
Working Party on GATS Rules

INTERPRETATION OF PROCUREMENT-RELATED PROVISIONS IN GATT
POSSIBLE APPLICATION TO ARTICLE XIII OF GATS

Background Note by the Secretariat

1. This Note has been prepared in response to a request by the Working Party on GATS Rules at its meeting of 19 February 1999. It provides background information on the interpretation of GATT provisions on government procurement, which are similar to those contained in Article XIII:1 of GATS. The purpose is to assist the Working Party in its discussion regarding the transactions that might be considered to constitute procurement of services. In preparing this Note, the Secretariat has drawn on GATT/WTO documents and publications, which delegations might want to read in parallel, particularly the Guide to GATT Law and Practice. However, this Note should not be regarded as an exhaustive or authoritative interpretation of GATT or GATS provisions.

I. RELEVANT PROVISIONS

2. In excluding government procurement of services from the application of Articles II, XVI and XVII of the GATS, Article XIII:1 refers to "... *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...*" (emphasis added). The Agreement contains no further definition of these terms, nor has any interpretation been provided by competent WTO bodies. However, the interpretation given to similar provisions under GATT might provide some useful guidance.

3. Under Article III:8(a) of GATT, government procurement is exempt from the principle obligation to national treatment with regard to internal taxation and regulation. The Article refers to "...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..." (emphasis added).

4. The two provisions not only fulfil a similar function, namely to exclude government procurement from the application of certain disciplines of the Agreements concerned, but are also formulated in almost identical terms. Given this concordance, one could reasonably assume that Article III of GATT served as a model for the drafting of Article XIII of GATS.

5. An additional reference to government procurement is contained in Article XVII:2 of GATT.¹ It exempts government procurement from the disciplines imposed by Article XVII:1 in respect of State Trading Enterprises, stating that these disciplines "...shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the

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

production of goods* for sale..." (emphasis added). Although the purpose of these provisions is similar to those contained in Articles XIII:1 (GATS) and III:8 (GATT), it uses different language to define the excluded procurement transactions. Thus, rather than "governmental purposes", reference is made to "immediate or ultimate consumption in governmental use". The second defining element used in GATT Article III (commercial resale/use) is retained in principle in Article XVII:2, except for the word "commercial".

II. INTERPRETATIONS

A. "GOVERNMENTAL PURPOSES" VERSUS "GOVERNMENTAL USE"

Drafting history

6. Since the exceptions of Article III:8(a) and XVII:2 are part of the same legal framework, the question arises as to the reasons for such differences. Are they intended to establish different criteria for procurement transactions in the two areas or have the relevant terms ("governmental purposes" and "governmental use") been considered equivalent at the time of drafting?

7. As to the drafting history of Article XVII, it has been noted that "at Havana, paragraph 2 of the Geneva Draft Article 30 [it corresponds to paragraph 2 of GATT Article XVII] was amended, (1) to conform the language to the wording of Article 18:8(a) [corresponds to Article III:8(a) of GATT] to avoid difficulties of interpretation and (2) to extend the "fair and equitable treatment" rule to also cover "the laws and regulations and requirements referred to in paragraph 8(a) of Article 18".² This seems to suggest that, originally, the two provisions were meant to refer to the same type of government procurement. In the same vein, John Jackson concludes that "the government procurement exception [for state trading enterprises] was intended to be virtually the same as that expressed in Article III, paragraph 8(a), but the wording diverged when the Havana changes were picked up in GATT Article III but not in Article XVII, although the Havana changes were stated to be non-substantive."³

8. The drafting history of Article III:8(a) recounts that it had been agreed at Havana that "paragraph 5 [III:8] was an exception to the whole of Article 18 [III]". It has been noted that "the Sub-Committee had considered that the language of paragraph 8 would except ... laws, regulations and requirements governing purchases effected for governmental use where resale was only incidental". Subsequently, during discussions at Havana "it was stated that paragraph 8 had been redrafted... specifically to cover purchases made originally for governmental purposes and not with a view to commercial resale, which might nevertheless later be resold..." (emphasis added).⁴

Accession Working Parties

9. The report of the Working Party on Accession of Venezuela notes that, in relation to purchases by State enterprises, some members had questioned whether buy-national provisions were consistent with Articles XVII and III of the General Agreement. "A member added that in order to conform with Article III obligations the preference...should only be applied to imports by the State for its own consumption and not to imports by enterprises engaged in normal commerce..." (emphasis added). It is worth noting that in this context "consumption" is used instead of "purposes". The representative of Venezuela stated that "... Decree 1182 [buy national provision] will be brought into conformity with Article III of the General Agreement... its application to purchases other than those for ultimate consumption in governmental use would not deny the benefits of Article III to imports of

² GATT, Analytical Index: Guide to Gatt Law and Practice, p. 485.

