Chapter 3
WTO Procurement Rules: In Particular the Government Procurement Agreement (GPA) and Services of General Interest

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Abstract The global procurement rules have been revised in 2012. This chapter therefore addresses the impact of the new Government Procurement Agreement (GPA) on services of general interest. A detailed analysis of the GPA's scope is given which delineates it from the purview of the GATT and the GATS as these agreements also address the issue of public procurement and provide useful guidance in the understanding of the new definition of covered procurement used in the new GPA 2012. Subsequently, the substantive and personal scope of the GPA rules is discussed in order to determine the relevance of GPA obligations to the provision of public services. The last section proceeds by considering the notion of government procurement in order to establish whether specific regimes used in the procurement of public services, such as concession contracts and in-house procurement, are covered by GPA rules.

Contents

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3.1 Introduction

The provision of services, in particular the provision of services in the general interest, i.e. public services, may be subject to WTO procurement rules as governments may decide either to procure these services or to procure goods or services for use in the public production or supply of these services. Hence, the economic transactions and operations used in the provision of such services may be determined by WTO procurement rules. This presupposes, of course, that WTO procurement rules are applicable to these transactions.

Besides rules dealing with public procurement in the multilateral GATT and GATS, WTO procurement rules are mainly collected in the plurilateral Government Procurement Agreement (GPA) which is included in Annex 4 to the WTO agreement. As a plurilateral agreement, the GPA is not binding for all WTO members but only for those who have specifically accepted it (Article II:4 WTO Agreement). The GPA rules were subject to a protracted revision process based on Article XXIV:7 GPA which began in 1996/7, and after gaining momentum in 2002 finally ended in 2012 with the adoption of a new, revised text and newly negotiated annexes.[1] The text of the GPA 2012 actually corresponds, by and large, to a provisional text agreed upon at the end of 2006.[2] The revision process strived for an improved text updating the GPA with regard to electronic procurement methods, eliminating remaining discriminatory practices (such as offsets and buy national rules which are in place under the GPA 1994[3]), and expanding the GPA's coverage, and was finally intended to make the disciplines of the GPA clearer and easier to implement so that protectionism in public procurement could effectively be reduced.[4]

[1]See WTO Committee on Government Procurement, Adoption of the results of the negotiations under Article XXIV:7 of the Agreement on Government Procurement, GPA/113, 2 April 2012.

[2]See WTO Committee on Government Procurement, Revision of the Agreement on Government Procurement of 8 December 2006, prepared by the Secretariat, GPA/W/297, 11 December 2006.

[3]Offsets are banned under the GPA 2012, see Article IV:6.

[4]See also Arrowsmith 2002, p. 761.

The new GPA 2012 which recently entered into force in April 2014 involves a new definition of covered procurement according to which procurement in the sense of the GPA covers procurement for governmental purposes which does not include procurement with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale (see Article II:2 (a) GPA 2012). The understanding of the definition is pivotal to the scope of the new GPA 2012 and in particular to the question as to whether the procurement of services of general interest will be covered by the GPA 2012, as services of general interest (such as energy, water supply, the provision of public transport and of travel infrastructure)—even though their provision is widely seen as part of government responsibility—are usually sold by public entities to consumers (generally with the exception of infrastructure and basic education). Hence, one could consider that these genuine public services are not government services in the sense of the GPA coverage but commercial services, as the state may act like an ordinary private market-oriented service supplier in this respect. Hence, the procurement of most services of general interest will not be covered by GPA 2012 disciplines. Such an understanding would imply a considerable shift from the GPA 1994, as the latter does not contain an equivalent definition of covered procurement, meaning that the procurement of public services is subject to GPA disciplines in any case.

Furthermore, it is usually local authorities or enterprises run by public authorities on the sub-central level which provide for public services. Local authorities and state enterprises, however, may not be bound by GPA disciplines because local authorities and state enterprises are subject to the procurement disciplines only insofar as the GPA parties list them in Annex 2 or 3 to the GPA (see Article I fin. 1 GPA 1994 and Article II:4 lit. (b) GPA 2012).

Hence, the new GPA 2012 gives occasion for an analysis of the relevance of WTO government procurement rules for the provision of services of general interest.

This chapter will proceed as follows: after a brief look at the notion of services of general interest, in particular in view of its specific use in EU law (Sect. 3.2), and a likewise brief introduction to the GPA (Sect. 3.3), a detailed analysis of the GPA's scope will be given which delineates it from the purview of the GATT and the GATS as these agreements also address the issue of public procurement and provide useful guidance in the understanding of the new definition of covered procurement used in the new GPA 2012 (Sect. 3.4). Subsequently, the substantive and personal scope of the GPA rules will be discussed in order to determine the relevance of GPA obligations to the provision of public services (Sect. 3.5). The last section proceeds by considering the notion of government procurement in order to establish whether specific regimes used in the procurement of public services, such as concession contracts and in-house procurement, are covered by GPA rules (Sect. 3.6). A summary will conclude (Sect. 3.7).

3.2 The Notion of Services of General Interest in WTO Law and in EU Law

In contrast to EU law, the term "services of general interest" does not exist in WTO law. In EU law, services of general (economic) interest are subject to fierce debate about the role of member states and their remaining leeway in unilaterally determining the conditions under which such public services are performed. Hence, in EU law the concept of services of general (economic) interest plays an important role in assessing how intensive EU common market law may impact on the domestic provision of such types of services and what role the specific exception to the application of EU competition rules contained in Article 106 para 2 TFEU plays. The European concept of services of general interest captures a specific category of public services. A comparable notion of services of general interest does not exist in WTO law. Neither the GATS nor the GPA use this term.[5] Comparably to EU law, however, WTO agreements exclude specific services from their scope of application, meaning that there are also specific types of services which are treated differently from others in WTO law. According to Article I:3 GATS, GATS disciplines do not apply to services supplied in the exercise of governmental authority, i.e. services supplied neither on a commercial basis nor in competition with one or more service suppliers.[6]

The two concepts of services of general interest or services of general economic interest in EU law, on the one hand, and of governmental services in WTO law, on the other, are not necessarily co-extensive, all the more since the term "governmental" used in Article I:3 (b) GATS or Article II:2 GPA 2012 may not have exactly the same meaning. These conceptual discrepancies between EU and WTO law give rise to the problem of determining whether and, if so, how far WTO procurement disciplines apply to the specific type of services encompassed by the European notion of "services of general interest".

EU law differentiates between the general category of services of general interest and the sub-category of services of general economic interest.[7] Services of general interest are services whose provision is important for everyone as these services meet the basic needs of any human being, such as water, energy, infrastructure, and telecommunications. Hence, their provision is in the general interest. Services of general economic interest are a sub-group of these services; they

[5] Adlung 2006, p. 456.

[6] A specific exclusion from the GATS is provided for in para 1 lit. (b) and (c) of the Annex on Financial Services concerning "activities forming part of a statutory system of social security or public retirement plans" as long as they are not conducted in competition of a public entity or a financial service supplier. Lack of competition is the decisive criterion here; Marchetti and Mavroidis 2004, p. 534.

[7] See for example Protocol (No 26) on services of general interest, *OJ* 2010 C 83/308.

comprise those services of general interest which are supplied in an economic way. They are supplied commercially on a market like any other economic activity.[8]

Due to the reliance of any human being on services of general (economic) interest, these services cannot be left to uncontrolled market forces, as market forces may not guarantee their availability in good quality to everyone, everywhere they are needed and at affordable prices. In addition, these services are special due to the need for network infrastructure. The provision of at least some of these services requires costly infrastructure which may lead to natural monopolies as there will be—for various reasons—only one network available for the provision of these services (water, energy supply, transport infrastructure; technological development has changed this in the telecommunications sector). Hence, these services cannot be compared to other commercial products as the market entrance barrier is very high. The specific character of services of general interest is perceived in a domestic way in most states since they have specific concepts of public involvement or public responsibility in these sectors, the expression of which is usually the existence of sector-specific rules and regulations laying down public service obligations. In the EU, services of general interest are perceived as important for social coherence (Article 174 TFEU) and hence enjoy a specific status as a shared value (Article 14 TFEU; see also Article 1 Protocol No 26), and to some extent receive unique treatment with regard to economic rules on the internal market.[9]

National concepts determining the unique status of services provided in the general interest vary, as does the concrete allocation of services to this specific category. Hence, it is unsurprising that WTO rules do not enshrine a specific concept of services of general interest. Consequently, one cannot discuss the relevance of WTO procurement rules to a specific concept of services which is particular to the European Union. Nevertheless, one can assess the significance of WTO procurement rules for the autonomy of WTO members to decide the institutional setting for the provision of services which are in the general interest and therefore must be available to all citizens in a reliable and affordable fashion. Moreover, the European differentiation between services of general interest and services of general economic interest is irrelevant here, all the more given that the differentiation is not beyond doubt even in the EU context.

