model for relevant chapters in regional trade

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129. See *Solid progress in talks on Australia's accession to the Government Procurement Agreement*, WORLD TRADE ORG., [https://www.wto.org/english/news\\_e/archive\\_e/gpro\\_arc\\_e.htm](https://www.wto.org/english/news_e/archive_e/gpro_arc_e.htm) (last visited Nov. 14 2017).

130. See *Agreement on Government Procurement: Parties, Observers and Accessions*, *supra* note 4.

131. Anderson & Müller, *supra* note 123, at 686-87.

132. See *Ukraine and the Republic of Moldova Welcomed to WTO Procurement Pact*, WORLD TRADE ORG., [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) (last visited Nov. 14, 2017).

133. See Committee on Government Procurement, Minutes of the Formal Meeting of 11 November 2015, paras. 1.9-1.13, WTO Doc. GPA/M/63 (2016).

agreements (see related discussion below), and is now extensively harmonized with other important international instruments in this area, notably the UNCITRAL Model Law on Procurement,<sup>134</sup> and is increasingly taken into account in the procurement rules and guidelines of international donor organizations such as the World Bank.<sup>135</sup> In sum, the revised GPA is fast becoming a pillar of the WTO system and of today's global economy.<sup>136</sup>

### III. THE KEY DESIGN FEATURES UNDERLYING THE GPA'S SUCCESS

As previously stated, 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 Committee Chairman 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 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.

#### A. *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

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134. The Model Law has also been prepared with a view to supporting the harmonization of international standards in public procurement, and takes account of the provisions of the GPA and other relevant instruments. See *UNCITRAL Model Law on Public Procurement (2011)*, U.N. COMMISSION INT'L TRADE L., [http://www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/2011Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html) (last visited Nov. 13, 2017).

135. See *New Procurement Framework and Regulations for Projects After July 1, 2016*, WORLD BANK, <http://www.worldbank.org/en/projects-operations/products-and-services/brief/procurement-new-framework> (last updated Aug. 21, 2017); see also World Bank, *Draft Guide to the APA Assessment: Methodology to Assess Alternative Procurement Arrangements in Borrower Implementing Agencies for Procurements Financed Under IPF*, at 20, (2016), <http://pubdocs.worldbank.org/en/634391468437110489/Alternative-Procurement-Arrangements-Guide-to-the-Assessor.pdf> (last visited Nov. 14, 2017). In the Alternative Procurement Arrangements (APAs) framework, Agencies from GPA countries do not need to be assessed for those elements that are assessed as part of the GPA accession process.

136. See Anderson & Müller, *supra* note 51, at 62.

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 currently binds forty-seven out of 164 WTO members, which formally constitute nineteen “Parties” to the GPA (the EU and its twenty-eight 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 to, for example, the Agreement’s coverage. Fundamentally, however, the Parties to the Agreement are convinced of the benefits that they thereby enjoy and are desirous of ensuring a successful future for the Agreement.<sup>137</sup> This, in itself, is hugely beneficial in enabling progress and makes the GPA Committee a highly active and efficient WTO body. Second, the 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 are other aspects of the work of the organization.<sup>138</sup>

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137. For information provided by the relevant authorities of the EU, see European Commission Press Release MEMO/11/922, FAQs: Revised GPA Agreement (Dec. 14, 2011). For information provided by countries outside of the EU, see *Government Procurement*, GLOBAL AFF. CAN., <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/gp-mp/index.aspx?lang=eng> (last modified Sept. 1, 2017); *Our Work with the WTO*, N.Z. MINISTRY OF FOREIGN AFF. & TRADE, <https://www.mfat.govt.nz/en/trade/our-work-with-the-wto/#gpa> (last visited Nov. 14, 2017); *Benefits for the United States from the Revised WTO Government Procurement Agreement*, OFF. OF THE U.S. TRADE REP., <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2011/december/benefits-united-states-revised-wto-government-procur> (last visited Nov. 14, 2017).

138. 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, this was arguably 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.

B. *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. As will be further illustrated in the following sections, this follows from the legal structure and scope of the Agreement, its 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.

More specifically, both the GATT and the GATS contain general exclusions from their core provisions relating to most-favored nation treatment, national treatment and—in the case of the GATT and the GATS—market access commitments for the purchase of goods/services by governments for governmental purposes (e.g., not with a view to commercial resale or with a view to use in the supply of good or services for commercial sale).<sup>139</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>140</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 negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement.”<sup>141</sup> 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>142</sup> No similar mandate to “fill the gap” is contained in the GATT.

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139. See General Agreement on Tariffs and Trade art. III.8(a), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; General Agreement on Trade in Services art. XIII, Apr. 15, 1994, 1869 U.N.T.S. 183 [hereinafter GATS]; see also SUE ARROWSMITH, GOVERNMENT PROCUREMENT IN THE WTO 49-76, 78-85 (2003). 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 PUB. PROCUREMENT L. REV. NA147-53 (2013).

140. WORLD TRADE ORG., A HANDBOOK ON THE GATS AGREEMENT 38 (2005); see also Blank & Marceau, *supra* note 17, at 125; Arfowsmith & Anderson, *supra* note 15, at 10.

141. See GATS, *supra* note 139, art. XIII, ¶2.

142. 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

The GPA 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 defines procurement falling within its general scope of application as covered procurement “for governmental purposes” not undertaken “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.”<sup>143</sup>

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 limits its scope of application to government procurement policies as such, and leaves border and other measures that can affect the ability of commercial enterprises, particularly foreign enterprises, to sell goods or services to governments for regulation, if any, under GATT and GATS.<sup>144</sup> Article IV.7 of the revised text states as follows in addressing “Measures Not Specific to Procurement”:

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.<sup>145</sup>

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

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scheduling instrument to interested Members. See Patrick A. Low et al., *Government Procurement in Services*, in *LAW AND POLICY IN PUBLIC PURCHASING: THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT* 225, 229 (Bernard M. Hoekman & Petros C. Mavroidis eds., 1997).

