

MEASURE AND DISCIPLINE IN WORLD PROCUREMENT MARKETS

MEDICIÓN Y REGLAS DE LOS MERCADOS MUNDIALES DE CONTRATACIÓN PÚBLICA

PABLO ZAPATERO MIGUEL

*Professor of Public international law
Carlos III University of Madrid*

MARC PETZ

*Visiting Professor of Economics
Carlos III University of Madrid*

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Abstract: The revised Government Procurement Agreement (GPA) illustrates the long-term transformation in the way governments currently deliver public policies: steering, not rowing. Under a regulatory paradigm based on improving efficiency and best value for money, the 51 GPA Parties have reformed the previous GPA framework and expanded global procurement markets in accordance. However, the figures of this structural policy trend have not yet been properly mapped. This research estimates on basis of the available data that the GPA parties cover round 26% (US\$2,140bn) of their GGCE (US\$8,220bn), whereby the global GPA coverage could potentially be expanded substantially (compare to global GGCE: US\$13,100bn) on the long term.

Keywords: public-private partnerships, world trade, market-formation, government procurement, GPA.

Resumen: El Acuerdo de Contratación Pública (GPA) revisado ilustra la transformación de largo plazo en la forma en que los Estados desarrollan políticas públicas: guiar, y no remar. Bajo un paradigma regulatorio basado en la mejora de la eficiencia y el mejor valor por el dinero, los 51 Miembros del GPA revisado han reformado el marco legal originario y contribuido a expandir los emergentes mercados globales de contratación pública. Esta investigación calcula en base a los datos disponibles que las partes del GPA cubren un 26% (2.140.000 US\$) de su GGCE (8.220.000 US\$), mientras la cobertura global del GPA podría expandirse de manera significativa (comparar con el GGCE global: 13.100.000 US\$) a largo plazo.

Palabras clave: partenariados público-privados, comercio mundial, formación de mercados, contratación pública, GPA.

Summary: I.- States and public authority as market niche. II.- Exploring the main practices and disciplines. III.- Regulatory upgrades and coverage. IV.- The GPA disciplines in current context.

I.- States and public authority as market niche

1. The world trade regime functions as a multi-issue regulatory barter exchange.¹ This phenomenon operates not only within but across some of its covered agreements. In this regard, the WTO Agreement contains several so-called ‘plurilaterals’ in its annex 4, resulting from such barter exchange, which are not binding on all members but on those who are party to them. The Government Procurement Agreement (GPA) is one of the plurilaterals within this annex. Traditionally, plurilateral agreements such as the Agreement on Trade in Civil Aircraft, the International Dairy Agreement, the International Bovine Meat Agreement, or the GPA itself, have not attracted much academic, media and public attention compared to the multilateral agreements (e.g. GATT, GATS, TRIPS). However, some of these instruments are increasingly important; and this is particularly the case of the revised GPA.²

2. The revised GPA entering into force in April 2014 is a paradigmatic example of the emerging world procurement markets. The new agreement substitutes the 1996 GPA resulting from the Uruguay Round (1986-1994) for all the 1996 GPA parties that have accepted its Protocol of Amendment. Essentially, the new GPA is the last of a wide variety of policy initiatives within GATT for the progressive opening up of government procurement to foreign competitors, which began with the negotiations within the Tokyo Round (1973-1979) for a Code on Government Procurement, which entered into force on 1 January 1981, and originally aimed at correcting the non-applicability of GATT rules to this sector.³ Against this background, the following pages contextualize and explore the disciplines and coverage of the new revised GPA.

3. The GPA is an illustrative example of steady regulatory trends towards market-formation in all areas of society, including basic tasks and activities originally performed by public authorities (e.g. communication infrastructures, education, health, etc.). It is no accident that, nowadays, government procurement offers a highly attractive market niche for global companies: states as market niches. In fact, the so-called ‘procurement markets’ are conventionally accounted for approximately 13% of the gross domestic product (GDP) and 29% of general government expenditures of the OECD countries.⁴

4. Both the number and volume of these contracts are steadily increasing, generally involving not only goods but services. In addition, the business opportunities of this emerging global ‘market’ are quite significant, as only a limited number of government procurement contracts are currently subject to international disciplines. In this context, globalized companies lobby host and home-state governments for increased “market access” to their procurement activity. Today various international regulatory initiatives establish disciplines ensuring that procurement contracts above certain economic thresholds are awarded in competitive, transparent and non-discriminatory conditions between local and foreign companies. Thus far, the world trading system is the most relevant initiative in this regard.⁵

5. Coverage of government procurement subject to the GPA amounts to 600 billion Euros annually according to the WTO Secretariat estimates: 500 billion Euro per annum, pursuant to the 1996 GPA, and a further 80-100 billion with entry into force of the 2014 GPA.⁶ However, the figures of this increasing trend have not yet been properly mapped on a global scale and context. The global Gross

¹ For an analysis of the negotiating forum as a multi-issue barter exchange, see B. HOEKMAN/ KOSTEKI, *The Political Economy of the World Trade Organization: From GATT to WTO*. Oxford, New York: Oxford University Press, 1995, pp.56-83.

² S. ARROWSMITH. "Reviewing the GPA: The Role and Development of the Plurilateral Agreement After Doha" *Journal of International Economic Law*, Vol. 5 (No. 4), 2002, pp.761-790.

³ See A. BLANK. "The History of the Government Procurement Negotiations Since 1945" *Public Procurement Law Review*, Vol. 4, 1996, pp. 77-147 and J. BOURGEOISE. "The Tokyo Round Agreement on Technical Barriers to Trade and on Government Procurement in International and EEC Perspective" *Common Market Law Review*, No. 5, 1982, pp.1157-1244.

⁴ See OECD (2013) *Government at a Glance 2013*, p.130 (for the ‘Size of Procurement Market’).

⁵ The ten Parties that have currently accepted the Protocol to amend the GPA are: Liechtenstein, Norway, Canada, Chinese Taipei, the United States, Hong Kong China, The European Union, Iceland, Singapore and Israel.

⁶ See WTO (2013) *Report of the Committee on Government Procurement*: World Trade Organization, p.2.

Domestic Product (GDP) increased in the last four decades by nearly 23 times from US\$ 3,394bn in 1970 to US\$75,119bn in 2016 on an average annual not adjusted growth rate of round 7.3 percent. The global General Government⁷ final Consumption Expenditures (GGCE)⁸ synchronically increased from US\$534bn in 1970 to US\$12,371bn in 2016 and the ratio between GDP and GGCE increased slightly, both at a relatively constant proportion during this period.

Table 1. Global aggregates of GDP and GGCE (1970-2016)

| | 1970 | 1980 | 1990 | 2000 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 |
|-----------|-------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|
| GDP | 3,394 | 12,231 | 23,733 | 32,967 | 65,272 | 72,325 | 73,730 | 75,665 | 77,507 | 74,171 | 75,119 |
| GGCE | 534 | 2,098 | 3,987 | 5,277 | 11,382 | 12,412 | 12,552 | 12,814 | 13,002 | 12,157 | 12,371 |
| Ratio [%] | 15.7 | 17.2 | 16.8 | 16.0 | 17.4 | 17.2 | 17.0 | 17.4 | 16.8 | 16.4 | 16.5 |

Source: Based on UNdata, in billion US dollars at current prices.⁹

Table 1 demonstrates the potential Free Trade Agreement (FTA) range of the GPA, covering the global scale of GGCE. On one hand, the GGCE does not include larger proportions of the general public expenditures (e.g. subsidies and investments). On the other hand, the GGCE includes positions (e.g. defense, aerospace, partially education, and social transfers such as unemployment or pension schemes) which are usually not covered by the GPA.

