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## Regional Trade Agreements & Procurement Rules: Facilitators or Hindrances?

Robert D. Anderson, Anna Caroline Müller,  
and Philippe Pelletier



European University Institute  
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## **Abstract**

This Working Paper considers the significance of government procurement chapters in regional trade agreements (RTAs), both in their own right and *vis-à-vis* the WTO Agreement on Government Procurement (GPA). The paper finds, inter alia, that: (i) a strong complementarity exists between government procurement trade commitments and general goods and services trade commitments, making integration of procurement commitments in a more general system such as the WTO Agreements desirable; (ii) government procurement chapters in RTAs, where they exist in detailed form, are modelled substantially or entirely on the WTO GPA – a fact which can facilitate eventual accession to the GPA by participating WTO Members; and (iii) the market access opportunities created by government procurement chapters in RTAs generally are less extensive than those available under the revised GPA - a factor helping to maintain incentives for eventual GPA accession by relevant WTO Members. The recent successful renegotiation of the GPA has set the stage for a broadening of its membership, over time, ensuring that the Agreement's future remains strong.

## **Keywords**

WTO Agreement on Government Procurement (GPA); Regional trade agreements; Market access; Good governance.





## Introduction\*

Government procurement is of considerable importance as an element of economic activity, accounting for more than 15% of GDP, on average, in both developed and developing economies (OECD 2002; see also Anderson, Müller, Pelletier and Osei-Lah 2012). It is, furthermore, an essential input to the delivery of broader public services and functions of government, such as investment in transportation, telecommunications, energy and other vital public and business infrastructure; the provision of public services such as the construction and maintenance of schools, hospitals and public sanitation systems; and the efficient delivery of medicines and other aspects of health care.<sup>1</sup> As a result, the efficiency and effectiveness of government procurement systems can have a far-reaching impact on developmental processes. Apart from their impact on these specific functions of government, well designed procurement systems can have positive spill-overs on the state of governance systems generally, thereby strengthening public confidence in government (see also Anderson, Kovacic and Müller 2011). As such, government procurement has a developmental significance that transcends its magnitude as an aspect of economic activity (Anderson, Müller, Osei-Lah and Pelletier 2012; Niggli and Osei-Lah 2014; see, for related discussion, below).

Binding international agreements relating to government procurement can help countries to optimize their procurement systems and promote growth and development in at least three distinct ways (see, for useful related discussion, Evenett and Hoekman 2005). First, to the extent that they open up procurement markets to increased competition, including through international trade, they can help governments procure the best internationally available goods and services at an optimal price, i.e. they can help achieve best value for money in the provision of essential public goods and services. Second, the market access achieved through reciprocal international trade liberalization in the government procurement sector can provide for significant economic opportunities for the private sector and can thus stimulate economic growth. Third, to the extent that international agreements entrench and promote principles of non-discrimination, transparency and procedural fairness, such agreements can guide countries towards increased integrity and good governance. The benefits of this may spill beyond procurement systems per se. Related to the above, putting in place transparent and fair procurement systems may also encourage beneficial in-bound foreign direct investment. In fact, all these effects tend to be mutually reinforcing (Anderson, Müller, Osei-Lah and Pelletier 2012; see also, for an important application to Africa, Niggli and Osei-Lah 2014).

In the past, government procurement has been effectively carved out of the main multilateral rules of the WTO system. Broad exceptions limit the application of the GATT's and the GATS' MFN obligations and related market access and national treatment commitments in this area. This is despite the fact that government procurement accounts, or potentially accounts, for a very significant proportion of goods and services trade.<sup>2</sup> For example, it has been estimated that, in some sectors, the

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\* This paper draws upon and synthesizes material from a substantially longer Working Paper, Anderson, Locatelli, Müller and Pelletier (2014). An initial version was presented at the Conference on "The Internationalisation of Government Procurement Regulation" held at the European University Institute, Florence, 15-16 December 2014. Aris Georgopoulos and Arie Reich provided helpful comments. Anderson also thanks Harsha Singh for collaboration on related work. The views expressed are the authors' and should not be attributed to the WTO or its Secretariat.

<sup>1</sup> See, for an analysis of the importance of sound government procurement and competition policies in order to foster innovation and access to medical technology, World Health Organization (WHO), World Intellectual Property Organization (WIPO), & World Trade Organization (WTO) (2013), various sections.

<sup>2</sup> The share of government procurement markets that is potentially internationally contestable (i.e. that could be opened to international trade) has been conservatively estimated as between 5.1 and 7.57% of GDP in most countries (OECD 2002). It should be noted that these estimates treat all defense-related expenditure as non-tradable. As a result, they arguably underestimate the true extent of potentially contestable procurement, as several countries have opened, in fact, their non-sensitive defense-related procurement sectors to international competition (Pelletier 2015).

procurement of services by governments could represent as much as 30% of overall services trade (Hoekman & Primo Braga 1997; Anderson and Müller 2008). As such, access to procurement markets can also have an important bearing on the scale of operations and the resulting overall competitiveness of individual suppliers. This is to say nothing of the broader benefits of trade liberalization in this sector which have already been noted.

The resulting gap in the international trading system is filled, at least to an extent, by the plurilateral WTO Agreement on Government Procurement (GPA) and by regional trade agreements (RTAs) embodying related disciplines.<sup>3</sup> Such rules represent an important complement to general trade rules on market access. In general, to participate meaningfully in public tenders and related processes, foreign suppliers not only need the formal right to participate in such processes on a non-discriminatory basis, but also more general rights of market access and establishment. Conversely, the right to participate in government procurement activities can reinforce the value of more general market access rights to an important extent (see, for elaboration of this core element of our analysis, Part 2 below).

To be sure, the GPA currently covers only 45 of the WTO's 161 Member governments; and only a part of the procurement of each participating government. As such, the gap identified in the international trading system is only partially filled. There are, nonetheless, reasons for optimism regarding both the progressive expansion of the Agreement's membership and, over time, the coverage of individual Parties (see Part 4 below).

With regard to RTAs, the majority of such agreements that have been notified to the WTO in recent years contain provisions on government procurement, whether of a detailed or a limited nature. Altogether, more than 75 WTO Members have undertaken, on at least one occasion, trade liberalization in the area of government procurement, either via the GPA or an RTA (see Table 1). This represents approximately 45% of the WTO's Membership. These figures are likely to grow in the coming years in light of the on-going GPA accessions (including, e.g. that of China) and other RTAs currently under negotiation (e.g. the Trans-Pacific Partnership (TPP)).

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<sup>3</sup> The term "RTA" is used in this paper to describe any reciprocal trade agreement between two or more partners.

