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Challenges of International Government Procurement

The Revised GPA from a European Perspective

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Abstract

The World Trade Organization Committee on Government Procurement adopted on 30th March 2012 the revised Government Procurement Agreement (GPA). The revised agreement will now go to the respective parliaments for ratification. The adoption of the revised text and the extension of the coverage put an end to long negotiations that started in 1997. The main goal of this paper is to analyze and understand how the agreement works from a European perspective and to determine what the consequences of the amendments are. For better comprehension, the paper deals with the context in which this Agreement was adopted, the implementation by its Members and what have been the achievements and failures so far. Finally, a comparison between the GPA 1994 and the Revised GPA is undertaken.

Introduction

The World Trade Organization Committee on Government Procurement adopted on 30th March 2012 the revised Government Procurement Agreement (GPA). The revised agreement will now go to the respective parliaments for ratification.[1] The adoption of the revised text and the extension of the coverage put an end to long negotiations that started in 1997. The main goal of this paper is to analyse and understand how the agreement works from a European perspective and to determine what the consequences of the amendments are. For better comprehension, the paper deals with the context in which this Agreement was adopted, the implementation by its Members and what have been the achievements and failures so far. Finally, a comparison between the GPA 1994 and the Revised GPA is undertaken.

1. The World Trade Organization and the covered agreements

The World Trade Organization (WTO) is a multilateral member-driven organization, which came into existence on the 1st of January 1995. The aims of the WTO are to increase standards of living, attainment of full employment, growth of real income and effective demand

[1] WTO website: http://www.wto.org/english/news_e/news12_e/gpro_30mar12_e.htm

and the expansion of, production of, and trade in, goods and services. According to the Preamble of the WTO Agreement, in order to achieve these goals, the organization has to take into account the preservation of the environment and the needs of developing countries.[2] There are two means by which WTO achieves its goals. First, market access measures dealing with the reduction of tariffs and non-tariffs barriers to trade in goods and services. Second, principles of non-discrimination between and against WTO Members. Thus, Members promote trade liberalization within the WTO in all areas except in those where trade has undesirable effects.[3]

The *WTO Agreement* covers a series of agreements which are equally binding and enforceable between all WTO Members. However, the Annex of the *WTO Agreement* clearly identifies two different kinds of agreements; Multilateral and Plurilateral Agreements. All original and acceding Members of the WTO are bound by all Multilateral Agreements. Therefore, GATT[4], GATS[5] and other implementing agreements are binding upon all WTO Members and its compliance is monitored by both the Trade Policy Review Mechanism[6] and the Dispute Settlement Mechanism.[7] On the other hand, there are a number of Plurilateral Agreements which were negotiated within the WTO, but its scope of application is reduced to those Members who voluntarily had adhered to them. These agreements are provided in Annex 4 of the *WTO Agreement* and are: Agreement on Trade in Civil Aircraft, Agreement on Government Procurement, International Dairy Agreement and International Bovine Meat Agreement.

2. Agreement on Government Procurement

Under the existing rules of the GATT 1947 and later the WTO rules, government procurement was meant to be covered by the rules on market access and non-discrimination. However, Article III:8(a) on national treatment obligation under the GATT 1994 states as follows '*The provisions of this Article shall not apply to laws regulations or requirements*

[2] *The Agreement Establishing the World Trade Organization* signed in Marrakesh in April 1994 commonly referred as the *Marrakesh Agreement* or the *WTO Agreement.*
[3] WTO website, "*Who we are*": http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm
[4] Annex 1A *WTO Agreement: "General Agreement on Tariffs and Trade"* commonly referred as GATT 1994
[5] Annex 1B *WTO Agreement: "General Agreement on Trade in Services"* commonly referred as GATS.
[6] Annex 3 *WTO Agreement: "Trade Policy Review Mechanism".*
[7] Annex II *WTO Agreement: "Understanding on Rules and Procedures Governing the Settlement of Disputes".*

governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale […]'. Hence, there is an explicit exclusion of public markets to the national treatment obligation. Part of the literature, as well as subsequent practice from the GPA Members, shows that the most favoured nation treatment obligation (MFN) was also excluded. In addition, Article XIII GATS also excludes explicitly government procurement from the GATS.

As a result, government procurement was, and still is, excluded from the scope of application of the GATT 1994 and GATS. Although the issue was tabled within the WTO negotiations several times, an agreement was never reached between all Members. In the light of lacking consensus on Ministerial Conference level, the furtherance of market access to public procurement markets was only to be achieved through a plurilateral agreement with the view that its benefits will attract other WTO Members to join.[8]

Currently there are 155 Members to the WTO[9]. From those only 42 are Members to the GPA. These comprise: Armenia, Canada, the European Union, including its 27 member States; Hong Kong, China; Iceland; Israel; Japan; Korea; Liechtenstein; the Kingdom of the Netherlands with respect to Aruba; Norway; Singapore; Switzerland; Chinese Taipei and the United States. Twenty-two other WTO Members have observer status under the Agreement.[10]

The first plurilateral agreement concerning public procurement was the so-called Tokyo Code. It was concluded during the Tokyo Round within the framework of the old GATT 1947 between some OECD Members and entered into force on 1st January 1981.[11] Ever since, the agreement has been amended several times and new provisions have been added. The most

[8] Government procurement amounts roughly between 10 and 15% of the average GDP. For instance, it has been said that just the accession of the five "BRICS" countries would add by itself a range between US$ 233 to US$ 596 billion annually to the value, see R.D. Anderson, P. Pelletier, K. Osei-Lah and A.C. 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* (WTO Staff Working Paper ERSD-2011-15, October 6, 2011), available at: *http:// www.wto.org/english/res_e/reser_e/ersd201115_e.htm.*

[9] 15th May 2012.

[10] These are: Albania, Argentina, Australia, Bahrain, Cameroon, Chile, China, Colombia, Croatia, Georgia, India, Jordan, the Kyrgyz Republic, Moldova, Mongolia, New Zealand, Oman, Panama, Kingdom of Saudi Arabia, Sri Lanka,Turkey and Ukraine. In addition, four 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 in the WTO Committee on Government Procurement, which administers the Agreement.