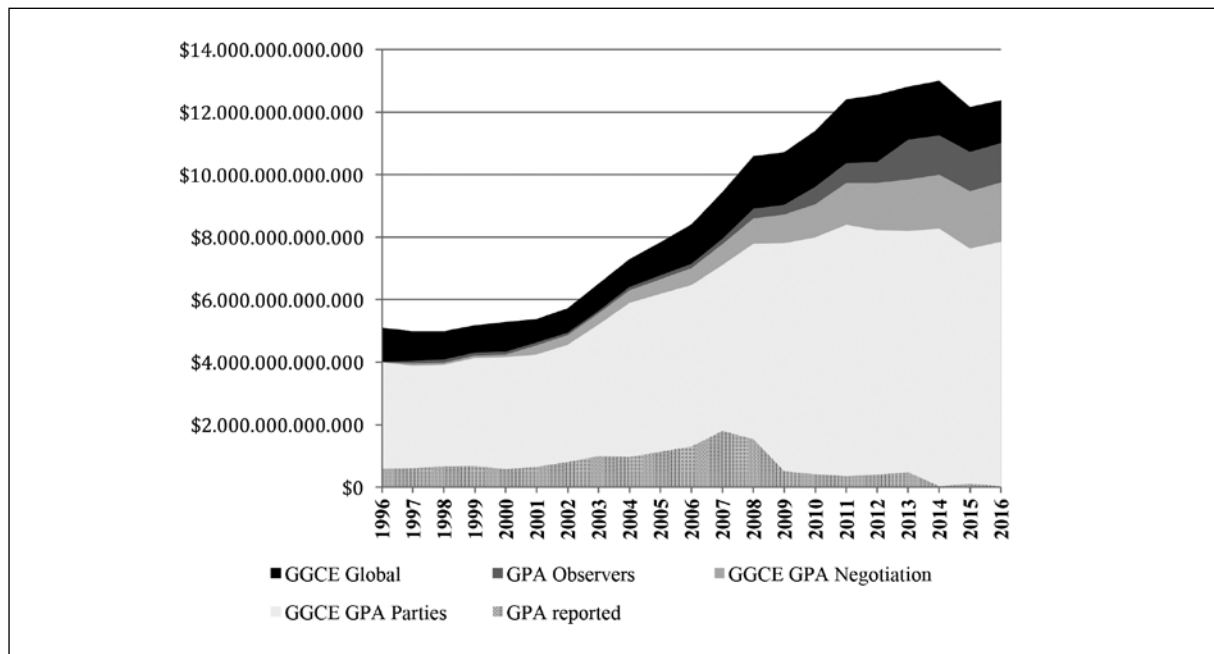
Figure 1 illustrates the aggregates of global GGCE, the GGCE of the GPA observers, the GGCE of GPA accession negotiating parties, the GGCE of the GPA parties, and, the public expenditures as reported under the GPA to the WTO.

⁷ The 'General Government Sector' consists of four subsectors: 1. Central government; 2. State government; 3. Local government, and 4. Social security funds (SNA 2009:80) and includes "all institutional units whose output is intended for individual and collective consumption and mainly financed by compulsory payments made by units belonging to other sectors, and/or all institutional units principally engaged in the redistribution of national income and wealth." (EuroStat, 2015). The general government's main functions are "1. to organise or redirect the flows of money, goods and services or other assets among corporations, among households, and between corporations and households; in the purpose of social justice, increased efficiency or other aims legitimised by the citizens; examples are the redistribution of national income and wealth, the corporate income tax paid by companies to finance unemployment benefits, the social contributions paid by employees to finance the pension systems; and 2. to produce goods and services to satisfy households' needs (e.g. state health care) or to collectively meet the needs of the whole community (e.g. defence, public order and safety)." See EuroStat (2015) *Statistics Explained: Glossary: The general government sector* and SNA (2009) *System of National Accounts 2008*. New York: United Nations.

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According to the definition of the World Bank (2012, pp. 245 and 249) (compare SNA, 2009) 'General Government final Consumption Expenditure (GGCE)' (formerly 'General Government Consumption') includes "all government current expenditures for purchases of goods and services (including compensation of employees). It also includes most expenditures on national defense and security, but excludes government military expenditures that are part of government capital formation."

⁹ See UNdata (2018) *UN Database "GDP by Type of Expenditure at current prices - US dollars"*. In U.N.S. Division (Ed.). New York: United Nations and UNdata (2018) *UN Database "National Accounts Main Aggregates Database"*. In U. N. S. Division (Ed.). New York: United Nations.

Figure 1. Mapping GGCE according to GPA typology (1996-2016)

Note: Reported Special Drawing Rights (SDR) have been translated at historical rates into US dollars at current prices by each country's currency exchange at the end of the reporting year (31/12). Graph displays aggregated data and accumulated values accordingly to dates of entry/accession/acceptance.

Source: Based on WTO (2018), IMF (2016) and UNdata (2018).¹⁰

6. The assigned GPA parties are spending nearly $\frac{2}{3}$ of the global GGCE.¹¹ The documented and reported WTO GPA statistic which are subject to discussions about WTO membership accession cover based on the available data relatively smaller proportion of the GGCE in comparison the government procurement with an average annual ration of round 19 percent between 1996 and 2008 for purchases of goods, services and construction for government needs; the construction position covered by the GPA is the largest in most countries.

7. As the WTO GPA dataset is incomplete and the data compiling procedure represents an approximation based on reported, available data and exchange rates, this share is in fact higher than illustrated. This is due to the different approach by applying exchange rates on national currencies because the available thresholds in SDRs are usually published based on the last two years average of the reporting period, but these reports are not standardized and not all include an explicit average SDR exchange rate(s); in some cases, the SDR exchange rates differ in the positions between goods, services and construction/central, state, and local government.

8. The GPA might potentially be expanded by further 25 percent by including the parties in negotiation and the observers, meanwhile, the other countries representing an additional global GGCE coverage of 12 percent. But this potential GPA volume is difficult to estimate as the GPA coverage in comparison

