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Trade, Law *and* Development

Vol. 7, No. 1

2015

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Published by

The Registrar, National Law University, Jodhpur

ISSN : 0976-2329 | eISSN : 0975-3346

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)

THE REVISED WTO AGREEMENT ON GOVERNMENT
PROCUREMENT AS AN EMERGING PILLAR OF THE WORLD
TRADING SYSTEM: RECENT DEVELOPMENTS

ROBERT D. ANDERSON* & ANNA CAROLINE MÜLLER*

This article reports on recent developments regarding the revised WTO Agreement on Government Procurement (GPA). 2014 was a year of significant developments concerning the Agreement and the first months of 2015 have shown significant movement. A new version of the Agreement, which manifests the Agreement's increasing importance as an instrument for the promotion of good governance in emerging markets, in addition to market access, entered into force on 6 April 2014. The role that the revised GPA is playing in contributing to the world trading system, as a driver of global growth, is further demonstrated by its increasing membership. Since the entry into force of the revised Agreement in 2014, two accessions to the Agreement – those of Montenegro and New Zealand – were concluded and good progress was made on other pending accessions. Furthermore, work has been initiated on a new set of work programmes and other tools to enhance the transparency of the GPA Parties' measures and operations under the Agreement. These represent an opportunity for Parties - and, in more limited ways, observers - to the GPA to shape the future of procurement policy with regard to such important issues as sustainable procurement and the furtherance of SME participation in procurement markets. Over and above its direct impact on the

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governments that are formally Parties to the WTO GPA, the Agreement also serves as the inspiration and template for chapters on government procurement that are incorporated in bilateral free trade or other preferential agreements around the globe, including recent "mega-regionals". This article elaborates on these themes and describes how each of these developments makes the GPA a new, emerging pillar of the international trading system.

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I. INTRODUCTION

2014 was a year of very significant developments concerning the WTO Agreement on Government Procurement (“the GPA” or “the Agreement”), and the first months of 2015 have shown significant movement. A new version of the Agreement, negotiated over more than ten years, entered into force.¹ The new version manifests the Agreement's increasing importance as an instrument for the promotion of good governance in emerging markets, in addition to market access.²

The role that the revised GPA is playing in contributing to the world trading system as a driver of global growth is further demonstrated by its increasing membership: in 2014, negotiations were concluded on two accessions to the

¹ *Revised WTO Agreement on Government Procurement Enters into Force*, WTO NEWS ITEM, Apr. 07, 2014, http://www.wto.org/english/news_e/news14_e/gpro_07apr14_e.htm. The relevant Parties are, in the order in which they accepted the Agreement, Liechtenstein, Norway, Canada, Chinese Taipei, the United States, Hong Kong (China), the European Union, Iceland, Singapore and Israel. Subsequently, Japan, the Netherlands with respect to Aruba, and Armenia accepted the revised Agreement.

² See also Robert D. Anderson, *The WTO Agreement on Government Procurement (GPA): An Emerging Tool of Global Integration and Good Governance*, LAW IN TRANSITION 1/8, 5/8 (Oct. 2010), <http://www.ebrd.com/downloads/research/news/lit102.pdf> [hereinafter Anderson, *The WTO Agreement on Government Procurement (GPA): An Emerging Tool of Global Integration and Good Governance*].

Agreement – those of Montenegro and New Zealand – and good progress was made on other pending accessions.³

In Geneva, work has been initiated on a new set of work programmes to enhance the transparency of the GPA Parties' measures and operations under the Agreement. These represent an opportunity for Parties - and, in more limited ways, observers - to the GPA to shape the future of procurement policy with regard to such important issues as sustainable procurement and the furtherance of SME participation in procurement markets. In addition, a new electronic tool is being created to make information on the market access opportunities under the Agreement more accessible to businesses, and strengthened capacity-building arrangements are being put in place to facilitate accession to the Agreement.

It is also worth flagging that, over and above its direct impact on the governments that are formally Parties to the WTO GPA, the Agreement also serves as the inspiration and template for chapters on government procurement that are incorporated in bilateral free trade or other preferential agreements around the globe.⁴

This article elaborates on these themes and describes how each of these developments makes the GPA a new, emerging pillar of the international trading system. Part III sets out in more detail the developments leading up to the entry into force of the revised GPA. Part IIII considers the prospects for the future expansion of the membership of the Agreement, also providing an update on the status of specific accessions to the Agreement that are currently under way. Part IV describes in more detail the agreed Work Programmes and their potential role in shaping procurement policies in areas of interest to many countries worldwide. Part V summarizes recent studies by the secretariat on the relationship between the GPA and procurement liberalization commitments in RTAs. Part VI provides brief concluding remarks.

³ On the role of trade liberalization as a form of economic stimulus generally, see also Roberto Azevêdo, *Use Trade as the Next Stimulus*, WALL ST. J., Mar. 31, 2015, <http://www.wsj.com/articles/roberto-azevedo-use-trade-as-the-next-stimulus-1427830482>.

⁴ See, in addition to other relevant sources, Robert D. Anderson *et al.*, *The Relationship between Services Trade and Government Procurement Commitments: Insights from Relevant WTO Agreements and Recent RTAs* (WTO Working Paper No. ERSD-2014-21, 2014), available at http://www.wto.org/english/res_e/reser_e/ersd201421_e.pdf [hereinafter Anderson *et al.*, *The Relationship between Services Trade and Government Procurement Commitments*].

