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# DISPUTE SETTLEMENT

WORLD TRADE ORGANIZATION

3.12 Government Procurement



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## NOTE

**The Course on Dispute Settlement in International Trade, Investment and Intellectual Property** consists of forty modules.

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## WHAT YOU WILL LEARN

This module provides the reader with a general overview of the Agreement on Government Procurement (GPA) of the World Trade Organization, and the distinctive scope of its obligations. Section 1 gives an overview of the main characteristics of the GPA. Section 2 highlights and analyses the special and differential treatment provisions of the Agreement. Section 3 examines the various interpretations of the GPA provisions under the dispute settlement system of the GATT 1947 and, more recently, under the Dispute Settlement Understanding (DSU) of the WTO. Case studies are presented in section 4 and recommended reading in section 5.



# 1. THE AGREEMENT ON GOVERNMENT PROCUREMENT (GPA)

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After completing this section, the reader should be able to:

- Identify the objectives of the GPA;
- Discuss the procedures ensuring transparency under the GPA;
- Explain the dispute settlement mechanism of the GPA; and
- Explain the similarities and differences between the legal principles underlying the GPA and those of other WTO agreements.

## 1.1 Introduction

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The generic definition of government procurement relates to the process by which a state agency procures a product or service for its own use. The principle objective of keeping open and non-discriminatory government procurement regimes is to allow for competition between potential suppliers, and hence to ensure that *best value for money* is obtained. In practice, government procurement may often be influenced by a range of secondary objectives which are not related to, or might even conflict with, the principle of *best value for money* in obtaining products or services under procurement. Examples of such secondary objectives are: the promotion of national industries by shutting out foreign competition; favouring foreign suppliers for the purpose of acquiring foreign currencies; or discriminating against certain foreign products or services for other reasons. The procedures used to reach these secondary objectives, such as discriminatory tendering requirements, closed or selective tendering and non-technical specification requirements can lead to trade distortion.

### 1.1.1 Government Procurement in the Context of International Trade

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Government procurement often accounts for a large proportion of a government's total expenditure, estimated at an average of 10–15 per cent of GDP, which represents a substantial purchasing power on domestic markets. In combination with the potential trade distorting effects of a government's secondary objectives, it is understandable that *transparency* of government procurement procedures and rules has become a fundamental issue within international trade.

Notwithstanding their economic importance, regulations on government procurement have traditionally been omitted from the scope of the multilateral rules on market access of both goods (Articles III:8(a) and XVII:2 of the GATT 1947),<sup>1</sup> and services (Article XIII:1 of GATS).<sup>2</sup>

This exclusion was discussed in the Havana Charter negotiations and led to the following conclusion:

*“Government procurement practices have traditionally been considered unreached by the language of GATT Article I, and the language of GATT Article III and the preparatory work of GATT seem to support this approach.”<sup>3</sup>*

#### **GATT, Analytical Index<sup>4</sup>**

*The ITO Charter, as proposed in the original United States draft, would have provided for national and most-favoured-nation treatment in respect of governmental purchases of supplies for governmental use. However, this provision was deleted from the London Draft Charter “as it appears to the Preparatory Committee that an attempt to reach Agreement on such a commitment would lead to exceptions almost as broad as the commitment itself...”<sup>247</sup> During discussions in Sub-Committee A at Havana, it was agreed that “paragraph 5 (III:8) was an exception to the whole of Article 18 (III).<sup>248</sup> It was noted later that “the Sub-Committee had considered that the language of paragraph 8 would exempt from the scope of Article 18 (III) and hence from Article 16 (I), laws, regulations and requirements governing purchases effected for governmental use where resale was only incidental”.<sup>249 247</sup> London Report, p. 9, para. (d)(iv).<sup>248</sup> E/CONF.2/C.3/A/W.39, p. 1.<sup>249</sup> E/CONF.2/C.3/SR.41, p. 3.*

### **1.1.2 Elaboration of Government Procurement Rules**

The initial effort to bring government procurement under internationally agreed trade rules was made at the Tokyo Round of Trade Negotiations, which led to the signing, in 1979, of the first Agreement on government procurement<sup>5</sup>.

The Tokyo Round Agreement set out the principle of national treatment in terms of laws and regulations on government procurement. This obligation was clearly limited to those Parties that negotiated and adhered to this “plurilateral” agreement.

#### **Plurilateralism**

For the purpose of expanding the scope and coverage, the Tokyo Round Agreement was renegotiated, parallel to the negotiations held during the

<sup>1</sup> GATT 1947, Article III:8 (a): “The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.”

GATT 1947, Article XVII:2: “The provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment.”

<sup>2</sup> GATS, Article XIII:1: “Articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.”

<sup>3</sup> John H. Jackson, *The Jurisprudence of GATT&WTO*, page. 63. Cambridge University Press, 2000

<sup>4</sup> GATT, Analytical Index: Guide to GATT Law and Practice, Updated 6<sup>th</sup> Edition (1995), Volume I, page 190

<sup>5</sup> This Agreement entered into force in 1981 and was subsequently amended in 1987. The amendments entered into force in 1988.



Uruguay Round. These negotiations led to the signing, on 15 April 1994, of the Government Procurement Agreement (GPA). The GPA is of a “plurilateral” nature meaning that, although the GPA is included in Annex 4 to the Agreement Establishing the WTO, all the Members of the WTO are not bound by the GPA – only the Parties adhering to it.

The idea behind limiting obligations to those States that are Parties to the Agreement, made possible an exception to the general “single undertaking” standard of negotiation under the Uruguay Round. In other words, this meant “broadening” and “improving” the scope of the Agreement “on the basis of mutual reciprocity,”<sup>6</sup> rather than on the basis of the most-favoured-nation (MFN) principle.

**Article I, GPA, GATT,  
Analytical Index<sup>7</sup>**

*“1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products and suppliers of other Parties offering products originating within the customs territories (including free zones) of the Parties, treatment no less favourable than: ... (b) that accorded to products and suppliers of any other Party.”*

The Parties to the GPA agreed to: deepen the scope of the plurilateral Agreement; maintain a Special Committee for the administration of the GPA, and use a dispute settlement mechanism (the DSU of the WTO), available exclusively to the Parties to the GPA.

**Preamble, para. 7,  
GPA**

*Desiring, in accordance with paragraph 6(b) of Article IX of the Agreement on Government Procurement done on 12 April 1979, as amended on 2 February 1987, to broaden and improve the Agreement on the basis of mutual reciprocity and to expand the coverage of the Agreement to include service contracts;<sup>8-9</sup>*

Currently, 15 countries, counting the European Community as one Party, are Parties to the GPA<sup>10</sup>, with 7 countries<sup>11</sup>

According to statistics relating to the coverage and enforcement of the Tokyo Round Agreement, from 1990 to 1994 approximately US\$ 30 billion annually was subject to the provisions of the Agreement. The new GPA, taking into

<sup>6</sup> *Agreement on Government Procurement of the Tokyo Round, Article IX (6)(b)*. “Not later than the end of the third year from the entry into force of this Agreement and periodically thereafter, the Parties thereto shall undertake further negotiations, with a view to broadening and improving this Agreement on the basis of mutual reciprocity, having regard to the provisions of Article III relating to developing countries....”

<sup>7</sup> *GATT, Analytical Index: Guide to GATT Law and Practice, Updated 6<sup>th</sup> Edition (1995), Volume I, page 46*

<sup>8</sup> *Agreement on Government Procurement (Annex 4, Uruguay Round Agreements), preamble, para. 7.*

<sup>9</sup> *Corresponding to the text in Article IX:(6)(b), Tokyo Round Agreement (see footnote 6).*

<sup>10</sup> *GPA Parties are: Canada, the European Communities and the 15 Member States thereof; Hong Kong (China), Iceland, Israel, Japan, the Republic of Korea, Liechtenstein, Aruba (part of the Netherlands), Norway, Singapore, Switzerland and the United States of America.*

<sup>11</sup> *Bulgaria, Estonia, Jordan, Kyrgyzstan, Latvia, Panama and Taiwan Province of China.*

account the extended coverage, including services as well as goods, and being applicable to sub-central entities and public utilities, has resulted in an estimated tenfold increase in the value of procurement open to international competition.

## 1.2 Objectives of the GPA

The GPA defines a framework of rights and obligations to which Parties must adjust their *national laws, regulations, procedures and practices* regarding government procurement. The scope of the GPA is broader than that of the original Agreement under the Tokyo Round, not only by virtue of the matters it governs (a point explained in greater detail below), but also because it attempts to address government procurement in broader terms than its predecessor. The following objectives, listed in the preamble, are expressed subsequently in the text of the Agreement:

**Non-discrimination**  
**Preamble, para. 3,**  
**GPA**

*Recognizing* that laws, regulations, procedures and practices regarding government procurement should not be prepared, adopted or applied to foreign or domestic products and services and to foreign or domestic suppliers so as to afford protection to domestic products or services or domestic suppliers and should not discriminate among foreign products or services or among foreign suppliers;

**Transparency**  
**Preamble, para. 4,**  
**GPA**

*Recognizing* that it is desirable to provide transparency of laws, regulations, procedures and practices regarding government procurement; Preamble, para. 4, GPA

**Dispute Settlement**  
**Preamble, para. 5,**  
**GPA**

*Recognizing* the need to establish international procedures on notification, consultation, surveillance and dispute settlement with a view to ensuring a fair, prompt and effective enforcement of the international provisions on government procurement and to maintain the balance of rights and obligations at the highest possible level; Preamble, para. 5, GPA

**Preamble, para. 6,**  
**GPA**

*Recognizing* the need to take into account the development, financial and trade needs of developing countries, in particular the least-developed countries; Preamble, para. 6, GPA

## 1.3 Regulatory Provisions in Support of the Objectives

**Structure of the GPA**

The objectives are expressed in several articles of the GPA. Specifically, the *scope and coverage* of the Agreement is set out in Articles I and II. Article III covers the principles of *national treatment and non-discrimination*. The obligations derived from these principles are specified in the requirements governing tendering procedures under Articles VII to XV. The principle of *transparency* is reflected in the provisions of Article XVII. Provisions relating to *dispute settlement* are set forth in Article XXII, and those concerning *special and differential treatment* for developing and least developed countries are found in Article V of the Agreement.

### 1.3.1 Coverage

**Scope and Coverage,  
Article I, GPA**

1. This Agreement applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement, as specified in Appendix I.
2. This Agreement applies to procurement by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of products and services.
3. Where entities, in the context of procurement covered under this Agreement, require enterprises not included in Appendix I to award contracts in accordance with particular requirements, Article III shall apply *mutatis mutandis* to such requirements.
4. This Agreement applies to any procurement contract of a value of not less than the relevant threshold specified in Appendix I.

