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CUI BONO? SCOPE, RATIONALES AND CONSEQUENCES OF
THE EXEMPTION FOR DEVELOPMENT PROCUREMENT IN
THE REVISED TEXT OF THE GPA

ANNAMARIA LA CHIMIA*

This article critically analyses the scope and coverage of the exemption for development procurement introduced in Art II of the revised text of the GPA. It considers the implications of this exemption in terms of coherence and consistency with the GPA negotiations' objectives of encouraging developing countries' accession to the agreement and of expanding the GPA coverage. The paper also reflects on the repercussions of the exemption in terms of aid effectiveness more generally, questioning in particular whether the exclusion of development procurement from the GPA coverage has been a missed opportunity to promote good governance and transparency in the public procurement process for aid-financed projects.

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I. INTRODUCTION

In 1994, some WTO parties signed a plurilateral¹ agreement governing the purchasing activities of their public bodies, called the Agreement on Government Procurement (GPA).² A new text of the agreement was approved in 2006 and formally adopted on 30 March 2012,³ after over ten years of negotiations. The

¹ The GPA is a plurilateral agreement, i.e., it is not binding on all WTO members but only on those members that have signed it. See SUE ARROWSMITH, *GOVERNMENT PROCUREMENT IN THE WTO* (2003), for a comprehensive account of the GPA's history.

² See Robert D. Anderson & Sue Arrowsmith, *The WTO Regime on Government Procurement: Past, Present and Future*, in *THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM* 3 (Sue Arrowsmith & Robert D. Anderson eds., 2011) [hereinafter *THE WTO REGIME ON GOVERNMENT PROCUREMENT*], for discussions on the revised 2006 GPA text. See also Robert D. Anderson, *Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiations*, 16 *PUB. PROCUREMENT L. REV.* 255 (2007).

³ On 15 December 2011, the GPA Parties agreed on the outcome of the renegotiation of the Agreement which was formally adopted on 30 March 2012 under Article XXIV:7 of the Agreement on Government Procurement; *The Re-negotiation of the Agreement on Government Procurement*, www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm. See WTO Committee on Government Procurement, *Adoption of the Results of the Negotiations under article XXIV:7 of the Agreement on Government Procurement, Following Their Verification and Review, as Required by the Ministerial Decision of 15 December 2011 (GPA/112)*, Paragraph 5, GPA/113 (April 2, 2012); see Robert D. Anderson, *The Conclusion of the Renegotiation of the WTO Agreement on Government Procurement in December 2011: What it Means for the Agreement and for the World Economy*, 19(3) *PUB. PROCUREMENT L. REV.* 83 (2012). The revised

purpose of the negotiations was to (i) improve and update the Agreement; (ii) extend its coverage; and (iii) eliminate remaining discriminatory measures. The negotiations were also intended to facilitate accession to the Agreement by developing countries.⁴ It is in light of these objectives that this article examines the exemptions from the GPA coverage for procurement funded by international assistance, development aid, grants, loans and other assistance (i.e., development procurement as it has come to be known among scholars) present in Article II(3)(e)(i) and (iii) of the renegotiated GPA text. Given that the majority of GPA parties are donors of aid/assistance and that much of the developing countries' procurement is funded by grants, loans and other assistance, the extent to which development procurement is excluded from the GPA coverage will affect both the scope of the GPA and the interest of developing countries in the agreement itself.⁵ Thus, these exclusions deserve careful attention from commentators.

This article will first examine the scope, coverage and rationale of the exemptions in Article II(3)(e)(i) and (iii). It will then consider the implications of excluding totally or partially,⁶ development procurement from the coverage of the GPA, particularly focusing on the consequences of these exemptions for developing

agreement formally entered into force once a minimum of two thirds of the current GPA Parties ratified it.

⁴ See <https://www.wto.org>.

⁵ See Vinod Rege, *Transparency in Government Procurement: Issues of Concern and Interest to Developing Countries*, 35(4) J. WORLD TRADE 489 (2001) (in this article, the issue of tied aid is specifically raised as an obstacle to negotiations on procurement); see ANNAMARIA LA CHIMIA, *TIED AID AND DEVELOPMENT AID PROCUREMENT IN THE FRAMEWORK OF EU AND WTO LAW: THE IMPERATIVE FOR CHANGE* (2013). See also Annamaria La Chimia & Sue Arrowsmith, *Addressing Tied Aid: Towards a More Development-Oriented WTO*, 12(3) J. INT'L ECON. L. 707 (2009) [hereinafter 'La Chimia & Arrowsmith']; Annamaria La Chimia, *Untying Aid Through the Agreement on Government Procurement: A Means to Encourage Developing Countries' Accession to the Agreement and to Improve Aid Effectiveness?*, in *THE WTO REGIME ON GOVERNMENT PROCUREMENT*, *supra* note 2; O Morrissey et al., *The Link between EU-ACP Economic Partnership Agreements (EPAs) and Institutional Reforms* (May 2007), http://trade.ec.europa.eu/doclib/docs/2008/march/tradoc_138082.pdf (last visited Aug. 23, 2015); see also Simon Evenett, *Can Developing Countries Benefit from Negotiations on Transparency in Government Procurement in the Doha Round?*, in *Background Paper prepared for Trade for Development, UN Millennium Project (Task Force 9, 2003)*, available at www.alexandria.unisg.ch/Publikationen/22164.

⁶ As explained below, this will depend on whether the procurement process is carried out by donors or by the recipients of assistance. When donors carry out the procurement process, the exemption in (i) applies which provides for total exclusion of development procurement from the coverage of the GPA, while when recipients carry out the procurement process, the exemption in (iii) applies. This latter exemption only applies when the funding is granted under procedural or other conditions that are incompatible with the GPA.

countries' coverage and negotiating positions within the GPA if they were to accede to the agreement in the future. The repercussions of these exemptions in terms of aid effectiveness in general will also be considered, questioning in particular whether the exclusion of development procurement from the GPA coverage has been a missed opportunity to promote good governance and transparency in the public procurement process for acquiring goods and services for aid-financed projects. The analysis will conclude by reflecting on whether abolishing the exemptions and including procurement funded by international assistance and development aid within the GPA coverage could be a means to entice more developing countries to join the agreement and to enhance aid success.

II. SCOPE AND RATIONALE OF THE GPA EXEMPTION FOR DEVELOPMENT PROCUREMENT

A. The art. II exemption and the GPA coverage.

The GPA aims at opening up the procurement market between members,⁷ with respect to all types of procurement and entities that members have agreed to include in its coverage, subject to settled thresholds, and to specific exceptions and derogations agreed.⁸ GPA Parties have adopted (in both the 1994 and the 2006 text of the GPA) a highly flexible approach on the issue of the agreement's coverage. In order to fully understand the extent to which the GPA affects procurement activities of the Parties, it is necessary to look at each country's GPA commitments. In relation to types of contracts, types of entities and thresholds, there are generally no common rules within the Agreement. Procurement activities of GPA Parties are affected only to the extent that a specific procurement has been inserted in each country's Appendix on coverage. The Articles on coverage and non-discrimination are strictly connected. Indeed, any breach of the National Treatment (NT) and Most Favoured Nation (MFN) principles endorsed by GPA Parties is conditional on whether the specific procurement under investigation is

⁷ The current Parties to the GPA are Armenia, the EU and its 28 Member States, Aruba, Canada, Hong Kong–China, Israel, Japan, Liechtenstein, Norway, the USA, South Korea, Switzerland, Singapore, Chinese Taipei and Taiwan. The majority of these GPA Parties are donors of aid. Another 28 WTO members and four international organizations participate in the GPA Committee as observers. Ten of these members with observer status are in the process of acceding to the Agreement: namely China, New Zealand, Montenegro, Albania, Georgia, Jordan, Kyrgyz Republic, Moldova, Oman and Ukraine (some are classified as developing countries).

