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Withdrawing the United States from the WTO Government Procurement Agreement (GPA): Assessing Potential Damage to the U.S. and Its Contracting Community

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FEATURE COMMENT: **Withdrawing The U.S. From The WTO GPA: Assessing Potential Damage To The U.S. And Its Contracting Community**

The Trump Administration is mulling an executive order that would trigger U.S. withdrawal from the World Trade Organization (WTO) Agreement on Government Procurement (GPA), according to reports from Bloomberg and POLITICO. E.g., *Trump Considers Withdrawing From WTO's \$1.7 Trillion Purchasing Pact*, Bloomberg, Feb. 4, 2020, www.bloomberg.com/news/articles/2020-02-04/trump-mulls-withdrawal-from-wto-s-1-7-trillion-purchasing-pact. Withdrawal from the GPA would deprive U.S. suppliers of a key point of access to public procurement markets internationally, under a world-wide agreement that has set global standards and opened over a trillion dollars annually in business opportunities. See, e.g., Robert D. Anderson et al., “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,” 2012 Pub. Proc. Law Rev. 113, www.wto.org/english/res_e/reser_e/ersd201115_e.pdf. The U.S. could forfeit access to important public procurement markets in Canada and many other countries, and the U.S. could lose its leadership role (which dates back to World War II) in shaping global standards in public procurement, even as more countries are joining the GPA.

The GPA: an Essential Foundation for Efficient Government Contracting World-wide—The WTO's GPA is the world's premier tool

for establishing and enforcing open markets for government contracting internationally. The GPA has three main elements: (1) binding guarantees of non-discriminatory treatment in covered public procurements run by the 48 WTO member governments covered by the GPA (including the European Union, Canada, Israel and many other industrialized and developing nations); (2) important transparency and procedural requirements that ensure U.S. and other offshore suppliers have access to the information necessary to compete fairly; and (3) a guarantee that all participating countries will have in place effective domestic review (bid protest) procedures to adjudicate supplier complaints. Estimates vary, but the GPA is generally thought to cover about \$1.7 trillion in public procurements, world-wide. See, e.g., Robert D. Anderson & Nadezhda Sporysheva, “The Revised WTO Agreement on Government Procurement: Evolving Global Footprint, Economic Impact and Policy Significance,” 2019 Pub. Proc. Law Rev. 71 (available on Westlaw).

The U.S. originally proposed an international agreement to open world public procurement markets in the months after World War II, and versions of the GPA have been in place since 1979, all prepared with extensive U.S. involvement during both Republican and Democratic administrations. In fact, it is safe to say that the GPA would not exist without U.S. leadership. The current version was adopted in 2012, and embodies modernized procedural requirements, improved market access commitments and, significantly, pathbreaking anti-corruption requirements that were strongly supported by the U.S. E.g., Anderson, Schooner & Swan, Feature Comment: “The WTO's Revised Government Procurement Agreement—An Important Milestone Toward Greater Market Access And Transparency in Global Public Procurement Markets,” 54 GC ¶ 1.

The GPA Is Becoming More Important Over Time—Currently, 48 WTO member jurisdictions are covered by the GPA. Other major economies, including China and the Russian Federation, are bidding to join the GPA, which will require

them to open their public procurement markets on fair and competitive terms. India is an observer (typically the first step to joining the GPA), and many other developing nations have entered the accession process. Brazil announced last month that it intends to join the GPA, as part of a broader effort to check corruption and join international markets. E.g., “Brazil Announces It Will Adhere to the International Agreement on Government Procurement,” Nat. Law Rev., Jan. 23, 2020, www.natlawreview.com/article/brazil-announces-it-will-adhere-to-international-agreement-government-procurement.

