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Government Procurement: A Multilateral Perspective into Goods and Services Trade

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GOVERNMENT PROCUREMENT: A MULTILATERAL PERSPECTIVE INTO GOODS AND SERVICES TRADE

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ABSTRACT

A large proportion of the WTO membership is not a party to the Plurilateral Agreement on Government Procurement. Accordingly, procurements by these Members is governed by the General Agreement on Tariffs and Trade, as modified by multilateral agreements like the TRIMS, SCM Agreement and the GATS. This article aims to identify the extent of the commitments relating to government procurement in these multilateral agreements and map out the policy space available to the developing countries.

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GOVERNMENT PROCUREMENT *SANS* THE GPA: A MULTILATERAL PERSPECTIVE INTO GOODS AND SERVICES TRADE

I. INTRODUCTION

> Governments typically wield their purchases as a policy tool, favouring domestic over foreign suppliers. By doing so, they aim to return tax money to domestic residents, create more jobs at home, and reduce imports.[1]
>
> *-Kaz Miyagiwa*

World over governments of developed nations are wary of being misguided about using the scarce taxpayer's money. The judicious purchase of goods and services by the state is inextricably linked with accountability in public offices. However, the buck does not always stop at free market economics which entails buying at the most competitive price. Welfare governments also must account for the domestic development dimension and the sensitivity of local industries in their procurement policies. Thus, it is no wonder that government procurement was never a part of multilateral trade negotiations until late 1973 (Tokyo Rounds). The multilateral trading system still stands far from the United States' proposal during the International Trade Organisation (ITO) negotiations, requiring government purchases to be subject to the general non-discrimination obligations.[2] Even today, the Agreement on Government Procurement remains plurilateral with only 20 signatories covering 48 WTO Members.[3]

Government procurement is largely excluded from the Most Favoured Nation (MFN) and National Treatment obligation of both GATT and GATS, baring perhaps transparency requirements. Government procurement markets, in most developing countries constitute a significant part of the economy making 'buy/ procure national' policies a significant barrier to international trade.
In India, government procurement is understood to be procurement made for and on behalf of the government, and includes central government, state governments, public sector undertakings (PSUs) and public bodies.[4] The Competition Commission of India estimates that it comprises 30%

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[1] Kaz Miyagiwa, *Oligopoly and Discriminatory Government Procurement Policy*, THE WTO AND GOVERNMENT PROCUREMENT 347 **(**Simon J. Evenett and Bernard Hoekman ed., 2006).

[2] Non-discrimination obligations of Most Favoured Nation (MFN) and National Treatment (NT). *See. The History of Government Procurement Negotiations since 1945,* THE WTO AND GOVERNMENT PROCUREMENT 77 (Simon J. Evenett and Bernard Hoekman, EE ed., 2006)

[3] The European Union and its 28 member states, all of which are covered by the Agreement is counted as one party. *See* World Trade Organisation, Agreement on Government Procurement, Parties, Observers, Accessions (Jun. 7, 2019), https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm (accessed 7 June 2019).

[4] Working Party on GATS Rules, *Communication from India – Response to the Questionnaire on Government Procurement of Service*s, WTO Doc. S/WPGR/W/11/Add.14 (Jan. 17, 1997).

of our GDP.[5] There are certain discernible trends in India's government procurement policies – a set hierarchy of preferences to buy, first, goods wholly produced in India; second, goods manufactured in India from imported materials; third, goods from foreign manufacturers held in stock in India; and last, imported products received for supply through Indian agents or India based establishments.[6] In this context this article seeks to ideate about the policy space reserved for non-GPA parties, in aligning their development goals to suit domestic needs by virtue of the government procurement derogation.

Part II of this paper deals with the aspect of Government Procurement under the GATT, Part III deals with the applicability of TRIMS in the case of a Government Procurement Derogation, Part IV explains the relationship between the SCM Agreement and Government Procurement and, Part V of the paper is a comment on the Government Procurement exception in the GATS agreement.

II. GOVERNMENT PROCUREMENT UNDER THE GATT

Given the variety of functions of a modern state, the procurement function embraces a broad and diverse range of transactions.[7] These transactions are internationally classified under three groups – construction services, supplies and services other than construction services.[8]

The GATT, 1994 excludes the National Treatment obligation from Government Procurement by virtue of the derogation under Article III:8(a), while Article XVII:2 exempts imports meant for 'immediate or ultimate consumption in governmental use' from the general principles of non-discriminatory treatment. A soft obligation of 'fair and equitable treatment' exists in the latter. It is worthy of observation that in Article I (MFN) there is no explicit reference to government procurement.