The GPA's coverage does not extend to *all* government procurement. The obligations under the Agreement are limited to the procurements:

- posted by a procuring *entity* listed in the GPA Party's schedule in Annex 1 to 3 of Appendix I to the GPA, relating to central government entities, sub-central government entities and other entities such as utilities;
- of *goods*; and
- all *services* and *construction services* that are specified in positive lists, set out respectively in Annexes 4 and 5 of Appendix I to the GPA;
- for which the contract value exceeds a certain *threshold*. These thresholds are specified by each Party as minimum thresholds applicable to procurement of goods and services under Annexes 1, 2 and 3 entities (Article I:4).

A Party is able to modify its coverage under the conditions set out in Article XXIV:6 of the GPA, which specifies the procedures for rectification or modification of the mutually agreed coverage in Appendices I to IV.

The conventional coverage derived from the plurilateral GPA, has, since 1994, been complemented by a series of bilateral agreements between individual Parties. This “loose-leaf” system expands the scope of the applicability of the Parties' Appendices, and has become a useful tool, as it provides a flexible solution for updating the Appendices at the time changes occur.

Notwithstanding the principles of coverage provided for in the GPA, a Party may make specific exemptions in the General Note found at the end of each Party's schedule in Appendix I.

Finally, it should be noted that the GPA, Article V, allows developing countries to make exemptions from certain obligations (see section 2 below).

Furthermore, a general exemption is available to all the Parties, under Article XXIII, for non-economic reasons such as the protection of national security interests, public morals, order or safety, human, animal or plant life or health, or intellectual property.

### **1.3.2 Non-discrimination**

**National Treatment and  
Non-discrimination,  
Article III:1-2, GPA**

1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than: (a) that accorded to domestic products, services and suppliers; and (b) that accorded to products, services and suppliers of any other Party.
2. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall ensure:
  - (a) that its entities shall not treat a locally-established supplier less favourably than another locally-established supplier on the basis of degree of foreign affiliation or ownership; and
  - (b) that its entities shall not discriminate against locally-established suppliers on the basis of the country of production of the good or service being supplied, provided that the country of production is a Party to the Agreement in accordance with the provisions of Article IV.

Article III:1 and 2, sets out the fundamental principle of non-discrimination.

First, a GPA Party must provide “no less favourable” treatment to products, services and suppliers of other GPA Parties than the treatment it provides to *domestic* products, services or suppliers. In addition, a GPA party must treat the products, services or suppliers of a fellow GPA Party no less favourably than the treatment accorded to any other GPA Party (non-discrimination as between foreign GPA Parties).

Furthermore, the GPA obliges the Parties to ensure that the governmental entities do not discriminate between local suppliers due to foreign ownership or affiliation, and that such entities do not discriminate between local entities due to country of production or the goods or services being supplied, on the condition that the Rules of Origin in Article IV of the GPA are respected. This provision gives the principle of non-discrimination a more effective application, as it targets the individual actions of the governmental entities, and precludes indirect discrimination.

To secure the principle of non-discrimination, Article III is complemented by the other provisions of the Agreement, which lay emphasis on procedures to assure transparency of laws, regulations, procedures and practices regarding government procurement.

### **1.3.3 Transparency**

The objective of transparency of the Agreement covers laws and regulations, as well as *practices* and *procedures*.

This general obligation of transparency covers two aspects, (a) those related to publication and (b) those related to regulation of tendering procedures.

#### **(a) Publication**

This category includes rules for the:

##### **(i) Publication of:**

**Article XVII:1**

- *invitations* to tender for the award of a procurement contract (Article XVII:1(b)); and

**Article XVIII:1**

- *notice* of the award results (Article XVIII:1).

This obligation, to give public notice of both the invitations to tender for the award of a contract and the award results, constitutes a prerequisite for participating in the tendering processes in accordance with the requirements of GPA Articles VII to XV. It is also a way to control the results ex-post. It affords the legal possibility of requesting additional explanations from the awarding entities on their procurement practices and the reasons for the removal of a supplier from the list of qualified suppliers. In addition, qualified but unsuccessful tenderers can request the technical reasons leading up to this result (“advantages of the tender selected”) (Article XVIII:2(a), (b) and (c)).

Additionally, information can also be requested in accordance with Article XIX:2, on the “contract award necessary to ensure that the procurement was made fairly and impartially”. This article uses some of the language of Article X of the GATT 1994, which concerns the obligation of *Publication and Administration of Trade Regulations*.<sup>12</sup>

**Article XIX:1**

- ##### **(ii) Publication of any law, regulation, judicial decision, administrative ruling and any procedure, including the “standard clauses” of the contracts in which the result of the tendering process appear (Article XIX:1).**

<sup>12</sup> For a definition of *impartial, uniform and reasonable* in various WTO precedents, see Panel Report, Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather (Argentina - Bovine Hides), WT/DS155/R, paragraphs 11.60 to 11.101, and Panel Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, (EC – Bananas III), WT/DS27/R and WT/DS27AB/R, and the Appellate Body Reports, paras. 7.212 and 199 to 204, respectively.

The GPA also requires that the Parties shall submit to the GPA Committee statistics on the number and value of contracts by the procurement entities, in accordance with their Annex category, as well as the scope of coverage thereof (i.e. by category of products and services according to a uniform classification) (Article XIX:5).

The provisions establishing an obligation of transparency strengthen the enforcement of the tendering process under the GPA. The provisions ensure that procurement contracts are open to all sources of supply, enabling suppliers of foreign goods and services to compete on an equal footing with local suppliers (national treatment).

### **(b) Regulation of Tendering Procedures**

#### **Article VII**

The GPA, in Article VII, defines three types of tendering procedures:

- (i) Public: Open to all interested suppliers.
- (ii) Selective: Tenders are invited from the maximum number of suppliers (domestic or foreign), “consistent with paragraph 3 of Article X and other relevant provisions of this Agreement”, which provides that *non-qualified* suppliers requesting to participate may also be included, when there is adequate time to complete the qualification procedure in accordance with Articles VIII and IX. Furthermore, suppliers from the permanent lists of qualified suppliers may be invited to tender (Article X:2).
- (iii) Limited: The entity contacts suppliers individually. The Agreement allows this deviation from the general principles governing tendering, in accordance with Article XV, in the following instances:
  - Collusiveness of the tenders submitted;
  - Works of art or reasons connected with the protection of patent rights;
  - Reasons of extreme urgency;
  - Additional deliveries by the original supplier under certain conditions;
  - Prototypes, or a first product or service, or from a contract for research;
  - Unforeseeable circumstances that require additional construction services not included in the initial contract;
  - Similar construction services which conform to a project already awarded an initial contract, envisaging *limited* tendering;
  - Products purchased on a commodity market;
  - Purchases made under exceptionally advantageous

- conditions which arise in the very short term (liquidations); and
- Contracts awarded to the winners of a contest, under certain conditions, judged by an independent jury.

When a contract is awarded under the *limited tender* procedure, the awarding agency is obligated to prepare a report, which will be at the disposal of the government authorities of the Party (Article XV:2). This report provides the basis which the Parties to the Agreement can use to initiate various actions under the GPA, i.e. to request a *Report and Review* (explanation to be provided by the entities in compliance with the publication requirements of Article XVIII:2); to prepare a report entitled *Information and Review* (to be presented by the Parties to the Committee under Article XIX); or to initiate a *Challenge Procedure* (see Article XX).

Lastly, as regards the principle of transparency, it should be noted that the GPA contains an explicit prohibition of “offsets” as a qualification requirement (Article XVI:1). The concept of *offsets* is described in footnote 7 to Article XVI:1 of the GPA as

*“measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements.”*

However, this provision allows for differential treatment for developing countries (section 2 below).

### **1.3.4** *Dispute Settlement and Enforcement*

#### **(a) The DSU and GPA special provisions**

Article XXII of the GPA contains the dispute settlement rules which, given the plurilateral nature of the Agreement, are binding only on the Parties. They establish particular modalities that should be taken into account in a dispute settlement procedure under the GPA.

As a general principle, expressed in Article XXII:1, the Dispute Settlement Understanding of the WTO applies to a dispute under the GPA. However, Article XXII:1 provides that in case of conflict, Article XXII of the GPA prevails.

#### **Consultations and Dispute Settlement, Article XXII:1, GPA**

*The provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes under the WTO Agreement (hereinafter referred to as the “Dispute Settlement Understanding”) shall be applicable except as otherwise specifically provided below.*

Article XXII:3 provides that the use of the GPA dispute settlement system is restricted to those WTO members that are Parties to the GPA. In other words, the Dispute Settlement Body can, for example, establish panels, which, by virtue of the GPA, are open only to Parties to the GPA as members or third parties.

**Consultations and  
Dispute Settlement,  
Article XXII:3, GPA**

*The DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, make recommendations or give rulings on the matter, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under this Agreement or consultations regarding remedies when withdrawal of measures found to be in contravention of the Agreement is not possible, provided that only Members of the WTO Party to this Agreement shall participate in decisions or actions taken by the DSB with respect to disputes under this Agreement.*

**(b) No cross-retaliation**

**Cross-retaliation**

Non-compliance with the GPA cannot be subject to retaliation under the “covered agreements” of Appendix 1 in the DSU proceedings. Conversely, other provisions of WTO Agreements that a panel may have examined for breaches of the two types of non-compliance (breaches of GPA provisions and breaches of provisions of other Agreements), may never be subject to cross-retaliation involving concessions or other obligations negotiated under the GPA.

**Consultations and  
Dispute Settlement,  
Article XXII:7, GPA**

*Notwithstanding paragraph 2 of Article 22 of the Dispute Settlement Understanding, any dispute arising under any Agreement listed in Appendix 1 to the Dispute Settlement Understanding other than this Agreement shall not result in the suspension of concessions or other obligations under this Agreement, and any dispute arising under this Agreement shall not result in the suspension of concessions or other obligations under any other Agreement listed in the said Appendix 1.*

**(c) Challenge procedures**

**Article XX**

The *challenge procedures* are the result of the difficulties encountered in honouring the recommendations in the dispute settlement procedures that call for a “retrospective” remedy. In fact, some say that the nature of the panel's decision in *Norway - Procurement of Toll Collection Equipment for the City of Trondheim*<sup>13</sup> is what led to the inclusion of this special provision in the GPA.

The provisions on *challenge procedures*, found in Article XX, introduce a separate and unique mechanism for enforcing the GPA. This Article requires

<sup>13</sup> “...the acts of non-compliance were acts that had taken place in the past... The only way... would be by annulling the contract and recommencing the procurement process. The Panel did not consider it appropriate to make such a recommendation,” *Panel Report, Norway – Procurement of Toll Collection Equipment for the City of Trondheim*, GPR.DS2/R, para. 4.17.



the Parties to the GPA to set up a domestic bid challenge system for the purpose of giving suppliers, who believe that a procurement has been executed inconsistently with the requirements of the GPA, a right of recourse to an independent domestic tribunal.