143. 2012 GPA, *supra* note 1, art. II.2(a)(ii).

144. *Id.* art. IV.7.

145. *Id.*

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 among their commitments under the various WTO Agreements. In fact, the market access commitments made under the GPA are likely to bear great weight 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.<sup>146</sup> 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 that 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>147</sup>

FIGURE 1.  
ILLUSTRATION OF THE INTERACTION BETWEEN GPA AND GATS  
COMMITMENTS

<b>GPA commitments on services procurement?</b>	<b>GATS commitments on the relevant services?</b>	<b>Commercial result</b>
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

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146. See also Robert D. Anderson, Claudia Locatelli, Anna C. Mueller & Phillippe Pelletier, *The Relationship Between Services Trade and Government Procurement Commitments: Insights from Relevant WTO Agreements and Recent RTAs* 18 (World Trade Org., Working Paper, ERSD No. 21, 2014), at 19.

147. *Id.* at 20.

WTO AGREEMENT ON GOVERNMENT PROCUREMENT

GPA commitments on services procurement?	GATS commitments on the relevant services?	Commercial result
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.<sup>148</sup> 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. Article II.2(a) of the revised GPA text clearly states that the GPA applies to covered procurement of “goods, services,

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148. See *Applied Tariff/Applied Rates* (Glossary term), WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/glossary\\_e/applied\\_tariff\\_e.htm](https://www.wto.org/english/thewto_e/glossary_e/applied_tariff_e.htm) (last visited Nov. 14, 2017) (“Duties that are actually charged on imports. These can be below the bound rates.”).

or any combination thereof.”<sup>149</sup> The GPA therefore takes into account the reality of procurement: fulfilling practical procurement needs may well require joint procurement of goods and services and establishing separate rules for each category does not seem warranted.<sup>150</sup> Similarly, the non-discrimination provisions of the GPA go beyond those of GATT. They provide non-discriminatory treatment not only for goods and 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>151</sup> 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>152</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, untapped market for their goods, services, and suppliers.

*C. The GPA’s Role in Ensuring Non-Discriminatory Treatment of Foreign Direct Investment and Cross-Border Trade in Government Procurement Markets*

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>153</sup> Second, no discrimination is allowed based on the origin of goods and services offered by these suppliers.<sup>154</sup> As such, the

149. See 2012 GPA, *supra* note 1, art. II.2.

150. *Id.* art. II.2(a) (“For the purposes of this Agreement, covered procurement means procurement for governmental purposes: of goods, services, or any combination thereof. . . .”).

151. See *id.* art. IV.1-2.

152. See, e.g., Andrea Ariu et al., *The Interconnections Between Services and Goods Trade at the Firm-Level 2* (CESifo Area Conference on Global Econ., Conference Paper, 2016), [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) (last visited Nov. 14, 2017).

153. See 2012 GPA, *supra* note 1, art. IV.2(a).

154. See *id.* art. IV.2(b).

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>155</sup>

The GPA, unlike the GATT, also does not distinguish between border measures and internal measures; it is only concerned with procurement regulation. The GPA, grouping both most-favored-nation and national treatment in a single article, refers to “any measure regarding covered procurement” for both national and most-favored-nation treatment.<sup>156</sup> Also, 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.

D. *The GPA’s Limited Application to “Covered” Procurements and Flexible Coverage*

As outlined above, the GPA’s rules and requirements apply only to procurements that are “covered” by the Agreement. This enables Parties to exclude from application of the Agreement elements of their procurements that are deemed sensitive for policy or political reasons. The 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, the market access commitments in the GPA are defined by detailed schedules that are incorporated in

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155. Eur. Commission Internal Mkt. and Services, *EU Public Procurement Legislation: Delivering Results: Summary of Evaluation Report*, at 15, <https://ec.europa.eu/docsroom/documents/15552/attachments/1/translations/en/renditions/native> (last visited Nov. 14, 2017).

156. See 2012 GPA, *supra* note 1, art. IV.1-2.

Appendix I to the Agreement and 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>157</sup> Individual exclusions and restrictions can be made for specific parts of the procurement market in which Parties would like to derogate from the procedural and transparency rules of the GPA.<sup>158</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, which is explained in the following paragraphs.

E. *Restricted Application of the National Treatment and Most-Favored-Nation Treatment Principles and Reciprocity of Parties' Coverage*<sup>159</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 and most-favored nation principles. The GPA's main non-discrimination provision, contained in Article IV.1 (a)-(b) of the revised text, provides as follows with regards to the principle of non-discrimination:

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 . . . *domestic goods, services and suppliers*; and [] *goods, services and suppliers of any other Party*.<sup>160</sup>

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157. In this regard, the GPA approach is similar to that taken under the GATS Agreement.

158. By way of example, several Parties—but not all—create exceptions for set-asides aimed at small and medium or minority-owned businesses. *See generally* WTO Doc. GPA/113, *supra* note 1, [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_app\\_agree\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm). *See also* section E.3. *infra* and references cited therein.

159. *See* Kamala Dawar, *Transcending Mercantilism: Identifying the Positive Externalities from International Public Procurement Agreements*, 5 PUB. PROCUREMENT L. REV. 181-196 (2016).

160. *See* 2012 GPA, *supra* note 1, art. IV.1 (a)-(b) (emphasis added).

The specific implications of this wording are discussed in the next section.