1. Government Procurement and the National Treatment Obligation

Article III of the GATT enshrines the National Treatment principle, one of the core principles of the WTO Agreement. This principle warrants that Members must not apply any internal measures to protect domestic production (Article III:1), as a general obligation. This general obligation is fleshed out in the subsequent paragraphs of Article III.

The second and fourth paragraph of Article III are quite relevant in understanding the government procurement derogation. Article III:2 prohibits discrimination of imported products vis-à-vis domestic products with respect to all internal taxes and charges. For an internal measure to be hit by Article III:4, it must be examined under the three-prong requirement, first the measure at issue must be a law, regulation or requirement; second, the imported and the domestic products must be 'like products'; and third the imported products should be accorded less favourable treatment than the 'like' domestic products.[9] If a measure satisfies the three elements of the test under Article III:4, it would be inconsistent with the National Treatment obligation.[10]

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[5] *Provisions Relating to Public Procurement*, COMPETITION COMMISSION OF INDIA - ADVOCACY SERIES 9, https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/pp.pdf (accessed 7 June 2019).

[6] S. Chakravarthy & Kamala Dawar, *The WTO Regime on Government Procurement: Challenge and Reform* 119 Cambridge University Press (Sue Arrowsmith and Robert D. Anderson ed., 2011).

[7] Sue Arrowsmith, *Government Procurement in the WTO*, STUDIES IN TRANSNATIONAL ECONOMIC LAW, Vol. 16 3 (Kluwer Law International, 2003).

[8] UNCITRAL Model Law on Procurement of Goods and Construction (1993).

[9] Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 133, WTO Doc. WT/DS161/AB/R (adopted Jan. 10, 2001).

[10] *Ibid.*

However, Article III:8 provides a derogation limiting the scope of the National Treatment obligation by making the obligation inapplicable to certain government procurement activities.[11] This derogation is built into the Article III in Para 8 of the provision:

> (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.
> (b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

The scope of Article III:8(a) has been analysed by the Appellate Body in the *Canada – Renewable Energy* case.[12] According to the Appellate Body, Article III:8(a) imposes three conditions:[13]

(i) the challenged measure must be characterized as 'laws, regulations or requirements governing the procurement of products purchased'

The Appellate Body in *Canada – Renewable Energy* stressed on the holistic interpretation of Article III:8(a) with due consideration to the linkages within the provision, as also the contextual connections with other parts of Article III. It stressed on the existence of "an articulated connection between the laws, regulations and requirements" and the procurement activity. In doing so it opined:

> Article III:8(a) describes the types of measures falling within its ambit as 'laws, regulations or requirements governing the procurement by governmental agencies of products purchased'. We note that the word 'governing' links the words 'laws, regulations or requirements' to the word 'procurement' and the remainder of the paragraph. In the context of Article III:8(a), the word 'governing', along with the word 'procurement' and the other parts of the paragraph, define the subject matter of the 'laws, regulations or requirements'. The word 'governing' is defined as 'constitut[ing] a law or rule for'. Article III:8(a) thus requires an articulated connection between the laws, regulations, or requirements and the procurement, in the sense that the act of procurement is undertaken within a binding structure of laws, regulations, or requirements."[14]

Thus, any procurement undertaken must derive its force from 'laws, regulations and requirements' which have legal sanctity under the domestic law of the Member country – within the relevant scope of these 'laws, regulations and requirements'.

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[11] For the interpretation of Article III:8(a) *See* Appellate Body Report, *Brazil – Certain Measures Concerning Taxation and Charges*, ¶ 5.84, WTO Doc. WT/DS472/AB/R and WT/DS497/AB/R (adopted Dec. 12, 2018); For the interpretation of Article III:8(b), *See* Panel Report, *European Communities — Measures Affecting Trade in Commercial Vessels*, ¶ 7.90, WTO Doc. WT/DS301/R (adopted June 20, 2005) [Hereinafter 'Panel Report, EC – Commercial Vessels'].

