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Christopher R. Yukins & Johannes S. Schnitzer, *GPA Accession: Lessons Learned on the Strengths and Weaknesses of the WTO Government Procurement Agreement*

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GPA ACCESSION: LESSONS LEARNED ON THE STRENGTHS AND WEAKNESSES OF THE WTO GOVERNMENT PROCUREMENT AGREEMENT*

CHRISTOPHER R. YUKINS & JOHANNES S. SCHNITZER⁺

Many member nations of the World Trade Organization (WTO) have joined the Government Procurement Agreement (GPA), a plurilateral agreement which aims to open public procurement markets. Joining the agreement reflects a commitment to international free trade, and to the rule of law in public procurement. A revised version of the GPA entered into force in 2014, and incorporated many amendments intended to make it easier for developing nations to join the GPA. Among other things, the revised GPA now allows developing nations acceding to the GPA to open their public procurement markets more slowly, through various transitional measures. This article reviews those changes, and discusses possible solutions to some of the practical and legal hurdles which nations face, as they consider accession to the GPA.

* This article is based, in part, on an earlier piece by co-author Johannes Schnitzer, *The WTO Agreement on Government Procurement in the EBRD Region*, LAW IN TRANSITION 50 (2013), <http://www.ebrd.com/downloads/research/law/lit113e.pdf>. While this article uses the familiar acronym “GPA”, from the agreement’s former name, today the agreement is formally known as the Agreement on Government Procurement. See Agreement on Government Procurement, available at https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

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I. INTRODUCTION

Public procurement has emerged as a critical issue in international trade over the last decade, and is becoming a central pillar of the international trading system. The reasons for this include not only the sheer volumes involved in public

procurement,¹ but also the fact that governments are increasingly aware of the economic costs of inadequate public procurement regulations and processes. More governments across the world now acknowledge public procurement as an important tool for economic development, as well as an instrument of good governance. Opening procurement markets internationally as well as harmonizing different domestic public procurement regimes have proven to be successful ways for governments to facilitate the purchase of goods, services and works at the best terms available.²

It is also encouraging to the cause of public procurement law reform that one of the most important international standard-setting instruments for public procurement policy was recently revised. A new version of the WTO Agreement on Government Procurement (“GPA”), arguably the most important binding international agreement on public procurement worldwide, negotiated over more than a decade, entered into force in April 2014.³ The GPA is increasingly becoming a central force that promotes value for money in public procurement worldwide.

¹ The Organisation for Economic Co-operation and Development (“OECD”) has estimated, for example, that its member nations spend an average of approximately 12% of their gross domestic products annually on public procurement. See OECD, *Size of Public Procurement Market*, in GOVERNMENT AT A GLANCE 148 (2011), http://dx.doi.org/10.1787/gov_glance-2011-46-en.

² For a general introduction see Robert Anderson & William Kovacic, *Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets*, PUB. PROCUREMENT L. REV. 67-101 (2009); SUE ARROWSMITH, GOVERNMENT PROCUREMENT IN THE WORLD TRADE ORGANISATION (2003); B. HOEKMAN & M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM (3rd ed. 2010). For background on current GPA accession negotiations, see the paper by the former negotiator for the Office of the U.S. Trade Negotiator (“USTR”), Jean H. Grier, *U.S. Perspective on Encouraging Countries to Join the GPA* (2015), <http://trade.djaghe.com/?tag=gpa-accession>.

³ Robert Anderson, *The Conclusion of the Renegotiation of the WTO Agreement on Government Procurement: What it Means for the Agreement and for the World Economy*, 21 PUB. PROCUREMENT L. REV. 83-94 (2012). For background on the revised GPA that entered into force in April 2014, including the agreement’s text, see, Agreement on Government Procurement, available at https://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm. The revised text of the GPA also was set forth in 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*, WTO Doc. No. GPA/113, (Apr. 2, 2012) [hereinafter GPA], a comprehensive document which reflected the parties’ related agreements on implementation of the revised GPA, available through *Integrated Government Procurement Market Access Information Portal*, WTO, available at <https://e-gpa.wto.org/>.

This paper focuses on why accession to the GPA should be an important public procurement policy objective of governments worldwide. It looks at challenges frequently faced by acceding countries when negotiating accession to GPA. Furthermore, it explains how the UNCITRAL Model Law on Public Procurement ('UNCITRAL Model Law'),⁴ which serves as a template available to national governments seeking to introduce or reform public procurement legislation for their internal markets, interfaces with the GPA, and how using the UNCITRAL Model Law can assist countries in joining the GPA.

This paper addresses these issues in several parts. Part 2 describes the agreement and the accession process, and explains why nations may wish to join the GPA -- especially given the recent modifications to the agreement. Part 3 explains how the UNCITRAL model law was reformed to ensure that it conformed to the revised GPA, so that nations seeking to join the GPA can use the UNCITRAL model law as a benchmark for their own laws. Part 4 offers a brief review of how the GPA handles socioeconomic requirements, which can raise serious non-tariff barriers to trade. The paper concludes that accession to the new GPA -- a more flexible agreement to facilitate international trade in procurement -- is an attractive option for many nations, so long as they plan and prepare carefully.

II. THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT

A. *Why join the WTO Agreement on Government Procurement?*

The GPA is a plurilateral agreement within the WTO system, and it provides a framework for the conduct of international trade with governments. Currently, 45 WTO members are bound by the GPA.⁵ As of August 2015, around 30 WTO Members had observer status in the Committee on Government Procurement.⁶

⁴ See United Nations Commission on International Trade Law, *UNCITRAL Model Law on Public Procurement* 2011, available at http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

⁵ The following WTO Members are covered by the Agreement: 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; Montenegro; New Zealand; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("Chinese Taipei"); and the United States.

⁶ The WTO Members with observer status in the Committee on Government Procurement are: Albania, Argentina, Australia, Bahrain, Cameroon, Chile, China, Colombia, Costa Rica, Georgia, India, Indonesia, Jordan, the Kyrgyz Republic, Malaysia, Moldova, Mongolia, Oman, Panama, the Russian Federation, Saudi Arabia, Sri Lanka, Tajikistan, the former Yugoslav Republic of Macedonia, Pakistan, Thailand, Turkey, Ukraine and Viet Nam. Four

Legally binding market access to the procurement markets of GPA parties is the cornerstone of the agreement. Thus, the GPA's principal (and most obvious) objective is to open up national procurement to international competition by giving enforceable access to other GPA parties' procurement markets. Being a member to the GPA provides safeguards against future protectionist measures introduced by GPA parties.

The total value of market access opportunities from GPA accession is enormous: it is estimated to be in the range of US\$ 1.7 trillion.⁷ Membership allows firms from a GPA party to enjoy access to a huge new global market. Accession to the GPA therefore constitutes an important step in the development of the acceding country's market economy and in its integration within the international trading system.

Interestingly, many countries around the world already grant foreign companies access to their national procurement markets. These countries simply do not distinguish between domestic and foreign companies in their public procurement laws. However, conversely, many GPA countries are either obliged or allowed⁸ to discriminate against companies from non-GPA parties in their public procurement processes (in the United States, for example, this concept is referred to as a "walled garden", and means that federal agencies are not, in principle, permitted to

intergovernmental organizations, namely the International Monetary Fund (IMF), the International Trade Centre (ITC), the Organization for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade And Development (UNCTAD), also have observer status. The WTO notes that any WTO member or observer may submit a written request to the Government Procurement Committee to participate in the Committee on Government Procurement as an observer, and may be accorded observer status. The process of becoming an observer, and observers participation in the work of the Committee, is described in a decision of the Committee on Government Procurement. See Committee on Government Procurement, *Decision on Procedural Matters Under the Agreement on Government Procurement (1994)*, WTO Doc. No. GPA/1, Annex 1 (Mar. 5, 1996); For recent developments regarding GPA accession see, e.g., Johannes S. Schnitzer, *Expanding the Membership of the WTO Government Procurement Agreement: Montenegro and New Zealand Ratifying the Revised GPA*, 24 PUB. PROCUREMENT L. REV. (2015).

⁷ Latest WTO published data (2008) is available at https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

⁸ While in many GPA countries, firms from non-GPA parties are not automatically disqualified, there are no legal barriers to stop GPA members from excluding firms from non-GPA nations.

purchase from companies from nations that do not have a special trading relationships with the United States, such as under the GPA).⁹

GPA accession can, therefore, be an important tool for countries to overcome such discrimination and achieve greater fairness in international trade.