3.3 A Brief Introduction to the GPA

The GPA provides for specific obligations for the public procurement of its parties. Since public procurement for governmental purposes is excluded from the general disciplines on trade in goods and services enshrined in the GATT and the GATS (for more detail see Sect. 3.4), there was a need for a specific agreement laying down rules to combat protectionism in the public procurement of WTO members. The GPA

[8]Compare the definition by the European Commission given in its Communication: A Quality Framework for Services of General Interest in Europe, COM(2011) 900 final, 20 December 2011, p. 3.

[9]For an overview of developments under EU law cf. Krajewski et al. 2009.

1994 is therefore based on similar basic disciplines as the whole of WTO law, in particular the ban on any discrimination (see Article III GPA 1994 and Articles IV:1, 2 GPA 2012), so that the GPA parties are obliged to immediately and unconditionally accord treatment to the goods, services or suppliers of any other party that is no less favourable than the treatment accorded to domestic goods, services or suppliers.

The personal and substantive coverage of the GPA disciplines, however, is restricted in different ways, in particular by the agreement's positive list approach. Under the positive list approach, only those public entities which have been listed explicitly in the parties' annexes are subject to GPA disciplines. In addition, this applies only to those goods and services listed in these annexes, and whose value equals or exceeds the relevant thresholds which are non-uniformly set by the parties in their annexes. As a consequence, the extent to which the GPA disciplines apply to each GPA party and its public procurement varies.

Beyond the core discipline of non-discrimination, the GPA contains rules that counteract unnecessary obstacles to international trade due to technical specifications (Article VI GPA 1994; Article X:1–6 GPA 2012) and that foster the transparency of procurement rules (Article XIX GPA 1994; Article VI GPA 2012), and provide for concrete procedural requirements in the tendering procedures (Articles VII, IX ff. GPA 1994), for rules on qualifications (Article VIII GPA 1994, Article IX GPA 2012), the awarding of contracts, and finally domestic review (Article XX GPA 1994; Article XVIII GPA 2012).

3.4 Delineation of Scope: GPA Versus GATT and GATS

3.4.1 (Some) Consonance in Exceptions

The provision of services by public entities may be covered by the disciplines of the GATS and of the GATT agreement. Both the GATS and the GATT agreement, however, specify that their central disciplines on market access and non-discrimination do not apply to the procurement of goods or services for governmental purposes by governmental agencies; see Article III:8 lit. (a) GATT[10] and Article

[10]Even though Article III:8 GATT explicitly only excludes national treatment, and not most-favoured nation treatment, the reference in Article I GATT to Article III:2 and 4 GATT also leads to the exclusion of Article I obligation, as confirmed by practice, see *European Communities—Measures Affecting Trade in Commercial Vessels*, Report of the Panel, WT/DS301/R, paras 7.85–90; Arrowsmith 2003, pp. 61–63; Dischendorfer 2000, pp. 15–17; Jackson 1997, p. 225. *Contra* Reich 1997, p. 142 et seq. Another argument reads that MFN obligation does not cover procurement as procurement is not mentioned there, see Trepte 2005, p. 1126. See also Article XVII:2 GATT according to which the obligation of state trading enterprises to respect the non-discrimination obligation (which includes the MFN obligation of Article I GATT, see *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Panel, WT/DS161/R, WT/DS169/R, para 753) does not apply to imports of products for immediate or ultimate consumption in governmental use. In this respect, only the requirement of a fair and equitable treatment of the trade of other WTO members exists which does, however, not impose any specific obligation; see Dischendorfer 2000, p. 17.

XIII:1 GATS.[11] Hence, government procurement is exempt from the main market access and non-discrimination obligations of the GATS and from the non-discrimination requirement under the GATT. The rationale behind this appears rather clear: since core GATT and GATS disciplines do not apply, WTO members need not open their domestic procurement activities to international competition (and there are good reasons for this, such as protection of domestic industries, or pursuit of non-economic, social policies that favour small and medium sized undertakings or undertakings from rural, poor areas[12]; the most important historic reason for exclusion of public procurement from international disciplines was analysed by Evenett and Hoekman who showed the prevalence of the Keynesian idea at that time that an increase in government expenses contributes to a greater increase in national wealth the smaller the share of goods produced abroad[13]). WTO members can thus still discriminate against companies from other WTO members in their public procurement of goods or services. Foreign companies' entrance to the domestic procurement market is subject to reciprocity by virtue of the GPA disciplines if the WTO member is bound by this plurilateral agreement. As the GATS and GATT disciplines step back by virtue of their exceptions, they make way for the GPA obligations.

Article III:8 (a) GATT and Article XIII:1 GATS do however contain a commercial sale/resale counter-exception: governmental procurement is covered by the above-mentioned GATT and GATS disciplines if procurement is done "with a view to commercial resale or with a view to use in the supply of services for commercial sale" (see Article XIII:1 GATS; similarly Article III:8 lit. (a) GATT and Article XVII:2 GATT[14]). In other words, in the case of commercial activities, GATT and GATS disciplines fully apply to public procurement. GPA rules may then not apply. As already mentioned, the new GPA 2012 explicitly gives a definition of covered procurement, according to which the GPA 2012 rules do not cover such commercial government procurement. The explicit definition in Article II:2 lit. (a) (ii) GPA 2012, according to which procurement with a view to commercial sale or for use in the production or supply of goods or services for commercial sale is not covered governmental procurement, almost repeats verbatim the wording of the counter-exception in Article III:8 (a) GATT and Article XIII:1 GATS, with one notable difference: both Article III:8 (a) GATT and Article XIII:1 GATS only refer to "governmental agencies" which—in reverse conclusion—excludes public enterprises. Public enterprises are not covered by the term "governmental agencies" as there is a specific rule on state trading enterprises: Article XVII

[11]Instead, Article XIII:2 GATS provides for multilateral negotiations on services procurement which take place in the multilateral Working Party on GATS Rules (WPGR), established by the Services Trade Council in 1995.

[12]See Zacharias 2008, para 1 et seq.

[13]Mavroidis 2012, p. 799.

[14]"and not otherwise for resale or use in the production of goods for sale".

GATT.[15] Article XVII GATT regulates the relevance of GATT rules for public enterprises, and in para 2 exempts government procurement by state enterprises from the non-discrimination disciplines. Hence, while governmental agencies are exempted from core GATT rules by Article III:8 lit. (a) GATT, public enterprises are exempted by Article XVII:2 GATT. Thus, Article XVII:2 GATT complements the exceptions from non-discrimination for government procurement in Article III:8 lit. (a) GATT.[16] Governmental agencies and state enterprises are hence allowed to procure for government purposes in a discriminatory manner. In accordance with this scope of exemptions, the GPA covers governmental agencies in Annex 1 and 2 and state trading enterprises in Annex 3. Hence, the scope of application of the GPA disciplines mirrors the scope of exclusion of government procurement from core GATT disciplines.

