

# **The treatment of government procurement in regional trade agreements (RTAs)**

---

**Jianning Chen, Legal Affairs Officer  
World Trade Organization**

**Bangkok  
26 May 2016**



# Content

---

- I. GPA and RTAs: complementary role in filling the gap in the multilateral trading system.
- II. How government procurement is treated in RTAs? - an analytical study.
- III. How government procurement is treated in the TPP?
- IV. Conclusions.



---

I. GPA and RTAs:  
complementary role in filling  
the gap in the multilateral  
trading system.

# Complementary role of GPA and RTAs in filling the gap in the MTS

- **A gap in the multilateral trading system:** the exemption of government procurement from the major principles of the GATT and the GATS.
- **GPA** fills the gap to some extent, as it currently covers:
  - only 46 of the WTO's 162 member governments; and
  - only a part of the procurement of each participating government.
- **RTAs** with disciplines on government procurement also play an important role in filling the gap to some extent.
- Compared with the existence of the gap, **both GPA and RTAs** are net trade-creating and global welfare-enhancing.

# Similar role of GPA and RTAs in achieving economic and governance purposes

RTAs play a similar role as the GPA does in helping governments:

- obtain **best value for money** in the provision of essential public goods and services;
- stimulate **economic growth** by creating market access opportunities for the private sector; and
- achieve **increased integrity and good governance** via establishing and promoting principles of non-discrimination, transparency, and procedural fairness.

# Other considerations for including government procurement in RTAs?

---

Apart from **benefits of broader liberalization**, the inclusion of government procurement in RTAs may

- **create a point of comparison with the GPA**; and
- **facilitate future GPA accessions** by acclimatizing procurement officials to relevant procedures and catalyzing related legislative and policy reforms.

## II. How government procurement is treated in the RTAs? - an analytical study.



# Participation in trade liberalization in the area of GP: an overview

Around **80 WTO Members** have undertaken trade liberalization in the area of GP, including:

## ○ **GPA Parties (46)**

Armenia; Canada; the EU and its 28 member states; Hong Kong, China; Iceland; Israel; Japan; Korea; Liechtenstein; Montenegro; the Netherlands with respect to Aruba; New Zealand; Norway; Singapore; Switzerland; Chinese Taipei; Ukraine; United States.

## ○ **Other WTO Members with GP commitments in RTAs (35, up to 2014)**

Antigua and Barbuda; Australia; Bahrain; Barbados; Belize; Brunei; Chile; Costa Rica; Colombia; Dominica; Dominican Republic; El Salvador; Georgia; Guatemala; Grenada; Guyana; Haiti; Honduras; Jamaica; Kuwait; Mexico; Moldova; Morocco; Nicaragua; Oman; Panama; Peru; Saint-Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; Saudi Arabia; Suriname; Trinidad and Tobago; United Arab Emirates; Qatar.



# Analysis of the notified RTAs: classification methods

**250 Agreements** are classified into **three** broad categories:

- agreements between GPA parties;
- agreements between a GPA party and a non-GPA party; and
- agreements between non-GPA parties.

Within each category, a **further distinction** was made between:

- RTAs having **no provisions** on GP;
- RTAs having only **a single or a few GP provisions**; and
- RTAs having **detailed provisions** on GP and related market access commitments.

Note: The TPP is not included in this set of agreement, as it has not yet been notified to the WTO.

# RTAs without GP provisions

**RTAs without GP provisions: 110, or around 45%.**

- The majority of them are concluded between non-GPA parties
- Around 50 of them entered into force more than 15 years ago or even before the creation of the WTO in 1995. Hence, is **not necessarily indicative of current trends.**



The **majority of RTAs** that have been notified to the WTO in recent years contain provisions on government procurement, whether of a detailed or a limited nature.

# RTAs with basic GP provisions

**RTAs with basic GP provisions: 67, or around 27%.**

- They often identify government procurement liberalization as an **objective**, and sometimes establish non-discrimination principles but **without tangible procedural and coverage commitments**.
  - A joint committee or similar body is mandated to consider further opening of procurement markets.
  - Parties make an explicit commitment, albeit in a soft or non-binding fashion, to accede to the GPA.
- They can be seen as **a useful initial step** towards further development of government procurement rules and related liberalization.