1. Maintaining the Incentive to Join: Limiting the Benefit of National Treatment and Most-Favored Nation Principles

The GPA, unlike, for example, the WTO's Information Technology Agreement (ITA), extends the market access benefits provided by virtue of its national treatment clause *only* to the Agreement's Parties.<sup>161</sup> 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 renegotiation of the Agreement. It is, in this context, not surprising that the renegotiation concluded in 2012 has sparked renewed interest in GPA accession among the wider WTO membership.<sup>162</sup> 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 national treatment and most-favored nation rules is an important fulcrum of the Agreement's success.

In making these observations, this Article *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

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161. Compare *id.* art. IV.1-2 with World Trade Organization, Ministerial Declaration on Trade in Information Technology Products, ¶ 2, WTO Doc. WT/MIN(96)/DEC/13 (1996).

162. The recent increase in requests for accession and observership testify to this. For an overview, see *Agreement on Government Procurement: Parties, Observers and Accessions*, *supra* note 4.

framework, for example, competition or investment policy. In subject areas where free riding is a concern, however, the GPA's approach merits consideration.

## 2. The Freedom to Conclude Regional Trade Agreements with Non-Parties

The limitation in application of the most-favored nation 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 from the most-favored nation principle within the GPA. 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.<sup>163</sup> 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>164</sup>

## 3. The Role of "Reciprocity" in Conditioning 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.<sup>165</sup> This allows tailoring of each Parties' commitments to reflect the structure of national procurement systems in addition to particular sensitivities that may apply. Another 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>166</sup> Indeed, the role of reciprocity as an overall guideline for the negotiation of market access commitments is specifically referenced in the Agreement.<sup>167</sup>

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163. See Anderson, Locatelli, Mueller & Pelletier, *supra* note 146, at 13.

164. See *infra* Section V.B and sources cited therein.

165. See 2012 GPA, *supra* note 1, art. II.2.

166. Generally, such restrictions are not considered to violate the Agreement because, by definition, they do not involve the treatment of covered procurement as defined in 2012 GPA, *supra* note 1, art. II.2.

167. See 2012 GPA, *supra* note 1, art. XXII.7.

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>168</sup>

The role of reciprocity under the GPA can be criticized as unnecessarily limiting the scope for beneficial changes to take place between jurisdictions.<sup>169</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>170</sup>

#### 4. A Further Application of Reciprocity Principles: the New Arbitration Procedures of the Committee on Government Procurement

The preferences of GPA Parties to maintain flexibility in designing their market access commitments on one hand and reciprocity of commitments on the other are reflected in the Agreement’s provisions regarding the modification of Parties’ schedules (or “Appendix I Annexes”) under the Agreement.<sup>171</sup> Article XIX of the revised Agreement sets out a procedure that permits Parties to notify the Committee of any 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.<sup>172</sup> No further action is needed if no other Party objects to the proposed modification within 45 days (under the GPA 1994, the

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168. ARROWSMITH, *supra* note 139, at 109.

169. *Id.* at 110.

170. For a more detailed discussion of the processes and tactics leading to the conclusion of the GPA renegotiation, see generally Anderson, *The Conclusion of the Renegotiation*, *supra* note 5.

171. See 2012 GPA, *supra* note 1, art. XIX.

172. See *id.*, art. XIX.1.

objection period was 30 days).<sup>173</sup>

Unlike the 1994 GPA, the revised Agreement allows 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.<sup>174</sup> In a recent development further showing the effectiveness of the operation of the GPA and its Committee, the Parties have adopted novel Arbitration Procedures to resolve any disputes that may occur in this respect.<sup>175</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) the mutually agreed coverage is affected by the change.<sup>176</sup> 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 hearings in June 2016, two years after the entry into force of the revised Agreement. This highlights the pragmatism and results orientation of the Committee, as emphasized above.

F. *The GPA's Distinct Approach to Special and Differential Treatment (S&D) of 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, an acceding developing country can negotiate transitional measures ("special and differential treatment" or S&D) in the form of: (i) "a price preference programme"; (ii) "an offset"; (iii) "the phased-in addition of specific entities and sectors"; and (iv) "a threshold that is higher than [the countries'] permanent threshold."<sup>177</sup> Parties may also agree to "the delayed application of any specific obligation" contained in the Agreement, other than the non-discrimination provisions, for a period of five years after accession to the Agreement for Least Developed Countries (LDCs) and of a maximum of three years for any other

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173. 1994 GPA, *supra* note 1, art. XXIV.

174. *See* 2012 GPA, *supra* note 1, art. XIX.5-7.

175. *See* Comm. on Gov't Procurement, *Decision on Arbitration Procedures Pursuant to Article XIX: 8 of the Revised GPA*, WTO Doc. GPA/139 (2016).

176. *See* 2012 GPA, *supra* note 1, art. XIX.7(b) (iv).

177. *See id.* art. V.3.

developing country.<sup>178</sup> All such transitional measures can be extended by decision of the Committee, and new measures can be authorized in special and unforeseen circumstances.<sup>179</sup>

The above-outlined approach to S&D under the revised GPA is subject to three important conditions. First, the transitional measures need to be negotiated by the individual developing country during the accession process, based on its developmental needs—there is no standard set of measures that automatically applies.<sup>180</sup> Second, they are designed as transitional measures, i.e. they are intended to be phased out over time and not kept for an indefinite period of time.<sup>181</sup> Third, they 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”, i.e. made subject to reciprocity considerations.<sup>182</sup> This approach differs from the traditional approach to S&D in the WTO, and arguably addresses some if not most of the questions that have been raised by some with regard to the effectiveness of conventional S&D in facilitating economic development.<sup>183</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>184</sup>

### G. *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. Article XXII.7 provides:

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178. *See id.* art. V.4.

179. *See* Müller, *supra* note 92, at 353.

180. *See* 2012 GPA, *supra* note 1, arts. V.1, V.3.