In case a Party opts to confer the function of the bid challenge system to an impartial and independent review body, this body's decision must be made subject to judicial review or the procedural conditions laid down in Article XX:6 (a) to (g):

- Participants can be heard before an opinion is given or a decision is reached;
- Participants can be represented and accompanied;
- Participants shall have access to all proceedings;
- Proceedings can take place in public;
- Opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions;
- Witnesses can be presented; and
- Documents are disclosed to the review body.

Of particular importance is the obligation to confer on the review body the competence to order the correction of a breach of the Agreement or compensation for losses or damages suffered by a supplier. But this may be limited to costs for tender preparation or protest.

**Article XX:7 Challenge  
Procedures, GPA**

*Challenge procedures shall provide for:*

- (a) Rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities. Such action may result in suspension of the procurement process. However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied. In such circumstances, just cause for not acting shall be provided in writing;*
- (b) an assessment and a possibility for a decision on the justification of the challenge;*
- (c) Correction of the breach of the Agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest.*

### **1.3.5 Further Development of Rules on Government Procurement**

While the GPA is a plurilateral agreement within the multilateral framework of the WTO, initiatives have been taken to regulate government procurement on a broader multilateral level. The initial step was taken at the Singapore Ministerial Meeting in 1996, which established a mandate for a Working Group on Transparency in Government Procurement:

**Singapore Ministerial  
Declaration 1996<sup>14</sup>**

*21. We further agree to: establish a working group to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate Agreement;*

More recently, the fourth Ministerial Meeting at Doha, adopted a Ministerial Declaration, which provided that negotiations, limited to the scope of transparency, should begin after the fifth Ministerial Meeting, and furthermore, that these negotiations should be based on the progress of the Working Group on Transparency.

**Doha Ministerial  
Declaration 2001<sup>15</sup>**

*26. Recognizing the case for a multilateral Agreement on transparency in government procurement and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations. These negotiations will build on the progress made in the Working Group on Transparency in Government Procurement by that time and take into account participants' development priorities, especially those of least-developed country participants. Negotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers. We commit ourselves to ensuring adequate technical assistance and support for capacity building both during the negotiations and after their conclusion.*

So far, not much progress has been achieved within the Working Group

**GATS**

In addition to the initiative on an agreement on transparency, multilateral negotiations have been conducted by the Working Party on the General Agreement on Trade in Services (GATS), in accordance with Article XIII:2 GATS. However, progress has been slow.

**Review**

Apart from the annual review by the Committee on Government Procurement (the Committee), the GPA contains a review mechanism, established by Article XXIV.7 (b), which implies mandatory negotiations, within three years of the entry into force of the Agreement, for the purpose of improving the Agreement and extending its coverage.

**Article XXIV:7 (a) -(b),  
Final Provisions, GPA**

*Reviews, Negotiations and Future Work*

*(a) The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall annually inform the General Council of the WTO of developments during the periods covered by such reviews.*

<sup>14</sup> WT/MIN(96)/DEC, 18 December 1996, issued at the first WTO Ministerial Conference, Singapore, 9–13 December 1996.

<sup>15</sup> WT/MIN(01)/DEC/1, 20 November 2001, issued at the fourth Ministerial Conference, Doha, Qatar, from 9 to 14 November 2001.

*(b) Not later than the end of the third year from the date of entry into force of this Agreement, and periodically thereafter, the Parties thereto shall undertake further negotiations, with a view to improving this Agreement and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity, having regard to the provisions of Article V relating to developing countries.*

At present, according to the Committee, this review has three main purposes:

- Simplification and improvement;
- Expanding coverage; and
- Removing existing discriminatory restrictions (including MFN derogation).

The main objective of negotiations under Article XXIV:7, is “the expansion of the membership of the Agreement by making it more accessible to non-Parties”<sup>16</sup>.

## **1.4 Test Your Understanding**

- 1. What basic principles of the multilateral system are part of the GPA and to what extent?**
- 2. What is an “entity” under the GPA?**
- 3. What are the characteristics of retaliation in the framework of the GPA?**
- 4. What is meant by offset, and what legal condition does this entail under the GPA?**

<sup>16</sup> Report of the Committee on Government Procurement, 2002, GPA/73.



## 2. SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES

After completing this section the reader should be able to:

- Identify the Special and Differential Treatment (S&D) provisions contained in the GPA;
- Interpret the effective scope of some of the S&D provisions under the GPA;
- Assess the types of S&D provisions that could be of interest to a developing country in acceding to the GPA;
- Determine when best to invoke S&D provisions.

### 2.1 Introduction

#### Article V

As pointed out in section 1.2, the preamble of the GPA recognizes that the financial and trade development needs of developing countries, in particular the least developed countries (LDCs), must be taken into account. The financial and trade needs are explained and specified as objectives in the operative part of the Agreement (Article V:1):

#### Special and Differential Treatment for Developing Countries, Article V, GPA

##### **Objectives**

*1. Parties shall, in the implementation and administration of this Agreement, through the provisions set out in this Article, duly take into account the development, financial and trade needs of developing countries, in particular least-developed countries, in their need to:*

- (a) safeguard their balance-of-payments position and ensure a level of reserves adequate for the implementation of programmes of economic development;*
- (b) promote the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backward areas; and economic development of other sectors of the economy;*
- (c) support industrial units so long as they are wholly or substantially dependent on government procurement; and*
- (d) encourage their economic development through regional or global arrangements among developing countries presented to the Ministerial Conference of the World Trade Organization (hereinafter referred to as the "WTO") and not disapproved by it.*

By explicitly listing these objectives, the Agreement sets out clear parameters for the general interpretation of the GPA as such, and, in particular, in the case of a dispute involving a developing country. These parameters serve as tools in the application of the provisions that allow for special and differential treatment for individual developing countries, as provided for in the operational paragraphs, 4 and 5, of Article V.

Article V, paragraphs 2 and 3 establish general rules aimed at guiding the Parties when undertaking commitments falling under the GPA. Under Article V:2, each Party to the GPA shall, in the preparation and application of laws, regulations and procedures affecting government procurement, “*facilitate*” increased imports from developing countries. Additionally, Article V:3 states that the parameters of Article V:1 shall be taken into account in the course of negotiations with respect to the procurement of developing countries covered by the GPA. The paragraph continues with an obligation for developed countries to “*endeavour*” to include in their coverage list products and services of export interest to developing countries.

These objectives and general rules are complemented by “operative” clauses, which relate to three types of special and differential treatment:

- Exclusion from the rules on national treatment with respect to certain products, services and entities covered by the Agreement;
- Exclusion from or modification of the coverage lists;
- Use of “offsets” to foster development or improve the balance-of-payments situation.

## 2.2 “Agreed Exclusions”

“Agreed Exclusions” can be obtained by three mechanisms: (i) through negotiations (Article V:4), (ii) through unilateral amendment of the coverage lists (Article V:5), or (iii) by requesting the Committee to grant an exclusion (Article V:5).

### Article V:4, GPA

*4. A developing country may negotiate with other participants in negotiations under this Agreement mutually acceptable exclusions from the rules on national treatment with respect to certain entities, products or services that are included in its coverage lists, having regard to the particular circumstances of each case. In such negotiations, the considerations mentioned in subparagraphs 1(a) through 1(c) shall be duly taken into account. A developing country participating in regional or global arrangements among developing countries referred to in subparagraph 1(d) may also negotiate exclusions to its lists, having regard to the particular circumstances of each case, taking into account, inter alia, the provisions on government procurement provided for in the regional or global arrangements concerned and, in particular, products or services which may be subject to common industrial development programmes.*

### Article V:5, GPA

*5. After entry into force of this Agreement, a developing country Party may modify its coverage lists in accordance with the provisions for modification of such lists contained in paragraph 6 of Article XXIV, having regard to its development, financial and trade needs, or may request the Committee on Government Procurement (hereinafter referred to as “the Committee”) to grant exclusions from the rules on national treatment for certain entities, products or services that are included in its coverage lists, having regard to the particular circumstances of each case and taking duly into account the*



*provisions of subparagraphs 1(a) through 1(c). After entry into force of this Agreement, a developing country Party may also request the Committee to grant exclusions for certain entities, products or services that are included in its coverage lists in the light of its participation in regional or global arrangements among developing countries, having regard to the particular circumstances of each case and taking duly into account the provisions of subparagraph 1(d). Each request to the Committee by a developing country Party relating to modification of a list shall be accompanied by documentation relevant to the request or by such information as may be necessary for consideration of the matter.*

### **2.2.1** *Negotiation on Accession*

Paragraph 4 entitles a developing country, during the process of its accession to the Agreement, to negotiate derogations from the rule of national treatment with respect to certain entities, products or services. However, this possibility is conditioned by parameters set out in subparagraphs (a) to (c) of paragraph 1 of Article V.

Secondly, paragraph 4 also permits a developing country to negotiate exclusions from its coverage list, under the condition of parameter (d) of paragraph 1. In other words, negotiating exclusions from the coverage list may be permissible when a developing country is participating in a regional or global arrangement between developing countries. This possibility is to be assessed in accordance with the “particular circumstances of the case”.

### **2.2.2** *Unilateral modification*

The second mechanism, governed by Article V:5, enables a developing country to acquire S&D treatment after the entry of force of the Agreement, through the *unilateral modification* of its coverage list. This can only be done in accordance with the provisions for modification, as provided for in Article XXIV, paragraph 6 of the GPA, and having regard to the country's development, financial and trade needs.

### **2.2.3** *Authorization of the Committee*

After the entry into force of the Agreement, a developing country has the possibility of turning to the Committee on Government Procurement to obtain the two types of S&D treatment.

The developing country can request the Committee to grant the exclusion from the rule on *national treatment* for certain entities, products or services in its coverage list, conditioned to the “particular circumstances of each case” and “taking duly into account the provisions of subparagraphs 1 (a) through (c) of Article V”.

A developing country may also request that the Committee grant exclusions for certain entities, products or services, included in its coverage list, as a result of the country's participation in regional or global arrangements. Correspondingly, this request will also be conditioned by the “particular circumstances of each case” and “taking duly into account the provisions of subparagraph 1(d)”.

## 2.3 The Use of “Offsets”

As a general principle, the use of offsets is explicitly prohibited by the GPA (Article XVI). Such measures are defined in footnote 7 of Article XVI:1 of the GPA.

### **Article XVI:1, GPA Footnote 7**

*Offsets in government procurement are measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements.*

The third and particularly important S&D provision is the exclusion of developing countries from the general prohibition on the use of “offsets”. In accordance with Article XVI:2, developing countries may negotiate, at the time of their accession, conditions for the use of offsets, provided these are used only for qualification to participate in the procurement process and not as criteria for awarding contracts. This provision is valuable in that it places these countries in a different position, from a legal standpoint, when they negotiate their accession to the GPA.