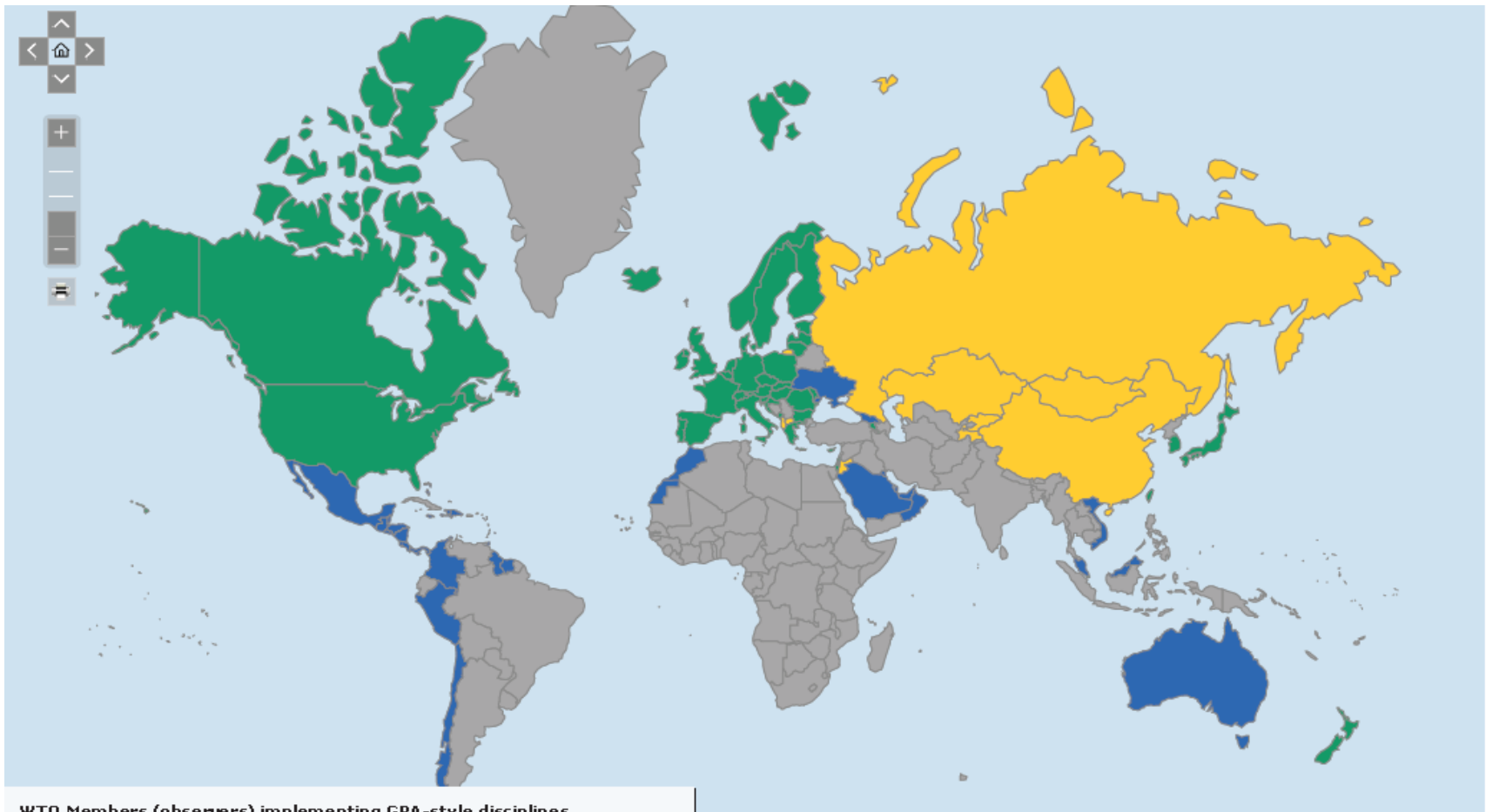
# RTAs with detailed GP provisions: statistics

**RTAs with detailed GP provisions: 68, or around 27%.**

- They contain **detailed provisions** on government procurement and specific **market access commitments**.
- 12 between GPA parties, 36 between GPA parties and non-GPA parties, and 20 between non-GPA parties.
- Altogether, they cover around 75 WTO Members, mainly originating from: Latin America, North America, Europe, and a number from Asia (e.g. Australia, Japan, Korea, New Zealand and Singapore).