The situation is slightly different, however, under the GATS. The limitation of the exclusion from core GATS principles in Article XIII:1 GATS to governmental agencies is not complemented by a GATS provision similar to Article XVII:2 GATT on state trading enterprises. Article VIII GATS only addresses monopolies and exclusive service suppliers, meaning that other public undertakings are not covered by GATS disciplines, such as public undertakings operating in a competitive environment.[17] If public undertakings not covered by Article VIII GATS do not come under the scope of the GPA either (for example, due to the commercial nature of their activities), their business conduct is subject to neither GPA disciplines nor GATS rules.[18]

Apart from this small difference, the consequence of this verbatim consonance between the exceptions from the GATT/GATS, on the one hand, and the scope of the GPA 2012, on the other, allegedly is that the scope of the GPA and the scope of the GATT and GATS exemptions are the same.[19] As a consequence, their coverage, in essence, is mutually exclusive. If public entities act like a commercial entity, their purchases of goods and services in the conduct of their commercial activities of selling goods and services on the marketplace are not subject to the specific GPA provisions, but have to respect the relevant obligations under the GATS and the GATT.

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[15] *Canada—Certain Measures Affecting the Renewable Energy Generation Sector, Canada—Measures Relating to the Feed-In Tariff Program*, Report of the Appellate Body, WT/DS412/AB/R, WT/DS426/AB/R, para 5.61, according to which the term "governmental agency" "refers to those entities acting for or on behalf of government in the public realm within the competences that have been conferred on them to discharge governmental functions. "This further confirms our understanding that a governmental agency is an entity acting for or on behalf of government and performing governmental functions within the competences conferred to it".

[16] Dischendorfer 2000, p. 17.

[17] Mattoo 1998, p. 51.

[18] The telecommunication rules, however, go beyond Article VIII GATS; see Mattoo 1998, p. 55 et seq.

[19] Reich 2009, p. 1006.

The practical effect of such distinction in the coverage of the GPA, the GATS and the GATT is that WTO law also differentiates between different types of services: (at least) under the GPA 2012, the GPA rules are intended to apply only to the public procurement of goods and services for governmental purposes and not for public commercial purposes such as state trading. State commercial activities are subject to multilateral GATT/GATS disciplines and not subject to plurilateral GPA 2012 rules. In contrast, the purchase of the specific type of government services is subject to plurilateral GPA disciplines only, which presupposes that the state has acceded to the plurilateral GPA. Otherwise, specific governmental services would not be subject to core WTO disciplines at all. As a result, the delineation of genuine governmental purposes from commercial purposes becomes highly relevant and will be looked at in more detail below in Sect. 3.4.3. However, before turning to this issue, one has to explore whether this distinction has the same relevance under the present GPA 1994 as under the future GPA 2012.

3.4.2 Differences in Coverage Between GPA 1994 and GPA 2012 with Regard to Commercial Purchases

The mutual exclusivity of the scopes of the GPA, on the one hand, and of the GATS and the GATT, on the other, may not apply to the same extent to the current, still relevant GPA 1994 since the definitional elements for the notion of government procurement in Article II:2 lit. (a) (ii) GPA 2012 ("not procured with a view to commercial sale … or for use in the production or supply of goods or services for commercial sale") are not present in the GPA 1994. Some authors, however, allege that it is implied that the GPA 1994 also did not cover commercial purchases but only procurement for governmental purposes, as the scope of the Article III:8 GATT exemption was the very *raison d´etre* of the GPA.[20] They also refer to the fact that GPA parties already under the GPA 1994 had included such a definition in their annexes.[21] Indeed, under the GPA 1994, some parties made specific restrictions in their annexes which exclude procurement for commercial sale from GPA coverage. For example, Korea excludes products and services purchased with a view to resale or to use in the production of goods or provision of services for sale. Japan excludes the purchase of goods and services for resale or for use in the production of goods for sale; with regard to entities under Annex 3, Japan excludes contracts for purposes of daily profit-making activities which are exposed to competitive forces in markets. The EU drafted its restriction to the coverage of entities in Annex 3 in different terms, as it excludes purchases for resale only when the entity does not enjoy special or exclusive rights and other entities

[20]Reich 2009, p. 1006. *Contra* Wang 2007, pp. 895, 905; Wang 2009, p. 682.

[21]See Reich 2009, p. 1006.

are free to sell or hire it under the same conditions as the procuring entity.[22] The most extensive specific definition was used by Canada, according to which "[p]rocurement in terms of Canadian coverage is defined as contractual transactions to acquire property or services for the direct benefit or use of the government. … It does not include non-contractual agreements or any form of government assistance including but not limited to co-operative agreements, grants, loans, equity infusions, guarantees, fiscal incentives and government provisions of goods and services, given to individuals, firms, private institutions, and sub-central governments. It does not include procurements made with a view to commercial resale or made by one entity or enterprise from another entity or enterprise of Canada".[23]

One has to consider, however, that even though several GPA parties had already included restrictions to their GPA coverage in their annexes to the GPA 1994 which use similar elements as are now contained in the definition of covered procurement in Article II:2 GPA 2012, it was not done by all. Hence, one cannot state that the explicit limitation to the notion of covered procurement present in Article II:2 GPA 2012 by excluding commercial procurement only mirrors an understanding already prevalent under the GPA 1994. On the contrary, extending exceptions from the GPA 1994 coverage (which exclude commercial procurement) present only in some parties' annexes to all GPA parties under the GPA 2012, and hence standardizing the scope of application of GPA disciplines to all GPA parties, could in the end even be criticized for reducing GPA coverage.[24] Furthermore, even though the GPA 2012 excludes these types of commercial activities from its coverage, some GPA parties still maintain their traditional definitions and exclusions to the GPA 1994 coverage in their annexes under the GPA 2012; see for example Annex 3 to the European Union, which not only excludes procurement in activities which are exposed to competitive forces in the market but also procurement "for purposes of re-sale or hire to third parties, provided that the procuring entity enjoys no special or exclusive right to sell or hire the subject of such contracts and other entities are free to sell or hire it under the same conditions as the procuring entity",[25] or the General Note by Canada in its future Annex 7, according to which procurement is contractual acquisition of goods or services for the direct benefit or use of the government.[26] This recurrence might be ascribed to the interpretive uncertainties caused by the broad formulations used in Article II:2 GPA 2012 (a lack of a clear and workable definition of covered procurement in the GPA 2012

[22]See Wang 2009, p. 682 with fn. 62 for references.

[23]See Canada's General Notes on its annexes. This extract is quoted from Wang 2007, p. 894, fn. 23.

[24]Reich 2009, p. 1006.

[25]See the notes on Annex 3 of the European Union, Committee on Government Procurement, Adoption of the results of the negotiations under Article XXIV:7 of the Agreement on Government Procurement, GPA/113, 2 April 2012, p. 188.

[26]Note 4, Annex 7 to Canada's Appendix I to the GPA 2012, GPA/113 (above note 1), p. 62.

has also been bemoaned[27]), so that for the sake of clarity the GPA parties still continue with their traditional derogations and exclusions under the GPA 2012, despite the danger of being repetitive as the traditional exclusions might now exclude goods and services from GPA coverage which will be excluded anyway by the definition of covered procurement in Article II:2 GPA 2012. The interpretive uncertainties of the new definitional elements given in Article II:2 GPA 2012 will be analysed in more detail below in Sect. 3.4.3.

The analysis here has shown that the coverage of the GPA 1994 appears not to be exactly the same, and not as uniform, as will be the coverage under the GPA 2012 concerning procurement for commercial purposes. Procurement for commercial purposes does NOT appear to be excluded a priori from the coverage of the GPA 1994. This is important for public services in the general interest: they are not excluded from the GPA 1994 coverage from the outset even if they are (re)sold by the public entity to the consumer. The exclusion of purchases of commercial services or goods appears relevant in order to meet a different challenge: to define the GPA coverage *vis-à-vis* state trading enterprises and countries with a huge number of state-owned commercial activities.[28]

As a further consequence, the mutual exclusivity between the scopes of the GATT and GATS agreements, on the one hand, and the GPA, on the other, which has been observed above may not necessarily apply to the same extent for all GPA parties under the GPA 1994.

