
**A HIDDEN STATUTORY BAR TO PRIVATE CAUSES OF
ACTION FOR BREACHES OF THE WTO'S AGREEMENT
ON GOVERNMENT PROCUREMENT**

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"History doesn't repeat itself, but it rhymes."
- Attributed to Mark Twain¹

ABSTRACT

Liberalizing public procurement is free trade's final frontier. The Transatlantic Trade and Investment Partnership (TTIP) is the largest free-trade agreement under negotiation. Talks will not progress without reaching an agreement on public procurement. U.S. law contains a hidden bar to the World Trade Organization's (WTO) Agreement on Government Procurement's (GPA) challenge procedures. This statutory bar could be a deal breaker for TTIP negotiations.

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¹ The Oxford Dictionary of American Quotations 316 (Margaret Miner & Hugh Rawson eds., 2d ed., 2006) (listing several variations of this quotation).

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1. INTRODUCTION

Liberalizing public procurement is free trade's final frontier. With the breakdown of the Doha Round in 2008, bilateral and regional agreements have become the favored means to advance free-trade measures. Perhaps foremost among such agreements is the Transatlantic Trade and Investment Partnership ("TTIP"),² the trade agreement being negotiated between the European Union and the United States, which was unveiled at President Obama's 2013 State of the Union address.

TTIP has enormous potential because of its scale; the EU and America account for nearly half of global GDP. The hope is that TTIP may serve as a catalyst for European and American economies and, in turn, may reignite a world economy still faltering from the global financial crisis of 2007-08.³ Much is at stake.

One component of TTIP is the liberalization of public procurement; in other words, countries opening the market for their governments' purchases of goods and services to foreign competition. Particularly important to the EU is gaining greater access to the United States' sub-central procurement markets. So important is this that negotiations may be stalled if an agreement cannot be reached. Indeed, the failure to extend coverage to sub-central procurement markets could be a deal breaker.

In discussing these points, some may feel a sense of *déjà vu*, as a similar melodrama played out during negotiations over the World Trade Organization's Agreement on Government Procurement ("GPA") in 1993-94. In that instance, talks were acrimonious; a small

² This is sometimes abbreviated with a hyphen ("T-TIP") and sometimes without. Unless quoting a source using the former punctuation, this article will not hyphenate.

³ See, e.g., Ben Leubsdorf, *Hiring Settles into Steady Gains*, WALL ST. J., Aug. 2, 2014, at A1 (noting that, despite signs of recovery, "[m]any scars from the financial crisis remain"); *The Origins of the Financial Crisis: Crash Course*, ECONOMIST, Sept. 7, 2013, at 74 (arguing that, even years later, the "effects of the financial crisis are still being felt"); *Why Not to Expect Recovery Anytime Soon*, ECONOMIST (Sept. 3, 2012), <http://www.economist.com/blogs/freexchange/2012/09/financial-crisis> (explaining why a financial-crisis recession tends to last longer than a business-cycle recession).

trade war ensued, and utter failure was only narrowly avoided. Similar issues were again in play during the discussions for the Revised GPA. It is remarkable how similar the issues are today, in this third attempt, are to the negotiations that were conducted ten and twenty years ago. Then, as now, the EU demanded greater access to the United States' sub-central markets. Then, as now, many state, local, and municipal governments resisted granting such access to European suppliers. "It's déjà vu all over again."⁴

In 1993, the EU and the United States fought obstinately for concessions to secure the necessary domestic support for an agreement on government procurement. Tense battles were fought over inches. Ultimately, they reached an agreement giving both sides cause to celebrate. Yet, perhaps unknowingly, Europe got less than it bargained for.

The GPA established minimum standards, and signatories were supposed to enact legislation implementing these standards. Among the minimum standards was the requirement that members were to provide a forum in which firms could challenge breaches of the GPA.⁵ This article presents a little-known fact: Congress never passed a law implementing private enforcement. It did just the opposite. Congress flouted the GPA, barring firms from seeking redress under the GPA at federal or sub-federal levels. Under the Uruguay Round Agreements Act ("URAA"), only the U.S. federal government may do so.⁶ Congress thereby created an insuperable bar to such challenges.⁷

⁴ THE YALE BOOK OF QUOTATIONS 58 (Fred R. Shapiro ed., 2006) (attributing this quotation to Lawrence Peter "Yogi" Berra).

⁵ See *infra* note 16, GPA, Art. XX.2, (requiring that members "provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the [GPA] arising in the context of procurements in which they have, or have had, an interest").

⁶ See 19 U.S.C. § 3512(c)(1) (limiting enforcement powers to "[n]o person other than the United States"); see also *infra* text accompanying notes 237-250 (detailing how the URAA bars private causes of action under the GPA).

⁷ This was little known, but was not unknown. See, e.g., Matt Schaefer, *Are Private Remedies in Domestic Courts Essential for International Trade Agreements to Perform Constitutional Functions with Respect to Sub-Federal Governments?*, 17 Nw. J. INT'L L. & BUS. 609, 639 (1997) (explaining that the URAA follows NAFTA's implementing legislation approach and "prohibits private causes of action"); Charles Tiefer, *The GATT Agreement on Government Procurement in Theory and Practice*, 26 U. BALT. L. REV. 31, 44-46 (1997) (noting and explaining the statutory bar on private causes of action under the URAA barely one year after its passage);

Fragile political support for TTIP within the EU makes genuinely reciprocal access to U.S. procurement markets crucial. The fact that the United States does not provide a forum in which to directly challenge GPA violations will not gratify the EU constituents – who will no doubt maintain that meaningful access to U.S. procurement markets requires private recourse to such forums.

This issue may seem inconsequential. Yet it has the potential to derail TTIP negotiations because access to procurement markets – more precisely *meaningful* access – entails the right to a private cause of action and remedies to enforce those rights. Rising awareness that the United States chose not to provide for these rights in its implementation of the WTO GPA could affect current TTIP negotiations. What for now may seem merely theoretical could soon be at the front and center of TTIP negotiations.

This article will proceed as follows: Section II describes free-trade initiatives since the Cold War, the breakdown of the Doha Round, the growth of regional and bilateral agreements, and the “revolution” in public procurement; Section III explains the history leading up to the GPA’s creation, the membership and accession process, and – most importantly to this article – the enforcement mechanisms. It concludes with a synopsis of the Revised GPA. Section IV describes the statutory bar to private litigation, explains how this may affect TTIP negotiations, and suggests that the United States should consider eliminating this bar.

2. BACKGROUND

This section provides the context necessary to grasp the interactions among the GPA, TTIP, and trade negotiations between the United States and the European Union. Subsection A gives an overview of multilateral free-trade negotiations over the past two decades. Subsection B describes the transition from multilateral to bilateral and regional trade agreements after the failure of the Doha Round negotiations. Subsection C introduces TTIP. Subsection D

Christopher Yukins, *Barriers to International Trade in Procurement after the Economic Crisis—Part II : Opening International Procurement Markets: Unfinished Business*, in GOVERNMENT CONTRACTS YEAR IN REVIEW CONFERENCE COVERING 2010 BRIEFS 4 (2011) (noting that Government Accountability Office precedent has not “squarely addressed” the question about whether it can enforce the GPA).

summarizes the efforts to liberalize government procurement markets and the significance of these efforts. This sets the stage for Section III, which covers multilateral agreements' recent success with liberalizing public procurement.

2.1. Free-Trade Efforts Since the Cold War

Modern free-trade agreements commenced with the General Agreement on Tariffs and Trade ("GATT") negotiations in 1947.⁸ Concerns about the trade wars that, in turn, caused the "collapse of international trade in the 1930s" and, many held, ultimately the outbreak of World War II, "led some world leaders to conclude that new international economic institutions were essential."⁹ Recognizing the significance of government purchases, the United States proposed including government procurement in the broader liberalization agenda.¹⁰ Yet given the political sensitivities, that was not to be. Government procurement was excluded from the GATT treaty.¹¹

⁸ See generally General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 188.

⁹ JOHN H. JACKSON, *THE JURISPRUDENCE OF THE GATT & THE WTO* 21 (2000) [hereinafter JACKSON]; see also ALLEN B. GREEN, *INTERNATIONAL GOVERNMENT CONTRACT LAW* 86-87 (2011) (explaining that "a global economic view tending towards free in developed countries took hold as the world sought to recover from the destruction [of World War II] and to prevent future occurrences of such calamity").

¹⁰ See Gabrielle Marceau & Annet Blank, *History of the Government Procurement Negotiations Since 1945*, 4 *PUB. PROCUREMENT L. REV.* 77, 77 (1996) (recounting the United States' initial proposal that procurement "be treated as any other measure[] relating to trade in goods and be subject to the general non-discrimination obligations of [n]ational [t]reatment").

¹¹ Sue Arrowsmith, *Reviewing the GPA: The Role and Development of the Plurilateral Agreement after Doha*, 5 *J. INT'L ECON. L.* 761, 762 (2002) [hereinafter Arrowsmith (2002)] (explaining that due to "its sensitive nature, government procurement was largely excluded from the non-discrimination obligations of GATT 1947"); Jean H. Grier, *Recent Developments in International Trade Agreements Covering Government Procurement*, 35 *PUB. CONT. L.J.* 385, 387 (2006) (noting that "government procurement was expressly excluded from the national treatment obligation"); Alan Kashdan, *Government Procurement*, in *THE WORLD TRADE ORGANIZATION: MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION* 555 (Terence P. Stewart ed., 1996) (explaining that far from upholding national treatment, "the right of countries to discriminate against non-domestic suppliers in their public procurements was even explicitly enshrined" in the GATT) (emphasis added)).

Successive negotiations continued with the Tokyo Round (1973-79)¹² and Uruguay Round (1986-94).¹³ In 1995, GATT was transformed into the World Trade Organization (“WTO”),¹⁴ whose purpose was to “raise global living standards by eliminating barriers to international trade.”¹⁵ The Uruguay Round included a parallel discussion that led to the creation of the Agreement on Government Procurement¹⁶ (“GPA”).¹⁷

The GPA is perhaps the most important manifestation of the “global revolution” in government procurement.¹⁸ Sue Arrowsmith lists several factors giving rise to this revolution,¹⁹ and suggests that its most “significant feature” is “the liberalisation of international procurement markets.”²⁰ She attributes this liberalization to a

¹² JACKSON, *supra* note 9, at 52 (recounting that the Tokyo Round made “extraordinary” progress because “for the first time important attention was given to nontariff barriers as well as to tariffs.”).

¹³ *Id.* at 399-413 (describing the creation of the WTO during the Uruguay Round).

¹⁴ *Id.* at 400.

¹⁵ SUE ARROWSMITH, GOVERNMENT PROCUREMENT IN THE WTO 25, n.3 (2003) [hereinafter ARROWSMITH (2003)] (citing the preamble to the treaty creating the WTO).

¹⁶ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement], Annex 4(b), Agreement on Government Procurement, available at https://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf [hereinafter GPA].

¹⁷ The literature on this subject sometimes refers to the Agreement on Government Procurement as the AGP and at other times as the GPA. This article uses the latter abbreviation for 1994 agreement. Further, an eponymous agreement under the Tokyo Round of the GATT is abbreviated as AGP. To avoid confusion, this Article will refer to the Uruguay Round procurement agreement as the GPA and the Tokyo Round procurement agreement as the AGP, *infra* note 71.

¹⁸ SUSAN L. ARROWSMITH, JOHN LINARELLI & DON WALLACE, JR., REGULATING PUBLIC PROCUREMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES 15 (2000) [hereinafter ARROWSMITH, ET AL.] (quoting Don Wallace, Jr., *The Changing World of National Procurement Systems: Global Reformation*, 4 Pub. Procurement L. Rev. 57 (1995)).

¹⁹ *Id.* at 15-17 (listing among these: the fall of communism, the emergence of market economies, the role of development banks, and the use of model procurement codes); see also Christopher Yukins & Steven L. Schooner, *Incrementalism: Eroding the Impediments to a Global Public Procurement Market*, 38 GEO. J. OF INT'L L. 529, 529-30 (2007) [hereinafter Yukins & Schooner] (observing that “[a]fter centuries of isolationism, the world’s public procurement markets are emerging as a progressively integrated, open market.”).

²⁰ ARROWSMITH, ET AL., *supra* note 18, at 17.

growing awareness "that overall economic welfare as well as the welfare of individual states is, in general, maximized by the operation of free international competition in their economies, rather than by each state protecting its own domestic industry."²¹ She also advocates the continued application of free trade to government procurement:

This free competition should ideally extend to government procurement as well as to private markets. This entails that governments should not discriminate in their procurement in favour of domestic industry, but should purchase from the source offering the best value, regardless of the nationality of the contractor or the origin of the goods or services. To promote international competition in public procurement, various arrangements have been concluded under which states promise to open up their procurement markets to other signatories.²²

The GPA is no mere corollary to free-trade initiatives. Initially, negotiations focused on the "most obvious barriers, notably import duties (tariff barriers) and quotas."²³ More recently, however, "attention has increasingly turned towards more subtle barriers," as the success of free-trade agreements has driven trade barriers into the shadows and led nations to employ "less obvious methods."²⁴ One non-tariff barrier is "[d]iscrimination in public procurement,"²⁵ and efforts to eliminate such barriers "may be the most important development[s] in procurement today,"²⁶ and vice versa: liberalization of public procurement is among the most important initiatives of free trade.

²¹ *Id.* at 157. Arrowsmith later contrasts governments in the past that "have tended to.... support domestic industry in general or to promote strategic economic objectives such as regional development" with "modern policy makers [who] have come increasingly to accept liberal trade theories which eschew protectionism and dictate that overall welfare will increase if there is free competition in international trade."

²² *Id.* at 17.

²³ *Id.* at 157.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Yukins & Schooner, *supra* note 19, at 530.

2.2 Post-Doha: The Flowering of Regional Trade Agreements

In 2001, the Doha Round of the WTO negotiations ensued. Like the negotiations that preceded it, the Doha Round's goal was to eliminate trade barriers and facilitate trade.²⁷ Negotiations faltered in 2003²⁸ and stalled entirely in 2008 when an agreement could not be reached on tariffs, other barriers, and remedies.²⁹ The divide was between industrialized nations and developing nations.³⁰ All hope is not lost,³¹ but many now favor other less contentious venues to promote free trade.³²

Working alongside the WTO are regional and bilateral trade agreements that liberalize trade on a piecemeal basis.³³ By their nature, these are "limited in scope and cannot create a truly

²⁷ See generally Doha Work Programme: Decision Adopted by the General Council on August 1, 2004, WT/L/579.

²⁸ See, e.g., Cancun Collapse, Wash. Post, Sep. 16, 2003, at A18 (recounting the 2003 dispute over reducing subsidies in rich countries and protecting foreign investments in poor countries).

²⁹ See, e.g., The Doha Round . . . and Round . . . and Round, ECONOMIST, Jul. 31, 2008 (attributing the breakdown of talks in Geneva to a stalemate over agricultural subsidies in the rich world).

³⁰ See, e.g., John W. Miller, Global Trade Talks Fail as New Giants Flex Muscle, Wall St. J., Jul. 30, 2008, at A1 (discussing the negotiations breakdown between the EU and U.S. and "rising titans such as China and India").

³¹ There was a glimmer of hope with the signing of the Bali declaration on December 7, 2013. See *Bali Ministerial Declaration*, WT/MIN(13)/DEC, WORLD TRADE ORGANIZATION (11 Dec., 2013) available at http://www.wto.org/english/thewto_e/minist_e/mc9_e/balipackage_e.htm (simplifying customs procedures); *Life After Doha*, ECONOMIST, Dec. 14, 2013 (writing that "reports, including some by this newspaper, of the death of Doha have proved to be greatly exaggerated."); See also *Dead Man Talking*, ECONOMIST, Apr. 30, 2011, at 81 (describing rich countries' renewed interest in the developing world, which were forecasted to account for "75% of the addition to world GDP between 2011 and 2014," as grounds for "salvaging" the Doha Round talks).

³² See, e.g., *In My Backyard*, ECONOMIST, Oct. 12, 2013 (writing that over the past decade, regional trade "increasingly looked like an alternative, not a complement, to multilateralism"); *Partners and Rivals*, ECONOMIST, Sept. 22, 2012, at 52 (discussing several pending trade agreements in Asia).

³³ See Yukins & Schooner, *supra* note 19, at 563 n.113 (cataloguing the literature on several of the regional and bilateral free trade agreements).

international open procurement market.”³⁴ However, for many, since the Doha Round, these agreements have become the “tool of choice” for removing trade barriers.³⁵

In addition to bilateral trade deals negotiated while the Doha Round was still faltering,³⁶ the United States has entered into several bilateral agreements since the Doha Round fell apart,³⁷ and has two major trade deals currently under negotiation.³⁸ The United States

³⁴ *Id.* at 563.

³⁵ Allen B. Green & Marques O. Peterson, *Converging Procurement Systems—Part II: International Trade and Public Procurement 2013 Update*, in WEST GOVERNMENT CONTRACTS YEAR IN REVIEW: CONFERENCE BRIEFS 1-11 (2014) (listing new agreements between Switzerland and China and the EU and Singapore, and negotiations between China and Australia and the EU and Japan); *see also Some Progress on Bilateral Trade Deals as Doha Remains Stalled*, ECONOMIST INTELLIGENCE UNIT (Aug. 1, 2012), <https://gfs.eiu.com/Article.aspx?articleType=wt&articleId=809043065&secId=2> (reporting that “in the absence of progress on the multilateral Doha round of trade negotiations, countries have turned to smaller and more focused deals”); *In the Absence of a Global Accord Countries Are Striking Bilateral Deals*, ECONOMIST INTELLIGENCE UNIT (Dec. 12, 2012), <https://gfs.eiu.com/Article.aspx?articleType=wt&articleId=1419935926&secId=3> (describing the United States’ efforts “to further bilateral trade agreements with [countries in] Asia and Latin America”).

³⁶ *See, e.g., Grappling with Globalisation*, ECONOMIST, Oct. 9, 2004, at S14-S15 (reporting that the U.S. entered into free trade agreements with 12 countries during President George W. Bush’s first term, including: Australia, Morocco, Bahrain, Chile, Singapore, and Jordan).

³⁷ Completed agreements include Panama, Colombia, and South Korea. *See* Randal Archibald, *Bursts of Economic Growth in Panama Have Yet to Banish Old Ghosts*, N.Y. TIMES, Dec. 14, 2011, at A18 (discussing Panama’s changing political and financial climate prior to the US-Panama free-trade agreement); *Carnation Revolution, Colombia’s Free Trade Deal*, ECONOMIST, May 19, 2012 (analyzing the impact of the US-Colombia free-trade agreement on Colombia’s domestic industries); William McGurn, *Presidential Seoul-Searching*, WALL ST. J., Sept. 20, 2011, at A13 (contrasting President Obama’s conflicting international and domestic priorities in the US-Korea free-trade agreement). There is also work afoot to revitalize existing free-trade agreements. *E.g., Ready to Take Off Again?*, ECONOMIST, Jan 4, 2014, at 23 ((describing President Obama’s trip to Mexico in May 2013, when he touted that the U.S. exports more to NAFTA than to the BRIC countries combined (i.e., Brazil, Russia, India, and China); and the potential for reform)).

