

# The GPA/WTO and Latin America: Lessons from Brazil's Accession Process

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## Abstract

*Future expansion of GPA/WTO membership can draw important lessons from the Brazilian experience in its accession process. This article analyses both the process that led to Brazil's fast and broad three offers of GPA coverage and the known reasons for Brazil to review its position and withdraw the offers, stalling the accession process. Firstly, this article deals with the context that led to Brazil's application, including government statements to relinquish Brazil's status as a developing economy eligible to benefit from Special and Differential Treatment (STD) and their effects on the accession negotiations. Secondly, it highlights the democratic process of public consultations to raise awareness in the public and private sectors and build a more effective first offer and basis for negotiation, and how the matter developed from the initial consultations. Thirdly, it examines the parallel but unrelated processes of public procurement legislation mostly between 2016 and 2021 and the greater engagement with the GPA around the same period, and how both might have benefitted from a closer mutual integration. One of the widely recognised gains from the involvement with the GPA is the exposure of non-member countries to international best practices, and some of these gains and the necessary legislative harmonisation could have been sped up by an exchange between the reform and accession efforts. Lastly, this article analyses the withdrawal of the Brazilian offer for accession to GPA in 2023, considering the legal aspects that led to this decision and its relationship with GPA's structure.*

## I. Introduction

Brazil's application for accession to the Agreement on Government Procurement of the World Trade Organization (GPA/WTO) in 2020 drew attention to the absence of Latin American countries in the Agreement and the prospects for regional expansion.<sup>1</sup>

Brazil had a swift engagement with the GPA. It became an observer in 2017 and hastened to apply for accession in 2020, unlike Colombia, Argentina, Panama and Chile, which have been observers since 1996 and 1997, respectively. Other Latin American countries (Costa Rica and Paraguay) are also observers.

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<sup>1</sup> A shortened version of this paper can be found at C. Pereira and R. W. Schwind, "Brazil and the WTO/GPA: An Opportunity for Regional Leadership" (Aris of Lawxley, 24 February 2023), <https://arisoflawxley.com/wto-gpa-brazil-accession/brazil-and-the-wto-gpa-an-opportunity-for-regional-leadership>. This article is an expanded and updated version of the paper the authors presented originally at XI Global Revolution at the University of Nottingham in June 2022.

However, Brazil is the only one negotiating actively its accession, following important initiatives by the Government, WTO and academia to raise awareness about the GPA.

This speed may seem counterintuitive, since Brazil has the largest domestic market in Latin America and has featured historically public procurement traits that, on their face, are contrary to GPA principles and mechanisms, such as national preferences with limited extension to Mercosur States, a strong use of government procurement to advance public policies like protection of SMEs and of preferred labor or environmental practices, and offset agreements in many international purchases.

The GPA is often described as a mechanism for integration between developed countries, due to the lack of emerging economies in the agreement. The inclusion of emerging countries in the GPA may help fill this gap. Brazil's accession is important also as a demonstration that a developing country can benefit from the GPA, which may generate a positive domino effect in Latin America.<sup>2</sup> In addition to Latin American countries, it may also amount to a change in perspective from the so-called BRICS (regional economies of Brazil, Russia, India, China and South Africa) as well.<sup>3</sup>

However, in May 2023, Brazil withdrew its offer for accession to the GPA. The change in positioning occurred shortly after the inauguration of a new president, who redesigned Brazil's public procurement internationalisation policies. The withdrawal does not imply the termination of Brazil's application to join the GPA but seems to put the process on hold. The publicly available reasons for the withdrawal of the offer also illustrates some of the reasons why developing countries tend not to seek access to the GPA.

Therefore, future expansion of GPA membership can draw important lessons from the Brazilian experience. It is useful to analyse both the process that led to Brazil's fast and broad three offers of GPA coverage and the known reasons for it to review its position and withdraw the offers, stalling the accession process.

Firstly, this paper deals with the context that led to Brazil's application, including government statements to relinquish Brazil's status as a developing economy eligible to benefit from Special and Differential Treatment (STD) and their effects on the accession negotiations.

Secondly, this paper highlights the democratic process of public consultations to raise awareness in the public and private sectors and build a more effective first offer and basis for negotiation, and how the matter developed from the initial consultations.

Thirdly, it addresses what is expected in terms of harmonisation of the Brazilian legislation.

Next, it examines the parallel but unrelated processes of public procurement legislation mostly between 2016 and 2021 and the greater engagement with the GPA around the same period, and how both might have benefitted from a closer mutual integration. One of the widely recognised gains from the involvement with the GPA is the exposure of non-member countries to international best practices, and some of these gains and the necessary legislative harmonisation could have been sped up by an exchange between the reform and accession efforts.

Lastly, this paper analyses the withdrawal of the Brazilian offer for accession to GPA, considering the legal aspects that led to this decision and its relationship with GPA's structure.

<sup>2</sup> About the possible domino effect of Brazil's accession, see G. W. Bush, "Bridging the Gap Between International Development and Government Contracts: Why Including the Developing World in the World Trade Organization's Government Procurement Agreement Matters and How It Can Work" (American Bar Association, 2022) *Public Contract Law Journal*, Public Law Contract Section. WTO's Committee on Government Procurement stated that: "The Committee welcomes and appreciates Brazil's submission of its application for accession to the Agreement and circulation of its Replies to the Checklist of Issues and its government procurement laws and regulations. It notes that the application is historic and systemically significant. Brazil's accession, when achieved, will be the first from Latin America and will raise interest in the GPA among countries in the region and beyond." WTO *Committee on Government Procurement*, Report (2020) of the Committee on Government Procurement, [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?DataSource=Cat&query=@Symbol=%22GPA/AR/3%22%20OR%20@Symbol=%22GPA/AR/3/%22&Language=English&Context=ScriptedSearches&languageUICChanged=true](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?DataSource=Cat&query=@Symbol=%22GPA/AR/3%22%20OR%20@Symbol=%22GPA/AR/3/%22&Language=English&Context=ScriptedSearches&languageUICChanged=true).

<sup>3</sup> I. Krizic, "For the Sake of Market Access: Comparing EU and US Approaches to Liberalize Public Procurement in Brazil, India and China" (2017) *European Foreign Affairs Review* 22, Special Issue, 77.

## II. The decision-making process for Brazil's application

Brazil's decision to join the GPA was exclusively led by the Government, not from the private sector. There are no records of pressure from Brazilian companies to expand internationally to other GPA markets, or from potential foreign bidders interested in gaining access to the Brazilian market.

This decision is part of a broader policy that Brazil is taking to internationalise public procurement. Since 2016, Brazil entered into agreements with Canada, Singapore, South Korea and, within the MERCOSUR (economic and political bloc consisting of Argentina, Brazil, Paraguay, and Uruguay),<sup>4</sup> with the European Union, among others. This means that the Brazilian Government has adopted a policy of internationalisation of public procurement that goes beyond but is consistent with its accession to the GPA.

The public procurement market in Brazil is large. In 2016, the Federal Government spent approximately BRL 322 billion on public procurement. When adding states (BRL 121 billion) and municipalities (BRL 190 billion), it totals BRL 633 billion. This figure amounts to 10.1% of Brazil's GDP (Gross Domestic Product) at the time.<sup>5</sup> This fact increases the importance of Brazil's market being made accessible through the GPA in the Latin American context.

In a study made in 2021 to find out and divulge the position of the largest Brazilian corporations on the accession to the GPA, the CNI (National Industry Confederation) describes the process leading to Brazil's decision.<sup>6</sup>

Brazil's CAMEX—Foreign Trade Chamber, the Federal Government's main body in charge of trade policy and part of the Ministry of the Economy, approved in August 2017 Brazil's participation as a GPA observer. Following several government and academic initiatives, with the support of the WTO, CAMEX approved in December 2019 the mandate for Brazil to apply to join the GPA. The reasons stated in the deliberation are:

- a) access to the public procurement market of the other 48 GPA member States, with the approximate size of USD 1.7 trillion per year;
- b) cost reduction in Brazilian Government purchases due to increased competition from foreign suppliers and increased difficulties for anticompetitive or corrupt practices;
- c) positive signal about Brazil's policy in the application's context to join OECD;
- d) reinforcement of Brazil's cooperative position in other WTO negotiations regarding e-commerce, investment facilitation and subsidies to the fishing industry.

As highlighted by CNI, the decision does not refer any comprehensive study regarding the likelihood of the expected benefits or the associated risks. Nor was it based on any interaction with the private sector, which took place later, as Brazil was preparing its legislative checklist and first offer for the coverage negotiation.<sup>7</sup>

Based on this government decision, Brazil applied to join the GPA on 18 May 2020 through a communication to the GPA Committee. It submitted its public procurement checklist on 5 October 2020,

<sup>4</sup> In fact, Brazil had already made the internationalisation of public procurement with the EU within the scope of MERCOSUR difficult. That is why Brazil's policy change is so relevant and significant for Brazilian and global public procurement policy. See WTO *Committee on Government Procurement*, Report (2020) of the Committee on Government Procurement, p.83.

<sup>5</sup> C. G. Ribeiro and E. Inácio Júnior, "O mercado de compras governamentais brasileiro (2006-2017): mensuração e análise" (Instituto de Pesquisa Econômica Aplicada, 2019), [https://repositorio.ipea.gov.br/bitstream/11058/9315/1/td\\_2476.pdf](https://repositorio.ipea.gov.br/bitstream/11058/9315/1/td_2476.pdf).

<sup>6</sup> "Negociações para acesso do Brasil ao Acordo da OMC em Compras Governamentais: Posição da Indústria" (Confederação Nacional da Indústria, 2021), <https://www.portaldaindustria.com.br/publicacoes/2021/9/negociacoes-para-acessao-do-brasil-ao-acordo-da-omc-em-compras-governamentais-posicao-da-industria/>, pp.39–40.