3.4.3 Covered Procurement: Governmental Versus Commercial Purposes

3.4.3.1 Preliminary

As has already become clear, the application of the GPA 2012 depends on two qualifiers to the notion of "covered procurement": firstly, the requirement of "governmental purposes" and, secondly, the requirement of "not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale" (Article II:2 (a) (ii) GPA 2012). The meaning of these prerequisites for the procurement of goods and services covered by the GPA 2012 is subject to contestation and debate[29] and is decisive in particular for the GPA coverage regarding services of general interest, as they are usually sold by public entities to the consumer, meaning that they could be perceived as being for commercial sale.

The interpretation of these qualifiers is also important for the reason that under the GPA 2012 the GPA parties still have the freedom to exclude the procurement of

[27]Wang et al. 2011, p. 271.

[28]See Anderson and Osei-Lah 2011a, p. 84.

[29]See, for example, Wang 2007, pp. 905–910.

certain services from the GPA's coverage; this is explicitly provided for in Article II:2 lit. (e) GPA 2012 (which allows parties' annexes to exclude services from GPA coverage) and is the corollary of the positive list approach. The parties, however, may no longer have the freedom to expand their GPA coverage to services to which the GPA explicitly does not apply. Such an implication could be concluded *e contrario* from Article II:3 GPA 2012 which grants the parties the freedom to exclude services actually covered by GPA coverage but does not grant the leeway to expand GPA coverage ("except where provided otherwise in a party's annexes…, this Agreement does not apply to"). This appears to be different in the GPA 1994 as the GPA 1994 coverage does not depend on any unified definition of covered procurement (as there is none) but solely on the coverage as defined in the parties' positive lists and the individual descriptions and derogations contained therein; under the GPA 1994 parties could more or less include their own definition of covered procurement in their annexes.[30] Hence, parties enjoyed the freedom to extend the coverage to rather commercial services which, under the GPA 2012, would be excluded by virtue of the insurmountable definition in Article II:2 (a) (ii) GPA 2012. A consequence of this deliberation is that whereas under the GPA 1994 the determination of GPA coverage by the parties in their annexes was binding, constitutive and hence decisive, the coverage of the GPA 2012 is now fixed by the definitions in Article II GPA, and the descriptions and derogations in the parties' annexes may only impact on the interpretation of these definitions, in accordance with the rules of treaty interpretation set out in the Vienna Convention. In this respect, the descriptions and derogations in the annexes are no longer constitutive as the purview of the GPA 2012 is determined by the treaty definitions. The annexes continue to have constitutive force insofar as the positive list approach applies.

3.4.3.2 Interpreting the Definitional Elements to Determine the GPA 2012 Scope

Now we turn to the interpretation of the above-mentioned qualifiers in Article II:2 GPA 2012.

Wording

Firstly, one might doubt whether the requirement of *governmental purposes* has its own stand-alone meaning, or whether its significance is exhausted in being the confirmation of the second qualifier and the antonym to procurement with a view to commercial sale/resale.[31] If so, then there was actually only one qualifier as the

[30] See Wang 2007, pp. 894, 898.

[31] An interpretive issue not further addressed here is the question of what kinds of procured goods/services are "for use in the production or supply", and what is meant by "use". Does this only encompass commodities and other starting material which is directly used for production, or also manufacturing equipment or energy used/consumed during the production process? Does it also cover the purchase of computers used for management and not for mere production purposes?

decisive issue was then to determine whether a procurement has been made for governmental purposes or not. The second phrase ("not procured with a view to commercial sale…") then merely determined when the procurement was not made for governmental purposes. The development of the texts speaks for the latter approach as the term governmental purposes has already been used in Article III:8 lit. (a) GATT and Article XIII:1 GATS. Hence, the phrase "for governmental purposes" was inserted into Article II:2 GPA 2012 in order to conform to the wording of Article III:8a GATT and Article XIII:1 GATS.[32] The wording in the latter rules allows for the conclusion that the requirement of "not with a view to commercial resale …" appears to be the explanation of governmental purposes due to the use of the conjunction "and" instead of "or". One may, however, as did the Appellate Body recently with regard to Article III:8 lit. (a) GATT,[33] conclude that the conjunction "and" points exactly to the opposite, i.e. that the two requirements of "governmental purposes" and "not with a view for commercial sale …" are different and cumulative. This deliberation, however, cannot be applied to the formulation used in Article II:2 GPA 2012 due to the different wording: the term "governmental purposes" is not linked to the other phase by an "and". Instead, the text of Article II:2 GPA 2012 allows for an understanding that the second phrase is an explanation of the term "procurement for governmental purposes".

Furthermore, Article XVII:2 GATT does not use the term "governmental purposes" but the phrase "immediate or ultimate consumption in governmental use" instead. Hence, this could be taken as an indication that the notion of governmental purposes used in the other rules refers to immediate use for governmental purposes, instead of use for the production or supply of products for sale. To draw such a conclusion (that governmental purposes are only present if the procurement refers to goods or services immediately used for the fulfilment of government tasks, i.e. for the government's own consumption, excluding any subsequent offer of services to consumers/citizens) would lead to a very narrow conception of the exception provided in Article III:8 lit. (a) GATT and in Article XIII:1 GATS and also of—consequently—the coverage of the GPA.

Context

The interpretation of the notion of "governmental purposes … not with a view to commercial sale/resale" must furthermore consider the ***context*** in which Article XIII:1 GATS is placed: Article I:3 GATS a priori excludes from the GATS' scope of application services supplied in the exercise of governmental authority which are defined as services neither supplied on a commercial basis nor in competition with other service suppliers. Hence, if Article I:3 lit. (b) GATS was conceived broadly, so as to exclude governmental services from the scope of the GATS, what scope would remain for the exclusion from GATS core principles brought about by Article XIII

[32] Wang 2007, p. 910.

[33] *Canada—Certain Measures Affecting the Renewable Energy Generation Sector, Canada—Measures Relating to the Feed-In Tariff Program*, Report of the Appellate Body, WT/DS412/AB/R, WT/DS426/AB/R, para 5.69.

GATS? The very existence of the exception provided in Article XIII GATS points to the fact that the concepts of governmental services used in Article I:3 GATS and of governmental procurement services used in Article XIII GATS are not identical. Instead, the general exclusion of governmental services in Article I:3 GATS must be interpreted much more narrowly than the specific exclusion for procurement for governmental purposes provided for in Article XIII:1 GATS. Thus, non-commercial, non-competitive services in the sense of Article I:3 GATS must be a different, and much narrower concept than non-commercial government services in the sense of Article XIII:1 GATS. From reading Article I:3 GATS and Article XIII:1 GATS it follows that commercial services and relevant purchases are covered by the GATS, irrespective of whether public or private entities supply them. Furthermore, there must be a type of commercial, non-governmental service to which the general exclusion of Article I:3 GATS does not apply, but with regard to whose purchase Article XIII:1 GATS excludes the application of core GATS principles as these services are assessed as serving non-commercial, governmental purposes under that rule.

These deliberations are confirmed by recognized interpretive practice as the definition of governmental services in Article I:3 GATS is perceived very narrowly[34] since the concepts of commercial basis and competitiveness are conceived rather broadly: in this respect, "commercial" refers to the existence of economically viable transactions; competitiveness draws on the existence of at least one other supplier.[35] Part of these broadly conceived commercial services, however, must be assessed as nevertheless working for governmental purposes and not for commercial resale in the sense of Article XIII:1 GATS, otherwise its exception from core GATS principles would become futile. Hence, the term "commercial" used in Article I:3 lit. (c) GATS and in Article XIII:1 GATS (and in Article III:8 lit. (a) GATT) has to have different meanings; the meaning of "commercial" in Article XIII:1 GATS must be narrower than that in Article I:3 lit. (c) GATS, and vice versa that of governmental purposes broader than in Article I:3 lit. (c). *This is a clear indication that governmental purposes in the sense of Article II:2 GPA 2012 should not be conceived to be confined to the ultimate government consumption*, as deliberated above in Sect. 3.1. Instead, government purposes can still be present, and the GPA disciplines apply, if the government procures services or goods for direct resale or for use in the production of goods and services for resale to consumers/citizens in the context of public services such as utilities, for Article II:2 GPA 2012 does not exclude any resale but only commercial resale. (Accordingly, with regard to Article III:8 lit. (a) GATT, the Appellate Body also recently concluded that this rule covers both situations, i.e. when procured goods are consumed by the government and when procured goods are used by the government in the provision of services to recipients in discharge of public functions.[36])

[34]See Krajewski 2003, p. 73.