**Table 1 WTO Members having undertaken GPA-style commitments on government procurement, either via the GPA and/or in RTAs**

No	WTO Member
<b>GPA Parties</b>	
1.	Armenia
2.	Canada
3. – 31.	the EU and its 28 member states
32.	Hong Kong, China
33.	Iceland
34.	Israel
35.	Japan
36.	Korea
37.	Liechtenstein
38.	Montenegro
39.	the Netherlands with respect to Aruba
40.	New Zealand
41.	Norway
42.	Singapore
43.	Switzerland
44.	Chinese Taipei
45.	United States
<b>Other WTO Members with GP-related commitments in RTAs</b>	
46.	Antigua and Barbuda
47.	Australia
48.	the Bahamas
49.	Bahrain
50.	Barbados
51.	Belize
52.	Brunei
53.	Chile
54.	Costa Rica
55.	Colombia
56.	Dominica
57.	Dominican Republic
58.	El Salvador
59.	Guatemala
60.	Grenada
61.	Guyana
62.	Haiti
63.	Honduras
64.	Jamaica
65.	Mexico
66.	Morocco
67.	Nicaragua
68.	Oman
69.	Panama
70.	Peru
71.	Saint-Christopher and Nevis
72.	Saint Lucia
73.	Saint Vincent and the Grenadines
74.	Suriname
75.	Trinidad and Tobago
76.	Ukraine

Provisions on government procurement liberalization in RTAs are of interest for a number of reasons, some specific to the field of government procurement and some general or systemic. First, such provisions can already provide, at least to an extent, the benefits of broader liberalization including

enhanced competition in domestic procurement activities and access to foreign markets. Second, RTAs provide an important point of comparison with the GPA. Third, to the extent that the rules embodied in RTAs replicate those of the GPA, they may facilitate future GPA accessions, by acclimatizing procurement officials to relevant procedures and catalysing related legislative and policy reforms. Indeed, the overall viewpoint of this chapter is that, in the area of government procurement, RTAs generally introduce relatively little in the way of "spaghetti-bowl" effects and are favourable to the proliferation of procurement reforms and common rules. On the other hand, to the extent that RTAs already provide the access to foreign procurement markets that governments seek, they may, in some cases, diminish the incentive for GPA accession.

There is, to be sure, a wider issue concerning the significance of RTAs and even a plurilateral agreement such as the GPA for global welfare. This is the longstanding issue of trade diversion vs. trade creation (see S. Arrowsmith 2003 and Anderson, Müller, Osei-Lah, Pardo de Leon, & Pelletier 2011). This concern is not, however, the focus of the current chapter. Rather, the analysis in this chapter assumes, as a point of departure, that the GPA is both net trade creating and global welfare enhancing. It then considers the significance of government procurement chapters in RTAs both in their own right and *vis-à-vis* the GPA. This approach is based, in part, on a recognition that the effects of the GPA and procurement provisions in RTAs go beyond trade creation among the participating countries and include also: (i) important efficiencies in the national procurement systems of the individual participants, to some extent independent of the actual amount of trade that is created;<sup>4</sup> and (ii) demonstration and learning effects regarding good procurement practices that spill beyond the bounds of any individual RTA and even the GPA itself. In addition, as the prospects appear good for a significant expansion of the GPA's membership in the coming years, this could alleviate the potential risk of trade diversion, over time.

The remainder of the paper begins with an overview of essential aspects of the GPA and government procurement provisions in RTAs which underpin the rest of the analysis (Section 1). As already flagged, Section 2 delves into the relationship between general goods and services and government procurement disciplines in international trade agreements, including both the WTO Agreements and RTAs. Thereafter, Section 3 provides information on the market access dimensions of government procurement in recent RTAs, in comparison with the revised GPA. Some other respects in which the GPA and RTAs may have differential effects are also noted. Section 4 highlights some additional reasons why we expect that, in the long run, countries will gravitate toward GPA participation even where they already enjoy significant trade benefits via RTAs. Chapter 5 provides concluding remarks.

## 1 Government Procurement in the WTO and in recent RTAs: an overview

### 1.1 The WTO's Agreement on Government Procurement (GPA)

The WTO Agreement on Government Procurement (GPA) is, to date, the only legally binding agreement in the WTO focusing on the subject of government procurement. It is a plurilateral Agreement, meaning that it comprises only a subset of the full Membership of the WTO. Currently, the Agreement binds 43 of the WTO's Members.<sup>5</sup> Two further WTO Members, Montenegro and

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<sup>4</sup> There is some basis for this assumption. See, e.g. the discussion of Korea's accession to the GPA in Choi 2003. Choi finds that "Korea's accession to the GPA has brought [about] improvement in the competitive nature and efficiency of the government procurement market, [even though it has] has not resulted in any significant increase in import penetration".

<sup>5</sup> These comprise: Armenia; Canada; the European Union, including its 28 member states; Hong Kong, China; Iceland; Israel; Japan; Korea, Liechtenstein; the Kingdom of the Netherlands with respect to Aruba; Norway; Singapore; Switzerland; Chinese Taipei and the United States. For a review of the evolution of the GPA from its inception until recent times, see Arrowsmith & Anderson (2011).

New Zealand, concluded their negotiations for accession to the GPA on 29 October 2014, and are expected to become fully GPA Parties in the coming weeks, after submission of their respective instruments of acceptance. Seventeen other WTO Members, including Australia, China, Russia, Saudi Arabia and Ukraine either have formally initiated the process of accession to the Agreement or have related commitments in their WTO accession protocols.<sup>6</sup> Currently, the accessions processes of China, Moldova, Ukraine and Tajikistan are under active consideration by the Committee on Government Procurement. Australia has indicated that it will also pursue its accession intensively in the coming months.

The "GPA 1994" was negotiated in parallel with the Uruguay Round and entered into force on 1 January 1996. On 15 December 2011, in parallel with the Eighth WTO Ministerial Conference, the Parties to the GPA reached political agreement on the conclusion of the renegotiation of the Agreement that they had conducted over more than a decade.<sup>7</sup> The results of the renegotiation comprised: (i) the revised text of the Agreement;<sup>8</sup> (ii) a significant expansion of the Parties' market access commitments, valued at US\$80-100 billion annually (see Box 1);<sup>9</sup> and (iii) a set of Agreed Work Programmes<sup>10</sup> relating to the administration and expected further evolution of the Agreement, to be conducted by the WTO Committee on Government Procurement.<sup>11</sup> Subsequently, on 30 March 2012, after the timely completion of a legal review and verification process, Parties formally adopted the results of the renegotiation (WTO, Committee on Government Procurement, 2012A). The revised Agreement came into effect on 6 April 2014, 30 days after the submission of formal acceptances of the "Protocol of Amendment" by two thirds of the Parties to the Agreement.<sup>12</sup>

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<sup>6</sup> Overall, ten WTO Members are in the process of negotiating their accessions to the Agreement: Albania, China, Georgia, Jordan, the Kyrgyz Republic, Moldova, Oman, Tajikistan and Ukraine. A further five WTO Members have provisions regarding accession to the Agreement in their respective Protocols of Accession to the WTO: the former Yugoslav Republic of Macedonia, Mongolia, the Russian Federation, Saudi Arabia and Seychelles.

<sup>7</sup> The basis for the renegotiation was provided in Article XXIV:7(b) and (c) of the 1994 Agreement, which called for the Parties to undertake negotiations with a view to improving the Agreement and achieving the greatest possible extension of its coverage among all Parties, and eliminating any remaining discriminatory measures and practices. The negotiations commenced in 1997. For related background, see Anderson and Osei-Lah (2011A).

<sup>8</sup> The revised GPA improves on the existing text of the Agreement in various significant ways. For example, the revised text entails a complete revision of the wording of the various provisions of the Agreement to streamline them and make the text easier to understand. It updates the Agreement to take into account developments in current government procurement practice, notably the use of electronic tools. The revised text also sets out related requirements regarding the general availability and interoperability of the information technology systems and software used; the availability of mechanisms to ensure the integrity of requests for participation and tenders; and maintenance of data to ensure the traceability of the conduct of covered procurement by electronic means. It incorporates additional flexibility for Parties' procurement authorities, for example in the form of shorter notice periods when electronic tools are used. Shorter time-periods have also been allowed for procuring goods and services of types that are available on the commercial marketplace. See also Anderson 2012. For further information on the new transitional measures available under the revised text, see Box 5 below.