[11] see e.g. http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm#govt .

relevant amendments have been first within the Uruguay round of Negotiations in January 1994 resulting in the first GPA. There were three clear improvements to the Tokyo Code: expansion on covered entities[12], expansion of coverage[13] and the challenge procedures under Article XX GPA 1994[14]. Second, the amendment finally adopted on 30th March 2012, which has not yet come into force, is awaiting the parliamentary ratification of the parties to the agreement.[15]

3. The functioning of the GPA

3.1. The GPA in practice

The GPA is a WTO Plurilateral market access agreement negotiated, signed and enforceable between WTO Members who expressly committed to be bound by it. Between those, the most favourable nation treatment (MFN) and national treatment (NT) obligations fully apply, unless otherwise provided in their Annexes.

The GPA is governed by two main principles, namely transparency and non-discrimination.[16] Transparency is concerned with the modalities in which the procurement procedure is conducted. It is therefore "designed to ensure that covered procurement under the Agreement is carried out in a transparent and competitive manner that does not discriminate against the goods, services or suppliers of other Parties".[17] Non-discrimination is at the core of the GPA and requires a "[…] *treatment no less favourable than: (a) that accorded to domestic products, services or suppliers, and (b) that accorded to products, services and suppliers of any other Party*". However, despite non-discrimination being at the core of the GPA, large exclusions are allowed within the Annexes from both the NT and MFN obligations. For instance, the United States General Notes excludes SMEs from the scope of application of the GPA. Therefore USA may discriminate in favour of its SMEs, thus excluding the national treatment obligation. In the same General Notes, Japan is excluded from the award of contracts by entities

[12] In order to include sub-central government entities which were excluded from the Code

[13] Including hire, lease and hire-purchase of products and the introduction of services and construction services in the Annexes.

[14] Obligation of all Members to the GPA to establish non-discriminatory, timely and transparent local remedies.

[15] Robert D. Anderson, The conclusion of the renegotiation of the World Trade Organization Agreement on Government Procurement: what it means for the Agreement and for the world economy, *P.P.L.R. 2012, 3*, 83-94, at 85.

[16] Article III:1 GPA.

[17] see e.g. http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm .

recorded in Annex 3 that are responsible for the generation and distribution of electricity. Thus, Japan is excluded from an advantage that is granted immediately and unconditionally to all GPA Members, hence MFN is excluded in this case towards Japan.

According to Article XXIV:12 GPA, the Annexes are an integral part of the Agreement.[18] Thus, all Parties have to comply with what they have committed within the Annexes or otherwise they will be violating their obligations under the GPA. There are 7 different Annexes attached to the GPA: 1) Containing the central government entities; 2) Containing the sub-central government entities; 3) Containing all other entities that procure in accordance with the provisions of the agreement; 4) Containing the goods covered; 5) Containing general services covered; 6) Specifying covered construction services; 7) The general notes, which are horizontal provisions that apply to all Annexes.

As a result, to be within the field of application of the GPA it is required: a) The contracting authority which procures a public contract must be recorded in Annexes 1 to 3; b) The object of the contract has to be a covered good or service in Annexes 4, 5 or 6; c) The value of the contract has to exceed the monetary thresholds determine by each Member; d) No specific exclusions to the NT or MFN obligations are recorded within the General Notes in regards to the subject of matter of the contract or the potential tenders which may apply for it. Once all these requirements are met, the core of the GPA is basically a set of procedural provisions which are established so as to guarantee that the principles of equal-treatment of tenderers, free competition, transparency, objectivity and fairness of the overall procedure is respected. If a tender considers that procedural provisions that protect such principles have been violated, he has the right to access local remedies. Members of the GPA are obliged to have an impartial and independent procedure to challenge the award process. A Party to the GPA may nevertheless initiate the procedures provided under the Dispute Settlement Understanding, which may result in an establishment of a panel to adjudicate the case.

It could therefore be stated that the scope of the GPA is very narrow. Within the EU the discussion as to whether the rules of Directive 2004/18/EC[19] apply is determined by: (i) the value of the contract exceeds the relevant thresholds; (ii) whether the contract is awarded by a

[18] Appendix 1 includes the relevant commitments and thresholds in Annexes 1-3.

[19] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. (OJ L 134, 30.4.2004. p.114).

contracting authority within the meaning of Article 1.9. Although there is a list of contracting authorities at the end of the Directive this is merely an indicative list that it is neither exhaustive nor updated. (iii) In addition, most of the services are included and are subject to all the procedural requirements provided under the Directive if they are recorded in Annex A. But even those works or services excluded from the Directive or subject to Annex B, fall under the scope of both the fundamental principles enshrined by the EU Treaties and national procurement law, which has to be in accordance with EU law. On the contrary, if GPA does not apply, nothing prevents any GPA Member from restricting access to or discriminating between and against other GPA Members.

3.2. GPA negotiations

Finally, as the scope of application of the GPA will depend on the commitments made by the Parties in their Annexes a few words on how negotiations are carried out are necessary. The starting point of the last negotiations has been the old article XXIV:7 GPA 1994. Parties agreed to engage into negotiations with the aim of achieving greater extension of the coverage on the basis of mutual reciprocity and having regard of the needs of developing countries. Negotiations are complex and are based in a request-and-offer approach. During the last negotiations an initial offer of all the parties had to be submitted to the Committee on the GPA. Afterwards, on that basis of those submissions, the parties started bilateral negotiations.[20] GATT 1994 and GATS negotiations are complex and often take several years. It can be stated that GPA follows the GATS approach of negotiations and that are even more complex. First because of the coverage: Within the GATS negotiations, the issue concerns whether to include a service or not in the Schedule of Specific Commitments and to determine to what extent a party will commit to that inclusion: whether with a full commitment; *None* (MFN and NT apply fully) or with a partial commitment (MFN and NT subject to conditions) or inclusion without commitments *Unbound* (only MFN). Whereas in the GPA in addition to the inclusion of the services covered, it has to be also negotiated which contracting authorities will be included in Annex I-III, and the thresholds that will trigger the scope of application of the agreement in each case and for each kind of service. In addition, restrictions to the MFN principles are allowed under Article II:2 GATS if

[20] Decision of the Committee on Government Procurement: GPA/79/Add.1; 22th July 2005.

they are listed and meet the conditions in the Annex on Article II exemptions. Whereas in the GPA there is no such Annex which will limit the application of restrictions to the MFN principle. Therefore situations like the US General Notes mentioned above are common. Thus, an extra layer of difficulty is added as a result. If a party considers that another´s commitments are insufficient, it may exempt it from one of the sectors included, or from contracting authorities covered.

