Government Procurement in the WTO: A Case for Greater Integration

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1. Introduction

This article assesses the regulation of government procurement in the WTO, specifically under the WTO Government Procurement Agreement (WTO GPA), the General Agreement on Tariffs in Trade (GATT), the General Agreement on Trade in Services (GATS), and the Agreement on Subsidies and Countervailing Measures (ASCM). It compares these findings from leading regional trade agreements (RTAs) with government procurement regulation, most notably the North American Free Trade Area (NAFTA) and the Treaty on the Functioning of the European Union (TFEU).

The article identifies both overlaps and gaps in the coverage of these agreements. Under the WTO framework, the government procurement of goods falls under a derogation included in the Article III national treatment obligations. This is generally interpreted – but not explicitly stated – to further exempt government procurement from the most-favoured-nation obligations under Article I.1 of the GATT. The government procurement of services is also explicitly exempt from the coverage of the GATS non-discrimination commitments. However, 45 out of the 161 WTO Members are currently signatory parties to a plurilateral agreement within the WTO regulating government procurement – the WTO GPA, included in Annex 4 of the WTO. The WTO GPA sets out detailed procurement tender requirements and non-discrimination rules to enhance competition in those markets inscribed in each signatory party’s schedules. In addition to this, the ASCM covers the provision of subsidies to the government procurement of all goods by all WTO Members, but it does not apply to the government procurement of services.

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1 As of August 2015, the WTO GPA comprised 45 WTO members or 17 parties with the EU, representing 29 Member States. Another 29 WTO members participate as observers, and of these ten members are in the process of acceding to the Agreement.
Following a comparative analysis of how government procurement is regulated under these different WTO agreements, this assessment concludes that while the WTO GPA works coherently as a stand-alone agreement, under prevailing legal interpretations various difficulties could potentially arise when regulating and enforcing the same procurement measure under the other WTO agreements. It then compares these findings to a similar analysis of leading regional trade agreements (RTAs) incorporating government procurement regulations.

This article addresses the complex interdependent relationship between government procurement markets and open markets, and consequently how the different sets of applicable rules operate in concert with each other. It provides fresh insight into the legal frameworks conditioning domestic policymaking in the area of government procurement, the design of RTAs with government procurement provisions, and more generally future plurilateral agreements that may be negotiated within the WTO system.

1.1 Government procurement and competition policy

The relationship between competition and government activities is one that has become more widely significant. Not only do government bodies increasingly operate in market environments and with substantial public resources, but also the will and the means of competition scrutiny of many aspects of governments’ activities have strengthened. Both of these developments are viewed as being generally positive.2 It is well understood that dynamic competition forces firms to innovate and improve efficiency to bring down prices. Yet in those markets where the government is a major procurer of goods and services, its own actions can also significantly influence how the market operates. Consequently, for procurement, ensuring value for money and encouraging strong competition go hand in hand.3

However, the effects and distortions that government procurement regulation and practice can generate in the market and the welfare losses that restrictive government procurement can provoke have hitherto been dominated by considerations of competition policy and law enforcement.4 Yet if government procurement rules are not sufficiently pro-competitive, they can generate the very same market failures that other trade and competition laws seeks to prevent in other markets.5 Similarly, if trade and competition laws fail to address distorted conditions of competition in

4 See Albert Sánchez Graells, Public Procurement and the EU Competition Rules (Oxford: Hart Publishing, 2011). This study argues that research into public procurement from the standpoint of industrial organization has received limited attention because its analysis belongs with the relatively secondary field of microeconomics dedicated to the study of monopsony and buyer power.
5 BetterCare Group Ltd v. DGFT [2002] CAT 7 (Case No. 1006/2/1/01).
open markets, government agencies will be unable to procure goods or services most efficiently. This paper seeks to promote a more integrated understanding of the different legal provisions applicable to government procurement. This should serve domestic decision-making and international economic governance.

The article examines the implications of the cumulative nature of the WTO agreements for the enforcement of these procurement rules. It notes that prevailing WTO Appellate Body findings suggest a relatively narrow definition of what can be considered ‘government procurement’ under the WTO. Consequently, even if a government is not a signatory party of the plurilateral WTO GPA, or even if it has explicitly excluded particular sectors from the coverage of the WTO GPA, or, moreover, even if a government has successfully justified a non-compliant WTO GPA measure as ‘necessary’ under the WTO GPA’s General and Security Exceptions, a challenged procurement measure may nevertheless be closely examined to determine whether it falls under the derogation for government procurement set out under GATT Article III.8(a).

The ASCM includes further obligations that address those distortions that government rules and practices can generate, whether in open or public procurement markets for goods – but this treatment does not reach services markets. As such, the ASCM can be said to provide a partially integrated approach to the regulation of government procurement measures that restrict competition, distorting both government procurement and private markets – albeit only in markets for goods. This can be usefully contrasted with existing RTAs. This contrast indicates that despite the variety of regional and bilateral agreements that have been negotiated with government procurement provisions, these regimes follow a less integrated approach than that of the WTO framework, with the qualified exception in the EU under the Treaty on the Functioning of the European Union (TFEU).

Yet despite the umbrella role the ASCM plays in regulating anti-competitive distortions to public and private markets for goods, a lack of legal consistency is still discernible among the various WTO agreements applicable to government procurement. This patchwork of applicable agreements and provisions could result in different outcomes within the DSB regarding disputes over the legality of the same government measure addressing secondary domestic policy objectives through government procurement.

This assessment argues that given the significant role that the ASCM performs in regulating government procurement, coupled with the important role that government procurement plays in the market, these ambiguities require clarification for

the benefit of both the WTO Members and for the international trading system. Further interpretative guidance is required about the nature of the relationship between different sets of applicable rules. It would be of more than heuristic value for the WTO Dispute Settlement Body (DSB) to use the occasion of settling a relevant dispute to provide more predictability as to the likely interpretative sequencing that can be expected during a WTO dispute involving several agreements, with specific reference to the exercise of judicial economy. Such on-going legal uncertainty undermines good economic governance and domestic policymaking, and may ultimately have a chilling influence on the use of the WTO to resolve complex disputes.