B. *The Process of Accession to the WTO Agreement on Government Procurement*

Completion of the process of accession to the GPA generally involves two key elements:¹⁰

First, the acceding member must proffer a “coverage offer”, and the existing GPA members must negotiate and ultimately agree to the acceding nation’s offer, as negotiated. The coverage offer, which needs to be negotiated in a series of bilateral and plurilateral consultations, sets out a list of the kinds of procurements (that is, goods, services and works) and which of the acceding member’s procuring entities are obliged to tender these, in accordance with the GPA, and the exceptions and derogations that apply.¹¹ Coverage under the GPA, therefore, depends on the acceding GPA party’s coverage commitments, and is defined in that party’s Appendix I coverage schedule of the GPA, which in turn is divided into seven detailed annexes. The annexes define the acceding nation’s coverage as follows: (i) Annexes 1, 2 and 3 define which of the acceding party’s central, sub-central and “other” entities (such as utilities) respectively are covered by the GPA; (ii) Annexes 4, 5 and 6 define which goods, services and construction services (works)

⁹ See, e.g., Christopher R. Yukins & Steven L. Schooner, *Incrementalism: Eroding the Impediments to a Global Public Procurement Market*, 38 GEO. J. INT’L L. 529, 569 (2007) (discussing bar against procurement under 19 U.S. Code (U.S.C.) § 2512).

¹⁰ See generally Robert Anderson & Kodjo Osei-Lah, *Forging a More Global Procurement Market: Issues Concerning Accessions to the Agreement on Government Procurement*, in THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM 67-69 (Sue Arrowsmith & Robert Anderson eds., 2011) [hereinafter THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM]. The text cited here, offers excellent background on the GPA’s revision, including an important introductory chapter 1, *The WTO Regime on Government Procurement: Past Present and Future*, by, who were also the editors of that volume. Robert Anderson leads the WTO Secretariat team which worked on revision of the GPA, and Professor Sue Arrowsmith heads the public procurement law program at the University of Nottingham, a leading international center of procurement law. Their edited volume followed on Sue Arrowsmith’s earlier, close analysis of the 1994 version of the GPA, *Government Procurement in the WTO*, cited *supra* note 1, which is probably the most comprehensive text available on the earlier agreement.

¹¹ Under the GPA, typically no GPA party opens all of its public procurement to foreign competition. Instead, based on a series of negotiations, detailed below, each GPA party specifies the procurement that it will open to the other GPA parties.

respectively are to be covered; and (iii) Annex 7 sets forth general notes (special exclusions and other matters).

Negotiating the coverage offer usually requires a certain amount of preparation and political coordination between all stakeholders. Our experience in the field indicates that the monetary threshold level above which the GPA will apply, entity coverage under Annex 3, which lists the “other entities”, and special exclusions and other matters under Annex 7, are often crucial issues in accession negotiations. Annex 3 addresses the coverage of state-owned enterprises and/or utility companies (frequently in the area of energy, transport and related sectors). Practical experience also shows that an acceding party is frequently asked to submit one or more revised offers for the purpose of clarifying or improving its initial offer. Generally, the process of coverage negotiations is highly flexible and allows room for individual approaches.¹²

Second, the GPA requires acceding parties to ensure the conformity of their laws and regulations with the GPA’s obligations. This may require changes to existing national public procurement rules. The GPA generally takes the approach of establishing only limited common ground rules to which acceding parties must conform their procurement laws. In this regard, one of the most important GPA requirements is compliance with the core principles of national treatment and non-discrimination,¹³ which obliges GPA parties not to treat suppliers from the other GPA parties less favourably than their own national suppliers (national treatment), nor to treat the enterprises of one GPA party less favourably than those of another (non-discrimination); in both cases, these general obligations are bounded by the GPA member’s limitations to coverage. Another important (and mandatory) requirement is compliance with procedural provisions. These procedural provisions include certain aspects of the procurement process (such as transparency), and enforcement – including, importantly, provisions on domestic review, which must provide for timely, effective and non-discriminatory administrative or judicial review procedures through which a supplier may challenge a breach of the GPA (or challenge the adequacy of the legal provisions that implement the GPA).¹⁴

¹² See, for instance, the recent case of Montenegro, which submitted its initial Appendix I offer on 4 November 2013, its first revised offer on 28 November 2013, its second revised offer on 18 June 2014, and its final offer on 18 July 2014.

¹³ GPA, *supra* note 2, art. IV.

¹⁴ These “domestic review” procedures are outlined in Article XVIII of the revised GPA. Domestic review procedures (also called “remedies” or “challenge” procedures, or (in the United States) “bid protest” procedures) are now quite common, worldwide; the UNCITRAL Model Law, for example, describes appropriate challenge procedures in detail in Chapter VIII. See generally Daniel I. Gordon, *Constructing a Bid Protest Process: Choices Every*

An acceding party is required to submit information regarding its domestic public procurement legislation, in the form of replies to a “Checklist of issues”.¹⁵ This allows a review of the acceding party’s national public procurement legislation. Bilateral and plurilateral consultations usually provide a forum to clarify, as necessary, any aspect of the domestic public procurement legislation. Consultations may lead to the acceding party being asked to amend its legislation to ensure conformity with GPA requirements. The involvement of an independent body to compare the party’s national public procurement legislation with the requirements of the GPA has proven to be beneficial in the past.¹⁶

C. *Why join the WTO Agreement on Government Procurement now?*

There is a renewed interest in accession to the GPA, one of the main reasons for which is the revision of the GPA text, which was completed in 2012 and entered into force in 2014.¹⁷ This update of the GPA has brought a streamlined and

Procurement Challenge System Must Make, 35 PUB. CONT. L. J. 427 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=892781.

¹⁵ For documents related to the accession process, see WTO, *General Overview of WTO Work on Government Procurement*, available at https://www.wto.org/english/tratop_e/gproc_e/overview_e.htm.

¹⁶ In the case of Armenia, such assistance was provided by SIGMA – a governance institute associated with the OECD, and supported by the European Union (EU). Clearly, it is logical that other international organizations, such as, for instance, the EBRD (alone or together with SIGMA or another governance institute), be involved in conducting analyses of the domestic public procurement laws of acceding parties with respect to the GPA. The EBRD, for example, has been at the forefront of the process of supporting legal and institutional reform in the EBRD countries of operation, providing assistance to governments to ensure that national public procurement regulations are in line with international standards and best practices. See, e.g., *Public Procurement – Improving public procurement in the EBRD region*, <http://www.ebrd.com/what-we-do/sectors/legal-reform/public-procurement.html> (last visited Sept. 14, 2015).

¹⁷ The revised GPA entered into force on April 6, 2014, 30 days after the submission of formal acceptances of the ‘Protocol Amending the Agreement on Government Procurement’ by two thirds of the GPA parties. See World Trade Organisation, *Revised WTO Agreement on Government Procurement Enters into Force*, Apr. 7, 2014, https://www.wto.org/english/news_e/news14_e/gpro_07apr14_e.htm. These (ten) parties were: Liechtenstein – WT/Let/883, dated 15 May 2013; Norway – WT/Let/912, dated 18 Nov. 2013; Canada – WT/Let/913, dated 20 Nov. 2013; Chinese Taipei – WT/Let/914, dated 29 Nov. 2013; the United States – WT/Let/915, dated 2 December 2013; Hong Kong, China – WT/Let/916, dated 2 Dec. 2013; the European Union – WT/Let/917, dated 3 Dec. 2013; Iceland – WT/Let/933, dated 28 Feb. 2014; Singapore –

modernized regime, enhancing the agreement's flexibility and user-friendliness. Improvements include new accommodations for electronic tools ("eProcurement"),¹⁸ and the right of procuring entities to shorten notice periods when electronic tools are used in order to improve effectiveness and transparency. Furthermore, the new text of the GPA enhances transitional measures for developing countries, including price preferences and offsets, the phased-in addition of specific procuring entities, and the setting of procurements thresholds at a provisionally higher level than the permanent level.¹⁹

A further reason for the high level of interest in accession is that as a consequence of the expansion of membership, the coverage of the agreement is very likely to expand significantly. The Committee on Government Procurement has moved ahead on multiple accessions within the last few months. Importantly, New Zealand and Montenegro completed accession negotiations in October 2014, and joined the GPA formally in mid-2015.²⁰ Moldova completed its accession negotiations in early 2015. Ukraine, despite current geopolitical challenges, is moving ahead quickly with its GPA accession, having circulated its final offer in June 2015.²¹ Tajikistan circulated its initial offer in February 2015,²² and Pakistan

WT/Let/934, dated 28 Feb. 2014; and Israel – WT/Let/935, dated 7 Mar. 2014. Japan and the Kingdom of the Netherlands with respect to Aruba submitted their respective instruments of acceptance subsequently (see WT/Let/936, dated 17 Mar. 2014 for Japan, and WT/Let/945, dated 6 June 2014 for the Kingdom of the Netherlands with respect to Aruba.