4. Achievements and Failures

4.1. Achievements of the GPA

It should not be underestimated what these plurilateral agreements have achieved so far. Government procurement was excluded from GATT 1947 and GATS, therefore all the efforts to close this gap should be welcome. The beginnings were modest and only central governments and a few services were included in the Tokyo Code. However, we see an exponential extension of the Annexes of the Parties to the GPA. Not only the sub-central government entities have been included, but also entities which are governed by public law.[21] In the last coverage negotiations adopted in March 2012, more than 200 additional contracting authorities have been added.[22] Build-operate-transfer contracts have been added by Japan, Korea and the European Union; Almost all parties have committed additional services in the area of telecommunication services; There are some improvements in the area of goods; Coverage for the first time of the full range of construction services and some of the Parties have reduced their relevant thresholds which will make easier to trigger the scope of application of the GPA.[23] It has roughly been estimated that these new commitments will increase the value of the market access in $ 80 to $ 100 billion dollars per year.[24] Thus, this extension of coverage should be already considered an achievement. Liberalization of the public procurement market is moving slowly but surely and it is to be welcome in this context of the paralysis of decision-making within WTO and the lack of furtherance of commitments within the Doha Negotiation Round.

[21] See Annex 3 of the European Union GPA commitments.

[22] Robert D. Anderson, The conclusion of the renegotiation of the World Trade Organization Agreement on Government Procurement: what it means for the Agreement and for the world economy, *P.P.L.R. 2012, 3*, 83-94.

[23] Japan, Israel, Korea and The Netherlands with respect to Artuba.

[24] Pascal Lamy, WTO´s Director General: http://www.wto.org/english/news_e/news11_e/gpro_15dec11_e.htm

On the other hand, the GPA's main failure has been the lack of developing countries' accessions. When it was first negotiated, the idea was to turn it into another multilateral agreement in the near future, being more aligned with the general WTO rules. In the end, however, it did not. Several reasons for this are addressed systematically by authors dividing them into either external or internal reasons.[25]

4.2. External reasons for the failure of the GPA

The external factors identified are basically protectionism, corruption, pursue of secondary policies within public procurement and the existence already of, bilateral, regional and plurilateral agreements. In this regard the latter are one of the most important factors and should be analysed in detail – a good example is provided by the trade and external policies of the European Union.

4.2.1. The Trade Agreements

The European Union tries to further trade on different levels and to varying extents. Within the framework of the WTO, the EU may go beyond the concessions already adopted on the basis of Article XXIV of the GATT and Article V of the GATS. Those bilateral agreements are either Free Trade Agreements (FTAs) or Preferential Trade Agreements (PTAs). In the following, FTAs and PTAs will be analyzed and the main distinguishing criteria highlighted.

4.2.1.1. Free Trade Agreements (FTAs)

The EU deepens trade relations with other countries through Free Trade Agreements on a bilateral basis. They are designed to open new markets, increase investment opportunities, reduce the costs of trade and increase legal certainty.[26] Those agreements do not exclude each other and therefore it is possible that a country is party to the GPA and additionally a party to a

[25] Valeria Guimaraes De Lima e Silva, "*The revision of the WTO Agreement on Government Procurement: to what extent might it contribute to the expansion of current membership?"*, Public Procurement Law Review 2008
[26] http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/agreements/#_europe

FTA with the EU.[27] There are currently four FTAs between the EU and respectively Chile, Mexico, South Korea and South Africa.[28] They cover a broad range of trade topics[29] and are mainly comparable to the GPA in terms of the Public Procurement obligations.[30]

The FTA with South Korea serves in the following as a good example. South Korea is party to the GPA and the EU has concluded a FTA with South Korea. This came into force 1st July 2011.[31] Next to the obligations arising from the GPA determining market access to public procurement, the FTA goes further and therefore complements the GPA. Article 9.1 to 9.3 reaffirm the GPA obligations and mention further areas to which the parties have access. These are not mentioned in the context of the GPA's concessions.[32] Hence, the bilateral agreement deepens the trade relations in certain economically important trade areas for the parties. Specifically, the EU has a vested interest to access the public procurement in relation to the services mentioned, as it a recognized global leader in those areas.[33] Thus, the bilateral agreements aim at furthering the WTO's approach of liberalizing trade where consensus in the Ministerial Conferences cannot be achieved. In this regard, the clear economic advantage is highlighted, as for example seen in recent Commission Communications which state that the market potential of the prospective trading partner, as well as the level of protection against EU exports, are at the heart of the agreements.[34]

4.2.1.2. Preferential Trade Agreements (PTAs)

The FTAs therefore mark the most comprehensive form of intensifying trade relations.[35] However, next to the FTAs, the EU adopts trade agreements that exchange preferential treatment

[27] Such as South Korea.

[28] http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/index_en.htm

[29] see for example the EU Mexico Free Trade Agreement covering Free Movement of Goods, Competition, Public Procurement, and Intellectual Property

[30] Oxfam et altera, The EU's approach to Free Trade Agreements government procurement, 2008, p.5, available at http://aprodev.eu/files/Trade/EU%20FTA%20Manual%20fta7_procurement.pdf (visited 30 May 2012)

[31] http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/index_en.htm

[32] citation GPA

[33] EU – South Korea Free Trade Agreement: A quick reading guide, October 2010, p.8, available at http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145203.pdf (visited 30 May 2012)

[34] Peter Holms, Deep Integration in EU FTAs, 14 August 2010, p3, available at http://www.sussex.ac.uk/economics/research/workingpapers (visited 30 May 2012)

[35] http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/agreements/

in one form or the other and are therefore so-called Preferential Trade Agreement (PTA). PTAs are increasingly receiving attention as the EU and other large economic areas use them frequently.[36] In fact, the EU concluded 34 of those agreements through which it became the leader on a worldwide scale.[37] If one takes a close look on the parties of the preferential trade agreements concluded by the European Union, it becomes apparent that one group consists of countries that are geographically close to the EU, such as Iceland, Norway, Liechtenstein, the Balkan states and Turkey.[38] The second group of countries are the northern African states including Algeria, Egypt, Morocco and Tunisia as well as countries from the Arabic region such as Israel, Jordan, Lebanon and Syria. Additionally, this group comprises Russia and Ukraine. The third group of countries are developing countries, such as the CARIFORUM states, West African states and states of the Pacific region.[39] The last group of countries comprises those states that are more geographically distant from the EU, such as the ASEAN countries, or Southern American states.