[35]Krajewski 2011, p. 459.

[36]*Canada—Certain Measures Affecting the Renewable Energy Generation Sector, Canada—Measures Relating to the Feed-In Tariff Program*, Report of the Appellate Body, WT/DS412/AB/R, WT/DS426/AB/R, paras 5.68, 5.74.

A further argument against a broad notion of "commercial" in Article II:2 GPA 2012 is that a broad notion might exclude all procurement for resale by public enterprises—which clearly would contradict the whole purpose of GPA coverage of public enterprises in Annex 3.[37]

Conclusions

Public procurement in the context of the supply of services of general interest which are resold to citizens is hence NOT a priori, from the outset, excluded from the procurement covered by the GPA. The notion of "commercial" in Article II:2 lit. (a) (ii) GPA 2012 has to be interpreted—in accordance with the notion of commercial in Article XIII:1 GATS or Article III:8 lit. (a) GATT—rather narrowly, so that a sale or resale under any market environment is not sufficient to exclude the procurement from GPA coverage.

3.4.3.3 Distinguishing Genuine Government Procurement from Commercial Activities

The question remains: what are the decisive criteria for the differentiation between genuine government procurement and commercial purchase? The basic distinction between procurement subject to the GPA 2012, on the one hand, and public purchase covered by multilateral core GATT and GATS disciplines, on the other, could be summarized as lying in the **differentiation** between the purchase of goods and services **for commercial, entrepreneurial objectives** (either in the context of state trading directly by government, public authorities or their agencies or indirectly by way of state trading enterprises) and purchase for the **fulfilment of genuine government tasks**. Hence, one could consider intentions to be relevant. However, it might not be acceptable to assess the intentions of the state as being the decisive criterion. Intentions are subjective, may change easily, and may differ in different member states. There is considerable difference among WTO members in their conception of appropriate government activity and hence among the domestic definition of government agencies and governmental purposes.[38] In addition, the Appellate Body recently showed with regard to the wording of Article IIII:8 lit. (a) GATT, on the basis of comparison with the Spanish and French versions, that the phrase "governmental purposes" does not refer to the intentions of government, but to the issue of whether a product is needed for government purposes in discharge of government functions.[39] This reasoning applies also to Article II:2 GPA 2012 as there too the French and Spanish versions read "pour les besoins des pouvoirs publics" and "la contratación realizada a efectos

[37] Wang 2007, pp. 906–907.

[38] Jackson 1997, p. 225.

[39] *Canada—Certain Measures Affecting the Renewable Energy Generation Sector, Canada—Measures Relating to the Feed-In Tariff Program*, Report of the Appellate Body, WT/DS412/AB/R, WT/DS426/AB/R, para 5.67.

gubernamentales" respectively. Accordingly, one should base the application of GPA rules on objective reasons and circumstances of government functions. Consequently, criteria for a commercial purchase might be whether the state behaves like a private service supplier on the market, in particular whether the state is seeking profit, or whether there is competition with other private service suppliers. GATT practice with regard to Article III:8 (a) GATT, however, shows that the mere fact that there was a governmental monopoly in itself was not sufficient to exclude its trade activities from the non-discrimination requirement of Article III GATT. If a governmental monopoly was a domestic sales monopoly of products on the market to the consumer, its activity was assessed as being of commercial character (as in such circumstance these products were procured with a view to commercial resale, they would not have to be assessed as being for genuine governmental purposes), meaning that the counter-exception from the exemption in Article III:8 GATT applied, with the consequence that the national treatment obligation of Article III GATT had to be respected.[40] In these cases, the question of whether the state monopoly makes profit was not addressed, meaning that such a requirement was not decisive. Recently, the Appellate Body, however, opined—with regard to Article III:8 (a) GATT—that commercial sale might on a regular basis imply profit orientation, but the Appellate Body also admitted that there was need for assessment of the entire transaction and of the seller's long-term strategy.[41]

The term "commercial" thus carries wider connotations than simply seeking profit[42] or the presence of a further competitor. It appears sufficient in itself that the public service provision was organized like the provision of services on competitive markets. Hence, procurement for government purpose refers to conditions and circumstances for service provision which do not take place in a competitive manner. The notion of commercial provision of services in the sense of Article II:2 GPA 2012 refers to institutional settings under which services can be performed under a workable competitive environment with no restrictions to market access and no involvement of governmental authority for establishing markets. The coverage of services by the GPA 2012 does not depend on the type of services or their properties and characteristics, but on the circumstances of their supply and the way in which their supply is organized by the state. Therefore, the assessment depends on whether a service is supplied by the state to its citizens for free, merely financed by tax revenues, or whether a service is offered to citizens or consumers in exchange for a quid pro quo as if there were a competitive market.

[40]See WTO 1995, Analytical Index: Guide to GATT Law and Practice, pp. 122–123.

[41]*Canada—Certain Measures Affecting the Renewable Energy Generation Sector, Canada—Measures Relating to the Feed-In Tariff Program*, Report of the Appellate Body, WT/DS412/AB/R, WT/DS426/AB/R, para 5.71. The Appellate Body did not need to make a conclusive statement about the notion of the term "with a view to commercial resale"; see ibid. para 5.84 et seq.

[42]Adlung 2006, p. 466, fn. 28.

This can be exemplified with regard to public health services: if health services are offered to the citizens in the framework of a national health service which is a tax-financed genuine government service, then the procurement of such services is covered by the GPA rules.[43] If the public health service is offered to the citizen in exchange for payment in a competitive context where the public supplier acts like a private undertaking, the public service has to be assessed as a commercial activity and hence is not covered by GPA rules, at least not under the GPA 2012. In many countries, however, public health services may not be supplied in either of these two ways, but in the context of a social security scheme where the quid pro quo is not paid by the patient but by a health insurance system which is either run or overseen by the state and which is subject to specific public regulations which decouple the service provision from the individual contribution. In such cases, the procurement of services or goods used by public health suppliers for the supply of health services does not operate in a competitive framework.[44] As a consequence, these services are then not to be seen as procured for commercial purposes in the sense of Article II:2 lit. (a) (ii) GPA 2012 but for governmental purposes, meaning that the GPA disciplines apply. The Appellate Body recently gave a comparable example of a procurement for governmental purposes: a public hospital purchases pharmaceuticals and provides them to patients.[45]

3.5 Public Procurement of Services: The Substantive and Personal Coverage of Procurement Rules

3.5.1 Substantive Ambit: Essentially All Goods and Some Services

As mentioned above, the GPA does not apply to all types of services but only to certain specific procurement acts (so-called "covered procurement") which are listed in the parties' annexes to the GPA. Besides the parameters of *value* of procurement (only contracts beyond a certain value threshold), of *identity of the*

[43]Such tax financed national health services are excluded a priori from the scope of GATS disciplines by virtue of Article I:3 lit. (c) GATS; see Krajewski 2011, p. 459.

[44]Likewise, the CJEU will then assess the activities of social insurance systems as not being of commercial character so that EU competition rules will not be applied; cf. CJEU, Case C-244/94 *Fédération francaise des sociétés d'assurance a.o.* v. *Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013, para 17; CJEU, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband a.o.* v. *Ichthyol-Gesellschaft Cordes, Hermani & Co. a.o.* [2004] ECR I-2493, paras 52–54.