The outline of this paper is as follows: Section 2 sets out the relevant non-discrimination and competition requirements in the plurilateral WTO GPA along with its enforcement mechanism under the WTO DSM and at the domestic level. Sections 3 and 4 examine those rules in the GATT that may be applicable to government procurement markets. After an assessment of the application of both Article III national treatment and Article I most-favoured-nation obligations to government procurement measures, Section 5 observes how secondary or horizontal policy objectives are regulated under the GATT. This is followed in Section 6 with an examination of the relevant provisions under the WTO ASCM. Section 7 provides a comparative overview of government procurement regulation and subsidy control in leading RTAs. Section 8 concludes that there are some identifiable gaps and inconsistencies in the different agreements applicable to government procurement measures, and that these shortcomings should be addressed for the betterment of economic governance, as well as future plurilateral agreements.

2. Government procurement under the WTO Government Procurement Agreement (WTO GPA)

In search of a comprehensive framework for liberalizing procurement markets and setting minimum standards, a number of GATT contracting parties negotiated a government procurement Code during the Tokyo Round. The Procurement Code established a rudimentary regulatory framework to open and provide for non-discrimination and the principle of competition among the various parties’ procurement markets. Twice since then, in 1994 and 2012, the signatory parties’ have addressed various substantive and procedural ambiguities that

7 Signed on 12 April 1979, as part of the Text of the Tokyo Round Agreements negotiated under the GATT. It became effective on 1 January 1981, was first amended by Protocol of 2 February 1987, which came into force on 14 February 1988. GATT, BISD 33S/190 [1987].

8 The Code was signed by eight developed countries plus the ten EC countries: Austria, Canada, the EC (consisting of Belgium, France, Netherlands, Germany, Luxembourg, the UK, Ireland, Denmark, Italy, Greece) Finland, Japan, Norway, Sweden, Switzerland, and the US, and three developing countries – Israel, Singapore, and Hong Kong’.

https://www.cambridge.org/core/terms. https://doi.org/10.1017/S1474745615000592
emerged from the original Code’s text,9 while expanding the scope of its coverage.

The WTO GPA is composed of the text of the Agreement’s general obligations along with the signatory parties’ schedules of market access commitments. While the text of the WTO GPA establishes rules requiring that open, fair, and transparent conditions of competition apply, they do not automatically cover all the procurement activities of each party. These rules apply only to those procurement activities conducted by covered entities that are purchasing listed items valued higher than the specified threshold values. As the Agreement has developed, more governments have joined and the scope and coverage of the previous treaties has significantly expanded to include the procurement of services and construction services, alongside goods, and to cover sub-central entities and a number of utilities.10 As of 2015, the annual value of procurement activities opened up to international competition by the 43 GPA parties was estimated at US$ 1.7 trillion.11

Article IV of the revised 2012 WTO GPA sets out the cornerstone principles and requirements for non-discrimination and competition. This article covers both the national treatment and most-favoured-nation requirements for the WTO GPA signatory parties’ procurement measures. It requires that a party provide immediately and unconditionally to the products, services, and suppliers of the other signatory parties treatment no less favourable than that accorded to its own domestic products, services, and suppliers, although again this is limited to those activities explicitly included under the rules. These requirements are bolstered by minimum standards to ensure that the tender process is open and competitive, and includes commitments to publish and widely advertise sufficient information about procurement opportunities. The WTO GPA also explicitly prohibits the use of offsets or domestic content requirements under Article IV:6, although there are limited transitional exemptions to this prohibition available for developing countries pursuant to Article V.

The WTO GPA includes general and security exceptions to the Agreement’s obligations under Article III:

Article III: Security and General Exceptions

1. Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes.

10 The coverage of the agreement is set out for each signatory party in Appendix I. This Appendix is divided into five Annexes concerning the specific coverage of the obligations. The Annexes address (1) central government entities covered by the Agreement; (2) covered sub-central government entities; (3) ‘other’ covered entities (e.g. utilities); (4) services coverage; and (5) coverage of construction services.
2. Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures:

- necessary to protect public morals, order or safety;
- necessary to protect human, animal or plant life or health;
- necessary to protect intellectual property; or
- relating to goods or services of persons with disabilities, philanthropic institutions or prison labour.

Secondary or horizontal policy objectives including the protection of public order, public morals, and the environment are therefore permitted even if they contravene the WTO GPA Article IV’s General Objectives, subject to certain non-discrimination requirements. The language of the WTO GPA Article III exceptions differs from that under the GATT and GATS general and security exceptions, as discussed in Section 4 below. But the WTO GPA still incorporates similar requirements for non-discrimination and competition in the application of a non-compliant measure that has been provisionally justified as a permitted public policy exception. As such, the WTO GPA Article III seeks to regulate non-compliant but provisionally justified domestic policy objectives into an international framework for progressively liberalizing government procurement markets.

The WTO GPA also incorporates two different dispute settlement mechanisms – at the domestic and the plurilateral level. Under the WTO GPA Article XVIII Domestic Review Procedures, the signatory parties must offer non-discriminatory, effective, timely, and transparent rules that include procedures before national courts or domestic administrative bodies to permit the injured party to oppose the tender procedure or the award of the tender. It is widely acknowledged that an effective domestic review mechanism for disappointed bidders establishes an invaluable transparency, self-policing, and accountability mechanism within the government procurement system itself. The most effective means of enforcing procurement rules is to enable citizens – as the suppliers that deal with the government’s procuring agencies – to police compliance with the requirements of the Agreement. As beneficiaries of the regime, they are in the best position to detect violations and they will also typically have the most incentive to challenge them. The

WTO GPA Article XVIII recognizes this with the requirement that domestic parties must also be able to challenge a bid believed to breach the rules of a particular procurement tender process.

While this dispute settlement system appears, at first blush, to be relatively strong and binding, the full extent of the corrective powers of these review bodies is somewhat unclear. This is particularly with regard to whether the review body must possess the authority to set aside an awarded signed contract that violates the Agreement. There is no requirement for a standstill period to allow for a postponement of the contract signature for a minimum time period after notification of the award in order to allow an effective bid challenge. This curtails the power to get redress. Moreover, while compensation can be given, it must be limited to costs for tender preparation or protest only, further diluting the effectiveness of the domestic review procedures. Some have suggested that this has resulted in them being used less than expected due to a lack of trust in the system or for fear of jeopardizing future tendering opportunities.