### **Offsets, Article XVI:2, GPA**

*...[a] developing country may at the time of accession negotiate conditions for the use of offsets, such as requirements for the incorporation of domestic content. Such requirements shall be used only for qualification to participate in the procurement process and not as criteria for awarding contracts. Conditions shall be objective, clearly defined and non-discriminatory. They shall be set forth in the country's Appendix I and may include precise limitations on the imposition of offsets in any contract subject to this Agreement. The existence of such conditions shall be notified to the Committee and included in the notice of intended procurement and other documentation.*

Compared with the other provisions of the Agreement that can be invoked, and that require consent from developed country Parties, developing countries can use this provision as a tool prior to their decision on commitment to the GPA disciplines. While Article XVI:2 specifies that offsets shall be used only for “qualification” to participate in the procurement process, and not as criteria for “awarding” contracts, and that these conditions must be *clear, objective and non-discriminatory*, this should not diminish the potential S&D that can be derived from the scope of the provision.



## 2.4 Technical Assistance

The S&D provisions are complemented by provisions on technical assistance (Article V:8 and 9) and the commitment of developed country Parties to the Agreement to establish information centres that will respond to reasonable requests for information from developing countries (Article V:11).

The technical assistance provision in Article V:8, is based on the obligation of developed countries to provide, upon request, a developing country Party to the Agreement with “all technical assistance” which the developed country deems appropriate to resolve problems in the field of government procurement.

The assistance is expressly conditioned by the principle of non-discrimination among the developing countries (Article V:9). Unfortunately, the Article does not determine the exact scope of the assistance, which in fact leaves a margin of discretion for the developed country providing assistance.

### Article V:9, GPA

*This assistance, which shall be provided on the basis of non-discrimination among developing country Parties, shall relate, inter alia, to:*

- *the solution of particular technical problems relating to the award of a specific contract; and*
- *any other problem which the Party making the request and another Party agree to deal within the context of this assistance.*

It should be noted, however, that paragraph 10 of Article V expressly states that the provision includes translation of qualification documentation and tenders made by suppliers of developing countries into an official WTO language. The developed country has the discretion to refuse the translation when it feels that it will be “burdensome”. In case of refusal, an explanation shall be provided upon request.

## 2.5 Special and Differential Provisions for LDCs

Article V:12 contains a provision giving special treatment for LDC Parties with respect to products or services originating in those Parties to the Agreement (currently, none). In addition, the GPA provides for the possibility of extending the benefit of this Agreement to LDCs not Party to the GPA, with respect to products or services originating in these countries.

### Article V:12, GPA

*...special treatment shall be granted to least-developed country Parties and to the suppliers in those Parties with respect to products or services originating in those Parties, in the context of any general or specific measures in favour of developing country Parties. A Party may also grant the benefits of this Agreement to suppliers in least-developed countries which are not Parties, with respect to products or services originating in those countries.*

Additionally, Article V:13 imposes an obligation on each developed country, upon request, to provide assistance for the promotion of tenderers in the LDCs, as well as an obligation to assist the tenderers and suppliers to comply with technical regulations and standards relating to products or services which are the subject of the planned procurement.

The special treatment provisions for the LDCs impose heavier obligations in respect of technical assistance given by developed countries (see subsection 2.3 above).

## 2.6 Developing Countries' Reluctance

In practice, developing countries and LDCs have demonstrated a reluctance to accede to the GPA. A study undertaken by UNCTAD, found several reasons for this attitude.<sup>17</sup>

First, the typical requirements tied to the products or services under government procurement, in particular in developed countries, are of such a nature that developing countries have difficulties participating. On the contrary, the opening up of developing countries' procurement sectors would most probably benefit suppliers in developed countries rather than those in other developing countries or LDCs. Conclusively, the economic benefits deriving from the GPA in terms of exports would be marginal.

Secondly, a potential alternative to the GPA is to open government procurement markets on a regional basis, for which there is no need to accede to the GPA. In fact negotiations on government procurement have played an important role in regional integration schemes both within developing countries and among developing and developed countries.

Thirdly, in terms of gained efficiency in applying the rules of the GPA, accession does not offer any substantial advantages for developing countries, as the use of tenders is widespread, it is debatable whether the use of "offsets" at the time of accession might balance this situation. Finally, with respect to purchases against aid that is intended for these purchases, the GPA does not apply.

## 2.7 Test Your Understanding

- 1. What is meant by agreed exclusions and how are these regulated?**
- 2. By what mechanism are agreed exclusions obtained under the GPA?**
- 3. What are the advantages developing countries can obtain at the time of accession to the GPA?**
- 4. What additional advantage is envisaged under the GPA for the least developed countries?**

<sup>17</sup> Source: UNCTAD, *Handbook for Trade Negotiators from Least Developed Countries*, United Nations, New York and Geneva, 1999.

### 3. DISPUTES WITHIN THE GATT 1947 AND THE WTO

After completing this section, the reader should be able to:

- Use the precedents as tools to help clarify the obligations of the GPA;
- Recognize the principles and rules of the GPA and the Tokyo Round Agreements as they have been interpreted in dispute settlement;
- Understand the scope and implications of these precedents for a policy maker having to decide whether or not to accede to the GPA;
- Identify the instruments provided for in the GPA that would be most useful to a developing country involved in a WTO dispute under the GPA.

#### 3.1 Importance of the Precedents

The previous sections describe the regulatory framework that governs the relationships between WTO Members that are Parties to the GPA. There has been a constant effort towards expanding the coverage and the membership of the GPA, as evidenced in the practice of applying government procurement rules as adopted through the Tokyo Round, their subsequent amendments and as a result of the Uruguay Round.

Some of the Agreement's provisions have been the subject of dispute settlement under the mechanism of the Tokyo Round Agreement. As noted, this mechanism was limited to the Parties to the Agreement and formally separated from the dispute settlement mechanism under the GATT 1947 (Articles XXII and XXIII). The responsibility of administering the mechanism fell to the Government Procurement Committee of the Tokyo Round Agreement

**Enforcement of Obligations, Institutions, Article VII:1, Tokyo Agreement**

**Dispute settlement, Article VII:7, Tokyo Round Agreement**

*There shall be established under this Agreement a Committee on Government Procurement (referred to in this Agreement as "the Committee")...*

*[the Committee] ...at the request of any party to the dispute [shall] establish a panel to:*

- (a) examine the matter;*
- (b) consult regularly with the parties to the dispute and give full opportunity for them to develop a mutually satisfactory solution;*
- (c) make a statement concerning the facts of the matter as they relate to application of this Agreement and make such findings as will assist the Committee in making recommendations or giving rulings on the matter.*

**Enforcement, Article  
VII:11-12, Tokyo Round  
Agreement**

*11. After the examination is complete or after the report of a panel, working party or other subsidiary body is presented to the Committee, the Committee shall give the matter prompt consideration. With respect to these reports, the Committee shall take appropriate action normally within thirty days of receipt of the report unless extended by the Committee, including:*

- (a) a statement concerning the facts of the matter;*
- (b) recommendations to one or more Parties; and/or*
- (c) any other ruling which it deems appropriate. Any recommendations by the Committee shall aim at the positive resolution of the matter on the basis of the operative provisions of this Agreement and its objectives set out in the Preamble.*

*12. If a Party to which recommendations are addressed considers itself unable to implement them, it should promptly furnish reasons in writing to the Committee. In that event, the Committee shall consider what further action may be appropriate.*

Three panel proceedings<sup>18</sup> took place within the framework of the Tokyo Round Agreement. It is worth highlighting the legal issues which arose, since they are relevant today in interpreting the scope of certain legal obligations contained in the Uruguay Round GPA. These legal issues were:

- The conditions for “direct procurement,” known as “limited tendering procedures” in GPA terminology;
- The scope of national treatment;
- The scope of the expression “technical specifications;”
- The coverage of services (not covered by the Tokyo Round Agreement) related to the procurement of products that were covered by the Agreement; and
- The definition of “threshold” and “contract value”.<sup>19</sup>

### **3.1.1 Direct Procurement (Limited Tendering Procedures)**

In *Norway-Procurement*<sup>20</sup> the question arose as to whether Norway had resorted to single tendering in accordance with the provisions set forth in the Tokyo Round Agreement. Tendering procedures are governed by Article V of the Agreement and the relevant provision is covered in Article V:15(e). In this case:

<sup>18</sup> *Panel Report*, EEC - Value-added Tax and Threshold, *GPR/21*, dated 16/5/84; *Panel Report*, United States - Procurement of a Sonar Mapping System, *GPR.DS1 (not adopted)*, dated 23/4/92; and *Panel Report*, Norway - Procurement of Toll Collection Equipment for the City of Trondheim, *GPR.DS/2/R*, dated 13/5/92.

<sup>19</sup> “...the term contract value in Article I:1(b) should be interpreted to be the full cost to the entity, taking into account all the elements that would normally enter into the final price, and would therefore include any VAT payable, unless the entity was exempted from paying VAT...therefore... the present EEC practice of excluding the VAT was not in conformity with this interpretation of the existing Agreement when the entity was not exempted from paying VAT.” *Panel Report*, EEC - Value-added Tax and Threshold, *GPR/21*, para. 28.

<sup>20</sup> *Panel Report*, Norway - Procurement of Toll Collection Equipment for the City of Trondheim, *GPR.DS2/R*, adopted by the Committee on Government Procurement on 13/5/92.

- (i) From a procedural perspective, invoking this provision transferred the burden of proof to Norway (which invoked the provision);
- (ii) Given the exceptional nature of the provision, the United States, the claimant in the case, maintained that the exceptions provision had to be construed narrowly;<sup>21</sup>
- (iii) From a substantive perspective, it was argued that the contract between the Norwegian Public Roads Administration and the supplier, Micro Design, did not have as its principal purpose the procurement of “research and development”, but a toll collection system (i.e. a “product”). This did not constitute an exception under Article V:15(e), which applies only to the manufacture of a first product in order to execute a research and development contract.

In arguments over what constitutes *research and development* for the purpose of the Agreement, it was important to know who in the end obtained ownership of the knowledge generated from performance of the contract: the governmental entity or the supplier (in this case, Micro Design was the owner). On the other hand, it was maintained that the Agreement did not refer to intellectual property and thus should have been left to the internal regulations of each Party.<sup>22</sup>

In discussions over what constitutes a *prototype*, it was argued that it was not appropriate to apply the exception of Article V:15(e) to “final products,” such as an operating toll collection system. Nor could a contract be considered the original development of a prototype (first product) since its contents went beyond the footnote to Article V:15(e), which states that original development: “...does not extend to quantity production to establish commercial viability or to recover research and development costs.”<sup>23</sup>

The Panel began by determining the Agreement's applicability to the case since the Norwegian Public Roads Administration was an “entity” covered by the Agreement.<sup>24</sup> Next, the Panel analysed the extent to which the exception to the article invoked applied (Article V:15(e)), since that article authorized the resort to direct procurement. On points (i) and (ii) above, the Panel concluded that paragraph 15(e):

**Panel Report, Norway -  
Procurement**

*...must be regarded as an exceptions provision containing, as made clear in the last sentence of Article V:1, a finite list of the circumstances under which Parties could deviate from the basic rules requiring open or selective tendering. ...and it would be up to Norway, as the Party invoking the provision, to demonstrate the conformity of its actions with the provision.*<sup>25</sup>

<sup>21</sup> Panel Report, Norway - Procurement of Toll Collection Equipment for the City of Trondheim, GPR.DS2/R, para. 3.8.

