

**SME PARTICIPATION IN GOVERNMENT PROCUREMENT MARKETS - LEGAL AND
POLICY CONSIDERATIONS UNDER THE WTO AGREEMENT ON GOVERNMENT
PROCUREMENT AND THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT**

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Prepared for publication in

SMALL AND MEDIUM-SIZED ENTERPRISES IN INTERNATIONAL ECONOMIC LAW
(OXFORD UNIVERSITY PRESS)

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1 INTRODUCTION

Access to and participation in public procurement¹ markets² by Small and Medium-Sized Enterprises (SMEs)³ has been identified, by many governments, as a crucial element in fostering sustainable economic development and prosperity world-wide.

First, SMEs have been described as the "backbone" of many economies, and governments increasingly recognize the role of SMEs and entrepreneurship as drivers of growth and job creation, and as effective tools for poverty alleviation.⁴ According to OECD Studies, SMEs are the dominant form of business organisation, accounting, on average, for between 95% and 99% of all enterprises. They are responsible for between 60-70% of net job creation in OECD member countries and over two-thirds of EU GDP.⁵ This suggests - as logic underlying government programmes fostering SME participation in the economy - that what is good for SME growth will also help governments achieve overall economic policy goals.⁶

Second, government procurement markets capture an important share of economic activity worldwide and represent a significant amount of government expenditure. In 2013, OECD governments spent, on average, 29% of the total general government expenditure on public procurement compared to an average level of 30% in 2009. In terms of GDP, OECD countries reported an average share of 12.1% spent on public procurement in 2013 (excluding procurement by state-owned utilities).⁷ When purchases of procurement contracts of state owned utilities are also accounted for, the size of procurement markets increases by an additional 2 to 13 percentage points of GDP,⁸ meaning that procurement markets can potentially capture up to around 25% of GDP or more. Variations in the size of procurement markets reflect the different size of the state, its role in the economy and the existence of high-value spending projects (e.g. infrastructure investments).

Certain characteristics of procurement markets make them potentially attractive for SMEs, and increasingly so. For example, public procurement at the state and local levels accounts on an average for 63% of total procurement spending across OECD countries, with the share going up to 87% in federal states, such as Canada, and 78% in other states, such as Italy.⁹ This may mean that "local" SMEs that are familiar with the condition prevailing in the relevant regions may have a competitive advantage over larger firms located elsewhere.¹⁰ Furthermore, even when public demand is aggregated through centralized purchasing, the increased use of framework agreements, which allow for smaller "call-offs", may mean that procurement markets are still

¹ Referred to throughout as 'procurement'.

² "Public procurement" or "government procurement" refers to the purchase by governments and state-owned enterprises of goods, services and works.

³ There are varying definitions of SMEs. See OECD/UNIDO (2004). "Effective policies for small business. A guide for the Policy Review Process and Strategic Plans for Micro, Small and Medium Enterprise Development," available at

http://www.unido.org/fileadmin/media/documents/pdf/Business_Environment/15hvgghso.pdf.pdfnote. It is found that SMEs are defined in the literature most commonly by reference to employment, due to the simplicity of the measure and the ease of collection of data. Due to varying requirements in this regard, figures are not directly comparable across different economies, even before accounting for the different level of development in the countries and regions concerned, though a general conclusion that most businesses are "SMEs" can be drawn.

⁴ See, e.g. the OECD Bologna Charter on SME Policies, adopted on 15 June 2000, available at: <http://www.oecd.org/cfe/smes/thebolognacharteronsmepolicies.htm>.

⁵ OECD (2011), *Regions and Innovation Policy*, OECD Reviews of Regional Innovation, OECD Publishing, Paris. DOI: <http://dx.doi.org/10.1787/9789264097803-en>

⁶ For a critical discussion of whether economic evidence confirms this premise, see T. Beck, A. Demircuc-Kunt and R. Levine, 'SMEs, Growth, and Poverty: Cross-Country Evidence', *Journal of Economic Growth*, 10 (2005), 199.

⁷ Figures range from 5.2% in Mexico to 20.8% in the Netherlands. OECD (2015), "Size of Public Procurement", in *Government at a Glance 2015*, OECD Publishing, Paris. DOI: http://dx.doi.org/10.1787/gov_glance-2015-42-en.

⁸ See OECD. (2011), "Size of public procurement", in *Government at a Glance 2011*, OECD Publishing, Paris. DOI: http://dx.doi.org/10.1787/gov_glance-2011-en

⁹ See OECD, above note 7.

¹⁰ This is not necessarily the case, however. A 2014 study on the EU market found that proportion of public procurement contracts awarded to SMEs was highest for contracts issued by central governments and utilities (43% and 46% of the total respectively) and lowest in contracts issued by local government (35% of the total). See Technopolis (2014), "Evaluation of SMEs' Access to Public Procurement Markets in the EU" Ref. Ares(2014)75984 - 15/01/2014.

attractive for SMEs.¹¹ Overall, therefore, even though public procurement is often thought of as high-value contracts and projects that may be difficult to obtain for SME, evidence suggests that this should not necessarily be the case. Yet, SMEs are routinely found to underperform in public procurement markets in that the percentage of public procurement contracts they win is lower than their proportionate participation in the economies concerned.¹² For example, a recent EU study finds that the 29% share of the procurement market that European SMEs secured in the 2009-2011 period, is 29 percentage points lower than it would have been (that is 58%) if the share of public procurement that they won equalled SMEs' share of the total gross value added produced in the business economy.¹³

These facts and figures, combined with the fact that public procurement markets are subject to detailed procedural rules and regulations, make government procurement an obvious target for governments trying to stimulate overall economic growth and prosperity through SME participation in the economy.¹⁴ Overall, public procurement is often described as a powerful "tool" to promote socioeconomic objectives, such as SME participation, because it operates at the intersection of the government's regulatory and buying powers.¹⁵ In line with this, 62.1% of OECD countries have developed strategies or policies to support SMEs.¹⁶ The fact that public procurement is often used to also support innovation,¹⁷ an area of economic activity in which SMEs may have a comparative advantage,¹⁸ may be particularly good news for SMEs. The argument is also advanced that it is economically sensible for governments to buy from SMEs and encourage their participation in procurement markets: SMEs can add comparative advantage and add value in innovation and responsiveness to government needs.¹⁹ They can also help overcome and respond to supply market dominance and fragmentation, and enhance overall competition in procurement markets.²⁰

A perfect fit, then? Not as perfect as it may seem at first glance, at least in some respects. First, the integration of socioeconomic policy goals in the procurement process may shift the focus of procurement policies away from their "primary" purpose: transparency, integrity and competition in public purchasing, in order to ensure value for money, efficiency, and safeguard the public interest.²¹ Achieving the primary goals of procurement is a key factor in achieving economic

¹¹ See, e.g. *SMEs' access to procurement markets and aggregation of demand in the EU*. A study commissioned by the European commission, DG Internal Market and Services (February 2014). Available at: http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/smes-access-and-aggregation-of-demand_en.pdf. The study reports that the use of framework agreements has increased in recent years and that more than half of all centralized purchasing arrangements (25 percent of the total value of all contracts and 5 percent of all contracts (in terms of number of awards) awarded above the EU-thresholds) are through framework agreements.

¹² In that regard, it is crucial to distinguish between the level of SMEs' participation in terms of value of contract and in terms of the number of contracts. A recent survey among GPA Parties resulted in the finding that among the six Parties that were able to report on relevant statistics, only three were able to provide data on the number of contracts awarded to SMEs. The results in terms of number of contracts ranged from 56 to 80% of contracts, while the results in terms of value of contracts ranged from 25 to 64% of public procurement spending.

¹³ See above note 11. Behind these aggregated data, however, the position varies as between micro, small and medium-sized enterprises.

¹⁴ See, for a discussion of the economic rationale behind SME policies, how they may be pursued through public procurement, and whether and how their effectiveness can be evaluated, Caroline Nicholas and Michael Fruhmman (2014) "Small And Medium-Sized Enterprises Policies In Public Procurement: Time For A Rethink? 1." 14 *Journal of Public Procurement* 3, pp. 328 – 360.

¹⁵ Christopher McCrudden (2004), "Using Public Procurement to Achieve Social Outcomes", *Natural Resources Forum* 28, pp. 257–267.

¹⁶ OECD(2015), "Strategic public procurement", in *Government at a Glance 2015*, OECD Publishing, Paris. DOI: http://dx.doi.org/10.1787/gov_glance-2015-43-en. Strategies and measures may differ significantly. On the different ways of using government procurement to implement secondary policies, see Sue Arrowsmith (2010), "Horizontal Policies in Government Procurement: a taxonomy," 10 *Journal of Public Procurement* 2, pp. 149-186.

¹⁷ This is the case in 39.3% of OECD countries. See OECD, above note 16.

¹⁸ See, e.g. OECD (2004), "The Istanbul Ministerial Declaration on Fostering the Growth of Innovative and Internationally Competitive SMEs", available at: <http://www.oecd.org/cfe/smes/theistanbulministerialdeclarationonfosteringthegrowthofinnovativeandinternationallycompetitivesmes.htm>.

¹⁹ J. Zheng, H. Walker & C. Harland (2006), "The Role of SMEs in Public Procurement: A Review of Literature and Research Agenda," available at: <http://www.ipsera.com/assets/documents/57.pdf>, citing

²⁰ N.D. Caldwell, Helen Walker, Christine Harland, Louise Knight, Jurong Zheng, Tim Wakeley (2004), "Promoting Competitive Markets: The Role of Public Procurement," in K. V. Thai et al. (editors), *Challenges in Public Procurement: an International Perspective* (Boca Raton, FL: PrAcademics Press), pp. 315-334.

²¹ For a discussion of the objectives of public procurement regulations, see Steven L. Schooner (2002), "

well-being and growth, as government procurement often is crucial for the fulfilment of essential public functions, such as the delivery of basic infrastructure, health care or education.²² Getting procurement policy right therefore transcends the mere goal of avoiding wasteful spending of public monies. As a consequence, commentators recognize that a balance needs to be struck between the achievement of primary procurement goals and secondary policy objectives.²³ Ideally, they coincide, as enhanced SME participation may increase competition in procurement markets, and therefore result in enhanced value for money and innovation.²⁴ However, this may not always be the case.

Second, the factual background and effectiveness of different measures taken is often unclear.²⁵ The OECD, reporting on the results of its latest surveys, finds that nowhere near all countries implementing such a programme measure the impact of their policy or strategy to provide support for SMEs (only 62.1%).²⁶ For those countries that are not measuring the results of their strategies, the main challenges include the lack of data, as well as the lack of an appropriate methodology to measure the impact of their policies. Therefore, some question the empirical viability of SME support measures. In the worst case, corruption enabled by complex exceptions to procurement rules diverts scarce public resources to socially wasteful contracts.²⁷

The significance of international trade rules and instruments for the participation of SMEs in procurement markets has been characterized in contrasting ways. On the one hand, general transparency and non-discrimination measures can be an important factor in limiting the scope for cronyism and thereby fostering the participation by new entrepreneurs, in particular SMEs. Furthermore, the beneficial effects of the integration of SMEs in procurement markets on economic growth and development may be multiplied if international trade is added to the mix.²⁸ Economic research suggests that for SMEs, there is a strong positive relationship between export and growth as well as exports and innovation.²⁹ Particularly for SMEs located in smaller and/or less developed economies, market opportunities in larger economies can therefore be of considerable importance in harnessing their potential. Therefore, to the extent that governments choose to support SME participation with measures that are generally conducive to increased participation in procurement

Desiderata: Objectives for a System of Government Contract Law," 11 *Public Procurement Law Review* 103.