[45]*Canada—Certain Measures Affecting the Renewable Energy Generation Sector, Canada—Measures Relating to the Feed-In Tariff Program*, Report of the Appellate Body, WT/DS412/AB/R, WT/DS426/AB/R, para 5.68, fn. 514.

procuring entity (central government institutions; some sub-central government entities and also some other entities[46]; only those listed by each party in its annexes 2 and 3), and of *origin* of the goods or services (the GPA of course merely applies between GPA parties), the GPA only covers certain types of *goods or services*. The GPA 1994 applies to all goods, apart from those explicitly excluded by a party (so-called negative list approach). With regard to services, the GPA 1994 runs a positive list approach so that it applies only to those services explicitly listed by each party in its annexes. The negative list approach for goods and the positive list approach for services prevalent under the GPA 1994 (see Article I and fn. 1) will be altered with the GPA 2012 (Article II:4) and even goods will then only be covered if listed in Annex 4. In practice, however, this change from a negative to positive list approach also for goods will not impede the increased coverage of the GPA 2012, including with regard to goods through deletion or reduction of existing derogations and additions of goods in the non-sensitive defence sector.[47] Future GPA 2012 Annexes 4 of the parties briefly state that the GPA covers all goods procured by the entities included in Annexes 1 through 3, unless otherwise specified. Hence, the coverage of goods by the GPA 2012 remains extensive.

With regard to services, generally speaking, the GPA disciplines cover public procurement of construction services and certain other services, as set out in the annex of each party. Once the GPA 2012 enters into force, the coverage of the GPA will be expanded (the WTO website mentions a "significant extension of the coverage of the Agreement"[48]) by lowering thresholds and adding new entities and sectors to the parties' commitments. This also concerns the procurement of services as additional services coverage has been added by almost all parties (for examples see below Sect. 3.5.3).

Even though GPA parties are subject to the requirement of non-discrimination (see Article III GPA 1994 and Article V GPA 2012), the GPA 1994 and the GPA 2012 allow for extensive derogations from these principles.[49] GPA parties can limit their commitments with regard to GPA coverage, for example by restricting non-discriminatory treatment to certain GPA parties which offer the same or at least equivalent concessions regarding the access to their domestic procurement markets as they do themselves in order to enforce reciprocity. GPA parties do so by introducing exceptions and deviations from the general GPA coverage in their General Notes to their Appendix I or by notes in their Annexes 1–3. This of course

[46]This is a residual category titled "all other entities whose procurement is covered by this Agreement"; see Article I:1, fn. 1 GPA 1994 and Article II:4 lit. (c) GPA 2012. This formula reflects the difficulty negotiators to have with common definition of entities such as public enterprises or public utilities; Dischendorfer 2000, p. 22.

[47]Williams 2013, p. NA 94.

[48]WTO, The re-negotiation of the Agreement on Government Procurement (GPA), available at: http://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm.

[49]With regard to the GPA 1994; see De e Silva 2008, pp. 64, 74.

increases discriminatory effects.[50] The GPA does not restrict the parties' discretion to make various types of party-specific derogations which then also depart from the MFN obligation.[51] In effect, the MFN treatment requirement between GPA parties has been abrogated.[52] The legality of this practice under the GPA 1994 has been confirmed by an explicit clause to this effect in Article II:2 lit. (e) GPA 2012 which allows for exclusions from GPA coverage in a party's annexes. Hence, the original aim for the GPA revision of eliminating exceptions and derogations aiming for reciprocity[53] has not been met.

3.5.2 Personal Scope: Entities Covered

The GPA 1994 and, in future, the GPA 2012 cover sub-central authorities and other entities if listed in Annexes 2 and 3 of the GPA parties' Appendix I. Annex 3 is designed to typically cover state enterprises or entities performing public utility functions such as energy or water supply, public transport services and infrastructures (airports, ports).[54] This does not, however, mean that any party subdues such public services to GPA disciplines.

The positive list approach applicable for the annexes has a considerable disadvantage: entities not affirmatively listed in the annexes are not covered by GPA disciplines. A panel explicitly held that entities not listed in annexes are only covered by the GPA in exceptional circumstances of which the panel named two: "(i) where the entity in question is essentially a part of, i.e. legally unified with a listed entity; (ii) where the entity in question is procuring on behalf of a listed entity."[55] This means that the GPA will only cover non-listed entities if they are either a branch or a procuring agent of a listed entity.[56] The reluctance to expand GPA coverage to entities not explicitly provided in the parties' annexes reflects the efforts not to undermine the negotiations.[57] As a consequence, the positive list approach engenders the opportunity that, with regard to public enterprises, for example, a

[50]See, for example, Note 6 on Annex 3 to the GPA 2012 Appendix I of the European Union according to which certain services are not covered by the GPA "until such time, the EU has accepted that the parties concerned provide satisfactory reciprocal access to EU goods, suppliers, services and service providers to their own procurement markets", GPA/113 (above note 1), p. 190.

[51]Wang 2007, p. 893.

[52]Trepte and De Graaf 1994, p. CS 71.

[53]Dischendorfer 2000, p. 33.

[54]Wang 2007, p. 895.

[55]*Korea—Measures Affecting Government Procurement*, Report of the Panel, WT/DS163/R, para 7.59.

[56]Wang 2009, p. 681.

[57]Trepte 2005, p. 1139, fn. 77.

state can easily circumvent GPA disciplines by establishing a new entity not mentioned in annex 3 so that its procurement is not subject to GPA rules.

The situation is different only if a GPA party determines the entities listed in Annex 3 in a more general way through generic approaches to entity coverage, for example by referring to all companies whose procurement is covered by domestic procurement law.[58] Yet even then an alteration of domestic procurement law instantly impacts on the coverage of the GPA. Additionally, in other states a reference to domestic procurement law would be hollow, as domestic procurement rules may not cover state enterprises.[59] Most GPA parties still indicate the covered entities in an exhaustive way so that those not mentioned are not covered.

As is the case with the GPA 1994, the list of entities given in Annexes 2 and 3 to the GPA 2012 is not free from overlap. Whereas some GPA parties list public enterprises in Annex 3, other GPA parties indicate some types of public enterprises in Annex 2. The list on Germany given in Annex 2 to the European Union's Appendix I to the GPA 2012, for example, also indicates legal persons governed by private law, including utilities enterprises run by local authorities, as sub-central entities in Annex 2. The GPA 2012 disciplines will hence apply in Germany to "[n]on-industrial and non-commercial establishments subject to State control and operating in the general interest, including … municipal utilities" in the health sector (hospitals, health resort establishments, medical research institutes, testing and carcase-disposal establishments), in the area of culture (public theatres, orchestras, museums, libraries, archives, zoological and botanical gardens), in the social welfare, sports, safety, education, science and other sectors, always indicating the entities covered in more detail.[60]

The new GPA 2012 will considerably expand the GPA coverage with regard to both the personal and the substantive scope. GPA parties revised their concessions and thus ameliorate market access to their procurement markets by adding more than 200 new contracting entities at the central and sub-central levels, increasing goods and services, including construction services coverage, and reducing the pertinent thresholds.[61]

3.5.3 GPA Coverage According to the Annexes with Regard to Public Services, in Particular Utilities

The GPA coverage of public services under the GPA 1994 is determined by the various individual concessions and derogations, and sometimes also specific definitions made by the GPA parties in their annexes. This reflects the rather strict reciprocity

[58] See Annex 3 of the Republic of Armenia, GPA/113 (above note 1), p. 43.

[59] As is the case with China, currently a non-member of the GPA which is negotiating its accession to the GPA, Wang 2009, p. 680.

[60] GPA/113 (above note 1), p. 152.