[12] Appellate Body Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* and *Canada – Measures Relating to the Feed-In Tariff Program*, WTO Doc. WT/DS412/AB/R (adopted May 24, 2013). [hereinafter Appellate Body Report, *Canada – Renewable Energy*]

[13] Appellate Body Report, *Canada – Renewable Energy*, ¶ 5.39, 5.59-60, 5.64.

[14] Appellate Body Report, *Canada – Renewable Energy*, ¶ 5.57.

The Appellate Body modified the Panel's decision in *Canada – Renewable Energy* stating that the applicability of the Article III:8(a) derogation does not require the satisfaction of the 'like product' test. In other words, there is no need that, in the impugned legal regime the discrimination should be between foreign products and 'like' domestic products. It was held that, to invoke the derogation, the product purchased by the government and the product governed by the legal regime should exist in a 'competitive relationship'.[15]

In *Canada – Renewable Energy*, as well as *India-Solar Cells*,[16] the product that the government was procuring/ purchasing was electricity which was not in a competitive relationship with the "product governed by the legal regime relating to the procurement", i.e. solar cells and modules. Thus, the LCR provisions in both these cases could not avail of the derogation under Article III:8(a).

(ii) it has to involve 'procurement by governmental agencies

In *Canada – Renewable Energy*, the Appellate Body considered the meaning of the term 'government agency'. The Appellate Body, interpreted the ordinary meaning of the term 'agency' as "a business, body, or organization providing a particular service, or negotiating transactions on behalf of a person or group".[17] The term 'government', on the other hand, is defined as "the group of people with the authority to govern a country or state; a particular ministry in office".

The Appellate Body while clarifying the import of the term 'governmental agencies' in the *Canada – Renewable Energy* appeal, read into its ambit 'arms-length' entities. It stated that, the question of whether an entity is a governmental agency in the sense of Article III:8(a), is determined by the competences conferred on the entity concerned and by whether that entity acts for or on behalf of government in the public realm.[18] There is no requirement for a so-called *charge to the public account.* The Appellate Body further stated that the concepts of *procurement* and *purchase* should not be equated because the former is a much broader concept.[19]

> Not every procurement needs to be effectuated by way of a purchase, and not every purchase is part of a process of government procurement ... The subject matter of the procurement is a 'product', and it is being procured by a 'governmental agency'.[20]

The Appellate Body in *Canada – Renewable Energy*, referred to its Report in the *US – AD/CVD (China)*[21] case and observed that the meaning of 'government' is derived, in part, from the functions that it performs and, in part, from the authority under which it performs those functions. Therefore, in the context of procurement, it would have to be examined if the entity in question (government organ or government company) is conferred with the power to perform governmental function and

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[15] Aditya Sarmah, *Renewable Energy and Article III:8(A) of the GATT: Reassessing the Environment-Trade Conflict in Light of the Next Generation Cases*, 9 Trade L. & Dev. 197 (2017), 210.

[16] Appellate Body Report, *India - Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc. WT/DS456/AB/R (adopted Oct. 14, 2016) [hereinafter Appellate Body Report, *India - Solar Cells*], ¶ 7.137.

[17] Appellate Body Report, *Canada – Renewable Energy*, ¶ 5.61

[18] *Ibid.*

[19] Kamala Dawar, *Government Procurement in the WTO: A Case for Greater Integration*, WORLD TRADE REVIEW (2016), 15: 4, 655.

[20] Appellate Body Report, *Canada – Renewable Energy*, ¶ 5.59.

[21] Appellate Body Report, *United States — Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R (adopted Dec. 18, 2014).

is acting for or on behalf of the government, especially when the procurement is by PSUs/ STEs. This must be done on a case to case basis with respect to each procuring entity.

In the *India – Solar Cells* case it was agreed by the parties to the dispute that the agencies purchasing solar electricity from the solar power developers were acting on behalf of the government under express government authority.[22] On this point, the Panel agreed with the parities to the dispute. This strengthens the argument that entities acting under express government authority and undertaking activities performed exclusively by governments, would satisfy the second element of Article III:8(a).[23] By this logic, several public-private partnerships, built around areas of core government competencies, would be able to avail of the derogation. Such an interpretation gels well with the development needs of developing countries where many such partnerships are being effectuated for large scale developmental projects, like railway infrastructure, construction of highways, airports, etc.