⁸ See Agreement on Government Procurement art. I, 15 Apr. 1994, 1869 U.N.T.S. 508 [hereinafter GPA 1994]; see Revision of the Agreement on Government Procurement, art. II, Dec. 8, 2006, GPA/W/297 [hereinafter 2006 text].

included in the GPA coverage.⁹ As specified in Article II paragraphs 1 and 2, the Agreement “applies only to measures regarding covered procurement”, where “covered procurement means procurement for governmental purposes...as specified in each Party’s annexes to Appendix I”. A positive list approach is used to define what entities and types of procurement are covered by the GPA (these are set out in Appendix I to the GPA); any procurement not referred to in the list is excluded from the GPA altogether. Coverage is based on bilateral arrangements rather than on the MFN treatment, i.e., markets are open only in return for equivalent economic concessions by trading partners. A flexible approach to reciprocity has also been endorsed,¹⁰ and parties seek equivalence in economic terms to their concessions allowing cross-sector exchanges of concessions.¹¹ Parties have allowed the existence of many country-specific derogations for their covered entities and for specific types of procurement, as explained below, which include some aid-funded procurement.¹²

Therefore, the process for negotiating accession to the Agreement requires specific and complex expertise to enable each country to negotiate the best possible terms of accession and take full advantage of the market access opportunities offered by each Party. This is an important factor for developing countries seeking to become members to the Agreement that also needs to be taken into consideration when assessing the possible benefits and drawbacks of including aid, international assistance, grants and loans in the coverage of the Agreement.

The main provision on coverage is Article II, entitled ‘Scope and Coverage’ which states that the Agreement applies “to any measure regarding covered procurement, whether or not it is conducted exclusively or partially by electronic means”. The

⁹ Joost Pauwelyn, *Iraqi Reconstruction Contracts and the WTO: “International Law? I’d Better Call My Lawyer”*, JURIST, <http://www.jurist.org/forum/forumnew133.php> (last visited Apr. 13, 2015).

¹⁰ The approach adopted for coverage has some drawbacks, for instance, it renders negotiations very burdensome and lacks transparency. However, this approach has also been credited with helping the Parties to reach a much wider agreement than was likely under a more formal arrangement, see Gerard De Graaff & Matthew King, *Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round*, 29(2) INT’L L. 435 (1995).

¹¹ In most cases reciprocity has been sought with respect to the nature of the entities covered.

¹² The approach to coverage has remained the same as the 1994 GPA. Indeed, because the GPA only covers procurement of listed entities, any assessment of whether Parties’ development procurement activities are covered by the GPA must include an investigation of whether the agencies responsible for aid procurement in each country are listed within the Parties’ annexes of entities subject to the GPA. For an extensive analysis of this point, see La Chimia & Arrowsmith, *supra* note 5.

article then continues with a definition of ‘procurement’.¹³ It has been argued that this definition, absent in the 1994 agreement, reflects the general meaning attributed to this term and the clarification given by the Panel in the *Sonar Mapping* case.¹⁴

Development procurement involves the acquisition of the use and benefit of goods and services for the implementation of projects funded by aid/assistance/grants/loans in exchange for valuable consideration, i.e., the aid/assistance/grant/loan money. Such procurement could, in principle, fall within the ambit of ‘public procurement’ covered by the new text of the GPA. However, two exemptions in paragraph 3(e) of art. II keep out development procurement from the coverage of the Agreement.¹⁵ In particular, letter (i) and (iii) of paragraph 3 (e) of Article II provide:

3. *Except where provided otherwise in a Party's annexes to Appendix I, this Agreement does not apply to:*
 - (e) procurement conducted:

¹³ This is an innovation introduced by the 2006 text; the 1994 text of the Agreement did not define procurement. Article II defines procurement as follows: “For the purposes of this Agreement, covered procurement means procurement for governmental purposes: (a) of goods, services, or any combination thereof: (i) as specified in each Party’s annexes to Appendix I; and (ii) not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale; (b) by any contractual means, including: purchase; lease; and rental or hire purchase, with or without an option to buy; (c) for which the value, as estimated in accordance with paragraphs 6 through 8, equals or exceeds the relevant threshold specified in a Party’s annexes to Appendix I, at the time of publication of a notice in accordance with article VII; (d) by a procuring entity; and (e) that is not otherwise excluded from coverage in paragraph 3 or a Party’s annexes to Appendix I.”

¹⁴ See Sue Arrowsmith, *The Revised Agreement on Government Procurement: Changes to the Procedural Rules and Other Transparency Provisions*, in THE WTO REGIME ON GOVERNMENT PROCUREMENT, *supra* note 2, at 285-336. It is generally thought that “procurement refers to the acquisition of goods, work and services from an external entity for valuable consideration,” see ARROWSMITH, *supra* note 1, at 100. Article I, paragraph 2 of the 1994 GPA text states that procurement could be “through such methods as purchase or as lease, rental or hire-purchase, with or without an option to buy.” The Panel in the *Sonar Mapping* case then clarified that “since these methods were all means of obtaining the use or benefit of a product, the word ‘procurement’ could be understood to refer to the obtaining of such use or benefit.” Panel report, *United States – Procurement of a Sonar Mapping System*, ¶ 4.4, GPR.DS1/R (Apr. 23, 1992) [hereinafter *Sonar Mapping* case].

¹⁵ Art. II(e) specifies that covered procurement does not include procurement excluded from coverage by paragraph 3 of the article or which is excluded in a Party’s annexes to Appendix I (i.e., Parties’ annexes on coverage).

- (i) for the specific purpose of *providing* international assistance, *including* development aid [emphasis added];
- (iii) under the particular procedure or condition of an international organization, or *funded by* international grants, loans or other assistance *where the applicable procedure or condition* would be inconsistent with this Agreement [emphasis added].

Hence Article II(3)(e)(i) and (iii) generally exclude development procurement from the coverage of the GPA,¹⁶ except, as stated in Article II itself, “where provided otherwise in a Party’s annexes to Appendix I”. This approach reverses the position under the 1994 GPA where procurement related to international assistance was, in principle, included within the coverage of the agreement subject to the applicability of a (much more limited) exemption for *tied* development aid which was included in an endnote to art. 1¹⁷ and to Parties’ specific *exclusions* for aid-funded procurement in their annexes on coverage. As Arrowsmith and I have argued elsewhere, the coverage of the endnote was limited to aid that was *tied* (i.e., aid provided bilaterally by a donor on the condition that goods and services for aid-financed projects be purchased from the donor country only) which implied that not all forms of development aid (and of tied aid) were excluded from the GPA coverage.¹⁸ For example, since the endnote only mentioned “tied aid to developing countries so long as it is practised by Parties”, in our view the endnote did not cover aid that was not tied (i.e., untied aid) and aid that was only partially tied (i.e., when procurement is restricted to a group of countries, including the donor and usually all developing countries. The US and the EU make much use of this aid category). Further, the endnote was limited to aid and was not extended to international assistance, which arguably includes instead a broader range of funds (see *infra*).¹⁹ In addition, the reference to “so long as it is practiced by Parties” in the endnote implied that the tied aid exemption did not apply when aid was received from donors that were not Parties to the GPA,²⁰ and possibly also when

¹⁶ The presence of these exceptions is also an indication that if it were not for the said exception, development aid procurement would be covered by the Agreement.

¹⁷ The endnote specified that: “Having regard to general policy considerations relating to tied aid, including the objectives of developing countries with respect to the untying of such aid, this Agreement does not apply to procurement made in furtherance of tied aid to developing countries so long as it is practised by Parties.” See La Chimia, *supra* note 5; La Chimia & Arrowsmith, *supra* note 5, for a full analysis of the endnote.

¹⁸ La Chimia, *supra* note 5; La Chimia & Arrowsmith, *supra* note 5.

¹⁹ La Chimia, *supra* note 5; La Chimia & Arrowsmith, *supra* note 5.

²⁰ For example, aid granted by Australia (a non-GPA Party) to Taiwan (a GPA Party) would not be covered by the endnote. See La Chimia & Arrowsmith, *supra* note 5 (arguing that in order to avoid a violation of the GPA, the non-Party donor would have to purchase the goods; when goods are purchased by a non-Party to the GPA, the GPA will not apply).

aid was donated to non-GPA countries.²¹ Besides, the reference to “so long as it is practiced by Parties” could also be interpreted as an implied condemnation of the practice of tying aid, or at least as an exhortation to countries to stop tying their aid.