It is important to elaborate on the purpose of these trade agreements in greater depth. The categorization into the four groups becomes, in this regard, essential as it pinpoints some of the underlying motives of the EU to conclude the PTAs. The first category receives a more integrated relationship due to its geographical proximity. The benefits for the EU are clearly to access markets, which are easily to reach and have great potential as either providing natural resources or as potential buyers of EU technologies. The benefit of concluding PTAs with the second category of countries is improved stability around European boarders. The EU took itself as an example of functioning economic integration preventing all sorts of conflicts. The underlying purpose of the trade agreements with the third category of states can be found in development aid. The agreements offer a long-term opportunity of providing the respective country with resources and technologies that would otherwise not be available or affordable to those states.[40]

The outline of those benefits leads towards the assumption that the EU does not only envisage economic advantages, but also seeks to maintain and further political stability, as well

[36] Ibid.
[37] List of regional trade agreements on the WTO website http://rtais.wto.org/UI/PublicAllRTAList.aspx
[38] Raymond J. Ahearn, Europe's Preferential Trade Agreements: Status, Content and Implementation, 3 March 2011, p.7, available at http://www.fas.org/sgp/crs/row/R41143.pdf (visited 30 May 2012).
[39] Ibid. p.39 for full list.
[40] Ibid. p.7.

as aiming at long-term benefits. Thus, the trade policies of the EU – although seeming at first sight as economic considerations – are to a considerable extent part of the Union's foreign policy.[41]

Another essential aspect of PTAs is that they are negotiated individually with each respective trading partner. Hence there is no "standard treaty" as for example used by the US[42], which is beneficial for two, in way complementary, reasons. The fact that each agreement is negotiated individually tackles the problem of marginalization, which is one of the main obstacles in current trade patterns.[43] This, rather psychological element, leads to the second benefit, namely to a higher degree of acceptance that can be supported by the vast amount of concluded PTAs by the EU as mentioned above.

As some additional remarks about PTAs – with high relevance for the scope of this paper – it has to be mentioned that not every PTA includes public procurement provisions and that their extent is, in the case that they are included, varies from agreement to agreement. To illustrate the immense difference, the agreements concluded with Albania,[44] Jordan[45] and the CARIFORUM[46] states may be considered. The Albanian PTA does not mention public procurement at all, whereas the EU-Jordan agreement mentions in Article 58 that the 'Parties agree on the objective of a gradual liberalization of public procurement'. This, rather political statement, cannot be compared with the EU-CARIFORUM agreement which includes an elaborate section on public procurement covering 17 articles which resemble to a large extent

[41] Worldbank, *Regional Trade and Preferential Trading Agreements: A Global Perspective*, Global Economic Prospects 2005, p5, available at http://siteresources.worldbank.org/INTGEP2005/Resources/GEP107053_Ch02.pdf (visited 30 May 2012).

[42] Raymond J. Ahearn, Europe's Preferential Trade Agreements: Status, Content and Implementation, 3 March 2011, p.7, available at http://www.fas.org/sgp/crs/row/R41143.pdf (visited 30 May 2012).

[43] Peter van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge University Press 2008, p.148f.

[44] COUNCIL DECISION of 15 September 2008 on the signing of a Protocol to the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, to take account of the accession of the Republic of Bulgaria and Romania to the European Union, OJ L 107/1.

[45] EURO-MEDITERRANEAN AGREEMENT, establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part, 15.05.2005, OJ L 129/03.

[46] ECONOMIC PARTNERSHIP AGREEMENT between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, 30.10.2008, OJ L 289/I/3.

Directive 2004/18/EC.[47] Furthermore, it is important to note that those bilateral agreements outlined above can be concluded with countries that are themselves party to a regional trade agreement. Examples are the agreements adopted by the EU (itself a regional trade area with 27 Member States) with e.g. the CARIFORUM states (comprising the 15 Caribbean Community States).

4.2.1.3. Interim conclusion on Trade Agreements

To conclude, it has to be assessed whether benefits of the FTAs exist which make the PTAs superfluous or vice versa. The FTAs are by far more comprehensive and usually go beyond the WTO and multilateral trade agreements. On the downside, they are hard to negotiate, evidenced by the sole existence of four FTAs with the EU as a partner. PTAs on the other hand are not only very numerous but also much more flexible, as parts which irrelevant to the specific relation, or which may not be agreed upon, can be left out of the agreement. The sensitivity and simplicity of the agreements lead to a higher degree of acceptance on which further market liberalization can be based. A side effect, which makes them very feasible for developing countries, is the low(er) negotiation costs and expertise necessary to adopt those agreements. On the contrary, PTAs are limited to specific fields of trade and therefore have only a limited impact.

4.3. Internal reasons for the failure of the GPA

Thus, all the external factors discussed above are relevant in order to determine why developing countries did not accede to the GPA. Nevertheless, there are also several internal factors which explain the low-adherence to the agreement. Although it is said that the benefits of opening procurements markets are outweighed by the benefits, the implementation of the GPA requires a great number of investments. Acceding Members are confronted with a series of costs such as: negotiations to the agreement, administrative costs of implementation and cost of maintenance. Moreover, there are other indirect costs such as the establishment of safety nets as a result of the loss of market share by national industries. Thus, measures to combat

[47] see articles 165-182 CARIFORUM agreement.

unemployment and investment in R&D have to be also considered within the actual costs of accession. Consequently, even if the assessment of the available data shows that the accession could bring mid or long-term positive spillovers, developing countries will certainly need support and technical assistance to cover these costs.

In addition, it has been argued[48] that the thresholds established in the Annexes are too high, and preclude developing countries the access to contracts in which they would have opportunities to compete. There is in fact no specific occasion in which the possibility of reducing thresholds for developing country Members is mentioned. Under the revised GPA[49], developing countries only have the possibility to raise their own thresholds in order to avoid the application of the GPA, but even that, is now considered a transitional measure subject to the approval of the Committee. The only way to achieve a reduction of the thresholds for developing countries would be a departure from the MFN principle, allowed by Article 5 of the revised GPA. This article provides for special consideration by reason of their development needs. Such reductions of thresholds would result in an increase of administrative costs for developed countries. Thus, the questions that may arise are: how much of these costs are developed countries willing to bear? How many further commitments may they ask for?