²² See e.g. Robert D. Anderson and Anna Caroline Müller (2015). "The revised WTO Agreement on Government Procurement: An Emerging Pillar of the World Trading System: Recent Developments," 7(1) *Trade Law and Development* 229, (2015).

²³ Such policies are also known in the procurement context as socio-economic policies (in UNCITRAL), secondary policies or horizontal policies (in the European Union). For a comprehensive discussion in the EU context, see Sue Arrowsmith and Peter Kunzlik, (eds.) (2009), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*, Cambridge University Press.

²⁴ See, e.g. A. Glover (2008), "Accelerating the SME Economic Engine: Through Transparent, Simple and Strategic Procurement", HM Treasury, London.

²⁵ McCrudden, above note 15, provides an overview of different initiatives over time, and states: "The use of public procurement to achieve social outcomes is widespread, but detailed information about how it operates is often sketchy and difficult to find." See also A. Gibb (2000), "SME policy, academic research and the growth of ignorance, mythical concepts, myths, assumptions, rituals and confusions." 18 *International Small Business Journal* 3, pp. 13-35; and A. Freeman (2013). "Challenging Myths about the Funding of Small Businesses...: Finance for Growth," *Demos Finance*, available at http://www.demos.co.uk/files/DF_-_Finance_for_Growth_-_web.pdf?137821. The author finds that: "a close examination of the academic, regulatory and commercial literature regarding SMEs and their role in the economy remains riddled with poor thinking and muddled conclusions, problems compounded by a plethora of issues relating to the availability and quality of relevant data."

²⁶ See OECD (2014) *Survey on Public Procurement*, available at: <http://dx.doi.org/10.1787/888933249069>, also quoted in OECD (2015), above note 16.

²⁷ See e.g. John Linarelli (2011), "The limited case for permitting SME procurement preferences in the Agreement on Government Procurement," in Sue Arrowsmith, Robert D. Anderson (eds.), *WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press, 2011), pp. 444-458. "The bad story is that some governments have used public procurement as an enclave in which politics predominates over market-based considerations, to protect favoured industries or even to dispense patronage to political friends. In the worst case, corruption diverts scarce public resources to socially wasteful contracts."

²⁸ The removal of trade barriers for SMEs has been identified as one of the goals international efforts to increase SME growth. See, e.g. OECD. (2008), *Removing Barriers to SME Access to International Markets*, OECD Publishing, Paris. DOI: <http://dx.doi.org/10.1787/9789264045866-en>.

²⁹ See E. Golovko and G. Valentini (2011), "Exploring the complementarity between innovation and export for SMEs growth," *Journal of International Business Studies* 42: 362-380; and James H. Love and Hamilton and Stephan Roper (2015), "SME Innovation, Exporting and Growth: A Review of Existing Evidence," 33 *International Small Business Journal* 1 pp. 28-48.

markets, the objectives of trade instruments, primary and secondary procurement policies may go hand-in-hand.

On the other hand, global markets created by international trade rules are sometimes perceived as a threat to SMEs, and international economic and trade rules, with their liberalization goals being often viewed as – at least potentially – constraining "policy space" with regard to the integration of secondary policy goals, such as SME participation.³⁰ And indeed, most government's dedicated *preferential* policies to support SMEs in public procurement, where they exist, are targeted at domestic SMEs. This may create an inherent tension with the non-discrimination principles contained in trade instruments, and, to some extent, with primary procurement objectives.

Rather than attempting to decide or even enter the policy debate as to whether and what measures should be taken by governments in furthering SME participation in procurement markets, this Chapter will consider how the participation of SMEs in public procurement³¹ is and can be facilitated under, respectively, the World Trade Organisation's Agreement on Government Procurement (WTO, GPA) and the Model Law on Public Procurement issued by the United Nations Commission on International Trade Law (UNCITRAL, Model Law).³²

The WTO and UNCITRAL have both undertaken work in public procurement as a matter of trade policy, with the explicit aim of encouraging cross-border participation in public procurement procedures. And given the large share of the world economy that SMEs represent, making international procurement markets work for SMEs, and enhancing cross-border procurement from SMEs may well be key to rendering the WTO and UNCITRAL instruments, as well as others, effective in that regard.³³ Recognizing the importance of facilitating the participation of SMEs in government procurement, the WTO Committee on Government Procurement has begun work on a Work Programme on SMEs with the aim of reviewing and identifying best practices on expanding the participation of SMEs of the Parties to the GPA in government procurement.³⁴

This Chapter considers how and why the GPA and Model Law seek to enhance participation of foreign suppliers in public procurement, and how these texts can complement and/or accommodate national SME support policies. It will not analyse social and political justifications for SME policies per se, though it is acknowledged that correcting historical disadvantage and supporting minorities in public procurement can also have consequential economic benefits.³⁵ It comments on the areas of coherence and of tension between SME support and many broader public procurement objectives, and the implications of the observations that SME and cross-border success in public procurement both remain a work-in-progress.³⁶ The Chapter concludes with some recommendations, drawn from evaluation of some measures to support SMEs in public procurement, on how those measures might also facilitate their cross-border participation in public procurement.

³⁰ See, e.g. Simona Morettini (2011), "Public Procurement and Secondary Policies in EU and Global Administrative Law," in Edoardo Chiti and Bernardo Giorgio Mattarella (ed.), *Global Administrative Law and EU Administrative Law* (Springer, 2011). DOI: 10.1007/978-3-642-20264-3_10

³¹ The authors refer to "public procurement" as the process to select a firm or firms to supply a national government with goods, services or construction (also referred to as works).

³² For further information on the UNCITRAL Model Law, see http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure/2011Model.html. For further information on the GPA, see https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

³³ Recent studies suggest that international direct cross-border procurement is low, even among GPA participants. For findings on the EU procurement market, as part of the GPA-covered market, see EU Commission (2011), "EU Public Procurement Legislation: Delivering Results. Summary of the Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation." See also, on the lack of available data: Lucian Cernat and Zornitsa Kutlina-Dimitrova (2014), "International Public Procurement: From Scant Facts to Hard Data."

³⁴ See WTO document GPA/113, Appendix 2, Annex C. Available at: <http://docsonline.wto.org/Doc2FE/Pages/FormerScriptedSearch/directdoc.aspx?DDFDocuments/t/PLURI/GPA/113.doc>. For further details on the Work Programme, see section 2.1 below.

³⁵ See, for a discussion Christopher McCrudden (2007), *Buying Social Justice: Equality, Government Procurement, & Legal Change* (Oxford University Press).

³⁶ See, e.g. OECD (2013), "Fair competition in public procurement and SMEs", in *Government at a Glance 2013*, OECD Publishing. DOI: http://dx.doi.org/10.1787/gov_glance-2013-47-en.

2 THE GPA AND THE UNCITRAL MODEL LAW AS INTERNATIONAL INSTRUMENTS SHAPING PROCUREMENT POLICIES AND LEGISLATION WORLD-WIDE

The GPA and the UNCITRAL Model Law are two complementary but distinct instruments, created by two different international institutions.³⁷ While the WTO, an independent international organization created in 1994/95, deals with state-to-state negotiations of binding and enforceable trade agreements (and resolves disputes pertaining to those rules),³⁸ the United Nations Commission on International Trade Law ('UNCITRAL') is the main legal body of the United Nations system in the field of international trade law, with a general mandate to further the progressive harmonization and unification of the law of international trade, primarily through the issuing of conventions and model laws.³⁹

This section of the Chapter briefly sets out the main characteristics of the GPA and the UNCITRAL Model Law that are of relevance to the discussion of SME participation in public procurement markets. Their "common denominator" is the objective of harnessing the potential for international trade in the public procurement market as an efficiency goal.

2.1 The WTO GPA⁴⁰

The Agreement on Government Procurement ("GPA" or "the Agreement")) is a binding international Agreement that (i) promotes value for money in government procurement, by (ii) establishing the right of foreign suppliers to participate in procurement markets based on the principle of non-discrimination, and thereby (iii) promotes the mutual opening of government procurement markets to international competition by the participating member governments. It does so by establishing minimum rules regarding integrity, transparency and procedural fairness in covered procurement and is an instrument that can potentially deliver both good governance benefits and market access for participating countries.⁴¹ As a result of several rounds of negotiations, the GPA parties have opened procurement activities worth an estimated US\$ 1.7 trillion annually to international competition (i.e. to suppliers from GPA parties offering goods, services or construction services).⁴²

The GPA is a plurilateral Agreement, meaning that it comprises only a subset of the full Membership of the WTO. Currently, the GPA binds 45 WTO Members which formally constitute fifteen "Parties" (the EU and its 28 member states are counted as a single Party).⁴³ Ukraine and Moldova have completed their accession negotiations and are expected to become GPA Parties in the coming months. Another eight WTO members are in the process of acceding.⁴⁴ Six other WTO members have undertaken commitments, in their WTO accession protocols, to eventually initiate accession to the GPA.⁴⁵ Just as the GPA only binds Parties, the benefits available under the Agreement are exclusively available to suppliers, goods and services from GPA Parties.

³⁷ On the synergies between the work of the WTO and UNCITRAL on government procurement, see Caroline Nicholas (2011), "Work of UNCITRAL on Government Procurement: Purpose, Objectives and Complementarity with the work of the WTO," in Robert D. Anderson and Sue Arrowsmith (2011), above note 27, pp. 746-772.

³⁸ For further information on the work of the WTO, see https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm.

³⁹ For further information on the work of UNCITRAL, see <http://www.uncitral.org/uncitral/en/index.html>.

⁴⁰ Parts of this section draw on Robert D. and Anna Caroline Müller (2015). "WTO Accession and accession to the Agreement on Government Procurement (GPA): – What is the relationship? Why should WTO accession candidates also consider GPA accession? What are the pros and cons?" in Osakwe, Chiedu and Uri Dadush, eds., *WTO Accessions and Trade Multilateralism: Case Studies and Lessons* (Geneva and Cambridge: World Trade Organization and Cambridge University Press co-publication:2015).

⁴¹ See Robert D. Anderson and Anna Caroline Müller, above note 22.

⁴² See Robert D. Anderson., Philippe Pelletier, Kodjo Osei-Lah and Anna Caroline Müller (2011). "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. Also published in 21 (2012) *Public Procurement Law Review*, Issue 4.

⁴³ The seventeen Parties currently are Armenia; Canada; the European Union with 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; and the United States.

⁴⁴ These are Albania, Australia, China, Georgia, Jordan, Kyrgyz Republic, Oman and Tajikistan.

⁴⁵ They are Kazakhstan, Mongolia, the Russian Federation, Saudi Arabia, Seychelles and the former Yugoslav Republic of Macedonia. For further, up to date information, see https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm.