¹⁸ See, e.g., GPA, *supra* note 2, art. IV.3, of the revised agreement, which requires measures to ensure that electronic procurement is not implemented in a discriminatory manner.

¹⁹ See GPA, *supra* note 2, art. V.3. For a discussion of how coverage exceptions are critical to GPA accession of major developing nations, such as India, see, e.g., S. Chakravarthy & Kamala Dawar, *India's Possible Accession to the Agreement on Government Procurement: What Are the Pros and Cons*, in THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM, *supra* note 9, at 129 ("The biggest challenge for the Indian negotiators . . . is in defining those sensitive and critical sectors of the economy that need to be excluded from the coverage of the GPA during the accession negotiations.").

²⁰ See Johannes S. Schnitzer, *Expanding the Membership of the WTO Government Procurement Agreement: Montenegro and New Zealand Ratifying the Revised GPA*, 24 PUB. PROCUREMENT L. REV. (2015).

²¹ With respect to Ukraine's eventual accession to the GPA, the Committee on Government Procurement has stated as follows: "The Committee notes that the accession of Ukraine to the GPA would represent a significant addition to the market access commitments under the Agreement. Furthermore, it considers that the GPA's principles and requirements can play a significant role in strengthening relevant institutions in Ukraine. On this basis, and subject to further discussions, it is hoped that Ukraine's accession can be concluded in the first half of 2015." Committee on Government Procurement, *Report (2014) of the WTO Committee on Government Procurement*, ¶ 3.27,

became an observer to the GPA in the same month. China, which applied for GPA accession in 2007,²³ presented its fifth revised offer in December 2014 and GPA parties, despite frustration expressed at the pace of progress,²⁴ are hopeful that China's GPA accession will be brought to a successful conclusion in the near future.²⁵

Furthermore, the GPA is particularly relevant for nations in Central and Eastern Europe and the Commonwealth of Independent States ("CIS"), and a number of countries in that region are currently seeking accession to the GPA. Accessing to the GPA opens potential trade opportunities for these nations, and reaffirms their

GPA/126 (Nov., 2014) [hereinafter *Report (2014)*]. See also World Trade Organisation, *Government Procurement: Committee on Government Procurement Moves Ahead on Multiple Accessions* (Feb. 11, 2015) [hereinafter *Government Procurement: Moves Ahead on Multiple Accessions*], http://www.wto.org/english/news_e/news15_e/gpro_11feb15_e.htm.

²² Committee on Government Procurement, *Application for Accession to the Agreement on Government Procurement: Communication from Tajikistan*, GPA/127 (Feb. 12, 2015).

²³ See, e.g., Ping Wang, *China's Accession to WTO's Government Procurement Agreement: Domestic Challenges and Prospects in Negotiation* (Mar. 2009), <https://www.nottingham.ac.uk/cpi/documents/briefings/briefing-48-china-gpa-ascension.pdf>; Ping Wang, *Accession to the Agreement on Government Procurement: The Case of China*, in *THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM*, *supra* note 9.

²⁴ In the meeting of the WTO Committee on Government Procurement in February 2015, China said that it would, in principle, not be willing to make significant further additions to its market access offer as included in its fifth revised offer dated December 2014. The GPA parties, although acknowledging improvements made by China in its fifth revised offer, noted that they are not willing to accept China's latest market access offer. Significant gaps need to be addressed. See *Government Procurement: Moves Ahead on Multiple Accessions*, *supra* note 20. China said it would be difficult or impossible for it to improve the offer but that it was ready to continue discussions on proposed exceptions. The chairman said both sides should not lose sight of the benefits at stake in the negotiations. He urged the Chinese delegation to go back to its capital to seek new flexibility while calling on GPA parties to remain pragmatic in their expectations and approach to the negotiations.

²⁵ As noted, China is currently negotiating accession. China becoming a GPA party would in itself add billions of dollars annually to the value of total procurements covered. With respect to recent developments regarding China's eventual accession to the GPA, see the 2014 Annual Report to the WTO's General Council, in which the GPA parties stated as follows: "China's GPA accession, on the appropriate terms, is a matter of great significance for the Agreement, for the WTO, and for the world economy; and a very important signal for other emerging economies. Essentially, to conclude the accession it is looking for terms of participation on China's part that are comparable to those of the existing Parties. The alignment of China's relevant legislation with GPA norms is also vital to conclude the accession. The Committee hopes for significant progress toward a conclusion of China's accession in the remainder of 2014 and in 2015.;" *Report (2014)*, *supra* note 20, at 3.18.

commitment to the rule of law, and their rejection of corruption. Other countries in the region (for instance, the Former Yugoslav Republic of Macedonia, Mongolia and Russia) have provisions in their respective WTO Accession Protocols which commit them to seek accession to the GPA in the near future.

Finally, joining the GPA is also a logical and natural step for countries that are in the process of reforming their domestic laws and adapting them to international best public procurement practices. Being a party to the GPA can be seen by foreign investors as a “stamp of approval”, indicating that the domestic public procurement regime is consistent with international best practice. It is, therefore, only natural that a number of countries, which are currently in the process of modernizing their domestic procurement laws, are also likely to join the club of GPA members within the next couple of years.

Due to the intensified interest in GPA accession, the WTO Secretariat has intensified its technical assistance activities.²⁶ With regard to capacity building activities as well as technical assistance for potential GPA parties, the WTO Secretariat, for instance, entered into an informal arrangement with the European Bank for Reconstruction and Development (EBRD). Under this framework, a series of workshops has already been delivered for participating countries such as Moldova, Georgia, the Kyrgyz Republic, Tajikistan, Turkey, Montenegro, and Ukraine. Importantly, EBRD has been providing technical assistance to Montenegro, Moldova and Ukraine with respect to eventual accession to the GPA.²⁷ Recently, these three countries made considerable progress in their GPA accession process.²⁸

²⁶ See World Trade Organization, *Technical Cooperation Activities*, https://www.wto.org/english/tratop_e/gproc_e/gptech_coop_e.htm.

²⁷ Technical assistance includes, for instance, seminars to aid better understanding of the GPA accession process; assistance in drafting negotiations offers (initial offer, revised offers and the final offer); assistance during accession negotiations in Geneva including strategic advice; assistance in drafting GPA compliant public procurement legislation; assistance in GPA implementation; etc.

²⁸ Montenegro ratified the GPA and was to join the GPA on July 15, 2015. World Trade Organisation, *Montenegro Ratifies Revised WTO Procurement Pact* (June 15, 2015), https://www.wto.org/english/news_e/news15_e/gpro_15jun15_e.htm. Moldova circulated its final offer in 2015 and it is expected that this offer will prove acceptable to all GPA parties. Ukraine is currently working on its third revised offer. On this basis, Ukraine and several GPA parties expressed their hope that Ukraine’s accession could also be concluded in the near future. For a report on progress by Moldova and Ukraine, see World Trade Organisation, *Committee on Government Procurement Moves Ahead on Multiple Accessions* (Feb. 11, 2015), https://www.wto.org/english/news_e/news15_e/gpro_11feb15_e.htm.

D. *The benefits of the revised text of the WTO Agreement on Government Procurement*

The revised GPA replaces the old GPA (1994). As noted, the revised agreement entered into force in April 2014, 30 days after two-thirds of the GPA parties accepted the Protocol amending the Agreement.²⁹ As indicated above, the renegotiation of the GPA addressed two major areas of reform:³⁰

First, the GPA's original text, which sets out minimum standards that procuring entities must observe when tendering covered procurement, was streamlined and modernized to reflect, for instance, modern procurement techniques including electronic procurement tools and allows for shortened timelines – e.g. deadlines for bid submission – when electronic means are used.³¹ It also includes new provisions with regard to good governance and the fight against corruption, including an important requirement that procuring entities must conduct covered tender procedures in a manner that avoids conflicts of interest and prevents corrupt practices.³² Such an express provision regarding the fight against corruption is unique in the context of WTO agreements.³³

²⁹ In this respect it must be noted that the revised GPA is not in force for all Parties. It is in force for Canada, the European Union (including 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. As of this writing, Armenia, Korea and Switzerland still needed to formally accept the revised GPA (*See Report (2014)*, *supra* note 20).

³⁰ *See* for background, Robert D. Anderson, *The Conclusion of the Renegotiation of the WTO Agreement on Government Procurement: What It Means for the Agreement and for the World Economy*, 21 PUB. PROCUREMENT L. REV. 83-93 (2012) and Robert D. Anderson, Steven Schooner & Collin Swan, *Feature Comment: The WTO's Revised Government Procurement Agreement: An Important Milestone Toward Greater Market Access and Transparency in Global Public Procurement Markets*, 54 GOVT. CONTRACTOR 1-6 (2012) [hereinafter Anderson, Schooner & Swan, *Feature Comment*].