In practice, however the application of the GPA to aid procurement activities of GPA Parties remained patchy. Indeed, the vast majority of GPA Parties had negotiated specific exemptions in their annexes on coverage, covering a broad range of aid-funded procurement (going beyond the tied aid exception in the endnote to art. 1). For example, the USA, an important donor country, had expressly excluded from its annexes on coverage all activities related to aid-funded procurement undertaken by two of its development agencies, namely the USDA and the USAID. Interestingly, no such exclusion was foreseen for another important US aid agency, namely the Millennium Challenge Corporation (MCC).²² Canada had also excluded aid procurement from its coverage by defining ‘procurement’ in a manner that excluded aid-funded procurement altogether. The EU and its member States only excluded food aid from GPA coverage,²³ but very few member States consistently applied the GPA rules to procurement funded by development aid (the UK and Ireland for example),²⁴ while others, with the

²¹ This eventuality however would highly reduce the scope of the endnote as very few recipients are (and were) members of the GPA, so such an interpretation would probably go against the intentions of negotiators albeit badly drafted.

²² Interestingly, the MCC is the only US aid agency which does not impose any restrictive eligibility condition related to the types of goods that can be purchased or the nationality of suppliers that could participate in the tender. This has led this author to make the observation that when donors do not use aid as a protectionist tool they are more inclined to include it within the GPA coverage.

²³ See Appendix I, Annex 1, p. 21/94 (showing that such exclusion was present in the General Notes, where a specific exemption for human feeding programmes was inserted). Thus, Italy has listed the Ministry of Foreign Affairs, through which it carries out aid projects, in Annex 1 of the Italian Annexes on coverage but it has not negotiated any exclusion for this entity for its aid-related procurement activities. Thus, procurement by the Italian Ministry of Foreign Affairs which was not subject to the tied aid exception in the endnote to article I of the 1994 text, and which does not relate to food aid, was required to be subjected to the GPA provisions (Subject to fulfillment of the conditions relating to thresholds and types of procurement). See Appendix I, Annex 1, p. 70/94 (showing that the same applies in the UK for aid-funded procurement undertaken by the Department for International Development).

²⁴ An extensive analysis by this author, of 4 EU donors, namely Italy, the Commission, UK and Ireland revealed that the UK and Ireland consistently respected the GPA rules. See Ireland: Tender, UG-Kampala: foreign economic-aid-related services, 2012/S 64-104380, www.ted.europa.eu/udl?uri=TED:NOTICE:104380-2012:TEXT:EN:HTML (last visited Aug. 23, 2015).

complacency of all other GPA Parties, were less compliant. The European Commission, for example, did not apply the GPA to its aid programmes despite those being, for the most part, partially tied and therefore not covered by the endnote.²⁵ Italy, to take another example, applied the GPA consistently only when aid procurement was conducted from the recipient country via an Italian Embassy but tended to disregard the GPA when the aid procurement process was conducted by – or under the responsibility of – the headquarters of the Minister of Foreign Affairs (the minister responsible for providing aid funds).

Hence, development procurement was either *de jure* or *de facto* outside the realms of international regulation which applied to public procurement in general. It is therefore possible that the exemptions in the revised text of the GPA are not *per se* intended as an expansion of the former exemption for tied aid contained in the 1994 GPA but, as it has been the case for other GPA provisions, as a formalization of Parties' practices.²⁶ A look at the way the other GPA exceptions/special provisions for developing countries have been interpreted by commentators confirms this position.²⁷ For example, Muller, in her lucid analysis of the GPA's SDT provisions²⁸ - which too are important for developing countries and their possible accession to the Agreement- hints at the non-use of the former SDT provisions as a justification for the current set up. Muller also suggests that such a practical approach might have also been favoured by the little or no participation of developing countries in the negotiations of the new Agreement and their disinterest in the revised text of the GPA.²⁹ Such arguments seem to equally apply in the case of development procurement. Yet the lack of developing countries' participation in the GPA negotiations cannot excuse the lack of debate on these issues, especially when this is done to the detriment of fully considering the development implications of these exemptions and underestimating the value that development procurement holds for developing countries – including its potential role in enthralling them to join the Agreement. This article aims at opening up such a debate and at stimulating further discussions over whether development procurement should be covered by the GPA.

²⁵ See LA CHIMIA, *supra* note 5, at 125-65 (discussing Italy, another EU country that has not negotiated specific exemptions for aid procurement other than for food aid, which applied the GPA rules to its aid programs only when it purchased aid goods via its embassies).

²⁶ As explained below, similar arguments have been made for other provisions of the GPA; in particular, see Anna Caroline Muller, *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, *supra* note 2.

²⁷ The lack of information and debate on the adoption of these exemptions during the negotiations and preparatory works of the new Agreement do not help in clarifying these issues (indeed the *travaux préparatoires* for the new Agreement are largely silent on this issue).

²⁸ Muller, *supra* note 26, at 355.

²⁹ *Id.*

Indeed the fact that these exemptions might formalize existing practices or that they might be the result of developing countries' lack of interest in the Agreement does not lessen the need to reflect on the consequences of excluding development procurement from the realms of international regulation for public procurement and on the consequences of these exemptions in terms of GPA coverage and developing countries' interest in the new Agreement. These are some of the questions that this article will focus on, after an analysis of the coverage of, and rationale for, these exemptions.

B. Coverage of the exemptions

Article II(3)(e)(i) and (iii) set out two exemptions: the first one, paragraph (i), is relevant for GPA Parties who 'provide', and are therefore donors of, international assistance and development aid. Under this paragraph, the donor GPA Party is the one which conducts the procurement process. The second exemption in paragraph (iii) is relevant for GPA Parties who receive assistance and are themselves in charge of carrying out the procurement process for the said assistance. In particular, this paragraph refers to two distinct situations: 1) where the procurement is conducted under the particular procedure or condition of an international organization, which necessarily implies that, that organization has funded (or co-funded) the procurement in question and that that procurement is carried out by the recipient (GPA member);³⁰ or 2) where the procurement is funded by grants, loans and other assistance, donated or lent by either a bilateral or a multilateral, a public or a private donor (in this case as well, procurement is conducted by the recipient of the funding).

Most GPA Parties are donors of assistance and they often maintain control of the aid procurement process, therefore the exemption in (i) is very important. For example, the EU and the USA, who together grant more than half of all bilateral aid,³¹ are both members of the GPA.³² The donor usually decides whether the procurement process for aid/assistance financed projects (and the rules to be

³⁰ If procurement was not conducted by the recipient member of the GPA but by the international organisations then the exemption would not apply as international organisations are not members of the GPA and are therefore not bound by it.

³¹ See Aid At a Glance [Title Ambiguous], OECD, <http://www.oecd.org/dac/stats/aid-at-a-glance.htm> (last visited Jul. 22, 2015).

³² All EU member States, who are prominent donors of aid, are members of the GPA. New Zealand, another donor, is also negotiating accession. Most traditional donors except Australia are members of the GPA.

followed³³) will be conducted by the donor itself or by the recipient country. Donors' decision is usually linked to a risk assessment of the recipient's capacity to conduct sound procurement and to the perceived degree of corruption associated with the recipient's procurement systems.³⁴ For the past sixty years donors have generally preferred to conduct the procurement process themselves, and even when recipient countries have been entrusted with carrying out the procurement process, donors have still maintained a strong control of the process itself, generally also imposing their own procurement rules (or conditions) on recipient countries.³⁵ This has been proved to lead to reduced ownership and undermining of partnership between donors and recipients.³⁶ It is indeed significant that one of the express commitments of the 2005 Paris Declaration on Enhancing Aid Effectiveness is to make more use of recipient countries' systems (especially recipients' procurement systems) as a means to increase ownership of the aid donated and foster better collaboration and partnership between donors and recipients. It is possible, therefore, that in the future, recipient countries will be more likely to conduct the procurement process for aid financed projects.

Hence paragraph (iii), linked to recipients carrying out the procurement process, also has the potential to become prominent in the future if more developing countries accede to the GPA and if donors, in furtherance to the call to enhance aid effectiveness and to make more use of recipient countries' systems, let recipient countries carry out the procurement process when procuring goods and services for projects financed by international assistance/grants/loans.³⁷

³³ This is also the case when procurement is funded by an international organization such as the WB.

³⁴ Donors do not follow clear and uniform practices; even within the same donor many differences persist. Very often even when the donor lets the recipient of the assistance carry out the procurement process, it still maintains a strong control over the process itself. Some donors even require the recipient country to use donors' rules when carrying out the procurement process or expect the process to be trusted to a procurement agency based in the donor country following donors' rules (while goods/services will be bought on behalf of the recipient). This creates numerous inefficiencies for recipient countries faced with having to implement many different procurement rules, highly increasing the administrative costs of the procurement process and undermining ownership of the aid itself.