The WTO legal system – as an inter-governmental body – does not provide standing for aggrieved individuals or companies to bring a complaint to the WTO DSB concerning the (non) implementation of the WTO GPA. This right is reserved for governments qua contracting parties of the agreement. Any signatory party that considers that any benefit accruing to it from the provisions of the Agreement is being nullified or impaired – either directly or indirectly – may notify the WTO DSB and the DSB shall have the authority to settle the dispute within the terms of the WTO DSU. Following the incorporation of the so-called Trondheim Provision into the 1994 WTO GPA, the WTO DSB has possessed the competence to authorize the suspension of concessions and other obligations under the WTO GPA, or consultations concerning remedies when the withdrawal of measures found to be in contravention of the WTO GPA is deemed impossible. This is set out in Article XX of the revised 2012 WTO GPA. Yet Article XX.3 also highlights the WTO GPA’s position as a plurilateral agreement, listed under Annex IV and hence separate and outside of the WTO ‘covered agreements’. As Article XX.3 stipulates, there is no possibility under the WTO GPA of suspending benefits from another WTO agreement. This consequently lessens the remedies available for enforcing WTO GPA rules in the event of non-compliance.

Despite the cumulative nature of the WTO agreements, the ability of this regime to complement the other WTO agreements is not only legally constrained but also

16 See Article XXII Consultations and Dispute Settlement.
beset by more practical, methodological complexities. For, under the WTO GPA, procurement is defined pursuant to Article II as:

Procurement for governmental purposes:

(a) Of goods, services, or any combination thereof. [Emphasis added]

That is, for the purposes of the coverage of the WTO GPA, it does not matter whether the procurement is for goods or services or both. Rather it is the value thresholds and the particular entities at central and sub-central levels of government, set out in the Appendix, that are the major determinants of the coverage of the agreement. This results in further discrepancies between the applicable agreements. For, on the one hand, the government procurement of services is explicitly exempt from the GATS national treatment and most-favoured-nation obligations under Articles XIII:

Article XIII Government Procurement

1. Articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.

Yet, on the other hand, subsidies applied to services markets are still subject to nondiscriminatory obligations under GATS Article II, if scheduled under the GATS, and if not scheduled under the GATS, subsidies applied to services markets are subject to the national treatment obligation under GATS Article XVII. However, a comprehensive agreement for regulating subsidies in services markets akin to the ASCM is still not available under the GATS, despite Article XV:

1. Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects.

If a challenged procurement measure falls under the scrutiny of the ASCM, the scope of those obligations applies only to the goods part of a procurement that may include both goods and services elements. Yet governments can procure services in combination with physical goods, such as processing, assembly, or labelling. Identifying and unbundling the goods-only portion of a build–operate–transfer project\(^\text{17}\) in order to determine if a benefit has been conferred under the ASCM is complex. In the US–Large Civil Aircraft dispute, the Panel considered whether excluding purchases of services from the scope of ASCM Article 1.1(a) (1) would run counter to the overall object and purpose of the Agreement by creating ‘an enormous loophole in the coverage of the SCM Agreement and provide

WTO Members with a roadmap for distorting trade in goods through “service contracts” with their goods producers. The Panel considered that:

the question of whether or not a transaction is properly characterized as a ‘purchase of services’ depends on whether or not the work performed was principally for the benefit or use of the government (or unrelated third parties), or rather principally for the benefit or use of the ‘service’ ‘seller’ itself.

However, on appeal the Appellate Body concluded that the Panel’s interpretation that ‘transactions properly characterized as purchases of services are excluded from the scope of Article 1.1(a)(1)(i) of the SCM Agreement’ to be moot and of no legal effect. It is consequently evident that while the WTO GPA works coherently as a stand-alone agreement, both legal and methodological difficulties arise when regulating the same procurement measure under the other applicable WTO agreements.

3. GATT Non-discrimination and government procurement

The GATT negotiating history indicates that early draft texts of the ITO Charter, as proposed by the US negotiators, contained provisions requiring the extension of national treatment to imported goods in the case of government purchases and government contracts. These provisions were deleted from the London Draft Charter as it appeared to the Preparatory Committee:

that an attempt to reach agreement on such a commitment would lead to exceptions almost as broad as the commitment itself.

Accordingly, although government procurement regulation can be characterized as an internal regulatory measure, it was explicitly carved out from the subsequent GATT Article III national treatment obligations by virtue of GATT Article III:8 (a), which states:

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. [Emphasis added]

Nevertheless, the WTO Canada–Feed-in Tariffs (FIT) dispute highlighted some of the complications that emerge when determining whether a challenged government purchase is or is not a government procurement – as defined under the GATT

19 Ibid. para. VII.79.
Article III.8(a) derogation – and which are of immediate relevance to this analysis. The FIT dispute emerged when Japan and the EU challenged the legality of the domestic content requirements set out in the FIT scheme established by the Canadian Province of Ontario. The FIT programme pays generators of electricity produced from certain types of renewable energy a guaranteed price for electricity delivered into the Ontario electricity system under 20-year or 40-year contracts.

However, only facilities geographically located in Ontario that inter alia generate electricity exclusively from specified sources of renewable energy were deemed eligible to participate in the Ontario Power Authority’s scheme.

The EU challenged this measure on the grounds that the GATT III:8(a) derogation could not apply to the FIT programme given that only those government departments directly using the procured goods or services are immune from Article III’s national treatment obligations. The EU claimed that the meaning of procurement for governmental purposes as set out in Article III:8(a) is narrow. It is restricted to acquisitions made to meet ‘the needs’ of government. To qualify as a government procurement, any purchase must pass a ‘needs’ test to ensure that it is indeed intended ‘for the direct benefit or use of the government’. The EU challenge also proposed a broad reading of Article III:8(a) when defining ‘not with a view to commercial resale or with a view to use in the production of goods for commercial sale’. The EU claimed that if the purchased product is sold or introduced into the market regardless of whether this is done for profit, it should be deemed to be ‘with a view to commercial resale’, and thus disqualified from the derogation. As such, this interpretation sought to exclude more types of government procurement that distort competition in open markets from the safe haven of the Article III.8(a) derogation.