The United Kingdom, for its part, has made clear its firm determination to continue to be bound by and enjoy the benefits of GPA participation following its exit from the EU. See WTO, “UK set to become a party to the Government Procurement Agreement in its own right,” Feb. 27, 2019, www.wto.org/english/news_e/news19_e/gpro_27feb19_e.htm. This is not surprising, given the extent to which contractors (from the UK and elsewhere) rely on the GPA’s assurances of fair treatment and access in a rapidly globalizing public procurement market.

For the U.S. supplier community, it is important to understand that as an existing party to the GPA, by the terms of the GPA the U.S. is entitled to *block the admission of new parties to the GPA (such as China and Russia) unless the U.S. is satisfied with the new parties’ offers of market access and reforms to their national procurement systems*. Furthermore, in our experience, the U.S. exercises its influence and negotiating heft adroitly and without hesitation to protect the interests of U.S. suppliers. See, e.g., Christopher Yukins & Johannes Schnitzer, “GPA Accession: Lessons Learned on the Strengths and Weaknesses of the WTO Government Procurement Agreement,” 7 Trade Law & Dev. J. 89 (2015). The U.S. will also have a seat at the table and well-established position of influence when, as is inevitable, the GPA is revised and renegotiated. The U.S. will, however, lose all of this critical negotiating leverage if in fact it withdraws from the GPA.

Misconceptions Regarding the Balance of U.S. Interests in the GPA—Some critics’ views of the GPA have been informed, at least in part, by a misunderstanding of the opportunities available to U.S. suppliers under the GPA. A 2017 report by the Government Accountability Office concluded that the U.S. had opened access to about \$837 billion worth of its procurement contracts annually, whereas the next five largest GPA parties—the EU, Japan, South

Korea, Norway and Canada—had provided access to only about \$381 billion worth of procurements. See *United States Reported Opening More Opportunities to Foreign Firms Than Other Countries, but Better Data Are Needed* (GAO-17-168), available at www.gao.gov/assets/690/682663.pdf. GAO acknowledged, though, that the available data were incomplete, and the report missed important structural advantages that the U.S. enjoys under the GPA.

Unlike the member states of the EU, which provide comprehensive access to national, provincial and local markets, only 37 of the 50 U.S. states have opened (and only partially opened) their markets under the GPA. The U.S. also excludes federally funded mass transit and highway projects and almost all municipalities from the GPA, and excludes the extensive preferences (including small business preferences) which may cover roughly a quarter of the federal procurement market. The EU, which favors open markets as a matter of principle, affords much broader coverage to sub-central and public utility procurements.

Other reports by GAO and the European Commission have pointed out that the true level of foreign penetration in the U.S. and EU markets is relatively low. This may well be due to de facto local preferences (“home bias”) in public purchasing. This argues for reinforcing, rather than abandoning, market-opening measures under the GPA, if U.S. suppliers hope to broaden their access to foreign markets.

The GAO report did not address specifically the matter of access to Canadian public procurement markets, which has recently emerged as a potentially serious issue were the U.S. to abandon the GPA. Canada added an estimated \$100 billion to its GPA commitments in the course of the renegotiation that culminated in 2012, see Robert D. Anderson, “The Conclusion of the Renegotiation of the WTO Agreement on Government Procurement: What it Means for the Agreement and for the World Economy,” 2012 Pub. Proc. L. Rev. 83—a renegotiation in which the U.S. itself gave up relatively little in the way of new market-opening commitments. This important access to Canadian procurement markets could be forfeited if the U.S. abandoned the GPA, because Canada refused to open its public procurement markets under the new U.S.-Mexico-Canada Agreement (USMCA).

As Jean Heilman Grier, the former lead negotiator on government procurement for the Office of the U.S. Trade Representative, noted with regard to U.S. reliance on the GPA to access Canadian public markets:

When the [USMCA] is implemented, it will terminate the North American Free Trade Agreement (NAFTA), which gives [U.S. suppliers] rights to participate in Canada's federal procurement market. By contrast, the USMCA excluded Canada from its procurement obligations. The administration, however, assured U.S. suppliers that they would continue to have access to Canadian procurement under the GPA.