<sup>7</sup> "Negociações para acesso do Brasil ao Acordo da OMC em Compras Governamentais: Posição da Indústria" (Confederação Nacional da Indústria, 2021), p.40.

its first offer on 3 February 2021<sup>8</sup> and its second offer on 25 November 2021.<sup>9</sup> There was a third offer in June 2022, which Brazil referred to as its “Final Market Access Offer”.<sup>10</sup> In May 2023, Brazil withdrew its offers. From the information made available by the Brazilian Government and the national press, the withdrawal is limited to the offers and does not terminate Brazil’s accession process. Therefore, Brazil is expected to submit in due course a fresh coverage offer aligned with the concerns expressed by the Brazilian Government at the time of the withdrawal.

Shortly before submitting its original application, Brazil announced its decision to forego any special and differential treatment (STD) under the WTO, which was criticised by specialists.<sup>11</sup> This decision was also repealed by the administration that took office in 2023 in Brazil. In June 2023, Brazil announced that in any further GPA/WTO negotiations it would take advantage of art.V STD as a developing country.

The US participation in the GPA provides some relevant information regarding the context of the coverage negotiations. The first is that the US has the largest protection program for SMEs.<sup>12</sup> In addition, the US has “Buy American”, which means public purchases directed to products made in the USA, according to legal definitions—extensive to signatories of trade agreements such as the GPA.<sup>13</sup> Therefore, at least conceptually, the US valued the protection of SMEs and domestic industry in specific aspects to the detriment of greater coverage. Furthermore, greater coverage is challenged by the US federal structure, since several subnational entities have public procurement policies that are seen as discriminatory<sup>14</sup> and are not covered by the GPA. This type of potential conflict with the GPA is not faced by Brazil, as we explain below.

The drafting history of the GPA and the history of each subsequent negotiation are important as a benchmark for Brazil’s ongoing negotiations. Expectations for fewer and less important exceptions to GPA coverage in Brazil’s offers may not be consistent with the GPA members’ previous practices. There are claims for greater coverage of health products and financial services,<sup>15</sup> based on an argument that Brazil should refrain from any “discriminatory reservation.”<sup>16</sup> Protection of Brazil’s health sector was one of the reasons alleged for Brazil’s withdrawal of its offers.

Although Brazil’s initial steps toward the GPA accession were made chiefly for government policy reasons, preparing the first offer drew from widely publicised consultations with the private sector. The Ministry of the Economy started formal public consultations on 21 August 2020 and received contributions from the private sector until 22 October 2020.<sup>17</sup> Parallel consultations were made with subnational entities to define the scope and nature of Brazil’s first offer.

<sup>8</sup> “Brazil’s initial offer for accession to the Government Procurement Agreement – Joint Press Release by the Ministry of Foreign Affairs and the Ministry of Economy” (Ministério das Relações Exteriores, 3 February 2021), <https://www.gov.br/mre/en/contact-us/press-area/press-releases/brazils-initial-offer-for-accession-to-the-government-procurement-agreement-joint-press-release-by-the-ministry-of-foreign-affairs-and-the-ministry-of-economy>.

<sup>9</sup> “Brazil presents offer for accession to the Agreement on Government Procurement – Joint Press Release by the Ministry of External Relations and the Ministry of Economy” (Ministério das Relações Exteriores, 25 November 2021), <https://www.gov.br/mre/en/contact-us/press-area/press-releases/joint-press-release-by-the-ministry-of-external-relations-and-the-ministry-of-economy-brazil-presents-offer-for-accession-to-the-agreement-on-government-procurement>.

<sup>10</sup> See Bush, “Bridging the Gap Between International Development and Government Contracts: Why Including the Developing World in the World Trade Organization’s Government Procurement Agreement Matters and How It Can Work” (2022) *Public Contract Law Journal* 5.

<sup>11</sup> “Brasil deixou seu status na OMC para se agarrar a uma sinalização na OCDE. Não é prudente” (El País Brasil, 11 October 2019), [https://brasil.elpais.com/brasil/2019/10/11/politica/1570827156\\_314753.html](https://brasil.elpais.com/brasil/2019/10/11/politica/1570827156_314753.html).

<sup>12</sup> J. Linarelli, “The Limited Case for Permitting SME Procurement Preferences in the Agreement on Government Procurement” in S. Arrowsmith and R. Anderson, *The WTO regime on Government Procurement: Challenge and Reform*, 1st edn (Cambridge: Cambridge University Press, 2011), p.444.

<sup>13</sup> Linarelli, “Global procurement Law in Times of Crisis: New Buy American Policies and Options in the WTO legal System” in Arrowsmith and Anderson, *The WTO regime on Government Procurement: Challenge and Reform*, 1st edn (2011), p.773.

<sup>14</sup> See WTO *Committee on Government Procurement*, Report (2020) of the Committee on Government Procurement, p.80.

<sup>15</sup> “Brazil urged to expand foreign access to biddings” (Valor International, 2021), <https://valorinternational.globo.com/economy/news/2021/11/09/brazil-urged-to-expand-foreign-access-to-biddings.ghtml>.

<sup>16</sup> See WTO *Committee on Government Procurement*, Report (2020) of the Committee on Government Procurement, p.79.

<sup>17</sup> C.A.G. Pereira, “INFRA Debate: Importância da Consulta Pública da Secex/ME (Circular 55) para a acesso do Brasil ao GPA/OMC – a participação do setor privado” (Agência Infra, 18 September 2020), <https://www.agenciainfra.com/blog/infradebate-importancia-da-consulta-publica-da-secex-me-circular-55-para-a-acessao-do-brasil-ao-gpa-omc-a-participacao-do-setor-privado/>.

Therefore, for this essay, it is possible to conclude that Brazil's first initiatives toward the GPA were based on (i) the GPA as a seal of recognition of the country's positive policies, (ii) the intention to adopt accepted international practices to facilitate the participation of foreign suppliers in the Brazilian market and (iii) the opportunity to negotiate access for Brazilian suppliers to foreign public procurement markets. It is understandable that the initial deliberations have not been based on extensive domestic studies or consultations, since in the WTO practice the accession negotiations are a long process. Brazil's Government prompted domestic discussions only after the prospect of joining the GPA had become a practical reality.

From a domestic public procurement legal standpoint, the reasoning behind Brazil's initiative to join the GPA seems twofold. First, it shows awareness that, although the public procurement market in Brazil is open to foreign companies, it is particularly challenging for them to partake. Second, it assumes that it is advantageous for Brazil, in terms of government expenditure efficiency, to expand its public contracting market to more foreign companies.

The flip side of this reasoning is the determination of the overall economic impact of a greater participation of foreign companies in Brazil's public procurement market and greater access to GPA markets from Brazilian companies.<sup>18</sup> These are complex economic issues that have been addressed in general and specific studies, both *ex ante* and *ex post*, and are beyond the purpose of this paper.<sup>19</sup> There are multiple overlaying impacts to be considered. This paper aims to show some aspects of the Brazilian experience regarding the interaction with the various domestic stakeholders in the accession process.

### III. Domestic public consultation

Brazil's Ministry of the Economy conducted a public consultation to gather structured information regarding the private sector's views on the accession process.

The GPA negotiation process involves two distinct aspects.

On the one hand, Brazil will need to address the GPA members' concerns regarding Brazil's legal framework, based on the checklist Brazil submitted in October 2020. The GPA allows that any necessary procedural adjustments be made until the GPA comes into force for Brazil. The legislative harmonisation does not have to be immediate, but it will need to happen before Brazil can benefit from the GPA.

Brazil needs to negotiate coverage, since the GPA obligations will only apply to covered contracts. Parties must negotiate the goods, services, or works that will be covered and the minimum threshold for the GPA commitments to be triggered. The structure of each State's accession contains typically seven annexes dealing with these various aspects of coverage.<sup>20</sup>

Brazil's public consultation dealt with both aspects, but understandably focused more on coverage. The purpose was to find out what were the industry's concerns regarding what to pursue and what to protect as Brazil initiated its negotiation process.

Although Brazil has shown until now determination to carry out the negotiations with relative speed, they are necessarily a time-consuming endeavor, as illustrated in the chart below:

<sup>18</sup> See more in C.R. Yukins and J. S. Schnitzer, "GPA Accession: Lessons Learned on the Strengths and Weaknesses of the WTO Government Procurement Agreement" (2015) 7 Trade L. & Dev. 89.

<sup>19</sup> "Acordo sobre Contratações Governamentais da Organização Mundial do Comércio – Análise da Adesão Brasileira" (Ministério da Economia, 2021), p.44.

<sup>20</sup> "The GPA does not automatically apply to all government procurement of the Parties. Rather, it Only applies to procurement of goods, services, or any combination thereof, as specifies in each Party's schedules to the Agreement (i.e., Annexes to Appendix I). These comprise: Annex 1, the central government entities whose procurement discovered by Agreement; Annex 2, the sub-central government entities whose procurement is covered by the Agreement; Annex 3, all other entities whose procurement is covered by the Agreement; Annex 4, the goods covered by the Agreement; Annex 5, the services, other than construction services, covered by the Agreement; Annex 6, the construction services covered by the Agreement; and Annex 7, any General Notes. The Annexes also specify the threshold values above which individual procurements are subject to the GPA disciplines", "The GPA in Brief" (WTO, 2023), <https://e-gpa.wto.org/en/GPAInBrief>.

Country	Application	First Offer	Latest or Final Offer	Accession
<i>China</i>	14 January 2001	7 January 2008	21 October 2019 (6th)	...
<i>Moldova</i>	8 January 2002	9 January 2002 (check-list)	30 January 2015 (5th)	29 June 2016
<i>Ukraine</i>	9 February 2011	13 December 2012	29 June 2015 (5th)	27 April 2016
<i>New Zealand</i>	1 October 2012	1 October 2012	21 July 2014 (4th)	20 July 2015
<i>Montenegro</i>	4 October 2013	4 November 2013	18 July 2014 (4th)	2 July 2015
<i>Tajikistan</i>	12 February 2015	16 February 2015	4 February 2020 (5th)	...
<i>Australia</i>	2 June 2015	8 September 2015	7 March 2018 (4th)	16 April 2019 (Deposit)
<i>Russia</i>	22 August 2016	7 June 2017	...	...
<i>United Kingdom</i>	5 June 2018	14 June 2018	2 October 2020 (2nd)	28 February 2019 (Committee Decision)
<i>Brazil</i>	18 May 2020	3 February 2021	21 June 2022	Offers withdrawn in May 2023

Since the first offer involves a formal initial expression of interest from the Brazilian Government to ensure non-discriminatory access to international suppliers from other GPA member States, the contents of the offer are of general interest.