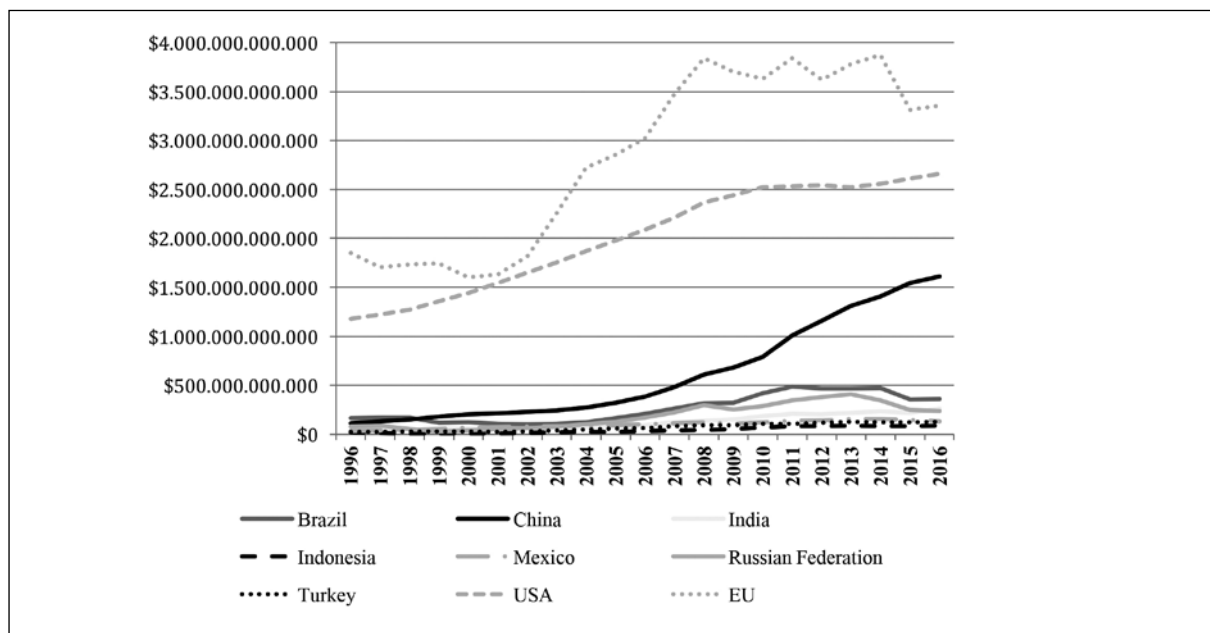
¹⁰ See WTO (2018) *GPA Procurement Statistics*, IMF (2016) *Exchange Rate Archives by Month: Currency units per SDR 1/1/1990-31/12/2015* and UN Database "National Accounts", op.cit.

¹¹ 'Government Procurement' (also 'Public procurement') is the intermediate consumption of goods and services purchased by governments for their own use (e.g. accounting or information technology services), and gross fixed capital formation (acquisitions excluding sales of fixed assets, e.g. buildings and construction of new roads). Costs of goods and services financed by general government, part of government procurement, are not included. See OECD-IDD. (2014). *Government at a Glance: Latin America and the Caribbean 2014 - Towards Innovative Public Financial Management*. Paris: OECD Publishing, p. 100.

to the GGCE among the parties is quite different (average ratios based on the reported, available quantifiable annual data): For example, Canada among the GPA parties represents the lowest average ratio with on 1.5 percent with an average annual reported GPA of US\$2.8bn. The EU has an average GPA-GGCE ratio of 7.1 percent (annual average GPA volume of US\$200bn). The US has comparatively the highest average GPA-GGCE ratio of 42 percent (annual average GPA volume of US\$720bn). The other average ratios of the GPA parties are between these intervals, but the reported GPA is likewise smaller.

9. Therefore, E7 governments might be of special interest for the expansion of the GPA coverage due to their prospective growth perspectives and economic impact on the long term. At the moment, only China and the Russian Federation are negotiating accession. Observer countries are Turkey, India, Indonesia and Brazil (see table 2). Only, Mexico is neither under observation, nor in GPA accession negotiations.

Figure 2. GGCE of EU, USA and E7 (1996-2016)



Note: In US dollars at current prices. The ‘E7’ are the seven emerging economies: Brazil, China, India, Indonesia, Mexico and the Russian Federation.

Source: Based on UNdata (2018).¹²

Figure 2 displays the GGCE development of the E7, US and EU since the GPA start in 1996. In general, the growth tendency is globally increasing among all countries (compare Table 1 and Figure 1). The E7 countries, in particular China, indicate a larger growth perspective than the industrialized countries. This might provide an additional momentum and a win-win-situation for the WTO GPA to cover easily larger proportions of the world government procurement market and might be an advantage for those countries finding themselves in a sharper negotiation position.

10. Hence, the composed figures presented above on global disciplines of public procurement prove that these disciplines are progressively changing the regulatory landscape, by creating an emerging rule-based procurement global market, of increasing size. The opening up of government procurement to foreign competition under common international disciplines also globally expands a new regulatory paradigm for governmental activity based on ‘less rowing’ and ‘more steering’.¹³ The basic policy

¹² UNdata (2018) *UN Database "National Accounts, op.cit*

¹³ R. OSBORNE/ T. GAEBLER, *Reinventing Government. How the Entrepreneurial Spirit is transforming the Public Sector*. Reading, MA: Addison-Wesley Publishing, 1992.

discourse around these initiatives aims to transform economic efficiency and best value for money into the main legal criteria in government procurement decision making (e.g. articles 7 to 16 of the GPA). In this context, procurement policies targeting other social values— such as environmental protection, job creation, local or regional development, etc.— tend to be increasingly framed as secondary procurement policies.¹⁴ The critics question these conceptions, by arguing that these disciplines reduce the capacity of public authorities to use procurement for pursuing other alternative and socially valued objectives.¹⁵ In addition, they also argue that in the long term, government entities and public officials may reduce technical capacities and practical expertise on the ground in all key policy areas, thus, compromising the quality and stability of publicly provided services, by means of the structural outsourcing of their tasks and activities. In short, so-called ‘learning by doing’ is intensely connected to ‘knowing by doing’. On the other hand, the globalization of procurement markets globalizes conflicts of interests as well. As government representatives and high-level officials currently move from industry to government, and back again, policy biases towards the structural outsourcing of publicly provided services (e.g. health, education, etc.) can be embedded within major government policy decisions.

11. In any case, developed countries are pushing the forward button and promoting new regulatory frameworks aimed at reforming government procurement along the lines of the aforementioned criteria. The World Bank, for example, fosters cooperation and technical assistance programs collaborating with the OECD through a joint initiative to strengthen the capabilities of developing countries in this sector, as well as assessing domestic initiatives for procurement reform.¹⁶ In this regard, the decades-old OECD program on procurement aims to remove trade restrictions and promote competition and market performance in this sector.¹⁷ Interestingly, United Nations Commission on International Trade Law (UNCITRAL) is also contributing to these initiatives, and its Model Law on government procurement does currently offer a template of ‘good practices’ for domestic law and regulation in this area¹⁸. Last but not least, some regional policies stand out within procurement reform initiatives. The European Union, in particular, has carried out major and extensive work in the area of procurement reform and market-formation.¹⁹ As a direct result, the EU directives and regulations on government procurement provide the EU DG Trade for a bargaining chip to obtain trade concessions from other GPA Parties in procurement negotiations. Thus, basically, public procurement has become a burgeoning area of global governance.

II. Exploring the main practices and disciplines

12. The GPA functions as a rule-based infrastructure for global procurement markets. To date, 51 Members of the WTO are 19 parties to the GPA (compare Table 2): Canada, the European Union (28 member states), Korea, United States, Hong Kong China, Iceland, Israel, Japan, Norway, the Netherlands, Singapore or Switzerland, Taipei China, among others.²⁰ Currently, the GPA recognizes 32 observers, and nine of these, including the People’s Republic of China, are negotiating accession. Of the 32

¹⁴ S. ARROWSMITH, "Horizontal Policies in Public Procurement: A Taxonomy", *Journal of Public Procurement*, Vol. 10 (Issue 2), 2010, pp.149-186.

¹⁵ See C. MCCRUDEN, *Buying Social Justice. Equality, Government Procurement, & Legal Change*. Oxford: Oxford University Press, 2007 and P. TREPETE, *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation*. Oxford: Oxford University Press, 2004.

¹⁶ See Joint OECD-World Bank Round Table Initiative as well as Bank (2016) for ‘Country Procurement Assessment Reports (CPAR)’.

¹⁷ For an example of OECD’s early and innovative initiatives in this field, see for example, OECD (1995) and OECD (1997), as well as its action program. See OECD (1995) *Recommendation of the Council of the OECD on improving the Quality of Government Regulation (Adopted on 9 March 1995)* and OECD (1997). *The OECD Report on Regulatory Reform Synthesis*.