³¹ *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: CHALLENGE AND REFORM, *supra* note 9, at 285–336.

³² *See* Article IV(4) GPA as well as the preamble to the Agreement, recognizing the importance of transparency and impartiality in public procurement. *See also* Robert D. Anderson, *The WTO Agreement on Government Procurement (GPA): An Emerging Tool of Global Integration and Good Governance*, LAW IN TRANSITION 1/8, 5/8 (2010), <http://www.ebrd.com/downloads/research/news/lit102.pdf>; Robert D. Anderson, William E. Kovacic & Anna C. Müller, *Ensuring Integrity and Competition in Public Procurement Markets: a Dual Challenge for Good Governance*, in THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM, *supra* note 9, at 681-718.

³³ For a critical discussion of these anti-corruption measures, *see* Sue Arrowsmith, *The Revised Agreement on Government Procurement: Changes in the Procedural Rules and Other Transparency Provisions*, in THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM, *supra* note 9, at 288-292.

Second, the coverage under the GPA was extended by additional market access commitments.³⁴ This was done in particular by adding more than 500 procurement entities under the GPA, by covering additional types of contracts,³⁵ and by reducing thresholds applied by certain GPA parties. The expansion of market access commitments due to the revised GPA is estimated to be worth approximately US\$ 80-100 billion per year.³⁶

Besides these two main elements, the revision of the GPA had further important purposes. It has been revised to facilitate the accession of new parties, notably developing countries, by allowing for special and differential treatment (see Subpart E below).³⁷ Additionally, as part of the renegotiation of the GPA, the

³⁴ Importantly, Canada covered, for the first time, the sub-central level of governments (i.e., Canada's provinces and territories). See David Collins, *Canada's Sub-Central Government Entities and the Agreement on Government Procurement: Past and Present*, in THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM, *supra* note 9, at 175–196. For a thorough discussion of the conceptual framework for the coverage negotiations that led to the revised GPA, and of the practical steps undertaken in those coverage negotiations, see Robert D. Anderson & Kodjo Osei-Lah, *The Coverage Negotiations Under the Agreement on Government Procurement: Context, Mandate, Process and Prospects*, in THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM, *supra* note 9, at 149-174.

³⁵ All GPA parties agreed to cover the full range of construction services (i.e., works); see, e.g., Anderson, Schooner & Swan, *Feature Comment*, *supra* note 29, at 3. In addition, many GPA parties offered additional types of goods and services (in particular telecommunication services). The European Union, Japan and Korea even covered a certain type of “Public-Private Partnership” contract, namely “BOT” (build-operate-transfer) contracts. See, e.g., WTO, *The Re-negotiation of the Agreement on Government Procurement (GPA)*, https://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm.

³⁶ See Robert D. Anderson, Philippe Pelletier, Kodjo Osei-Lah, & Anna Müller *Assessing the Value of Future Accessions to the WTO Agreement on Government Procurement (GPA): Some New Data Sources, Provisional Estimates, and an Evaluative Framework for Individual WTO Members Considering Accession*, 21(4) PUB. PROCUREMENT L. REV. 113–138, and see, Eighth WTO Ministerial Conference, Report by the Director-General, WT/MIN(11)/5 (Nov. 18, 2011), http://www.wto.org/english/thewto_e/minist_e/min11_e/min11_5_e.pdf; see also OFFICE OF U.S. TRADE REP., *Fact Sheet: Benefits for the United States from the Revised WTO Government Procurement Agreement*, Dec. 2011, <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2011/december/benefits-united-states-revised-wto-government-procur>.

³⁷ For a comprehensive review, see Anna Caroline Müller, *Special and Differential Treatment and Other Special Measures for Developing Countries under the Agreement on Government Procurement: the Current Text and New Provisions*, in THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM, *supra* note 9, at 339-376 [Müller, *Special & Differential Treatment*].

parties to the GPA agreed to open a new round of work programs under the WTO Committee on Government Procurement, including work programs on small and medium-sized enterprises (“SMEs”), and on sustainability in public procurement (see Part IV below). These work programs will allow the parties to the GPA to extend their discussions of issues, such as (beyond sustainability and SMEs) safety standards and the collection of statistical information on procurement, at least some of which were raised but not concluded during negotiations on the revised GPA.

E. Transitional measures to facilitate accession by developing and least-developed economies

i. General

Over many decades, the general impression of the GPA was that it was open only to the most developed countries. This view was supported by looking at the actual parties to the GPA – an “elite club” including the United States, the Member States of the European Union, Canada, Japan, Hong Kong, China and Singapore.

The revised GPA makes it clear that developing or transition economies are particularly encouraged to accede to the GPA.³⁸ Special measures introduced for developing countries confirm that great importance was attached to facilitating the accession of such new members to the GPA. To this end, transitional measures allow for “special and differential treatment” for developing countries that accede to the GPA. As the name suggests, transitional measures are temporary and their application is time-bound. These measures serve the purpose of granting acceding countries a certain degree of flexibility for allowing domestic industry to adapt to increased foreign competition during a limited period of time. The intention is to avoid economic ‘shocks’ to more vulnerable sectors of the domestic economy, and to permit domestic industry to adapt gradually to increased foreign competition.

ii. Types of differential treatment

The core purpose of transitional measures is, as noted above, to provide breathing space for the domestic industry of a developing nation when it joins the GPA regime. Such measures under the revised GPA include flexibility for: (a) price preferences; (b) offsets; (c) phased-in additions of specific entities and sectors; as well as (d) thresholds that are initially set higher than their permanent levels.³⁹

³⁸ Article V of the revised GPA contains a set of special provisions on developing countries. See generally Müller, *Special & Differential Treatment*, *supra* note 36.

³⁹ See also GPA, *supra* note 2, art IV.4, which relates to delayed application of specific substantive GPA obligations other than the most favored nation (“MFN”) principle. The

Developing countries are free to negotiate the use of these measures with the GPA parties in their accession process.⁴⁰ In any event, the exact terms and conditions of transitional measures must be spelled out in Appendix I i.e. the coverage schedule of the respective developing country. These transitional measures have been discussed briefly, as follows:

- a) Price preferences, typically afforded to domestic bidders, result in a discriminatory treatment (an otherwise illegitimate comparative advantage) of domestic and foreign bids. Price preferences may take different forms. For instance, a procuring entity may be required always to accept a bid by a domestic company over a foreign firm's bid, so long as the difference in price does not exceed a specific margin of preference. A similar example would be that the prices offered by domestic companies are discounted by a certain percentage (e.g., 5%) over the prices of foreign firms.⁴¹ Art V.3.a of the GPA stipulates that developing countries are allowed to make use of price preferences.⁴² In any event, price preferences are

implementation period shall be five years for a least developed country, after its accession to the GPA; and for any other developing country, 'only the period necessary to implement the specific obligation and not to exceed three years'.

⁴⁰ Robert D. Anderson, *Reflections on Bagwell and Staiger in Light of the Revised WTO Agreement on Government Procurement*, in *GLOBALIZATION IN AN AGE OF CRISIS: MULTILATERAL ECONOMIC COOPERATION IN THE TWENTY-FIRST CENTURY* (Robert C. Feenstra & Alan M. Taylor eds., 2014).

⁴¹ These price preferences are not used by developing nations alone; for goods not covered by free trade agreements (such as the GPA), for example, under the Buy American Act as implemented per the Federal Acquisition Regulation, a U.S. federal agency is to apply a price preference of up to 12 percent. FAR 25.105, 48 C.F.R. § 25.105, www.acquisition.gov.

⁴² Article V states, in pertinent part:

3. Based on its development needs, and with the agreement of the Parties, a developing country may adopt or maintain one or more of the following transitional measures, during a transition period and in accordance with a schedule, set out in its relevant annexes to Appendix I, and applied in a manner that does not discriminate among the other Parties:

(a) a price preference programme, provided that the programme:

(i) provides a preference only for the part of the tender incorporating goods or services originating in the developing country applying the preference or goods or services originating in other developing countries in respect of which the developing country applying the preference has

limited in different ways: first, the price preference and its application must be transparent and clearly described in the tender notice; second, price preferences are permitted only with respect to (i) goods or services (i.e., not construction services), and (ii) such goods and services must originate principally in the developing country applying the preference.⁴³

- b) Offsets are defined in Art 1.1. GPA as “any condition or undertaking that encourages local development or improves a Party’s balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar action or requirement”. The GPA includes the general rule that GPA parties ‘shall not seek, take account of, impose or enforce any offset’.⁴⁴ The GPA, however, provides an exception to this rule for developing countries, allowing such countries to adopt offsets “provided that any requirement for, or consideration of, the imposition of the offset is clearly stated” in the tender notice. Under Article V.3 of the revised GPA, therefore, a procuring entity in a developing country may negotiate with GPA parties, for example, to be permitted to impose an offset requirement that a contractor, once awarded a contract, make an offsetting investment in local production capacity.

an obligation to provide national treatment under a preferential agreement, provided that where the other developing country is a Party to this Agreement, such treatment would be subject to any conditions set by the Committee; and

(ii) is transparent, and the preference and its application in the procurement are clearly described in the notice of intended procurement;

⁴³ Price preferences are, according to Art V.3 GPA, also allowed ‘for goods or services originating in other developing countries in respect of which the developing country applying the preference has an obligation to provide national treatment under a preferential agreement, provided that where the other developing country is a Party to this Agreement, such treatment would be subject to any conditions set by the Committee’.