The GPA is composed of two principal parts: the text of the GPA and the Parties' market access commitments which are set out in detailed schedules known as the "Appendix I Annexes". The text of the Agreement establishes rules requiring that open, fair and transparent conditions of competition be ensured in government procurement. Box 1 below provides an overview of the main elements of those rules.

Box 1 Main elements of the WTO Agreement on Government Procurement

The WTO Agreement on Government Procurement (GPA), signed by most of the world's industrialized countries at the conclusion of the Uruguay Round of multilateral trade negotiations in 1994, provides an international legal framework for the liberalization and governance of public procurement markets. The Agreement embodies the following main elements:

- General rules guaranteeing national treatment, non-discrimination and transparency with respect to each Party's "covered procurement markets". Additional specific requirements regarding the transparency of procurement-related information (e.g. relevant statutes and regulations; evaluation criteria and contract awards);
- Minimum standards (based on international best practices and incorporating significant flexibility) on aspects of the procurement process, to ensure transparent and open conditions of competition. Includes provisions on:
 - Tendering procedures;
 - Qualification of suppliers;
 - Time limits, documentation, opening of tenders and contract award procedures;
- Provisions relating to the establishment of independent domestic review procedures and application of the WTO Dispute Settlement ("enforcement tools");
- Provisions regarding accession to the GPA and the availability of "transitional measures" for developing countries that join the GPA; and
- A "built-in agenda" for improvement of the GPA, extension of coverage and elimination of remaining discriminatory measures applied by Parties.
- Detailed schedules ("Appendix I Annexes") setting out the range of each Party's procurements covered by the Agreement. Specify covered entities, thresholds, covered services, specific exclusions, etc. The Agreement also incorporates built-in procedures for modification of Parties' coverage in response to relevant developments (e.g. the privatization of covered entities);

It should be emphasized that the GPA's rules do not automatically apply to *all* procurement activities of each party. Rather, the coverage schedules play a critical role in determining whether a procurement activity is covered by the Agreement or not. Only those procurement activities that are carried out by covered entities purchasing listed goods, services or construction services of a value exceeding specified threshold values are covered by the GPA. The coverage is specified in each Party's market access schedules.

Recently, on 6 April 2014, a revised version of the GPA entered into force.⁴⁶ The GPA renegotiation was, first and foremost, an international trade negotiation; as such, the expansion of access to the Parties' procurement markets by their respective suppliers was central to the process and to the agreement reached. The package of additions to market access adopted in the conclusion has been valued by the WTO Secretariat as being worth in the range of \$80-100 billion annually.⁴⁷

The second element of the re-negotiation, the revised GPA text, is based on the same principles and contains the same main elements as the existing Agreement. It, nonetheless, improves on the existing text in multiple significant ways. For example, the revised text reflects, streamlines and updates the Agreement to take into account developments in current government

⁴⁶ For information on the date of entry into force of/accession to the Agreement for individual Parties, see http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm.

⁴⁷ See, for relevant details, Robert D. Anderson (2012), "The Conclusion of the Renegotiation of the WTO Agreement on Government Procurement: What it Means for the Agreement and for the World Economy". February 2012," 21 *P.P.L.R.* 83.

procurement practice, notably the use of electronic tools. In an important additional change, the transitional measures ("special and differential treatment" or "S&D") that are available to developing countries that accede to the Agreement have been clarified and improved.⁴⁸

Another significant element of the revised GPA text consists in a specific new requirement for participating governments and their relevant procuring entities to conduct their procurements in ways that *avoid conflicts of interest and prevent corrupt practices*. This provision is unique in the context of WTO treaty obligations.⁴⁹ The significance of this new provision is reinforced by new language, in the Preamble to the GPA, recognizing the GPA's significance for good governance and the fight against corruption.⁵⁰ Together, these elements signal a belief on the part of the Parties that the GPA, while first and foremost an international trade agreement, is directly relevant to the global struggle for good governance.

As integral part of the renegotiation of the Agreement, the Parties to the GPA agreed on the initiation of a set of Work Programmes on issues of common interest and/or concern. These, importantly, include a Work Programme on SMEs. Currently, work is under way, and a large majority of Parties have provided answers to a survey agreed upon by Parties.

Box 2 The GPA Committee's Work Programme on SMEs

The WTO Committee on Government Procurement agreed on the initiation of a Work Programme on SMEs as part of the results of the renegotiation of the GPA (see WTO document GPA/113, Appendix 2, Annex C - Decision of the Committee on Government Procurement on a Work Programme on SMEs). The relevant decision entered into force on 6 April 2014, together with the Protocol Amending the GPA.

In the decision, Parties recognize (i) the importance of facilitating the participation of SMEs in government procurement; and (ii) that Parties have agreed in Article XXII:6 of the GPA to seek to avoid introducing or continuing discriminatory measures that distort open procurement.

The Committee is given the mandate to review measures and policies for SMEs that the Parties use to assist, promote, encourage, or facilitate participation by SMEs in government procurement and to identify the measures and policies that it considers to be best practices for promoting and facilitating the participation of SMEs of the Parties in government procurement.

The work is carried out on the basis of a transparency programme consisting of replies to a survey and related exchanges, questions and comments. Questions addressed in the survey relate to (i) the measures and policies used to promote, encourage or facilitate participation by SMEs in government procurement; (ii) the definition of SMEs, (iii) the existence of agencies or institutions to assist SMEs with respect to government procurement; (iv) information (including statistics, if available) on the level of participation by SMEs in government procurement in terms of both value and number of contracts awarded to SMEs; (v) measures and policies related to SME subcontracting; (vi) facilitation of SMEs participation joint bidding; (vii) measures related to enhanced transparency, simplifying qualification requirements, reducing contract sizes, and ensuring timely payments; and (viii) measures and policies to stimulate SME innovation.

After two years, the Committee is to review the effect of the best practices on expanding the participation of SMEs of the Parties in government procurement, and to consider whether other practices would further enhance participation by SMEs.

The decision also states that Parties shall avoid introducing discriminatory measures that favour only domestic SMEs and shall discourage the introduction of such measures and policies by acceding Parties.

⁴⁸ See, for elaboration, Anna Caroline Müller, "Special and Differential Treatment and Other Special Measures for Developing Countries under the Agreement on Government Procurement: the Current Text and New Provisions," in Arrowsmith and Anderson (eds.), above note 27, chapter 11, pp. 339-376.

⁴⁹ See Sue Arrowsmith, "The Revised Agreement on Government Procurement: Changes to the Procedural Rules and Other Transparency Provisions," in Arrowsmith and Anderson, (eds.), above note 27; see also Robert D. Anderson, Steven L Schooner and Collin D. Swan (2012) "The WTO's Revised Government Procurement Agreement - An Important Milestone Toward Greater Market Access and Transparency in Global Public Procurement Markets," *GWU Legal Studies Research Paper* No. 2012-7.

⁵⁰ See also Robert D. Anderson, William E. Kovacic and Anna Caroline Müller (2015). "Promoting Competition and Deterring Corruption in Public, Procurement Markets: Synergies with Trade Liberalization", Think Piece, *E15 Expert Group on Competition Policy and the Trade System*, ICTSD, World Economic Forum.

2.2 The UNCITRAL Model Law

UNCITRAL is a United Nations Commission whose mandate is to remove barriers to commercial relationships that can arise under the substantive *private* law rules governing cross-border trade, including procurement contracts entered into by governmental and other public bodies.⁵¹ UNCITRAL's decision to issue a Model Law on Public Procurement,⁵² in addition to opening up the international market concerned, was motivated by a wish to address inadequate or outdated legislation in many countries, which was itself impeding the efficient and effective provision of public services by governments. Furthermore, it was considered that divergent national laws hampered the ability of firms to sell to foreign governments, and that harmonising those laws through the use of a model in practice would be beneficial. The UNCITRAL Model Law is consequently designed to ensure that the government purchaser will obtain value for money in spending public funds and, in addition, that there is integrity in the process. Integrity in this sense means more than a lack of abuse or corruption: it involves government purchasers acting ethically and fairly, and in accordance with the values of the system as expressed through its objectives.

The UNCITRAL Model Law is, as its name implies, a non-binding template for national legislation on public procurement. It therefore differs in its objective from the GPA, which contains binding minimum rules at the international level. It is accompanied by a Guide to Enactment,⁵³ intended as a reference tool for policymakers and users of a procurement system based on the Model Law (e.g. regulators and public procurement agencies), explaining the policy choices made by UNCITRAL in drafting the Model Law and how it is envisaged they be implemented.

The Model Law was negotiated in an intergovernmental forum, as are all UNCITRAL texts, with the participation of all UN member States, together with a variety of intergovernmental organizations and non-governmental organizations, which represent different legal traditions and levels of economic development. The text, adopted by consensus, is considered to be widely acceptable in offering solutions appropriate for all governments.⁵⁴ It was also designed to be consistent with the WTO GPA, to allow national governments to use the UNCITRAL Model Law towards fulfilling their legal obligations under the GPA.⁵⁵

The Model Law contains a statement of its objectives (set out in a Preamble to the main text).

Box 3 Objectives of the Model Law

- (a) Achieving economy and efficiency;
- (b) Wide participation by suppliers and contractors, with procurement open to international participation as a general rule;
- (c) Maximizing competition;
- (d) Ensuring fair, equal and equitable treatment;
- (e) Assuring integrity, fairness and public confidence in the procurement process; and

⁵¹ In this regard, UNCITRAL furthers the "progressive harmonization and unification of the law of international trade". See, further, "Origin, Mandate and Composition of UNCITRAL", available at http://www.uncitral.org/uncitral/en/about_us.html. UNCITRAL's mandate under General Assembly resolution 37/106 is "body of rules governing commercial relationships of a private nature involving different countries", Report submitted by the Secretary-General to the General Assembly at its twenty-first session, 1966, United Nations document A/6396, para 10, A/6396/Add.1 and A/6396/Add.2, available at <http://www.uncitral.org/uncitral/en/commission/sessions/pre.html>.

⁵² The text of the Model Law is issued in 2011 available at http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html. The Model Law addresses the award of contracts for goods, construction and services by governmental and other public bodies.

⁵³ UNCITRAL (2012), *Guide to Enactment of the UNCITRAL Model Law on Public Procurement*, available at http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

⁵⁴ See, e.g. Christopher R. Yukins (2007), "Integrating Integrity and Procurement: The United Nations Convention Against Corruption and the UNCITRAL Model Procurement Law," 36 *Public Contract Law Journal*, pp. 307-329; and (2006), "A Case Study in Comparative Procurement Law: Assessing UNCITRAL's Lessons for U.S. Procurement," 35 *Public Contract Law Journal*, pp. 457-484.

⁵⁵ Both texts, in addition, are designed to comply with the procurement-related aspects of the United Nations Convention against Corruption set out in its article 9 (see text available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf).

(f) Promoting transparency.

These objectives are, to a large extent, mutually supporting and reinforcing. Competition, objectivity and transparency in the procurement process, in turn, facilitate fair, equal and equitable treatment and public confidence in the system, and thus the achievement of value for money and integrity in the procurement process. They are also important in the fight against corruption and abuse.