³⁸ In addition to the Transatlantic Trade and Investment Partnership (TTIP) trade deal that is under negotiation with the EU, which is discussed in detail below, the U.S. is actively engaged in the Trans-Pacific Partnership (“TPP”) with 11 countries: Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and Japan, with the possibility of Korea and China also subsequently joining this free-trade zone. *See Korea, China Likely to Join US-led Trans-Pacific Trade Pact*, BUSINESS KOREA (Dec. 2, 2013), <http://www.businesskorea.co.kr/news/politics/2316-tpp-vs-rcep-korea-china-likely-join-us-led-trans->

is not alone.³⁹ Bilateral and regional agreements have proliferated to such a degree that some economists fret that they are distorting trade flows.⁴⁰

2.3. *The Transatlantic Trade and Investment Partnership*

Perhaps foremost among the regional free trade agreements under negotiation is TTIP⁴¹ between the EU and the United States. It is significant, not least because of its scale. The EU and the United States “have the largest economic relationship in the world” and a “[c]ombined [GDP of] ... over \$15 trillion... equating to half of the

pacific-trade-pact (characterizing Korea’s decision as a shift “from a cautious attitude to willingness to join it”).

³⁹ In 2013 alone, several trade agreements were finalized or negotiated. The EU entered a free-trade agreement with Singapore and continued talks with Japan. See European Commission Press Release Database, *The EU-Singapore Free Trade Agreement* (Sept. 20, 2013), http://europa.eu/rapid/press-release_MEMO-13-805_en.htm (reporting that the EU and Singapore have offered terms in line with or beyond those available to “comparable trading partners”); European Union Press Release Database, *The Free Trade Agreement between the EU and Japan* (June 17, 2013), http://europa.eu/rapid/press-release_MEMO-13-572_en.htm (predicting EU-Japan exports to rise by 32.7%, and Japan-EU exports to rise by 23.5%). China and Switzerland also finalized an agreement. See REUTERS, *China, Switzerland Sign Free Trade Agreement* (July 6, 2013), <http://www.reuters.com/article/2013/07/06/us-china-trade-idUSBRE96503E20130706> (reporting “a comprehensive and mutually beneficial pact that should contribute to increased trade between the two economies”). China and Australia’s negotiations are ongoing. See *Who Resurrected the China-Australia Free Trade Agreement?*, THE DIPLOMAT (Nov. 20, 2013), <http://thediplomat.com/2013/11/who-resurrected-the-china-australia-free-trade-agreement/> (describing a string of comments by both Chinese and Australian officials about re-opening negotiations between nations). South Korea alone has entered into nine trade agreements in the past decade. See *Corporate Armistice*, ECONOMIST, Oct. 26, 2013 (outlining trade agreements in light of Korea’s history of domestic growth through monopolistic conglomerates called “chaebols”).

⁴⁰ See, e.g., *Least Favoured Nation*, ECONOMIST, Aug. 3, 2006 (describing the perils of each of the WTO’s 149 members entering into bilateral trade deals with one another for a total 11,026 bilateral deals) (citing Richard Baldwin, *Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade*, (Nat’l Bureau of Econ. Research, Working Paper No. 12545, 2006)).

⁴¹ This is sometimes abbreviated as T-TIP, sometimes as TTIP. This article will use the latter abbreviation except when quoting from sources using the former.

world's output."⁴² With imports of \$458 billion in 2012, the EU is the United States' largest export market.⁴³

Size matters. Though tariffs between the United States and EU are already relatively low,⁴⁴ TTIP still promises large returns "given the magnitude of the transatlantic relationship."⁴⁵ Even a free-trade agreement limited to just tariffs, which are 3.5% in the United States and 5.3% in the EU,⁴⁶ could amount to "[d]ynamic welfare gains" of \$168 billion per year.⁴⁷ With trade flows this large, even minor gains have the potential to yield tremendous benefits.⁴⁸ It is no wonder that TTIP is "welcomed by the business communities on both sides of the Atlantic."⁴⁹

⁴² Green & Peterson, *supra* note 35, at 1-12 (citing Business Coalition for Transatlantic Trade, *Economic Benefits of a Transatlantic Trade and Investment Partnership*, <http://www.transatlantictrade.org/faqs/economic-benefits-of-a-transatlantic-trade-and-investment-partnership/> (last visited Sept. 3, 2015)); see also Anne Gearan, *Kerry Urges Quick Action on U.S.-European Free-Trade Deal*, WASH. POST, Mar. 28, 2013, at A9 (reporting that if TTIP is successful, EU-U.S. exchanges would grow to 40% of total world trade).

⁴³ White House, *Fact Sheet: Transatlantic Trade and Investment Partnership (TTIP)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Jun. 17, 2013), <http://www.ustr.gov/about-us/press-office/fact-sheets/2013/june/wh-ttip> (touting \$3.7 trillion in reciprocal investments and 13 million jobs).

⁴⁴ *Charlemagne: Ships That Pass in the Night*, ECONOMIST, Dec. 13, 2014, at 57 (explaining that "TTIP focuses on regulatory and other non-tariff barriers, because levies on most products traded across the Atlantic are already close to zero (exceptions include running shoes and fancy chocolate.)").

⁴⁵ Shayerah Ilias Akhtar, Cong. Research Serv., R43158, *Proposed Transatlantic Trade and Investment Partnership (TTIP): In Brief Summary* (2013).

⁴⁶ *Id.* at 6.

⁴⁷ *Id.* (estimating direct U.S. and EU welfare gains at \$7.5 billion, as well as a range of "[d]ynamic welfare gains" from \$117 to \$168 billion) (citing FREDRIK ERIXON AND MATTHIAS BAUER, *A TRANSATLANTIC ZERO AGREEMENT: ESTIMATING THE GAINS FROM TRANSATLANTIC FREE TRADE IN GOODS*, European Center for International Political Economy, ECIPE Occasional Paper No. 4/2010 (2010)).

⁴⁸ Business Coalition, *supra* note 42 (estimating that if TTIP is implemented, exports would be "\$150 billion higher, our economies some \$250 billion bigger, and we would generate an additional 500,000 high-paying jobs"); ECONOMIST, *supra* note 44, at 57 (noting that "potential benefits are hard to estimate, but one reasonable guess is that an 'ambitious' TTIP could raise America's GDP by 0.4% and the EU's by slightly more.").

⁴⁹ Lucas Bergkam & Lawrence Kogan, *Trade, the Precautionary Principle, and Post-Modern Regulatory Process*, 4 EUR. J. RISK REG. 493, 493 (2013) (citations omitted).

Further, while EU-U.S. tariffs are low in absolute terms, the United States is one of the few countries subjected to the EU's highest tariffs.⁵⁰ So not only is TTIP mutually beneficial, the United States also stands to benefit disproportionately from eliminating the outsized tariffs that the EU imposes. Indeed, when President Obama announced TTIP negotiations at his 2013 State of the Union address, he touted it would "support millions of good-paying American jobs."⁵¹

Yet eliminating non-tariff barriers is far more important than a marginal decrease in tariffs.⁵² As one study reports, "[b]ecause transatlantic tariff barriers are generally quite low and EU and US companies are deeply interlinked and invest heavily in each other's countries," the various forms of non-tariff barriers "are far more important impediments to greater transatlantic trade and investment flows than tariffs."⁵³ Here lies the greatest potential furthering free trade.

⁵⁰ See Hans H. Stein, *The Transatlantic Trade and Investment Partnership: Transatlantic Relations Reloaded*, FREIHEIT (Jun. 2, 2013), <http://www.en.freiheit.org/The-Transatlantic-Trade-and-Investment-Partnership-Transatlantic-Relations-Reloaded/1322c27170i1p/index.html> (which notes that although between the US and EU, the "[t]ariff barriers are at an average of 3-5% . . . which is low[,] for certain types of goods there are extremely high "tariff peaks[;]" such as 20% for agricultural related products).

⁵¹ John R. Crook, *Contemporary Practice of the United States Relating to International Law* 107 AM. J. INT'L L. 650, 692 (2013) ((citing Press Release, White House, Remarks by the President in the State of the Union Address (Feb. 12, 2013), <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>)).

⁵² A recent study prepared for the European Commission suggested that eliminating non-tariff barriers is probably more important to transatlantic trade negotiations than reducing tariffs. See JOSEPH FRANCOIS, ET AL., REDUCING TRANSATLANTIC BARRIERS TO TRADE AND INVESTMENT 95 (2013), available at http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf ("[The] core message . . . is that a focus on [non-tariff barriers] is critical to the logic of transatlantic liberalization").

⁵³ KOEN G. BERDEN, ET AL., NON-TARIFF MEASURES IN EU-US TRADE AND INVESTMENT - AN ECONOMIC ANALYSIS xvii (2009), available at http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145613.pdf (presenting a study prepared by ECORYS on behalf of the European Commission).

Among the market sectors with the highest barriers to trade is government procurement.⁵⁴ Such barriers are familiar to students of U.S. procurement practices.⁵⁵ The EU complains that these barriers result in access to only 32% of U.S. procurement markets.⁵⁶ Hence, there are “large potential benefits” from reducing these non-tariff barriers.⁵⁷

2.4. Liberalizing Procurement: Free Trade's Final Frontier

Much of the easy work in liberalization has already been done.⁵⁸ Public procurement is among the most important of the remaining obstacles. Since there is “little [if any] political incentive for any one government to liberalize its procurement rules unilaterally,”⁵⁹ trade agreements such as the GPA and TTIP play an important role. Case in point, the United States has been unwilling to liberalize its state and local procurement markets, but it may be pressured into doing so via TTIP. Access to these markets will be pivotal to negotiations due to their size, their historic barriers, and the EU's manifest interest in those markets.

⁵⁴ *Id.* at xxxiv (reporting that non-tariff trade barriers are “relatively high” in the area of government procurement); *Id.* at 183–88 (describing the public procurement markets as “saddled with” non-tariff trade barriers, which affects the construction sector most but also affects the information technology, financial, aerospace, steel metal, transport, chemical, machinery, automotive, wood, and pharmaceutical sectors).

⁵⁵ *Id.* at xxxiv (“Among the most important restrictions to government procurement in the US are the Berry Amendment, the Buy American Act, the Buy America Act, procurement restrictions on military purchases and discrimination against foreign companies, which together create relatively high [non-tariff barriers] in this area.”).

⁵⁶ Stein, *supra* note 50.

⁵⁷ Berden, *supra* note 53, at 188.

⁵⁸ ARROWSMITH ET AL., *supra* notes 23–25 at 157; Yukins & Schooner, *supra* note -26 at 530.

⁵⁹ Kashdan, *supra* note 11, at 555. *But see* Arie Reich, *The New GATT Agreement On Government Procurement: The Pitfalls of Plurilateralism and Strict Reciprocity*, 31 J. OF WORLD TRADE 125, 138 (1997) [hereinafter Reich (1997)] (noting that economists have long argued that “reciprocity has no intrinsic economic rationale, since trade liberalization ought to be carried out even on a unilateral basis”) (citing PETER KENAN, *THE INTERNATIONAL ECONOMY* Section 2.2 (1985)).

Public procurement is big in absolute terms. Thus, it will matter to TTIP negotiations simply because of its size. Procurement dollars account for an estimated 7-9% of global GDP, 14% if utilities are included,⁶⁰ or \$7 trillion when put into monetary terms.⁶¹ The U.S. federal government alone spends about \$1 trillion in goods and services each year,⁶² and U.S. state and local governments spend another \$2 trillion,⁶³ for a total about \$3 trillion.⁶⁴ Thus, absolute size may account for why the EU has so persistently sought access to the United States' sub-central procurement markets.⁶⁵

Public procurement is also big in relative terms. This is because it has historically "been one of the most protected areas in international trade."⁶⁶ Relative to the private sector, which has long been subject to market forces, public markets are stagnant and

⁶⁰ See ARROWSMITH (2003), *supra* note 15, at 2-4.

⁶¹ SCOTT MILLER & DANIEL F. RUNDE, A NEW DEVELOPMENT AGENDA: TRADE, INVESTMENT, AND PROCUREMENT 21 (2014) (citing Colin Cram, *\$3.5tn Global Spend on Local Procurement 'Woefully' Mismanaged*, THE GUARDIAN (Oct. 22, 2012), available at <http://www.theguardian.com/local-government-network/2012/oct/22/colin-cram-local-government-global-procurement>); cf. Yukins & Schooner, *supra* note 19, at 533 (reporting that the figure was \$5.5 trillion in 1998) (citing *The Size of Government Procurement Markets*, 1 ORG. FOR ECON. COOPERATION AND DEV. J. ON BUDGETING, 25, 34 (2002), available at <http://www.oecd.org/dataoecd/34/14/1845927.pdf>).

⁶² Michael Keating, *The Keating Report: 2014 Forecast on Government Budgets and Spending - Part 2*, GOV'T PRODUCT NEWS (Jan. 28, 2014), <http://www.americacityandcounty.com/gpn> (citing ISH Global Insight) [hereinafter *Keating Report*] (predicting federal spending would rise to \$1.27 trillion in 2014, up from \$1.25 trillion in 2013); cf. Yukins & Schooner, *supra* note 19, at 533 (estimating the figure for 2007 to be \$400 billion).

⁶³ DANIELLE M. CONWAY, STATE AND LOCAL PROCUREMENT xiii (2012); see also *Keating Report*, *supra* note 62, at 4 (estimating state and local governments will spend \$1.92 trillion in 2014).

⁶⁴ Estimates of the combined federal, state, and local total vary. *E.g.*, compare *Keating Report*, *supra* note 62, at 4 (estimating \$3.19 trillion in 2014, up from \$3.13 trillion in 2013) with Raj Sharma, *Letter to the Editor: What About Fairness for Taxpayers?*, WALL ST. J., Oct. 25, 2013, at A14 (estimating \$1.9 trillion, apparently by citing figures compiled by the author's company, the Censeo Group).

⁶⁵ Yet this explanation only goes so far as the EU stands to gain more from eliminating high tariffs on vehicles or farming than from public procurement, but it still resists making these cuts. See Yukins, *supra* note 7, at 2.

⁶⁶ Christian Schede, *The "Trondheim Provision" in the WTO Agreement on Government Procurement*, 5 Pub. Proc. L. REV. 161, 161 (1996); see also Kashdan, *supra* note 11, at 555 (noting that governments are "adept at fashioning successful barriers to foreign participation in domestic government procurement opportunities," and mentioning the Buy American Act as an example).

uncompetitive – perhaps especially at the sub-central level where the EU has expressed particular interest.⁶⁷ It may be that Europeans have insisted on access to these markets because they anticipate greater potential for exports at the sub-central government level than anywhere else in the U.S. economy.

Whatever the EU's motive for taking an interest in sub-central procurement markets, clearly this will be an important issue for TTIP negotiations; in fact, the Europeans have said as much.⁶⁸ Their negotiators have repeatedly expressed interest in greater access to sub-central or sub-federal markets – that is, what Americans more often call state and local governments.⁶⁹ And the U.S. government has taken notice.⁷⁰

For market access to be meaningful, it must include more than just the right to transact in that market. It must also include at least

⁶⁷ See *EU-US Transatlantic Trade and Investment Partnership, Public Procurement: Initial EU Position Paper* (Jul. 12, 2013), available at http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151623.pdf (describing the EU's goal to expand sub-central coverage); *Note for the Attention of the Trade Policy Committee re: Transatlantic Trade and Investment Partnership (TTIP)* (2012), available at <http://www.iatp.org/files/TPC-TTIP-non-Papers-for-1st-Round-Negotiations-June20-2013.pdf> (advocating that discussions consider “all sub-central government entities, including those operating at the local, regional or municipal level”); *EU Aims For New Coverage, ‘GPA-Plus’ Disciplines In TTIP Chapter*, 31 *INSIDE U.S. TRADE* 1 (Jul. 12, 2013) (describing the EU's “expansive goals” regarding its “longstanding demand[s]” for increasing the United States' central and sub-central coverage); Karel De Gucht, *Team Europe: What We Need for a Successful TTIP* (Sept. 23, 2013), available at http://europa.eu/rapid/press-release_SPEECH-13-734_en.htm (naming procurement among TTIP's top four priorities); see also *Final Report: High Level Working Group on Jobs and Growth* 3 (Feb. 11, 2013), available at http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf (describing a joint EU-U.S. team's recommendation for “substantially improved access to government procurement opportunities at all levels of government”).

⁶⁸ See also *Under Pressure To Show TTIP Progress, U.S., EU Focus on Market Access*, 32 *INSIDE U.S. TRADE* (Apr. 18, 2014) (reporting that TTIP negotiations will focus first on market access including government procurement, services, and investment areas); *Structure of Market Access Talks Is Latest Sore Spot in TTIP Negotiations*, 32 *INSIDE U.S. TRADE* (Apr. 25, 2014) (describing a dispute over terms of the process and that the EU is insisting that negotiations include public procurement access along with other subjects).

⁶⁹ See *Structure of Market Access Talks Is Latest Sore Spot in TTIP Negotiations*, 32 *INSIDE U.S. TRADE* (Apr. 25, 2014).

⁷⁰ Shayerah Ilias Akhtar, CONG. RESEARCH SERV., R43387, *TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP) NEGOTIATIONS* 25–26 (2014) (reporting that the EU wants greater access to sub-central procurement markets and that this will likely be an issue in TTIP negotiations).

the basic protections afforded by the GPA. Among these is a right to challenge breaches of the GPA. That was part of the compact. The importance to TTIP negotiations of the U.S.'s disregard for this obligation is further explored in Section IV. It could be pivotal.

3. THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT

Before coming to the GPA, it is important to understand what preceded it, and how the GPA was designed to address the shortcomings of its predecessor's system. Subsection A begins with the GATT Agreement on Government Procurement (AGP)⁷¹ first negotiated in 1979⁷² and then amended in 1987.⁷³ With that context, Subsection B introduces the GPA and Subsection C its enforcement tools. Finally, Subsection D details the EU-U.S. coverage debate, starting with the original GPA and continuing with the Revised GPA, thereby setting up the argument in Section IV that the coverage debate will be front and center at TTIP negotiations.

3.1. *The GATT AGP*

The GPA's predecessor was the AGP (also called the GATT Code or Tokyo Round Code).⁷⁴ While the AGP was in some respects a

⁷¹ For easy reference, this article refers to the Tokyo Round Agreement on Government Procurement as the "AGP" or just the "AGP," while the eponymous Uruguay Round agreement will be called the "WTO GPA" or just "GPA". There are some variations, but this seems to be the consensus in the secondary literature.

⁷² GATT AGREEMENT ON GOVERNMENT PROCUREMENT (1979), available at http://www.wto.org/english/docs_e/legal_e/tokyo_gpr_e.pdf [hereinafter AGP].