¹⁸ See S. ARROWSMITH, "Public Procurement: An Appraisal fo the UNCITRAL Model Law as a Global Standard" *The International and Comparative Law Quaterly*, Vol. 53 (No. 1), 2004, pp.7-46 and R. R. HUNJA "The UNCITRAL Model Law on Procurement of Goods, Construction and Services and its impact on Procurement Reform" In S. D. Arrowsmith, A. (eds.) (Ed.), *Public Procurement: Global Revolution*. London: Kluwer Law International, 1998, pp.97-107.

¹⁹ C. CHINCHILLA MARÍN, *Public Procurement in the European Union an its Member States*. Valladolid: Lex Nova, 2012.

²⁰ For accession negotiations see Doc GPA/*

GPA observers, WTO Members such as China, India, Australia and Turkey are notable for the volume and potential of their procurement sector. In addition, the protocols for WTO accession of nine of these GPA observers including the Russian Federation and Saudi Arabia, are contemplating GPA accession.²¹

Table 2. Entry and Acceptance Date of GPA Parties and Observers

| Party | Date of entry into force/ accession | | Observer government | Acceptance date by committee as observers |
|---------------------|--|-------------|---------------------|---|
| | GPA 1994 | Revised GPA | | |
| Armenia | 15/09/2011 | 06/06/2015 | Afghanistan | 18/10/2017 |
| Canada | 01/01/1996 | 06/04/2014 | Albania* | 02/10/2001 |
| EU15 ¹ | 01/01/1996 | 06/04/2014 | Argentina | 24/02/1997 |
| EU25 ² | 01/05/2004 | 06/04/2014 | Australia* | 04/06/1996 |
| EU27 ³ | 01/01/2007 | 06/04/2014 | Bahrain | 09/12/2000 |
| EU28 ⁴ | 01/07/2013 | 06/04/2014 | Belarus | 27/06/2018 |
| Hong Kong (China) | 19/06/1997 | 06/04/2014 | Brazil | 18/10/2018 |
| Iceland | 28/01/2001 | 06/04/2014 | Cameroon | 03/05/2001 |
| Israel | 01/01/1996 | 06/04/2014 | Chile | 29/09/1997 |
| Japan | 01/01/1996 | 06/04/2014 | China* | 21/02/2002 |
| Korea | 01/01/1997 | 16/04/2014 | Colombia | 27/02/1996 |
| Liechtenstein | 18/09/1997 | 14/01/2016 | Costa Rica | 03/06/2015 |
| Moldova | 14/07/2016 | 14/07/2016 | Georgia* | 05/10/1999 |
| Montenegro | 15/07/2015 | 15/07/2015 | India | 10/02/2010 |
| Aruba (Netherlands) | 25/10/1996 | 04/07/2014 | Indonesia | 31/10/2012 |
| New Zealand | 12/08/2015 | 12/08/2015 | Jordan* | 08/03/2000 |
| Norway | 01/01/1996 | 06/04/2014 | Kazakhstan | 19/10/2016 |
| Singapore (China) | 20/10/1997 | 06/04/2014 | Kyrgyz Republic* | 05/10/1999 |
| Switzerland | 01/01/1996 | 06/04/2014 | Malaysia | 18/07/2012 |
| Taipei (China) | 15/07/2009 | 06/04/2014 | Mongolia | 23/02/1999 |
| Ukraine | 18/05/2016 | 18/05/2016 | Mongolia | 23/02/1999 |
| United States | 01/01/1996 | 06/04/2014 | Oman* | 03/05/2001 |
| | | | Panama | 29/09/1997 |
| | | | Pakistan | 11/02/2015 |
| | | | Russian Federation* | 29/05/2013 |
| | | | Saudi Arabia | 13/12/2007 |
| | | | Seychelles | 16/09/2015 |
| | | | Sri Lanka | 23/04/2003 |
| | | | Tajikistan* | 25/06/2014 |
| | | | Thailand | 03/06/2015 |
| | | | Macedonia | 27/06/2013 |
| | | | Turkey | 04/06/1996 |
| | | | Viet Nam | 05/12/2012 |

¹ EU15 consists of the following member states: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom.

² EU25 consists of the EU15 adding Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic and Slovenia.

³ EU27 consists of the EU25 adding Bulgaria and Romania.

⁴ EU28 consists of the EU27 adding Croatia.

Note: * Negotiating accession.

Source: Based on WTO (2018) and Chen & Whalley (2011)²²

²¹ On the market value of new accessions, see R. ANDERSON; K. OSEI-LAH & A. 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" *Public Procurement Law Review*, Vol. 4, 2012, pp. 113-138.

²² See WTO (2018) *GPA parties, observers and accessions* and H. CHEN & WHALLEY. *The WTO Government Procurement Agreement and its Impacts on Trade*. (Working Paper 17365). Cambridge, MA: NBER, 2011.

13. The basic principles of the GPA are non-discrimination, transparency and procedural fairness. The GPA regulates basic disciplines for the procurement of goods and services by central government, sub-state entities and state-owned enterprises in respect of which, each GPA Party has scheduled market-access commitments. In essence, this agreement establishes a minimum general standard for undertakings relating to tendering procedures covered by its rules (e.g. regional airport services, transport infrastructures, tenders by state-owned enterprises, etc.).

14. The GPA Parties are required to grant ‘treatment no less favorable’ than that accorded to domestic products, services and suppliers (article 3.1). Similarly, they may not treat any foreign based supplier less favorably than a locally-established supplier on the basis of ‘degree of foreign affiliation or ownership’; nor may they discriminate against locally-established suppliers ‘on the basis of the country of production of the good or service being supplied’ (article 3.2). The regulatory objective is to ensure that foreign suppliers have equal access and opportunities in government procurement of goods and services. To achieve this, the following basic requirements have been established: (1) Minimum time limits to prepare, submit and receive tenders; (2) Requirements for tender specifications; (3) Procedures for submission, receipt and opening of tenders and awarding of contracts; and (4) Criteria for awarding contracts.²³ In this respect, GPA rules prescribe procedural requirements for three basic types of tenders: (a) *Open tendering procedures*; (b) *Selective tendering procedures*, in which suppliers are invited to submit a tender with conditions of participation linked to the ability to complete the contract as well as (c) *Limited tendering procedures*.²⁴

15. The scope of application or coverage of the GPA is determined with regard to each Party in its Appendix I (also referred to as each Party's ‘schedule’). In this regard, Appendix I contain details of the contracting entities which are subject to GPA as well as minimum threshold values for the public tenders. Within this appendix, the coverage for each GPA Party is determined in Annex 1 (central government entities), Annex 2 (sub-central government entities), and Annex 3 (all other entities procuring in accordance with GPA) as well as Annex 4 (covered services) and 5 (covered construction services).

16. In principle, services are only incorporated in the two final annexes of the aforementioned Appendix I. However, some WTO Members have also consigned services undertakings to Annexes 1, 2 and 3. The other appendices include publications in which the Parties insert advertisements for public contracts (Appendix II), permanent lists of qualified providers for selective tenders (Appendix III) as well as regulations and domestic procedures on government procurement (Appendix 5). These appendices are designed to easily formalize regular changes and updates.²⁵ In regard to these, rectifications, transfers of entities from one annex to another or amendments are subject to so-called ‘compensatory adjustments’ as well as WTO dispute settlement mechanism (articles XXIV.6.a).