⁴⁴ See GPA, *supra* note 2, art IV.6. While offsets are generally disfavored in many industrialized nations, in part because they raise risks of corruption -- a government buyer may demand, for example, that the seller purchase services from a favored local vendor as an offset, *see, e.g.*, Ben Magahy, Francisco Vilhena da Cunha & Mark Pyman, *Defence Offsets: Addressing the Risks of Corruption and Raising Transparency*, TRANSPARENCY INT’L (Apr., 2011), <http://archive.transparency.org/publications/publications/subject/%28topic%29/21#sth.ash.mzX4HwD1.dpuf>, offsets are still strongly favored by many policymakers, *see, e.g.*, Anuradha Mitra, *A Survey of Successful Offset Experiences Worldwide*, 3(1) J. DEFENSE STUDIES (Jan., 2009).

- c) As noted, a GPA party must define those procuring entities and sectors the GPA applies to in its coverage schedule in Appendix I. Entities on the federal level (e.g., ministries) are to be specified in Annex 1, entities on the sub-federal level (e.g., regions, provinces, municipalities or cities) in Annex 2 and other entities (e.g., state-owned companies and companies in the utilities sector) in Annex 3. Covered goods need to be specified in Annex 4, covered services in Annex 5 and covered construction services (works) in Annex 6. The GPA allows developing countries to negotiate with GPA parties the exclusion of certain procuring entities or sectors from coverage for a certain period of time after accession to the GPA. However, initially excluded procuring entities or sectors must be added (phased-in) within a time schedule, to be agreed with other GPA members. This would, for instance, allow a developing country to negotiate so that certain state-owned enterprises in the utilities sector (e.g., a provider of electricity) or an entire sector of the industry (e.g., the sector of sewage and refuse disposal) be required to procure according to GPA rules only after a certain ‘grace period’.
- d) Only procurements for which the estimated contract value equals or exceeds the relevant thresholds specified in the relevant GPA Party’s annexes to Appendix I coverage schedule are covered by the GPA. Developing countries are also free to negotiate that thresholds initially be set at a higher level than permanent thresholds. Thresholds are to be specified in Annexes 1-3 (i.e., the entity coverage) and differ for goods, services and works. The “standard” monetary thresholds (in “Standard Drawing Rights”, or SDRs, a benchmark compiled from a basket of currencies) are as follows:

ANNEX 1			ANNEX 2			ANNEX 3		
Good s	Service es	Constru ction services	Good s	Service s	Construc tion services	Good s	Service es	Constructi on services
130,0 00	130,0 00	5,000,00 0	200,0 00	200,00 0	5,000,000	400,0 00	400,0 00	5,000,000

A developing country could therefore, for instance, negotiate that the thresholds for entities covered under Annex 3 (other entities) initially be set at SDR 8,000,000 and that this threshold be reduced annually by EUR 500,000 over the first six years of its membership of the GPA. In any case, the developing country will always need to negotiate any higher initial threshold and any lower permanent threshold, as well as the time schedule for the threshold’s reduction.

The revised GPA even allows post-accession flexibilities for developing countries. These include an extension of initially agreed transition or implementation periods, as well as (potentially) new transitional measures.⁴⁵ The latter are, however, limited to special circumstances that were unforeseen during the accession process.⁴⁶

iii. Why are waivers from the non-discrimination principles allowed?

In this respect, it must be noted that special and differential provisions constitute a major deviation from the non-discrimination principles contained in the GPA, i.e., the principle of national treatment and the most favored nation (MFN) principle.⁴⁷ Special and differential provisions have the opposite result – ⁴⁸ they allow countries to treat domestic industry more favourably than foreign industry (e.g., a foreign bidder may not be allowed to participate in a tender at all, or a bid by a domestic bidder may receive better treatment than a bid from a foreign supplier).

One of the main reasons for special and differential provisions is, as mentioned above, temporary market protection.⁴⁹ The GPA has, in contrast, one principal purpose: to dismantle trade barriers between national markets, and contribute to an increasing liberalization of the GPA parties' procurement markets and, consequently, to stimulate the exchange of goods and services on the basis of comparative competitive advantages.⁵⁰ Membership in the GPA therefore should allow foreign bidders to participate in public tender procedures in other GPA parties under the same terms and conditions domestic suppliers enjoy. Under the

⁴⁵ GPA, *supra* note 2, art V.6.a-b.

⁴⁶ Specifically, the Committee on Government Procurement in the WTO may, on application by the developing nation, "approve the adoption of a new transitional measure . . . in special circumstances that were unforeseen during the accession process." *Id.* art. V.6.b.

⁴⁷ The MFN principle requires that products or services from any one GPA party receive treatment no less favourable than like products and services from other GPA parties, i.e., the same degree of liberalization shall be offered as to all other GPA members. The principle of national treatment requires that companies as well as their goods and services from other GPA parties be given the same treatment as national companies as well as national goods and services.

⁴⁸ See Alexander Keck & Patrick Low, *Special and Differential Treatment in the WTO: Why, When and How?*, 11 (WTO Staff Working Paper No. ERSD-2004-03, 2004), available at https://www.wto.org/english/res_e/reser_e/ersd200403_e.htm.

⁴⁹ See also John Whalley, *Non-Discriminatory Discrimination: Special and Differential Treatment Under the GATT for Developing Countries*, ECO. J. 1318, 1322 (1990).

⁵⁰ See Johannes Schnitzer, *Regulating Public Procurement Law at Supranational Level: The Example of EU Agreements on Public Procurement*, J. PUB. PROCUREMENT 301-334 (2010) [hereinafter Schnitzer, *Regulating Public Procurement*]; Alan O. Sykes, *Comparative Advantage and the Normative Economics of International Trade Policy*, 34 J. INT'L. ECO. L. 49-82 (1998).

GPA's guiding principles, in other words, ultimately the bidder which offers best value for money should win a public contract, regardless of the bidder's origin, or the origin of the goods or services it provides.

Although international studies show that increased competition and transparency due to the opening of (national) procurement markets have positive effects,⁵¹ some governments still tend to be reluctant to (further) liberalize in this respect.⁵² The rationale for this is often of a political nature.⁵³ To this end, many governments

⁵¹ In charting a course of open procurement markets in the 1980s, the European Commission predicted that the liberalisation of procurement markets should, in principle, have a number of significant economic benefits. The three most important of these benefits are, first, the so-called "static trade effect", which concerns saving resources by purchasing high value products and services from foreign industry, followed by the "competition effect", which pressures governments to open up procurement markets domestically and that will result in better value, and finally the "restructuring effect", which concerns the beneficial savings from restructuring inefficient businesses. See, e.g., SUE ARROWSMITH ET AL., EU PUBLIC PROCUREMENT LAW: AN INTRODUCTION 51-52 (2010) (citing Paulo Cecchini, *The European Challenge: the Benefits of a Single Market*, sec. 3 (1988)); see also Commission of the European Communities, *A Report on the Functioning of Public Procurement Markets in the EU: Benefits from the Application Of The EU Directives and Challenges for the Future* (Feb. 3, 2004), available at http://ec.europa.eu/internal_market/publicprocurement/docs/public-proc-market-final-report_en.pdf.

⁵² The core idea of the theory of comparative advantage, most famously put forward by the Scottish theorist Adam Smith in 1776 in *The Wealth of Nations*, is that free trade between states maximises both the aggregate wealth of the two states as well as the wealth of each of the two individually. This exchange (of goods or services) thus allows each country to specialize in those areas in which it has an absolute or relative competitive advantage over the other country. This means that it saves production resources otherwise used in economically inefficient production processes, and instead moves resources to more efficient production processes. Hence, countries should import such goods for which they have no competitive advantage in producing, and export such goods as they have specialised in producing. Reduction, or ideally avoidance, of autarkic behaviour then results in the optimisation of national and global wealth. Nonetheless, present day foreign trade policy in all market economies is basically determined by this liberal economics theory. Numerous studies by renowned economists have delivered empirical proof for the validity of the comparative advantage theory, showing that growth in wealth is substantially smaller when there are trade barriers than when free trade is allowed – even for the country which sets up the trade barriers. See Schnitzer, *Regulating Public Procurement*, *supra* note 49, at 301-334 and Johannes S. Schnitzer, *The External Sphere of Public Procurement Law: Bi-Regional Trade Relations from the Perspective of the European Community*, 14 PUB. PROCUREMENT L. REV. 63-90 (2005).