<sup>22</sup> *Idem*, paras. 3.9 and 3.10.

<sup>23</sup> Tokyo Round Government Procurement Code, Article V:15(e), footnote 1.

<sup>24</sup> Panel Report, Norway – Procurement of Toll Collection Equipment for the City of Trondheim, GPR.DS2/R, para. 4.3.

<sup>25</sup> *Idem*, para. 4.5.

The Panel then analysed the substantive arguments, i.e. defining the nature of the contract in question (point (iii) - research and development). The definition of “procurement for research and original development” was relevant to this point. To this end, the Panel followed the methodology of the Vienna Convention on the Law of Treaties.<sup>26</sup>

The panel decided that the definition of a “contract for research...or original development” should be analysed from the perspective of the procuring entity that is subject to the obligations of the Agreement. In other words, the end result of the procurement was relevant in determining the type of procurement. The steps carried out to arrive at this result were not material, given that the amount of research needed to arrive at a final product was not relevant. What was relevant was whether the “entity,” by means of procurement, sought to acquire a *product* or the *knowledge* leading up to its production. Since the objective was “knowledge” (for example, the copyright of a new process), it was logical to turn to a supplier who could develop it. The same reasoning that applies to products likewise applies to input when the purpose of a contract is the input needed to produce a product.

The Panel concluded:

**Panel Report, Norway - Procurement**

*...the phrase “contract for research ... or original development” had to be understood as referring to a contract for the purpose of the procurement by the procuring entity of the results of research and/or original development, i.e. knowledge.*<sup>27</sup>

In its analysis of what constitutes a prototype, the Panel stated that prototypes could be considered as such to the extent that they are created “in the course of, and for, a particular contract for research...or original development.” Based on this analysis, the Panel reached the following conclusion:

**Panel Report, Norway - Procurement**

*...In the Panel's view, this meant that, for products to be considered prototypes, they must have as their principal purpose the testing and furthering of the knowledge that the procuring entity was procuring under the contract for research and/or development.*<sup>28</sup>

None of the requirements needed to invoke the exception, to carry out what would be limited tendering under the current GPA, were covered by Norway.

<sup>26</sup> “The Panel then proceeded to examine the different interpretations of Norway and the United States of the phrase ‘contract for research ... or original development,’ bearing in mind the general rule for the interpretation of treaties that a treaty be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” *Panel Report, Norway - Procurement of Toll Collection Equipment for the City of Trondheim, GPR.DS2/R, para. 4.7.*

<sup>27</sup> *Idem, para. 4.8.*

<sup>28</sup> *Idem, para. 4.9.*

### 3.1.2 *Scope of the Obligation of National Treatment*

The Panel's findings on this matter are derived from its earlier conclusion that proceeding “without justification” under the Tokyo Round Agreement with single tendering in favour of a local supplier led automatically to “less favourable treatment” of the other parties to the Agreement than the treatment Norway accorded domestic suppliers.<sup>29</sup>

### 3.1.3 *Scope of the Obligation Related to “Technical Specifications”*

The above claim parallels a provision in the current GPA (Article VI:3). The concept of technical regulations and its compatibility with WTO obligations has been dealt with in various precedents that followed the conclusion of the Uruguay Round.<sup>30</sup> Standards regarding technical specifications were not as developed in the concluding phase of the Tokyo Round Agreements.

The arguments submitted to the Panel revolved around the fact that by allowing Micro Design to take part in the improvement of a project before the procurement procedure of the toll collection system began, Norway had allowed the company to help define the “technical specifications of the contract.” It was argued that, as a result, Micro Design's “proprietary technology for the automatic vehicle identification products would be specified for the project.”<sup>31</sup> This provided the basis for justifying discrimination in favour of the local supplier, the only one having the technology to meet the requirement. The Panel pointed out that the resulting situation, to which Micro Design had contributed, excluded competition.

The Panel concluded:

#### **Panel Report, Norway - Procurement**

*...advice from Micro Design had been used in the preparation of the specifications for the procurement in a manner which had helped Norway consider that the use of a research and development contract that could be single tendered was justified; i.e. the advice had been accepted “in a manner which would have the effect of precluding competition” and thus inconsistently with Article IV:4. Since the act of single tendering had precluded competition and since the Panel had already found that the contract should not have been single tendered, the Panel did not make a finding on Article IV.*<sup>32</sup>

<sup>29</sup> *Panel Report, Norway – Procurement of Toll Collection Equipment for the City of Trondheim, GPR.DS2/R, para. 4.15.*

<sup>30</sup> *Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC – Asbestos), WT/DS135/AB/R; Panel Report, European Communities – Trade Description of Sardines (EC – Sardines), WT/DS231/R.*

<sup>31</sup> *Panel Report, Norway – Procurement of Toll Collection Equipment for the City of Trondheim, GPR.DS2/R, para. 3.27.*

<sup>32</sup> *Idem, para. 4.16.*

### 3.1.4 The Tokyo Round Agreement and the Coverage of Services

This topic was discussed in *United States - Procurement of a Sonar Mapping System*.<sup>33</sup> The Tokyo Round Agreement did not cover “service contracts *per se*”<sup>34</sup> The question that arose was whether “products” procured within the framework of a broader procurement of services rendered the provisions of the Agreement inapplicable to the said contract.<sup>35</sup>

The United States argued that, given that the main contract between the parties was a service contract not covered by the Agreement, the product subcontract (a sonar mapping system) likewise could not be covered by the Agreement,<sup>36</sup> despite the fact that it exceeded the minimum threshold established by it.

In other words, the United States maintained that the exclusion of “service contracts *per se*” from the scope and coverage of the Agreement “must be understood as meaning that the service contracts in their entirety, including incidental product procurement elements of those contracts, were excluded.”<sup>37</sup>

The EC argued that, under the Tokyo Round Agreement, “service contracts *per se* must be understood as meaning contracts for the procurement of services as such. Thus, only the service portions of contracts under which both goods and services were procured would be excluded.”<sup>38</sup>

To analyse the phrase “service contracts *per se*,” the Panel, without explicitly stating so, followed the methodology set out in Article 31 of the Vienna Convention on the Law of Treaties. First, it studied the literal meaning (textual analysis) of the various versions of the Agreement. It concluded that the phrase by itself could not convey the full meaning. The Panel then stated that it would try to determine the meaning of the phrase in its context and in light of the object and purpose of the Agreement.<sup>39</sup>

The Panel began by pointing out the scope and coverage of the Agreement for “procurement contracts” entered into by entities “regarding the procurement of products.”<sup>40</sup> The Panel considered this provision to be a “wide statement of coverage”<sup>41</sup> that excluded only those contracts below the threshold established by the Agreement.

<sup>33</sup> *Panel Report*, United States – Procurement of a Sonar Mapping System, *GPR.DS1/R (not adopted)*, dated 23/4/92.

<sup>34</sup> *Article I:1(a) of the GPA under the Tokyo Round*.

<sup>35</sup> *Panel Report*, United States – Procurement of a Sonar Mapping System, *GPR.DS1/R (not adopted)*, para. 4.14.

<sup>36</sup> *Idem*, para. 3.26.

<sup>37</sup> *Idem*, para. 3.28.

<sup>38</sup> *Idem*, para. 4.17.

<sup>39</sup> *Idem*, para. 4.18.

<sup>40</sup> *Tokyo Round Government Procurement Code, Article I.1(a)*.

<sup>41</sup> *Panel Report*, United States – Procurement of a Sonar Mapping System, *GPR.DS1/R (not adopted)*, para. 4.19.



By combining the “wide statement of coverage” with the “threshold,” the Panel determined that services inherent to the procurement of products are covered if the value of those services does not exceed that of the products.

In the Panel's opinion, the “wide statement of coverage” implies that, if the value of the product does not exceed the threshold, but the value of the product added to that of the *cost of the service inherent to the procurement* of the product results in the contract exceeding the threshold value of the Agreement, the latter then becomes applicable to the product, whose value, in principle, would be less than the threshold.<sup>42</sup>

This “broad” interpretation led to the rejection of the argument of the United States in that “the exclusion of 'service contracts *per se*' must therefore be understood to mean that contracts whose essential or major purpose was the procurement of services were excluded in their entirety, including any products procured under them, from the Agreement's coverage.”<sup>43</sup>

By handing down a decision on the basis of the end objective of the Agreement in terms of what it defined as a “wide statement of coverage,” the Panel clearly had to reject the narrower argument put forward by the United States:

**Panel Report, US -  
Sonar Mapping  
System**

*...But the implication of the interpretation proposed by the United States is that any product procurements, whatever their value, would be excluded from the Agreement's coverage if the contract under which they were procured included services of greater value. This is potentially a very large derogation from the principle that “any procurement of products” is covered; ...First, a product procurement would be outside the scope of the Agreement if it comprised 49 per cent of the value of the contract under which it was procured, but inside if it comprised 51 per cent; these proportions would often be fortuitous, and sometimes impossible to foresee at the time of drafting a contract. In the case of a multi-year contract, in which the proportion of products to services is unknown at the outset (which appears to be the case of the NSF-ASA contract), the “preponderant value” criterion would make it impossible for procurement officers to know what were their obligations under the Agreement, thus creating considerable legal uncertainty. Second, it would very often be within the power of covered entities to determine the extent of their legal obligations under the Agreement, simply by choosing a legal form under which procurements were grouped in the desired proportions.*<sup>44</sup>

### **3.1.5 Legal Status of the Principles after the Uruguay Round**

As was pointed out under point 3.1 above, the value of these precedents must be examined in the context of the Uruguay Round negotiations that were under way when these cases were being decided. In doing so, we see that the trend confirmed in the dispute settlement framework to limit direct purchases (item 3.1.1) was subsequently addressed in GPA Article XV:1(e). In addition,

<sup>42</sup> *Idem*, para. 4.19.

<sup>43</sup> *Idem*, para. 4.17.