II. THE ENTRY INTO FORCE OF THE REVISED WTO AGREEMENT ON GOVERNMENT PROCUREMENT (GPA)

In March 2012, the Parties to the WTO Agreement on Government Procurement (GPA) completed a comprehensive revision of the Agreement, encompassing both its text and coverage (market access commitments).⁵ This represented the culmination of more than ten years of work on the Agreement's renegotiation in the WTO Committee on Government Procurement.⁶

The revised GPA, the negotiating processes that led to its adoption and coming into force, and the continuing gradual broadening of its membership are of interest for multiple reasons. To begin with, the renegotiation has added an estimated \$ 80-100 billion annually to the value of the market access commitments by the Parties under the Agreement. With the additional coverage, in total, the Agreement will now cover an estimated \$1.7 trillion in procurements annually.⁷

To appreciate the extent of what was achieved, it is important first to emphasize that the GPA has, from its inception, applied to only a portion of the procurements of each of the Parties. Specifically, the obligations under the Agreement only apply to procurement: (i) by the procuring entities that each Party has listed in Annexes 1 to 3 of Appendix I, relating respectively to central government entities, sub-central government entities and other entities such as utilities; (ii) of goods; and (iii) of services and construction services that are specified in lists, found respectively in Annexes 4 to 6 of Appendix I. Furthermore, the GPA only applies to procurement contracts of an estimated value not less than certain threshold values, which are specified in each Party's Appendix I Annexes (see Box 1 below). These three different dimensions of coverage with regard to entities, services or construction services sectors, and threshold levels all have to

⁵ See Committee on Government Procurement, Adoption of the Results of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement, Following Their Verification and Review, As Required by the Ministerial Decision of 15 December 2011 (GPA/112), Paragraph 5, GPA/113 (Apr. 2, 2012). The full text of the decision, including the revised text of the Agreement and other elements, is available on the WTO website at http://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm (last visited Apr. 23, 2015).

⁶ See *Committee on Government Procurement Adopts Revised Agreement*, WTO NEWS ITEM, Mar. 30, 2012, http://www.wto.org/english/news_e/news12_e/gpro_30mar12_e.htm. For further background, see 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).

⁷ See also *Agreement on Government Procurement*, WTO, https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (last visited Sept. 30, 2015).

be taken into account in a cumulative manner when determining coverage under the GPA. In other words, a specific procurement only falls within the ambit of the GPA's rules if the procuring entity is covered, if the service procured is included in the relevant Party's commitments, and if the value of the procurement in question is above the threshold levels indicated in the relevant Party's schedules.

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

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

N.B.: The structure of Appendix I noted above is based on the revised text of the GPA.⁸ The text of the GPA 1994 does not contain a Goods Annex (i.e. the new Annex 4).

⁸ *Revised Agreement on Government Procurement*, WTO, https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm (last visited Apr. 23, 2015). See also *Appendices and Annexes to the GPA*, WTO, http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm (last visited Sept. 30, 2015).

The additional market access commitments embodied in the revised GPA comprise, *inter alia*:⁹

- coverage by the Parties of (at a minimum) more than 500 additional central, local and other government agencies under the Agreement. This includes, as one Party's (Canada's) contribution, the coverage under the Agreement, for the first time, of that Party's sub-central level of government (i.e. its provinces and territories) - a contribution that has been valued, by itself, in the tens of billions of dollars;
- the coverage by three Parties (the European Union, Japan and Korea), for the first time, of build-operate-transfer contracts, a form of public-private partnership and another significant addition to coverage;
- coverage of additional services by almost all of the Parties, especially in the area of telecommunications services;
- some improvements in the coverage of goods;
- the coverage by all Parties, for the first time, of the full range of construction services, subject to relevant thresholds; and
- downward adjustments in the thresholds applied under the Agreement by several Parties, notably Israel, Japan, Korea and the Netherlands with respect to Aruba.

From a legal point of view, the revision constitutes an amendment to the 1994 Agreement, rather than a new international treaty. To be sure, the main elements and principles of the Agreement, while updated and modernized in their application, have remained the same (see Box 2 below).

Box 2: Main elements of the WTO Agreement on Government Procurement

The WTO Agreement on Government Procurement (GPA), signed by most of the world's industrialized countries at the conclusion of the Uruguay Round of multilateral trade negotiations in 1994, provides an international legal framework for the liberalization and governance of public procurement markets. As described in this article, recently, the Agreement has been extensively modernized. Both the existing and the revised versions of the Agreement embody the following main elements:

- General rules guaranteeing national treatment, non-discrimination and

⁹ See also Philippe Pelletier, *La révision de 2012 de l'Accord de l'OMC sur les Marchés Publics: Son Contexte et les Dimensions de son Champ D'Application*, in *THE CANADIAN YEARBOOK OF INTERNATIONAL LAW*, VOLUME 51, at 99 (John H. Currie & Ren Provost eds., 2013).

transparency with respect to each Party's "covered procurement markets". Additional specific requirements regarding the transparency of procurement-related information (e.g. relevant statutes and regulations; evaluation criteria and contract awards);

- Minimum standards (based on international best practices and incorporating significant flexibility) on aspects of the procurement process, to ensure transparent and open conditions of competition. Includes provisions on:
 - Tendering procedures;
 - Qualification of suppliers;
 - Time limits, documentation, opening of tenders and contract award procedures;
- Provisions relating to the establishment of independent domestic review procedures and application of the WTO Dispute Settlement ("enforcement tools");
- Provisions regarding accession to the Agreement and the availability of "transitional measures" for developing countries that join the Agreement;
- A "built-in agenda" for improvement of the Agreement, extension of coverage and elimination of remaining discriminatory measures applied by Parties; and, importantly
- Detailed schedules ("Appendix I Annexes") setting out the range of each Party's procurements covered by the Agreement.¹⁰ Specify covered entities, thresholds, covered services, specific exclusions, etc. The Agreement also incorporates built-in procedures for modification of Parties' coverage in response to relevant developments (e.g. the privatization of covered entities).