181. *See id.* arts. V.3, V.5.

182. *See id.* art. V.2.

183. *See* Kyle Bagwell & Robert W. Staiger, *Can the Doha Round be a Development Round? Setting a Place at the Table*, in *GLOBALIZATION IN AN AGE OF CRISIS: MULTILATERAL ECONOMIC COOPERATION IN THE TWENTY-FIRST CENTURY* 91, 91-124 (Robert C. Feenstra & Alan M. Taylor eds., 2014). 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. *See also* Robert D. Anderson, *Reflections on Bagwell and Staiger in Light of the Revised WTO Agreement on Government Procurement*, in *GLOBALIZATION IN AN AGE OF CRISIS: MULTILATERAL ECONOMIC COOPERATION IN THE TWENTY-FIRST CENTURY* 124, 124-130 (Feenstra & Taylor eds., 2014).

184. Nicholas Niggli & Kodjo Osei-Lah, *Infrastructure Provision and Africa’s Trade and Development Prospects* 1-71 (World Trade Org., Econ. Res. & Stat. Division, Working Paper No. 20, 2014), [http://www.wto.org/english/res\\_e/reser\\_e/ersd201420\\_e.pdf](http://www.wto.org/english/res_e/reser_e/ersd201420_e.pdf) (last visited Nov 14, 2017).

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.<sup>185</sup>

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 mandated to commence as early as the end of 2017.<sup>186</sup> 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 steps to further 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 renegotiation.<sup>187</sup>

#### H. *Summary Observations*

This section has outlined a number of specific design features of the GPA which have been important underpinnings of its success. In addition to the Agreement's plurilateral nature, and its complementarity with GATT and GATS, the features 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 and most-favored nation 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 can usefully be applied to other areas of trade policy is a more complicated question, and one which this Article leaves largely to be resolved in other contexts.

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185. 2012 GPA, *supra* note 1, art. XXII.7.

186. *See Agreement on Government Procurement: Parties, Observers and Accessions, supra* note 4.

187. *See supra* Section II.D.3.

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

While the GPA is first and foremost an international trade agreement, its importance goes well beyond the securing of market access. 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.<sup>188</sup> Indeed, the possibility to enhance competition and improve governance in internal procurement markets has the potential to achieve better value for money and thus bring about economic benefits apart from those achieved through exports into external procurement markets.<sup>189</sup> In that sense, accession to the GPA can catalyze and reinforce broader reforms that improve overall governance, and ultimately strengthen not only the economy, but also the legitimacy of governments.

The revised GPA was renegotiated in the aftermath of the recent global economic crisis and it 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 that is environmentally sustainable. It is time to recognize that such rules are an essential counterpart to market opening.<sup>190</sup>

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

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188. See 1994 GPA, *supra* note 1.

189. See Anderson et al., *supra* note 94, at 24.

190. Pascal Lamy, Director-General, WTO, Remarks to a Symposium on The WTO Agreement on Government Procurement: Developmental and Trade Significance, Changing Context and Future Prospects (Feb. 11, 2010), [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*, BUS. DAILY (Feb. 16, 2010), <http://www.businessdailyafrica.com/Opinion-and-Analysis/-/539548/862654/-/4m8ebx/-/index.html>.

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>191</sup>

In practice, it can be observed that recent accession candidates see GPA accession as a part of an overall economic reform strategy and seek to improve governance and strengthen competition in their own procurement markets.<sup>192</sup> This was *inter alia* evident in the 2016 accessions of Ukraine and Moldova.<sup>193</sup>

BOX 2

UKRAINE'S ACCESSION TO THE GPA<sup>194</sup>

On November 11, 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.

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191. *Id.*

192. See Box 2 for an example.

193. *Ukraine and the Republic of Moldova Welcomed to WTO Procurement Pact*, *supra* note 132.

194. *Id.*; see also *Ukraine to Join WTO's Government Procurement Agreement*, WORLD TRADE ORG. (Nov. 11, 2015), [https://www.wto.org/english/news\\_e/news15\\_e/gpro\\_11nov15\\_e.htm](https://www.wto.org/english/news_e/news15_e/gpro_11nov15_e.htm).

A legitimate question that can be asked is whether these benefits can be counted as benefits arising from GPA accession, as arguably countries could eliminate barriers to competition, including international competition, and eradicate corrupt practices from their procurement systems on their own, without joining the GPA.<sup>195</sup> In addition, no single event such as GPA accession will suffice to eradicate related problems once and for all: governance issues will require on-going attention. However, the real question is whether the GPA accession process and continuing participation in the Agreement can catalyze and/or reinforce such internal reform processes and reinforce monitoring to a degree that helps in maintaining a “cleaner” and more competitive procurement system.<sup>196</sup>

In our view, the answer to this question is “yes.”<sup>197</sup> The experience of many countries suggests that participation in international agreements can help overcome obstacles to domestic reforms and market liberalization.<sup>198</sup> In part, the reciprocal market access gains abroad can have this effect.<sup>199</sup> In addition, participation in an international body or agreement has reputational effects that can reinforce the incentives for and effects of internal reform: it sets a clear signal that the economy in question is “open for business.” Given the political significance that attaches to procurement policy in many countries,<sup>200</sup> the latter aspect may be particularly relevant with regard to government procurement. To be clear: GPA participation is not 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”

195. For further background, see Anderson et al., *supra* note 94.

196. *Id.* at 24-25.

197. See Bernard Hoekman, *Using International Institutions To Improve Public Procurement*, 13 WORLD BANK RES. OBSERVER 249, 250 (1998).

198. See WORLD TRADE ORG., WORLD TRADE REPORT 2004: EXPLORING THE LINKAGE BETWEEN the Domestic Policy Environment and International Trade 188-97 (2004) [https://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report04\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report04_e.pdf).