<sup>44</sup> *Idem*, para. 4.20.

it could be said that definitions of terms such as “entity” or “research contract” were incorporated into the WTO *acquis*. This is attributed to the legal nature of the adopted panel reports, which generate legitimate expectations among WTO Members and, when relevant, should be taken into consideration for future disputes.<sup>45</sup>

While services were excluded from the Tokyo Round Agreement, the Uruguay Round negotiations extended the coverage of the Agreement to include them. This is especially important since the dispute settlement practice under the Tokyo Round on the issue of services lacks legal merit in the WTO. The panel report on US - Sonar Mapping System (GPR.DS1/R) was never adopted by the Committee on Government Procurement. As a result, the report “*does not have legal status in GATT and the WTO,*” as was decided by the Appellate Body in *Japan - Taxes on Alcoholic Beverages*. However, the Appellate Body also said that “*a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant.*”<sup>46</sup>

## 3.2 Disputes under the GPA (1994)

There have been two disputes so far: *US - Procurement*<sup>47</sup>, on requests by the European Communities (EC) and Japan respectively to establish a panel; and *Korea - Procurement*<sup>48</sup>, on a request by the United States to establish a panel.

### 3.2.1 Domestic Legislation and the GPA Commitments of Sub-central Governments

In *US - Procurement*, a panel was established at the request of the EC and Japan.<sup>49</sup> The panel's terms of reference were to investigate a law adopted by the state of Massachusetts, which forbade state agents, state authorities and other state entities from procuring goods and services from any company doing business with Myanmar (formerly known as Burma).

<sup>45</sup> *Appellate Body Report, Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages II), WT/DS8/AB/R, p. 16.*

<sup>46</sup> *Idem, page 17.*

<sup>47</sup> United States – Measure Affecting Government Procurement (US – Procurement), *WT/DS/88/3 and WT/DS/95/3.*

<sup>48</sup> Korea – Measures Affecting Government Procurement (Korea – Procurement), *WT/DS/163/R.*

<sup>49</sup> “The EU and Japan lodged a WTO complaint in 1998 under the GPA against the United States for a Massachusetts law that prohibited the state from procuring from companies active in Burma unless doing so would result in inadequate competition...A federal district court ruled that Massachusetts Burma law violated the dormant foreign affairs doctrine. The First Circuit affirmed the ruling (on even broader grounds). The First Circuit did not rely at all on the fact that Massachusetts was bound to the obligations within the GPA and that the Massachusetts law might have conflict with GPA...Instead, the Massachusetts law was invalidated for its effect on U.S. foreign policy and its foreign policy motivation...the Massachusetts statute would be unconstitutional even if Massachusetts had elected not to become bound to the GPA because it infringed on the federal government affairs powers.” *Schaefer M, New Directions in International Economic Law, Essays in Honour of John H. Jackson, ISBN 90-411-9805-9, Kluwer Law International, Chapter 31, U.S. States, Sub-Federal Rules, and the World Trading System, 2000 pp. 536-----537.*

The list of state entities prohibited from procurement included United States sub-federal entities, which were also included in the United States' coverage list under the GPA. The EC and Japan contested the consistency of the Massachusetts “Burma Law” with the GPA by requesting a WTO panel. The issue at stake, according to the EC, related to the Massachusetts “Burma Law” violating the United States' obligations under the GPA. The EC contested that its application would result in a *less favourable treatment* of EC companies presumed to trade with Myanmar.<sup>50</sup>

Separately, within the United States domestic judicial system, an industry group, the National Foreign Trade Council (NFTC), brought a court case against the state of Massachusetts challenging the constitutionality of the Act under domestic United States law. On 4 November 1998, the Federal District Court in Boston ruled that the Massachusetts law was in fact unconstitutional and the state of Massachusetts was subsequently barred from enforcing it. Later, in June 2000, the United States' Supreme Court affirmed the ruling, on the grounds that the law's provisions conflicted with Congress' specific delegation to the President of flexible discretion to develop a comprehensive, multilateral strategy. The application of the law was therefore considered unconstitutional.

As a consequence of this ruling, the EC and Japan suspended the WTO proceedings, as the Act had, in practice, become obsolete. Following one year of suspension, the panel's authority expired on 11 February 2000 in accordance with Article 12:12 of the DSU.

### 3.2.2 *The Coverage of the GPA*

In the second case, *Korea - Procurement*, the United States and the Republic of Korea argued in extenso about the coverage of the GPA. The concept of “entity” was key to defining the scope of the Agreement.

The United States argued that:

#### **Panel Report, Korea - Procurement**

“... [the] Ministry of Construction and Transportation (“MOCT”) (including the New Airport Development Group (“NADG”) under MOCT), the Korean Airport Authority (“KAA”), the Korean Airport Construction Authority (“KOACA”), and the Incheon International Airport Authority (“IIAC”), all of which are or have been in the past Korean Government entities involved in procurement for the Incheon International Airport (“IIA”) project, are covered under Korea's Appendix I of the WTO Agreement on Government Procurement (“GPA”) and:

- (a) That by imposing bid deadlines for the receipt of tenders that are shorter than the GPA-required 40 days, Korea is in violation of Article XI:1(a) and XI:2(a) of the GPA.
- (b) That by imposing qualification requirements specifying that an interested foreign supplier must have a licence that in turn requires

<sup>50</sup> WT/DS/88/6; WT/DS/95/6.

*that supplier to build or purchase manufacturing facilities in Korea, just so the supplier may be eligible to bid as a prime contractor, Korea is in violation of Articles III:1(a), VIII first sentence, and VIII(b) of the GPA.*

- (c) That by imposing domestic partnering requirements that force foreign firms to partner with, or act as subcontractors to, local Korean firms, just so the foreign firms may participate in tendering procedures, Korea is in violation of Articles III:1(a), VIII first sentence, and VIII(b) of the GPA.*
- (d) That by not establishing effective domestic procedures enabling foreign suppliers to challenge alleged breaches of the GPA for procurements related to the IIA project, Korea is in violation of Article XX of the GPA.”<sup>51</sup>*

The Panel examined the concept of “covered entity” in the GPA. It attempted to determine whether or not the following entities were included in the annexes (in this case, Annexes I and II: central and/or sub-central government entities): the Ministry of Construction and Transportation (MOCT), the Korean Airport Authority (KAA), the New Airport Development Group (NADG), and other entities related in one way or another to the construction of Incheon International Airport (IIA). In the light of the Panel's finding, the question could be answered whether the procurements for the construction of the IIA were subject or not to the obligations of the GPA.

To this end, the Panel first had to interpret the scope of Note 1 to Annex 1 of Appendix I of the Republic of Korea's Schedule. According to Note 1: “The above central government entities include their subordinate linear organizations, special local administrative organs, and attached organs as prescribed in the Government Organization Act of the Republic of Korea”.<sup>52</sup>

The question was: What constitutes a “subordinate linear organization”? The answer to this question gave rise to the following arguments presented by the United States and the Republic of Korea respectively:

The United States argued that the terms “include” and “subordinate linear organizations” implied a broader criterion in terms of the entities covered, extending to branch offices and subsidiary organizations, at least as stated in Annex 2. It believed that the MOCT was clearly covered by the Annex and the NADG, was part of the MOCT, and was responsible for building the IIA; consequently, the contract regarding the IIA was covered by the GPA.

**Panel Report, Korea -  
Procurement**

*... “Include” is a broadening term, not a limiting one. Thus, the organizations described in Note 1 are in addition to the central government entities themselves. These other organizations include branch and subsidiary organizations. ...The United States argues that NADG is the organization*

<sup>51</sup> Panel Report, Korea – Procurement, para 7.1, footnotes omitted WT/DS/163/R.

<sup>52</sup> *Idem*, para. 7.14.

*responsible for IIA construction and that, therefore, the IIA is a project of a covered entity.*<sup>53</sup>

In addition, even if this were not the case, the NADG exercised control over the KAA with respect to the IIA construction project, likewise rendering it subject to the GPA.

**Panel Report, Korea - Procurement**

*...The United States...argues that given the degree of control exercised by MOCT over KAA and its successors, procurements by those entities are actually procurements by MOCT. The United States argues that, therefore, the GPA requirements apply to those procurements.*<sup>54</sup>

Finally, the exclusion of entities for airport procurements with respect to certain Members of the GPA (General Note 1 of the Republic of Korea's Appendix) precisely asserted that there are entities that are included, at least with respect to other Members of the GPA, such as the United States.

**Panel Report, Korea - Procurement**

*7.21 The United States argues that ... the General Note confirms that there are, in fact, entities listed in Annex 1 of Korea's Schedule that are responsible for procurement for airports. The United States further argues that since MOCT, the NADG, KAA, KOACA and IIAC are the only entities Korea has held out as being responsible for procurements for airports, these are the entities that must be covered under Annex 1 for all countries not referred to in the General Note.*<sup>55</sup>

In contrast, the Republic of Korea read the last part of the Note (“*as prescribed in the Government Organizations Act*”) as allowing it discretion to organize its governmental structure and specific binding commitments in the areas of government covered by the GPA in accordance with the governmental organization that established the Act.

**Panel Report, Korea - Procurement**

*...Thus, the subordinate linear organizations are defined as individual offices rather than organizations as such....*<sup>56</sup>

The Republic of Korea also argued that the entities involved in the IIA project were not subsidiaries of the MOCT, which is covered by the GPA.

**Panel Report, Korea - Procurement**

*...Therefore, the Seoul Airport Act was the controlling law and it explicitly authorized an entity other than MOCT to have the responsibility for the IIA project...<sup>57</sup>*

<sup>53</sup> *Idem*, paras. 7.15 and 7.16.

<sup>54</sup> *Idem*, para. 7.17.

<sup>55</sup> *Idem*, para. 7.20 and 7.21.

<sup>56</sup> *Idem*, para. 7.34.

<sup>57</sup> *Idem*, para. 7.24.

Finally, the Republic of Korea argued that the GPA does not provide a definition or means for proving the “control” one entity might have over for the purpose of determining coverage of an entity under GPA.<sup>58</sup>

### 3.2.3 *WTO Precedents Applied in the Korea Case*

From *EC - Computer Equipment*<sup>59</sup>, in which the Appellate Body pronounced itself on the legal status of the Schedules of Concession to the WTO Agreement, the Panel argued as follows:

*“A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the Vienna Convention.”*<sup>60</sup>

On the basis of this precedent, the Panel decided in the case at hand:

#### **Panel Report, Korea - Procurement**

*7.9 Like GATT Article II:7 that refers to the tariff Schedules as “integral” parts of the Agreement, Article XXIV:12 of the GPA states that: “The Notes, Appendices and Annexes to this Agreement constitute an integral part thereof.” Thus, it follows that we should consider the Schedules appended to the GPA as treaty language. Accordingly, we will refer to the customary rules of interpretation of public international law as summarized in the Vienna Convention in order to interpret Korea's GPA Schedule.*<sup>61</sup>

In *US - Sugar*,<sup>62</sup> the Panel decided that “...Headnotes could be used to qualify the tariff concessions themselves.”<sup>63</sup>

Using this precedent, the Panel, in the case at hand, decided that:

#### **Panel Report, Korea - Procurement**

*The implication of the Findings in United States - Sugar for the present case would be that a GPA signatory could use Notes to its Schedules to qualify the entity coverage itself...*<sup>64</sup>

<sup>58</sup> *Idem*, para. 7.51.