That being said, the revision has effectively modernized the Agreement's text, duly reflecting, for example, the now nearly universal use of electronic procurement tools that were little used at the time that the previous version of Agreement was adopted in 1994 and, therefore, were not well reflected in that version of the Agreement.

The revised GPA text also embodies: (i) greater emphasis on the promotion of "good governance" and the fight against corruption as explicit objectives of the Agreement;¹¹ (ii) a new approach to transitional measures for developing countries

¹⁰ See also Box 1 in this regard.

¹¹ See also Anderson, *The WTO Agreement on Government Procurement (GPA): An Emerging Tool of Global Integration and Good Governance*, *supra* note 2, at 1/8-8/8.

that join;¹² and (iii) additional flexibilities for all participating WTO Members.¹³ In addition, and as will be elaborated below, the “Future Work Programmes” of the Committee on Government Procurement that were adopted as an integral element of the negotiating package and which will now commence, hold significant potential to promote increased transparency and further international convergence around best practices in public procurement.

The GPA and its renegotiation are also of interest from a WTO-systemic point of view.¹⁴ The Agreement fills (or at least partially fills) what would otherwise be a significant gap in the WTO system, complementing both the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS) in important ways. Moreover, until an agreement reached recently on the new WTO Agreement on Trade Facilitation at the WTO’s Ninth Ministerial Conference in Bali, the GPA renegotiation represented the largest augmentation of market access commitments to be achieved in the WTO since the organization was established in 1994. The processes followed to achieve these results might prove useful elsewhere in the system. The final details of the GPA market access enhancement package were agreed only at the last minute (in fact, literally on the morning of the day on which the package was adopted by Ministers in December 2011). The package built, however, on a series of actions taken by the Parties throughout the previous two years, pursuant to a “Roadmap” for conclusion of the negotiations that was put forward by the Committee’s then Chairman, Nicholas Niggli, initially in 2010 and subsequently, in updated form, in 2011.

More significantly, as a plurilateral rather than a fully multilateral agreement, the GPA embodies design features that may be relevant to other areas of trade liberalization, in the future. Of particular interest are the approach taken with respect to application of the most-favoured-nation (MFN) principle in the Agreement, the GPA’s continuing strong emphasis on principles of reciprocity, and its approach to special and differential treatment which differs in design from the approaches that are used widely in regard to other WTO Agreements. Arguably, these features of the Agreement are important underpinnings of its (relative) success and respond to/illustrate and validate key insights of recent trade

¹² See, for elaboration, Anna C. 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* 339-376 (Sue Arrowsmith & Robert D. Anderson eds., 2011) [hereinafter *THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM*].

¹³ See, for detailed analysis, 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 12, at 285-336.

¹⁴ See also Robert D. Anderson & Anna C. Müller, *The Revised WTO Agreement on Government Procurement: An Emerging Pillar of Global Trade and Development* (forthcoming 2015).

policy literature.¹⁵ In particular, the possibility to include country-specific derogations and reciprocity notes in the coverage schedules was used by some Parties in order to make the conclusion of the re-negotiation possible despite different “levels of ambition”.¹⁶ While the GPA Parties had hoped, in the course of the negotiations, to limit and reduce the extent of such derogations and notes, the flexibility provided by these balancing tools proved to be essential in reaching a conclusion to the negotiations - a conclusion that nonetheless achieved very significant market opening for the Parties.

The GPA’s renegotiation and the continuing gradual expansion of its membership have occurred/are occurring at a time when the Agreement is, in any case, gaining importance as an element of the legal framework for global trade. This reflects phenomena such as: (i) the huge and escalating infrastructure investment needs of major emerging economies in the present era; (ii) wide acknowledgement of the need for parallel investments in infrastructure renewal in major developed economies, particularly the US; and (iii) a renewed threat of national measures that potentially restrict access to public procurement markets. Together, these factors heighten the importance of the GPA as the main tool available to exporting economies to maintain open markets in this context. In addition, the Agreement’s text is used as a template for government procurement chapters in preferential trade agreements, worldwide.¹⁷ In part, as a consequence of the recent renegotiation, the GPA is now also extensively harmonized with other important international instruments in this area, notably the UNCITRAL Model Law on Procurement.¹⁸ For all these reasons, the revised GPA stands poised to emerge as a pillar of the WTO system and the global economy of the present era.

¹⁵ See 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 (R. C. Freenstra & A. M. Taylor eds., 2014); See also, for further relevant background, Bernard Hoekman, SUPPLY CHAINS, MEGA-REGIONALS AND MULTILATERALISM: A ROAD MAP FOR THE WTO (2014), available at http://www.voxeu.org/sites/default/files/file/WTO_Roadmap.pdf; BUILDING ON BALI: A WORK PROGRAMME FOR THE WTO (Simon J. Evenett & Alejandro Jara eds., 2013), available at http://www.voxeu.org/sites/default/files/Building_on_Bali.pdf.

¹⁶ See also Anderson, *et al.*, *The Relationship Between Services Trade and Government Procurement Commitments*, *supra* note 4.

¹⁷ See Part V below.

¹⁸ See, for further background, Caroline Nicholas, *Work of UNCITRAL on Government Procurement: Purpose, Objectives and Complementarity with the Work of the WTO*, in THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM, *supra* note 12, at 746-772; See also Johannes S. Schnitzer, *The WTO Agreement on Government Procurement in the EBRD Region, LAW IN TRANSITION* 50 (2013), <http://www.ebrd.com/downloads/research/law/lit113e.pdf>.