⁵³ For a discussion of the birth of the Buy American Act -- probably the best-known example of a domestic preference law -- in the broader context of advancing U.S. public

across the globe impose “buy-domestic” measures that favour domestic-made products over foreign products in government procurement.⁵⁴ Special and differential measures legally justify a deviation from the GPA’s core principle of non-discrimination on a temporary basis. The purpose is to give special consideration to the development, financial and trade needs and other circumstances of developing countries.

Two points bear special emphasis here, based on the authors’ practical experience working with nations contemplating accession to the GPA. First, the very limited, transitional protections allowed to developing nations may, in fact, reflect industrialized nations’ assumption that firms supplying governments in developing nations can simply adjust to foreign competition -- and if those firms cannot adjust, that those nations can afford to let those firms die. Very often, however, the ties between those firms and their governments are deep, complex and mutually reinforcing,⁵⁵ and policymakers in those developing nations may legitimately fear that exposing those firms to foreign competition could prove to be badly destabilizing. Negotiators from the existing member states enjoy a substantial negotiating advantage -- they are many, negotiating with one (see below) -- and existing members should be careful not to collapse the negotiations by pressing too aggressively on the assumption that opening procurement markets is simply a matter of dry statistics, without potentially serious social, economic and political risks.

procurement law, see Khi Thai & Rick Grimm, *Government Procurement: Past and Current Developments*, 12:2 J. PUB. BUDGETING, ACCOUNTING & FINANCIAL MANAGEMENT 231-47 (2000).

⁵⁴ See, for instance, the current concerns of several GPA parties with regard to U.S. federal and state legislative measures which “increase domestic content requirements in procurement conducted by federal, state and municipal-level entities”. These concerns were recently raised at meetings of the WTO Committee on Government Procurement in June 2014 and February 2015. See *Canada Reiterates Concern over Recent U.S. Buy-America Actions*, FOREIGN AFFAIRS, TRADE & DEV. CANADA (June 27, 2014), <http://www.international.gc.ca/media/comm/news-communiques/2014/06/27b.aspx?lang=eng>.

⁵⁵ See, e.g., Mona Frøystad, Kari K. Heggstad & Odd-Helge Fjeldstad, *Linking Procurement and Political Economy* (2010), <http://www.cmi.no/publications/file/3955-linking-procurement-and-political-economy-a-gui.pdf>. China’s potential accession to the GPA, for example, has been stalled in part by the question of whether procurement by state-owned enterprises -- an important part of the economic and political fabric of China -- should be opened under the GPA. See, e.g., Jean Heilman Grier, *China’s GPA Accession: U.S. Industry Identifies Deficiencies* (June 9, 2014), <http://trade.djaghe.com/?tag=china-state-owned-enterprises>.

Second, those risks are compounded by a lack of information, for governments in many developing nations lack efficient mechanisms to exchange information with industry on the potential effects of opening procurement markets, or for assessing the limited data available. That lack of information in developing nations contrasts sharply with the robust information available to negotiators in member nations. The Office of the U.S. Trade Representative, for example, regularly exchanges information with industry through a mature, sophisticated (and largely closed) system of advisory committees, established by law.⁵⁶ Information exchanges give industry an early opportunity to object to new openings for foreign competition, and they reduce risk for government trade negotiators as they assess new agreements to open public procurement markets. Negotiators from industrialized nations should recognize that where efficient mechanisms for exchanging and assessing information do not exist in nations contemplating GPA accession, the negotiators from those nations, working in an informational vacuum, will naturally tend to be much more cautious when they open procurement markets to foreign competition.

iv. Which nations should seek accession and how can they enjoy special and differential treatment?

The revised GPA refers to “developing” countries, and makes it clear that this term also covers least developed countries.⁵⁷ The GPA, however, does not include any definition of developing countries or least developed countries. Therefore, it can be assumed that an acceding country may declare itself as “developing” or “least developed”; this is, of course, subject to a plausibility check by existing GPA parties.⁵⁸

⁵⁶ The advisory committees are described on the U.S. Trade Representative’s website, available at <https://ustr.gov/about-us/advisory-committees>. For a critical discussion of how exchanges with industry occur in practice, see Timothy B. Lee, *E-mails Show Cozy Relationship Between Obama Trade Negotiators and Industry Groups*, WASHINGTON POST, Nov. 29, 2013, <http://www.washingtonpost.com/blogs/the-switch/wp/2013/11/29/e-mails-show-cozy-relationship-between-obama-trade-negotiators-and-industry-groups/>.

⁵⁷ Article V.1 states, in relevant part: “In negotiations on accession to, and in the implementation and administration of, this Agreement, the Parties shall give special consideration to the development, financial and trade needs and circumstances of developing countries and least developed countries (collectively referred to hereinafter as ‘developing countries’, unless specifically identified otherwise), recognizing that these may differ significantly from country to country.”

⁵⁸ GPA parties may challenge the decision of a proposed member to denominate itself as a developing or least developed country. The United Nations publishes criteria for a nation to be considered as a “least developed country” (“LDC”), at http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_criteria.shtml. A list of

Importantly, under Article V.1 of the revised GPA it is set out clearly that transitional measures are not granted automatically to every developing country. Moreover, each (developing) country must negotiate its exact terms and conditions of accession, including transitional measures, with all GPA parties when conducting negotiations on accession. Any special and differential measures must thus be negotiated on an individual basis. The possibility to invoke special and differential treatment, therefore, depends on the attitude of the acceding party as well as all existing GPA parties. The revised GPA expressly notes that special and differential provisions “may differ significantly from country to country”.⁵⁹ Any transitional measures negotiated, need to be reflected in the acceding country’s coverage schedule in Appendix I of the GPA (i.e. Annexes 1-7).⁶⁰

v. Is special and differential treatment available only to developing countries?

As noted above, one of the main purposes of the revision of the GPA was to facilitate the accession of new parties, notably developing countries. To this end, the GPA explicitly allows for special and differential measures with respect to developing countries.

Practice, however, shows that countries may be reluctant to declare themselves as “developing” or “least developed”. It is, therefore, important to note that, as a general rule (i.e., not only for developing countries), the GPA text provides for a high degree of flexibility. Article XXII of the GPA sets forth the basic rule that any WTO member may join the GPA on the terms agreed with the GPA parties. Hence, any country acceding to the GPA which has special requirements is free to discuss those requirements with GPA parties, and to join the GPA on any terms agreed. In practice, however, GPA parties will have certain expectations as to (temporary) special and differential treatment for acceding parties.

In this respect it is worth noting that GPA parties have already shown their willingness to grant countries special or differential treatment, even if those nations enjoy a relatively high level of development. One example in this regard is Israel, which joined the GPA in 1996. Israel negotiated in its Annex 1 to the revised GPA that the monetary threshold for construction services for central government entities be set at SDR 8,500,000 instead of the usually applicable SDR 5,000,000

LDCs appears at
http://www.un.org/en/development/desa/policy/cdp/ldc2/ldc_countries.shtml.

⁵⁹ See GPA, *supra* note 2, art V.1.

⁶⁰ For instance, Annexes 2 and 3 could specify that on the one hand certain cities or municipalities and/or on the other hand certain state-owned enterprises will be required to procure in line with GPA rules only after a certain period of time.

during the first six years; after this period, the threshold will be reduced to the usual SDR 5,000,000 for construction services.⁶¹

Arguably, therefore, transitional measures, such as phased-in addition of specific entities, or thresholds that are initially set at higher levels, need not be limited to developing countries. It might be the case that, subject to successful negotiations conducted by the acceding country, GPA parties will also prove willing to grant special and differential treatment to other developed countries.⁶² Thus, while GPA parties have general expectations concerning market access to be offered by acceding nations, it is not out of the question that GPA parties may also be willing to accept temporary deviations in the form of special and differential treatment for developed nations that also wish to become a party to the GPA.

III. THE COMMON PURPOSE OF THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT WITH THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

A. What is the purpose of the UNCITRAL Model Law on Public Procurement?

The UNCITRAL Model Law is one of the most commonly recognised public procurement codes internationally.⁶³ One of its main purposes is to serve as a template available to national governments seeking to introduce or reform public procurement legislation for their internal markets.⁶⁴ It is non-binding (in contrast with the GPA), and summarises established international principles of good practices in public procurement. Provisions of the UNCITRAL Model Law may be adopted as written, when they are transposed onto national laws. The UNCITRAL Model Law provides nations with a varied menu of options from

⁶¹ See note 1 in Israel's Annex 1 of Appendix I coverage schedule of the GPA.