Jean Heilman Grier, "Consequences of Potential U.S. Withdrawal from GPA," *trade.djaghe.com/?p=6244*. Withdrawal from the GPA thus would deprive U.S. suppliers of hard-won rights to participate in Canadian government procurements, rights that were enjoyed for years under NAFTA and were supposed to survive the transition to the USMCA, based on Canada's separate commitments in the GPA and the assumption that the U.S. would remain in the GPA. See, e.g., Christopher R. Yukins, "The United States in International Procurement: Understanding a Pause in the Trump Administration's Protectionism," 2019 Gov. Contr. Year in Rev. Br. 6 (Feb. 2019), *papers.ssrn.com/sol3/papers.cfm?abstract_id=3439736*.

Another problem with the GAO report at the center of the current debate, as Grier notes, is that the GAO report suggests that "the value of procurement agreements should be determined by the size of covered procurement, as opposed to whether the parties are offering comparable coverage in terms of the entities, goods and services subject to the agreements." Jean Heilman Grier, "GAO Procurement Report: Valid Criticisms, Questionable Comparison," *trade.djaghe.com/?p=3820*. This approach to trade agreements—sometimes called "dollar-for-dollar reciprocity"—ignores the huge size disparities between procurement markets, the practical impossibility of opening markets on a rigidly reciprocal basis, and the collateral diplomatic and economic benefits of a shift to open trade (discussed below).

The 2017 GAO report further overlooked the fact that, currently, among the GPA parties, only the U.S. has in place effective enforcement machinery—under the Trade Agreements Act—to exclude and penalize suppliers from non-GPA parties. In the EU and at least some other GPA parties, in contrast, bids from suppliers that are not strictly entitled to participate often "slip through the cracks." That may change, however, if the U.S. abandons the GPA. The EU has been considering similar enforcement mechanisms for years, see, e.g., European Parliament, "A New EU In-

ternational Procurement Instrument," *www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-international-procurement-instrument-(ipi)*; Jean Heilman Grier, "EU: New Push for Measure to Open Procurement," *trade.djaghe.com/?p=5628*. In the event of an abrupt U.S. withdrawal from the GPA, the EU would be much more likely to put in place enforcement measures to exclude U.S. suppliers from EU procurements. See generally Jean Heilman Grier, "Consequences of Potential U.S. Withdrawal from GPA," *trade.djaghe.com/?p=6244*.

Even more importantly, the GAO report never considered the new business opportunities for U.S. suppliers that will accrue when China, Russia, Brazil and other emerging economies complete their accessions to the GPA. These have been previously (and, in our view, conservatively) estimated by the WTO Secretariat to be valued at perhaps \$500 billion annually. See Robert D. Anderson et al., "Assessing the Value of Future Accessions," *supra*. For example, while details of China's eventual market access commitments are still under negotiation, at a minimum they will include (in addition to very significant central government purchases) procurements by multiple cities larger than 10 million persons and by numerous major state-owned enterprises. See, e.g., Jean Heilman Grier, "China's New GPA Offer: Enhances Accession Prospects" (Nov. 7, 2019), *trade.djaghe.com/?p=6073*; Skye Mathieson, "Note: Accessing China's Public Procurement Market: Which State-Influenced Enterprises Should the WTO's Government Procurement Agreement Cover?," 40 Pub. Cont. L.J. 233 (2010). The opportunities available to U.S. suppliers will, moreover, grow over time if the rapid growth of the Chinese economy continues.

Cutting-edge economic research further illuminates the economic benefits accruing from the GPA. Such research emphasizes that the welfare gains for participating states from the liberalization of public procurement markets go beyond narrow market access considerations and include broader benefits, such as strengthened competition, the availability of new technologies, and better value for money in procurement markets. For a review of this emerging literature, see Zornitsa Kutlina-Dimitrova, "Can We Put a Price on Extending the Scope of the GPA? A First Quantitative Assessment," EU Commission, DG Trade, Chief Economist Note, Issue 1 (Mar. 2017), *trade.ec.europa.eu/doclib/docs/2017/march/tradoc_155456.pdf*.