III. THE EXPANDING MEMBERSHIP OF THE AGREEMENT

The GPA renegotiation has occurred at a time when the Agreement's membership is expanding, over time. The GPA's predecessor, the Tokyo Round Government Procurement "Code", covered a total of nineteen countries, ten of which were EU Member states.¹⁹ Currently, the following WTO Members are covered by the Agreement: Armenia, Canada, the European Union, including each of its now-28 member States; Hong Kong (China), Iceland, Israel, Japan, Korea, Liechtenstein, Montenegro, the Kingdom of the Netherlands with respect to Aruba, New Zealand, Norway, Singapore, Switzerland, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (referred to in the WTO as "Chinese Taipei"); and the United States.²⁰ As is evident, this represents a broad spectrum of WTO Members including large, traditional developed jurisdictions (the EU and its member states, the US, Japan, and Canada); and a number of other, often smaller, economies of a more diverse nature (e.g. Armenia, Aruba, Hong Kong (China), Israel, Singapore and Chinese Taipei). Importantly, Armenia, Croatia, Montenegro, New Zealand and Chinese Taipei came under the Agreement only in the past 5-6 years.²¹

In particular, on 29 October 2014, negotiations were concluded with respect to two accessions to the Agreement: those of Montenegro and New Zealand.²² The GPA took effect for Montenegro on 15 July 2015, and for New Zealand on 12 August 2015, thirty days following the receipt of the respective formal "instruments of accession" from the two WTO Members. In the case of Montenegro, the negotiations were concluded essentially in one year; in New Zealand's case, it was a two-year process. The relatively speedy conclusion of work on these two accessions has been cited by some GPA Parties as exemplary.

As of August 2015, a total of ten other WTO Members — Albania, Australia, China, Georgia, Jordan, the Kyrgyz Republic, Moldova, Oman, Tajikistan and Ukraine — have also applied to join the GPA. Of these, Australia and Tajikistan are the most recent accession candidates, and the accessions of Moldova and

¹⁹ See also Annet Blank & Gabrielle Marceau, *The History of the Government Procurement Negotiations Since 1945*, 5 PUB. PROCUREMENT L. REV. 77-147 (1996).

²⁰ For up-to-date information on the membership and other aspects of the GPA, see WTO *and Government Procurement*, WTO, https://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm (last visited Aug. 5, 2015).

²¹ Armenia, Montenegro, New Zealand and Chinese Taipei joined as separate Parties to the GPA; Croatia became a covered European Union member state.

²² See Committee on Government Procurement, *Report (2014) of the WTO Committee on Government Procurement*, GPA/126 (Nov. 26, 2014).

Ukraine are receiving highly focused attention, with good chances of conclusion of these accession negotiations still in 2015.²³

In January 2015, Moldova submitted its fourth and final offer. At the Committee's meeting in February, most GPA Parties indicated that they were prepared to recommend acceptance of its final offer to their authorities. Moldova furthermore adopted revised procurement legislation in July 2015. On this basis, a revised draft decision on Moldova's accession was circulated to Parties on 31 July 2015. The hope for Moldova's accession being adopted at the Committee's meeting in September was expressed.²⁴

Ukraine applied for membership in the GPA in 2011 and tabled its initial coverage offer in 2012. Since the accession negotiations accelerated significantly, Ukraine submitted two revised offers in 2014. After the circulation of a third revised and a final draft offer in April and May 2015, Ukraine submitted its final offer at the end of June. On this basis, a draft decision on Ukraine's accession was circulated on 9 July 2015. Ukraine and several parties expressed the hope that the country's accession could be concluded in the near future.²⁵

China submitted its fifth revised offer in December 2014, and the Committee reviewed it in February 2015. Parties recognized the significant improvements in that offer, but continued to also point out previously identified gaps that will need to be addressed before China's GPA membership can be approved. China responded that it would be difficult, if not impossible, for it to make significant additions to improve its coverage, but signalled its readiness to discuss the proposed exceptions in its offer in order to continue the dialogue with Parties. China was reminded by GPA Parties that its procurement laws and regulations would need to be in compliance with the GPA before its accession could be

²³ See also *Committee on Government Procurement Moves Ahead on Multiple Accessions*, WTO NEWS ITEM, Feb. 11, 2015, https://www.wto.org/english/news_e/news15_e/gpro_11feb15_e.htm (last visited Aug. 5, 2015); *Australia Launches Bid to Join Government Procurement Pact*, WTO NEWS ITEM, June 3, 2015, https://www.wto.org/english/news_e/news15_e/gpro_05jun15_e.htm (last visited Aug. 5, 2015).

²⁴ See also Jean Grier, *U.S. Perspective on Encouraging Countries to Join the GPA*, 4th ANN. PROCUREMENT WEEK CONFERENCE: GAME CHANGING IDEAS & INNOVATIONS (Mar. 18, 2015), <https://app.box.com/s/s0yc175i75etkls84hn5vyammdx9t3wr>; *Australia Launches Bid to Join Government Procurement Pact*, *supra* note 23.

²⁵ See *Remarks by WTO Director-General Roberto Azevêdo*, WTO Symposium on the Revised WTO Agreement on Government Procurement (GPA): an emerging pillar of 21st century trade and development, (Sept. 17, 2015), available at: https://www.wto.org/english/news_e/spra_e/spra79_e.htm.

finalized, and encouraged to undertake any necessary reforms in parallel to market access negotiations.²⁶

Based on statements by relevant delegations in the GPA Committee, further movement can also be expected in 2015 with regard to the GPA accessions of Tajikistan, which submitted its first offer in February 2015, and the Kyrgyz Republic, which is finalizing its internal procurement reforms before taking up its GPA accession negotiations in a renewed effort to join the Agreement.

The intensified interest in GPA accession and the generally higher profile of the Agreement as described above have dramatically increased demands for related capacity building activities and assistance. Responding to this demand, arising in particular in Eastern Europe and Central Asian economies, in 2014, the WTO Secretariat and the European Bank for Reconstruction and Development (EBRD) implemented a new informal arrangement, based on an exchange of letters between the respective agency heads, for the purpose of facilitating the two organizations' cooperation in this area.²⁷ The new arrangement has already facilitated the organization/presentation of multiple joint national seminars on the Agreement for the countries serviced by EBRD, and provided assistance to Montenegro in the context of its recent successful accession negotiation. Related discussions are under way with the World Bank and other relevant organizations to equally well respond to increased demand by other regions that we expect to observe over the next few years.