⁶² In this instance, such special and differential treatment might not be granted under Art V of the GPA concerning developing countries but, as noted, simply under the general rule that a WTO member may accede to the GPA on terms to be agreed between that WTO member and GPA parties (See GPA, *supra* note 2, art. XXII.2).

⁶³ The full text is available at uncitral.org. As noted, the UNCITRAL Model law is accompanied by a comprehensive *Guide to Enactment*.

⁶⁴ See, for instance, Sue Arrowsmith & Caroline Nicholas, *The UNCITRAL Model Law on Procurement of Goods, Construction and Services: Past, Present and Future in PUBLIC PROCUREMENT REGULATION IN THE 21ST CENTURY: REFORM OF THE UNCITRAL MODEL LAW ON PROCUREMENT* (Sue Arrowsmith ed., 2009) [hereinafter *PUBLIC PROCUREMENT REGULATION IN THE 21ST CENTURY*]; Christopher Yukins, *A Case Study in Comparative Procurement Law: Assessing UNCITRAL's Lessons for US Procurement*, 35 *PUB. CONT. L. J.* 457 (2006).

which to choose, in order to address different procurement situations and to suit local circumstances. The updated 2011 law reflects modern practices, such as eProcurement (including electronic communications, electronic submissions and electronic reverse auctions) and framework agreements.⁶⁵ The 2011 version of the UNCITRAL Model Law is supplemented by a comprehensive, consensus-based “Guide to Enactment”, which provides background and explanatory information for legislators, regulators and policymakers using the UNCITRAL Model Law.

B. *Why is the UNCITRAL Model Law on Public Procurement relevant in the context of the WTO Agreement on Government Procurement?*

Approximately thirty states – including Afghanistan, Bangladesh, Mongolia and Uganda – have enacted legislation based on the UNCITRAL model procurement laws.⁶⁶ This is particularly common for states in Central and Eastern Europe, a number of which based their public procurement laws on the 1994 UNCITRAL Model Law before they joined the European Union. (After they joined the European Union, their laws had to conform to the EU procurement directives.) Furthermore, a number of countries currently seeking accession to the GPA have also based, or intend to base, their public procurement laws on the non-binding UNCITRAL Model Law.⁶⁷

Thus, neither the UNCITRAL Model Law nor the GPA should be viewed in isolation. This is why the drafters of the UNCITRAL Model Law sought to enhance its usefulness by harmonising the Model Law’s text (to the greatest extent possible) with other international texts on procurement, particularly the GPA. The drafters of the UNCITRAL Model Law did this so that acceding parties to the GPA, having based their national public procurement legislation on the UNCITRAL Model Law, then need not – or need not significantly – amend their domestic law to meet the demands of the GPA.

In this regard, the question which arises, in particular, is whether basing national public procurement legislation on the UNCITRAL Model Law will involve any incompatibility with the requirements of the GPA. If so, the next question is how

⁶⁵ See, for instance, Caroline Nicholas, *Electronic Communication under the UNCITRAL Model Law*, in PUBLIC PROCUREMENT REGULATION IN THE 21ST CENTURY, *supra* note 63; Sue Arrowsmith & Caroline Nicholas, *Framework Agreements under the UNCITRAL Model Law*, in PUBLIC PROCUREMENT REGULATION IN THE 21ST CENTURY, *supra* note 63.

⁶⁶ See Caroline Nicholas, *Work of UNCITRAL on Government Procurement: Purpose, Objectives and Complementarity with the Work of the WTO*, in THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM, *supra* note 9, at 747 *et seq.*

⁶⁷ These include, for example, Albania, the Kyrgyz Republic, Moldova and Mongolia.

national procurement legislation based on the UNCITRAL Model Law should be brought in line with the GPA.

C. Comparison of the UNCITRAL Model Law on Public Procurement and the WTO Agreement on Government Procurement

In order to address these key questions, the EBRD, working together with the UNCITRAL Secretariat on the *EBRD and UNCITRAL Initiative on Enhancing Public Procurement Regulation in the CIS countries and Mongolia*, decided to conduct an in-depth comparison of the UNCITRAL Model Law and the GPA. The comparison – which has been published, in summary form⁶⁸ – illustrates the similarities and differences between the two regimes. It aims to serve as a guide for countries that intend to remedy inadequate or outdated public procurement legislation, or are seeking accession to the GPA. The comparison covers the following topics: (i) objectives, implementation and ambit; (ii) general principles; (iii) scope and coverage; (iv) award procedures; (v) remedies and enforcement; (vi) electronic procurement; (vii) socio-economic policies; and (viii) efforts to attract developing countries.

The comparison between the UNCITRAL Model Law and the GPA shows that the same principles underpin the rules set out in both texts. Basic principles such as transparency, economy and efficiency, competition, non-discrimination, proportionality, integrity and accountability are key features of both the UNCITRAL Model Law and the GPA. These principles also inform regulation in the texts in connection with scope and coverage, award procedures, remedies and enforcement, and socio-economic policies. Both texts allow for eProcurement – including electronic communications, electronic submissions and electronic reverse auctions – and recognise that effective mechanisms to monitor compliance with the text's rules, and to enforce them if necessary, are key features of a successful public procurement system.

Potential users of the UNCITRAL Model Law can be assured that the texts of the UNCITRAL Model Law and the GPA share many similarities, and are therefore largely consistent. The members of the working group who prepared the UNCITRAL Model Law were careful to ensure that it remained consistent with the latest GPA text, which had stabilized as of late 2007. Differences between the

⁶⁸ See the webpage of the EBRD and UNCITRAL Initiative on Enhancing Public Procurement Regulation in the CIS countries and Mongolia, *available at* EBRD UNCITRAL Public Procurement Initiative, *Comparison 2011 ML and revised WTO GPA*, <https://www.ppi-ebd-uncitral.com/index.php/en/comparison-2011-ml-and-revised-wto-gpa-ax>.

UNCITRAL Model Law and the GPA are marginal, and should not be substantive. Given the high degree of harmonisation between the two codes, basing national procurement legislation on the UNCITRAL Model Law will greatly assist countries which need to comply with GPA requirements upon GPA accession.

IV. THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT AND POLICIES ON FACILITATING PARTICIPATION OF SMALL AND MEDIUM-SIZE ENTERPRISES IN PUBLIC PROCUREMENT

As mentioned above, the renegotiation of the GPA led to new work programs of the WTO Committee on Government Procurement.⁶⁹ One of the work programs considers best practices with respect to measures and policies to encourage the participation of small and medium-size enterprises (“SMEs”) in public procurement. The issue of SMEs and government procurement is a major concern for existing GPA parties and for many countries considering joining the GPA, in part because SMEs are quite often the backbone of a national economy. For instance, 99.8 % of all registered companies in the EU are SMEs.⁷⁰ Indeed, SMEs frequently contribute a large portion of a country’s GDP, and play an important role in innovation and research & development. Although some say that procurement markets alone should decide which enterprises are allowed to contract with the government, it can fairly be stated that there appears to be an international consensus that SMEs should be particularly encouraged to participate in public tenders.⁷¹

There is, however, a basic tension when it comes to SME policies and the notion of procurement market liberalization. Any more favourable treatment for SMEs under the GPA seems to violate the non-discrimination principles⁷² in the GPA as well as rules on equal treatment. In particular, Article VIII.1 of the GPA requires that a “procuring entity shall limit any conditions for participation in a procurement to those that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the

⁶⁹ See GPA, *supra* note 2, at 3.

⁷⁰ Nine out of ten SMEs in the EU are actually micro enterprises with fewer than 10 employees. See *SMEs' Access to Public Procurement Markets and Aggregation of Demand in the EU*, EUROPEAN COMM., 5 (Feb. 2014), http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/smes-access-and-aggregation-of-demand_en.pdf.

⁷¹ T. Bech, A. Demircuc-Kunt & R. Levine, *SMEs, Growth, and Poverty: Cross-Country Evidence*, 10(3) J. ECO. GROWTH 199-229 (2005).