It interests the various levels of government in a federal state such as Brazil. States, the Federal District and Municipalities must reflect on the possibility and convenience of getting more international participation in their public contracts and the related legal and practical changes, such as international advertising and data gathering. They must also reflect on the types and values of contracts, and on the entities that may be covered by the GPA obligations.

It also interests the private sector, both in terms of greater competition for contracts in Brazil and access for Brazilian companies to foreign public procurement markets, including traditional markets for Brazilian products like the United States or the European Union. The industry can also benefit from gains resulting from the internationalisation of public procurement. This is the case, for example, of the benefits obtained by implementing better infrastructure, with advanced technology.<sup>21</sup>

Brazil has broad legal provisions for public consultation. At the federal level, the Law of Administrative Procedure (Law 9,784/1999) provides that public consultation may collect expressions from third parties when the subject is of general interest. Likewise, there is a generic authorization for public consultations in the Introduction to the Norms of Brazilian Law Act (Decree-Law 4,657/1942). Some Brazilian authors associate the public consultation with the idea of giving reasons to government choices<sup>22</sup>—so that the legal grounds can be generic, not requiring specific and case-by-case determinations.

The Government created a regulatory framework for public consultations. Permission for this public consultation was generic since Decree 9,745/2019 allowed the Foreign Trade Secretariat of the Ministry of Economy (one of the entities responsible for accession to the GPA) to adopt public consultations. To gather the necessary information, the Ministry of the Economy opened in August 2020 a public consultation process (Circular 55/2020),<sup>23</sup> aimed at receiving contributions from the interested sectors, including possibly affected suppliers, contractors, scholars, and specialists. Interested parties (individuals or entities) had 60 days to submit their expressions virtually.

<sup>21</sup> R.D. Anderson and K. Osei-Lah, “Forging a More Global Procurement Market: Issues Concerning Accessions to the Agreement on Government Procurement” in Arrowsmith and Anderson, *The WTO regime on Government Procurement: Challenge and Reform*, 1st edn (2011), p.77.

<sup>22</sup> V. Monteiro, “Art. 29 da LINDB - Regime jurídico da consulta pública” (2018) *Rev. Dir. Adm.* 225–242.

<sup>23</sup> “Acordo de Compras Governamentais da OMC (GPA)” (Ministério da Economia, 17 August 2020), <https://www.gov.br/produtividade-e-comercio-exterior/pi-br/assuntos/comercio-exterior/negociacoes-internacionais/acordos-em-negociacao-1/acordo-de-compras-governamentais-da-omc-gpa>.

The consultation had structured and open questions, and it focused on the following points:

- (i) interest in the increase of foreign competition in domestic public tenders, and, in the affirmative, in which goods, services or sectors;
- (ii) if the participant considers that “there are goods and/or services that are sensitive from the standpoint of contracts made by the Government or government-owned companies”, and, in this case, what are such goods or services and why are they subject of concern;
- (iii) if the participant operates or is interested in operating in public procurement in other countries that are signatories of the GPA and that are joining, specifying which are the countries of interest (from a list of current and potential member States) and what are the goods or services it intends to supply; and
- (iv) to state, “if any, barriers that prevent or make more difficult your participation in the public tenders to supply the goods or services of your interest”.

The consultation was available in Portuguese only, as it intended to gather information from the domestic market and current suppliers. The CNI study reports that

after the submissions of responses to the public consultation, representatives from the Ministries of the Economy and of Foreign Affairs made themselves available for a series of meetings with entities representing the sectors that answered the questions, to understand better the positions then expressed and to present clarifications on the expectations of the Government regarding the GPA accession.<sup>24</sup>

#### IV. Brazil's three offers

Brazil's first offer was submitted to the GPA Committee on 3 February 2021. Some information about the initial offer was made public by the press.<sup>25</sup> The CNI study addresses some points allegedly contained in such first offer. One of the important takeaways was that from the beginning, Brazil had a comprehensive offer to open its public contracts market to foreign bidders. The offer allegedly included contracts from government entities of several states, which was a first in any agreement signed by Brazil. There are accounts of at least 42 state enterprises such as ports, railways, supplies centers and energy companies. Even the public procurement thresholds were similar to the ones adopted by most GPA members (BRL 900,00 for Federal Government purchases and around BRL 26.5 million for public works). Strategic contracts and entities were excluded from the provisions such as purchases from the Ministry of Defence and others made by sensitive or strategic agencies, such as the Ministry of Health and the Space Agency. However, the opening will encompass purchases related to Information Technology, such as cryptography, made by the Ministry of Justice, the Ministry of Foreign Affairs and the Presidential office.<sup>26</sup> At the time, the Ministry of Foreign Affairs declared that acceding to the GPA would reduce public spending and improve the quality of goods and services contracted by the Brazilian Government.<sup>27</sup> The WTO also disclosed that the first offer could add up to USD 145 billion per year to the procurement market covered by the GPA.<sup>28</sup>

Brazil's second offer was submitted on 25 November 2021. There is no more detailed information publicly available except what was disclosed by Brazil's Government: “The revised Brazilian offer expands the number of Public Administration bodies and entities that commit to carrying out public contracts open

<sup>24</sup> See Ribeiro and Júnior, “O mercado de compras governamentais brasileiro (2006–2017): mensuração e análise” (Instituto de Pesquisa Econômica Aplicada, 2019), pp.65–67.

<sup>25</sup> “Brasil apresenta plano para abrir compras públicas a estrangeiros” (Valor Econômico, 4 February 2021), <https://valor.globo.com/brasil/noticia/2021/02/04/brasil-apresenta-plano-para-abrir-compras-publicas-a-estrangeiros.ghtml>.

<sup>26</sup> See WTO *Committee on Government Procurement*, Report (2020) of the Committee on Government Procurement, p.41.

<sup>27</sup> WTO *Committee on Government Procurement*, Report (2020) of the Committee on Government Procurement, p.41.

<sup>28</sup> “Talks Kick off for Brazil's Accession to Government Procurement Pact” (WTO, 2021), [https://www.wto.org/english/news\\_e/news21\\_e/gpro\\_03mar21\\_e.htm](https://www.wto.org/english/news_e/news21_e/gpro_03mar21_e.htm).

to the participation of suppliers from the parties to the agreement, covering goods, services, and public works. Brazil's adherence will promote the reduction of public spending and the improvement of the quality of government goods and services, as well as will promote Brazilian exports and foreign investments in the country".<sup>29</sup>

In June 2022, there was a third offer. Not much information was released, but the Secretary of Foreign Trade of the Ministry of Economy disclosed, prior to the offer, that the number of states included in the third offer would be substantially larger than in the previous ones.<sup>30</sup>

As discussed below, the offers were withdrawn in May 2023.

## V. Industry's concerns regarding the GPA

The CNI study reports that, following Brazil's initial application, associations representing several sectors involved in public procurement (construction, defense, electrical and electronic equipment, medical equipment, pharma and chemicals, machinery, buses, textiles, and clothing) gathered to assess the industries' perception of the GPA accession process.

The survey gathered 101 responses, of which 75% represented the sectors of construction, machinery, pharma, and defense. It showed a great deal of concern both in terms of (i) the ineffectiveness or uselessness of additional access to the GPA member States public procurement markets and (ii) risks of enhanced direct participation of foreign companies in domestic public tenders.

The companies were asked whether in the Brazilian public tenders the companies usually faced competition from foreign companies or Brazilian companies that imported foreign goods or services. Only 39% had direct competition from foreign companies. 33% had no competition either from foreign companies or foreign goods or services.

The main concern is that the so-called "Brazil Cost"—the economic implications of tax inefficiencies and bureaucratic encumbrances—drags Brazilian companies away from competitiveness. According to CNI, 72% of the participants stated that opening up to foreign suppliers will have significant impacts in their sectors. Conversely, most participants (59%) showed that facilitated access to foreign public procurement markets would have little or no impact on their business.

The reasons for pessimism are lack of competitiveness of Brazilian products due to "Brazil Cost", regulatory requirements and related costs, and difficulty to obtain finance and required bonds.<sup>31</sup>

Chang-Fa Lo, commenting on Taiwan's accession, argues that the increase in foreign suppliers could create problems for the participation of domestic suppliers in public procurement. But the author understands that this does not happen for two reasons: the GPA allows certain protections (especially in Appendix I) and the Taiwan market is internationalised.<sup>32</sup>

This is precisely the case in Brazil. Since the Government Contracts Act already provides for measures to encourage the participation of foreign suppliers, it is possible that domestic suppliers will not suffer a significant loss of competitiveness, if any, due to accession to the GPA.

Nevertheless, the fear of foreign competition in the context of "Brazil Cost" are the related strategy of protecting domestic manufacturers were some of the main reasons for Brazil to withdraw its GPA coverage offers. As discussed below, in the context of the change in the federal administration, CNI released in May 2023 a new paper with a plan to resume Brazil's industrial production. The paper proposes expedited

<sup>29</sup> See "Brazil's initial offer for accession to the Government Procurement Agreement – Joint Press Release by the Ministry of Foreign Affairs and the Ministry of Economy" (*Ministério das Relações Exteriores*, 3 February 2021).

<sup>30</sup> "Brasil amplia acesso das empresas estrangeiras às compras públicas" (Valor Econômico, 12 June 2022), <https://valor.globo.com/mundo/noticia/2022/06/12/brasil-amplia-acesso-das-empresas-estrangeiras-as-compras-publicas.ghtml>.