Another important benefit of the GPA is that, because the GPA requires the parties' consensus to change, it plays a key role in checking policy "backsliding"—the weakening of commitments to open markets and the introduction of new restrictive measures in times of economic crisis and/or political exigency. See Bernard Hoekman, "Reducing Home Bias in Public Procurement: Trade Agreements and Good Governance," 24 *Global Governance* 249 (2018). By constraining sharp swings in protectionism, the GPA reduces risks for governments (and firms) that invest in efficient cross-border supply chains.

The GAO report also did not address how U.S. withdrawal from the GPA would disrupt the lattice-work of global free trade agreements. The government procurement chapters of U.S. regional and bilateral free trade agreements—which provide important market access to U.S. suppliers—are typically modelled directly on the GPA. Abandoning the GPA would encourage a proliferation of different models and approaches, which would create costly uncertainty for suppliers. See, e.g., Robert D. Anderson, Anna Caroline Müller & Philippe Pelletier, "Regional Trade Agreements and Procurement Rules: Facilitators or Hindrances?," in A. Georgopoulos, B. Hoekman & P. Mavroidis (eds.), *The Internationalization of Government Procurement Regulation* 55 (Oxford Univ. Press, 2016), papers.ssrn.com/sol3/papers.cfm?abstract_id=2707219.

Additional Practical Implications for U.S. Contractors if the U.S. Abandons the GPA—Abandoning the GPA could carry additional serious—and potentially costly—implications at home for U.S. contractors, if the U.S. finds itself locked in years of bilateral negotiations to replace the GPA:

- Suppliers in the federal market are likely to shift aggressively towards the commercial "electronic marketplaces" that the General Services Administration plans to open soon, under a pending "pilot" procurement. See Christopher R. Yukins, Feature Comment, "U.S. Government To Award Billions Of Dollars In Contracts To Open Electronic Marketplaces To Government Customers—Though Serious Questions Remain," 61 *GC* ¶ 303. Users will be able to make micro-purchases directly from online marketplaces (Amazon is the leading commercial example). Those micro-purchases would be exempt from the Buy American Act. Because many more federal procurements will

become subject to the Buy American Act if the U.S. withdraws from the GPA, and the Trump Administration is simultaneously increasing price preferences under the Act, see Christopher R. Yukins, Feature Comment, "Trump Executive Order Calls For More Aggressive Use Of The Buy American Act—An Order Likely To Have More Political Than Practical Effect," 61 *GC* ¶ 219, direct user purchases from the coming "electronic marketplaces" may well soar.

- Conversely, more traditional contracting vehicles such as the GSA Multiple Award Schedules, which rely on the Trade Agreements Act exemption for purchases under the GPA, could be thrown into chaos. Thousands of contracts across the Government may need to be reviewed and renegotiated (at a potential cost of billions of dollars) if the cornerstone to many Trade Agreements Act certifications—U.S. membership in the GPA—disappears.
- Withdrawing from the GPA also may cause years of costly reordering in contractors' supply chains. If the U.S. moves to replace the GPA with bilateral trade agreements negotiated with other nations, U.S. suppliers may need to seek out alternative sources of supply in those nations—but during a period of high uncertainty and flux, similar to the current tariff wars in U.S. commercial markets.

These are just some of the obvious potential impacts of dropping out of the GPA. Less predictable indirect effects—such as possible retaliation against U.S. suppliers selling abroad—should also be considered and taken seriously.