It is also important to understand that the derogation of Article III:8(a) is available only at the point of first purchase by the governmental agency, e.g. the government decides to procure printers manufactured in X country where all parts of it are locally produced. In this instance the derogation is applicable. However, the local content requirement imposed by the private printer manufacturer may breach Article III:4 if it can be substantiated that it stemmed from a 'law, regulation or requirement' of the government.[24]

(iii) the procurement must be undertaken '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'.

According to Article III:8(a) of the GATT, the procurement must be 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. The Appellate Body in *Canada – FIT* went on to define the first element of 'governmental purpose' in a narrow sense:

> [B]ecause governmental agencies by their very nature pursue governmental aims or objectives, the additional reference to 'governmental' in relation to 'purposes' must go beyond simply requiring some governmental aim or objective with respect to purchases by governmental agencies. [25]

The Appellate Body further observed that the phrase 'products purchased for governmental purposes' in Article III:8(a) refers to what is consumed by government or what is provided by government to recipients in the discharge of its public functions.[26] The scope of these functions is to be determined on a case by case basis.

Finally, Article III:8(a) refers to purchases 'for governmental purposes'. The word 'for' relates the term 'products purchased' to 'governmental purposes', and thus indicates that the products purchased must be intended to be directed at the government or be used for governmental purposes.

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[22] Aditya Sarmah, *Supra Note* 13, at 212.
[23] *Id.* At 213.
[24] Holger Hystermayer, *The Legality of Local Content Measures under WTO Law*, JOURNAL OF WORLD TRADE, 2014, at 578, 579.
[25] *See.* Appellate Body Report, *Canada – Renewable Energy*, ¶ 5.66; Both the French (les besoins des pouvoirs publics) and Spanish versions of the provision (las necesidades de los poderes públicos), corresponding more with the term 'need' than 'purpose', also point towards purchases for the needs of the government.
[26] Appellate Body Report, *Canada – Renewable Energy*, ¶ 5.68

Thus, Article III:8(a) requires that there be a rational relationship between the product and the governmental function being discharged. [27]

2. Government Procurement and Most-Favoured Nation Treatment

Unlike National Treatment, the GATT does not provide for an express exclusion of government procurement from the ambit of the Most-Favored Nation (MFN) Treatment. This section of the article analyses whether and how the GATT exempts government procurement from MFN obligation.

Article I:1 of the GATT contains the Most-Favored Nation (MFN) treatment principle. The MFN treatment is considered to be the cornerstone of the WTO regime. *In Canada – Autos*, the Appellate Body explained the pervasive character of MFN obligation in the WTO regime[28]:

> Apart from Article I:1, several 'MFN-type' clauses dealing with varied matters are contained in the GATT 1994. The very existence of these other clauses demonstrates the pervasive character of the MFN principle of non-discrimination.

Despite the pervasive character of MFN in the GATT, the agreement still provides certain exemptions to the MFN obligation. One such exemption is Article XXIV under which Members can provide preferential treatment under a Free Trade Agreement or Customs Union. Article XXIV does not provide for a blanket exemption to the MFN obligation. It instead permits Members to deviate from the obligation only to the extent to which it is necessary for the creation of a Customs Union or a Free Trade Area.[29] Despite the pervasive character of the MFN obligation, the GATT nowhere provides for an explicit exclusion or exemption for government procurement from the MFN obligation.

The GATT MFN obligation requires Members to treat all its trading partners on a non-discriminatory basis. Article I.1 covers four measures: "customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports"; "and with respect to the method of levying such duties and charges"; "and with respect to all rules and formalities in connection with importation and exportation"; and "with respect to all matters referred to in paragraphs 2 and 4 of Article III". For the purposes of this analysis, the measure under consideration will be – "with respect to all matters referred to in paragraphs 2 and 4 of Article III". This measure incorporates by reference matters contained in paragraphs 2 and 4 of the Article III into the Article I:1 of the GATT. For identifying whether government procurement is excluded from MFN it is pertinent to understand the extent to which MFN incorporates paragraphs 2 and 4 of Article III by reference.

Under Article III, paragraph 8 provides an explicit exclusion of government procurement from the scope of Article III. Article III:8 reads as follows:

> (a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for

[27] *Ibid.*

[28] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶82, WTO Doc. WT/DS139/AB/R, (adopted May 31, 2000).