199. See Inbom Choi, *The Long and Winding Road to the Government Procurement Agreement: Korea's Accession Experience*, in OPTIONS FOR GLOBAL TRADE REFORM: A VIEW FROM THE ASIA-PACIFIC 249, 249-269 (Will Martin and Mari Pangestu eds., 2003); Changfa Lo, *The Benefits for Developing Countries of Accession to the Agreement on Government Procurement: The Case of Chinese Taipei*, in THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM, *supra* note 15, at 140, 140-48.

200. See, e.g. DANIEL I. GORDON, DEVELOPMENTAL AND TRADE SIGNIFICANCE OF GOVERNMENT PROCUREMENT: COMPETITION, GOVERNANCE, VALUE FOR MONEY, AND THE INTERNATIONAL DIMENSION 3 (Sept. 2015), [https://www.wto.org/english/tratop\\_e/gproc\\_e/symp092015\\_e/S6-1Gordon.pdf](https://www.wto.org/english/tratop_e/gproc_e/symp092015_e/S6-1Gordon.pdf).

unless they are accompanied by a sustained effort to engage stakeholders in addressing the problems that are most critical to them.<sup>201</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. Indeed, the Agreement has 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 also 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 the following sections.

A. *The GPA as an Essential Tool of Good Governance*

Public procurement markets pose two important challenges with regard to good governance: (i) ensuring integrity in the procurement process (preventing corruption on the part of public officials) and (ii) promoting effective competition among suppliers.<sup>202</sup> In the past, most research has focused on either one of them and they have been viewed as distinct and separate objectives in policy making. The fight against corruption is treated first and foremost as a principal-agent problem in which the procurement official (the “agent”) acts against the interests of the public sector as employer (the “principal”). The fight against anti-competitive practices has focused on preventing collusion among potential suppliers and advocacy to increase participation in procurement markets through the removal of barriers. Yet the two problems often overlap, e.g. where public officials are paid to turn a

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201. See MATT ANDREWS, THE LIMITS OF INSTITUTIONAL REFORM IN DEVELOPMENT: CHANGING RULES FOR REALISTIC SOLUTIONS 89-109 (2013).

202. See Robert D. Anderson, William E. Kovacic & Anna Caroline Müller, *Ensuring Integrity and Competition in Public Procurement Markets: A Dual Challenge for Good Governance*, in THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM, *supra* note 15, at 681.

blind eye to or facilitate collusion (e.g., if they release information such as the universe of potential bidders or the bids themselves).<sup>203</sup>

The damage caused by corruption and collusion goes beyond the direct economic loss associated with the bribe paid by the supplier and the resulting inflated price paid by the public treasury. Importantly, the misallocation of procurement contracts to the wrong supplier can have far-reaching consequences on the public as the intended beneficiaries: poor quality roads or school and hospital food, unsafe school or hospital buildings are just some examples that could be cited. Overall, economic opportunities and resulting growth are stifled; newcomers will neither be willing nor able to enter corrupt or collusive markets. As a result, the overall performance of the procurement system suffers far beyond any direct monetary effect and public confidence in governments is diminished. The role of the GPA in addressing both challenges will be discussed in the following paragraphs.

### 1. The GPA's Supporting Role in 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, 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;<sup>204</sup>
- 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 under-

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203. See Frédéric Jenny, *Competition and Anti-Corruption Considerations in Public Procurement*, in FIGHTING CORRUPTION AND PROMOTING INTEGRITY IN PUBLIC PROCUREMENT 29, 31-32 (2005).

204. Anderson, Kovacic, & Müller, *supra* note 12, at 92.

taken in an institutionalized fashion by GPA Parties and the WTO's dispute settlement function at the international level, thus helping to break vicious cycles;<sup>205</sup> 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. This can potentially challenge entrenched societal expectations with regard to corruption.<sup>206</sup>

Beyond the foregoing, the revised GPA incorporates a new substantive provision regarding the “conduct of procurement” in Article V.4. That provision provides that “[a] procuring entity shall conduct covered procurement in a transparent and impartial manner that . . . avoids conflicts of interest [] and [] prevents corrupt practices.”<sup>207</sup> Insight into the intended purpose of this provision is provided by related language in the preamble to the revised Agreement that recognizes its shared purpose with other international instruments and initiatives in deterring corrupt practices. For example, a new recital to the preamble recognizes “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>208</sup> A further new recital recognizes “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>209</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 can help to promote compliance and galvanize related institutional efforts, thereby helping countries to grapple with both principal-agent and collective action problems related to corruption and collusion.<sup>210</sup> In effect, the language in Article V.4(b) and (c) creates a new treaty-based obligation for GPA Parties to

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205. *Id.*

206. *Id.*

207. 2012 GPA, *supra* note 1, art. V.4(b)-(c).

208. *Id.* pmb. (“Recognizing that the integrity and predictability of government procurement systems are integral to the efficient and effective management of public resources, the performance of the Parties’ economies and the functioning of the multilateral trading system . . .”).

209. *See supra* note 101.

210. For further detail, see Anderson, Kovacic & Müller, *supra* note 12, at 92.

conduct their procurements in ways that avoid conflicts of interest and corrupt practices.<sup>211</sup> This can be an important “hook” for efforts to eradicate corruption on the part of both governmental and non-governmental authorities, as so suggested by Arrowsmith:

[T]ransparency 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>212</sup>

## 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>213</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.<sup>214</sup> Furthermore, the available evidence suggests that public procurement markets may be attractive targets for and uniquely prone to collusive practices—more so than other markets.<sup>215</sup> This can be inferred from

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211. 2012 GPA, *supra* note 1, art. V.4.