³⁵ See generally LA CHIMIA, *supra* note 5.

³⁶ As shown in a study conducted for the OECD in Mali, a number of failings in terms of aid effectiveness and Mali's ownership of aid were caused by the multitude of public procurement procedures applied. See Jean Ruche & Eric Grandeau, Study Report for the OECD Development Aid Committee, 'The Mali Donors' Public Procurement Procedures: Towards Harmonisation with the National Law 2 (Jul. 2000), www.oecd.org/dac/2488727.pdf (last visited Aug. 23, 2015).

³⁷ Many of the international initiatives such as the 2005 Paris Declaration on Aid Effectiveness and the 2008 Accra Agenda of Action call on donors to make more use of

Hybrid situations, where countries are sometimes donors and on other occasions are recipients of assistance, are also possible. In the last decade for example, Brazil, Turkey and China (the third is negotiating accession to the GPA) have funded projects in many developing countries while still receiving assistance themselves. When a country is both a donor and a recipient of assistance it will be able to use paragraph (i) of art. II(3)(e) when it grants assistance and conducts the procurement process, and paragraph (iii) when it receives the assistance and conducts the procurement process.

The wording of Article II(3)(e)(i) suggests that when donors who are members of the GPA carry out the procurement process to *provide* assistance, the procurement is *tout court* excluded from the GPA coverage (unless Parties explicitly state otherwise in their annexes).

Au contraire, art. II(3)(e)(iii) seems to have a more complex, and to a large extent restrictive, coverage. This paragraph distinguishes between two situations, namely: 1) when the procurement is conducted under the particular procedure or condition of an international organization (who hence funds or co-funds the procurement) and 2) when the procurement is funded by international grants, loans or other assistance *where the applicable procedure or condition* would be inconsistent with the GPA.

In the first case, i.e., when procurement is conducted under the particular procedure or condition of an international organisation, the GPA exemption applies and such procurement is always excluded from the GPA coverage. International organisations usually abide by transparency and competition principles similar to those endorsed by the GPA. Furthermore, many international organisations now open their procurement to suppliers and goods from all countries (limited exclusions apply, usually against countries affected by UN sanctions). For example, most international organisations require their beneficiaries to purchase via International Competitive Bidding rules; therefore, procurement is open to international competition, and suppliers from most countries will be able to participate in the tender process.³⁸ Such exemption thus does not necessarily contradict the general GPA principles of market access and competition. However, other benefits of applying the GPA such as enhanced transparency and effectiveness, linked with the availability of national review mechanisms to

recipients' country systems by, for example, letting recipient countries carry out the procurement process and their own procurement rules when purchasing aid goods.

³⁸ The WB has opened up procurement to nearly all countries, excluding only countries on sanction lists. Instead, Regional Banks, such as the IBRD, are sometimes more restrictive and many still tie their aid funds.

aggrieved suppliers and the possibility to activate the WTO remedy system, will be lost. Interestingly, under the 1994 GPA, procurement funded by international organisations was not covered by the endnote to Article 1 as international organisations were not parties to the Agreement (as explained above, the endnote only applied to tied aid ‘practiced by Parties’).

The second limb of art. II(3)(e)(iii) covers situations where procurement is funded by grants, loans and other assistance *where the applicable procedure or condition* would be inconsistent with the GPA. Arguably, this exemption only applies when conditions or procedural requirements inconsistent with the Agreement are attached to such grants, loans or assistance. If, instead, the assistance is granted free from any such requirement or condition, the GPA rules should be followed. For example, if the grant/loan/assistance is provided under the condition that the procurement will be restricted to goods/services or suppliers from a specific country (or group of countries) only, for breaching the GPA NT and MFN rules, the exemption should apply. When, instead, no GPA-incompatible conditions are imposed by donors, recipients should apply the GPA. This is an important qualification of the exception considering that a significant portion of developing (and developed) countries’ procurement is financed by grant/loans and other assistance. However, the practical impact of this qualification rests on one important question, namely, whether for Art II(3)(e)(iii) to apply, the *applicable* requirement/condition needs to be formally set in the agreement between the donor and the recipient with which the grant/assistance is disbursed or whether informal arrangements suffice to exempt the procurement from GPA coverage. This question has practical implications as many donors are willing to be seen as not imposing conditions on recipients of assistance (especially when those conditions lead to aid ineffectiveness). As a result, they might prefer not to insert GPA-inconsistent conditions in the assistant agreement itself, whilst informally still expecting GPA-inconsistent procedures or conditions to be applied. It is well documented, for example, that donors make extensive use of informal tied aid (i.e., where procurement is restricted to purchases from the donor country even if no formal conditions are imposed by the donor to that effect, yet the grant/loan is donated on the understanding that donor’s goods/suppliers will be favoured³⁹). I am of the view that a narrow interpretation of the exemption should be preferred, which would require GPA-incompatible conditions or requirements to be formally set out in the assistance/grants/loans agreement. Such an approach would also help enhance (much needed) transparency in donors’ assistance agreements forcing donors to formalize their conditions/requirements if they want recipients to use the exemption.

³⁹ See LA CHIMIA, *supra* note 5.

A more restrictive interpretation of the exemption could also be supported in light of the possible broad range of funding that the second limb of the exemption in art. II(3)(e)(iii) can cover and hence could be seen, in line with the GPA negotiations' objective (see *supra*), as a way of restricting the application of the exemption and broadening the GPA coverage. Indeed as explained below, the silence in the Article over whom the grants, loans, and other assistance should be donated by (or donated to) for the exemption to apply, could be interpreted very broadly as including *any* grant, loan and other assistance, whether provided by a GPA or a non-GPA Party, private bodies, i.e., private foundations or individuals, or multilateral institutions. This will depend on the definition of 'grants, loans and other assistance', to which I now turn.

C. Gaps in the interpretation of the exemption

In order to understand the scope of the exemptions an important question that needs to be investigated is what is meant by international assistance, development aid, grants, loans and other assistance. Most importantly, it is critical to understand if the terms cover only funds linked to development objectives or if they also cover funds that are commercial in nature, such as export credits and commercial loans. Article II(3)(e)(i) and (iii) do not define these terms, hence, in line with article 31(1) of the VCLT one has to look at the ordinary meaning given to these terms and hence at the way they have been commonly interpreted and understood at the international level to ascertain what they might cover.

When analysing the endnote to art. 1 of the 1994 GPA, I had argued that only funds with a strict 'development' character could fall within the scope of the endnote, excluding therefore export credits and mixed credits. In my view the term 'aid' in the endnote to art. 1 of the 1994 GPA had to be interpreted following international practice, hence excluding from the definition of aid all financial instruments granted on commercial terms and for commercially viable projects.⁴⁰ Is such an interpretation still valid under the revised GPA?

Article II(3)(e)(i) refers to 'international assistance' and then specifies 'including development aid' which suggests, at least on first reading, that the exemption covers a broad range of funding 'including,' but not limited to, 'development aid'. What exactly the exemption covers, however, remains unclear.

⁴⁰ According to the Helsinki Agreement, export credits for financially viable projects cannot be tied unless the grant element exceeds 80%, in which case financially viable projects can be tied in developing countries. Financially viable projects can also be tied when the recipient country is an LDC (however, in this latter case, the use of tied aid in LDCs needs to be accompanied by a grant element of at least 50% concessionality level).

A look at GPA Parties' practice reveals that the term 'international assistance' has not been unanimously used. In fact, while some use the term 'international assistance' (Canada, for example⁴¹), some refer to 'foreign assistance' rather than to 'international assistance' when speaking of their funding interventions in third countries (the USA for example in its annexes on coverage); others refer, instead, to 'government assistance' (e.g. Taiwan) to cover a broad range of funding. No GPA Party provides a clear definition of these terms in their appendixes on coverage. In fact, only one Party, namely the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, makes reference to this term when defining the term 'procurement' specifying that procurement does not cover "non-contractual agreements or any form of government assistance, including, but not limited to, cooperative agreements, grants, loans, guarantees and fiscal incentives".

However, it is submitted that because this is not a direct definition of 'government assistance' and, because this list includes a vast category of funding, potentially covering any type of procurement, it cannot be used for defining what 'international assistance' is for the scope of the art. II(3)(e)(i) exemption. Indeed such a broad and uncertain definition could lead to abuse, conflicting with the negotiations' aim to broaden the GPA's coverage and more generally, with the GPA transparency principle.