<sup>31</sup> See Ribeiro and Júnior, "O mercado de compras governamentais brasileiro (2006-2017): mensuração e análise" (Instituto de Pesquisa Econômica Aplicada, 2019), pp.63–69.

<sup>32</sup> C. Lo, "The Benefits for Developing Countries of Accession to the Agreement on Government Procurement: The Case of Chinese Taipei" in Arrowsmith and Anderson, *The WTO Regime on Government Procurement: Challenge and Reform*, 1st edn (2011), p.146.



initiatives to conclude “strategic trade agreements” such as the EU-Mercosur Agreement and other bilateral agreements (strategy #23). At the same time, it proposes the “recalibration” of Brazil’s offer to accede to the GPA to avoid an excessive opening of Brazil’s public procurement market with little or no gain to Brazilian companies.

## VI. Difficulties for foreign companies in public tenders in Brazil

The CNI survey addressed another aspect of the problem. Based on the participants’ experience in competing with foreign suppliers, it investigated the main difficulties faced by foreign competitors.

Out of the replies received, 35% noted “regulatory requirements”, 31% “difficulties to comply with formalities or to obtain required documents”, 28% reported “problems of access to information regarding biddings” and 15% described “preferential treatment to foreign [*rectius*, domestic] products”.

These answers are revealing. Domestic preferences, even though they exist in theory, have very little practical application. The barriers to foreign participation are much more subtle and indirect, rather than outright prohibitions or direct favors to domestic bidders.

Public tenders and public contracts in Brazil are formally open to foreign companies at national and subnational levels—including when public tenders and public contracts are carried out by their respective entities, such as state-owned companies, for example.<sup>33</sup> The participation of foreign companies is only prohibited in very specific situations in which the object of the public contract relates to aspects of national sovereignty.<sup>34</sup>

Although the general rule is to open the Brazilian market of public contracts to foreign companies, the participation of these companies has always been hampered by the need to comply with certain formal requirements. These requirements ended up making this market relatively closed to the effective participation of foreign companies.

An example illustrates this kind of difficulty. To operate in Brazil, a foreign company must have a formal authorization that is granted if the applicant complies with the requirements set out in arts 1134–1143 of the Brazilian Civil Code (for example, nominate a legal representative in the country and deposit a certain amount of funds in a Brazilian bank account).<sup>35</sup> Instead of requiring this authorisation only for the formalisation of the public contract or for the beginning of its execution, Law 8,666/1993 required this authorization (as a general rule) *ex ante*, namely for the mere participation in the public tender.<sup>36</sup> However,

<sup>33</sup> Article 3 para.1 item II of Law 8,666/1993 establishes that: “Public agents are prohibited from: (...) II — establishing differentiated treatment of a commercial, legal, labor, social security or any other nature, between Brazilian and foreign companies, including with regard to currency, modality and place of payment, even when financing from agencies is involved international law, with the exception of the provisions of the following paragraph and art. 3 of Law No. 8.248, of October 23, 1991”. The 2021 Brazilian Act on public procurement (Law 14,133/2021) establishes a very similar provision in art.9, item II: “Art. 9 The public agent designated to act in the area of bids and contracts is prohibited, except in the cases provided for by law: (...) II — to establish differentiated treatment of a commercial, legal, labor, social security or any other nature between Brazilian and foreign companies, including with regard to currency, mode and place of payment, even when international agency funding is involved”. About this subject see RW. Schwind, *Licitações internacionais: participação de estrangeiros e licitações realizadas com financiamento externo*, 1st edn (Fórum, Belo Horizonte, 2013), p.61.

<sup>34</sup> Schwind, *Licitações internacionais: participação de estrangeiros e licitações realizadas com financiamento externo*, 1st edn (2013), p.56.

<sup>35</sup> The Brazilian Civil Code, for instance, provides the following: “Article 1134. The foreign company, whatever its purpose, may not, without authorization from the Executive Power, operate in the country, even through subordinated establishments, and, however, with the exception of cases expressed by law, may be a shareholder of a Brazilian corporation. § 1 The following must be added to the authorization request: I — proof that the company is constituted in accordance with the law of its country; II — the entire content of the contract or statute; III — list of members of all the company’s management bodies, with name, nationality, profession, domicile and, except for bearer shares, the value of each one’s participation in the company’s capital; IV — copy of the act that authorized the operation in Brazil and fixed the capital destined to the operations in the national territory; V — proof of appointment of the representative in Brazil, with express powers to accept the conditions required for authorization; VI — last balance sheet. § 2 The documents shall be authenticated, in accordance with the national law of the applicant company, legalized at the Brazilian consulate at the respective headquarters and accompanied by a translation into the vernacular. Article. 1135. The Executive Power, in order to grant the authorization, is entitled to establish convenient conditions for the defense of national interests. Sole paragraph. Once the conditions are accepted, the Executive Power will issue an authorization decree, which will include the amount of capital destined for operations in the Country, and the company will be responsible for promoting the publication of the acts referred to in art. 1.131 and in § 1 of art. 1.134”.

<sup>36</sup> Article 28 of Law 8,666/1993: “The documentation relating to the legal qualification, depending on the case, shall consist of: (...) V — a decree of authorization, in the case of a foreign company or partnership in operation in the country, and act of registration or authorization to operate issued by the competent body, whenever the activity requires it”.

it takes months to obtain such authorization. Therefore, it becomes an obstacle for the participation of foreign companies in several situations. After all, foreign companies do not intend to spend time and money for such an authorisation without a concrete prospect of being hired by a Brazilian public entity.

Because of formal difficulties like this one, the participation of foreign companies in public tenders is relatively reduced in Brazil.

A detailed study carried out by Carlos Cesar Martins Ferreira collected data for the period between 2011 and 2018 from the *Brazilian Federal Government Procurement Panel*. According to the data, in this period, public purchases were carried out by the Federal Government in the total amount of BRL 422.6 billion (equivalent to USD 74.1 billion). From this total, only BRL 28.9 billion (USD 5.07 billion) were used in contracts with foreign companies (out of 22,726 public contracts in the period).<sup>37</sup>

This means that only 6.83% of public purchases carried out by the Brazilian Federal Government between 2011 and 2018 were awarded to foreign companies. In relative terms, the smallest participation of foreigners occurred in 2012 (with only 3.75% of public purchases awarded to foreign companies). The largest participation occurred in 2015 (12.36%). The Ministry of Health handled 88.67% of public purchases from foreign companies, followed by the Ministry of Education and the Ministry of Science, Technology and Innovation.

Even the Federal Government recognises these difficulties for the participation of foreign companies in public tenders in Brazil, as it can be seen in a public report.<sup>38</sup> In fact, Brazil is the second country with the highest number of discriminatory measures in public procurement. Only the United States has more discriminatory measures in bidding than Brazil.<sup>39</sup>

The participation of foreign companies is more consistent in long-term contracts—such as concessions of public services, public-private partnerships and port leases. This relates to the fact that, in these types of contracts, the private party can normally be a Special Purpose Entity incorporated (after the bidding) under national laws, with possible foreign bidders as its shareholders. For this situation, art.1134 of the Brazilian Civil Code does not require a foreign company to have a formal authorization to operate in Brazil.

But the Government also recognises that it is difficult to predict the impacts of GPA on the internationalisation of public procurement. It expects that joining the GPA will generate gains on exports and imports, cause increases in the participation of foreign suppliers in public procurement and enable improvements in the efficiency of procurement carried out by governments. Nevertheless, it also sees the possibility that the effects of the GPA may be smaller in Brazil, when compared to other countries, due to those internal barriers. At the same time, it sees the possibility that the effects are greater than expected due to factors specific to Brazil, such as the current low participation of foreign suppliers in bids.<sup>40</sup>

## VII. Legislative harmonization and the case of Brazil

The process of Brazil joining the GPA is just the beginning. At the end of this process, Brazilian legislation must be harmonised with the GPA.<sup>41</sup> However, the GPA leaves a large area for national regulation, which

<sup>37</sup> C.C.M. Ferreira, “Participação estrangeira em licitações federais: uma abordagem quantitativa utilizando Painel de Compras” (2021) 72 *Revista do Serviço Público* 779.

<sup>38</sup> “Participação de Empresas Estrangeiras em Licitações” (Ministério da Economia, November 2020), <https://www.gov.br/compras/pt-br/agente-publico/cadernos-de-logistica/midia/empresas-estrangeiras-em-licitacoes-publicas.pdf>.

<sup>39</sup> Z. Kutlina-Dimitrova, “Government Procurement: Data, Trends and Protectionist Tendencies” (2018) Directorate General for Trade, European Commission, Issue 3, [https://ideas.repec.org/p/ris/dgtcen/2018\\_003.html](https://ideas.repec.org/p/ris/dgtcen/2018_003.html).

<sup>40</sup> “Acordo sobre Contratações Governamentais da Organização Mundial do Comércio – Análise da Adesão Brasileira” (Ministério da Economia, 2021).

<sup>41</sup> See more in R.S.L. de Oliveira and C. Fortini, “A adesão brasileira ao acordo de compras governamentais da Organização Mundial do Comércio” (2020) 18 *Revista Opinião Jurídica* 140; E.F. Jordão and L.F.E. Cunha, “A Adesão do Brasil ao Acordo sobre Contratações Públicas da OMC: entre tabus e dificuldades reais” (2021) 11 *Revista Brasileira de Políticas Públicas* 136.

lessens the need for harmonisation. In fact, GPA does “little to reshape procurement laws at the state or federal levels”.<sup>42</sup>

In Brazil, public procurement rules are, in general, centralised. The Federal Government is responsible for norms that cover several bodies of the Federal Government itself, but also cover states and municipalities. There is also a specific law for public procurement in SOEs (state-owned enterprises), which covers SOEs from the Union (Federal Government), states and municipalities. Thus, harmonisation is easier, as there are not so many different levels of standards—which constitutes a difficulty in acceding to the GPA.<sup>43</sup>

### *A. The harmonisation requirement in the GPA*

Article XXII(4) of the GPA requires the parties, until the entry into force of the Agreement in their territory, to adapt their laws and regulations, as well as their rules, procedures and practices, to the provisions of the GPA.