Apart from the current accession candidates listed above, a further five WTO Members have provisions regarding accession to the Agreement in their respective WTO Accession Protocols and consequently may well start the GPA accession process in the not too distant future: the former Yugoslav Republic of Macedonia, Mongolia, the Russian Federation, Saudi Arabia and, as the most recent addition, the Seychelles.²⁸ Kazakhstan, which concluded its WTO accession negotiations in

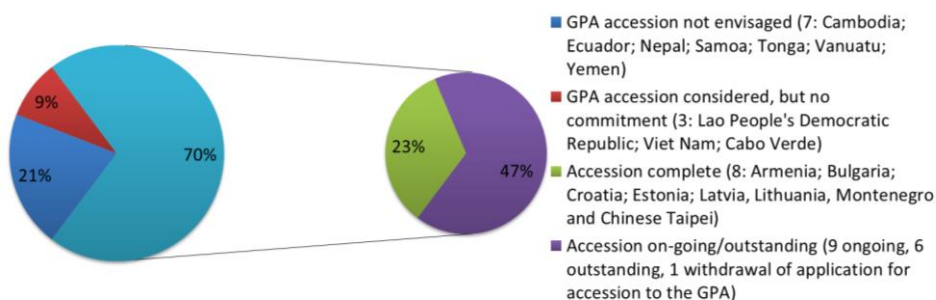
²⁶ See also *Committee on Government Procurement Moves Ahead on Multiple Accessions*, WTO NEWS ITEMS, Feb. 11, 2015, https://www.wto.org/english/news_e/news15_e/gpro_11feb15_e.htm (last visited Aug. 5, 2015).

²⁷ See also EBRD GPA Facility, <http://ebrd-gpa-facility.com/?id=2> (last visited Aug. 5, 2015).

²⁸ For further analysis of the relationship between accession to the WTO and accession to the GPA, see also Robert Anderson & Anna Müller, *WTO Accession and Accession to the Agreement on Government Procurement (GPA): – What is the Relationship? Why Should WTO Accession Candidates also Consider GPA Accession? What are the Pros and Cons?*, in WTO ACCESSIONS AND TRADE MULTILATERALISM: CASE STUDIES AND LESSONS FROM THE WTO AT TWENTY (Chiedu Osakwe & Uri Dadush eds., forthcoming 2015). The timelines for the start of accession negotiations envisaged in the various accession protocols differ

July 2015, also has undertaken GPA-related commitments in its accession protocol.²⁹ As will be evident, the prospect of these accessions underscores the Agreement's relevance as a tool for the strengthening of governance and the promotion/implementation of related reforms in the former socialist republics of Central and Eastern Europe and in other significant economies across the globe. Box 3 below shows that GPA accession-related commitments have become an important feature of recent accessions to the WTO, with 70% of new WTO Members undertaking such commitments. As negotiated results, the high incidence of GPA accession commitments in WTO accession protocols can be seen as a sign of both- the fact that existing WTO Members attach importance to new WTO Members joining the GPA, and those new Members' willingness to do so.

Box 3: WTO accession commitments related to GPA accession



Other existing WTO Members are observing the proceedings of the WTO Committee on Government Procurement and some of them are considering the potential merits of accession. In total, thirty WTO Members have observer status in the Committee.³⁰ Countries that have become observers in recent years include India, Indonesia, Malaysia, the Russian Federation, Saudi Arabia, Turkey, Viet Nam and, most recently, in 2015, Costa Rica, Pakistan, and Thailand. Pakistan not only became an observer but also expressed its determination to work toward GPA accession.

from case-to-case. Please note that Panama withdrew its application for accession to the GPA in 2014.

²⁹ See also *General Council Approves Kazakhstan's Membership Terms, Only Ratification Left*, WTO NEWS ITEMS, July 27, 2015, https://www.wto.org/english/news_e/news15_e/acc_kaz_27jul15_e.htm (last visited Aug. 5, 2015).

³⁰ See also *Parties, Observers and Accessions*, WTO, https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm (last visited Aug. 5, 2015).

On 14 November 2014 (following the successful conclusion of New Zealand's accession), Australian Trade and Investment Minister, Andrew Robb announced that Australia would "[initiate] work towards joining the ... Agreement on Government Procurement". Australia subsequently submitted its formal application for accession to the GPA at the beginning of June 2015.³¹ Clearly, the prospect of Australia's accession – bringing into the Agreement the main developed economy that currently remains outside of it – is a very significant development for the Parties and would further strengthen the Agreement and its role.

However, most observers, including Costa Rica, India, Indonesia, Malaysia, Turkey, Thailand and Viet Nam, have not signalled an intention to commence accession negotiations and do not have related WTO accession protocol commitments. It is, nonetheless, possible that their interest in accession will be stimulated, over time.³²

It is to be noted that the progressive broadening of the GPA's membership has, to date, left certain regions of the developing world, notably Africa and Latin America untouched. There is, nonetheless, a strong analytical case to be made regarding the relevance of the Agreement to countries in these regions.³³ In Latin America, to some extent the gap is filled by bilateral or other preferential agreements incorporating GPA-style disciplines. This is, however, not only true for Latin American economies: a significant number of other WTO Members not formally Parties to the Agreement, adhere to broadly the same disciplines as a result of preferential agreements in which they participate.³⁴ This, arguably, represents a further broadening of the Agreement's reach.