One therefore has to look at international practice to understand what is meant by 'international assistance'. The major organisation collecting data on development aid and development assistance, the OECD, defines the words 'aid' and 'assistance' as "flows which qualify as Official Development Assistance (ODA) or Official Aid (OA)".⁴² In turn, ODA is defined as: "Flows of official financing administered with the promotion of the economic development and welfare of developing countries as the main objective, and which are concessional in character with a grant element of at least 25 percent (using a fixed 10 percent rate of discount)."⁴³ By

⁴¹ See Glossary of Statistical Terms, OECD, <https://stats.oecd.org/glossary/detail.asp?ID=1887> (last visited Jul. 22, 2015). Such definition matches the definition at Org. For Econ. Cooperation & Dev., *Development Cooperation Report 2014: Mobilising Resources for Sustainable Development*, http://www.oecd-ilibrary.org/development/development-co-operation-report_20747721 (last visited Jul. 22, 2015).

⁴² See Glossary of Statistical Terms, OECD, <http://stats.oecd.org/glossary/detail.asp?ID=3795> (last visited Apr. 13, 2015). Such definition matches the definition at External Debt Statistics: Guide for Compilers and Users, INTERNATIONAL MONETARY FUND (Jun. 25, 2003), <http://www.imf.org/external/pubs/ft/eds/Eng/Guide/index.htm>.

⁴³ See Glossary of Statistical Terms, OECD, <https://stats.oecd.org/glossary/detail.asp?ID=6043> (last visited Jul. 22, 2015). Such definition matches the definition at External Debt Statistics: Guide for Compilers and

convention, ODA flows comprise contributions of donor government agencies, at all levels, to developing countries (“bilateral ODA”) and to multilateral institutions. ODA receipts comprise disbursements by bilateral donors and multilateral institutions. Lending by export credit agencies - with the pure purpose of export promotion - is excluded.” OA are defined as “Flows which meet conditions of eligibility for inclusion in Official Development Assistance (ODA), other than the fact that the recipients are on Part II of the Development Assistance Committee (DAC) List of Aid Recipients.” Thus, three elements are key to the above definition: *first*, the funding needs to be directed towards developing countries’ economic development and welfare; *second*, when the funds are granted as loans, they need to have a high concessionality level; and *third*, funds are granted government to government.

Arguably, given that the OECD definition is endorsed by all OECD members, who are for the most part also GPA members, as well as by all financial institutions, it should be used to interpret the term ‘international assistance’ under the GPA.⁴⁴ There is no indication that the GPA parties wanted to depart from such a widely accepted definition of international assistance. If this interpretation is correct, then international assistance under the GPA does not include commercial grants and export credits.

A further question to be asked is whether the definition here endorsed for interpreting the term ‘international assistance’ under the first part of Article II - in art. II(3)(e)(i)- can also be used for interpreting the terms ‘grants, loans and other assistance’ used in art. II(3)(e)(iii). As said above, it is important to understand whether the exemption includes only grants, loans and other assistance donated for development purpose or if it covers all grant/loans, including commercial loans. Correspondingly, it must also be seen if the definition covers only grants donated government to government or if it also covers private funding, and finally if it covers grants/loans/assistance to developing countries only or those to developed countries as well.

Users, INTERNATIONAL MONETARY FUND (Jun. 25, 2003), <http://www.imf.org/external/pubs/ft/eds/Eng/Guide/index.htm>.

⁴⁴ Canada refers to the term ‘international assistance’ when defining its aid projects on the website of the Canadian aid agency and it provides a narrow definition of the term: *The term international assistance* refers to any financial resource provided by Canadian governments (federal, provincial, or municipal) in favour of *development*. The terms ‘international assistance,’ ‘international aid,’ and ‘aid’ are synonymous and are used interchangeably. See Understanding International Assistance Terminology, CANADIAN INTERNATIONAL DEVELOPMENT AGENCY, [http://www.acdicida.gc.ca/INET/IMAGES.NSF/vLUIImages/Reports/\\$file/statistical_report_on_international_assistance_2011-12-eng.pdf](http://www.acdicida.gc.ca/INET/IMAGES.NSF/vLUIImages/Reports/$file/statistical_report_on_international_assistance_2011-12-eng.pdf) (last visited Apr. 13, 2015).

For a start, given that the two paragraphs of art. II(3)(e) use different language, a literal interpretation of the two exemptions suggests that the exemptions probably cover different categories of funding. Several other factors, based both on a systematic as well as a teleological interpretation of the provisions, also support this finding. *Firstly*, the coverage of the two exemptions is different, i.e., broader for the exemption in (i) and narrower in (iii). As clarified above, the latter exemption only applies when GPA-inconsistent procedures or conditions are attached to the funding. *Secondly*, the two exemptions have different addressees, namely the donor for the first exemption in (i) and the recipient for (iii) and as further explained below, this means that different rationales lie behind the adoption of the exemptions.

The fact that art. II(3)(e)(iii) does not specifically refer to ‘development grants’ or ‘development loans’ suggests that the terms ‘grants’ and ‘loans’ cover all forms of grants and loans, whether provided for development or commercial purposes, by government or private entities, or to developing or developed countries. A broad interpretation would enable recipients of assistance - who are or who will become GPA Parties - to accept any external funding sponsoring their procurement activities regardless of commitments undertaken under the GPA (see *infra* on the conditions that could be attached to aid funds). It is reasonable to assume that if developing countries were afraid of having to refuse assistance because of their GPA accession, they would be (even more) reluctant to accede to the Agreement and hence the exception could be seen as a way to remove obstacles to developing countries’ accession to the GPA. If this interpretation is correct, the exemption would apply whenever government procurement has been financed by external funding. This is again a departure from the position adopted in the 1994 GPA where the exemption for tied aid was limited to aid granted by GPA Parties and only when granted for development purposes.⁴⁵ This interpretation would also help explain why the second section of the exemption in Article II(3)(e)(iii) has a more limited scope and only applies when the funding granted is tied to procedures or conditions inconsistent with the GPA rather than *tout court*, as under Article II(3)(e)(i).

Uncertainties over the correct interpretation of these terms remain, leaving significant gaps in the scope of the exemptions. This may explain why some donors have maintained in their annexes on coverage some specific exceptions in

⁴⁵ La Chimia & Arrowsmith, *supra* note 5 (arguing that the fact that aid granted by non-GPA parties was not exempted from the GPA coverage might have led donors who are not members to the GPA to carry out the procurement process themselves. This would have been an unsatisfactory solution from a development point of view especially given the international call to increase the use of country systems when aid is disbursed).

connection to the activities of their development agencies. However, a return to country-by-country exemptions entirely defeats the purpose of simplification which might have lay behind the adoption of such broad exemptions for development procurement. A return to country-by-country exemptions and country-by-country definition of the terms international assistance, grants, loans and other assistance is not a satisfactory solution. A common, uniform interpretation is needed to ensure consistency and uniformity in the interpretation of the Agreement. The absence of a definition of these terms is therefore a grave lacuna in the new Agreement.

D. Rationales for the GPA exceptions for procurement funded by international assistance, development aid, grants, loans and other assistance

This section will consider the possible rationales for the Article II(3)(e)(i) and (iii) exemptions, attempting to ascertain why the exemptions have been inserted and what objectives they serve. It has already been mentioned that one possible reason why these exemptions were adopted was simply to consolidate Parties' practices. As explained above, although development procurement was not totally exempted from the GPA's coverage, donors' practices meant that GPA rules were not really applied when aid goods and services were purchased. It was also said that the lack of debate over the adoption of these exceptions and of reasoned discussions over the pros and cons of the exclusion of development procurement from the GPA coverage, together with developing countries' absence at the negotiations table for the renewal of the GPA, has certainly contributed to maintaining the status quo of donors' practice where development procurement is left outside the realms of international regulation. This alone, however, does not sufficiently explain why these exemptions were adopted and what the inner rationale, the final scope and more deeply the *raison d'être* of these exemptions are. In the absence of significant official discussions within the GPA negotiations,⁴⁶ over whether, how and why these exemptions have been formulated, it is difficult to assertively establish the rationales for the exemptions. Hence, it needs to be noted from the outset that the analysis here is unavoidably limited and any answer to such questions is necessarily approximate. In fact, the purpose of this section is not to provide assertive answers but rather to open a debate and stimulate future official and much needed discussions by advancing some initial reflections on these important issues. To assist the interpretative process, recourse will be made to institutional and political

⁴⁶ With the exemption of the subject of tied aid that was briefly discussed in 2003 at a negotiations meeting of the Committee on Government Procurement when Norway proposed to delete the general exclusion for tied aid; Committee on Government Procurement, *Minutes of the Meeting Held on 6 February 2003*, GPA/M/20 (May 8, 2003). The topic was however abandoned as minutes of future meetings do not refer to any further discussions on tied aid.

theories linked to the development aid discourse which are used to justify why donors grant aid; along with scrupulous attention to donors' aid procurement practices and reference to the objectives of the negotiations, these can assist the interpretative process, helping to delve into the possible rationale behind the Article II(3)(e)(i) and (iii) exemptions.