Note: these numbers have gone up since the study was done in 2014. Recently there is a trend towards inclusion of detailed government procurement chapters in RTAs among an increasingly diverse set of WTO Members.

# WTO Members implementing GPA style disciplines



# RTAs with detailed GP provisions: structure of chapter

## 12 Elements in RTAs

- a. **General principles** : 1) national treatment / non-discrimination; 2) MFN; 3) use of offsets;
- b. **Procedural rules**: 4) detailed provisions;
- c. **Enforcement**: 5) domestic review / bid challenge; 6) dispute settlement mechanism;
- d. **Further liberalization**: 7) commitment to GPA accession; 8) further negotiations;
- e. **Provisions on integrity**: 9) detailed provisions;
- f. **Cooperation**: 10) detailed provisions;
- g. **Institutional arrangement**: 11) detailed provisions;
- h. **Coverage commitments**: 12) schedules.



# RTAs with detailed GP provisions: disciplines aspect

## Observations on discipline aspect:

- The GPA text has clearly served, with only occasional and sporadic exceptions, as the **model for the relevant chapters in RTAs**.
- This is true both for agreements of this nature between non-GPA parties and for agreements involving GPA parties.
- A significant number of countries have in fact committed themselves to **implement GPA-style disciplines via RTAs**.

**Reason: Disharmony in procedural and behavioral rules could entail significant costs.**

# RTAs with detailed GP provisions: market aspect - US RTAs

Agreement	Central Government Entities	Sub-Central Government Entities	Other Entities
<b>GPA</b>			
<b>US commitments under the revised GPA</b>	89 entities	37 states	10 entities
<b>RTAs between GPA Parties</b>			
<b>US-Singapore</b>	As in their respective GPA schedules (by reference)	As in their respective GPA schedules (no entity coverage for Singapore)	As in their respective GPA schedules (by reference)
<b>US-Israel</b>	As in their respective schedules of the GATT Tokyo Round GPA 1988 (by reference) US: 53 entities (36 less than the revised GPA); Israel: 1 entity for Israel (i.e. Ministry of Defense)	Not covered	
<b>US-Korea</b>	US: 79 entities (10 less than the GPA); and Korea: 51 entities (9 more than the GPA).	Not covered	





# RTAs with detailed GP provisions: market aspect - US RTAs

Agreement	Central Government Entities	Sub-Central Government Entities	Other Entities
<b>GPA</b>			
<b>US commitments under the revised GPA</b>	89 entities	37 states	10 entities
<b>RTAs BETWEEN GPA PARTIES AND NON-PARTIES</b>			
<b>NAFTA (Goods/ services)</b>	Canada: 78 entities (as in the GPA); Mexico: 86 entities; US: 53 entities (36 less than the GPA)	Not covered	Canada: 10 entities (as in the GPA); Mexico: 48 entities; US: 6 entities (4 less than the GPA)
<b>US-Australia</b>	US: 79 entities (10 less the GPA); Australia: similar positive list	US: 31 states, (6 less than the GPA); Australia: extensive list	US: 7 entities (3 less than the GPA); Australia: similar positive list
<b>US-Bahrain</b>	US: 52 entities (37 less than the GPA); Bahrain: equivalent list	Not covered	US: 7 entities (3 less than the GPA); Bahrain: 17 entities
<b>US - Chile</b>	US: 79 entities (10 less than the GPA); Chile: 20 entities (19 ministries and the Office of the President of the Republic)	US: 37 states covered, as in its GPA schedule; Chile: List of 51 entities, Gobernaciones in 13 different regions + list of 341 municipalities	US: 10 entities (like in GPA) Chile: 11 entities