17. The GPA also encourages participation and increased transparency in procurement.²⁶ However, it concentrates mainly on disciplining large-scale procurement in general. In this respect, its provisions are only applicable to public tenders with values exceeding specific thresholds (article I.4).²⁷ On one hand, the threshold value for goods and services procured by central government entities is 130,000 SDR;²⁸ currently, that figure equates to 185,000 US dollars. On the other, the threshold value for contracts entered into by sub-central government entities varies. In general, it is situated at around 200,000 SDR with some 400,000 SDR for procurement by state-owned enterprises. With construction contracts,

²³ See articles 11.2, 12, 13.1-3 and 13.4 respectively.

²⁴ See articles 7.3(a), 7.3(b) and 10, as well as article 15.

²⁵ See WTO/LET/*.

²⁶ Differences in coverage vary in intensity. For an interesting study on the relative impact of the GPA in the US, see C. TIEFER. "The GATT Agreement on Government Procurement in Theory and Practice" *University of Baltimore Law Review*, Vol. 31, 1997, pp.31-50.

²⁷ On methods of notification for threshold values see Doc WTO GPA/1, Annexe 3.

²⁸ IMF assesses the daily value which is based on the stock market exchange rate of four currencies (US dollar, Euro, pound sterling and Japanese yen).

the figures rise to 5 million SDR. In summary, the GPA's approach to procurement tends to favor the 'macro' over the 'micro' and thus generally involves large companies and large numbers.

18. Compliance with the GPA disciplines is promoted through an (1) effective inter-state monitoring system, within the WTO Government Procurement Committee, (2) the enforcement of binding rules for domestic review procedures, so that foreign bidders can appeal contracting decisions and obtain reparation, and (3) access to the WTO dispute settlement. With regard to the first point, the GPA regulates transparency of laws, procedures and practices on government procurement as well as the technical specifications of the tenders. In addition, tendering procedures are required to include accessible publications identified in Appendices II to IV (**article IX**). The GPA thus imposes a general obligation to publish applicable laws, court decisions and administrative rulings of general application, as well as any procedure (including standard contract clauses) regarding government procurement (article XIX.1). At the same time, Parties to the agreement are required to submit annual statistics (broken down into categories of products and services) on the number and estimated value of the tenders awarded to both domestic and foreign suppliers.²⁹ Each GPA Party is also required to collect and provide the Committee on Government Procurement, on an annual basis, with statistics on its procurement covered by the rules (article XIX.5).

19. The GPA also determines the publication and right of foreign tenderers to obtain information on positive or negative decisions on the award of tenders (article XVIII.1 and 2). This obligation is complemented by the right of the bidder's country of origin to request additional information; such procedural guarantees are established to ensure that procurement decisions are based on 'fairness' and 'impartiality' (article XIX.2). In addition, the provisions of the GPA also establish a general requirement for its Parties to deliver regular notifications regarding the evolution of their domestic procurement rules and practices. In this respect, Member States are required to notify any modification to procurement regulations and practices (article XXIV.5(b)1).³⁰ In addition, modifications to the appendices can be objected to by other Parties, and are also regularly monitored by the Committee on Government Procurement, which supervises eventual compensatory adjustments pursuant to article XXIV.6(a).³¹

20. In this context, the WTO Secretariat has recently been involved in a project for turning the appendices into online tools, to provide governments and businesses (as potential tenderers) with interactive information regarding procurement. The so-called 'e-GPA project' aims at creating an integrated database comprising information on market access schedules, statistical reports and links to the GPA Parties' procurement sites, to serve as a 'market information tool'.

21. With regard to domestic procedures, article XX of the GPA requires that domestic legal systems set up procedures enabling suppliers to challenge alleged breaches of the agreement through judicial review. The domestic judicial body with competence for this purpose should operate according to a series of procedural requirements (article XX.6.a-c), and shall be authorized to determine the correction, compensation (restricted to costs of tender preparation or protest) as well as rapid interim measures to correct GPA breaches and thus to preserve commercial opportunities (article XX.7, a-c).

22. Ultimately, GPA rules are under the jurisdiction of the WTO dispute settlement system in accordance with article XXII.1. Therefore, WTO panels and the Appellate Body are available to the 51 GPA Parties not only for solving their disputes through neutral third party adjudication but to authorize suspensions of GPA concessions as a result of non-compliance with GPA rules and standards. With

²⁹ See WTO GPA/*, *Statistics for [20**] reported under article XIX:5 of the Agreement*.

³⁰ See WTO GPA/1/Add.1. *Procedure for notification of national implementing legislation*, Committee Decision of 4 June 1996, (27 June 2006) and, for example, WTO GPA/20, *Notification of national implementing legislation—European Community Communication* (28 January 1998) and WTO GPA/32, *Examination of Applicable National Legislation in European Union* (12 January 2000).

³¹ For an example regarding the last EU proposals of modification and the US objections see GPA/MOD/EEC/23 (24 March 2011) and GPA/MOD/EEC/24 (5 April 2011).

regard to non-compliance, however, the GPA differs from the rest of the agreements covered by the WTO jurisdiction in some key issues. For example, non-compliance does not imply suspension of trade concessions or other obligations under WTO covered agreements. As the GPA is a voluntary agreement – whereas the GATT, the GATS and TRIPS are agreements of compulsory accession for all WTO members – GPA Parties are not authorized to suspend trade concessions deriving from the GATT (goods), GATS (services) or TRIPS (IP) in order to respond to non-compliance with GPA provisions. Hence, the so-called crossed-retaliation between GPA Parties is circumscribed to the procurement sector.³²

23. Currently, WTO dispute settlement regarding procurement is relatively scarce compared with other covered agreements. Arguably, the most significant controversy to date was that concerning public procurement of the State of Massachusetts, aimed at disciplining companies operating in Myanmar (Burma) and promoting human rights in that country.³³ In addition, a US claim against procurement conditions for the construction of Incheon International Airport in Korea was also resolved by a panel in 2000.³⁴ Previously, a dispute between the EC and Japan regarding a tender for a capacity extension in a Multi-functional Satellite (MTSAT) was settled.³⁵ Thus, there have been few procurement disputes to date within WTO.³⁶ Notwithstanding this fact, it is reasonable to expect an increase in the number of disputes in the midterm, as 10 new WTO Members are negotiating accession to the revised GPA, and in particular a further 24 states are negotiating accession to the WTO itself.

24. In order to accede to the GPA, a state is required to offer a list of undertakings which are acceptable for all 51 GPA Parties; when this occurs, the offer becomes part of Appendix I. For the purpose of GPA accession, the Committee on Government Procurement set up working groups to examine the scope of the offers as well as full information on opportunities for export of the applicant state.³⁷ Consequently, accession to the WTO will depend on acceptance by all its 160 members and, therefore, also by the 51 GPA Parties. As a result, as mentioned, some WTO accession negotiations are raising the issue of accession to the GPA; although paradoxically this is technically a voluntary accession. In this regard, negotiating GPA accession sometimes becomes a *sine qua non* requirement for some states to obtain the so-called ‘entry ticket’ to the WTO.

III. Regulatory upgrades and coverage

25. In addition to the current disciplines, the 1996 GPA incorporated a Future Work Program, also so-called ‘built-in agenda’, aimed at expanding its sector coverage. The revised GPA of 2014 is a direct result of that agenda, significantly extending the scope of the previous agreement within the Annexes of the new Appendix I; drawn up within the 1996 GPA negotiating framework of article XXIV.7, the agreement was adopted in 2012 and has finally entered into force in April 2014. This updated version of the GPA is yet another by-product of treaty-based progressive liberalization.³⁸ In this regard, the revised

³² Article XXII.3 and 7.