These questions relate to what has been said to be the major obstacle to accede the GPA. Article XIII:1 GATS excludes MFN and NT obligations from the scope of the GPA. Thus, Parties may discriminate between and against other Parties if those provisions are provided in their Annexes. These derogations from the MFN principle run counter the interests of developing countries. Under the GATT regime for instance, advantages granted between developed countries as a result of tough negotiations are afterwards immediately and unconditionally granted to all WTO Members. However, under GPA negotiations, this extension to all GPA Members may be excluded by way of derogation within the General Notes. It has been suggested, that the exclusion from the GPA of the MFN principle leads the agreement to be a patch of bilateral agreements rather than a result of plurilateral negotiations.[50] In this context, new Article V:2 of the Revised GPA may be a major step ahead. It provides that Parties to the GPA *shall* provide for MFN under all their coverage to developing countries. However, it also

[48] Valeria Guimaraes De Lima e Silva, "*The revision of the WTO Agreement on Government Procurement: to what extent might it contribute to the expansion of current membership?"*, Public Procurement Law Review 2008.
[49] Article 5.3.d) Revised GPA.
[50] Arrowsmith, *Government Procurement in the WTO,* Kluwer Law International, The Hague 2003, p.68.

provides that this extension may be *'subject to any terms negotiated between the Party and the developing country in order to maintain an appropriate balance of opportunities…'*. It has still to be seen how this provision is going to be interpreted and applied. Possibly, this might be a prohibition to exclude MFN towards developing countries. It is relevant to notice however, that although the provision obliges to provide *immediately* all advantages granted to other parties, the word *unconditionally* does not appear in the provision. On the contrary, *subject to any terms negotiated* and *balance of opportunities* do. Thus, declare that there is a prohibition to exclude MFN towards developing countries will probably be far-reaching. On the contrary, the provision may merely be a commitment on how negotiations should be carried on in regards to developing countries accessions. MFN should be the rule, and exclusions to it should be the exception, and only in so far as it is necessary to maintain an appropriate balance of opportunities. However, as already pointed out[51], this concept of balance of opportunities is quite vague, leaving the door open to multiple interpretations. If the balance is made in terms of value of market access, the small procurement markets of developing countries will be insufficient so as to achieve the prohibition of exclusion of MFN. However, if the balance of opportunities is interpreted as the extent of commitments that developing countries may offer, this article will therefore be a step ahead. In any case, the way in which the provision has been drafted does not help to create legal certainty. Hence, the actual conduct of the negotiations is decisive.

The greatest challenge of the Revised GPA is to facilitate accession by the widest possible number of countries.[52] The expansion of the GPA coverage and the new provisions for accession of developing countries may be helpful by itself. In any case, other approaches are being used by USA and the EU. For instance, requiring the accession to the GPA in order to become Member of the WTO or the EU.[53]

In addition, the proposed draft Regulation by the European Commission on *the access of third-country goods and services to the Union´s internal market in public procurement markets and supporting negotiations on access of Union goods and services to the public procurement markets of third countries* is also called to put pressure on accession to the GPA. By this

[51] Valeria Guimaraes De Lima e Silva, "The revision of the WTO Agreement on Government Procurement: to what extent might it contribute to the expansion of current membership?", *Public Procurement Law Review 2008*.

[52] Committee on Government Procurement on June 4, 1996.

[53]Armenia, China, Croatia, Mongolia, the Former Yugoslav Republic of Macedonia and Saudi Arabia are expected to join the Agreement as a result of the commitments undertaken in their respective Protocols of Accession to the WTO.

proposal, EU law will provide a legal basis to the EU contracting authorities to exclude access to third-country suppliers to the EU public procurement. Thus, access to the internal market will be subject to reciprocity. Contracting authorities will have to notify the European Commission if they receive a tender offer from a non-EU supplier. If this tenderer comes from a country which is neither covered by any multilateral or bilateral agreement; or if it is covered, it does not offer equal opportunities of access to EU companies; the Commission then may accept the exclusion. Although this is just a draft proposal, it shows how the Commission is committed to trade liberalization of public procurement markets and it is developing an overall policy in regards to its expansion.

5. The Revised GPA

This paper has already addressed what the WTO is, what plurilateral agreements are, how the GPA works and what are the main achievements and failures so far. In this section, the very wording of the most relevant articles of the Revised GPA will be analysed. The analysis will be done by comparing the revised text with the GPA 1994 and with how the EU Directive 2004/18/EC deals with the specific issue.

5.1. The Preamble

The Revised GPA maintains and confirms the fundamental reasons why the agreement was adopted. It recognizes the need for an effective framework to achieve liberalization, avoid discrimination and to assure a predictable set of rules to enhance trade in public procurement markets. However, the Revised GPA introduces a new fundamental policy reason in paragraph 7. Transparency in the GPA 1994 was *desirable*[54] to achieve liberalization and non-discrimination. However, in the Revised GPA the parties recognize *the importance of transparent measures* not only for the reasons mentioned above, but also to avoid *conflicts of interests and corrupt practices.*[55] It is remarkable that such a statement is included in the Revised GPA. It adds an extra reason to access to the GPA for developing countries. Accession to this agreement will not

[54] GPA 1994 Preamble Paragraph 3.
[55] Revised GPA Paragraph 7: Which further states: '*in accordance with the UN Convention Against Corruption'.*

only provide market access and avoid discrimination in the international arena, but it will also show to the international community a commitment to combat corruption and to achieve best practices.

5.2. Scope of the GPA

The provision which states the scope of application of the GPA has been moved to Article II. Currently, under Article I of the revised text, definitions of the terms of the agreement are provided. This makes the text more comprehensive, and narrows the potential different interpretations that some terms might have within the different legal systems.

The new article is drafted in a more detailed manner. It specifically provides for four cumulative conditions that have to be met to be under the scope of application of the GPA.[56] In addition, it provides for specific exclusions to the agreement.[57] Moreover, it provides for a specific way on how the Annexes of each party to the agreement shall be structured.[58] Furthermore, it includes the rules on valuation that were under Article II GPA 1994.[59] Finally, it broadens the scope of application to all measures concerning public procurement regardless conducted exclusively or partially by electronic means.

5.3. General Principles

Article IV deals with the General Principles applied to procurement covered by the agreement. The provision covers rules on non-discrimination, paragraph 1 and 2; the use of electronic means, paragraph 3; the conduct of procurement, paragraph 4; the rules of origin, paragraph 5 and offsets, paragraph 6.