# RTAs with detailed GP provisions: market aspect - US RTAs

Agreement	Central Government Entities	Sub-Central Government Entities	Other Entities
<b>GPA</b>			
<b>US commitments under the revised GPA</b>	89 entities	37 states	10 entities
<b>RTAs Between GPA Parties and non-Parties</b>			
<b>US-Colombia</b>	US: 78 entities (11 less than the GPA); Colombia : 28 entities	US: 8 states + Puerto Rico (29 less than the GPA); Colombia: 38 gobernaciones	US: 7 entities (3 less than the GPA); Colombia: 22 entities
<b>US-DR-CAFTA</b>	US: 79 entities (10 less than the GPA); Others: more exceptions than under GPA	US: 22 states + Puerto Rico (15 less than the GPA) (and for Honduras 16 states + Puerto Rico); Others: extensive lists	US: 7 entities (3 less than the GPA); Others: more or less extensive lists
<b>US-Morocco</b>	US: 79 entities (10 less than the GPA); Morocco: 30 entities	US: 23 states (14 less than the GPA); Morocco: extensive list	US: 7 entities (3 less than the GPA); Morocco: extensive list
<b>US-Oman</b>	US: 50 entities (39 less than the GPA); Oman: equivalent list	not covered	US: 7 entities (3 less than the GPA); Oman: 5 entities

# RTAs with detailed GP provisions: market aspect - US RTAs

Agreement	Central Government Entities	Sub-Central Government Entities	Other Entities
<b>GPA</b>			
<b>US' commitments under the revised GPA</b>	89 entities	37 states	10 entities
<b>RTAs between GPA Parties and non-Parties</b>			
<b>US-Panama</b>	US: 78 entities (11 less than the GPA) Panama : 16 entities	US: 8 states + Puerto Rico (29 less than the GPA) Panama : 12 provinces	US: 7 entities (3 less than the GPA); Panama : 30 entities + the Authority of the Panama Canal
<b>US-Peru</b>	US: 78 entities (11 less than the GPA); Peru: extensive list (61 entities)	US: 8 states + Puerto Rico covered (29 less than the GPA); Peru: 25 entities	US: 7 entities (3 less than the GPA); Peru: 23 entities

# RTAs with detailed GP provisions: findings from US RTAs

- **US RTAs with non-GPA parties** typically involve less extensive entity coverage on the part of the US than do agreements with GPA parties.
- Among the three **US FTAs with GPA Parties**, only one—the RTA with Korea—provides greater coverage of entities for the US (though only at the central government level) than the GPA itself.

# RTAs with detailed GP provisions:

## US-Korea RTA as an example

### The US-Korea RTA

- regarded as a state-of-the-art bilateral trade agreement.
- builds importantly (and explicitly) on the WTO GPA:
  - it expressly re-affirms both parties' rights and obligations under the GPA;
  - with regard to procedural rules, in most respects it incorporates by reference the relevant rules of the GPA;
  - in a few cases, select rules (e.g. regarding electronic tools and conditions for participation) that have now been included in the revised 2012 GPA are carried over in the US-Korea RTA; and
  - with regard to compliance mechanisms, it relies upon rather than displaces the core enforcement mechanisms of the GPA.

# RTAs with detailed GP provisions: US-Colombia RTA as an example

## US-Colombia FTA

- In general, the market access opportunities created by the Colombia-US RTA are substantially fewer than those available as between the US and its GPA Partners:
- At the sub-central level, the **US** covers only 8 states and Puerto Rico (as compared to thirty-seven states in the GPA); and in regard to central government entities (Annex 1) and all other entities (Annex 3), the US covers fewer entities than under the revised GPA.
- **Colombia** has offered significant coverage under the agreement (e.g. a total of 28 entities in the three branches of the central government; 32 sub-central governments; and it also covers important SOEs.
- It incorporates a version of the GPA procedural rules.
- With regard to compliance, government procurement commitments in the Colombia-US RTA are not enforceable via the WTO dispute settlement system.