⁷³ GATT AGREEMENT ON GOVERNMENT PROCUREMENT (AMENDED) (1988), available at http://www.wto.org/english/tratop_e/gproc_e/gpa_rev_text_1988_e.pdf [hereinafter AGP (1988)].

⁷⁴ See ARROWSMITH (2003), *supra* note 15, at 34-37 (describing the Tokyo Round's attempt to deal with non-tariff barriers to trade); Kashdan, *supra* note 11, at 556-62 (providing an overview of the Tokyo Round and characterizing it as "the first step towards a more open regime for international government procurement");

“considerable achievement,”⁷⁵ it also suffered from several defects: 1) its members were few,⁷⁶ 2) its entity and coverage were limited,⁷⁷ and 3) its enforcement was inadequate. Enforcement issues under the AGP are discussed in this section, while Subsection B reviews how the GPA later addressed these problems.

Feeble enforcement is often the “Achilles heel” of trade agreements, and proved the AGP’s undoing.⁷⁸ The AGP’s enforcement measures were “relatively weak,” consisting mainly of government-to-government negotiations.⁷⁹ Further, the AGP “followed the GATT tradition of excluding private parties from all dispute resolution procedures.”⁸⁰

Grier, *supra* note 11, at 387 (calling the GATT Code the first step in allowing U.S. suppliers to fairly compete for government contracts).

⁷⁵ See Andrew Halford, *An Overview of E.C.-United States Trade Relations in the Area of Public Procurement*, 1 PUB. PROC. L. REV. 35, 36 (1995) (stating that the AGP was a “considerable achievement” and that it “made some inroads into establishing a global system of procurement regulation”); PETER TREPTE, *REGULATING PROCUREMENT: UNDERSTANDING THE ENDS AND MEANS OF PUBLIC PROCUREMENT REGULATION 372-73* (2004) [hereinafter TREPTE (2004)] (explaining that the original 1979 AGP’s “two broad elements of entity coverage by entity list and the introduction of detailed procedural requirements were maintained and formed the basis of the [GPA].”).

⁷⁶ See Bernard M. Hoekman & Petros C. Mavroidis, *The WTO’s Agreement on Government Procurement: Expanding Disciplines, Declining Membership?*, 2 PUB. PROCUREMENT L. REV. 63, 73-74 (1995) (suggesting that the “newness” of the AGP may explain why more states did not join in the 1980s and offering several explanations about why they were still reluctant 15 years later during the WTO GPA negotiation).

⁷⁷ Reich (1997), *supra* note 59, at 128-29 (describing limited coverage as the AGP’s “central problem” and that as a result its “economic impact was very limited”).

⁷⁸ ARIE REICH, *INTERNATIONAL PUBLIC PROCUREMENT LAW: THE EVOLUTION OF INTERNATIONAL REGIMES ON PUBLIC PURCHASING* 126 (1999) [hereinafter REICH (1999)].

⁷⁹ Kashdan, *supra* note 11, at 561-62. Nor did the AGP allow appeals by private parties directly to the GATT. See Isabel Dendauw, *New WTO Agreement on Government Procurement: An Analysis of the Framework of Bid Challenge Procedures and the Question of Direct Effect*, 18 J. ENERGY & NAT. RESOURCES L. 254, 254-55 (2000) (stating that the GPA introduced the “direct challenge” system, allowing private parties to bring actions on their own behalf before the contracting party’s national courts, without having to go through their States).

⁸⁰ Reich (1997), *supra* note 59, at 130-31 (citing Ernst-Ulrich Petersmann, *The Dispute Settlement Systems of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948*, 31 COMMON MKT. L. REV. 1157, 1169 (1994)).

Though the AGP was well-intended, members “soon realized” that these measures were insufficient and that achieving their objectives required a detailed procedural regime going beyond solely prohibiting discrimination.⁸¹ Among other things, an effective agreement would require a means by which aggrieved suppliers could challenge discriminatory awards.⁸² Since only such interested parties would have the sufficient incentive to challenge discrimination, government-to-government talks were no substitute.⁸³

Further, an effective forum to challenge awards required certain features. First, for the sake of both suppliers and procuring agencies, it must provide a speedy resolution to their complaints,⁸⁴ which is often of even more import to the procuring agency.⁸⁵ Another factor that must be considered is whether protests are worthwhile, both in terms of the probability of success and potential

⁸¹ Arie Reich, *WTO as a Law-Harmonizing Institution*, 25 U. PA. J. INT’L ECON. L. 321, 334 (2004) [hereinafter Reich (2004)].

⁸² *Id.*; see also Schede, *supra* note 66, at 170-71 (explaining that the intergovernmental panel rulings were only a minimal deterrent); REICH (1999), *supra* note 78, at 307 (describing growing complaints about “lax implementation” of AGP due in part to insufficient enforcement mechanisms).

⁸³ See, e.g., Ernst-Ulrich Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction*, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 114-15 (Ernst-Ulrich Petersmann ed., 1997) (arguing that “practice experience” in the United States and EU “confirm that the citizens themselves and the courts are in a better position to protect individual rights and nondiscriminatory competition than political bodies dominated by majority politics”); ARROWSMITH (2003), *supra* note 15, at 402 (arguing that the “availability of challenge procedures to those with the strongest motivation to enforce the rules and the best opportunities to spot breaches increases the risks of non-compliance for procuring entities and thus improves deterrence”).

⁸⁴ See Bernard M. Hoekman & Petros Mavroidis, *Basic Elements of the Agreement on Government Procurement*, in LAW AND POLICY IN PUBLIC PURCHASING: THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT 20-21 (Bernard M. Hoekman & Petros Mavroidis eds., 1997) (arguing that “unless rapid action can be taken, inconsistencies with the Agreement will *de facto* be tolerated because firms will not have an interest” in litigation before the WTO); ARROWSMITH, ET AL., *supra* note 18, at 761 (explaining that “[s]peedy remedies are particularly important in public procurement” as a “contract will often be awarded, and the work begun, quite quickly following the conclusion of the award procedure, making it difficult to correct the breach once the review body has heard the case”).

⁸⁵ See Daniel I. Gordon, *Constructing a Bid Protest Process: The Choices that Every Procurement Challenge System Must Make*, 35 PUB. CONT. L.J. 427, 431 (2006) (describing the procuring entity’s interest in having a system that “efficiently and promptly complete[s] its core role”).

for meaningful relief.⁸⁶ As talks proceeded on the GPA, the parties reached a compromise that would set forth minimum rules and establish forums to ensure aggrieved suppliers had the proper incentives to challenge contracts that were unfairly awarded to domestic suppliers.⁸⁷

As a historical note, commentators have suggested that the challenge procedures under that new GPA discussed below were proposed in response to the United States' dissatisfaction with the *Trondheim* decision.⁸⁸ Some also hold that the United States modeled its proposal on the EU's Remedies Directive to ensure the new agreement would include meaningful domestic challenge procedures.⁸⁹ Whatever the origin, one of the United States' goals

⁸⁶ See Arwel Davies, *Remedies for Enforcing the WTO Agreement on Government Procurement from the Perspective of the European Community: A Critical View*, 20 WORLD COMPETITION L. & ECON. REV. 113, 129 (1997) (arguing that disappointed suppliers' "willingness to litigate will depend upon the confidence which firms have in the independence of the review"); Gordon, *supra* note 85, at 442-44 (explaining that before challenging an award that disappointed suppliers want to know firms' interest in knowing the difficulty of winning a protest and if winning affords "any meaningful relief"); see also Gordon, *supra* note 85, at 430-32 (explaining that ensuring speedy resolution and the provision of an effective forum for bid protests can be antagonistic goals, and that this "overarching tension can be viewed as the tension between the desire to exhaustively investigate any complaint . . . and the need to let the procurement process move forward" and that "[t]here will always be tension between the first cluster of goals and the goal of avoiding undue disruption to the procurement system").

⁸⁷ EU and U.S. experience has shown that granting standing to aggrieved suppliers is an effective surveillance and enforcement mechanism. See Petersmann, *supra* note 83, at 114-15.

⁸⁸ In that case, an American firm complained it was unfairly excluded from a Norwegian contract for electronic toll collection equipment for the city of Trondheim. The U.S. complained before the intergovernmental review panel, and although the panel held that Norway had violated the treaty, it provided an unsatisfying remedy: Norway was ordered to prospectively amend its award procedures, but the panel did not annul the award so that the contract could be re-competed. See Dendauw, *supra* note 79, at 255-57 (citing Report of the Panel, *Norway-Procurement of Toll Collection Equipment for the City of Trondheim*, GATT Doc GPR.DS2/R (April 28, 1992), GATT Doc GPR/M/46 at 13 (1992)); Schede, *supra* note 66, at 171 (attributing the GPA's challenge system to "lessons learned from *Trondheim*"); Petros C. Mavroidis, *Government Procurement Agreement: The Trondheim Case: The Remedies Issue*, 48 AUSSENWIRTSCHAFT 77, 87-93 (1993) (analyzing the inadequacy of the remedies under the AGP exemplified in the *Trondheim* case).

⁸⁹ Several commentators agree that the EU's Remedies Directive served as a model for the GPA. See, e.g., Dendauw, *supra* note 79, at 262 (writing that Article XX is "very much inspired by the Remedies Directive"); Gerard de Graaf &

was the “provision of meaningful dispute resolution mechanisms at the national level,”⁹⁰ and it is clear that the AGP’s defects informed its position during negotiations.

3.2. *The WTO Agreement on Government Procurement (GPA)*

Separate negotiations on government procurement, concurrent with WTO negotiations in 1993,⁹¹ ultimately led to the creation of the GPA.⁹² The GPA’s purpose was to expand trade, end trade discrimination, and enhance transparency.⁹³ Specifically, negotiators sought expanded coverage to include services, improve enforcement, and address the concerns that kept developing countries from joining.⁹⁴ They succeeded at the former two but failed at the latter; membership has hardly budged.⁹⁵

To accomplish its objectives, the GPA lays down two main principles: non-discrimination and national treatment.⁹⁶ “[T]he

Matthew King, *Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round*, 29 INT’L LAW. 435, 437 (1995) (stating that “key elements of the new GPA are derived largely from the European Union’s directives on public procurement”).

⁹⁰ Kashdan, *supra* note 11, at 569 (listing the United States’ nine goals for the GPA).

⁹¹ See Judith H. Bello & Mary E. Footer, *Symposium: Uruguay Round—GATT/WTO, Preface*, 29 INT’L LAW. 335, 343 (1995) (explaining that the GPA was “negotiated on a separate but parallel track” with the rest of the WTO treaty; that negotiations on the GPA commenced not in Punta del Este in September 1986 with the rest of the WTO negotiations, but in Montreal in December 1988; and that these negotiations were concluded in January 1994, or one month after the Uruguay Round Final Act).

⁹² See GPA, *supra* note 16.

⁹³ See *id.* Preamble.

⁹⁴ Hoekman & Mavroidis, *supra* note 76, at 64.

⁹⁵ *Id.*

⁹⁶ See GPA, Article III, *supra* note 16 (adopting the two pillars of the GATT); see also SUE ARROWSMITH, *THE LAW OF PUBLIC AND UTILITIES PROCUREMENT* 1333-34 (2d ed. 2005) [hereinafter ARROWSMITH (2005)] (arguing national treatment means granting foreign suppliers the same rights as firms “even when the rights of domestic firms go beyond the specific minimum requirements on award procedures and remedies set out in the GPA”).

former,” Mavroidis and Hoekman write, “refers to a legal prohibition on discrimination between foreign products,” and the “latter refers to a legal prohibition on discrimination . . . between foreign and domestic sources.”⁹⁷ Additionally, the GPA establishes some minimum standards for procurement systems,⁹⁸ whose “direct aim is to open up government procurement markets . . . while at the same time allowing for governments to procure in a rational way.”⁹⁹

The GPA is a *plurilateral* agreement, meaning that unlike *multilateral* agreements, which are required for WTO membership, the GPA is optional, and declining to join affects neither status¹⁰⁰ nor membership in the WTO.¹⁰¹ Peter Trepte succinctly captures the

⁹⁷ Hoekman & Mavroidis, *supra* note 76, at 66.

⁹⁸ “Implementation of the basic obligations of non-discrimination is ensured by setting out a number of detailed operational rules for tendering to be followed by procuring entities.” TREPTE (2004), *supra* note 75, at 377; ARROWSMITH (2005), *supra* note 96, at 1339 (explaining that the GPA “requir[es] states to follow transparent contract award procedures, to ensure that contract opportunities are known to foreign industry and to ensure that discrimination cannot be hidden”). For example, signatories are to use open, selective, and limited tendering procedures “in a non-discriminatory manner.” GPA, art. VII.1, *supra* note 16. They are not to share bidders’ private information if that would “have the effect of precluding competition.” *Id.*, art. VII.2. Advertisements for procurement opportunities must include nature, quantity, method of tendering (i.e., open, selective, negotiated), starting date, tender deadline, procuring entity’s address, technical requirements, and terms of payment. *Id.*, art. IX.6. The deadline cannot be less than, e.g., 40 days for open tendering. *Id.*, art. XI.2(a). Opening tenders must be done “under procedures and conditions guaranteeing the regularity of the openings.” *Id.*, art. XIII.3. Specifications, advertising, and regulations should be designed to ensure transparency. *Id.*, art. XVII.1. As well, signatories must provide for basic challenge procedures. *Id.*, art. XX.

⁹⁹ Marceau & Blank, *supra* note 10, at 122; *cf.* Gordon, *supra* note 85, at 430-32 (describing the tension between the competing goals of transparency, integrity, and provision private remedies versus “having the procurement system efficiently and promptly complete its core role, the acquisition of goods or services that the Government needs”).

¹⁰⁰ See EMILY BARBOUR, CONG. RESEARCH SERV., R31406, TRADE AGREEMENTS: AN INTRODUCTION TO SELECTED INTERNATIONAL AGREEMENTS AND U.S. LAWS 45 (2012) (explaining that plurilateral agreements “are not prerequisites to WTO membership”); Alan W.H. Gourley, Jean Grier & Frederick F. Shaheen, *International Legal Developments in Review: 2000 Business Regulation International Procurement*, 35 INT’L LAW. 395, 400 (2001) (explaining that the GPA applies only to the signatories); JACKSON, *supra* note 9, at 403 (explaining that agreements contained in Annex 4 are “hortatory” or “optional” and that this was “a departure from the single package ideal” of the rest of the agreement).

¹⁰¹ *But see* Sue Arrowsmith, *The Character and Role of National Challenge Procedures Under the Government Procurement Agreement*, 4 PUB. PROCUREMENT L.

GOA's complicated interrelation with the rest of the WTO: "While [the GPA] remains part of the GATT/WTO family by virtue of its inclusion in the WTO annexes and is served by the WTO Secretariat and Dispute Settlement Body, the GPA . . . remains binding on and confers benefits only to those members who have signed up to it."¹⁰² As another commentator noted, it is "the only major part of the Uruguay Round package . . . that allows voluntary rather than full participation."¹⁰³

When the GPA went into force on January 1, 1996 there were just 25 signatories.¹⁰⁴ Given that less than a quarter of the WTO members had initially joined,¹⁰⁵ the GPA is often criticized for limited membership,¹⁰⁶ especially because so few poor and developing countries have joined.¹⁰⁷ This will continue to be a challenge – not

REV. 235, 236 (2002) (explaining that although the GPA is not mandatory for current members, new members "are now often expected to commit to signing it as a price for their ticket of admission").

¹⁰² TREPTE (2004), *supra* note 75, at 374.

¹⁰³ ERNEST H. PREEG, *TRADERS IN A BRAVE NEW WORLD: THE URUGUAY ROUND AND THE FUTURE OF THE INTERNATIONAL TRADING SYSTEM* 198 (1995). In fact, the GPA "is one of four plurilateral agreements under the umbrella of the WTO, which do not require participation of all WTO signatories." JEFFREY J. SCHOTT, *THE URUGUAY ROUND: AN ASSESSMENT* 66 (1994); *see also* Mavroidis & Hoekman, *supra* note 76, at n.2 (1995) (contrasting the GPA with "most of the other Tokyo Round codes," which are multilateral and mandatory," and listing the four plurilateral agreements: "the GPA, the civil aircraft agreement, and the arrangements on bovine meat and dairy products") (citing WTO Agreement, Annex 4(b)).

¹⁰⁴ The founding members were Canada, the EU (and its member countries), Finland, Israel, Japan, Korea, Norway, Sweden, Switzerland, and the United States. *See Agreement on Government Procurement: Parties, Observers, and Accessions*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm.

¹⁰⁵ *See, e.g.*, Arrowsmith (2002), *supra* note 11, at 768-71 (explaining that in 2002 "less than one quarter of the WTO's 140-plus members" were signatories while discussing the various "obstacles to wider participation").

¹⁰⁶ *Id.* at 103-06 (reviewing the economic and political reasons that discourage "obstacles to wider participation" in the GPA); Hoekman & Mavroidis, *supra* note 76, at 73-77 (arguing that "the absence of broad-based participation is a source of concern").

¹⁰⁷ *See, e.g.*, Victor Misoti, *The WTO Agreement on Government Procurement: A Necessary Evil in the Legal Strategy for Development in the Poor World?*, 25 U. PA. J. INT'L ECON. L. 593, 596 (2004) (noting that the "common thread" is the presence rich countries and the absence of poor ones); CROOME, *infra* note 113, at 76-77 (noting that "[f]ewer countries . . . signed the [GPA] than any other code, and all but three of its signatories were developed countries"); Reich (1997), *supra* note 59, at 134 (noting that the GPA remains a "rich man's club").

so much because countries' interests diverge but because officials are reluctant to relinquish control over public spending for reasons both legitimate and illegitimate.¹⁰⁸

¹⁰⁸ One challenge with promoting free trade is that the "immediate impact" is concentrated in a single industry, with lost jobs and profits, while the benefits are often defuse. See ARROWSMITH (2003), *supra* note 15, at 11-12 (citing PAUL R. KRUGMAN & MAURICE OBSTFELD, *INTERNATIONAL ECONOMICS: THEORY AND POLICY*, Chapter 11 (5th ed. 2000)). Arrowsmith identifies four types of collateral policies, whose immediate benefits governments are reluctant to give up in exchange for the more ephemeral gains to be had from free trade: measures granting domestic industry a competitive advantage; secondary objectives of a non-economic nature; illegitimate practices such as corruption, nepotism, and patronage; domestic procurement rules concerned with commercial objectives. *Id.* at 13-19. It may be that they "are not prepared to give up their use of procurement for policy objectives that involve discrimination." *Id.* at 440; see also Patrick A. Low, Aaditya Mattoo & Arvind Subramanian, *Government Procurement in Services*, in HOEKMAN & MAVROIDIS, *supra* note 84, at 225-26 (attributing the reluctance to open up procurement to competition to "two broad reasons": that it is "valued political patronage," and that it is a "means of protecting certain industries").