³³ WT/DS88/*, *United States–Measure affecting public procurement* (2000)

³⁴ WTO WT/DS163/R, *Measures affecting public procurement (procurement practices of the Korean Airport Construction Authority)* (1 May 2000).

³⁵ WT/DS73, *Japan–Procurement of a navigation satellite* (3 March 1998). See also Doc WT/GPA/M/(18 February 1998).

³⁶ Three panels have drawn up reports prior to creation of the WTO: *Value-Added Tax and Threshold* GPR/21 (16 May 1984) BISD 31/247, *United States Procurement of a Sonar Mapping System* (23 April 1992, not adopted) GPR.DS1/R and *Norwegian Procurement of Toll Collection Equipment for the City of Trondheim*. GPR.DS2/R (adopted on 13 May 1992) BISD 40S/319. For a comment on these cases see F. WEISS, "Settlement of International trade disputes in regional free trade agreements and domestic courts - dispute settlement in the EC - lessons for the GATT/WTO dispute settlement system?" In E.-U. Petersmann (Ed.), *International trade law and the GATT/WTO dispute settlement system*, London, Boston: Kluwer Law International, 1997, p.704. See also UNCTAD (2003) *Dispute Settlement World Trade Organization-Government Procurement*. New York, Geneva: United Nations, pp.24-29.

³⁷ See WTO GPA/1, *Decisions in procedural matters within the framework of the public procurement agreement* (1994), Annex 2, paragraphs 2 to 4 (5 March 1996).

³⁸ See R.ANDERSON, "The WTO Regime on Government Procurement: Past, Present and Future". In S. A. Arrowsmith,

GPA builds on the procurement regulatory experience initiated in the GATT Tokyo Round (1973-1979), and later followed by the GPA resulting from the Uruguay Round (1982-1994). Following decades of experience, the world trading system has finally reformed this regulatory framework in 2014. As a result, the revised GPA adds 4 complementary objectives to the traditional disciplines managed by the GPA of the Uruguay Round:

- (1) Promoting the implementation of new procurement practices and methods, such as use of information technologies (*on line* tenders);
- (2) Extending the coverage of central (and sub-central) public bodies subject to the GPA;³⁹
- (3) Eliminating some discriminatory measures which were not under the provisions of 1996 GPA;⁴⁰ and
- (4) Facilitating accession of new Parties by incorporating special and differentiated treatment (S&D) for developing countries.

26. Not surprisingly, the negotiations for the new instrument, led by the Swiss Mr. Nicolas Niggli, were particularly complicated. Beginning in 1997, it was only in 2006 that negotiators reached a provisional understanding on obtaining improvements in coverage of Appendix I for all the GPA Parties. In fact, negotiations regarding coverage (e.g. public procurement in Canadian provinces and territories, public procurement for Japanese airports, etc.) closed just hours before the 8th WTO Ministerial Conference. Accordingly, on 15 December 2011, the 43 Parties to the GPA reached a deal to improve its disciplines and expand market access. The final agreement was adopted by the Committee on Government Procurement on 30 March 2012.⁴¹

27. The revised GPA framework aims to create a more manageable and dynamic agreement. In this respect, it clarifies the S&D treatment for developing countries as well as simplifying the procedures for amending the lists of commitment contained in Appendix I. The new agreement also reinforces its pro-competitive and anti-discriminatory provisions and reinforces its mandatory rules regarding transparency in procurement policies and practices. At the same time, its provisions reduce time frames for government procurement of goods and services already available on the market, and establish specific procedures so that potential foreign suppliers can more easily challenge and be compensated for decisions awarding procurement contracts contrary to the GPA. However, the most significant advances have been in its improved scope of application (so-called GPA coverage), including procurement by provincial or departmental authorities as well as procurement of services under the new rules; particularly, regarding infrastructure construction projects.

28. The revised GPA increases its coverage tenfold with respect to the volume of procurement regulated by the Tokyo Round Code on Government Procurement. The increased volume of trade has resulted from incorporating new entities and sectors in the annexes to Appendix I as well as reducing threshold values. In short, Parties to the GPA have added over 200 bodies to their lists as well as procurement of services. The GPA coverage has been significantly extended in sectors such as construction, infrastructure, telecommunications, public transport, hospital equipment services and other public authority services. Thus, for example, the European Union and the United States have extended access to tenders from central bodies such as the European Commission and various US federal agencies. In

Robert. D. (Ed.), *The WTO Regime on Government Procurement: Challenge and Reform* (pp. 896). Cambridge, Cambridge University Press & World Trade Organization, 2011 and S. ARROWSMITH, "Horizontal Policies in Public Procurement: A Taxonomy," *Journal of Public Procurement*, Vol. 10 (Issue 2), 2010, pp.149-186.

³⁹ WTO (2004) *Modalities for the Negotiations on Extension of Coverage and Elimination of Discriminatory Measures and Practices*, GPA/79.

⁴⁰ WTO (2005) *Modalities for the Negotiations on Extension of Coverage and Elimination of Discriminatory Measures and Practices*, GPA/79/Add.1.

⁴¹ WTO (2012) *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.

addition, Japan has offered access to public-private partnerships (PPP) and large scale infrastructure construction projects. At the same time, for example, Canada has opened up its provincial procurement markets, and, Korea its public railway and urban transport tenders. Finally, several GPA Parties provide coverage for new complex 'contractual vehicles' like the macro-construction contracts known as build-operate-transfer agreements (BOTs).

29. Therefore, the revised GPA significantly increases access to procurement markets for foreign companies. As a result, the procurement covered by the new rules expands market access by an estimated USD 80-100 billion annually.⁴² Consequently, the consolidation of a global procurement market is moving forward. It is thus a sector in which rule-based liberalization has successfully advanced within the context of an ongoing world economic crisis. In fact, the new instrument incorporates its own built-in agenda, which focuses on the following areas:

- (1) Sustainable public procurement;
- (2) Public procurement and SMEs;
- (3) Restrictions and exclusions within the Annexes of member state; and
- (4) Improvements in the compilation of statistical data.

30. The third of these points lays down a new negotiating mandate for increasing the coverage or scope of application. In this regard, the 2014 GPA built-in agenda formally brings to the negotiating table those sectors and entities currently restricted or excluded in the annexes of all 43 GPA Parties. Needless to say, the purpose of this item is to ensure the possibility of extending GPA coverage in the long term, with or without a successful Doha Round.⁴³ Thus, the built-in agenda allows this global procurement regime in the making to continue its forward march. In fact, Parties to the 1996 GPA formally agreed that the revised GPA provided the basis for negotiating accession to the former, even before the latter entered into force. This peculiar arrangement obviously involved some degree of juggling for those state representatives who were negotiating accession, as their discussions for accessing one treaty (the old GPA) were in the process of being replaced by another treaty (the new GPA!). As a result, as the revised GPA finally entered into force in 2014, countries in the process of negotiating accession to the former GPA were required to swap over to the new regulatory framework.

31. Currently, the complex and long-term negotiations for accession to the revised GPA continue to slowly move forward. In fact, the US and the EU have been redoubling their efforts to exert pressure on certain key states, with the People's Republic of China being prominent among these. The case of China's accession is particularly illustrative. For some observers, accession to the GPA of emerging economies such as China would be more positive for US and EU companies than other potential results awaiting an outcome in the stalled Doha Round. To paraphrase the Committee on Government Procurement, China's accession is 'a matter of tremendous significance for the agreement, for the WTO and for the world economy and an extremely important signal for emerging economies'.⁴⁴ As a result, the Committee hopes to conclude negotiations in the mid-term, thus intensifying its ongoing dialogue regarding coverage and market access. In addition, the WTO Secretariat is particularly involved in providing technical assistance to Chinese representatives, in order to facilitate a prompt deal within the brand new GPA framework.