<sup>9</sup> It should be noted that not all of the additional coverage provided is necessarily available to each of the Parties, due to country-specific derogations that may apply. For further details, see Box 1.

<sup>10</sup> These comprise: (i) 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; (ii) a Work Programme to enable Parties to improve procedures followed in the collection and reporting of statistical data relating to the Agreement; (iii) a Work Programme to promote the use of sustainable procurement practices, consistent with the Agreement; (iv) a Work Programme to address restrictions and exclusions in Parties' coverage commitments under the Agreement; and (v) a Work Programme on safety standards in international procurement.

<sup>11</sup> See, for additional details, WTO, Committee on Government Procurement (2012B), paragraphs 7-10.

<sup>12</sup> The Parties that have, to date, submitted their instruments of acceptance and for which the revised Agreement has entered into force are Armenia, Canada; the European Union with its 28 member States; Hong Kong, China; Iceland; Israel; Japan; Liechtenstein; the Netherlands with respect to Aruba; Norway, Singapore; Chinese Taipei; and the United States. Korea and Switzerland are yet to submit their instruments of acceptance.

### **Box 1 The expansion of market access commitments achieved in the GPA renegotiation**

The conclusion of the GPA renegotiation is important for multiple reasons. Inter alia, it has added an estimated \$80-100 billion annually to the value of the market access commitments by the Parties under the Agreement.<sup>13</sup> This derives from:

- coverage by the Parties of (at a minimum) more than 500 additional central, local and other government agencies under the Agreement. This includes, as just one Party's (Canada's) contribution, the coverage under the Agreement, for the first time, of its sub-central level of government (i.e. all of its provinces and territories) - already a contribution that has been valued in the tens of billions of dollars;
- some improvements in the coverage of goods;
- downward adjustments in the thresholds applied under the Agreement by a few Parties, notably Israel, Japan, Korea and the Netherlands with respect to Aruba;
- significant coverage of new services sectors, by the following GPA Parties: (i) the European Union; (ii) Hong Kong, China; (iii) Iceland; (iv) Israel; (v) Japan; (vi) Korea; (vii) Liechtenstein; (viii) the Netherlands with respect to Aruba; (ix) Norway; (x) Singapore; (xi) Switzerland; and (xii) the United States. In all, 50 new services or sub-categories of particular services have been added to coverage. The coverage of telecommunications services, in particular, has been increased by the following eight Parties: (i) the European Union; (ii) Hong Kong, China; (iii) Iceland; (iv) Liechtenstein; (v) the Netherlands with respect to Aruba; (vi) Norway; (vii) Switzerland; and (viii) the United States. As a result, nine Parties are now covering telecommunication services in full;
- full coverage by all Parties of construction services (CPC 51); and
- for the first time, explicit coverage of Build-operate-transfer contracts (BOTs)/public works concessions or other forms of public private partnerships by three Parties (the European Union, Japan and Korea). This, in itself, is a very significant addition to coverage.

#### ***1.2 Trends in recent RTAs: growing inclusion of dedicated chapters on government procurement and resulting issues for reflection***<sup>14</sup>

Separately from the modernization of the GPA and the augmentation of related market access commitments, government procurement has increasingly been made subject to disciplines negotiated in the context of RTAs. As will be elaborated below, government procurement chapters in RTAs that embody detailed commitments, where they exist, typically are modelled substantially or entirely on the text of the WTO GPA (in some cases, the 1994 version of the text, and in others, the revised version). The fact that government procurement disciplines in RTAs broadly track those of the GPA also makes easier a significant further broadening of the GPA's membership (if WTO Members choose to pursue this), to the extent that it has already brought participating WTO Members procurement legislation and practices broadly in line with GPA norms.

Government procurement chapters in regional trade agreements are of interest for a number of reasons, some specific to the field of government procurement and some general or systemic. To begin with, in many jurisdictions, government procurement provisions in RTAs go a long way to establish

<sup>13</sup> As noted above, this brings the total coverage of the Agreement to an estimated \$1.7 trillion in procurements by the Parties annually. It should be noted that each Party to the GPA will not necessarily benefit individually from all the extended coverage of the Agreement inasmuch as each Party may apply special derogations in certain cases. See, for relevant details, WTO, Ministerial Conference (2011); and Pelletier (2015).

<sup>14</sup> This section draws on Anderson, Locatelli, Müller and Pelletier 2014; Anderson, Müller, Osei-Lah, Pardo de Leon, & Pelletier (2011); and Anderson & Müller (2008).

the prevailing conditions of trade and competition in public procurement markets.<sup>15</sup> This impact may be manifested through both behavioural rules that regulate procurement procedures and through coverage schedules that subject specific procurements to international competition. As such, government procurement provisions in RTAs can directly affect performance in a key economic sector with implications for economy-wide development and growth.

Second, provisions on government procurement in RTAs provide an important point of comparison with the GPA. In broad terms, both the GPA and government procurement provisions in RTAs address the same subject-matter – i.e. the application of non-discrimination principles, rules for the conduct of procurement, etc. However, RTA provisions may suggest alternative ways of addressing matters that are also subject to the GPA's rules. If RTA provisions on government procurement differed fundamentally from those of the GPA, RTAs could create disharmony and the possibility of conflict.

On the other hand, government procurement provisions of RTAs that broadly parallel and complement those of the GPA not only pose less risk of disharmony, but even can be said to validate and extend the influence of these provisions beyond GPA Parties. In this way, the GPA itself gains enhanced significance: the wording of its provisions will have implications not only for GPA Parties but also for non-Parties that commit themselves to RTA provisions that track the GPA.

Additionally, provisions on government procurement in RTAs that broadly track those of the GPA can facilitate accessions to the Agreement. The process of GPA accession has two main aspects: first, verification of the consistency of the acceding Party's national legislation with the norms and requirements of the GPA; and second, negotiations on coverage issues (in particular, on the "Appendix I Offer" of the acceding Party which sets out the entities to be covered and other aspects of coverage). Where a WTO Member acceding to the GPA has already adopted, or committed itself to adopt, legislation consistent with RTA provisions modelled on the GPA, it is likely to be well ahead in regard to the first aspect. It may also have an advantage in regard to the second aspect, to the extent that the RTA(s) in question also involve coverage commitments similar to the GPA (this aspect will be discussed below). Overall, it is our belief that this benign or positive impact of RTAs, in this sector, is likely to predominate (see also Anderson, Müller, Osei-Lah, Pardo de Leon and Pelletier 2011; Ueno 2013; and Anderson, Locatelli, Müller and Pelletier 2014).

Further to the above, the latest of the above-cited contributions, Anderson, Locatelli, Müller and Pelletier (2014), analyses a total of 250 agreements, 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 (these distinctions are also retained in the current chapter). Within each category, a further distinction was made between: (a) RTAs having no provisions on government procurement; (b) RTAs having only a single or a few government procurement provisions; and (c) RTAs having detailed provisions on government procurement and related market access commitments.