Membership now stands at 43 states,¹⁰⁹ mainly due to the EU's expansion.¹¹⁰ Several more are currently undergoing or considering negotiations,¹¹¹ including China¹¹² and India.¹¹³

Despite limited membership, the GPA was heralded as "one of the large and lasting accomplishments of the Uruguay Round."¹¹⁴

¹⁰⁹ The new members since January 1, 1996 are Armenia, Aruba, the new EU member states (Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, and Slovenia), Hong Kong, Iceland, Korea, Liechtenstein, Singapore, and Taiwan. See *Agreement on Government Procurement: Parties, Observers and Accessions*, WTO (Nov. 1, 2015), https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm (listing party nations to the GPA and the RGPA, and noting the corresponding date of entry into force or accession).

¹¹⁰ The EU has expanded from 15 to 28 member states from 1996 to present. See *EU Member Countries*, http://europa.eu/about-eu/countries/member-countries/index_en.htm (noting that Croatia was the most recent addition to the EU on July 1, 2013).

¹¹¹ Albania, China, Georgia, Jordan, Kyrgyzstan, Moldova, Montenegro, New Zealand, Oman, and Ukraine are all negotiating entry into the GPA; all but three of these (Montenegro, New Zealand, and the Ukraine) already have been in observer status for a decade or more. See *Agreement on Government Procurement: Parties, Observers and Accessions*, WTO (Nov. 1, 2015), https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm (listing party nations to the GPA and the RGPA, and noting the corresponding date of entry into force or accession).

¹¹² Though significant obstacles remain, China is much further along in the negotiation process than is India. See Ping Wang, *Accession to the Agreement on Government Procurement*, in *GOVERNMENT PROCUREMENT IN THE WTO* 92-116 (Sue Arrowsmith & Robert D. Anderson eds., 2011) (recounting that China rejected pressure to join the GPA as precondition to WTO membership and that its initial offer was spurned as "deeply disappointing," and recommending a "phased" approach to entity coverage); Skye Mathieson, *Assessing China's Public Procurement Market: Which State-Influenced Enterprises Should the WTO's Government Procurement Agreement Cover?*, 40 *PUB. CONT. L.J.* 233, 239-241 (2010) (explaining the role of state owned firms in the Chinese economy and how coverage of these firms affects China's GPA accession negotiations).

¹¹³ Though a participant in the AGP negotiations, India has yet to enter formal membership negotiations and did not even assume official observer status until 2010. See S. Chakravarthy & Kamala Dawar, *India's Possible Accession to the Agreement on Government Procurement: What Are the Pros and Cons?*, in *ARROWSMITH & ANDERSON, supra* note 113, at 117-39 (listing the reasons for India's reluctance); JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM* 77, 184-85 (2d ed. 1999) (describing India's role in the original AGP negotiations in 1987).

¹¹⁴ Bello & Footer, *supra* note 91, at 343.

Its significance within the WTO system has only grown since then,¹¹⁵ having proven a success in several respects.¹¹⁶

First, it has freed up government procurement as never before. Following negotiations, the GPA was predicted to open up \$350 billion of U.S. procurements and as much as \$1 trillion of global procurement markets,¹¹⁷ or “approximately a tenfold increase in the value of contracts open to bidding under the present [AGP].”¹¹⁸ While cross-border procurement trade may not have proven as common as might have been hoped for,¹¹⁹ gains in trade have been significant and the GPA is still a major victory for free trade.¹²⁰ For example, the GPA now affords access to \$1.6 trillion in procurement

¹¹⁵ See *Lamy Notes Rising Interest in WTO Government Procurement Agreement*, NEWS PRESS (Feb. 18, 2010) [hereinafter *Rising Interest*] (reporting that WTO Director-General Pascal Lamy said the GPA “appears to be in the process of taking on relatively greater importance in the constellation of the WTO Agreements,” in part because it “recognizes the need for governance mechanisms”).

¹¹⁶ Perhaps the success of the GPA’s negotiations and implementation is due, in part, to its plurilateral status; it was easier to reach an agreement among a few rich countries with common interests and values than if negotiations had included the larger and more diverse membership of the WTO. Multilateral deals are, presumably, harder to strike.

¹¹⁷ Compare de Graaf & King, *supra* note 89, at 435-36, and PREG, *supra* note 103, at 198 (predicting annual coverage of “\$400 billion in procurement contracts, of which three-quarters are in the EU and the United States”).

¹¹⁸ de Graaf & King, *supra* note 89, at 435-36; see Grier, *supra* note 11, at 387-92 (supporting the fact that a “tenfold expansion” has occurred in the GATT Code).

¹¹⁹ See, e.g., HEJING CHEN & JOHN WHALLEY, THE WTO GOVERNMENT PROCUREMENT AGREEMENT AND ITS IMPACTS ON TRADE, The National Bureau of Economic Research, Working Paper 17365, 17-20, 30 (Aug. 2011), available at <http://www10.iadb.org/intal/intalcdi/PE/2011/08931.pdf> (using a “gravity model” to ascertain the impact on trade and finding that “government procurement markets seem far from being internationally integrated”).

¹²⁰ 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, World Trade Organization Economic Research and Statistics Division, ERSD-2011-15, 20-21 (Oct. 6, 2011), available at http://www.wto.org/english/res_e/reser_e/ersd201115_e.pdf (citing studies showing cross-border rates as high as 30 percent in the EU); Lena Johansson, Cross-border public procurement – an EU perspective, Swedish National Board of Trade (Nov. 2011), available at <http://www.kommers.se/Documents/dokumentarkiv/publikationer/2011/rapporter/Report%20-%20Cross-border%20Public%20Procurement.pdf> (summarizing studies on cross-border procurement among GPA members and within the EU).

markets.¹²¹ Although direct cross-border purchases are relatively few, foreign-affiliated firms (e.g., firms with local subsidiaries or joint ventures) enjoy a higher penetration rate than the figures might otherwise suggest.¹²² Therefore, the GPA has been a success both in terms of scale and market penetration and has thereby done much to liberalize this market.¹²³

Second, just as the Uruguay Round agreement “deepened,” “widened,” and “enlarge[ed]” the GATT obligations, the GPA has done likewise for government procurement.¹²⁴ While the AGP covered only goods¹²⁵ and the Uruguay Round negotiations initially prohibited even the discussion of services,¹²⁶ GPA negotiations sought coverage of services from the beginning.¹²⁷ Later, coverage

¹²¹ See ANDERSON ET AL., *supra* note 120, at 18-20 (detailing the guaranteed market access afforded to GPA members, especially in the United States and the EU, which constitute “75% of the total value of existing market access opportunities under the GPA, i.e. US \$1.2 trillion”); United States, Office of the U.S. Trade Representative, *The WTO Government Procurement Agreement: A Tremendous Opportunity for China*, available at <http://shenyang.usembassy-china.org.cn/wto-gpa.html> (estimating the GPA affords members access to \$1.6 trillion in procurement markets).

¹²² See ANDERSON ET AL., *supra* note 120, at 20-24 (explaining that while one European Commission study reports that direct cross-border procurement only “accounts for 1.6% of awards or roughly 3.5% of the total value of contract awards” this “figure rises to 16.9% when indirect cross-border procurement is taken into account, and overall to 29.9%, taking into account the additional effect of imports by local agents and distributors”).

¹²³ *But see* Reich (1997), *supra* note 59, at 136-38 (describing coverage that is “significantly more limited than expected” than a “quick glance at coverage annexes might suggest” since the “purported expansion of coverage is beset by a myriad of derogations”).

¹²⁴ See Jacques Pelkmans, *The Economic Significance of the Round*, in *THE URUGUAY ROUND RESULTS: A EUROPEAN LAWYER’S PERSPECTIVE* 44-45 (Jacques H.J. Bourgeois, Frédéric Berrod & Eric Gippini Fournier eds., 1996).

¹²⁵ AGP, *supra* note 73, Article I.1(a) (establishing that the AGP would apply only as to goods, and making only a limited exception for services “incidental to the supply of products”).

¹²⁶ See CROOME, *supra* note 113, at 76 (explaining that the GPA and the general Uruguay Round negotiations were kept separate in part because the GPA “included negotiations on services as well as goods, and thereby mixed two elements that were supposedly kept rigidly apart under the ground-rules of the Uruguay Round”). The WTO was later extended to include coverage of services with passage of the General Agreement on Trade in Services (GATS), or what became Annex 1B to the WTO Agreement. See JACKSON (2000), *supra* note 9, at 184, 190, 402, 406.

¹²⁷ GPA, *supra* note 16, Article I.2 (establishing that the GPA would cover “any combination of products and services”); GPA, *supra* note 16, Preamble (reciting that

improved services and construction¹²⁸ and expanded to include some sub-central governments and utilities.¹²⁹ And it eliminated offsets¹³⁰ with only a few exceptions¹³¹ – no mean feat given their proliferation elsewhere.¹³²

But there was trouble in paradise. In addition to limited membership, another shortcoming was coverage. Restrictive coverage was the tradeoff for “far-reaching obligations,” and the GPA only covers entities and contracts its members submit to.¹³³ GPA principles “apply in a qualified manner to specified entities, goods, and services, which have been the subject of extensive bilateral negotiations[.]”¹³⁴ Describing the 1993 negotiations Trepte writes, “These negotiations were largely bilateral with each party

one of the goals of this agreement was to “expand the coverage of the [GPA] to include service contracts”).

¹²⁸ PREG, *supra* note 103, at 198.

¹²⁹ *Id.*

¹³⁰ GPA Article XVI, *supra* note 16, at n.7 (“Offsets are measures used to encourage local development by means such as requirements for domestic content, licensing of technology, investment, or countertrade.”); Kashdan, *supra* note 11, at 572 (The Tokyo Round Code, by contrast, “discouraged but did not prohibit the use of offsets.”).

¹³¹ GPA, Article, XVI.2, *supra* note 16 (listing domestic content requirements as one example; further, only one exception is mentioned in Article XVI - “development” in “developing countries.”); Article XXIII.1, and most countries omit defense ministries from their covered entities in their Annex 1. *See, e.g.*, Government Procurement, The Plurilateral Agreement on Government Procurement: Appendices and Annexes to the GPA: United States, Appendix I, Annex 1, *available at* https://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm (omitting the Department of Defense from the covered central government entities). This exception for defense offsets is increasingly criticized. *See, e.g.*, Drew B. Miller, *Is it Time to Reform Reciprocal Defense Procurement Agreements?*, 39 PUB. CONT. L.J. 93, 95-96 (2009) (explaining that the defense trade “represents an immense segment of government procurement” that has been “largely excluded from the march toward liberalization”).

¹³² *See, e.g.*, Bernard Udis, *Offsets and Industrial Participation*, in RICHARD A. BITZINGER, *THE MODERN DEFENSE INDUSTRY: POLITICAL, ECONOMIC, AND TECHNOLOGICAL ISSUES* 257-64 (2009) (recounting the growth of defense offsets and describing them as “ubiquitous” in the industry).

¹³³ Mavroidis & Hoekman, *supra* note 76, at 63-64.

¹³⁴ Trepte (2004), *supra* note 75, at 368.

negotiating with the others resulting in a kaleidoscope of reciprocal arrangements between the parties.”¹³⁵ The results were not pretty.¹³⁶

This has given rise to several problems. First, on closer inspection, coverage is “significantly more limited” than it may appear at first.¹³⁷ Second, bespoke coverage diluted the GPA’s efficacy as members carved out exceptions based on idiosyncrasies of domestic politics.¹³⁸ Third, what coverage countries negotiate for during accession depends on relative bargaining power, rather than any sensible moral, legal, or economic criterion.¹³⁹ And Reich

¹³⁵ *Id.* at 375.

¹³⁶ *Id.* (stating, “The resulting annexes to the GPA contain not only lists of entities and contracts covered; they also contain a variety of derogations and reciprocity clauses which apply differently between the various parties.”).

¹³⁷ Reich (1997), *supra* note 59, at 136-37.

¹³⁸ *Id.* at 140-41 (citing 19 U.S.C. § 2512(a)). (Reich relates a striking example from the United States:

One prominent example is provided by the United States who, in its implementation of the GPA, has basically barred all countries which have not joined the [GPA] from participating in tenders for U.S. Government contracts subject to the GPA. . . . As a result, the position of non-GPA suppliers has been significantly worsened compared to the situation prior to the Code. Before the Code, they were allowed to compete for U.S. government contracts, and were only subject to the 6 or 12 percent price differential under the Buy American Act. Thus, if their bid was lower than the comparable U.S. bid by more than the differential, they still win the contract. Now, however, they are not allowed to compete at all, except perhaps in cases where the product cannot be obtained from U.S. or GPA sources.

(requiring the President to prohibit the procurement of goods from non-GPA countries with exceptions for developing countries and when the goods are unavailable in GPA countries)).

¹³⁹ Writing about the Chinese experience with the GPA accession process and then generalizing from that experience in his concluding remarks, Wang writes:

The GPA’s approach to covered entities and procurement remains complex and lacks a general principle that facilitates the preparation of coverage offers by acceding countries. In the absence of general rules, the outcome of accession negotiations based upon reciprocity *largely depends on the bargaining power of the acceding country* and the expectation of existing Parties. (Emphasis added).

Wang, *supra* note 112, at 114. He suggests that because so much depends on bargaining power and negotiation tactics, China made an unreasonable offer on purpose:

Since the extent to which an acceding country can enjoy special treatment available for developing countries and retain existing discriminatory national policies by derogation is also subject to negotiation, China’s initial

describes a fourth problem with so many crisscrossing coverage arrangements:

[B]ecause the derogations are so detailed and complicated, it is extremely hard to know if a particular procurement is covered under the GPA, and if it is open to all GPA suppliers or only to some. This seriously impairs the commercial predictability of the procurement regime set up by the GPA. It also makes the [GPA] very hard to implement.¹⁴⁰

Multiple arrangements complicate foreign market access, increase transaction costs, and reduce the incentive to compete in those markets.¹⁴¹ These arrangements undermine the goals of the GPA.

Not all coverage rules were negotiated in this manner. Although these rules are mostly “determined through negotiating reciprocal concessions . . . there are some ‘common’ coverage rules[.]”¹⁴² The existence of such common rules suggests negotiations were more than just a political contest with each member country simply attempting to maximize its own interests. These common rules suggest members were also motivated by a sense of the common good and sought to harmonize rules, increase transparency, and build legitimacy.¹⁴³

offer of coverage, although disappointingly limited as highlighted in section 2, may arguably reflect a strategic choice of negotiation technique.

Id. If Wang is right about that, his analysis does not bode well for future accession talks, and not only with China.

¹⁴⁰ Reich (1997), *supra* note 59, at 139.

¹⁴¹ *Id.* at 136 (explaining the GPA’s approach is not only that its “coverage significantly more limited than expected but, more importantly, that the GPA in fact harbours an *intra-discriminatory trade regime* between its Members”) (emphasis added); Kashdan, *supra* note 11, at 571-72 (describing the “large number of permutations” among the various countries’ annexes regarding coverage of entities and contract types).

¹⁴² Arrowsmith (2002), *supra* note 11, at 784-85 (listing the treatment of concessions and the use of framework agreements as two of these common coverage rules).

¹⁴³ To be sure, such goals are not mutually exclusive. Harmonization “reduces barriers to trade because it reduces transaction costs for vendors crossing borders” thereby increasing trade flows and liberalizing the market. Yukins & Schooner, *supra* note 19, at 531. It also promotes economic development and “efficient procurement markets.” *Id.* at 531-32 (citing Simon J. Evenett & Bernard M.

When an agreement was first reached, hopes were high for what the WTO GPA could accomplish.¹⁴⁴ Considered as a part of the larger WTO, it was lauded as “perhaps the most important development in international economic law since the Bretton Woods Agreement”¹⁴⁵ and “one of the most ambitious efforts at international lawmaking and institution building since the establishment of the United Nations.”¹⁴⁶ Yet as Mavroidis and Hoekman presciently noted, “much depend[ed] on the diligence and good faith of the GPA signatories that put into place and appl[ie]d the challenge procedures.”¹⁴⁷ Such efforts have been imperfect and uneven.

After a digression in Subsection C to describe the GPA’s new enforcement mechanisms, Subsection D returns to the question of coverage, considering the GPA negotiations in 1993 and the Revised GPA negotiations in the last decade.

Hoekman, *International Cooperation and the Reform of Public Procurement Policies* 32 (World Bank Policy Research, Working Paper No. 3720, Sept. 2005), available at <http://ssrn.com/abstract821424>; see also Yukins & Schooner, *supra* note 19, at 557-58, 561-63 (elaborating on the GPA’s potential in the harmonization of global procurement); *Rising Interest*, *supra* note 115 (lauding the GPA since it “recognizes the need for governance mechanisms”). Reich considers harmonization “a byproduct with many blessings” even though it “was never an official objective of the [GPA].” Reich (2004), *supra* note 81, at 335. He continues, “In addition to compelling many states to introduce clear, transparent, and truly competitive rules of tendering that prevent not only domestic protectionism, but also corrupt favoritism, the greater uniformity between the national systems also makes it easier for suppliers to participate in the market for foreign government contracts.” *Id.*

¹⁴⁴ See, e.g., Bello & Footer, *supra* note 91, at 343 (stating that although the GPA was only a voluntary agreement with limited membership, “in light of the continuing significance of government procurements in world trade and the substantive expansion of the agreement with respect to its scope and coverage, this agreement is expected to be one of the large and lasting accomplishments of the Uruguay Round”).

¹⁴⁵ JOHN H. JACKSON & ALAN O. SYKES, *IMPLEMENTING THE URUGUAY ROUND 1* (1997) [hereinafter JACKSON & SYKES].

¹⁴⁶ David E. Leebron, *Implementation of the Uruguay Round Results in the United States*, in JACKSON & SYKES at 175.

¹⁴⁷ Mavroidis & Hoekman, *supra* note 76, at 70; see also JACKSON & SYKES, *supra* note 145, at 1 (warning that the “extent of this transformation will rest chiefly on the faithful implementation of new international legal obligations in the domestic law of each country”).

3.3. *New Enforcement Mechanisms Under the GPA*

In response to the ineffectual enforcement mechanisms under the AGP, the GPA granted a private right to challenge breaches of the GPA rules in importing states' domestic forums.¹⁴⁸ Article XX.2 provided, "Each Party shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest."¹⁴⁹

This was a departure from the AGP and "arguably the most innovative aspect of the [WTO] GPA."¹⁵⁰ It was innovative in that firms could make direct challenges using domestic forums without "having to go through their governments as in the case under 'normal' WTO dispute settlement procedures."¹⁵¹ Arrowsmith explains this "mark[ed] a departure from the approach of most other WTO agreements," which had not afforded a private cause of action but "rel[ie]d mainly on inter-governmental enforcement" mechanisms.¹⁵² This is a "rare example in the WTO-system where private parties can invoke WTO-law before domestic courts."¹⁵³

¹⁴⁸ See GPA, Article XX, *supra* note 16.