IV. THE AGREED WORK PROGRAMMES

The agreed Work Programmes of the Committee, the terms of which were negotiated in parallel to the final negotiations on the coverage of the revised

³¹ See also *Australia Launches Bid to Join Government Procurement Pact*, WTO NEWS ITEMS, June 3rd, 2015, https://www.wto.org/english/news_e/news15_e/gpro_05jun15_e.htm.

³² See also the discussion in Robert Anderson, *et al.*, *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), available at https://www.wto.org/english/res_e/reser_e/ersd201115_e.htm.

³³ Elements of such a case are presented in Nicholas Niggli & Kodjo Osei-Lah, *Infrastructure Provision and Africa's Trade and Development Prospects: Potential Role and Relevance of The WTO Agreement on Government Procurement (GPA)*, (WTO Secretariat Working Paper No. ERSD-2014-20, 2014), available at http://www.wto.org/english/res_e/reser_e/ersd201420_e.pdf.

³⁴ See also *infra* Part V.

Agreement, proved to be an important balancing tool in the renegotiation. Arguably, they provided an essential ingredient for the conclusion that was reached. The Work Programmes respond both to socio-political concerns shared by all Parties and to continuing negotiating interests of at least some of the Parties which could not be fully resolved in the negotiation.³⁵ As such, they provided at least a partial victory for those Parties holding the outstanding concerns, in the form of an assurance of the opportunity for continued discussion and the possibility of influencing the future evolution of the Agreement.³⁶

A number of these Work Programmes are the subject of specific proposed Committee Decisions that are annexed to the Protocol of Amendment adopted on 30 March 2012. They include:

- A Work Programme to consider best practices with respect to measures and policies that the Parties use to support the participation of small and medium-size enterprises (SMEs) in government procurement;³⁷
- A Work Programme to enable Parties to improve procedures followed in the collection and reporting of statistical data relating to the Agreement;³⁸
- A Work Programme to promote the use of sustainable procurement practices, consistent with the Agreement;³⁹
- A Work Programme to address restrictions and exclusions in Parties' coverage commitments under the Agreement;⁴⁰ and
- A Work Programme on safety standards in international procurement.⁴¹

³⁵ See Robert D. Anderson, *The Conclusion of the Renegotiations of the World Trade Organization Agreement on Government Procurement: What it Means for the Agreement and for the World Economy*, 21(3) PUB. PROCUREMENT L. REV. 83–93 (2012).

³⁶ As in the original 1994 Agreement, an eventual further round of negotiations is foreseen in the revised Agreement (see Article XXII:7), with the aims of improving the Agreement, progressively reducing and eliminating discriminatory measures, and achieving the greatest possible extension of its coverage among all Parties.

³⁷ See Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement, in Adoption of the Results of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement, Following Their Verification and Review, As Required by the Ministerial Decision of 15 December 2011 (GPA/112), Paragraph 5, *supra* note 5, at Annex 5.

³⁸ *Id.* Annex 6.

³⁹ *Id.* Annex 7.

⁴⁰ *Id.* Annex 8.

⁴¹ *Id.* Annex 9.

In addition to the above-noted Work Programmes whose initiation is foreseen following the coming into force of the revised Agreement, a further attachment to the Protocol of Amendment calls for the initiation of additional work programmes, at a time to be determined, on the following subjects: (a) a review of the use, transparency and the legal frameworks of public-private partnerships, and their relationship to covered procurement; (b) the advantages and disadvantages of developing common nomenclature for goods and services; and (c) the advantages and disadvantages of developing standardized notices.⁴² Yet another attachment implements a new process for electronic notification to the Committee of changes to national laws and regulations.⁴³

These work programmes address issues that are at the heart of concerns shared by most governments world-wide: from our experience gathered e.g. in technical assistance seminars provided to a broad range of countries, not just GPA Parties are interested in promoting access to government procurement processes by small and medium-size enterprises; nonetheless, approaches to promoting such access differ and can be a source of concern from a market access point of view. There are, moreover, conflicting views on the efficacy and cost-effectiveness of set-asides and other programmes to promote SME participation in procurement processes, even from the standpoint of some of the governments implementing such programmes.⁴⁴ The Committee's Work Programme on this issue will provide an important opportunity for governments to consider these issues in a context that could well influence the future evolution of related policies at the international level.

Similarly, the issue of sustainability in public procurement practices is one of widespread interest. While in some jurisdictions this is viewed as being principally a matter of measures to promote "green procurement", in other jurisdictions, it can encompass social policy considerations (even labour rights), as well.⁴⁵ While there is no doubt a common interest among the GPA Parties to promote at least elements of these interests through their respective procurement systems, there is also, at least for some Parties, a concern that the promotion of such interests has

⁴² *Id.* Annex 4.

⁴³ *Id.* Annex 3.

⁴⁴ 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 12, at 444-58.

⁴⁵ See also Robert D. Anderson et al., *The WTO's Revised Government Procurement Agreement - An Important Milestone Toward Greater Market Access and Transparency in Global Public Procurement Markets*, (GWU Legal Studies Research Paper No. 2012-7, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984216.

not become a disguised tool of protectionism. The Work Programme on this issue will, no doubt, provide a valuable forum for reflection on these issues.

Restrictions and exclusions from Parties' coverage commitments under the Agreement are of obvious concern from a market access standpoint, and the implications of safety standards in international procurement are a longstanding issue of interest particularly to the European Union. Again, the various work programmes that have been initiated on these topics will provide an opportunity for all interested Parties to carry forward their concerns regarding these issues, without prejudice to specific outcomes of the discussions. In the authors' view, the Work Programmes also represent a significant opportunity for interested academics to contribute to the future evolution of the Agreement, through the publication of research relevant to the various Programmes.