<sup>59</sup> European Communities - Customs Classification of Certain Computer Equipment (EC – Computer Equipment), *WT/DS67/R; WT/DS67/AB/R*.

<sup>60</sup> Korea – Procurement, para. 7.8 (in which the Panel quoted para. 84 of the Appellate Body Report on EC – Computer Equipment).

<sup>61</sup> *Idem*, para. 7.9.

<sup>62</sup> *GATT Panel Report, United States – Restrictions on Imports of Sugar (US – Sugar)*, *BISD 36S/331*.

<sup>63</sup> In Korea – Procurement, para. 7.30, the Panel makes a summary reference to US – Sugar paras. 5.2, 5.3 and 5.7.

<sup>64</sup> *Idem*, para. 7.31.

### **3.2.4** *Analysis of the Annexes Using the Textual Method*

The Panel analysed the Note to Annex 1 of the Republic of Korea's Schedule, reading “central government entities include their subordinate linear organizations, special local administrative organs, and attached organs as prescribed in the Government Organization Act of the Republic of Korea”. An analysis of Articles 2:3 and 3:1 of the Government Organization Act of the Republic of Korea led the Panel to conclude that the “KAA is not a subordinate linear organization”<sup>65</sup> and that “KAA and its successors are not considered local administrative organs.”<sup>66</sup> Based on an analysis of Article 4 (definition of attached organs) of the Government Organization Act, the Panel found that: “There is no dispute that KAA is not an 'attached organ' within the meaning of this definition.”<sup>67</sup>

The Panel then analysed the meaning of the word “include” in Note 1 to Annex 2 reading “The above sub-central administrative government entities include their subordinate organizations under direct control and offices as prescribed in the Local Autonomy Law of the Republic of Korea”.

The ambiguity created by the use of different expressions, for example, on the one hand, defining “subordinate linear organizations...shall be Vice-Minister...Deputy Administrator...” (as stated in the Government Organization Act of the Republic of Korea) and “its successors are not considered local administrative organs” (as stated in Local Autonomy Law of the Republic of Korea) and, on the other hand, the use of the word, *include*, led the Panel to refer to supplementary means of interpretation, such as in Article 32(a) of the Vienna Convention (see point 3.2.6), to clarify the scope of the Republic of Korea's commitments.

### **3.2.5** *The Question of “Control”*

Given the difficulty in resolving the relationship between the entities referred to in the Republic of Korea's Annexes 1 and 2, using a textual method, and before turning to other methods, the Panel tried to apply the argument of one entity's control over another for determining the possible coverage.

The “control” argument was relevant since, depending on how it would be resolved, it could change the balance of obligations and rights, given that certain entities could move from one Annex to another<sup>68</sup> and the level of obligations could change.

The GPA under the Tokyo Round did not categorically support the concept of “control” as a determining factor in defining coverage, since this approach was put forward in a panel report that had not been adopted.<sup>69</sup> The current

<sup>65</sup> *Idem*, para. 7.34.

<sup>66</sup> *Idem*, para. 7.35.

<sup>67</sup> *Idem*, para. 7.36.

<sup>68</sup> *Idem*, para. 7.51.

<sup>69</sup> United States – Procurement of a Sonar Mapping System, *GPR.DSI/R* (not adopted).

GPA has specifically excluded the words “direct control” from its text, and defines coverage on the basis of the contents of the Schedules (the *Annexes to Appendix I*).<sup>70</sup>

Based on these findings, the Panel emphasized the unique nature of the GPA and looked at the nature of governmental measures covered by the GPA:

**Panel Report, Korea - Procurement**

*...the GPA is virtually sui generis in this regard. It is an important question under the GATT/WTO Agreements as to whether an action is being taken by a “governmental” entity or a private person, for the covered Agreements are considered to apply to “governmental” action only. However, once it is determined that there are “governmental” measures at issue, it is not generally of legal relevance which “governmental” entity is applying the measures. But within the GPA this is a critical question. There are obligations on the part of certain government entities but not others.<sup>71</sup>*

The Panel decided that the concept of “control” is not appropriate in determining coverage under the GPA:

**Panel Report, Korea - Procurement**

*...Members generally may...decide which entities (and procurement covered by those entities) are included in their Schedules and in which Annex they will be included. The question of “control” or other indicia of affiliation is not an explicit provision of the GPA. Rather, it is a matter of interpretation for the content of the Schedules themselves. Therefore, the issue of whether a Party can use a Note to exclude an entity which would otherwise appear to be covered within the concession contained in a particular Annex is precisely the sort of issue appropriate for qualifications through Notes as found by the panel in United States - Sugar...<sup>72</sup>*

In this case, as the notes were not clear, the Panel turned to the negotiating history.

### **3.2.6 The Negotiating History**

Noting that the footnotes to the annexes were ambiguous, the Panel looked at the negotiations preparatory to the GPA, in accordance with Article 32 of the Vienna Convention on the Law of Treaties.

Referring to the precedent *EC - Computer Equipment*, it found that what is important in this context is “to assess the objective evidence of the mutual understanding of the negotiating parties.”<sup>73</sup> This objective evidence covers not only the conduct of the parties in the dispute, but also their conduct vis-à-vis third parties. Hence the exchanges that took place between the Republic of Korea and the United States and the other Members of the GPA during the process of the Republic of Korea's accession were important.

<sup>70</sup> Korea – Procurement, paras. 7.54 and 7.55.

<sup>71</sup> *Idem*, para. 7.56.

<sup>72</sup> *Idem*, para. 7.71.

<sup>73</sup> *Idem*, para. 7.75.



The Panel then analysed the *Supplementary Explanation* to the Republic of Korea's initial offer, the latter's answers in the bilateral negotiations with the United States and the EC, as well as the reservations of other Members (the EC) about the Republic of Korea's offer.<sup>74</sup> It concluded that: "...negotiating parties other than the United States were clear that the IIA project was not covered."<sup>75</sup>

The Panel stated:

**Panel Report, Korea - Procurement**

*...the full negotiating history reflecting what the several parties to the negotiations understood with respect to Korea's offer; confirms our conclusion that there was no mutual understanding on the coverage of KAA.*<sup>76</sup>

The Panel's conclusion was based on three basic concepts: (i) the *IIA project* was **not** covered; (ii) the *entities engaged* in procurement for the project were **not** covered under Article I of the GPA; and, (iii) the *kind of affiliation* concluded to be necessary to render an entity **not** listed as subject to the GPA was not present.

In the end, the Panel decided to exercise judicial economy for claims (a), (b), (c) and (d)<sup>77</sup> and refrained from handing down a decision on the other violations of the Agreement.

**Panel Report, Korea - Procurement**

*Therefore, we conclude that the IIA construction project was not covered, as the entities engaged in procurement for the project are not covered entities within the meaning of Article I of the GPA. Furthermore, the kind of affiliation that we have concluded is necessary to render an unlisted entity subject to the GPA is not present in this case. Therefore, we do not need to proceed further and make specific findings with respect to the alleged inconsistencies of Korea's procurement practices in this regard.*<sup>78</sup>

### **3.3 Claim of Non-Violation Nullification or Impairment**

In addition, the Panel rejected the claim of *non-violation nullification or impairment* also put forth by the United States, because the United States had not demonstrated **error**,<sup>79</sup> in accordance with Article 48 of the Vienna Convention, at the time of the Republic of Korea's accession to the GPA.

Based on the principles of the GPA and how these are addressed under the DSU, matters likely to be subject to nullification or impairment in a case such as this differ from that of traditional nullification or impairment under the

<sup>74</sup> *Idem*, paras. 7.74–7.80.

<sup>75</sup> *Idem*, paras. 7.81.

<sup>76</sup> *Idem*, paras. 7.82.

<sup>77</sup> See footnote #56.

<sup>78</sup> *Panel Report, Korea – Procurement*, para. 7.83.

<sup>79</sup> *Idem*, paras. 7.126 and previous.

GATT/WTO. That is to say, while the concept of “reasonable expectation” falls under the GPA, the reason for the claim must be distinct.<sup>80</sup>

**Panel Report, Korea - Procurement**

*...However here, if there is to be a non-violation case, the question is whether or not there was a reasonable expectation of an entitlement to a benefit that had accrued pursuant to the negotiation rather than pursuant to a concession.<sup>81</sup>*

The Panel concluded that the United States failed to demonstrate that it had a *reasonable expectation* of benefiting from the Agreement,<sup>82</sup> partly because it did not ask the Republic of Korea to further clarify the scope of its offer.<sup>83</sup>

The Panel characterized the inaction of the United States as an error that was **non-excusable**. Only an excusable error can qualify as an error which may vitiate the consent to be bound by the Agreement (Vienna Convention on the Law of Treaties, Article 48:2):

**Panel Report, Korea - Procurement**

*...Here again the facts already recounted in the previous sub-section (767) demonstrate that the United States has not properly discharged this burden. We do not think the evidence at all supports a finding that the United States has contributed by its own conduct to the error, but given the elements mentioned earlier (such as the two and a half year interval between Korea's answer to the US question and its final offer, the actions by the European Community in respect of Korea's offer (768), the subsequent four-month period, of which at least one month was explicitly designated for verification, etc.), we conclude that the circumstances were such as to put the United States on notice of a possible error. Hence the error should not have subsisted at the end of the two and a half year gap, at the moment the accession of Korea was “concluded.” Therefore, the error was no longer “excusable” and only an excusable error can qualify as an error, which may vitiate the consent to be bound by the Agreement.<sup>84</sup>*

*(767) See paragraphs 7.104-7.116 above.(768) Note that the actions of a third State in avoiding error was already considered important in the case on the Legal Status of Eastern Greenland, loc. cit. PCIJ, p. 71 (the reaction of the United States to the Danish request not to make any difficulties in the settlement of the Greenland question compared to the Norwegian reaction).*

<sup>80</sup> *Idem*, 7.87.

<sup>81</sup> *Idem*, para.7.87, in fine.

<sup>82</sup> *Idem*, 7.119.

<sup>83</sup> *Idem*, 7.116.

<sup>84</sup> *Idem*, para. 7.125.

### **3.4 Test Your Understanding**

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- 1. What is the scope of the exception for *research and development* that makes it possible to resort to *single tendering* as in the precedents?**
- 2. Why does the GPA prohibit technical specifications in tendering procedures?**
- 3. Based on the precedents, how did the Tokyo Round Agreements treat procurement contracts that included services and products?**
- 4. What is the legal status of the Annexes to the GPA?**
- 5. Based on precedents from the Tokyo Round and the GPA, what is the legal value of the *control* of one entity over another as a key factor in determining the existence of an obligation?**



## 4. CASE STUDIES

The cases discussed in this section are based on information presented earlier in this paper. To prepare your answers, keep in mind the provisions of the GPA under the Tokyo Round, as well as those of the current GPA. The GATT 1947 and the current WTO cases may be used as part of your analysis.