[29] Appellate Body, *Turkey — Restrictions on Imports of Textile and Clothing Products*, ¶ 42-58, WTO Doc. WT/DS34/AB/R (adopted Nov. 19, 1999)

> governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.
> (b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

Paragraph (a) permits the government to procure goods exclusively from domestic entities, provided the procurement satisfies the conditions stipulated by the paragraph. Paragraph (b) permits the government to provide subsidies to exclusively to domestic producers. The Appellate Body in *Canada – FIT* and the Panel in *EC – Commercial Vessels* held these paragraphs (Article III:8(a) and III:8(b)) to be a derogation to Article III.[30] Stated differently, Article III:8 limits the scope of Article III to only those matters other than those referred in these paragraphs. Thus, Article III:8 being a derogation, the question at this point is whether Article I:1 incorporates Article III after excluding matters referred in Article III:8 or not?

The only dispute dealing with the question posed above is the un-appealed Panel Report of *EC – Commercial Vessels*. According to the Panel 'matters referred to in paragraphs 2 and 4 of Article III' in Article I:1 is required to be 'construed in light of the scope of the substantive obligations in those provisions'. The substantive obligations in this regard being the derogation contained in Article III:8. For the sake of clarity, it is important to refer to the relevant portion of the Panel Report[31]:

> Understood in this sense, it is clear to us that the "matters referred to in paragraphs 2 and 4 of Article III" cannot be interpreted without regard to limitations that may exist regarding the scope of the substantive obligations provided for in these paragraphs. If it is explicitly provided that a particular measure is not subject to the obligations of Article III, that measure in our view does not form part of the "matters referred to" in Articles III:2 and 4.

To arrive at this holding, the Panel relied primarily on two sources. The first was the GATT Panel Report in *Belgium Family Allowance* and the other was the negotiating history of the GATT. In the *Belgium Family Allowance* dispute, the measure at issue was a charge levied by Belgium on foreign products purchased by public bodies when the products originated in a country whose family allowance did not meet certain requirements. The Panel found the levy to be an internal charge within the meaning of Article III:2 and Article I:1 as a matter referred to in paragraph 2 of Article III. Since Belgium had given exemptions to certain countries, the complainant had alleged that Belgium had failed to extend this advantage unconditionally to other Contracting Parties. The GATT Panel upon examination stated that "[t]he Panel did not feel that the provisions of paragraph 8 (a) of Article III were applicable in this case as the text of the paragraph referred only to laws, regulations and requirements and not to internal taxes and charges"[32].

According to the Panel in *EC – Commercial Vessels*, the GATT Panel made this observation only because "the [GATT] Panel was of the view that Article III:8(a) would remove from the scope of

[30] Panel Report, *European Communities — Measures Affecting Trade in Commercial Vessels*, ¶ 7.90, WTO Doc. WT/DS301/R (adopted June 20, 2005) [Hereinafter 'Panel Report, EC – Commercial Vessels']; Appellate Body Report, *Canada — Measures Relating to the Feed-in Tariff Program* – ¶ 5.56, WTO Doc. WT/DS412/AB/R (adopted May 24, 2013)
[31] Panel Report, EC – Commercial Vessels, ¶ 7.83.
[32] Report of the Panel, *Belgian Family Allowances (allocations familiales)*, ¶ 4, G/32 (Nov. 7, 1952), BISD 1S/59.

Article I:1 a measure relating to government procurement in the form of law, regulation or requirement."[33].

Similarly, the Panel found support in the negotiating history of the GATT to state that Article III:8 exempts government procurement from obligations contained in Article I. The most critical being the discussion on draft Article 18.8(a) of the Havana Charter corresponding to Article III:8(a). In the meeting on February 1948 it was observed that:

> ...the Sub-Committee had considered that *the language of paragraph 8 would except from the scope of Article 18 [national treatment] and hence from Article 16 [MFN treatment]*, laws, regulations and requirements governing purchases effected for governmental purposes where resale was only incidental...[34]

Based on the characterisation of Article III:8 by the Panel (*EC – Commercial Vessels*) and Appellate Body (*Canada - FIT*) and the cogent reasoning of the Panel in *EC – Commercial Vessels*, it could be stated that government procurement satisfying the conditions prescribed in Article III:8 is also excluded from the scope of Article I. The probable exclusion of government procurement from MFN obligation has been a matter of debate among scholars. Majority of scholars seems to have agreed on the point that government procurement is excluded from the ambit of MFN.[35] And some have stated otherwise.[36] But like stated above, legal interpretation of Article I and Article III of the GATT along with the negotiating history of the GATT seems to favour the present authors and others supporting the exclusion.