The parallel with the main GPA objectives is clear and, indeed, there is broad international consensus that these objectives should underpin all public procurement systems. The Model Law places a high premium on transparency, a lack of which has been identified as a major barrier to SMEs in public procurement.⁵⁶ Transparency in this context involves five main elements: the public disclosure of the rules that apply in the procurement process; the publication of procurement opportunities; the prior determination and publication of what is to be procured and how tenders are to be considered; the visible conduct of procurement according to the prescribed rules and procedures; and the existence of a system to monitor that these rules are being followed and to enforce them if necessary.

The Model Law's objectives are not self-enforcing, and so the Model Law sets out the main principles and procedures required to implement them. At a more detailed level, the default rules under the Model Law require universal eligibility, that set out permissible criteria for determining the suppliers that are qualified to participate in a procurement procedure; a comprehensive description of what is to be procured, to provide a common basis upon which firms are to prepare their tenders and so that they can be compared objectively; full disclosure of the criteria to be used in identifying the successful tender; the strict prohibition of negotiations on tenders, once submitted; the public opening of tenders at the deadline for submission, and the disclosure of any formalities required for entry into force of the procurement contract.

There is, by contrast with the GPA and reflecting the different scope of the two texts, no *de minimis* threshold for the application of the UNCITRAL Model Law: it applies to all public procurement (with flexibility for enacting States to set the dividing-line between public and private firms in their jurisdiction). As a non-binding instrument, the UNCITRAL Model Law and the related Guide to Implementation also are not geographically limited in their application in any way: it is available as source of inspiration and guidance to governments worldwide. While governments are therefore free to enact (elements of) it as they see fit, the UNCITRAL Model Law is conceived as a template, so that its potential benefits are largely proportional to the extent that it is implemented as a whole.

The Model Law, therefore, while a template for national legislation going beyond the minimum roles provided by the GPA, does not provide a comprehensive, pre-defined set of rules for a public procurement system, but rather a flexible legislative framework for such a system. Effective use of the Model Law requires more detailed rules, together with implementation support and guidance (as further explored below). This approach allows enacting States the policy space to implement the main principles and procedures in practice.

2.3 Harnessing the potential for international trade in the public procurement market

In their approach, both the GPA and the UNCITRAL Model Law encourage the widest possible participation in procurement markets and therefore are designed to help government attract the best possible suppliers offering their goods and services at the most competitive prices. The idea behind both instruments is that governments benefit as they achieve the best value for money, and suppliers benefit as they gain access to markets that were previously closed to them, whether due to formal reasons such as discriminatory policies, or practical obstacles, such as a lack of transparency regarding opportunities and conditions for participation.

The GPA and the UNCITRAL Model Law are complementary in that the GPA's rules, while setting minimum standards and principles, are not designed to provide a full set of legislative rules applying to government procurement. The UNCITRAL Model Law and the Guide to Implementation fill that gap to a significant extent, by providing a model for possible legislative provisions and approaches, as well non-binding guidance for government seeking to apply international best practices. While ratification of the GPA and implementation of the UNCITRAL Model Law by no

⁵⁶ See, e.g. Glover, above note 24.

means necessarily coincide, the UNCITRAL Model Law, with its toolbox approach, is one way of ensuring GPA-compliant legislation at the national level.

Their role in facilitating the integration of SMEs in procurement markets is important in two respects. First, both instruments ultimately derive their *raison d'être* from their usefulness in facilitating private sector suppliers' access to procurement markets abroad. In that regard, SMEs represent an important factor in rendering them effective, as SMEs represent a large majority of firms worldwide. Second, both instruments are part of and derived from an emerging standard of international best practices in government procurement, and seek to increase good governance and the efficiency of public procurement systems for the benefit of governments and their citizens. Therefore, they arguably need to offer appropriate solutions and or flexibilities to governments seeking to integrate SMEs in their supplier base in the best possible ways. In order for these goals to be achieved and to increase the effectiveness of procurement systems worldwide, the barrier-reducing measures that the GPA and the UNCITRAL Model Law propose need to work in tandem with SME support measures.

3 ENCOURAGING SME PARTICIPATION UNDER THE GPA AND THE UNCITRAL MODEL LAW

How do the GPA and the UNCITRAL Model Law, then, address SME participation in procurement markets? In that regard, a first important point to note is that neither the GPA nor the UNCITRAL Model Law contains specific provisions on the issue as part of their core provisions.

The revised text of the GPA, while specifically stating Parties' right to adopt technical specifications to promote the conservation of natural resources or protect the environment, only refers to SMEs in its Article XXII:8, under the heading of "Future Negotiations" and establishes the work programme on SMEs described above.⁵⁷

Similarly, the Model Law does not take a position on whether secondary policies are appropriately or best pursued through a procurement system, reflecting a long-standing policy approach in UNCITRAL. When first considering revisions to an earlier version of the Model Law in 2004,⁵⁸ an UNCITRAL inter-governmental Working Group noted that sustainable development policy should include long-term planning and the consideration of social, economic and environmental impacts beyond the local area (regional, national and international impacts). However, when reviewing the scope of the reform programme for the 1994 Model Law,⁵⁹ the group noted that while using procurement to achieve other policy goals might be considered appropriate, such use might in some cases undermine the main objectives of the procurement process (as described in Section 2 above).

Therefore, a main focus of this chapter is to identify ways to pursue SME policies that are in harmony with the general procurement policy goals and rules established by the two instruments, and to discuss how to legally include and mitigate negative effects of policies that have the potential to conflict with those goals. In line with the preferences expressed by many governments worldwide, the underlying assumption is that policies are needed to address obstacles faced by SMEs in procurement markets, and to create conditions in which potential factors enabling SMEs to fully utilize their competitive advantage over other enterprises.

The following sections identify three areas of interaction between the GPA and the UNCITRAL Model Law with regard to national efforts to increase participation of SMEs in procurement markets. First, we address measures to improve general features of procurement legislation and systems relating to transparency, integrity and competition. These "level the playing field" among all potential suppliers, as a first step. The second area concerns more specific measures relating to procurement practices that can be taken in the application of general rules in order to facilitate SME participation. These are needed to overcome potential barriers to SME participation that may persist despite a generally open and transparent system. The final subsection concerns preferential measures or programmes designed to give SMEs privileged access to procurement contracts. For each of these types of measures, the approach taken by the GPA and the UNCITRAL Model Law is set out.

⁵⁷ See, for further discussion of the Work Programme, Box 2 above.

⁵⁸ See 1994 Model Law on Procurement of Goods, Construction and Services, also available at http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

⁵⁹ See paras. 94-101 of document A/CN.9/568, Report of Working Group I (Procurement) on the work of its sixth session, (Vienna, 30 August-3 September 2004), available at http://www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html.

3.1 Improving procurement legislation and systems: lack of transparency, integrity, and inclusiveness as potential barriers to SME participation.

A first fundamental contribution that the GPA and the UNCITRAL Model Law have to make in improving SME access to procurement markets, whether at the local, regional, national or the international level, lies in their potential to help governments increase transparency, integrity and supplier inclusiveness of their procurement systems.

Indeed, SMEs can be expected to be less likely to overcome barriers to procurement markets related to insufficient availability of information on procurement opportunities, cronyism and/or corruption, whether at the national or the international level. With regard to transparency, a paper by the International Trade Centre (ITC) points out:

*"SMEs face considerable barriers to entry because of the costs of obtaining information on goods, works and services being sought by governments. Information costs may be sufficiently onerous so as to preclude SME involvement in public procurement. The difficulty of acquiring information is more significant in the international context. Large firms, especially multinationals, have easier access to information about invitations to tender in foreign countries than do SMEs. Potentially, the lack of information is damaging particularly to firms in developing and transitioning economies. Lowering the costs of information will remove or lessen a significant impediment to SME participation in public procurement."*⁶⁰

Indeed, inadequate information on procurement regulations and requirements as well as on procurement opportunities has been identified as a major impediment to SME participation in procurement.⁶¹ The increasingly wide-spread use of electronic procurement systems holds the potential to offer promising solutions with regard to transparency of procurement information at low cost, and its usefulness for SMEs has been noted.⁶²

With regard to corruption, SMEs have been described as more vulnerable than large firms to corrupt practices in their effort to win government contracts, with this trend being relatively more prominent in the developing world.⁶³ Measures to ensure appropriate competition in procurement markets are also needed to complement anti-corruption strategies.⁶⁴ Where corruption dominates, one of its effects may be the exclusion of SMEs from procurement markets via the endogenous creation of cartels among "established" large suppliers.⁶⁵

Overly restrictive qualification requirements and technical specifications also particularly harm SMEs. SMEs may offer innovative solutions, but risk aversion on the part of procurement officials may prevent them from harnessing their potential. From a design perspective, ensuring that excessive "standard" requirements are avoided and setting this out clearly in the initial

⁶⁰ International Trade Centre (2002), "SMEs and export-led Growth: Are there roles for public procurement programmes? A Practical Guide for Assessing and Developing Public Procurement Programmes to Assist SMEs," Paper presented at the WTO-World Bank regional workshop on procurement reforms and transparency in public procurement for Anglophone African countries, Dar Es Salaam, Tanzania, January 14-17, 2003.

⁶¹ See E. Mishory (2013), "Leveling Asymmetry: The Information-Leveling Model of Transparency in Government Procurement," available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2365092. See also R. Fee, A. Erridge, A., & S. Hennigan, (2002), "SMEs and Government Purchasing In Northern Ireland: Problems And Opportunities," 14 *European Business Review* 5, pp. 326 – 334; and K. Karjalainen & K. Kemppainen, (2008), "The Involvement of Small- and Medium-Sized Enterprises in Public Procurement: Impact of Resource Perceptions, Electronic Systems and Enterprise Size," 14 *Journal of Purchasing and Management* 4, pp. 230–240, available at <http://www.sciencedirect.com/science/article/pii/S1478409208000642>;

⁶² See, e.g. the EU Commission's explanation of the rationales for the new EU rules on e-procurement: "The use of electronic tools in public procurement offers a range of important benefits such as new business opportunities by improving the access of enterprises, including small and medium-sized enterprises (SMEs) to public procurement markets", available at http://ec.europa.eu/growth/single-market/public-procurement/e-procurement/index_en.htm.

⁶³ See Lea Kaspar and Andrew Puddephatt (2012), "Benefits of transparency in public procurement for SMEs," available at: <http://www.gp-digital.org/wp-content/uploads/pubs/Benefits-of-transparency-in-PP-for-SMEs.pdf>.

⁶⁴ See Anderson, Kovacic and Mueller (2015), above note 50. See also R. D. Anderson and W. E. Kovacic (2009), "Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets," 18 *Public Procurement Law Review*, Issue 2, 67-101.

⁶⁵ See Gustavo Piga (2011), "A fighting chance against corruption in government procurement," in Susan Rose-Ackerman and Tina Soreide, (eds.), *International Handbook on the Economics of Corruption* (Edward Elgar Publishing, 2011).

publicity may therefore assist in enhancing interest from SME-bidders.⁶⁶ Furthermore, SMEs are less experienced bidders: allowing them sufficient time to bid in new opportunities, and engaging in outreach to build capacity in how to draft and present a bid may also yield benefits.⁶⁷

In sum, measures to ensure the broadest possible participation of suppliers in procurement markets can generally be considered as a positive contribution to SME participation. Importantly, such measures are not only in the interest of SMEs trying to win contracts: they are fully in line with the broader goals of procurement systems outlined above. Essentially, they can be expected to favour successful participation not only of SMEs "per se", but in particular of those SMEs that are competitive in sense that they offer advantages to the government as buyer.