32. China's accession is an incentive to other emerging economies to make a move, in order to avoid being left out of the procurement markets to which Chinese companies will gain access. In fact, India has joined the GPA as an observer, to a great extent as a result of China's accession negotiations. The People's Republic of China has been a WTO Member since 2001, but began negotiations to join the

⁴² See GPA/121, *Report (2013)*, op.cit.p.2.

⁴³ WTO (2012) *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.

⁴⁴ See GPA/121 (24 October, 2014), *Report (2013) of the Committee on Government Procurement*, paragraph 3.13.

GPA later on:⁴⁵ Accession was formally requested on 28 December 2007 and the initial offer by China was circulated among the parties on 7 January 2008.⁴⁶ To date, China has already submitted several revised offers to the GPA Parties. In fact, GPA Parties have received several revised bids already, following formal requests by the United States Trade Representative (USTR).⁴⁷ However, the bids have failed to meet the expectations of key players such as the United States and the European Union. The requests for market access improvements from the US and the EU focus on gaining extended coverage from central public bodies, regional authorities, and reducing threshold values, as well as its wide exclusions to certain procurement sectors and authorities.

IV. The GPA disciplines in current context

34. World procurement markets are currently dominated by industries from developed countries. As a result, developed countries are exerting strong pressure in WTO and other forums so that developing countries reduce the margins of discrimination against foreign companies in government procurement.⁴⁸ In this regard, companies lobby representatives from developed countries to obtain extra market access in the emerging E7 economies with a view, to name an illustrative example, towards providing new transport and communications mega-infrastructure. However, developing countries have systematically opposed the launch of multilateral negotiations in this area since the Uruguay Round (1986-1994).⁴⁹ Thus, at the present time, there is no mandate for negotiating multilateral disciplines in this area.⁵⁰

35. In this regard, the mandate of the Doha Round only covered the negotiations on the improvement of transparency in government procurement in response to the opposition to multilateral negotiations by developing countries. Accordingly, the WTO Ministerial Declaration of Singapore (13 December 1996) established a working group to analyze the transparency of procurement practices,⁵¹ and envisaged the eventual negotiation of an agreement on transparency in the sector, which was in any case to be de-linked from GPA negotiations.⁵² In Doha, the trade delegates from developing countries managed to ensure that the Final Declaration of 2001, inaugurating the new Development Round, expressly excluded the negotiation of undertakings on procurement market access:⁵³ '[the negotiations] shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers.'⁵⁴

⁴⁵ H. WANG/ QI. WANG, "China's ten years in the WTO: review and perspectives" *Journal of Chinese Economic and Foreign Trade Studies*, Vol. 6 (Issue 2), 2013, pp.53-69.

⁴⁶ See GPA/ACC/CHN/1 (7 January 2008) and GPA/93 (14 January 2008).

⁴⁷ See, for example, the bid received at the session of the US-China Joint Commission on Commerce and Trade. For a comment on the bid circulated to GPA Parties on a confidential basis see *Inside U.S. Trade's China Trade Extra, New China GPA Offer Adds Six Provinces, But Still Falls Short Of Demands* (7 January 2014).

⁴⁸ See, for example, USTR (2014) *2014 National Trade Estimate Report on Foreign Trade Barriers*.

⁴⁹ On the pre-Seattle proactive position of developing countries (with more than 200 proposals) see C. MICHALOPOULOS, "Developing Country Strategies for the Millennium Road" *Journal of World Trade*, Vol. 33 (Issue 5), 1999, pp.1-30. For long-term longitude perspective on the position of developing countries previous to WTO see J. SCOTT, "Developing Countries in the ITO and GATT Negotiations" *Journal of International Trade Law and Policy*, Vol. 9, 2010, pp.5-24.

⁵⁰ For a study on the gradual approach to non-discrimination in the field of multilateral public procurement see M. DISCHENDORFER, "The Existence and Development of Multilateral Rules on Government Procurement under the Framework of the WTO" *Public Procurement Law Review*, Vol. 9 (Issue 1), 2000, pp.1-38.

⁵¹ See WTO (1996) *Ministerial Declaration on Trade in Information Technology Products*, WT/MIN(96)/16) and S. ARROWSMITH, "Towards a multilateral agreement on transparency in government procurement" *International and Comparative Law Quarterly*, Vol. 47, 1997, pp. 793-810 (studying the establishment of this group).

⁵² For the original idea of such multilateral agreement see *Non Paper-Government Procurement* (European Union 1996) and *Non Paper-Further Ideas on a WTO Government Procurement Initiative* (USTR 1996).

⁵³ See WT/MIN(01)/DEC/1, *Ministerial Declaration adopted 14 November 2001* (20 November 2001).

⁵⁴ For a critical assessment of the functions and benefits of transparency in public procurement see S. ARROWSMITH, "Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the World Trade Organization" *Journal of World Trade*, Vol. 37, 2003, pp. 283-303.

36. The Final Declaration opened up the possibility of new negotiations in this area following the fifth WTO Ministerial Conference (Cancun 2003), ‘on the basis of a decision to be taken, by *explicit consensus*, at that session on *modalities of negotiations*’.⁵⁵ However, developing and developed countries were unable to attain the required *explicit consensus* in that Conference:⁵⁶ The Cancun failure to reach agreement on this issue arose from the increasing tensions in negotiations regarding the so-called Singapore issues; that is, as a result of the tensions caused by critical policy issues such as investment protection and antitrust in particular. In fact, the Singapore issues ended by being formally excluded from the Doha Round in 2004, as a way of mitigating policy frictions in the interests of a successful Round. In this way, the WTO Members approved the so-called ‘July package’ in which developed countries agreed to remove these issues from the negotiation mandate, in order to keep the Round talks ongoing.⁵⁷ Nevertheless, developed countries have stepped up the pressure on certain developing countries to obtain undertakings to open up their government procurement markets through other regulatory vehicles within the WTO (e.g. GATS), as well as outside WTO (e.g. preferential trade agreements).

37. However, with regard to the former, developed countries are finding it increasingly difficult to use their traditional negotiating leverage for obtaining trade-offs within the WTO institutional structure. As a result, the feasibility of improving access to the procurement markets of developing countries through GATS is currently scarce at best, as its article XIII.1 expressly exempts government procurement from the main market access provisions of GATS.⁵⁸ In any case, GATS article XIII.2 establishes a negotiating mandate on services procurement. Thus, it is not easy to predict final outcomes in this area, as the success of multilateral trade negotiations always depends on complex trade-offs on which consensus may be reached, literally, at the last minute. In practice, as mentioned, Multilateral Trade Negotiations (MTN) Rounds encourage a precarious balance of concessions between a wide variety of requests offered in numerous negotiating sectors (e.g. industrial tariffs, subsidies, agriculture, IP-health related issues, among others). Therefore, it is generally difficult to predict the developments and outcomes of the Round overall. In fact, many already argue that the Doha Round has already failed. The July package managed to overcome this impasse and reinvigorated the Round. To summarize, notwithstanding some progress in the GATS negotiations regarding procurement of services, the success of negotiations is also dependent on other parallel WTO negotiations. In this regard, whether or not there is a definitive deal will depend on 160 WTO Members valuing the overall results positively; which is a difficult but not impossible task to achieve, as previous GATT Rounds suggest.