A few observations on each of these categories are as follows. First, around 45% or 110 of the agreements considered have no provisions on government procurement (no market access commitments). These agreements include several plurilateral regional economic integration agreements.<sup>16</sup> This might be seen as an indication that negotiation of government procurement

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<sup>15</sup> Obviously, this may be particularly true for parties to RTAs that are not also Parties to the WTO GPA. In fact, however, as will be shown below, in the clear majority of cases, provisions on government procurement in RTAs incorporate, whether by reference or explicitly, elements of the GPA. This is the case even for WTO Members that are not Parties to the Agreement. Hence, the actual conditions of trade and competition in public procurement markets often depend on a complex interaction between RTAs and the GPA, and the impact and influence of the GPA may extend beyond those WTO Members that are formally Parties to it.

<sup>16</sup> 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); South Asian Association for Regional Cooperation Preferential Trading Arrangement (SAPTA); Common Market for Eastern and Southern Africa

provisions is (perceived as) difficult where a larger number of parties takes part in the negotiations.<sup>17</sup> 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 not to have internal government procurement regimes compliant to 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.<sup>18</sup> 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. Hence, this category of agreements is not necessarily indicative of current trends.

Second, 67 of the agreements (around 27%) considered incorporate a single or (in some cases) two or three basic provisions on government procurement, often identifying government procurement liberalization as 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).<sup>19</sup> 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. This category of agreements can thus be seen as a useful initial step towards further development of government procurement rules and related liberalization.

The third major approach (embodied in 73 (around 27%) of the agreements examined) contains more detailed provisions on government procurement than those found in the second category and, very importantly, include market access commitments. These comprise 12 RTAs between GPA Parties; 36 agreements between GPA Parties and non-GPA Parties; and 20 RTAs between non-GPA Parties. Altogether, these RTAs cover around 75 WTO Members<sup>20</sup>, 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). *A salient finding regarding RTAs in this category is that the relevant textual*

(Contd.) \_\_\_\_\_

(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).

<sup>17</sup> 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.

<sup>18</sup> Some of these non-GPA parties seem to have taken a deliberate policy choice not to 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.

<sup>19</sup> 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).

<sup>20</sup> See above Table 1.



*provisions tend to track very closely the provisions of the GPA itself (whether the 1994 or the 2012 Agreement).*

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 other important ways. To begin with, often at least one party to the agreement is a GPA Party. Moreover, 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 a further development of regulations on government procurement or even possible GPA accession.

Most importantly, though, we find that the case of agreements containing detailed provisions on government procurement, the 1994 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 is an important finding in its own right: it 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.

A further observation is that GPA Parties participating in RTAs containing provisions on government procurement appear to be mindful of the linkages between the bilateral and the plurilateral levels and have made efforts to avoid overlapping, incompatible obligations. This is achieved through various means: firstly, obligations are modelled on the GPA. Alternatively, GPA provisions are imported by reference, ensuring a harmonized approach. Furthermore, MFN obligations are generally avoided so that obligations under RTAs and the GPA can be kept separate.

Overall, the co-existence of the GPA with the government procurement provisions of RTAs seems to involve relatively little in the way of the negative or "spaghetti-bowl" effects to which reference is often made in the context for example, of diverging tariff bindings relating to trade in goods at the bilateral/regional versus the multilateral level. This is important since international government procurement commitments involve procedural and behavioural rules regarding which disharmony could entail significant costs. Most significantly, the fact that government procurement provisions in RTAs broadly track those of the GPA also makes feasible a significant further broadening of the GPA's membership (if WTO Members choose to pursue this), to the extent that it has already brought participating WTO Members procurement legislation and practices broadly in line with GPA norms.

This raises an important question for reflection: why have non-GPA Parties been willing to adopt GPA-style procurement regimes and undertake government procurement trade liberalization in RTAs but not been willing to join the GPA? Although a full analysis of this question would go beyond the scope of this chapter, the following considerations may be noted.

To begin with, in our view, it appears that one of the main advantages of undertaking government procurement commitments in the context of an RTA - unlike in the GPA context - is that it allows for trade-offs across different matters/sectors of the RTA that would otherwise seem unrelated. For example, a country could make concessions on agriculture against concessions on government procurement. In this case, building domestic support for market access gains in agriculture could potentially help to overcome domestic resistance for keeping domestic preferences in the area of government procurement. Conversely, this cross-sectorial trade-off possibility is not available under the GPA, where government procurement is taken as a stand-alone negotiation.

On the other hand, in terms of market access interests, the participation in the GPA provides, overall, a broader set of market access opportunities than mere participation in an RTA with a

government procurement chapter (see below). In addition to have access to the Government Procurement markets of the 43 WTO Members that are currently covered by the Agreement, GPA accession will also provide future access to the markets of other major emerging, transition and developing countries, including not only China but also Russia, Ukraine, Saudi Arabia and the various others that are currently negotiating their accession to the Agreement or have commitments to seek such accession in their respective WTO accession protocols. These potential gains in the value of WTO market access commitments are very substantial – they have been estimated in the range of US\$ 439-1,123 billion annually (Anderson, Pelletier, Osei-Lah, & Müller 2012).

Another consideration is that, from a defensive point of view, under the GPA - unlike in bilateral negotiations - tailored transitional measures are available (subject to negotiation) to ease any "pain" associated with GPA accession by developing countries (see Box 5 below).<sup>21</sup> A further consideration is that, as a Party to the Agreement, such a country would be in a position to make its own demands and exercise leverage regarding the terms of accession of other Parties that join the Agreement. Yet, another consideration is that accession to the Agreement also provides an opportunity to participate in and influence its future evolution. It is especially relevant in the context of the new agreed Work Programmes of the Committee<sup>22</sup> and the built-in agenda for future negotiations to improve the agreement.

## **2 The complementarity of General Trade Rules and Government Procurement Disciplines**

As pointed out in the introduction to this chapter, despite its potential significance for both goods and services trade, government procurement has been effectively carved out of the main WTO multilateral trade rules. In particular, the application of the GATT's and GATS' MFN obligation as well as market access and national treatment commitments to government procurement have been suspended. The gap left by the absence of multilateral disciplines on government procurement trade is partially filled, at the international level, by the plurilateral WTO Agreement on Government Procurement and also by RTAs containing government procurement chapters. But how large is the remaining gap, and why is it of relevance?

First of all, the GPA is a plurilateral Agreement, meaning that not all WTO Members are Party to it. Overall, therefore, the situation remains that the wider WTO Membership has not signed up to international trade rules opening procurement markets internationally in the framework of the WTO.<sup>23</sup> Second, RTAs are, by nature, fragmented agreements among a sub-set of countries only, and as will be elaborated below, often stay behind the levels of market liberalization achieved in the GPA. Therefore, important potential for the expansion of disciplines relating to government procurement continues to exist.

Why is this of relevance? First of all, as pointed out earlier, procurement markets are an important part of economic activity in most countries in their own right. Furthermore, general market access commitments on trade in goods and services, on the one hand, and commitments on government procurement of goods and services, on the other hand, are likely to bear importantly on the effectiveness of each other. The reason is that commitments on government procurement generally

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<sup>21</sup> The transitional measures that are potentially available, subject to negotiations, include: (i) price preferences; (ii) offsets; (iii) phased-in addition of specific entities and sectors; and (iv) thresholds that are initially set higher than their permanent level.

<sup>22</sup> See above note 10.