[61] Williams 2013, p. NA 94.

approach described above adopted by GPA parties with regard to GPA coverage. The different domestic status of utility companies, for example, contributes to the differing scope of application of the GPA 1994 to services of general interest.[62]

Usually, the utility sector is covered by the GPA disciplines on the basis of reciprocity. Under the present GPA 1994 all parties except Canada and the USA offered access to utilities procurement to different extents and subject to various derogations.[63] Canada and the USA will still exclude public utilities under the GPA 2012.[64]

In concrete terms this means, for example, that EU undertakings have access to procurement regarding ports and airports in Japan, Korea, Hong Kong, Israel, Switzerland, and, of course, the EEA countries, regarding urban transport in Hong Kong, Switzerland and the EEA, and for electrical utilities in Korea, Israel, Switzerland and the EEA. Accordingly, undertakings from these countries enjoy access to public procurement in the EU.[65]

With the entry into force of the new GPA 2012, the parties' commitments with regard to services of general interest increases as GPA coverage will be extended in this respect. For example, this means for the telecommunications sector that—whereas under the GPA 1994 telecommunications had not been included[66]—almost all parties will cover telecommunications services in their revised annexes,[67] apart from the USA and Canada which will only cover enhanced or value-added telecommunication services.[68]

3.6 The Notion of "Government Procurement"

Procurement refers to acquisition, by any contractual means, of goods, services or a combination thereof,[69] see Article I:2 GPA 1994 and Article II:2 (b) GPA 2012. Article II:3 (b) GPA 2012 furthermore provides that non-contractual agreements are only covered by the GPA if explicitly provided in a GPA party's annexes. Under the GPA 1994, due to the lack of a pre-set definition of covered procurement, what government procurement precisely means is subject to debate. Therefore, as already

[62]Trepte and De Graaf 1994, p. CS 71.

[63]Williams 2010, p. NA 41.

[64]See Note 3 lit. (b) on Annex 5 to Canada's Appendix I to the GPA 2012, GPA/113 (above note 1), 2 April 2012, p. 60 and Annex 5 to the USA's Appendix I to the GPA 2012, GPA/113 (above note 1), p. 431.

[65]See Trepte and De Graaf 1994, p. CS 72.

[66]See Trepte and De Graaf 1994, p. CS 71.

[67]Anderson 2012, p. 85.

[68]See Note 2 on Annex 5 of Canada's Appendix I to the GPA 2012, GPA/113 (above note 1), p. 60, and Annex 5 to the USA's Appendix I to the GPA 2012, GPA/113 (above note 1), p. 431.

[69]See also WTO Working Group on Transparency in Government Procurement, Work of the working group on the matters related to the items I-V of the list of the issues raised and points made, Note by the Secretariat, WT/WGTGP/W/32, 23 May 2002, para 13.

mentioned, certain parties included their own definition of procurement in their annexes. In reaction to this, the new GPA 2012 gives an authentic definition of government procurement in Articles II:2 and 3 GPA 2012, which has been analysed in detail above. Despite this rather elaborate definition of the notion of government procurement in the GPA 2012, some of the old discussions about the reach of the GPA to specific procurement activities still have not been clarified. This relates in particular to specific procurement arrangements such as concession contracts (see Sect. 3.6.1) and the issue of in-house procurement (see Sect. 3.6.2).

3.6.1 Procurement, Concession Contracts and PPP

The first issue relates to the question as to whether the notion of government procurement also covers **concession contracts**, since such agreements between public and private entities are contracts as well. However, a concession does not involve the acquisition of a good or service of a private entity by a public entity, as under concessions a (usually private) entity provides a service to the users who have to pay in exchange for its use, meaning that the remuneration for the service comes from them.[70] The concessionaire is not usually paid by the state; it may even be asked to pay a fee to the authorities in exchange for the temporary right of exploitation. Hence, there is no public purchase situation in this context. The supplier is granted the exclusive and temporary right by a public entity to provide the (remunerated) service in the common good which is first defined by the responsible central, sub-central, or even local authorities. They are responsible for the existence of such services or facilities.

Nevertheless, concessions are also an expression of arrangements based on mutuality: the state has the job done by private entities, and in exchange the concessionaire is given the right to charge the users. Such contractual arrangements are similar to procurement activities, but at the same time they are different due to their long-term nature, their complex remuneration mechanism and their use of private finances.[71] Due to the lack of a classic purchase context, concession contracts are not seen as covered by the GPA rules, even though, basically, the rationale of procurement rules may be convenient to them as well. The state does not purchase goods or services but the fulfilment of governmental tasks, in exchange for specific rights instead of financial remuneration. In the EU's internal market law, concession contracts are also not subject to procurement rules as the relevant directives explicitly exclude concession contracts from their purview.[72]

[70] Arrowsmith 2002, p. 784.

[71] Arrowsmith 2002, p. 785.

[72] See Articles 17 and 18 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts, *OJ* 2004 L 134/114 and of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, *OJ* 2004 L134/1.

Comparable to concession contracts but slightly different are so-called **build-operate-transfer (BOT) arrangements** under which a contractor finances, builds and operates an infrastructure facility for a limited period of time, at the end of which the government is given the facility, usually free of charge. In Korea's future Annex 6 on Construction Services under the GPA 2012, BOT contracts are defined as "any contractual arrangement the primary purpose of which is to provide for the construction or rehabilitation of physical infrastructures, plants, buildings, facilities, or other government-owned works and under which, as consideration for a supplier's execution of a contractual arrangement, a procuring entity grants to the supplier, for a specified period of time, temporary ownership or a right to control and operate, and demand payment for the use of such works for the duration of the contract." State and private undertakings thus enter into a contract whereby the undertaking is obliged to build and maintain, for example, a motorway or port in exchange for the right to collect tolls, or a hospital in exchange for the right to operate it. Such contracts contain elements of public procurement as they provide for construction of a good for the government (which will ultimately be transferred to it), like in a purchase context, but also elements from concession regimes due to the temporary right to exploitation. Hence, BOT arrangements are perceived as complementing the usual method of public procurement. BOT contracts come particularly close to procurement contracts with regard to construction services (which are covered) if the right to operate a facility or to provide a service stands not at the centre of contractual arrangements (as it only serves as means of making the investment finance itself) but where the contract is primarily aimed at public acquisition of an infrastructure. Hence, in such a situation, BOT contracts could be assessed as government procurement covered by the GPA as the means of financing public infrastructure, either directly or indirectly by novel ways, should not determine the coverage of the GPA.[73]

The assignment of concession contracts and BOT contracts to the scope of the GPA is subject to controversy (unless country specific definitions of covered procurement in the parties' annexes settle this issue[74]). Whereas the USA favour their coverage by procurement rules, the EU opposes it,[75] in accordance with intra-EU rules which exclude concession contracts from the procurement regime.

Under the GPA 2012, the definition of procurement in Article II:2 GPA also pleads against their inclusion under GPA coverage as, in particular, the exclusive right to charge fees granted to the concessionaire documents their commercial background.[76] The conclusion, however, may be different where BOT contracts are an innovative means of infrastructure procurement by public entities, as construction services are covered by the GPA and defined in broad terms in Article I (c)

[73]Zacharias 2008, para 16; see also Reich 2009, p. 1007.

[74]Anderson and Arrowsmith 2011, p. 51.

[75]Arrowsmith 2002, p. 785.

[76]Compare Adlung 2006, pp. 466–467, with regard to Article I:3 GATS.

GPA 2012 as the "realization by whatever means of civil or building works", which may also refer to innovative ways in which public authorities realize their construction plans.[77] Arguing on the basis of this broad definition of construction services, however, is built on shaky ground as even under the GPA 1994 this wording can be found in the common definition of construction services in Annex 5 of most GPA parties' Appendix I (such as the EU, Chinese Taipei)[78] and many of them still maintain that such innovative arrangements are not covered by their GPA obligations.[79]

The conclusion that concession contracts and BOT arrangements are not usually covered by the definition of government procurement is finally confirmed by domestic practice as many countries adopt specific legislation for concession contracts.[80] UNCITRAL Model rules on procurement also do not cover concession contracts; instead, separate model rules for this type of arrangements were drafted.[81]

In conclusion, the text of the GPA 2012 did not bring about any more clarity in the issue of GPA coverage of concession contracts and BOT contracts than the GPA 1994,[82] apart from allowing new arguments to be drawn in the debate over the definition of covered procurement in Article II:2 GPA 2012.

Innovative developments will result from some parties' revised annexes as the GPA 2012 will expand the GPA coverage to works concessions and BOT contracts because three parties will enter into concessions for the first time, i.e. the EU,[83] Korea[84] and Japan.[85] Hence, here the issue of country specific coverage due to the parties' formulations in the annexes may arise again. As explained above

[77]Reich 2009, p. 1001.