Article IV of the Revised GPA differs from the GPA 1994. However, the main differences are not about the content, but the form. The Revised GPA respects as the GPA 1994

[56] Revised GPA Article II:2: Covered: goods, services, above the threshold, procuring entity and not otherwise excluded within the Annexes.
[57] Revised GPA Article II: 3
[58] Revised GPA Article II: 4
[59] Revised GPA Article II: 5

the NT and MFN principles.[60] Nonetheless, the latest version devotes a whole Article on general principles, whereas the original version mentioned them only loosely throughout the agreement. The reasons for the new formulation are manifold. For once, the new version aims to be reader friendly. Next to that, the new text entails a political statement by naming the underlying general principles of government procurement at the beginning of the agreement. This statement is especially important when it comes to the potential accession of developing countries. It shows that current members consider these principles as essential and underlies the ambition to adhere to them. Furthermore, it becomes apparent that the Revised GPA follows the approach taken by the EU in its 2004/18/EC Directive. Article 2 lays down the general principles of EU public procurement, namely equal treatment, non-discrimination and transparency. Thus, the 2004 Directive certainly played a role in the 2006 negotiations, however, certain WTO specific principles have been added.

Apart from that, one specific paragraph has to be analysed, as it has an important difference with the old version. Article IV:5 of the Revised GPA sets out the regime on "Rules of Origin". Thus, it is part of the general principles of the GPA. The GPA 1994 provided in Article IV as well as the Revised GPA does, that the parties shall not apply rules of origin to products or services in the context of public procurement that are different from those applied in the normal course of trade. In itself, the texts are similar. The criticism only comes up when looking at the old version's second paragraph, which contained the procedural aspects. GPA 1994 provided for the possibility that the outcome of the 'work programme for the harmonization of rules of origin' would serve as the basis for amending paragraph 1 of that article. This paragraph has been moved to the final provisions of the GPA in Article XXII:9. It is questionable, whether this new placement has been made for logical reasons (being part of the section 'Future Negotiations and Future Work Programmes') or due to the lack of success in this area of rules on market access.[61]

5.4. Developing Countries

The provision containing special rules for developing countries has not been moved and continues in Article V. The amendment done to this article is of major importance, because the

[60] Sue Arrowsmith, Government Procurement in the WTO, *Public Procurement Law Review 2005*, P.P.L.R. 2005, 2, 114-116, at 114.

[61] http://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm#top

accession of developing countries is one of the main reasons for the review of the GPA. As MFN has been already dealt with in this paper, this section will exclusively deal with what kind of measures can developing members adopt in accordance with their circumstances.

Article V:3 Revised GPA provides for transitional measures that can be adopted on the basis of developing countries´ needs. Such measures comprise: 1) Price preferences; 2) Offsets; 3) Phased-in additions; 4) Thresholds higher than permanent. These measures have to be negotiated and recorded in their Annexes. Eventually, they will be monitored by the Committee which will be able to grant the adoption of new measures under exceptional circumstances.

Thus, measures to be adopted by developing countries are exhaustive. It may add rigidity to the system, but it is a good way to assure that all barriers to trade are quantifiable, therefore, easily subject to subsequent negotiations as opposed to non-quantifiable barriers to trade. In addition, these are all temporal measures and their extension is subject to the Committee and thus to approval with developed country Members. Particularly, off-sets were not subject to any temporal restrictions under Article XVI GPA 1994. This may be seem as another obstacle to accession of developing country Members but it will be necessary to fill the new provisions with subsequent practice. As these measures have to be adopted upon accession, developed countries will have to strike a balance between, another overall refusal to accede or, be generous within the negotiations of these measures.

Moreover, in order to facilitate accessions, developing countries may ask for a waiver of a GPA obligation for a period of either five or three years, depending on whether they are least-developed or developing country members.[62] It may be considered a short amount of time, considering the establishment of the infrastructure required to the implementation of the agreement. However, Article V Revised GPA provides for two mechanisms to solve this potential shortage. Technical cooperation to all those countries that so request, and granting an extension to these periods within the Committee.[63]

5.5. Notices

[62] Article V:4 Revised GPA
[63] Article V:8 Revised GPA

When procurement is under the scope of the GPA, contracting authorities have a series of procedural obligations in order to guarantee transparency and equal treatment between tenderers. Thus, giving notice to economic operators that a public procurement is going to be held is the first major obligation under the GPA. Notices were regulated under Article IX GPA 1994 and this provision has been moved to Article VII Revised GPA. When dealing with Notices of public procurement two issues are always relevant: accessibility and content. First, it is of major importance that economic operators know beforehand where the relevant notices are published. Second, it is also important to regulate the content of those notices, in order to guarantee the principles of transparency and equal treatment of information of the relevant procurement.

The wording of the Revised GPA restructures the provision, which is to be welcomed. As in the GPA 1994, the Revised GPA provides for three different notices, although regulated in more detail. The first notice is the so-called *Notice of Intended Procurement (NIP)* which is the equivalent of a *Contract notice (CN)* under the EU Directive 2004/18/EC. Article VII: 1 Revised GPA provides for the accessibility obligations. For each procurement under the scope of the agreement, a NIP has to be published, either by electronic or paper means. Central entities are obliged to provide access by electronic means, whereas sub-central government entities are encouraged to do so by way of a reduction of the deadlines.[64] In all cases, Members have to provide within Appendix III of their commitments where the notices are going to be published, and are called to provide a single point free of charge for it. The content required in the NIP has not been changed, although it has been drafted more comprehensively.[65] The only addition is that contracting authorities are obliged to specify in their NIP in which language offers shall be submitted, only in so far as it is not one of the WTO official languages.[66]

Among NIP, for every intended procurement a *Summary Notice (SN)* shall be published in one of the official WTO languages. A SN must provide, at least, what is the subject-matter of procurement, deadlines and address where further information may be requested. The last notice provided under the GPA is the *Notice of Planned Procurement (NPP)* which will be the EU equivalent of a *Prior Information Notice (PIN)*. Each fiscal year all procuring entities are *encouraged* to publish their planned procurements within that year. Although entities are not obliged to do so, the Revised GPA gives two incentives. First, entities which publish a NPP will

[64] Article XI Revised GPA
[65] Article VII:2 Revised GPA
[66] English, French and Spanish are the WTO official languages.

benefit from a reduction of the time-limits.[67] Second, in case of sub-central government entities, if the information contained in the NPP fulfils what it is required for the NIP, they will be exempted of the obligation to publish it, although a SN will still be necessary.