Donor countries grant aid for a multiplicity of reasons: humanitarian and developmental concerns, born from a genuine desire to end poverty and to improve the lives of suffering people, often coupled with donors' political⁴⁷ and economic interests, such as fostering exports and opening up new markets to their countries' industries. Donors' interests can be supported in different ways; deciding to fund certain countries or certain projects *per se* is already a means to further certain interests over others. Procurement can also be, and has long been, used by donors to protect specific interests, especially those of an economic nature. For example, to secure financial advantages to industries from the donor country, donors can limit the purchase of goods and services for aid-financed projects to those originating in their country only (i.e., via the practice of tying aid). A look at donors' practice confirms that donors still make substantial use of their aid funds to procure economic advantages for their industries. Indeed, data on the level of aid that is tied shows that many GPA members still tie a substantial portion of their aid funds.⁴⁸ Tying aid runs against the principles of market liberalization endorsed by GPA Parties and would be in breach of the GPA National Treatment and MFN principles were it not for the exception in Article II(3)(e)(i). As mentioned earlier, the 1994 GPA had an express exemption for tied aid (i.e., the endnote to Article 1) which is indicative of the importance of this practice for GPA members and their firm intention of excluding the application of the free-trade and non-discrimination principles in the context of development aid – paradoxically exactly where the need for the best allocation of resources is most felt. It is therefore plausible that via Article II(3)(e)(i) GPA Parties wanted to continue to use aid to afford a protectionist niche to their industries via the aid sector.⁴⁹

⁴⁷ For example, aid to ex-colonies or aid to countries who commit to fight terrorism. During the Cold War, aid was openly associated with the need to arrest communism.

⁴⁸ Aid continues to be tied despite the fact that economists have proved that there are many negative effects associated with aid tying and that tying aid does not help the donors' economy. Amongst other negative effects, tying aid increases the costs of the goods and services purchased and distorts the nature of the aid. The OECD for example reports that tying aid increases the costs of the aid goods purchased by 15-30% more than if they were purchased via international competition. Tying aid ultimately undermines the effectiveness of the aid.

⁴⁹ Although members of the GPA have undertaken soft law commitments to abolish this practice and untie (some) aid, there seems to be little political will to reach a legally binding agreement to open up development procurement to international competition. A binding

It could be argued, however, that economic/protectionist interests might not be the only reasons why GPA Parties have included the exemption for development procurement in the coverage of the Agreement, but that Parties might have wanted to retain the freedom to use development aid/assistance to support specific non-economic policies linked to, for example, the protection of the environment, minority groups, human rights etc. To this end, for instance, donors could impose eligibility and specification criteria in the aid tender favouring certain environmental goods or certain environmentally friendly processes; they could also grant price preferences or set aside aid contracts for suppliers and goods that further these interests.⁵⁰ Two objections could, however, be made against this argument. *Firstly*, donors' practice reveals that donors make little use of aid procurement to protect non-economic interests. Indeed, such conditions could conflict with recipients' interests or with recipients' own policies and could undermine recipients' ownership of the aid, possibly also conflicting with recipients' national interests and their right to self-determination. For instance, it is possible that recipients' industries would be unable to meet the requirements set by donors (this would especially be the case for environmental criteria) compromising their ability to participate in the aid tender. *Secondly*, even if donors wanted to use aid procurement to pursue non-economic interests, it would not be necessary to entirely exclude development procurement from the coverage of the agreement. In fact, they could have followed GPA's 'ordinary course of action' for supporting such policies, i.e., the procedures available for procurement in general. Animus debates have taken place amongst scholars to understand to what extent social, environmental and human rights policies can be pursued by GPA Parties without breaching the GPA.⁵¹ The general consensus seems to be that although the GPA leaves only a limited leeway to parties to use procurement to pursue non-economic interests, such horizontal policies are not forbidden outright by the GPA,⁵² as is

agreement, where private parties can enforce their commitments via national courts, would be difficult to disregard.

⁵⁰ See, e.g., OECD, *DAC Recommendation on Untying ODA to the Least Developed Countries and Heavily Indebted Poor Countries* ¶ 16 (July 2008), <http://www.oecd.org/dac/41707972.pdf> (exhorting donors to include environmental criterion in the tendering process). See Annamaria La Chimia, *Climate Change and Aid Funding: An Appraisal of Recent Developments*, in CLIMATE CHANGE: EXPLORING THE LEGAL AND CRIMINOLOGICAL CONSEQUENCES (Stephen Farrall et al. eds., 2011). The new Agreement seems more in favour of such policies than the previous 1994 text.

⁵¹ For an account of this debate, see Arwel Davies, *The National Treatment and Exception Provisions of the Agreement on Government Procurement and the Pursuit of Horizontal Policies*, in THE WTO REGIME ON GOVERNMENT PROCUREMENT, *supra* note 2, at 429-43.

⁵² In particular, it is thought that human rights and social policies could fall within the Article III(2)(a) and (d) exemption. In any event, as Arrowsmith argues, Parties are

the case for economic and protectionist interests pursued via the practice of aid tying discussed above. It is submitted that given that the possibility to use procurement to protect non-economic interests is open to Parties for procurement in general, there is no reason why the Parties would have sought special treatment for development procurement. Therefore, it is unlikely that the pursuance of such non-economic interests lies behind the adoption of the art. II(3)(e)(i) exception.

Another factor that might have influenced the decision to keep aid outside the GPA coverage could have been the imminent accession to the GPA of new (donor) countries, such as China, that make extensive use of restrictive procurement practice in the aid context and use aid to further economic interests and open up new markets for their industries. Negotiators might have felt that the negotiations process for the accession of such countries was at risk of being further jeopardized if talks to include development procurement within the coverage of the GPA were also initiated. Indeed, new donors (and China especially) seem very reluctant to subject their aid policies to any scrutiny from other donors, who, they blame, have used and misused development aid for years before. For example, China (a new donor whose process for accession has already proved long and difficult) has refused to join current international soft law initiatives to regulate the aid procurement process such as the OECD Recommendation to untie aid. One could speculate that China would probably maintain the same position under the GPA. However, arguing that development procurement has been excluded from the coverage of the GPA just because some of the countries who are currently negotiating accession might have been reluctant to join the Agreement seems too far-fetched. In fact, the possibility would be open to new donors acceding to the GPA to negotiate an Appendix 1 exemption to exclude from their annexes on coverage, procurement linked to their development programmes. If this was the case, however, and if aid procurement was included in the GPA coverage, the Appendix 1 exemption would be regarded as a concession on coverage by GPA members that, in return, could lead to further concessions by the country using it. Furthermore, excluding development procurement from the GPA coverage has been a missed opportunity to test new donors' willingness to subject their aid funds to the GPA transparency, good-governance and competition rules.