<sup>23</sup> See also Arrowsmith (2003), p. 50. This is despite the fact that there is a growing number of bilateral or regional trade agreements, including agreements by GPA Parties with non-GPA Parties or among non-GPA Parties, with chapters on government procurement. See Anderson, Müller, Osei-Lah, Pardo de Leon, & Pelletier (2011) and Anderson, Locatelli, Müller and Pelletier (2014).

deal only with the right to participate in procurement activities (bidding and related processes) as such, whereas the ability to bid competitively will also depend on more general conditions of market access (e.g. tariffs or the rights of establishment of service suppliers).

The relationship between coverage of commitments under the GATS and the GPA illustrates this point. Possible interactions are summarized in Table 2. Overall, market access provided under the GATS has a very important impact on suppliers' ability to compete in government procurement markets if, and to the extent that, the services supplied to the government are sourced internationally. For example, rights of establishment or of cross-border supply granted to foreign service-suppliers in a given services sector under the GATS can have an important bearing on their ability to compete effectively for such contracts under the GPA. Similarly, whether or not a procurement contract can be fulfilled by a foreign supplier through presence of natural persons can have an important bearing on that supplier's competitiveness, e.g. in areas such as business services and construction and related services. At the limit, GPA commitments may be relatively meaningless without some degree of corresponding GATS market access/national treatment commitments.

**Table 2 Complementarity of GPA and GATS Commitments**

GPA service commitments?	GATS commitments?	Commercial result
Yes	Modes 1 and 2 only; Modes 3 and 4 "unbound" or partially restricted	Limited ability to compete in procurement markets, notwithstanding that relevant service is covered.
Yes	Modes 1 to 4 fully committed ("none")	Full ability to compete in procurement markets of interest.
No	Modes 1 and 2 only; Modes 3 and 4 "unbound" or partially restricted	Negative effects of exclusion from procurement markets are reinforced by limited GATS commitments.
No	Modes 1 to 4 fully committed ("none")	Notwithstanding GATS rights in respect to modes 1 to 3, commercial utility may be affected by exclusion from procurement markets.

Access to procurement markets (governed by the GPA) can also have an important bearing on the scale of operations and therefore the competitiveness of individual suppliers generally. Often, in fact, the largest contracts of individual suppliers will be with government entities (Hoekman and Primo Braga 1997). If a foreign supplier is excluded from these, this will affect its commercial presence in the market independent of market access rights under general trade agreements. GPA coverage thus adds commercial value and viability to commitments in the multilateral trade agreements, and the other way around. This economic, rather than legal, interrelationship also exists in the context of government procurement and services liberalization in RTAs.

Clearly, the fact of the GPA's limited membership as compared to the multilateral agreements means that many WTO Members do not benefit from the synergies that are possible between these two fields of trade regulation. Similarly, the fact that RTAs only achieve fragmented and limited liberalization of government procurement markets means that a high, unused potential for a boost in international trade through the liberalization of untapped procurement markets remains (Anderson, Locatelli, Müller and Pelletier 2014).

### 3 The GPA VS. RTAS: comparative impact on market access and other considerations

This section of the chapter examines the comparative effectiveness of the GPA as compared to RTAs, as vehicles for liberalization in the government procurement sector. As a preliminary consideration, it is important to emphasize that neither the GPA nor RTAs with procurement chapters provide for all-encompassing, complete coverage commitments. With regard to the GPA, the Agreement does not apply to the entire government procurement market of Parties.<sup>24</sup> On the contrary, 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 2). These three different dimensions of coverage with regard to entities, goods and services (including construction services), and threshold levels all have to 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 or good 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 2 The structure of GPA market access/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.

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

The Annexes also specify the threshold values above which individual procurements are subject to the GPA disciplines. In addition, the Annexes of most Parties contain notes that qualify the application of the Agreement. In principle, all goods are covered if procured by a covered entity and not excluded specifically.

Furthermore, when reading the schedules in Appendix I to ascertain whether a particular procurement contract is covered by the Agreement, it is important to check not only whether the procuring entity is covered, the threshold level and, if the contract is for a service, whether that service is covered, but also the General Notes at the end of most Parties' schedules, which provide for a number of exceptions.<sup>25</sup>

<sup>24</sup> For fuller analysis of the GPA Parties' market access commitments under the revised GPA, see Pelletier 2015.

<sup>25</sup> It should be noted that exceptions from the obligations of the Agreement are also allowed for developing countries in certain situations (see Article V of the revised GPA and Box 5 below) and for non-economic reasons, for example to protect national security interests, public morals, order or safety, human, animal or plant life or health or intellectual property, etc.

As highlighted in our previous analyses of this issue (Anderson and Müller 2009; Anderson, Müller, Osei-Lah, Pardo de Leon and Pelletier 2011; and Anderson, Locatelli, Müller and Pelletier 2014), the structure of government procurement coverage commitments in RTAs closely follows the structure of the GPA market access schedules, as described above.<sup>26</sup> The GPA therefore provides for a framework in which a direct comparison is possible. In a nutshell, three questions are generally relevant to determine coverage<sup>27</sup>:

- which entities need to comply with procurement rules and procedures?
- which goods, services or construction services are concerned?
- what is the minimum estimated value of proposed procurements in order for procurement rules to apply?

In our view, all three aspects must be considered to arrive at a balanced assessment of market access across agreements. This is because, in any particular agreement, the provision of what appears to be greater market access according to one particular dimension may be compensated by less extensive market access according to another dimension. Indeed, as demonstrated in different studies, there are indications that in some cases countries have sought to compensate the acceptance of lower thresholds with a more restrictive approach regarding either entities or services covered (and/or vice versa) (Anderson, Müller, Osei-Lah, Pardo de Leon, & Pelletier 2011 and Anderson, Locatelli, Müller and Pelletier 2014).

Looking at liberalization commitments made under the GPA and in RTAs, we reach the overall conclusion that when and if WTO Members decide to liberalize procurement markets via the GPA, they often are willing/able to offer greater market access under the GPA than in RTAs. While some RTAs provide for procurement commitments that are deeper than those of the GPA in particular respects (e.g. additional services sectors or coverage of build-operate-transfer arrangements (BOTs)), this is by no means true generally with regard to all dimensions of coverage. Indeed, a number of inter-linked elements have to be taken into account in estimating the overall value of commitments (e.g. the thresholds and the entities covered) with regard to government procurement markets. Overall, the market access opportunities created by government procurement chapters in RTAs generally are significantly less than those available under the revised GPA. The main arguable exceptions concern some RTAs between GPA Parties and a few agreements in Latin America.

To address one set of examples, US RTAs with non-GPA Parties typically involve less extensive entity coverage on the part of the US than do agreements with GPA Parties (see Table 3, next page).<sup>28</sup> Secondly, among the three US FTAs with GPA Parties, only one - that with Korea - provides greater coverage of entities for the US (though only at the central government level) than the GPA itself. In that case, however, the market access commitments achieved explicitly affirm and build directly on the two parties' GPA commitments - suggesting (importantly) that they were possible only on that basis.

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<sup>26</sup> With the exception of some RTAs, e.g. the EFTA Convention, which covers specific sectors.

<sup>27</sup> Another aspect of coverage is country exclusions and other derogations to the coverage generally provided, e.g. of SME programmes, sensitive procurements by the military, etc. While these potentially carve out important sectors of the procurement market of any country, due to the diversity and less unified structure in which such derogations are made, their inclusion in the analysis would go beyond this chapter.

<sup>28</sup> Further elements relevant to determining coverage under FTAs and/or the GPA are thresholds, goods, services and construction services coverage and exceptions to coverage. A full analysis of all those aspects goes beyond the scope of this chapter.