³ Jackson, John; *World Trade and the Law of Gatt*, Boos-Merrill Company, 1969; pp. 291 and 359.

⁴ GATT, Analytical Index: Guide to Gatt Law and Practice, p. 190.

other contracting parties..." (emphasis added). It seems that in this context the definitions of government procurement contained in the two GATT Articles were used interchangeably to cover acquisitions by the government "for its own consumption and not for normal commerce".⁵

Panel reports

10. The non-adopted 1992 Panel Report on "United States - Procurement of a sonar mapping system", in addressing relevant provisions of the Agreement on Government Procurement (AGP), also referred to terms contained in Articles III:8 and XVII:2 of GATT.⁶ The issue at hand was whether an acquisition by a private company, in connection with a contract between this company and a governmental entity, constituted government procurement under the AGP or private procurement subject to GATT disciplines. While the AGP did not define "government procurement", the Panel noted that its Article I referred to "such methods as purchase or as lease, rental or hire-purchase, with or without an option to buy". Since all these methods were means of obtaining the use or benefit of a product, the Panel considered that the word "procurement" could be understood accordingly.⁷

11. Attempting to clarify scope and coverage of "government procurement" in the AGP, the Panel looked at references contained in the GATT. Thus, its attention was drawn to the terms "procurement by governmental agencies of products purchased for governmental purposes" [Article III:8(a)] and "products for immediate or ultimate consumption in governmental use" [Article XVII:2].

12. In this respect, the Panel observed that "the emphasis [of GATT provisions] on the concepts of 'governmental use', 'governmental purposes', and 'procurement by government agencies' supported its [i.e. the Panel's] own understanding of the concept of government procurement." The Panel thus felt that in considering any particular case, the following characteristics, none of which alone could be decisive, provided guidance as to whether transactions should be regarded as government procurement within the meaning of Article I:1(a) of GPA: payment by government, governmental use of or benefit from the product, government possession and government control over the obtaining of the product.

13. Although the Panel did not elaborate further on the definition of "governmental use" and "governmental purposes", it found a consistent, mutually supportive, relationship between them and its own characterization of government procurement. In considering the specifics of the case, the Panel noted that the US governmental entity "...would also enjoy the benefits of the system's purchase - Antarctic research and the preparation of seabed maps - which were clearly for government purposes, and the Government can thus be regarded as the ultimate beneficiary of the system...".

B. "COMMERCIAL RESALE" AND "USE IN THE PRODUCTION OF GOODS FOR COMMERCIAL SALE"

14. According to the drafting history of Article III, while paragraph 8(a) of Charter Article 18 on national treatment was revised at Havana by adding the word "commercial" before "resale" and "sale", and this change was brought into Article III of the General Agreement in 1948, parallel changes which had been made to paragraph 2 of Article 29 (on government procurement) were not brought over into the paragraph 2 of Article XVII.⁸

⁵ Accession of Venezuela, Report of the Working Party, L/6696, adopted on 11 July 1990, paras. 68-71.

⁶ GPR.DS1/R, dated 23 April 1992 (not adopted).

⁷ GATT, Analytical Index: Guide to Gatt Law and Practice, p. 192.

⁸ *Ibidem*, p. 193.

15. Reportedly, the change was made to cover cases in which governments had received tied loans to purchase equipment from the country granting the loan, and which might resell such equipment later to private entities. The new wording was intended "...to cover purchases made originally for governmental purposes and not with a view to commercial resale, which might nevertheless later be sold."⁹ Thus, it seems that the word "commercial" was introduced to ensure the continued application of the national treatment exemption to procurement of goods which are sold after use.

⁹ *Ibidem*, p. 190.