[78]Cf. Trepte 2005, p. 1139; Anderson and Osei-Lah 2011b, p. 156.

[79]See again Reich 2009, p. 1007, fn. 85.

[80]Anderson and Arrowsmith 2011, p. 50; Arrowsmith 2002, p. 784.

[81]See United Nations Commission on International Trade Law (UNCITRAL), Model Legislative Provisions on Privately Financed Infrastructure Projects (2003), available at: http://www.uncitral.org/pdf/english/texts/procurem/pfip/model/03-90621_Ebook.pdf. For an analysis see S. Son, Legal Analysis on Public-Private Partnerships regarding Model PPP Rules. http://www.uncitral.org/pdf/english/colloquia/public-private-partnerships-2013/20120704_Report_on_PPP_legal_IssuesSon_Seungwoover.11.pdf. June 2012. Accessed 12 December 2013.

[82]Reich 2009, p. 1007; see also Anderson and Arrowsmith 2011, p. 49.

[83]See Annex 6 of the EU's Appendix I to the GPA 2012, GPA/113 (above note 1), p. 250: "Works concessions contracts, when awarded by Annex 1 and 2 entities, are included under the national treatment regime for the construction service providers of Iceland, Liechtenstein, the Netherlands on behalf of Aruba and Switzerland … and for construction service providers of Korea." The relevant thresholds are SDR 5 million or SDR15 million.

[84]See Korea's Annex 6, according to which construction services contracts include BOT contracts. The annex gives a definition of BOT contracts. The threshold is SDR 5 million or SDR 15 million. See GPA/113 (above note 1), p. 319.

[85]The Note on Japan's Annex 6 provides that procurement with regard to a construction project based on the Act on Promotion of Private Finance Initiative 2011 is covered, GPA/113 (above note 1), p. 306.

(Sect. 3.4.3), under the GPA 2012 it is subject to doubt whether parties can unilaterally—by virtue of their formulations or definitions in the annexes—expand the coverage of GPA rules beyond the confines of the definition of covered procurement spelled out in Article II:2 GPA 2012. Such confines to GPA coverage with regard to concession contracts and BOT arrangements, however, cannot be clearly derived from Article II:2 GPA 2012, as shown above. Hence, it is indeed advisable and preferable to have the issue of coverage of concession contracts and BOT contracts resolved in the parties' annexes rather than through dispute settlement.[86]

3.6.2 Coverage of In-house Procurement

The second contested issue regarding the definition of "covered procurement" concerns government acquisition of products from other public entities which can have different forms, such as purchase from or via collective purchasing agencies, or purchase from other public entities or even subsidiaries of the procuring entity.[87] Under the GPA 1994, as well as under the GPA 2012, some parties explicitly exclude procurement between covered entities from the GPA coverage. Canada, as already quoted, has the widest formulation and excludes procurement made by one covered entity from another entity or enterprise of Canada which reflects the conception of the state of Canada to be treated as one legal person.[88] This formulation, although slightly redrafted, will not change in essence in the GPA 2012.[89] Other parties exempt procurement from undertakings or entities which are affiliated with or dependent on the procuring entity.[90] The significance of this coverage issue will arise again when more countries with a large state sector like China join the GPA.[91]

Again, the treatment of such "intra-public sector procurement"[92] is far from clear if the issue is not decided in the annexes of the GPA parties as neither the texts of the GPA 1994 nor of the GPA 2012 rule on this. As regards the EU, the GPA 1994 concessions in the EU's annexes did not address the issue of in-house procurement at all and hence did not include derogations in this respect (except some reference to exceptions in domestic Finish and Swedish law[93]), which gives rise to the problem that the scope of the GPA obligations of the EU might be broader than

[86]Anderson and Arrowsmith 2011, pp. 51–52.

[87]Anderson and Arrowsmith 2011, p. 52; Arrowsmith 2002, p. 785.

[88]Wang et al. 2011, pp. 273–274.

[89]See General Note 4, Annex 7, GPA/113 (above note 1), p. 62.

[90]Cf. Wang 2009, p. 683.

[91]Arrowsmith 2002, p. 785.

[92]Wang 2007, p. 910.

[93]See also Wang et al. 2011, p. 274.

the purview of domestic EU procurement rules as the relevant CJEU case law[94] provides for exceptions for in-house procurement.[95] Hence, whereas domestic EU procurement rules do not apply to specific types of in-house procurement, the EU's obligations under the GPA 1994 are broader in scope. The situation will alter, however, with the entry into force of the GPA 2012 as the new notes to Annex 3 to the EU's commitments excludes procurement to an affiliated undertaking or procurement by a joint venture, in accordance with intra-EU procurement law.[96]

One starting point for assessing GPA coverage for intra public arrangements in case of lack of derogations in the annexes may be the notion of covered entities. Covered procurement is the procurement made by a procuring entity, see Article II:2 in conjunction with Article I (o) GPA 2012. Hence, any procurement made by them is covered by GPA disciplines. On the other hand, the internal organisation of a covered entity is up to each party. Thus, it should not make any difference, in terms of GPA coverage, whether a covered entity provides a service internally by an internal division or whether, after reorganisation, it purchases the same service from the same division which has then become legally separated but is still a wholly owned subsidiary. The same deliberation must apply if several local authorities set up a joint venture which provides services for them. Such transactions then have to be regarded as purely internal administrative arrangements to which GPA rules do not apply.[97] Hence, intra-public procurement should not be regarded as government procurement for the purposes of the GPA if the providing entity is controlled by the procuring entity (even if jointly with other procuring entities[98]), in contrast to procurement activities from legally separate and economically independent entities.[99] Objections could be made to the latter understanding as the establishment of legally separate, non-affiliated entities may as well be seen as an expression of the national organisation autonomy regarding the domestic administrative regime, in conformity with Canada's understanding as reflected in Canada's annex, according to which the state has to be assessed as one indivisible legal person. As already mentioned, other GPA parties have a much narrower approach in excluding intra-public arrangements from the GPA coverage. This divergence in national conceptions is caused by the positive list approach. Hence, it is hardly unavoidable that coverage varies from party to party as it mirrors the different approaches and understandings present among GPA parties, given the lack of clear treaty language and the lack of a principled approach in the GPA for defining its coverage.

[94]For an analysis see Wang et al. 2011, pp. 256–263.

[95]Wang et al. 2011, p. 277.

[96]See Notes 4 and 5 on Annex 3 of the EU's Appendix I to the GPA 2012, GPA/113 (above note 1), pp. 188–189.

[97]Wang 2007, p. 910.

[98]See also the explicit exclusion from the GPA coverage of cooperative agreements in Article II:3 lit. (b) GPA 2012.

[99]Arrowsmith 2002, p. 785.

3.7 Summary and Assessment: The Autonomy of the GPA Parties in Providing Services of General Interest

Both the GPA 1994 and the GPA 2012 apply to the procurement of services in the general interest. The explicit exclusion of service provision for commercial purposes enshrined in the GPA 2012's definition of government procurement hardly confines the scope of application of GPA rules to services of general interest due to its imprecise notion. It is therefore again the parties who by their annexes to the GPA determine the coverage of GPA rules. The analysis shows that procurement law leaves considerable discretion to the GPA parties in the organization of the provision of services for the common good. Their flexibility in formulating their annexes has been confirmed by Article II:2 (e) GPA 2012, as has been their freedom to base commitments on reciprocity, despite the MFN principle.

Innovative means of service provision through concession contracts and BOT arrangements are only covered if explicitly provided for in the parties' individual annexes. Determining GPA coverage has been left to the parties in this respect. Intra-public procurement arrangements are not usually covered due to respect for the organisational autonomy and the sovereignty of the nation states with regard to their administrative entities. Hence, the ability of public entities to provide services of general interest directly or through public private partnerships is hardly limited. These results, however, are subject to change if the Appellate Body adopts a different interpretation of the relevant GPA rules. This does not appear probable given the imprecise terms in the definition of covered procurement in Article II:2 GPA 2012 and the lack of common rules and general principles regarding GPA coverage.[100]

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[100] See Wang et al. 2011, p. 279.

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