Table 3 Entity Coverage Commitments in US' RTAs as compared to the revised (2012) GPA

No	Agreement	Central Government Entities	Sub-Central Government Entities	Other Entities
<b>I. The GPA</b>				
	<b>All GPA Parties</b>	<b>More than 1,700 entities</b>	<b>More than 2,000 entities</b>	<b>More than 1,500 entities</b>
	<b>US's Commitments under the revised GPA</b>	<b>89 entities</b>	<b>37 states</b>	<b>10 entities</b>
<b>II. RTAs BETWEEN GPA PARTIES</b>				
1.	<b>US - Singapore</b>	As in their respective GPA schedules (by reference)	As in their respective GPA schedules (no entity coverage for Singapore)	As in their respective GPA schedules (by reference)
2.	<b>US - Israel</b>	As in their respective schedules of the GATT Tokyo Round GPA 1988 (by reference) <b>US</b> : 53 entities (36 less than the revised GPA); <b>Israel</b> : 1 entity for Israel (i.e. Ministry of Defense)	Not covered	
3.	<b>US - Korea</b>	<b>US</b> : 79 entities (10 less than the GPA); and <b>Korea</b> : 51 entities (9 more than the GPA).	Not covered	
<b>III. RTAs BETWEEN GPA PARTIES AND NON-PARTIES</b>				
4.	<b>NAFTA (Goods/ Services)</b>	<b>Canada</b> : 78 entities (as in the GPA); <b>Mexico</b> : 86 entities; <b>US</b> : 53 entities (36 less than the GPA)	Not covered	<b>Canada</b> : 10 entities (as in the GPA); <b>Mexico</b> : 48 entities; <b>US</b> : 6 entities (4 less than the GPA)
5.	<b>US - Australia</b>	<b>US</b> : 79 entities (10 less the GPA); <b>Australia</b> : similar positive list	<b>US</b> : 31 states, (6 less than the GPA); <b>Australia</b> : extensive list	<b>US</b> : 7 entities (3 less than the GPA); <b>Australia</b> : similar positive list
6.	<b>US - Bahrain</b>	<b>US</b> : 52 entities (37 less than the GPA); <b>Bahrain</b> : equivalent list	Not covered	<b>US</b> : 7 entities (3 less than the GPA); <b>Bahrain</b> : positive list (17 entities, including Bahrain Petroleum)
7.	<b>US - Chile</b>	<b>US</b> : 79 entities (10 less than the GPA); <b>Chile</b> : 20 entities (19 ministries and the Office of the President of the Republic)	<b>US</b> : 37 states covered, as in its GPA schedule; <b>Chile</b> : List of 51 entities "Gobernaciones" in 13 different regions + list of 341 municipalities	<b>US</b> : 10 entities <b>Chile</b> : 11 entities
8.	<b>US - Colombia</b>	<b>US</b> : 78 entities (11 less than the GPA); <b>Colombia</b> : 28 entities	<b>US</b> : 8 states + Puerto Rico (29 less than the GPA); <b>Colombia</b> : 38 gobernaciones	<b>US</b> : 7 entities (3 less than the GPA); <b>Colombia</b> : 22 entities
9.	<b>US – DR-CAFTA</b>	<b>US</b> : 79 entities (10 less than the GPA); <b>Others</b> : more exceptions than under GPA	<b>US</b> : 22 states + Puerto Rico (15 less than the GPA) (and for Honduras 16 states + Puerto Rico); <b>Others</b> : extensive lists	<b>US</b> : 7 entities (3 less than the GPA); <b>Others</b> : more or less extensive lists.
10.	<b>US - Morocco</b>	<b>US</b> : 79 entities (10 less than the GPA); <b>Morocco</b> : 30 entities	<b>US</b> : 23 states (14 less than the GPA); <b>Morocco</b> : extensive list	<b>US</b> : 7 entities (3 less than the GPA); <b>Morocco</b> : extensive list

11.	<b>US - Oman</b>	<b>US:</b> 50 entities (39 less than the GPA); <b>Oman:</b> equivalent list	not covered	<b>US:</b> 7 entities (3 less than the GPA); <b>Oman:</b> positive list (17 entities, including Bahrain Petroleum)
12.	<b>US - Panama</b>	<b>US:</b> 78 entities (11 less than the GPA) <b>Panama :</b> 16 entities	<b>US :</b> 8 states + Puerto Rico (29 less than the GPA) <b>Panama :</b> 12 provinces	<b>US:</b> 7 entities (3 less than the GPA); <b>Panama :</b> 30 entities + the Authority of the Panama Canal
13.	<b>US - Peru</b>	<b>US:</b> 78 entities (11 less than the GPA); <b>Peru:</b> extensive list (61 entities)	<b>US:</b> 8 states + Puerto Rico covered (29 less than the GPA); <b>Peru:</b> 25 entities	<b>US:</b> 7 entities (3 less than the GPA); <b>Peru:</b> 23 entities

Further to the above, among the agreements in the first category (i.e. RTAs between the US and another GPA Party), the recent Korea-US FTA is sometimes cited as the "state of the art" and represents a possible paradigm for other US trade initiatives (Schott and Cimino 2013). However, its applicability as a paradigm for a US chapter on government procurement with a *non-GPA Party* is doubtful, in that *it builds directly and explicitly on the GPA commitments of the two countries (US and Korea)*. This and other relevant features of the government procurement chapter of this agreement are summarized in Box 3.

**Box 3 The Government Procurement Chapter of the US-Korea FTA (in force in 2012):  
reliance on the GPA**

The US-Korea FTA is widely regarded as a state-of-the-art bilateral trade agreement. However, the government procurement chapter of the agreement builds importantly (and explicitly) on the WTO GPA:

- it expressly re-affirms both Parties' rights and obligations under the GPA;
- with regard to behavioural rules governing the operation of procurement markets, it, in most respects, incorporates by reference the relevant rules of the GPA;
- in a few cases, select rules (e.g. regarding electronic tools and conditions for participation) that have now been included in the revised 2012 GPA are carried over in the US-Korea FTA; and
- with regard to compliance mechanisms, it relies upon rather than displacing the core enforcement mechanisms of the GPA (robust domestic review or "bid challenge" systems and, ultimately, the WTO dispute settlement machinery).

Concerning FTAs between the US and non-GPA Parties, the government procurement chapter of the Colombia-US agreement provides a pertinent example (see Box 4).

**Box 4 An example of what can be achieved in a Government Procurement Chapter in a FTA between the US and a non-GPA Party: the Colombia-US FTA (concluded in 2006; brought into force only in 2012)**

- In general, the market access opportunities created by the GP Chapter of the Colombia-US FTA are substantially less than those available as between the US and its GPA Partners. For example :
- at the sub-central level, **the US** covers only 8 states and Puerto Rico (as compared to 37 states in the GPA); and in regard to central government entities (Annex 1) and all other entities (Annex 3), the US covers a fewer entities than under the revised GPA.
- on the other hand, **Colombia** has offered significant coverage to the US under the agreement (e.g. a total of 28 entities in the three branches of the central government (i.e. executive, legislative and judicial); 32 "Gobernaciones" (comparable to US states) at the sub-central government level; and it also covers important state-owned enterprises.
- The GP Chapter of the Colombia-US FTA relies implicitly on the GPA in that it incorporates a version of the GPA procedural rules.
- With regard to compliance, government procurement commitments in the Colombia-US FTA are, of course, not enforceable via the WTO dispute settlement system. The transitional mechanisms of the revised GPA also do not apply.