III. GOVERNMENT PROCUREMENT AND ITS INTERACTION WITH THE TRIMS AGREEMENT

The Appellate Body upheld the Panel's ruling in *Canada – Renewable Energy*[37] that, in the context of the TRIMs Agreement, Article III:8(a) of the GATT applies, thus government procurement is not only exempted from obligations under Article III of the GATT, but also from the application of Article III under the TRIMs Agreement:

> It does not follow, however, that TRIMs having the same characteristics as those described in Paragraph 1(a) of the Illustrative List must be automatically found to be inconsistent with Article III:4 of the GATT 1994 when they would otherwise be covered by the terms of Article III:8(a) of the GATT 1994. Such a reading of Article 2.2 would be inconsistent with the clear terms of Article 2.1, which explicitly state that there will be a violation of Article 2.1 of the TRIMs Agreement whenever a measure is inconsistent with Article III of the GATT 1994.This refers to the whole of Article III, including Article III:8(a).

Since the TRIMS agreement focuses on investment measures that infringe Article III, it is only logical that an exception to Article III, should logically extend to the TRIMs agreement as well.

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[33] Panel Report, EC – Commercial Vessels, ¶ 7.89

[34] United Nations Conference on Trade and Employment, Third Committee: Commercial Policy, Summary Record of the Forty-First Meeting, E/CONF.2/C.3/SR.41 (23 February 1948), p. 3; Panel Report, EC – Commercial Vessels, ¶ 7.89

[35] S. Arrowsmith, *Supra* note 7; Gary Clyde Hufbauer, Joanna Shelton Erb, and H. P. Starr, *The GATT Codes and the Unconditional Most Favored-Nation Principle*, Law and Policy in International Business, 12 (Spring 1980).

[36] Kamala Dawar, *Government Procurement in the WTO: A Case for Greater Integration*, World Trade Review (2016), 15: 4, 645–670

[37] *Canada – Renewable Energy*, ¶ 5.33.

IV. GOVERNMENT PROCUREMENT AND ITS INTERACTION WITH THE SCM AGREEMENT

Subsidies provided by the government are regulated by Article XVI of the GATT and more elaborately by the SCM Agreement. Article 1.1 of the SCM Agreement defines a subsidy:

> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
> …
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
> …
> or
> (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;
> and
> (b) a benefit is thereby conferred.

To qualify as a subsidy under the SCM Agreement, Article 1.1 requires a financial contribution or any form of income or price support to confer a benefit on the recipient. Existing jurisprudence has interpreted this to mean that the recipient is 'better off' than it would have been absent the alleged support from the government.[38] But Article 14 deems government procurement as not one conferring a 'benefit' if the procurement is one made for adequate remuneration. Article 14 further states that "adequate remuneration" is to be "determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)". In determining 'benefit', the issue arises when the market is distorted due to frequent government interventions making the price and other market signal unreliable. This would make identifying a benchmark from the market to determine 'benefit' almost impossible. Therefore, for products or sectors in where there is a higher reliance on government procurement, identifying a benchmark for determining existence of 'subsidy' would be prove to be a challenging task. In such cases the Appellate Body has often resorted to proxies, like costs.[39]

One of the primary concerns in the SCM Agreement with regards to government procurement is whether GATT exception are available to defend an inconsistent subsidy program. Although both the GATT and the SCM Agreement forms part of the WTO Agreement, neither Panel nor the Appellate Body has ruled on whether exceptions contained in GATT can be used to justify a violation of the SCM Agreement. In *Brazil – Desiccated Coconut*, it was stated that the availability will have to identifies on a case-by-case basis.[40] Therefore, with the expiration of Article 8 (Non-Actionable Subsidies), subsidies can only be prohibited subsidies or actionable subsidies. The former can be challenged before the WTO dispute settlement body, and the latter can be

[38] Appellate Body Report, *Canada — Measures Affecting the Export of Civilian Aircraft*, ¶ 157, WTO Doc. WT/DS70/AB/R (adopted Aug. 20, 1999).
[39] *See* Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WTO Doc. WT/DS103/AB/RW, WT/DS113/AB/RW (adopted Dec. 18, 2001); Appellate Body Report, *US – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, ¶ 52,WTO Doc. WT/DS257/AB/R (adopted Feb. 17, 2004).
[40] Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, ¶ 13, WTO Doc. WT/DS22/AB/R (adopted Feb. 21, 1997).

countervailed by affected Members. Due to this ambiguity, even subsidies meeting legitimate policy objectives and possibly permitted under the GATT[41] can be affected by the SCM Agreement.