In its defence, Canada claimed that the EU’s interpretation of Article III:8(a) contravened the customary rules of international treaty interpretation. Rather, not
only was the FIT procurement exempt from GATT national treatment obligations by virtue of Article III:8(a)\(^{29}\) but, moreover, the FIT regulation did not infringe upon Canada’s obligations as a signatory party of the WTO GPA. In effect, Canada’s defence was primarily the assertion that when negotiating the coverage of the WTO GPA, Canada had not committed Ontario’s electricity purchases in the schedules of entities or markets that fall under the scope of the WTO GPA. Consequently, the FIT regulation could not be prohibited by Canada’s commitments under either GATT or WTO GPA legal obligations.

On appeal the Appellate Body clarified that the term ‘governmental agencies’ also refers to those ‘arms-length’ 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. There need not be a so-called charge to the public account. Further, the concepts of ‘procurement’ and ‘purchase’ should not to be equated, for procurement is a broader concept than just a purchase:

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’.\(^{30}\)

The Appellate Body found that the scope of the derogation under Article III:8(a) should be limited to products purchased for the use of government, consumed by government, or provided by government to recipients in the discharge of its public functions.\(^{31}\) This finding is broader than the interpretation submitted by the EU. Further, both the terms: ‘for governmental purposes’ and ‘not with a view to commercial resale’ qualify and limit the scope of ‘products purchased’. In other words, a purchase that does not fulfil the requirements of being made ‘for governmental purposes’ will not be considered to fall within the derogation of Article III:8(a). This condition is regardless of whether the procurement in question complies with the requirement of being made ‘not with a view to commercial resale’\(^{32}\) because these are cumulative requirements.\(^{33}\)

Having determined the nature of the measure being challenged, the Appellate Body undertook a like-product analysis. This would allow for some conclusions to be made as to whether Canada’s FIT programme was disrupting international competitors’ sales of renewable energy generating equipment, as claimed by the EU and Japan. It sought to determine whether the particular product being

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\(^{29}\) Appellate Body Report, Canada—FIT, WT/DS412/AB/R and WT/DS426/AB/R, 6 May 2013, para. 5.74 stated that Article III:8(a) is a derogation from the Article III national treatment obligation.

\(^{30}\) Ibid., para. 5.59.

\(^{31}\) The Appellate Body further noted that the characterization of the provision as a derogation does not pre-determine the question as to which party bears the burden of proof with regard to the requirements stipulated in the provision. Canada—FIT, para. 5.57.

\(^{32}\) Ibid., paras. 5.59, 5.60, 5.61.

\(^{33}\) Ibid., para. 5.69.
procured by a governmental agency was similar to the product that was being treated more favourably as a consequence of the offsets set up under the FIT programme. The Appellate Body identified whether the product of foreign origin allegedly being discriminated against was in a competitive relationship with the product being purchased. The Appellate Body concluded that the product being procured was electricity, whereas the product discriminated against for reason of its origin was generation equipment, and that these two products are not in a competitive relationship. Therefore, the scheme was not covered by the Article III.8(a) derogation.

Consequently, the FIT scheme fell under application of the GATT Article III.4 national treatment obligations and in favouring domestic over foreign products, the FIT scheme was found to be in violation of GATT Article III.4. 

In the light of our finding that the Minimum Required Domestic Content Levels do not fall within the ambit of Article III:8(a), and in the light of the fact that Canada has not appealed the Panel’s finding that the FIT Programme and Contracts are inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement, the Panel’s conclusion ... that the Minimum Required Domestic Content Levels prescribed under the FIT Programme and related FIT and microFIT Contracts are inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994 stands.34

The Appellate Body then demonstrated the cumulative nature of the WTO agreements by proceeding to assess the legality of the same measure under the ASCM. This move indicated definitively that with or without the GATT Article III.8(a) derogation and, moreover, whether or not a WTO GPA party has excluded a specific procuring entity or market from its Appendix 1 Annexes, there is no safe haven from the application of the ASCM to those government procurement measures that relate to goods. This provides a partially integrated approach to regulating government procurement measures that distort competition in both public and open markets. In sum, even if a GPA party deliberately excludes a particular procurement measure from its GPA obligations, this does not generally free it from the obligations of the GATT or ASCM.

4. The GATT Article I.1 most-favoured-nation principle and government procurement

As a cornerstone principle of the WTO, GATT Article I.1 provides that the most-favoured-nation obligation applies to any kind of duty or administrative procedure that affects trade in goods. Pursuant to this, WTO Members cannot normally discriminate between their trading partners. If a Member grants a country an advantage such as a lower tariff on one of its products, it must grant this advantage

34 Ibid., para. 5.85.
immediately and unconditionally to all WTO Members. The Appellate Body in *Canada–Autos* emphasized the context and character of the MFN principle:

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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.35
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There are various explicit exemptions and conditions to the most-favoured-nation principle in the GATT36 that limit or ‘dethrone’ its all-pervasive character.37 Yet nowhere is government procurement explicitly excluded from the GATT Article I.1 most-favoured-nation obligations. Despite the lack of explicit exclusion of government procurement from the Article I most-favoured-nation obligation, prevailing opinion holds that government procurement is nevertheless exempt from the ambit of the provision. Article I:1 explicitly refers to four types of measures and it is the fourth of these – ‘with respect to all matters referred to in paragraphs 2 and 4 of Article III’ – that we are concerned here. Article III paragraphs 2 and 4 state that:

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GATT Article III:2.
The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.
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GATT Article III:4.
The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. [Emphasis added]
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As stipulated, Article III:4 addresses all laws, regulations, and requirements affecting their internal sale: offering for sale, purchase, transportation, distribution, or use. This, as noted above, is eminently applicable to government procurement *qua* a law or regulation affecting the internal sale of a product. In other words, the category in question incorporates government procurement measures within the scope of the Article I.1 most-favoured-nation obligations.