38. At the present time, the WTO regime not only manages substantive and procedural rules – which become international hard law under a binding global jurisdiction – but also provides a stable and dynamic regulatory framework for opening up domestic markets through regular multi-state crossed-concessions and trade-offs. In this sense, WTO law constitutes a hyper-specialized legal system on its own terms and one that has been shown to be particularly dynamic to date. In fact, as explained, the WTO defines itself in its constitutive treaty as a Permanent Forum for Negotiations, and thus includes the regular launch of multilateral trade negotiations among its functions.⁵⁹ As progressive liberalization is inherent in the world trading system, the GATT regime has expanded its negotiating mandates over entire new areas. The long-term efforts to build a global procurement market from an agreement of voluntary accession for WTO Members – a plurilateral agreement such as the GPA – are an expression of this culture. In this context, some developed GPA Parties tend to promote the opening up of government

⁵⁵ See WT/WGTGP/W/32, *Work of the working group on the matters related to items I-V of the list of the issues raised and points made*, Secretariat Note (23 May 2002), and WT/WGTGP/W/33, *Work of the working group on the matters related to items vi-xii of the list of the issues raised and points made*, Secretariat Note (3 October 2002).

⁵⁶ For the 12 items examined by the transparency working group (potential areas for drafting a possible agreement) see the ‘Chairman’s Checklist’. See JOB (99)6782, *List of issues raised and points made*, *President’s Informal Note*.

⁵⁷ See Doc WT/579 *Decision adopted by the General Council on 1 August 2004* (2 August 2004).

⁵⁸ On GATS liberalization and the eventual GPA multilateralization see B. HOEKMAN/ EVERNETT, "Government Procurement of Services: Assessing the Case for Multilateral Disciplines" In P. S. Sauvé, Robert M. (Ed.), *Services 2000: New Directions in Services Trade Liberalization* Washington, D.C.: Brookings Institution Press, 2000, pp.143-164.

⁵⁹ See Article III.2 of the WTO Agreement.

procurement markets through any regulatory vehicle available within the scope of WTO covered agreements. In fact, many north-south tensions within the Doha Round originate from such practices, as some developed WTO Members such as the US and the EU are particularly lax when interpreting the agreed negotiating mandate for each MTN Round; and procurement is not foreign to these practices.

39. The objective of governments pushing for this strategy –notably USA and EU– is to increase market access for the global companies incorporated in their territories. By regularly shifting forums, parallel negotiating venues are available for the ‘opening up of government procurement markets’. Thus, trade representatives not only negotiate procurement within the GPA framework but in other WTO regulatory frameworks such as GATS, as well as outside WTO, such as the variety of US and EU FTAs incorporating procurement provisions.⁶⁰ As a result, concessions that cannot be achieved within the world trading system will be requested in alternative forums.⁶¹ Therefore, a variety of initiatives have been launched in diverse forums for promoting the opening up of procurement markets. This strategy not only transcends the GPA framework, but also the WTO itself:

- Liberalization within the GPA framework;
- Liberalization within the WTO framework, but outside the GPA (e.g. GATS);
- Liberalization outside the WTO (e.g. bilateral treaties).

40. In the world of regulatory networks, the WTO will continue to be the central regulatory regime for governing the global market economy in the making as long as it is able to regularly expand and upgrade its rules. In this regard, as Sell suggests, international politics are far messier than is generally assumed.⁶² In fact, the game is never over, as all actors involved continuously cycle through fora to find one at a moment in time where their power will be optimized.⁶³ In the words of Chorev,⁶⁴ institutions have interactive effects in any given policy space: as a result, the repositioning of one piece in one of those institutions (i.e. adoption of a rule) may result in the repositioning of more pieces in other institutions. The phenomenon has been also defined as “chessboard politics”.⁶⁵

41. Under this scenario, GPA policymakers and practitioners might interpret the GPA in relation to latest WTO accession negotiations in a wrong manner: the research demonstrates that the impact of GPA neither translates in 100 percent of all government expenditures. In fact, the share of the GPA in comparison among the parties differs in distribution, nor does the GPA relate in absolute and large shares to the GGCE in most countries; exceptionally, in the USA where the GPA has the highest share, with more than 40% in comparison to the GGCE. Thus, the GPA might impact relatively lesser, than generally assumed. Therefore, the coverage could be improved by further liberalization efforts among the GPA parties—the proportions between GPA and GGCE are relatively smaller in most countries compared to the USA— or by triggering the thresholds, and enhancing regulatory practices, as most GPA supplier

⁶⁰ See, for example, S. A. KHORANA/ N. ANAND. "EU FTA Negotiations with India: The question of Liberalisation of Public Procurement" *Asia Europe Journal*, Vol. 12 (Issue 1), 2014, pp.251-263.. For a recent OECD study (briefly covering 47 RTA with procurement provisions) see A. UENO, “Multilateralising regionalism on government procurement”, *OECD Trade Policy Papers* 151 (10 May 2013). See also S/WPGR/W/49 *Government Procurement related provisions in Economic Integration Agreements – Note by Secretariat* (31 August 2004) and S/WPGR/W/49/Add.1 (8 September 2009), containing the two reports from WTO Secretariat on this issue.

⁶¹ See K. ALTER, "The Politics of International Regime Complexity" *Perspectives on Politics*, Vol. 7 (Issue 1), 2009, pp. 13-24. For the case of industrial property, see, in particular, S. SELL "Cat and Mouse: Forum shifting in the battle over intellectual property rules and enforcement" *International Studies Association Montreal*, 2011.

⁶² S. SELL "Cat and Mouse, op.cit.

⁶³ P. DRAHOS. "Four lessons for developing countries from the trade negotiations over access to medicines" *Liverpool Law Review*, Vol. 28 (No. 11), 2007, pp.11-39.

⁶⁴ N. CHOREV, "Political and Institutional Manoeuvres in International Trade Negotiations: The United States and the Doha Development Round" In W. a. B. Blaas, J. (Eds.) (Ed.), *Strategic Arena Switching in International Trade Negotiations*. Aldershot, UK: Ashgate Publishing, 2007, pp. 33-34.

⁶⁵ K. ALTER/MEUNIER, "The Politics of International Regime Complexity" *Perspectives on Politics*, Vol. 7 (Issue 1), 2009, pp. 13-24.

contracts are found in large proportions to be of domestic nature.⁶⁶ Future research might explore this issue more appropriately, provided that more transparent data is available.

42. Finally, the taxonomy and data collection methodology regarding the GPA reports issued by WTO Members should become more standardized as the reports are structured quite different. For example, Japan represents a best-practice case by including statistics distinguishing between domestic and international GPA contracts. This might serve as an example to improve transparency on these reports regarding the global reach of government procurement. In addition, the research highlights that not all GPA member countries comply with their duties regarding reporting. Thus, for example, in some cases there are missing entire reporting periods (e.g. Switzerland), or reports have not yet been disclosed (e.g. EU for 2014, USA since 2010, etc.), or the reports are not provided publicly available at the WTO database, but are only available on personal request at the WTO Secretary (e.g. Hong Kong).

⁶⁶ In this regard, compare reports of best-practice case Japan where about 90% of all GPA contracts represent domestic suppliers. See H. CHEN/ J. WHALLEY, "The WTO Government Procurement Agreement and Its Impacts", *NBER Working Paper No. 17365*, 2011, p.17.