5.6. Conditions for Participation

The conditions to participate and the qualification of suppliers are regulated in Article. VIII and IX Revised GPA, whereas in the GPA 1994 they were only provided in Article VIII. The selection of suitable tenders shall not be confused with the award phase. The former only analyses whether an economic operator may be able to perform the public contract, whereas the latter provides for a selection of the best offer, within those who are all able to perform the contract. Within the EU, the CJEU has declared that the criteria to determine suitable tenders are exhaustive.[68] Contracting authorities are limited to select tenderers on the basis of their professional ability, financial standing and technical ability.[69] Contracting authorities keep a large discretion in order to establish the award criteria, however, the selection criteria is limited. The reason why is limited is because that is the only information which is pertinent in order to establish suitability, and because if contracting authorities were vested with large discretion to establish the selection criteria, it could be used as a disguised restriction hindering the accomplishment of competition in public markets within the internal market.

Under the GPA we do not have case law concerning selection criteria, and therefore it cannot be stated that the criteria is exhaustive. However, Article VIII:1 provides that 'a procuring entity shall limit any conditions […] 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 relevant procurement'. The wording thus suggests that contracting authorities are also limited under the GPA to establish conditions that are only necessary to establish suitability. However, the Revised GPA does not provide an exhaustive list of documents that may be requested from the procuring entities to the economic operators, in order to assess each of the selection criteria as EU

[67] Article XI Revised GPA

[68] Case C-532/06 *Emm. G. Lianakis AE, Sima Anonymi Techniki Etairia Meleton kai Epivlepseon, Nikolaos Vlachopoulos v Dimos Alexandroupolis, Planitiki AE, Aikaterini Georgoula, Dimitrios Vasios, N. Loukatos kai Synergates AE Meleton, Eratosthenis Meletitiki AE, A. Pantazis — Pan. Kyriopoulos kai syn/tes OS Filon OE, Nikolaos Sideris* [2008] OJ C064, 08.03.2008.

[69] Article 46, 47, 48 of Directive 2004/18/EC.

Directive 2004/18 does. As a result, although under the EU Directive and the GPA procuring entities are limited to establish criteria which is only necessary to establish suitability, the obligation under EU law is more detailed and leaves less room for disguised restrictions to access public procurements.

Finally, Article VIII:4 Revised GPA provides for six grounds in which procuring entities may exclude tenderers. Under GPA 1994 the only two exclusions were bankruptcy and false declarations. Currently, deficiencies in prior contracts, serious crimes, professional misconduct and failure to pay taxes have been added. Although this addition could be considered a major step ahead if read in combination with the aim to combat corruption in the preamble, it could also be said that this provision could have been drafted more strictly. Article 45 EU Directive 2004/18 provides for two different kinds of exclusions. Those by which procuring entities *shall*[70] exclude tenderers, and others by which they *may*[71] exclude them. Article VIII Revised GPA only provides that these tenders *may* be excluded and therefore leaving the good governance´s obligation under this agreement in a mere statement which will lastly depend on the will of Parties Member to the agreement.

5.7. Technical Specifications

The requirement of technical specifications may constitute a barrier to trade and therefore it has its specific regulation under the GPA. Under GPA 1994 this provision was regulated in Article VI, whereas under the Revised GPA we can now find it in Article X, among Tender Documentation. The main obligation that contracting authorities have under this provision is not prepare, adopt or apply technical specifications in such a manner that will constitute a barrier to trade. This obligation will be fulfilled in so far as procuring entities refer to technical specifications in terms of performance and functional requirements, rather than design or descriptive characteristics, as well as using international standards where such exists. Where it is not possible and descriptive characteristics or reference to trademarks, patents or copyrights are done, they must always be follow by the 'or equivalent' clause.

[70] Conviction by final judgment of: participation in criminal organization, corruption, fraud and money laundering.
[71] Bankruptcy, professional misconduct, failure to pay social security obligations, failure to pay taxes, serious misrepresentation.

In addition, the provision reinforces its aim to achieve best practices and avoid corruption by precluding contracting authorities to seek or accept advise from persons that may have commercial interests at stake.[72] Finally is worth noting, that a provision concerning green procurement has been added, and procurement entities are explicitly allowed to adopt environmental specifications, although in compliance with all the requirements stated above.

5.8. Time-Periods

Article XI Revised GPA provides for the relevant time periods of each kind of procurement method. As in GPA 1994, the publication of a NPP gives the right to reduce deadlines to procuring entities.[73] The used of electronic means will also allow entities to reduce their time limits. Specifically they will be able to reduce 5 days for each of the following circumstances: a) The NIP is published electronically; b) All tender documentation is made available electronically; c) The entity accepts tenders by electronic means. As entities are subject to more reductions under the Revised GPA, it was necessary to establish a minimum amount of days. This amount has been fixed in Article XI:6: In no case time limits for a public procurement may be less than ten days from the date on which the NIP is published.

5.9. Award of contract

The treatment of tenderers and the awarding of contracts have been modified within the Revised GPA. Article XV:1-3 set out principles that have to be observed by the contracting authorities during this stage of the procurement. Interestingly, the article itself is headed 'treatment of tenders', followed by the three principles of *fairness*, *due process* and *equal treatment*. The article is therefore different from the previous approach in Article 13 of the GPA 1994, as it gives clear indication of the underlying principles. The old text provided only in paragraph 3 for non-discrimination obligations. Within the EU public procurement Directive, the respective Article 53 does not mention any principles applicable for awarding the contract, as Article 2 remains valid throughout the whole Directive.

[72] Article X:6 Revised GPA. This provision already existed under Article VI: 4 GPA 1994.
[73] Article XI:4 Revised GPA.

Concerning the actual award criteria, the three legislative measures, both versions of the GPA and EU Directive, stipulate different hierarchies. Firstly, the Revised GPA provides in Article XV:5a)b) for: either (a) the most advantageous tender or (b) the lowest price. Hence, the drafters of the Revised GPA considered the most advantageous tender as the preferred option. Secondly, the GPA 1994 favoured the exact opposite order, thereby following to some extent the approach taken by the European Union. Thirdly, the EU Directive criteria of awarding the contract follows the pattern of the GPA 1994, but the most important textual difference lies in the wording 'most *economically* advantageous tender' in the EU Directive. The CJEU interpreted the wording '*economic*' as flexible and wide.[74] The CA may choose awarding criteria in the order which they prefer, inter alia, 'price, delivery or completion date, running costs, cost-effectiveness, profitability, technical merit, product or work quality, aesthetic and functional characteristics, after-sales service and technical assistance, commitments with regard to spare parts and components and maintenance costs, security of supplies'.[75] Those criteria are non-exhaustive and may be changed according to the circumstances. Recently, social and environmental considerations are seen to be included in contract notices.[76] It appears therefore, that the awarding of contracts under the Directive may be less closely linked to economical considerations that the wording in Article 53 would suggest. Consequently, it is reasonable that the Revised GPA's hierarchy will lead to essentially the same outcomes as under the EU Directive. Nevertheless, the European approach is more transparent as CAs are obliged to determine the relative weighting of the criteria used in the contract notice.[77]

In addition *abnormally low* tenders are included in the provision of the GPA. It is remarkable that the wording has been elevated from 'enquiring', that the 'supplier satisfies the conditions for participation and is capable of fulfilling the terms of the contract', in the GPA 1994; to 'verifying', in the Revised GPA. . This rather optional approach is to be distinguished from the wording in the EU Directive. Under the Directive, CA '*shall request* details of the constituent elements of the tender which it considers relevant'. Automatic rejections, which are in theory possible under the GPA regimes, are thus not possible under EU law.