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However, the leading interpretation submits that even though procurement is not explicitly exempt from the obligations of Article I.1, or Article III paragraph 2 or 4, it is nonetheless excluded from the scope of Article I.1 by virtue of the derogation for public procurement provided in Article III:8(a). John Jackson notes that ‘government procurement practices have traditionally been considered unrequited by the language of GATT Article I, and the language of GATT Article III and the preparatory work of GATT seem to support this approach’. Mary Footer looks to the context of the treaty negotiation and points out that while early draft texts both for an International Trade Organization (ITO) and the GATT contained provisions requiring the extension of national treatment to imported goods, in the case of government purchases and government contracts these clauses were deliberately not included in the final texts. This position is also supported by Sue Arrowsmith, and by Haufbauer, Shelton, Erb, and Starr. They all submit that Article III, paragraph 8(a) should be read so as to free government procurement practices entirely from the disciplines of Article I.1, in addition to those of Article III.

It is reasoned here, however, that this interpretation is not self-evident and therefore open to questioning. The EC–Vessels dispute is the only case to offer instruction on this point of law. Here, the Panel was concerned with the different question of whether and how the Article III:8(b) subsidy exemption affects the scope of ‘all matters referred to in paragraphs 2 and 4 of Article III’. The Panel considered that the phrase ‘matters referred to in’ in Article I:1 refers to the subject matter of those provisions in terms of their substantive legal content. If it is explicitly provided that a particular measure is not subject to the obligations of Article III, then the measure does not form part of the ‘matters referred to’ in Articles III:2 and 4 and therefore cannot be covered by the expression ‘matters referred to in paragraphs 2 and 4 of Article III’ in Article I:1. The Panel thus concluded its analysis by concurring that:

[T]he relevant drafting history that we are aware of shows that the exclusion of government procurement from the national treatment article would also apply to the most favoured nation clause.

42 In a paragraph similar to the government procurement exemption provision in Article III:8(a), the dispute concerned Article III:8(b) which states that ‘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.’
43 EC–Commercial Vessels, WT/DS301/R, para. 7.83.
44 Ibid. para. 7.87.
GATT Articles I and III both aim to prohibit less favourable treatment of directly competitive goods. The basic policy of Article III – to eliminate market distortions caused by internal measures – is as compelling with respect to national treatment type discrimination as it is to most-favoured-nation type discrimination. Therefore, it could be reasoned that the same range of goods should be covered by both obligations. Analysing the differences and complementarities of Articles I and III in enshrining non-discrimination, Horn and Mavroidis submitted that most-favoured-nation has more stringent requirements with regard to product similarity than national treatment, since it only refers to ‘like’ products. National treatment, on the other hand, applies not only to ‘like’ products, but has also been interpreted to apply in the case of ‘directly competitive or substitutable goods’. They further note that most-favoured-nation applies to both internal and border measures, and is therefore wider than national treatment, which only applies to internal measures. As a result, the authors characterize the two provisions as ‘orthogonal’ in the sense that most-favoured-nation refers to the treatment rendered to different foreign products, whereas national treatment compares the treatment given to foreign products to that of domestic products. This analysis suggests that while the scope of the application of the two articles is similar, the important difference lies rather in how they determine whether the products in question are ‘like’.

While this logic may be economically persuasive, it still remains questionable whether the coverage of the two rules should be interpreted to be the same. The two types of discrimination have very different political considerations. Discrimination in favour of a domestic firm cannot be deemed equivalent to discrimination among different WTO Members. The latter is more divisive in undermining the cohesion, solidarity, and non-politicization of trade among WTO Members than the former. This is recognized in the GATT Article XX, where deviations from the national treatment standard are under specific conditions permitted, but not with regard to most-favoured-nation obligations. Under the chapeau of Article XX, there is a requirement, inter alia, that any measure deemed exempt from GATT obligations under one of the Article XX(a)–(j) exceptions must nevertheless not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. Article XX, in effect, offers a refuge from the requirement for national treatment, but not from the obligation towards the most-favoured-nation principle.

Moreover, this interpretation of the scope of Article I.1 ignores several Appellate Body Reports that stipulate that if the drafters of an agreement especially intended to exclude a particular aspect from the application of a rule, they would have done

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so expressly. It is also pertinent to note here the negotiating history of the WTO GPA, which indicates that the Tokyo Round closed with the signatories taking a decision with regard to the six-plurilateral agreements. In doing so, they sought to ensure that the application of the GATT Article I most-favoured-nation principle to procurement rules was not to be undermined by the most-favoured-nation and national treatment obligations operating as between the limited parties to the Tokyo Procurement Code. The signatories stated that:

[Any] existing rights and benefits under the GATT of contracting Parties not being parties to these Agreements, including those derived from Article I, are not affected by these agreements.

This provision mirrors Article II.3 of the Marrakesh Agreement:

The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as ‘Plurilateral Trade Agreements’) are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.

Article II.3 Marrakesh Agreement confirms that the Procurement Code and now the WTO GPA create a framework of obligations and minimum standards for opening up procurement markets between a limited number of parties. These obligations do not apply on a multilateral basis to the wider membership of the WTO. Article II.3 Marrakesh does not operate to suspend the existing prohibition on discrimination as between the wider WTO Membership, pursuant to GATT Article I.1 most favoured nation obligation.

Given that GATT Article I does not include an explicit derogation either for government procurement or for subsidies, and in light of the available negotiating history, this prevailing interpretation deprives WTO Members of the protections of the most-favoured-nation obligation and diminishes their rights to non-discrimination as between the Members, contra DSU Article 3.2:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered


49 The Code, which came into effect on 1 January 1981 (and subsequently amended in 1987), was signed by Austria, Canada, EC, Israel, Finland, Hong Kong, Japan, Norway, Singapore, Sweden, Switzerland, and the US.
agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements. [Emphasis added]

In such cases of interpretative uncertainty, the WTO DSU requires that any clarification of WTO rules should take place pursuant to customary rules of interpretation, most notably those embodied in Articles 31, 32, and 33 of the Vienna Convention on the Law of Treaties (VCLT). For as the Appellate Body has pronounced:

The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended. [Emphasis added]

Under the General Rule of Interpretation set out pursuant to VCLT Article 31.1, a treaty should be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty, and also in the light of its object and purpose. It is submitted here that to read the Article III.8(a) derogation into ‘all matters referred to in paragraphs 2 and 4 of Article III’ is to go against the ordinary meaning that should be accorded to the provision. Such an interpretation is opaque and convoluted. There is scant indication of any explicit intentions from the drafters’ as to this reading, and, moreover, it works against the object and purpose of the GATT.