¹⁴⁹ *Id.* at Article XX.2.

¹⁵⁰ HOEKMAN & MAVROIDIS (1997), *supra* note 84, at 20-21; see also Dendauw, *supra* note 79, at 254-55 (describing the new procedures as "revolutionary"); Mary Footer, *Remedies Under the New GATT Agreement Procurement*, 4 PUB. PROC. L. REV. 80, 88-91 (1995) (describing the new challenge procedures as "undoubtedly" the "most innovative step in the new GPA"); Kashdan, *supra* note 11, at 573 (describing the strengthened dispute resolution mechanisms one of the GPA's "major advancements" over the Tokyo Round); Arrowsmith (2002), *supra* note 11, at 788 (noting the WTO generally is not "enforceable by private parties" and arguing "judicialiation" "was possible because of the GPA's plurilateral character and the fact that most of the original parties were already obliged to provide challenge procedures under regional agreements").

¹⁵¹ HOEKMAN & MAVROIDIS (1997), *supra* note 84, at 48-49 (calling this new mechanism a "major textual change" to the 1988 agreement).

¹⁵² ARROWSMITH (2003), *supra* note 15, at 385, n.99 (noting some other exceptions for private enforcement) (citing Agreement in Pre-shipment Inspection, Article 4; GATT Article X; GATS Article VI(2); Agreement on Customs Evaluation, Article XI; Agreement on Subsidies and Countervailing Measures, Article 23; Trade Related Intellectual Property Measures, Article 42).

¹⁵³ Mavroidis & Hoekman, *supra* note 76, at 70.

A debate rages about whether the GPA alone has direct effect¹⁵⁴ or depends on implementing legislation to take effect.¹⁵⁵ Settling that debate is beyond the scope of this Article because the EU, it appears, knew that the United States planned on passing implementing legislation that would ensure that the GPA would not have direct effect.¹⁵⁶ And that is just what Congress did with the supremacy clause of the URAA.¹⁵⁷ Thus, whether the GPA (but for the supremacy clause) would have had direct effect is an academic question and is of no practical significance. It will not be considered here.

What is important, however, and what European negotiators apparently did not know, was that Congress would then pass implementing legislation exempting the United States from the requirement that a forum be provided for private challenges under

¹⁵⁴ Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 76-90 (2012) (explaining direct effect in the sense that no other act is required to confer a right, written within the treaty, on an individual or party); see generally John H. Jackson, *United States of America*, in THE EFFECT OF TREATIES IN DOMESTIC LAW 144-56 (Francis G. Jacobs & Shelley Roberts eds., 1987) (defining "self-executing" treaties and explaining the legal approach, particularly in the United States, of how to determine if a treaty is self-executing); see, e.g., Johannes Schnitzer, *Regulating Public Procurement Law at Supranational Level: the Example of EU Agreements on Public Procurement*, 10 J. PUB. PROCUREMENT 301, 326-28 (2010) (arguing that the GPA has direct effect or "applicability" due, in part, because the GPA is very similar in formation to the EC Public Procurement Directives "whose direct 'applicability' has been recognised").

¹⁵⁵ Davies, *supra* note 86, at 127-28 (arguing that although parts of the GPA may have direct effect, Article XX is not directly effective because "its operation is conditional upon implementation of the discretionary requirements"); ARROWSMITH (2005), *supra* note 96, at 1334-35 (arguing that the GPA does not have direct effect); Pierre Didier, *The Uruguay Round Government Procurement Agreement: Implementation in the European Union*, in HOEKMAN & MAVROIDIS (1997), *supra* note 84, at 138-39 (arguing that the effect unambiguously direct, despite several EU statements and decisions reaching the opposite conclusion); PETER TREPTE, PUBLIC PROCUREMENT IN THE EU 130-31 (2007) [hereinafter TREPTE (2007)] (explaining the EU's position that the GPA does not have direct effect); Schaefer, *supra* note 7, at 627-30 (describing GPA member countries as either dualists or monists and distinguishing the former, which require implementing legislation, from the latter, which do not).

¹⁵⁶ See Didier, *supra* note 155, at 138 (arguing that the other GPA parties knew that the United States' implementing legislation would explicitly rule out direct effect).

¹⁵⁷ See 19 U.S.C. § 3512(a)(1); see also note 248, *infra*, and accompanying text.

the GPA.¹⁵⁸ That the United States would not recognize the direct effect of the GPA did not mean that it would not comply with the GPA because implementing legislation could have served the same purposes. These two propositions are “analytically distinct.”¹⁵⁹ If Congress had passed legislation giving Article XX effect, the Europeans would have had cause for neither surprise nor disappointment. Implementation of the GPA works in much the same way in the EU; for example, rather than being given direct effect, Article XX is given effect through the Remedies Directive.¹⁶⁰ But Congress did not do that. Instead, the URAA’s supremacy clause precludes direct effect of the GPA, and then the URAA denies private parties a cause of action under the GPA.

European negotiators were not alone; the consensus among scholars was also that a private cause of action under Article XX depended primarily on implementing legislation.¹⁶¹ Each member was “to repeal or amend any national legislation” inconsistent with the GPA.¹⁶² But the United States did not pass implementing legislation giving effect to Article XX. Later, Subsection IV explores

¹⁵⁸ See 19 U.S.C. § 3512(c); see also notes 234-246, *infra*, and accompanying text.

¹⁵⁹ Schaefer, *supra* note 7, at 610 n. 3 (arguing that “whether an international agreement has direct effect . . . is an analytically distinct question from whether the agreement can be invoked by a particular private party”) (citing Jackson, *supra* note 154; RESTATEMENT (THIRD) OF FOR. REL. LAW OF THE UNITED STATES, § 111 cmt. g (1987)).

¹⁶⁰ Remedies Directive for the Private Sector, Directive 89/665/EEC, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0665:20080109:EN:PDF> [hereinafter Remedies Directive] (detailing how states will act to ensure the GPA is in effect), as amended by Council Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:335:0031:0046:EN:PDF> (amending the Remedies Directive and providing suppliers with additional remedies); see also TREPTE (2007), *supra* note 155, at 131 (explaining that these revisions to the Remedies Directive were made in order to comply with the GPA’s obligations).

¹⁶¹ See, e.g., REICH (1999), *supra* note 78, at 309-12 (noting the consistency of the EU directives with the GPA); ARROWSMITH (2003), *supra* note 15, at 43-46 (discussing the importance of domestic legislation to implement the GPA’s requirements; Hans-Joachim Priess & Pascal Friton, *Designing Effective Challenge Procedures: The EU’s Experience with Remedies*, in ARROWSMITH & ANDERSON, *supra* note 113, at 530-31 (explaining the significance of implementing legislation for the GPA); Dendaauw, *supra* note 79, at 262-63 (explaining that due to superior remedies afforded under the EU Remedies Directives that it was unnecessary to amend the Directives).

¹⁶² ARROWSMITH (2003), *supra* note 15, at 44-45.

the United States' record on this score and examines the section of the URAA that specifically bars private litigation under the GPA.

3.4. *The EU-U.S. Debates on Coverage: 1993-Present*

This section considers first the original GPA negotiations in 1993-94, and reviews the Revised GPA negotiations in the first decade of the 2000s. In both cases, the EU-U.S. debates centered on the coverage issues. Access to sub-federal markets was a seminal issue to the Europeans. The terms of this debate lay the groundwork for Subsection B, which considers how Europeans' past experience with the URAA may affect TTIP negotiations.

3.4.1. *The Original GPA Negotiations (1993)*

The 1979 AGP first established the "entity coverage by entity list" method that has been used since.¹⁶³ "To a large extent," the GPA negotiations were "dominated by the European Union and the United States, which together account for a substantial share of procurement contracts."¹⁶⁴ "The bargaining over entity coverage which had been the hallmark of previous negotiations," Trepte recounts, "reached a fever pitch during the Uruguay Round[.]"¹⁶⁵ This was due in part to the marching orders U.S. negotiators had received, which were themselves impacted by the United States' perception that it had been slighted in the 1979 negotiations.¹⁶⁶

Each side took to the barricades: the United States sought access to utilities, particularly water, energy, transportation, and

¹⁶³ TREPTE (2004), *supra* note 75, at 372.

¹⁶⁴ SCHOTT, *supra* note 103, at 68.

¹⁶⁵ TREPTE (2004), *supra* note 75, at 374.

¹⁶⁶ de Graaf & King, *supra* note 89, at 441 (explaining that Congress thought that the United States had lost on "balance of benefits" in the 1979 AGP and that for that reason Congress had inserted Title VII into the Trade Agreements Act of 1987, which required annual reports on the "level of openness in foreign procurement markets").

telecommunications;¹⁶⁷ the EU, for its part, wanted access to U.S. sub-federal procurement entities.¹⁶⁸ Worse than just assuming uncompromising positions, each side accused the other of bad faith and “disputed the value of each other’s offers.”¹⁶⁹ They eventually overcame this impasse by negotiating on a “value-of-opportunities basis,” using market information put together by consultants at Deloitte & Touche.¹⁷⁰ It was from this report that U.S. negotiators learned that they were offering only \$18 billion in sub-central procurement in exchange for the EU’s \$100 billion in expanded coverage.¹⁷¹ They had to make a better offer.

Another complication lay behind this dispute. The United States held that principles of federalism forbade compelling the states to join the GPA.¹⁷² The Europeans seemed to have believed that the United States could have compelled the states, but had simply chosen not to.¹⁷³ There is insufficient space to explore this issue, but

¹⁶⁷ TREPTE (2004), *supra* note 75, at 372; de Graaf & King, *supra* note 89, at 442 (reporting that the United States sought “unrestricted access to the strategically important electrical and telecommunications”).

¹⁶⁸ SCHOTT, *supra* note 103, at 68 (describing the “most heated discussion” on the EU side was access to sub-federal procurement); de Graaf & King, *supra* note 89, at 443 (relating that the EU wanted “unfettered access to state and major city level procurement in the United States”).

¹⁶⁹ TREPTE (2004), *supra* note 75, at 374; *see also* Halford, *supra* note 75, at 47-48, n.70 (describing the “wide difference of interpretation about market access” and relating that U.S. assertions that \$150 billion were open to foreign competition was “suspect and misleading” because of 20% of business must go to small and medium sized businesses). Perhaps the story that is most emblematic of the mistrust during the GPA negotiations is that of the U.S. Trade Representative’s report leaked to the *Financial Times*, which maintained that the United States had open up \$16.8 billion to European contractors but that EU opened up only \$7.8 million to U.S. contractors. *Id.* at 47-48.

¹⁷⁰ ARROWSMITH, ET AL., *supra* note 18, at 199.

¹⁷¹ de Graaf & King, *supra* note 89, at 448, n.56 (citing STUDY OF PUBLIC PROCUREMENT OPPORTUNITIES (Mar. 22, 1994) (prepared at the request of the EU and United States)).

¹⁷² *See* Yukins, *supra* note 7, at 2-3 (explaining the United States “has long argued that the principles of federalism bar the federal government from compelling the states to open their procurement markets under an international agreement”); Leebron, *supra* note 146, at 176 (recounting that “[o]ne theme dominated the debate over the Uruguay Round Agreements in the United States, and this was sovereignty” and that implementation was “controversial”).

¹⁷³ *See* ARROWSMITH, ET AL., *supra* note 18, at 199 (remarking the United States “did not want to bind state governments to the GPA without their consent,” not that it could not do so); *see also* Ernst-Ulrich Petersmann, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW 154

suffice it to say that the debate about the extent to which the U.S. federal government can bind states without their consent via unratified trade agreements is ongoing.¹⁷⁴ (At the present, it appears that the United States and the EU have at last reached some degree of mutual understanding on this question.¹⁷⁵)

The parties signed a memorandum of understanding (MOU) in May 1993, postponing their dispute.¹⁷⁶ The EU agreed to open central government procurement and electrical equipment for utilities,¹⁷⁷ the United States to seek voluntary coverage of sub-federal entities.¹⁷⁸

Just two days before the signing of the GPA on April 13, 1994, the parties signed another MOU extending the May 1993 MOU.¹⁷⁹ Sharp bargaining throughout meant that mutual concessions were *quid pro quo* and “dollar-for-dollar.”¹⁸⁰ Such strict reciprocity

(1991) (arguing that federal courts’ enforcement of free-trade agreements belies argument that federalism precludes enforcement on uncooperative states).

¹⁷⁴ See, e.g., Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 421-23 (2003) (arguing based on “new federalism” jurisprudence the Supreme Court “may no longer assume an inviolable link between the ability to exercise the treaty power and the authority to legislate preemptively”); Leebron, *supra* note 146, at 224-28 (recounting the scholarly and political debates about how the Uruguay Round Agreement implicates issues of federalism); Amol Mehra, Note & Comment, *Federalism and International Trade: The Intersection of the World Trade Organization’s Government Procurement Act and State “Buy Local” Legislation*, 4 B.Y.U. INT’L L. & MGMT. REV. 179, 194-197 (2008) (arguing that the GPA applies to states only if they consent); Tracey Taylor, *The Legislature, The Governor & International Trade Agreements: An Analysis of Washington Law*, at 6 (Office of Program Research, Washington State House of Reps., Dec. 2004), <http://www.leg.wa.gov/House/Committees/CDHT/Documents/JLOCTP.pdf> (explaining the relationship between state and federal law under given that Washington state is a GPA signatory).

¹⁷⁵ Yukins, *supra* note 7, at 3-4 (suggesting that “while the issue of federalism is not fully settled . . . informal discussions members of the European procurement community seem to have accepted the U.S. argument that the federal government may not compel states to open their markets”).

¹⁷⁶ SCHOTT, *supra* note 103, at 73 (describing the signing of the interim EC-U.S. MOU in May 2003); cf. Exec. Order No. 12,849, 58 Fed. Reg. 30,931 (May 25, 1993), available at <http://www.archives.gov/federal-register/executive-orders/pdf/12849.pdf> (order implementing the EC-U.S. MOU on government procurement).

¹⁷⁷ SCHOTT, *supra* note 103, at 73.

¹⁷⁸ Halford, *supra* note 75, at 49.

¹⁷⁹ SCHOTT, *supra* note 103, at 74.

¹⁸⁰ *Id.* at 74-75; cf. Marceau & Blank, *supra* note 10, at 116-17 (recounting the same conflict).

resulted not only in reduced coverage but also coverage “beset by a myriad of derogations *vis-à-vis* the various signatories.”¹⁸¹ The GPA thereby “harbours an intra discriminatory trade regime between its Members[.]”¹⁸²

The purpose in detailing the negotiations was to illustrate that coverage was closely bargained. That is because the GPA permits discrimination against members for procurement contracts not covered by the GPA,¹⁸³ and that is precisely what the parties did during negotiations. Reich explains the significance of the GPA countenancing such tactics:

This situation, where a major trade barrier is allowed to continue and flourish, and to distort so much trade between WTO members, is obviously in conflict with the GATT principle of

¹⁸¹ Reich (1997), *supra* note 59, at 136-38; *see also* Kashdan, *supra* note 11, at 571 (noting coverage negotiations about sub-central entities were marked by a “high degree of reciprocity”). It is of some consolation, however, that the parties have not taken a strict sector-by-sector approach to reciprocity but rather have attempted only a rough balance of opportunities. *See* ARROWSMITH (2003), *supra* note 15, at 110.

¹⁸² Reich recounts examples where the tit-for-tat approach produced undesirable results. The United States, for example, in response to perceived slights originally denied access to its state governments and electrical utilities to all signatories except for Israel and South Korea. And at one time, the EU only allowed Finland and Switzerland access to public transportation and excluded all other GPA members. *See* Reich (1997), *supra* note 59, at 136-37.

¹⁸³ “The GPA applies only to government procurement covered by the [GPA], and it bestows national treatment only to products, services and suppliers of other parties to the GPA.” Reich (1997) *supra* note 59, at 134, n.70 (citing GPA, Articles I.1 and III.1, *supra* note 16). Arrowsmith and Anderson explain that “market-opening commitments under the current GPA do not always apply on [a most-favored nation] basis, in particular because some concessions are limited by the Parties to those Parties who themselves offer reciprocal concessions of the same type.” Robert D. Anderson & Sue Arrowsmith, *The WTO Regime on Government Procurement: Past, Present and Future*, in ARROWSMITH & ANDERSON, *supra* note 113, at 20. Anderson elaborates in another article in the same book co-authored with Osei-Lah:

Party A may exclude certain products or services from its coverage for particular reasons. In response, Party B, which otherwise covers such products or services, may restrict access to procurement of such products and services by its entities with respect to suppliers of Party A, or otherwise impose other restrictions or derogations with respect to Party A.

Robert D. Anderson & Kodjo Osei-Lah, *The Coverage Negotiations Under the Agreement on Government Procurement: Context, Mandate, Process and Prospects*, in ARROWSMITH & ANDERSON, *supra* note 113, at 159.

trade liberalization and open markets. The fact that this has occurred . . . serve[s] as a baffling testimony to the immense domestic interests at stake in this field and the powerful political forces opposing liberalization of government purchasing.¹⁸⁴

Hence, the particular coverage arrangements that resulted did not come about by accident. Each choice about coverage made during the negotiations had immediate and reciprocal consequences.

In the end, the United States persuaded thirty-seven states and seven of its twenty-four largest cities to enter the GPA voluntarily.¹⁸⁵ The thirty-seven states were thought to encompass 80% of state procurement.¹⁸⁶ The federal government granted coverage for goods, services, and construction.¹⁸⁷ On the other side of the ledger, it retained set aside programs for minorities and small businesses¹⁸⁸ and made full use of the national security exception.¹⁸⁹

3.4.2. *The Revised GPA Negotiations*

This subsection gives an overview of the negotiations from 1997 until the Revised GPA became effective in 2014. It next summarizes the key revisions, and then reviews the increased coverage caused by the revisions. Lastly, it compares the EU's demands for increased coverage of sub-central entities with the final results in the United States.

The original GPA negotiators foresaw the need to continue negotiations, and included a provision that talks would begin within

¹⁸⁴ Reich (1997) *supra* note 59, at 134-35.

¹⁸⁵ SCHOTT, *supra* note 103, at 74 (noting that among these 37 states the five largest were California, New York, Illinois, Florida, and Texas and that the seven cities were Chicago, Detroit, Boston, Dallas, Indianapolis, San Antonio, and Nashville); see also Scott Sheffler, *A Balancing Act: State Participation in Free Trade Agreements with "Sub-central" Procurement Obligations* (forthcoming) (providing a detailed analysis of the application of the GPA to the 37 U.S. states who are signatories).

¹⁸⁶ de Graaf & King, *supra* note 89, at 449.

¹⁸⁷ SCHOTT, *supra* note 103, at 74.