Such measures are also actively encouraged by both the GPA and the UNCITRAL Model Law: In all respects addressed above, SMEs may be disadvantaged in a way that is very similar to international suppliers, whose participation in procurement markets both the GPA and UNCITRAL Model Law are designed to facilitate. Consequently, the goals and specific procedural rules established by the two instruments, in encouraging broad participation and competition in procurement markets, are fully compatible with the goal to favour the inclusion of SMEs in the supplier base of governments by such means.

The following subsections highlight particular provisions of the GPA and the UNCITRAL that can be expected to be of particular relevance in this regard.

3.1.1 The GPA

As a basic rule, Article IV:4 of the GPA provides that a procuring entity shall conduct covered procurement in a transparent and impartial manner using methods such as open tendering, selective tendering and limited tendering; that avoids conflicts of interest; and prevents corrupt practices. The GPA therefore promotes open, transparent procurement procedures and integrity as basic prerequisite for SME participation in procurement markets.

With regard to the publication of notices, the revised GPA goes beyond mere transparency requirements in terms of the information to be contained in notices, and encourages the publication of electronic notices available free of charge and through a single point of access (see Article VII:1). The resulting enhanced availability of information on procurement opportunity can be expected to be especially beneficial to SMEs and other companies with limited staff and resources to search multiple information outlets for relevant information.

Furthermore, Article VIII:1 contains an obligation for procuring entities to limit any conditions for participation in a procurement to those that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement. In this regard, the GPA makes it clear that only essential requirements are considered legitimate and thereby opens possibilities for participation of SMEs.

Similarly, Article IX:2 and 3 of the GPA obliges GPA Parties to seek to minimize differences and unnecessary obstacles to participation in qualification procedures and registration systems. Again, such obstacles and differences, where they exist, can be expected to place a particular burden on SME suppliers due to their resource constraints.

Article X on technical specifications and tender documentation safeguards the interest of SMEs in seeing unnecessary technical specifications removed, and in obtaining tender documentation in time in order to permit them to submit a responsive tender. With regard to timelines, Article XI of the GPA establishes minimum rather than maximum time periods, thereby protecting SMEs interest in being allowed sufficient time to prepare tenders. Subsequent Articles guarantee the transparent and fair conduct of procurement procedures related to negotiations and electronic auctions, as well as to the award of the contract.

Very importantly for SMEs as potential newcomers, Article XVI:1 of the GPA provides unsuccessful SMEs with the right to request (and receive) an explanation of the reasons why the entity did not select its tender and the relative advantages of the successful supplier's tender. This right to be debriefed is particularly valuable to SMEs with little experience in submitting tenders and ensures that their chances of winning can increase over time.

⁶⁶ See Caroline Nicholas and Michael Fruhmman (2013), above note 14, and references quoted therein.

⁶⁷ Ibid.

Finally, all these rights are made enforceable in Article XVIII through Domestic Review Procedures.⁶⁸

While these minimum rules and standards relating to the transparency and procedural fairness of procurement procedures in the GPA were designed with international suppliers, rather than SMEs in mind, the potential meaning and impact of their existence on the participation of SMEs in GPA Parties' procurement markets should not be underestimated. This view is corroborated by GPA Parties' answers to the questionnaire as part of the GPA Committee's Work Programme on SMEs. Ten out of thirteen Parties confirm therein that they use their general transparency instruments implementing GPA provisions to make government procurement information available to SMEs. Three Parties enhance them with special portal sites that are relevant to SMEs' participation in government procurement. Similarly, nine Parties expressly confirm that their implementing legislation takes into consideration the needs of SMEs in simplifying qualification requirements.

Furthermore while little, if any, data exist to measure whether GPA accession has an impact on SME participation in covered procurement markets, it can by no means be assumed that non-GPA parties, especially if not implementing UNCITRAL Model Law standards or other applicable international best practices, necessarily follow such rules.

3.1.2 The UNCITRAL Model Law

The introduction to the UNCITRAL Model Law in section 2.2 above explains that the UNCITRAL Model Law includes requirements that reflect the provisions of the GPA described in the preceding paragraphs. Consequently, the relevant provisions of the UNCITRAL Model Law are not repeated here.⁶⁹ Some additional provisions that are designed to support wide participation of suppliers in public procurement under the Model Law are summarised in the following paragraphs.

A key rule under the UNCITRAL Model Law is unrestricted eligibility to participate for all qualified suppliers, with the limited exemptions under the Model Law requiring justification. This principle is given effect through an express prohibition against discrimination:

"Except when authorized or required to do so by the procurement regulations of other provisions of law of this State, the procuring entity shall establish no other requirement aimed at limiting the participation of suppliers ... in procurement proceedings that discriminates against or among suppliers ... or against categories thereof" (Article 8).

This rule operates also to establish a default rule in favour of international participation in any procurement process, and it is supported by a requirement that prior announcements of procurement proceedings under the Model Law be published internationally. A general non-discrimination rule in almost identical terms is also expressly applied to the determination of which suppliers are considered qualified to supply the subject-matter of the procurement to the government, in article 9; to the description of the subject-matter of the procurement at issue in article 10, and to rules on designing and applying the evaluation criteria that will be used to determine the winner of the procurement contract concerned in article 11.

Therefore, and as stated above, the UNCITRAL Model Law promotes reforms aimed at creating open, transparent and inclusive procurement legislation and systems that encourage the widest possible participation in procurement markets.

Overall, both the UNCITRAL Model Law and the GPA actively encourage measures needed in order for SMEs to overcome barriers to participation in public procurement: In all regards addressed above, SMEs are very similar to international suppliers, whose participation in procurement markets both the GPA and UNCITRAL Model Law are designed to facilitate.

⁶⁸ On the importance of domestic review procedures, and related policy considerations, see Daniel I. Gordon (2013), "Bid Protests: The Costs are Real, But the Benefits Outweigh Them," 42 *Public Contract Law Journal* 3; and Daniel I. Gordon (2006), "Constructing a Bid Protest Process: Choices Every Procurement Challenge System Must Make" 35 *Public Contract Law Journal* 3.

⁶⁹ For readers wishing to consider the complementarity of the two texts further, Article IV:4 of the GPA is reflected in article 28 of the Model Law; the recommendation of Article VII:1 are reflected in the Guide to Enactment discussion of solicitation in Chapter II, part II of the Model Law; the requirements of Article VIII: 1, Article IX:2 and 3 are reflected in articles 9 and 18 of the Model Law; those of Article X in article 10 of the Model Law; debriefings are encouraged in the commentary to article 22 of the Model Law, and Chapter VIII of the Model Law also contains enforcement procedures through its challenge mechanism.

Consequently, the goals and specific procedural rules established by the two instruments, in encouraging broad participation and competition in procurement markets, are fully compatible with the goal to favour the inclusion of SMEs in the supplier base of governments by such means.

3.2 Reforming Procurement Practices and Systems to enhance SME participation

A second contribution that the work of the WTO and of UNCITRAL can make to the integration of SMEs in procurement markets lies in providing policy space, and guidance and advice, where needed, on "optional" features and characteristics of procurement systems that can have an impact on SME participation.

In that regard, the extent to which procurement is disaggregated, the use of framework agreements and e-procurement systems, the design of standard procurement documentation to reduce transaction costs, and other procurement practices come to mind. Furthermore, the creation of institutions or other instruments to provide information and training on procurement opportunities for SMEs, and to monitor their success may have a positive impact. Similarly, possibilities for SMEs to act as subcontractor or to participate in joint bidding may be encouraged and impacted on through procurement practices. Ensuring prompt payment of suppliers may have a particular impact on SMEs that dispose of less cash-flow reserves than larger enterprises.

In this regard, the basic approach of both instruments is to leave options for each government to decide on, as long as general principles of transparency and non-discrimination are complied with. Such choices are left to governments as the measures in question are not considered as generally conflicting with the primary goals of the procurement function as described above, or per se problematic in regard to the participation of international suppliers. Nevertheless, the choices and solutions adopted can have a significant impact on SME procurement and the efficiency of the procurement system as a whole, and therefore need to be reflected upon. For example, recent research shows that both high individual contract values and centralized purchasing have a considerable negative effect on SME access.⁷⁰ However, the efficiency gains achieved for the public sector may also be non-negligible. While SME participation may be encouraged by a more flexible approach to subcontracting and joint bidding, some measures – such as allowing temporary consortia between suppliers – may carry the risk of making a cartel or collusive agreement in the form of bid rotation more feasible or raise other integrity issues.

While it may therefore not be appropriate to determine across-the-board solutions in either the GPA or the text of the UNCITRAL Model Law, the two instruments do not entirely ignore the relevance of such issues. While the GPA, as binding instrument, carefully carves out policy space in this regard, the Work Programme on SMEs established by the GPA Committee permits related policy discussions. Similarly, the Guide to Enactment of the UNCITRAL Model Law raises issues and addresses advantages and disadvantages of policy choices to be made in this regard.

3.2.1 The GPA

As explained above, the GPA establishes minimum rules in the sense that it only addresses those aspects and features that are considered essential in safeguarding the rights of foreign suppliers to participate in covered procurement under conditions of transparency and non-discrimination. In many respects, the interests of foreign suppliers and those of SMEs are aligned.

This furthermore means that the GPA provides ample policy space with regard to many choices governments can make, and that are essential in determining SME participation in markets. For example, while the GPA does contain provisions on the valuation of procurements in order to avoid the circumvention of commitments by artificially splitting procurements,⁷¹ it does not contain any limitation with regard to the awarding of smaller lots within a covered procurement. As SMEs are more likely to apply for and win smaller contracts, government choices in this regard can have a significant impact on SME participation.

Similarly, the GPA simply reflects, in its Annexes, choices individual economies make as to the number of procuring entities and resulting aggregation or disaggregation of the procurement function. In that regard, the GPA's Annex structure is flexible enough to accommodate different models and therefore does not interfere or contain any restrictions.

⁷⁰ See above note 11.

⁷¹ See Article II:6-8 of the GPA.

The GPA also does not contain any provisions either encouraging or prohibiting the use of framework agreements. While it regulates some aspects of the use of "multi-use lists" to encourage possibilities for inclusion on such lists by new suppliers and make them transparent, it does not indicate under what circumstances and to what extent they are to be used. And while the GPA generally recognized the transparency, governance and efficiency benefits of e-procurement systems, it leaves many choices as to the mandatory nature and the exact extent of their use to its Parties. The use of standard documentation is not addressed in the GPA,⁷² and neither is subcontracting or joint bidding.

Furthermore, while the GPA contains reporting requirements with regard to procurement statistics, it does not establish an obligation to include information on SME participation in these. Technical assistance envisaged under the Agreement is directed at developing WTO Members generally, without specific reference to SMEs – even though inclusion of such topics is possible upon request of the receiving WTO Member(s). No requirements relating to post-award contract management and/or payment of suppliers are contained in the GPA.