The rationale for this prevailing view seems to be premised chiefly upon an unappealed Panel Report to the WTO EC–Vessels dispute. Neither the WTO Panel nor Appellate Body Reports are covered by the rule of stare decisis that binds domestic courts to previous reports. This rule was excluded from the pre-Uruguay Round GATT dispute settlement system, and continues to be from the post-Uruguay Round WTO system. Still, WTO Panel and Appellate Body reports

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50 In the Vienna Convention on the Law of Treaties Section 3: Interpretation of Treaties, Article 31 covers the general rule of interpretation; Article 32 covers supplementary rules of interpretation; and Article 33 covers Interpretation of treaties authenticated in two or more languages.


52 There is no doctrine of stare decisis or binding precedents in international law. Article 59 of the Statute of the International Court of Justice explicitly provides that the decision of the Court has no binding force except between the parties and in respect of that particular case. Additionally, Article 38 states that judicial decisions constitute only ‘subsidiary means for the determination of rules of law’ United Nations, Statute of the International Court of Justice, 18 April 1946, http://www.refworld.org/docid/3deb4b9c0.html [accessed 16 November 2015].

have been described as ‘stones in the growing edifice even if in theory the builders are free not to continue to build upon them’. The Appellate Body has expressed its deep concern over a Panel’s decision to depart from prior Appellate Body rulings on the same question of law because:

Ensuring ‘security and predictability’ in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.55

The Appellate Body in China–Rare Earth also confirmed that ‘absent cogent reasons’ an adjudicatory body must resolve the same legal question in the same way in a subsequent case. If a party asks a panel to deviate from a prior finding on a question of law on the basis of novel legal arguments, a full exploration of those arguments may assist the DSB in the event of an appeal, particularly where those arguments raise complex legal issues. This could be of particular significance with respect to unilateral ad hoc procurement measures such as ‘matching clauses’.57

5. Government procurement and secondary policy objectives under the GATT

Even if a government procurement measure is found to be inconsistent with GATT requirements, it may be defended as necessary under the General or Security Exceptions set out under GATT XX and XXI respectively. These exceptions acknowledge and accommodate other necessary policy goals pursued by domestic laws and policy choices, and formulated in response to societal values and preferences. Furthermore, the various exceptions that Members choose to pursue may have little in common, due to the specificity of their domestic circumstances.

However, it is incumbent upon the respondent party to provide an affirmative defence to establish that the ‘offending’ procurement measure is justified under the scope of one of the domestic policy objectives of Article XX.58 Despite the

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57 Matching clauses are regulatory provisions that authorize increased subsidies if foreign competitors have directly or indirectly received, or are going to receive, aid of an equivalent intensity for similar projects programmes, research, development, or technology. A matching clause is included, for example under Section 5.1.7 of the Community Framework for State Aid for Research and Development and Innovation (“the R&D&I Framework”) with the stated aim of unilaterally addressing actual or potential, direct or indirect distortions of international trade.
availability of this legal avenue to defend legitimate domestic non-economic policy objectives, these derogations involve huge entanglements with domestic governance and administration. The burden of proving that a measure is ‘necessary’ within the meaning of Article XX resides with the responding party, while the complaining party has the onerous task of identifying any alternative measures that, in its view, the responding party should have taken.

This legal avenue has clear legal parallels under the WTO GPA’s Article III Security and General Exceptions. That is, a challenged measure justified under either the GATT Article XX or XXI, or the WTO GPA Article III exceptions, would – all things being equal – undergo a similar legal analysis if a panel were to determine whether a violation of the obligations of the agreement could be justified as necessary to pursue a legitimate domestic public policy objective. This provides for some degree of legal uniformity and legal certainty.

In sum, the WTO legal framework and case law implicitly acknowledges the possibility of making a distinction between measures regulating government procurement and other trade measures. This results in a narrow interpretation of the derogation under Article III.8(a), which subjects some types of government procurement activity to both the national treatment and most-favoured-nation obligations. Nevertheless, even if a GATT non-compliant government procurement measure is challenged, the GATT provides general and security exceptions – as does the WTO GPA – through which to pursue necessary domestic policy objectives, subject to certain non-discrimination requirements.

6. The ASCM and government procurement

In light of the GATT Article III.8(b) derogation for subsidies, a plurilateral Subsidies Code was also sought out and negotiated by certain GATT parties during the Tokyo Round. However, unlike the plurilateral Procurement Code and its successor the WTO GPA, the Subsidies Code subsequently expanded into the multilateral ASCM during the Uruguay Round negotiations. The ASCM provides an unprecedented definition of a subsidy in Article I.1(iii):

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

_Affecting Imports of Woven Wool Shirts and Blouses from India_, WT/DS33/AB/R, 25 April 1997, paras. 15–16.


61 The GATT and the Subsidies Code of 1979 did not provide an express definition of this term.
within the territory of a Member (referred to in this Agreement as ‘government’),
i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and
equity infusion), potential direct transfers of funds or liabilities (e.g. loan
guarantees);
(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal
incentives such as tax credits);1
(iii) a government provides goods or services other than general infrastructure, or
purchases goods;
(iv) a government makes payments to a funding mechanism, or entrusts or directs a
private body to carry out one or more of the type of functions illustrated in (i) to
(iii) above which would normally be vested in the government and the practice,
in no real sense, differs from practices normally followed by governments;

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. [Emphasis added]

The ASCM therefore clearly states that a subsidy exists if there is ‘a financial con-
tribution by a government or any public body within the territory of a Member’. Government procurement is explicitly listed under Article I.1(a)(1)(iii) as one of the
categories of government measures deemed to be a financial contribution.