### 4.1 Cases for Discussion

#### Case Study A

**Patria** is a developed country that is a Member of the WTO as well as a Party to the Government Procurement Agreement (GPA). **Libertario** is a developing country acceding to the GPA. As part of the accession process, **Libertario** has presented, in Annex 2 to Appendix I, limitations to its commitments regarding contracts to be carried out by *development entities* from different provinces in **Libertario**.

These limitations are explained in the General Note to **Libertario's** Annex I. The note provides that: "Procurement contracts for goods and services entered into by provincial development entities shall be excluded from the provisions of the present Agreement, except for cases in which the provincial authorities decide otherwise. This exception shall not be applied when the contract is part of a regional industrial development programme."

**Libertario** is party to a regional integration agreement together with its developing neighbour, **Rebelius**, which is not party to the GPA. This integration agreement provides, *inter alia*, for the promotion of a regional automotive industry. The WTO Committee on Trade and Development (CTD) had been made aware of this programme under the *Enabling Clause*.

**Verbatim**, another developed country Party to the GPA, has established a reservation of reciprocity limiting some of its obligations with respect to **Libertario's** commitments, to the extent that **Libertario's** provincial entities agree to be subject to the GPA.

**Patria** requests that the DSB establish a panel, on the grounds that **Libertario** is failing to comply with its obligation of national treatment by allowing bidders from **Rebelius** to participate in the limited tendering procedure for a construction contract to build a plant for manufacturing fuel-injection engines and develop prototypes for such engines, while refusing participation by bidders from **Patria** in the limited tendering procedure.

The DSB establishes the Panel.

Answer the following questions using the information set out in previous sections to explain your answers:

1. Who can participate in the case before the Panel and under what conditions?
2. What is the legal value and legal status of the Notes to the Appendices in helping to determine the scope of *Libertario's* obligations?
3. What factors, highlighted in the GATT/WTO precedents, can be considered in determining the scope of *Libertario's* obligations?
4. Based on the precedents, what legal value would *Verbatim's* reservations about the accession of *Libertario* have in the proceedings? Could these reservations be used to define the scope of *Patria's* obligations?
5. Can the Note to the Appendix impose the obligations of the regional integration agreement on provincial government authorities?
6. What is the relevance of the fact that *Libertario* and *Rebelius*, developing countries, notified the Committee on Trade and Development (CTD) about their agreement on regional integration?
7. Are the provincial development entities included among the entities under the GPA?
8. Are the provincial development entities bound by the regional integration agreement? Explain your answer based on your answer to question 7.
9. Is a construction contract for the plant covered by the GPA?
10. Is a research prototype development contract covered by the GPA?
11. Using the concept of special and differential treatment, what defense could *Libertario* present to exclude construction of the plant from GPA obligations?
12. Can the development of a prototype for a fuel-injection engine be considered a research contract? Can any of the special and differential treatment provisions back *Libertario's* defense by which it would attempt to define the construction of a fuel-injection engine as a *prototype*?
13. Based on the precedents, what is needed for a “contract” to be considered a “research contract”?
14. Who has the burden of proof in terms of qualifying the contract?

### Case Study B

*Patria* and *Verbatim* are two developed countries that are Parties to the GPA. Upon its accession to the GPA, *Libertario* negotiated offsets establishing “local content” for contract tenders to provide software to public organizations.

A subsidiary of an enterprise from *Verbatim* that is operating in *Libertario* wins a tender to provide software to *Libertario's* Ministry of Trade (an entity covered under *Libertario's* Annex 1). The enterprise is awarded the contract after the Ministry establishes that only the subsidiary of the enterprise from *Verbatim*, which is operating in *Libertario* and produces a security programme,

“Security Access,” that meets the needs of the Ministry of Trade, qualifies under the tender documentation.

*Patria* lodges a complaint at the WTO against *Libertario*, claiming that *Libertario* has violated Article XVI (offsets), Article VI (technical specifications) and Article III (national treatment) of the GPA.

According to the GPA and the GATT/WTO precedents studied above, please provide detailed answers to the following questions:

15. Does *Libertario* have the right to establish a requirement for “local content” in the product or service under the contract up for tender?
16. When and where should *Libertario* have reserved this right?
17. What exactly is the scope of this right?
18. Can *Patria* question *Libertario* for requiring local content as a condition for qualifying in the tendering procedure?
19. What *substantive* conditions are required for seeking offsets in a government procurement tendering procedure under the GPA?
20. What *formal* conditions are envisaged for seeking offsets in a government procurement tendering procedure under the GPA?
21. Can *Libertario* maintain that the contract was awarded in accordance with the GPA, based on the fact that the local enterprise (a subsidiary of the enterprise from *Verbatim*) was the only enterprise that met the “local content” requirement?
22. Can the requirement in the tender documentation for a “compatible programme,” which is only produced by the local subsidiary of the enterprise from *Verbatim*, be considered a “technical specification” according to Article VI of the GPA?
23. According to the precedents, what effect in trade is claimed to be avoided by virtue of the possible recourse to “technical specifications?”
24. Could *Libertario* have required in the tendering documents that the bidder be able to provide the programme, “Security Access”? Explain your answer.
25. Can *Patria* invoke the provisions of Article III?
26. Is Article III:2(a) applicable to the case by virtue of the fact that the winning enterprise is a subsidiary of an enterprise from *Verbatim*?
27. What rights does *Verbatim* have in the proceedings?
28. If the Panel concluded that *Libertario* violated its obligations under the GPA, could *Patria*, in light of the precedents, demand that the contract be annulled?
29. If it is determined that *Libertario* violated a provision of the GPA, could *Patria* suspend tariff concessions negotiated under the WTO Agriculture Agreement?

## 4.2 Test Your Understanding

1. Is the GPA one of the “covered Agreements” under the WTO Dispute Settlement Understanding (DSU)? YES  NO
2. Is the GPA guided by the most-favoured-nation (MFN) principle vis-à-vis WTO Members that are not Parties to the GPA? YES  NO
3. Is the GPA a plurilateral Agreement? YES  NO
4. Does the GPA include the principle of national treatment and non discrimination? YES  NO
5. Does the GPA apply to services? YES  NO
6. Can the obligation of Article III be extended to companies not included in the Appendices in the case of a procurement on the part of an entity that is included? YES  NO
7. Can a party to the GPA move an entity from one annex to another of the Appendix? YES  NO
8. Are the dispute settlement precedents from the Tokyo Round relevant in interpreting the scope of current GPA obligations? YES  NO
9. Can all WTO Members participate in the proceedings of a panel under the GPA? YES  NO
10. Is the scope of *retaliation* under the GPA equal to that of retaliation under the DSU? YES  NO
11. Can developing countries be excluded from the obligations of national treatment in the GPA? YES  NO
12. Can developing countries have different coverage in terms of commitments? YES  NO
13. Can developing countries negotiate offsets that would, for example, override the overall obligations of the on Trade-Related Investment Measures under the GPA? YES  NO
14. Under the GPA, can a Least Developed Country (LDC) become a supplier of a good or service in a tendering procedure for a developed country even though the LDC is not a party to the GPA? YES  NO
15. If an *entity* seeks to acquire a first product through procurement, does this allow for the possibility of limited tendering (Article XV)? YES  NO
16. Does the acquisition of research results by the bidding entity make it possible to invoke limited tendering provisions? YES  NO
17. Can technical specifications be included with the documentation for a call for tenders? YES  NO
18. Does the Tokyo Round Agreement cover procurement contracts for services that are inherent to product procurements? YES  NO



19. Do procurement contracts for services that are inherent to product procurement fall under the GPA? YES  NO
20. Is the *governmental* nature of the entity that applies the provisions less relevant under the GPA than under other GATT/WTO Agreements? YES  NO
21. Can the Notes to the Annexes to the Appendices to the GPA be used to determine the scope of the obligations they put forth? YES  NO
22. Is the control of one “entity” (in Annex 1, for example) over another “entity” (in Annex 2, for example) a factor in defining the coverage of the GPA? YES  NO
23. Under the GPA, is the concept of “reasonable expectations” applicable in cases of nullification or impairment without a violation? YES  NO
24. Under the GPA, do the reasonable expectations for a non-violation complaint include the benefits derived from a concession? YES  NO
25. According to the precedents studied above, can the concept of “excusable error” be invoked in a DSU proceeding in relation to the GPA? YES  NO



## 5. FURTHER READING

### 5.1 Books

- **Bronckers M and Quick R** eds. (2000). *New Directions in International Economic Law. Essays in Honour of John H. Jackson*. (Petersman E-U, Chapter 8, p. 113; Steger, DP, Chapter 9, pp. 141-142; Bronckers CEJ, Chapter 22, p. 379; Schaefer M, Chapter 31, pp. 530-537). The Hague, Kluwer Law International.
- **Jackson JH** (2000). *The Jurisprudence of GATT and the WTO* (Part III: Trade policy fundamentals, Chapter 5: Equality and discrimination in international economic law: the General Agreement on Tariffs and Trade). Cambridge, Cambridge University Press, pp. 57-68
- **Petersmann E-U** (1997). *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement*. The Hague, Kluwer Law International, pp. 228-232.
- **Waincymer J** (2002). *WTO Litigation. Procedural Aspects of Formal Dispute Settlement.*, Cameron May, pp. 509-510; 783.

### 5.2 GATT/WTO Panel Reports

- WTO Panel, *Korea - Measures Affecting Government Procurement (Korea - Procurement)*, WT/DS163/, Report of the Panel, adopted by the DSB on 19/6/2000.
- WTO Panel; *United States - Measures Affecting Government Procurement (US - Procurement)*. Panel established by the DSB under document WT/DS88/3 dated 9/9/98, whose activities were suspended on 10/2/99 under document WT/DS88/6.
- WTO Panel; *Norway - Procurement of Toll Collection Equipment for the City of Trondheim*, GPR.DS2/R, Report of the Panel, adopted on 13/5/92.
- GATT Panel, *United States - Procurement of a Sonar Mapping System*, GPR.DS1/R, dated 23/4/92, Report of the Panel, (not adopted).
- GATT Panel, *EEC - Panel on Value-Added Tax*, GPR/21, Report of the Panel, adopted on 16/5/84.

### 5.3 Documents

- Agreement on Government Procurement done at Marrakech on 15 April 1994, which entered into force on 1 February 1996. WTO web page: <http://www.wto.org>
- Agreement on Government Procurement of 1979, which entered into force on 1 January 1981 and was amended in 1987, with this amended

version entering into force in 1988. WTO web page:  
<http://www.wto.org>: Document code LT/TR/PLURI/2.

- WTO Web page on Government Procurement, available in the three official languages of the organization, at:  
[http://www.wto.org/english/traop\\_e/gproc\\_e/agrmnt\\_e.htm](http://www.wto.org/english/traop_e/gproc_e/agrmnt_e.htm).