V. USE OF THE GPA AS A TEMPLATE FOR GOVERNMENT PROCUREMENT CHAPTERS IN PREFERENTIAL TRADE AGREEMENTS

It is also interesting to note that there are a growing number of bilateral or regional trade agreements, including agreements of GPA Parties with non-GPA Parties or among non-GPA Parties that feature chapters on government procurement.⁴⁶

Recent analyses of these issues have cast important light on this phenomenon.⁴⁷ In particular, the most recent analysis by Anderson, Locatelli, Müller, & Pelletier provides relevant information on the treatment of government procurement in about 250 RTAs.⁴⁸ In general terms, these represent those RTAs notified to the WTO before the end of August 2013, and which remain in force. To facilitate the analysis, the 250 agreements were allocated into three broad categories: (i) agreements between GPA parties; (ii) agreements between a GPA party and a non-GPA party; and (iii) agreements between non-GPA parties (this distinction is also retained in this paper). Within each category, a further distinction was made between: (a) RTAs that do not include government procurement-related commitments; (b) RTAs that have at least some provisions establishing

⁴⁶ See, for analysis, 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 12, at 561-656.

⁴⁷ See *id.*; Anderson *et al.*, *The Relationship between Services Trade and Government Procurement Commitments*, *supra* note 4; Asaki Ueno, *Multilateralising Regionalism on Government Procurement* (OECD Trade Policy Paper No. 151, 2013), available at [http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP\(2012\)30/FINAL&docLanguage=En](http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP(2012)30/FINAL&docLanguage=En).

⁴⁸ Anderson, *et al.*, *The Relationship between Services Trade and Government Procurement Commitments*, *supra* note 4.

liberalization of procurement markets as an objective; and (c) RTAs incorporating full government procurement chapters and related schedules.

First, 57% of the agreements considered have no provisions on government procurement (no market access commitments). These agreements include several plurilateral regional economic integration agreements (e.g. the EU treaty and EU enlargements (3),⁴⁹ CACM, AFTA, APTA, CACM, SAPTA, COMESA, ECOWAS, CEMAC, GCC, EAEC, PAFTA, SAFTA, SACU, SAPTA, WAEMU, etc.).⁵⁰ This might be seen as an indication that negotiation of government procurement provisions is (perceived as) difficult where a larger number of parties take part in the negotiations.⁵¹ This category of agreements also includes a good number of RTAs signed between members of the Commonwealth of Independent States (CIS) (around 35 RTAs). Furthermore, the majority of the agreements without government procurement provisions are concluded between non-GPA parties, which are more likely to not have internal government procurement regimes compliant with international standards in place than countries which are already party to an international agreement including government procurement provisions, such as the GPA and/or NAFTA.⁵² Finally, this category includes some of the oldest RTAs notified to the WTO - around 50 of these agreements entered into force more than 15 years ago and, in some cases, even before the creation of the WTO in 1995. More recently, a trend towards inclusion of provisions on government procurement in RTAs can be observed, especially (but not only) in regard to those concluded by GPA Parties.

⁴⁹ While the EU Enlargement treaties equally do not contain government procurement provisions themselves, secondary EU legislation establishes a comprehensive government procurement regime in the EU internal market.

⁵⁰ See, e.g., the EU treaty + EU enlargements (3); Central American Common Market (CACM); ASEAN Free Trade Area (AFTA); Asia-Pacific Trade Agreement (APTA); Central American Common Market (CACM); SAPTA; Common Market for Eastern and Southern Africa (COMESA); Economic Community of West African States (ECOWAS); Economic and Monetary Community of Central Africa (CEMAC); Gulf Cooperation Council (GCC); Eurasian Economic Community (EAEC); Pan-Arab Free Trade Area (PAFTA); South Asian Free Trade Agreement (SAFTA); Southern African Customs Union (SACU); south Asian Preferential Trade Arrangement (SAPTA); and West African Economic and Monetary Union (WAEMU).

⁵¹ This would seem consistent with a finding that the assessment of coverage offers, for example, requires insights into the internal structure of government and purchasing entities of participating countries.

⁵² Some of these non-GPA parties seem to have taken a deliberate policy choice to not include government procurement disciplines in RTAs, e.g. India, China. It will be interesting to see whether China's accession to the GPA (negotiations are ongoing) will engender a change in policy in regard to RTAs.

Second, 39 of the agreements (16%) considered incorporating a single or (in some cases) two or three basic provisions on government procurement, often identifying government procurement liberalization as an objective, and sometimes establishing non-discrimination principles without translating these goals into more tangible procedural and coverage commitments. These provisions tend to be "future-oriented" in that they favour soft commitments to future negotiations and developments over binding obligations. This approach is predominant in agreements concluded by the EU and EFTA in their relations with North African and Middle Eastern countries. It is also often found in the agreements of Turkey with Eastern European and Middle Eastern countries, and Japan has introduced a comparable approach in RTAs with Asian countries. Mexico and other Latin American/Caribbean countries have used, in a few cases, future-oriented provisions in RTAs mostly in view of future negotiations. Furthermore, this category of agreements includes several plurilateral regional economic integration agreements (e.g. CARICOM, CEFTA, CIS, EAC, MERCOSUR, PICTA).⁵³ The common denominator of these agreements is that the parties to these agreements clearly recognize the relevance of government procurement to international trade and consider the liberalization of their respective public procurement markets as an objective of the RTA in question.

The third major approach (embodied in 68 (24%)) of the agreements examined contains more detailed provisions on government procurement than those found in the second category and, very importantly, include coverage of services. These comprise (i) 12 RTAs between GPA Parties; (ii) 36 agreements between GPA Parties and non-GPA Parties; and (iii) 20 RTAs between non-GPA Parties. Altogether, these RTAs cover around 70 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).