¹⁸⁸ *Id.*

¹⁸⁹ GPA, Article XXIII.1, *supra* note 16; BARBOUR, *supra* note 100, at 46 (citing GPA, Appendix I, United States, Annex 1, *supra* note 15) (also citing an example of the Department of Energy's exception for safeguarding nuclear materials).

three years of signing.¹⁹⁰ Thus, informal discussions started in early 1997,¹⁹¹ and a first draft came together in 2003.¹⁹² The parties agreed on negotiation procedures in 2004.¹⁹³ In 2006, they agreed changes would not take effect until coverage had been worked out.¹⁹⁴ Five years of haggling ensued¹⁹⁵ and the negotiations continued until a deal was struck on December 15, 2011.¹⁹⁶ The final text was adopted on March 30, 2012,¹⁹⁷ but would not take effect until ten countries ratified it,¹⁹⁸ as a two-thirds majority was required.¹⁹⁹ Israel

¹⁹⁰ GPA, Article XXIV.7(b), *supra* note 16; *see also* GPA Article XXIV.8 (mandating that the parties would consult regularly on necessary modifications due to changes in information technology).

¹⁹¹ *See* Anderson & Arrowsmith, *supra* note 183, at 21.

¹⁹² *Id.* at 22; Anderson & Osei-Lah, *supra* note 183, at 163.

¹⁹³ Modalities for the Negotiations on Extension of Coverage and Elimination of Discriminatory Measures and Practices, GPA/79 (Jul. 19, 2004); *see also* Committee on Government Procurement, *Report (July 2003 - November 2004) of the Committee on Government Procurement*, ¶ 23, GPA/82, (Dec. 11, 2006) (noting that the chairman's suggestion on the negotiations was followed).

¹⁹⁴ Committee on Government Procurement, *Report of the Committee on Government Procurement (November 2005 - December 2006)*, ¶ 20, GPA/89 (Dec. 11, 2006); *but see* Sue Arrowsmith, *The Revised Agreement on Government Procurement: Changes to the Procedural Rules and Other Transparency Provisions*, in ARROWSMITH & ANDERSON, *supra* note 113, at 285 [hereinafter Arrowsmith (2011)] (explaining that a revised text was provisionally adopted in 2006 to facilitate new accessions).

¹⁹⁵ Anderson & Osei-Lah, *supra* note 183, at 165-66.

¹⁹⁶ *See* EU, *Japan Wrestle With Final GPA Deal, While EU, U.S. Narrow Differences*, 29 INSIDE U.S. TRADE (Nov. 18, 2011) [hereinafter *Narrow Differences*] (describing "daily" conversations between U.S. and EU ambassadors in Geneva to "hammer out the final terms" until just weeks before the agreement's signing).

¹⁹⁷ Protocol Amending the Agreement on Government Procurement (Mar. 30, 2012), GPA/113, *available at* http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm#negotiations [hereinafter Revised GPA]; Decision on the Outcomes of the Negotiations under Article XXIV § 7 of the Agreement on Government Procurement, GPA/112, ¶ 5 (December 16, 2011); *see also* Ping Wang, *The Renewed Momentum for the Expansion of the WTO Agreement on Government Procurement*, 4 PUB. PROC. L. REV. NA157 (2012) (recapping the last four months of approval process).

¹⁹⁸ Although there are currently 43 GPA member states, all 28 EU member states count as one country for purposes of ratification. *See* notes 104 and 109-111, *supra* (listing original and new signatory states). Therefore, ten countries must ratify.

¹⁹⁹ Originally, the plan was to have the Revised GPA ratified by a two-thirds majority not later than the WTO ministerial conference in Bali, Indonesia, on 3-6 December 2013, but those plans had to be postponed because only one GPA member country (Lichtenstein) had completed ratification as of October 30, 2013.

supplied the tenth vote,²⁰⁰ and the Revised GPA came into force on April 6, 2014.²⁰¹

“The revised text,” Anderson and Arrowsmith say, “is in no sense a radical revision[.]”²⁰² Mostly, it “streamlined and modernized” the GPA,²⁰³ and “carrie[d] over a large number of the existing Agreement’s provisions, albeit in modified and more easily understood form.”²⁰⁴ Its “aim” was “streamlining, simplifying or clarifying the text, providing more flexibility or, as appropriate, more transparency, and/or bringing the text up to date to reflect new practical developments.”²⁰⁵ Among its most striking developments are new provisions on corruption, transparency, and good governance, which are far removed from the WTO’s traditionally singled-minded emphasis on free trade.²⁰⁶

The provision on challenge procedures corresponding to GPA Article XX is Revised GPA Article XVIII.1. There are several minor changes to Article XX.²⁰⁷ Most significant here, however, is the tacit

Revised GPA Will Not Enter into Force by Bali due to Ratification Shortfall, 31 *INSIDE U.S. TRADE* (Nov. 8, 2013).

²⁰⁰ Timothy Keeler & Kelsey M. Rule, *Revisions to WTO Agreement on Government Procurement Enter into Force*, *MONDAQ* (Apr. 10, 2014), <http://mondaq.com/> (reporting that Israel adopted the Revised GPA on March 7, 2014).

²⁰¹ *Id.*

²⁰² Anderson & Arrowsmith, *supra* note 183, at 23.

²⁰³ Keeler & Rule, *supra* note 200.

²⁰⁴ Arrowsmith (2011), *supra* note 194, at 287.

²⁰⁵ *Id.* at 288.

²⁰⁶ *Id.* at 287-88 (describing “innovative new provisions which refer to conflicts of interest and corruption” as well as “more transparency”); Robert D. Anderson, *The Conclusion of the Renegotiation of the World Trade Organization Agreement on Government Procurement: What It Means for the Agreement and for the World Economy*, 3 *PUB. PROC. L. REV.* 83, 90-92 (2012) (arguing that “the revised GPA text, the Agreement has to an extent been re-framed to respond directly to current concerns regarding good governance in addition to its core role in maintaining open markets”); Krista Nadakavukaren Schefer & Mintewab Gebre Woldesenbet, *The Revised Agreement on Government Procurement and Corruption*, 47 *J. WORLD TRADE* 1129, 1130 (2013) (noting that the Revised GPA is the first WTO document to use the word “corruption” and to address such concerns directly).

²⁰⁷ The GPA labels this section “Challenge Procedures,” whereas the Revised GPA calls the section “Domestic Review” procedures. There are a number of other changes of this nature. Compare GPA, Article XX.2, *supra* note 16 (showing the original language) with Revised GPA, Article XVIII.1, *supra* note 197 (revising the text to read “Domestic Review”).

acknowledgement that not all members would grant private parties a right to challenge under the Revised GPA. Article XVIII.1(b) provides that foreign suppliers may use a State's domestic challenge procedures "where the supplier does not have a right to challenge directly a breach of the Agreement under the domestic law of a Party, a failure to comply with a Party's measures implementing this Agreement[.]"²⁰⁸ It seems this provision may have been adopted to recognize what had been implicitly understood during the original GPA negotiations - namely, that granting direct challenges under the GPA was not required, so long as the private parties are afforded an adequate forum under domestic challenge procedures.

The transition from GPA Article XX to Revised GPA Article XVIII.1 was uneventful as the latter merely memorialized what the member states had always intended.²⁰⁹ Their intention, it seems, was that while members could elect not to grant foreign suppliers direct challenge rights, implementing legislation was required to afford parties substantive and procedural rights as if they had done so. This must have been their intention or else Article XX would

²⁰⁸ See *supra* notes 154-162, and accompanying text.

²⁰⁹ When interpreting treaties in the United States, the parties' intention is paramount. Elsewhere, the text controls. See JACKSON, *supra* note 9, at 165 (explaining that "most countries interpret international agreements in accordance with the ordinary meaning of the text" and that "the object and purpose of the agreement is merely ancillary"). For U.S. courts, the "prime objective of interpretation . . . is to ascertain the meaning intended by the contracting parties." *Id.* at 165-66 (reporting that the rule favoring the intention of the parties over the language of the agreement in the interpretation of treaties "has been repeatedly sanctioned by the Supreme Court") (citing *Sumitomo Shoji America v. Avagliano*, 457 U.S. 176 (1982); *Maximov v. United States*, 373 U.S. 49 (1963); *Pigeon River Improvement Slide & Boom Co. v. Charles W. Fox*, 291 U.S. 138 (1934)).

have been to no purpose²¹⁰ and members could simply opt out of their obligations.²¹¹

The Revised GPA added between \$80 and \$100 billion to the \$1 trillion to coverage.²¹² Members included more than 200 new entities.²¹³ Several lowered their thresholds,²¹⁴ and for the first time all members agreed to robust coverage of construction.²¹⁵ Though not insignificant, this was far less than what the EU had hoped for.

They entered into discussions “seeking a major expansion in coverage.”²¹⁶ Negotiations again faltered in 2007 when the EU

²¹⁰ It would be mistaken to conclude that Article XX of the GPA was written only to be ignored for two reasons. First, treaties should not be read in a manner that “[l]eads to a result which is manifestly absurd or unreasonable.” Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 60, 1155 U.N.T.S. 331. [Hereinafter Vienna Convention]. Reading Article XX as if it were written to be ignored would be absurd. Second, the Vienna Convention’s general rule of interpretation is that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context*[.]” *Id.*, art. 32 (emphasis added). Interpreting the words of a treaty “in their context” entails applying the rule against surplusage, which holds that an interpretation that would render a word or phrase redundant or meaningless should be rejected. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174-79 (2012) (defining the rule of surplusage); Stephen M. Schwabel, *May Preparatory Work Be Used to Correct Rather Than Confirm the “Clear” Meaning of a Treaty Provision?*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY* 545 (Jerzy Makarczyk ed., 1996) (noting that this rule is also “a canon of treaty interpretation”). Although the United States is not a signatory to the Vienna Convention, it does hold that portions “constitute customary international law on the law of treaties.” U.S. Department of State, Vienna Convention on the Law of Treaties, *available at* <http://www.state.gov/s/l/treaty/faqs/70139.htm>.

²¹¹ Article XX was an unambiguous obligation of the WTO GPA. As with all treaties and international agreements, the parties have specific obligations to co-signatories to comply with the terms of the agreement and concerning the procedures for modifying or withdrawing from the agreement. *See* Vienna Convention, *supra* note 210, at art. 26 (good faith performance), art. 27 (may not rely on internal law to justify nonperformance); art. 39 (“treaty may be amended [only] by agreement between the parties”), art. 65 (withdrawal procedure). The GPA is no exception and sets forth procedures for complying with, amending, and withdrawing from the agreement. *See* GPA, *supra* note 16, art. XXIV.5 (implementing legislation); art. XXIV.9 (amendments); art. XXIV.10 (withdrawal).

²¹² Anderson 2012, *supra* note 206, at 84.

²¹³ *Id.* at 84-85.

²¹⁴ *Id.* at 85 (mentioning Japan, Korea, and Aruba).

²¹⁵ *Id.*

²¹⁶ Anderson & Osei-Lah, *supra* note 183, at 170-71 (explaining that there was a “significant gap in aspirations” between the EU and the other major parties).

complained that the United States had failed to “put anything significant on the table.”²¹⁷ Just like the 1993 negotiations, the EU sought greater access to sub-central procurement.²¹⁸ Ultimately, the EU lowered its expectations, withdrawing its 2008 offer when the United States and other major parties would not match it.²¹⁹

The United States’ contribution was, perhaps, especially disappointing. It added eleven federal entities, but not one state or municipality.²²⁰ The United States added only \$4-4.5 billion to the \$400 billion already covered under the GPA, or 1% of its coverage.²²¹ Though this may be of small consolation, it was not for lack of effort or bad faith,²²² but stemmed from the obstacles associated with federalism described above.²²³ From the EU’s perspective, this was, nonetheless, a modest offer coming from the second largest GPA member. The Europeans elected to move forward with talks anyway.²²⁴ Their aspirations for better access to the United States’ sub-central markets may resurface during TTIP negotiations. It is unlikely that they have given up.

²¹⁷ U.S., *EU Spar Over WTO Government Procurement Pact, Miss Deadline*, 25 INSIDE U.S. TRADE (Dec. 21, 2007) (describing “tense discussion[s]” between the United States and EU).

²¹⁸ See RAJ BHALA, *Modern GATT Law* 969-71 (2013) (relating that the Europeans demanded, in particular, that the United States extend coverage to the 13 states not subject to the GPA); *Narrow Differences*, *supra* note 196.

²¹⁹ *New EU Offer in GPA Talks Will Scale Back Ambition, but Talks Advance*, 28 INSIDE U.S. TRADE (Dec. 17, 2010) [hereinafter *Scale Back Ambition*].

²²⁰ Jean Heilman Grier, *Background: New Procurement Opportunities Under Revised GPA*, PERSPECTIVES ON TRADE (Mar. 17, 2014), available at <http://trade.djaghe.com/?p=488>.

²²¹ See *U.S. Commitments in Revised GPA Expand Coverage by Roughly 1 Percent*, 30 INSIDE U.S. TRADE (Jan. 13, 2012).

²²² See *Documents Show USTR Made Last-Ditch Effort to Sign Up States to GPA*, 30 INSIDE U.S. TRADE (Feb. 17, 2012) (recounting the United States Trade Representative’s failed efforts to secure consent from Georgia, West Virginia, New Jersey, and North Carolina).

²²³ See *supra* notes 173-175 and accompanying text. *But see* Leebron, *supra* note 146, at 224-31 (recounting the lengthy federalism debate over the URAA and the sides taken by various academics and suggesting this is more a political issue than a genuine constitutional issue because of the “broad legal powers of the federal government”).

²²⁴ See *Scale Back Ambition*, *supra* note 219.

4. A STATUTORY BAR AND THE FUTURE OF TTIP NEGOTIATIONS

Having presented the necessary background on the alphabet soup of the WTO, AGP, GPA, Revised GPA, and TTIP, this section now engages the main argument: namely, that the United States' statutory bar to domestic challenges required under both the GPA, Article XX, and the Revised GPA, Article XVIII.1 could prove an obstacle to TTIP negotiations.²²⁵

Subsection A details the statutory bar's sources. Subsection B explains why that may be a bone of contention during TTIP negotiations.

Before proceeding, two considerations about the statutory bar on private actions bear mentioning, and the ramifications of each are discussed in corresponding footnotes. First, the statutory bar is hardly unique to the GPA, but extends to all of the United States' legislation implementing the WTO (i.e., the URAA).²²⁶ Second, the bar on private actions is not unique to the WTO, but extends to other free-trade agreement such as NAFTA.²²⁷

²²⁵ For that matter, the fact that the URAA did not grant private parties the right bring complaints under the original GPA when that was required under Article XX and was apparently understood in that way during the 1993 negotiations may also affect TTIP negotiations. The Revised GPA has barely taken effect in March 2014; any injuries to aggrieved suppliers before that would, presumably, be governed by the original GPA.

²²⁶ See 19 U.S.C. § 3512(c)(1); see also note 241 *infra* (raising a question about whether the argument favoring removal of the statutory bar to private actions under the GPA should be extended to implement the WTO more broadly. Though this will probably not happen. Under the sovereign acts doctrine in the United States, there is a distinction between the government's distinct roles as buyer and sovereign. Similarly, this Article submits that unlike other challenges under the WTO (for which private actions may be ill suited), granting private challenges under the GPA is important since "private attorneys general" may be uniquely situated to challenge the government's abuses and shortcomings when it is acting a buyer). See, e.g., Robert C. Marshall, Michael J. Meurer & Jean-Francois Richard, *The Private Attorney General Meets Public Contract Law: Procurement Oversight by Protest*, 20 HOFSTRA L. REV. 1, 21 (1991) (arguing disappointed bidders "may be characterized as private attorneys general because they have incentives to detect and prosecute actions by procurement officials that are contrary to the public interest."). Government procurement is a special case; this Article does not advocate removing the bar on *all* private actions that could be brought under the WTO.

²²⁷ A similar bar on private actions has been included in every act implementing a free trade agreement. See, e.g., 19 U.S.C. § 3312(c) (establishing that

4.1. *The United States Does Not Provide a Forum for Aggrieved Foreign Suppliers to Challenge Violations of the GPA.*

When the GPA was negotiated, it was widely held that the United States would need few if any changes to implement the GPA.²²⁸ Whereas the GPA establishes only basic requirements for a

only the United States government has a cause of action under the North American Free Trade Agreement (NAFTA), specifically prohibiting “private remedies”); *but see* Patricia Isela Hansen, *Dispute Settlements in the NAFTA and Beyond*, 40 TEX. INT’L L.J. 417, 419 (2005) (arguing NAFTA provides a model for other trade agreements because although it did not create private remedies, it established binding arbitral awards requiring national governments to pay for violations of the agreement, thus raising the question about whether this Article’s advocacy for private action should be extended to other free trade agreements). This Article argues (a) that during the original GPA negotiations in early 1990s the United States may have left its partners with the impression that it would grant private parties standing to challenge procurements under the GPA and (b) that there are costs associated with flouting that (tacit) agreement. Whether the United States should reassess or amend its implementing legislation for other free trade agreements depends on (c) what was said during negotiations, including (d) whether specific commitments were made that the implementing legislation does not deliver on, and (e) what consequences may follow from renegeing on such commitments. This Article does not delve into legal or moral reasons that may favor removing the statutory bar. Its approach is mainly descriptive. Insofar as it makes normative arguments, it does so based on practical considerations. Specifically, it argues that the bar may have the unintended consequence of derailing TTIP and, thus, ought to be reconsidered. Whether to amend the bar to private causes of action under free trade agreements (e.g., NAFTA) ought to be evaluated in like manner: What did the United States promise? If a bar was not envisioned, would it be in the national interest to correct any misunderstandings? Et cetera. Such questions are worth pondering, but are well beyond the scope of this Article.

²²⁸ See Kashdan, *supra* note 11, at 562, 573 (holding that “[r]elatively little legislation was needed . . . since the waiver of the Buy American Act and Balance of Payments Program could be accomplished relatively simply, and U.S. procurement procedures already were consistent with the obligations imposed under the [GPA]” and that the URAA was only a “relatively minor” change to existing law); Joseph Francois, Douglas Nelson & N. David Palmetier, *Public Procurement in the United States: A Post-Uruguay Round Perspective*, in HOEKMAN & MAVROIDIS (1997), *supra* note 84, at 106 (relating that implementation “required only minor changes in federal law”); Christopher F. Corr & Kristina Zissis, *Convergence and Opportunity: The WTO Government Procurement Agreement and U.S. Procurement Reform*, 18 N.Y.L. SCH. J. INT’L & COMP. L. 303, 345–46 (1998) (writing that federal procurement laws and regulations already complied with the GPA for the most part and required only a few changes, that it already had transparent procedures, and that the GPA was instead “aimed at countries without such procedures”). This

government procurement system,²²⁹ the United States already had a procurement system that many considered the “envy of the world.”²³⁰ What was there to amend?²³¹

Yet U.S. federal law falls short in at least one respect,²³² and this affects the remedies available to suppliers at federal, state, and local

Article is not, however, the first to observe that the URAA imperfectly implements the various WTO agreements. *See, e.g.,* Leebron, *supra* note 146, at 212 (noting that “many aspects of the agreement were not explicitly implemented by the legislation”).