Four examples of a benefit are set out as guidance for calculating benefits under
Article 14 ASCM. To be characterized as a benefit, the measure has to make the
recipient ‘better off’. The most appropriate basis from which to identify a mea-
sure’s trade-distorting potential is for a comparison with the marketplace.62 If no
benefit can be found, such as when a government body purchases goods and ser-
vice at a market price, there can be no benefit and therefore no subsidy exists.63

For as Luca Rubini notes:

‘[T]he objective of the benefit analysis, which is broadly the same of the definition
of subsidy, is fairly simple. It is there to capture those measures that have the po-
tential to distort trade. No more, no less. No comprehensive analysis to conclu-
sively determine whether this potential has translated into actual harm is

62 Appellate Body Report, Canada — Measures Affecting the Export of Civilian Aircraft, WT/DS70/
63 This was reinforced by the EC—Drams Panel finding that: ‘In sum, if the financial contribution is not
provided by the government (or directed or entrusted by the government), it is of no concern to us. If the
financial contribution is provided (or directed or entrusted) by the government but still does not confer an
advantage over what was available on the market, there is no need to discipline such government behaviour
which lacks a trade distorting potential’. Panel Report, European Communities — Countervailing Measures
on Dynamic Random Access Memory Chips From Korea, WT/DS299, 17 June 2005, para. 7.175.
necessary; no consideration of the redeeming, even if legitimate, objectives of the measures is permitted’.  

It thus caused controversy when the Appellate Body in the WTO Canada–FIT dispute opined in the face of substantial existing legal reasoning that Ontario’s local content requirements were not conferring a benefit under the ASCM Article 3 Prohibition:

ASCM Article 3.1

Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

1. (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex 15;
2. (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1. [Emphasis added]

It was previously held that any intervention contingent on the use of domestic offsets or export performance is prohibited under ASCM Article 3 and no burden of proof was required as to its specificity or its adverse effects. These measures are designed to directly effect trade and are inherently likely to have adverse effects on the interests of other Members. Such a prohibited subsidy must be withdrawn. Indeed, Article 4 ASCM even sets up a rapid (three-month) dispute settlement mechanism for complaints regarding such prohibited subsidies.

The Appellate Body findings in the Canada–FIT dispute were subsequently denounced as an *anticlimactic denouement*, which confuse when benefits are to be pursued under WTO subsidy law. This controversy is related to the ongoing difficulty caused by the expiration of the provisional ASCM Article 8. This rule rendered certain subsidies as immune from WTO remedies and the imposition of countervailing duties. Hence, the ASCM now differentiates only between actionable and prohibited subsidies; but unlike under the GATT and WTO GPA, it cannot exempt a subsidy effected through a discriminatory government procurement measure that is deemed necessary to achieve another domestic policy objective. All that continues to be known about the applicability of the GATT exceptions


to the ASCM is that the relationship between the GATT and other Annex 1A agreements, which includes the ASCM, shall be considered on a case-by-case basis.67

Adding to the lack of doctrinal agreement as to whether a government procurement that is deemed to confer a subsidy prohibited under the ASCM can be defended under the GATT or WTO GPA exceptions, there is now further ambiguity as to when an offset will be considered a benefit.68 Obfuscation is also caused by the combination of the Panel’s margin of discretion: first, to determine the sequencing of the agreements being interpreted during a dispute69 and, second, to exercise judicial economy to curtail the interpretation of several applicable agreements if a measure has already been found to violate one of them. For as the Appellate Body stated in the Wool Shirts and Blouses dispute:70

Nothing in [Article 11 of the DSU] or in previous GATT practice requires a panel to examine all legal claims made by the complaining party ... Thus, if a panel found that a measure was inconsistent with a particular provision of the GATT 1947, it generally did not go on to examine whether the measure was also inconsistent with other GATT provisions that a complaining party may have argued were violated. In recent WTO practice, panels likewise have refrained from examining each and every claim made by the complaining party and have made findings only on those claims that such panels concluded were necessary to resolve the particular matter.

However, as the Panel Report to the India–Autos dispute observed, the order selected for examination of the claims may have an impact on the potential to apply judicial economy.71 While some judicial discretion is unavoidable because no law can anticipate every situation or breach, the degree of discretion afforded could be seen to produce a commensurate degree of legal uncertainty. It is also clear that too much uncertainty, coupled with an undefined use of judicial economy, can operate to undermine transparency and good policymaking, and, moreover, the future use of the WTO DSB to resolve trade disputes falling under these agreements.

7. Do RTAs do it differently?

The WTO’s partially integrated, cumulative approach can usefully be contrasted with those RTAs that include government procurement rules. At the regional

68 In addition to Luca Rubini, supra note 63, see Bradly J. Condon, ‘Climate Change and Unresolved Issues in WTO Law’, 12 Journal of International Economic Law (2009), 895.
69 Appellate Body Report, Canada–FIT, para. 5.8
level, over 87 trade agreements have been concluded incorporating a wide variety of different government procurement legal frameworks. However, these regimes appear to be more fragmented than under the WTO. For example, of those RTAs concluded by the US, only the NAFTA incorporates rules to regulate and remedy the provision of subsidies as well as provisions to regulate government procurement. Chapter Ten Article 1003 regulating government procurement sets out the national treatment and non-discrimination provisions that seek to prevent a party from discriminating against the suppliers of another party to favour domestic suppliers. Article 1006 prohibits offsets or local content requirements. These obligations and other requirements relating to tender procedures are enforced through the requirement for domestic bid challenge procedures under Article 1017. In addition to the General Exceptions provided for under Article 1018, the covered procurement set out in the US’ schedules explicitly excludes all classes of research and development, telecommunications services, all classes of utilities, transportation, travel, and relocation services.