Each party must inform the Government Procurement Committee about the implemented changes that are relevant to the application of the GPA.

### *B. The objectives pursued with harmonisation*

The duty of legislative harmonization stems from the understanding that the existence of similarities between the countries' legislation on public procurement is a factor that facilitates the transit of companies between the national public procurement markets.

More than that, however, the harmonisation of the national rules is a necessity for the application of the GPA provisions. If there were antinomies between the GPA and the national rules, this would cause legal uncertainties that could compromise the very objectives of the GPA.

### *C. Harmonisation, standardisation, and sovereignty*

Harmonisation does not mean standardisation.

In standardisation, almost all the matter would be defined in an international agreement, leaving little room for each signatory to discipline the subject in question. The rules would be mostly identical for all countries.

In harmonisation, a different phenomenon occurs. It is accepted that there are different rules between countries—and, therefore, the freedom that each GPA signatory has to define their internal rules for public tenders and contracts are respected. More general guidelines are dealt with in the international standard, assuming that there are specific rules in each country, which may even differ from each other, but which must be harmonious, they must coexist without compromising the general guidelines and objectives of the agreement that was signed.

An example helps clarify the issue. As known, GPA includes three selection methods: open tendering, selective tendering, and limited tendering. The Agreement admits that there are procedures open to any interested party, procedures open only to pre-qualified bidders, and procedures in which there are directed invitations. But this does not mean that each signatory of the Agreement must change its bidding procedures to contemplate these three methods. Each country can continue to have its specific bidding methods. What is required from GPA signatories is that the principle of having this variety of selection methods is possible. So, for example, if a country has domestic bidding rules that only involve invitations directed to specific

<sup>42</sup>S. Arrowsmith, “Recommendations for Urgent Procurement in the EU Directives and GPA” in S. Arrowsmith et al., *Public Procurement Regulation In (a) Crisis?*, 1st edn (New York: Hart Publishing, 2021) p.97.

<sup>43</sup>S. Kohrana and S. Subramanian, “Potential Accession to the WTO Government Procurement Agreement: A Case-Study on India” (2012) 15 *Journal of International Economic Law* 1.

companies selected according to non-transparent criteria, there would not be the necessary harmonisation. This system, besides being evidently contrary to principles accepted by the GPA (such as non-discrimination and transparency), would be incompatible with the idea that guides the Agreement in the sense that the general rule should be the opening of contracting procedures to all potential stakeholders.

Evidently, the legislative harmonisation required by the GPA—and by various international instruments in general—is not offensive to the sovereignty of countries. By acceding to an agreement such as the GPA, a country is precisely exercising its sovereignty. Legislative harmonisation is not a unilateral imposition; it is just an instrument to give effectiveness to the objectives that the countries freely accept when signing an agreement like this.<sup>44</sup> A country, when acceding to the GPA, may have to change domestic rules, but it is not an imposition. It is a free adherence to objectives that the country itself considers relevant and positive for its domestic economy.

#### *D. The Brazilian case: sensitive points of harmonisation*

In the event of Brazil's accession to the GPA, there will be a need to harmonise some domestic rules, even though Brazilian legislation, especially with the innovations contemplated by Law 14,133 (as seen below in section VIII), is already in line with the fundamental principles of the Agreement.

There are also administrative practices that may violate the GPA regime. This is the case, for example, of “direct awards” (without prior bidding). These procedures are non-competitive. In 2018, the Federal Government spent 62.3% of its resources on public procurement without prior bidding. These resources are directed to local suppliers, without disputes with foreign agents. Therefore, this practice may need to be reassessed in light of the GPA commitments.<sup>45</sup>

In this sense, a few points deserve elaboration.

#### *E. Nationality as a tiebreaker rule*

Article 60 of Law 14,133/2021 establishes four criteria for tiebreakers, which must be applied in the following order: (i) final dispute, (ii) evaluation of the bidders' prior contractual performance, (iii) development by the bidder of equity actions between men and women in the work environment, and (iv) development by the bidder of an integrity program in accordance with the guidelines of the control bodies.

Paragraph 1 of art.60 of Law 14,133 establishes that, under equal conditions, if there is no tiebreaker with the application of the aforementioned criteria, preference will be ensured, successively, to the goods and services produced or provided by (i) companies established in the territory of the State or Federal District of the Public Administration body or entity that is carrying out the bidding, (ii) Brazilian companies and (iii) companies that invest in research and technology development in Brazil.

The provision of rules that consider the nationality of bidders or the fact that they invest in research and development of technology in Brazil for the purpose of breaking a tie does not seem compatible with the principle of non-discriminatory treatment of the GPA. After all, it represents a discrimination among bidders based on their nationality, something that GPA precisely seeks to rule out.

Therefore, in harmonising internal bidding rules, the tie-breaking criteria of art.26 of Law 14,133 will need to be reviewed and probably reformulated or eliminated.

#### *F. Margins of preference*

Another complex point refers to the margins of preference.

<sup>44</sup> I.T. de Araújo, “Uma análise dos custos e benefícios da entrada do Brasil no acordo de compras governamentais da Organização Mundial do Comércio” (2019) *Instituto de Pesquisa Econômica Aplicada*.

<sup>45</sup> G.J. Jurksaitis, “O Acordo de Compras Públicas (GPA) da Organização Mundial do Comércio e a Nova Lei de Licitações” (2022) 153 *Revista do Advogado*.

Article 26 of Law 14,133 provides that, in the bidding process, a margin of preference may be established for domestic manufactured goods and services that meet Brazilian technical standards.

Also, according to art.26, the margin of preference provision will be defined in a reasoned decision of the federal Executive Branch (art.26, s.1, item I), but it may be up to 10% (item II) and may even be extended to manufactured goods and services originating in the countries that make up Mercosur as long as there is reciprocity with the country in an international agreement (item III).

Specifically in relation to national manufactured goods and national services resulting from technological development and innovation, the margin of preference may be up to 20%.

Therefore, the establishment of preference margins for national companies that invest in development and technology in Brazil ends up creating a distinction directly related to the nationality of the bidders. Therefore, strictly speaking, such provisions are not in accordance with the principle of non-discrimination provided for in the GPA.

It should be noted that para.6 of art.52 of Law 14,133 establishes that solicitation notices may not provide for qualification, classification and judgment conditions that make up barriers to access for foreign bidders. However, the same provision allows for the provision of a margin of preference for goods produced in the country or national services that meet the Brazilian technical standards provided for in art.26 of the law. Law 14,133 itself admits that the provision of preference margins can be a factor that contributes to the closing of the national market for public purchases.

In view of this, the provisions related to margins of preference for Brazilian companies will need to be revised considering the principle of non-discrimination and other general principles contemplated by the GPA.

### *G. Minimum time periods*

In its art.XI, the GPA requires compliance with certain specific deadlines between the publication of the notice and other reference dates. GPA deadlines are usually 40, 25 and 10 days, depending on the type of modality being used.

This is a fundamental rule to guarantee the transparency of tenders.

In the specific case of Brazil, Law 14,133 provides for a series of deadlines that must be observed. However, if, for the same event, GPA requires a longer term, it should be understood that GPA's terms shall prevail in the bids that are covered by the Agreement.

Strictly speaking, therefore, it would be appropriate to change the deadlines of Law 14,133 so that the provisions related to deadlines are compatible with those of GPA.

### *H. Selection methods*

As mentioned above, the GPA provides for three selection methods: open tendering, selective tendering, and limited tendering. The distinguishing criterion is the possibility of participation. Open tendering is open to anyone interested and is the general rule. Selective tendering admits the participation of all bidders as long as they have been pre-qualified. Limited tendering is open only to invited bidders.

Law 14,133 contemplates several types of bidding that are not exactly those listed in the GPA. However, Brazil is not required to have the same bidding modalities provided for in the GPA. Thus, it is unnecessary to reformulate the procedural structure of bids in Brazil. What is required is that the bidding procedures provided for in the domestic rules are in harmony with the selection methods existing in the GPA.

Here, the bidding methods provided for in the Brazilian legislation do not conflict with GPA's selection methods. This is because the general rule is that the bids are open to all interested parties and there is provision for auxiliary procedures.<sup>46</sup>

Thus, it does not seem necessary to amend Law 14,133 because, in terms of selection methods, it is in line with the GPA.

### *I. Procedures for control and review of acts*

GPA requires that the parties of the Agreement have a procedure for internal review of conduct related to the contracts covered by the Agreement. The domestic review procedures should allow for alleged violations of the GPA and domestic rules issued by the signatory parties as a means of enforcing the Agreement.

But any internal review procedure is not enough. GPA requires a "judicial type procedure", i.e. a procedure that involves fundamental procedural guarantees, so that reviews are effective, timely, transparent, and non-discriminatory.

It is understood that it is unnecessary to change Brazilian legislation. Brazil has a system for controlling and challenging the acts performed in any contracting procedure. And such controls are undoubtedly made with contradictory, prior defense, and the possibility of third-party participation at certain times.

In general, developing countries are perceived as opposing to increased transparency.<sup>47</sup> This is not a problem in Brazil. Several laws, such as the Access to Information Law (Law 12,527/11) provide for transparency mechanisms, with the possibility of closely monitoring government decisions, including those related to public procurement. This facilitates review mechanisms, as it becomes easier to find information and notice violations of rights.

There are two constitutionally defined fundamental rights that open the system for reviewing errors in public procurement: (i) the broad right of access to justice, which expands the list of legitimate people and protects the vulnerable, and (ii) the right of petition, which allows anyone to submit complaints or application to the Public Administration and be entitled to a decision.

The Brazilian constitution still has the Public Prosecutor's Office ("Public Ministry"), an independent body whose function is to defend the legal order and certain social interests. This body can report to the various competent authorities and in different ways whenever it finds illegal acts in public procurement.