In sum, the GPA leaves significant "policy space" for its Parties to either establish procurement practices with SMEs inclusion as a goal in mind, or not – depending on the preference of the GPA Party in question. The current lack of restrictive rules on such procurement practices impacting on SME inclusion may mean that GPA Parties have, in the past, considered such issues predominantly as areas of domestic policy, which would make a lack of binding rules on the matter very much appropriate. However, given the above-mentioned importance of SMEs in the global economy, the lack of guidance on the issue in the GPA can also be considered a *lacuna* that could lead to both governments and SMEs forgoing the potential benefits of SME participation in international procurements.

The Work Programme on SMEs established by the Committee may help in either confirming the adequacy of the current approach, or in finding different, appropriate solutions. In any case, it permits policy discussion with a view to Parties agreeing on (non-binding) best practices. Under the Work Programme, Parties have, in the past months, exchanged information on many of the issues raised above. This certainly is a helpful first step in increasing transparency and creating a basis for discussion in the Committee.

3.2.2 The UNCITRAL Model Law

The non-discrimination provisions of the UNCITRAL Model Law outlined above are designed to ensure that SMEs are not deliberately prevented from accessing the public procurement markets. They are subject to a caveat: procuring entities may not discriminate among suppliers "except when authorized or required to do so by the procurement regulations or by other provisions of law of this State". As the Guide to Enactment explains, the purpose of this provision is to allow procuring entity, solely in order to promote a government's declared national policies as reflected in other laws or the procurement regulations, to restrict procurement to and/or to prefer tenders from certain groups of suppliers.⁷³ The exceptional use of such policies – the intended effect of which is to discriminate against, for example, larger suppliers – is discussed further in section 3.3 below.

However, as also explained in the Guide to Enactment, there may be unintended barriers to SME participation in public procurement markets, perhaps explaining why SMEs are often considered to underperform in public procurement markets. These barriers might arise due to factors such as the aggregation of public procurement demand, or technical, health and safety, sustainability, equality and diversity policies that may put the contracts beyond SMEs. Elements of procurement procedures themselves, as applied in practice, may also operate to create unintended barriers to access. These unintended barriers are the focus of the following paragraphs, which set out some of the guidance provided by the UNCITRAL Model Law and the Guide to Enactment on these topics.

As a matter of design of the procurement process, the UNCITRAL Model Law starts from the premise that the procuring entity should have the flexibility to choose how to determine and express its needs, and how to conduct the procurement procedure in a way that will meet them. Its article governing qualification, article 9, therefore provides that the procuring entity can apply any of the listed criteria that are considered appropriate and relevant in the circumstances of the

⁷² The GPA Parties have, however, decided to conduct future work on the advantages and disadvantages of developing standardized notices. See GPA/113, above note 34, Annex B.

⁷³ See Guide to Enactment, above note 53, pp. 5 et seq. and p. 222.

procurement, to ensure that potential suppliers have the necessary professional, technical and environmental qualifications, and financial and other necessary resources, to fulfil the procurement contract envisaged, that they meet ethical and legal standards, and that they have paid applicable taxes and social security contributions. How these rules are applied in practice requires the procuring entity to balance meeting its needs in the most effective way possible with opening up the procurement procedure to potential suppliers without previous experience in supplying the government.

The Guide to Enactment, when discussing article 9, encourages enacting States to consider carefully the procedures and requirements for each procurement contract, to seek to eliminate unnecessary barriers.⁷⁴ For example, a common requirement for a minimum of 5 years' audited accounts and previous relevant experience may prevent new and innovative suppliers from participating. Technical qualifications may be, similarly, excessively stringent,⁷⁵ or primarily aimed at mitigating governments' reputational risk or reducing the administrative burden on procurement officials in assessing marginal tenders.

In addition, it is routinely noted that the law governing procurement, and other applicable rules, are highly complex: they may also not be easily available or comprehensible, and learning to use them may involve considerable time and effort; information about procurement opportunities may be poor or lacking entirely; tender documents are often unclear, ambiguous, expressed in jargon and/or not issued in timely fashion. In terms of transparency, poorly-worded requirements in tender documents means that the procurement may be accessible only to those familiar with the procuring entity's requirements or the resources to investigate them. As the Guide to Enactment points out, these issues can be particularly disruptive to SMEs, which generally do not have experience in tendering or specialised tender-writing departments (unlike some large government suppliers). Therefore, the Guide to Enactment recognizes the helpful role of rationalization and standardization of procurement and of procurement practices in facilitating SME participation.⁷⁶

The Guide to Enactment also points out that enacting States should ensure consistent terminology across their legislation to avoid confusion and ensure consistency in interpretation and application.⁷⁷ Using standard terminology in specifications and other elements of descriptions of what is to be procured (such as the EU's procurement vocabulary, CPV,⁷⁸ and the United Nations Standard Products and Services Code) may assist in some markets where SMEs tend not to participate (or, conversely, be barriers in others).

The UNCITRAL Model Law, too, has provisions in many procurement methods (including framework agreements) that allow suppliers to compete for only a part of a procurement contract, and permits the use of multi-supplier framework agreements, both of which techniques can facilitate SME access. In helping enacting states address barriers related to contract size, Article 39 (g) of the UNCITRAL Model Law allows partial tenders as a general rule, and the Guide to Enactment points out that permitting partial tenders may facilitate participation by SMEs, who may have the capacity to submit tenders only for certain portions of the procurement.⁷⁹ With regard to framework agreements, it states expressly that placing smaller orders within the framework agreement may allow smaller suppliers or contractors to participate and discusses the risk of restricting market access, particularly to SMEs, through bundling several requirements.⁸⁰

The UNCITRAL Model Law also contains several features to support innovation in procurement as an area in which SMEs may have a potential competitive advantage over larger firms, e.g. through advance notices, appropriately open tender specifications through use of output-based descriptions and terms and conditions for the procurement and the choice of procurement methods, all of which can encourage SME participation.⁸¹ In particular, an over-

⁷⁴ See Guide to Enactment, above note 53, pp. 78 et seq.

⁷⁵ See, for example, EU Directive 2014/24/EU, which introduces self-declarations in qualification, and limits the evidence of financial capacity of the supplier that can be required (e.g. turnover requirements may not exceed a maximum of twice the estimated value of the contract). It has been noted that the latter requirement may be of limited assistance, and that a limit by reference to the annual cost might enhance the impact.

⁷⁶ See Guide to Enactment, above note 53, p. 20.

⁷⁷ See Guide to Enactment, above note 53, p. 48.

⁷⁸ See Regulation (EC) No. 213/2008, available at: <http://data.europa.eu/eli/reg/2008/213/oj>.

⁷⁹ See Guide to Enactment, above note 53, p. 148.

⁸⁰ See Guide to Enactment, above note 53, p. 255 and p. 262.

⁸¹ See, e.g. Guide to Enactment, above note 53, p. 68, p. 84 and p. 194.

emphasis on price over quality in evaluation criteria can disadvantage SMEs and discourage participation.

A second set of barriers relates to the costs of participation in the procurement process – both in cash and time terms – which may operate as a disincentive to participation. SMEs are disproportionately affected by the costs involved, many of which are fixed. Estimates indicate that these costs may be 10-50% higher in public procurement as compared with comparable projects in the private sector.⁸² For example, tender securities, performance bonds, licences, and other fees can be disproportionately expensive for SMEs. Here, the Guide to Enactment encourages a case-by-case analysis of the costs and benefits of imposing these requirements.⁸³ In low-value procurement, the risks of delivery or performance faced by the procuring entity and its potential losses are generally low, and the cost of providing a tender security—which will normally be reflected in the contract price as well as perhaps excluding SMEs—will be less justified. The Guide to Enactment also encourages implementing states to consider the negative effect of charges for solicitation documents etc. on the participation of suppliers or contractors, in particular SMEs.⁸⁴

Once a contract is awarded, a winning supplier will probably be confronted with complex contract management procedures and dispute resolution processes, and the cash-flow implications of funding the contracts concerned until payment, noting that the payment period in the public sector is significantly longer than in the private sector.⁸⁵ Addressing the financial cost of contract performance, through reducing times for the payment under procurement contracts and providing direct financing measures, may be desirable but there are indications that some governments under financial pressure may be reluctant to implement this practice.⁸⁶

Supporting these regulatory and design measures, governments can also seek to enhance capacity to participate in procurement and SME ability to supply governments through capacity-building.⁸⁷ Measures can include improving SME visibility in procurement (promoting the use of SMEs to procuring entities); improving communications and interaction between SMEs and procuring entities: targeting information as noted above at SMEs, which may not be aware of the potential for supplying the government; enhancing tender-drafting abilities (as SMEs suffer from inexperience in writing tenders); building capacity in using new procurement tools (e-procurement tool such as electronic reverse auctions), so that they do not become a new barrier to access; addressing SME weaknesses in terms of technical and financial capacity by allowing SMEs to combine or sub-contract to reach minimum turnover requirements, or to be able to offer complementary components.

Similar to the GPA, the UNCITRAL Model Law therefore provides a great degree of flexibility of implementing governments with regard to many issues that can be of considerable importance for SME participation in procurement. The Guide to Enactment is a useful reference tool for policy makers and procuring entities in determining appropriate solutions to the issues raised. Of course, there is no guarantee that the flexibilities offered by the UNCITRAL Model Law or the guidance provided by the Guide to Enactment will be taken up in practice. Problems in take-up and related negative effects on SME participation in public procurement may well be related to risk-averseness of procurement officials who may be reluctant to depart from tried-and-tested solutions. In that regard, policy makers should be aware of the fact that how procurement officials' performance is measured may have an impact on their attitude to taking the risks that contracting with untried-and-untested SMEs may involve.

Any review of potential successes and failures pre-supposes first and foremost, that transparency is created with regard to the impact of choices to be made on procurement outcomes. In the current absence of sufficiently precise and complete data in most economies,

⁸² See Nicholas and Fruhmman (2014), above note 14, citing Fee *et al.*, above note 61: Karjalainen and Kemppainen, above note 61; P. Smith, P., & A. Hobbs, A. (2001), "SMEs and Public Sector Procurement," *Management Consultancy for the Small Business Service*, Available at <http://www.dti.gov.uk/files/file38305.pdf>; UK Government Consultation (2013), "Analysis of Responses to the Consultation on Making Public Sector Procurement More Accessible to Small and Medium Sized Enterprises," available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264101/LYCons_response3final.pdf.

⁸³ See Guide to Enactment, above note 53, p. 99.

⁸⁴ See Guide to Enactment, above note 53, p. 146.

⁸⁵ See, further, Nicholas and Fruhmman (2014), above note 14.

⁸⁶ See Guide to Enactment, above note 53, p. 25.

⁸⁷ See Guide to Enactment, above note 53, p. 25.

many countries will have to rely on more general policy guidance based on experience gained in countries with more experience in this regard. Therefore, policy discussions and technical assistance may be helpful for many countries in the process of setting or reviewing procurement policies with regard to SMEs.

Both UNCITRAL and the WTO engage in demand-driven technical assistance in support of their published texts. They often work together with other international institutions and have established dedicated co-operation programmes on public procurement with the European Bank for Reconstruction and Development.⁸⁸ They also partner with organization such as World Bank and the OECD in order to be able to respond to the needs of developing and transition economies. Again, the barriers with regard to procurement practices to be overcome by SMEs as "newcomers" to public procurement often resemble those foreign suppliers face. Therein lays an opportunity for governments to address unintended barriers for both SMEs and international suppliers at the same time – with the benefit of rendering their procurement system more efficient. This can be done through the implementation of the policy approach of the GPA and the UNCITRAL Model Law – both of which require more detailed elaboration at the national level in order to be rendered effective.