Direct control of subsidies in the NAFTA, as in the WTO, is confined to goods and not services. NAFTA Chapter 19 on the Review and Dispute Settlement in Antidumping and Countervailing Duty Matters establishes the rules of procedure for investigations and reviews, along with an agreement to consult on developing more effective rules and disciplines concerning the use of government subsidies. NAFTA Article 1502 on Monopolies and State Enterprises further notes in paragraph 3 that each party shall ensure that Monopolies and State enterprises do not act in an anticompetitive or discriminatory manner towards the firms or investments of the other parties. However, Article 1502 paragraph 4 explicitly carves out government procurement from these obligations. As a result, the regulatory

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73 Although the US–Morocco RTA makes a reference to the WTO ASCM Article 18 when addressing voluntary export restraints.

74 NAFTA Article 1018 Exceptions relating to security, public morals, human, animal or plant life, intellectual property rights, and relating to goods or services of handicapped persons, of philanthropic institutions, or of prison labour.

75 NAFTA Chapter 12 ‘Cross Border Trade In Services’ explicitly excludes subsidies from the coverage of the chapter in Article 1201.2(d), which states: ‘This Chapter does not apply to: (d) subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance’, http://www.sice.oas.org/trade/nafta/chap-12.asp.

76 NAFTA Article 1907.2 Consultations states: ‘The Parties further agree to consult on: (a) the potential to develop more effective rules and disciplines concerning the use of government subsidies’, http://www.sice.oas.org/trade/nafta/chap-192.asp.

77 Article 502.4, paragraph 3 does not apply to procurement by governmental agencies of goods or services for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods or the provision of services for commercial sale.
framework for preventing anti-competitive State measures in public and private markets remains based on a traditional un-integrated or parallel track approach.

In the EU under the Treaty on the Functioning of the European Union (TFEU), compliance with the government procurement rules set out in the government procurement directives precludes the legal existence of any ‘undue economic advantage’ in the award of a public contract. This provides a somewhat tautological method that accepts that if a tender award has followed the government procurement directives’ rules, it cannot legally constitute State aid. Thus on the one hand, the revised 2014/24/EU Public Sector Procurement Directive stipulates under Article 18 that procurements of goods and services should not be designed with the intention of artificially reducing competition through discriminating for or against certain economic operations. On the other hand, although Article 107 State aid control covers both goods and services it is inapplicable to public procurement markets because an awarded public contract is presumed not to constitute State aid. However, recipients of legal and authorized State aid are not automatically excluded from bidding for public tenders.

The consequences of this are that while such State aid is deemed legal, these procurement procedures cannot unequivocally be said to guarantee a market price. There is no legal mechanism with which the Commission can pronounce ex ante that State aid is or is not being provided through a particular procurement tender. In effect, this approach relies on government procurement rules to provide transparency and due process but without definitively preventing the provision of economic advantages. The benefits that this approach provides in its coverage of services, relative simplicity, and legal certainty should be balanced against the potential loss of welfare gains caused by these permitted government distortions to competition.

In sum, despite the relative strength of State aid control in the EU in its coverage of both goods and services, it is unable to comprehensively limit the use of


82 The revised Directives have introduced a ‘light touch’ regime for services described as being of a ‘social’ nature. The Directives largely leave the detailed requirements surrounding the procurement of social services to the Member States, and as such this is another area that will require additional clarification.
government procurement as a means to grant disguised State aid. Nor does it provide a convincing approach to preventing government restrictions on competition from affecting either both government procurement or open markets. It therefore offers a less integrated approach than the WTO. For, unlike under the TFEU, the cumulative nature of the WTO agreements does not allow the ASCM to make the same legal presumptions about the compliance of a procurement that is concurrently regulated by the WTO GPA.

8. Conclusions

This paper has examined those WTO provisions that seek to prohibit discrimination and unnecessary distortions to competition in government procurement markets. The analysis suggests that there are various rules and agreements applicable to government procurement laws and policies across the WTO system. Yet they do not, however, provide comprehensive coverage or a fully integrated body of regulation that is applicable to the procurement of both goods and services and to all WTO Members.

Given the current albeit narrow interpretation of the applicability of the GATT Article III.8(a) derogation for government procurement, the plurilateral WTO GPA is still widely regarded as the most comprehensive procurement regime, albeit limited in membership, scope, and coverage. It includes non-discrimination obligations to prohibit anti-competitive measures that favour domestic bidder/producer interests in procurement markets for both goods and services. These commitments are strengthened by the inclusion of minimum standards to ensure the tender process is open and competitive, and has transparency provisions and requirements that aim to prevent technical design specifications from unnecessarily curtailing competition. In recognition of legitimate domestic policy objectives that might conflict with the obligations of the WTO GPA, the Agreement’s security and general exceptions permit non-compliant procurement measures provided that they can be justified as necessary to protect specified public policy objectives and do not discriminate in their application.

However, Appellate Body findings from the WTO Canada–FIT dispute indicate that whether or not a government is a signatory party of the WTO GPA and, moreover, whether or not a signatory party has explicitly excluded particular sectors from the coverage of the WTO GPA as set out in its Annexes to Appendix 1, the ASCM will remain applicable to all WTO Members’ goods procurement measures. In effect, the WTO GPA does not provide a shelter from the other applicable WTO Agreements for the procurement either included or excluded from the WTO GPA’s Appendices and Annexes. The WTO GPA rather provides a framework for liberalizing international procurement markets in goods and services or a combination thereof, and for promoting good governance among the signatory parties. The ASCM framework, on the other hand, addresses *inter alia* any challenged
distortions that any WTO Member’s government procurement rules and practices can generate in goods’ markets.

This analysis therefore concludes that as a result of the cumulative nature of the WTO agreements, the WTO legal framework goes somewhat further than RTAs, with the qualified exception of the EU under the TFEU, in acknowledging that government procurement measures can engender distortionary effects to competition in both government procurement and open markets.

This assessment also suggests that such economic and regulatory interdependence requires a more complete legal framework that covers the distortions that government procurement practices can effect in both open and public markets, and for both goods and services. This is of relevance to the design of future plurilateral agreements as well as the negotiation of RTAs with public procurement and subsidy control provisions. On-going uncertainty about the legality of secondary policy making in the area of government procurement is not only a constraint on domestic decision-making and economic management but it may also have a more general chilling effect on the regulation of international trade.