*Source:* Pelletier 2015.

As shown in Box 4, the market access opportunities created by the Colombia-US agreement - especially for Colombia - are significantly less than those potentially available under the GPA. More broadly, the record shows that the market access benefits that are created in the government procurement sector by US RTAs with non-GPA Parties are almost always less than those available via GPA participation. An arguable exception is the US-Chile FTA, in which Chile achieved access to the US procurement sector which was comparable to that offered by the US to its partners under the 1994 GPA, in return for very significant market access concessions by Chile. The US-Chile Agreement does not, however, include the additional coverage at the central government level that the US subsequently granted to its GPA partners in the negotiation of the 2012 GPA.

To summarize, US bilateral agreements with non-GPA Parties consistently involve lower levels of market access commitments than do agreements with countries that have already joined the GPA. In this respect, it is fair to say that GPA accession is the key to higher levels of market access for both the US and its trade partners. Furthermore, while the above examples focus on the US as an example of a GPA Party actively concluding RTAs with non-GPA Parties, similar findings hold true with regard to other GPA Parties as well.

To be sure, the relative extent of market access commitments is only one respect in which the GPA and RTAs embodying government procurement commitments can be compared. Other dimensions may include:

- the scope for rationalization/synergizing of commitments regarding government procurement per se and broader market access commitments, as highlighted in Part 2 above. Here, it seems at least arguable that the GPA has an advantage given its status (via Annex 4 of the Marrakesh Agreement) as an integral element of the WTO system;
- the relative institutional solidity of the GPA and relevant RTA disciplines, taking account of aspects such as the availability of the WTO dispute settlement system; the broader availability of technical assistance and capacity building to facilitate implementation of relevant commitments; and the institutional support provided by the Committee on Government Procurement;



- related to the foregoing points, the potentially greater positive spill-overs with respect to governance systems emanating from commitments in the GPA as compared to RTAs due to their greater visibility, enforceability and institutional solidity; and
- importantly, given the admittedly limited coverage of the present GPA as compared to the overall scope and size of government procurement markets worldwide, the scope for and likelihood of progressive deepening of market access commitments and updating of related procedural disciplines.

In light of the above considerations, overall, our view is that the GPA is and will remain at the centre of global efforts to promote liberalization/sound rules and broaden access to government procurement markets. As has been demonstrated, government procurement provisions in RTAs that address the issue substantively themselves rely on the GPA in diverse ways. Nonetheless, to the extent that government procurement chapters in RTAs themselves tend to track the GPA rather closely, such agreements can clearly facilitate eventual accession to the GPA. Thus, the possibility of the quasi-multilateralization of the GPA, over time, should not be ruled out.

#### **4 Additional reasons for believing that countries will eventually gravitate toward the plurilateral system: the GPA as an emerging pillar of the 21<sup>st</sup> century global economy**

This section of the chapter looks at the current status, future prospects and inherent sources of strength of the GPA, as a further basis for reflection on its relative strengths and role as compared to RTAs. An obvious limitation of the GPA is that roughly two thirds of the WTO's Members remain outside of it, and the majority of these have not shown interest in joining the Agreement in the future.<sup>29</sup> The membership of the Agreement has nonetheless, increased substantially since its first entry into force: whereas in 1996, only 23 WTO Members<sup>30</sup> were covered by the Agreement, 45 WTO Members are now covered. Moreover, a gradual broadening of the GPA's membership over time together with a progressive deepening of market access commitments is not at all unrealistic: already, ten additional WTO Members<sup>31</sup> have started the process of accession to the Agreement; a further five have made similar commitments in connection with their WTO accession protocols;<sup>32</sup> and a large number of other WTO Members, including Members from Africa, Asia, Eastern Europe, the Middle East and Latin America participate in bilateral agreements which, as noted above, potentially make GPA accession relatively easy by including very similar commitments in government procurement chapters.

The recent conclusion of the GPA renegotiation and entry into force of the revised Agreement holds the potential to encourage and facilitate future GPA accessions in multiple ways. First, the conclusion of the renegotiation was made possible due to the possibility, under the GPA, to adapt coverage to the reciprocal commitments provided by each Party to the Agreement, which GPA Parties prefer to a strict MFN approach. Second, by increasing the sum of market access opportunities made available via the Agreement, the renegotiation has strengthened the incentive for outsiders to join the Agreement. Third, as noted above, the improved S&D provisions that are incorporated in the revised text of the Agreement are intended to facilitate future accessions, by offering an array of possible transitional measures that can be tailored to the needs of specific acceding Parties, without eroding the principles of reciprocity. Fourth, the new flexibilities contained in the revised Agreement make it easier to implement for all Parties, including new ones. Lastly, the conclusion could have a

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<sup>29</sup> See also Anderson and Osei-Lah (2011B).

<sup>30</sup> Canada, the EU and its then 15 Member states, Israel, Japan, the Netherlands with respect to Aruba, Norway, Switzerland, and the United States. Hong Kong, China; Korea; Liechtenstein and Singapore joined in 1997.

<sup>31</sup> Albania, Australia, China, Georgia, Jordan, Kyrgyz Republic, Moldova, Oman, Tajikistan and Ukraine.

<sup>32</sup> Mongolia, the Russian Federation, Saudi Arabia, Seychelles and the former Yugoslav Republic of Macedonia.

psychological impact: it has undeniably raised the profile of the Agreement, and has also demonstrated the seriousness and results-orientation of the Parties.

Elaborating on these aspects of the Agreement, first, the more direct application of the reciprocity principle under the GPA than under some WTO Agreements provides Parties with the opportunity to adapt their coverage commitments flexibly to what they get in return, thereby taking up an important success factor of RTAs. To explain this legally, the application of the GPA's MFN and national treatment principles are limited to "covered procurement". In the GPA context, this is interpreted as meaning that these provisions do not apply to questions of market access, thus permitting for country-specific derogations in coverage schedules. This approach differs significantly from that taken under GATT and GATS rules in that the GPA expressly permits negotiated exclusions from both national treatment and MFN through the coverage schedules without restrictions. While systemically, this may make the GPA less ambitious, it also provides important "wiggle room" to find negotiated, tailor-made solutions.

Second, as an essential design feature of the Agreement and a safeguard against free riding, the (now augmented) market access benefits under the GPA are available only to Parties to the Agreement. This follows from the fact that, in the GPA, the MFN principle only applies with regard to treatment accorded to goods, services and suppliers of other Parties to the Agreement. The GPA Parties have implicitly decided not to "multilateralize" the GPA's liberalization benefits by making them freely available to other WTO Members, with no corresponding commitments on those other WTO Members' part. Rather, accession to the Agreement is required and again, reciprocity is maintained.

Third, as a key aspect of the recent textual revision, the GPA's provisions relating to "developing countries" (special and differential treatment or "transitional measures") have been made more specific and concrete. The resulting provisions embody important features that arguably respond to concerns that have been identified with respect to S&D in the WTO more generally (see Box 5).