# RTAs with detailed GP provisions: market access aspect (1)

---

## ○ **Entity coverage:**

- GPA Parties mainly follow or stay behind their GPA commitments on coverage of entities;
- In RTAs between GPA and non-GPA parties, a big number such agreements provide for less or no coverage of sub-central government entities (less than under the GPA);
- Some agreements between non-GPA Parties provide very broad entity coverage (Latin America).

## ○ **Thresholds:**

- Generally, similar to the GPA.
- Some exceptions at the central government level.
- No thresholds in RTAs from Central America.

# RTAs with detailed GP provisions: market access aspect (2)

- **Goods:**
  - Covered across the board (subject to exceptions, e.g. defence)
- **Services:**
  - Positive vs negative list approach;
  - Very extensive coverage by Chile;
  - Comprehensive coverage: Mexico-Nicaragua; New Zealand-Singapore; Panama-El Salvador; Panama-Costa Rica; Singapore-Australia and Singapore-New Zealand.
- **Construction Services:**
  - Tendency to cover comprehensively – in line with revised GPA;
  - Positive vs negative lists.
- Panama-El Salvador, Panama-Costa Rica, Chile-El Salvador and Chile-Costa Rica RTAs cover all government procurement (no lists).





# RTAs with detailed GP provisions: market access aspect (3)

## Observations on market access aspect:

- RTAs may provide for commitments that are deeper than those of the GPA in particular respects , e.g. additional services sectors or coverage of build-operate-transfer arrangements.
- **A few agreements in Latin America** liberalize regional procurement markets beyond the level generally achieved in the GPA in a geographically limited context.
- Overall, the market access **opportunities** created by government procurement chapters **in RTAs are significantly less than** those available under the revised GPA.

# RTAs with detailed GP provisions: general observations

## General observations:

GPA parties appear to be mindful of the linkages between the bilateral and the plurilateral levels and have made efforts to avoid overlapping, incompatible obligations. This is achieved through various means:

- Obligations are modelled on the GPA;
- GPA provisions are imported by reference, ensuring a harmonized approach; and
- MFN obligations are generally avoided so that obligations under RTAs and the GPA can be kept separate.

### III. How government procurement is treated in the TPP?



# TPP chapter on GP: text

## Chapter 15 of the TPP: government procurement.

TPP tracks and extends the **core rules** of the WTO GPA in multiple ways:

- The text is based on the same principles as the GPA (**non-discrimination, transparency and procedural fairness**); and
- In most of its provisions, tracks closely the actual language used in the revised GPA.

# TPP chapter on GP: text

## Integrity

- **GPA** (Preamble): ***Recognizing** that the integrity and predictability of government procurement systems are integral to .... **Recognizing** the importance of ... avoiding conflicts of interests and corrupt practices,...*
- The **TPP** chapter expands on the provision of the revised GPA regarding integrity in procurement practices (**Article 15.18**):
  - Each Party shall ensure that criminal or administrative measures exist to address corruption in its government procurement.
  - Each Party shall also ensure that it has in place policies and procedures to eliminate or manage potential conflicts of interest in its procurement system.

# TPP chapter on GP: text

---

## Treatment of SMEs

- **GPA**: not discussed in the text; further discussions to be carried out in a work programme.
- The **TPP** chapter (**Article 15.21**) emphasizes the importance of facilitating **participation of SMEs** in government procurement, requires that **preferential treatment** to SMEs be provided in a transparent manner, and outlines **specific measures** facilitating SMEs participation.

# TPP chapter on GP: text

## Environmental measures

### ○ TPP

#### **Article 15.3: Exceptions**

• “1. Subject to the requirement that the measure is not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail, or a disguised restriction on international trade between the Parties, nothing in this Chapter shall be construed to prevent a Party, including its procuring entities, from adopting or maintaining a measure:

- (a) necessary to protect public morals, order or safety;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to protect intellectual property; or
- (d) relating to the good or service of a person with disabilities, of philanthropic or not-for-profit institutions, or of prison labour.