3.3 Preferential Programmes

The third range of measures that can be taken by governments to support SME participation in procurement markets concerns preferential programmes designed to alter the outcome of procurement processes and tip the balance in favour of SMEs, thereby creating incentives for them to participate.

Such programmes can take a variety of forms: they can consist of (potentially a combination of) set-asides, price preference margins, or offset requirements relating to SME inputs or subcontracting, or a combination of the above.⁸⁹ Some systems – such as in the US and South Africa, which base their SME policies on targeted assistance for economic and social reasons – set targets for awards to SMEs using a flexible combination of price preferences and set-asides, (and in the case of the US), require procuring entities to justify deviations from the policies concerned.⁹⁰ According to OECD statistics, a third of OECD member countries (33%) have put in place specific legislative provisions or policies, including set-asides, to encourage participation from SMEs in procurement – worldwide statistics as to the prevalence of such measures are hard to find, but anecdotal evidence suggests that a number of countries implement such programmes.⁹¹ Where such direct assistance programmes are permitted, the advantages cited are that they support SMEs directly through creating and sustaining demand, and provide quick and visible benefits to SMEs.⁹²

In the decision whether or not to implement such measures, several factors can play a role. Arguments in favour of preferential programmes, such as social justice, industrial policy objectives, and potential efficiency gains due to enhanced SME participation etc. have to be balanced against potential drawbacks. Set-asides, by their very nature, exclude non-targeted tenderers from procurements, and may therefore lead to reduced competition, with potential effects on the value for money of the goods and services procured.⁹³ Price preference margins may raise the cost of procurement and therefore have important budget implications or reduce the quantity of goods and services that can be procured out of the public purse.⁹⁴ Offset requirements

⁸⁸ For further information on the EBRD UNCITRAL Public Procurement Initiative, see <https://www.ppi-ebd-uncitral.com/>. For further information on the EBRD GPA Technical Cooperation Facility, see <http://ebd-gpa-facility.com/?id=1&PHPSESSID=2c64554d0cf9719558ad063184477748>.

⁸⁹ For a concise overview, see ADB (2012), "SME Development: Government Procurement and Inclusive Growth," available at: <http://www.adb.org/publications/sme-development-government-procurement-and-inclusive-growth>.

⁹⁰ Ibid.

⁹¹ See, e.g. Linarelli (2011), above note 27, citing examples from the US, South Africa and Malaysia. See also McCrudden, above note 15.

⁹² See Nicholas and Fruhmman (2014), above note 14.

⁹³ See Arrowsmith (2010), above note 16. For a study with contrary findings, using data on US Federal procurement of dredging services, see T.A. Denes (1997), "Do Small-Business Set-Asides Increase the Cost of Government Contracting?" 57 *Public Administration Review* 5, pp. 441-444.

⁹⁴ See Arrowsmith (2010), above note 16. On potential efficiencies of price preferences in a trade context and under certain circumstances, see Simon Evenett (2009), "Government Procurement," in Kenneth A. Reinert and Ramkishan S. Rajan (eds.), *The Princeton Encyclopedia of the World Economy* (Princeton

may have similar effects by making it more difficult for suppliers to comply with tender requirements.⁹⁵ Furthermore, the administration of such programmes may, under some circumstances, be burdensome and create opportunities for collusion and corruption.⁹⁶ Finally, they may not create the desired economic benefits: they may involve awards to less efficient firms, or be applied in sectors where they are not needed.⁹⁷ It therefore seems prudent for governments that decide in favour of such programmes to monitor both costs and outcomes in order to target them well, and encourage effective and beneficial participation of innovative and competitive SMEs.⁹⁸

Perhaps due to the potential costs, and in line with the political economy and industrial policy goals of such measures, such programmes, where implemented, are almost exclusively, if not entirely, aimed at *domestic* SMEs as beneficiaries. They therefore have important implications for the objectives of the GPA and the UNCITRAL Model Law to encourage the widest possible participation in procurement markets.

3.3.1 Preferential programmes under the GPA

The GPA, as a matter of principle, prohibits discrimination of foreign suppliers, goods and services from GPA Parties, as well as offsets with regard to covered procurement.⁹⁹ Furthermore, it restricts the conditions for participation to those that are essential to ensure that a supplier is capable and able to undertake the relevant procurement (see Article VIII). On this basis, a commentator, Linarelli, expresses the view that, as a matter of principle, *"GPA non-market access provisions do not permit SME or HDI preference policies. Going further, SME preference policies probably violate several GPA provisions."*¹⁰⁰ As Linarelli also points out, it is, in any case, still possible for GPA Parties to implement preferential programmes without breaching their obligations under the Agreement.

As explained above, GPA obligations only apply to covered procurement, i.e. procurement that is specified by the Party in question in its Appendix I to the Agreements and satisfies several other conditions spelled out in Article II of the Agreement (see Box 4 for details).

Box 4 The structure of GPA coverage schedules (Appendix I of the Agreement)

For each GPA Party, Appendix I is divided into six Annexes which deal, respectively, with (i) central government entities covered by the Agreement; (ii) covered sub-central government entities; (iii) "other" covered entities (e.g. utilities and SOEs); (iv) coverage of goods; (v) services coverage; (vi) coverage of construction services; and (vii) any general notes.

Annex 1	Central Government Entities
Annex 2	Sub-Central Government Entities
Annex 3	Other Entities
Annex 4	Goods
Annex 5	Services

University Press, 2009), citing R. Preston McAfee and John McMillan (1989), "Government Procurement and International Trade," 26 *Journal of International Economics*, pp. 291-308.

⁹⁵ See Arrowsmith (2010), above note 16, "Policies directed at, or affecting, behaviour outside government contracts often impose a greater burden on contractors than policies limited to the contract, especially when they extend to all the contractor's activities. As a result, there are also potentially greater costs for the procurement process. These arise both because of the costs of compliance reflected in tenders, and because (especially with contract conditions laid down by government) these policies may reduce the pool of contractors."

⁹⁶ See, e.g. Transparency International (2012), "Due diligence and corruption risk in defence industry offset programmes," available at: <http://www.ti-defence.org/publications/20-category-publications/publications-dsp/76-dsp-pubs-due-diligence-offsets.html>: "Besides the risk of bribery in offsets contracts, there is an additional risk that main supplier companies may be using the offsets package as a vehicle to offer benefits to individuals in return for undue influence or access to [...] contracts."

⁹⁷ See Arrowsmith (2010), above note 16.

⁹⁸ See the discussion in Nicholas and Fruhmman (2014), above note 14, with reference to P. Nightingale & A. Coad (2011), "Muppets and Gazelles: Rooting Out Ideological and Methodological Biases in Entrepreneurship Research." (Brighton, UK: University of Sussex, 2011) available at http://www.finnov-fp7.eu/sites/default/files/FINNOV_DP8.5. See also the Guide to Enactment of the UNCITRAL Model Law on Public Procurement, p. 6.

⁹⁹ See Article IV:1-2 and 6, as well as Article XIII:1 of the revised GPA.

¹⁰⁰ Linarelli (2011), above note 27, at p. 453.

Annex 6 Construction Services
Annex 7 General Notes

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

By virtue of the rules on coverage specified in the GPA, a procurement only falls within the ambit of the GPA's rules if the procuring entity is covered, if the service or good procured is included in the relevant party's commitments, and if the value of the procurement in question is above the threshold levels indicated in the relevant party's schedules.¹⁰¹ This leaves a possibility to apply preferential SME programmes below the threshold values of the GPA – in other words with regard to smaller value procurements, that may be particularly attractive to SMEs (see Box 5 for general threshold values applied by most GPA Parties). As all Parties apply thresholds and do not open up small-value procurement to international competition, this does not require extensive negotiation of "policy space".

Box 5 General Threshold Values under the GPA (in Special Drawing Rights (SDR))¹⁰²

	Annex 1 Central government entities	Annex 2 Sub-central government entities	Annex 3 Other entities
Goods and services	130,000 SDR	200,000 SDR	400,000 SDR
Construction services	5,000,000 SDR	5,000,000 SDR	5,000,000 SDR

Furthermore, Parties can negotiate specific exclusions to their above-threshold coverage. Apart from targeted procurement by non-covered entities, or SME programmes applicable only to non-covered sectors (goods, services or construction services), it is possible for Parties to indicate exceptions from coverage in notes to specific Annexes and in the General Notes in Annex 7. Several Parties, including Canada, Japan, Korea, and the US, have negotiated relevant exceptions from coverage and apply SME preferences in this way.

Linarelli points out that these "negotiated" exclusions may lead to inequalities between GPA Parties. According to him, "the extent of a GPA contracting party's autonomy to pursue its own domestic justice policies depends on its market power, on its ability to offer up on the GPA negotiating table substantial other procurements unaffected by preference programmes. Thus, in the GPA context, only contracting parties with substantial import markets in public procurement have substantial policy autonomy."¹⁰³ This concern identified by Linarelli with regard to the situation prevailing under the GPA 1994, may have been alleviated to some extent by the provisions of the revised GPA.

As noted above, the revised GPA introduces a completely re-designed provision on developing countries,¹⁰⁴ expressly permitting them to adopt or maintain price preference programmes and offsets, as well as higher initial thresholds as transitional measures, based on their development needs and subject to transparency requirements.¹⁰⁵ While these still need to be negotiated by the country in question – the measures are subject to the agreement of existing

¹⁰¹ See also Robert D. Anderson, Anna Caroline Müller, and Philippe Pelletier (2015). "Regional Trade Agreements and Procurement Rules: Facilitators or Hindrances?" *Research Paper No. RSCAS 2015/81*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2707219; and Robert D. Anderson, Claudia Locatelli, Anna Caroline Müller and Philippe Pelletier (2014), "The Relationship between Services Trade and Government Procurement Commitments: Insights from Relevant WTO Agreements and Recent RTAs," *WTO Working Paper ERSD-2014-21*, available at: http://www.wto.org/english/res_e/reser_e/ersd201421_e.pdf.

¹⁰² Not all Parties apply the threshold levels as indicated. For more detailed information, see <https://e-gpa.wto.org/en/ThresholdNotification/FrontPage>.

¹⁰³ Linarelli (2011), above note 27.

¹⁰⁴ See Article V of the revised GPA.

¹⁰⁵ See for further detail Müller (2011), above note 48.

GPA Parties – this provision can arguably be seen as an attempt by GPA Parties to "level the playing field" to some extent and introduce the flexibilities required in order for less developed and/or smaller economies to join the Agreement. In any case, the provision can reinforce the negotiating position of developing or transition economies wishing to use targeted preferential SME programmes in government procurement for economic development.

Furthermore, the submissions of GPA Parties under the Work Programme on SMEs have helped in further increasing transparency as to the implementation of negotiated exceptions to the GPA in practice. The Work Programme commits Parties to a discussion on best practices in this regard.

Overall, the GPA therefore recognizes the need to provide flexibilities to allow for preferential treatment of SMEs and other "secondary" or "horizontal" policies and makes it a subject-matter of negotiation and discussion.