[74] Case 31/87, *Gebroeders Beentjes v. The Netherlands*,
[75] C.H. Bovis, *EU Public Procurement Law*, Edward Elgar Publishing Ltd, Cheltenham UK 2007, p.274.
[76] Ibid. p.274ff.
[77] Article 53(2)

5.10. Modifications and Rectifications to coverage

As the GPA works with its Annexes in a similar way as the schedules under the GATS, the market access is dependent on the parties' commitments. The more is included in the Annexes, the broader the market access will be. The degree of market access is therefore an effective tool for negotiations.[78] The parties to the GPA may want to alter their commitments to either update them or respond to another Member's change of coverage.

Under the GPA 1994, this 'rectification or modification' was part of the final provisions contained in Article XXIV:6. Subsection (a) provided that in case of an objection of one parties' proposed modification, the matter had to be referred to the Committee. The Committee had the task to consider 'compensatory adjustments, with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage […]'.

The Revised GPA has a more comprehensive system on 'modifications and rectifications to coverage' under Article XIX. It is not part of the final provisions any more and covers a wider range of provisions. Two important novelties will be outlined. Paragraph 6 of Article XIX allows objecting parties to withdraw substantially equivalent coverage as a response to a modification of another party. The purpose of this is twofold: on the one hand it shows acceding countries that they are not bound by their commitments under all circumstances. On the other hand, this provision may well lead to a higher compliance of the parties to their commitments, as they fear reciprocity in case of a negative modification.

Next to these observations, it is remarkable that the Revised GPA has a more sophisticated approach to facilitating negotiations. In case of objections to a modification, the parties concerned to the dispute shall 'make every attempt to resolve the objection through consultations' as provided for in Article XIX:3. In case of non-agreement, the Revised GPA has in paragraph 7 a new system of arbitration that has to be provided by the Committee according to paragraph 8. The aim is to facilitate the resolution of objections concerning withdrawal of commitments and to ensure an equal level of reciprocity.

[78] Peter van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge University Press 2008, p.89-92.

5.11. Final Provisions

Classically, the final provisions of treaties provide for procedural and practical matters, such as the entry into force and the accession to the agreement. The same is true for the GPA. However, there are substantial changes between the two versions. The Revised GPA provides for a section on domestic legislation in paragraph 4 of Article XXII. It obliges Members to bring their national laws into conformity with the provisions of the GPA. This obligation can be regarded as an express confirmation of the supremacy of this agreement over national laws, which was not mentioned in the GPA 1994. It increases legal certainty and clearly outlines the obligations for those States considering accession.

Furthermore, the Revised GPA offers a more elaborate system on future negotiations. It provides in paragraph 7 that: 'the parties shall undertake [periodically] further negotiations, with a view to improving this Agreement, progressively reducing and eliminating discriminatory measures and achieving the greatest possible extension of its coverage […]'. In this regard, the tasks of the Committee are more detailed (see paragraph 8) than under Article XXIV:7 GPA 1994,. In setting up agendas and work programmes reviewing law and practice, the process comes close to the 'Open Method of Coordination' (OMC) employed in the EU as a form of soft law integration facilitator. Setting benchmarks, reviewing and monitoring leads to a high compliance as parties fear 'naming and shaming' in case of non-compliance with the agreement.

Some final provisions in the GPA 1994 are not mentioned in the new version. Article XXIV:3 and Article XXIV:8. Paragraph 3 concerned transitional arrangements, which have become obsolete, and paragraph 8 dealt with information technology. The latter envisaged that the parties should modify the GPA in case of the employment of new technologies. This mandate has been clearly achieved through the amendment of the text.

Conclusion

The Agreement on Government Procurement is currently the most comprehensive international framework in order to open public procurement markets to free competition. Although there are currently only 42 parties to the GPA, other States are parties to other trade agreements containing public procurement obligations. The challenge for the international

community must be to unify procurement rules. In our view, the GPA is the most suitable instrument to achieve this goal, by reason of its inclusion into the WTO framework. However, there are external and internal reasons that preclude further accessions which the Revised GPA does not seem to tackle substantially.

We believe that trade agreements concluded by the European Union and the United States run contrary to the achievement of a uniform set of rules. Trade agreements containing public procurement obligations should be carefully used because they are at the same time cause and solution of the problem. On the one hand, they increase limited market access for undertakings but, on the other hand, they preclude a complete liberalization of public markets that a 'multilateralization' of the GPA will produce. Therefore, we call for a long-term policy view. Particularly, in the case of the EU, the European Commission will dispose of a new tool to enhance access to public markets. That tool should be mainly used as a basis to increase adherence to the GPA and not to sign new PTAs or increase their respective coverage.

The Revised GPA appears to be a compromise to achieve consensus between its Members. Still, the compromise was not far-reaching, because much of the differences are in form and not in a substantial increase of obligations under the agreement. The extension of coverage is the only incentive for developing countries to join the agreement, but the actual revised text does not significantly enhance their position. Unless issues concerning MFN, transitional measures and technical cooperation are improved, it is questionable that the actual text of a GPA will by itself achieve adherence.

As a conclusion, the new framework will create a new scenario for international public procurement within the next years. It will have to be filled with new practice so as to analyse if GPA Members take a different approach towards negotiations of accessions. The Revised GPA is drafted in a way in which it may allow a flexible application of the agreement to developing countries. Thus, at the end of the day it will all depend on a policy decision. Are we, as Members to the GPA, willing to continue with this system of combinations of plurilateral, regional and bilateral agreements? Or, are we ready to look forward and create a single set of rules under a multilateral WTO agreement?