In fact, Brazilian legislation guarantees adversarial proceedings and prior defense in administrative proceedings, always with reasonable deadlines. Besides the possibility of challenging certain acts within the scope of the bidding itself, there are a variety of other means of discussion, such as (i) representations to the Public Prosecutor's Office, (ii) representation to the competent Court of Auditors, (iii) possibility of proposing collective actions, (iv) possibility of joining as *amicus curiae*, among others.

The actions of the Courts of Accounts in this matter are quite strong. The Federal Supreme Court considers that these bodies may provisionally suspend public tenders if they identify irregularities, although there is some legal uncertainty on this subject.

There is a multiplicity of control bodies of the Public Administration,<sup>48</sup> which act with great autonomy.<sup>49</sup> Although there are conflicting decisions and invasion of powers of the government,<sup>50</sup> bidders manage to obtain a review of public procurement acts in these various bodies and in different ways, which vary in

<sup>46</sup> Auxiliary procedures are procedures carried out by the contracting agency to facilitate the execution of bids. There are five auxiliary procedures, which are provided for in arts 78–88 of Law 14,133. They are accreditation, pre-qualification, expression of interest procedure, price registration system and cadastral record.

<sup>47</sup> M.A. Kinsey, "Transparency in Government Procurement: An International Consensus" (2004) 34 *Public Contract Law Journal* 155.

<sup>48</sup> C.A. Sundfeld, *Direito Administrativo—O novo olhar da LINDB*, 1st edn (Belo Horizonte: Editora Fórum, 2022).

<sup>49</sup> F. de A.M. Neto, "Os grandes desafios do controle da Administração Pública" (2010) 100 *Fórum de Contratação e Gestão Pública—FCGP* 9.

<sup>50</sup> F. de A.M. Neto and J.B. de Palma, "Os sete impasses do controle da administração pública" in M.A. Perez and R.P. de Souza, *Controle da administração pública*, 1st (Belo Horizonte: Editora Fórum, 2017), pp.21–38.

aspects used for judgment and speed. In summary, the review system is broad, accessible and diversified, which is in line with the GPA.

### *J. Conclusion on harmonization in the Brazilian case*

There will not need to be such significant changes in domestic norms. Brazil has a developed bidding system that requires clear, objective, transparent decisions, prevents conflicts of interest and allows for contradictory and broad defense.

## **VIII. The evolution of the Brazilian legislation in the context of the GPA**

Finally, it is interesting to note that, in parallel with the GPA accession procedure, Brazil has revised its bidding laws over the last few years, always to facilitate the participation of foreign companies. This can be seen as a positive influence of GPA, even before Brazil's accession to the Agreement.

Brazil's public procurement legislation is, in theory, open to foreign bidders. However, there are practical barriers, as explained above. The GPA has the potential to force Brazil to reassess these situations, since its rules are created to prevent this type of barrier. Thus, it provides for procedures that simplify the access of foreign bidders—making their access to public procurement more than a mere legal provision. The GPA is also seen as a “stamp of approval” for domestic public procurement laws.<sup>51</sup> Therefore, Brazil's accession to the GPA will allow foreign bidders to see it as a reliable contracting party.

At the same time, a possible accession to the GPA will consolidate the principle of non-discrimination. Therefore, it will change the logic commonly adopted in Brazil - such as preference margins, for example. Accession to the GPA brings a new pillar to public procurement rules, capable of altering the participation of foreigners in bids.

In addition, there is the possibility of changing the culture mentioned above, to mitigate formalism and bureaucracy.

As it is an agreement between several countries, the GPA creates reciprocal positive influences among the members. Possible GPA updates may, for example, benefit Brazil without legislative change—or may even catalyse legal and regulatory changes. Accession to the GPA allows Brazil to benefit from the agreement, but it also allows Brazil to influence the agreement. Thus, there is the construction of a reciprocal agenda for future negotiations.<sup>52</sup>

Some of these gains and the necessary legislative harmonisation are, in fact, being sped up in the context of the accession efforts.

### *A. Normative measures to facilitate the participation of foreign companies*

In order to facilitate the participation of foreign companies in public tenders in Brazil, a few regulatory measures have been adopted in the last few years. Two of them are worth mentioning.

On 20 September 2019, Federal Decree 10,024/2019 was issued, exempting foreign bidders from submitting officially accepted translations of their tender documents. Since the Decree was issued, translations would only need to be presented for the signing of the contract (if a foreign company is the winner of the public tender).

<sup>51</sup> C.R. Yukins and J.S. Schnitzer, “GPA Accession: Lessons Learned on the Strengths and Weaknesses of the WTO Government Procurement Agreement” (2015) 7 Trade L. & Dev 89, 99.

<sup>52</sup> R.D. Anderson and K. Osei-Lah, “Forging a More Global Procurement Market: Issues Concerning Accessions to the Agreement on Government Procurement” in Arrowsmith and Anderson, *The WTO Regime on Government Procurement: Challenge and Reform*, 1st edn (2011), p.77.

The second measure was the issuance, on 10 February 2020, of Normative Instruction 10, of the Special Secretariat for Debureaucratisation, Management and Digital Government of the Ministry of Economy.<sup>53</sup> According to this Normative Instruction, foreign companies can be registered in the Unified Registration System for Suppliers (“Sicaf”) of the Federal Government without having legal representation in Brazil. Legal representation in the country will only be required when the contract is signed.

With these provisions, the electronic public procurement system in Brazil can be accessed from anywhere, thus facilitating the participation of companies from all over the world in public tenders in Brazil.

It is interesting to note that these innovations were issued just after Brazil expressed its intention to join the WTO/GPA—which was publicly announced at the World Economic Forum in Davos in January 2019.

Nevertheless, the enactment of a formal law was still necessary to consolidate these provisions and to introduce other innovations aimed at enhancing the participation of foreign companies in public tenders in Brazil.

### *B. The new Brazilian law on public biddings and contracting (Law 14,133/2021)*

On 1 April 2021, after several years of discussions, the new Brazilian law on public biddings and contracting was enacted (Law 14,133/2021).

Among other aims, the new law clearly intends to facilitate the participation of foreign companies in public tenders in Brazil.<sup>54</sup> This aim is precisely in accordance with Brazil’s intention of becoming a signatory to the GPA and is certainly a step in the same direction as joining the GPA.<sup>55</sup>

The process of enacting Law 14,133/2021 was not influenced by Brazil’s efforts to join the GPA. These are two independent phenomena at their origins. When Brazil applied to join the GPA, in 2019, the bill leading to the new act was in the final stages of discussion in Congress. It was finally approved in December 2020, with no significant changes. Law 14,133/2021 was published in April 2021, when Brazil had already submitted its checklist and first offer for the accession negotiation.

Although unlinked at their origins, the two parallel initiatives have become intertwined. Scholars discuss the possibilities of interpretation and development of Law 14,133/2021 consistently with the GPA.

Some innovations of Law 14,133/2021 must be highlighted.

### *C. Legal definition of international bidding*

Law 14,133/2021 finally created a definition of international bidding, which did not exist in the previous legislation. The elements of this definition are: (1) tender processed in Brazilian territory; (2) mandatory admission of foreign companies; (3) possibility of quotation in foreign currency; or (4) the possibility of the contract object to be performed in whole or in part in foreign territory.

Among these elements of the definition of international bidding, it is worth noting that the admission of foreign companies is *mandatory*. This provision, in addition with the fact that the new law no longer demands the formal authorisation to operate in Brazil as a qualification requirement, leads to the conclusion that foreign companies are no longer required to have authorisation to operate in Brazil only for participating in public tenders. If a foreign company wins a public tender and the scope of the contract involves “operation

<sup>53</sup>“Instrução Normativa nº 10, de 10 de Fevereiro de 2020” (Ministério da Economia, 2020), <https://www.gov.br/compras/pt-br/acao-a-informacao/legislacao/instrucoes-normativas/instrucao-normativa-no-10-de-10-de-fevereiro-de-2020-atualizada>.

<sup>54</sup>A.C. Barretto, M.H. de Moura and F. de A. Figueira, “Brazil’s New Procurement Law and its Possible Impacts on Government Procured Construction Contracts” (International Bar Association, 27 September 2022), <https://www.ibanet.org/clint-september-2022-feature-1>.

<sup>55</sup>The approximation between Law 14,133/21 and the GPA can be found in C. Pereira and R. W. Schwind “Brazil and the WTO/GPA: An Opportunity for Regional Leadership” (Aris of Lawxley, 24 February 2023), <https://arisoflawxley.com/wto-gpa-brazil-accession/brazil-and-the-wto-gpa-an-opportunity-for-regional-leadership>.



in Brazil”, it will need to obtain the formal authorization required by the Brazilian Civil Code (as seen above in section VI). But this formal authorisation will not be necessary for the mere participation in the public tender. Therefore, there is no longer a practical difficulty that was really a barrier for the participation of foreign companies in public tenders in Brazil.

#### *D. Possibility of a foreign company leading a consortium with Brazilian companies*

Brazilian law allows two or more companies to join in a consortium to take part in public tenders. The formation of a consortium permits the companies to join their technical, economic, and financial qualifications in order to fulfill all the participation requirements. Every consortium must have a leading company, which is normally the one with the largest share.

Article 33 of Law 8,666/1993 admitted the possibility of consortium between Brazilian and foreign companies but prohibited any foreign company from being the leader of the consortium in these situations. The leadership of the consortium should always be provided by the Brazilian company. This situation generated uncertainty among foreign companies because they could not lead the consortium with Brazilian companies even if they had the largest share. The prohibition made no sense, given that the legislation always admitted the participation of foreign companies alone and in a consortium between them. If they can take part alone or in a consortium, there was no reason to prevent their leadership in a consortium with Brazilian companies.<sup>56</sup>

Law 14,133/2021 no longer forbids foreign companies from being the leaders of a consortium with Brazilian companies. The rules on consortium formation are established in art.15 and none of them prohibits the leadership by foreign companies. Therefore, from now on, in case of a consortium between Brazilian and foreign companies, they are free to define that the leadership may be provided by the foreign company. This is an important innovation of Law 14,133/2021, and it is in line with GPA provisions.