3.3.2 Preferential programmes under the UNCITRAL Model Law

While the UNCITRAL Model Law, as non-binding instrument, does not limit government's choices with regard to preferential SME programmes by establishing prescriptive rules, the general approach promoted under it and the guidance provided for its implementation go in a similar direction.

As pointed out above, the non-discrimination provisions of the UNCITRAL Model Law outlined above are designed to ensure that SMEs are not deliberately prevented from accessing the public procurement markets. They are subject to a caveat: procuring entities may not discriminate among suppliers "except when authorized or required to do so by the procurement regulations or by other provisions of law of this State". As the Guide to Enactment explains, the purpose of this provision is to allow procuring entity, solely in order to promote a government's declared national policies as reflected in other laws or the procurement regulations, to restrict procurement to, and/or to prefer tenders from, certain groups of suppliers.¹⁰⁶

The caveat to the non-discrimination provisions in the Model Law (see section 3.2.2) allows the government, through the procurement regulations or other laws, to limit eligibility to participate in procurement to particular groups, such as SMEs, so that a procurement may be set aside for those groups, as well as allowing them to receive preferential treatment, and/or requiring or allowing credit in a tender for engaging SMEs as sub-contractors. Without the caveat, however, targeted procurement of this type would be prohibited under the Model Law.

A further option under article 11 allows procuring entities to grant a margin of preference to suppliers on the basis of their nationality or on the basis of the origin of the subject-matter of procurement (in practice, applying to domestic suppliers or domestically produced or provided items or services). The effect in practice is to provide a discount on the offered tender price in favour of, for example, SMEs. It is important to note, in this regard, that article 11 does not limit preferences to domestic suppliers or contractors or for domestically produced goods, but also allows any other preference.¹⁰⁷

It should be emphasised that while UNCITRAL recognizes that governments may wish to pursue SME policies (and other secondary policies), it does not take a position on whether those policies are appropriately or best pursued through a procurement system, reflecting the long-standing policy approach referred to above (see section 2.2). The Guide to Enactment, however, provides the following commentary:

"The pursuit and implementation of these policies may have an impact on the performance of the procurement system itself, as, in essence, they are implemented through restrictions on competition for a particular procurement. For this reason, the pursuit of socio-economic policies involves exceptions to the principle of full and open competition and can bring additional costs to procurement, as it may increase the ultimate price paid. Additionally, the cost of monitoring compliance with government policies may add to administrative or transaction costs, which may have a negative effect on efficiency. On the other hand, some policies of this type may open the procurement market to groups or sectors that have traditionally been excluded from procurement contracts (such as SMEs) and may increase participation and

¹⁰⁶ See Guide to Enactment, above note 53, pp. 5 et seq. and p. 222.

¹⁰⁷ See Guide to Enactment, above note 53, pp. 359.

competition, though in the longer term such benefits may not persist (e.g. if suppliers or contractors choose artificially to remain SMEs). Consequently, the pursuit and implementation of socio-economic policies through procurement should be carefully weighed against the costs that the policies may involve in both the short and long term. 15. In this regard, while there are indications that the results from the use of some preference policies (such as the use of evaluation criteria to prefer a defined group) tend to be more positive than from set-aside policies (such as restricting qualification or requiring subcontracting to a defined group, or resorting to domestic procurement), the main concern is that total insulation from competition for an extended period of time or beyond the point that suppliers or contractors can compete freely can also frustrate the capacity development that such policies are designed to achieve. Consequently, such policies may be considered to be appropriate as transitory measures, only for the purposes of granting market access to emergent suppliers or contractors, opening the national economy, such as through capacity-building, and should not be used as a form of protectionism. The policies should accommodate a progressive exposure to unlimited competition."¹⁰⁸

Furthermore, these measures are all made subject to three caveats. First, the UNCITRAL Model Law required an overall targeted policy in requiring that socio-economic policies be made part of the legislation on government procurement so that procuring entities are not permitted to create exemptions on an *ad hoc* basis. Second, it also establishes rigorous transparency standards, so that the impact of the measures is pre-determined and pre-disclosed as for any other applicable term of a procurement procedure.¹⁰⁹ Third, enacting States may use them only where its international obligations – for example those under the GPA – permit.¹¹⁰

The Guide to Enactment also encourages States to make use of the transparency rules and other benchmarks to assess any premium paid for set-asides or preferences, and to balance it against the benefits to be derived, though it is considered that a full empirical assessment of costs and results is likely to be difficult.¹¹¹

In sum, it can be concluded therefore that both the GPA and the UNCITRAL Model Law offer flexibilities for governments wishing to implement preferential programmes. As such programmes can create significant tensions with the general objectives of both instruments, they permit them only as targeted exceptions to the open and non-discriminatory procurement procedures that are encouraged as matter of principle. In regulating their use, they establish transparency and other requirements designed to encourage the careful design and monitoring of policies by implementing governments.

4 CONCLUSIONS

This chapter has discussed the role of the WTO GPA and the UNCITRAL Model Law in facilitating the participation of SMEs in public procurement, in light of the fact that access to and participation in public procurement markets by Small and Medium-Sized Enterprises (SMEs) has been identified, by many governments, as a crucial element in fostering sustainable economic development and prosperity world-wide.

In their approach, both the GPA and the UNCITRAL Model Law encourage the widest possible participation in procurement markets and therefore are designed to help government attract the best possible suppliers offering their goods and services at the most competitive prices. The idea behind both instruments is that governments benefit as they achieve the best value for money, and suppliers benefit as they gain access to markets that were previously closed to them, whether due to formal reasons such as discriminatory policies, or practical obstacles, such as a lack of transparency regarding opportunities and conditions for participation.

Their role in facilitating the integration of SMEs in procurement markets is important in two respects. First, both instruments ultimately derive their *raison d'être* from their usefulness in facilitating private sector suppliers' access to procurement markets abroad. In that regard, SMEs represent an important factor in rendering them effective, as SMEs represent a large majority of

¹⁰⁸ See Guide to Enactment, above note 53, p. 6.

¹⁰⁹ See Guide to Enactment, above note 53, p. 7.

¹¹⁰ See Guide to Enactment, above note 53, p. 6.

¹¹¹ See Guide to Enactment, above note 53, p. 7. Included in the costs of such measures will be additional administrative the cost of monitoring that SMEs fulfil the criteria to define them as such.

firms worldwide. Second, both instruments are part of and derived from an emerging standard of international best practices in government procurement, and seek to increase good governance and the efficiency of public procurement systems for the benefit of governments and their citizens. Therefore, they arguably need to offer appropriate solutions and or flexibilities to governments seeking to integrate SMEs in their supplier base in the best possible ways. In order for these goals to be achieved and to increase the effectiveness of procurement systems worldwide, the barrier-reducing measures that the GPA and the UNCITRAL Model Law propose need to work in tandem with SME support measures. Neither the GPA nor the UNCITRAL Model Law contains specific provisions on the issue as part of their core provisions. However, both instruments are of relevance, and should usefully be considered by governments seeking to devise SME policies in public procurement in three respects.

First, they are helpful in identifying measures to improve general features of procurement legislation and systems relating to transparency, integrity and competition. These "level the playing field" among all potential suppliers, and can be expected to remove obstacles to participation of particular relevance of SMEs as a first step. Important synergies therefore exist between SME policies and the objectives, rules and principles of the GPA and the UNCITRAL Model law. Both the UNCITRAL Model Law and the GPA actively encourage measures related to transparency, openness and integrity needed in order for SMEs to overcome barriers to participation in public procurement: in these regards, SMEs are very similar to international suppliers, whose participation in procurement markets the two instruments are designed to facilitate. Consequently, the goals and specific procedural rules established by the two instruments, in encouraging broad participation and competition in procurement markets, are fully compatible with the goal to favour the inclusion of SMEs in the supplier base of governments by such means.

The second area concerns more specific measures relating to procurement practices that can be taken in the application of general rules in order to facilitate SME participation. Examples include the disaggregation of demand, appropriate use of framework agreements and e-procurement systems, creation of opportunities for subcontracting and joint bidding, prompt payment of suppliers, and the provision of training. Such measures may be needed to overcome potential barriers to SME participation that may persist despite a generally open and transparent system. In this regard, the basic approach of both instruments is to leave options for each government to decide on, as long as general principles of transparency and non-discrimination are complied with. Such choices are left to governments as the measures in question are not considered as generally conflicting with the primary goals of the procurement function as described above, or per se problematic in regard to the participation of international suppliers. Nevertheless, the choices and solutions adopted can have a significant impact on SME procurement and the efficiency of the procurement system as a whole, and therefore need to be reflected upon. The two instruments therefore do not ignore the relevance of such issues. While the GPA, as binding instrument, carefully carves out policy space in this regard, the Work Programme on SMEs established by the GPA Committee permits related policy discussions. Similarly, the Guide to Enactment of the UNCITRAL Model Law raises issues and addresses advantages and disadvantages of policy choices to be made in this regard.

The third area of interaction concerns preferential measures or programmes designed to give SMEs privileged access to procurement contracts. In that regard, both the GPA and the UNCITRAL Model Law, even if in varying degrees, offer flexibilities for governments wishing to implement preferential programmes that discriminate against some suppliers or categories of suppliers. As such programmes can create significant tensions with the general objectives of both instruments they permit them only as targeted exceptions to the open and non-discriminatory procurement procedures that are encouraged as matter of principle. In regulating their use, they establish transparency and other requirements designed to encourage the careful design and monitoring of policies by implementing governments.

Overall, therefore, the synergies that exist between the two instruments and policies to encourage SME participation in procurement market may well exceed conventional perceptions in this regard. Recent developments, including the entry into force of the revised GPA in 2014, the initiation of Work Programme on SMEs, and the new, 2011 UNCITRAL Model Law, provide a convenient point of departure for relevant discussions.

In that regard, it may be most striking that statistics and data on the use and effectiveness of the different types of measures are extremely hard to find, and where national data exist, international comparisons are difficult. The GPA and the UNCITRAL Model Law, as tested

instruments designed to identify international best practices in government procurement, may be helpful in reminding policy makers of guidelines to be followed.

With this in mind, and in line with the findings set out above, the following observations seem relevant. First, there is potential to further harness the synergies that can be created between general reform and liberalization efforts and SME participation measures. The GPA and the UNCITRAL Model Law can be helpful instruments in this regard, whether implemented directly, or as general guidelines. Second, many choices governments can make while fully respecting non-discrimination and transparency principles under both instruments can be expected to have a positive impact on SME participation. In this respect, the possibilities for information sharing and technical assistance opened up by the work of the WTO and UNCITRAL may be helpful in further contributing to the development of international best practices. Finally, while both instruments recognize that it is up to each government to decide on the usefulness of preferential programmes to foster SME participation, such programmes would ideally be designed as effective and targeted measures subject to rigorous transparency standards that allow a cost-benefit analysis.

Recent economic analysis suggests that both SME and cross-border success in public procurement remain a work-in-progress. It is therefore only natural that neither the GPA, nor the UNCITRAL Model Law offers all relevant answers. What seems crucial, however, is that the principle of transparency that is embodied in the Agreements is integrated into policy discussions on the subject matter – and potentially into future rules of international economic law governing it.