V. GOVERNMENT PROCUREMENT UNDER THE GATS

The General Agreement on Trade in Services (GATS) is the primary multilateral agreement under the WTO governing international trade in services. The most significant rules governing in the GATS are Article II (MFN), Article XVI (Market Access) and Article XVII (National Treatment). Article XIII:1 of GATS is the primary provision governing government procurement of services:

> 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.

This provision excludes government procurement from the ambit of Article II, Article XVI and Article XVII if the procurement of services is by 'government agencies' for 'government purposes'. Provided such services are procured 'not with a view to commercial resale or with a view to use in the supply of services for commercial sale'. This provision is yet to be interpreted by a Panel, but considering the similarity of this provision with GATT Article III:8, it would be fair to extend the jurisprudence of GATT to this provision.

One issue of concern is the scope of 'procurement of services' in Article XIII. Often government resort to management contracts, concession contracts and Build-Operate-Transfer (BOT), mainly for construction of public infrastructure.[42] There still lacks clarity whether services rendered by the provider under these contracts is subject to the jurisdiction of the GATS.[43]

However, unlike the GATT, the GATS does not exclude subsidies provided to exclusively to domestic entities. Members should instead avail flexibilities of GATS Schedule of Commitments to exclude payment of subsidies from the National Treatment obligation.[44]

1. Non-Discrimination in GATS and Government Procurement

Article II of the GATS is an obligation falling under Part II of the agreement. The consequence of this is that the obligation is unconditional i.e. it does not depend on what is inscribed in the Member's schedule of commitments, as is necessary under Part III of the GATS. Unlike the MFN provision in the GATT which covered only four measures, the MFN in GATS is broader and extends to 'any measure covered by this Agreement'. However, unlike the GATS, Article XIII explicitly excludes government procurement, subject to satisfaction of the conditions prescribed therein, from the ambit of MFN obligation.
National Treatment and Market Access obligations in the GATS fall under Part III of the agreement. Consequently, these obligations extend to only those commitments undertaken by the Member in its Schedule of Commitments. Therefore, if a Member has not taken a commitment to provide non-

[41] Subsidies paid exclusively to domestic producers permitted by Article III:8(b) of the GATT.
[42] *See* Markus Krajewski & Maika Engelke, Article XVII, in MAX PLANCK COMMENTARIES ON WORLD TRADE LAW: TRADE IN SERVICES, Trade in Services, pg. 278-280 (Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle eds., 2008).
[43] *Ibid.*
[44] Markus Krajewski & Maika Engelke, Article XVII, in MAX PLANCK COMMENTARIES ON WORLD TRADE LAW: TRADE IN SERVICES, Trade in Services, pg. 362 (Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle eds., 2008).

discriminatory access to government procurement in a particular sector, the Member is not obligated to do so. Apart from the flexibility under the Schedule of Commitments, Article XIII of the GATS explicitly excludes government procurement from the ambit of Article XVI and Article XVII of the GATS.

VI. CONCLUSION

This article has focused on identifying the extent of government procurement-related commitments in the various multilateral agreements under the WTO. The analysis seems to suggest that there are minimal obligations under these agreements covering government procurement activities. Of particular interest to developing and least-developed countries would be the exclusion of government procurement from the ambit of both MFN and National Treatment obligations. This exclusion is available explicitly under the GATS, and not so explicitly under the GATT. However, one area of concern would be the coverage of government procurement under the SCM Agreement. There lacks clarity whether the exception under Article III:8(b) available for subsidies paid to domestic producers would be available as a defence for subsidies otherwise inconsistent with the SCM Agreement. Furthermore, with the expiry of Article 8 of the SCM Agreement, there is little policy space for governments to provide subsidies meeting legitimate policy objectives. This would leave governments scampering for policy space to meet legitimate policy objectives like procuring subsidised renewable energy or stimulating innovation in critical science and technology areas through government procurement.