Despite the withdrawal of this prohibition by Law 14,133, some States and Municipalities have enacted regulations to determine that Brazilian companies must lead the consortium—for example, the State of Paraná (art.102, para.2 of Decree 10.086/2022). However, there are doubts about the constitutionality of these norms, since they contradict Law 14,133 and are outside the competence of States and Municipalities to rule public procurement.

#### *E. Facilitating the submission of documents by foreign bidders*

Law 14,133/2021 created facilitations for the submission of documents by foreign companies. Two examples can show this.

First, according to the new law, foreign companies can present certificates of technical qualification or other competent documents” issued by foreign entities, provided that they are translated into Portuguese and that the entities issuing these documents are reliable (art.67, para.4). If these requirements are met, any document that shows the technical qualification of the foreign company must be accepted without further formalities.<sup>57</sup>

The second example concerns the need for registration with the competent professional body. In some cases, Brazilian legislation requires companies to be registered with certain professional bodies (for example, in order to carry out constructions, the company must be previously registered with the Regional Board of Engineering—“CREA”). The previous legislation (Law 8,666/1993) required bidders—including foreigners—to be registered with the competent professional body as a prerequisite for participating in

<sup>56</sup> Schwind, “Licitações internacionais: participação de estrangeiros e licitações realizadas com financiamento externo”, 1st edn (2013), p.102; M. Justen Filho, *Comentários à Lei de Licitações e Contratações Administrativas: Lei 14.133/2021*, 1st edn (São Paulo: Revista dos Tribunais, 2021), p.571.

<sup>57</sup> In public tenders in Brazil, bidders must present documents demonstrating that they have experience (technical qualification) to carry out the bid object. The request for bids must list the experiences that bidders must demonstrate.

public tenders. However, Law 14,133/2021 permits that foreign companies can apply for such registration only to sign the contract (art.67, item V). Therefore, foreign companies will take part in public tenders even without having the registration.

Again, these provisions result from the GPA's positive influence.

### *F. Overcoming the idea of “equalization” of bid proposals*

Paragraph 4 of art.42 of Law 8,666/1993 set out that “For the purpose of judging the bid, the proposals submitted by foreign bidders shall be increased by the amount corresponding to the taxes that burden exclusively the Brazilian bidders in relation to the final sales transaction”. As a result, several scholars understood that the tax burden levied on Brazilian bidders should be simply “added” to the bid proposal of foreign bidders.<sup>58</sup>

This understanding is wrong for several reasons.<sup>59</sup> One of them is that simply adding the “Brazilian tax burden” to the bid proposal of foreign bidders contradicts the principle of equality and practically makes it impossible for foreign companies to win public tenders in Brazil.

The contrary argument, advanced by CNI (an industry association), raises the issue that foreign bidders often benefit from tax exemptions on exports in their countries of origin. Since government entities in Brazil are exempt from import duties, foreign suppliers would be unduly favored by a foreign preference arising from such alleged distortion in the Brazilian tax system.<sup>60</sup> Although the issue may raise valid concerns in terms of international taxation and domestic tax policies, it is not solved by the fictitious “tax equalization” provided for in Law 8,666/1993.

Law 14,133/2021 does not contain any rule providing for such “equalisation” of the bid proposals presented by foreign bidders. Therefore, their bid proposals may not be increased by the amount corresponding to the taxes that burden exclusively the Brazilian bidders.

This is also consistent with the GPA framework. Artificially adding the “Brazilian tax burden” to the bid proposal of foreign companies would be contrary to the GPA's basic principles.

### *G. The GPA's impact on the interpretation and application of Law 14,133/2021*

Brazil tends to have a formalist tradition in public procurement, forming a bureaucratic culture. In general, forms are favored to the detriment of content. The legal system is formed by very rigid and procedural norms, such as Law 8,666/1993.<sup>61</sup> Also, innovative norms tend to be read from the formal rules.<sup>62</sup> There is little room for change from this bureaucratic culture.

Law 14.133/21 deviated, to a certain extent, from this logic, which is exemplified by the decrease in formal requirements described above. However, it purposely maintained its strongly regulated character, with a major bureaucratic influence.

The publication of a new public procurement law, with new possibilities for interpretation and application, allows room for strong institutional changes. At this point, accession to the GPA consolidates

<sup>58</sup> J.T. Pereira Junior, *Comentários à Lei de Licitações e Contratações da Administração Pública*, (Rio de Janeiro: Renovar, 2009), p.512; R. Charles, *Leis de Licitações Públicas Comentadas*, 3rd edn (Salvador: JusPODIVM, 2010), p.259.

<sup>59</sup> An important precedent from the Brazilian Federal Court of Audit (TCU) finally examined the issue very profoundly: Decision No.2,238/2013-Plenary, Rel. Min. José Jorge, j. 21 August 2013. One of the authors of this paper made some comments about the importance of this decision: Schwind, *Licitações internacionais: participação de estrangeiros e licitações realizadas com financiamento externo*, 1st edn (2013), pp.113–118.

<sup>60</sup> A study conducted by CNI in 2021 regarding Brazil's accession to the GPA also argues in favor of the tax equalization, albeit conceding that this practice may be prevented by the commitments arising from the GPA. See Ribeiro and Júnior, “O mercado de compras governamentais brasileiro (2006–2017): mensuração e análise” (Instituto de Pesquisa Econômica Aplicada, 2019), pp.65–67.

<sup>61</sup> A. Rosilho, “As licitações segundo a Lei 8.666: um jogo de dados viciados” (2012), *Revista de Contratos Públicos*, 2, 9–38; Innovation challenges in public construction contracts in Brazil: Municipality of Itu Headquarters Building case, International Bar Association.

<sup>62</sup> F. de A.M. Neto, “Do contrato administrativo à administração contratual” (2009) *Revista do Advogado - Contratos com o Poder Público*, 107, 74–82. Exemplified in F. de A.M. Neto, H. Pinheiro and T. Cukiert, “Efficiency Contracts in the New Brazilian Procurement Law: Conceptual Framework and International Experience” (2021) 11 *Revista Brasileira de Políticas Públicas* 244.

public policy aspects of public procurement, which can encourage good practices to reduce bureaucracy and formalism when applying Law 14,133.<sup>63</sup>

## IX. The future of Brazil's accession to the GPA/WTO

After the third offer, there was a change in the Federal Government of Brazil due to the presidential election of 2022. All offers were made during the previous administration, so the change of President raised concerns about Brazil's accession to the GPA.<sup>64</sup>

In May 2023, Brazil withdrew its offer to join the GPA. There is no indication that Brazil will terminate its accession process entirely. It is reasonable to expect Brazil to submit a fresh coverage offer which is consistent with the concerns expressed at the time of the withdrawal.

The withdrawal of the offer seems to have been influenced by the dissatisfaction of the private and productive sector with the accession to the GPA. Earlier in May 2023, the CNI released the paper "Industry Resumption Plan"<sup>65</sup> as a series of recommendations to the Federal Government, in which the CNI detailed measures to promote growth in the industrial sector. Among these measures was "Recalibrating the Brazilian offer for access to the WTO Government Procurement Agreement". According to the CNI, the offer presented by Brazil for accession to the GPA caused potential harm for many reasons:

- a) Several countries still maintain huge reserves and preferences for local products and suppliers in public procurement.
- b) Brazil implements public policies through the purchasing power of the State, with great economic and strategic importance.
- c) Absence of equal footing between Brazilian and foreign bidders, due to the so-called Brazil Cost.
- d) The public procurement markets of many GPA member countries are already open to foreign bidders, so that there will not necessarily be gains for Brazilian companies.
- e) It could be of greater interest for Brazil to negotiate the opening of its public procurement market in bilateral trade agreements.

Shortly after the release of this material, the Brazilian Government announced the withdrawal of the offer for accession to the GPA—which was celebrated by the industrial sector. In a note, the CNI considered that the offer presented was very "ambitious", given its broad coverage, and reaffirmed the defense of bilateral negotiations.<sup>66</sup>

However, the defense by the industrial sector of withdrawing the accession offer to the GPA was accompanied by the defense of the internationalisation of public procurement within the scope of the Mercosur-EU Agreement or other bilateral trade agreements. The Brazilian Government also remains extremely committed to the Mercosur-EU Agreement. The difference in structures between this agreement and the GPA illustrates some reasons why developing countries do not accede to the GPA.

The Foreign Trade Secretary (a body linked to the Ministry of Development) explained that the GPA would mean a loss of Brazil's bargaining power. This is because Brazil's third and final offer had a broad and would open Brazilian public procurement to several countries, reducing their interest in future bilateral negotiations. Brazil's accession to the GPA would allegedly neutralize much of its bargaining power in

<sup>63</sup> V. Klein and A. Ferneda, "The New Public Procurement Law and GPA Accession: A Way for Brazil to Overcome Path Dependence" (Aris of Lawley, 16 December 2021), <https://arisoflawley.com/wto-gpa-brazil-accession/the-new-public-procurement-law-and-gpa-accession-a-way-for-brazil-to-overcome-path-dependence/>.

<sup>64</sup> For example, a Brazilian newspaper published that "Brazil's Accession to a WTO Agreement Has Gone Up in Smoke" (Valor Econômico, 9 January 2023), <https://valor.globo.com/opinio/assis-moreira/coluna/adesao-do-brasil-a-um-acordo-da-omc-subiu-no-telhado.ghtml>.

<sup>65</sup> "Plano de Retomada da Indústria" (CNI, May 2023), [https://static.portaldaindustria.com.br/media/filer\\_public/99/4c/994c17a5-e837-4aea-9de5-54048ec499b5/plano\\_de\\_retomada\\_9mai23\\_web.pdf](https://static.portaldaindustria.com.br/media/filer_public/99/4c/994c17a5-e837-4aea-9de5-54048ec499b5/plano_de_retomada_9mai23_web.pdf).