In conclusion, a multiplicity of factors could lie behind the adoption of the exception in Art II(i), together they maintain intact the status quo of a system of aid procurement where donors can dispose of aid funds as they see fit (including

ultimately free to negotiate specific exemptions to allow these policies in the Parties' annexes on coverage. See Sue Arrowsmith, *The Revised Agreement on Government Procurement: Changes to the Procedural Rules and Other Transparency Provisions*, in *THE WTO REGIME ON GOVERNMENT PROCUREMENT*, *supra* note 2, at 285-337.

granting preferences for their national suppliers and maintaining a protectionist niche for their own industries). What is the position instead for the Article II(3)(e)(iii) exemption? This exemption, in allowing recipient countries who are (or will become) GPA members to accept *any* assistance received by *any* donor, regardless of whether receiving it would breach the GPA (i.e., either because of an attached condition or a procedural requirement) seems to reveal a pragmatic intent, closely linked with the negotiations objective to remove obstacles and encourage developing countries' accession to the Agreement. Indeed, given developing countries' constrained public resources, being able to always accept external assistance is paramount for them. However, such an approach neglects the fact that donors might have renounced GPA-inconsistent provisions had they been confronted with the fact that international obligations forced the recipient to refuse the aid. It could of course be feared that donors might have preferred to divert the assistance towards non-GPA Parties in an effort to avoid the funding being subject to GPA rules. However, it is doubtful that donors would divert aid exclusively for that reason. After all, strong political and humanitarian reasons lie behind the decision to grant aid and it is unlikely that such a decision would be modified because of the procurement rules applied to the aid tender. Indeed, studies on the implementation of the OECD Recommendation on untying aid - that sets transparency and competition rules for certain aid tenders - show that the level of aid to countries covered by the Recommendation has not decreased as a result of its adoption. Besides, this problem (of donors diverting aid to non-GPA Parties) would become more marginal if more and more developing countries became parties to the Agreement and if all aid was subject to the GPA rules. In fact, in my opinion, if development procurement was covered by the GPA - and hence benefitted from the GPA transparency provision and the GPA remedy system - donors would have been more willing to drop any GPA-incompatible condition/requirement in light of the benefits that can be accrued from the application of GPA rules. This argument would be especially valid for international organisations, other financial institutions and private donors - who don't back suppliers and industries from specific countries - interested in the money being well spent. In my view it could be argued that if development procurement was covered by the GPA, international organisations and private foundations would feel especially encouraged to donate grants/loans and other assistance to developing countries who become GPA Parties as the GPA offers guarantees of transparency, competition and effective review systems that would appeal to any organisation interested in their money being well spent.

Not long ago it could have been argued that donors who are not GPA members might have been reluctant to donate to GPA countries if the procurement funded by their aid money was open to competition from all GPA Parties while their own suppliers would not have been able to participate to tenders funded by other

donors who are GPA Parties. However, given that now most donors are members to the Agreement,⁵³ or are negotiating accession (China, Australia), such objection seems to have been overcome.

III. THE DEVELOPMENT IMPLICATIONS LINKED TO THE EXCLUSION OF PROCUREMENT FUNDED BY INTERNATIONAL ASSISTANCE AND DEVELOPMENT AID FROM THE GPA COVERAGE:

In the past two decades public procurement in general has been subject to a great deal of regulation at both the international and the regional levels. Such regulation, along with harmonising the procurement practices of members to such agreements and prompting institutional and good governance reforms in member countries, has also brought about significant progress in terms of market access for foreign suppliers, competition, and transparency.⁵⁴ Yet, procurement funded by international assistance has been left outside this process of harmonisation and modernisation of procurement practices. The development procurement market – especially the one linked to bilateral aid disbursements- is still substantially closed to international competition. Development procurement is used to reserve a protectionist niche to donors' suppliers and goods. The exemption of development procurement from the GPA coverage confirms this position.

As this author has amply documented elsewhere,⁵⁵ procurement related to aid activities is often matched by poor procurement practices along with unclear and unduly complicated procurement rules (especially with regard to the rules for participation to aid tender opportunities). Discriminatory rules, lack of transparency and the absence of adequate monitoring and review mechanisms when purchasing goods and services for projects financed by international assistance have been said to undermine the efficiency of the procurement process and to breed ground for corruption, ultimately undermining the effectiveness of the assistance donated.⁵⁶ It comes as no surprise that every now and then a corruption scandal rears its ugly head in the aid sector.

⁵³ Currently, with the exception of Australia, all major traditional bilateral donors are members of the GPA. Indeed, even one of the major new donors, China, is currently negotiating accession.

⁵⁴ Anderson, *supra* note 2.

⁵⁵ See La Chimia, *supra* note 5.

⁵⁶ For example, in Italy, aid procurement is acutely affected by the lack of consistent and transparent regulation disciplining the aid procurement process and the way in which procurement is implemented, often resulting in the absence of review mechanisms (or at least of practical and effective review mechanisms) for aggrieved suppliers when aid procurement is, as is often the case, carried out by (or on behalf of) the recipient country. Italy mostly implements aid by requiring the recipient country to carry out the procurement process or to employ an Italian procurement agency to carry out the procurement process

It is emblematic of this state of affairs that at the international level and within the debate to enhance the effectiveness of aid much attention has been paid to the need for reforming and improving the procurement process linked to the spending of the aid money.⁵⁷ Many of the aid effectiveness targets of the Paris Declaration on Enhancing Aid Effectiveness focus on aid procurement (for example, the target to untie aid, to make more use of country system, to fight corruption, and to generally enhance ownership and partnership⁵⁸). This is because more than 50% of ODA is delivered through the public contracting process and hence, better procurement is critical for overall aid success.⁵⁹ “Small improvements in procurement policy would have large aid-equivalent in payoffs.”⁶⁰ It is in this context that, in my view, the GPA exception for procurement funded by international assistance, grants and loans needs to be reassessed. In my view, excluding development procurement from the coverage of the GPA is a missed opportunity to answer the call to make aid more effective and to ensure that international law can work for development.

and to award the contract on its behalf. The rules applied are the Italian rules on procurement. In 2007, the Italian high administrative court, the Consiglio di Stato, denied jurisdiction to the Italian judiciary to decide cases arising between suppliers and contracting authorities when, in furtherance of an aid agreement between Italy and the recipient country, aid procurement is conducted and contracts are awarded by or on behalf of the recipient country. This is the case even when (or despite the fact that) the actual procurement is carried out by an Italian procurement agency acting from Italy, following the Italian rules on procurement and purchasing under the instruction and supervision of an Italian expert appointed by the Italian Ministry of Foreign Affairs.

⁵⁷ See OECD Initiatives on Enhancing Aid Effectiveness, OECD, available at <http://www.oecd.org/dac/effectiveness/> (last visited Aug. 23, 2015).

⁵⁸ See La Chimia, *supra* note 5.

⁵⁹ Eurodad estimates that “\$69 billion annually, more than 50% of ODA, is channeled through donor and recipient procurement systems in order to procure goods and services for development projects.” See Bodo Ellmers, *How to Spend It: Smart Procurement for More Effective Aid*, EUROPEAN NETWORK ON DEBT & DEV. (Sept. 2011), http://www.un.org/en/ecosoc/newfunct/pdf/luxembourg_eurodad-how_to_spend_it.pdf. (This data includes procurement activities by either the donor or recipient which have been financed by aid. See Francesca Giubilo, *Smart Procurement For Food Security* (Dec. 2012), http://www.eurodad.org/files/integration/2012/12/Smart_procurement_food_VF1.pdf. See also *Harmonising Donor Practices for Effective Aid Delivery*, DAC Guidelines & Reference Series, OECD (Apr. 14, 2003), <http://www.oecd.org/development/effectiveness/20896122.pdf>.

⁶⁰ Evenett, *supra* note 5.

Increased transparency and competition, institutional improvements and good governance reforms are often cited as collateral benefits of GPA accessions.⁶¹ Excluding development procurement from the coverage of the GPA means denying these benefits in a sector where the need for efficiency, competition, transparency and good governance is most felt.

Competition and non-discrimination would be the first tangible benefits of subjecting development procurement to the rules of the GPA. If international assistance were covered by the GPA, Parties would not be able to impose conditions that are in breach of the GPA and, for example, use development procurement as a means to protect their industries. In this respect, including aid within the GPA coverage could serve as a means to stop donors (GPA donors) from tying aid (which, as demonstrated by OECD studies, increases the costs of aid goods of between 15-30% and distorts the nature of the aid⁶²). Including aid within the GPA coverage could also be of immense value to recipients of aid who would be able to get better value for the aid money spent and use the aid money for what they need the most rather than for what donors' industries can sell. By stopping aid from being tied the GPA could help make aid more effective.

Further, since in many developing countries public bodies, and in particular aid-financed projects, are major potential outlets for trade between neighbouring states, including development procurement in the coverage of the Agreement may enhance opportunities for trade between developing countries.⁶³ Hence, if development procurement was covered by the GPA, developing countries would see an advantage in joining the Agreement as the procurement that is of most interest to them would be covered.