The main findings of the above-mentioned studies are as follows:⁵⁴ First, the provisions on government procurement in the RTAs notified to the WTO – both those that deal with procurement in one or two basic provisions and those that address it in a more detailed fashion – are linked to the GPA in important ways. To begin with, often at least one party to the agreement is a GPA Party. Moreover,

⁵³ See Caribbean Community (CARICOM); Central European Free Trade Agreement (CEFTA); Commonwealth of Independent States (CIS); East African Community (EAC); MERCOSUR; and Pacific Island Countries Trade Agreement (PICTA).

⁵⁴ See *supra* note 46; *supra* note 47.

a considerable number of the agreements containing less detailed provisions on government procurement incorporate one of two types of references to broader international rules on government procurement. In the first case, a Joint Committee or similar body is mandated to consider further opening of procurement markets especially in the light of international regulations. In the second, parties make an explicit commitment, albeit in a soft or non-binding fashion, to accede to the GPA. These agreements therefore clearly aim at preparing the parties for further development of regulations on government procurement or even possible GPA accession.

In the case of agreements containing detailed provisions on government procurement, the current GPA text (and more recently the revised GPA text) has clearly served, with only occasional and sporadic exceptions, as the model for the relevant chapters. This is true both for agreements of this nature between non-GPA Parties and for agreements involving GPA Parties. This implies that a significant number of countries, including, for example, major Latin American developing countries that currently are outside the GPA, have, in fact, committed themselves to implement GPA-style disciplines via RTAs. This raises an important question for reflection: why have non-GPA Parties been willing to adopt GPA-style procurement regimes in bilateral or RTAs but not been willing to join the GPA? One wonders, also, if such countries might, indeed, be willing to join the GPA in a negotiating context that they find suitable to their needs and aspirations. Certainly, they would appear to be in a position to do so relatively easily. As a general conclusion, it also seems possible to say that the significance of the GPA as an instrument of international economic policy goes beyond its actual membership, in that it has so clearly and visibly influenced corresponding provisions of RTAs.

Overall, the co-existence of the GPA with the government procurement provisions of RTAs seems to involve relatively little in terms of any negative or “spaghetti-bowl” effects to which reference is often made in the context of— for example, diverging of tariff bindings relating to trade in goods at the bilateral/regional versus the multilateral level. This is certainly important since international government procurement commitments involve procedural and behavioural rules regarding which disharmony could entail significant costs. The government procurement provisions of RTAs that broadly track those of the GPA have also at least made feasible a significant further expansion of the membership of the GPA, in the event that parties decide to take this step. Importantly, the above findings, while not based on so-called “mega-regional” trade agreements still under discussion, such as the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) seem to hold true for the

on-going negotiations in such frameworks, and the resulting conclusions can be expected to be reinforced by them, at least in some respects.⁵⁵

One further conclusion can clearly be drawn: as such, the GPA's basic disciplines are relevant to substantially more procurement and potentially more countries than its current membership would suggest.⁵⁶

VI. CONCLUDING REMARKS

As outlined in this article, the coming into force of the revised WTO Agreement on Government Procurement coincides with and reinforces the increasing significance of the Agreement as a pillar of the global economy. The revised Agreement manifests, in diverse ways, the Agreement's growing importance as an instrument for the promotion of good governance in participating economies, in addition to market access.

The WTO Agreement on Government Procurement (GPA) is the main safeguard available to exporting economies to maintain their market-access rights in the crucial government procurement sector. In this context, the conclusion of the recent GPA renegotiation in March 2012 and the entry into force of the revised Agreement represented an important success for the international trading system. Together, these developments have expanded the Agreement's scope of application, effectively modernized it and set the stage for work aimed at continual improvement in its administration and, possibly, its further evolution over time.

With the renegotiation concluded, the focus of work on the Agreement in Geneva and in Parties' capitals is now shifting to expansion of the Agreement's membership. While in 1994, only a handful of (almost entirely) developed countries were bound by the Agreement, the membership has broadened over the years such that it now comprises 43 WTO Members, including not only the original partners but all 28 of the EU's member states and a number of relatively high-income jurisdictions which at least until recently were widely considered as developing economies (Korea, Hong Kong (China), Israel, Singapore and Chinese Taipei).

Furthermore, and as detailed above, a number of other WTO Members particularly from Eastern Europe and the Asia-Pacific region are either pursuing accession or

⁵⁵ See also Peter Draper et al., *Mega-Regional Trade Agreements: Implications For The African, Caribbean, And Pacific Countries*, 23 (ECIPE Occasional Paper No. 2/2014, 2014), available at http://www.ecipe.org/app/uploads/2014/12/OCC22014_.pdf.

⁵⁶ See also Anderson, *The WTO Agreement on Government Procurement (GPA): An Emerging Tool of Global Integration and Good Governance*, *supra* note 2, at 1/8-8/8.

are at least committed to learning more about the Agreement. These prospects represent a very significant opportunity to promote good governance and rule-based trade in addition to good public procurement practices across the developing and emerging world, and merit the full and enthusiastic support of the international community.

The agreed Work Programmes of the Committee proved to be an important balancing tool in the renegotiation, and respond both to socio-political concerns shared by all Parties and to continuing negotiating interests of at least some of the Parties which could not be fully resolved in the negotiation. They now represent an opportunity for Parties - and, in more limited ways, observers - to the GPA to shape the future of procurement policy with regard to such important issues as sustainable procurement and the furtherance of SME participation in procurement markets.

Overall, the conclusion of the renegotiation has raised the profile of the Agreement in the WTO and enhanced its contribution to good governance and the effective management of public resources, in addition to reinforcing its core function in maintaining the openness of the procurement markets covered by the Agreement. The conclusion has provided an important demonstration of the continuing viability of WTO negotiating processes in a difficult period. Doubtless, it will also serve to enhance interest in plurilateral approaches to important international negotiations where these are suitable for the purposes at hand. Together, these developments make the GPA an emerging pillar of the World Trading System.