#### **Box 5 New transitional measures for developing countries in the revised GPA text**

In a key change, the transitional measures ("special and differential treatment" or "S&D") that are available to developing countries that accede to the Agreement have been clarified and improved. The transitional measures that are potentially available, subject to negotiations, include: (i) price preferences; (ii) offsets; (iii) phased-in addition of specific entities and sectors; and (iv) thresholds that are initially set higher than their permanent level. The time periods during which these measures would apply are subject to negotiation, and not to arbitrary caps. Provision has also been made for delaying the application of any specific obligation contained in the Agreement, other than the requirement to provide equal treatment to the goods, services and suppliers of all other Parties to the Agreement, for a period of five years following accession to the Agreement for Least Developed Countries (LDCs) or up to three years for other developing countries. These periods can be extended by decision of the Committee on Government Procurement, on request by the country concerned (see Müller 2011; and, for a pathbreaking application to Africa, Niggli & Osei-Lah 2014).

The approach to S&D under the revised GPA differs from the traditional approach to S&D in the WTO in interesting respects. First, the transitional measures noted above are not available "as of right" but are to be awarded on the basis of the specific developmental needs of acceding Parties, subject to negotiation with the other Parties. Second, such S&D as may be awarded is clearly intended to be time-bound. Third, rather than providing for S&D on a "non-reciprocal" basis (i.e. without regard to the preservation of a balance of market access opportunities), the relevant provisions of the revised GPA stipulate that the market access opportunities that will be made available to acceding Parties are "subject to any terms negotiated between [other Parties] and the developing country in order to maintain an appropriate balance of opportunities under this Agreement" – thereby preserving (or at least creating the possibility of preserving) the principle of reciprocity. Arguably, this approach represents an alternative paradigm for S&D in the WTO that avoids some or all of the problems concerning past approaches that have been highlighted by academic critics (Anderson 2014; building on Müller 2011).

With regard to the scope for and likelihood of further evolution of the Agreement/progressive deepening of relevant commitments, this is deliberately built into the Agreement (as it was in the 1994 Agreement). Specifically, Article XXII:7 of the revised Agreement provides that:

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

Furthermore, further negotiations will be facilitated by an agreed set of Work Programmes that was negotiated as an integral outcome of the renegotiation of the 1994 Agreement. The following Work Programmes are the subject of specific Committee Decisions that are annexed to the Ministerial Decision of 15 December and which, like the other agreed results of the negotiations came into effect in April 2014:

- a Work Programme to consider best practices with respect to measures and policies that the Parties use to support the participation of small and medium-size enterprises (SMEs) in government procurement;<sup>33</sup>
- a Work Programme to enable Parties to improve procedures followed in the collection and reporting of statistical data relating to the Agreement;<sup>34</sup>
- a Work Programme to promote the use of sustainable procurement practices, consistent with the Agreement;<sup>35</sup>
- a Work Programme to address restrictions and exclusions in Parties' coverage commitments under the Agreement;<sup>36</sup> and
- a Work Programme on safety standards in international procurement.<sup>37</sup>

In addition to the above-noted Work Programmes, a further attachment to the Ministerial Decision calls for the initiation of additional work programmes, at a time to be determined, on the following subjects: (a) a review of the use, transparency and the legal frameworks of public-private partnerships, and their relationship to covered procurement; (b) the advantages and disadvantages of developing common nomenclature for goods and services; and (c) the advantages and disadvantages of developing standardized notices.<sup>38</sup>

The foregoing Work Programmes respond both to socio-political concerns shared by all Parties and to continuing negotiating interests of at least some of the Parties. For example, the issue of restrictions and exclusions in Parties' coverage commitments under the Agreement is of direct significance for future negotiations under the Agreement. Similarly, most or possibly all Parties are interested in promoting access to government procurement processes by SMEs; nonetheless, approaches to promoting such access differ and can also be a source of concern from a market access point of view. And, the work programme on improvement of the collection and reporting of statistical data relating to the Agreement is an essential underpinning for related negotiations. To be sure, the foregoing Work

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<sup>33</sup> See Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement, GPA/113 of 2 April 2012, Annex 5.

<sup>34</sup> See *ibid*, Annex 6.

<sup>35</sup> See *ibid*, Annex 7.

<sup>36</sup> See *ibid*, Annex 8.

<sup>37</sup> See *ibid*, Annex 9.

<sup>38</sup> See *ibid*, Annex 4.

Programmes are exploratory in nature; they, nonetheless, hold the potential to contribute importantly to the future evolution of the Agreement and/or its administration.

## **5 Concluding remarks**

This paper has discussed the relationship between general trade rules and commitments on government procurement with reference to both relevant WTO agreements and recent RTAs. Both economic and legal dimensions have been considered, and a number of insights have emerged.

To begin with, and as noted in section 1, government procurement chapters in RTAs typically are modelled substantially or entirely on the text of the WTO GPA (in some cases, the 1994 version of the text, and in others, the revised version). As a consequence, the significance of the GPA as an instrument of international economic policy goes beyond its actual membership. The fact that government procurement disciplines in RTAs broadly track those of the GPA also makes easier a significant further broadening of the GPA's membership (if WTO Members choose to pursue this), to the extent that it has already brought participating WTO Members procurement legislation and practices broadly in line with GPA norms. From this standpoint at least, clearly, government procurement chapters in RTAs are more likely to facilitate than to hinder eventual accession to the GPA by relevant WTO Members

As developed in section 2 of the paper, a strong complementarity exists between general trade commitments (as under the GATT and the GATS) and government procurement commitments (as under the GPA). The complementarity of general trade commitments and government procurement commitments is first and foremost a matter of economics. The relationship between the GATS and the GPA illustrates this point. Typically, rights of establishment or of cross-border supply granted to foreign service-suppliers in a given service sector under the GATS will have an important bearing on their ability to compete effectively for such contracts under the GPA. This is because foreign suppliers not only have to secure the right to participate in tenders on a non-discriminatory basis, but also need to rely on general market access rights to be able to supply services to government. Conversely, access to procurement markets (governed by the GPA) can also have a significant bearing on the scale of operations and therefore the competitiveness of individual suppliers generally. The fact of the GPA's limited membership as compared to the multilateral agreements means that many WTO Members do not benefit from the synergies that are possible between these fields of trade regulation.

With regard to the structure and extent of coverage commitments, as developed in Part 3, the approach used to schedule government procurement commitments in RTAs closely follows the structure of the GPA market access schedules. Additionally, while some RTAs provide for government procurement commitments that are deeper than those of the GPA in particular respects (e.g. additional services sectors or lower thresholds), this is by no means true generally when all dimensions of coverage are considered. Overall, the market access opportunities created by government procurement chapters in RTAs generally are significantly less than those available under the revised GPA. The generally less extensive market access opportunities provided by government procurement chapters in RTAs preserve an important incentive for eventual GPA accession by relevant WTO Members.

Section 4 of the paper looked at the current status, future prospects and inherent sources of strengths of the GPA, as a further basis for reflection on its relative strengths and role as compared to RTAs. While noting the (currently) limited membership of the Agreement, we highlighted the possible broadening of its membership over time and the multiple ways in which the key elements of the GPA renegotiation and the entry into force of the revised GPA hold the potential to encourage and facilitate future GPA accessions. This, too, creates an incentive for eventual accession to the GPA by WTO Members currently outside the Agreement.

Overall, the successful renegotiation of the GPA has substantially raised the profile of the Agreement in the WTO and enhanced its contribution to market openness, good governance and the effective management of public resources. For this reason, as well, regional trade agreements embodying government procurement chapters are unlikely to eclipse its role. Indeed, for the broader reasons we have discussed, there are grounds for optimism that in many countries government procurement chapters in RTAs may eventually serve as a stepping stone to full GPA participation.

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