The Broader Strategic Context: Would a GPA Withdrawal Undermine the Current Overwhelming U.S. Advantage in Defense Procurement?—Abandoning the GPA also could undermine the reciprocal defense procurement agreements between the U.S. and its allies, in Europe and elsewhere—reciprocal agreements in defense goods and services which open markets around the world, and help support the substantial U.S. trade surplus in defense. Partially in response to Trump Administration initiatives, the EU has already launched the "European Defence Fund," which could shield European defense procurements from U.S. firms, in apparent violation of the standing reciprocal defense procurement agreements. A U.S. move to abandon the GPA could trigger other retaliatory measures in defense,

in Europe and elsewhere, as allies respond in kind to U.S. protectionism—despite the security costs of closing what are, in fact, remarkably open defense markets under these reciprocal agreements. Withdrawing from the GPA thus could pitch the Department of Defense into years of efforts (like those currently underway in response to the European Defence Fund) to reinforce these reciprocal agreements, which open defense markets to facilitate mutual cooperation and interoperability among U.S. allies. See, e.g., Christopher R. Yukins, “How the Trump Administration May Reshape International Procurement Markets—Defense and Electronic Marketplaces,” *Gov. Contr. Year in Rev. Br.* (forthcoming Feb. 2020).

The Importance of U.S. Participation in the GPA for the Rules-based Multilateral Trading System—Ultimately, a U.S. withdrawal from the WTO GPA would carry with it risks for the sustainability of the multilateral trading system as a whole. The system, which is already under significant strain, see, e.g., Jeffrey J. Schott & Euijin Jung, “The WTO’s Existential Crisis: How to Salvage Its Ability to Settle Trade Disputes,” *Peterson Inst. Int’l Econ.* (Dec. 2019), www.piiie.com/sites/default/files/documents/pb19-19.pdf, depends on participating countries accepting the fundamental legitimacy of all of its parts, rather than opting out at will from particular agreements or provisions that are deemed disadvantageous at a particular point in time. Having been put in place with over three-quarters of a century of strong U.S. support, the GPA is an integral part of that system. Given this, while it is impossible to foresee precisely how other WTO members would respond if the U.S. were to abandon its GPA commitments, they could well retaliate in material ways, potentially further disrupting international supply chains and fragmenting the global economy.

In sum, a U.S. withdrawal from the WTO GPA—as is apparently being mulled by at least some elements in the current administration—would entail very significant risks for the U.S., its suppliers and the international trading system. It would, at a minimum,

put at risk the market access opportunities that U.S. businesses currently enjoy under the GPA, arguably valued at over \$1 trillion annually. It would deprive the U.S. of an essential tool to set global standards as procurement markets open internationally, notably in the cases of China, Russia, Brazil and other emerging economies expected to come into the GPA. It would undermine the viability of the GPA as a template for chapters on government procurement in regional and bilateral free trade agreements (something that both Republican and Democratic administrations have found useful) and thus could create further costs and uncertainties for industry. Withdrawing from the GPA could undermine U.S. free trade agreements in defense—an essential part of U.S. national security and strength in world defense markets—and would risk further weakening the already strained WTO system. For all these reasons, it is hoped that the U.S. can avoid the self-inflicted harms, direct and indirect, that withdrawing from the GPA would entail.



This Feature Comment was written for THE GOVERNMENT CONTRACTOR by Robert Anderson and Christopher Yukins. Mr. Anderson (www.robert-anderson.info/) is Honorary Professor at the University of Nottingham (UK), and an independent consultant based in Sarasota, Fla. Until March 2019, Mr. Anderson was Senior Counsellor and Team Leader for Government Procurement in the WTO. Professor Yukins is co-director of the Government Procurement Law Program at the George Washington University Law School, Washington, D.C.; that program marks its 60th year in 2020. On Tuesday, Feb. 18, 2020, 9–11 am, a free colloquium on the possible U.S. withdrawal from the GPA will be held at the George Washington University Law School, Law Learning Center L006, 2028 G Street NW; further info at publicprocurementinternational.com/2020/02/09/colloquium-what-happens-if-the-u-s-leaves-the-wto-government-procurement-agreement/.