• 2. The Parties understand that subparagraph 1(b) includes **environmental measures** necessary to protect human, animal or plant life or health.”

### ○ GPA

Not specified as in the TPP.



# TPP chapter on GP: text

## Labour rights

### ○TPP

#### Article 15.8: Conditions for Participation

*“For greater certainty, this Article is not intended to preclude a procuring entity from **promoting compliance with laws in the territory in which the good is produced or the service is performed relating to labour rights as recognised by the Parties and set forth in Article 19.3 (Labour Rights)**, provided that such measures are applied in a manner consistent with Chapter 26 (Transparency and Anti-Corruption), and are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade between the Parties.”*

### ○GPA

Not touched upon.





# TPP chapter on GP: market access.

## structure of schedules

### GPA

- Annex 1: central government entities
- Annex 2: sub-central government entities
- Annex 3: other entities
- Annex 4: goods
- Annex 5: services
- Annex 6: construction services
- Annex 7: general notes

### TPP

- Section A: Central government entities
- Section B: Sub-central government entities
- Section C: Other entities
- Section D: Goods
- Section E: Services
- Section F: Construction services
- Section G: General Notes
- Section H: Threshold adjustment formula
- Section I: Procurement information
- Section J: Transitional measures

# TPP chapter on GP: market access

---

The **structure of the market access commitments** under TPP tracks very closely that of the GPA "schedules".

- BOTs/public works concessions are covered by some Parties under both agreements.
- TPP includes a definition of BOTs/public works concessions in its text.

# TPP chapter on GP: market access

- **TPP parties that are also GPA Parties** (i.e., Canada, Japan, New Zealand, Singapore, and the United States) follow or stay behind their GPA commitments
  - The US and New Zealand do not cover sub-central government entities under the TPP, as they do under the GPA; and
  - Japan, New Zealand and the US offer less coverage at the "other entity" level as compared to the GPA.
- **TPP parties that are not Parties to the GPA but have significant experience with liberalized GP markets under other agreements** (i.e., Australia, Chile, Mexico and Peru) have taken substantial coverage commitments;
- **TPP parties that are not Parties to the GPA and have limited or no experience with liberalization in this sector** (i.e., Malaysia, Vietnam, and Brunei) have taken commitments that are not as comprehensive as that of the other TPP parties and are subject to transitional measures.



# Enhanced harmonization of the TPP chapter on GP with the GPA

Three side letters further contribute to harmonization of international procurement rules.

- The letter between Canada, Mexico and the United States: the TPP rules will replace NAFTA's government procurement rules.
- The letter between Canada and the United States: the two countries' NAFTA thresholds will be aligned with the TPP (and the GPA).
- The letter between Australia and the US: the two countries thresholds at the central government level in the Australia-US RTA will be aligned with that of the TPP (and the GPA).



# Potential Implication of the TPP GP chapter on the GPA

- TPP GP chapter preserves an **incentive** for parties seeking broader access to markets in this sector **to eventually join the GPA**, in that the TPP parties that are also GPA Parties follow or stay behind their commitments in the GPA.
- Potentially, the TPP chapter also illustrates **possibilities for the future evolution** of the GPA.
  - Integrity
  - Treatment of SMEs
  - labour rights
  - environmental protection measures

## IV. Conclusions

# Conclusions

- **The GPA is at the center of global efforts** to promote liberalization/sound rules and broaden access to government procurement markets.
- Government procurement provisions in **RTAs rely on the GPA** in diverse ways.
- The co-existence of the GPA with the government procurement provisions of RTAs seems to involve relatively **little** in the way of the **negative or "spaghetti-bowl" effects**. Overall, RTAs with GP chapters are favourable to the proliferation of procurement reforms and common rules.

# Conclusions

---

- **RTAs** with provisions on government procurement that broadly track those of the GPA can clearly **facilitate eventual accession to the GPA**.
- To the extent that **RTAs** already provide the access to foreign procurement markets that governments seek, they **may limit part of the remaining incentive for GPA accession**.
- The **possibility of the quasi-multilateralization of the GPA**, over time, should not be ruled out.