212. Arrowsmith, *supra* note 80, at 289. For further analysis, see Dawar, *supra* note 159.

213. See Anderson, Kovacic & Müller, *supra* note 12, at 13.

214. *Id.*

215. See Org. for Econ. Co-operation & Dev. [OECD], Global Forum on Competition, *Roundtable on Collusion and Corruption in Public Procurement*, 10, OECD Doc. DAF/COMP/GF (2010) 6 (Oct. 15, 2010), <http://www.oecd.org/competition/cartels/46235884.pdf>.

the large number of cartel cases related to procurement markets that have been prosecuted in recent years. 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>216</sup>

Relatedly, despite the inherent instability of larger cartels observed in other markets, Heimler observes that in public procurement, even bid rigging schemes with up to 100 members can operate successfully over years.<sup>217</sup>

Governmental measures that limit the possibilities for beneficial trade and competition are often a key factor in facilitating inter-supplier collusion. These measures can consist of measures limiting procurement to national suppliers, goods or services (in the form of “buy national” schemes), other general obstacles to successful participation by non-incumbent firms, such as over-restrictive licensing and other requirements, and obstacles relating to the procurement process itself, such as the use of unnecessarily narrow technical specifications, references to proprietary standards, etc.<sup>218</sup> What these measures have in common is that they directly limit competition through governmental measures, and thereby potentially create a fertile breeding ground for private anti-competitive conduct, such as collusion. In other words, collusion flourishes 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>219</sup> Much experience suggests, though, that this role, while necessary, is not sufficient to eliminate the problem.<sup>220</sup> Trade liberalization can play an important complementary role. For example, the GPA

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216. Albert Sanchez Graells, *Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement*, in INTEGRITY AND EFFICIENCY IN SUSTAINABLE PUBLIC CONTRACTS 171, 176 (2014).

217. Alberto Heimler, *Cartels in Public Procurement*, 8 J. COMPETITION L. & ECON. 849, 851 (2012).

218. See Robert D. Anderson & William E. Kovacic, *Competition Policy and International Trade Liberalization: Essential Complements to Ensure Good Performance in Public Procurement Markets*, 18 PUB. PROCUREMENT L. REV. 67, 67-101 (2009); see also Anderson, Kovacic & Müller, *supra* note 12, at 6.

219. See OECD, *supra* note 215, at 13.

220. See Anderson, Kovacic & Mueller, *supra* note 202, at 76-77.

addresses the challenge of combatting collusion in different ways. First, the market access commitments undertaken by GPA Parties reinforce competition by making sure that suppliers from other GPA Parties are not discriminated against and can therefore participate in relevant procurement markets.<sup>221</sup> Even the potential threat of participation by new competitors reduces the incentives for collusion by making a cartel among existing suppliers less stable and enhancing the number and diversity of competitors that would have to cooperate in order for the collusive scheme to remain intact. Second, this effect is reinforced by the GPA's transparency provisions, which are designed to ensure that all necessary information with regard to the tender is made accessible and distributed equally among all interested suppliers. Third, the GPA contains specific provisions with regard to technical specifications and other aspects of the procurement process that ensure an "open" approach, e.g., by referring to international rather than national standards whenever possible. Fourth, the domestic review procedures required by the GPA can have a positive effect on participation by enhancing the confidence supplier place in the fairness of the procurement process, as opposed to cronyism.<sup>222</sup> And fifth, the WTO Dispute Settlement Understanding (DSU) represents an essential complement to ensure that participating governments honor their commitments and do not arbitrarily exclude potential competitors from the other GPA Parties.<sup>223</sup> International trade agreements on government procurement—in particular the GPA—can therefore complement antitrust enforcement and measures needed to fight corruption by enhancing outside participation and confidence in procurement systems.

B. *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).<sup>224</sup> It has the potential to open up significant economic opportunities for under-represented social groups, including youths and women, which are

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221. See GPA, *supra* note 1, art. IV.1-2.

222. *Id.* art. XVIII.

223. See *id.* art. XX.

224. See G.A. Res. 70/1, paras. 1-91 (Oct. 15, 2015).

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.

### 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. As the former Director-General of the WTO, Pascal Lamy put it:

Unreformed procurement systems favor 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>225</sup>

Corrupt and collusive practices that can be counteracted through the GPA and related good governance measures unfairly and disproportionately impact underrepresented groups, preventing them from winning contracts.<sup>226</sup> 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.<sup>227</sup> The review mechanisms established by the GPA provide disadvantaged groups with important fora to be heard and draw attention to any remaining discriminatory practices.<sup>228</sup>

Interestingly, these good governance benefits the GPA creates will not only concern formally GPA-covered procurement open to interna-

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225. See Pascal Lamy, *Opening Government Procurement to Women's Enterprises*, INT'L TRADE CTR. (July 1, 2012), <http://www.intracen.org/Opening-government-procurement-to-womens-enterprises/>.

226. See, e.g., INT'L TRADE CTR., *EMPOWERING WOMEN THROUGH PUBLIC PROCUREMENT* 42 (2014), <http://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/Women%20procurement%20guide-final-web.pdf>.

227. *Id.*

228. *Id.*

tional 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, 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 catalyze progressive market participation through targeted transitional measures. Subject to relevant negotiations, disadvantaged groups can benefit from offset or price preference programs to favor their inclusion, and non-covered procurement can be set aside for them, with full “graduation” and market liberalization as the ultimate goal.

## 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>229</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>230</sup>

The GPA shows that this is not simply a possibility for the future. 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

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229. See *Electronic Commerce*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/ecom\\_e/ecom\\_e.htm](https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm) (last visited Nov. 13, 2017).

230. See Roberto Azevêdo, Director-General, WTO, Remarks at the MIKTA Workshop on Electronic Commerce (July 5, 2016), [https://www.wto.org/english/news\\_e/spra\\_e/spra132\\_e.htm](https://www.wto.org/english/news_e/spra_e/spra132_e.htm).