The enhanced transparency and the improved institutional mechanisms would also be corollary advantages of covering development procurement through the GPA. The enhanced transparency provisions and the strong review mechanisms provided for in the new text of the GPA could undoubtedly provide an opportunity to make development aid procurement more effective, transparent and in line with modern procurement practices. For example, national bid challenge procedures – which are foreseen by the GPA as review mechanisms

⁶¹ See Anderson, *supra* note 2; Robert D. Anderson et al., *Ensuring Integrity and Competition in Public Procurement Markets: A Dual Challenge for Good Governance*, in THE WTO REGIME ON GOVERNMENT PROCUREMENT, *supra* note 2, at 681-718; see generally the many papers available on the WTO website at www.wto.org.

⁶² *Policy Brief: Untying Aid to the Least Developed Countries*, OECD 2 (2001), <http://www.oecd.org/finance/2002959.pdf>.

⁶³ See La Chimia and Arrowsmith, *supra* note 5, who have first advanced this argument in the context of the 1994 GPA and the possibility to abolish the endnote to Article 1. That same argument has here been extended to development procurement more generally.

together with the WTO-DSU system - could ensure compliance with the procurement rules, while freeing development procurement from political concerns. National challenge procedures would ensure bidders' control of the aid procurement process. Furthermore, the application of the GPA could help enhance national procurement practices; for instance, those members of the GPA that do not provide adequate review mechanisms would be required to do so.

Moreover, as Arrowsmith and Anderson have argued, the GPA has played a fundamental role in ensuring that the trade liberalisation commitments endorsed in the Agreement were respected by countries who implemented protectionist measures in the face of the 2008 credit crunch.⁶⁴ Arguably, if the GPA covered development procurement it could also prevent donors from using aid/assistance as a means to protect their industries during the times of crisis. This would be especially important for the aid sector given that when donors suffer financial constraints, aid donations tend to diminish and the need to enhance aid efficiency is at its most pressing.

Scholars have also suggested that developing countries' reluctance to participate in international procurement agreements is linked to poor market access;⁶⁵ in particular developing countries fear they will not be able to gain access to developed countries' markets and derive any benefit from opening up their procurement markets to international competition, "while exposing their own firms to competition from rich countries". Indeed, the same authors argue that "the share enjoyed by developing countries of the procurement market in developed countries covered by the Agreement is at present negligible."⁶⁶ Linked to the market access issue is, according to these commentators, the fact that developing countries' procurement is financed through aid.⁶⁷ Hence, whether or not development aid procurement is covered by the GPA could play a "fundamental role for encouraging developing countries' participation to the GPA".⁶⁸ Similarly, and in connection with the market access argument, I have also previously argued, with Arrowsmith, that the fact that developing countries are not

⁶⁴ Robert D. Anderson & Sue Arrowsmith, *The WTO Regime on Government Procurement: Past, Present and Future*, in *THE WTO REGIME ON GOVERNMENT PROCUREMENT*, *supra* note 2, at 40.

⁶⁵ Martin Khor, *Government Procurement in FTAs: An Outline of the Issues*, http://www.ftamalaysia.org/file_dir/58298860344cdb056ceb99.pdf (last visited Aug. 23, 2015). For developing countries' opposition to the WTO negotiations on market access, see WTO Working Group on Transparency in Government Procurement, *List of Issues Raised and Points Made*, JOB(99)/5534 (Sept. 24, 1999).

⁶⁶ Rege, *supra* note 5, at 131; Morrissey et al., *supra* note 5.

⁶⁷ See Rege, *supra* note 5; Khor, *supra* note 64; Evenett, *supra* note 5.

⁶⁸ La Chimia & Arrowsmith, *supra* note 5, at 745.

able to open up their aid markets to other GPA Parties “will reduce their own ability to bargain for concessions under the GPA and may make accession less attractive”.⁶⁹

It could be argued that the legally binding nature of the GPA is not appropriate for dealing with a political matter as delicate as international aid. Aid is a scarce resource and if donors fear that they may be liable to breach GPA rules when granting aid, they may become reluctant to grant aid at all or may reduce the level of aid donated.⁷⁰ To avoid such risk, an express commitment could be inserted in the text of the Agreement to prevent donors from reducing the level of aid donated and to commit them to fulfill their international obligations to continue to grant aid to countries in need. Besides, it needs to be remembered that aid is also an important resource in terms of foreign policy strategies and it is unlikely that donors would stop granting aid because it is regulated by the GPA.⁷¹ On the contrary, if aid was covered by the GPA, most donors would be placed on an equal footing, as the GPA rules would apply to everyone, and would be able to resist pressure from national lobbies to use aid as a protectionist instrument.

One final question that needs to be considered at this point is whether developing countries and recipients of assistance, who become members of the GPA, should include procurement funded by grants, loans and other assistance in their appendix on coverage, as allowed by the opening line of article II, which states that the exemptions apply ‘Except where provided otherwise in a Party’s annexes to Appendix I.’ This possibility can be particularly important for recipients of assistance, who could decide, independently from the donor, whether to subject the international assistance they receive to the coverage of the GPA. As I have said above, including development procurement in the GPA coverage might increase developing countries’ negotiating power within the GPA negotiations. However, since the inclusion of development procurement would be made on a selective ad hoc basis, developing countries would need to have adequate negotiating skill to be able to select appropriately the instances when including procurement would be convenient and to bargain for further concessions by other members. Further, because development procurement is not generally included in the GPA coverage, GPA parties who are donors of aid might nullify any attempt by developing countries to insert procurement in the GPA coverage by simply carrying out the procurement process themselves and take advantage of the exception in article II(3)(e)(i). Developing countries even risk being discriminated against by donors, both Parties and non-Parties to the GPA, who may decide to grant aid to

⁶⁹ La Chimia & Arrowsmith, *supra* note 5, at 745-46.

⁷⁰ *Id.*

⁷¹ *Id.*

recipients who have not chosen to include their aid activities in the GPA coverage. Hence, until and unless the GPA covers aid procurement for all its Parties, limited gains would be accrued for developing country Parties from including aid procurement in their annexes on coverage.

IV. CONCLUSIONS

The new GPA rules on coverage exclude development procurement from the coverage of the Agreement and to a great extent restrict, rather than expand, the GPA coverage. This is regrettable considering that two of the explicit aims of the negotiations for the new GPA text were to expand the GPA coverage by eliminating existing discriminations and to attract new developing country members. This article has opened the debate on whether development procurement should be covered by the GPA. Failing to consider the issues raised in this paper risk undermining the credibility of GPA Parties. Arguably, the process for purchasing goods and services funded by international assistance grants and loans should benefit from the same competitive and transparent rules which apply to public procurement in general. Hence, development procurement should fall within the scope of the GPA.

As argued elsewhere by this author, including procurement funded by international assistance, grants and loans within the GPA coverage could offer an incentive to developing countries to become members of the Agreement, while enhancing the development character of the GPA itself and helping to foster the effectiveness of the assistance donated.⁷² Further, given the enhanced transparency provisions and the stronger review mechanisms provided for in the new text of the GPA, the exclusion of development procurement from the GPA coverage feels like a missed opportunity to make procurement linked to development funds more effective, transparent and in line with modern procurement practices.

Over the past ten years, all the international initiatives aimed at enhancing aid effectiveness have identified the efficiency of the process for purchasing aid-funded goods and services as the key factor in ensuring aid success. This is not surprising considering that an overwhelming proportion of aid is delivered through the public contracting process; hence, improving the efficiency of the procurement process can lead to greater value for money and ultimately better use of resources. Despite this, development procurement continues to be left out of the international regulation processes, reforms and harmonisations that apply to procurement in general. To date, the issue of aid effectiveness remains 'unresolved' and it is imperative that international law is used to make aid more effective.

⁷² See La Chimia, *supra* note 5; La Chimia & Arrowsmith, *supra* note 5.

The process for purchasing goods and services funded by international assistance, grants and loans should benefit from the same competitive and transparent rules which apply to public procurement in general. This could be done using the existing legislative framework which has been used to foster free trade and competition in other sectors of the economy and in public procurement in general. Development procurement should no longer be left out of regional and international agreements regulating public procurement. Regrettably however, protectionist practices continue to exist in the development procurement sector.