²²⁹ Arrowsmith helpfully cites sources describing the measures taken to conform with the GPA in several countries. *See* ARROWSMITH (2003), *supra* note 15, at 384 n.97.

²³⁰ *See, e.g., Politicizing Procurement: Will President Obama’s Proposal Curb Free Speech and Hurt Small Business?: J. Hearing Before the H. Comm. on Oversight and Gov’t Reform and the H. Comm. on Small Business*, 112th Cong. 103 (2011) (written testimony of Daniel I. Gordon, Adm’r For Fed. Procurement Policy at the Office of Mgmt. and Budget, stating that the United States’ acquisition system is the “envy of the world”); REICH (1999), *supra* note 79, at 128 (explaining that the United States’ procurement system was considered an exception).

²³¹ That is not to say that the GPA is so specific that it requires that a particular sort of system be implemented. Arrowsmith explains, “There is a great diversity between GPA parties in the types of bodies (if any) that have been entrusted with the task of reviewing procurement decisions” and lists common law countries where procurement cases are heard before courts of general jurisdiction and civil law countries which have “created specialist tribunals or other review bodies that deal wholly or mainly with procurement” ARROWSMITH (2003), *supra* note 15, at 393-94. “The GPA recognises the diversity of national legal traditions,” she concludes, “and leaves considerable discretion for states to determine the forum and procedure for review.” *Id.* at 394. Article XX sets minimal requirements, and then leaves the details to the member states. *Id.* at 394-95.

²³² U.S. federal law may fall short in other ways as well. For example, subcontractors’ rights to bring actions are limited, and such actions can be brought only through the sponsorship of a prime contractor with privity of contract with the government. *See, e.g.,* RALPH C. NASH, JR., KAREN R. O’BRIEN-DEBAKEY & STEVEN L. SCHOONER, *THE GOVERNMENT CONTRACTS REFERENCE BOOK: A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT* 477-78 (4th ed. 2013). By contrast, it does not appear subcontractors’ rights are limited in the same manner under the GPA. *See, e.g.,* REICH (1999), *supra* note 78, at 308 (explaining that the GPA adopted a “broad definition” of legal standing that “would appear to allow not only main contractors to file challenges, but also potential sub-contractors”); ARROWSMITH (2003), *supra* note 15, at 391-93 (arguing that while “supplier” is undefined, the “better view” is that the word has a “broader meaning, extending to any firm engaged in supplying works, supplies or services, whether as a main contractor, subcontractor, or operating further down the supply chain”); Xinglin Zhang, *Constructing a system of challenge procedures to comply with the Agreement on Government Procurement*, *See* comment in ARROWSMITH & ANDERSON, *supra* note 113, at 501-03 (arguing the requirement for challenge procedures applies to subcontractors as well as prime contractors). While there are surely other ways the

levels.²³³ Among the GPA's minimum standards is a requirement that member states provide access to a forum where aggrieved suppliers can challenge "alleged breaches of the [GPA] arising in the context of procurements in which they have, or have had, an interest."²³⁴ The Revised GPA makes a similar provision.²³⁵ This is not the same as providing access to domestic award challenge forums. Instead, Article XX.2 guarantees suppliers from member states not only the right to challenge particular awards under domestic law but also *the right to challenge the domestic system's compliance with the GPA*.²³⁶ U.S. legislation unequivocally bars the latter.²³⁷ And there is not, therefore, a single forum at any level of U.S. government where a foreign supplier can challenge breaches of the GPA.²³⁸

United States may fall short of the GPA requirements, a full exploration is beyond the scope of this Article.

²³³ The United States has been "restrictive" in its implementing legislation since the Tokyo Round negotiations. Leebron, *supra* note 146, at 213. What is new, however, "is the attempt to circumscribe the effect of the law itself." *Id.* Congress sought to "greatly limit the extent to which the [URAA] may be interpreted to alter any existing laws." *Id.* Leebron explains, "instead of choosing to grease the path to compliance, Congress to a considerable degree chose to put stones on it." *Id.* at 214. In a word, Congress chose a "minimalist approach to implementation: if the provisions of its law were not clearly in violation of the WTO agreements as the United States interpreted them, the United States took no legislative action." *Id.* at 234 (emphasis added). Especially with regard to federalism and other politically sensitive areas "the approach was one of 'wait and see': wait to see if in fact violations develop and whether they are challenged by other parties to the WTO." *Id.* (emphasis added). Although "in most contexts the United States took the steps required to bring it into compliance," he concludes, "a number of provisions in the implementing legislation [i.e., URAA] which appear not to be in full compliance with the WTO agreements." *Id.*

²³⁴ GPA, Article XX.2, *supra* note 16. One limitation of the analysis of this provision, however, is that there has been "[n]o jurisprudence or decision of a competent WTO body." WTO Analytical Index: Agreement On Government Procurement, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gpa_02_e.htm#article20B.

²³⁵ Revised GPA, Article XVIII.1, *supra* note 197 (providing that a private party may bring an action "arising in the context of a covered procurement, in which the supplier has, or has had, an interest").

²³⁶ *Id.*

²³⁷ See 19 U.S.C. § 3512(c)(1) (2011). This Article is not the first to note the effect of this provision. See Tiefer, *supra* note 7, at 44-46; Schaefer, *supra* note 7, at 639.

²³⁸ See 19 U.S.C. § 3512(c)(1)(B) (2011) (forbidding any private causes of action under the GPA to challenges state or local procurement procedures or decisions); see also Leebron, *supra* note 146, at 242 (criticizing Congress for expanding the

Only one legal “person” can challenge violations of the WTO agreement: “the United States.”²³⁹ Under the URAA,²⁴⁰ which, again, applies not only to subsidiary agreements such as the GPA but also to the WTO generally,²⁴¹ suppliers cannot seek “private remedies.”²⁴² No one else may “challenge” agency decisions “on the grounds that such action . . . is inconsistent with [the GPA].”²⁴³ Actions under the GPA against state and local governments are also barred.²⁴⁴ For those who doubted its motivations, Congress explained that its intention was to preclude “any person other than the United States from bringing actions” under the GPA.²⁴⁵ For easy reference, the full text of 19 U.S.C. § 3512(c) is provided below.²⁴⁶

President’s trade authority and encouraging trade agreements “while simultaneously closing United States courts to those wishing to challenge actions of the state or federal government as violative of international commitments”).

²³⁹ 19 U.S.C. § 3512(c)(1) (2011) (proscribing private causes of action by holding that “[n]o person other than the United States” can bring action under the GPA); Leebron, *supra* note 146, at 212 (explaining that there is no private cause of action under the URAA).

²⁴⁰ Pub. L. 103-465, Dec. 8, 1994, 108 Stat. 4809; 19 U.S.C. § 3501, *et seq.*

²⁴¹ 19 U.S.C. § 3511(a) (approving the trade agreements listed in subsection (d) of this section); 19 U.S.C. § 3511(d)(17) (listing the GPA as an agreement “annexed to” the WTO agreement). *See also* Leebron, *supra* note 146, at 206 (explaining that the URAA did not distinguish between the multilateral and the plurilateral agreements).

²⁴² 19 U.S.C. §§ 3512(c)(1) and (c)(2).

²⁴³ 19 U.S.C. § 3512(c)(1)(B).

²⁴⁴ 19 U.S.C. § 3512(c)(1)(B) (prohibiting private actions against state governments and “any political subdivision of a State,” which would include city and local government).

²⁴⁵ 19 U.S.C. § 3512(c)(2).

²⁴⁶ 19 U.S.C. § 3512(c) provides as follows:

(c) Effect of agreement with respect to private remedies

(1) Limitations

No person other than the United States –

(A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or

(B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.

(2) Intent of Congress

In addition to the specific prohibition of private actions under the GPA, Congress also included a general prohibition on utilizing inconsistencies between domestic law and the GPA. 19 U.S.C. § 3512(a)(1) provides: “No provision of any of the Uruguay Round Agreements . . . that is inconsistent with any law of the United States shall have effect.”²⁴⁷ This has become known as the URAA’s “supremacy clause.”²⁴⁸

Finally, apart from insulating states and local agencies from litigation for breaches of the GPA,²⁴⁹ the URAA-implementing legislation also “failed to specify state obligations[.]”²⁵⁰ The consequences of shielding states and local agencies run counter to the purposes of the GPA and are considered below. Suffice it to say that this is precisely where foreign competition would have been most useful and where the EU has expressed the most interest.

It is the intention of the Congress through paragraph (1) to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements, including by precluding any person other than the United States from bringing any action against any State or political subdivision thereof or raising any defense to the application of State law under or in connection with any of the Uruguay Round Agreements –

(A) on the basis of a judgment obtained by the United States in an action brought under any such agreement; or

(B) on any other basis.

²⁴⁷ 19 U.S.C. § 3512(a)(1) (2011).

²⁴⁸ See Filicia Davenport, Note, *The Uruguay Round Agreements Act Supremacy Clause: Congressional Preclusion of the Charming Betsy Standard with Respect to WTO Agreements*, 15 FED. CIR. B.J. 279, 281-82 (2005) (noting that Congress “expressly forbade any judicial deference to conflicts between domestic statutes and the WTO agreements in a section known as the URAA Supremacy Clause”); Raj Bhala, *Equilibrium Theory, the FICAS Model, and International Banking Law*, 38 HARV. INT’L L.J. 1, 16 (1997) (explaining that “Congress inserted in the Uruguay Round Agreements Act a supremacy clause: in the event of an inconsistency between United States law and a provision in a Uruguay Round agreement, the former takes precedence over the latter”).

²⁴⁹ See Leebron, *supra* note 146, at 228-229 (explaining that in “sweeping language” Congress declared “[n]o state law, or its application, may be declared invalid on the basis that it violates the [WTO] except in an action brought by the federal government specifically for that purpose”).

²⁵⁰ *Id.* at 230 (explaining that “reluctance to impinge on state activity resulted in inaction in cases where [state] implementing provisions were arguably required”).

The following example illustrates the problem. Article III prohibits discrimination against foreign suppliers.²⁵¹ Member states may at any time after accession enact laws or regulations that are inconsistent with this requirement and which are not exempted in their accession agreements. Suppose that the United States passed a law called the Always Buy American Act (“ABAA”), which unlike the real Buy American Act does not exempt partners in free-trade agreements or the GPA.²⁵² Suppose also that Airbus lost an award to build an airplane for the U.S. Air Force only because Boeing is a domestic supplier and the ABAA says agencies must favor such domestic suppliers. Airbus could protest at the Government Accountability Office (GAO), the Court of Federal Claims (COFC),

²⁵¹ This is just one example. There are any number of ways that member states could breach their duties. They may engage in bid splitting tactics to avoid thresholds (Article II, Valuation of Contracts); they may neglect their duties to developing countries (Article V, Special and Differential Treatment for Developing Countries); they may word specifications in order to favor domestic firms (Article VI, Technical Specifications); they may share information with domestic firms to give them a leg up (Article VII, Tendering Procedures); they may tinker with qualifications to render foreign firms uncompetitive (Article VIII, Qualification of Suppliers); they may inadequately advertise (Article IX, Invitation to Participate Regarding Intended Procurement); they may fail to notify foreign firms of opportunities to be included on short lists of qualified suppliers (Article X, Selection Procedures); they may set deadlines that would be unrealistic for foreign competitors (Article XI, Time-limits for Tendering and Delivery); they may choose a native language that would preclude foreign competition (Article XII, Tender Documentation); they may open bids early and share those bids with domestic firms to undercut foreign competitors (Article XIII, Submission, Receipt and Opening of Tenders and Awarding of Contracts); they may violate a party’s confidentiality during negotiations to favor a local firm (Article XIV, Negotiation); or they may grant sole-source contracts without justification (Article XV, Limited Tendering). Any of these may comply with domestic law but would certainly fail under the GPA, and that is why Article XX grants parties the right to directly challenge awards under the GPA.

²⁵² JOHN CIBINIC, JR., RALPH C. NASH, JR. & CHRISTOPHER R. YUKINS, *FORMATION OF GOVERNMENT CONTRACTS* 1624-26 (2011) (explaining that the application of the Buy American Act was waived by an executive order implementing one provision of the Trade Agreements Act of 1979) (citing 19 U.S.C. § 2511(a) (authorizing the President to waive any otherwise applicable “law, regulation, procedure or practice regarding Government procurement” that would accord foreign products less favorable treatment than that given to domestic products); Exec. Order No. 12,260, 46 Fed. Reg. 1653 (Dec. 31, 1980)).

or both;²⁵³ neither forum discriminates based on nationality²⁵⁴ and both regularly hear protests brought by foreign suppliers.²⁵⁵ But supposing that these forums uphold the ABAA, the award will stand. What could Airbus do?

The GPA promises aggrieved suppliers the right to challenge “breaches” of the GPA,²⁵⁶ and this hypothetical presents such a breach.²⁵⁷ But U.S. law bars private actions in such cases. Two options remain. Like its predecessor, the GPA provides a forum for inter-governmental negotiation.²⁵⁸ It also grants recourse to the WTO’s Dispute Resolution Understanding forum.²⁵⁹ What it does

²⁵³ See, e.g., 28 U.S.C. § 1491(b)(1) (granting COFC jurisdiction over contract claims brought by “interested part[ies]” and not limiting such claims to domestic firms); Fed. Cl. R., App. C. (Aug. 30, 2013), Procedure in Procurement Protest Cases (Court of Federal Claims rules not specifying that the parties cannot be foreign contractors in procedure procurement protest cases).

²⁵⁴ Corr & Zissis, *supra* note 228, at 311-13, 353 (explaining that an aggrieved “multinational supplier” “may pursue relief through various U.S. remedial processes”).

²⁵⁵ See, e.g., *Supreme Food Service GmbH*, B-405400.6, *et al.* (Comp. Gen. Mar. 27, 2013), available at <http://www.gao.gov/assets/660/653510.pdf> (Swiss firm protesting bid at GAO); *Supreme Food Service GmbH*, 112 Fed. Cl. 402 (2013) (same Swiss firm protesting the same award at COFC following an unsuccessful protest at GAO).

²⁵⁶ See GPA, Article XX.2, *supra* note 16; the full text is as follows:

Each Party shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest.

²⁵⁷ See GPA, Article III(1)(a), *supra* note 16 (providing that member states “shall provide immediately and unconditionally” foreign suppliers of other member states “treatment no less favourable than” that “accorded to domestic . . . suppliers”).

²⁵⁸ See AGP (1988), Article VII, *supra* note 73 (establishing system of inter-governmental discussions); GPA, Article XXII, *supra* note 16 (retaining the system of inter-governmental discussions); see also Footer, *supra* note 150, at 88-91 (explaining that the GPA “basically retains” the AGP’s inter-governmental dispute settlement system).

²⁵⁹ See WTO Agreement, Annex 2, Understanding on the Rules and Procedures Governing the Settlement of Disputes, *supra* note 16 (establishing the DSU’s basic rules); GPA, Article XXII, *supra* note 16 (providing that the DSU applies to GPA disputes). For explanations about the DSU’s application to the GPA see ARROWSMITH (2003), *supra* note 15, at 358-71; REICH (1999), *supra* note 78, at 312-15; Davies, *supra* note 86, at 116-123. “In the area of public procurement,” however, “recourse to the DSU has been vastly less extensive than individual bid challenges before national authorities.” Robert D. Anderson, William E. Kovacic & Anna Caroline Müller, *Ensuring Integrity and Competition in Public Procurement Markets: A*

not provide, however, is a substitute for GPA Article XX's private cause of action. Airbus can complain and it can lobby EU politicians in hopes that European diplomats or trade negotiators will seek some form of redress from the United States.²⁶⁰ But it can do little else.²⁶¹

This example illustrates one problem with the URAA from an individual supplier's perspective. But there is a deeper problem. The GPA's challenge procedures were established for more than protecting the interests of posh European aerospace manufacturers. "The main objective of the GPA," Mavroidis and Hoekman explain, "has always been - and remains - to subject government procurement to international competition."²⁶² Granting firms standing to protect their private interests was primarily a means to that end.²⁶³ By limiting complaints of GPA violations, the URAA to some degree insulates U.S. government procurement at all levels

Dual Challenge for Good Governance, in ARROWSMITH & ANDERSON, *supra* note 112, at 696-97. Though perhaps underutilized, the authors argue the DSU "nonetheless represents an essential complement to individual bid challenges as a mechanism for considering systemic matters that may not be adequately addressed in individual bid challenges." (citing Mitsuo Matsushita, *Major WTO Dispute Cases Concerning Government Procurement*, 1 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 299, 305-12 (2006)) (reviewing international disputes under the AGP and the GPA).

²⁶⁰ See ARROWSMITH (2003), *supra* note 15, at 379 (explaining that while private parties are excluded from the DSU, "member states may provide for private parties to be involved in the government's decision on whether to invoke the DSU procedures against another state").

²⁶¹ See ARROWSMITH (2005), *supra* note 96, at 1337 (explaining that if the parties do not pass implementing legislation then intergovernmental discussions are the "sole legal recourse").

²⁶² Mavroidis & Hoekman, *supra* note 76, at 63. Its loftier concerns may also include "good government," increased participation by multinational firms, and "protecting the integrity of the procurement system." Gordon, *supra* note 85, at 430-31. Arrowsmith adds that better enforcement produces "greater certainty and predictability in the application of agreed trade rules" which "encourages governments and private traders to rely on the rules" and the realization of the economic benefits of the liberal trade rules. ARROWSMITH (2003), *supra* note 15, at 380, 402-03.

²⁶³ That point should not be overstated. Article XX's main purpose was to promote the greater good, but it was also supposed to eliminate "individual cases of discriminatory practices by governments against private foreign suppliers" on a case by case basis. REICH (1999), *supra* note 78, at 127. The rationale "for allowing disappointed bidders to protest comes from multiple sources, serving multiple - and not necessarily consistent - goals." Gordon, *supra* note 85, at 430. One such goal is that disappointed bidders ought to have a forum in which to seek relief. *Id.*

from international competition, thereby undermining the GPA's core purpose.

Finally, it is particularly significant that the URAA prohibits private challenges under the GPA at state and local forums.²⁶⁴ It may be that the federal challenge system works well enough that any harm from denying a direct challenge under the GPA is merely fanciful or academic.²⁶⁵ Even if that is true,²⁶⁶ state and local governments' procurement forums are a different story. Many are far less competitive and transparent than the federal system.²⁶⁷ Even their compliance with the minimum standards is questionable, which brings about foreseeable consequences; namely that competition will suffer.²⁶⁸ Anecdotal evidence also suggests that corruption is rife.²⁶⁹ Thus, both foreign suppliers and domestic taxpayers lose from an uncompetitive system rewarding local suppliers at the expense of the public fisc.²⁷⁰ On the whole, everyone is worse off.