Agreement].”<sup>231</sup>

The revised GPA text takes a three-fold approach with regard to e-procurement. First, provisions of the GPA that were based on the idea that communication would take place in paper form were revised to be “technologically neutral.”<sup>232</sup> This means that provisions not mentioning e-procurement specifically are generally understood to apply to both traditional forms of 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.”<sup>233</sup> 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>234</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.<sup>235</sup> In this regard, the GPA mostly adopts a “permissive” approach, which means that the use of electronic means is not made mandatory.<sup>236</sup> 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 fulfillment of their obligations under the Agreement.<sup>237</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 Agree-

231. See GPA, *supra* note 1, pmb. (“Recognizing the importance of using, and encouraging the use of, electronic means for procurement covered by this Agreement . . .”).

232. See *id.* art. I(g) (stating the technologically neutral definition of “in writing” or “written”); see also U.N. Comm’n on Int’l Trade Law, *Guide to Enactment of the UNCITRAL Model Law on Public Procurement*, 27-28 (2014), <http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/Guide-Enactment-Model-Law-Public-Procurement-e.pdf>.

233. See 2012 GPA, *supra* note 1, art. I(g).

234. See Arrowsmith & Anderson, *supra* note 15, at 297.

235. See 2012 GPA, *supra* note 1, arts. VII.1, IX.7, X.7(e), XI.5, XIV.

236. See, e.g., *id.* art. XIV. Article XIV 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), which stipulates 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 . . .” *Id.* art. VII.1(a).

237. See, e.g., 2012 GPA, *supra* note 1, art. XI.5 (providing for the optional reduction of time-frames for tendering if and to the extent that electronic means are used).

ment, namely (i) general information on the procurement system;<sup>238</sup> (ii) information on procurement opportunities and processes,<sup>239</sup> and (iii) post-award publication of statistical and other information.<sup>240</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, information technology systems and software need to be widely available and interoperable,<sup>241</sup> the integrity of information, including submissions by suppliers needs to be ensured,<sup>242</sup> information on how electronic auctions are conducted must be published,<sup>243</sup> and data to ensure the traceability of the conduct of covered procurement by electronic means needs to be collected.<sup>244</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>245</sup>

### C. 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. 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, this Article argues, 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.

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238. Compare *id.* art. VI.1(a) with *id.* art. VI.2(a).

239. Compare *id.* art. VI.2(b) with *id.* arts. VII, IX.7, XVI.2.

240. Compare *id.* art. VI.2(c) with *id.* arts. XVI.5-6.

241. See *id.* art. IV.3(a).

242. See *id.* art. IV.3(b).

243. See *id.* arts. X.7(e), XIV.

244. See *id.* *supra* note 1, art. XVI.3(b).

245. See *id.* arts. IX.7(b), IX.9(b), X.7(d), XIV, XVI.2.

V. SYNERGIES BETWEEN THE GPA AND OTHER RELEVANT INTERNATIONAL INSTRUMENTS

As mentioned briefly in the introduction to this Article, the GPA's renegotiation has made possible very significant synergies between the Agreement and other international instruments and initiatives. The latter include both multilateral initiatives and mandates such as the United Nations Convention Against Corruption and the UNCITRAL Model Law<sup>246</sup> and regional trade agreements. These synergies are the focus of this section.

A. *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.<sup>247</sup> 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>248</sup>

Importantly, the Convention evinces a specific interest in the field of public procurement. Article 9.1 mandates that "[e]ach 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>249</sup>

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246. See U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT, U.N. Doc. A/66/17, Annex I, U.N. Sales No. E.14.V.1 (July 1, 2011), <http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf> [hereinafter U.N. Doc. A/66/17].

247. See *supra* note 101.

248. Kofi A. Annan, U.N. Secretary General, *Foreword* to United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/58/4, at iii-iv (Oct. 31, 2004), [https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf) [hereinafter UNCAC].

249. *Id.* at art. 9.1.

Not surprisingly, therefore, the revised GPA, in its own Preamble, refers specifically to the Convention: “[r]ecognizing 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>250</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 countries 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 “[t]he 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.”<sup>251</sup> The GPA, as demonstrated, carries this requirement forward with more detailed and specific timelines and requirements.<sup>252</sup>

Similarly, the Convention refers to “[a]n 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.”<sup>253</sup> The GPA, for its part, embraces this requirement and incorporates specific standards to ensure the effectiveness of such systems.<sup>254</sup>

Another very significant area of synergy with the revised GPA concerns the UNCITRAL Model Law on Public Procurement.<sup>255</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

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250. See *supra* note 101.

251. UNCAC, *supra* note 248, art. 9.1(a).

252. See 2012 GPA, *supra* note 1, arts. VI, VII, X, XI.

253. UNCAC, *supra* note 248, art. 9.1(d).

254. See 2012 GPA, *supra* note 1, art. XVIII.

255. See U.N. Doc. A/66/17, *supra* note 246. For a general overview, see Caroline Nicholas, *The 2011 UNCITRAL Model Law on Public Procurement*, 21 PUB. PROCUREMENT L. REV. 111 (2012).

does not directly facilitate trade and does not have treaty status.<sup>256</sup> Still, it plays an important complementary role, in that countries can use the Model Law as a basis for implementing national legislation that is intended to be GPA-compatible.<sup>257</sup> Happily, then, not only were the GPA and the Model Law renegotiated in parallel, but through deliberate efforts and cross-fertilization between the relevant negotiators and Secretariat, the instruments have been substantially harmonized.<sup>258</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:

[I]n 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>259</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.<sup>260</sup> This collaboration has been a key factor in supporting the GPA accessions and/or ratifications of the revised

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256. See, e.g., W. Bank, *Comparison of the International Instruments on Public Procurement* ¶ 2 (Mar. 2013) (unpublished background paper), [http://siteresources.worldbank.org/PROCUREMENT/Resources/84265-1354233251381/Background\\_paper-International\\_instruments.pdf](http://siteresources.worldbank.org/PROCUREMENT/Resources/84265-1354233251381/Background_paper-International_instruments.pdf).