<sup>66</sup> "Brasil retira a oferta para acesso ao Acordo de Compras Governamentais da OMC" (CNI, May 2023), [https://static.portaldaindustria.com.br/media/filer\\_public/87/1c/871c0b93-e369-4779-bbe4-704175558969/informepoliticacomercial\\_23\\_17\\_acg\\_da\\_omc.pdf](https://static.portaldaindustria.com.br/media/filer_public/87/1c/871c0b93-e369-4779-bbe4-704175558969/informepoliticacomercial_23_17_acg_da_omc.pdf).

the Mercosur-EU agreement, since the EU countries are already included in the GPA. The strategic positioning of countries that see advantages in bilateral negotiations reduces interest in GPA.

In addition, the GPA has a most favored nation clause—which means that its members are obliged to extend to other countries any advantage or privilege granted to another member. Thus, the GPA reduces the strategic potential for entering into other agreements, potentially undermining the advantages of the Mercosur-EU agreement in terms of public procurement.

The table below summarizes some differences between the GPA and the Mercosur-EU agreement:<sup>67</sup>

GPA	Mercosur-EU Agreement
Several competitive countries such as USA and Japan	Many competitive countries, but significant ones (such as USA and Japan) are left out
48 members	27 EU countries + Mercosur
Threshold for federal government purchases: BRL 900,00	Threshold for federal government purchases: around BRL 2 million in the first five years
Threshold for public works: around BRL 26.5 million	Threshold for public works: around BRL 51 million in the first five years
Coverage of subnational entities previously defined and presented in the offers	Coverage of subnational entities must be carried out within 2 years of signing the agreement
Last offer covered 20 states	Brazil must get coverage from subnational entities that represent at least 65% of GDP
There is no news that Brazil has sought margins of preference in the GPA	Possible margins of preferences in favor of brazilians Small and Micro Enterprises (SMEs).
There is no news that Brazil has sought any kind of limited tendering procedure	Possible limited tendering procedure in the procurement from nonprofit institutions dedicated to social assistance, public services or social services of public interest.
National Industry Confederation stated that the offer should be remodeled	National Industry Confederation stated that the agreement should be concluded under the terms already defined

The difference in coverage also draws attention. The GPA has very broad coverage, whereas the Mercosur-EU agreement will have more exceptions and, potentially, fewer subnational entities. Thus, it is possible that the Brazilian Federal Government maintains public policy purposes in public procurement. When addressing the Mercosur-EU Agreement, President Lula has been emphasizing the importance of public procurement for Small and Micro Enterprises (SMEs).

According to the available news reports mentioned above, the concerns expressed by Brazil to withdraw its offers are the following:

- a) The entry of foreign companies in the Brazilian market may cause greater corruption, not less. The argument that the GPA helps the fight against corruption is only a disguise to advance a measure that in fact aims at curbing Brazil's freedom to adopt its own industrial policy through public procurement.
- b) The offers made by Brazil are excessively broad, since at the end (third and final offer) they comprised 21 sub-national governments (20 states and the federal district) and 100 SOEs.

<sup>67</sup> The analysis considers the latest publicly disclosed version of the agreement, available at: <https://www.gov.br/siscomex/pt-br/acordos-comerciais/mercotel-uniao-europeia>. Possibly, substantial changes will be made due to negotiations.

- c) Joining the GPA would make Brazil vulnerable and weaker in the negotiation of bilateral agreements, since it would have granted too much within the GPA plurilateral agreements and reduced its bargaining power in more useful negotiations, such as the Mercosur-EU or other bilateral treaties.
- d) The GPA creates limitations on public policies that Brazil may want to advance through public procurement, such as the protection of SMEs or the establishment of domestic preferences in government purchases (“industrial policy”).
- e) Most demands for opening are in the health sector, in which Brazil already has a trade deficit due to the high volume of imports, despite the existing preference for Brazilian suppliers for the health system.
- f) The GPA would make it impossible for Brazil to continue to use its offset policy to acquire technology in areas such as defense, security, and health. It is believed also to curb the country's ability to use government contracts to promote R&D (research and development) and creative contractual conditions to compensate companies for development risks.
- g) The US demands greater opening of the Brazilian market while it continues to rely on its “Buy American” program.
- h) The private sector supports Brazil's withdrawal from the GPA, since the CNI sees risks in the negotiation, such as the lack of reciprocity and the creation of a non-level playing field to favor foreign bidders (which are not subject to the so-called Brazil Cost).
- i) There are concerns due to China's possible accession to the GPA, since China may have unfair commercial practices that would affect the Brazilian domestic market.

Brazil took undeniably an aggressive approach to joining the GPA. It relinquished its SDT as an emerging economy and submitted three offers rapidly. Its third and final offer was made in June 2022, when the campaign for the October 2022 election was about to start, but the main candidates were already known (former President Bolsonaro and President Lula). Despite the risks of a political shift depending on the election results, the GPA current members did not accept Brazil's third offer. The current administration concerns are not a surprise and must have been taken into consideration by the existing GPA Member States in their negotiation strategy.

In hindsight, it might have been a better approach for the existing GPA Member States to accept Brazil's third and final offer of June 2022 and finalise Brazil's accession with the former administration. However, art.XXII(12)(13) allows any party to withdraw from the GPA, and the withdrawal will take effect 60 days after the respective notice. Nevertheless, it is reasonable to conclude that Brazil's political cost of withdrawing its pending coverage offer is lower than withdrawing from a formalised accession to the GPA by resorting to art.XXII(12)(13).

The main point is that Brazil can address such concerns without interrupting its accession process. On the one hand, some of the concerns voiced by the private sector are not unusual and have been raised and overcome in other countries. There seem to be misconceptions about the GPA restrictions or effects. It is important that the private sector and government agencies have clear and unbiased views on the purposes and effects of the GPA before rejecting it as potentially harmful.

If Brazil considers it necessary to review its coverage offer, it should not withdraw from the accession process entirely but take the narrowest possible measure. Any changes are damaging to Brazil's credibility in the negotiation, so it should change as little as possible to address its concerns.

Another important step Brazil has already taken is to undo its statement that it will not rely on SDT. Many issues such as SMEs, offsets and domestic preferences can be addressed legitimately in the negotiations under the SDT regime of art.V. It may be more palatable for the existing GPA members to deal with changes in the offers by accepting that Brazil should never have relinquished its benefits as an

emerging economy, and that such step was mere an act of pretended grandiosity by the former administration.

Coverage is entirely up to negotiation. Brazil may continue to set out limits for access to its health sector, for instance, if it considers it is a strategic sector that is not prepared for foreign competition. Article XIX of the GPA also allows modifications, which means that the coverage negotiated for accession is not immutable. The only more substantive condition is that if the consequences of the modification are not defined by negotiation, an objecting party is entitled to withdraw equivalent coverage, under art.XIX(6) of the GPA.

The argument regarding the Buy American program may be too simplistic. As indicated above, the US system extends to GPA members the same level of access within its program.

The Brazilian Government had a quite transparent process to hear the private sector when devising its coverage offers. The CNI was heard and expressed its concerns at the time. The opening of markets should be seen as an opportunity to address and reduce the “Brazil Cost” that burdens local suppliers, rather than a risk.

The argument regarding China is in favor of joining the GPA, not the other way around. If Brazil joins before China does, it will be able to negotiate with China as a GPA member State and make its own access and reciprocity demands.

The GPA is widely considered as helping in the fight against corruption through transparency and a broader pool of suppliers that are not part of the local networks underlying corrupt practices. There is no statistical support for the concern that foreign bidders will increase corruption. On the contrary, a larger and more diverse pool of suppliers tends to reduce corruption by breaking the closed networks of repeated suppliers, expanding private supervision of procurement practices and introducing players previously exposed to international practices.

The concern about opening Brazil’s market within the GPA and having little to offer in future bilateral agreements should be taken into consideration in the respective negotiations. In international practice, the existing GPA Member States combine both the participation in the GPA and the negotiation of bilateral agreements among themselves or with third parties.

## X. Conclusions

- a) The decision process of Brazil to join the GPA was originally made for government policy reasons, with no record of a direct assessment of the interests of Brazilian companies competing domestically or abroad.
- b) As part of the accession process, Brazil conducted broad consultations with the private sector and subnational governments to gather the necessary information for its first offer.
- c) Brazil had in 2019–2021 two parallel unrelated initiatives regarding public procurement, namely the application to join the GPA and the enactment of a new public procurement act.
- d) From a legal standpoint, the purpose of enhancing access for foreign suppliers is based on two fundamental recognitions: (i) the Brazilian public procurement market, despite being formally open to foreign bidders, presents several difficulties for the participation of companies based in other countries; and (ii) facilitating the participation of foreign companies in bids in Brazil is positive because it increases competition and, therefore, the chances of obtaining more advantageous proposals to the Public Administration.
- e) The decision-making process regarding the conditions for Brazil’s acceding the GPA has been conducted with considerable transparency and agility. There was a public consultation that allowed the participation of all citizens, and a second offer was made less than ten months after the first one. There was a third offer in the middle of 2022.

- f) If Brazil joins the GPA, Brazilian legislation on public tenders and public contracts must be submitted to a process of harmonization. Certain adjustments to the legislation will be essential, but it does not seem necessary to introduce very radical changes in Brazilian laws.
- g) In parallel with joining the GPA, in recent years there have already been several changes in Brazilian rules aimed at facilitating the participation of foreigners. This can be seen as a positive influence of Brazil's transparent process of joining the GPA.
- h) Brazil decided to withdraw its offer for accession to the GPA due to a series of reasons, mainly a fear that it would lose (i) strategic leverage in the negotiation of allegedly more relevant bilateral trade agreements, and (ii) the power to use public procurement as a tool to advance public policies. These and other concerns may be overcome through an unbiased understanding of the GPA's limits, effects, and possibilities. Moreover, the withdrawal of Brazil's existing offer does not compromise Brazil's possible accession or the internationalization of its public procurement market.