²⁶⁴ 19 U.S.C. § 3512(c)(1)(B) (forbidding private parties from bringing an action under the GPA in any state forum "or any political subdivision of a State").

²⁶⁵ See, e.g., *Politicizing Procurement: Will President Obama's Proposal Curb Free Speech and Hurt Small Business?: J. Hearing Before the H. Comm. on Oversight and Gov't Reform and the H. Comm. on Small Business*, 112th Cong. 103 (2011) (written testimony of Daniel I. Gordon, Adm'r For Fed. Procurement Policy at the Office of Mgmt. and Budget, stating that the United States' acquisition system is the "envy of the world").

²⁶⁶ It is not the case that the U.S. federal procurement system is without fault or would not benefit from the crucible of foreign competition. See, e.g., Jessica Fickey, *Fraud in the Bidding Process: The Limited Remedies Available to Contractors*, 38 PUB. CONT. L.J. 913, 914-15 (2009) (describing prosecutions for fraud involving bribes and kickbacks to secure public contracts, and arguing that private firms who lose out due to such fraud are often left without meaningful compensation even after bringing a damages claim).

²⁶⁷ For every Maryland there is an Alabama. See Keith M. Lusby, *Improving the Effectiveness of State Bid Protest Forums: Going Above and Beyond the Agreement on Government Procurement and Adopting the ABA's Model Procurement Code*, 43 PUB. CONT. L.J. 57, 64-66, 69-71 (2013) (comparing the ineffective bid challenge system in Alabama with the more effective bid challenge system in Maryland).

²⁶⁸ See *supra* text accompanying note 98 (explaining methods that can be taken to maximize competition).

²⁶⁹ See, e.g., Robert A. Mullins, *Corruption in Municipal Procurement: Foreclosing Challenges of Disappointed Bidders—Augusta, Georgia, and the Need for Reform*, 42 PUB. CONT. L.J. 281, 282-83, 294-99, 303-04 (2013) (attributing the "[p]olitical favoritism and discriminatory enforcement of procurement regulations [that] run rampant in Augusta" to a broken procurement system).

²⁷⁰ See, e.g., Kingsley S. Osei, *The Best of Both Worlds: Reciprocal Preference and Punitive Retaliation in Public Contracts*, 40 PUB. CONT. L.J. 715, 716-22 (2011)

It also bears mentioning that even if U.S. state and local governments comply with the GPA's standards for challenge procedures, they may still violate the national treatment principle. This principle may require more than the minimum standards for challenge procedures set forth in GPA Article XX or the Revised GPA Article XVIII.1. That is, to the extent state and local governments afford domestic suppliers more ample challenge procedures than those required under the GPA, foreign suppliers must receive no less than their domestic counterparts.²⁷¹ Given the uncompetitive and un-transparent environment at the state and local levels, it seems likely that foreign suppliers are not always given their due privileges under the national treatment principle.

4.2. *Reciprocal Access to Government Procurement Markets*

This subsection argues that the statutory bar against bringing private actions under the GPA could be a deal breaker for TTIP negotiations. In doing so, it reviews the three premises underlying this argument. First, it returns to the GPA negotiations in 1993 and examines how coverage details mattered then. Second, it explains how the statutory bar to private litigation is a violation of the GPA. Third, it considers what Europeans' perspectives may be on the statutory bar, given their position at the recent Revised GPA negotiations and the ongoing TTIP negotiations.

4.2.1. *The GPA Negotiations in 1993*

If the histrionic negotiations in 1993 are any guide, the statutory bar may be a significant issue in the TTIP negotiations. That is the

(describing American governmental entities' use of protectionist policies; the "widespread practice . . . [of] adopt[ing] arbitrary bid price distortion and procurement preferences that favor their resident bidders over out-of-state or foreign bidders").

²⁷¹ See ARROWSMITH (2005), *supra* note 96, at 1333-34 (explaining that the national treatment principle requires that foreign suppliers "should enjoy rights no less favourable tha[n] those of domestic providers . . . even when the rights of domestic firms go beyond the specific minimum requirements on . . . remedies set out in the GPA").

case for two reasons. First, the 1993 negotiations were a close-run fight about coverage. Both sides were determined to give no more than they got.²⁷² The statutory bar to private actions may seem like a collateral issue, but at its core, it concerns coverage. The fight over coverage was the most challenging issue under negotiation in 1993, and it remains among the most challenging issues under negotiation for the TTIP.

The statutory bar on private action removes an important enforcement mechanism and thereby undermines meaningful access to U.S. procurement markets. A constant refrain in this Article has been that EU negotiators will demand not only access to markets, but that such access be *meaningful*, which surely entails access to a forum to challenge breaches of the GPA.²⁷³ Here lies the link between coverage and the right to bring a private action. When the EU fully grasps that the United States did not deliver on its commitment to abide by one of the GPA's most basic principles, a contentious fight may follow.

Second, the EU's main concern during the 1993 negotiations was not just for coverage generally but for coverage of U.S. sub-central markets.²⁷⁴ That is significant since the statutory bar potentially has a disproportionate impact on these markets. This is because many U.S. state and local governments lack the sort of robust award challenge procedures and forums which are available at the federal level.²⁷⁵ Thus, the statutory bar deprives foreign suppliers of a challenge forum where it matters most. From the European perspective, this exacerbates their longstanding complaint about inadequate access to sub-central procurement markets. They want more than just access to U.S. markets, they want *meaningful* access, which would include the right to a private cause of action at all levels of government; especially at the state and local level where the U.S. system is, perhaps, least transparent and fair. So ultimately, this is a fight about coverage without fully functional

²⁷² TREPTE (2004), *supra* note 75, at 374; SCHOTT, *supra* note 103, at 74-75; Marceau & Blank, *supra* note 10, at 116-17.

²⁷³ See, e.g., *supra* text accompanying notes 86, 89, and 90 (explaining that effectiveness of remedies will greatly affect challenges to breaches).

²⁷⁴ See SCHOTT, *supra* note 103, at 68; de Graaf & King, *supra* note 91, at 443; TREPTE (2004), *supra* note 75, at 374; Halford, *supra* note 75, at 47 n.70.

²⁷⁵ See *supra* text accompanying notes 228-230 (describing efforts to conform the GPA with multiple countries and praising the procurement system of the U.S. Federal government).

enforcement mechanisms, and the U.S. has effectively only provided access.

4.2.2. *The Uruguay Round Agreements Act as a Violation of the GPA*

The statutory bar to private actions is a violation of the GPA.²⁷⁶ Signatories agreed that aggrieved suppliers could challenge breaches of the GPA.²⁷⁷ Not only was Article XX clear on its face,²⁷⁸ the EU²⁷⁹ and scholars²⁸⁰ also understood its language that way. It meant what it said.

Further, Article XX was not secondary or optional. Many considered this provision among the most important developments, perhaps even the cornerstone of,²⁸¹ the new agreement on government procurement.²⁸²

Finally, as suggested, depriving foreign firms' recourse is most significant at the state and local levels as these forums lack the procedural safeguards existing at the federal level. This is not only significant in that it clearly violates Article XX, but also in terms of a baleful consequence: in that foreign suppliers have little incentive to compete for state and local markets because they lack a forum in

²⁷⁶ The United States failed to adopt implementing legislation consistent with its commitments under the GPA. *See* GPA, Article XXIV.5.a (requiring implementing legislation to ensure compliance of domestic laws and regulations with the Agreement). To say that the failure to follow this provision was done with malice aforethought would go too far. Yet the URAA's wording "suggests a willingness to tread close to the limit . . . and to exploit any opening left by the agreements for protectionist interests." Leebron, *supra* note 146, at 242 (emphasis added). *Cf.* Leebron, *supra* text accompanying note 233 (quoting earlier passages from Leebron's article where he describes the United States' "minimalist" and "wait and see" approach in the URAA).

²⁷⁷ *See* WTO Agreement, *supra* note 16, at Article XX (setting out the guidelines for challenge procedures).

²⁷⁸ *Id.*; *see also* note 246, *supra*, for the full text.

²⁷⁹ *See supra* note 160 (the European regulations are in compliance with GPA Article XX).

²⁸⁰ *See supra* notes 161-162 (explaining the language of Article XX).

²⁸¹ The author is indebted to conversations with Johannes Schnitzer for this observation.

²⁸² *See supra* notes 150-153 (noting major changes to the GPA because of the article XX provision minus a few exceptions).

which to enforce their rights and challenge discrimination. Thus, competition suffers.

4.2.3. *The EU's Priorities During the Revised GPA and TTIP Negotiations*

One lesson to be drawn from the GPA, Revised GPA, and TTIP negotiations is that “the more things change, the more they are the same.”²⁸³ During the Revised GPA negotiations, the transatlantic debate once again centered on coverage, particularly on sub-central coverage.²⁸⁴ Also, for a third time, public procurement and sub-central coverage are central features in the TTIP debate.²⁸⁵ The last two decades have shown that the EU has consistently demanded equal access to U.S. markets in exchange for any concessions. This suggests the EU is responding to pressure from persistent political constituencies.²⁸⁶ So one would expect similar demands as TTIP negotiations continue.²⁸⁷ To the extent EU negotiators share the contention that there is link between *meaningful* access to markets and coverage, the United States’ bar on private causes of action may

²⁸³ This is a translation of a saying attributed to French novelist Alphonse Karr, “Plus ça change, plus c’est la même chose.” See THE OXFORD DICTIONARY OF QUOTATIONS BY SUBJECT 72 (Susan Ratcliffe ed., 2d ed. 2010).

²⁸⁴ See *supra* text accompanying notes 216-222 (describing the revised GPA negotiations).

²⁸⁵ See, e.g., *supra* notes 67-68 (explaining that the EU will focus on sub-central coverage in the TTIP debate).

²⁸⁶ See Yukins & Schooner, *supra* note 19, at 565-67 (describing the role of various constituencies in “influenc[ing]” and “skew[ing]” the “the political decision-making process”).

²⁸⁷ This Article’s observations about the status of the TTIP negotiations should be taken with a grain of salt. This endeavor necessarily involves a degree of speculation because of the lack of transparency about the negotiations. See, e.g., *TTIP Papers Published as EU Ombudsman Demands More Transparency*, (Jan. 7, 2015), <http://www.euractiv.com/sections/trade-society/ttip-papers-published-eu-ombudsman-demands-more-transparency-3110881>. But see Glen Moody, *European Commission Announces Major Transparency Initiative For TAFTA/TTIP*, TechDirt, (Jan. 8, 2015), <https://www.techdirt.com/articles/20150107/07102529619/european-commission-announces-major-transparency-initiative-taftattip.shtml> (detailing the European Commission’s newfound commitment to making TTIP negotiations more transparent).

prove a significant obstacle.²⁸⁸ Set against the backdrop of already “floundering” negotiations, this could be even more significant.²⁸⁹

5. CONCLUSION

To bring this full circle, this Article has discussed a statutory bar to private actions. Private actions are among the most important safeguards in the GPA. Yet the United States chose to opt out of this provision, without bothering to advise its partners that it had done so.

Much is at stake. Public procurement is among Europe’s top four priorities in TTIP negotiations, and wanting access to U.S. sub-central procurement markets has been a recurring theme in negotiations with the United States for three decades. The failure to provide a forum in which to challenge violations of the GPA is tantamount to a coverage issue because without such a forum foreign suppliers’ rights are inadequately protected, especially at the state and local level where bid challenge procedures vary widely. If European negotiators finally recognize the full significance of the statutory bar and United States does not

²⁸⁸ EU negotiators may be frustrated with the United States’ half-hearted efforts as the European Court of Justice has mandated compliance with Article XX and reforms were implemented in Greece and Germany more than a decade ago. See ARROWSMITH (2003), *supra* note 15, at 403 n. 145 (citing Aris Georgopoulos, *The System of Remedies for Enforcing the Public Procurement Rules in Greece: A Critical Overview*, 9 PUB. PROCUREMENT L. REV. 75 (2000); Birgit Spiesshofer & Mathias Lang, *The New German Public Procurement Law: Commentary and English Translation of the Text*, 8 PUB. PROCUREMENT L. REV. 103 (1999)).

²⁸⁹ See generally *Ships That Pass in the Night*, *supra* note 44, at 57 (listing various EU objections that range from concerns that it would “allow America multinationals to undercut tough European standards” to worries that it would force American factory processed chlorine-soaked chicken (*Chlorhühnhchen*) “down European throats”); see also “We Can’t Protect Every Sausage” Says German Agriculture Minister Over TTIP Deal, DEUTSCHE WELLE, (Jan. 4, 2015), <http://www.dw.de/wecant-protect-every-sausage-says-german-agriculture-minister-over-ttip-deal/a-18169728> (reporting on Germany’s Agriculture Minister’s advocacy of the TTIP in the face of criticism by those wanting to preserve specialty food’s protected titles); *Pasty Peril! TTIP Threatens Cornwall’s £300m Meat Pastry Trade*, RT, <http://rt.com/uk/220243-ttip-cornish-pasty-threaten/> (describing trade unions’ opposition based on claims that TTIP will undermine UK food safety standards).

capitulate, this could be a deal breaker.²⁹⁰ Prudence counsels in favor of amending the law for at least four reasons.

First, if America is perceived as not having honored previous commitments, there will be hell to pay at subsequent negotiations – and not only with Europe.²⁹¹ Reputations matter.

Second, the cost of opening the federal forum to private actions would probably be minimal. The GAO's and COFC's dockets are not currently overwhelmed with disappointed foreign firms. And since the federal system, for the most part, meets or exceeds the GPA's standards, it is unlikely that the volume of protests would increase by much if foreign firms could complain about violations of the GPA. The delta would be small.

Third, savings at the state and local level would offset the costs. Admittedly, at the state and local level, where there are fewer safeguards and less transparency, the costs of providing a forum for complaints about GPA violations would be higher. Yet in the long run such costs would be offset by efficiency gains from subjecting these stagnant buyers to the rigors of competition. Because states and local governments almost certainly overpay for what they buy, liberalizing these markets could save them tens of billions if not more,²⁹² which would more than repay the added cost of providing

²⁹⁰ Arrowsmith observes that a common objection to “the provision of national remedies for enforcing WTO law is that this may result in the unequal application of WTO law, because of national differences in the effectiveness of the review procedures[.]” ARROWSMITH (2003), *supra* note 15, at 404. This Article identifies a particular version of that objection – namely, that the EU could justifiably complain about the United States’ substandard compliance with Article XX. The counterargument is that uneven and sometimes weak enforcement is the price of encouraging wide membership and this arrangement is probably justified. *Id.* at 404-05. As Arrowsmith later explains, “the less the agreement interferes with national discretion, the more likely it is that states will accept an enforcement regime.” *Id.* at 466. Thus, it is possible that the EU has done the math and decided that having an imperfect and unequal free trade agreement with the United States is better than having none at all.

²⁹¹ If the United States gains a reputation for failing to honor its commitments, problems may arise with any number of prospective negotiations. For example, in addition to TTIP, this could affect the United States’ position in larger Doha Round negotiations, as well as in the pending TPP negotiations. See note 38, *supra* (listing other Trans-Pacific treaties that may be endangered if the United States gains a reputation for not honoring its commitments).

²⁹² If international competition lowered prices by just 10 percent, state and local governments would save in the neighborhood of \$192 billion each year. See *supra* note 63 (estimating state and local spending at \$1.92 trillion).

private parties with a forum through which to challenge GPA violations.

Finally, the United States' foreign policy and national security interests benefit from broader ties with NATO allies.²⁹³ Russia's belligerence in the Ukraine and threats to allies on NATO's eastern periphery have sharpened minds globally about the ongoing importance of this alliance.²⁹⁴ The decade-long support in Afghanistan, rendered by NATO allies, also aided in this. Fostering trade ties of corresponding depths would enrich both sides and further their mutually beneficial relationship.²⁹⁵

This Article has suggested that the passage of the URAA, perhaps inadvertently, may have created at least a perception of duplicity. To ensure that the past failures to fully implement its GPA obligations does not interfere with TTIP negotiations, Congress should consider passing a bill that would eliminate the bar on private actions under the GPA.²⁹⁶ It should do so in haste, not

²⁹³ Of course, not all NATO members are EU members, or vice versa. But there is a rough correlation between them, which is close enough for purposes of the point being made here.

²⁹⁴ See, e.g., *NATO: All for One*, *ECONOMIST*, Mar. 29, 2014, at 15-16 (describing Russia's aggressiveness toward the Baltics and other countries on NATO's eastern periphery, and calling for NATO action).

²⁹⁵ Frequently, trade relationships and shared national security interests are reciprocal. See Tom Donilon, *The National-Security Case for Free Trade*, *WALL ST. J.*, Oct. 6, 2011, at A19 (advocating a free-trade agreement with South Korea, and making the case for the link between trade relationships and national security interests by listing several countries where free-trade agreements have advanced U.S. national security interests). See also *Ships That Pass in the Night*, *supra* note 44, at 57 (reporting that some favor TTIP as it would "cement the transatlantic relationship just as Europeans are getting twitchy about Russia" and create an "economic NATO").

²⁹⁶ It may be tempting to suggest that if Congress will not pass such a bill that the President should act unilaterally. The President does have authority to waive certain trade laws under the Trade Agreements Act of 1979 (TAA). See 19 U.S.C. § 2511(a) (authorizing the President to waive any otherwise applicable "law, regulation, procedure or practice regarding Government procurement that would . . . [accord foreign products] less favorable treatment than that" given to domestic products); CIBINIC, NASH & YUKINS, *supra* note 252, at 1624-26 (explaining that the application of the Buy American Act was waived pursuant to an executive order); 1 *MANUAL OF FOREIGN INVESTMENT IN THE U.S.* § 9:25 (J. Eugene Marans, et al., eds., 3d ed. 2013) (explaining that originally TAA was for GATT negotiations, but that was later extended to cover the GPA, NAFTA, and the various bilateral trade); W. NOEL KEYES, *GOV'T CONT. UNDER FED. ACQUISITION REG.* § 25.3 (2013) (explaining the application of the TAA to the Federal Acquisitions Regulations). Grier explains that the TAA cannot be extended to new laws. She notes that the "American Recovery

only for the sake of the transatlantic economies directly affected, but also for the welfare of the world economy as a whole which would stand to gain from a wealthier America and Europe. It would be a pity for such an important free-trade agreement to founder on such a small issue – especially one so easily remedied.

and Reinvestment Act of 2009 (ARRA) illustrates that the TAA does not apply to new domestic purchasing restrictions.” See Jean Heilman Grier, *Trade Agreements Act of 1979: Broad Agreement, Narrow Application* (Apr. 21, 2014), <http://trade.djaghe.com/?p=559>. Further, the authority the TAA grants to the President extends only to waiving buying restrictions. Since waiving portions of the implementation legislation in order to facilitate compliance with the GPA would affirmatively create a private cause of action, this would be contrary to Congress’s express intent in the URAA. Therefore, that would clearly be more than what Congress had intended for the TAA in 1979 or as subsequently amended.