257. See, e.g., Caroline Nicholas, *Policy Coherence - The 2011 UNCITRAL Model Law on Public Procurement: Synergies and Complementarities with the Revised GPA*, (Sept. 17, 2015), [https://www.wto.org/english/tratop\\_e/gproc\\_e/symp092015\\_e/S2-4Nicholas.pdf](https://www.wto.org/english/tratop_e/gproc_e/symp092015_e/S2-4Nicholas.pdf).

258. *Id.*

259. Rep. of the Comm. on Gov't Procurement, WTO Doc. GPA/134, ¶ 3.38 (2015) [hereinafter WTO Doc. GPA/134].

260. See *GPA Technical Cooperation Facility*, EBRD GPA FACILITY, <http://ebrd-gpa-facility.com/?id=2> (last visited Nov. 13, 2017).

GPA of new Parties (e.g., Armenia, Moldova, Montenegro, and Ukraine) in the region.<sup>261</sup> Increasingly, the Secretariat is also cooperating or seeking to cooperate with other regional development banks.<sup>262</sup>

A further global initiative that will, this Article argues, entail important synergies with the GPA concerns the UN's Sustainable Development Goals.<sup>263</sup> While the Goals do not specifically reference public procurement policy, they attach great importance to, for example, 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.<sup>264</sup> 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.

### B. Synergies with 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 another colleague and looking at 250 such agreements implemented up until 2015, we find that around twenty-seven percent of them contain detailed chapters or provisions on government procurement, including market access commitments.<sup>265</sup> Specifically, the research of our related research with our other colleague revealed that:

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261. *Id.*

262. WTO Doc. GPA/134, *supra* note 259, ¶¶ 3.34-3.40.

263. See G.A. Res. 70/1, *supra* note 224, paras. 1-91.

264. See *id.* at 14/35. Including in the updated agenda of seventeen Sustainable Development Goals (1) [e]nsur[ing] healthy lives and promote well-being for all at all ages (Goal 3); (2) [e]nsur[ing] and equitable quality education and promote lifelong learning opportunities for all (Goal 4); and (3) [e]nsur[ing] sustainable consumption and production patterns (Goal 12).

265. The trend in this regard is rising, and significantly higher percentages can be found if only recently concluded RTAs are taken into account. Robert D. Anderson, Anna Caroline Müller & Phillipe Pelletier, *Regional Trade Agreements and Procurement Rules: Facilitators or Hindrances?* 6-8 (Eur. U. Inst. Working Paper, RSCAS No. 81, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2707219##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2707219##) [hereinafter Anderson, Müller & Pelletier, *Facilitators or Hindrances?*]; see also Robert D. Anderson et al., *Government Procurement Provisions in Regional Trade Agreements: a Stepping Stone To GPA Accession?*, in *THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM*, *supra* note 15, at 561, 567-576.

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, 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).<sup>266</sup>

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>267</sup>

Furthermore, the approach used to schedule government procurement commitments in such “RTAs [often] closely follows the structure of the GPA market access schedules.”<sup>268</sup> In terms of depth of commitments, we observed that the overall level of market liberalization overall stays behind the GPA when all dimensions of coverage (thresholds, entities, and goods, services and construction services covered) are considered: RTAs may contain deeper commitments than the GPA in particular respects (e.g. lower thresholds for central government entities, or some additional services that are included in the coverage), but then often lack coverage in other respects (e.g. with regard to sub-central government entity procurement).<sup>269</sup> Furthermore, RTA chapters on government procurement do not generally contain most-favored nation clauses, so that market access commitments made by GPA Parties are not extended to RTA partners.<sup>270</sup> Arguably, this means that RTAs cannot easily replace GPA participation, and that the incentive to eventually join the GPA persists even for countries benefitting from the more limited rights granted by GPA Parties in RTAs.<sup>271</sup> As a result, government procurement chapters in RTAs generally introduce

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266. Anderson, Müller & Pelletier, *Facilitators or Hindrances?*, *supra* note 265, at 8.

267. *Id.* at 8-9.

268. *Id.* at 13.

269. *Id.* at 13.

270. *Id.* at 9.

271. *Id.* at 9.

relatively little in the way of “spaghetti-bowl” effects<sup>272</sup> and are, overall, favorable to the proliferation of procurement reforms, open markets, and common rules.

## VI. CONCLUSION

The conclusion of the GPA renegotiation in March 2012 represented an important success for the international trading system. The renegotiation expanded the market access available to Parties under the Agreement, provided for a revised and modernized text of the Agreement, and set a roadmap for further work of the Committee through Work Programmes relating to the administration and possible further evolution of the Agreement. Apart from the renegotiation, the GPA’s vitality has also been manifested by continuing growth in its membership, from twenty-two WTO members covered in 1996 to forty-seven at present. 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 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 the good governance concerns that it exemplifies. As has been 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

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272. A term first introduced by Jagdish N. Bhagwati. See Jagdish N. Bhagwati, *US Trade Policy: The Infatuation with FTAs* 4 (Columbia U., Discussion Paper Series, No. 726, 1995), <http://hdl.handle.net/10022/AC:P:15619>.

for investment policy, for ensuring competition in relevant markets, and for domestic economic reforms, and is an important tool of e-commerce. Further, the revision has made possible significant synergies between the GPA and other international instruments and activities by 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.