⁷² In this respect it could be argued that the principle of national treatment is not violated when foreign and domestic SMEs are treated the same.

relevant procurement.” A provision in tender documents, for example, setting forth that only SMEs are allowed to participate in a given tender would not seem to be “essential” in the above sense. Moreover, SME preference policies might violate the prohibition on offsets, forbidding “any condition or undertaking that encourages local development”.⁷³

As mentioned above, the scope and coverage of a GPA party’s market access commitments is determined by its commitments as stipulated in the Appendix I coverage schedule. In other words, parties may negotiate exceptions for SMEs from their GPA coverage in their GPA market access provisions.⁷⁴

Indeed, some existing GPA parties have special provisions on SMEs in their market coverage offers. The United States, to name one example, does not apply the GPA to “any [procurement market] set-aside on behalf of a small- or minority-owned business”.⁷⁵ The reason for this is that the United States reserves, i.e., sets aside, billions of dollars for contract awards to small businesses.⁷⁶ By means of this provision, the United States keeps a substantial part of its procurement market closed to maintain preference programs for SMEs.⁷⁷ In practical terms, the set-

⁷³ See GPA, *supra* note 2, art. I.1 & IV.6.

⁷⁴ In this regard, the view is also expressed that only countries with a certain market power would actually be in a position to negotiate adequate SME policy preferences. See John Linarelli, *The Limited Case for Permitting SME Procurement Preferences in the Agreement on Government Procurement*, in THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM, *supra* note 9, at 456-457 [hereinafter Linarelli, *Permitting SME Procurement Preferences*].

⁷⁵ See note 1 in the United States’ Annex 7 of Appendix I coverage schedule of the GPA. In this note, the United States specifies that a “set-aside may include any form of preference, such as the exclusive right to provide a good or service, or any price preference”.

⁷⁶ See Linarelli, *Permitting SME Procurement Preferences*, *supra* note 73, at 444-458.

⁷⁷ The EU, for instance, has a different approach to encouraging SMEs’ participation in public procurement. Because economic integration amongst the European states is an essential policy goal in the European Union, the EU does not support setting aside a portion of public contracts in each EU member state for SMEs. Instead, the EU aims to promote the participation of SMEs in public procurement by applying other measures, such as permitting the participation of SMEs in consortia or as subcontractors; lowering SMEs’ administrative burdens by allowing for self-declarations as to pre-qualification requirements; requiring adequate minimum and selection criteria which are appropriate with regard to the subject matter of the procurement; and, limiting a prospective awardee’s required minimum turnover (gross annual revenue) level to twice the expected value of the relevant contract; etc.). See Martin Burgi, *Small and Medium-Sized Enterprises and Procurement Law--European Legal Framework and German Experiences*, 4 PUB. PROC. L. REV. 284-294 (2007); Max V. Kidalov, *Small Business Contracting in the United States and Europe: A Comparative Assessment*, 40 PUB. CONT. L.J. 443 (2011).

asides for small businesses mandated under U.S. law create a barrier to foreign firms, for as per the definition of ‘small business’, only U.S.-owned firms qualify as “small businesses” under U.S. federal procurement law.⁷⁸ The new work program of the WTO Committee on Government Procurement regarding SMEs is therefore of particular importance. The exact content of the work program is set out in the Committee’s decision on a work program on SMEs.⁷⁹ The decision makes it clear that the GPA parties “shall avoid introducing discriminatory measures that favour only domestic SMEs and shall discourage the introduction of such measures and policies by acceding Parties”. Importantly, the decision requires the WTO Committee on Government Procurement to conduct an in-depth survey of SME policies in the GPA member states regarding the measures and policies used to assist, promote, encourage, or facilitate participation by SMEs in government procurement.

A draft questionnaire seeking information regarding the measures and policies used to assist, promote, encourage, or facilitate participation by SMEs in government procurement was circulated to GPA parties in October 2014. It was planned that responses to the final questionnaire were to be provided by all GPA parties by March 2015. Upon receipt of the responses, the WTO Secretariat will prepare a compilation of the responses and circulate the responses and the compilation to the GPA parties. It is intended that the assessment of the results of the SME Survey will be discussed amongst the GPA parties in the near future before starting with the implementation of the outcome of the SME Survey.

The work program on SMEs is of particular relevance for both existing and acceding GPA parties. As noted earlier, practice shows that countries with economies in transition pay special attention to favouring (domestic) SMEs. Although procurement covered by the GPA (typically larger, above-threshold procurements) may only be of limited practical importance to most SMEs,⁸⁰ the work program on SMEs illustrates the tactical advantages of being a party to the GPA. Countries that are not parties to the GPA will have limited standing to

⁷⁸ See 13 Code of Federal Regulations (C.F.R.) § 121.105 (“a business concern eligible for assistance from SBA [the U.S. Small Business Administration] as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor”).

⁷⁹ GPA, *supra* note 2, Annex C.

⁸⁰ Only procurements for which the estimated contract value equals or exceeds the relevant thresholds specified in the relevant GPA Party’s annexes to Appendix I coverage schedule are covered by the GPA. To take an example, for construction services, the relevant threshold is set, in most cases, at SDR 5,000,000.

submit comments and suggestions on how SME policies should be dealt with under the framework of the GPA in the future.

V. CONCLUSION

The last few years have been very significant ones for the WTO's Government Procurement Agreement. A revised text of the GPA, which better reflects the needs and realities of modern procurement processes, entered into force in April 2014. This revision of the GPA also resulted in expanded coverage of government entities and types of procurement by various GPA members. Importantly, the revised GPA provides for a high degree of flexibility in the GPA accession process, and offers important transitional measures for developing countries that wish to join the GPA.

The WTO Committee on Government Procurement has moved ahead on multiple accessions recently. Montenegro and New Zealand successfully completed GPA accession negotiations in October 2014. Moldova's final offer is likely to be accepted in short order, and Ukraine is moving ahead with its GPA accession process in a timely and deliberate fashion. Tajikistan, which became an observer to the GPA only in September 2014, circulated its initial Appendix I coverage offer in February 2015. GPA parties admitted Pakistan as an observer in February 2015, and many other observer countries to the GPA are currently considering initiating GPA accession negotiations in the very near future.

The GPA, besides being a bulwark against protectionist measures in public procurement, has been an important catalyst for reform in public procurement law in many countries worldwide. This is because countries seeking accession to the GPA must ensure that their national procurement regimes comply with the requirements of the GPA, which is based on the fundamental principles of non-discrimination, transparency, competition and integrity. Compliance of national public procurement legislation with the minimum requirements prescribed in the GPA is, in contrast to market access commitments, non-negotiable. This means that GPA minimum requirements must always be met by a country wishing to become a party to this agreement. During the accession process, countries with public procurement regimes that are already GPA-compliant must demonstrate this to existing GPA parties. Any country with a public procurement regime that is not fully GPA compliant will likely be asked by existing GPA parties to amend its legislation to ensure conformity with GPA requirements, during the GPA accession process.

The UNCITRAL Model law is harmonised to the greatest extent possible with the GPA, and is therefore very well suited to serve as a template for countries that

need to update their domestic procurement legislation to comply with the requirements of the GPA. While there are some differences, the texts of the UNCITRAL Model Law and the GPA are, by design, largely consistent. Basing national procurement legislation on the UNCITRAL Model Law will not involve any substantive incompatibility with the requirements of the GPA, and will greatly assist countries that intend to accede to the GPA in complying with GPA requirements.

Joining the GPA is a logical and natural step for countries that are in the process of reforming their domestic laws and are adapting their legal regimes to international best public procurement practice. The GPA has been acknowledged by many countries as an important defense against a downward spiral of protectionist measures. The GPA, besides being the best available bulwark against closure of national procurement markets, has also been widely accepted as a vital tool for the promotion of good governance.

Any country wishing to accede to the GPA will need to set up a coherent negotiation strategy. In principle, market access is fully negotiable, but GPA parties have certain expectations, notably as to monetary thresholds, coverage of sub-central level as well as coverage of state-owned-enterprises and utility companies, and the number of exceptions to coverage. As a practical matter, those expectations are framed by prior negotiations, and because the pace of accessions has accelerated in recent years, new candidate nations have found it easier to negotiate the accession process.

In conclusion, GPA membership entails many advantages. Importantly, there is currently a high level of interest in GPA accession, and the WTO Committee on Government Procurement has moved ahead recently on multiple accessions. Countries interested in GPA membership are encouraged to make use of this momentum, as the coverage demands put on those acceding to the GPA may rise in the future. Accession to the GPA requires the consent of all GPA parties, and as new parties (including major, highly industrialized nations) join the GPA, they may raise the bar by requiring additional coverage concessions by new members. Acceding now will give new members the opportunity to influence the terms of other WTO Members' accessions. Furthermore, new GPA parties will benefit from the negotiating power of the combined GPA parties, as they negotiate to open public procurement markets worldwide.

Although the GPA forms a highly specialised part of the WTO framework, and joining the GPA involves institutional, legal and trade challenges, experience shows that GPA accession can be successfully and promptly concluded if the acceding

nation demonstrates sufficient political will, and carefully prepares both before and during the GPA accession process.